



# Oregon

Theodore R. Kulongoski, Governor

**Department of Land Conservation and Development**

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May 21, 2009

TO: Land Conservation and Development Commission

FROM: John Renz, Southern Oregon Regional Representative  
Darren Nichols, Community Services Division Manager

SUBJECT: **Agenda Item 4, June 4-5, 2009, LCDC Meeting**

## **PETITION FOR ENFORCEMENT – CITY OF GRANTS PASS**

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

This item is a citizen-initiated petition to LCDC to enforce provisions of an intergovernmental agreement (IGA) between the City of Grants Pass and Josephine County. The petition is filed pursuant to ORS 197.320 by Perry Wickham (petitioner), a resident of Grants Pass.

#### **A. Type of Action and Commission Role**

This item is before the Land Conservation and Development Commission (LCDC or commission) because Perry Wickham initiated enforcement proceedings against the City of Grants Pass by letter dated February 20, 2008, as provided by ORS 197.319 and OAR 660-045-0040. The city responded within the 60 days provided under Oregon Administrative Rule (OAR) 660-045-0050(1). This petition to the commission followed, by letter dated April 3, 2009.

Under OAR 660-045-0090, the commission's role is to review issues raised in the petition and determine whether there is good cause to proceed to a contested case hearing. If the commission finds there is good cause to proceed to a contested case hearing, the commission shall issue a written decision describing the reasons for its decision. If the commission finds there is not good cause to proceed, the commission shall issue a decision stating its rationale for doing so.

#### **B. Staff Contact Information**

If you have questions about this agenda item, please contact John Renz, Southern Oregon Regional Representative at (541) 858-3189 or [john.renz@state.or.us](mailto:john.renz@state.or.us).

## **II. SUMMARY OF RECOMMENDED ACTION**

The Department of Land Conservation and Development (DLCD or department) reviewed the issues raised by the petitioner and additional information provided by the City of Grants Pass. The department recommends the commission issue an order dismissing the petition.

## **III. BACKGROUND**

### **History of Action – City of Grants Pass Enforcement Order**

Petitioner initially sought redress by filing an appeal to LUBA regarding the city's conditions of approval placed on two land partitions. LUBA affirmed the city's decisions (LUBA Nos. 2006-125 and 2006-147). The petitioner chose not to appeal LUBA's decision to the Court of Appeals. This petition followed.

The petitioner initiated enforcement proceedings by letter to the City of Grants Pass, dated February 20, 2008. In the letter, the petitioner alleges that six separate categories of "pattern and practice" violate the terms of an intergovernmental agreement (the IGA) between the city and Josephine County. The petitioner cites several decisions relating to the city's pattern or practice of decision-making. OAR 660-045-0050(1) requires the city to respond in writing within 60 days of the date on which the request was mailed. The city provided a detailed response to the allegation by letter dated April 16, 2008, explaining why the city had not violated terms of the IGA and stating that the city would take no corrective action. Petitioner responded by letter on July 8, 2008 stating the city's response was not acceptable. The city responded again by letter on August 26, 2008 to explain why the city believes that it had not violated the terms of the IGA. Petitioner then petitioned LCDC by letter dated October 13, 2008. The department reviewed the petition and rejected it due to material deficiencies.

Following the department's initial rejection, the petitioner initiated enforcement proceedings with the city a second time by letter dated February 9, 2009. The city responded by letter March 12, 2009 stating there was no basis for taking corrective action and this petition to LCDC followed by letter dated April 3, 2009.

The department determines the petition is complete and that it complies with the procedural requirements of ORS 197.319 to 197.325 and OAR 660-045-0040 to 0060. The commission's role is to consider whether there is good cause to proceed to a contested case hearing, and (if so) whether the commission or a hearings officer should hold the hearing, and when the hearing should be held (OAR 660-045-0080). The commission's decision regarding "good cause" is made under OAR 660-045-0090.

### **Nature of Request for Enforcement**

Petitioner alleges that the City of Grants Pass demonstrates a pattern and practice of improperly applying its development code and provisions of the "Intergovernmental Agreement for the

Orderly Management of the Grants Pass Urban Growth Boundary Area “ (IGA) to the petitioner’s property and to other similarly situated properties.

The petitioner requests that the commission adopt an order requiring the City of Grants Pass to do the following:

1. Bring city land use regulations and land use decisions into compliance with the August 9, 1998 Intergovernmental Agreement between the City and Josephine County (the IGA) with respect to properties identified as “Category 1 development” under the IGA;
2. Conform the city’s authority to the limits set forth in the express language of delegation of authority under the IGA;
3. Take all required actions to remedy all unauthorized activities related to the regulation of Category 1 development, including refunding to the petitioner and all others similarly situated all unauthorized fees and charges, and to void all unauthorized deferred development agreements, service and annexation agreements, or the applicable portions thereof which are inconsistent with the IGA.

The petition also alleges the following improprieties:

- the city’s requirement to execute a service and annexation agreement as a condition of land use approval;
- the city's requirement for payment for extension of water service to the properties; and
- the city’s conduct as it allegedly violates ORS 197.307(6) (requirement for clear and objective standards that do not discourage needed housing).

Petitioner requests that the commission require the city to cease engaging in patterns and practices of decision making that violate acknowledged land use regulations specifically detailed and limited in the IGA. Petitioner further requests that the department order the city to bring its comprehensive plan, land use regulations and land use decision making into compliance with the limitations of the IGA and require the city to refund all monies improperly collected by the city.

#### **IV. REVIEW CRITERIA AND PROCEDURES**

##### **A. Decision-making Criteria**

The criteria applicable to this review are:

- ORS 197.319–197.350, Enforcement of Planning Requirements
- OAR Chapter 660, Division 45, Citizen Initiated Enforcement Orders

##### **B. Procedural Requirements**

OAR 660-045-0090 (The commission’s Determination of Good Cause to Proceed) sets forth the procedural requirements and standards for the commission's decision in this matter:

- (1) The commission shall conduct a public hearing to determine whether there is good cause to proceed to a contested-case hearing.
- (2) Only the department and parties to the proceeding may present testimony during the good-cause hearing described in Section 1.
- (3) The commission may set limits on the time allowed for testimony at the good-cause hearing.
- (4) A requester who alleges a pattern or practice of noncompliant decision-making may present as evidence of good cause to proceed recent examples of noncompliant decisions made after the requester notified the affected local government or district of the requester's intent to petition for enforcement.
- (5) In deciding whether there is good cause to proceed, the commission shall consider the following:
  - (a) The department's recommendation;
  - (b) The requester's petition;
  - (c) The citizen's request notice to the affected local government or district;
  - (d) The affected local government or district's response to the citizen's request;
  - (e) Related facts known to or ascertained by the commission; and
  - (f) Any testimony from parties to the enforcement proceeding.
- (6) The commission shall find that there is good cause to proceed to a contested-case hearing if the information described in Section 5 contains substantial evidence of noncompliance.
- (7) If the commission finds there is not good cause to proceed, it shall issue an order dismissing the petition and stating its reasons for doing so. A commission order dismissing a petition on grounds that there is not good cause to proceed shall be a final order. If the commission finds there is not good cause to proceed, no contested-case hearing of the petition shall be conducted.
- (8) If the commission finds there is good cause to proceed, it shall issue a written decision describing the reasons for its decision.
  - (a) The commission may find good cause to proceed on some assertions of noncompliance in a petition, but not on others.
  - (b) The commission may, under its own motion pursuant to ORS 197.324, proceed on related assertions of noncompliance not contained in the petition.
- (9) If the commission finds there is good cause to proceed, it shall initiate proceedings toward a contested-case hearing, as described in OAR 660-045-0100 to -0120.

**V. ANALYSIS**

Pursuant to ORS 197.320 (6), the petitioner alleges that the City of Grants Pass engaged in a pattern or practice of decision-making that violates its acknowledged IGA. The terms “pattern” and “practice” of decision-making have specific meanings set forth in OAR 660-045-0020 (10) and (11):

- (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.

The role of the commission at this juncture in the proceedings is to determine whether there is good cause to believe that one or more of the petitioner’s allegations is valid and that proceedings toward a contested-case hearing should therefore be initiated.

