



# Oregon

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December 30, 2015

TO: Land Conservation and Development Commission  
FROM: Jim Rue, Director  
SUBJECT: **Agenda Item 12 January 14, 2016, LCDC Meeting**

## **DIRECTOR'S REPORT**

### **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 (the department or DLCD) to report to the Land Conservation and Development Commission (the commission 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 October 30, 2015 and December 9, 2015, the department received 12 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 November 1, 2015 and November 30, 2015, the department received copies of nine recently issued LUBA opinions. Of these, LUBA dismissed four, remanded three, reversed one and affirmed one.

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

Goal 3, ORS 215.296(1), ORS 215.283(2)(k), OAR 660-033-0120 Table 1 OAR 660-033-0130(18(a), Solid Waste Facility Expansion on Farmland: *Stop the Dump Coalition v. Yamhill*

County, LUBA 2015-036, issued November 10, 2015. LUBA remanded a decision by Yamhill County approving an expansion of the Riverbend Landfill.

LUBA determined that Yamhill County did not make adequate findings under ORS 215.296(1) that the proposed landfill expansion “will not force a significant change in accepted farm practices, or significantly increase the cost of such practices, on surrounding lands.” LUBA identified the following flaws in the county’s findings:

- The county established a more onerous “compelling evidence” test for alleged impacts on farm practices greater than one mile from the landfill, for which there is no basis in the statute.
- The county misconstrued the applicable law by requiring quantification of an alleged impact upon farm practices before determining if the statutory standard was met.
- The county applied a different, more onerous standard regarding quantification of impacts upon landfill opponents than it did upon the landfill applicant.
- The county found an inappropriate logical connection between a study of long-term farm use in the vicinity of the landfill and a finding that the results of that study showed that the landfill had not significantly changed or significantly increased the cost of accepted farm practices on surrounding farms.
- Despite the fact that the applicant bears the ultimate burden of proof regarding compliance with ORS 215.296(1), the county did not require the applicant to provide information regarding significant impacts on surrounding farm practices resulting from nuisance birds attracted to the landfill, and odor and visual impacts on farm stands, direct sales, and a boarding stable.

LUBA upheld Yamhill County’s decision against a challenge based upon OAR chapter 660, division 33 rules regarding agricultural lands. While OAR 660-033-0120 Table 1 prohibits establishment of new solid waste disposal sites on high-value farmland (which exists on the landfill expansion site), OAR 660-033-0180(18)(a), adopted in 1996, allows expansion of existing solid waste facilities if the facility is wholly within a farm use zone. The landfill expansion site had been rezoned to exclusive farm use (EFU) in 2014. LUBA rejected the petitioner’s assertion that OAR 660-033-0180(18)(a) was meant to apply only to landfill sites that were EFU-zoned as of 1996, finding that the rule did not include any such provision, and could not be “read into” the text.

Goal 3, ORS 215.283(2)(o), OAR 660-033-0120, ORS 197.660 ORS 197.667, Residential Treatment Facilities on Agricultural Land: *Kandu Ranch v. Jackson County*, LUBA 2015-060, issued November 18, 2015. LUBA reversed a decision by Jackson County approving a residential treatment facility for six to 15 individuals on property zoned EFU. LUBA determined that the two statutes in question, ORS 197.667 and ORS 215.283(2), do not allow residential treatment facilities serving six to 15 individuals on lands zoned EFU. LUBA found that the county had misinterpreted the provisions of OAR 660-033-0120, and that the administrative rule language was consistent with the two statutes. Since Jackson County’s decision was prohibited as a matter of law, LUBA reversed the decision.

**3. Appellate Court Opinions**

None

**4. Other Opinions of Interest**

None

**5. Appeal Notices of Interest**

Affordable Housing Denial in City of Silverton: *Marion County Housing Authority v. City of Silverton*, LUBA 215-086, filed October 30, 2015. Appeal of a decision by the City of Silverton denying a design review application for a 93-unit affordable housing project.

Bonny Slope West Subarea Plan in Washington County: *Bethany Neighborhood Coalition v. Washington County*, LUBA 2015-090, filed November 18, 2015. Appeal of a decision by Washington County adding the Bonny Slope West Area as a subarea of the Cedar Hills-Cedar Mill Community Plan and adopting implementing zoning and public facilities provisions.

Laurel Ridge Zone Change in City of Eugene: *Laurel Hill Valley Citizens v. City of Eugene*, LUBA 2015-091, filed November 19, 2015, and *Environ-metal Properties v. City of Eugene*, LUBA 2015-092, filed November 20, 2015. Appeal of a decision by the City of Eugene approving a zone change for the Laurel Ridge property.

Removal of Historic Resources designation for property in City of Portland: *Restore Oregon v. City of Portland*, LUBA 2015-095, filed November 24, 2015. Appeal of a decision by the City of Portland removing a property from the city's Historic Resources Inventory in downtown Portland.

