

OFFICE OF THE SECRETARY OF STATE

LAVONNE GRIFFIN-VALADE
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE
AND TRIBAL LIAISON



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 660
LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

FILED

08/28/2024 3:48 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Describing how local governments comply with Goal 5 for cultural areas

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/16/2024 11:55 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Casaria Taylor
971-600-7699
casaria.taylor@dlcd.oregon.gov

635 Capitol St.
Ste. 150
Salem, OR 97301

Filed By:
Casaria Taylor
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 09/27/2024

TIME: 8:00 AM

OFFICER: LCDC

IN-PERSON HEARING DETAILS

ADDRESS: Department of Land Conservation and Development - Basement Hearing Room, 635 Capitol St., Basement Hearing Room, Salem, OR 97301

SPECIAL INSTRUCTIONS:

Sign-up to testify in advance of the meeting <https://www.oregon.gov/lcd/Commission/Pages/Public-Comment.aspx>

REMOTE HEARING DETAILS

MEETING URL: [Click here to join the meeting](#)

PHONE NUMBER: 719-359-4580

CONFERENCE ID: 86996661469

SPECIAL INSTRUCTIONS:

Sign-up to testify in advance of the meeting <https://www.oregon.gov/lcd/Commission/Pages/Public-Comment.aspx>

NEED FOR THE RULE(S)

OAR chapter 660, division 23, is the primary set of rules that describe process steps and standards to comply with Goal 5. The division has a rule specific to each Goal 5 resource category except cultural areas. This new rule will improve implementation of Statewide Planning Goal 5 for cultural areas. The rule promotes greater understanding of cultural resource areas, supports protection of significant sites, and will serve to preserve the state's cultural heritage.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Statewide Land Use Planning Goal 5 <https://www.oregon.gov/lcd/OP/Pages/Goal-5.aspx>

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The State of Oregon requires that a rulemaking notice include "a statement identifying how adoption of the rule will affect racial equity in this state." ORS 183.335(2)(b)(F). For the purposes of this statement, racial equity has been defined as treating people of all races fairly, justly, and without bias. The agency is required to attempt to determine the racial groups that will be affected by the rule, and how the rule will increase or decrease disparities currently experienced by those groups. In this context, a disparate treatment of racial groups may be supportable if it addresses current disparities.

The proposed new rule is not expected to negatively impact racial equity and equitable outcomes. The recognition and protection of culturally significant landscape features and input from Native American communities may increase their participation and contributions in land use actions. The rule is expected to promote racial equity and equitable outcomes through increased consideration and incorporation of tribes and other culturally identified groups in land use decisions. Required notice to tribes is supportive of the goal to decrease disparity experienced by racial groups including Native Americans. In addition, the rule is designed to clarify and expand cultural resource recognition and local protections for resource sites most likely to have a beneficial impact on Native Americans.

While the new rule may extend planning periods the department does not anticipate a disproportionate impact on underserved populations.

The proposed rule represents a clarification of the treatment of significant cultural areas. The rule would at a minimum maintain the status quo on racial equity, with the potential to advance racial equity.

FISCAL AND ECONOMIC IMPACT:

While the new rule is additive to the existing rules in division 23, identification and protection of archaeological sites is already present in Oregon's Revised Statutes (ORS) and Administrative Rules (OAR). As such, the net anticipated fiscal impact of the archaeological resources sections of the rule is negligible. The new rule describes a process for identifying and protecting significant cultural landscape features. While Goal 5 and OAR chapter 660, division 16 currently provide for identification and protection of culturally significant areas, the new rule requires communication with Oregon Tribes at times when long-range planning decisions could increase the risk of impact to these areas. It also highlights the opportunity for tribes and other culturally identified groups to be engaged in the public process, for identifying culturally significant landscape areas and crafting protection measures for such sites. The rule does not require local governments to consider adding or amending a local inventory of landscape features of cultural significance, except when information is entered into the record of an urban growth boundary (UGB) amendment that a potentially significant feature is present in land being added to a UGB. Cities and counties will also need to respond to applications to add a site to a local inventory. The identification and local inventory of culturally significant landscape areas under this rule will place some burden on local governments, and resultant Goal 5 protection of these resources could impact the outcome of future land use decisions. Local jurisdictions will continue to have the option of conducting an inventory of cultural areas in part or the entirety of their jurisdiction.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost

of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

State agencies

The proposed rule is expected to have a significant fiscal impact on only DLCD among state agencies. The Oregon State Historic Preservation Office (SHPO) currently maintains the Oregon Archaeological Records Remote Access (OARRA) database of archaeological sites. The proposed rule is not expected to alter the requirements or costs to maintain this database, depending on the increased volume of OARRA users, there would be some minimal impact to staff time both assisting with use of OARRA and responding to inquiries about site location.