**Provisions of the IGA pertinent to this enforcement petition**

Properties identified in the petition are defined in Section II of the IGA as “Category 1 Development”. The IGA defines Category 1 development as:

Development within the urban area (UA) on an authorized lot or lot of record existing as of the effective date of this agreement which is:

- A. A new single-family or one duplex development which is beyond 100 feet from the nearest water main; or
- B. A residential remodel; or
- C. A lot line adjustment; or
- D. A partition which does not create more than one new lot from a parent parcel within a ten year period and which is beyond 300 feet from the nearest water main; or
- E. An expansion, up to a total of 25%, of an existing commercial, industrial or public use and associated structures, which is beyond 100 feet from the nearest water main and which does not include a different nonconforming use; or
- F. A change in use from a previously permitted use to a use permitted under the City's Land Use Regulations of the same or lesser intensity and which does not require or request a new connection to city water or sanitary sewer service.

The IGA cites Category 1 development in two other sections in the agreement. Section IV.3 of the IGA states: “All land uses within the UA (Category 1 and Category 2) shall be subject to the City's Land Use Regulations; Land Development Regulations including Development, Building and Utility standards and procedures, except Category 1 developments shall not be required to execute an agreement for future annexation or to extend water as a condition of development unless annexation or extension is otherwise required by state statute or administrative rule.” (*emphasis added*).

Section VI.1 of the IGA states: “All Category 1 developments within the UA which are required to connect to sanitary sewer or municipal water by state statute or administrative rule, or which request such connection, shall be subject to a service and annexation agreement.” (*emphasis added*)

### **Issue 1. Services and Annexation Agreement**

DLCD does not dispute that cases cited by the petitioner are Category 1 developments. However, an administrative rule of the Environmental Quality Commission (EQC) OAR 340-071-0160((f)(A)(i)(I) requires connection to a sanitary sewer for a single family dwelling in an urban area if (among other things) the nearest sewerage connection point from the property to be served is within 300 feet. All of petitioner's properties are within 300 feet of a sanitary sewer line. Therefore, consistent with IGA Sections IV and VI, the city properly required service and annexation agreements for petitioner's properties. Remaining properties cited in the petition are either already connected to sewer or are further than 300 feet from a sewer line.

**Issue 2. Deferred Development and Waiver of Remonstrance Agreement**

1. The city requires deferred development agreements as a condition of Category 1 development permits. The agreements do not require the developer to extend water or other services. The agreements do, however, bind an owner or developer to not remonstrate against the formation of a local improvement district or an advanced finance district to provide services in the future. The agreements include a requirement for a cash deposit paying for the frontage infrastructure improvements, which include water. This type of agreement is a common local government tool to ensure the future provision of services which are impracticable to provide at the present time. DLCD does not find any clause in the IGA which would prohibit the city from requiring a deferred development agreement for a Category 1 development.

**Issue 3. Alleged Violation of ORS 197.307(6)**

ORS 197.307(6) is a prohibition on actions which discourage needed housing through unreasonable cost or delay. The petition does not explain how the city is violating this statute, but staff understands the petitioner believes the requirement for a deferred development agreement and a cash deposit for frontage improvements violate the statute. The department finds that the city's actions support needed housing by ensuring that the costs of development are made clear and paid at the time of development. DLCD does not interpret the city's actions as a violation of this statute.

**Issue 4. Bringing the Comprehensive Plan and City Code into Compliance with the Limitations in the IGA**

The IGA is an acknowledged intergovernmental agreement, which relies on existing comprehensive plans and development codes. The IGA, plans and codes are sufficiently coordinated. Staff does not see need for the city to amend its plan and code to cite limitations in the IGA.

**Issue 5. Refunding of Cash Deposits**

The petitioner requests that the commission direct the city to refund the cash deposits for the installation of frontage improvements. The department does not find that the required deposits violate state law. Therefore no refund is due on this basis.

**VI. COMMISSION OPTIONS**

Pursuant to OAR 660-045-090(7) through (9), the commission may take action as follows:

1. If the commission finds there is not good cause to proceed, the commission shall issue a written decision stating its rationale for doing so;

2. If the commission finds there is good cause to proceed to a contested case hearing, the commission shall issue a written decision describing the reasons for its decision. The commission may find good cause to proceed on some assertions of noncompliance in a petition, but not on others. The commission may, under its own motion pursuant to ORS 197.324, proceed on related assertions of noncompliance not contained in the petition; or
3. If the commission finds there is good cause to proceed, it shall initiate proceedings toward a contested-case hearing, as described in OAR 660-045-0100 to -0120.

#### **A. Department's Recommended Option**

The department recommends that the commission issue a written decision stating it has not found good cause to proceed to a contested case hearing in this matter and stating the rationale for its decision.

#### **B. Alternative Options**

If the commission disagrees with the department's recommendation it can issue a written decision to proceed to a contested case hearing. If the commission finds good cause to proceed on some assertions of noncompliance in a petition, but not on others, it may issue a written decision to proceed to a contested case hearing on only those valid issues. Or the commission may, under its own motion pursuant to ORS 197.324, proceed on related assertions of noncompliance not contained in the petition. If the commission finds there is good cause to proceed, it shall initiate proceedings toward a contested-case hearing, as described in OAR 660-045-0100 to -0120.

### **VII. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS**

The department recommends that the commission issue a written decision stating that it has not found good cause to proceed to a contested case hearing in this matter and stating the rationale for its decision.

#### **A. Proposed Motion**

I move that the commission issue a written decision stating it has not found good cause to proceed to a contested case hearing in this matter. In that decision, the commission shall clearly state the rationale for its decision, based on findings and conclusions in the staff report.

#### **B. Alternative Motions**

1. I move that the commission issue a written decision stating it has found good cause to proceed to a contested case hearing in this matter. In our decision, the commission shall

clearly state the rationale for its decision, based on findings and conclusions in the staff report and shall initiate proceedings toward a contested-case hearing, as described in OAR 660-045-0100 to -0120.

2. I move that the commission issue a written decision stating it has found good cause to proceed to a contested case hearing on certain assertions of noncompliance in the petition. In our decision, the commission shall clearly state the rationale for its decision, based on findings and conclusions in the staff report and additional findings and conclusions of the commission. The commission shall also initiate proceedings toward a contested-case hearing, as described in OAR 660-045-0100 to -0120.

#### **LIST OF ATTACHMENTS**

- A. February 20, 2008 Request for Enforcement Order and subsequent correspondence between the city and petitioner (without attachments)
- B. February 9, 2009 Request for Enforcement Order and subsequent correspondence between the city and petitioner (without attachments)

WALTER L. CAUBLE  
JAMES R. DOLE  
CHRISTOPHER L. CAUBLE\*  
DEBORAH L. SORENSON  
WILLARD L. RANSOM

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\*ALSO ADMITTED IN WASHINGTON

February 20, 2008

VIA FACSIMILE

Mr. Kris Woodburn  
City Attorney  
101 N.W. A Street  
Grants Pass, OR 97526

Re: Perry Wickham - Request Pursuant to ORS 197.319

Dear Kris:

As we have discussed, this firm represents Perry Wickham with respect to the question of whether the city of Grants Pass properly administered its local development code in connection with the partition of Mr. Wickham's property located at 171 Canyon Driver, Grants Pass. This letter constitutes our request pursuant to ORS 197.319(1)(b)(B) that the city (1) refund to Mr. Wickham the amount of \$52,797.82 which the city required him to pay for deferred public improvements and (2) that the city exonerate Mr. Wickham from responsibility under the Annexation and Service Agreement it required him to execute as a condition of the property's partitioning. In accordance with ORS 197.319(2)(a), the city is required to respond to us within 60 days of the date of mailing this letter.

The basis for this request is as follows:

As you know, in 1998, the city and Josephine County entered into an intergovernmental agreement (IGA) which transferred to the city most, but not all, authority over lands within the Grants Pass Urban Growth Boundary. Section IV.3 of the IGA exempts property deemed "Category 1 Developments" from certain requirements that would otherwise apply to lands within the city's jurisdiction. The IGA provides:

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"...Category 1 developments shall not be required to execute an agreement for future annexation or to extend water as a condition of development unless annexation or extension is otherwise required by state statute or administrative rule."

On June 21, 2006, the city approved Mr. Wickham's application for partition of the identified property. Condition 3 of the approval required Mr. Wickham to:

"Sign a Deferred Development Agreement and provide a cash deposit to the City of Grants Pass for future installation of storm drain, water, curb, gutter and sidewalk along the full frontage of Fruitdale Drive."

