

WASCO COUNTY PLANNING COMMISSION

July 7, 2015

Meeting begins at 3:00 p.m.
Mosier Terrace (Senior Center)
500 E 2nd Street
Mosier, Oregon 97040

CALL TO ORDER

I. ROLL CALL

WASCO COUNTY PLANNING COMMISSIONERS PRESENT

Russell Hargrave
Vicki Ashley
Kenneth McBain
Taner Elliott
Mike Davis
Brad DeHart
Andrew Myers

WASCO COUNTY PLANNING COMMISSIONERS ABSENT

Jeff Handley

WASCO COUNTY PLANNING OFFICE STAFF PRESENT

Angie Brewer, Planning Director
Dawn Baird, Associate Planner
Patricia Neighbor, Associate Planner
Brenda Jenkins, Planning Coordinator

II. PUBLIC COMMENT: Maximum 15 minutes, *limited to items not being heard or discussed elsewhere on the agenda.*

None.

III. APPROVAL OF PAST MINUTES:

- April 7, 2015
- May 5, 2015
- June 2, 2015

Vice Chair Ashley moved to approve the April 7, 2015, May 5, 2015, and June 2, 2015 minutes as submitted. **Commissioner Elliott** seconded. **Chair Hargrave** called for discussion; there was none. **Chair Hargrave** called for the vote. **The motion was unanimously approved 6 to 0, 1 abstained (Commissioner McBain) 1 absent (Commissioner Handley).**

A listing of the vote, as required by Oregon Revised Statute 192.650.c. is as follows:

Chair Hargrave – yes
Vice-Chair Ashley – yes
Commissioner Myers – yes
Commissioner Handley - absent
Commissioner Elliott – yes
Commissioner DeHart – yes
Commissioner McBain – abstain
Alternate Commissioner Davis – yes
Alternate Position #2 - Vacant

IV. QUASI JUDICIAL HEARING:

File PLANCU-14-09-0003 Garofoli

Request for a verification of nonconforming use determination for a dwelling (used as recreational cabin) that burned down in a wildfire, and a request to replace the lost dwelling with a new dwelling and accessory building. The property is in the Exclusive Farm Use Zone and the Sensitive Wildlife Habitat Overlay Zone (EPD-8, Big Game Winter Range). The property is located on an access road approximately 220' south of Obrist Road, approximately 3.1 miles west of Dutch Flat Road, approximately 10 miles southwest of The Dalles.

Chair Hargrave opened the hearing as follows:

We will now open the public hearing on agenda item PLANCU-14-09-0003, a request by Joe Garofoli for the verification of a nonconforming use and replacement of a recreational cabin and two sheds lost to a wildfire in 2013.

The application includes two requests:

- 1) Verification of a nonconforming use
- 2) Replacement of a nonconforming use

The 13.54 acre property is described as Township 1, South; Range 12, East; Section 18; Tax Lot 402; also known as Wasco County Assessor Account #16341

The criteria for approval of the applications include: Review Authority contained in Chapter 2, Section 2.060.B.14. ("matters which the Director elects not to review"), and Chapter 13 (*Nonconforming Uses, Buildings and Lots*) of the Wasco County Land Use and Development Ordinance.

The procedure I would like to follow is:

- a. Disclosure of Interest, Ex Parte Contact or Potential Conflicts
- b. Reading of the Rules of Evidence
- c. Planning department will present their report
- d. Those who wish to speak in favor of the proposal
- e. Those who wish to speak in opposition of the proposal
- f. Rebuttal
- g. Close the hearing and record and begin deliberation
- h. If enough information is available the Planning Commission will make a decision today.

Chair Hargrave asked if any Commission member wished to disclose any ex-parte contact; There were none.

Chair Hargrave asked if any Commission member had visited the location for a site visit; There were none.

Chair Hargrave asked if any Commission member wished to disqualify themselves for any personal or financial interest in this matter? There were none.

Chair Hargrave asked if any member of the audience wished to challenge the right of any Commission member to hear this matter? There were none.

Chair Hargrave asked if any member of the audience wished to question the jurisdiction of this body to act on behalf of Wasco County in this matter? There were none.

Chair Hargrave explained the Rules of Evidence which will be followed.

Chair Hargrave called for the staff to present their report and recommendation.

Angie Brewer, Planning Director presented the following (summarized):

Today's hearing is a quasi-judicial hearing for the verification of a nonconforming use, and the replacement of that use. In 2013, Mr. Garofoli's recreational cabin and storage sheds were destroyed in the Government Flats Complex Wildfire. Upon its loss, Mr. Garofoli and his consultants began working with staff on procedural options for the replacement of the destroyed development.

Staff and the consultants conducted research and found although the property is a legal parcel, no planning, building or septic permits could be located for the development that was lost. The property is 13.71 acres in size, is zone A-1 (160) Exclusive Farm Use and is located in the Big Game Winter Range sensitive wildlife habitat overlay. Within one-year of the disaster, an application was submitted for the verification of a nonconforming use and the replacement of that use.

Staff's review, report and recommendation are limited to the nonconforming use chapter – Chapter 13, Section 050 – Verification of a nonconforming use and Section 060 – Restoration or alteration of a nonconforming use and Chapter 3 – alteration, restoration, relocation or replacement of a lawfully established dwelling.

Please refer to staff's analysis for details; I plan to provide a high level overview. The nonconforming use verification and restoration chapter is intentionally sequenced. We must first verify the nonconforming use was lawfully established as defined in Section 050 before restoration or alteration can be approved through Section 060. Lawfully established means, lawfully established on or before the effective date of applicable ordinances. No unlawful use of the property existing at the time of the effective date of the ordinance can be deemed a nonconforming use.

There are two types of verification: Type 1 is verified by non-discretionary evidence, including but not limited to zoning approval or Assessor's records to confirm the date of establishment (before rules applied). Type 2 is for instances lacking non-discretionary

evidence (e.g. we don't know when it was constructed, but know it is pre-LUDO; most evidence is aimed at providing a date).

According to information provided by the applicant, the dwelling was constructed in 1979 and modified multiple times between 1979 and 1982. Assessor's records verify the development existed in 1982. In 1979, the property was zoned A-3, and would have required a land use review for a dwelling. Similarly, a sign off from the Building and Health Departments would have been required for construction, water, power and sanitation. Because non-discretionary evidence should exist for development constructed at a time when permits were required, Type 1 process is most applicable. Based on the information provided to staff, the proposed verification is inconsistent with the requirements of this process.

