BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF THE ENFORCEMENT ORDER FOR THE CITY OF DAMASCUS PURSUANT TO ORS 197.324	))))	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

INTRODUCTION

This matter involves an enforcement action initiated by the Land Conservation and Development Commission (LCDC) against the City of Damascus pursuant to ORS 197.324. As discussed later, the City of Damascus incorporated in 2004 and was required by statute to eventually adopt a comprehensive plan and land use regulations that are acknowledged as complying with the statewide planning goals. That has not occurred. The City of Damascus has been working with the Department of Land Conservation and Development (DLCD) to achieve this statutory requirement. Compliance schedules for various tasks necessary for acknowledgement have been established, and multiple continuances to those compliance schedules have been provided. The most recent continuance extended certain deadlines until August 2013. When those deadlines were not met, DLCD and LCDC began the process of initiating this enforcement action.

When LCDC decided to initiate enforcement proceedings, LCDC appointed a hearings officer to conduct the contested case proceeding and prepare findings of facts, conclusions of law, and recommended actions. As identified in the Notice of Contested Case Hearing, there are four issues to be considered in this proceeding: (1) Whether the city failed to make satisfactory progress toward its compliance schedule; (2) Whether the city failed to comply with LCDC orders; (3) Whether the city failed to adopt a comprehensive plan and land use regulations within

four years of the date of incorporation; and (4) What corrective actions and/or interim measures LCDC should impose under an enforcement order.[1]

In addition to the City of Damascus and DLCD, a number of other local governments, groups, businesses, and individuals became parties or limited parties to this enforcement proceeding, including: Metro, Clackamas County, City of Happy Valley, Johnson Creek Watershed Council, Citizens for Moving Damascus Forward, General Distributors, Inc., Karl Westcott, and Lowell Patton. The parties submitted stipulated facts, legal briefs, and conducted oral argument on the issues. These findings of fact, conclusions of law, and recommended actions follow.

PROCEDURAL ISSUES

A. The Petition of Lowell Patton for Party Status

The Notice of Contested Case Hearing explained that any person who wished to become a party or limited party to the enforcement proceeding must comply with the provisions of OAR 137-003-0005(3) and that consideration of those petitions would be based on OAR 137-003-0005(7). DLCD responded to Lowell Patton's (Patton) petition that Patton had failed satisfy OAR 137-003-0005(7)(b), which requires that the potential party's "affected interest [be] within the scope of the agency's jurisdiction and within the scope of the notice of the contested case hearing." DLCD asked that the ruling on Patton's party status be delayed until after initial briefs had been filed.[2] As there are tight timelines in this proceeding, I allowed Patton's petition and stated that I would not consider irrelevant parts of Patton's argument if necessary. Order Determining Party Status 2-3, December 16, 2013.

At the conclusion of oral argument, DLCD renewed its objection to Patton's party status and asked to have irrelevant portions of Patton's briefs stricken. At the time of the Order Determining Party Status, I did not know that the arguments concerning potential corrective

[1] There were no objections raised to the issues identified in the Notice of Contested Case Hearing.
[2] Patton's Petition for Party Status was also filed after the deadline established in the Notice of Contested Case Hearing, but as explained in the Order Determining Party Status, there was good cause for the late filing and no party objected to the filing on grounds of untimeliness.

actions would include suggestions that LCDC provide some way for individual landowners who have not been able to develop their property in the absence of a comprehensive plan or land use regulations be allowed to develop their property outside the normal regulatory framework. As discussed later, that suggestion is arguably within the range of options available to LCDC, and Patton's arguments regarding the authority for such actions and the arguments in favor of applying them are certainly not irrelevant. I see no need to revise my ruling that allows Patton party status or to strike any of his pleadings.[3]

B. The Record

Unlike a typical contested case hearing, there is virtually no dispute about the facts involved in this proceeding. As discussed later, the parties agreed to stipulated facts relevant to the issues identified in the Notice of Contested Case Hearing. Thus, there were no arguments or objections to materials submitted into the record by the parties. All materials submitted or asked to be included were admitted into the record. Those materials include all the pleadings and correspondence filed with the hearings officer. The materials also include the exhibits submitted by DLCD with their Opening Brief and identified in their exhibit list of December 20, 2013. The materials also include those documents submitted by the other parties with their briefs, and those documents and tapes asked to be included in the record in the briefs. Additionally, the recordings of the prehearing conference of December 5, 2013, and the oral argument of January 9, 2014 are included in the record.

[3] Patton also filed a Response to DLCD Reply Brief after the time allowed for filing additional pleadings. The arguments contained in the brief were the same arguments Patton made at oral argument, so there is no reason to strike the response.

