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July 10, 2014

TO: Land Conservation and Development Commission

FROM: Rob Hallyburton, Community Services Division Manager

SUBJECT: **Agenda Item 12, July 24-25, 2014, LCDC Meeting**

**PERIODIC REVIEW BRIEFING**

## I. AGENDA ITEM SUMMARY

This briefing is to remind and inform commission members regarding periodic review and to address certain issues. The department will seek guidance and direction, but no formal action, from the commission.

One issue relates to periodic review tasks that have been on work programs for many years and the local jurisdiction may or may not have plans to complete them. There is nothing requiring the department to address these tasks at this time, but a strategy regarding how to get the tasks completed or otherwise dispensed with will provide clarity to the local governments and the department regarding their status.

Another issue raised herein concerns whether to bring more cities into the periodic review process. Several cities have completed their work programs so the demand for periodic review grants has decreased, raising a question of whether to continue the periodic review grant program. Grant funds available for periodic review have continually declined over the last several biennia, but the department is seeking an increase for the next cycle.

If you have questions about this report please contact Rob Hallyburton, Community Services Division Manager, at 503-934-0018 or rob.hallyburton@state.or.us.

## II. BACKGROUND

Statewide Planning Goal 2 requires that local governments keep comprehensive plans up to date, but provides no guidance regarding how often updates should occur. Statutes setting out a process to periodically review comprehensive plans have been in place since 1981. The statutes address the responsibilities of local government, the Department of Land Conservation and Development (DLCD or the department), and the Land Conservation and Development Commission (LCDC or commission). The requirements of the statutes, and the implementing administrative rules, have been amended several times in intervening years. The required comprehensive plan update has become known as “periodic review.”

Periodic review is essentially just a process. The statutes initially did not address content at all; however, since 1999, there are limits on what content can be required to be addressed at periodic review. The process consists of a schedule, local action, and DLCD review (with possible appeals of commission actions to the Court of Appeals and Supreme Court). The periodic review schedule is approved by LCDC based on timeframes contained in the statute. There are two phases at the local level: (1) plan evaluation and work program development; and (2) work program completion. DLCD, and potentially LCDC, is involved in review and approval of the work program and of each task on the work program.

In addition to the requirement to keep plans up to date, it is a good idea. The comprehensive plan is a community's expression of its vision and a statement of its aspirations. This foundation needs to be examined from time to time to ensure the plan reflects the current needs and desires of the community. A comprehensive plan and its implementing ordinances also need continual evaluation to account for changes in circumstances and regional trends, unforeseen developments and opportunities, and foreseeable growth. There is an adage that you need to use the right tool for the job; an out-of-date comprehensive plan is *never* the right tool for guiding a community's growth and development.

## A. <u>The Periodic Review Process</u>

### *1. Schedule*

The interval between required plan updates is specified in statute. Since 1999, jurisdictions under a specified size are not required to complete periodic review unless the commission determines that the jurisdiction meets certain criteria[1] and the department pays the costs. Legislation amended the statute governing the schedule in 2005 creating the current schedule, as follows:

- Cities over 2,500 population within a metropolitan planning organization (MPO): every seven years
- Cities over 10,000 population outside an MPO: every 10 years
- Counties: coordinate with the above cities for urban lands

A local government has the option to update portions of or its entire plan outside periodic review (through the "post-acknowledgment plan amendment" process) or to request entering periodic review. The commission must approve the latter option.

### *2. Evaluation and Work Program Development*

When the schedule dictates, or the commission approves a voluntary periodic review, the commission "*initiates*" periodic review and instructs the department to send a "*periodic review notice*" to the affected jurisdiction. The notice includes an explanation of timing and local notice

[1] The circumstances under which the commission can require a jurisdiction to complete periodic review include where a city has been growing faster than the annual population growth for the past five years, certain major transportation projects, major state-funded facilities such as prisons, or where a city or county has approved a facility for major employer. See <u>ORS 197.629(4)</u>.

requirements, and a summary of issues and changes to laws, goals, and rules the jurisdiction should consider in the evaluation of its comprehensive plan.

