



# **Initiating Enforcement Order Proceedings for Local Governments**

**Under ORS 197.320(6) (1999)**

## **A Citizen's Guide**

**by Evan Manvel, Michael Grant, and Robert Liberty  
1000 Friends of Oregon**

### **Disclaimer**

This manual is designed to provide general guidance to citizens seeking to enforce the provisions of their local land use plan and regulations. It is not intended to be used as legal advice regarding the merits or legal bases for particular enforcement actions or other land use proceedings.

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# Introduction

“Eternal vigilance is the price of liberty.”  
-- *Wendell Phillips (1811-1844)*

Oregon’s landmark land use laws rely on citizen involvement and monitoring for their effectiveness. Sometimes, citizens must rein in local governments that believe they are above the law, governments that systematically flaunt the voter-approved statewide planning laws. Citizen-initiated enforcement orders are a rare, but important way for citizens to ensure our land use system continues to serve the community.

This manual describes the laws governing enforcement orders, reviews some common types of violations requiring orders, and offers tips on dealing with the press and monitoring local government decisions after enforcement order proceedings. The appendices include copies of the applicable statutes (abbreviated in this text as ORS, Oregon Revised Statutes) and rules (abbreviated as OAR, Oregon Administrative Rules).

## The Multiple Meanings of “Enforcement”

The word *enforcement* has multiple meanings in land use planning and regulation in Oregon. Here are four ways it is commonly used:

- *Prosecution of Illegal Uses*

Some people construct, expand or continue uses of land which violate local land use laws. For example, someone might establish an auto wrecking yard in the middle of a residential-only zone. The local government might issue a fine and direct the land owner to close down the wrecking yard. Nearby landowners may sue the land owner to force the landowner to remove the automobiles or sue the local government to do so. In this context, *enforcement* means government or private parties taking legal action to have an illegal use discontinued.

- *Proper Administration of Local Land Use Plans*

“Enforcing a plan” can also mean a local government is properly carrying out its land use plan; i.e., issuing or not issuing permits as required by the zoning ordinance and other applicable regulations. Used in this context, *enforcement* is a synonym for “proper administration” of the plan and regulations.

- *Appeals of Improper Decisions*

When a local government makes a land use decision that someone believes violates the local land use plan or state land use laws, the concerned citizen may appeal this decision. The citizen is using

the appeal process to correct an action in violation of the plan and/or land use laws. In this sense, an appeal is an effort to *enforce* the plan or land use laws.

- *LCDC Enforcement Order Proceedings*

When a local government is consistently making permit decisions violating its comprehensive plan or land use regulations (e.g. zoning ordinance), state law requires LCDC to intervene and direct the local government to cease the violations. LCDC may choose to monitor or prohibit the category of actions violating the plan. LCDC's formal written determination that a local government is violating its plan along with the (optional) corrective actions adopted by the Commission are called "*enforcement orders*."

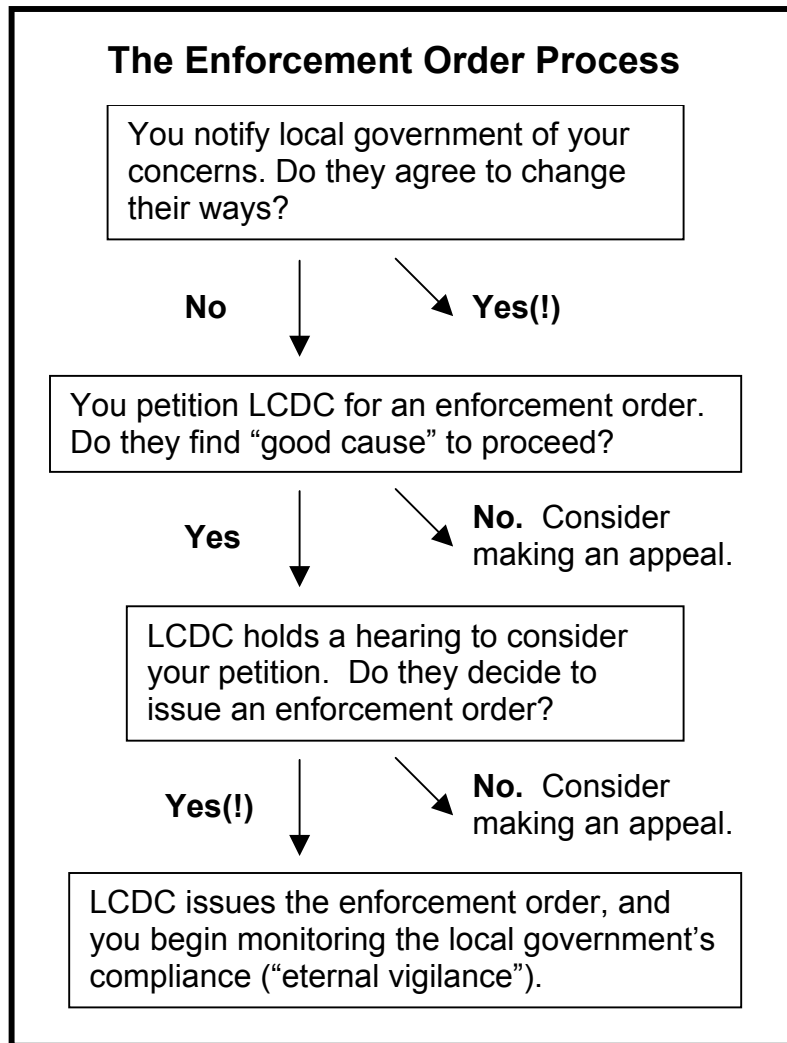
Several other circumstances may also be grounds for LCDC to initiate an enforcement order:

- ✓ when a local government fails to update their comprehensive plan and land use regulations to implement changes in statewide planning goals, LCDC administrative rules, or land use statutes;
- ✓ when a local government adopts a comprehensive plan or land use regulation that is not in compliance with statewide planning goals;
- ✓ when a local government fails to comply with an order from LCDC directing them to make certain changes to its plan or land use regulation;
- ✓ when a local government has created standards, special conditions, or procedures for approval of residential development in ways that may discourage the creation of affordable housing; or
- ✓ if any of the preceding actions are performed by a state agency or special district (e.g., a school district).

This manual only addresses the first case, where an enforcement order results from a local government repeatedly violating its own comprehensive plan or land use regulations. If you are interested in any of the other types of enforcement orders, please contact 1000 Friends.

# 1 The Process

While an enforcement order is a serious undertaking, the process is relatively clear.