Pursuing Verification Process Type 2, the applicant provided information to demonstrating existence and continued use for more than 20 years. The applicant contends that ORS 215.130 prohibits a county from requiring an applicant to prove the existence, continuity, or nature and extent of the use for more than 20 years immediately preceding the application. Staff does not argue that the dwelling has existed and been used continuously for the last 20 years, however, we do not feel that ORS 215.130 prohibits a county from confirming non-discretionary evidence of lawful establishment when the date of establishment is known. In summary, the use could not be verified as a nonconforming use that was lawfully established at the time of construction.

Although it could not be verified, Staff's analysis does include findings for replacement, under section 060 for restoration and alteration. Restoration restores the original development. This section requires the size of the replacement development to be the same and in the same general location. Alteration allows replacement in a new location and a new size.

"FINDING: *The original cabin was a 1,200 square foot, single-story dwelling (footprint of 24'x50'). The proposed replacement dwelling is 1,856 square foot, single-story dwelling (footprint of 32'x58'). As proposed, the replacement building would increase the floor area, and therefore must be considered an alteration. The applicant states that the replacement accessory buildings will replace the functioning accessory buildings at the time of the fire, including a 192 square foot, single-story storage shed (footprint of 12'x16') and a 144 square foot, single-story wood shed (footprint of 12'x12'). No information was provided about the size of the previously existing accessory buildings.*

The request is for alteration, and requires compliance with 7 criteria to ensure continued lawful existence, compatibility with the surrounding neighborhood and landscape, consistency with health and safety regulations and other resource protection requirements. Again, this comes back to lawful establishment. Because the use was not lawfully established at the time of construction, it cannot be altered or restored through Section 060.

Chapter 3 – Basic provisions for the A-1 (160) EFU zone contains a subject to standards review process for the discretionary alteration, restoration, relocation or replacement of a lawfully established dwelling. Again, because the lawful existence could not be established, the use cannot be verified as nonconforming.

CONCLUSARY FINDING: *Based on the information available at the time of Staff's review, staff concludes the dwelling and accessory buildings destroyed by wildfire in 2013 are not lawfully established nonconforming uses and cannot be replaced or repaired through Chapter 13 Nonconforming Uses, Buildings and Lots. Please see Attachment C for staff's recommendation and Planning Commission options." (Source: PLANCU-14-09-0003 staff report)*

Director Brewer read the following Planning Commission decision options:

- A. Deny the (1) non-conforming use determination and deny the (2) replacement development; or
- B. Approve the (1) non-conforming use determination and approve the (2) replacement development with conditions of approval recommended by the Planning Department; or
- C. Approve the (1) non-conforming use determination and deny the (2) replacement development with conditions of approval recommended by the Planning Department; or
- D. Deny the (1) non-conforming use determination and approve the (2) replacement development
- E. Any combination of options (A) through (D) above, with amended conditions of approval; or
- F. If additional information is needed, continue the hearing to a date and time certain to allow the submittal of additional information.

Director Brewer provided a staff recommendation. She said that Staff recommends Option A: Deny requests (1) and (2) on the grounds that the original development was not lawfully established and therefore cannot be verified or replaced through WCLUDO *Chapter 13 Nonconforming Uses, Buildings and Lots*.

Chair Hargrave called for questions from the Commission.

Commissioner Elliott asked Staff how good the record keeping in the Department was, how complete. **Associate Planner Baird** stated that nothing is 100%, but the Department's records are pretty good. She stated that between the Health Department and the Planning Department, she was 90% sure there would be some record of a permit if one was taken out.

Chair Hargrave asked if the dwelling would have been a permitted use in 1979. **Director Brewer** stated that yes; it would have been an allowed use with a land use permit.

Vice Chair Ashley asked if it was the same land owner now as in 1979. **Director Brewer** stated that she believed the property had changed hands. Mr. Garofoli confirmed from the audience that he was not the original owner.

Commissioner DeHart asked for clarification on the language used by Director Brewer: "at the time of staff report," and asked if anything had developed since that time. **Director Brewer** stated that Staff made a recommendation based on the application material. If new information, such as a permit is located in the future, the Planning Department would reconsider the issue.

Chair Hargrave asked if the applicant had been able to provide any discretionary evidence to show the legal status of the use. **Director Brewer** stated that the evidence provided showed the date of placement, and that the use was there and on the tax rolls in 1982. The applicant provided statements from neighbors and deed records, but nothing showing whether or not it was legally placed or lawfully established.

Commissioner DeHart asked for clarification on why the assessor records were not adequate to show legally established use. **Director Brewer** explained that the assessor records simply showed that the use was on the property and being taxed at that time. It did not show legally established and illegal structures can be taxed.

Commissioner Myers asked for clarification that the county assessor records verify the date of establishment, and the Planning Department is not contesting that date. **Director Brewer** stated that yes, we are not contesting that it was there, just that it was not established legally with the required permits.

Commissioner Davis asked if the applicant could show that it was there since 1974, would that be considered evidence of legal placement. **Associate Planner Baird** stated that it would if they met the criteria that we list as verifiable evidence.

Commissioner McBain asked when the current owner obtained ownership. **Mr. Joe Garofoli** – the applicant and owner replied from the audience stating that it was in 2007.

Chair Hargrave called for other questions by the Commission.

Commissioner Myers asked if Director Brewer could explain the referenced Oregon Revised Statute and whether it was in conflict with the Wasco County Land Use Development Ordinance (LUDO). **Director Brewer** stated that the statute was not in conflict with the LUDO. She referred the Commission to Attachment E in the agenda packet. She stated that she believes the statute is for situations where they are unable to identify the date that the use was established. In which case it makes sense to not make the applicant continue going back in time. In this case, we know when it was established, but it was not legally established. She also explained that Staff did outreach with other Oregon Counties to ask how they have dealt with this type of situation in the past and basically we are right in line with the other counties. She reiterated that the statute does not include lawful establishment and that the applicant was unable to provide evidence of lawful establishment as required by the LUDO.

Commissioner Myers asked where she was getting her interpretation. **Director Brewer** stated that she spoke with other counties as well as Wasco County's legal counsel.

Commissioner Myers asked for clarification on whether Staff could require information more than 20 years prior to the application. **Director Brewer** explained the difference between legal use and legal establishment.

Chair Hargrave called for additional questions from the Commission; there was none.

Chair Hargrave called for testimony from applicant.

