

## SUPPLEMENTAL MEMORANDUM #2

Memorandum Date: October 25, 2010  
Second Reading/ Public Hearing Date: October 26, 2010



---

**TO:** LANE COUNTY BOARD OF COMMISSIONERS &  
LANE COUNTY PLANNING COMMISSION

**DEPARTMENT:** Public Works, Land Management Division – Long Range Planning

**PRESENTED BY:** Keir Miller, Associate Planner

**AGENDA ITEM TITLE:** 1) ORDINANCE NO. 8-10 – IN THE MATTER OF AMENDING CHAPTERS 10 AND 16 OF LANE CODE TO MODIFY EXISTING FLOODPLAIN REGULATIONS IN ORDER TO CORRECT DEFICIENCIES; ACHIEVE CONFORMITY WITH OREGON BUILDING CODES AND TO INCORPORATE CERTAIN BEST MANAGEMENT PRACTICES AND HIGHER REGULATORY STANDARDS. (LC10.271 AND LC16.244) (Department File No. PA 10-5658)

2) ORDINANCE NO. PA 1276 – IN THE MATTER OF AMENDING THE LANE COUNTY RURAL COMPREHENSIVE PLAN (RCP) BY REVISING GOAL-2, POLICY 25, TO ESTABLISH PROVISIONS FOR A DRINKING WATER PROTECTION OVERLAY ZONE; BY ADOPTING AN OFFICIAL DRINKING WATER PROTECTION OVERLAY ZONE MAP; BY APPLYING THE OVERLAY ZONE TO PROPERTIES WITHIN IDENTIFIED GROUNDWATER AND SURFACE WATER PROTECTION AREAS AND ADOPTING SAVINGS AND SEVERABILITY CLAUSES. (Department File No. PA 10-5659)

3) ORDINANCE NO. 9-10 – IN THE MATTER OF AMENDING CHAPTER 16 OF LANE CODE TO CODIFY DRINKING WATER PROTECTION OVERLAY ZONE REGULATIONS. (LC16.298) (Department File No. PA 10-5659)

---

### 1. PROPOSED MOTIONS OR ACTIONS:

- Staff recommends that the Board postpone the hearing on Ord. No. 8-10 (floodplain code amendments) and instead make a motion to reschedule the hearing to a date, time and place certain - November 9, 2010, at 7:00pm in Harris Hall with the changes to the proposed code language as included in Attachment 3 to this memo.
- Depending on the progress and outcome of the October 26 Public Hearing on Ord. Nos. 9-10 and PA 1276 (drinking water protection amendment) a variety of possible options are discussed in section 4, below.

## 2. ISSUE

Staff has recently identified several necessary changes that would substantially enhance the clarity and efficacy of the proposed Drinking Water Protection Overlay Zone (LC 16.298). Staff recommends that these changes be incorporated into any motion, should the Board consider adoption of Ordinance No. 10-9 and PA 1276 after receiving a recommendation from the LCPC. These changes are described in Section 3.1, below and included in Attachments 1-2 to this memo. These changes would constitute a significant change in the ordinances as read on October 5. Therefore, if the Board chooses to incorporate these changes then no final action on these ordinances can occur on October 26.

In addition, a number of more substantive policy-level issues have been raised by community members regarding LC 16.298. In an effort to proactively address these issues, staff has highlighted them Section 3.2 and also begun generating possible code language revisions that the Board and Planning Commission may wish to consider and possibly, adopt. This preliminary language is provided below; however, because other issues and potential policy choices will most certainly be raised during the public hearing, staff has not yet attempted to incorporate these possible changes into any finalized version of LC 16.298.

Finally, in Section 5 of this memo, staff recommended changes to the proposed floodplain code amendments of LC 10.271 and 16.244 have been described. These proposed changes are included in Attachment 3 to this memo. If the LCPC and Board would like to see these changes incorporated into the

Staff recommends that all of these changes be considered simply as a starting point. As additional community dialogue and input is gathered through the public hearing process, it is anticipated that additional changes will likely be useful, prudent and necessary.

## 3. DISCUSSION

### 3.1 Staff Recommended Changes to Drinking Water Protection Overlay Zone:

A number of issues with the proposed overlay zone language and map have recently been identified by LMD staff. Late discoveries of this nature are not unusual and are to be expected when an extended opportunity to review such significant code changes (through an initial Planning Commission Hearing and / or broader community involvement process) is not feasible.

