



# Oregon

John A. Kitzhaber, M.D., Governor

## Department of Land Conservation and Development

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January 11, 2013

TO: Land Conservation and Development Commission

FROM: Jim Rue, Director  
Jennifer Donnelly, Metro Area Regional Representative

SUBJECT: **Agenda Item 1 – January 24, 2013 LCDC Meeting**

### CITY OF DAMASCUS ACKNOWLEDGMENT OF COMPLIANCE

#### **I. AGENDA ITEM SUMMARY**

The city is out of compliance with the compliance schedule the commission approved. Currently the city is out of compliance with the following elements of the compliance schedule, all due in November 2012:

- Adopt a 20-year population forecast that is coordinated with Metro and that complies with Goal 14, OAR 660-024-0030, ORS 195.025 and ORS 195.036;<sup>1</sup>
- Adopt a residential buildable lands inventory that complies with Goal 10; OAR chapter 660, division 7; and ORS 197.295; and
- Adopt a 20-year housing needs analysis that complies with Goal 10; OAR chapter 660, division 7; ORS 197.295; and ORS 197.303.
- Adopt a transportation systems plan that complies with OAR chapter 660, division 12;
- Ensure that all lands within the urban growth boundary have urban plan designations consistent with need determinations, in compliance with Goal 14 and OAR 660-024-0050(6).
- Ensure that all lands within the urban growth boundary are zoned either 1) for urban use, or 2) to manage their use and division in a manner that maintains their potential for planned urban development until appropriate public facilities and services are available or planned, by either retaining the rural zoning or by adopting interim zoning, in compliance with Goal 14 and OAR 660-024-0050(6).

On January 9, 2013, the department received a request to extend the deadline for all non-completed tasks to January 2014. This request includes the above tasks as well as the public

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<sup>1</sup> The city provided a progress report on January 8, 2013 (Attachment C). This report indicates the city “approved” a population forecast in November 2012. The forecast will need to be adopted with the comprehensive plan.

facilities plan (due September 2013). A copy of the city's request is included in the agenda packet.

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

The commission will decide whether to direct staff to initiate enforcement proceedings under ORS 197.320(11) under 197.065.

**B. Staff Contact Information**

If you have questions about this report or the city's acknowledgment, please contact DLCD Metro Regional 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 department recommends that the commission amend the compliance schedule dates for November 2012 to August 2013 and initiate enforcement if this date is not satisfied. See Section IV of this report.

**III. BACKGROUND & ANALYSIS**

**A. Past Actions**

The City of Damascus incorporated in November 2004. ORS 197.757 requires newly incorporated cities to have comprehensive plans and land use regulations acknowledged no later than four years after the date of incorporation. The commission has sole authority under ORS 197.251(1) to acknowledge comprehensive plans and land use regulations as being in compliance with the statewide planning goals. Below is a timeline of actions following the Damascus incorporation:

- The City of Damascus incorporated by a vote of the people on November 2, 2004.
- The department director granted the city a one-year extension in November 2008.
- The commission approved a compliance schedule for completion of the comprehensive plan and implementing ordinances at the commission's January 20-22, 2010 meeting.
- The city held its first evidentiary hearing of its comprehensive plan on October 26, 2010.
- The city council adopted Damascus' first comprehensive plan and plan map on December 15, 2010.
- The city submitted its notice of adoption for the plan and the plan map to DLCD on December 16, 2010. The city had planned to submit its comprehensive plan in two

phases. This first phase was to address the Damascus 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.

In April 2011, the commission reviewed the request for acknowledgement by the city for its first comprehensive plan. The commission accepted Goals 1, 3, 4 and 13 of the plan and set out a compliance schedule for Goals 2, 5, 6, 7, 8, 9, 10, 11, 12 and 14 as authorized by ORS 197.251(10) (Attachment A). The compliance schedule lists the tasks Damascus must complete, including a generalized time schedule showing when the tasks are to be completed. In May 2011 the adopted comprehensive plan was overturned by city referendum. The commission had merely "accepted" the plan as complying with Goals 1, 3, 4 and 13 because acknowledgment cannot be granted until the plan is complete. 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.

In March 2012, the citizens of Damascus passed an initiative (Measure 3-389), which added the following new section to the city charter:

Section 7. Additional Powers Retained by Citizens. After March 1, 2011, the council shall not submit any ordinance or plan to Metro, the L.C.D.C., the D.L.C.D. 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.

The department has provided Damascus with \$300,000 in planning grants for development of the comprehensive plan and implementing codes necessary for acknowledgment.

