



# Oregon

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November 7, 2013

TO: Land Conservation and Development Commission

FROM: Carrie MacLaren, Deputy Director

SUBJECT: **Agenda Item 9, November 14-15, 2013 LCDC Meeting**

## **CITY OF DAMASCUS: INITIATION OF ENFORCEMENT PROCEEDINGS**

### **I. SUMMARY**

The City of Damascus (city) incorporated in November 2004. ORS 197.757 requires newly incorporated cities to adopt comprehensive plans and land use regulations no later than four years after the date of incorporation. The city has not yet completed its adoption, and is out of compliance with the most recent continuance order. *See* Continuance Order, Compliance Schedule and Enforcement Order 13-CONT-COMPLY-001828, dated February 7, 2013 (2013 Continuance Order); *see also* Continuance Order and Compliance Schedule 11-CONT-COMPLY-001801, dated July 22, 2011 (2011 Continuance Order).<sup>1</sup>

At the January 2013 Land Conservation and Development Commission (commission) meeting, the commission determined there was “good cause” to proceed with enforcement against the City of Damascus for its failure to meet the deadlines in the 2011 Continuance Order, and directed staff to amend the compliance schedule and initiate enforcement proceedings if the city did not adopt certain elements of its comprehensive plan by August 31, 2013. The amended compliance schedule was reflected in the 2013 Continuance Order.

The City of Damascus did not adopt the required elements of its comprehensive plan by the end of August. However, at the September 2013 LCDC meeting, the commission elected to defer the initiation of enforcement proceedings until the commission’s November 2013 meeting, in order to allow the question of whether the city would disincorporate to be resolved. *See* Clackamas County Measure 3-433.

As of the date of this report, the “yes” vote to disincorporate the City of Damascus had 63.5 percent of the votes. However, because state law requires that majority of the electorate vote to disincorporate a city, the measure failed, and Damascus remains an incorporated city. *See* ORS 221.610.<sup>2</sup>

<sup>1</sup>The 2011 Continuance Order and 2013 Continuance Order are available on DLCD’s website at [http://www.oregon.gov/LCD/pages/damascus\\_acknowledgement.aspx](http://www.oregon.gov/LCD/pages/damascus_acknowledgement.aspx).

<sup>2</sup>The City of Damascus has 6,879 registered voters. Thus, under ORS 221.160, 3,439 “yes” votes were required to disincorporate. The “yes” vote received 2,678 votes; the “no” vote received 1,653 votes.

**A. Type of Action and Commission Role**

The commission will decide whether to initiate enforcement proceedings under ORS 197.324. In January 2013, the commission made the substantive determination that there was “good cause” to believe that the city has (a) failed to make satisfactory progress toward performance of its compliance schedule or (b) failed to comply with commission orders in order to initiate enforcement proceedings. ORS 197.320. However, the commission declined to immediately initiate enforcement proceedings after determining that immediate initiation was unlikely to result in a faster adoption than letting the city’s scheduled hearing process conclude in August. Thus, having previously determined there was “good cause,” the commission’s decision here is only to initiate the enforcement proceedings.

The enforcement proceedings are carried out through a contested case hearing process, during which a factual determination is made as to the city’s noncompliance, and the possible corrective actions (i.e., enforcement actions) are evaluated, culminating in a final order by the commission. The contested case hearings process is summarized in Section III.B. below.

This agenda item is not scheduled for public testimony, as the commission previously held a hearing to determine whether there was “good cause” to initiate enforcement.

**B. Staff Contact Information**

If you have questions about this report or the city’s acknowledgment process, please contact DLCD Metro-area Representative Jennifer Donnelly at (503) 725-2183 or [jennifer.donnelly@state.or.us](mailto:jennifer.donnelly@state.or.us).