By statute, issues addressed at periodic review are limited to economic development, needed housing, public facilities and services, transportation, and urbanization. Plan evaluation consists of the jurisdiction (generally a city) reviewing its existing plan and, through a public process, deciding which parts, if any, of the plan need to be updated. The statute includes four "factors" indicating the need for periodic review. These are:

1. There has been a substantial change in circumstances including but not limited to the conditions, findings or assumptions upon which the comprehensive plan or land use regulations were based, so that the comprehensive plan or land use regulations do not comply with the statewide planning goals;
2. Decisions implementing acknowledged comprehensive plan and land use regulations are inconsistent with the goals;
3. There are issues of regional or statewide significance, intergovernmental coordination or state agency plans or programs affecting land use which must be addressed in order to bring comprehensive plans and land use regulations into compliance with the goals; or
4. The local government, commission or DLCD determines that the existing comprehensive plan and land use regulations are not achieving the statewide planning goals.

Based on its evaluation, either the jurisdiction determines there is no need to complete periodic review, or it develops a work program to address needed updates. The work program must be approved by the DLCD director. Beginning with 2005 legislation (HB 3310), a decision by the director to approve a work program cannot be appealed. A work program rejected by the director may be appealed to the commission.

### *3. Task Completion*

The work program includes one or more "*tasks*" and each task must be accompanied by a due date. The work program should only include tasks that can be completed in three years. Again, tasks are only required to address economic development, needed housing, public facilities and services, transportation, and urbanization.

A task is usually complete when the jurisdiction adopts a plan amendment or ordinance update, or both, to address a need identified during the evaluation; a task may, however, culminate in a report or data that is not adopted, or a conclusion that the plan didn't need to be amended after all. Once the task is complete, the local government sends notice of adoption or completion to the department and to persons who participated in the local process.

If the local government does not complete the task by the date indicated in the approved work program, it is eligible for one, one-year extension. If the extended deadline is missed, the director is required to bring the matter before the commission. The commission, in turn, is required to impose sanctions "to resolve a specific deficiency."

#### *4. Review and Appeal*

The local government submits a completed task to the department. Those who participated locally are provided an opportunity to submit objections to the content of the submittal. Once the objection period has concluded, the director may approve or remand the submittal, or refer it to the commission. The review is based on relevant goals, rules, and statutes. The department must complete its review within 120 days unless the commission approves an extension or the local government waives the deadline.

Upon an appeal of a director decision, or upon referral, the commission decides the matter. The commission may uphold or modify the director's decision. The result may be an approval of the task, a remand with a resubmittal date, or approval requiring a specific language change to the submitted amendment. If a task gets remanded, the resubmitted amendment is reviewed in the same manner as the original submittal.

### B. Current Status

The statutes and rules on periodic review have been amended several times. Major changes occurred in 2003 and 2005. Because of perceived deficiencies in the process, the 2003 legislature enacted a bill that prohibited the commission from initiating any new work programs for four years and made many existing work programs and tasks optional for local governments. The statutes describing the periodic review process changed substantially in 2005 and the commission initiated several new work programs under the "new" process in 2007 and 2008. Because of the changed requirements, the department treats the work programs differently and reports their status separately here.

#### *1. Pre-2003 Work Programs*

Senate Bill 920 in 2003 made completion of tasks on an existing work program optional for a number of jurisdictions. The bill did not excuse a task that had been submitted to DLCD or a task that had not been submitted when:

1. The work program concerns a city with a population of more than 10,000;
2. The work program concerns a county or a metropolitan service district and the work task is related to economic development, housing, public facilities and services, transportation or urbanization;
3. The task is related to a statewide land use planning goal protecting coastal management and is required by federal law or a contract with a federal agency;
4. The commission determines that a significant statewide or regional need requires that the work task be performed and the department pays the costs to perform the work task;
5. An interested party petitions the commission to require the completion of a work program or a work task, and the commission agrees to the requirement; or
6. A local government submits a written request that the commission approve a new task and the commission agrees, or the commission requires a new task and pays the costs to perform the new task.

Table 1 lists the outstanding tasks that pre-date SB 920. Some tasks that would have been made optional by SB 920 had already been submitted to DLCD and remanded; consequently the jurisdiction was not relieved of the requirement to complete the task. Those identified as "not optional" in Table 1 are subject to one of the exceptions in nos. 1 to 3 in the list above. The commission required one jurisdiction (Gold Beach) to complete tasks under the fourth exception, because the work had been paid for and was nearly complete. The commission received petitions as authorized in the fifth exception above for Tillamook County and decided to require completion of the task.