FINDINGS OF FACT

As discussed earlier, in this proceeding the facts are virtually undisputed and the parties submitted stipulated facts regarding the relevant issues. Below, I list the stipulated facts[4] pertinent to the issues to be considered:[5]

1. The Damascus area was added to the Urban Growth Boundary (UGB) by Metro in 2002, with conditions of approval requiring certain planning activities to occur under Title 11 of the Metro Functional Plan within identified timeframes.
2. The City of Damascus was incorporated by a vote of the people on November 2, 2004.
3. The first mayor and city council were sworn into office on January 3, 2005.
4. The first resolution passed by the city council was to adopt the applicable Clackamas County land use regulations, which had already been acknowledged by LCDC.
5. Clackamas County and the City of Damascus entered into intergovernmental agreements under ORS 190 for the county to perform land use and planning services for the city. The county provides current planning functions for the city under contract and other mutually agreeable planning projects at the request of the city. Planning functions include the processing of daily land use applications, issuing building permits, and performing inspections. The county also performs code enforcement services for land use and building code enforcement issues. The county provides transportation engineering services to the city.
6. On December 26, 2004, the City of Damascus, Metro and DLCD executed a Memorandum of Understanding agreeing to a work plan and regulatory framework for the development and adoption of the Damascus comprehensive plan and implementing land use regulations.

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[4] The findings of fact are taken largely verbatim from the stipulated facts provided by DLCD and the City of Damascus.

[5] The parties submitted additional stipulated and proposed stipulated facts. Those additional facts have varying degrees of relevance, but I do not understand any of the parties to contest any of the other facts, and I agree that those facts are accurate.

7. On August 14, 2007, LCDC acknowledged the Citizen Involvement Program of the Damascus Comprehensive Plan as being in compliance with Statewide Planning Goal 1.
8. In November 2008, the DLCD director granted the City of Damascus a one-year extension.
9. On January 21, 2010, LCDC approved a compliance schedule pursuant to OAR 660-014-0010(4) for the completion of the comprehensive plan and implementing ordinances.
10. On December 14, 2010, the City of Damascus adopted an ordinance that adopted a comprehensive plan, comprehensive plan maps, and findings of fact in support of the comprehensive plan and maps.
11. On December 16, 2010, the City of Damascus submitted notice of adoption of the comprehensive plan to DLCD and requested LCDC grant acknowledgement of compliance as required by Oregon law.
12. On December 29, 2010, DLCD requested further items, which the City of Damascus provided on January 19, 2011.
13. On April 22, 2011, LCDC reviewed the request on the record as required by ORS 197.251(1) and (4) and found that the submittal did not comply with all of the statewide planning goals.
14. On May 12, 2011, the voters of the City of Damascus rejected, by initiative petition, the comprehensive plan that the city council had adopted.
15. On July 22, 2011, DLCD issued a continuance order implementing LCDC's ruling, which included a compliance schedule for remaining tasks the city was required to complete, with due dates for the submittal of the tasks.
16. The compliance schedule included tasks to be completed by December 2011 and June 2012 that the City of Damascus completed in a timely manner.
17. The compliance schedule included tasks to be completed by November 2012, which were not submitted to DLCD as complete as of January 24, 2013.
18. Throughout 2012, the City of Damascus worked towards the completion of a new comprehensive plan and accompanying documents.

19. The City of Damascus updated LCDC on the status of the compliance schedule on January 26, 2012 and September 20, 2012.
20. On March 13, 2012, the City of Damascus Charter was amended to read, "After March 1, 2011, the council shall not submit any ordinance or plan to Metro, the LCDC, the DLCD, or their successors until it is ratified by a majority vote of the city's qualified electors voting in an election where at least 50 percent of the registered voters cast a ballot, or the election is a General Election in an even-numbered year."
21. On January 8, 2013, the City of Damascus requested an extension of all tasks on the compliance schedule to June 2014, to accommodate the non-serial document preparation and anticipated simultaneous adoption.
22. The City of Damascus' Progress Report on LCDC Compliance Work Program in 2013 identified compliance tasks for each of the goals as well as a status update and strategy for moving towards completion of the tasks.
23. On February 7, 2013, DLCD issued a continuance order implementing LCDC's grant of an extension to the compliance schedule for tasks that were due to be completed on November 2012 to the end of August 2013 and directing staff to initiate enforcement proceedings under ORS 197.320 et seq. if the city had not adopted the tasks due in their revised compliance schedule.
24. In July 2013, a potential Damascus comprehensive plan, the 2013 Plan, was sent, as recommended by the planning commission to the city council for consideration. The city council considered the 2013 throughout July and August of 2013, but was unable to reach a political compromise to adopt the plan.
25. On October 10, 2013, the Damascus city council reached a compromise to prepare two comprehensive plans and send them to the voters for adoption of one. Both were modifications of the 2013 plan. One of the plans increased property rights interests, and the other, environmental protections.
26. In November 2013, an initiative petition was circulated by the citizens of Damascus to send the 2103 Plan to the voters. If sufficient signatures are gathered, that measure is expected to be placed on the ballot in May 2014.