Mr. Wickham complied with this by paying to the city \$52,797.82.

Condition 4 of the approval required Mr. Wickham to:

"Sign a Service and Annexation Agreement and provide the required exhibits for parent tax lot 1402."

Mr. Wickham signed the Service and Annexation Agreement.

In accordance with the express terms of the IGA, neither of these conditions was permissible. I do not believe there has ever been any disagreement that Mr. Wickham's property is a Category 1 Development. Mr. Wickham's property is clearly a Category 1 Development.

In *Wickham v. City of Grants Pass*; Or LUBA Nos. 2006-125 and 2006-147 (2007), the Oregon Land Use Board of Appeals held that Mr. Wickham failed to establish that the IGA would take precedence over the city's development code. In effect, LUBA held that the development code, which is the exclusive authority under which the city can partition land, does not distinguish between Category 1 and Category 2 Development. The problem seems to be nothing more than the fact that the city never amended the development code to conform to the IGA. This is, of course, not Mr. Wickham's fault. The IGA should have resulted in the city amending the development code to recognize the IGA's limitations on the city's grant of authority with regards to Category 1 Development. Had the city amended the code as required, Mr. Wickham's partition would have not been subject to the requirements that he pay in advance for deferred development and sign the service and annexation agreement. He never should have been required to pay the \$52,797.82 as a condition of partition

Mr. Kris Woodburn  
February 20, 2008  
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and should not have been compelled to sign the agreement. Should the city reject our request, we will proceed with seeking an enforcement order as provided by law. ORS 197.320 authorizes the Oregon Land Conservation and Development Commission (LCDC) to undertake an enforcement action where:

(6) "A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. In making its determination under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions."

(10) "A local government is applying approval standards, special conditions on approval of specific development proposals or procedures for approval that do not comply with ORS 197.307(6)."

ORS 197.307(6) provides:

"Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Clearly, the city's failure to conform its code to the IGA runs afoul of Oregon law in the foregoing respects. The city must amend its development code accordingly and, in so doing, must reimburse Mr. Wickham for costs he should never have had to pay and must exonerate him from all obligations under the Service and Annexation Agreement.

Very truly yours,

CAUBLE, DOLE, SORENSON & RANSOM

James R. Dole

JRD:ks

cc: Perry Wickham

# City of Grants Pass



April 16, 2008

By Hand Delivery April 16, 2008

Mr. James R. Dole  
Cable, Dole, Sorenson & Ransom  
111 SE 6<sup>th</sup> Street  
P.O. Box 398  
Grants Pass, Oregon 97528

RECEIVED  
APR 16 2008  
CAUBLE, DOLE, SORENSON & RANSON  
ATTORNEYS AT LAW  
111 S.E. SIXTH STREET  
GRANTS PASS, OR 97526

Re: Perry Wickham---Request Pursuant to ORS 197.319/171 Canyon Drive

Dear Jim:

The purpose of this letter is to respond to your February 20, 2008 ("February 20 Letter") letter regarding property located at 171 Canyon Drive (the "Property"). The Property is located outside of the Grants Pass city limits, but within the City's urban growth boundary.

It is our understanding from reading your February 20 letter that you believe the City has made some error with regards to its analysis and review of your client's attempted partition of the Property. It is your contention that such an error would justify and you intend to seek the issuance of an enforcement order by the Oregon Land Conservation and Development Commission ("LCDC") under ORS 197.320 subsections (6) and (10).

For many reasons, it is the City's position that your allegations are not supported by the facts of this matter. On two occasions, Mr. Wickham has sought to partition the Property. His first attempt sought a three lot partition. His second attempt sought a two lot partition. It is the second attempt that was conditionally approved by the City, a decision which Mr. Wickham unsuccessfully appealed to the Grants Pass City Council and to LUBA. Mr. Wickham chose not to appeal the LUBA decision to the Oregon Court of Appeals.

The conditional approval of the partition for the Property expired in December 2007, eighteen months following its approval in accordance with City codes. Contrary to your letter, Mr. Wickham has never signed a Service and Annexation Agreement or a Deferred Development Agreement with respect to the Property. Likewise, Mr. Wickham has never paid any deferred development fees respecting the Property.

In addition, the City believes that the LCDC lacks jurisdiction in this matter for the reason that neither of the sections of ORS 197.320 on which you rely is applicable or supported by the facts. First, your allegations do not involve nor do you demonstrate any pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation as required by section (6) of ORS 197.320. As will be demonstrated below, the City has not violated any acknowledged plan or land use regulation nor engaged in any pattern or practice to do so.

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Similarly, your allegations fail to show in any fashion how the actions of the City and the ordinances and policies relied upon by the City are anything but clear and objective or how such actions, ordinances and policies could possibly have any effect of discouraging needed housing through unreasonable cost or delay as required by section (10) of ORS 197.320. To the contrary, the City's actions, ordinances and policies are clear and objective, and such actions, ordinances and policies do not have the effect of discouraging needed housing through unreasonable cost or delay.

Please be advised that for the reasons set forth above and below, and in accordance with OAR 660-045-0050 (2)(b), the City of Grants Pass (the "City") will not take corrective action in connection with the captioned matter.

Chronology/ Statement of Additional Facts

It is important to an understanding of this matter to have an accurate history of it. While your letter relates to Mr. Wickham's partition of the 171 Canyon Drive property, much of the history of this matter relates to both 171 Canyon Drive and 165 Canyon Drive, and both histories are included herein for your convenience.

A. Director's Decision for PLA #05-10200017

- 06/03/05 An Application for Property Line Adjustment (#05-10200017) between 165 and 171 Canyon Drive (map and tax lots 36-05-21-40-1401 & 1402) is submitted by Perry Wickham. The Application is deemed complete the same day.
- 06/22/05 The Community Development Director (the "Director") issues a staff report, conditionally approving the Property Line Adjustment application.
- 12/07/06 The Director grants 6-month extension of land use approval for PLA, to 6/22/07 (original expiration 12/22/06.)
- 06/13/07 The Director grants second 6-month extension of land use approval for PLA, to 12/22/07.

B. Director's Decisions for Partition #s 05-10300019 (165 Canyon) & 05-10300022 (171 Canyon)

- 07/08/05 An Application for 2-lot partition of 165 Canyon Drive (map and tax lot #36-05-21-40-1401, application #05-10300019) is submitted by Perry Wickham. The Application is deemed complete the same day.
- 07/22/05 An Application for 3-lot partition of 171 Canyon Drive (map and tax lot #36-05-21-40-1402, application #05-10300022) is submitted by Perry Wickham. The Application is deemed complete the same day.

07/29/05 The Director issues a staff report for 165 Canyon Dr. partition, conditionally approving the proposal. The land division is conditioned upon the execution and delivery of a Deferred Development Agreement and a Service and Annexation Agreement.

8/18/05 The Director issues a staff report for 171 Canyon Dr. partition, conditionally approving the proposal. The land division is conditioned upon the execution and delivery of a Deferred Development Agreement and a Service and Annexation Agreement.

C. Appeal of Director's Decisions to UAPC (App. #s 05-30200011 (165 Canyon) & 05-30200012 (171 Canyon))

08/12/05 An Appeal of the Director's Decision to the Urban Area Planning Commission (UAPC) is submitted by Perry Wickham for the 165 Canyon Dr. partition decision. The Appeal is specific to the Deferred Development Agreement ("DDA") amount and / or the option to install frontage improvements rather than defer.

08/24/05 An Appeal of the Director's Decision to Urban Area Planning Commission ("UAPC") is submitted by Perry Wickham for the 171 Canyon Dr. partition decision. The Appeal is specific to the DDA amount and / or the option to install frontage improvements rather than defer.

09/28/05 A UAPC hearing is held to consider both appeals. The UAPC orally affirms the Director's Decision and associated conditions for both partitions.

10/12/05 The UAPC approves written Findings of Fact for the appeal decisions.

D. Appeal of UAPC Decisions to City Council (App. #s 05-30200013 (165 Canyon) & 05-30200014 (171 Canyon))

10/06/05 A Notice of Intent to Appeal the UAPC decisions to the City Council is submitted by Perry Wickham.

10/19/05 The grounds for Appeal of the UAPC decisions submitted by Perry Wickham, indicate that the appeal is specifically of the DDA amount and / or the option to construct public improvements rather than defer.