## Enforcement Order Statutes and Rules

The statutes establishing the standards and procedures for enforcement orders (ORS 197.319 to 197.335) were part of the original Senate Bill 100. The Department of Land Conservation and Development (DLCD) created the administrative rules to further clarify the application of

enforcement orders (OAR 660-045-000 to 660-045-0180) in September of 1998 (see appendices for copies of these statutes and rules).

Here is how the process works, with critical laws noted:

### **1. ORS 197.319: Notice to Local Government; Local Government Response**

A person (or organization) must notify a local government of its intention to seek an enforcement order, explain what it believes the violations are, and request changes to the plan standards or review procedures that would eliminate the violations.

The local government has 60 days to respond to this request. The response may include mediation with the assistance of DCLD, if both parties jointly request this mediation. If those making the enforcement request believe the response is inadequate, they may file a petition for an enforcement order with LCDC. OAR 660-045-0060 specifies the required contents of such a petition, including detailed documentation of the actions of the local government substantiating the inadequacy of their response to the initial request (details below; sample in appendices).

### **2. ORS 197.320: The Nature of an Enforcement Order; Grounds for an Enforcement Order**

LCDC must issue an “order requiring a local government [and other government entities] to take action necessary to bring its comprehensive plan, land use regulation or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations.” LCDC must issue such an order for a local government “if the commission has good cause to believe” that the city or county is “engaged in a pattern or practice of decision-making that violates an acknowledged comprehensive plan or land use regulation” (ORS 187.320(6)). The other circumstances under which LCDC must issue an order, as described previously, are also listed in this section of the statute.

### **3. ORS 197.324: Initial Steps by or Before the Commission**

The Commission may proceed with an enforcement order on its own initiative. Alternatively, it can consider a petition for an enforcement order brought by citizens. If it does the latter, OAR 660-045-0090 specifies LCDC must first conduct a public hearing on the matter and then determine whether there is “good cause to proceed on the petition.” If the Commission finds “good cause,” it proceeds as provided in the next section. If it does not, it issues a “final order” for the dismissal of the petition. Final orders may be appealed to the Court of Appeals, a process described below.

### **4. ORS 197.328: Procedures and Schedule for LCDC Action**

When reviewing a proposed enforcement order, LCDC can hold a hearing itself or appoint a hearings officer to hold the hearing and draft a proposed order for Commission consideration. The hearing is a formal, “contested case” proceeding in which a factual record is developed and the parties are allowed to present written and oral argument concerning the law and the facts. As provided for by OAR 660-045-0120, interested persons or organizations other than the requester or the local government may also participate in this hearing by filing a request with DLCD.

If a hearings officer is used, the Commission's review of the proposed order will be limited to the record (the collection of factual materials offered by the parties to support their position) presented to the hearings officer.

As an alternative to the contested-case hearing, OAR 660-045-0110 requires LCDC to provide mediation if both parties request it.

LCDC has 120 days from the date a petition for an enforcement order is mailed to issue a final order. This final order is a final determination as to whether one of the several triggering circumstances exists and, if so, a specification of the remedial action to be taken.

## **5. ORS 197.335(1): Contents of LCDC's Order**

Any enforcement order issued by LCDC must specify the decision-making constituting the pattern or practice of violation, including specific plan or zoning ordinance provisions being misapplied, and the corrective actions needed to correct the pattern or practice, including revisions to the plan or zoning ordinance.

## **6. ORS 197.335(2): Appeal of LCDC's Order to the Court Of Appeals**

A final order issued by LCDC can be appealed to the Court of Appeals by anyone who was a party to the enforcement order proceeding. The Court of Appeals will reverse, remand or modify the final order in only four cases: the order is unconstitutional, LCDC lacked the authority to adopt the order it did, evidence to support LCDC's fact finding (if any) is inadequate, or a serious procedural error has been made.

While the appeal is pending, the Court of Appeals can allow LCDC's order to remain in effect, including any protective actions or sanctions.

## **7. ORS 197.335(3), (4) and (6): Protective Measures, Sanctions and Enforcement**

If the Commission finds grounds for issuing an enforcement order, it can impose certain protective measures while the local government is taking action to address the identified violations. LCDC can prohibit the local government from approving, or force the local government to approve, certain permits. LCDC can also institute supervisory review of local government actions and can direct the State Treasurer to withhold certain funds to cover the Commission's cost of monitoring the local government decisions. Finally, LCDC can seek an order from a Circuit Court forcing a local government to comply with an enforcement order. The Circuit Court has powers LCDC lacks, including the power to imprison local officials who are in contempt of the enforcement order.

# 2 Should You Petition?

## Who Can Request an Enforcement Order?

The enforcement order statutes set no limitations on who can request an enforcement order. Persons making such a request are called “requesters” in the statute and can also be described as “petitioners,” since the request is described as a “petition” in ORS 197.324(2)(a). State statute defines “person” in this context as “any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind.” ORS 197.015(18).

Groups and individuals seeking enforcement orders should state their reasons for wanting proper implementation of the land use plan. In a Washington County enforcement order (1988), citizens noted membership in a local land use organization and a record of involvement in prior land use proceedings. Petitioners might supplement these statements with descriptions of economic harm from improper land use decisions. For example, persons who were farmers or tree farmers should describe how improper approvals of new houses and land divisions can lead to lawsuits over pesticides, increased harassment of livestock, and increased incidence of forest fires.

These statements are not required by law, but can be very important to local officials and the press as explanations of why citizens are undertaking the enforcement proceeding; therefore, it is helpful to select petitioners whose motives and standing will garner respect.

## What is a “Pattern or Practice” of Violation?

The starting point for most enforcement orders is finding one or more “patterns” or “practices” of decision-making by a city or county that violate its plan or regulations (typically, the zoning ordinance). OAR 660-045-0020 (see appendix) defines these phrases. Both a *pattern* and *practice* require the decisions in question occurred within the last three years; a *pattern* of decision-making may also include “decisions [that] are likely to occur after that date.” A “pattern” may constitute only one decision.

In the Washington County enforcement order proceeding, Gabriella Lang of the Attorney General’s office provided advice to DLCDC Director James F. Ross, dated June 1, 1988. In her memo, Lang advised the Commission to look for “more than accidental or isolated incidents.” Instead, the Commission must find a “regular or repeated activity” with similar characteristics.

Discussed below are some past examples of patterns and practices and the evidence of these patterns and practices found sufficient in enforcement orders adopted under ORS 197.320(6).

- ***The Washington County Enforcement Order (1988)***

In the Washington County enforcement order, samples of between 7% and 100% of the decisions made over a year in each category of decision were reviewed. Each of these decisions was reviewed against many separate plan and zoning ordinance provisions, with violation percentage noted.