27. The Damascus city council intends to refer the two new alternative plans as two ballot measures to the city's voters in May 2014.
28. On November 15, 2013, LCDC voted to initiate enforcement proceedings under ORS 197.324 against the City of Damascus for failure to make satisfactory progress towards its compliance schedule, failure to comply with LCDC orders, and failure to adopt a comprehensive plan and land use regulations within four years of incorporation.
29. On November 22, 2013, LCDC provided the City of Damascus and interested persons notice of the contested case hearing

CONCLUSIONS OF LAW

The Notice of Contested Case Hearing listed four issues to be considered in this contested case proceeding. The first three concern whether the City of Damascus complied with planning requirements imposed by statute or LCDC. The fourth issue concerns what actions should be taken if the city is found to have failed to comply with those requirements. There is no dispute that if the city failed to comply with any of the requirements in the first three issues then the fourth issue of what corrective actions and/or interim measures should be imposed by LCDC must be addressed. I now address all the issues in order.

A. Whether the city failed to make satisfactory progress towards its compliance schedule.

As stated in the caption, this is an enforcement action pursuant to ORS 197.324. ORS 197.324(1) provides:

> "On its own motion, the Land Conservation and Development Commission may initiate a proceeding to carry out the provisions of ORS 197.320. If the

commission proceeds on its own motion, it shall proceed as set forth in ORS 197.328."[6]

ORS 197.320 provides:

"The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe:

"* * * * *

"(3) A local government is not making satisfactory progress toward performance of its compliance schedule;

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[6] ORS 197.328 provides:

"If a proceeding is initiated under ORS 197.324, the following procedures apply:

"(1) The Land Conservation and Development Commission shall hold a hearing to consider the petition or shall appoint a hearings officer to consider the petition under the provisions of ORS 183 applicable to contested cases, except as otherwise provided in this section.

"(2) The commission or hearings officer shall schedule a hearing within 45 days of receipt of the petition.

"(3) If the commission appoints a hearings officer, the hearings officer shall prepare a proposed order, including recommended findings and conclusions of law. The proposed order shall be served on the Department of Land Conservation and Development and all parties to the hearing within 30 days of the date the record closed.

"(4) If the commission appoints a hearings officer, the commission review of the proposed order shall be limited to the record of the proceedings before the hearings officer. In its review of a proposed order, the commission shall not receive new evidence but shall hear arguments as to the proposed order and any exceptions. Any exception to the proposed order shall be filed with the commission no later than 15 days following issuance of the proposed order.

"(5) The commission shall adopt a final order relative to a petition no later than 120 days from the date the petition was filed."

"* * * * *

"(7) A local government has failed to comply with a commission order entered under ORS 197.644;

"* * * * *."

The first issue is based on ORS 197.320(3) and whether the City of Damascus failed to make satisfactory progress toward performance of its compliance schedule. While the city has completed a number of tasks required by the compliance schedules, it is undisputed that the city has not completed a significant number of the tasks required by the compliance schedules, let alone all of the tasks. Additionally, the city has been granted multiple continuances that also have not been met. The continuance order from February 7, 2013 extended a number of tasks to August 2013 that were not accomplished by August 2013. Those tasks included adopting a 20-year population forecast, adopting a residential buildable lands inventory, adopting a 20-year hosing needs analysis, adopting a transportation systems plan, and ensuring that all lands within the urban growth boundary have urban plan designations consistent with need determinations.

While it is established that the City of Damascus has not complied with the compliance schedules, the question remains whether the city has made "satisfactory progress toward performance" of the compliance schedules. DLCD argues that because ORS 197.757 requires that the city have its comprehensive plan and land use regulations acknowledged within four years of incorporation, the city has as a matter of law failed to make satisfactory progress towards performance of its compliance schedule.[7] While the failure to obtain an acknowledged comprehensive plan and land use regulations within four years may constitute a violation of ORS 197.757, as discussed later, I do not see that it automatically constitutes failure to make satisfactory progress towards performance of compliance schedules. While it would be convenient if all acknowledgement procedures were completed in a timely manner, the history of comprehensive plan and land use regulations acknowledgements demonstrates that this is often

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[7] ORS 197.757 provides:

"Cities incorporated after January 1, 1982, shall have their comprehensive plans and land use regulations acknowledged under ORS 197.251 no later than four years after the date of incorporation."

not the case. In many, if not most, cases acknowledgement compliance schedules are extended, as in the present case, likely because LCDC and DLCD feel that acknowledgment efforts are moving in the right direction. If the city had accomplished the tasks required by the February 7, 2013 continuance order, even though well more than four years has elapsed since the city's incorporation, I believe the city would have been making satisfactory progress toward its compliance schedule. In other words, when a compliance schedule itself allows for completions of tasks after the four year deadline of ORS 197.757, the mere fact that more than four years has elapsed since incorporation does not in itself establish a violation of ORS 197.320(3).