11/16/05 The City Council hearing is held to consider the appeals. Council continues the hearing to January 18, 2006, with instructions to staff to work with Mr. Wickham to determine if improvements are feasible to install.

- 11/23/05 The Community Development Director sends a letter to Mr. Wickham, outlining exactly what frontage improvements are required, and requesting submittal of engineered construction drawings, so that it can be determined if installation of improvements is feasible.
- 01/05/06 Formal construction drawings for Fruitdale Drive improvements are circulated to City departments for review.
- 01/11/06 The Community Development Director includes a memorandum in the Council packet regarding events which have transpired since the previous hearing (meetings between staff and Mr. Wickham, submittals, etc.) and making recommendation that most improvements be deferred. The primary issues are applicant's desire to install a "dry" water line along Fruitdale Drive, and the existence of a large Grants Pass Irrigation District ("GPID") canal along the Fruitdale frontage that would prevent a planter strip between the curb and sidewalk. It is believed that improvements should be deferred because it is likely that the canal will be piped in the future, allowing the planter strip to be installed.
- 01/18/06 A second City Council hearing is held to consider the appeals. Discussion centers on construction drawings and whether to allow Mr. Wickam to install improvements rather than defer. The Council continues the hearing to February 1, 2006 to allow Mr. Wickham and City staff more time to review drawings, and to discuss the future of canal with GPID.
- 02/01/06 A third City Council hearing is held to consider appeals. Staff's recommendation that improvements be deferred has not changed. Discussions held with GPID have indicated that future plans for the canal are unclear. A GPID manager speaks at the hearing, saying that GPID has no plans to pipe the canal in the near future. The City Council orally affirms the UAPC decisions and original conditions imposed by the Director for both applications.
- 02/15/06 The City Council approves written Findings of Fact for appeal decisions.

E. Director's Decisions & Interpretation for Partition #s 06-10300008 (165 Canyon) & 05-10300009 (171 Canyon)

- 03/03/06 New applications for a 2-lot partition of 165 Canyon Drive (map and tax lot #36-05-21-40-1401, application #06-10300008) and a 2-lot partition of 171 Canyon Drive (map and tax lot #36-05-21-40-1402, application #06-10300009) are submitted by Perry Wickham. The Applications are deemed complete the same day. The Applications each include a copy of the Intergovernmental Agreement between the City and Josephine County (the "County") and emphasize that each proposal is considered a Category 1 development under the agreement.

- 03/21/06 Applicant requests a Director's Interpretation to explain why the connection to City sewer and signature of a Service and Annexation Agreement are required as conditions of approval for each partition.
- 04/21/06 The Director's Interpretation is issued, finding that the City has authority to require sewer connection and Service and Annexation Agreements prior to final partition plats. Specific findings of the Director included:
- a. Section 1.050 of the Grants Pass Development Code ("GPDC") provides that the Director shall interpret all terms, provisions and requirements of the GPDC;
  - b. Section 1.054 of the GPDC provides that interpretations shall be based upon the following considerations: the comprehensive plan; the purpose and intent of the particular section of the code in question; the definitions contained in GPDC Article 30; and the opinion of the City Attorney;
  - c. Mr. Wickham's proposal is subject to the provisions of the 1998 Intergovernmental Agreement between the City and Josephine County ("IGA"), the GPDC and other applicable City plans, policies and utility standards and procedures, including, the following:
    - (i) Urban Services Policy 31 requires that urban levels of development shall require a public sanitary sewage system;
    - (ii) The definition of "development" found in GPDC Article 30 includes land divisions; and
    - (iii) Mr. Wickham's proposed developments constitute an urban level of development that requires a public sanitary sewage system under GPDC 28.071(1) and Oregon Department of Environmental Quality regulations.
  - d. GPDC section 28.071 (1) provides that sanitary sewers shall be installed to service all land divisions;
  - e. Both the GPDC and Oregon Department of Environmental Quality regulations require connection to the existing sewer line along the property's Fruitdale Drive frontage;
  - f. GPDC section 28.014 requires as a condition to receiving City services such as water and sewer that the property be annexed into the City or the property owner sign a Service and Annexation Agreement with the City;
  - g. The City can not legally provide sewer services to the properties in the absence of a signed Service and Annexation Agreement;
  - h. Prior to the signing of the IGA in 1998, the City required the signing of a Service and Annexation Agreement as part of the complete application. Thereafter, the City has required the signing of a Service and Annexation Agreement as one of the conditions of the land use decision;
  - i. In executing and delivering a signed Service and Annexation Agreement, Mr. Wickham agreed that he was making application to receive city water or sewer service making the property subject to City Ordinances and requiring payment of City fees;
  - j. City utility policies have required since at least August of 1998 that applicants with property in the urbanizing area which requires a

connection to a City service must sign a Service and Annexation Agreement as part of the land division approval;

- k. The City has consciously tied the signing of a Service and Annexation Agreement to the platting process and not to the building permit process to guarantee that newly created parcels can receive City services; and
- l. Without signing a Service and Annexation Agreement prior to approval of the creation of new parcels, the City can't meet the purpose and intent of GPDC Article 17 which states, in relevant part, "The intention is to create lots and parcels for which development permits and/or building permits can be issued without varying applicable site development standards, and for which urban services and necessary off-site improvements are provided."

04/24/06 The Director issues staff reports for 165 and 171 Canyon Drive partition applications. Both applications are conditionally approved.

05/04/06 The County Planning Director sends Wickham a letter, affirming the conclusions of the Director's Interpretation.

F. Appeal of Director's Decisions to UAPC (App. #s 06-30200004 (165 Canyon ) & 06-30200005 (171 Canyon))

05/08/06 Appeals of the Director's Decisions to UAPC are submitted by Perry Wickham. The Appeals are specific to conditions that require the signature of Service and Annexation and Deferred Development Agreements. The appeals are referred directly to the City Council in accordance with Section 2.020 of the Development Code, which allows the Director to refer any Type I, II or III application to a Type IV review.

06/07/06 The City Council held a hearing to consider both appeals. The Council orally affirms the Director's Decision with respect to 171 Canyon. The Council also voted unanimously not to hear Mr. Wickham's appeal regarding his second 165 Canyon partition application for the reason that the second application was substantially similar to Mr. Wickham's first application which had been conditionally approved and for which no appeal had been filed to LUBA by Mr. Wickham;

06/21/06 The City Council approves written Findings of Fact for appeal decisions.

G. LUBA Appeal of City Council Decisions (2006-125 (171 Canyon) & 2006-147 (165 Canyon))

07/07/06 Perry Wickham files one Notice of Intent to Appeal to LUBA for City Council decisions on partitions.

- 07/10/06 LUBA sends a request for record to the City.
- 07/26/06 The City moves to request two separate appeals, one for each partition decision.
- 08/03/06 Mr. Wickham files a separate appeal for each decision.
- 08/10/06 LUBA files its order consolidating appeals and giving the City two weeks to file the record for each case.
- 08/21/06 City files the record for each LUBA case.
- 01/30/07 LUBA issues its final decision on appeals, denying all assignments of error and affirming the City's decisions. Among the findings contained in the LUBA decision are the following:
- a. With respect to 165 Canyon, LUBA agreed with the City that the original partition application submitted by Mr. Wickham which had been conditionally approved by the City and had never been appealed by Mr. Wickham. Instead, Mr. Wickham chose to submit a substantially similar application to the application the City had previously approved with conditions and which had not yet expired. The resubmission of substantially the same request was rightfully rejected by the City;
  - b. With respect to both 165 and 171 Canyon, Mr. Wickham failed to set forth each assignment of error under a separate heading as required by state rules, and that Mr. Wickham had strayed in oral argument from issues presented in his appeal brief. The cumulative effect of these errors was to leave the City's attorney and LUBA to speculate as to the nature of Mr. Wickham's claims;
  - c. With respect to 171 Canyon, there was no requirement for the City to amend its development code to conform in any way to the IGA;
  - d. With respect to 171 Canyon, in the event of an inconsistency between the IGA and the GPDC, the GPDC would control since it was part of an acknowledged plan. The City must make its land use decisions and limited land use decisions in compliance with acknowledged land use regulations under ORS 197.175(2)(d);
  - e. With respect to 171 Canyon, the City has no jurisdiction to partition absent an annexation agreement under GPCD 17.020. Moreover, the City has and in this case, exercised its implicit authority to require the execution of a Service and Annexation Agreement as a condition of approval of any partition request, consistent with the underlying purpose of GPDC 17.020 and in accord with ORS 197.829(1);

- f. With respect to 171 Canyon, the City need not wait until a request for the approval of the actual development was made to require the execution of a Services and Annexation Agreement. To require execution at the time of a partition is not inconsistent with GPDC 28.014;
- g. With respect to 171 Canyon, the City's interpretations of its codes and policies is not inconsistent with the language of the City's codes or policies or state statutes.
- e. Mr. Wickham did not attempt to appeal all or any portion of LUBA's decision to the Court of Appeals.