For example, in 1987 all six applications for rezoning from AF-10 to AF-5 zoning were approved. All six were analyzed and found to violate four separate plan provisions. LCDC’s hearings officer David Ellis determined this analysis sufficiently established “good cause to believe” a “pattern or practice” of violation existed. A subsequent hearing found this evidence sufficient to establish an actual “pattern or practice” of violation.

At the other end of the spectrum in this same proceeding, even a small sample in which a bare majority had similar violations was sufficient to establish a “pattern or practice.” In 1987, Washington County made 89 decisions on applications for lot line adjustments. Sixteen files were reviewed. Six of those sixteen files were for approved lot line adjustments in farm or forest zones. These six represented 7% of the total for the year, but perhaps 14% to 25% of the adjustments in farm or forest zones. Four of the seven had similar violations. This was sufficient to establish a “pattern or practice.” It was important that these violations involved a lack of evidence, the basis for many of the other violations. Thus, the overall pattern of lacking evidence across a dozen kinds of violations helped compensate for the small sample and relatively modest percentage of violations.

- ***Crook County Enforcement Order (1989)***

LCDC adopted an enforcement order under ORS 197.320(6) for Crook County in 1989, based on violations of plan and zoning ordinance provisions governing non-farm dwellings. The petitioner for the Enforcement Order reviewed 252 decisions of non-farm dwelling applications between 1981 and April 1989 (this was prior to the requirement that decisions must have been recent) and found large numbers of the decisions shared similar violations. For example, 51 of the decisions were based on conclusory findings (assertions of factual conclusions without describing the evidence to support that conclusion).<sup>1</sup>

In this proceeding, the Department itself reviewed the set of “representative decisions” presented by the petitioner along with “a representative sample of the 252 EFU decisions submitted in its support.” The review was necessary to determine whether the decisions were supported by adequate evidence, since the 1989 amendments to ORS 197.320(6) prohibit the Commission from judging the adequacy of the evidentiary support for decisions solely on the local government’s findings.

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<sup>1</sup> Many of the “violations” cited by the petitioner involved the failure to reference governing legal standards at all, or failure to cite them adequately. The petitioner relied on these inadequacies to argue that there wasn’t evidence addressing those standards. Such errors in the findings are no longer sufficient grounds for an enforcement order under the 1989 amendments. See ORS 197.320(6).

## **Conclusion: Adequate Proof of a “Pattern or Practice”**

The most common way to establish a “pattern or practice” of violation is to determine the percentage of violations occurring within each type of decision, either by reviewing all of the decisions or a “representative sampling” over the review period.

Based on the Washington County and Crook County precedents, the conservative approach recommended is reviewing a very high proportion of a modest number of decisions over a one or two year period (e.g. 100% of the 44 decisions made in the last four years), or using a representative sample of a much larger volume over any period (e.g. a 25% sample of the 279 decisions made in the last year). The sample should be collected on a random basis. The most obvious method is to select every other, every third, every fourth, etc. decision. Another method is to draw the file numbers out of a hat.

Although there is no direct authority on this point, a violation rate may be less than 50% of all of the decisions, as long as the violations are all of the same type.

# **3**

## **Preparing Records**

### **Conducting Research and Keeping Records**

Local government land use files are public records. Denying you access to these files is improper under the Public Records Act. If this happens, inform the city or the county that you intend to contact the Attorney General’s office in Salem and ask for advice about filing a Public Records Act request. It may be useful to have a member of the press with you when you make this request.

The local government is entitled to make arrangements for the inspection of these documents, which minimize the demands on its staff, and to charge you for copies. Most local planning staff are overworked, and a respectful approach usually works best.

The best method for conducting research is to select a small test sample of the decisions you suspect are being made in violation of the plan and/or regulations. Identify all of the violations you detect within this sample and then create a set of “log tables” for your review of subsequent files.

These logs should have columns in which you can enter: (a) the file number; (b) the applicant’s name; (c) the date of decision; (d) the decision -- approval or denial; (e) each type of violation referenced by the applicable code or plan provision with room to identify the page number in the decision document (usually the staff report) at which the error occurs; and (f) miscellaneous comments.

You should make copies of all the relevant pages in the file of each decision. Careful bookkeeping at the beginning will make the subsequent task far easier.

# 4 Step One: To The County

## **Presenting the Reasons to the County**

The law requires citizens seeking an enforcement order to submit in writing “the reasons... for such an order,” and OAR 660-045-0040 specifies exactly what this request must include. Assuming the requester has kept good records, you should not have a problem fulfilling these requirements.

The local government’s reaction to this evidence should quickly reveal whether it intends to examine the alleged violations honestly or respond with counterattacks and delaying tactics. The nature of the response will give the petitioners a good idea of what they can expect, should the proceedings continue to LCDC.

# 5 Step Two: To The Commission

If the citizens are not satisfied with the local government’s response, they can proceed to bring their petition to LCDC. Before proceeding further, LCDC must determine whether there is “good cause to proceed on the petition.”

## **What is “Good Cause to Believe” for LCDC?**

The previously referenced 1988 memo from the Attorney General’s representative described “good cause to believe” as a low threshold of proof requiring only facts sufficient to reach a reasonable conclusion, citing *Tice v. OSP*, 23 Or App 531, 542 P2d 1040 (1975). The standard is fairly easily met because it is only a threshold for reasonable suspicion. It is not the same as concluding a pattern or practice of violation is actually occurring.

OAR 660-045-0090 specifies LCDC may only find “good cause to proceed” if it finds “substantial evidence of noncompliance” on the part of the local government. As this rule was recently implemented, it has not been tested. The “substantial evidence” is a qualitative, not quantitative, judgement. Mere volume of evidence is not enough.

# 6 Common Violations

## Common Types of Violations in Farm and Forest Zones

Below are common types of county violations of standards in their farm and forest zone and plan provisions. These are only some kinds of errors to look for; they are not a complete statement of the law. In some cases, the legal assertions may be subject to dispute. An attorney should assist you in providing the authorities and legal analysis to support allegations of violation.

- *Non-farm Dwellings and Partitions to Create Non-farm Homesites*

The primary standards for authorizing new non-farm dwellings and land divisions are in LCDC's Goal 3 rule at OAR 660-033-0130(4) and ORS 215.284 (dwellings) and OAR 660-033-0100(11)(b) and ORS 215.263(4) (land divisions). The state has different criteria for non-farm homesites inside the Willamette Valley and outside the Willamette Valley. Local governments may include additional standards in their comprehensive plans and zoning ordinances; they also may prohibit non-farm dwellings and land divisions altogether.