The city has moved forward with consideration of elements of its comprehensive plan, and is now targeting August 2013 for the adoption of a new comprehensive plan which would be referred to the voters at the November 2013 election.<sup>2</sup> During the city's update to the commission in September 2012, the city's planning director reported that if the November vote does not result in an approved plan, there will be another opportunity in the spring to take the revised work to the voters for approval before the ultimate June 2014 deadline in the compliance schedule.

Several tasks were due in 2011 and June 2012. The city completed the work required for those items on the compliance schedule. Adoptions of plan elements regarding a population forecast, housing and employment needs, transportation, and plan map designation and preliminary zoning for the city were due in November 2012. The city has not completed the tasks, but has now asked for an amendment to the compliance schedule to delay these tasks (as well as any other task due in 2013) to January 2014 (Attachment C).

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<sup>2</sup> As above, the city charter now requires that any ordinances adopting a comprehensive plan be approved by the voters.

## **B. Enforcement Procedures**

If the commission has good cause to believe that Damascus is not making satisfactory progress toward its compliance schedule, then the commission shall issue an order requiring Damascus to take action necessary to come into compliance (ORS 197.320(3)). The commission may initiate such a proceeding on its own motion (ORS 197.324(1)). The relevant statutory and rule provisions are provided in Attachment B.

Once the commission initiates an enforcement proceeding, it may hold a hearing itself to consider the enforcement order or it may appoint a hearings officer (ORS 197.328(1)). Once the commission initiates the proceeding, the commission or the hearings officer must hold a public hearing within 45 days (ORS 197.328(2)). If the commission appoints a hearings officer, the hearings officer's proposed order must be delivered to the commission and other parties involved no more than 30 days after the hearing (ORS 197.328(3)). The commission then must itself hold a hearing on the record, and adopt a final enforcement order (ORS 197.328(4)). The entire process must be completed within 120 days of the initial commission decision to initiate the enforcement proceeding (ORS 197.328(5)).

The hearings officer or commission hearing must be conducted under the provisions of ORS chapter 183 applicable to contested cases (ORS 197.328(1)). This requires a series of procedural steps, including proper notice of the hearing (ORS 183.413 and 183.415), specific and detailed rules for the conduct of the hearing (ORS 183.417), allowance of the commission or parties involved to subpoena witnesses (ORS 183.440), rules of evidence, including allowance of cross-examination (ORS 183.450), rules regarding representation of the agency and other parties (ORS 183.452 and 183.457), and limitations and disclosure of ex-parte (outside of the scope of the hearing) contacts between the hearings officer or commissioners and the parties (ORS 183.462).

OAR chapter 660, division 45 also contains specific rules for the commission to follow in conducting an enforcement proceeding, which follow the requirements of ORS Chapter 183 for contested cases. Of particular note is the option of the commission to hold the primary hearing itself, but delegate to a hearings officer pre-hearing matters, including, but not limited to, notice, party and limited party status, discovery, and pre-hearing conferences (OAR 660-045-0100(6)). The commission's order must set forth in detail the nature of the city's non-compliance with the statewide planning goals, and the corrective action decided upon by the commission (ORS 197.335(1)).

## **C. Department Analysis**

The commission should consider whether the city is making "satisfactory progress toward performance of its compliance schedule." The final tasks in the compliance schedule are not due until June 2014, which may give the appearance that the city has ample time to complete the tasks that have become overdue, but these interim tasks are building blocks that must be completed in order for the city to complete later tasks in a timely manner.

The commission has provided a liberal allowance of time for the city to complete the transportation system plan, public facilities plan, buildable lands inventory and housing needs analysis. The city's own timetable indicates it will not be completed until July 2013, almost a

year after the compliance schedule requirement. The city is making what the department believes is a good-faith effort toward completing the plan, but the voting requirement in the city charter does not permit assurance that these efforts will ultimately lead to implementation of a goal-compliant comprehensive plan. Similarly, the department is not convinced that immediate initiation of enforcement proceedings will have a positive impact on eventual endorsement of a plan.

The options staff has identified for the commissions consideration at this time are:

1. Determine the city is making adequate progress toward performance and amend the compliance schedule to reflect new submittal dates that are acceptable to the commission (such as the August 2013 recommended by staff, or the January 2014 date requested by the city);
2. Determine the city is not making adequate progress and either:
  - a. Initiate enforcement under ORS 197.324(1); or
  - b. Amend the compliance schedule to allow the city to complete its current planning efforts and direct the department to initiate enforcement at a date certain if the city has not performed.

Regarding enforcement (option 2.a), the commission has a wide range of remedies available to it, as set forth in ORS 197.335(1)(c) and 197.335(3). The department is not prepared at this time to provide practical options for remedying the city's noncompliance through enforcement. The facts and nature of this case are different than any other enforcement proceeding the commission has entertained in the past, so past orders do not provide a model to follow. The nature of enforcement actions will be determined through the hearings process in any case (not at initiation) so the commission does not need to know the outcome in order to initiate enforcement.

