

Todd Sadlo

Attorney At Law

April 19, 2010

Via Email

Richard M. Whitman, Director
Oregon Department of Land Conservation & Development
635 Capitol Street N.E. Ste. 150
Salem, Oregon 97301

**Re: Agenda Item #9, Land Conservation and Development Commission Meeting,
April 22, 2010; your request to file an agency brief re: a Linn County Park
on Seven Mile Lane**

Dear Director Whitman:

Please review these comments and deliver them to your Commission as Linn County's written concerns regarding the agency brief you have requested permission to file. The brief has yet to be filed. We expect the brief to assert that the County erred in approving development of a County park that will include a campground, with 50 recreational vehicle camping spaces.

The Department's Agenda Item Description and Case Summary Mischaracterize the Approval in this Case

The decision in this case, Linn County Board of Commissioners Resolution No. 2009-570, is the County's approval of a conditional use permit, under ORS 215.283(2)(d), which allows public parks on land zoned for agricultural use.¹ The County's long-range plans for the park have yet to be finalized, and are not on appeal in this case. The Department is asking that the Commission allow the filing of an agency brief against the County, because the County approved the development of 50 RV spaces, on less than 15 acres of the 175-acre property, roughly adjacent to an existing truck stop. The bulk of the site will consist of restored and enhanced wetlands, open fields, forested and/or landscaped areas, and nature trails.

¹ The staff report incorrectly indicates that "Linn County Resolution 2009-570" is attached. The attachment is not the Resolution, but a one-page notice of decision. The Resolution is four pages, with 37 pages of findings for approval.

1532 SE 36th Avenue
Portland, Oregon 97214
Phone 503-232-0404
Fax 503-232-7466
TSadlo@aol.com

The Conditional Use Permit issued by the County to its Parks Department states:

“2. A recreational Vehicle (RV) camping facility, having no more than 50 Recreational Vehicle spaces may be developed on the site, without prior, additional public process or Board of Commissioners review, in accordance with law. Additional public process and Board of Commissioners review are required prior to construction of more than 50 RV camping spaces at the park. A caretaker dwelling, interpretive kiosks and trails may be developed as operations of the park warrant.”

This is the decision the Department is asking to oppose through the filing of an agency brief with LUBA.²

Response to Department Analysis of Basis for Filing an Agency Brief

- **Interpretation of OAR 660, Division 34**

In its “Analysis” of factors (a) through (e), the staff report misconstrues applicable caselaw. In Rural Thurston, Inc. v. Lane County,³ the petitioner appealed “a county decision approving a special use permit authorizing improvements to a public park within an exclusive farm use (EFU) zone.” The improvements were to an existing park (Ruff Park), with “trails, benches, signage, doggy bag dispensers, a magnolia arboretum and other landscaping.”⁴ (Id.) Willamalane Park and Recreation District was given permission by the county to make the following improvements to the park:

“construct proposed improvements, including a pedestrian and maintenance vehicle bridge over the South Branch of Cedar Creek, additional trails, a restroom, picnic tables, and 23 parking spaces within the panhandle access strip.”

A hearings officer then also required the construction of “a fence along both sides of the panhandle and along the banks of certain portions of the creeks.”

LUBA upheld the County’s decision. This case does not assist the opponents of Seven Mile Lane Park or DLCD. A bridge over a creek, fences, a restroom, and a parking lot are allowed on EFU land as part of a local park, which is also an allowed use on EFU land. That is all that can reasonably be concluded from the decision.

² The decision also clearly states that approximately 60 acres will be occupied by RV camping spaces “at full build-out.” (findings 1.2 and 2.5.5) Condition #2 clearly prohibits development of more than 50 RV spaces “without additional public process or Board of Commissioners review, in accordance with law.”

³ Rural Thurston, Inc. v. Lane County, 55 Or LUBA 382, 384, 2007 WL 4662094 (2007).

⁴ Id.

