

**BEFORE THE BOARD OF COMMISSIONERS of
KLAMATH COUNTY**

**IN THE MATTER OF
FILE NUMBERS ZC 10-07 & CUP 22-07**

FINAL ORDER

WHEREAS, the Secretary to the Klamath County Planning Commission issued Final Orders for Planning Files ZC 10-07 and CUP 22-07 in proper form on August 1, 2007; and

WHEREAS, Adkins Consulting Engineers Inc, appellant and applicant for Juanita S. Fairclo (Goode) and Ewauna Park LLC, filed a timely Notice of Intent and Statement of Appeal of a Final Order (Planning File CUP 22-07) as required by Klamath County Land Development Code Article 33; and

WHEREAS, the State of Oregon Department of Transportation, appellant, filed a timely Notice of Intent and Statement of Appeal of Final Orders (Planning Files ZC 10-07 and CUP 22-07) as required by Klamath County Land Development Code (KCLDC) Article 33; and

WHEREAS, appellants requested the Klamath County Board of County Commissioners review of KCLDC zone change approval standards concerning a Transportation Impact Analysis for Planning File ZC 10-07 and the Conditional Use Permit (CUP 22-07) for a Planned Unit Development, including Conditions of Approval concerning traffic mitigation, additional and final review requirements and procedures, and interpretation of KCLDC Article 83.080(G) open space; and

WHEREAS, the Klamath County Board of County Commissioners held a properly advertised appeal hearing on September 5, 2007; and

WHEREAS, on September 5, 2007, appeal testimony by appellants and parties based on the record was considered by the Klamath County Board of County Commissioners, which Findings of Fact and Conclusions of Law in support of a decision to approve included the requested permits in accordance with Article 33 of the Klamath County Land Development Code and Comprehensive Plan; and

WHEREAS, the Klamath County Board of County Commissioners finds the Oregon Department of Transportation's (ODOT) concerns about the risk of approval of Planning Files ZC 10-07 and CUP 22-07 are not well founded as their concerns will be properly addressed by the due process that occurs between this decision to move forward and final acceptance of the site plan; and, because of the Developer's stipulation to accomplish the Transportation Impact Analysis (TIA) in cooperation with ODOT before a final site plan is approved; and, because site plan approval will be appealable; and

WHEREAS, the Klamath County Board of County Commissioners finds ODOT had sufficient time to address the TIA between the time they received the application and the decision was made but still has not responded other than to say it was unsatisfactory, at this time; and

WHEREAS, the Klamath County Board of County Commissioners finds that in the case of Planning File CUP 22-07, KCLDC Article 83.080(G) is interpreted to mean the Planned Unit Development Open Space requirement of twenty-five percent (25%), 30-acres, includes landscaping inside parking areas; and

WHEREAS, the Klamath County Board of County Commissioners considered all written and oral testimony during its deliberations, and upon a unanimous decision the Klamath County Board of County Commissioners UPHELD Planning Commission Final Order ZC 10-07 and AMENDS Planning Commission Final Order CUP 22-07 in part; and

WHEREAS, the Board of County Commissioners at the conclusion of the appeal hearing on September 5, 2007, directed staff to prepare this final written order for their signatures and timely mail notice to all parties with standing.

NOW, THEREFORE, THE BOARD OF COMMISSIONERS OF KLAMATH COUNTY ORDERS:

1. ***Klamath County Planning Commission Planning File ZC 10-07 Final Order Upheld***
2. ***Klamath County Planning Commission Planning File CUP 22-07 Final Order Amended in part, as follows:***
 - a. Delete Conditions of Approval #7 and #13 in their entirety and include a new Condition of Approval #16 to require:
 - 1) Compliance with OAR 660-012-0060; and
 - 2) Submittal of a new Transportation Impact Analysis; and
 - 3) Submittal of a Transportation Mitigation Agreement; and
 - 4) ODOT's participation in the Site Plan Review process to ensure compliance with all transportation approval requirements; and
 - 5) Site Plan Review conducted as a Final Land Use Decision, per ORS Chapter 197.
 - b. Delete Condition of Approval #11 in its entirety and include a new Condition of Approval #17 requiring the owner/developer to return for Conditions of Approval compliance review by Klamath County Planning Department staff, at a twelve (12) month interval from start of initial construction
 - c. Amend Condition of Approval #15 to read, "twenty-five percent (25%) Open Space to include landscaping and tree island areas"