It is the recommendation of staff that if the Board elects to proceed toward adoption of Ordinance No 10-9 and PA 1276 that the following issues be addressed:

#### 3.1-a - Issues with Text of LC16.298:

1. Consistency in the use of the term “removal of vegetation” – The terms “Vegetation removal” and “removal of vegetation” are used interchangeably throughout the proposed code. One consistent term is needed.
2. Clarification needed regarding the trimming, mowing, weeding and general maintenance of existing lawns and landscaped areas – The proposed vegetation removal standards of LC 16.298 are intended to prevent the clearing of new vegetation only. The proposed language is somewhat ambiguous regarding the maintenance of existing vegetation and additional

language is needed to clarify that gardening, landscaping and general yard maintenance activities would continue to be permitted uses.

3. Clarification needed regarding the use of the word “perpendicularly” – In the proposed language of LC16.(4)(a), which describes how SWPA setbacks are to be determined, the term “perpendicularly” is used. It is recommended that this term be replaced with the wording “at a horizontal right angle”.
4. Clarification needed in the definition of the word “Development” – Under the proposed definition of the word “development” it is unclear whether or not interior alterations or remodeling would be considered development. Interior remodeling should not be considered development for the purpose of LC 16.298 and changes are needed to clarify this. Also, staff does not believe that the term “grading of land” needs to be included in the LC 16.298 definition of development.
5. Issues with the current variance criteria language – After more thorough analysis of the proposed variance criteria language of LC16.298(6)(d), it appears that the process currently laid out to allow for a variance could, in some instances, create unreasonably high standards which must be met. It is necessary that reasonable options for development be available and that the proposed code language does not deny any reasonable use of a property. Therefore, the variance process originally drafted has been substantially modified. The new “exception” process that is proposed attempt to establish a clear and objective set of criteria that would not require a lengthy Planning Director level review process. The new exception process would be less costly and time consuming for the applicant and would not be an appealable decision.
6. Exemption language to enable certification under the Oregon Forestland Urban Interface Fire Protection Act is needed – An exemption is needed to provide for fire risk mitigation activities consistent with OAR 629-044-0200 and the National Fire Plan.
7. Consistency in the use of the terms “surface water protection areas” and “ground water protection areas” – These terms are not used consistently throughout LC16.298. Also, it would be helpful if acronyms (SWPA and GWPA) were codified for these terms.
8. Modified exemption language is needed regarding wells and associated infrastructure to ensure consistency with State Law – ORS 537.769 prohibits local governments from regulating wells. After consultation with the State Water Resources Department it appears that the well house square footage limitation criteria of LC 16.298(6)(a)(v) need to be deleted and that additional language for well related infrastructure be added .
9. Additional language needed to clarify standards for removal of vegetation that poses a fire safety or health hazard – language has been added to LC16.298 (6)(b)(ii) that clarifies who is qualified to determine when vegetation poses a health or fire safety hazard.
10. Other minor text corrections and clarifications as shown in Attachment 1 to this memo.

### **3.1-b - Issues with Official Overlay Zone Map:**

11. The inadvertent inclusion of a Surface Water Protection Area around the Clear Lake Watershed on the proposed Official Overlay Zone Map - The Clear Lake Watershed, which is located in western Lane County, is currently protected by a drinking water protection overlay zone (LC 16.258 CLWP-RCP). Those regulations were developed through a lengthy process and are designed to address the issues specific to that watershed. It was not the intent of the TAC or staff that land use activities within the Clear Lake Watershed be regulated by the proposed overlay zone and it was an oversight that this watershed was

included on the proposed official zone map included with the 9/17/10 packet to the Board. It should be noted that staff has received two comments from members of the public who feel that the proposed overlay zone should be applied in addition to the requirements of the existing Clear Lake protection overlay zone.

12. The inadvertent omission of certain Ground Water Protection Areas (GWPA)s on the Proposed Official Overlay Zone Map – Due to a Geographic Information System mapping error, seven GWPA)s were not included on the proposed official zone map included with the 9/17/10 packet to the Board.
13. Remove surface water and groundwater protection areas from Non-Impacted Forest (F-1) zoned lands. - It has been recommended that the proposed Drinking Water Protection overlay zone map be amended to remove all SWPA and GWPA designations from lands zoned F1. While visually this may appear to be a major reduction in the extent and coverage of the proposed overlay zone, both staff and the Technical Advisory Committee (TAC) believe that this change will have little, if any, impact on the extent of drinking water protection provided by LC16.298. This is because opportunities for new development on these lands are exceptionally rare and those activities which primarily do occur (commercial forestry) are exempted from such regulations under the Oregon Forest Practices Act.