In the present case, it has been more than nine years since the City of Damascus was incorporated. The city has made some progress towards an acknowledged comprehensive plan and land use regulations, but not a lot. The comprehensive plan that was adopted and sent to LCDC for review was found to comply with only goals 1, 3, 4, and 13 – and goals 3 and 4 do not apply to the city. LCDC expressly found that the proposed comprehensive plan did not comply with goals 2, 5, 6, 7, 8, 9, 10, 11, 12, and 14. Furthermore, that comprehensive plan was rejected by the city's voters and is no longer viable. The city has been granted multiple extensions that have not been met, and it appears to me that LCDC has been patient with the city.

The City of Damascus argues that it is working as hard as it can towards satisfying the tasks identified in the compliance schedules, but due to political differences within the city and the requirement that any comprehensive plan and land use regulations be approved by the voters before submission to LCDC for acknowledgment, it has been unable to meet the deadlines. The city also argues that other local governments, including the City of Happy Valley, have been allowed extended periods of time to obtain acknowledgment of their comprehensive plans and land use regulations.

While I am sympathetic to the hurdles facing the City of Damascus in obtaining an acknowledged comprehensive plan and land use regulations, ultimately those obstacles are of the city's own making. I do not see that that constitutes an adequate defense for failing to comply with the multiple continuances granted for performing the tasks in the compliance orders. While at first blush it may seem unfair that other local governments (including local governments arguing in favor of enforcement action against the City of Damascus) were also allowed significantly more time and multiple extensions for obtaining acknowledgment of their

comprehensive plans and land use regulations, there are significant difference in the circumstances. The other local governments cited by the City of Damascus (Clackamas County, Washington County, City of Portland, and in particular City of Happy Valley) were attempting to obtain acknowledgment before ORS 197.757 was enacted in 1983. Prior to 1983 there was not a four-year deadline for acknowledgment, and ORS 197.757 may have been enacted partly due to the delays associated with the City of Happy Valley. Additionally, ORS 197.757 only applies to cities, not counties. In any event, the fact that the other cities were acting before the four-year deadline of ORS 197.757 and ORS 197.757 does not apply to counties is enough to distinguish the situations. Furthermore, while there were many delays involving the acknowledgement process for the City of Happy Valley, the city in that case did adopt a comprehensive plan and land use regulations that could be reviewed. The arguments were over whether the adopted comprehensive plan and land use regulations complied with the goals. That step in the acknowledgment process put the City of Happy Valley further along than the City of Damascus is now.

Given that it has been over nine years since incorporation, multiple continuances have been granted, and multiple tasks have yet to be completed, I conclude that the City of Damascus has not made satisfactory progress toward performance of its compliance schedule.

B. Whether the city failed to comply with LCDC orders.

As discussed earlier, under ORS 197.324(1) LCDC may initiate proceedings to carry out the provisions of ORS 197.320. The second issue is based on ORS 197.320(7) and whether the City of Damascus "failed to comply with a commission order entered under ORS 197.644." Unlike the first issue which includes the subjective term "satisfactory," the second issue is more straightforward – whether the city failed to comply with LCDC orders.

In April 2010, LCDC issued a compliance order stating that "[i]n accordance with ORS 197.757 and OAR 660-014-0010(4) the compliance schedule for the City of Damascus is granted and the planning work shall be given to LCDC for acknowledgment by November 2010." There is no dispute that the city failed to comply with that order. In July 2011, LCDC issued a compliance order establishing a work program for the city that established deadlines of December 2011, June 2012, November 2012, September 2013, and June 2014 for work to meet

the goals. There is no dispute that the city failed to comply with that order. In February 2013, LCDC issued a compliance order requiring the city adopt "comprehensive plan and land use regulation provisions in conformity with the amended compliance schedule by the end of August 2013." There is no dispute that the city failed to comply with that order.

Given that this issue is an objective matter of whether the city has failed to comply with LCDC orders and the city has undisputedly failed to comply with at least three LCDC orders, I conclude that the city has failed to comply with LCDC orders.

C. Whether the city failed to adopt a comprehensive plan and land use regulations within four years of the date of incorporation.

