



Oregon

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January 11, 2013

TO: Land Conservation and Development Commission

FROM: Jim Rue, Director
Jon Jinings, Community Services Specialist

SUBJECT: **Agenda Item 4, January 24-25, 2013, LCDC Meeting**

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

CROOK COUNTY

I. RECOMMENDATION

The director has approved an appeal of a recent decision by Crook County to amend its program to protect big game winter range. The department finds that the amended program does not comply with the procedural or substantive aspects of Goal 5 and OAR chapter 660, division 23 relating to significant big game winter range. The department also finds that the criteria for approval of an appeal in OAR 660-001-0230(3) are satisfied, as explained in this report.

Therefore, the director recommends, based on the information contained in this report, that the commission authorize the department to proceed with the appeal of a Crook County decision to the Land Use Board of Appeals. The department filed a Notice of Intent to Appeal with LUBA on January 10, 2013. It was necessary for the department to file the Notice of Intent to Appeal because the 21-day filing period expired prior to the commission's next scheduled meeting.

The Oregon Department of Fish and Wildlife (ODFW) has also filed a notice of intent to appeal regarding this matter.

If you have questions regarding this case, please contact Jon Jinings, DLCD Community Services Specialist, at (541) 325-6928 or jon.jinings@state.or.us.

II. CASE SUMMARY

A. Background

This case involves a Crook County decision to substantially revise its big game winter range provisions under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and the commission's implementing administrative rule. In Crook County, significant big game winter range supports Mule Deer, Rocky Mountain Elk and Pronghorn Antelope.

Crook County's revisions affect its comprehensive plan map and creates two sub-areas for big game winter range protection: (1) the West County Area that contains nearly all of the county's human population; and (2) the Greater County Area that includes most of the county's land base. Substantial revisions have also occurred with respect to the county's Economic, Social, Environmental, and Energy (ESEE) analysis document, comprehensive plan policies, and implementing ordinance language.

Primary changes include switching from a minimum parcel size-based protection program for protecting big game winter range from residential development (formerly 320 acres for elk winter range, 160 acres for critical deer winter range and 80 acres for general deer winter range) to a residential density-based program that would allow new non-farm dwelling parcels to be created.

B. The Goal 5 Process

Goal 5 is interpreted and carried out by the provisions of OAR chapter 660, division 23, commonly referred to as "the Goal 5 Rule." The Goal 5 Rule applies in this case because the county changed the areas mapped as significant Big Game Habitat in its acknowledged plan and substantially revised its comprehensive plan provisions and land use regulations. Among other things, OAR 660-023-0040 requires the following:

- (1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule. Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:
 - (a) Identify conflicting uses;
 - (b) Determine the impact area;
 - (c) Analyze the ESEE consequences; and
 - (d) Develop a program to achieve Goal 5.

C. Department Participation

The department and ODFW have worked with the county for well over a year on this project. The department focused its advice on process while ODFW took the lead with biological information. Both agencies participated in many meetings and hearings and delivered written and comments and oral testimony on multiple occasions. The state agencies also drafted and offered an example Goal 5 ESEE analysis and a strategy for amending the county's code to implement protection program supported by the ESEE analysis that was based on our understanding of the county's needs and what they hoped to accomplish (see Attachment E).

After this work, the department and ODFW supported the changes to the county's plan map and we agree that it is reasonable to establish a two sub-district system for considering big game winter range protection. Unfortunately, we remain concerned regarding several aspects of the county's adopted revisions and their ability to provide adequate protections for the county's big game resource and compliance with relevant rules.

Pursuant to Oregon administrative rules, the department notified Crook County of its intent to appeal the county's decision as required by OAR 660-001-0220 (Attachment F). In that notice, the department indicated that an opportunity exists to appear before the commission to discuss the merits of the department's appeal. Parties were also informed of the factors in OAR 660-001-0230(3), upon which the commission will base its decision whether to direct the department to proceed with an appeal.

D. Department Concerns

After much work with Crook County on this project, the department concludes that the adopted materials revising the county big game winter range provisions are flawed because they have failed to identify conflicting uses as required by OAR 660-023-0040 and failed to properly conduct the necessary ESEE analysis required by OAR 660-023-0040. Therefore, the county has no basis for the resulting comprehensive plan policies and new land use regulations. Finally, we are concerned that the errors and oversights contained in the new local program could cause further reductions in protections for big game.

III. APPEAL FACTORS AND ANALYSIS

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

- (a) Whether the case will require interpretation of a statewide planning statute, goal or rule;
- (b) Whether a ruling in the case will serve to clarify state planning law;
- (c) Whether the case has important enforcement value;
- (d) Whether the case concerns a significant natural, cultural or economic resource;
- (e) Whether the case advances the objectives of the agency's Strategic Plan;

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

For the reasons stated below, the department finds that the facts of this case lead to a conclusion that consideration of factors (a), (b), (d) and (e) support a decision to appeal Crook County's decision to the Land Use Board of Appeals, and that consideration of factor (f) does not present a viable alternative to the appeal.

(a) Whether the case will require interpretation of a statewide planning statute, goal or rule

This case involves the interpretation of Statewide Planning Goal 5 and OAR chapter 660, division 23, because the decision revises a county's big game winter range protection program, which was acknowledged as complying with Goal 5.

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

A ruling in this case will clarify the appropriate application of OAR chapter 660, division 23. The department has concerns with the following elements of the program adopted by Crook County:

1. The county has not adequately identified conflicting uses (OAR 660-023-0040)
2. The county has not conducted a proper ESEE analysis (OAR 660-023-0040)
3. The county's program to achieve the goal does not assure adequate protection (OAR 660-023-0050)

(c) Whether the case has important enforcement value

The department does not find that this criterion applies.

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

This case concerns about 1.5 million acres of big game winter range, a significant natural resource. The record also shows that big game hunting annually contributes about \$3.3 million dollars to the local economy.

(e) Whether the case advances the objectives of the agency's strategic plan

This case advances the objectives of the Agency's Strategic Plan based on Strategic Goal 1:

1. Secure Oregon's Legacy
 - o Protect unique and threatened resources by guiding development to less sensitive areas.

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

The department and ODFW have provided technical assistance without apparent effect. There is no pattern or practice of decision-making that violates the goals, and the case involves a legislative plan amendment not issuance of permits, so enforcement is not a practical option. The parties to the appeal may identify or propose an alternative method of accomplishing the

objective of the appeal, such as mediation, prior to the hearing or during testimony to the commission, but no alternative method of resolving the issues has been identified at the time of this report.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

The department recommends that the commission support the director's recommendation and proceed with a department appeal of the Crook County land use decision.

Proposed Motion: I move that the commission authorize the department to appeal the subject decision from Crook County to the Land Use Board of Appeals based on the information included in the staff report and its demonstration that OAR 660-001-0230(3) (a), (b), (d) and (e) apply.

Alternative motion: I move the commission not authorize the department to appeal the subject decision from Crook County for the following reason(s) _____.

ATTACHMENTS

- A. Crook County Final Decision
- B. DLCD/ODFW Comment Letter dated August 15, 2012
- C. DLCD/ODFW Comment Letter dated November 2, 2012
- D. DLCD e-mail dated December 4, 2012
- E. DLCD/ODFW example Goal 5 program
- F. Notice of LCDC hearing to Crook County