This leads to option 2.b, which gives the city more time to comply, but with full knowledge that this is the last extension. The extension would also give the commission and department an opportunity to more fully consider the range of possible outcomes of an enforcement proceeding prior to initiation, should it become necessary.

#### **IV. RECOMMENDED ACTION AND DRAFT MOTIONS**

The department recommends that the commission direct staff to amend the compliance schedule deadlines from November 2012 to August 2013 for city council adoption, and to initiate enforcement proceedings if the city has not submitted the required materials. Additionally, the department recommends the commission direct staff to bring a thorough analysis of enforcement options to the May 2013 commission meeting for consideration.

This action will allow the city an opportunity to complete the local process described during its September 2012 update to the commission. Staff believes that making the city council adoption, rather than the result of a popular vote, the operative action for avoiding enforcement is appropriate for several reasons. First, if the city has not adopted the comprehensive plan and

implanting regulations by August 2013, it will not be able to refer the ordinances to the voters for the November 2013 election. And, because the new charter provision requires a double-majority vote (for non-November elections), it is unlikely that the city could conduct another election in sufficient time to meet the final June 2014 deadline. Second, it is the city council adoption that required by the relevant statutes and rules (recognizing, however, that to be effective, the decision must be ratified by the voters).

***Recommended motion:*** I move the commission direct staff to amend the city of Damascus compliance schedule to extend the current November 2012 deadlines to August 2013 for city council adoption, to initiate enforcement proceedings if the city has not submitted the required materials by the end of August 2013, and to provide the commission with additional analysis of enforcement options at its May 2013 meeting.

***Optional motion 1:*** I move the commission direct staff to amend the city of Damascus compliance schedule to extend the current November 2012 deadlines to August 2013 [or some other date no later than June 2014].

***Optional motion 2:*** I move the commission direct staff to initiate enforcement proceedings under ORS 197.324(1) and select a hearings officer to hold a public hearing on the matter within 45 days as set forth in ORS 197.328.

***Optional motion 3:*** I move the commission direct staff to initiate enforcement proceedings under ORS 197.324(1) and schedule a public hearing before the commission on the matter within 45 days as set forth in ORS 197.328.

## **ATTACHMENTS**

- A. Compliance schedule approved by LCDC in 2011
- B. Cited regulations regarding enforcement
- C. Damascus comprehensive plan status report and request for extension

**WORK PROGRAM FOR DAMASCUS ACKNOWLEDGEMENT**

The work program is based on the record the City of Damascus submitted to the Department of Land Conservation and Development for acknowledgement. Any modifications to the goals will be reviewed for compliance with the statewide planning goals. Modifications to the “accepted” sections of the goals will be reviewed again for compliance with that goal.

<b>GOAL</b>	<b>COMPLIANCE TASKS</b>	<b>COMPLETION DATE</b>
<b>Goal 2</b>	Adopt development standards and implementing ordinance for the Damascus Comprehensive Plan. Once Damascus adopts implementing ordinances and adequately addresses Goals 5, 6, 7, 8, 9, 10, 12, and 14 (listed below), the Damascus comprehensive plan will comply with Goal 2.	<b>June 2014</b>
<b>Goal 5</b>	The city shall complete an inventory of significant scenic views and sites; and shall complete an ESEE analysis for significant views and sites.  Adopt goal 5 implementing ordinances.	<b>December 2011</b>  <b>June 2014</b>
<b>Goal 6</b>	The city shall work with DEQ on a TMDL implementation plan and water quality issues.  The city shall further develop their goal 6 chapter with the data and findings in the city’s public facilities master plan, when it is completed.  The city shall adopt goal 6 implementing ordinances.	<b>June 2012</b>  <b>June 2012</b>  <b>June 2014</b>
<b>Goal 7</b>	The city shall adopt goal 7 implementing ordinances.	<b>June 2014</b>
<b>Goal 8</b>	The city shall complete an inventory of recreational resources and incorporate proposed goals and polices into the implementing ordinances.  The city shall adopt goal 8 implementing ordinances.	<b>June 2012</b>  <b>June 2014</b>
<b>Goal 9</b>	The city shall adopt a suitable land development code and implementing ordinances that support and facilitate economic development in the city.  The city shall reconsider or make findings about the availability of sites for heavy industrial activity.	<b>June 2014</b>  <b>June 2012</b>