Historically, counties have often approved these dwellings and land divisions without sufficient evidence to show the land is “generally unsuitable” for the production of farm crops, livestock and merchantable tree species – the primary criterion for non-farm dwellings outside the Willamette Valley. Another common error is concluding land is “unsuitable” simply because of the small size of the parcel.

Counties also often approve dwellings without adequate evidence and factual analysis of whether the dwelling will “materially alter the stability of the overall land use pattern of the area” – a criterion that applies to non-farm dwellings both in and outside the Willamette Valley. A proper analysis is detailed in administrative rule, and should include a description of the types of dwellings in the area (i.e., whether they are used for farming or not), when they were built and the cumulative effects of approving another dwelling.

The Goal 3 rule sets forth the appropriate factual and legal inquiry for the “generally unsuitable” and the “stability” standard. For guidance on proper application, see generally the Oregon State Bar's Continuing Legal Education, *Land Use*, Chapter 3, §§ 3.20-3.24 and 3.33 (1994, 1999 Supp.)

- *Non-forest Dwellings and Partitions to Create Non-forest Homesites*

Many files do not contain sufficient evidence to show the land is unsuitable for the production of timber. A common error is to consider only the suitability of the land to grow Douglas Fir and not for other commercial species such as Ponderosa Pine or White Pine.

- *“Lot-of-Record” Dwellings on High-Value Farmland*

While state law generally prohibits non-farm “lot-of-record” dwellings on high-value farmland (composed predominantly of Class I, II, Prime and Unique Soils), there is a very limited exception. Counties may approve such dwellings if a hearings officer finds the parcel “cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity.” See OAR 660-33-130(3)(c) and ORS 215.705(2)(c).

When the Department of Agriculture provided the hearings officer, few permits were approved. Since the Legislature transferred review authority to county hearings officers, approvals have dramatically increased. Counties tend not to apply the “extraordinary circumstances” criteria properly. They also regularly fail to do a proper “stability standard” analysis, which is part of the governing administrative rule listed above.

For detailed guidance on proper application of this provision, see the Oregon State Bar’s Continuing Legal Education, *Land Use*, Chapter 3, § 3.26 (1994 and 1999 Supp.)

# 7 Fixing the Problem

## **Remedial Actions: Interim Corrective Measures as Part of the Enforcement Order**

ORS 197.335(3) gives LCDC discretion to regulate local government decision-making “if the commission finds that in the interim period during which a local government, state agency or special district would be bringing itself into compliance with the commission’s order under ORS 197.320.” Any such requirement “may be imposed only if the commission finds that the activity, if continued, aggravates the goal, comprehensive plan or land use regulation violation and that the requirement is necessary to correct the violation.”

The Commission can:

- *Prohibit Issuance of Permits for Certain Uses*

LCDC can prohibit the issuance of permits for certain kinds of uses, throughout the local government boundaries or within particular areas.

- *Require Issuance of Permits for Certain Uses*

Some local governments improperly fail to issue permits for uses allowed by their plan and zoning ordinance. For example, Happy Valley, a Portland suburban city, was refusing to allow development at the higher densities authorized by their plan, thus frustrating the objective of more

compact urban development. LCDC's order forced it to approve subdivisions meeting the plan's standards.

- *Require Submission of Applications for Prior Review by LCDC Staff*

In the Washington County and Crook County enforcement orders, LCDC's order required the county to submit proposed decisions on applications to the DLCD field representative for review prior to taking final action. The Department could advise the county as to whether it believed the proposed decision was consistent with the correct interpretation of the plan revealed in the enforcement order proceeding. The statute also allows the Department to have a hearings officer review the proposed decisions.

The statute may allow LCDC to require the local government to submit the proposed decision for review by other groups, such as a farm or forestry association, or a representative of a state agency such as DEQ or the Department of Fish and Wildlife, provided the comments of this person or agency were advisory to DLCD's field representative or hearings officer.

- *Withhold Grant Funds and State-Shared Revenues to Cover the Costs of the Supervisory Activities*

LCDC can withhold grant moneys for local government planning efforts and can direct the State Treasurer to withhold state revenues shared with local governments. Unlike earlier provisions, this section is a sanction, a punishment for the local government's bad faith. But it is also designed to provide a way of recovering enforcement costs. These funds can also be used to pay the cost of experts, such as foresters, agronomists, wildlife biologists or hydrologists, who could supervise the issuance of permits during the interim period and perhaps help draft new, objective standards needed to rectify the problems identified in the enforcement order.

### **Remedial Actions: Changes to Standards and Procedures**

One of the most important tasks for enforcement petitioners is describing the changes necessary to correct the violations. Of course, these changes may not address the root cause of the violation, often the local government's hostility to the state's role in the planning program or antipathy to certain objectives, especially conserving farm and forest lands, protecting wildlife, increasing urban densities and historic preservation. Attitudes cannot be changed by the adoption of new regulations.

However, improved regulations establishing clear and objective standards can reduce the opportunities for hostile attitudes to be expressed in individual permit decisions. For example, it is easy to authorize hobby farm homesites when a planner interprets the vague verbal standard "appropriate for the continuation of the commercial agricultural enterprise within the area." It is impossible to cheat when there is an 80-acre minimum lot size.

Similarly, changes in procedures will not change minds but they can make it easier for citizens to monitor decisions and keep the local government honest. Giving opponents and applicants equal time at hearings and equal time to respond to each other's evidence, prohibiting late-night or daytime hearings which most citizens cannot attend, is another needed reform. Citizens may also

wish to secure clear conflict of interest provisions defining conflicts of interest and prohibiting participation of interested decision-makers.

# 8 The Spin

## Press Relations and Public Education

Enforcement orders are likely to generate a great deal of press attention. Instead of avoiding this publicity, citizens should welcome it as an opportunity to present their concerns to the public and raise the profile of their issues. Good press coverage can do as much, or more, to change the behavior of the local government and to change attitudes of the public about land use as the enforcement order.

Good press coverage does not result from good intentions and a meritorious cause. It requires careful thought and considerable preparation. Consider press coverage when deciding who should be the petitioners, where and when you hold press conferences, and who you select to be your spokespersons. We recommend designating a person or small committee to devote themselves entirely to press and public relations.