**II. SUMMARY OF RECOMMENDED ACTION**

The Oregon Department of Land Conservation and Development (department) recommends that the commission initiate enforcement proceedings under ORS 197.324, which involves a contested case hearing process. As part of that decision, the department recommends that the commission appoint a hearings officer to conduct both the procedural and substantive portions of the contested case hearing, including the preparation of a proposed order for the commission’s consideration. Finally, the department recommends that the commission delegate appointment of a hearings officer to the director.<sup>3</sup>

**III. BACKGROUND AND ANALYSIS**

**A. Past Actions**

The city incorporated in November 2004. ORS 197.757 requires newly incorporated cities to have comprehensive plans and land use regulations adopted no later than four years after the date of incorporation. Below is a timeline of actions following the Damascus incorporation, including those taken after the commission’s January 2013 meeting:

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<sup>3</sup> The department has confirmed that Fred Wilson, former staff attorney for the Land Use Board of Appeals, is able to serve as the hearings officer. However, for ease of administration – and particularly to address any unforeseen circumstances – the department recommends the commission delegate this function to the director.

- The director granted a one-year extension in November 2008.
- The commission approved a compliance schedule for completing the comprehensive plan and land use regulations at the commission’s January 20-22, 2010 meeting.
- The city council adopted its first comprehensive plan on December 15, 2010.
- The city submitted its notice of adoption for the comprehensive plan and plan map on December 16, 2010. The city had planned to submit its planning documents in two phases. This first phase was to address the comprehensive plan and plan map. The second phase was to address the city’s land use regulations and zoning map, as well as any remaining goals.
- The department undertook review of the submittal in January 2011, including providing the required notice and opportunity to comment, review of objections, and preparation of a staff report to the commission. The commission reviewed the submittal in April 2011, accepting Goals 1, 3, 4, and 13 of the plan and setting a compliance schedule for Goals 2, 5, 6, 7, 9, 10, 11, 12 and 14, as authorized by ORS 197.251(10).<sup>4</sup> *See* 2011 Continuance Order.
- In May 2011, the adopted comprehensive plan was overturned by city referendum. The referendum had no practical effect on the city’s acknowledgment status, because the plan that was rejected by the voters had not been acknowledged by the commission.
- In March 2012, the citizens of Damascus passed Measure 3-389, which requires ratification by voters before any ordinances or plans may be submitted to Metro or the commission or department for review.
- The city provided updates to the commission on its progress at the January 26, 2012, September 20, 2012, and January 24, 2013 meetings. At the January 2013 meeting, the commission extended certain deadlines until August 31, 2015, and directed the department to initiate enforcement proceedings if the required materials were not submitted.
- In June 2013, the disincorporation initiative, Measure 3-433, qualified for the November 2013 ballot.
- In July and August 2013, the draft comprehensive plan was presented to the city council, but was not adopted.
- In September 2013, the commission deferred initiation of enforcement proceedings until after the vote on Measure 3-433.

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<sup>4</sup> The commission “accepted” Goals 1, 3, 4, and 13 of the plan because acknowledgment cannot occur until a plan is complete.

- On November 5, 2013, the vote to disincorporate under Measure 3-433 failed. Although the “yes” vote garnered 64.5 percent, it did not obtain a majority of the registered voters.

## **B. Enforcement Proceedings**

The commission is initiating enforcement proceedings on its own motion, pursuant to ORS 197.324(1). The enforcement proceedings are carried out through a contested case hearing process. ORS 197.328(1).<sup>5</sup> This section briefly summarizes the contested case process and the commission’s responsibilities.

### **1. Timeline – Overview**

The contested case hearing must be held within 45 days of the date the commission initiates enforcement proceedings. ORS 197.328(2). The commission must issue a final order not more than 120 days after initiation of enforcement proceedings. ORS 197.328(5). Assuming the commission initiates enforcement proceedings on November 15, 2013, the contested case hearing must be held no later than December 30, 2013, and the final order issued no later than March 14, 2014.

### **2. Appointment of a Hearings Officer**

The commission has the option of holding the contested case hearing, appointing a hearings officer to conduct the contested case proceeding, or appointing a hearings officer to address certain prehearing matters and conducting the hearing itself. ORS 197.324(1); OAR 660-045-0100(6). The commission previously indicated it would elect to appoint a hearings officer for the entire process; that is to address the pre-hearing matters, conduct the contested case hearing, and prepare a proposed order for the commission’s review and action. The department continues to recommend this approach as the most expedient and efficient use of the commission’s time and department resources.