<b>Goal 10</b>	<p>Adopt a 20-year population forecast that is coordinated with METRO and that complies with Goal 14, OAR 660-024-0030, ORS 195.025, and ORS 195.036.</p> <p>Complete and adopt a residential Buildable Lands Inventory (BLI) that complies with Goal 10, OAR chapter 660, division 7, and ORS 197.295.</p> <p>Complete and adopt a 20-year housing needs analysis (HNA) that complies with Goal 10, OAR chapter 660, division 7, ORS 197.295, and ORS 197.303. The HNA shall be based on an overall residential density of eight or more dwelling units per net buildable acre for new construction, consistent with OAR 660-007-0035.</p> <p>Complete and adopt a 20-year residential lands needs analysis (RLNA) that complies with Goal 10, OAR chapter 660, division 7, ORS 197.295, ORS 197.307, ORS 197.312, ORS 197.314, ORS 197.475, ORS 197.480, ORS 197.485, and ORS 197.660 through 197.670. The RLNA shall be based on an overall residential density of eight or more dwelling units per net buildable acre for new construction, consistent with OAR 660-007-0035. The RLNA shall designate sufficient buildable land to provide the opportunity for at least 50% of new residential units to be attached single family housing or multiple families housing, consistent with OAR 660-007-0030.</p> <p>Complete and adopt implementing land use/development regulations, zoning map, revised comprehensive plan map, and revised residential plan policies to designate, zone, and govern development on residential lands within the urban growth boundary for 1) housing consistent with the HNA and RLNA, and 2) non-residential uses permitted in residential zones, if any, consistent with 20-year urban needs.</p> <p>Adopt all of the above-described documents, except for land use/development regulations, into the city's comprehensive plan.</p>	<p><b>November 2012</b></p> <p><b>November 2012</b></p> <p><b>November 2012</b></p> <p><b>June 2014</b></p> <p><b>June 2014</b></p> <p><b>June 2014</b></p>
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<p><b>Goal 11</b></p>	<p>Revise the public facilities plan to comply with Goal 11, OAR chapter 660, division 11, and the city’s adopted coordinated 20-year population forecast. Adopt the revised public facilities plan into the city’s comprehensive plan.</p> <p>Prepare and adopt implementing ordinances that address the provision of water, sanitary sewer, storm water, and transportation facilities and services consistent with the revised public facilities plan and with the land use designations in the urban growth boundary.</p>	<p><b>September 2013</b></p> <p><b>June 2014</b></p>
<p><b>Goal 12</b></p>	<p>The city shall adopt a Transportation Systems Plan (TSP) that meets OAR 660-12.</p> <p>The city shall adopt goal 12 implementing ordinances.</p>	<p><b>November 2012</b></p> <p><b>June 2014</b></p>
<p><b>Goal 14</b></p>	<p>Adopt a 20-year population forecast that is coordinated with METRO and that complies with Goal 14, OAR 660-024-0030, ORS 195.025, and ORS 195.036.</p> <p>Coordinate with the applicable school district or districts to prepare and adopt a school facilities plan for the urban growth boundary consistent with ORS 195.110 and the city’s comprehensive plan. Adopt the school facilities plan into the city’s comprehensive plan.</p> <p>Ensure that all lands within the urban growth boundary have urban plan designations consistent with need determinations, in compliance with Goal 14 and OAR 660-024-0050(6).</p> <p>Ensure that all lands within the urban growth boundary are zoned either 1) for urban use, or 2) to manage their use and division in a manner that maintains their potential for planned urban development until appropriate public facilities and services are available or planned, by either retaining the rural zoning or by adopting interim zoning, in compliance with Goal 14 and OAR 660-024-0050(6).</p> <p>Work with department staff to revise transition and urbanization plan policies for consistency with Goal 14. Adopt revised policies into the city’s comprehensive plan.</p>	<p><b>June 2014</b></p> <p><b>June 2014</b></p> <p><b>November 2012</b></p> <p><b>November 2012</b></p> <p><b>Update the commission in December 2011 – adopt revised policies</b> <b>June 2014</b></p>

<p>Other</p>	<p>The City of Damascus will provide status reports approximately every six months to the Land Conservation and Development Commission until they have an acknowledged Comprehensive Plan and implementing ordinances adopted. The updates may be written reports that DLCD staff can present to the commission or part of the director's report. The first update should be a detailed outline of how the City intends to transition from rural to urban.</p>	<p><b>December 2011</b> – update on transition from rural to urban development</p> <p><b>April 2012</b> – progress update on comp plan adoption</p> <p><b>October 2012</b> - progress update on comp plan adoption</p> <p><b>April 2013</b> - progress update on comp plan adoption and implementing ordinances</p> <p><b>October 2013</b> – LCDC acknowledgment of the Comprehensive Plan</p> <p><b>April 2014</b> – LCDC acknowledgment review of implementing ordinances</p>
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**CITED REGULATIONS REGARDING ENFORCEMENT**

**197.250 Compliance with goals required.** Except as otherwise provided in ORS 197.245, all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special district shall be in compliance with the goals within one year after the date those goals are approved by the Land Conservation and Development Commission.