### Here are some tips on how to be successful in presenting your story to the press:

- ✓ *Most reporters know absolutely nothing about the planning program.* It may be seen as a purposeless and intimidating jumble of laws and procedures. In addition, reporters operate under strict deadlines. Usually they do not have time to conduct research; they will depend entirely on what you tell them and what they hear from the other side. You must spoon-feed them with the background information that will allow them to cover the story intelligently. The appendices contain an example of background information used with the press and public.
- ✓ *Most reporters know nothing about the economic significance of farming or forestry or how those enterprises are conducted.* You must explain the economic stakes involved in honoring the land use plan provisions protecting farm and forest lands.
- ✓ *Many reporters believe LCDC and the planning laws have no local support, or at least no support from rural residents.* This belief may be so deep that they will become confused or suspicious about the point of view of local rural residents seeking enforcement of rural land use restrictions. Be prepared for harsh questions about your motives and anticipate their confusion about why you would support this enforcement effort.
- ✓ *Many local government reporters have developed a friendly and trusting relationship with local government officials over the years.* This may incline them to skepticism of your claims of violation. Even when the reporter is objective, you need to remember that if they cover the local government beat, they depend to a certain extent on the good will of the local government for their news. Catching the local government out in half-truths or obfuscation will *damage*

their credibility; catching you out in the same kind of half-truth or obfuscation will *destroy* your credibility.

- ✓ *Media reports include only small parts of conversations.* Thoughtful and considerate people often have some qualifications and hesitations about what they do. But if these doubts are expressed publicly, the press may take them out of context and create the perception of defensiveness about your efforts to uphold the law. All of your press materials and interviews should be crystal clear and express a simple, consistent and confident point of view. Consciously prepare colorful 10 to 20 second quotations for use as television or radio sound bites. This requires editing and rehearsal.
- ✓ *There is no need to impugn the motives of local officials.* While you may believe the local officials are violating the law for certain reasons, defamation is unlikely to benefit you in the long term.

An interesting photograph (provided by you in black and white and screened), visual aid or television background will increase the prominence of the story. Consider this whenever you hold a press conference.

It is almost impossible to predict the level of prominence your story will receive. Don't be discouraged by poor coverage. Keep trying because you might strike it rich when you least expect it.

A convincing real-life illustration of the problems created by the violations will be worth tons of press releases.

# 9 Eternal Vigilance

## **Monitoring the Local Government after an Order is Adopted**

All recent enforcement orders have included a provision for monitoring the local government's decisions over a period of six to eighteen months. The DLCDC Field Representative is required to make a report to the Commission at these intervals, and these reports determine whether the enforcement order is terminated, modified or extended. As an aside, termination of an order may also occur in response to a request made by the affected local government or the petitioner, as described in OAR 660-045-0170.

You should participate in monitoring the local government's compliance with the enforcement order. Most, if not all, DLCDC Field Representatives have close relationships with their local governments, and their monitoring of decisions is likely to be generous to the local government at best. At worst, the field representatives do not understand the nature of the violations because they have poor understandings of the laws. In those cases they won't be able to determine whether a decision is a violation or not.

In earlier enforcement orders, LCDC and DLCD have done little or nothing to apprise the petitioners of their monitoring activities nor have they discussed the contents of their reviews of the decisions being monitored. To avoid this situation, petitioners should request a formal role in the monitoring process, including scheduled meetings with the Field Representative prior to his presentation to the Commission and an assured place on the Commission's agenda when the reports are made.

# Appendices

- **Oregon Revised Statutes (ORS) Regarding Enforcement Orders**
- **Oregon Administrative Rules (OAR) Regarding Enforcement Orders**
- **Enforcement Order Examples from Jackson and Deschutes Counties**

The following appendices are available without charge from 1000 Friends or DLCD, and do not appear in this version of the online manual:

- **The Main Phases in the Enforcement Order Petition Process**
- **A Chronology of Filed Enforcement Orders**  
*these two documents are pages four and five of the DLCD manual on the subject, at:  
<http://www.lcd.state.or.us/citizeninvolve.html>*
- **Questions and Answers about Enforcement Orders (DLCD, 1995)**  
*also at <http://www.uoregon.edu/~pppm/landuse/enforcement.html>*

The final appendix is available from 1000 Friends without charge:

- **Example of Enforcement Notice and Petition (Jackson County)**

## Oregon Revised Statutes Relating to Enforcement Orders

*note: this is prior to the release of the 2001 ORS code;  
however, we believe nothing has changed*

### **197.319 Procedures prior to request of an enforcement order.**

(1) Before a person may request adoption of an enforcement order under ORS 197.320, the person shall:

(a) Present the reasons, in writing, for such an order to the affected local government; and

(b) Request:

(A) Revisions to the local comprehensive plan, land use regulations, special district cooperative or urban service agreement or decision-making process which is the basis for the order; or

(B) That an action be taken regarding the local comprehensive plan, land use regulations, special district agreement or decision-making process that is the basis for the order.

(2)(a) The local government or special district shall issue a written response to the request within 60 days of the date the request is mailed to the local government or special district.

(b) The requestor and the local government or special district may enter into mediation to resolve issues in the request. The Department of Land Conservation and Development shall provide mediation services when jointly requested by the local government or special district and the requestor.

(c) If the local government or special district does not act in a manner which the requestor believes is adequate to address the issues raised in the request within the time period provided in paragraph (a) of this subsection, a petition may be presented to the Land Conservation and Development Commission under ORS 197.324. [1989 c.761 s.4; 1993 c.804 s.9] Note: 197.319, 197.324, 197.328 and 197.335 were added to and made a part of ORS chapter 197 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

### **197.320 Power of commission to order compliance with goals and plans.**

The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe:

(1) A comprehensive plan or land use regulation adopted by a local government not on a compliance schedule is not in compliance with the goals by the date set in ORS 197.245 or 197.250 for such compliance;

(2) A plan, program, rule or regulation affecting land use adopted by a state agency or special district is not in compliance with the goals by the date set in ORS 197.245 or 197.250 for such compliance;

(3) A local government is not making satisfactory progress toward performance of its compliance schedule;

(4) A state agency is not making satisfactory progress in carrying out its coordination agreement or the requirements of ORS 197.180;

(5) A local government has no comprehensive plan or land use regulation and is not on a compliance schedule directed to developing the plan or regulation;

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

(7) A local government has failed to comply with a commission order entered under ORS 197.644;

(8) A special district has engaged in a pattern or practice of decision-making that violates an



shall be limited to the record of proceedings before the hearings officer. In its review of a proposed order, the commission shall not receive new evidence but shall hear arguments as to the proposed order and any exceptions. Any exception to the proposed order shall be filed with the commission no later than 15 days following issuance of the proposed order.