The Legislative Commission on Indian Services staff will be responsible for identifying appropriate Tribes for local governments to consult and coordinate with in the course of fulfilling the rule. It is anticipated that there will be a minimal fiscal impact associated with staff responding to these requests from local governments. It is expected that this impact can be absorbed within the current operating budget of LCIS. However, as this is a new process, there is a possibility that it will have a greater fiscal impact on LCIS than anticipated, depending on the volume of inquiries. In addition, a small fiscal impact is anticipated for LCIS associated with staff time dedicated to training and workgroup participation related to the development and deployment of Tribal notification protocols. It is expected that this impact can be absorbed within the current operating budget of LCIS.

DLCD staff will be responsible for the review of plan amendments that result from the few required elements of the rule and that result from a local government choosing to develop a communication and coordination agreement with one or more tribes. We would not anticipate any significant increase in costs associated with staff review of Goal 5 cultural area PAPA submittals; however, the review of new, voluntary communication and coordination agreements with tribes that are intended to take the place of some of the requirements in the rule would represent new work for agency staff.

Additionally, there is the potential for DLCD to incur Department of Justice legal fees in situations where DLCD files, or is a party to, an appeal of a local government's actions that are deemed not consistent with this administrative rule to the Land Use Board of Appeals (LUBA) or is brought to intervene in a LUBA case between two other parties regarding an appeal. DLCD also maintains authority to enact an enforcement order, which would incur legal fees and demand a modest increase in staff effort in time to review and compile legal records.

The fiscal impact to DLCD is difficult to estimate due to the complexity of the issues involved. DLCD staff will be required to review documents related to this rule in a wide range of geographic contexts. The agency will also need to provide technical assistance to the local governments applying the proposed rule.

Local government

The primary impacts expected from the proposed rule include:

- Compliance costs, both monetary and time-related, for local governments to add information on state law on archaeological sites to development permits and provide notice to tribes.
- While this is expected to occur at two points: when the application for development is received within a period of seven days, and also at the time of full application, the costs are expected to be nominal and within the realm of typical notice requirements. DLCD expects that these can be done via email and will provide model language, forms and training to both help minimize impact to local government staff time, and increase consistency. Costs will also be incurred when assessment of landscape areas is required as part of a UGB amendment and when the remaining steps of the Goal 5 process (OAR 660-023-0040 and 0050) are applied to significant sites.
- Additional time for review of quasi-judicial land use approval will result when a local government learns that the proposed action could impact a known or suspected archaeological site. Archaeological resources are currently protected under current law (ORS 358.910) on public lands and permitting is required for excavation and/or removal on private lands. Potential cost of applying the Goal 5 process to cultural areas and consideration of impact of avoidance

measures during the UGB process.

The following is a summary of areas in which the draft administrative rule may have fiscal and economic impacts, including:

- The new rule will apply when local governments review and process permit applications for development.
- The rule augments the standard Goal 5 process (OAR 660-023-0030, 0040, and 0050) rules somewhat, but primarily represents a clarification of its requirements. The recognition of landscape areas of cultural significance, outreach to identify these areas, inventory, and incorporation into division 23 will replace the application of division 16 to these cultural areas.
- The incremental cost of identifying and inventorying landscape areas of cultural significance would be borne during a UGB amendment process if information on areas of cultural importance is entered into the record. Local governments can continue to work voluntarily with tribes to identify areas of significance at any time.
- Additional notice will result in an increase in volume of notices received by Federally Recognized Tribes.
- The new rule could potentially increase areas designated of cultural significance.
- This would likely be landscape areas of cultural significance that were not previously addressed. Archaeological sites are already recognized and protected under state law.
- Designating a site as culturally significant will not necessarily result in local prohibitions of conflicting uses.
- Protection measures are informed by an ESEE analysis, which will balance the consequences of impacts with economic, social, environmental, and energy considerations.
- There is potential for increased costs to public and private landowners and developers to comply with measures adopted by a local government to limit or prohibit impacts to landscape areas of cultural significance on a local inventory.
- Identification of significant cultural areas may impact the location and size of future UGB expansions.
- A landscape area identified in a county comprehensive plan as a significant Goal 5 resource site could result in assignment of limited or no development capacity to the site (OAR 660-024-0067(5)(c)). This could affect the location of a UGB expansion and result in a city turning to higher-quality agricultural land in order to meet land needs. We would consider this a low-likelihood result as it would only potentially alter one variable among many to be considered.
- Identification and protection of a landscape area of cultural significance in a new UGB expansion area, or elsewhere in a UGB could result in reduced development capacity on the site. The reduction or loss of capacity will be factored into the buildable land inventory used to support a city's next UGB amendment.
- To the extent that locations of known or suspected archaeological sites are not publicly disclosed, and that the nature and location of culturally significant landscape areas are only roughly understood, application of the rule may bring an increased level of uncertainty to land use planning actions.