**197.320 Power of commission to order compliance with goals and plans.** 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;

\* \* \*

**197.324 Proceedings prior to order of compliance with goals; disclosure notice.** (1) 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.

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**197.328 Procedures to consider order to comply with goals.** 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 chapter 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 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.

**197.335 Order for compliance with goals; review of order; withholding grant funds; injunctions.** (1) An order issued under ORS 197.328 and the copy of the order mailed to the

local government, state agency or special district shall set forth:

(a) The nature of the noncompliance, including, but not limited to, the contents of the comprehensive plan or land use regulation, if any, of a local government that do not comply with the goals or the contents of a plan, program or regulation affecting land use adopted by a state agency or special district that do not comply with the goals. In the case of a pattern or practice of decision-making which violates the goals, comprehensive plan or land use regulations, the order shall specify the decision-making which constitutes the pattern or practice, including specific provisions the Land Conservation and Development Commission believes are being misapplied;

(b) The specific lands, if any, within a local government for which the existing plan or land use regulation, if any, does not comply with the goals; and

(c) The corrective action decided upon by the commission, including the specific requirements, with which the local government, state agency or special district must comply. In the case of a pattern or practice of decision-making that violates an acknowledged comprehensive plan or land use regulation, the commission may require revisions to the comprehensive plan, land use regulations or local procedures which the commission believes are necessary to correct the pattern or practice. Notwithstanding the provisions of this section, except as provided in subsection (3)(c) of this section, an enforcement order does not affect:

(A) Land use applications filed with a local government prior to the date of adoption of the enforcement order unless specifically identified by the order;

(B) Land use approvals issued by a local government prior to the date of adoption of the enforcement order; or

(C) The time limit for exercising land use approvals issued by a local government prior to the date of adoption of the enforcement order.

(2) Judicial review of a final order of the commission shall be governed by the provisions of ORS chapter 183 applicable to contested cases except as otherwise stated in this section. The commission's final order shall include a clear statement of findings, which set forth the basis for the order. Where a petition to review the order has been filed in the Court of Appeals, the commission shall transmit to the court the entire administrative record of the proceeding under review. Notwithstanding ORS 183.482 (3) relating to a stay of enforcement of an agency order, an appellate court, before it may stay an order of the commission, shall give due consideration to the public interest in the continued enforcement of the commission's order and may consider testimony or affidavits thereon. Upon review, an appellate court may affirm, reverse, modify or remand the order. The court shall reverse, modify or remand the order only if it finds:

(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal, modification or remand unless the court shall find that substantial rights of any party were prejudiced thereby;

(b) The order to be unconstitutional;

(c) The order is invalid because it exceeds the statutory authority of the agency; or

(d) The order is not supported by substantial evidence in the whole record.

(3)(a) 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 the Department of Land Conservation and Development before the local decision becomes final.

(b) Any requirement under this subsection may be imposed only if the commission finds that the activity, if continued, aggravates the goal, comprehensive plan or land use regulation violation and that the requirement is necessary to correct the violation.

(c) The limitations on enforcement orders under subsection (1)(c)(B) of this section shall not be interpreted to affect the commission's authority to limit, prohibit or require application of specified criteria to subsequent land use decisions involving land use approvals issued by a local government prior to the date of adoption of the enforcement order.

(4) 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 so do by the commission or its designee. The commission may retain a portion of the withheld revenues to cover costs of providing services incurred under the 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.

(5)(a) As part of its order under this section, the commission may notify the officer responsible for disbursing funds from any grant or loan made by a state agency to withhold such funds from a special district to which the order is directed. The officer responsible for disbursing funds shall withhold funds as outlined in this section and shall release funds to the special district or department when notified to do so by the commission.

(b) The commission may retain a portion of the funds withheld to cover costs of providing services incurred under the 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 special district upon completion of the requirements of the commission order.

(6) The commission may institute actions or proceedings for legal or equitable remedies in the Circuit Court for Marion County or in the circuit court for the county to which the commission's order is directed or within which all or a portion of the applicable city is located to enforce compliance with the provisions of any order issued under this section or to restrain violations thereof. Such actions or proceedings may be instituted without the necessity of prior agency notice, hearing and order on an alleged violation.

**197.757 Acknowledgment deadline for newly incorporated cities.** 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.

**DIVISION 45**

**CITIZEN-INITIATED ENFORCEMENT ORDERS**

**660-045-0000**

**Purpose**

The purpose of this division is to establish uniform procedures for citizen-initiated enforcement orders, as provided in ORS 197.319 to 197.335 and 197.646.