**Table 1. Jurisdictions in periodic review since before 2003 legislative changes**
✓ – Actively working on completing work program
* – Received grant from DLCD for completion of one or more tasks

| Jurisdiction | Remaining task(s) | Reason task remains | Last submittal |
|---|---|---|---|
| Ashland | (1) Goal 5 wetland/riparian | Not optional/not submitted | 1999 |
| Baker Co. | (1) Goal 14 | Not optional/not submitted | 2014 |
| Beaverton✓ | (1) Urban service area | Not optional/not submitted | 2004 |
| Canby | (3) Goal 11; solar access ord.; Goal 14 | Not optional/not submitted | 2006 |
| Central Point | (4) Inventories; capacity study; Goal 11; Goal 12 | Not optional/not submitted | 1998 |
| Hood River Co.*✓ | (2) Both related to Goal 14 | Not optional/not submitted | 2005 |
| La Grande✓ | (1) Land need analysis | Not optional/not submitted | 2003 |
| Lincoln Co. | (1) Goals 16–18 | Not optional/not submitted | 2004 |
| Linn Co. | (4) Goal 12; airport overlay; urban housing; urban area agreements | Not optional/not submitted | 2002 |
| Medford✓ | (3) Goal 12; special dist. agreements; Goal 5 | Not optional/not submitted | 2009 |
| Ontario | (3) Goal 5 wetland/ riparian; Goal 12; urban service agreement | Not optional/not submitted | 2008 |
| Wilsonville*✓ | (2) Goal 10; intergovernmental coordination | Not optional/not submitted | 2008 |
| Curry Co. | (2) Goal 12; coordination agreements | TSP remanded; agreements not optional/not submitted | 2005 |
| Klamath Falls* | (2) Goal 12; Goal 11 & urban service agreements | TSP not optional/not submitted; PFP/agreements pending county approval | 2003 |
| Boardman* | (1) Goal 5 wetland/ riparian | Remanded | 2003 |
| Cave Junction | (2) Goal 5; Goal 9 | Remanded | 2001 |
| Klamath Co. | (1) Goal 14 rural industrial uses | Remanded | 2008 |
| Marion Co. | (1) Unincorporated community | Remanded | 2004 |

| Jurisdiction | Remaining task(s) | Reason task remains | Last submittal |
|---|---|---|---|
| Sublimity* | (2) Goal 10; Goal 12 | Remanded | 1999 |
| Turner | (1) Goal 5 wetlands | Remanded | 2013 |
| Winston* | (2) Both related to street standards | Remanded | 2003 |
| Wallowa Co. | (1) Unincorporated comm. | Remanded | 2003 |
| Woodburn*✓ | (1) Goal 9 | Remanded | 2014 |
| Lincoln City | (3) Goals 5 and 17; Goal 16; Goal 18 | Tasks remanded, pending county co-adoption | 2002 |
| Florence | (1) Recreation/open space/natural resources | Pending county co-adoption | 2010 |
| Gold Beach* | (2) Goal 10; Goal 12 | Commission required work task completion in 2004 | 2008 |
| Tillamook Co. | (1) Goal 5 riparian | Commission required work task completion in 2004 | 2002 |
| Bandon | (3) Goal 10; Goal 16; UGMA | City requested to remain in PR after SB 920 | 2005 |

The periodic review statute authorizes the commission to impose sanctions for failing to meet the deadlines in a periodic review work program. The department rarely recommends such sanctions to the commission, and enforcement is still not seen as the best way to achieve plan updates.

### *2. Post-2005 Work Programs*

When the moratorium on new work programs ended in 2007, the commission applied the updated periodic review process by initiating periodic review for nine cities. One additional city – Junction City – requested to enter periodic review and the commission agreed. The status of these 10 work programs is shown in Table 2.

Progress, measured by the number of tasks submitted to DLCD, is shown in the “Work Tasks Complete” column. If that column shows a date, the jurisdiction has completed all the tasks on its work program.

