



# Oregon

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January 11, 2024

To: Land Conservation and Development Commission

From: Brenda Ortigoza Bateman, Ph.D., Director  
Gordon Howard, Community Services Division Manager  
Hilary Foote, Farm and Forest Land Use Specialist

Subject: **Agenda Item 14, January 25-26, 2024 LCDC Meeting**

## Farm-Forest Rulemaking Initiation

### I. Agenda Item Summary

The Department of Land Conservation and Development (DLCD or department) is asking the Land Conservation and Development Commission (LCDC or commission) to initiate rulemaking for administrative rules implementing Goal 3 (Agricultural Lands). If initiated at this meeting, the rulemaking would conform rule to current legislative standards, make minor corrections to existing rules, and codify established case law standards with the intent of improving consistency of implementation across the state.

**Purpose.** Department staff request that LCDC initiate rulemaking on the identified topics, approve a rulemaking charge, and direct the department to appoint a Rules Advisory Committee (RAC). The commission may also appoint a commission liaison for the RAC process.

The RAC will recommend modifications to Oregon Administrative Rules (OARs) that codify case law standards related to the implementation of Goal 3: Agricultural Lands. Subsequently, staff will recommend to the Land Conservation and Development Commission rule changes that will:

- Codify the identified established case law standards.
- Result in more consistent implementation of case law standards.
- Provide additional clarity to counties and potential land use permit applicants with the intent of reducing unnecessary appeals.

Topics for consideration by the RAC will include standards related to: ORS 215.296 (the 'Farm Impacts Test'), Commercial Activities in Conjunction with Farm Use, the Agri-

Tourism and Other Commercial Events ‘incidental and subordinate’ and ‘necessary to support’ standards, and Transportation Facilities on Rural Lands.

**Objective.** This rulemaking is intended to make technical corrections to rule and codify established case law standards with the intent of improving clarity and consistency of implementation across the state.

For further information about this report, please contact Hilary Foote, Farm and Forest Land Use Specialist at 503-881-9249 or [hilary.foote@dlcd.oregon.gov](mailto:hilary.foote@dlcd.oregon.gov).

## **II. Background**

Oregon’s zoning-based farm and forest land conservation programs have been in place for nearly 50 years. During that time, the legislators, the commission and the courts have expanded, modified and re-designed the program to improve the performance of the program in achieving the objectives of statewide planning Goals 3 and 4 and to adapt to changes in public priorities. These adaptations have been precipitated by the state legislature, by LCDC through rule adoption clarifying and interpreting statutory provisions, and by the courts’ interpretations, which establish case law standards. These programs are living, dynamic regulatory structures.

Oregon’s Farm and Forest Conservation Program attempts to balance the need for clear and objective statewide standards with provisions for local discretion and the flexibility to adapt the program to the unique circumstances of individual counties. In some cases, ambiguity in use definitions or rule language has resulted in more frequent appeals of certain types of use applications and more discretionary criteria. Consequently, there is a body of case law from the courts that has the effect of common law but has not been codified in state administrative rule. Local jurisdictions have varying degrees of resources to be able to stay abreast of court decisions.

Codifying certain of these case law standards in administrative rules will result in more consistent implementation across Oregon counties and provide additional clarity to counties and potential land use permit applicants with the intent of reducing unnecessary appeals.

### **a. Topics for Consideration**

#### **1. The Farm Impacts Test:**

Chapter 215 of the statute contains lists of uses, other than farm use, which may be permitted in exclusive farm use zones. All of the uses listed in ORS 215.213(2) and 215.283(2) require a county to find that the proposed use will not force a significant change in farm and forest practices in the surrounding area and will not significantly increase the cost of farm and forest practices on the surrounding lands. This discretionary review requirement is often referred to as the ‘farm impacts test’ or by

its statutory reference, ORS 215.296. A body of case law exists that offers guidance about how to determine what constitutes a significant impact. These established case law standards have not been codified in statute or rule and are therefore applied inconsistently throughout the state.

Proposal: Codify guidance from the courts on the analysis required to provide findings under ORS 215.296 (the 'farm impacts test') as established in *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991); *Von Lubken v. Hood River County*, 846 P.2d 1178 (1993); *Stop the Dump Coalition v. Yamhill County*, 364 Or 432 (2019); and *Friends of Marion County v. Marion County* (Jones/Agritainment), 88/89 Or LUBA (2022).

## **2. Commercial Activities in Conjunction with Farm Use (CACFU):**

Multiple court rulings have found under different circumstances that a 'commercial activity in conjunction with farm use' must: 1) be either exclusively or primarily a customer or supplier of farm products, 2) provide products or services essential to the practice of agriculture; and/or 3) significantly enhance the farming enterprises of the local agricultural community. Case law establishes that there must be a direct connection between the proposed nonfarm commercial activity and area agriculture. Case Law also clarifies that any associated events or activities must be incidental to the commercial activity. DLCD has referenced these established case law standards in its model code for exclusive farm use zones, but they have not been codified in statute or rule and are therefore applied inconsistently throughout the state.

Proposal: Codify guidance from the courts on what constitutes a commercial activity in conjunction with farm use as established in *Balin v. Klamath County*, 3 LCDC 8 (1979); *Craven v. Jackson County*, 308 Or 281 (1989); *Chauncey v. Multnomah County*, 23 Or LUBA (1992); *City of Sandy v. Clackamas County*, 28 Or LUBA (1994); and *Friends of Marion County v. Marion County* (Jones/Agritainment), 88/89 Or LUBA (2022).

