

# CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

## Policy Session Worksheet

**Presentation Date:** March 8, 2016 **Approx. Start Time:** 10:30 AM **Approx. Length:** 30 min

**Presentation Title:** Sandy River Mapping and Regulation

**Department:** County Counsel, Transportation & Development, and County Administration

**Presenters:** Laurel Butman, County Administration; Nate Boderman, County Counsel; and Mike McCallister, Transportation & Development

**Other Invitees:** Members of the Sandy River Sustainable Flood Recovery Work Group

### WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

This is an informational policy session to provide additional information to the Board regarding flood erosion mapping and regulations in the upper Sandy River area.

### EXECUTIVE SUMMARY:

An Erosion Study was completed recently for a portion of the upper Sandy River. That Study included new information and maps delineating areas of historic and potential future channel migration. The Study has been accepted by the County and it will provide scientific information to assist in upcoming work to that Transportation and Development will undertake to update the portions of the County's Zoning and Development Ordinance related to floodplain management. Any adoption of channel migration maps would happen during that process.

Following completion of the Erosion Study, the Board of County Commissioners raised questions regarding potential responsibilities of the County to address the new information in the Study which further clarified hazards along the studied reach of the Sandy River. Those questions included an interest in any liability the County and/or property owners may now have and how the Study would be used going forward.

This Policy Session includes an overview of public information and outreach actions by the County, the legal environment in relation to the Erosion Study and maps, and future planning, including community planning and regulatory updates related to the Study.

### *PUBLIC INFORMATION & OUTREACH*

The Sandy River Sustainable Flood Recovery Work Group has been performing outreach in the Sandy River area since May 2011. Each of the past four years the Group has held an annual *Flood of Information* event in the area to educate the community about flood insurance, hazards and their mitigation, and other Sandy River related and emergency preparedness activities and issues. The Group also convened a Community Flood Risk Management Committee to collaborate on a Flood Risk Management Plan and future options for reducing flooding risks. They also authored a Flood Insurance brochure used extensively to educate property owners about the importance and value of obtaining flood insurance. Many past and current activities are summarized in Attachment A.

### *LEGAL CONSIDERATIONS*

Government liability resulting from flood issues in the US generally falls into one of three categories:

1. Failure to warn, regulate or otherwise act;
2. Negligent implementation of a solution; and
3. Administration and enforcement of regulations and takings.

With the completion of new studies and mapping that has provided information beyond what we currently possess, the most pressing question with regards to liability falls under the first category; specifically, what duty does the County have to warn and what exposure might the County have for otherwise failing to act on the new information. This is a fundamentally different question than, for instance, whether a flood control measure constructed by the government actually increased flood damage, or whether regulations adopted by the government is a “taking” of private property without just compensation. A liability analysis under categories 2 and 3 will come later, once it is time to decide on which options to pursue to address those issues that have been identified in the new studies.

The issue to resolve in the short term is whether the County has a “special duty” to protect individuals from flooding. Cases around the country have typically found that this special duty does not exist for those members of the public that are using private hazard prone lands. As is the case in many states around the country, Oregon does not provide a state mandate that local governments plan for and regulate flood hazards. Of course, it is nearly impossible to generalize the liability analysis given the amount of variables at play. Public vs. private ownership of the land, the status of the user on land, the relationship between government and injured party, and whether government action created or increased the hazard are just a few of the factors we would need to consider.

In the context of other natural hazards, some courts have found governments liable for inadequate dissemination of hazard information. In most of those cases, however, the courts found the act of informing the public to be a ministerial function, rather than a discretionary one. With no special duty to protect individuals from flooding, it is more likely than not that a court would find the County’s decisions surrounding the dissemination of information to be discretionary, rather than ministerial, thereby making it more difficult to demonstrate liability.

There are a few cases of record which dealt directly with whether local government could be found negligent in the mapping of flood areas. None of these cases resulted in liability to the government, even where there was the inclusion of incorrect information. Although the facts of those cases differ from the situation involving the Sandy River, it should be noted that the County’s official flood maps are still of some value, and are the same FEMA maps that have been adopted around the country for purposes of flood plain management.

Discretionary immunity is the basis of many successful defenses to alleged liability. So long as the Board continues to proceed towards adoption of regulations or other hazard mitigation measures, it’s likely that the County will be able to rely upon discretionary immunity as a defense.

Bear in mind, the County already has a fairly comprehensive regulatory framework in place. The County has embraced the no adverse impact (NAI) floodplain management approach since the Sandy River flooded in 2011. NAI floodplain management encourages managing public and private development and redevelopment (including regulatory permitting, public works projects, and other activities) according to the principle of avoiding detrimental impacts anywhere in the watershed—such as increased flood peaks or flood stages, higher flood velocities, erosion and sedimentation, or other adverse consequences. Utilization of NAI floodplain management requires anticipation and estimation of adverse impacts, prevention of those impacts where possible, and, if not, ensured mitigation of adverse impacts. It is not anticipated that there will be a departure from the NAI approach, but it also creates some additional complexities as new mapping and new regulatory concepts must be merged with the current regulatory framework already in place.