As discussed earlier, ORS 197.757 requires the City of Damascus to have its comprehensive plan and land use regulations acknowledged by LCDC no later than four years after the date of incorporation. *See* n. 7. Like the second issue, the third issue is objective and straightforward – either the city had its comprehensive plan and land use regulations acknowledged within four years or it did not. There is no dispute that it has been over nine years since the city was incorporated and the city has not obtained acknowledgement of a comprehensive plan and land use regulations. Given those facts, I conclude that the City of Damascus has failed to adopt a comprehensive plan and land use regulations within four years of the date of incorporation.

D. What corrective actions and/or interim measures LCDC should impose under an enforcement order.

OAR 660-045-0130(9) provides that "[a]fter the hearing and record have been closed, the * * * hearings officer shall determine whether there is good cause to believe that grounds for enforcement pursuant to ORS 197.320(1) to ORS 197.320(10) or 197.646(3) exist." In order to find that there is good cause for enforcement, I must conclude that the City of Damascus failed to meet its planning requirements under at least one of the first three issues identified in the Notice of Contested Case Hearing. While there was some argument regarding the first issue regarding "satisfactory progress," there is no dispute that the city failed to comply with LCDC orders and failed to obtain an acknowledged comprehensive plan and land use regulations. Thus, I conclude

there is good cause to believe that grounds for enforcement exist. Therefore, I must address the questions of what, if any, corrective actions and/or interim measure LCDC should take.[8]

1. City's Defenses to Enforcement Action

Before considering what corrective actions and/or interim measures may be appropriate, I must consider the City of Damascus' argument that any sanctions are prohibited under the defenses of selective prosecution, estoppel, latches, or freedom of speech. While these issues were raised in the city's brief, they were barely discussed at oral argument and I do not think that they are persuasive arguments. Rather than engage in an extended discussion, I quote the response to these arguments provided by General Distributor's, Inc., which I agree with:

> "Assuming for the purpose of argument that the principles of selective enforcement apply in administrative proceedings, the courts have clearly held that a party would need to demonstrate that the government is bringing the enforcement proceeding as a result of 'intentional or purposeful invidious discrimination.' *Spray v. Board of Medical Examiners*, 50 Or App 311, 333-35, 624 P2d 125 (1981), *order modified by* 51 Or App 773, 627 P2d 25 (1981), *rev den* 291 Or 117, 631 P2d 1341 (1981) (finding that selective prosecution is not a defense in a medical licensing proceeding). The City has not attempted to demonstrate, nor can it demonstrate, that the instant enforcement proceeding has been brought as a result of the Commission's 'intentional or purposeful invidious discrimination' against the City.
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> "With regard to the claim of estoppel, '[t]he well-settled rule is that in all governmental affairs, as distinguished from mere proprietary matters, neither the state nor any of its officers acting in a governmental capacity are estopped by any act of any such officer.' *Rhode v. State Industrial Accident Commission*, 108 Or App 426, 438, 217 P 627 (1923). If it is the City's claim that the Commission is somehow

[8] OAR 660-045-0130(10) provides: "If it is determined that there is good cause to believe that grounds for enforcement exist, * * * the hearings office must recommend, appropriate corrective action." OAR 660-045-0130(11) provides: "If it is determined that there is good cause to believe that grounds for enforcement exist, * * * the hearings officer may recommend one or more interim measures, in accordance with the provisions of ORS 197.335(3) and (4)."

estopped from proceeding with an enforcement order, *Rhode* clearly confirms that the City's position is not well taken:

> "'Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers. On the same ground that the government is excused from the consequence of latches, it should not be affected by negligence or even willfulness of any one of its officers.' *Id.* At 438-39.

"If the City is making an estoppel argument, that argument fails.

"If it is the City's argument that the enforcement order is subject to latches because the Commission failed to timely bring the enforcement action, its argument fails. 'By the weight of authority, the defense of latches is not available against the government, state or national, in a suit by it to enforce a public right or to protect a public interest.' *State v. Vincent*, 152 Or 205, 214, 52 P2d 201 (1935). Oregon courts have recognized that latches may not be used as a defense against a claim that is purely legal in nature. *See e.g. Corvallis Sand & Gravel Co. v. State Land Board*, 250 Or 319, 325, 439 P2d 575 (1968). In any event, to prevail on a claim of latches, the City must prove that the Commission delayed in asserting its enforcement remedy for an unreasonable amount of time, that the Commission had full knowledge of relevant facts when delaying, and the resulting delay substantially prejudices the City. *Mattson v, Commercial Credit Business Loans, Inc.*, 301 Or 407, 419, 723 P2d 996 (1986). *See also Hilterbrand v. Carter*, 175 Or App 335, 342, 27 P3d 1086 (2001). The City cannot show that delay, if any, by the Commission in instituting the enforcement action is prejudicial to the City when any such delay was specifically designed to provide the City with additional time to comply with compliance orders." General Distributors, Inc. Opening Brief 2-3.