**660-045-0010**

**Applicability**

OAR 660-045-0000, -0030 to -0090, and -0160 apply only to enforcement orders requested by a citizen petition in accordance with ORS 197.319; they do not apply to enforcement orders initiated by the Land Conservation and Development Commission in accordance with ORS 197.324(1). OAR 660-045-0020 (definitions), 660-045-0100 to -0150 (on contested-case hearings), and 660-045-0170 to -0180 (on terminating enforcement orders) apply to all types of enforcement orders.

**660-045-0020**

**Definitions**

- (1) Affected local government or district means a local government, as defined in ORS 197.015(13), or a special district, as defined in ORS 197.015(19), against which a requester seeks an enforcement order.
- (2) Commission means the Land Conservation and Development Commission.
- (3) Corrective action means an action sought by a requester or required of an affected local government or district by an enforcement order under ORS 197.335(1)(c). The term includes revisions to an affected local government or district's comprehensive plan, land use regulations, special district cooperative agreement, urban service agreement, or decision-making process. A corrective action is the remedy for the noncompliance specified by an enforcement order.
- (4) Department means the Department of Land Conservation and Development.
- (5) Enforcement order means a final order adopted by the commission in accordance with the provisions of ORS 197.319 to 197.335 and 197.646.
- (6) Interim measure means a temporary measure required of an affected local government or district by an enforcement order in accordance with ORS 197.335(3) to 197.335(5). An interim measure is one in effect only while an affected local government or district is bringing itself into compliance with an enforcement order. Interim measures include (but are not limited to) limitations on land use permits, withholding of state-shared revenues, and review of local land use decisions by a hearings officer or by the department.
- (7) Mail means to convey a document by any of the following means: first-class mail via the United States Postal Service, if verified with a certificate of mailing; certified or registered mail

via the United States Postal Service; delivery by commercial carrier, if the carrier guarantees delivery within three days and issues a receipt of transmittal. As used in this division, the word mail does not include the transmitting of documents by facsimile (fax), electronic mail (e-mail), or telephone.

(8) Mediation means a process in which a collaborative dispute resolution provider, as defined in OAR 137-001-0005(4), assists the requester and the affected local government or district in reaching a mutually acceptable resolution of issues raised in a petition for enforcement. Mediation is a voluntary process available to parties at any stage of an enforcement proceeding.

(9) Noncompliance means a state of not being in compliance with a currently applicable comprehensive plan, land use regulation, special district cooperative agreement, urban growth management agreement, goal, rule, or other regulation or agreement, as described in ORS 197.320(1) to 197.320(10) or in ORS 197.646. The term includes a failure to comply with applicable case law in making a land use decision. The term includes a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. Noncompliance is the problem that an enforcement order seeks to eliminate through corrective action.

(10) Pattern of decision making means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:

(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and

(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date.

(11) Practice of decision making means a series or succession of decisions with these characteristics:

(a) The decisions involved the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

(b) The decisions involved the same or similar geographic areas, plan designations, zones, or types of land use; and

(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040.

(12) Requester means a person as defined in ORS 197.015(18) who seeks an enforcement order under ORS 197.319 to 197.335.

(13) Year means any period of 365 consecutive days.

Stat. Auth.: ORS 183 & ORS 197

Stats. Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646

Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98

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**660-045-0100**

**Arranging the Contested-Case Hearing**

(1) A contested-case hearing on a petition for enforcement shall be conducted before a hearings officer appointed by the commission, unless the commission decides to conduct the hearing itself.

(2) When a hearings officer conducts a hearing, the commission shall delegate all its authority regarding the contested case to the hearings officer, except for its authority to act on the hearing officer's proposed order.

(3) If the commission decides to have a hearings officer conduct the hearing, the hearings officer shall set a date for that hearing. The act of setting such a date must be done within 45 days of the date when the petition was received by the department.

(4) If the commission decides that it will conduct the hearing itself, the department shall set a date for that hearing. The act of setting such a date must be done within 45 days of the date when the petition was received by the department.

(5) The commission may delegate to the department the responsibility for appointing a hearings officer.

(6) The department shall appoint a hearings officer to preside over pre-hearing matters, including, but not limited to, notice, party and limited party status, discovery, and pre-hearing conferences.

**660-045-0110**

**Notice of the Contested-Case Hearing**

(1) The department or hearings officer must mail notice of the contested-case hearing to the requester, affected local government or district, mediator (if any), and any other person who has requested notice.