Dated this 14 day of September, 2007

FOR THE BOARD OF COMMISSIONERS

John W. Elliott / approved by
Chairman
[Signature]
Chairman

William B. Brown
Commissioner
[Signature]
County Counsel
Approved as to form

NOTICE OF APPEAL RIGHTS

This decision may be appealed to the Oregon Land Use Board of Appeals (LUBA) within 21 days following the date of the mailing of this order. Contact LUBA for information as how to file this appeal (LUBA by phone 1-503-373-1265 or mail at 550 Capitol Street NE, Suite 235, Salem, Oregon 97301-2552). Failure to do so in a timely manner may affect your rights.

ZC 10-07/CUP 22-07 (PUD)

Adkins Consulting
2950 Shasta Way
Klamath Falls, OR 97603

Juanita Fairclo
6422 Hilyard Avenue
Klamath Falls, OR 97601

Michael Rudd
Brandsness, Brandsness, & Rudd
411 Pine Street
Klamath Falls, OR 97601

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Ferguson & Assoc
PO Box 1336
Bend, OR 97709

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Craig Rovzar
2031 Van Ness Avenue
Klamath Falls, OR 97601

Paula Van Glack
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Jon Jinnings
DLCD
888 NW Hill Street
Bend, OR 97701

Devin Hearing
ODOT
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Bend, OR 97701

Tim Amuchastegui
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6775 Arnold Ave
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Jennifer Berry
26200 Washburn Way
Klamath Falls, OR 97603

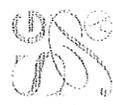
City of Klamath Falls
Jeff Ball – City Manager
226 S 5th Street
Klamath Falls, OR 97601