Revisions to address these recommended changes are included as Attachments 1-2 of this memo.

### **3.2 Concerns Identified Through Public Notification Process**

On October 1, 2010, Ballot Measure 56 notifications were mailed to property owners informing them of the October 26, 2010, public hearing regarding Ordinance Numbers 8-10, 9-10, and PA 1276. Approximately 8,900 notices were mailed describing the proposed floodplain regulation changes (Ord. No. 10-8). Approximately 9,000 notices were mailed describing the proposed Drinking Water Protection Overlay Zone (Ord. Numbers 9-10 and PA 1276).

As of 5:00 pm, Monday, October 25, 2010, LMD received approximately 100 phone calls and 230 written comments regarding the proposed changes. Of the written comments received 208 pertained to the proposed Drinking Water Protection Overlay Zone, 3 pertained to the proposed floodplain regulation changes and 19 pertained to both. The majority of written comments indicated a lack of support for the proposals, 19 comments indicated support for the proposals.

Written comments pertaining to the proposed Drinking Water Protection Overlay Zone conveyed a number of concerns, the prominent themes of which included:

1. Concerns regarding the possible decline in property values [81 comments]. Several parties stated that requiring development to be located further away from the river than currently required would result in the loss of “views of the river” and a decrease in property values;
2. Concerns regarding the possible infringement of private property rights [57 comments]. Several parties stated that the proposed regulations would unreasonably limit their property rights and result in a “taking” of their property;
3. Concerns and misunderstandings regarding the proposed vegetation removal standards [55 comments]. Several parties stated that proposed removal limitations would result in increased fire hazards and properties becoming overrun with invasive plant species;

4. Concerns regarding the speed at which the process is moving and the lack of transparency during the initial code development process [48 comments]. Several parties noted their displeasure with the lack of citizen involvement;
5. Concerns regarding the requirement that new, rebuilt and/or replaced structures would need to be setback outside of Surface Water Protection Areas (SWPAs) if there is a location on the lot or parcel to do so [39 comments]. Several parties noted that, if their dwelling were destroyed, their homeowner insurance policies would not pay for costs incurred to locate a replacement dwelling elsewhere than within the existing footprint. Others cited concerns regarding the time and expense that may be involved in applying for an exception to allow development within a Surface Water Protection Area;
6. Concerns regarding the enforcement of current and proposed regulations [36 comments]. Several parties noted that the County lacks sufficient resources to enforce current regulations and questioned the County's ability to enforce additional regulations;
7. Concerns regarding the possible legal and financial ramifications for the County [31 comments]. Several parties stated that the proposed changes would result in numerous lawsuits filed against the County that will have significant associated financial costs. Others predicted that the proposed changes will decrease property values, which would in turn decrease is property tax revenue; and

Some of these issues were anticipated and were identified in the original (9/17/10) staff memorandum to the Board and LCPC as likely areas where policy decisions will need to be made. Where possible, the Planning Commission and Board may choose to address these concerns (or others that may arise) through refinements to the proposed language of LC16.298 or the map.

In consultation with the Technical Advisory Committee, staff has identified two significant changes, which we recommend you consider:

Possible Change #1: Enable the replacement or reconstruction of existing structures and septic systems within Surface Water Protection Areas:

The current proposed development exception language of LC 16.298(6)(a)(vi) allows for replacement of existing structures within a SWPA only if options for replacing the structure elsewhere on the lot or parcel are not available. The current language reads:

***Replacement of existing structures provided a replacement location outside of the Surface Water Protections Area does not exist on the lot or parcel and the replaced structure is set back as far away as possible from the drinking water source or tributary to the drinking water source based on a consideration of site characteristics, including but not limited to topography, road and property line setback. Applications for replacement of existing structures within Surface Water Protection Areas shall be reviewed as ministerial land use decisions.***

A possible change to this exemption would simply read:

***The alteration, restoration or replacement of existing lawfully established structures and septic systems.***

This change would be more or less consistent with the Technical Advisory Committee's intent to maintain existing water quality by limiting future (i.e. new) land use-related impacts to water quality. In addition, it would alleviate costs and delays associated with a ministerial land use review process.

