MEMORANDUM

TO: Deschutes County Planning Commission
FROM: Nicole Mardell, Associate Planner
DATE: September 19, 2019
SUBJECT: Model Flood Amendments (247-19-000530-TA / 533-PA) – Continued Public Hearing

The Deschutes County Planning Commission held a public hearing on August 8, 2019 and a continued public hearing on September 12, 2019. At the conclusion of the meeting, the hearing was continued to September 26, 2019 to allow for additional written and oral testimony.

I. PROPOSAL

Deschutes County, through File Nos. 247-19-000530-TA / 533-PA, is amending the Deschutes County Zoning Ordinance and Comprehensive Plan to incorporate text from the Department of Land Conservation and Development (DLCD)'s 2014 Oregon Model Flood Damage Prevention Ordinance referred to hereafter as “DLCD’s Model Flood Ordinance”.

These amendments are solely focused on amendments to the Deschutes County Code (DCC) and Comprehensive Plan that incorporate language from DLCD’s Model Flood Ordinance. The Model Flood Ordinance is a statewide standard and includes requirements for critical facilities, accessory structures, and storage in the Flood Plain Zone, among other items. Staff is proposing these amendments to ensure consistency among local land use approvals and state requirements and to promote best practices in hazard mitigation. Extensive background is provided in the July 25, 2019 work session packet¹ and on the project website: https://www.deschutes.org/cd/page/floodPlain-information-and-text-amendments.

II. PUBLIC COMMENTS

Many of the comments received were generally opposed to any amendments involving the Flood Plain Zone due to impacts to wildlife from additional development near sensitive riparian areas but did not provide comments specific to the model flood language proposed. DLCD Natural Hazards Planner Katherine Daniels submitted suggested changes for

¹http://deschutescountyор.igm2.com/Citizens/FileOpen.aspx?Type=1&ID=2126&Inline=True
consistency with DLCD's model ordinance. ODFW suggested that staff rework the proposed purpose statement to ensure its role as a Goal 5 resource is not reduced.

As three members of the Planning Commission could not attend the public hearing on September 12, items handed out during that meeting are included as Attachment 1. No comments have been received since that time (as of 11 am on September 19).

- Alvarado
- Benson
- Brewer
- Caram
- Castelbaum
- Central Oregon Land Watch
- DLCD – Daniels
- DCLD – Punton
- Elshoff
- Emerson/Brayfield
- Frank
- Gould
- Harris
- Kassy
- Kruse
- McKay
- Monte
- ODFW - Vaughn
- Pederson
- Pokorny
- Quinlan
- Resto-Spotts
- Storm
- Warriner

III. NEXT STEPS
The public hearing to take testimony on the proposed amendments will be held on Thursday, September 26, 2019 at 5:30 pm, in the Barnes and Sawyer Room, 1300 NW Wall Street, Bend, OR. At the conclusion of the public hearing, the Planning Commission can:

1) Continue the hearing to a date certain;
2) Close the hearing and leave the written record open to a date certain; or
3) Close the hearing, and commence deliberations.

Staff provides a suggestion to the Planning Commission regarding deliberations. As there has been limited testimony directed at this specific amendment, which incorporates text from the 2014 DLCD Model Flood Ordinance, the Planning Commission could close the hearing on September 26, 2019 and commence deliberations on this specific amendment. Staff has included a public comment summary in order to aid the Planning Commission in their review, if deliberations were to commence on September 26, 2019.

ATTACHMENT
1. Public Comments Received between 9/12-9/19
2. Public Comment Summary

Dear Chair Crawford and Commissioners,

Thank you for the additional opportunity to comment on the proposed amendments to the Flood Plain Zone. Central Oregon LandWatch (“LandWatch”) offers these comments in addition to our oral and written comments submitted at the Planning Commission hearing on August 8, 2019.