The fiscal impact of the proposed rule is expected to range from negligible to modest, depending upon the jurisdiction and presence of Goal 5 culturally significant areas. For the subset of cultural areas that are archaeological sites, the proposed rule is not expected to have any substantive fiscal impact. Reducing the incidences of inadvertent discovery may result in time and cost savings for property owners and developers.

The public

The public is not anticipated to experience a significant fiscal impact from the new rule. Any related costs incurred by local jurisdictions and state agencies may reduce resources available for other uses, but this impact is expected to be negligible. Members of the public will likely realize some level of qualitative benefits from the preservation of culturally significant areas in communities in which they are present.

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

Small and Large Businesses

While the proposed rule is not expected to have any impact on businesses related to compliance, with the proposed rule not applying to the functional operation of most businesses, for landscape features of cultural significance, DLCD recognizes that limits local governments may adopt to reduce impacts could affect private property owners and developers. Developers or property owners seeking to develop their properties may be impacted by increased uncertainty, constraints on development, and/or a more complicated and time-intensive approval process. These impacts could be reflected in a reduction in the underlying value of the property impacted after an ESEE analysis. Baseline requirements are already in place in division 23. These rules clarify the notice and expectations for participation in an inventory and protection process associated with a UGB expansion or legislative amendment for landscape areas of cultural significance. In the case of where a local government would establish Goal 5 protections for cultural areas of landscape significance through an overlay zone where the zone limits uses currently allowed, the local government would need to mail a ballot measure 56 notice to property owners in that area. Property owners would then be notified and able to participate in the public discussions about the legislative amendment – overlay zone or other.

The incorporation of a cultural areas element into local comprehensive plans and adoption of local protection measures for significant resource sites may result in land use approvals that are marginally less favorable for business location, but this is only one of many factors to be considered during a UGB amendment process is not expected to have a substantive impact on either small or large businesses.

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

For local governments, fiscal costs are related to the cost of compliance. These are both monetary and time-related costs associated with:

- notification to Federally Recognized Tribes in Oregon
- outreach
- applying the rule to cultural areas at the time of a UGB amendment
- adopting protection measures for a culturally significant landscape area when one is identified
- amending local development regulations
- coordinating with DLCD during review

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

The rule may result in cultural areas being identified as significant in local plans and protected by provisions in local code. Local protection measures may result in greater infrastructure costs, lower marketability, and/or constraints on allowed usage of sites. This is likely to be a rare outcome as a wide range of factors are considered and weighed in a local decision to apply protective measures to significant sites.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Rulemaking Advisory Committee membership included attorneys who represent developers and property owners who may be organized as a small businesses.

HOUSING IMPACT STATEMENT:

Description of proposed change: (Please attach any draft or permanent rule or ordinance)

OAR 660-023-0210

This rule defines how local governments comply with Statewide Land Use Planning Goal 5 for cultural areas including archaeological sites and significant landscape features.

OAR 660-023-0250

This amendment removes the exception for cultural areas in OAR 660-023-0250(1).

Description of the need for, and objectives of the rule: OAR chapter 660, division 23, is the primary set of rules that describe process steps and standards to comply with Goal 5. The division has a rule specific to each Goal 5 resource category except cultural areas. This new rule will improve implementation of Statewide Planning Goal 5 for cultural areas. The rule promotes greater understanding of cultural resource areas, supports protection of significant sites, and will serve to preserve the state's cultural heritage.