"* * * the City of Damascus argues that LCDC's enforcement activity will 'chill political expression,' in effect telling the City, and the City Council what

to do when the City is still discussing its options in the political arena. The City's argument is meritless. Just because a person engaging in a course of conduct contrary to statute chooses to describe that course of conduct as 'political' does not transform the conduct into expression under Article 1, Section 8 of the Oregon Constitution. *See Huffman and Wright Logging Co. v. Wade*, 317 Or 445, 857 P2d 1010 (1993) (describing trespass conduct as politically motivated does not insulate that conduct from trespass sanctions under the law)." Response of General Distributors, Inc. 1.

I agree with General Distributors, Inc. that the city's defenses to LCDC bringing an enforcement order are not persuasive.

2. Potential Corrective Actions and/or Interim Measures

Given that that there are so many parties and limited parties with different perspectives and interests, it is not surprising that there are a number of very different suggested corrective measures and interim measures. The following list briefly describes the respective parties' positions:

(1) DLCD seeks to withhold state-shared revenues from the City of Damascus in the amount of $300,000 pursuant to ORS 197.335(4).
(2) The City of Damascus recommends no enforcement action.
(3) Metro argues that the city failed to meet its planning requirements as described in the first three issues but does not recommend any specific corrective actions or interim measures.
(4) Clackamas County takes no position on the potential withholding of state-shared and does not suggest any other corrective action or interim measures.
(5) The City of Happy Valley argues that the City of Damascus has failed to meet its planning requirements as described in the first three issues and asks that if any land use applications are allowed that they comply with certain land use agreements and plans that involve the City of Happy Valley.

(6) Johnson Creek Watershed Council asks that the two potential comprehensive plans that the City of Damascus plans to submit to the voters in May 2014 be suspended and only the 2013 Plan be allowed to go forward.

(7) Citizens for Moving Damascus forward want to have the city fulfill its planning requirements but do not want to have state-shared revenues withheld.

(8) Karl Westcott asks that LCDC prohibit any new building permits that would not have been permitted under Clackamas County zoning regulations, prohibit any land divisions other than property line adjustments, and withhold state-shared revenues but allow them to be disbursed for infrastructure maintenance only.

(9) General Distributors, Inc. agrees that enforcement is appropriate and with DLCD's request to withhold state-shared revenues.

(10) Lowell Patton's arguments are directed primarily towards obtaining relief for restrictions on his property rather than a comprehensive solution, but his suggestions for corrective actions and interim measures include allowing development of land currently served by urban services to begin under different plans or regulations like those of Clackamas County or the City of Happy Valley, order the City of Damascus to allow Patton to de-annex from the city, and request that the Oregon legislature enact legislation to allow property owners such as Patton to develop their property.

a. Unusual Requests

A few of the suggested actions or measures are unusual in that they do not appear to be supported by any particular authority and are merely based on that party's attempt to solve the problem. Johnson Creek Watershed Council asks that the city be prohibited from placing the two amended potential comprehensive plans on the May 2014 ballot and be required to proceed only with the 2013 Plan. I do not see that there is any particular authority for LCDC to require such actions. In essence, Johnson Creek Watershed Council is asking LCDC to make a political decision for the City of Damascus. Even if there were authority for LCDC to take such an unusual step, which I do not believe there is, I do not believe that would be a good idea and do not recommend that LCDC take such action.

Karl Westcott asks that LCDC take actions that there is some authority for such as prohibiting certain actions, allowing other actions, and withholding state-shared revenues, but he also adds his own personal caveats to those suggestions. I discuss later whether I believe LCDC should allow development applications under different standards and whether state-shared revenues should be withheld. I do not believe trying to add in the caveats suggested by Karl Westcott would be effective even if they are permissible. For instance, I do not see that LCDC could seek to have state funds withheld for all purposes except to maintain existing infrastructure. Therefore, I do not recommend that LCDC impose the actions and measures suggested by Karl Westcott.

b. Corrective Actions to Allow Development of Certain Properties

Patton provides numerous arguments and citations to authority for the proposition that LCDC has broad powers to take various actions or enact various interim measures to enforce the planning provisions that the City of Damascus has failed to adopt and have acknowledged. There was tremendous disagreement between the parties as to whether LCDC can or should order specific remedies for property owners such as Patton, be that applying Clackamas County zoning provisions as if the City of Damascus did not exist, forcing the city to allow owners to leave the city, or allowing certain owners with access to urban services to develop. Some parties, such as General Distributors, Inc. argued that such actions are not an available corrective action. Other parties, such as DLCD and Metro argued that such actions might be a possibility but would be constrained by various other planning requirements, such as Metro provisions.