I. Purpose of the proposed amendments.

The last time the County attempted to amend the Flood Plain Zone, via Ordinance No. 2018-005, the stated intent was to “streamline the County’s administration of FEMA’s requirements” by converting the Flood Plain Zone from a base zone to an overlay zone. Ordinance No. 2018-005, Exhibit P, page 4 (repealed). Many interested members of the public, however, saw the amendments for what they really were: an attempt to permit additional residential development adjacent to waterways throughout the County. The current proposed amendments in File Nos. 247-19-000530-TA, 533-PA would adopt portions of DLCD’s “Oregon Model Flood Damage Prevention Ordinance.” But the true intent of the other two proposed amendments, in File Nos. 247-19-000531-TA and 532-TA, is now transparent. These amendments seek nothing more than to allow increased land division and residential development on Flood Plain-zoned properties to the detriment of riparian areas, wetlands, and most of the County’s fish and wildlife species. If the County’s true
intent was to simply streamline the administration of FEMA requirements, then only File Nos. 247-19-000530-TA, 533-PA would be proposed.

II. Existing County fish and wildlife inventory.

In our August 8, 2019 oral and written comments, we questioned whether the proposed amendments would repeal and replace the County’s Goal 5 inventory of fish and wildlife resources contained in Ordinance No. 92-041. Staff has since clarified that this is not the case, and that inventories in Ordinance No. 92-041 would remain intact. LandWatch is glad to hear this is the case. However, our Goal 5 concerns as related to the proposed amendments to the County’s program to protect fish and wildlife, riparian areas, and wetlands in the Flood Plain Zone, remain. To comply with Goal 5, the proposed amendments should identify each Goal 5 resource that relies on the Flood Plain Zone, and should analyze the effects of allowing new conflicting uses created by the proposed amendments on each of those Goal 5 resources through the ESEE decision process. The proposed findings and ESEE analyses fail to adequately identify individual fish and wildlife species, riparian areas, wetlands and adjacent upland habitats that would be impacted, and fail to analyze the ESEE effects on each of those individual resources, as required by OAR Division 660 Chapter 23.

III. ODFW letter.

The letter submitted by the Oregon Department of Fish and Wildlife (“ODFW”) on August 7, 2019 discusses the impacts of the proposed amendments on individual species of fish and wildlife, riparian areas, and wetlands:

“The proposal does not thoroughly evaluate or acknowledge the essential functions and values floodplains provide to fish and wildlife, nor does it adequately acknowledge the integral relationship between the floodplain and adjacent upland, riparian or wetland habitats.” (ODFW comments, page 1-2)
Further, ODFW states that the proposed amendments will not ensure that impacts to Goal 5 resources will be “fully mitigated,” as required currently “in the Goal 5 program for impacts to wetlands and riverbanks, […] as evaluated by ODFW.” ODFW comments, page 5.

ODFW also identifies several new conflicting uses that will be created by the proposed amendments that are not evaluated for their ESEE effects on Goal 5 resources. As one example, ODFW discusses the Landscape Management Combining Zone and its role in protecting many significant Goal 5 resources:

“[I]t is not clear from the proposal how or if [the Landscape Management Combining Zone] was evaluated for the increased potential of conflicting uses for the significant Goal 5 wildlife species that utilize these habitats. Cliffs, rimrock, rock outcrops and talus are identified as ‘Specialized and Local Habitats’ per the Oregon Conservation Strategy. These habitats are essential for wildlife, such as raptor nesting (golden eagles in particular) and bat roosting, protected as significant Goal 5 resources through the existing Goal 5 program. ODFW is concerned about the individual and cumulative impacts as a result of development actions disturbing these sensitive habitats. Residential development at the edge of rims alters vegetation and disturbs nesting birds, which can cumulatively affect the available suitable habitat along canyons.” (ODFW comments, page 2) (footnotes omitted)

As another example of a new conflicting use, ODFW identifies direct habitat loss that would result:

“[T]he ESEE analyses do not evaluate habitat loss, including the direct loss of resources available to wildlife. For example, vegetation removal and excavation in the upland may displace wildlife, but also have other direct and indirect effects, such as the loss of available forage and cover, and the increase in wildlife damage within the newly developed residential developments. Big game, such as mule deer, need forage and cover to provide safe passage between winter and summer ranges. The current policy (Ord. 92-040) also identifies that the county and ODFW will work together to ensure that deer migration is retained, which includes protection with a conservation easement for the corridor. ODFW continues to recommend a wildlife mitigation plan per the ODFW Fish and Wildlife Habitat Mitigation Policy4, for development actions that could result in the loss of fish and wildlife habitat.” (ODFW comments, page 6)

ODFW also questions whether an adequate ESEE analysis and program to achieve Goal 5 are possible using 30-year old existing Goal 5 inventories:
“Overall, even with being limited to the existing Goal 5 inventories, ODFW does not believe that the ESEE analysis thoroughly evaluates the potential conflicting uses and proposes a program to achieve Goal 5.” (ODFW comments, page 5-6)

ODFW has extensive knowledge and expertise in fish and wildlife species and their habitat requirements. Their letter identifies many deficiencies in the proposed amendments’, including the ESEE analyses and decisions. LandWatch encourages the County to fully address all of ODFW’s concerns.

IV. “Clear and objective” standards and criteria.

Recent changes in state law require that all standards and criteria applicable to housing, including outside of urban areas, must be “clear and objective”:

“[T]he ‘clear and objective’ requirement in ORS 197.307(4) applies, as it states, to ‘standards, conditions and procedures regulating the development of housing, including needed housing,’ without regard to whether the development will occur on ‘buildable land.’” (Warren v. Washington County, 296 Or App 595, 601 (2019))

As ODFW finds in its letter, the requirement for a Riparian Area Management Plan (“RAMP”) in 247-19-000531-TA “does not identify any specific mitigation measures to offset, or replace, the loss of habitat.” ODFW comments, page 4. The RAMP requirement lacks clear and objective standards, and under the rule from Warren, violates ORS 197.307(4).

V. Goal 2 adequate factual base.

Statewide land use planning Goal 2 requires that an “adequate factual base” underpin every land use decision. The proposed amendments do not identify which fish, wildlife, and bird species and habitats, which riparian areas, which wetland areas, and which adjacent rimrocks, rock outcrops, talus, and cliffs will be impacted, nor the ESEE consequences specific to each of those resources. As such, the proposed amendments lack an adequate factual base.

Thank you for your consideration of these comments. Because the proposed amendments result in significant negative impacts on many Goal 5 resources, and those impacts have not been
adequately identified and analyzed, we urge the Planning Commission to recommend denial of the proposed amendments.

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// Sincerely,

Rory Isbell  
Staff Attorney  
Central Oregon LandWatch

50 SW Bond St., Ste. 4 | Bend, OR 97702  
Phone: (541) 647-2930  
www.colw.org
September 12, 2019

Deschutes County
Community Development Department
Attn: Nicole Mardell, Associate Planner
PO Box 6005
117 NW Lafayette Ave
Bend, OR 97708-6005


Dear Ms. Mardell:

Thank you for providing the Oregon Department of Fish and Wildlife (ODFW) the opportunity to review and comment on the proposed revisions to the Deschutes County Comprehensive Plan and Zoning Ordinance related to the Flood Plain Zone (247-19-000530/533-PA; 247-19-000531-TA; 247-19-000532-TA). ODFW previously submitted comments for the August 8, 2019 hearing, and we would like to acknowledge those are still applicable. In addition, ODFW recently submitted comments in an email dated September 5, 2019 specifically regarding the Riparian Area Management Plan (RAMP) proposal which were included in the record. In accordance with our mission, ODFW offers the following additional comments and recommendations for submittal in the record for all three amendments for the Deschutes County Planning Commission Hearing on September 12, 2019:

**Model Flood Plain Amendments (247-19-000530/533-PA):** ODFW continues to recommends the language provided in Chapter 18.96.010 of the current Flood Plain Zone are included in the new text amendments to Section 2.5 of the Comprehensive Plan. The current language and policy in DCC 18.96.010 does not prioritize or designate primary and secondary benefits to the floodplain zone. It acknowledges that there are multiple functions of the floodplain zone. Therefore, ODFW is concerned that the proposed text amendments are inconsistent with the existing policy.
Flood Plain Cluster and Planned Unit Development Amendments (247-19-000531-TA): ODFW appreciates the opportunity to coordinate on the fish, wildlife and habitat concerns raised in our previous comments regarding the RAMP, and provide the county with recommendations to consider in addressing those concerns. As provided in our emailed comments on September 5, 2019, ODFW recommends that the RAMP require a component of habitat enhancement, which is consistent with the requirement per DCC 18.128.200(B)(3)(a) for Wildlife Management Plans.