## **3. Incidental and subordinate and necessary to support:**

Agri-tourism or other commercial events or activities as authorized in ORS 215.213(11) and ORS 215.282(4) must be 'incidental and subordinate' to existing farm use of the property. Likewise, approvals for up to 18 agri-tourism or other commercial events per year permitted on land zoned within EFU zones must be found to be 'necessary to support' the commercial farm uses or the commercial agricultural enterprises in the area. Counties have interpreted these standards in a variety of ways leading to unequal application across the state.

Proposal: Codify guidance from the courts on agritourism events and other commercial activities as established in *Friends of Yamhill County v. Yamhill County* (*DeBenedetti*), Or LUBA (2019) and *Friends of Yamhill County v. Yamhill County* (*DeBenedetti*), Or LUBA (2020).

**4. Transportation facilities on rural lands:**

The language in the OAR 660-012-0065 rules related to transportation improvements on rural lands has been described as ambiguous as to whether or not the farm impacts test should be applied to facilities proposed in farm and forest zones. This section of rule could be modified to clarify that it is LCDC’s intent that uses listed in OAR 660-012-0065(3) are subject to 215.296 findings, which is consistent with our guidance on the topic and recent case law.

Proposal: Codify guidance from the courts regarding 215.296 findings from *Van Dyke v. Yamhill County*, 81 Or LUBA 427 (2020).

**b. Rulemaking Advisory Committee**

Staff are providing a list of interests to be represented on a Rules Advisory Committee, prioritizing those likely to be impacted by changes to the Farm and Forest Conservation Programs and persons who will also have a strong understanding and working knowledge of the history and structure of the state’s farm and forest zoning-based land conservation programs. The proposal below includes recommendations made by the Local Officials Advisory Committee at the December 11, 2023 meeting.

Recommended Rules Advisory Committee Members
Owners and lessees of land zoned for farm and forest use
Farm, woodlot and forest business owners and suppliers of farm, woodlot, and forest industries
Agricultural, woodlot and forest industries and industry groups
County commissioners and planning staff
County public works departments
Farmland and forestland protection advocates
Natural resource and climate advocates
Farm and forest and land use scholars
Land trust organizations
Land use lawyers
Property rights advocates
Developers
Tourism support entities
Natural resource agency staff
Land Conservation and Development (LCDC) liaison
Community Involvement Advisory Committee (CIAC) liaison

### **III. Draft Rulemaking Charge**

The purpose of a rulemaking charge is to allow the commission to offer direction on project management, as well as express its expectations regarding the treatment of subject matter and content. The charge will be the instrument relied on by staff and the RAC for guidance resolving any questions on project direction. Staff have included the draft charge as Attachment A.

### **IV. Recommended Action**

The department recommends that the commission officially initiate rulemaking, approve the draft charge included as Attachment A, and direct the department to appoint the RAC in the manner described in this staff report.

***Proposed Motion:*** I move that the commission initiate rulemaking to codify caselaw standards as described in the staff report, approve the draft charge included as Attachment A, and direct the department to appoint the RAC in the manner described in this staff report.

***Alternative Motion:*** I move that the commission initiate rulemaking to codify caselaw standards as described in the staff report with the following revisions [specify revisions], approve the draft charge included as Attachment A, and direct the department to appoint the RAC in the manner described in this staff report, with the following revisions [specify revisions].

### **V. Attachments**

#### **a. Draft Rulemaking Charge**

**Department of Land Conservation and Development**  
**Farm and Forest Conservation Program: Draft Rulemaking Charge**  
**December 11, 2023**

*Farm and Forest Conservation Program Improvements Project: Codification of Case law Standards. Department of Land Conservation and Development (DLCD) Staff intend that the charge will support the Rulemaking Advisory Committee's (RAC) efforts by implementing commission expectations. Should there be confusion or disagreement among the RAC, the charge will prevail. The following draft language has been or will be reviewed by DLCD's Rural Team, Policy Team and the Local Officials Advisory Committee (LOAC). This work focuses on codification of case law associated with statewide land use planning Goals 3: Agricultural Lands and 4: Forest Lands.*

**Proposed charge:**

*Members of the Rules Advisory Committee (RAC) will provide assistance to agency staff to analyze, draft, and recommend Oregon Administrative Rules (OARs) that codify certain case law standards related to the implementation of Goal 3: Agricultural Lands and 4: Forest Lands. OARs staff recommend for consideration by the Land Conservation and Development Commission will:*

- *Codify the identified established case law standards.*
- *Result in more consistent implementation of those identified case law standards across Oregon counties.*
- *Provide additional clarity to counties and potential land use permit applicants with the intent of reducing unnecessary appeals.*

Topics of consideration: ORS 215.296 (the 'Farm Impacts Test'), Commercial Activities in Conjunction with Farm Use, the Agri-Tourism and Other Commercial Events 'incidental and subordinate' and 'necessary to support' standards, Transportation Facilities on Rural Lands.

*If approved, this charge would lead the document of operating principles for the Rules Advisory Committee as they begin their work.*

**What stakeholders would be involved:** *The potential audience for this effort is very broad including owners and lessees of land zoned for farm and forest use, owners and renters of neighboring properties, farm, woodlot and forest business owners and suppliers of farm, far, woodlot and forest industries and industry groups, county commissioners and planning staff, county public works departments, farmland and forestland protection advocates, natural resource and climate advocates, farm and forest and land use scholars, land trust organizations, land use lawyers, property rights advocates, developers, tourism support entities, natural resource agency staff with interest in land use, a member of LCDC's Community Involvement Action Committee and a LCDC liaison.*