(5) The commission shall adopt a final order relative to a petition no later than 120 days from the date the petition was filed. [1989 c.761 s.6]

Note: See note under 197.319. 197.330 [1973 c.80 s.50; repealed by 1977 c.664 s.42]

**197.335 Order for compliance with goals; review of order; withholding grant funds; injunctions.**

(1) An order issued under ORS 197.328 and the copy of the order mailed to the local government, state agency or special district shall set forth:

(a) The nature of the noncompliance, including, but not limited to, the contents of the comprehensive plan or land use regulation, if any, of a local government that do not comply with the goals or the contents of a plan, program or regulation affecting land use adopted by a state agency or special district that do not comply with the goals. In the case of a pattern or practice of decision-making which violates the goals, comprehensive plan or land use regulations, the order shall specify the decision-making which constitutes the pattern or practice, including specific provisions the Land Conservation and Development Commission believes are being misapplied;

(b) The specific lands, if any, within a local government for which the existing plan or land use regulation, if any, does not comply with the goals; and

(c) The corrective action decided upon by the commission, including the specific requirements, with which the local government, state agency or special district must comply. In the case of a pattern or practice of decision-making that violates an acknowledged comprehensive plan or land use regulation, the commission may require revisions to the comprehensive plan, land use

regulations or local procedures which the commission believes are necessary to correct the pattern or practice. Notwithstanding the provisions of this section, except as provided in subsection (3)(c) of this section, an enforcement order does not affect:

(A) Land use applications filed with a local government prior to the date of adoption of the enforcement order unless specifically identified by the order;

(B) Land use approvals issued by a local government prior to the date of adoption of the enforcement order; or

(C) The time limit for exercising land use approvals issued by a local government prior to the date of adoption of the enforcement order.

(2) Judicial review of a final order of the commission shall be governed by the provisions of ORS 183.310 to 183.550 applicable to contested cases except as otherwise stated in this section. The commission's final order shall include a clear statement of findings which set forth the basis for the order. Where a petition to review the order has been filed in the Court of Appeals, the commission shall transmit to the court the entire administrative record of the proceeding under review. Notwithstanding ORS 183.482

(3) relating to a stay of enforcement of an agency order, an appellate court, before it may stay an order of the commission, shall give due consideration to the public interest in the continued enforcement of the commission's order and may consider testimony or affidavits thereon. Upon review, an appellate court may affirm, reverse, modify or remand the order. The court shall reverse, modify or remand the order only if it finds:

(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal, modification or remand unless the court shall find that substantial rights of any party were prejudiced thereby;

(b) The order to be unconstitutional;

(c) The order is invalid because it exceeds the statutory authority of the agency; or

(d) The order is not supported by substantial evidence in the whole record.

(3)(a) If the commission finds that in the interim period during which a local government, state agency or special district would be bringing itself into compliance with the commission's order under ORS 197.320 or subsection (2) of this section it would be contrary to the public interest in the conservation or sound development of land to allow the continuation of some or all categories of land use decisions or limited land use decisions, it shall, as part of its order, limit, prohibit or require the approval by the local government of applications for subdivisions, partitions, building permits, limited land use decisions or land use decisions until the plan, land use regulation or subsequent land use decisions and limited land use decisions are brought into compliance. The commission may issue an order that requires review of local decisions by a hearings officer or the Department of Land Conservation and Development before the local decision becomes final.

(b) Any requirement under this subsection may be imposed only if the commission finds that the activity, if continued, aggravates the goal, comprehensive plan or land use regulation violation and that the requirement is necessary to correct the violation.

(c) The limitations on enforcement orders under subsection (1)(c)(B) of this section shall not be interpreted to affect the commission's authority to limit, prohibit or require application of specified criteria to subsequent land use decisions involving land use approvals issued by a local government prior to the date of adoption of the enforcement order.

(4) As part of its order under ORS 197.320 or subsection (2) of this section, the commission may withhold grant funds from the local government to which the order is directed. As part of an order issued under this section, the commission may notify the officer responsible for disbursing state-shared revenues to withhold that portion of state-shared revenues to which the local government is entitled under ORS 221.770, 323.455, 366.525 and 366.800 and ORS chapter 471 which represents the amount of state planning grant moneys previously provided the local

government by the commission. The officer responsible for disbursing state-shared revenues shall withhold state-shared revenues as outlined in this section and shall release funds to the local government or department when notified to so do by the commission or its designee. The commission may retain a portion of the withheld revenues to cover costs of providing services incurred under the order, including use of a hearings officer or staff resources to monitor land use decisions and limited land use decisions or conduct hearings. The remainder of the funds withheld under this provision shall be released to the local government upon completion of requirements of the commission order.

(5)(a) As part of its order under this section, the commission may notify the officer responsible for disbursing funds from any grant or loan made by a state agency to withhold such funds from a special district to which the order is directed. The officer responsible for disbursing funds shall withhold funds as outlined in this section and shall release funds to the special district or department when notified to do so by the commission.

(b) The commission may retain a portion of the funds withheld to cover costs of providing services incurred under the order, including use of a hearings officer or staff resources to monitor land use decisions and limited land use decisions or conduct hearings. The remainder of the funds withheld under this provision shall be released to the special district upon completion of the requirements of the commission order.

(6) The commission may institute actions or proceedings for legal or equitable remedies in the Circuit Court for Marion County or in the circuit court for the county to which the commission's order is directed or within which all or a portion of the applicable city is located to enforce compliance with the provisions of any order issued under this section or to restrain violations thereof. Such actions or proceedings may be instituted without the necessity of prior agency notice, hearing and order on an alleged violation. [1989 c.761 s.7; 1991 c.817 s.25; 1993 c.804 s.11; 1995 c.301 s.36; 1995 c.778 s.1] Note: See note under 197.319.

**197.340 Weight given to goals in planning practice; regional diversity and needs.**

(1) The Land Conservation and Development Commission, the Department of Land Conservation and Development, other state agencies and local governments shall give the goals equal weight in any matter in which the goals are required to be applied.

(2) The commission and the department shall consider and recognize regional diversity and differences in regional needs when making or reviewing a land use decision or otherwise applying the goals. [1981 c.748 s.20; 1987 c.729 s.1; 1995 c.521 s.2]

**197.350 Burden of persuasion or proof in appeal to board or commission.**

(1) A party appealing a land use decision or limited land use decision made by a local government to the board or Land Conservation and Development Commission has the burden of persuasion.

(2) A local government that claims an exception to a goal adopted by the commission has the burden of persuasion.

