



Oregon

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May 6, 2011

TO: Land Conservation and Development Commission

FROM: Jerry Lidz, Acting Director
Gloria Gardiner, Urban Planning Specialist

SUBJECT: **Agenda Item 2, May 19, 2011, LCDC Meeting**

REVIEW OF A DIRECTOR'S DECISION TO APPEAL TO THE LAND USE BOARD OF APPEALS (LUBA)

CITY OF BANKS

I. RECOMMENDATION

The director recommends, based on the information contained in this report, that the commission authorize the Department of Land Conservation and Development (department) to proceed with the appeal of a City of Banks decision to the Land Use Board of Appeals (LUBA). A Notice of Intent to Appeal was filed with LUBA (LUBA No. 2011-039) on May 5, 2011. The 21-day period for filing an appeal concluded on May 9, 2011.

II. CASE SUMMARY

Banks is an incorporated city of 1,435 people¹ in western Washington County. On April 12, 2011, the city adopted post-acknowledgment plan amendments in three related ordinances:

- Ordinance No. 2011-04-01 expanded the City of Banks' urban growth boundary (UGB) by 248.18 acres;
- Ordinance No. 2011-04-02 adopted a revised transportation system plan (TSP) and implementing land use regulations; and
- Ordinance No. 2011-04-03 adopted a revised Park and Recreation Master Plan, amended the revised TSP adopted in Ordinance No. 2011-04-02, and revised the UGB amendment adopted in Ordinance 2011-04-01 by adding approximately 141 acres of the existing Quail Valley Golf Course and approximately three acres from two other parcels.

The department has appealed only the third ordinance to LUBA.

¹ July 1, 2010 certified population estimate by Portland State University.

During 2010, department staff worked with the city's consultant and the city planner, answering questions and providing requested advice regarding the evaluation and amendment of the city's UGB. The department and the Oregon Department of Transportation (ODOT) offered the city informal approval of the UGB proposal that was later adopted in Ordinance No. 2011-04-01, and the TSP that was later adopted with Ordinance 2011-04-02. That UGB consisted of an approximately 248-acre expansion that did not include the Quail Valley Golf Course. On October 29, 2010, the city submitted a Notice of Proposed Amendment for a proposed UGB amendment that included approximately 141 additional acres of the existing Quail Valley Golf Course. The golf course is an existing use legally established on rural land primarily zoned Exclusive Farm Use (EFU) in Washington County.

On November 24, 2010, the department submitted written comments to the city with the department's position that including the Quail Valley Golf Course in the UGB is inconsistent with Goal 14 and OAR 660-024. On December 15, 2010, the City of Banks held its first evidentiary hearing. The department submitted written comments at that hearing, repeating its position that the city had not justified the addition of the Quail Valley Golf Course into the UGB. On February 2, 2011, the department again submitted written comments to the city explaining why including the golf course is not consistent with Goal 14 and OAR 660-024. On February 8, 2011, department staff reiterated these comments in oral testimony at the City of Banks City Council hearing.

The department also advised the city that the UGB amendment must be adopted by both the city and Washington County (county) prior to acknowledgment. The city forwarded the department's advice to the county and, on March 15, 2011, the department sent a letter to the city and the county stating its position that Goal 14 and OAR 660-018-0021 require both the city and county to adopt the three-part plan amendments before the decisions could become final and before the city or county sends the department a Notice of Final Adoption.

On April 12, 2011, the Banks City Council adopted the three ordinances described above without the substantive changes requested by the department (*i.e.*, exclusion of the golf course). On April 15, 2011, the City Attorney advised the department in writing that county staff had informed the city that the county would not adopt the city ordinances until after the city gave the department Notice of Adoption and any possible appeals had been exhausted. Based on that information, the city stated that it would submit a Notice of Adoption without county co-adoption. The department received the city's Notice of Adoption on April 19, 2011.

The department timely appealed this decision to LUBA as described above.

Under ORS 197.090(2) (c), the Director as defined in ORS 197.015, the applicant, and the affected local government as defined in OAR 660-001-0201, may address the commission. There is no party that is the applicant. The City of Banks is the affected local government because it made the land use decision.

Pursuant to OAR 660-001-0220, the department notified the City of Banks of its intent to appeal the city's decision. In the notice, the department indicated that an opportunity exists to appear before the commission to discuss the merits of the department's appeal. The department also informed the city

of the factors upon which the commission is asked to base its decision whether or not to direct the department to proceed with this appeal.

III. APPEAL FACTORS

To proceed with an intervention on appeal, the commission must base its decision on one or more of the following factors in OAR 660-001-0230(3):

- (a) Whether the case will require interpretation of a statewide planning statute, goal or rule;
- (b) Whether a ruling in the case will serve to clarify state planning law;
- (c) Whether the case has important enforcement value;
- (d) Whether the case concerns a significant natural, cultural or economic resource;
- (e) Whether the case advances the objectives of the agency's Strategic Plan; or
- (f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance.