Filed with the county clerk and mailed to the above
this 14 day of Sept, 2007

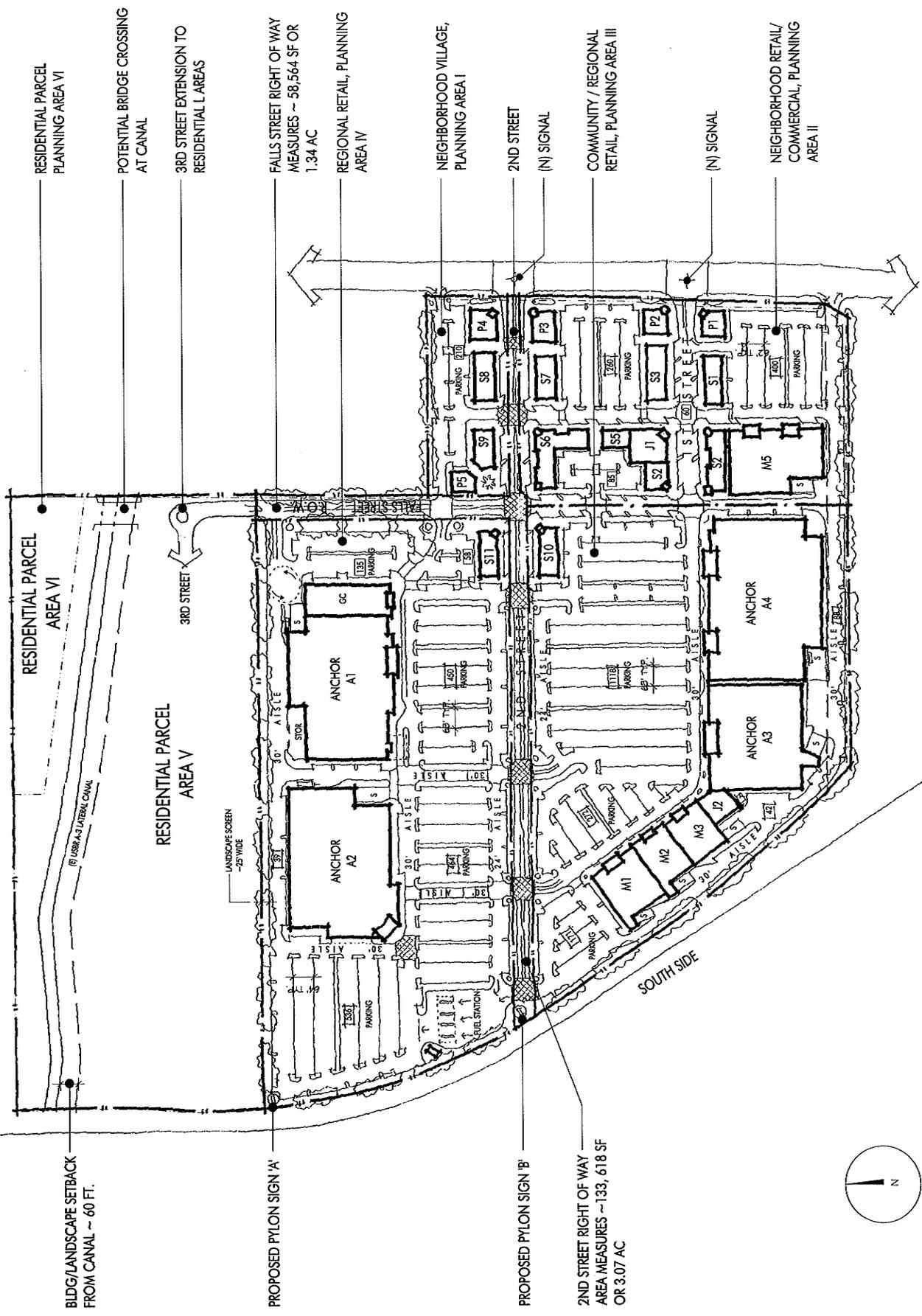
Alyssa Boles
Alyssa Boles

Subscribed and sworn to before me this
_____ day of _____, 2007.

Notary Public for Oregon



SGPA ARCHITECTURE + PLANNING
 SAN DIEGO
 SAN FRANCISCO
 LOS ANGELES
 DALLAS, HOUSTON



RESIDENTIAL PARCEL
 PLANNING AREA VI

POTENTIAL BRIDGE CROSSING
 AT CANAL

3RD STREET EXTENSION TO
 RESIDENTIAL L AREAS

FALLS STREET RIGHT OF WAY
 MEASURES ~ 58,564 SF OR
 1.34 AC

REGIONAL RETAIL, PLANNING
 AREA IV

NEIGHBORHOOD VILLAGE,
 PLANNING AREA I

2ND STREET
 (N) SIGNAL

COMMUNITY / REGIONAL
 RETAIL, PLANNING AREA III

(N) SIGNAL

NEIGHBORHOOD RETAIL/
 COMMERCIAL, PLANNING
 AREA II

RESIDENTIAL PARCEL
 AREA VI

RESIDENTIAL PARCEL
 AREA V

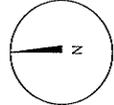
BLDG/LANDSCAPE SETBACK
 FROM CANAL ~ 60 FT.

PROPOSED PYLON SIGN 'A'

PROPOSED PYLON SIGN 'B'

2ND STREET RIGHT OF WAY
 AREA MEASURES ~ 133, 618 SF
 OR 3.07 AC

SOUTH SIDE



CONCEPTUAL SITE PLAN A.1

Shasta View Shopping Center
 KLAMATH FALLS, OREGON

CYPRESS EQUITIES
 SAN RAMON, CALIFORNIA

From: Jon JININGS
To: bocc@co.klamath.or.us, aturiel@co.klamath.or.us
Date: 9/5/2007 7:53 AM
Subject: Appeal of ZC 10-07 & CUP 22-07

Hon. Commissioners,

Commitments in NE Oregon will preclude my attendance at the appeal hearing of the cases mentioned above. Please accept this e-mail message as our testimony in support of the positions taken by the Oregon Department of Transportation (ODOT) in their Statement of Appeal dated August 15, 2007.