ORS 197.335(1)(a) appears to be the most applicable statutory provision regarding the potential to take such specific action to allow certain development.

> "If the commission finds that in the interim period during which a local government, state agency or special district would be bringing itself into compliance with the commission's order under ORS 197.320 or subsection (2) of this section it would be contrary to the public interest in the conservation or sound development of land to allow the continuation of some or all categories of land use decisions or limited land use decisions, it shall, as part of its order, limit, prohibit or require the approval by the local government of applications

> for subdivisions, partitions, building permits, limited land use decisions or land use decisions until the plan, land use regulation or subsequent land use decisions and limited land use decisions are brought into compliance. The commission may issue an order that requires review of local decisions by a hearings officer or [DLCD] before the local decision becomes final."

While ORS 197.335(1)(a) appears to give LCDC authority to require certain applications to approved or prohibited, there was still differing opinions among the parties as to what exactly that authority entails. For instance, DLCD argued that the remedies in ORS 197.335(1)(a) may not be available until *after* the city has obtained an acknowledged comprehensive plan and land use regulations. There was also no consensus on what, if any, effect Metro policies and provisions that could apply would have on such actions.

It is tempting to attempt to fashion a remedy that would allow long suffering property owners to escape from the developmental limbo that they have been in for too long. For instance, it certainly appears that General Distributors, Inc. has development plans that would be approved if the city had an acknowledged comprehensive plan and land use regulations and that those plans would be beneficial for many reasons. It also appears that Patton has been waiting a long time to begin developments, at least some of which would certainly seem to be permitted if the city had performed its planning requirements. Unfortunately, I do not see that there is a specific remedy that I could recommend that would solve this problem. As discussed, there is no consensus as to whether such remedies are even possible. As this is an enforcement action brought by LCDC, I think any remedies suggested should be on a citywide basis and not directed to relief for individual property owners. Furthermore, any remedies suggested might not be successful due to Metro provisions that affect the area. In other words, even if I were to suggest a remedy for LCDC to impose, there is no guarantee that it would even accomplish the sought after result. It seems more likely that any suggested remedy that I suggest out of whole cloth would cause more problems than it would solve. Therefore, even assuming LCDC has the broad authority to order creative solutions to allow development to proceed, I do not recommend that LCDC impose corrective actions relating to allowing or prohibiting development under ORS 197.335(1)(a) or any other authority at this time.

c. Withholding State-Shared Revenues

The final potential corrective action or interim measure to consider is whether LCDC should withhold state-shared revenue funds from the City of Damascus. ORS 197.335(4) provides:

> "As part of its order under ORS 197.320 or subsection (2) of this section, the commission may withhold grant funds from the local government to which the order is directed. As part of an order issued under this section, the commission may notify the officer responsible for disbursing state-shared revenues to withhold that portion of state-shared revenues to which the local government is entitled under ORS 221.770, 323.455, 366.762 and 366.800 and ORS chapter 471 which represents the amount of state planning grant moneys previously provided the local government by the commission. The officer responsible for disbursing state-shared revenues shall withhold state-shared revenues as outlined in this section and shall release funds to the local government or department when notified to do so by the commission or its designee. The commission may retain a portion of the withheld revenues to cover costs of providing services incurred under this order, including use of a hearings officer or staff resources to monitor land use decisions and limited land use decisions or conduct hearings. The remainder of the funds withheld under this provision shall be released to the local government upon completion of requirements of the commission order."

DLCD argues that LCDC should withhold $300,000 in state-shared revenues pursuant to ORS 197.335(4), which represents the amount of state planning grant money previously provided by LCDC to the City of Damascus. The City of Damascus argues that the state-shared revenues should not be withheld.

Initially, I believe it is clear that withholding the state-shared revenues is certainly within the authority of LCDC and is a reasonable option. The city did not make satisfactory progress toward accomplishing its planning requirements, did not comply with LCDC orders, and did not obtain acknowledgment of its comprehensive plan and land use regulations within four years of

incorporation. LCDC has also been patient with the city in extending continuances for achieving the city's required tasks. Thus, the question is not whether LCDC can withhold the state-shared revenues but whether it should.