H. Follow-Up Since LUBA

165 Canyon Drive

- 07/11/07 Perry Wickham signs two Deferred Development Agreements ("DDAs") required for the partition of 165 Canyon Drive (parent tax lot 1401). Mr. Wickham also signs two Service and Annexation Agreements, one for each new parcel (165 Canyon and 163 Canyon).
- 07/12/07 A cash deposit is received for above-mentioned DDAs. The amount of the payment is \$51,797.51. A Development Permit is issued for PLA and 165 Canyon Partition. Final Plat mylars for both projects (the PLA and partition of 165 Canyon) are released by City and recorded by County (# 2007-49).
- 07/19/07 Service and Annexation Agreements for parent TL 1401 (165 Canyon) are recorded.
- 07/23/07 DDAs for parent TL 1401(165 Canyon) are recorded.

171 Canyon Drive

The Property (171 Canyon) is never partitioned. No Service and Annexation Agreement or DDA is signed, and no payments in respect of the same are made. By the express terms of the Findings approved by the City Council, the conditional approval of the 171 Canyon partition expired on December 21, 2007, eighteen months following its conditional approval in accordance with GPDC 17.313 (1).

Response to Written Request

As is evident from the lengthy history of this matter, the City has acted entirely in accordance with its acknowledged plans and land use regulations. Its actions have been reviewed and

consistently interpreted by its Community Development Director, the UAPC, the City Council and LUBA with respect to both 165 Canyon Drive and 171 Canyon Drive.

Before LUBA, it was clear that the City's actions are supported by substantial evidence in the record and complied with applicable provisions of the City and State's land use regulations, all in accord with ORS 197.828. The City's interpretation of its comprehensive plan and land use regulations are consistent with the purposes and underlying policies that provide the bases for its comprehensive plan and land use regulations in accordance with ORS 197.829. The City's interpretations and actions are not inconsistent or contrary to any state statute, land use goal or rule that the comprehensive plan or land use regulation implements.

Mr. Wickham appealed the decisions relating to 165 Canyon and 171 Canyon to LUBA. With respect to 165 Canyon, the Mr. Wickham's appeal was dismissed largely for the reason that it was a resubmission of an earlier substantially similar partition application by Mr. Wickham which had not been appealed to LUBA and which was still in effect.

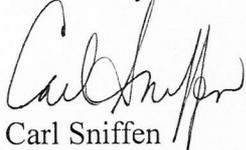
As noted, Mr. Wickham determined not to appeal the LUBA decisions for either 165 Canyon or 171 Canyon to the Oregon Court of Appeals as allowed by Oregon law.

Instead, Mr. Wickham now seeks relief in the form of an enforcement order for the 171 Canyon partition application. Mr. Wickham requested that the City allow the partition of this property, and the application was conditionally approved by the City. He unsuccessfully pursued these conditions to the Grants Pass City Council and to LUBA. The conditional approval of Mr. Wickham's request expired automatically 18 months following the Council's approval of it. Mr. Wickham has not signed a deferred development agreement or a services and annexation agreement with the City with respect to 171 Canyon.

### Conclusions

For all of the reasons set forth above, the City will take no corrective action in response to your request.

Yours truly,



Carl Sniffen  
Deputy City Attorney

CF#: 08-052

WALTER L. CAUBLE  
JAMES R. DOLE  
CHRISTOPHER L. CAUBLE\*  
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KENDELL H. FERGUSON

LOUIS F. SCHULTZ, JR.  
(1923-2004)

\*ALSO ADMITTED IN WASHINGTON

July 8, 2008

HAND DELIVERED

Mr. Carl Sniffen  
Assistant City Attorney  
101 N.W. A Street  
Grants Pass, OR 97526

Re: Perry Wickham - Request Pursuant to ORS 197.319

Dear Carl:

This is in furtherance of Perry Wickham's intent to petition the Land Conservation and Development Commission for an enforcement order pursuant to ORS 197.319 to 197.335. We have reviewed your April 16, 2008, response to our February 20, 2008, correspondence. We believe that it is inadequate to resolve this matter. We continue to believe that the city of Grants Pass has failed to properly administer its local development code in connection with the partition of Mr. Wickham's property located at both 165 and 171 Canyon Driver, Grants Pass. This letter constitutes our request pursuant to ORS 197.319(1)(b)(B) that the city (1) refund to Mr. Wickham and all others similarly situated all charges and assessments required to be paid for deferred public improvements and (2) that the city exonerate Mr. Wickham and others similarly situated from responsibility under annexation or deferred developments it required as a condition of developing certain property that is subject to the 1998 Intergovernmental Agreement with Josephine County. We maintain that the city has engaged in a pattern and practice of failing to comply with its responsibilities as set forth in this letter. In accordance with ORS 197.319(2)(a), the city is required to respond to us within 60 days of the date of mailing this letter.

Mr. Carl Sniffen  
July 8, 2008  
Page 2

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The basis for this request is as follows:

As you know, in 1998, the city and Josephine County entered into an intergovernmental agreement (IGA) which transferred to the city most, but not all, authority over lands within the Grants Pass Urban Growth Boundary (UGB). Section IV.3 of the IGA exempts property deemed "Category 1 Developments" from certain requirements that would otherwise apply to lands within the city's jurisdiction. The IGA provides:

"...Category 1 developments shall not be required to execute an agreement for future annexation or to extend water as a condition of development unless annexation or extension is otherwise required by state statute or administrative rule."

Mr. Wickham and others applied for partition of properties on Canyon Drive and elsewhere inside the UGB. As a condition of the approving these requests, the city required Mr. Wickham to:

"Sign a Deferred Development Agreement and provide a cash deposit to the City of Grants Pass for future installation of storm drain, water, curb, gutter and sidewalk along the full frontage of Fruitdale Drive."

Mr. Wickham complied with this, including by paying to the city cash deposits for deferred development. Others did likewise as conditions of development.

Condition 4 of the approval required Mr. Wickham to:

"Sign a Service and Annexation Agreement and provide the required exhibits for parent tax lot 1402."

Mr. Wickham signed service and annexation agreements. Likewise, others did as well.

In accordance with the express terms of the IGA, neither of these conditions was permissible. I do not believe there has ever been any disagreement that Mr. Wickham's property is a Category 1 Development. Mr. Wickham's property is clearly a Category 1 Development.

In *Wickham v. City of Grants Pass*; Or LUBA Nos. 2006-125 and 2006-147 (2007), the Oregon Land Use Board of Appeals held that Mr. Wickham failed to establish that the IGA would take precedence over the city's development code. In effect, LUBA

Mr. Carl Sniffen  
July 8, 2008  
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held that the development code, which is the exclusive authority under which the city can partition land, does not distinguish between Category 1 and Category 2 Development. The problem seems to be nothing more than the fact that the city never amended the development code to conform to the IGA. This is, of course, not Mr. Wickham's fault. The IGA should have resulted in the city amending the development code to recognize the IGA's limitations on the city's grant of authority with regards to Category 1 Development. Had the city amended the code as required, Mr. Wickham's partition would have not been subject to the requirements that he pay in advance for deferred development and sign the service and annexation agreement. Nor should other developers of Category 1 properties. Mr. Wickham never should have been required to pay cash security for deferred development as a condition of partition and should not have been compelled to sign deferred development or annexation agreements. Nor should others developers of Category 1 properties.

Should the city reject our request, we will proceed with seeking an enforcement order as provided by law. ORS 197.320 authorizes the Oregon Land Conservation and Development Commission (LCDC) to undertake an enforcement action where:

(6) "A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. In making its determination under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions."