Mr. Joe Garofoli, the owner and applicant, and **Ms. Leslie Ann Hauer**, the Applicant's representative were seated at the presenter's table. **Ms. Hauer** gave a summarized presentation of her document submitted to the Commission (Attachment A). She stated that there was one question before the Commission, was the use lawfully established. She further stated that in planning a use is "an activity". There is no question that the use in this case is the dwelling, she believes the use was lawfully established (see attachment for case law outlined by Ms. Hauer). **Ms. Hauer** submitted written testimony from Michael Ferguson (see Attachment B). She also stressed that Mr. Garofoli had been waiting well beyond the required 150 days for a decision on his request. She stated that even with the 60 day waiver that Mr. Garofoli signed; the County has surpassed this deadline.

Chair Hargrave called for questions from the Commission.

Chair Hargrave asked for clarification as to whether Ms. Hauer was not stating that the structure was legally placed but that permits are not the relevant criteria, she is saying the relative criteria is that the zone that would allow that use changed in 1980, and that until 1980 that use would have been allowed. **Ms. Hauer** stated yes and the likelihood is that if they did have permits, then those permits are probably gone. She further explained that their stance is that zoning allowed the use at that time, and that the records are not available to show that they did not have permits.

Chair Hargrave asked if she was arguing that there were permits, but that they have been lost. **Ms. Hauer** stated that she has no idea if they were lost, but that absence of the permits doesn't prove anything.

Vice Chair Ashley asked if lot books or title searches were done at the time the applicant took ownership of the property, would these searches have shown if the dwelling was legally established. **Ms. Hauer** stated that she wasn't sure if there had been searches, but that she didn't think it was relevant to a land use request. **Vice Chair Ashley** stated that the legal establishment is relevant. **Ms. Hauer** stated that holding onto an old building permit is difficult; and reiterated that the absence of the permit does not mean no permit was obtained.

Commissioner McBain asked Ms. Hauer to define the use of this structure. **Ms. Hauer** stated that the use was a dwelling. **Commissioner McBain** stated that it seemed to him the use was more recreational. **Ms. Hauer** stated that since Mr. Garofoli has had the property, the use has been more as a recreational cabin. However her understanding is that a dwelling is a dwelling whether it is recreationally used full time dwelling.

Commissioner DeHart asked if the Assessor records reflect that the structure is a dwelling. **Ms. Hauer** stated that yes; the structure was taxed as a dwelling.

Commissioner McBain asked if there was a realtor involved in the sale of the property. **Mr. Garofoli** stated that yes, there was a realtor. **Commissioner McBain** stated that real estate law requires a disclosure statement and in that statement there is a question as to whether or not there has been any work or improvements without a permit. He then asked if there had been a disclosure statement regarding the structure. **Mr. Garofoli** stated that he didn't remember reading any disclosure statement or being advised in any way on the structure. He knew it was an established building and had been being assessed taxes so he had assumed that everything was legal and ok.

Chair Hargrave called for additional questions from the Commission.

Commissioner Myers asked Ms. Hauer for clarification on the way she interprets 215.130(10)(a). **Ms. Hauer** referred to the Rogue Advocates case stating that a building permit is not essential to providing the use.

Vice Chair Ashley asked if there were water and sewer on the property now. **Mr. Garofoli** stated that he believes there is a septic but no water or electricity.

Commissioner DeHart asked why the original application was to replace the dwelling in kind, but now they are asking to update the request with an expansion and to reorient the dwelling. **Ms. Hauer** stated that the request was being made now based on the advice of past Planning Director, John Roberts, to be more efficient and to avoid an additional application fee. **Mr. Garofoli** stated that he is seeking an expansion to better accommodate his growing family.

Chair Hargrave asked if the rules require a legally placed dwelling or a legal use. **Director Brewer** stated that the rule requires that the use be lawfully established. She further explained that if you were to apply for the use (dwelling) in 1979, it would have required a permit. **Chair Hargrave** asked for clarification that the rule doesn't say a lawful use, but it says that the use has to be lawfully established. **Ms. Hauer** responded by stating that case law says that lawfully established means it was there when the law changed to make it nonconforming. She also stated that there is no question that the dwelling was there when the law changed. **Director Brewer** clarified that the law changed on September 5, 1974. **Chair Hargrave** stated that the law changed in 1974, which would have allowed the use but the law changed again in 1980 at which point the use became nonconforming. **Associate Planner Baird** clarified that in 1980 the zone changed from A3 to A1. **Chair Hargrave** stated that he wanted to be clear on his understanding because "lawful use" has one feel and "legally established dwelling" has another.

Chair Hargrave called for additional questions from the Commission; there was none.

Chair Hargrave called for additional testimony in support.

Michael Ferguson provided testimony in support of applicant. **Mr. Ferguson** stated that he was contacted by Joe (Mr. Garofoli) to find proof of the residence being established. He further stated that his father bought the property in approximately 1977. Mr. Ferguson's father moved a trailer onto the property and lived there until 1986. He further testified that as late as 1982 the property still used an outhouse, no septic was on the property while he lived there growing up. He stated that he wasn't sure if they had any permits.

Chair Hargrave called for questions from the Commission; there was none.

Chair Hargrave called for other testimony in support.

Mr. Garofoli provided additional testimony by asking Staff if Wasco County had ever made a decision under ORS 215.130 in the past. **Director Brewer** stated that this was the County's first experience with this State rule. **Mr. Garofoli** asked if she had consulted an attorney. **Director Brewer** stated that she had consulted with Wasco County's legal counsel and reached out to other Oregon counties for their interpretations.

Chair Hargrave called for other testimony in support; there was none.

Chair Hargrave called for testimony in opposition; there was none.

Chair Hargrave closed the hearing for deliberation

Director Brewer outlined the planning commission's options:

- A. Deny the (1) non-conforming use determination and deny the (2) replacement development; or
- B. Approve the (1) non-conforming use determination and approve the (2) replacement development with conditions of approval recommended by the Planning Department; or
- C. Approve the (1) non-conforming use determination and deny the (2) replacement development with conditions of approval recommended by the Planning Department; or
- D. Deny the (1) non-conforming use determination and approve the (2) replacement development
- E. Any combination of options (A) through (D) above, with amended conditions of approval; or
- F. If additional information is needed, continue the hearing to a date and time certain to allow the submittal of additional information.

Director Brewer stated that Staff recommends denial of both requests.

Commissioner Myers stated that he still has questions and would like to spend some time reading ORS 215.130 as well as the case law submitted by Ms. Hauer.

Chair Hargrave stated that he would like to know where Commissioner Myers is based on what the Commission has before them. **Commissioner Myers** said there was very little analysis in the staff report on how this statute applies to this situation he would like to understand it before approving or denying it.