List of rules adopted or amended: OAR 660-023-0210, OAR 660-023-0250

Materials and labor costs increase or savings: While increased notice and coordination with Federally Recognized Tribes could affect the location of housing units, the new rule will not directly impact either the production or consumption of housing. The rule is designed to clarify how certain cultural areas are identified and protected under the Goal 5 process. The rule will have no impact on the construction cost of housing (materials, labor) or broader impact areas such as interest rates and underwriting requirements.

The primary roles the land use system plays in the production of housing are:

Providing for adequate and entitled development capacity consistent with projected needs

Providing direction and certainty with respect to what development types and forms are entitled

This is primarily done during periodic review and using the Goal 10 Housing Needs Analysis approach, which determines projected demand and anticipated capacity of land within the current Urban Growth Boundary (UGB) to meet demand. If a deficit of residential capacity is determined within the UGB, the jurisdiction will move forward with a Goal 14 process to determine how this deficit can be addressed. The result of this process may be an amendment to the UGB.

The new rule could have an impact on the Goal 14 process through the expansion of identified Goal 5 cultural resources, which may alter the outcome of the alternatives analysis. If the marginal change in any UGB expansion results in land that is more expensive to develop and/or has higher infrastructure costs, those costs could translate into higher development costs. This outcome is not expected to be widespread, but it is possible in limited circumstances. The ability of the homebuilder to shift those higher costs to buyers would be limited though, and the net impact is more likely to be a reduction in underlying land value as opposed to higher home prices for buyers.

In summary, the rule would be expected to have a negligible impact on home pricing for a 1,200 square foot home on a 6,000 square foot lot. Our expectation is that only a limited number of jurisdictions will be impacted by the clarified definition of cultural areas, and for those jurisdictions, the additional Goal 5 protections could alter the location of housing, they would not be expected to impact the costs and/or price of the reference residential development.

Estimated administrative construction or other costs increase or savings: N/A

Land costs increase or savings: N/A

Other costs increase or savings: N/A

RULES PROPOSED:

660-023-0210, 660-023-0250

ADOPT: 660-023-0210

RULE SUMMARY: This rule defines how local governments comply with Statewide Land Use Planning Goal 5 for cultural areas including archaeological sites and significant landscape features.

CHANGES TO RULE:

660-023-0210

Cultural Areas

(1) For purposes of this rule, the following definitions apply:¶

(a) "Archaeological Site" means a geographic locality in Oregon, including but not limited to submerged and submersible lands but not the bed of the sea within the state's jurisdiction, that contains archaeological objects as defined in ORS 358.905(1)(a) and the contextual associations of the objects with:¶

(A) Each other; or¶

(B) Biotic or geological remains or deposits. Examples of archaeological sites include but are not limited to shipwrecks, lithic quarries, house pit villages, camps, burials, lithic scatters, homesteads and townsites.¶

(b) "Cultural areas" means archaeological sites, landscape features of cultural interest, and sites where both are present. Also referred to as "cultural resource site".¶

(c) "Cultural Areas Protection Plan" means an element of a local government's comprehensive plan addressing Goal 5 for cultural areas and associated development code provisions.¶

(d) "Potentially Significant Cultural Landscape Feature" means a landscape feature that is: integral to a tribe's history, legends, traditions, and stories; traditionally used for wayfinding; traditionally used for gathering first foods and materials; integral to ongoing tribal cultural practices; traditional trails; and sites on which events occurred that are important to the history of a culturally identified group.¶

(e) "Oregon qualified archaeologist" means an archaeologist with documentation from SHPO that satisfies the qualifications listed in ORS 390.235(6)(b) and as provided in OAR 736-051-0070. ¶

(f) "Professional archaeologist" as defined in ORS 97.740, means a person who has extensive formal training and experience in systematic, scientific archaeology and to whom the State Historic Preservation Office (SHPO) has granted access to the Oregon Archaeological Records Remote Access (OARRA) database.¶

(g) "Site of archaeological significance" as defined in ORS 358.905, means:¶

(A) Any archaeological site on, or eligible for inclusion on, the National Register of Historic Places as determined in writing by the State Historic Preservation Officer; or¶

(B) Any archaeological site that has been determined significant in writing by an Indian tribe.¶

(h) "Tribe" as defined in ORS 182.162(2), means a federally recognized Indian tribe in Oregon, except where the definition in ORS 97.740 applies by statute.¶

(2) Relationship of Cultural Areas Protection to the Standard Goal 5 Process and Other Rules in this Division.¶