### **3. Steps in Contested Case Process**

Notice of Contested Case Hearing: The department must provide notice to the parties of the contested case hearing, including the time and place of hearing, a statement of authority and jurisdiction, and a general statement of issues. ORS 183.413; ORS 183.415; OAR 660-045-0110; OAR 137-003-0001. The department also recommends providing notice to those who testified to the commission at the January and September 2013 hearings and to Metro and Clackamas County. OAR 660-045-0110.<sup>6</sup>

Participation of Others as Parties or Limited Parties: At the time the enforcement proceedings are initiated, the city is the only “party” to the proceeding. However, other persons may petition to

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<sup>5</sup> The commission has adopted the model rules for contested cases. OAR 660-001-0005(1); *see also* OAR 137-003 (setting forth the model rules).

<sup>6</sup> Although titled “Citizen-Initiated Enforcement Orders,” certain portions of OAR 660, division 045 apply to enforcement orders initiated by the Commission. OAR 660-045-0010.

join the proceeding as a party or limited party. OAR 660-045-0120; OAR 137-003-0005. Such petitions must be filed at least 21 calendar days before the date set for the hearing. *Id.*

Duties and Functions of the Hearings Officer: As above, the commission has the discretion to appoint a hearings officer to cover the entire contested case, only the procedural aspects of the case, or none of the contested case. Assuming the commission appoints a hearings officer to cover the entire contested case process, the hearings officer is responsible for the following:

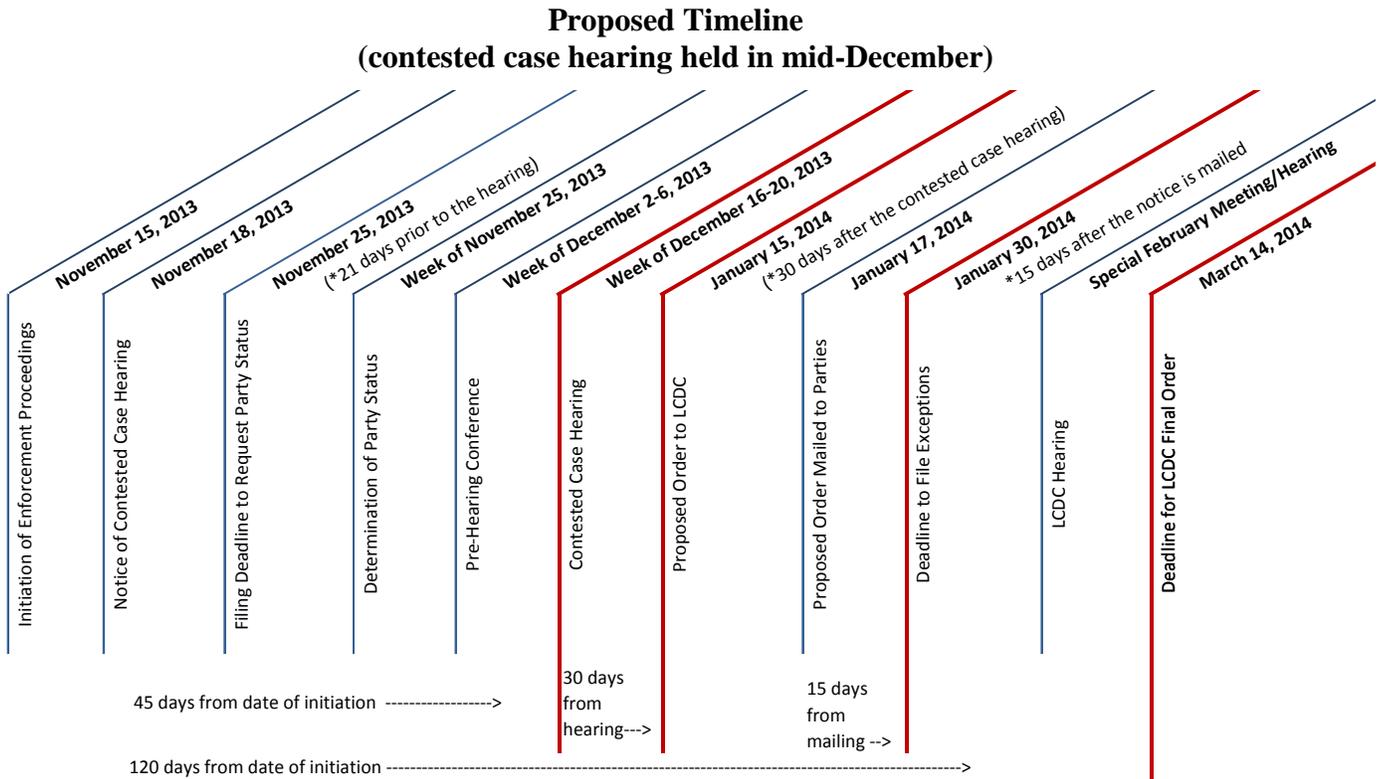
- a. Notice of contested case hearing (can also be issued by the department).
- b. Determination of party and limited party status.
- c. Conducting the pre-hearing scheduling conference (e.g., briefing schedule, stipulations of fact, names of witnesses for the contested case hearing, identification of issues, provision of documents intended to be submitted as evidence, and other procedural matters).
- d. Conducting the contested case hearing.
- e. Preparing the proposed order, including findings of fact, legal analysis, and recommendation of “corrective actions” (e.g., enforcement actions) the commission could impose in its final order. OAR 660-045-0130(9)-(11). The proposed order must be delivered to the commission and other parties involved no more than 30 days after the date the record is closed (in this case, most likely the date of the contested case hearing). ORS 197.328(3); OAR 660-045-0140.