We are particularly concerned that authorizing intensive retail commercial uses and residential activities that would not otherwise be allowed in an Industrial zone is inconsistent with the county's comprehensive plan, development code and various aspects of state law. Please see our written comments dated July 19, 2007 for additional detail regarding these issues.

Thank you for this opportunity to comment. Please include this e-mail message in the record of this case and provide us notice of the county's decision. Again, I regret not being able to attend the hearing in person but I am looking forward to my next trip to Klamath Falls.

Respectfully,

Jon Jinings

Jon Jinings
Regional Representative
Department of Land Conservation and Development
888 NW Hill Street, Ste. 3
Bend, OR 97701
(541) 318-2890 - Office
(541) 325-6928 - Cell

From: Jon JININGS
To: lwilson@co.klamath.or.us
Date: 9/5/2007 1:48 PM
Subject: Re: Les,

I tried to send it to the boc address and copied you and Alwin.

It said that we support the positions taken by ODOT in their statement of appeal and that we are particularly concerned that approving intensive large format commercial and residential uses are not consistent with the Klamath Co. Comp Plan, Development Code and various provisions of state law.

If my earlier message has not been received could you please enter this e-mail into the record of this case and provide us notice of the county's final decision.

Thanks,

Jon Jinings

-----Original Message-----

From: "Les Wilson" <lwilson@co.klamath.or.us>
To: JININGS, Jon <JININGJ@lcd.state.or.us>

Sent: 9/5/2007 1:25:59 PM
Subject: RE: Les,

I'll check with staff - but as of writing this NOPE!

-----Original Message-----

From: Jon JININGS [mailto:Jon.Jinings@state.or.us]
Sent: Wednesday, September 05, 2007 1:00 PM
To: Les Wilson
Subject: Les,

Les,

I'm in a meeting in Ontario right now but I wanted to drop you a note to see if the county received my e-mail message on the Shasta View appeal this morning.

Thanks,

Jon



Theodore R. Kulongoski, Governor

Department of Transportation
Program and Planning
63085 N. Highway 97, Ste. 107
Bend, OR 97701
Telephone (541) 388-6388
FAX (541) 388-6361

August 13, 2007

Klamath County Board of County Commissioners
305 Main Street
Klamath Falls, OR 97601

SUBJECT: Statement of Appeal

STATEMENT OF APPEAL

Klamath County Planning Commission decision on applications ZC 10-7 and CUP 22-07 (Shasta View Shopping Center)

Klamath County Land Development Code

Article 33, Appeal of Decisions

33.040 – Statement of Appeal

No later than 7 days following the filing of a notice of appeal pursuant to Section 33.030, the appellant shall file with the Planning Department a written statement of grounds for the appeal explaining:

B. What information in the record of decision was pertinent to the decision, but was not considered by the review body.

The Oregon Department of transportation (ODOT) is appealing this decision because The Klamath County Planning Commission approved the above referenced applications, without an adequate Transportation Impact Analysis (TIA), to determine the possible impacts of the development on the area transportation system. The ODOT response to the TIA scoping letter was sent on July 12, 2007. The applicants Traffic Engineering consultant stated in the submitted TIA that "...the comments submitted by ODOT staff were received too late to be able to integrate all of ODOTs comments into the analysis."(TIA page 1/51). At the initial Klamath County Planning Commissions hearing (7/24/07) ODOT pointed out that the submitted TIA was insufficient (letter dated 7/24/07), however the Planning Commission chose to move forward and approve the development subject to conditions.

ODOT believes that the decision of the Planning Commission is premature, and that to adequately evaluate the applicant's proposal, a more thorough technical review of the transportation system is required. Unfortunately, the opportunity to adequately study (and coordinate with ODOT) has been truncated by the Planning Commission's decision.