Chair Hargrave asked for Commissioner Myers thoughts on lawful use versus legally placed structure. **Commissioner Myers** stated that it was a question as to whether or not

it was lawfully placed. **Chair Hargrave** confirmed that Commissioner Myers was leaning towards the dwelling needed to be legally placed. **Commissioner Myers** stated that yes, but it seemed to him that the applicant is stating that due to statute the application should be approved. **Chair Hargrave** stated that the distinction here is that the question is was the use lawfully established at the time it became nonconforming.

Commissioner Elliott asked for clarification stating that the case law states that the county "may not require", he asked if our county rules state "may" or "shall" require. **Director Brewer** stated that our county does not have a time limit attached. It is either discretionary or nondiscretionary. And, if there was an ordinance in effect at the time it required a review, then that should be nondiscretionary.

Chair Hargrave stated that in his mind it is not a legally placed structure, and no one is advocating that it is a legally placed structure.

Vice Chair Ashley clarified that in 1979 the parcel would have been zoned A3. **Associate Planner Baird** stated that was correct. **Vice Chair Ashley** asked if it would have needed a permit then. **Associate Planner Baird** stated that yes, a single family dwelling would have been approved with a conditional use permit. **Commissioner Davis** stated that the Commission needs to take into consideration that this will be a policy for similar situations in the county.

There was discussion on how prevalent this type of situation is in the county. The Commission consensus was that this was a unique situation due to the change of zoning but that there were many instances where illegal development has existing for more than 20 years.

Commissioner Elliott asked for clarification on the language that a change of ownership or occupancy shall be permitted. **Vice Chair Ashley** stated that the language just meant you could sell it. **Commissioner Elliott** stated that if it were sold then someone else could occupy it legally. **Chair Hargrave** replied yes, they could occupy it legally, if it were legally established.

Commissioner McBain moved to deny both requests.

Chair Hargrave suggested amending the motion for the individual requests and to make two motions.

Commissioner McBain amended his motion, moving to deny the request for verification of a nonconforming use. **Commissioner Davis** seconded. **Chair Hargrave** called for discussion; there was none. **Chair Hargrave** called for the vote. **The motion was approved 4 to 3, 1 absent (Commissioner Handley).**

A listing of the vote, as required by Oregon Revised Statutes 192.650.c. is as follows:

Chair Hargrave – yes
Vice-Chair Ashley – yes
Commissioner Myers – no
Commissioner Handley - absent

Commissioner Elliott – no
Commissioner DeHart – no
Commissioner McBain – yes
Alternate Commissioner Davis – yes
Alternate Position #2 - Vacant

Vice Chair Ashley moved to deny the request for replacement development in coordination with a nonconforming use. **Commissioner Davis** seconded. **Chair Hargrave** called for discussion; there was none. **Chair Hargrave** called for the vote. **The motion was approved 4 to 3, 1 absent (Commissioner Handley).**

A listing of the vote, as required by Oregon Revised Statutes 192.650.c., is as follows:

Chair Hargrave – yes
Vice-Chair Ashley – yes
Commissioner Myers – no
Commissioner Handley - absent
Commissioner Elliott – no
Commissioner DeHart – no
Commissioner McBain – yes
Alternate Commissioner Davis – yes
Alternate Position #2 - Vacant

V. Long-Range Planning Project Work Session:

Scott Edelman, Central Oregon Regional Representative from the Community Services Division of the Oregon Department of Land Conservation and Development, presented an overview of State process and State level assistance options available for the plan update project. (See attachments B – G)

VI. OPTIONAL: DISCUSSION OF OTHER BUSINESS/PLANNING DIRECTOR COMMENTS:

There was none.

Adjourned 5:37

Russell Hargrave, Chair
Wasco County Planning Commission

Angie Brewer, Planning Director
Wasco County Planning & Development

ATTACHMENT A

ADDITIONAL DISCUSSION FOR APPLICATION FOR CONFIRMATION OF NON-CONFORMING BUILDING & USE

Applicant/Owner: Joseph Garofoli

Mailing Address: 4408 NE 77th Avenue
Portland, OR 97218-3924
(503) 288 2569 Home
(503) 252 0974 Work

Site Address: 5320 Orbist Grade Road
Map: 1S 12E 18 402

Applicant's Representatives: Leslie Ann Hauer
6100 Collins Road
West Richland, WA 99353
(509) 967-2074
(509) 539-9992

Carrie Richter
Garvey Schubert Barer
121 SW Morrison Street, 11th floor
Portland, Oregon 97204
(503) 228-3939

Comprehensive Plan/
Zoning Current zoning A-1
Historic zoning A-3

Background

Mr. Garofoli submitted an application for verification of non-conforming use and restoration of a non-conforming use following its destruction by forest fire prior to the September 8, 2014 deadline. Subsequently, Mr. Garofoli requested a stay in processing “completeness” in order to submit additional information. In November 2014, Mr. Garofoli submitted a request to alter the non-conforming use by changing the orientation of the structure and to increase the size of the structure.

In the staff report, staff suggests that Mr. Garofoli could have replaced this dwelling by getting a new land use approval as either a non-farm dwelling or as a lot-of-record dwelling. This is the first time that staff has suggested there may be another path for the applicant to recover what he has lost through no fault of his own. Further, it is misleading to suggest that either of these alternative paths are assured. Qualifying as a non-farm dwelling under the county’s current standards requires a showing that the land is “generally unsuitable” for farming. Although this property has never been farmed, additional research and potentially expert testimony would be necessary to establish this was this case, which could come at a significant cost when the result is not assured. WCZO 3.210(J). To qualify for a lot of record dwelling, the owner must have owned the property since before January 1, 1985. The applicant acquired the property in July, 2007 and would not qualify for a lot-of-record dwelling.

Summary of Facts

The cabin previously located at 5320 Orbist Road was destroyed by the 2013 Government Flats Complex fire.

Testimony of neighbors was provided with the application, demonstrating that the residential structure had been on the property prior to 1993, and most likely was originally placed on the property in 1978 or 1979 following the creation of the 13.50-acre lot.

In addition to the testimony considered by staff, the applicant has been able to contact Michael Ferguson, the son of Ernest and Linda Ferguson, who purchased the property in 1978. Mr. Ferguson testified that he lived in a manufactured home that was located on the property in 1978, with a new bedroom addition constructed shortly thereafter.

The County’s record retention policy for building permits is two years. As a result, the County has no building or septic permits on file relating to the siting of the manufactured home or its expansion shortly thereafter.