(a) The requirements of the standard Goal 5 process in OAR 660-023-0030 through 660-023-0050, in conjunction with the requirements of this rule, apply when a local government adopts or amends a cultural areas protection plan.¶

(b) A local governments is not required to assess archaeological sites for significance under OAR 660-023-0030 or complete an analysis of the economic, social, environmental, and energy consequences of a decision to allow, limit, or prohibit uses that conflict with a significant resource site (ESEE) pursuant to OAR 660-023-0040 in order to inform a local program to protect cultural resource sites that are also protected under ORS 358.905 to 358.961 and subject to permit requirements in OAR chapter 736, division 51.¶

(c) A local government shall identify and protect a cultural area significant for reasons other than archaeology that is also a significant historic site using procedures provided in OAR 660-023-0200 and section (8).¶

(d) Local protections for a cultural area significant for reasons other than archaeology that intersects with a

significant riparian area, wetland, or wildlife habitat will be in addition to local Goal 5 protection measures adopted for these resource sites. ¶

(e) A cultural area significant for its culturally significant vista, which is identified as a significant scenic resource in a local comprehensive plan shall be subject to protection measures in the local code for that site and is not subject to this rule. ¶

(f) When the use conflicting with a significant cultural resource is a photovoltaic solar power generation facility, located on sites or areas identified under OAR 660-023-0195, the provisions of OAR 660-023-0195 and local codes adopted under the rule supersede the provisions of this rule. ¶

(3) State Inventory of Archaeological Sites ¶

(a) The Oregon Archaeological Records Remote Access (OARRA) database is maintained by the Oregon State Historic Preservation Office. OARRA includes information on documented archaeological resources and archaeological survey reports. ¶

(b) For sites listed in OARRA, a local government is not required to follow the process provided in OAR 660-023-0030 through 660-023-0050. Instead, a local government must support protection of archaeological sites, as directed in section (5), regardless of whether the resources are designated in the local plan. ¶

(c) When provided information on known or suspected archaeological site, local government will use the information to inform land use decisions, recommendations to applicants, and permit conditions in a manner that preserves confidentiality and is consistent with state law. ORS 192.345(11) exempts most information concerning the location of archaeological sites and objects from public records disclosure, except when information on an Indian tribe's cultural or religious activities is requested by the governing body of a tribe. Requirements in this rule are intended to be consistent with ORS 192.345(11). ¶

(A) A professional archaeologist representing either a local government or an applicant may access data relevant to a proposed land use action or permit application, consistent with privileges assigned by state law and administrative rule. ¶

(B) In the acquisition and publishing of data exempt from disclosure, local governments may: ¶

(i) Acquire and publish aggregated data in a spatial format to indicate relative likelihood of inadvertent discovery within all or a portion of a local jurisdiction. ¶

(ii) Acquire and publish data on a known archaeological site if the location of the site is approximated so that the precise location of the site is obscured. ¶

(iii) Acquire and keep confidential information on a specific site that is used to inform permit conditions or other strategies for avoiding impacts to a significant site or support compliance with state laws and rules governing excavation of a significant archaeological site. ¶

(d) An archaeological site is significant under this rule if it meets the ORS 358.905(1)(b) definition of a site of archaeological significance. An archaeological site shall be treated as significant until the site is evaluated by a professional archaeologist and SHPO concurs with a determination that the site is not eligible for listing on the National Register and confirms that the office has not been informed in writing by an Indian tribe that it is significance to that tribe. ¶

(4) Local Inventory of Significant Cultural Landscape Features ¶

(a) A landscape feature of cultural interest is significant if a local government has determined to be significant through application of the OAR 660-023-0030 assessment process. When assessing significance of a site, a local government shall recognize the use of a site for ceremonial gatherings or harvest of traditional foods and materials as an indication of the quality, when assessing the importance of the site compared to other known examples of the same resource. A local government shall consider a Tribal Government an authoritative source of knowledge on landscape features that are significant to their tribe's culture. ¶

(b) A local government may inventory culturally significant landscape features across a portion or the entirety of its jurisdiction following the procedures and standards in subsection (a). ¶

(c) A local government shall process an application for a legislative amendment to a comprehensive plan to place a culturally significant landscape site on a local inventory following the procedures and standards in subsection (a). ¶