ODOT is concerned that the Traffic Impact Analysis (TIA) prepared for the Zone Change (ZC 10-7) is deficient, in that it does not adequately address ODOT facilities and therefore are insufficient upon which to base any findings of approval¹. The project could have a significant affect on the state transportation system and the TIA is inconsistent with the Transportation Planning Rule (TPR), specifically OAR 660-012-0060. There were numerous deficiencies pointed out by ODOT (letter of 7/12/07) in the original scoping product submitted by the applicants Traffic Engineer. ODOT does not believe it is appropriate to defer adherence to the TPR to a subsequent application (CU 22-07)².

Two specific conditions of approval of the approved Conditional Use Permit CUP 22-07 address transportation facilities.

CUP 22-07 Condition #7

External roadway construction must meet development standards applicable at time of construction to mitigate safety concerns, whether identified by the applicant's Traffic Engineer, ODOT, or Klamath County Public Works and the applicant must enter into a written traffic mitigation agreement with ODOT, Klamath County and the City of Klamath Falls (if appropriate). The applicant or owner shall be responsible for all mitigation costs associated with this development.

CUP 22-07 Condition #13

Prior to start of site construction, the applicant or owner shall prior start of site construction return to the Planning Commission, in open advertised hearing, and report to the Planning Commission with regard to meeting any required traffic mitigation PUD Condition(s) of Approval. During this hearing the applicant or owner shall submit proof of a traffic mitigation agreement signed by the legal property owner, ODOT, and Klamath County, if needed. Failure to report and/or failure to meet this Commission requirement shall result in the immediate cessation of project construction or further development, until such hearing may be held and documentation provided to the Planning Commission.

¹ Plan map and zoning amendments that significantly affect a transportation facility must be consistent with the Transportation Planning Rule (TPR). Therefore findings must address Goal 12 and the TPR as they apply to all access to the subject property unless the local government restricts access by imposing conditions of approval. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

² A city may not defer its obligations to determine whether a rezoning decision will "significantly affect a transportation facility" or its decision whether to impose measures to mitigate that impact to a later date when specific development is proposed for the property, where the rezoning decision does not include a condition of approval that the transportation planning rule requirement be considered at that later stage and the city's land use regulations do not require that the transportation planning rule be considered at that later stage. *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

Findings used to support the decision defer the mitigation of traffic impacts including roadway function, mobility and safety to the time of actual site construction (CUP 22-07 condition #13). In addition, the CUP decision requires the applicant to reach an as yet to be determined mitigation program agreement with ODOT (CUP 22-07 Condition #7) prior to construction. Without an adequate TIA, it is an unreasonable burden on both the applicant and ODOT to defer an agreement on transportation mitigation to as yet unknown date. The current system may be drastically different before the applicant can reach a point in their development when an agreement with ODOT is required. It appears from the adopted condition of approval related to transportation listed above, that the Planning Commissions' intent is that a subsequent TIA be performed which identifies traffic deficiencies and proposes adequate mitigation. If this is indeed the intent of the decision, ODOT would require that ***the TIA shall adhere to all requirements of OAR 660-012-0060***. We believe that at a minimum, the Board of County Commissioners should add the OAR 660-012-0060 compliance requirements to both CUP 22-07 conditions #7 and #13.

The much broader development issues illuminated by this decision are those identified by the Oregon Department of Land Conservation and Development (DLCD) in their letter of July 19, 2007(attached). DLCD has raised several concerns to ODOT, which we believe are relevant to the appeal discussion before the Klamath County Board of County Commissioners. These include the following:

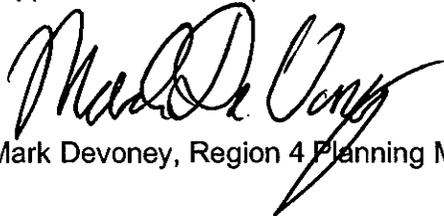
A. How the Comprehensive Plan, Klamath County Land Development Code, or applicable State law was incorrectly interpreted or applied in the decision;