Summary of Requirements

The County’s Code sets out requirements for verification, restoration, and alteration of a nonconforming use in Chapter 13. Specifically, the following sections apply to this application:

Chapter 13 Nonconforming Uses, Buildings and Lots 13.060 Restoration or Alteration of Nonconforming Use

13.060.A.3 – The replacement dwelling will be located in the same area, with a small change in orientation from the original footprint. Setbacks will generally be the same and far exceed minimum requirements for the zoning district.

13.060.C.Alteration of a nonconforming use....

This section requires that an alteration will “result in no greater adverse impact on the neighborhood or shall result in less of an adverse impact on the neighborhood....”

13.060.C.1.a Residential Uses Only

(1) The cabin use was shown to be established prior to 1993, with evidence indicating it was on the site at least from 1982. No conditions or limitations associated with its creation have been identified.

(2) The proposed replacement dwelling will be similar in appearance to the previous cabin and in any case will be in the same location (with proposed minor change in orientation).

(3) The use of the replacement dwelling will be identical to the previous cabin.

(4) The proposed addition to the cabin area will not cause a non-conforming condition with respect to setbacks, which remain far greater than required for the zone.

(5) Setbacks for the original dwelling and the replacement dwelling greatly exceed minimum requirements.

(6) The applicant expects that any required standards pertaining to health, safety, fire protection, and so on, will be satisfied when plans are submitted for building permits.

(7) No factors impacting the character or needs of the neighborhood have been identified. The replacement dwelling will be largely invisible from Obrist Road and adjacent properties.

In addition to the County Code, the Oregon Revised Statutes (“ORS”) 215.130 provide a limitation to the amount of information (subsection 11) that a County may demand of an applicant requesting a continuation or alteration of a non-conforming use (subsection 5):

(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

(11) For purposes of verifying a use under subsection (5) of this section, *a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application. (Emphasis added.)*

Further, ORS 215.215 provides that in cases where nonfarm dwellings are destroyed by fire, the county zone regulations may allow re-establishment, notwithstanding other restrictions that may exist in state law, particularly ORS 215.130. It provides:

Notwithstanding ORS 215.130(6), if a nonfarm use exists in an exclusive farm use zone and is unintentionally destroyed by fire, other casualty or natural disaster, the county may allow by its zoning regulations such use to be reestablished to its previous nature and extent, but the reestablishment shall meet all other building, plumbing, sanitation and other codes, ordinance and permit requirements.

Analysis

The Dwelling Existed on the Date that the Restrictive Zoning Took Effect

County zoning established the “A-1” (Exclusive Farm Use) Zone on April 1, 1980, requiring a minimum of 80 acres for new lots. The subject property is smaller than 80 lots and as a result, a dwelling may not be constructed unless the structure was in existence on or before March 31, 1980. As long as the structure was in existence before this date, the County need not establish exactly when the structure was established. *Aguilar v. Washington County*, 201 Or App 640, 645-50, 120 P3d 514 (2005). The evidence that a dwelling existed on March 31, 1980 includes testimony that a manufactured home was placed in the property in 1979. This is conclusive evidence that the home was in “existence” before March 31, 1980.

Further, Mr. Garofoli has provided evidence that the cabin existed on the Obrist Road property for more than 20 years, satisfying the standard in ORS 215.130(11). This presumption coupled with the uncontroverted oral testimony of the continuous existence of the structure is sufficient to establish that the structure was lawfully established when the zoning took effect. This evidence is sufficient to satisfy the County’s code coupled with state law authority for establishment of this nonfarm use under ORS 215.215.

In a recent case, *Rogue Advocates vs. Jackson County* (LUBA Nos. 2013-102/103), LUBA faced a similar non-conforming use establishment issue as it related to the establishment of a “batch plant,” a facility used for mixing materials such as asphalt or concrete, where the restrictive zoning took effect in 1973. The County relied on testimony from the plant owner, Howard DeYoung to conclude that a batch plant operated on the property from 1963 to 1974. Notwithstanding the lack of any building permits or DEQ-required air quality permits on file, LUBA affirmed the County’s approach finding that such oral testimony was reasonable and substantial evidence sufficient to prove that the use was in existence and affirmed the county’s finding that it was a lawful non-conforming use.

Lack of a Building or Septic Permit is Irrelevant

According to County staff, there are no permits in the files for any aspect of the establishment of the structure—no building permit or septic system approval. First, the County’s only obligation with respect to *Aguilar* and the local regulations, is to show that the structure existed on March 31, 1980, the date when the restrictive zoning took effect, and not the date when it was first established. Second, building permits in the past were only kept for two years and as a result no building permit approvals would remain. Given the County’s short record retention practices, the lack of records in this case only suggests that the County likely destroyed any records. It does not suggest that the building was constructed after 1980 and in fact, provides no guidance as to when the building was constructed.

Again, in *Rogue Advocates*, LUBA considered whether the lack of evidence of required air quality permits for the batch plant established that the use was not “lawful.” LUBA explained that the obligations imposed by ORS 215.130 are directed at whether the required land use approvals were obtained. LUBA explained:

In our view, a use is lawfully established for purposes of verifying that use as a nonconforming use under ORS 215.130(5) and the county's regulations if, at the time restrictive zoning is applied, the use is established and either required no local land use approvals under a comprehensive plan or land use regulations or received all required local land use approvals that were required under the applicable comprehensive plan and land use regulations. Under ORS 215.130(5) through (11), verification and other elements of nonconforming uses are described with reference to local zoning ordinances and land use regulations.

Building and septic permit approvals are not required zoning or land use approvals and the failure to obtain such permits does not prove that the dwelling was not lawfully established or that the structure was constructed after April 1, 1980. Lack of records is not proof, particularly when the lack of records, given the County's practice of recycling such records, does not contradict the oral testimony indicating that the structure was established before March 31, 1980.

Finally, ORS 215.215 appears to allow reestablishment of a nonfarm use, including nonfarm dwellings, if the county code allows for such establishment, notwithstanding the requirements of ORS 215.130(5) through (11) and the cases interpreting them, the basis for staff's recommendation of denial in this case. The County's code requires a finding that the "non-conforming use" is "lawfully established." Again, this is directed at the County's review of the land use and not whether other building permit or septic permits may have been required.

CONCLUSION

Mr. Garofoli has provided uncontroverted and detailed evidence that the structure, along with the one bedroom addition was "lawfully established." A use is presumed to be "lawfully established" if it existed before land use review was required and it exceeds the 20-year limit of ORS 213.130(11). No land use approval was required in order to locate a non-farm dwelling in 1979, when the dwelling was established. As a result, the structure was "lawfully established" with regard to land use. The lack of building or permits unrelated to land use review does not prove that that the dwelling was unlawfully established. More importantly, the question of whether a structure lawfully exists is restricted to land use permitting and need not include any consideration of other building code or DEQ issued permits that may or may not have also been required.