(d) Except as provided in paragraph (7)(a)(B), a local government shall adopt protection measures for a culturally significant landscape feature concurrently with the creation or amendment of a local inventory, consistent with subsection (6)(a) and OAR 660-023-0050. ¶

(5) Protection of significant archaeological sites. ¶

Goal 5 protection for significant archaeological sites is achieved through application of state statutes and permit requirements governing treatment of all archaeological sites and associated human remains, and objects. Local governments shall support awareness and compliance with these state laws and rules. Measures that arise from application of this section for characterizing and avoiding alteration of a suspected archaeological site or a known site for which boundaries have not been established in OARRA will be advisory to an applicant. ¶

(a) All local application forms for authorizations that involve ground disturbance must include a statement informing the applicant that it is unlawful to disturb an archaeological site without first obtaining a permit

required by OAR chapter 736, division 51 and of steps to take in the event of unintentional discovery of an archaeological site. ¶

(b) For applications requiring permits as defined in ORS 215.402(4) or ORS 227.160(2), limited land use decisions as defined in ORS 197.015(12) or expedited land divisions as defined in ORS 197.360(1), that involve ground disturbance, a local government shall:¶

(A) Notify tribes within seven days of receiving the application to request information about the potential for negative impacts to a known or suspected archaeological site. The local government shall inform the applicant of responses received prior to its completeness determination and include information on their correspondence with notified tribes and the applicant in the record for the application. Notice to tribes shall include the following information:¶

(i) A description of the proposed development as provided by the applicant;¶

(ii) A map showing the vicinity of the proposed development; and¶

(iii) Tax lots and address of the subject property, as provided by the applicant.¶

(B) Include tribes in the list of interested parties receiving notice of complete applications and information on how to view or request a copy of the application.¶

(c) Cities shall notify tribes of a proposed urban growth boundary (UGB) amendment and request information on the potential of the proposed development to impact a known or suspected archaeological site.¶

(d) Each city and county shall obtain a list of tribes with an ancestral connection to land within their jurisdiction from the Oregon Legislative Commission on Indian Affairs. A local government satisfies the notice requirements under subsections (a) and (b) when notice is sent to all tribes with an ancestral connection to the land within the jurisdiction of the city or county. Examples of ground disturbance for which notice is required include:¶

(A) Grading¶

(B) Foundation installation¶

(C) Installation of underground utilities¶

(D) Mining of aggregate or minerals¶

(e) When information is entered into the record by a participant in the public process for a decision listed in subsection (b) or (d), by a tribe or other entity, that the proposed development has potential to impact an archaeological site, the local government shall provide SHPO a copy of the information and consider and recommend appropriate measures for characterizing, avoiding, and minimizing impacts to the site. Appropriate measures may include, but shall not be limited to the following:¶

(A) A pedestrian archaeological survey of the site¶

(B) Subsurface probing to locate artifacts or identify site boundaries, with permit from SHPO¶

(C) Preparation of an inadvertent discovery plan¶

(D) Use of site design measures, such as clustering development, to avoid alteration of the archaeological site¶

(E) Preservation of the archaeological site as open space to be used for non-impactful activities¶

(F) Use of civil means to ensure adequate protection of the site, such as acquisition of easements, public dedications, or transfer of title¶

(f) When information is entered into the record for review of applications described in subsection (b) documenting that the proposed development is within the established boundaries of an archaeological site recorded in OARRA, a local government shall condition an approval on the applicant obtaining an Oregon Archaeological Permit or a letter from SHPO stating that a permit is not required.¶

(g) When information on a known or suspected archaeological site is entered into the record of a UGB expansion described in subsection (c), the local government will consider the use of open space zoning, acquisition of easements, public dedications, or transfer of title to support protection of archaeological sites.¶

(h) A local government shall include findings on measures considered, measures recommended, and measures required to protect the site by avoiding or mitigating impacts in the approval decision or adoption ordinance. The local governments shall notify SHPO of the decision. Alteration of an archaeological site, as defined in ORS 358.905(1)(c)(A), is subject to permit requirements of OAR chapter 736, division 51.¶

(6) Protection for landscape areas of cultural significance¶

(a) For landscape areas found to be culturally significant under section (4), a local government shall complete the Goal 5 process and adopt a program to achieve the goal as provided in OAR 660-023-0040, as modified by subsection (c) of this section, and OAR 660-023-0050 except as provided in subsection (b).¶

(b) For sites determined to be significant as part of a UGB expansion, protection measures may be determined and applied at time of annexation.¶