- I. The decision to approve the Shasta View Shopping Center Planned Unit Development is inconsistent with the Comprehensive Plan.
 1. In this case the subject property has been designated for Industrial uses by the Klamath County Comprehensive Plan. The department is willing to agree that the county's Light Industrial Zoning district is adequate to implement an Industrial plan designation. However, relying on the county's planned unit development article, Article 83, to authorize intensive levels of retail commercial and residential development not otherwise permitted in an IL zone overreaches the uses that are legally available. Allowing intensive retail commercial and residential activities in an Industrial zone that does not otherwise permit such uses is inconsistent with the applicable Industrial Comprehensive Plan Designation.
- II. The decision to approve the Shasta View Shopping Center Planned Unit Development is inconsistent with the Klamath County Land Development Code.
 1. Article 83 includes the county's planned unit development provisions. Planned unit development provisions are common planning tools intended to provide some flexibility to encourage a better overall outcome within the scope of the comprehensive plan and applicable zoning provisions. A planned unit development can not be used to undermine the comprehensive plan. To the extent that Article 83 may provide authority to consider uses that are not expressly identified by the IL zone those uses must be consistent with the purposes of the Industrial plan and zoning designation and commensurate to support industrial activities. Retail commercial activities and stand-alone residential development are not consistent or commensurate with an Industrial plan and zoning designation.

Simply stated, Article 83 can not be interpreted to allow intensive retail commercial and residential development on lands in an Industrial plan designation and IL zoning district. Any other reading would mean that the county's IL zone cannot carry out an industrial plan designation because almost any level of retail commercial and residential development could be allowed.

- III. The decision to approve the Shasta View Shopping Center Planned Unit Development is inconsistent with State Law.
1. Statewide Planning Goal 2 (*Land Use Planning*) and ORS Chapter 197 require that the provisions of local zoning and subdivision ordinances conform to the comprehensive plan. See also *Baker v. City of Milwaukie*, 271 Or 500, 533 P2d 772 (1975). Authorizing intensive levels of retail commercial and residential development that could not otherwise be allowed on lands included in an Industrial Comprehensive Plan designation and IL Zone fails to conform to the Klamath County Comprehensive Plan.
 2. Cities and counties do have the ability to interpret local provisions that do not emanate directly from state law. Therefore, the county can interpret the provisions of Article 83. However, local governments do not enjoy limitless discretion. The county can not, for example, interpret the local program to say what it clearly does not say or in such a way as to effectively amend the comprehensive plan without engaging in the appropriate zone change procedures. Please see *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). Furthermore, the Land Use Board of Appeals will not give deference to a local government's interpretation of its comprehensive plan and land use regulations if the interpretation is inconsistent with the comprehensive plan and land use regulations or the underlying policy that forms the basis for the comprehensive plan or land use regulation. Please see ORS 197.829.
 3. The ability to site intensive retail commercial and residential development is contingent upon the subject property being placed in the proper Comprehensive Plan and Zoning designations. Converting more than two-acres from an Industrial Comprehensive Plan designation requires consideration of Statewide Planning Goal 9 (*Economic Development*) and the Goal 9 rule: OAR Chapter 660, Division 9. Specifically applicable is OAR 660-009-0010(4).

The Oregon Department of Transportation (ODOT) appeals the above referenced decision to the Klamath County Board of County Commissioners, as per the requirements of Article 33 (Appeal of Decisions), of the Klamath County Land Development Code.



Mark Devoney, Region 4 Planning Manager

CC: Alwin Turiel, Planning Director, Klamath County
Mike Stinson, Region 4, District 11 Manager
Butch Hansen, Region 4, Klamath Falls Area Manager



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

Central Oregon Regional Office

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Rural Regional Representative (541) 318-2890

Urban Regional Representative (541) 318-2899

Community Service Specialist (541) 318-8193

Fax (541) 318-8361

Web Address: <http://www.oregon.gov/LCD>

July 19, 2007

Leslie C. Wilson
Klamath County Planning Department
305 Main Street
Klamath Falls, Oregon 97601



RE: Local File ZC 10-07 proposed zoning map change from Heavy Industrial (IH) to Light Industrial (IL) and Conditional Use Permit Application.
DLCD File: AKLAM 008-07.

