



Oregon

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September 11, 2013

TO: Land Conservation and Development Commission

FROM: Bob Rindy, Senior Policy Analyst

SUBJECT: **Agenda Item 10, September 26-27, 2013, LCDC Meeting**

JOINT MEETING OF LCDC AND CIAC

I. OVERVIEW

This item is the annual joint meeting between the Land Conservation and Development Commission (LCDC) and the commission's Citizen Involvement Advisory Committee (CIAC). The CIAC advises LCDC on matters pertaining to citizen involvement. The joint meeting is an opportunity for the commission to discuss citizen involvement issues with the committee and to provide direction regarding the committee's work program for the biennium.

The CIAC met September 10 in order to determine its biennial work plan, and it is anticipated that the draft work plan will be part of the discussion with the commission. The draft work plan is attached to this report.

II. ORS 9.320 ISSUE BROUGHT TO THE ATTENTION OF THE CIAC AT ITS SEPTEMBER 10, 2013 MEETING.

At its September 10 meeting, Corinne Sherton presented an issue to the CIAC concerning the recent recommendation of the Coos County Hearings Officer. This concerns some "standing" challenges raised by applicant Jordan Cove Energy Project (JCEP) concerning issues raised locally by the group Citizens Against LNG, Inc. (CALNG). The Board of Commissioners adopted the Hearings Officer's recommendation, but there has been no written order yet.

The section on the interpretation of ORS 9.320 is on pages 19-20 (see Attachment B). Corinne Sherton, referring to the Hearings Officer's interpretation, stated that it concludes: "in situations where ORS 9.320 applies only an individual human being can appear 'in person,'" and local government land use hearings are "proceedings" within the meaning of ORS 9.320. Ms. Sherton indicates that this would mean that no citizens group could participate, as a group, in local government land use proceedings unless they had an attorney to represent them. This would also apply, e.g., to neighborhood organizations and businesses. It would also mean that an applicant, whether an individual, partnership, corporation, etc., could not be represented in a local land use proceeding by an architect, engineer, planning consultant or anyone else who is not an attorney.

The CIAC agreed that this matter seems to be of major concern with respect to citizen involvement in land use statewide. If this interpretation holds, it would have many implications for local land use proceedings. As such, the CIAC voted to refer this matter to LCDC an request that the department and legal counsel further investigate to determine whether this interpretation is reasonable and would have statewide applicability, and if so, whether a legislative concept or some other remedy should be considered.

III. ATTACHMENTS

- A. Draft CIAC Biennial Work Program
- B. Excerpt from Hearings Officer Report to Coos County Board of Commissioners, June 18, 2013

Work Plan: 2013-2014
Citizens Involvement Advisory Committee

DRAFT: September 10, 2013

- 1. Continue with the STAR awards Program.**
- 2. Annually hold a joint meeting with LCDC on CIAC work plan.**
 - a. Assist commission and department with public outreach.**
 - b. Review expectations regarding advisory role and responsibilities.**
- 3. Create or obtain data on acknowledged local citizen involvement programs.**
 - a. Survey cities and counties, preferably with AOC and LOC.**
- 4. Outreach: Establish and develop relationships with local governments:**
 - a. Outreach to planning directors.**
 - b. Other potential partnerships (e.g. Environmental Justice Task Force).**
- 5. Report to LCDC with list of no-cost and low-cost outreach methods, and discussion of best practices.**
- 6. Assist LCDC in assessing effectiveness of streaming video.**

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18 June 2013

VIA EMAIL

Coos County Board of Commissioners
C/o Coos County Planning Dept.
250 N. Baxter Street
Coquille, OR 97423

*Re: Jordan Cove Energy Project: Appeal of Site Plan Approval SP-12-02
Interim Recommendation Regarding Standing and Related Procedural Issues.*

Dear Honorable Members of the Board:

I. Introduction.

The Coos County Planning Department asked me to conduct an *ad hoc* hearing to respond to motions filed by Jordan Cove Energy Project (“JCEP”). JCEP challenges the standing of Citizens against LNG, Jody McCaffree, John Clarke, John Craig Neikirk and Richard F. Knablin, on the grounds that the appeals that these persons filed did not certain standards set forth in the Coos County Zoning and Land Development Ordinance (“CCZLDO”). The hearings officer accepted written testimony on the topic and conducted a telephone hearing on June 13, 2013. The telephone hearing provided all parties a broad opportunity to argue the merits of their position.

The hearings officer has broken the arguments into a series of six (6) questions and recommendations, which may be read in the manner of an Executive Summary. The hearings officer has also provided detailed legal analysis which could become the basis of findings necessary to survive review by LUBA and the courts.

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Citing ORS 9.320, JCEP argues that CALNG’s appeal must be dismissed because Jody McCaffree is not an attorney, and, as a result, cannot file an appeal as a “representative” of CALNG.

It is common practice in Oregon for land use consultants, surveyors, engineering firms, architects, and land use planning firms to submit both land use applications and appeals, as well as representing private citizens and corporations in local land use proceedings. As far as the hearings officer is aware, neither the Oregon Courts nor the Oregon State Bar have ever taken a formal position on the matter. ORS 9.320 states:

9.320 Necessity for employment of attorney; effect of employment. Any action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorney, except that the state or a

corporation appears by attorney in all cases, unless otherwise specifically provided by law. Where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of the client of the attorney as between the client and the adverse party, except as provided in ORS 9.310.

In situations where ORS 9.320 applies, only an individual human being can appear "in person." *Oregon Peaceworks Green, PAC v. Secretary of State*, 311 Or. 267, 810 P.2d 836 (1991).

ORS 9.320 applies to "actions," "suits," and "proceedings." Thus, a threshold question is whether the current land use appeal constitutes a "proceeding" within the contemplation of ORS 9.320. The statute does not define these three terms, although it seems relatively clear that this appeal does not constitute an "action" or a "suit." On the other hand, the term "proceeding" is more broad in its scope. Although there is no case law on point, it does seem relatively obvious that a local land use hearing is a "proceeding" within the meaning of ORS 9.320. An Attorney General opinion written in 1974 supports this conclusion. 36 Or Atty Gen. 960, 988 (1974). Furthermore, ORS 9.160 provides relevant context to this interpretation, and bolsters the conclusion that a local land use proceeding are a proceeding. The process of filing out appeal forms and effectively representing a person at a land use hearing does require the exercise of legal and factual judgment as well as the interpretation of law. These are precisely the types of matters that ORS 9.160 states should be handled by attorneys.

Having said that, the remedy that JCEP seeks to have the County impose is not fairly suggested by the language of ORS 9.160 or ORS 9.320. LUBA has stated that "other consequences may attend violation of the requirement for legal representation; however, we do not believe forfeiture of the right of appeal should be imposed." *League of Women Voters of Coos County v. Coos County*, 14 Or. LUBA 45 (1985), *aff'd*, 76 Or App 705, 712 P2d 111 (1985).

The second question is whether the letter sent by attorney Corinne Sherton dated June 7, 2013 cures any deficiency that might otherwise exist. In light of both LUBA's and the Court of Appeal's decision in the *League of Women Voters of Coos County* case, the hearings officer believes that it does.

Conclusion: Whatever violation of ORS 9.320 existed by virtue of the fact that Jody McCaffree filed an appeal on behalf of CALNG without using the services of an attorney, denial of the appeal is not an appropriate remedy. Furthermore, the fact that CALNG is now represented by attorney Corinne Sherton cures whatever violation occurred, at least for purposes of the disposition of this appeal proceeding.