



Oregon

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DEPARTMENT OF JUSTICE INTEROFFICE MEMO



DATE: March 8, 2021

TO: Palmer Mason, Senior Policy Advisor
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FROM: Steven E. Shipsey, Assistant Attorney General
Natural Resources Section, Oregon Department of Justice

SUBJECT: Current Statutory Framework for Amending or Creating
Statewide Planning Goals

Background & Purpose of Statewide Planning Goals

In Oregon, land use planning and regulation occurs within a framework enacted in 1973 as Senate Bill 100 which, with some amendments, now appears as ORS chapter 197. The Oregon Supreme Court described the impetus for that framework as “legislative concern that state intervention was needed to stop a process of cumulative public harm resulting from uncoordinated land use. To stop that threat and to provide for a more satisfactory future, the legislature established our now familiar system of local and state comprehensive land use planning performed in compliance with statewide land use goals[.]” *1000 Friends of Oregon v. Land Conservation and Development Commission*, 292 Or 735, 745, 642 P2d 1158 (1982). In establishing the Land Conservation and Development Commission (LCDC), the legislature granted broad statutory authority to adopt administrative rules or state land use policies to implement ORS chapters 195 (Local Government Planning Coordination), ORS 196 (Columbia River Gorge; Ocean Resource Planning; Wetlands; Removal and Fill), and ORS 197 (Comprehensive Land Use Planning Coordination). ORS 197.040(1)(b)–(c). LCDC must adopt rules, including rules that adopt new statewide planning goals or amend the current goals, in accordance with the Oregon Administrative Procedures Act (APA), ORS chapter 183.

The legislature enacted broad policies and delegated legislative authority to LCDC “to refine and particularize those policies by adoption of land use goals and rules.” *1000 Friends of Oregon v. Land Conservation and Development Commission*, 292 Or at 745. The legislature delegated LCDC separate responsibilities: first, to adopt the statewide planning goals, ORS 197.040(2)(a), ORS 197.225; second and more generally, to promulgate rules, ORS 197.040(1)(b). From that statutory scheme, the Court of Appeals, noting “the special procedures required, over and above the general rulemaking procedures of the Administrative Procedures Act, for LCDC’s adoption or revision of the statewide planning goals” observed that “the goals occupy a preferred

position." *Willamette University v. LCDC*, 45 Or App 355, 373-74, 608 P2d 1178 (1980); *Marion County v. Federation for Sound Planning*, 64 Or App 226, 668 P2d 406 (1983). Although the goals stand preeminent to LCDC's other rules in OAR chapter 660, there is no hierarchy amongst the goals and they are to be given "equal weight in any matter in which the goals are required to be applied." ORS 197.340(1).

The statewide policies for land use that LCDC establishes through the adoption of the goals are mandatory and binding on local governments. ORS 197.040(2); ORS 197.015(8). Local governments must adopt comprehensive plans that comply with the goals and submit those plans to LCDC for review. *Central Or. Landwatch v. Deschutes Cnty.*, 301 Or App 701, 703-704, 457 P3d 369 (2020). After reviewing the comprehensive plan, if LCDC determines that it is in compliance with the goals, it acknowledges the plan. ORS 197.015(1) (defining "acknowledgment"). After LCDC acknowledges a local government's plan, the "plan and implementing zoning regulations control land use decisions." *Byrd v. Stringer*, 295 Or 311, 313, 666 P2d 1332 (1983).

"Once acknowledgment has been achieved, land use decisions must be measured not against the goals but against the acknowledged plan and implementing ordinances." *Id.* at 318–19. The local government must "make land use decisions * * * in compliance with the acknowledged plan." ORS 197.175(2)(d). *Central Or. Landwatch*, 301 Or App at 704.

Requirements for Adoption & Amendment of Statewide Planning Goals

Accompanying the authority to adopt or amend statewide planning goals, ORS 197.225; ORS 197.245, the legislature has provided certain substantive requirements related to adopting and amending the goals. ORS 197.230 provides:

"(1) In preparing, adopting and amending goals and guidelines, the Department of Land Conservation and Development and the Land Conservation and Development Commission shall:

"(a) Assess:

"(A) What economic and property interests will be, or are likely to be, affected by the proposed goal or guideline;

"(B) The likely degree of economic impact on identified property and economic interests; and

"(C) Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

Department of Justice Interoffice Memo: Current Statutory Framework for Amending or

Creating Statewide Planning Goals

March 8, 2021

Page 3 of 6

“(b) Consider the existing comprehensive plans of local governments and the plans and programs affecting land use of state agencies and special districts in order to preserve functional and local aspects of land conservation and development.