Mr. Garofoli requests that the Planning Commission accept the testimony that has been provided, and allow him to replace his cabin with a slightly re-oriented residence at its previous location and allow the alteration/enlargement as proposed. Testimony has been provided that the building re-orientation and enlargement can be accomplished with minimal impact to the site and surrounding properties. Reconstruction of this dwelling will require the applicant to obtain a building permit as well as any necessary septic or Health Department issued permits.

For these reasons, Mr. Garofoli asks that the Planning Commission approve his application.

ATTACHMENT B



CLACKAMAS
COUNTY



services



departments



government



BCC Land Use Hearings

Comprehensive Plan

Design Review

Floodplain Information

Flood Insurance

Flood Terminology

Comprehensive Plan

- Chapter 1 - Introduction
- Chapter 2 - Citizen Involvement
- Chapter 3 - Natural Resources and Energy
- Chapter 4 - Land Use
- Chapter 5 - Transportation System Plan
- Chapter 6 - Housing
- Chapter 7 - Public Facilities and Services
- Chapter 8 - Economics
- Chapter 9 - Open Space, Parks and Historic Sites
- Chapter 10 - Community Plans and Design Plans
- Chapter 11 - The Planning Process
- Appendix A Maps and Documents Adopted by Reference
- Appendix B Summary of Supporting Documents

ATTACHMENT C

Deschutes County Comprehensive Plan

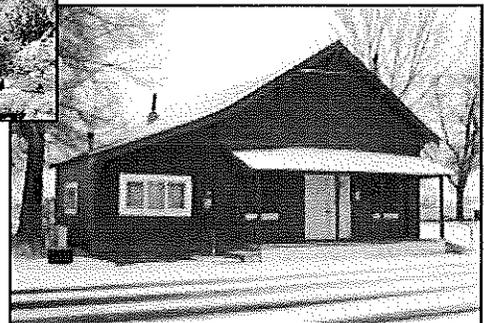


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Preamble, Vision and Use of this Plan

Preamble

The Deschutes County Comprehensive Plan is a statement of issues, goals and policies meant to guide the future of land use in this County. This Comprehensive Plan is intended to recognize the expectations and rights of property owners and the community as a whole.

Community Vision

As a result of community outreach, a vision emerged that defines what people care about in Deschutes County.

The high quality of life in Deschutes County stems from:

- The beauty, bounty and richness of a healthy natural environment
- A community of caring people
- A strong and diverse economy
- Access to a wide variety of outdoor recreational opportunities
- The rural character of the region
- Maintaining a balance between property rights and community interests



Use of this Plan

The Comprehensive Plan is a tool for addressing changing conditions, markets and technologies. It can be used in multiple ways, including:

- To strengthen communication with the public.
- To guide public decisions on land use policy when developing land use codes, such as zoning or land divisions.
- As a basis for the development of public programs and budgets.
- As a basis for the measurement and evaluation of changes in the physical, social, environmental or economic makeup of the County. Modifications of the Plan itself may result from this process.
- To promote inter-government coordination, collaboration and partnerships.

This Plan does not prioritize one goal or policy over another. Implementation of this plan requires flexibility because the weight given to the goals and policies will vary based on the issue being addressed.

The Plan is not intended to be used to evaluate specific development projects. Instead, the Plan is a 20-year blueprint to guide growth and development

ATTACHMENT D

A Summary of Oregon's Statewide Planning Goals

1. **CITIZEN INVOLVEMENT** Goal 1 calls for "the opportunity for citizens to be involved in all phases of the planning process." It requires each city and county to have a citizen involvement program containing six components specified in the goal. It also requires local governments to have a committee for citizen involvement (CCI) to monitor and encourage public participation in planning.
2. **LAND USE PLANNING** Goal 2 outlines the basic procedures of Oregon's statewide planning program. It says that land use decisions are to be made in accordance with a comprehensive plan, and that suitable "implementation ordinances" to put the plan's policies into effect must be adopted. It requires that plans be based on "factual information"; that local plans and ordinances be coordinated with those of other jurisdictions and agencies; and that plans be reviewed periodically and amended as needed. Goal 2 also contains standards for taking exceptions to statewide goals. An exception may be taken when a statewide goal cannot or should not be applied to a particular area or situation.
3. **AGRICULTURAL LANDS** Goal 3 defines "agricultural lands." It then requires counties to inventory such lands and to "preserve and maintain" them through farm zoning. Details on the uses allowed in farm zones are found in ORS Chapter 215 and in Oregon Administrative Rules, Chapter 660, Division 33.
4. **FOREST LANDS** This goal defines forest lands and requires counties to inventory them and adopt policies and ordinances that will "conserve forest lands for forest uses."
5. **OPEN SPACES, SCENIC AND HISTORIC AREAS AND NATURAL RESOURCES** Goal 5 covers more than a dozen natural and cultural resources such as wildlife habitats and wetlands. It establishes a process for each resource to be inventoried and evaluated. If a resource or site is found to be significant, a local government has three policy choices: preserve the resource, allow proposed uses that conflict with it, or strike some sort of a balance between the resource and the uses that would conflict with it.
6. **AIR, WATER AND LAND RESOURCES QUALITY** This goal requires local comprehensive plans and implementing measures to be consistent with state and federal regulations on matters such as groundwater pollution.
7. **AREAS SUBJECT TO NATURAL DISASTERS AND HAZARDS** Goal 7 deals with development in places subject to natural hazards such as floods or landslides. It requires that jurisdictions apply "appropriate safeguards" (floodplain zoning, for example) when planning for development there.
8. **RECREATION NEEDS** This goal calls for each community to evaluate its areas and facilities for recreation and develop plans to deal with the projected demand for them. It also sets forth detailed