Possible Change #2: Reduce the proposed SWPA setback from 200 feet to 150 or 100 feet:

On a site-by-site basis, an effective buffer width can vary. If setback widths are tailored to the many factors that can influence a buffer's effectiveness (soil type, slope, vegetation type, current vegetation cover, type of waterbody, type of adjacent land use activity, types of contaminants, etc.) you can get a range from 50 to 1,000 feet to be effective. Trying to manage such variety would be a challenge, especially for a Land Management Division that is limited in budget and staffing. A majority of the TAC initially agreed on a proposed uniform setback distance of 200 feet based on a review of the professional literature and sample codes from other jurisdictions, professional judgment about allowable risk in the face of uncertainty, and recognition that enforcement of a variable-width code would be difficult. This figure was selected to address the risks associated with two distinct threats to water quality: the chronic day to day cumulative inputs to the water from people living and working and driving close to the water, and the pulse of inputs that can occur when there is a major spill or a flood or a shift in a river that can take out a house, its septic system, or even a larger cluster of development. The 200 foot setback also recognizes the limited ability of Lane County community water providers to collect adequate monitoring data on a regular basis to assess when a source area is degraded or becoming degraded. Reducing that proposed setback is an option, with the understanding that it increases the risk of both chronic and flood-associated inputs to the drinking water source affecting water quality.

### **3.3 Staff Recommended Changes to Proposed Floodplain Code Amendments**

A Number of changes have also recently been identified, which staff feels would help improve the functionality of the proposed floodplain code amendments. These changes are described below and incorporated into the revised text of LC 10.271 and LC 16.244, included as Attachment 3.

1. Language needed to ensure that permits are required for critical facilities – Proposed code language in LC 10.271-40, LC 10.271-45, LC 16.244(8) and LC 16.244(9) reference permits requirements for development within the SFHA but do not include such references for the 500-year floodplain where critical facilities are concerned. These references are needed to ensure that the proposed critical facility standards are enforceable.
2. Clarification needed regarding the division of land in the floodway – A minor revision is needed to LC10.271-45(4)(f) and LC 16.244(9)(d)(vi). This change simply clarifies a proposed provision which would allow for land divisions that would result in parcels entirely within the floodway if the resulting floodway lot or parcel is established for conservation purposes and cannot be developed.
3. Issues with the proposed floodway variance criteria language – Similar to the variance process within the Drinking Water Protection Overlay zone outlined above, the variance criteria language of LC10.271-55(2) and 16.244(11)(b), appears as though it may, in some instances, create unreasonably high standards. It is necessary that options for development

be available and that the proposed code language does not deny any reasonable use of a property. Therefore, the variance process originally drafted has been substantially modified. The new “exception” process that is proposed would create a clear and objective set of criteria. The new exception process would be less costly and time consuming for the applicant and would not be an appealable decision.

4. Allow for replacement dwellings and septic systems in the floodway – Consistent with the intent of the Technical Advisory Committee to limit new development within the floodway, staff recommends that replacement dwellings and septic systems be permitted when it can be demonstrated through engineering analysis that such development will not create a rise in flood waters.
5. Allow for replacement septic systems in the floodplain – Again, in an effort to remain consistent with the TAC’s intent to maintain existing water quality by limiting new land use-related impacts, staff recommends that the repair or replacement of existing septic systems be permitted.
6. Modified exemption language is needed regarding wells and associated infrastructure to ensure consistency with State Law – ORS 537.769 prohibits local governments from regulating wells. After consultation with the State Water Resources Department it appears that the well house square footage limitation criteria of LC 10.271-45(b)(iv) and 16.244(9)(d)(ii)(dd) need to be deleted and that additional language for well-related infrastructure be added.
7. Critical Facility requirements modified to enable new critical facilities if they are built at least 1 foot above 500-year floodplain – the originally proposed critical facility standards allowed for substantial improvements of facilities if they were built 1 foot above the 500-year floodplain but did not allow for new facilities if they met this same standard. In retrospect, structures that are built to an elevation of 1 foot above the 500 year floodplain would likely be well protected from all but the most catastrophic flood events, therefore staff recommends that new critical facilities be permitted if they are elevated above the 500 year floodplain.
8. Other minor text corrections and clarifications as shown in Attachment 3

#### **4. ALTERNATIVES / OPTIONS**

##### **LCPC Options**

The Planning Commission may:

- A. Postpone opening the Hearing on Ordinance No. 8-10 and instead reschedule to a date, time and place certain. This option may be advisable considering that that the large majority of comments staff have received are in regards to the proposed drinking water protection overlay zone and / or:
- B. Close the public hearing; close the record and deliberate (there will likely not be time for all this on 10/26). Possible recommendations following deliberations include:
  - a. Recommend Board adoption of the ordinances; *or*
  - b. Recommend Board adoption of the ordinances with changes as outlined by staff or otherwise identified in the public hearing or subsequent discussion; *or*
  - c. Recommend that the Board not adopt the ordinances
  - d. Recommend some other combination of actions

- C. Close the public hearing but leave the record open for a specified period of time
- D. Continue with the Joint public hearing to a date and time certain. Possible dates include:
  - Tuesday, November 9, 2010 @ 7:00pm – **(only if the Board and LCPC have not rescheduled Ord. No. 8-10 to this date)**
  - Tuesday, November 30, 2010 @ 7:00pm- **(staff recommendation)**
  - Tuesday December, 07, 2010. @ 7:00pm
  - Tuesday December, 14, 2010. @ 7:00pm

**Board Options:**

- A. The Board may postpone opening the Hearing on Ordinance No. 8-10 and instead reschedule to Tuesday, November 9, 2010 @ 7:00pm in Harris Hall, This option may be advisable considering that that the large majority of comments staff have received are in regards to the proposed drinking water protection overlay zone; or
- B. If all of the public testimony can be heard on October 26 (which may be unlikely) the Board may close the public hearing, close the record and deliberate on the Ordinance No. 8-10 and / or 9-10 and PA 1276 as read during the First Reading on October 5, 2010; or
- C. If all of the public testimony can be heard on October 26 (which may be unlikely), the Board could close the public hearing and leave the record open to a date and time certain.
- A. Finally, the Board could continue the joint hearing to a date, time and place certain. Possible dates include:
  - Tuesday, November 9, 2010 @ 7:00pm – **(only if the Board and LCPC have not rescheduled Ord. 8-10 to this date)**
  - Tuesday, November 30, 2010 @ 7:00pm- **(staff recommendation)**
  - Tuesday December, 07, 2010. @ 7:00pm
  - Tuesday December, 14, 2010. @ 7:00pm

Upon receipt of a recommendation from the Planning Commission the Board may either:

1. Adopt the ordinances with changes recommended by staff and with other changes identified through the public hearing process
2. Adopt Ord. No. 8-10, Ord. No. 9-10 and Ord. No. PA 1276 as read on October 5
3. Not adopt Ord. No. 8-10, Ord. No. 9-10 and Ord. No. PA 1276
4. Adopt Ordinance 8-10 but deny Ordinance 9-10 and PA 1276 or vice versa
5. Direct staff to make other changes to any of the ordinances
6. Take no action

**5. RECOMMENDATIONS**

Regarding Ordinance 8-10, staff’s initial recommendation to the LC PC and Board is that they postpone opening the public hearing and instead reschedule to Tuesday, November 9, 2010 @ 7:00pm (option A).

Regarding Ord. No. 9-10 and Ord. No PA 1276, staff recommends that the Board continue the hearing to Tuesday November 30, 2010 @ 7:00pm, with direction to staff that work on the proposed ordinance language continue in the interim and that options for addressing issues raised during public testimony or submitted into the record be provided to the Board for their consideration at a later date (option D).

## **6. TIMING**

The staff recommended changes outlined in section 3, represent significant changes to Ordinance No. 8-10, 9-10 and PA 1276 as presented during the First Public Reading on October 5, 2010. Therefore, if the Board chooses to take action on these ordinances and incorporate these changes (or any other substantive changes) then that action will need to be postponed at least 13 days in accordance with Section 18 of the Home Rule Charter for Lane County.

Other timing considerations are outlined in Section 4, above.

## **7. ATTACHMENTS**

**Attachment 1** – Staff recommended changes to LC 16.298 since 10/4/10 (track change format)

**Attachment 2** – Revised Drinking Water Protection Overlay Zone Map

**Attachment 3** – Staff recommended changes to Lane Code 10.271 and 16.244.

**Attachment 4** – Lane Code 10.271 and 16.244 (Ordinance No. 8-10) (as read on 10/5)

**Attachment 5** – Lane Code 16.298 (Ordinance No. 9-10) (as read on 10/5)