**Table 2. Jurisdictions initiated since the 2005 legislative change: spring 2014 status**

| Jurisdiction | Initiated | Work Program Submitted | Work Program Approved | Work Tasks Complete |
|---|---|---|---|---|
| Forest Grove | Nov. 2007 | July 2008 | April 2010 | April 2014 |
| Hermiston | Nov. 2007 | Jan. 2009 | April 2010 | 2 of 6 (2 partially complete) |
| Keizer | Nov. 2007 | June 2008 | Sept. 2008 | Sept. 2013 |
| Portland | Nov. 2007 | Aug. 2008 | Sept. 2009 | 2 of 4 |
| The Dalles | Nov. 2007 | Dec. 2009 | July 2010 | None submitted |
| Junction City | March 2008 | March 2008 | March 2008 | March 2013 |
| Lake Oswego | May 2008 | May 2009 | April 2010 | None submitted |
| Pendleton | May 2008 | March 2009 | April 2010 | 1 of 7 (2 partially complete) |
| Tigard | May 2008 | Feb. 2009 | April 2010 | 5 of 6 |
| Troutdale | May 2008 | Nov. 2008 | April 2010 | 3 of 6 |

Due in part to the moratorium on new work programs from 2003 to 2007, a sizable number of cities were eligible for periodic review based on the statutory schedule. At the end of the moratorium, the commission's intent was to initiate periodic review for several cities biannually; however, for the reasons described below, that strategy was carried out for only two cycles. Soon after the cities began submitting locally approved programs, the state's economy, and therefore the state and department budgets, declined. Because the department and commission were concerned about the ability of state and local budgets to allow the cities to complete the tasks in the work programs, the department took significantly longer than anticipated to approve most of the work programs.

Resource availability also led the commission to forego initiating additional cities after May 2008. With concerns about the ability to assist the existing work programs, it made little sense to add to the demand for scarce resources. As the department's grant budget has continued to decline, and the commission has likewise continued the policy of suspending further periodic review activity.

Work programs are encouraged by statute to include no more than three years of work. Table 2 shows that the most successful cities are completing their work programs in four to five years. A variety of factors contribute to the variability in completing periodic review tasks. Availability of dedicated staff, motivated elected officials, staff turnover, and the nature of local planning challenges all have a bearing on how efficiently a city moves through the process. There are undoubtedly other factors.

As shown in Table 2, three of the cities initiated by the commission in 2007-08 have completed their work programs. The department expects several more cities to complete periodic review before the end of the current biennium.

***3. Jurisdictions eligible to be initiated***

Based on the schedule in statute, the commission could send periodic review notice to any of the cities listed in Table 3.

**Table 3. Jurisdictions eligible for periodic review notice**

| City | Eligible for PR |
|---|---|
| King City | Oct. 2002 |
| Happy Valley | July 2004 |
| Milwaukie | July 2007 |
| Newberg | July 2007 |
| Newport | July 2007 |
| Redmond | July 2007 |
| Roseburg | July 2007 |
| Sherwood | July 2007 |
| Tualatin | July 2007 |
| West Linn | July 2007 |
| Wood Village | July 2007 |
| Fairview | Feb. 2009 |
| Oregon City | May 2009 |
| Talent | May 2010 |

| City | Eligible for PR |
|---|---|
| Gladstone | July 2010 |
| Phoenix | Dec. 2010 |
| Hillsboro | Dec. 2010 |
| Eagle Point | July 2011 |
| Philomath | July 2011 |
| Jacksonville | Aug. 2011 |
| Corvallis | Sept. 2012 |
| Grants Pass | Dec. 2012 |
| Cornelius | Nov. 2013 |
| Coos Bay | April 2014 |
| Eugene | April 2014 |
| Springfield | April 2014 |
| St. Helens | Aug. 2014 |
| Dallas | March 2016 |

## III. ISSUES

### A. What should be done with old tasks?

The department has identified 52 tasks on 29 pre-2003 work programs that have not been submitted (see Table 1). A variety of reasons account for a work program still being required, and the answer to the question “what should be done?” may be different for each circumstance.

Regardless of why a task is required, the most common explanation for a task not having been completed is that the local government simply decided not to finish the task. There are, of course, many possible reasons that a city or county would make that decision: local controversy and higher priorities for the planning department work plan are a couple of the possible explanations for a periodic review task going unfinished. In some cases, a city is reliant on a county to co-adopt the task, so the city is not in full control. In other cases, the jurisdiction may have intended to finish the work but didn’t have sufficient resources.