ODFW continues to have concerns regarding the proposal for cluster and planned unit developments that may result in conflicting uses with wildlife in the non-floodplain zoned land. Therefore, ODFW recommends that properties within the Wildlife Area Combining Zone are not eligible. ODFW understands that the existing DCC 18.128.200 requires a Wildlife Management Plan for cluster developments, however the existing DCC 18.128.210 for planned unit developments do not have the same requirement. Therefore, the reliance on the Wildlife Management Plan or RAMPs, to address the conflicting uses to Goal 5 resources outside of the floodplain zoned land, does not appear to be sufficient since a planned unit development would not be required to develop a Wildlife Management Plan. If these amendments are approved within the Wildlife Area Combining Zone without the requirement for a Wildlife Management Plan, ODFW recommends the county consult with ODFW regarding recommendations for the appropriate siting and design of the open space within the planned unit development to avoid, minimize and mitigate the impacts to wildlife (e.g., open space sited east-west to facilitate migratory corridors).

**ESEE Analysis:** As stated in our previous comments, ODFW does not believe that the ESEE analysis thoroughly evaluates the potential conflicting uses and proposes a program to achieve Goal 5. Therefore, ODFW would appreciate the opportunity to continue our coordination with the county on providing technical assistance regarding the ESEE analysis.

Thank you for the opportunity to provide these comments and recommendations for the Planning Commission hearing scheduled for September 12, 2019. ODFW is committed to finding collaborative solutions to avoid and/or minimize impacts to fish, wildlife and habitat resources of the state. Please contact me (joy.r.vaughan@state.or.us or 503-947-6089) with any questions or if you need further clarification on ODFW’s comments and recommendations.

Joy Vaughan
ODFW Land Use and Waterway Alterations Coordinator

cc: Corey Heath, Andrew Walch-ODFW
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| 1   | Compliance with DLCD Model Ordinance            | • Katherine Daniels, Natural Hazards Planner, DLCD, provided text edits to ensure consistency with state requirements.  
   |                                                | • Ms. Daniels also noted DLCD is in the process of reviewing a 2019 Model Flood Ordinance and would prefer the County postpone the amendment so as not to duplicate efforts in revising the code. | • Staff is supportive of the amendments provided by DLCD staff (attached).  
   |                                                |                                                                                                         | • The Board of County Commissioners and staff are supportive of moving forward with the proposed amendments to mend current issues and aid in interpretations. Additional changes can be made when the 2019 Model Flood Ordinance is adopted and following a community visit by FEMA scheduled for 2020. |
| 2   | Addition of Flood Plain Purpose Statement       | • ODFW is concerned the proposed purpose statement could undermine the role of the Flood Plain Zone as a Goal 5 protection measure and as a resource itself. | • Staff's intent in drafting the code is to describe the primary purpose of the Flood Plain Zone, which is a hazard mitigation boundary set by FEMA to reduce flood damage.  
   |                                                |                                                                                                         | • Staff recommends the PC keep the purpose statement as proposed, or remove the purpose statement altogether. |
## Public Comment Summary – Model Flood Amendments