(3) There shall be no burden of proof in administrative proceedings under ORS chapters 195, 196 and 197. [1981 c.748 s.10a; 1983 c.827 s.43; 1991 c.817 s.26]

# Oregon Administrative Rules Relating to Enforcement Orders

*The Oregon Administrative Rules contain OARs  
filed through August 15, 2001*

## LAND CONSERVATION AND DEVELOPMENT DEPARTMENT

### OAR 660-045

#### DIVISION 45 CITIZEN-INITIATED ENFORCEMENT ORDERS

##### 660-045-0000 Purpose

The purpose of this division is to establish uniform procedures for citizen-initiated enforcement orders, as provided in ORS 197.319 to 197.335 and 197.646.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 &  
ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef.  
9-23-98*

##### 660-045-0010 Applicability

OAR 660-045-0000, -0030 to -0090, and -0160 apply only to enforcement orders requested by a citizen petition in accordance with ORS 197.319; they do not apply to enforcement orders initiated by the Land Conservation and Development Commission in accordance with ORS 197.324(1). OAR 660-045-0020 (definitions), 660-045-0100 to -0150 (on contested-case hearings), and 660-045-0170 to -0180 (on terminating enforcement orders) apply to all types of enforcement orders.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 &  
ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef.  
9-23-98 660-*

##### 660-045-0020 Definitions

(1) Affected local government or district means a local government, as defined in ORS 197.015 (13), or a special district, as defined in ORS 197.015 (19), against which a requester seeks an enforcement order.

(2) Commission means the Land Conservation and Development Commission.

(3) Corrective action means an action sought by a requester or required of an affected local government or district by an enforcement order under ORS 197.335 (1)(c). The term includes revisions to an affected local government or district's comprehensive plan, land use regulations, special district cooperative agreement, urban service agreement, or decision-making process. A corrective action is the remedy for the noncompliance specified by an enforcement order.

(4) Department means the Department of Land Conservation and Development.

(5) Enforcement order means a final order adopted by the commission in accordance with the provisions of ORS 197.319 to 197.335 and 197.646.

(6) Interim measure means a temporary measure required of an affected local government or district by an enforcement order in accordance with ORS 197.335(3) to 197.335(5). An interim measure is one in effect only while an affected local government or district is bringing itself into compliance with an enforcement order. Interim measures include (but are not limited to) limitations on land use permits, withholding of state-shared revenues, and review of local land use decisions by a hearings officer or by the department.

(7) Mail means to convey a document by any of the following means: first-class mail via the United States Postal Service, if verified with a certificate of mailing; certified or registered mail via the United States Postal Service; delivery by commercial carrier, if the carrier guarantees delivery within three days and issues a receipt of transmittal. As used in this division, the word mail does not include the transmitting of documents by facsimile (fax), electronic mail (e-mail), or telephone.

(8) Mediation means a process in which a collaborative dispute resolution provider, as defined in OAR 137-001-0005 (4), assists the requester and the affected local government or district in reaching a mutually acceptable resolution of issues raised in a petition for enforcement. Mediation is a voluntary process

available to parties at any stage of an enforcement proceeding.

(9) Noncompliance means a state of not being in compliance with a currently applicable comprehensive plan, land use regulation, special district cooperative agreement, urban growth management agreement, goal, rule, or other regulation or agreement, as described in ORS 197.320(1) to 197.320(10) or in ORS 197.646. The term includes a failure to comply with applicable case law in making a land use decision. The term includes a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. Noncompliance is the problem that an enforcement order seeks to eliminate through corrective action.

(10) Pattern of decision making means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:

(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and

(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date.

(11) Practice of decision making means a series or succession of decisions with these characteristics:

(a) The decisions involved the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

(b) The decisions involved the same or similar geographic areas, plan designations, zones, or types of land use; and

(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040.

(12) Requester means a person as defined in ORS 197.015 (18) who seeks an enforcement order under ORS 197.319 to 197.335.

(13) Year means any period of 365 consecutive days.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0030 Petitioning for Enforcement**

(1) A person may petition the commission for an enforcement order against a local government or special district in accordance with ORS 197.319 to 197.335 and 197.646.

(2) A person petitioning for enforcement shall do so in accordance with the requirements of ORS 197.319 to 197.335 and this division.

(3) The commission may dismiss any petition for enforcement not conducted in accordance with ORS 197.319 to 197.335 and this division.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0040 The Citizen's Request to the Affected Local Government or District**

(1) When a requester seeks to initiate enforcement proceedings against an affected local government or district, the requester first must notify that government or district by mailing a copy of the request to it. If the request for enforcement is directed toward a local government, the requester must notify both the governing body and the legal counsel of that local government.

(2) The citizen's request shall be in the form of a letter containing the following information:

(a) The name, address, and telephone number of the requester;

(b) The name, address, and telephone number of the attorney, if any, who will represent the requester;

(c) The name and address of the affected local government or district;

(d) A clear statement of the requester's intent to "petition the Land Conservation and Development Commission for an enforcement order pursuant to ORS 197.319 to 197.335";

(e) The subsection of the statute on which the petition will be based

(ORS 197.320 (1) to ORS 197.320 (10) or ORS 197.646(3)); and

(f) A statement of facts that establish a basis for seeking enforcement and for invoking the subsection of ORS 197.320 or ORS 197.646 cited by the requester.

(3) The statement of facts required in subsection (2)(f) shall describe five matters:

(a) The specific provisions of the comprehensive plan, land use regulation, special district cooperative agreement, urban growth management agreement, goal, rule, or other regulation or agreement, as described in ORS 197.320 (1) to 197.320 (10) or ORS 197.646, with which the affected local government or district is alleged not to comply;

(b) Any case law or appellate rulings with which the affected local government or district is alleged not to comply;

(c) The nature of the noncompliance alleged in subsection (3)(a);

(d) The lands affected by the noncompliance alleged in subsection (3)(a); and

(e) The corrective action the requester seeks from the affected local government or district.

(4) If the requester alleges that a pattern of noncompliant decisions by the affected local government or district is the reason for seeking enforcement, the requester's statement of facts also shall describe the following:

(a) The mode, method, or instance of decision making that constitutes the pattern;

(b) An estimate of the total number of decisions that make up the pattern; and

(c) The period within which the decisions constituting the pattern were made.

(5) If the requester alleges that a practice of noncompliant decisions by the affected local government or district is the reason for seeking

enforcement, the requester's statement of facts also shall contain the following:

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

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

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

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

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0050 The Local Government or Special District's Response to a Citizen's Request**

(1) An affected local government or district that receives a citizen's request for enforcement shall mail the requester a response within 60 days of the date on which the request was mailed.

(2) The response shall contain either of the following:

(a) A statement that the affected local government or district will take corrective action in response to the request and a description of what that action will be; or

(b) A statement that the affected local government or district will not take corrective action and an explanation of its reasons for taking no action.