**I. ACTIVITIES AND INITIATIVES**

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

Marine Issues: Ocean Policy Advisory Council (OPAC) met December 4 in Tillamook and conducted a facilitated meeting to consider what OPAC will focus their attention on in the next few years. OPAC made three decisions that were approved by consensus. The first was a motion to have the executive committee draft a letter to LCDC recommending that at least one LCDC commission member have knowledge of Oregon ocean issues. Second, OPAC voted to establish three new ad hoc work groups to begin initial conversations on the issues of marine debris, ocean acidification, and resilience, and to draft an approach that OPAC can use to address each issue. Third, OPAC re-established the Territorial Sea Plan Working Group to address the Rocky Shores Inventory portion of the plan.

The Oregon Ocean Science Trust met for the first time at the Department of State Lands (DSL), the administrator of the new program. The trust members elected Louis Solliday, former DSL director, as their executive director. She will be developing the organizational structure for the trust. The trust was offered financial assistance from several non-governmental organizations, not for research, but for assisting the trust in setting itself up administratively. The trust hopes to have funding to eventually hire professional staff to manage the trust and its funding, should it receive any donations. The trust may ask DSL to request the legislature to change its status so that it can receive funds from sources it would presently be precluded from accepting.

The Pacific Marine Energy Center Collaborative (PMEC) Work Group met in December to discuss the progress in the pending Federal Energy Regulatory Commission license application. The Oregon Parks and Recreation Department has asked PMEC to look for alternative landing sites for the cable, which may be a problem given that they must have an approved site prior to obtaining a license. Discussions with the resource agencies about how to address the roadblocks to an agreement on the monitoring and adaptive management plans, as well as the types of best management practices and mitigation measures that should be applied are ongoing.

Coastal Hazards: The OCMP was not successful in its application to the National Oceanic and Atmospheric Agency (NOAA) for a Coastal Resilience Grant to increase resilience to a local tsunami event along the coast. NOAA could only fund between 5 and 10 out of 130 applications. However, OCMP staff developed and submitted an additional but reduced proposal through a NOAA coastal program project of special merit application. This proposal is similar to the NOAA Coastal Resilience grant in content but will likely fund fewer local government projects. The department is hopeful that we will be successful in obtaining resources from this funding source. NOAA should make the selection of the successful projects of special merit by February, 2016.

The north coast has been hit particularly hard with the recent winter storms. OCMP staff is currently conducting Community Assistance Visits (CAVs) with Clatsop County and the city of Cannon Beach for the National Flood Insurance Program (NFIP). This gave the OCMP staff the opportunity to assist these communities in assessing flood damage immediately following the storms.

OCMP staff toured various floodplains in Clatsop County with Clatsop County's floodplain administrator. As part of this, staff photo-documented the tour and is compiling a report that will eventually be included as part of the final Clatsop County NFIP CAV papers. All in all, Clatsop County fared relatively well with only minor flood damage to buildings, roads and infrastructure.

The North Coast Regional Solutions Team met and discussed ways to assist their community partners in flood recovery. Staff has been in contact with Rockaway Beach, Cannon Beach and Nehalem officials to discuss flood impacts and recovery planning efforts. Staff will continue to stay in close contact with north coast and lower Columbia cities and counties as recovery efforts continue and preparations are made for additional storms that are in the forecast.

## **B. DIRECTOR'S OFFICE**

An oral report will be provided at the meeting.

## **C. ADMINISTRATIVE SERVICES**

Fiscal (Budget, Accounting, and Procurement): The fiscal team has concluded its modifications to the 2015-17 financial reports improving functionality and efficiency.

The department has requested two items for consideration by the January 2016 Interim Joint Ways and Means Committee. They are: 1) The department has requested a \$216,000 increase in Other Fund limitation, in order to partner with the Office of Emergency Management (OEM) to fund local planning efforts mitigating natural hazards. OEM has successfully applied to the Federal Emergency Management Agency (FEMA), and DLCD needs Other Funds expenditure authority as a sub-recipient. 2) The department has requested \$1,099,742 in General Fund appropriation to replace federal fund dollars that were not received by the state due to disapproval of Oregon's Coastal Nonpoint Pollution Control Program. \$641,505 of this amount is for coastal planning and technical assistance grants to local governments and \$458,237 is for agency staff, supplies and services. Additional information and potential legislative results will be presented by Director Rue during the Director's Report to the commission.

Information Technology: Commissioners will receive training on Microsoft Surfaces during this meeting.