**REGULATORY PLANNING**

The adoption of the erosion study, channel migration maps, and other changes to the regulatory standards along the Sandy River require amendments to the Clackamas County Comprehensive Plan and Zoning and Development Ordinance (ZDO). This would include drafting proposed regulations, public outreach, and public hearings before the Planning Commission and Board of County Commissioners. The Board will be considering the Planning and Zoning Division’s Work Program for adoption at the March 17, 2016 business meeting. The proposed Work Program includes continued work on the ZDO audit. The ZDO audit schedule being considered would include updates to the Floodplain Management District (Section 703) in FY 2018-19. The most efficient way to complete this work is in the context of the ZDO audit when the floodplain and other environmental regulations are being considered, unless the Board chooses to accelerate this portion of the ZDO audit. That would require additional funding and/or staffing resources to be made available.

**FINANCIAL IMPLICATIONS (current year and ongoing): N/A**

Is this item in your current budget?  YES  NO

What is the cost? N/A

What is the funding source? N/A

**STRATEGIC PLAN ALIGNMENT:**

This issue aligns with three of the Board’s five Strategic Priorities:

- Build public trust through good government – by ensuring the public has reliable information about their risks and options
- Ensure safe, healthy and secure communities – by working to minimize flood risks for the community and for County infrastructure
- Honor, utilize, promote and invest in our natural resources – by addressing the need of the Sandy River for space for channel migration

**LEGAL/POLICY REQUIREMENTS: N/A**

**PUBLIC/GOVERNMENTAL PARTICIPATION:** See *PUBLIC INFORMATION & OUTREACH*, above.

**OPTIONS:** N/A

**RECOMMENDATIONS:** N/A – informational only.

**ATTACHMENTS:**

1. Attachment A: Upper Sandy River Flood Recovery & Risk Management Activities, 2011 – 2016

**SUBMITTED BY:**

Division Director/Head Approval \_\_\_\_\_

Department Director/Head Approval \_\_\_\_\_

County Administrator Approval \_\_\_\_\_ **LSB** \_\_\_\_\_

For information on this issue or copies of attachments, please contact Laurel Butman @ 503-655-8893.

# Attachment A

## Upper Sandy River Flood Recovery & Risk Management Activities, 2011 – 2016

*Highlighted items are areas of current focus.*

<b>Flood Recovery Policy Activities</b>	<b>Date(s)</b>	<b>Status</b>
Flood Risk Management Plan	2016-2017	Army Corps PAS project
Channel Migration Zoning	2018-2019	In Planning work plan
District/Willing Seller Program	2016 begin	Oregon Solutions project
Upper Sandy River Erosion Study	2014-2015	Complete
Flood Warning System	2013-2014	River gauges installed
<b>NFIP (National Flood Insurance Program)</b>	<b>Date(s)</b>	<b>Status</b>
Community Rating System Review	2015	Downgraded to 7
Sandy Basin Flood Insurance Rate Maps	Pending since 2014	Public comment period
Flood Insurance Reform Act	On Hold since 2014	Pending Congressional Action
Flood Insurance Brochure Creation	2013	Used online, meetings & mailings
<b>Water Environment Services</b>		
Hoodland Master Plan	July 2016	Projected completion
Wastewater Outfall Project		On hold pending Master Plan
<b>Sandy River Basin Watershed Council</b>		
CLT Side Channel Restoration	2016 (summer)	Construction (in-water period)
Community Playbook	2015	Complete, Printing Pending
CLT Side Channel Restoration	2014-2015	Design, Permitting Complete
64+50 Oral history/film	2014	Complete
<b>Outreach</b>		
Board of County Commissioners	2011-present	1-2 Policy Sessions/Year
Flood of Information	2012-present	Annual event (2 in 2016)
Community Flood Risk Management Committee	2014 (established)	2-3 meetings/year
Villages, Timberline Rim Meetings	Upon request	Generally 1-2 per year
USACE Public Involvement Pilot Project	Feb 2014-Feb 2015	Complete
50th Anniversary, 1964 Christmas Flood	2014	Complete
Hazardous Waste Collection Event	June 2014	Complete
<b>Transportation &amp; Maintenance</b>		
Lolo Pass Rd Alternatives Study	2014 – present	Underway
Barlow Trail Bank Project	2013 – present	Entering bid stage

Online resources the County provides:

[www.clackamas.us/emergency/flooding.html](http://www.clackamas.us/emergency/flooding.html)

[www.clackamas.us/planning/flood.html](http://www.clackamas.us/planning/flood.html)