(10) "A local government is applying approval standards, special conditions on approval of specific development proposals or procedures for approval that do not comply with ORS 197.307 6)."

ORS 197.307(6) provides:

"Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Clearly, the city's failure to conform its code to the IGA runs afoul of Oregon law in the foregoing respects. The city must amend its development code accordingly and, in so doing, must reimburse Mr. Wickham and others facing similar situations for costs they should never have had to pay and must exonerate them.

Mr. Carl Sniffen  
July 8, 2008  
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from all obligations under the Service and Annexation Agreement.

The city has clearly engaged in a pattern and practice of exceeding its authority in a number of other circumstances. In addition to Mr. Wickham's properties, we have identified at least four other similar circumstances, listed as follows:

- ▶ 229 Canyon Drive
- ▶ 270 Canyon Drive
- ▶ 225 Canyon Drive
- ▶ 2016 Fruitdale Drive

I include evidence of these decisions, reflecting the city's inappropriate decision making.

All of these circumstances involve the city conditioning the development of Category 1 property. We would estimate that the total number of similar circumstances exceeds ten. These improper decisions appear to have been made since at least 2001 and the city's pattern and practice appears to continue today.

Very truly yours,

CAUBLE, DOLE, SORENSON & RANSOM

James R. Dole

JRD:ks  
Enclosures

cc: Perry Wickham

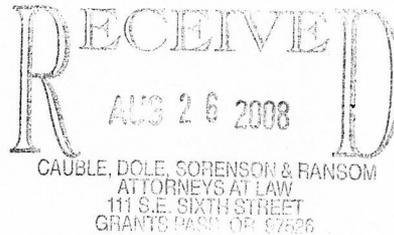
# City of Grants Pass



August 26, 2008

Hand Delivered

Mr. Jim Dole  
Cauble, Dole, Sorenson & Ransom  
111 S.E. Sixth Street  
P.O. Box 398  
Grants Pass, Oregon 97526



Re: Perry Wickham—Your Request Pursuant to ORS 197.319

Dear Jim:

The purpose of this letter is to respond to your July 8, 2008 letter (“Wickham’s July 8 Letter”) regarding Mr. Wickham’s properties located at 165 and 171 Canyon Drive (the “Canyon Drive Properties”). Your July 8 Letter refers to my earlier letter to you of April 16, 2008 (City’s April 16 Letter”). In turn, the City’s April 16 Letter was responsive to your letter of February 20, 2008 relating to the Canyon Drive Properties.

The City’s April 16 letter provided a detailed chronology of events which outline the course of history relating to the Canyon Drive Properties and the City. It also sets forth the bases upon which the City determined that your allegations are not supported by the facts of this matter and that the City would not take any corrective action in connection with this matter.

We find nothing in Wickham’s July 8 Letter that alters the conclusion set forth in the City’s April 16 Letter and the bases for that conclusion. For convenience, the City’s April 16 Letter and the documents, decisions and references referred to therein are by this reference fully incorporated herein as if fully set forth herein.

In response to new matters which you raise in Wickham’s July 8 Letter, please be advised as follows:

In Wickham’s July 8 Letter, you assert (as you did in your February 20 letter) that you are prepared to seek an enforcement order from the Oregon Land Conservation and Development Commission (“LCDC”) pursuant to ORS 197.320. By its plain language, ORS 197.320 requires a violation of an acknowledged plan or land use regulation, and no such violation has occurred here. And, as noted in the City’s April 16 Letter, there is more than ample evidence in the record to support the decisions made by the City.

Moreover, you assert that somehow the City has failed to comply with ORS 197.307 (6). Again, your reliance on this section is misplaced. As noted in the City’s April 16 Letter, the City’s

EXHIBIT 5  
PAGE 1

actions do not discourage needed housing through unreasonable cost or delay. Rather, the City's reasonable interpretations of its codes and policies are not inconsistent with its codes or policies or state law. In effect, the City's interpretations of its codes and policies actually support needed housing by making sure that the costs of development are paid by the developer and not the ultimate homeowner. In this way, the development costs are likely going to be included in the final sale price of the property. If the development costs are not paid up front, the ultimate homeowner becomes responsible, and he or she may not be aware of the costs until building plans are submitted.

You further allege that the City has "clearly engaged in a pattern and practice of exceeding its authority." In support of your allegation, you cite what you describe as "four other similar circumstances," and refer to properties located at 229, 270 and 225 Canyon Drive and 2016 Fruitdale Drive. In reality, the circumstances relating to these properties and the Canyon Drive Properties are hardly similar at all.

For example, none of these property owners were required to sign a service and annexation agreement. The property at 270 Canyon Drive was never developed, and therefore no service and annexation agreement has been requested or required. In the case of the properties located at 225 and 229 Canyon Drive, the proposed development for each consisted of single family homes (not land divisions) that did not front existing sewer lines (unlike the Canyon Drive Properties) and were located more than 300 feet from the nearest City sewer main. These proposals were thus exempt from requirements to connect to City sewer per GPDC Section 28.071 and OAR 340-071-0160. With respect to 2016 Fruitdale Drive, the project was a replacement home which utilized an existing sewer connection and well.

As for deferred development agreements ("DDA" or "DDA's"), the following facts are true:

- There is no DDA for 270 Canyon Drive (as the property has never been developed.)
- For 229 Canyon Drive, a DDA was signed in 2001 (prior to the City's requirement for a cash deposit) as part of a requirement for the construction of a single family home. The DDA covers future water and sewer installation in Canyon Drive.
- For 225 Canyon Drive, a DDA was signed in 2003 as part of a requirement for the construction of a single family home. The DDA covers future water and sewer installation in Canyon Drive.
- For 2016 Fruitdale Drive, a DDA was signed in 2006 as part of a requirement for the installation of a new manufactured home. This DDA covers future improvements in Mt. Baldy Road.

If there are similarities with the Canyon Drive Properties, they are that none of the examples set forth in Wickham's July 8 letter were required to extend water as a condition of development, and that each example is consistent with the provisions set forth in the 1998 Intergovernmental Agreement between Josephine County and the City of Grants Pass ("IGA"). Per the IGA, each of the above-referenced properties (including the Canyon Drive Properties) contains previous development proposals defined by the IGA as a Category 1 Development (with the exception of 270 Canyon Drive, where no formal development proposal has ever been submitted.) There are two provisions within the IGA that apply specifically to Category 1 Developments:

For all of the reasons set forth above and in the City's April 16 letter, and in accordance with OAR 660-045-0050(2)(b), the City will not take corrective action in connection with the captioned matter. At all times, the City has acted entirely in accordance with its acknowledged plans and land use regulations. Its actions have been reviewed and consistently interpreted by its Community Development Director, the Urban Area Planning Commission, the City Council, and the Land Use Board of Appeals with respect to the Canyon Drive Properties.

Yours truly,



Carl Sniffen  
Deputy City Attorney

CF#: 08- 121A

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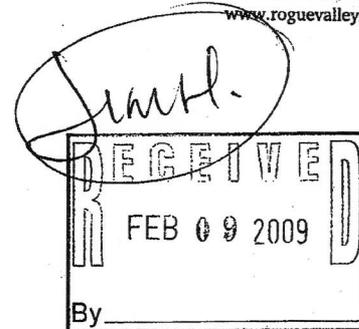
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LOUIS F. SCHULTZ, JR.  
(1923-2004)

\*ALSO ADMITTED IN WASHINGTON

February 9, 2009



HAND DELIVERED

Mr. Carl Sniffen  
Assistant City Attorney  
101 N.W. A Street  
Grants Pass, OR 97526

Re: Perry Wickham - Request Pursuant to ORS 197.319

Dear Carl:

This is in response to John Renz's December 1, 2008, letter. Mr. Wickham and I disagree with Mr. Renz's position as we believe we have responded fully and in conformance with the applicable statutes and rules. However, the available alternatives would be to resubmit the matter to you once again or to seek judicial review. The latter is not cost-effective considering the procedural nature of Mr. Renz's position. I would stress that you should be clear that Mr. Wickham is committed to assuring that the Commission reviews the merits of this matter. He is committed to pursuing the matter as fully as the law allows.

The only alleged defect Mr. Renz cites with respect to our request for the city's review of the matter is as follows:

"The petition is not compliant with OAR 660-045-0040 because the petitioner's request to the city does not contain a detailed description of two or more city decisions that are part of the noncompliant practice (see OAR 660-045-0040(5)(a))."