## **D. PLANNING SERVICES**

Natural Hazards: The House Interim Committee on Veterans and Emergency Preparedness requested a presentation on "Impediments to local emergency planning". DLCD presented along with the Department of Geology and Mineral Industries (DOGAMI) and the Oregon Partnership for Disaster Resilience (OPDR) at the University of Oregon. Department testimony identified two of the biggest impediments to emergency preparedness planning:

- Inadequate information and risk assessment
- Insufficient staff at local governments

The written testimony, slides, and video recording of the entire hearing are available online: <https://olis.leg.state.or.us/liz/2015II/Committees/HVET/2015-11-18-14-00/Agenda>

Department staff has been assisting the city of Canyon City as they rush to prepare a natural hazard mitigation plan. The area around Canyon City was severely burned this summer, which has greatly increased the risk of flooding and mudslides. The city needs an approved hazard mitigation plan before they will be eligible for federal funding to mitigate this risk.

Transportation: The policy project to review metropolitan area transportation planning has started slower than originally anticipated. This is in part because of the reduced staff with the retirement of Bob Cortright, and partly because of the complexity in defining the scope for the

project. For the March meeting we will present proposed member for the advisory committee and a scope for the project, including updating the greenhouse gas reduction targets.

Measure 49: Yamhill County gave preliminary approval for two property line adjustments on parcels that were created under Measure 49 authorizations. The adjustments do not comply with the maximum parcel size enacted by Measure 49, and therefore violate the conditions of approval for the Measure 49 authorizations. The department is opposing the adjustments through the local process.

## **E. COMMUNITY SERVICES**

General Fund Grants Program: The department has awarded \$529,675 of \$564,115 available for Technical Assistance (TA) grants. Most of the agreements are still being negotiated, and we expect most of them to be executed by the beginning of February. The grants are going to Beaverton, Canyon City, Halfway, Harney County, Lincoln City, Newberg, North Plains, Prineville, Sweet Home, Talent, Waldport, Wallowa County, and Washington County. The top priority use of TA grants according to the Grants Allocation Plan is planning that promotes economic development. Of the \$529,675 awarded so far, \$300,000 has been to economic development-related projects in small towns such as Waldport and Talent and larger cities such as Beaverton and Newberg. About \$70,000 has been allocated for updating the farm and forest zone chapters in six counties, the continuation of a program initiated last biennium. Remaining funds have gone to projects related to natural hazards planning, public infrastructure planning, and responding to new requirements related to sage-grouse habitat protection. The funds are somewhat proportionally allocated to counties, small cities (smaller than 10,000), and large cities, with small cities receiving the largest share.

Planning Assistance grants (\$1,000 to cities smaller than 2,500 and \$4,000 to counties smaller than 15,000) have been paid. All eight eligible counties accepted the offer while 83 of 137 eligible cities signed the agreement to receive the grant.

Urban Growth Boundaries: The city of *Lafayette* submitted an adopted amendment to its UGB to the department for review because the amendment included more than 50 acres and the city has a population larger than 2,500. The department received one objection to the submittal. The director issued an order remanding the submittal on December 29, 2015. The city completed the amendment before the new streamlining rules came into effect, so OAR chapter 660, division 24, along with Goal 14 and ORS 197.298, provided the relevant criteria for review. The city utilized the “safe harbor” provisions provided in division 24 to calculate its housing need. The department review found that the city applied the goal, statutes, and rules correctly except that the final adoption did not match the findings because the city removed over 30 acres from the expansion at the final hearing. The director found that the city did not accommodate its 20-year need for residential land as required by Goal 14 and division 24. No appeal challenging the director’s remand has been received at the time of this report, but the appeal period has not closed.

The city of *Woodburn and Marion County*, at a joint hearing on December 14, 2015, adopted amendments to the Woodburn comprehensive plan expanding the UGB, establishing urban reserves, and making other related plan changes. The action also amended to the city-county urban area management agreement. The department received notice of the adoption on December 17. The amendments are the result of mediation among parties to a Court of Appeals case, which concluded with an agreed-upon location of the boundary and plan provisions preventing urban-area expansion into certain areas of farmland for a minimum of 20 years. The period for objecting to the submittal ends January 7.

As reported in the director's report for the December 2015 meeting, the Court of Appeals upheld the commission's approval of the *Scappoose* UGB amendment. The court concluded:

Based on LCDC's correct articulation of its own substantial evidence standard of review and the manner in which it applied that standard, we conclude that LCDC properly understood its substantial evidence standard of review. We also conclude, applying the rule of deference noted earlier, that LCDC correctly applied the statewide planning goals and its rules implementing those goals to the city's UGB amendment decision. Finally, we conclude that LCDC adequately explained its determination of petitioner's objections sufficiently to allow us to examine its order for legal sufficiency.

The full decision is available at <http://www.publications.ojd.state.or.us/docs/A153856.pdf>.

Periodic Review: The department has not received or acted on any periodic review task or work program submittals during this reporting period.

## **F. RETIREMENTS, NEW STAFF AND PROMOTIONS**

No changes since December meeting.

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

Agenda items relating to policy and rulemaking are included elsewhere in this meeting's materials. Please refer to the followings agenda items:

- Item 5: Minor and Technical Rule Amendments
- Item 6: Legislative Briefing