(2) The notice required in Section 1 shall contain the following:

(a) The date, time, and place of the hearing;

(b) A statement of the authority under which the hearing is to be held;

- (c) A reference to the specific provisions of the statutes and rules involved;
- (d) A short, plain statement of the matters asserted or charged;
- (e) A statement that, pursuant to ORS 183.457, parties and limited parties to the proceedings may be represented by an attorney or an authorized representative, subject to the other requirements of ORS 183.457 and OAR 137-003-0008;
- (f) A statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case, will automatically become part of the contested-case record upon default for the purpose of proving a prima facie case (per OAR 137-003-0001(1)(a));
- (g) A statement containing the following information about mediation:
  - (A) That mediation is available as an alternative to a contested-case hearing, if requested by both the requester and the affected local government or district;
  - (B) That DLCD will provide mediation services;
  - (C) That choosing to enter into mediation will not affect one's right to a contested-case hearing if the matter is not resolved through mediation;
  - (D) The date by which both parties must request mediation.

**660-045-0120**

**Participation of Parties or Limited Parties in the Contested-Case Hearing**

(1) Persons interested in the enforcement proceeding may request status as a party or limited party in accordance with OAR 137-003-0005 ("Participation as a Party or Limited Party"). Any such request must be filed with the department at least 21 days before the date of the contested case hearing. The department shall respond to such requests as is specified in OAR 137-003-0005.

(2) In accordance with OAR 137-003-0007 ("Agency Participation as Interested Agency or Party"), the department may designate another agency as an interested agency or party.

**660-045-0130**

**The Contested-Case Hearing**

(1) The contested-case hearing shall be conducted in accordance with ORS 183.413 to 183.470 ("Contested Cases"). The hearing also shall be conducted in accordance with the provisions of OAR Chapter 137, Division 3, Contested Case Proceedings. However, some provisions of OAR Chapter 137, Division 3, have been modified by commission rules pursuant to OAR Chapter 660, Division 3, or by this division. In such cases, the commission rules and this division shall apply.

(2) Before the hearing begins, the commission or hearings officer shall inform all parties of

certain rights, issues, and procedures as required by subsections (2) to (4) of ORS 183.413 and ORS 183.415(7).

(3) The commission or hearings officer may conduct a prehearing conference, in conformance with OAR 137-003-0035 ("Prehearing Conferences").

(4) As specified in OAR 660-001-0005(2), parties to the contested-case hearing may be represented in three ways:

(a) A party may represent itself.

(b) A party may be represented by an attorney.

(c) Certain parties may be represented by an authorized representative who is not an attorney.

(5) Pursuant to ORS 183.440, parties to the contested case may subpoena witnesses. A party that subpoenas a witness shall pay the fees and mileage of the witness in accordance with ORS 183.440(1) and ORS 44.415(2). Payment shall be made directly to the witness.

(6) All discovery through means other than subpoena shall be done in accordance with OAR 137-003-0025 ("Discovery in Contested Cases").

(7) At the hearing, the requester shall recommend whether the enforcement order should include interim measures as specified in ORS 197.335(3)(a) (on interim requirements pending compliance with an order) and ORS 197.335(4) (on withholding grants or state-shared revenues). If the requester recommends that such measures be adopted, the requester must specify precisely what measures it recommends.

(8) At the hearing, the affected local government or district shall respond to the requester's recommendation on interim measures, and shall specify what measures, if any, the affected local government or district recommends.

(9) After the hearing and the record have been closed, the commission or 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 ORS 197.646(3) exist.

(10) If it is determined that there is good cause to believe that grounds for enforcement exist, the commission must specify, or the hearings officer must recommend, appropriate corrective action.

(11) If it is determined that there is good cause to believe that grounds for enforcement exist, the commission may specify, or the hearings officer may recommend, one or more interim measures, in accordance with the provisions of ORS 197.335(3) and (4).

**660-045-0140**

**Procedures After a Hearing Conducted by a Hearings Officer**

(1) If a hearings officer conducts the contested-case hearing, the hearings officer shall complete

the following actions within 30 days of the date when the record closed:

(a) Write a proposed order pursuant to ORS 197.328(3) and complying with ORS 197.335;

(b) Send the proposed order to the commission.

(2) 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 parties; and

(c) Mail to all 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.

(3) At least 16 days after the proposed order is mailed to the parties, the commission shall consider the proposed order and adopt a final order. The commission may adopt the proposed order as the final order, modify parts of the proposed order, or not use any part of the proposed order.

(4) In reviewing the proposed order and adopting the final order, the commission shall not consider new evidence. The commission shall consider only the following:

(a) The record of proceedings before the hearings officer;

(b) Timely exceptions to the proposed order;

(c) Arguments concerning the proposed order and exceptions;

(d) Recommendations and information from the department.