“(c) Give consideration to the following areas and activities:

“(A) Lands adjacent to freeway interchanges;

“(B) Estuarine areas;

“(C) Tide, marsh and wetland areas;

“(D) Lakes and lakeshore areas;

“(E) Wilderness, recreational and outstanding scenic areas;

“(F) Beaches, dunes, coastal headlands and related areas;

“(G) Wild and scenic rivers and related lands;

“(H) Floodplains and areas of geologic hazard;

“(I) Unique wildlife habitats; and

“(J) Agricultural land.

“(d) Make a finding of statewide need for the adoption of any new goal or the amendment of any existing goal.

“(e) Design goals to allow a reasonable degree of flexibility in the application of goals by state agencies, cities, counties and special districts.

“(2) Goals shall not be land management regulations for specified geographic areas established through designation of an area of critical state concern under ORS 197.405.

“(3) The requirements of subsection (1)(a) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule.

“(4) The commission may exempt cities with a population less than 10,000, or those areas of a county inside an urban growth boundary that contain a

Department of Justice Interoffice Memo: Current Statutory Framework for Amending or

Creating Statewide Planning Goals

March 8, 2021

Page 4 of 6

population less than 10,000, from all or any part of land use planning goals, guidelines and administrative rules that relate to transportation planning."

LCDC can demonstrate that it has met these substantive requirements by adopting an order that accompanies the goal amendments that undertakes the analysis and makes the required findings.

The process for amending the goals is provided in ORS 197.235, 197.240, and 197.245. This is in addition to and not in lieu of the standard process for adopting administrative rules provided in the APA. The statutory process assigns roles and responsibilities to the Department of Land Conservation and Development (DLCD), the Local Officials Advisory Committee, the State Citizen Involvement Advisory Committee, as well as "the appropriate legislative committee" for the preparation, public hearings, and review of the proposed amendments. ORS 197.235.

DLCD has several statutory tasks. First, DLCD is to prepare a new goal or goal amendment and the accompanying guidelines for adoption by LCDC. ORS 197.225. Again, the requirements for preparing a new goal or goal amendment are provided in ORS 197.230, discussed above. Note that it is DLCD, and not LCDC, that is statutorily tasked with having the ten goal hearings around the state. ORS 197.235(1)(a). The procedure for LCDC are provided in ORS 197.240, and requires at least one hearing. Of the minimum ten hearings required of DLCD, at least two must be held in each congressional district. ORS 197.235(1)(a). DLCD must provide the statutorily prescribed notice 30 days prior to the hearing. *Id.* DLCD must also implement the Citizen Involvement Guidelines developed by the State Citizen Involvement Advisory Committee and approved by LCDC. ORS 197.235(1)(b). DLCD must provide a copy of the proposed goal or goal amendments to the statutorily created Local Officials Advisory Committee and State Citizen Involvement Advisory Committee as well as the "appropriate legislative committee" for the opportunity to review and provide comments that LCDC must consider before adopting new goals or goal amendments. ORS 197.235(2)-(3). Additionally, DLCD provides a copy of the proposed goals or goal amendments to LCDC, the Governor, affected state agencies, special districts, and each local government. ORS 197.240(1).

LCDC is required to provide specified notice, provide copies of the proposal upon request, and hold at least one hearing on the proposed new goals and guidelines or goal amendments. ORS 197.240. After considering any recommendations and comments received at the hearing(s) and amending the proposal if it deems necessary, LCDC may approve the new goals or goal amendments. In adopting the new provisions, LCDC must specify an effective date and the applicability of the new provisions to land use decisions prior to a local government's amendment of its comprehensive plan to implement the goal. ORS 197.245. Generally, local governments and state agencies will have one year to be in compliance with the new goal provisions. ORS 197.250. Local

governments can achieve compliance through the acknowledgement process under ORS 197.251 or through the post-acknowledgement procedures in ORS 197.612. State agencies generally rely on taking actions affecting land use that are compatible with acknowledged comprehensive plans and land use regulations of local governments to establish that such actions are in compliance with the goals. ORS 197.180. However, state agencies may need to make findings of compliance with the new goals or goal amendments during the interim period before local governments have amended their plans and received acknowledgment from LCDC.