All of the parties, even DLCD, agreed that this is not a punitive enforcement proceeding. The enforcement proceeding was not brought as a punishment against the city or as a way to recoup money for LCDC, but was only brought because LCDC felt the city was not making enough progress towards the ultimate goal of obtaining an acknowledged comprehensive plan and land use regulations and something had to be done. In other words, DLCD believes that withholding $300,000 in state-shared revenue is the best available incentive for the city to complete the planning tasks that have been delayed for so long. The city argues that, on the contrary, withholding state-shared revenues would make it *less* likely for the city to be able to fulfill its planning requirements. According to the city, there is already enough antipathy towards the state and state agencies and adding the stigma of withholding state-shared revenues would only exacerbate these sentiments, making it less likely for the city to be able to perform the tasks required by state law. Additionally, the city argues that actually withholding the money would not have much of an effect because due to provisions of the city charter, the city would not be able to spend all the money anyway.[9]

In my opinion, the purpose of my recommendation is to suggest the corrective action or interim measure most likely to result in the city fulfilling its planning requirements in the shortest amount of time. Given that purpose, I recommend that LCDC withhold from the City of Damascus state-shared revenues in the amount of $300,000 effective July 1, 2014 if the city has not adopted a comprehensive plan and land use regulations and submitted them to LCDC for acknowledgment by that date.

I am not convinced that withholding the state-shared revenue funds immediately would be more effective than withholding them later if the city fails to adopt a comprehensive plan and land use regulations.[10] The city spent two months arguing over whether or not to adopt the 2013

[9] This argument can cut both ways. If the city does not really need the money then presumable it will not really miss it if it is gone.

[10] At oral argument, none of the parties seemed to know when the state-shared revenues are actually disbursed. No one knew whether the effect of withholding the state-shared revenues immediately, as opposed to after the election, would have any practical effect.

Plan. When the city was unable to reach a decision on the 2013 Plan, a compromise was made to refer two alternative plans to the voters in May 2014. It also appears that the 2013 Plan will be on the ballot. I see almost no possibility, even if the state-shared revenues were withheld immediately, that the city will do anything other than wait until after the May 2014 elections to adopt a comprehensive plan and land use regulations. Having the stigma of withheld funds looming over the elections would seem to make accomplishment of the required planning tasks less, rather than more, likely. The only possibility would be to adopt one of the competing plans, but under the city's ordinances it could not submit it to LCDC for acknowledgment until it is approved by the voters. While LCDC only originally required the city to adopt a plan and not have it approved by the voters, it makes little sense at this point to adopt a plan that has not been approved by the voters, especially when that vote is only months away. With the election in May 2014, the city should have ample time to take the required steps to adopt one of the proposed comprehensive plans before July 1, 2014.

The continuance orders that the city failed to comply with had staggered the times for the various tasks to be completed. The latest of those tasks were to be completed in June 2014. I agree with the city that because the city can only submit a comprehensive plan and land use regulations that are approved by the voters, it makes more sense to submit an entire plan for acknowledgment rather than conduct the piecemeal approach originally set forth in the compliance orders. If the city does adopt one of the potential comprehensive plans after the May 2014 election then it is possible that the city will complete all the tasks required of it by the time originally specified for the final tasks in the final continuance order. If the city does not adopt a comprehensive plan and land use regulations after the election to submit for acknowledgment by July 1, 2014 then the state-shared revenues should be withheld. In addition, if the city fails to adopt a comprehensive plan and land use regulations by July 1, 2014, I recommend that LCDC direct DLCD to explore what actions are legally available to allow property owners such as General Distributors, Inc. and Patton to develop urban uses despite the lack of an acknowledged comprehensive plan and land use regulations.

In conclusion, despite the failure on the part of the City of Damascus to comply with its planning responsibilities in a timely manner, I believe allowing the city one more chance to adopt a comprehensive plan and land use regulations after receiving essentially a referendum on

the various comprehensive plan possibilities from the city's voters is more likely to result in an adopted comprehensive plan and land use regulations than withholding state-shared revenues immediately. I also recommend that if the city again fails to adopt a comprehensive plan and land use regulations that LCDC explore avenues to allow property owners to develop urban uses despite the lack of a city comprehensive plan and land use regulations.[11]

January 18, 2014

Fred Wilson
Hearings Officer

[11] ORS 197.328(3) requires that I serve a copy of the proposed order on DLCD and all parties to the hearing. OAR 660-045-0140 requires that I also send a copy of the proposed order to LCDC. Once the proposed order is served on LCDC, OAR 660-045-0140(2) provides:

> "After the commission receives the proposed order from the hearings officer, the commission must do the following:
>
> "(a) Establish a date on which the commission will consider the proposed order;
>
> "(b) Mail the proposed order to all the parties; and
>
> "(c) Mail to all the parties the following information:
>
> "(A) The date on which the commission will consider the proposed order;
>
> "(B) A statement that the commission will limit its review as specified in Section (4) of this rule;
>
> "(C) A statement that exceptions to the proposed order may be filed by parties to the case; and
>
> "(D) A statement that exceptions to the proposed order must be received by the commission no later than 15 days after the order was mailed to the parties."