- standards for expedited siting of destination resorts.
9. ***ECONOMY OF THE STATE*** Goal 9 calls for diversification and improvement of the economy. It asks communities to inventory commercial and industrial lands, project future needs for such lands, and plan and zone enough land to meet those needs.
 10. ***HOUSING*** This goal specifies that each city must plan for and accommodate needed housing types, such as multifamily and manufactured housing. It requires each city to inventory its buildable residential lands, project future needs for such lands, and plan and zone enough buildable land to meet those needs. It also prohibits local plans from discriminating against needed housing types.
 11. ***PUBLIC FACILITIES AND SERVICES*** Goal 11 calls for efficient planning of public services such as sewers, water, law enforcement, and fire protection. The goal's central concept is that public services should to be planned in accordance with a community's needs and capacities rather than be forced to respond to development as it occurs.
 12. ***TRANSPORTATION*** The goal aims to provide "a safe, convenient and economic transportation system." It asks for communities to address the needs of the "transportation disadvantaged."
 13. ***ENERGY*** Goal 13 declares that "land and uses developed on the land shall be managed and controlled so as to maximize the conservation of all forms of energy, based upon sound economic principles."
 14. ***URBANIZATION*** This goal requires cities to estimate future growth and needs for land and then plan and zone enough land to meet those needs. It calls for each city to establish an "urban growth boundary" (UGB) to "identify and separate urbanizable land from rural land." It specifies seven factors that must be considered in drawing up a UGB. It also lists four criteria to be applied when undeveloped land within a UGB is to be converted to urban uses.
 15. ***WILLAMETTE GREENWAY*** Goal 15 sets forth procedures for administering the 300 miles of greenway that protects the Willamette River.
 16. ***ESTUARINE RESOURCES*** This goal requires local governments to classify Oregon's 22 major estuaries in four categories: natural, conservation, shallow-draft development, and deep-draft development. It then describes types of land uses and activities that are permissible in those "management units."
 17. ***COASTAL SHORELANDS*** The goal defines a planning area bounded by the ocean beaches on the west and the coast highway (State Route 101) on the east. It specifies how certain types of land and resources there are to be managed: major marshes, for example, are to be protected. Sites best suited for unique coastal land uses (port facilities, for example) are reserved for "water-dependent" or "water related" uses.
 18. ***BEACHES AND DUNES*** Goal 18 sets planning standards for development on various types of dunes. It prohibits residential development on beaches and active foredunes, but allows some other

types of development if they meet key criteria. The goal also deals with dune grading, groundwater drawdown in dunal aquifers, and the breaching of foredunes.

19. *OCEAN RESOURCES* Goal 19 aims "to conserve the long-term values, benefits, and natural resources of the

nearshore ocean and the continental shelf." It deals with matters such as dumping of dredge spoils and discharging of waste products into the open sea. Goal 19's main requirements are for state agencies rather than cities and counties.

INTRODUCTION

Wasco County citizens are fortunate to live in an area with abundant natural resources which form the basis of the viable economic system. However, poorly considered land use decisions leading to a disorderly and uneconomic land use pattern can threaten this way of life. We must consider land a resource which must be managed, and not merely a commodity which may be sold and purchased. Once land has been committed to a particular use, it is usually physically impossible, or economically impractical, to reclaim it. Therefore, all options must be carefully considered prior to a land use decision. This is the purpose of planning.

Scope of the Plan

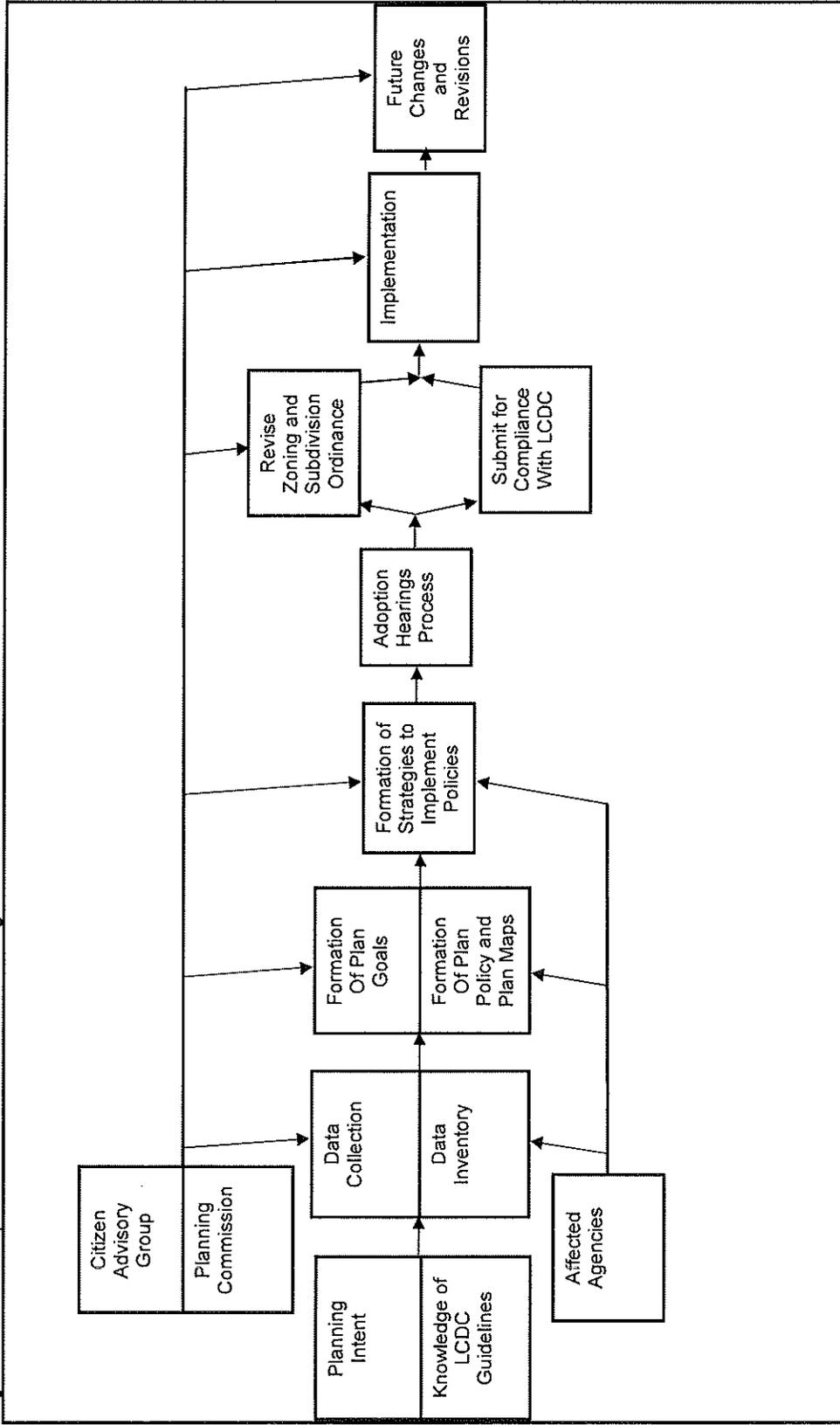
In the effort to achieve a viable citizen involvement program at the inception of the planning process in Wasco County, the County was divided into seventeen planning units; each unit representing a specific geographic area. Changes in staff personnel prompted the reformation of the seventeen units into five units, known as the Western, Eastern, Central, Southern, and The Dalles Urban Units. Plans for the Western, Eastern, Central and Southern Units were adopted by the County Court in January of 1980 and taken to the Land Conservation and Development Commission for acknowledgement. Due to an excess of repetitive information and the difficulties presented in correlating, reviewing, and utilizing four separate county plans, it was decided, based on comments and suggestions from the Land Conservation and Development Commission staff and reviewing agencies, that they would be combined into one Comprehensive Plan. The Dalles Urban Plan remains as the Plan for the City of The Dalles and surrounding urban area. The county-wide approach to planning will continue to allow active citizen participation while giving a clear and concise picture of the County's goals and avenues for achieving those goals.