New goals or goal amendments must comply with statutory procedural requirements, and they must be constitutional and consistent with the enabling legislation, particularly the legislative directive in ORS 197.230 to consider certain areas and activities. See *1000 Friends of Oregon v. Land Conservation and Development Commission*, 292 Or at 748–750 (LCDC amendment to Statewide Planning Goal 14, that all land within city limits shall be classified as urban or urbanizable, invalid for exceeding delegated legislative authority). When LCDC meets these requirements in making goal amendments, incorporated as administrative rules, the amendments are usually accorded the same deference given to the rules of a state agency. *Polk County v. Dep’t of Land Conservation and Development*, 217 Or App 521, 532, 176 P3d 432 (2008) (“LCDC’s interpretation of its own rule is entitled to deference if it is within the range of its responsibility for effectuating a broadly stated statutory policy and is not inconsistent with the text of the rule or with any other source of law.”).

Measures 56 & 49

Because the goals are administrative rules, under 1998 Ballot Measure 56, LCDC must provide 90 days’ notice to local governments of the final public hearing on proposed new or amended goals that would cause a local government to change the base zoning classification of property, or limit or prohibit uses previously allowed in a zone. ORS 197.047(2), (10). Local governments must in turn provide notice to potentially affected property owners “[a]t least 20 days but not more than 40 days before the date of the first hearing.” ORS 215.503(4), 227.186(4).

Ballot Measure 49 provides prospective statutory entitlement to relief from certain land use regulations adopted after January 1, 2007. ORS 195.310(1). Relief is due where and only to the extent that the change in law restricts the use (relative to existing law) and only to the extent that the change also reduces the value of the property (measured before and after the change in law). Whether relief is provided through monetary compensation or through a waiver, the relief is also proportional to the reduction in value—the objective being to restore the claimant to the same position they were in before the adoption or enactment of the new regulation, and no more.

Generally, Measure 49 could apply to new goals or amended goals and local government implementing ordinances if they restrict the residential use of real property. ORS 195.310(1). The statutory definition of land use regulations includes an “administrative rule or goal of the Land Conservation and Development Commission.” ORS 195.310(1)(g). Thus, a claimant could seek relief under Measure 49 from a new goal or goal amendment that restricts the residential use of real property or restrict a farm or forest practice.

Judicial Review

The validity of administrative rules is judicially reviewable under the APA. ORS 183.400(1)–(2). The action must be a rule, however, before this statute can be invoked. Courts also consider challenges to the validity of land use rules in contexts other than under the APA rulemaking challenge provisions of ORS 183.400, such as the review of Land Use Board of Appeals (LUBA) decisions, *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 365–366, 369–370, 703 P2d 207 (1985) (urbanization land use planning goal did not prohibit incorporation of new city on rural land absent exception to land use goal; LCDC cannot amend goals through interpretation); the review of acknowledgments by LCDC, *1000 Friends of Oregon v. Land Conservation and Development Commission*, 305 Or 384, 400–402, 752 P2d 271 (1988) (LCDC improperly merged Goals 3 and 4, and violated Goal 4 by acknowledging Lane County plan despite plan’s allowance of farm uses on forest lands without showing of compatibility with forest uses); and the review of LCDC periodic review orders, *Yamhill County v. Land Conservation and Development Commission*, 115 Or App 468, 470, 839 P2d 238 (1992) (Goal 5 rule on historic sites, subsequently modified by statute, found valid).

In *Lane County v. Land Conservation and Development Commission*, 325 Or 569, 942 P2d 278 (1997), the Oregon Supreme Court discussed LCDC’s land use rulemaking authority against that authority previously delegated to counties by statute. The court held that LCDC may impose additional restrictions on land classified as high-value farmland that it considers necessary to carry out its state mandate, even if those regulations have the effect of prohibiting uses otherwise permissible under ORS 215.203(1) (authorizing exclusive farm use zones when such zoning is consistent with county’s comprehensive plan). *Lane County*, 325 Or at 583. In *Jackson County v. Land Conservation and Development Commission*, 132 Or App 302, 306, 888 P2d 98 (1995), the court decided that LCDC need not engage in prior rulemaking to fashion a remedy in an enforcement order under ORS 197.319–197.353 when LCDC required a county to set a two-year limit on validity of land use approvals.