IV. ANALYSIS

(a) Whether the case will require interpretation of a Statewide Planning Statute, Goal or Rule:

OAR 660-024-0040(10): The city added approximately 31 acres of residential land for the city's estimated 20-year land need for parks, school facilities, and streets and roads. The city used the safe harbor in OAR 660-024-0040(10) to justify the expansion for these urban uses. The city separately added approximately 141 acres of the Quail Valley Golf Course and approximately three acres of other land for a "special use" recreation need. If a city chooses to use the safe harbor, however, the safe harbor is exclusive for Goal 8 (Recreational Needs) 20-year land need estimates. The city's position is that "open space is not included in the safe harbor allowance, so that the golf course could be included as open space if the need was substantiated."²

Goal 14 and OAR 660-018-0020: The city relies on Washington County's position that the county is not required to address and adopt the city ordinances until after the city provides its Notice of Adoption to the department and after any appeal periods for the decision have been exhausted. The department's position is that Goal 14 and OAR 660-018-0021 require both the city and county to adopt a UGB amendment before the decision can become final and before the city or county sends the department a Notice of Final Adoption for acknowledgment.

Goal 14 and OAR 660-024-0040(1): Change of a UGB must be based on a demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of these need categories. The city's revised Park and Recreation Master Plan and UGB amendment findings state that the Quail Valley Golf Course is used by city residents, this "recreational resource" is in danger of conversion to farm use under current rural resource zoning, and the golf course is an urban park or open space need that must be

² Exhibit 4 to Ordinance 2011-04-03, February 8, 2010 Amendments to UGB Expansion Justification Technical Report, p. 12.

protected by inclusion in the city's UGB. The department's position is that the city has not demonstrated a need for the Quail Valley Golf Course to be added to the UGB as an urban land use need for the 20-year planning period. To the contrary, the city's findings demonstrate that the Quail Valley Golf Course is a regional and possibly statewide rural recreational use that was legally developed on rural resource land in 1996.

(b) Whether a ruling in the case will serve to clarify State planning law:

A ruling in the case will clarify:

- (1) Whether a city may determine its 20-year Goal 8 Recreational Needs by using the safe harbor in OAR 660-024-0040(10) and also include separately calculated land need for one or more specific Goal 8 uses and add that amount of land to the amount of land determined through use of the safe harbor; or in the alternative, a ruling will determine that when the safe harbor is used to estimate land needs, those results must constitute the entire 20-year Goal 8 land need;
- (2) Whether both the city and applicable county must adopt a plan amendment that concerns land under county jurisdiction, such as a UGB expansion, before the decision is final, or whether unilateral city adoption is sufficient; and
- (3) The definition of "urban use" for purposes of a UGB amendment.

(c) Whether the case has important enforcement value:

A number of cities around the state are contemplating and completing UGB evaluations and UGB amendments. ORS 197.298, which establishes priorities for adding land to a UGB, makes rural resource land, and specifically high capability resource land, the lowest priority of land to add to a UGB. With very limited exceptions, urban reserves, marginal lands, and exception lands must be added before resource land. Once rural land is included in a UGB, it becomes urbanizable land that may be used for any urban use. There is no way to guarantee that a city governing body now or in the future will prohibit a landowner from re-zoning the land to another urban use. This means that a large, flat parcel of high-value farm land could be justified for inclusion in the UGB for a land-extensive recreation need such as a golf course and zoned appropriately, but later could be re-zoned for a regional retail center or a residential subdivision.

(d) Whether the case concerns a significant natural, cultural or economic resource:

Sustaining valuable agriculture resource lands is important to Oregon's economic strength and stability. Oregon's agricultural industry generates about \$12 billion of the state's economic output. This industry is seriously affected by the loss of land to urban uses and by the fragmentation of the resource land base.³

The additional 144 acres of land that was included in the Banks UGB through Ordinance 2011-04-03 is primarily high-value farmland. The vast majority of the site has Class II soils, with a small area of Class I soils and some Class IV soils. Agriculture is one of Washington County's major industries.

(e) Whether the case advances the objectives of the agency's Strategic Plan:

³ See the 2009-11 DCLD Biennial Report at p. 18.

One of the department's Strategic Goals is to secure Oregon's legacy by conserving coastal, farm, forest, riparian and other resource lands, and by protecting unique and threatened resources by guiding development to less sensitive areas. Another Strategic Goal is to promote sustainable, vibrant communities by encouraging economic development. Our Strategic Initiatives include:

- Continue programs to conserve farm and forest lands; and
- Improve the monitoring and evaluation of how areas of the state are performing in terms of conversion of farm and forest uses to non-resource uses.

Maintaining the Quail Valley Golf Course on rural land outside the Banks UGB will protect high-value farm land from conversion to urban use.

(f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance:

The department sought to resolve the matter with the city (1) by advising it of the state's position through numerous telephone and electronic mail communications with the city's planning consultant and the city planner prior to the city's submission of the 45-day notice, (2) by the department's written comments dated November 24, 2010, December 15, 2010, February 2, 2011, and March 15, 2011, and (3) by department staff participation at the city's public hearing on this matter on February 8, 2011. The city's decision may be final unless the decision is appealed to LUBA, so this action is the only option available for enforcing the applicable goals and rules.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

The department recommends that the commission support the director's recommendation and proceed with an appeal of the City of Banks' land use decision. The department specifically requests that the commission direct the department to appeal City of Banks Ordinance 2011-04-03, adopted by the city council on April 12, 2011.

Proposed motion: I move that the commission approve a department appeal of the subject decision from the City of Banks to the Land Use Board of Appeals because the information included in this report demonstrates that the factors in OAR 660-001-0230(3) (a), (b), (c), (d), (e), and (f) apply.

Alternative motion: I move that the commission approve a department appeal of the subject decision from the City of Banks to the Land Use Board of Appeals because the information included in this report demonstrates that the factors in OAR 660-001-0230(3) _____ apply.

Alternative motion: I move that the commission not approve an appeal of the subject decision from the City of Banks because _____.