Since this plan attempts to address all topics of interest to the citizens of Wasco County, an extensive amount of detail must be avoided. Such detail is not needed in a plan which assigns future general land uses. More detailed information may be necessary when considering specific developments and projects on the land, and should be provided by the developers.

Generalized Planning Process

The planning process, as shown on the following schematic, is a continual process. It begins with a knowledge of the intent of land use planning and the Land Conservation and Development Commission's (L.C.D.C.) 14 Goals and Guidelines.

Figure 1 – Comprehensive Plan Planning Process



Data is collected and gathered into an inventory document which will become the factual basis for the plan. An analysis of the data is then undertaken. This becomes a complex consideration of the physical, social, economic, energy, and environmental data with respect to future land use. Goals and policies, to accommodate data analysis and the direction of the area's future, are then made. The plan is adopted through a hearings process, and the zoning and subdivision ordinances reflect the comprehensive plan. The plan must also be submitted to the Land Conservation and Development Commission for compliance with the state-wide goals. Citizen advisory groups, the Planning Commission, and a variety of governmental agencies are involved throughout the process. The comprehensive plan is not a static document but can be revised and updated as needed.

Planning Intent

The intent of the plan is to establish a single, coordinated set of policies which will act to provide for orderly development of Wasco County. These policies will give a direction to planning, establish priorities for action, serve as a basis for future decisions, provide a standard by which progress can be measured, and promote a sense of community for an improved quality of life. It will also help all levels of government and private enterprise to understand the wants and needs of Wasco County citizens.

Comprehensive Plan Definition (Oregon Revised Statute 197.015)

"Comprehensive plan" means a generalized, coordinated land use map and policy statement of the governing body of a state agency, city, county, or special district that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to, sewer and water systems, transportation systems, educational systems, recreational facilities, and natural resources and air and water quality management programs.

"Comprehensive" means all inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan.

"General nature" means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is "coordinated" when the needs of all levels of governments, semi-public and private agencies and the citizens of Oregon have been considered and accommodated as much as possible.

"Land" includes water, both surface and subsurface, and the air.

Citizen Involvement

Citizen involvement is an integral part of the overall planning process. It encompasses not only the review and acceptance of the comprehensive plan, but requires citizens to be involved in each phase of plan development.

To ensure continued meaningful citizen involvement and influence in the development of various plans and ordinances the County will organize staff and work with a number

of citizen advisory groups. The County's planning program (and state law) has continued to progress to a point where clear topic areas have developed. It is critical the Planning Department be able to seek the expertise and opinions of individuals with knowledge and interests in these various subjects. For this reason the pre existing regionally defined citizen advisory group format of citizen involvement is now being organized around specific planning topics and tasks. The advisory groups will be set up to represent issues including but not limited to the following subjects:

- ◆ Transitional Lands Study Area
- ◆ Goal 3 Lands
- ◆ Goal 4 Lands
- ◆ Rural Communities
- ◆ National Scenic Area

This arrangement provides input on specialized topic areas while also representing regional interests as they align themselves with the topics and their related planning tasks. Citizens serving on these committees will focus in depth on projects within their focus area. They will meet regularly on at least a bi-annual basis to review the workings of adopted ordinances and plan provisions affecting their immediate interests. In addition to these regular meetings, they will coordinate with staff, as needed, to provide input on suggested revisions and critical issues prior to bringing these issues before the Planning Commission.

Advisory group members shall also be charged with seeking and bringing to the planning process the broader input of the citizens with whom they live and work. Members represent or have affiliation with groups that have special knowledge (or interest) regarding the focus subject. In addition to bringing input to the planning process, advisory groups will also carry the knowledge they gain back to those same citizens. The County will continue to encourage input from the broader public throughout its planning process at the advisory group level, before the Planning Commission and before the County Court.

Citizen Advisory Group membership will be by appointment of the County Court. Group size will vary depending on interests to be represented. Terms of appointment will be determined by the advisory group members.

ATTACHMENT F

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Wasco County Comprehensive Plan

GEOGRAPHICALLY ACKNOWLEDGED
BY LCDC August 25, 1983

*EFFECTIVE

9 May 1984
4 April 1984
6 November 1985
9 July 1986
11 September 1986
7 January 1987
15 April 1987
11 January 1989
12 April 1989
3 May 1989
4 October 1989
7 March 1990
20 June 1990
15 May 1991
2 June 1993
7 June 1993
4 October 1993
15 December 1993
28 February 1995
17 June 1996
13 November 1996
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27 April 1999
3 June 1999
30 June 1999
7 July 1999
24 November 1999
9 February 2000
28 May 2003

*Some early effective dates may be missing

25 February 2004
5 January 2005
9 June 2005
22 November 2006
27 December 2006
28 February 2007
27 March 2008
25 June 2008
16 December 2009
1 June 2010

PREPARED BY THE
Wasco County Planning and Development Office

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ATTACHMENT H

Received by
Brenda Perkins
7/7/15

STATEMENT OF MICHAEL FERGUSON

I am the son of Ernest and Linda Ferguson, who purchased property on Obrist Road from James and Helen Keehnen, on November 10, 1978. This transaction is recorded as a deed, Number 783779.

We lived at 809 Lincoln Street, The Dalles, when my parents purchased the property. Within about a month, there was a fire at our house on Lincoln Street. My Dad bought a manufactured home and moved it to the Obrist Road property. A spot was cleared for the manufactured home, it was installed, and my family and I began living there. Within a year, a bedroom was added for me. I lived on the Obrist Road property from 1979 through my high school years.

I remember the dates because of the fire, and subsequent actions that my father took to make a home for his family on the Obrist Road property.

Michael Ferguson
(address)

McFerguson
911 Federal ST. #8
The Dalles, OR

(date)

7-4-15