(c) An ESEE analysis shall include consideration of applying the following limits to conflicting uses as part of a program to protect a landscape feature of cultural significance.¶

(A) For sites that are significant due to use of the immediate area (e.g. gathering first foods, traditional location of ceremonies, trails):¶

(i) Avoidance through clustering and other means to preserve the area as open space and the preservation of

existing public access; and¶

(ii) Establishment of time windows when access is restricted to members of the tribe or cultural group engaging in the activity from which the basis of the site's significance is derived.¶

(B) For sites that are significant due to a culturally significant vista (e.g. landform features used for wayfinding, landform features integral to a tribe's legends/traditions/ stories):¶

(i) Limits on structure heights to preserve the vista; and¶

(ii) specifications on the use of non-reflective surfaces.¶

(d) For projects with a federal nexus, a local government shall defer to measures for mitigating impacts to landscape areas of cultural significance applied by the federal decision.¶

(7) Consideration of potentially significant cultural landscape features ¶

(a) When information on the presence of a potentially significant cultural landscape feature is entered into the record of a UGB expansion, a city or Metro shall follow the procedures and standards in subsection (4)(a), to determine if the site is significant.¶

(A) As provided in OAR 660-023-0250(3)(c), a local government shall add significant sites to the local inventory in conjunction with the UGB amendment.¶

(B) As provided in subsection (6)(b), a local government may delay adoption of protection measures for significant sites until the time of annexation of the site.¶

(b) Local authorization subject to quasi-judicial review on rural lands, a local government shall notify tribes to request information on the potential of the proposed development to negatively impact a landscape area of cultural value to one or more tribes.¶

(c) Procedures for notifying tribes, providing information to applicants, and incorporating responses into the record of review shall follow those provided in subsection (5)(b) for archaeological sites.¶

(d) A local government satisfies the notice requirements under subsections (b) and (c) by providing notice to all tribes with an ancestral connection to the land within the jurisdiction of the county.¶

(e) Prior to the first evidentiary hearing for a permit application, described under subsection (b), for which one or more tribes have indicated the potential for a negative impact, the local government shall offer to arrange a meeting with the tribe(s) and applicant. The purpose of the meeting is to discuss potential impacts to landscape areas of cultural value to the tribe or tribes and voluntary measures for avoiding or minimizing impacts.¶

(f) Notification and consultation with tribes required and carried out as part of a federal action satisfy the requirements of this section.¶

(g) A local government will make any voluntary measures on the part of the applicant to avoid or mitigate impacts and required measures stemming from a federal action a part of the record of approval.¶

(8) Local government-to-government consultation programs¶

(a) As an alternative to the baseline protections described in sections (5), (6), and (7), a local government may, for the purpose of protecting sites of cultural significance to one or more tribes, adopt a local protection program as a plan amendment after January 1, 2025, enabled by a memorandum of understanding with one or more tribes, consistent with subsections (b), (c), and (e).¶

(b) When adopting a local program for consultation with tribes under this section, a local government shall make findings on consistency with the principles for establishing tribal relationships.¶

(c) A local government that proceeds under this section shall provide opportunities for community-wide participation when developing the program to incorporate different perspectives on the benefits of protecting significant cultural resource sites.¶

(d) For identifying potential significant archaeological sites, a local government may augment OARRA with tribal or local government inventories.¶

(e) A government-to-government consultation program adopted pursuant to this section shall be enabled by a memorandum of understanding with one of more tribes. A government-to-government consultation program supersedes the requirements of sections (5) and (6) only as it pertains to the cultural areas of the tribe or tribes party to the memorandum of understanding. The standards and review requirements of the local program that diverge from the baseline protections in sections (5), (6), and (7) shall be described in the adoption materials.¶

(f) Notification to a local government by a tribe of withdrawal from a memorandum of understanding, upon which the government-to-government consultation program relies, will cause the local government to resume compliance with the baseline protections in sections (5), (6), and (7).¶

(9) Applicability¶

(a) Local governments are not required to amend acknowledged plans or land use regulations to provide new or amended inventories, resource lists, or programs regarding cultural areas except as a result of applying OAR 660-023-0030 through 660-023-0050 to significant cultural landscape features identified in response to a UGB expansion process or an application for a legislative amendment to a comprehensive plan as provided in subsection (4)(c). A local government may adopt procedures for consulting with tribes on decisions that could impact cultural areas that are of value to one or more tribes.¶

(b) A local government shall apply the standards and protection measures described in sections (5), (6), and (7) directly except as provided by (c) and (d).¶

(c) When a local government develops a program under section (8), review and protection elements of that program shall replace some or all of the requirements of sections (5), (6), and (7), as these sections pertain to the tribe with which a consultation agreement has been reached and are covered by a memorandum of understanding.¶

(d) When a local government chooses to develop a local program to identify and protect significant cultural areas that are significant to a group of Oregonians with a common cultural heritage, it must do so pursuant to OAR 660-023-0030 to 660-023-0050.