(5) The final order shall include findings of fact and conclusions of law as specified in ORS 197.335. The final order shall meet the requirements of OAR 137-003-0070, "Final Orders in Contested Cases."

(6) The commission shall adopt its final order within 120 days of the date on which the requester filed its petition for enforcement with the commission.

(7) Within five days of the commission's adoption of the final order, the department shall mail to all parties a copy of that order and its findings and conclusions.

**660-045-0150**

**Procedures After a Hearing Conducted by the Commission**

(1) If the commission conducts the contested-case hearing, the commission shall adopt a final order within 30 days of the date when the record closed. The commission may adopt a final order on the same day that it conducts the contested-case hearing, or it may adopt a final order at a subsequent meeting within 30 days of the hearing.

(2) The final order shall include findings of fact and conclusions of law as specified in ORS 197.335. The final order shall meet the requirements of OAR 137-003-0070, "Final Orders in Contested Cases."

(3) The commission shall adopt its final order within 120 days of the date on which the requester filed its petition for enforcement with the commission.

(4) Within five days of the commission's adoption of the final order, the department shall mail to all parties a copy of that order and its findings and conclusions.

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**660-045-0170**

**Terminating an Enforcement Order**

(1) The commission shall terminate an enforcement order if the commission finds that any one of these conditions exists:

(a) The affected local government or district has complied with the requirements of the order;

(b) A substantial change in circumstances has eliminated the need for corrective action of the type required by the order; or

(c) A change in the applicable laws has rendered the enforcement order moot or has eliminated the need for corrective action of the type required by the order.

(2) The commission may initiate proceedings to terminate an enforcement order without having received a request to terminate the order. If the commission decides to initiate such proceedings, it shall notify all parties and provide for their participation under the provisions of OAR 660-045-0110 to -0130.

(3) An affected local government or district, a requester, or the department may request that an enforcement order be terminated. If the commission receives such a request, it shall notify all parties and provide for their participation under the provisions of OAR 660-045-0110 to -0130.

(4) The commission may write an enforcement order so that it terminates automatically when a

specified date is reached or when an action specified in the order has been completed by the affected local government or district. If an order specifies such a termination date or action, the order shall terminate without notice to the parties and without further action by the department or commission when the termination date passes or when the termination action is completed. If an enforcement order contains no provision for automatic termination, then it shall remain in effect until the commission terminates the order in accordance with this rule.

**660-045-0180**

**Requests for Terminating an Enforcement Order**

(1) A party requesting termination of an enforcement order shall mail its request to the commission. On the same day that it mails its request to the commission, the party shall mail copies of the request to all other persons who were parties to the enforcement proceeding.

(2) A request to terminate an enforcement order shall be in the form of a letter containing the following items:

(a) A statement asking that the commission terminate the enforcement order;

(b) Citation to the subsection of OAR 660-045-0170(1) on which the request for termination is based;

(c) A description of how the affected local government or district's corrective action, a substantial change of circumstances, or a change in the applicable laws justifies termination of the order;

(d) Documentation of the corrective action, substantial change of circumstances, or change in the applicable laws that justifies termination of the order.

(3) Within 30 days of the date on which the request for termination was mailed, the department shall review the request to determine whether it is complete and complies with this rule. On or before the thirtieth day, the department shall convey the results of its review to the commission and to all parties to the order.

(a) If the department finds that the request for termination is incomplete or fails to comply with this rule, the commission shall not consider the request.

(b) If the department finds that the request for termination is complete and that it does comply with this rule, the department shall evaluate the request and recommend to the commission whether the enforcement order should be terminated. The department must mail its recommendation to the commission and to all parties within 90 days of the date the request for termination was mailed to the commission.

(4) Any party to an enforcement order may comment on a request for termination of that order. Such a comment shall be mailed to the commission within 30 days of the date on which the request for termination was mailed. On the same day that it mails its comment to the commission, the responding party shall mail a copy of the comment to all other parties to the

order.

(5) Only those persons who were parties to an enforcement order may participate in proceedings to terminate that order.

(6) A party's comment on a request for termination shall be in the form of a letter to the commission containing the following items:

(a) A statement indicating whether the party supports or opposes termination of the enforcement order;

(b) A description of how the affected local government or district's corrective action, a substantial change of circumstances, or change in the applicable laws justifies or fails to justify termination of the enforcement order;

(c) Documentation of the corrective actions, substantial change of circumstances, or change in the applicable laws referred to in the description required by subsection 6(b).

(7) Within 60 days of the date when the department mails its recommendation to the commission, the commission shall decide whether to terminate the enforcement order. The commission shall issue a written decision stating reasons for its decision.

(8) Within five days of the commission's decision, the department shall mail copies of that decision to all parties to the enforcement order.