I attach another copy of my July 8, 2008, letter and incorporate it herein by reference. Mr. Renz argues that we did not adequately comply with OAR 660-045-0040(5)(a). That rule states:

"If the requester alleges that a practice of noncompliant decision by the affected local government or district is the reason for seeking enforcement, the requester's statement of facts also shall contain the following:

Mr. Carl Sniffen  
February 9, 2009  
Page 2

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(a) A detailed description of two or more decisions that are part of the practice;

(b) Copies of the findings (if any) adopted by the affected local government or district in support of the decisions specified in (a);

(c) An estimate of the total number of decisions that make up the practice; and

(d) A description of the period within which the decisions constituting the practice were made”

OAR 660-045-0020(10) defines “pattern of decision making” as decisions involving the same or related provisions of a comprehensive plan, land use regulation or special district cooperative agreement. The decisions must involve the same or similar geographic areas, plan designations, zones or types of land use. The decisions must have occurred within three years of the date of the request to the local government.

For the purposes of this matter, we are relying on the following decisions:

1. 171 Canyon Drive.

A. Date of Decision. June 21, 2006

B. Description of Decision. The city council findings of fact are included. The property is zoned Residential, R-1-10, and is within the Grants Pass UGB. The application was to partition the property into two lots. There is no dispute that the property is “Category 1 development” under the IGA. As a condition of approving the partition, the city purportedly applied its development code provisions and improperly required the applicant to sign a service and annexation agreement and improperly required him to pay for the extension of urban services, including for the extension of water lines, directly contrary to the IGA. A copy of the document entitled “Calculation of Up-front Cash Security Deposit” is included.

2. 165 Canyon Drive.

A. Date of Decision. June 21, 2006

B. Description of Decision. The city council findings of fact are included. The property is zoned Residential, R-1-10, and is within the Grants Pass UGB. The application was to partition the property into two lots. There is no dispute that the property is “Category 1 development” under the IGA. As a condition of approving the partition, the city purportedly applied its development code and improperly required the applicant to sign a service and annexation agreement and improperly required him to pay for the extension of urban services, including for the extension of water lines, directly

Mr. Carl Sniffen  
February 9, 2009  
Page 3

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contrary to the IGA. A copy of the document entitled "Calculation of Up-front Cash Security Deposit" is included

3. 2016 Fruitdale Drive.

A. Date of Decision. July 21, 2006.

B. Description of Decision. Evidence of the final decision is included. The request was for a building permit to replace a mobile home with a conventional, "stick-built" house. The property is zoned residential and is within Grants Pass UGB. There is no dispute that the property is "Category 1 development" under the IGA. A condition of approving the building request was that the property owner pay for the future extension of water services. This is contrary to the IGA. A copy of the document entitled "Calculation of Up-front Cash Security Deposit" is included

4. 270 Canyon Drive.

A. Date of Decision. July 31, 2006.

B. Description of Decision. Evidence of the final decision is included. The request was for site plan approval and building permit for a new single-family dwelling. The property is zoned residential and is within the Grants Pass UGB. There is no dispute that the property is "Category 1 development" under the IGA. A condition of approving the request was that the property owner pay for the future extension of water service to the property, contrary to the IGA. A copy of the document entitled "Calculation of Up-front Cash Security Deposit" is included

5. 1914 Fruitdale Drive.

A. Date of Decision. May 4, 2007.

B. Description of Decision. Evidence of the final decision is included. The request was for site plan approval and a building permit for a single-family residence. The property is zoned residential and is within the Grants Pass UGB. There is no dispute that the property is "Category 1 development" under the IGA. A condition of approving the request was that the property owner pay for the future extension of water service to the property, contrary to the IGA. A copy of a Deferred Development Agreement and the "Calculation of Up-Front Cash Security Deposit" are included.

We submit that the five foregoing matters all involve the same or related provisions of the comprehensive plan, and land use regulations, specifically the IGA and city Development Code Chapter 28. All five instances involve properties that are to permit residential development. We are required to submit only two or more illegal decisions. We are submitting five. At a minimum, the Wickham decisions for 165 and 171 Canyon Drive are sufficient to establish a pattern of conduct which the commission should overturn in the event that the city refuses to acknowledge that its conduct violates the language of the IGA.

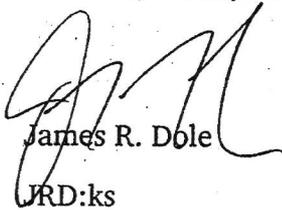
Mr. Carl Sniffen  
February 9, 2009  
Page 4

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We restate our request set forth in our July 8, 2008, letter or we intend to proceed accordingly.

Very truly yours,

CAUBLE, DOLE, SORENSON & RANSOM, LLP

A handwritten signature in black ink, appearing to be 'JRD', written over the printed name 'James R. Dole'.

James R. Dole

JRD:ks  
Enclosures

cc: Perry Wickham

# City of Grants Pass



*Via hand delivery*

March 12, 2009

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RECEIVED  
MAR 13 2009  
CAUBLE, DOLE, SORENSON & RANSOM  
ATTORNEYS AT LAW  
111 S.E. SIXTH STREET  
GRANTS PASS, OR 97526

Re: Perry Wickham/City of Grants Pass - Request Pursuant to ORS 197.319

Dear Jim:

I am in receipt of your letter dated February 9, 2009 which you indicate is written in response to a letter dated December 1, 2008 from John Renz of the Oregon Department of Land Conservation and Development. You also indicate that your February 9 letter is being made pursuant to ORS 197.319 which sets forth the procedures which must be undertaken before a person may request the adoption of an enforcement order under ORS 197.320.

For all of the reasons set forth below, and in my earlier letters to you of April 16, 2008 and August 26, 2008, in my letter to the Oregon Land Conservation and Development Commission dated, October 21, 2008, and in the record, briefs and decision rendered in LUBA case numbers 2006-125 and 2006-147, we respectfully disagree with the demands set forth in your February 9 letter.

As you know, this matter has a long history. The letters and decisions described in the preceding paragraph provide a detailed response to your request including, without limitation, an expansive chronology and history of these matters. In that LUBA record alone, you will find a lengthy history of this matter, legal arguments, and ample support for the City's actions. All of the letters and LUBA matters described above are hereby incorporated by reference as if fully set forth herein.

In your February 9, 2009 letter, you list five properties which you claim demonstrate a "pattern of decision making" by the City in violation of Oregon law. Four of these properties were raised by you in your July 8, 2008 letter to me and have already been discussed in detail in my August 26 response. In the August 26 letter, I painstakingly demonstrate why the four properties you relied upon (171 Canyon Drive, 165 Canyon Drive, 2016 Fruitdale Drive, and 270 Canyon Drive) as similar properties did not reflect any pattern or practice in violation of any acknowledged plan or land use regulation.

EXHIBIT  
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In your February 9 letter, you add a fifth property to the properties you listed in your July 8, 2008 letter. The additional property you describe is located at 1914 Fruitdale Drive. As with the other four properties, no new utility connections were required for this property. A Deferred Development Agreement was signed for future water, storm drain and street improvements along the 1914 Fruitdale Drive frontage. No Service and Annexation Agreement was required, and no extension of water was required for the 1914 Fruitdale Drive property.

I believe that Mr. Renz's letter of December 1, 2008 is correct. Your correspondence was materially deficient, and your petition was rightfully rejected. I also believe, however, that the letter did not go far enough. The LUBA decision, coupled with my letters of April 16, 2008, August 26, 2008 and October 21, 2008, clearly indicate that Mr. Wickham's petition seeking an enforcement order should have been dismissed on its merits at that time. Hopefully, that dismissal will be forthcoming.

For all of the reasons set forth above, and in the City's letters of April 16, August 26, and October 21, 2008, and in accordance with OAR 660-045-0050(2)(b), the City will not take corrective action in connection with the captioned matter. The City does not, nor has any reason been demonstrated why it should, acknowledge any pattern or conduct that is in any way in violation of any acknowledged plan, land use regulation or the Intergovernmental Agreement between the City and Josephine County.

At all times, the City has acted entirely in accordance with its acknowledged plans and land use regulations. Its actions have been reviewed and consistently interpreted by its Community Development Director, the Urban Area Planning Commission, the City Council, and the Land Use Board of Appeals with respect to Mr. Wickham's properties.