It should be noted that some tasks, especially these on older work programs, were not requested by the local government. There had been many changes to goals and rules in the years immediately following acknowledgment, and periodic review was the tool to ensure plans and codes reflected those revised policies and requirements. Because of changes in circumstances and statutes, development of the recent work programs has been more collaborative.

***1. Mandatory tasks under SB 920***

This is the group of tasks that were not made optional in 2003 (the criteria in SB 920 are listed in section II.B.1 of this report). These 28 tasks are described as "not optional/not submitted" in Table 1. They have never been submitted to DLCD so they have presumably not been completed by the local government.

***2. Remanded tasks***

SB 920 did not modify tasks that had already been submitted to DLCD for review. Several submitted tasks had been remanded due to deficiencies in the submittal, and 12 of these tasks are outstanding. These tasks don't necessarily need to be treated differently than the "not optional/not submitted" group, but these jurisdictions are under a specific order to perform, as opposed to the more general work program. The nature of the remand and required response need to be considered individually as each circumstance is different.

***3. Pending co-adoption***

Five tasks in Table 1 have been completed by the city and are pending at the county for co-adoption. These tasks could be categorized as "mandatory" or "remanded," but are described separately in order to highlight the potential complexities in resolving outstanding issues.

***4. Commission-ordered completion***

Two tasks were retained on work programs by commission order. In one case – Tillamook County – the commission received petitions from interested parties to retain the task and require the county to complete its Goal 5 program for riparian area protection. In response, the commission ordered the county to complete the task. In the second case – Gold Beach – the state had provided funding for three tasks and the tasks were nearly complete. DLCD staff recommended the commission retain these tasks on the city's work program. The city consented to the requirement and the commission ordered completion of the tasks. Two of the three tasks were submitted and approved, but one task, relating to the transportation system plan, was not.

***5. Local request***

Bandon requested that its work program not become optional and the commission granted the request. Three of the tasks on that city's work program have not been submitted.

***6. Moving forward***

The department proposes to proceed with each task on a case-by-case basis. The commission has the authority to amend a work program to remove a task, but the department does not recommend that solution at this time. Before a jurisdiction is relieved of completing a task, the department will establish criteria or factors to consider in deciding whether to eliminate the task or insist on completion. An analysis of available resources to assist in completion of the tasks is needed, as well. Due to the wide variety of tasks and jurisdictions involved (*e.g.*, the topic, the local government's intentions, the status of past completion efforts), a blanket solution is not advisable.

The criteria could include considerations such as:

- How close is the jurisdiction to completing the task? Are earlier drafts obsolete?

- Are local staff and/or budget limitations the only impediments to completion?
- For growth-related tasks, such as Goal 10, 11, and 12 compliance, is the city growing?
- Has the state contributed resources toward task completion?
- Is the current plan or code out of compliance with goals or statutes?

The department will work with the local governments to determine the best course of action. The department is not proposing enforcement and expects to be able to avoid it in all cases. The commission's authority is relevant, however. The applicable statute states:

> **197.636 Procedures and actions for failure to meet periodic review deadlines.**
> * * *
> (2) If a local government fails to submit a work program or to complete a work task by the deadline set by the director or the commission, including any extension that has been granted, the director shall schedule a hearing before the commission. The commission shall issue an order imposing one or more of the following sanctions until the work program or the work task receives final approval by the director or the commission:
>
> (a) Require the local government to apply those portions of the goals and rules to land use decisions as specified in the order. Sanctions may be imposed under this paragraph only when necessary to resolve a specific deficiency identified in the order.
>
> (b) Forfeiture of all or a portion of the grant money received to conduct the review, develop the work program or complete the work task.
>
> (c) Completion of the work program or work task by the department. The commission may require the local government to pay the cost for completion of work performed by the department, following the withholding process set forth in ORS 197.335 (4).
>
> (d) Application of such interim measures as the commission deems necessary to ensure compliance with the statewide planning goals.

## B. <u>Should the commission initiate periodic review for additional cities?</u>

With several of the cities that have been working on periodic review complete, and several more poised to finish (see section II.B.2), the question of whether to allow or require additional jurisdictions to enter the process arises. To answer to this question, the commission has several issues to consider.