Mr. Wilson:

The department has conducted a review of the file referenced above. The subject property includes about 120-acres located in an unincorporated portion of the Klamath Falls urban growth boundary. The subject property is adjacent to Washburn Way along its eastern boundary and the Southside Expressway on its west side. It is our understanding that the subject property is included in an Industrial comprehensive plan designation that is implemented by a Heavy Industrial (IH) zoning district. The proposal before the county seeks to retain the property's Industrial comprehensive plan designation while converting the applicable zoning from IH to Light Industrial (IL). The proposal also includes a conditional use application requesting approval of a planned unit development.

Our review of the county's IL zone shows it to be a relatively common industrial zoning district generally focusing on industrial activities that can occur within an enclosed building with limited external impacts. Some ancillary uses may be authorized but non-industrial activities are limited. No opportunities for commercial sales activities are provided beyond what might ordinarily be expected in a light industrial zone (Agricultural Supplies, Building and Garden Sales, Manufactured Dwelling Sales, etc...). Residential opportunities are restricted to employee housing (worker residential) that may be considered as a conditional use.

As we continued to read the materials provided for our review it became apparent that the applicant is not seeking a zone change to pursue approval for light industrial uses. Instead it appears that the entire zone change proposal is motivated by the fact that the county's planned unit development article (Article 83; Klamath County Development Code) is available in the IL zone but not in the IH zone. There seems to be a presumption that Article 83 will allow the county to consider uses beyond those listed in the IL zone regardless of the applicable comprehensive plan and zoning designations.

It is our understanding that if the property is rezoned to IL, the applicant is proposing to utilize Article 83 to authorize intensive levels of retail commercial and residential development, uses not otherwise allowed in the IL zone. Section 5. of the conditional use application provided for our review states:

“This development will consist of various sized facilities ranging up to 150,000 square feet, to accommodate light industrial, commercial, professional, tourist and transportation needs. Users will include emerging businesses, warehousing, large retail stores, restaurants, professional offices and services, tourist accommodations, care facilities, mixed residential and medical services.”

Conceptual Site Plan A.1. offers a visual representation of how the language cited above would be carried out on the ground. We note the title of Shasta View Shopping Center and the decided appearance of a regional retail commercial center. We understand that the four “anchor” buildings shown on the site plan are intended to be occupied by big box retail tenants. We also notice that about 35-acres in the northern most portion of the property appear to be designated for residential development. Simple assumptions regarding residential densities and estimating deductions for the presence of the Lateral Canal and infrastructure requirements suggest that 90-135 homes or more could be sited at this location.

We are left to assume that the applicant is requesting the zone change from IH to IL and the conditional use application containing the planned unit development request be reviewed concurrently. If the zone change is approved the county decision makers will then turn immediately to the matter of the planned unit development.

The department believes this case involves two fundamental questions. First, should the property be rezoned from IH to IL? The department is not necessarily troubled by the notion of adjusting from one industrial zoning category to another. Both the IH and IL zoning districts have been designed to carry out an Industrial comprehensive plan classification and focus on allowing industrial uses. Both zoning districts have been designed to accommodate employment creating industry for the benefit of Klamath County citizens. We do, however, urge the county to coordinate closely with the city of Klamath Falls to ensure that an adequate balance of industrial land opportunities is available in the Klamath Falls urban area.

The second and more important question is how does the county’s planned unit development article, Article 83, apply to lands zoned IL and what effect, if any, does it have on uses permitted in the IL zone? The information provided for our review shows that the applicant is also requesting conditional use approval for a planned unit development proposal that relies on several very large retail facilities to anchor an assortment of smaller commercial activities with a significant portion of the property designated for residential uses. This approach causes the department several concerns; please accept the following comments.

Consistency with the Comprehensive Plan

Local planning programs are based on a comprehensive plan and zoning provisions that implement the comprehensive plan. Longstanding case law has established that zoning provisions must be consistent with the comprehensive plan and that the plan is the controlling document should any conflict arise between the two.

In this case the subject property has been designated for Industrial uses by the Klamath County Comprehensive Plan. The department is willing to agree that the county's Light Industrial Zoning district is adequate to implement an Industrial plan designation. However, we are concerned that relying on the county's planned unit development article, Article 83, to authorize intensive levels of retail commercial and residential development not otherwise be permitted in an IL zone overreaches the uses that are legally available. Allowing intensive retail commercial and residential activities in an Industrial zone that does not otherwise permit such uses is inconsistent with the applicable plan and zoning designations. In this case, the Industrial plan designation must prevail.