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<td>3</td>
<td>Changes to the Flood Plain Zone Weaken Protections to Wildlife</td>
<td>• Species depend on the Flood Plain Zone for protection.</td>
<td>• These items were general comments submitted in response to three separate Flood Plain amendments and appear to be focused on the Cluster/PUD and Split Zone elements of the 2019 amendments which are separate applications.</td>
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<td>• Riparian areas along certain streams are critical habitat for Oregon Spotted Frog, a threatened species.</td>
<td>• The items don't address any specific item within the Model Flood amendments.</td>
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<td>• Changes could result in dense development along sensitive river corridors.</td>
<td>• Staff finds the Model Flood changes will not reduce protections to wildlife and rather will aid in a reduction in damages from natural hazards.</td>
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<td>4</td>
<td>Improper Notice Provided to Property Owners</td>
<td>• COLW states the notice should have been provided to all property owners containing Flood Plain Zoning</td>
<td>• The proposed amendment is legislative and does not impact any specific property, nor does it rezone or redesignate a property, therefore notice to individual property owners is not required.</td>
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<td>• Maintaining deer populations is important to quality of life in Deschutes County for residents.</td>
<td>• Staff provided a courtesy notice to parties with standing from the 2017 Flood Plain Amendment process.</td>
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| 5   | Goal 5 Analysis Not Conducted                   | • Ramis states the proposed amendments require a Goal 5 ESEE analysis as some of the amendments could impact requirements for development in the Flood Plain Zone, which is a Goal 5 Resource. | • Staff finds an ESEE analysis is not required as no new use is being added as part of these amendments.  
• OAR 660-023-0240 states the requirements of Goal 5 do not apply to the adoption of measures required by Goal 7, as long as the measures are specifically related to natural hazards. Staff finds the proposed model flood language, as provided by DLCD is intended to reduce flood risk and therefore is exempt from Goal 5 and ESEE requirements. |
| 6   | Special Flood Hazard Area Development           | • COLW states the measure in the proposed amendments could allow new uses and structures in areas determined to be outside the Special Flood Hazard Area. In this scenario, when contradictory information appears (i.e. mapped area versus field conditions), the Planning Director can determine where the boundary exists.  
• This allowance could lead to development in the Riparian Area and could impact Goal 5 species. An ESEE analysis is required as a new use is being added. | • The text provided regarding Special Flood Hazard Areas is not intended to allow any new use, but rather to exempt structures outside of this boundary from flood proofing and anchoring standards, as they are not required by FEMA if outside of the boundary. Staff notes COLWs concern and will remove item J from the proposed amendments and rework the language to better address the intent. |
August 5, 2019

Ms. Nicole Mardell, Assistant Planner
Deschutes County Community Development
117 NW Lafayette Avenue
Bend, OR 97708

Re: Submission 247-19-000530-TA / 533-PA

Dear Ms. Mardell;

Thank you for the opportunity to comment on the proposed amendments to the Deschutes County Code Chapter 18.04.030 Definitions and Chapter 18.96 Flood Plain Zone – FP through the Post Acknowledgement Plan Amendment (PAPA) process. The proposed revisions were based on the minimum standards of the National Flood Insurance Program in the 2014 Oregon Model Flood Damage Prevention Ordinance. Please note that DLCD has prepared a new model ordinance, and FEMA is in the process of reviewing and approving the new model ordinance. We recommend that the county consider postponing this amendment so that it can be based on the updated model ordinance, and the county will not need to amend the county code again.

If the county prefers to proceed with an amendment based on the 2014 model ordinance, the following revisions highlighted in yellow are recommended.

In Chapter 18.04.030 Definitions

"Substantial improvement" means any repair, reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the true cash market value of the structure either:
A. Before the improvement or repair is started; or
B. If the structure has been damaged and is being restored, before the damage occurred. For the purposes of this definition, "substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. The term does not, however, include either:

A. Any project for improvement of a structure to comply with correct existing violations of state or local health, sanitary or safety code specifications which have
been identified by the local code enforcement official and which are solely the minimum necessary to assure safe living conditions; or

B. Any alteration of a structure listed on the National Register of Historic Places or a State Inventory of Historic Places provided that the alteration will not preclude the structure's designation as a 'historic structure'.

In Chapter 18.96.080 Criteria to Evaluate Conditional Uses, subsection G.3

3. Exception for Small Accessory Structures

If you have any questions or concerns about any of this, please contact me.

Yours,

Katherine

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