Yours truly,



Carl Sniffen  
City Attorney

cc: CF#: 09-046

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April 3, 2009

Oregon Land Conservation  
and Development Commission  
635 Capitol Street NE, Ste. 150  
Salem, Oregon 97301

DEPT OF  
APR 06 2009  
LAND CONSERVATION  
AND DEVELOPMENT

Re: Perry Wickham / City of Grants Pass - Petition for Enforcement Order Pursuant to  
ORS 197.319 to 197.352 and OAR 660-045-0060

Ladies and Gentlemen:

This is a re-submission of the matter first presented to you by our letter dated October 13, 2008. You rejected the petition by the December 1, 2008, letter of John Renz, Southern Oregon Regional Representative. We have complied with the first of Mr. Renz's two observations by our February 9, 2009, letter to the city and include a copy of that, along with the response from the Grants Pass City Attorney dated March 12, 2009.

The remaining alleged deficiency cited in Mr. Renz's letter is as follows:

"The petition is not compliant with OAR 660-045 because the petitioner's request to the commission does not contain records of noncompliant actions taken by the city (see OAR 660-045-0060((2)(e)(A))." (emphasis in original)

Accordingly, pursuant to ORS 197.319 to 197.352 and OAR 660-045-0060, petitioner Perry Wickham, through undersigned counsel, sets forth as follows:

**I. 660-045-0060(1)(a):**

Petitioner requests that the Commission adopt an order requiring the city of Grants Pass (the City) to do the following:

1. To bring its land use regulations and land use decisions into compliance with the August 9, 1998, Intergovernmental Agreement between the City and Josephine County (the IGA) with respect to properties identified as "Category I development" under the IGA;

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2. To conform its authority to the limits set forth in the express language of and delegation of authority under the IGA;

3. To take all required actions to cure its unauthorized activities as those relate to the regulation of Category I development, including refunding to petitioner and all others similarly situated all unauthorized fees and charges, and to void all unauthorized deferred development agreements, service and annexation agreements, or the applicable portions thereof, which are inconsistent with the IGA.

## II. OAR 660-045-0060(1)(b):

Attached as Exhibits 1, 2 and 3 are the requests to the City, dated February 20, 2008, July 8, 2008, and February 9, 2009. Also attached as Exhibits 4, 5 and 6 are the responses from assistant city attorney Carl Sniffen. The responses of the City attorney are inadequate.

To show a pattern or practice of noncompliant decisions, a petitioner must show "two or more decisions that are part of the practice." OAR 660-045-040(5). We have done so as discussed below:

On or about August 5, 1998, City and Josephine County entered into the IGA, which generally transferred to the City certain jurisdiction, authority and regulatory control of lands otherwise under County jurisdiction within the Grants Pass Urban Growth Boundary (UGB). A copy of the IGA is attached as Exhibit 7.

The IGA defines Category 1 development as development within the Urbanizing Area (UA) of the City on an authorized lot or lot of record existing as of the effective date of the IGA which is:

1. A new single-family or one duplex development which is beyond 100 feet from the nearest water main; or
2. A residential remodel; or
3. A lot line adjustment; or
4. A partition which does not create more than one new lot from a parent parcel within a ten year period and which is beyond 300 feet from the nearest water main; or
5. An expansion, up to a total of 25%, of an existing commercial, industrial or public use and associated structures, which is beyond 100 feet from the nearest water main and which does not include a different non-conforming use; or
6. A change in use from a previously permitted use to a use permitted under the City's Land Use Regulations of the same or lesser intensity and which does not require or request a new connection to City water or sanitary sewer service.

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The IGA defines Category 2 development as all development within the UA not classified as Category 1 development.

Under the IGA section on Land Use Management, City and County agreed that:

“[a]ll land uses within the UA (Category 1 and Category 2) shall be subject to the City’s Land Use Regulations, Land Development Regulations including Development, Building and Utility standards and procedures, *except Category 1 developments shall not be required to execute an agreement for future annexation or to extend water as a condition of development unless annexation or extension is otherwise required by state statute or administrative rule.*”  
(emphasis added).

The IGA otherwise states that “[a]ll Category 1 development within the UA which are required to connect to sanitary sewer or municipal water by state statute or administrative rule, or which request such connection, shall be subject to a service and annexation agreement.”

The City has engaged in a pattern and practice of requiring persons, including petitioner, who seek to engage in development defined as Category I development, to consent to annexation as a prerequisite to developing real property, regardless of whether the development will be required to connect to municipal sewer or water services under state statutes or administrative rules and regardless of whether the developer requests such connections. The City further has required persons, including petitioner to pay for or agree to pay for the extension of water as a condition of development.

The records submitted to the City and to the Commission herewith show that petitioner Perry Wickham filed applications for partition of his property located at 165 and 171 Canyon Drive, Grants Pass. The partitions did not create more than one new lot from a parent parcel within a ten-year period and they are beyond 300 feet from the nearest water main. Notwithstanding, the decisions of the City of Grants Pass condition approval of these partitions on petitioner signing service and annexation agreements and paying for the extension of water lines. This is directly contrary to the IGA.

With respect to Mr. Wickham’s two properties, the “noncompliant actions” subject to this petition are represented by the findings of the City of Grants Pass, which are included herewith, to the extent they purport to require him to sign service and annexation agreements and pay to extend water service as a condition of approval of partition of his category 1 property. In accordance with OAR 660-045-040(5), these two acts alone are sufficient for the Commission to proceed on this petition, even without further consideration of the other three instances cited and documented in the February 9, 2009, letter to the City of Grants Pass.

With respect to each one of the *five total instances* cited in our February 9, 2009, letter which reflects the improper pattern and/or practice of decision-making, the decisions of the city of Grants Pass were to condition approval of partition requests (see Items 1 and 2

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of petitioner's February 9, 2009, letter) or condition the approval of building permits (*see* items 2, 3 and 4 of petitioner's February 9, 2009, letter) on the property owner signing service and annexation agreements and paying for the extension of urban services, including water lines, directly contrary to the IGA. This pattern or practice has occurred since as early as 2001, but petitioner has identified not less than five separate instances evidencing this pattern and practice within the three years before its February 9, 2009, letter to the city of Grants Pass. OAR 660-045-0040(3). Records of the 5 noncompliant actions are included as the exhibits to the February 9, 2009, letter to the city of Grants Pass. These records are specifically incorporated herein by reference. In all of these instances, the noncompliant actions of the City were to condition partition or other development of Category I properties on the execution of service and annexation agreements and the payment for extension of water service to the properties.

Pursuant to the express provisions of the IGA, the City lacked the authority to impose these conditions on petitioner and others similarly as approval conditions. Because petitioner's development, and the development of others similarly situated, meet the definition of Category 1 development and because annexation or extension of City services is not required by other state statute or regulation, the City lacked the authority under the IGA to require service and annexation agreements for these and other Category I development.

The City's conduct in this respect violates ORS 197.307(6). The Department should require the City to follow the IGA and cease engaging in patterns and practices of decision-making that violate acknowledged land use regulations which are specifically detailed and limited in the IGA. This pattern or practice of decision-making violates acknowledged land use regulations within the IGA and the Department should order the City to bring its comprehensive plan, land use regulations and land use decision-making into compliance with the limitations of the IGA. This should include an order requiring the refund of all money improperly collected by the City.

### III. OAR 660-045-0060(1)(c):

The City has imposed special conditions on approval of specific development proposals as to properties owned by petitioner and others similarly situated. These special conditions have been imposed even though they are not permitted under the IGA. The special conditions are not warranted or permitted under the IGA or other state law or regulation. Therefore, the basis for these conditions is not clear and to impose such conditions on a Category 1 development is not objectively reasonable. These special conditions have caused petitioner and others similarly situated to incur unreasonable cost and delay and have had the effect of discouraging the development of needed housing within the Grants Pass UGB. The City is applying approval standards, special conditions on approval of specific development proposals or procedures for approval to that do not comply with ORS 197.307(6).

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For the foregoing reasons, the Commission should enter an appropriate order.

Very truly yours,

CAUBLE, DOLE, SORENSON & RANSOM, LLP



James R. Dole

JRD:ks  
Enclosures

cc: Perry Wickham  
Carl Sniffen (w/copy of enclosures)