### *1. UGB streamlining*

House Bill 2254 (2013) directed the commission to "develop and adopt simplified methods for a city that is outside Metro to evaluate or amend the urban growth boundary of the city." One provision of this bill states:

> . . .when a city evaluates or amends the urban growth boundary of the city pursuant to [the new, simplified method], the city is not required to commence or complete periodic review. The commission shall, by rule, specify alternate means to ensure that the comprehensive plan and land use regulations of the city comply with the statewide land use planning goals and are updated over time to reflect changing conditions and needs.

The administrative rules required by this bill are currently under development, but they will not be effective until 2016 at the earliest, and they will not address cities within Metro. A city that does not anticipate the need for a UGB amendment may nevertheless wish to update its plan, and the "alternative means" developed in accordance with HB 2254 will not address that circumstance.

In short, periodic review is not obsolete, at least in the near term. The answer to the question of whether new cities should be initiated is not entirely answered by the development of a new alternative means of updating plans. It does have an effect, however, on *which* cities may be considered for periodic review, as those contemplating a UGB amendment under the streamlined process or subject to the new "alternative means" of updating its plan would not be candidates for periodic review.

***2. Grants Allocation Plan***

The commission approves a biennial Grants Allocation Plan after it receives a recommendation from the Grants Advisory Committee. The allocation plan includes the categories of general fund grants the department will offer during the biennium and how much of the fund is allocated to each category. The advisory committee will begin its consideration of a recommendation for the 2015-2017 biennium soon after the commission's July 2014 meeting. This is relevant because assistance in completing periodic review tasks have been a major component of the grant program for a very long time. With several of the cities that are currently in periodic review scheduled to complete their work programs during this biennium, funds will theoretically be available for new work programs during the next biennium. It is "theoretical" because the grant fund for 2015-2017 will not be established until a year from now, at the culmination of the next legislative session.

The department is seeking a significant increase in the size of the grant fund for next biennium, but the success of that effort will not be known until the legislature acts on the department budget. If the grant fund does not increase, and there is an increased demand for periodic review grants, the technical assistance grant program will suffer (if current priorities continue).

The department is hesitant to ask the commission to initiate periodic review for additional cities until we know the level of available resources. However, waiting to initiate until the grant budget is approved would make it difficult for a city to prepare its work program and complete a significant amount of task work during the grant period. That is, by the time the city completed its plan evaluation and work program, the department approved the work program, and a grant agreement was executed, the city would probably have less than a year to work on a task before the end of the biennium when that grant period terminates.

### *3. Moving forward*

The department proposes to survey eligible cities to gauge the level of interest in initiating periodic review. Informal communications have indicated there is some interest, but the prospect of a directive from the commission could reveal whether a city is actually prepared to commit to the work. Local interest is important if the commission follows the practice it used in 2007-2008 and gives priority to those jurisdictions that display motivation to enter and complete the periodic review process. While this may not result in the most important cities (*i.e.*, fastest growing, most out-of-date plan) entering periodic review, it should avoid bad investments and stalling of the entire periodic review program.

Part of the inquiry will be whether a city is interested in completing a plan evaluation and developing a work program without assurance that a grant is forthcoming. If a city has the resources to complete these tasks, or has already done so for its own purposes, it would have a head start on the process should the commission schedule the city for periodic review.

The results of this survey would help inform the commission and department on the level of interest and capacity to complete periodic review. It will also help inform the Grants Advisory Committee in whether or how to prioritize periodic review grants in the allocation plan.

The department proposes to follow up with the commission at its September meeting with the results of the survey and of the advisory committee meeting. The department may, at that time, recommend proceeding with periodic review notice to a small number of cities, or the indicators may point to waiting to see how the department's grant budget fares in the legislature.

## IV. CONCLUSION AND NEXT STEPS

The periodic review program has changed considerably over the last 15 years. Its focus has been narrowed and resources available for plan updating have dwindled. Recent legislation calls for a new process for updating plans for some jurisdictions.

Regarding old tasks, the department, in coordination with affected local governments, will establish criteria or factors to consider in deciding the best course of action for each task. The commission will not necessarily be involved in the solution(s), but the department will keep the commission apprised of any progress.

Regarding the commission initiating any new periodic review work programs, the department proposes to survey eligible cities to gauge the level of interest and capacity to enter and complete periodic review. The Grants Advisory Committee will be consulted and the department will provide a recommendation to the commission in September.