The part of Rural Thurston that both the opponents of the park and DLCD avoid, is the part discussing petitioner's argument that "the subject property cannot be expanded or intensified without taking an exception to Statewide Planning Goal 3 (Agricultural Land), pursuant to the State and Local Park Planning Rule, at OAR Chapter 660, division 034." As to this assignment, LUBA stated:

"OAR 660-034-0035 and 0040 are not models of clarity. Providing that 'some of the uses' listed in OAR 660-034-0035(2) require a goal exception, but not specifying which uses, is not particularly helpful in determining which uses do and do not require a goal exception. Nonetheless, it is clear that some of the park uses listed in OAR 660-034-0035(2) require no goal exception to be approved in a state park. When OAR 660-034-0040(4) refers to the park uses listed in OAR 660-034-0040(4) refers to the park uses listed in OAR 660-034-0035(2)(a) through (g), the apparent intent is to define the scope of uses that are also allowed in local parks in resource zones under OAR 660-034-0040(1). and (4)."

DLCD has known at least since 2007 that its rule was unclear. If the agency intended to require a goal exception for any of the uses on the list, or to prescribe limits to uses on the list, it should have done so in its rule. Instead, the Commission acknowledged the County's zoning regulations for EFU zones. The County's zoning code, like LCDC's park planning rule, allow development, under conditional use review, of recreational vehicle campsites in public parks.

- **Department Reference to Private Park Rules is Misleading**

It is disingenuous for the Department to argue that standards and regulations applicable to private parks should be applied to public parks. These two types of parks are subject to separate systems of approval and governance, and the Department knows this is true. Public and private parks are governed by ORS 215.213(e) and 215.283(2)(c) and (d). Private parks are limited by statute and by LCDC administrative rules, especially OAR 660-033-0120 and 0130(19). Public Parks are listed separately in LCDC's table of "Uses Authorized on Agricultural Lands" (OAR 660-033-0120), and instead of being subject to the limitations of subsection (19) applicable to private parks, public parks are limited by subsection (31), which states: "Public parks including only the uses specified under OAR 660-034-0035 or 660-034-0040, whichever is applicable."

By statute, public parks are not private parks nor vice versa. The Department should not now be allowed to argue to LUBA that private park restrictions should be applied, through a LUBA interpretation, to public parks.

- **Factor (f) as Basis for Alternative Motion**

We hope you will take a closer look at this matter. We hope you will read Linn County Resolution No. 2009-570 and its findings (at least the 4 page Resolution) before

granting the Department the authority to file a brief against the County's decision regarding a public park on Seven Mile Lane. This is not an appropriate case for requesting a rule interpretation from LUBA, because the rule does not specify which uses on the "allowed use" list are actually not allowed, unless an exception is taken to unspecified Goals, or a master plan is established for the park.

Under Factor (f), you are directed to consider:

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

According to the staff report, the "objective of the appeal" is to "gain needed clarification of division 34."

There is clearly a better way to accomplish the objective of the appeal. The rule is the Commission's rule. The rule is not clear. The Commission should not allow the Department to file post-hoc rationalizations or explanations of what the Commission must have meant when it adopted division 34. The Commission should not be asking LUBA to develop a new strain of exceptions law, so the Commission can avoid having to face the issue reflected in the rule. How many recreational vehicle campsites can be located in a local, public park on rural lands, without an exception or park master plan? That is a decision that the Commission should make.

The County is hopeful that LUBA will not read into the Commission's rule any additional restrictions on local park development that are not specified in the rule. Counties should not be required to develop expensive master plans covering all potential future uses of all parks. Incremental park development should continue to be allowed, including the development of camping facilities, which are traditionally located almost exclusively in rural areas. We would simply prefer that the Department not attempt to put its thumb on LUBA's scale, by requesting that a flawed agency rule be interpreted in an as yet unknown manner.

Thank you for this opportunity to comment, on behalf of Linn County. I intend to be available at your meeting, should you have additional questions or concerns. I would also be happy to discuss this matter with Department legal staff.

Sincerely,

/s/

Todd Sadlo
Of Attorneys for Linn County