Statutory/Other Authority: ORS 197.040

Statutes/Other Implemented: ORS 197.040, ORS 197.225-197.245

RULE SUMMARY: This amendment removes the exception for cultural areas in OAR 660-023-0250(1).

CHANGES TO RULE:

660-023-0250

Applicability ¶¶

(1) This division replaces OAR 660, division 16, except with regard to ~~cultural resources, and~~ certain PAPAs and periodic review work tasks described in sections (2) and (4) of this rule. Local governments shall follow the procedures and requirements of this division or OAR 660, division 16, whichever is applicable, in the adoption or amendment of all plan or land use regulations pertaining to Goal 5 resources. The requirements of Goal 5 do not apply to land use decisions made pursuant to acknowledged comprehensive plans and land use regulations.¶¶

(2) The requirements of this division are applicable to PAPAs initiated on or after September 1, 1996. OAR 660, division 16 applies to PAPAs initiated prior to September 1, 1996. For purposes of this section "initiated" means that the local government has deemed the PAPA application to be complete.¶¶

(3) Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:¶¶

(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;¶¶

(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list; or¶¶

(c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.¶¶

(4) Consideration of a PAPA regarding a specific resource site, or regarding a specific provision of a Goal 5 implementing measure, does not require a local government to revise acknowledged inventories or other implementing measures, for the resource site or for other Goal 5 sites, that are not affected by the PAPA, regardless of whether such inventories or provisions were acknowledged under this rule or under OAR 660, division 16.¶¶

(5) Local governments are required to amend acknowledged plan or land use regulations at periodic review to address Goal 5 and the requirements of this division only if one or more of the following conditions apply, unless exempted by the director under section (7) of this rule:¶¶

(a) The plan was acknowledged to comply with Goal 5 prior to the applicability of OAR 660, division 16, and has not subsequently been amended in order to comply with that division;¶¶

(b) The jurisdiction includes riparian corridors, wetlands, or wildlife habitat as provided under OAR 660-023-0090 through 660-023-0110, or aggregate resources as provided under OAR 660-023-0180; or¶¶

(c) New information is submitted at the time of periodic review concerning resource sites not addressed by the plan at the time of acknowledgement or in previous periodic reviews, except for historic, open space, or scenic resources.¶¶

(6) If a local government undertakes a Goal 5 periodic review task that concerns specific resource sites or specific Goal 5 plan or implementing measures, this action shall not by itself require a local government to conduct a new inventory of the affected Goal 5 resource category, or revise acknowledged plans or implementing measures for resource categories or sites that are not affected by the work task.¶¶

(7) The director may exempt a local government from a work task for a resource category required under section (5) of this rule. The director shall consider the following factors in this decision:¶¶

(a) Whether the plan and implementing ordinances for the resource category substantially comply with the requirements of this division; and¶¶

(b) The resources of the local government or state agencies available for periodic review, as set forth in ORS 197.633(3)(g).¶¶

(8) Local governments shall apply the requirements of this division to work tasks in periodic review work programs approved or amended under ORS 197.633(3)(g) after September 1, 1996. Local governments shall apply OAR 660, division 16, to work tasks in periodic review work programs approved before September 1, 1996, unless the local government chooses to apply this division to one or more resource categories, and provided:¶¶

(a) The same division is applied to all work tasks concerning any particular resource category;¶¶

(b) All the participating local governments agree to apply this division for work tasks under the jurisdiction of more than one local government; and¶¶

(c) The local government provides written notice to the department. If application of this division will extend the time necessary to complete a work task, the director or the commission may consider extending the time for completing the work task as provided in OAR 660-025-0170.

Statutory/Other Authority: ORS ~~183~~, 197

Statutes/Other Implemented: ORS 197.040, ORS 197.225 - 197.245