The department is targeting mid-December for the contested case hearing.

Post-Hearing Process: As above, the hearings officer has 30 days from the date the record is closed to deliver the proposed order to the commission. After the commission receives the proposed order from the hearings officer, the commission must: (a) mail the proposed order to the parties and limited parties and (b) provide notice to the parties and limited parties of the date on which the commission will consider the proposed order, the scope of the commission’s review, and the 15-day deadline for filing exceptions to the proposed order. OAR 660-045-0140(2).

In reviewing the proposed order, the commission may not consider new evidence, but only the record before the hearings officer, the exceptions to proposed order and arguments concerning the proposed order and exceptions. OAR 660-045-0140(4). Thus, the public hearing on the proposed order would be limited to parties and limited parties, including the department. The hearings officer may also present the proposed order. The commission must issue a final order within 120 days of the date the enforcement proceedings were initiated. OAR 660-045-0140(3).

In order to allow time for the exceptions to be both filed and reviewed by the commission, the department recommends that the commission’s hearing be held at least three weeks after the hearings officer completes the proposed order. If the hearings officer is able to complete the proposed order in less than 30 days, the commission may be able to hold its final hearing at the January 2014 meeting. If not, it will be necessary to hold an additional meeting in early February 2014.



*\*note: The above timeline states that the final order must be issued no later than March 14, 2014. However, because a proposed order will be prepared in advance of the LCDC meeting, the department anticipates the final order can be issued shortly after the LCDC meeting.*

**IV. RECOMMENDED ACTION AND DRAFT MOTIONS**

The department recommends that the commission initiate enforcement proceedings, and delegate the appointment of the hearings officer to the director.

**Recommended motion:** I move the commission initiate enforcement proceedings under ORS 197.324(1), and direct the director to appoint a hearings officer to hold a public hearing on the matter within 45 days as required by ORS 197.328.

**Optional Motion 1:** I move the commission initiate enforcement proceedings under ORS 197.324(1), and direct the director to: (i) appoint a hearings officer to preside over pre-hearing matters and (ii) schedule a public hearing on the matter before the commission within 45 days as set forth in ORS 197.328.

**Optional Motion 2:** I move the commission initiate enforcement proceedings under ORS 197.324(1), and direct staff to schedule a public hearing on the matter before the commission within 45 days as set forth in ORS 197.328.

**Optional Motion 3:** I move that the commission decline to initiate enforcement proceedings.

**REFERENCES**

1. [ORS 197](#)
2. [ORS 221](#)
3. [2013 Continuance Order](#)
4. [2011 Continuance Order](#)
5. [Clackamas County Measure 3-433](#)