We have reviewed Article 83, which includes the county's planned unit development provisions. Planned unit development provisions are common planning tools intended to provide some flexibility to encourage a better overall outcome within the scope of the comprehensive plan and applicable zoning provisions. A planned unit development can not be used to undermine the comprehensive plan. To the extent that Article 83 may provide authority to consider uses that are not expressly identified by the IL zone those uses must be consistent with the purposes of the Industrial plan and zoning designation and commensurate to support industrial activities. Retail commercial activities and stand-alone residential development are not consistent or commensurate with an Industrial plan and zoning designation.

Cities and counties do have the ability to interpret local provisions that do not emanate directly from state law. Therefore, the county can interpret the provisions of Article 83. However, local governments do not enjoy limitless discretion. The county can not, for example, interpret the local program to say what it clearly does not say or in such a way as to effectively amend the comprehensive plan without engaging in the appropriate zone change procedures. Please see *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). Furthermore, the Land Use Board of Appeals will not give deference to a local government's interpretation of its comprehensive plan and land use regulations if the interpretation is inconsistent with the comprehensive plan and land use regulations or the underlying policy that forms the basis for the comprehensive plan or land use regulation. Please see ORS 197.829. The department does not believe that interpreting Article 83 in the manner proposed would pass muster under *Clark* or ORS 197.829.

Local Review Criteria

Article 47 of the Klamath County Development Code includes review criteria for a quasi-judicial zone change application. Specific criteria enumerated at section 47.030.B. must be satisfied before a change of zone designation may be approved. The material provided for our review does not include any response to section 47.030.B.

Planned Unit Development proposals must satisfy the review criteria included at section 83.090. The material provided for our review does not seem to include any response to section 83.090.

Transportation Planning Rule (TPR)

Amending the county comprehensive plan or land use regulations could have the potential to impact the transportation system. The Transportation Planning Rule, otherwise known as the "TPR" describes how local governments must consider the potential for impacts to the transportation system. Please see OAR 660-012-0060. The material provided for our review does not include any response to the TPR.

Conclusion

In conclusion, the department believes it could be possible to rezone the property from IH to IL while remaining consistent with the Klamath County Comprehensive Plan. However, we do not agree that Article 83 can be interpreted to allow intensive retail commercial and residential development on lands in an Industrial plan designation and IL zoning district. Any other reading would mean that the county's IL zone cannot carry out an industrial plan designation because almost any level of retail commercial and residential development could be allowed. In other words, applying the IL zone would be inconsistent with an Industrial comprehensive plan designation. If this were the case, property would need to be included in a commercial and/or residential comprehensive plan designation in order for the IL zone to be applied. While this situation would be confusing enough for future applicants it would also raise questions regarding current areas included in an Industrial plan classification and IL zoning district.

If the county believes the subject property is an appropriate location for intensive retail commercial and residential development the correct course of action would be to amend the subject property's comprehensive plan designation and applicable zoning. This would require coordination with the city of Klamath Falls as well as adequate consideration of Statewide Planning Goal 9 (*Economic Development*) and the Goal 9 rule: OAR Chapter 660, Division 9.

Thank you for providing this opportunity to comment. Please submit these comments into the record for these proceedings and provide us with a copy of the decision. If additional information is provided at the hearing please keep the record open so that we may review the new information and comment if necessary.

Please contact me if you would like to discuss the content of this letter or if you have any questions. I can be reached directly at (541) 318-2890, or by e-mail at jon.jinings@state.or.us.

Respectfully,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Jon Jinings
Regional Representative

Cc: Sandra Zaida, City of Klamath Falls
Lane Shetterly, DLCD
Darren Nichols, DLCD
Mark Radabaugh, DLCD
Larry Ksionzyk, DLCD
Bob Cortright, DLCD
Matt Crall, DLCD
Norman C. Hanson, ODOT