(3) If the affected local government or district will take corrective action, its statement of the intended action must specify the following:

(a) How the provisions of any relevant plan, regulation, agreement, or process will be amended;

(b) How the provisions of any relevant plan, regulation, agreement, or process will be applied or interpreted differently;

(c) Precise citations to the provisions of any plan, regulation, agreement, or process to be amended or applied differently; and

(d) The schedule for the action to be taken.

(4) If the affected local government or district fails to mail a response within 60 days, that failure shall be construed as a refusal to take corrective action. The requester then may petition the commission for enforcement. The requester shall mail such a petition within 240 days after the original request was mailed to the affected local government or district.

(5) If the affected local government or district mails a response to the requester within 60 days, the requester shall evaluate it.

(a) If the requester finds the corrective action proposed by the local government or district to be adequate, the requester shall notify the affected local government or district and the department and take no further action toward enforcement.

(b) If the requester finds the corrective action proposed by the local government or district to be inadequate, the requester may:

(A) Take no further action toward enforcement;

(B) Enter into mediation with the affected local government or district; or

(C) Petition the commission for enforcement.

(6) If the requester receives a response, finds it to be inadequate, and decides to petition for enforcement, the requester must mail the petition to the department within 180 days of the date when the affected local government or district mailed its response to the requester.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0060 Petitioning the Commission to Initiate Enforcement Proceedings**

(1) A petition for enforcement shall be in the form of a letter to the commission and shall contain these three items:

(a) A request for the commission to adopt an enforcement order to secure the corrective action sought in the citizen's initial request to the affected local government or district;

(b) An explanation of why the affected local government or district's response to the request is not adequate, or a statement that the affected local government or district failed to respond; and

(c) A statement of consequences likely to result from the affected local government or district's refusal to take adequate corrective action.

(2) The petition shall be accompanied by copies of the following documents:

(a) The request mailed to the affected local government or district;

(b) A receipt or certificate showing how and when that request was mailed to the affected local government or district;

(c) The affected local government or district's response (if any) to the request;

(d) any maps or photographs that illustrate the type, extent, or location of the alleged noncompliance;

(e) Documentation of the noncompliance alleged in the request, including but not limited to the following:

(A) Records of noncompliant actions taken by the affected local government or district, such as approvals, permits, rezonings, plan amendments, and amendments of land use regulations;

(B) Requirements from the comprehensive plan, land use regulation, special district cooperative agreement, urban growth management agreement, goal, rule, or other regulation or agreement, as described in ORS 197.320(1) to 197.320 (10) and ORS 197.646, with which the affected local government or district has not complied.

(3) For each record and requirement cited in accordance with paragraphs (2)(e)(A) and (2)(e)(B), the documentation must include copies of the following:

(a) The document's cover or title page (if any);

(b) The document's table of contents (if any);

(c) Precise citations to the relevant provisions; and

(d) The relevant provisions.

(4) The requester must mail an identical copy of the petition, including all documentation, to the affected local government or district. The requester must mail that copy on the same day it mails its petition to the commission.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 &*

*ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0070 The Department's Receipt and Initial Review of a Petition**

- (1) The department shall record the petition's arrival and review it for completeness and compliance with ORS 197.319 and OAR 660-045-0040 to -0060.
- (2) If the petition is incomplete, the department may, at its discretion, request additional information from the requester, add such information to the petition, and then accept the petition.
- (3) If the petition (including any information added under the provisions of Section 2) fails to meet the requirements of ORS 197.319 to ORS 197.924 and this division in a way that substantially prejudices the affected local government or district or is materially deficient, the department shall reject the petition.
- (4) If the department rejects the petition, the commission shall not consider the petition.
- (5) If the department rejects the petition, the department shall notify the requester and the affected local government or district of the rejection. The notice of rejection must describe the reasons for the petition's being rejected.
- (6) If the petition fully meets the requirements of ORS 197.319 to ORS 197.924 and this division, or if it does not fail to meet them in a way that substantially prejudices the affected local government or district or is materially deficient, the department shall accept the petition.
- (7) If the department accepts the petition, the department shall notify the requester and the affected local government or district of the acceptance.

*Stat. Auth.: ORS 183 & ORS 197 Stats.  
Implemented: ORS 197.319 - ORS 197.335 &  
ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0080 The Department's Actions After Accepting a Petition**

- (1) If the department accepts a petition, the department shall evaluate the alleged

noncompliance and prepare recommendations to the commission.

(2) In evaluating the alleged noncompliance, the department shall consider these three matters and any others it deems relevant:

- (a) The noncompliance specified in the citizen's request to the affected local government or district;
- (b) The affected local government or district's response to the request;
- (c) Facts known to the department or ascertained by its investigation.

(3) The department shall prepare recommendations to the commission that include findings on the following three matters and any others the department deems relevant:

- (a) Whether there is good cause to proceed to a contested-case hearing of the petition;
- (b) Whether the commission or a hearings officer should conduct the contested-case hearing, if one is to be held;
- (c) A date for the contested-case hearing, if one is to be held.

*Stat. Auth.: ORS 183 & ORS 197 Stats.  
Implemented: ORS 197.319 - ORS 197.335 &  
ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0090 The Commission's Determination of Good Cause to Proceed**

- (1) The commission shall conduct a public hearing to determine whether there is good cause to proceed to a contested-case hearing.
- (2) Only the department and parties to the proceeding may present testimony during the good-cause hearing described in Section 1.
- (3) The commission may set limits on the time allowed for testimony at the good-cause hearing.
- (4) A requester who alleges a pattern or practice of noncompliant decision making may present as evidence of good cause to proceed recent examples of noncompliant decisions made after the requester notified the affected local government or district of the requester's intent to petition for enforcement.

(5) In deciding whether there is good cause to proceed, the commission shall consider the following:

- (a) The department's recommendation;
  - (b) The requester's petition;
  - (c) The citizen's request notice to the affected local government or district;
  - (d) The affected local government or district's response to the citizen's request;
  - (e) Related facts known to or ascertained by the commission; and
  - (f) Any testimony from parties to the enforcement proceeding.
- (6) The commission shall find that there is good cause to proceed to a contested-case hearing if the information described in Section 5 contains substantial evidence of noncompliance.
- (7) If the commission finds there is not good cause to proceed, it shall issue an order dismissing the petition and stating its reasons for doing so. A commission order dismissing a petition on grounds that there is not good cause to proceed shall be a final order. If the commission finds there is not good cause to proceed, no contested-case hearing of the petition shall be conducted.
- (8) If the commission finds there is good cause to proceed, it shall issue a written decision describing the reasons for its decision.
- (a) The commission may find good cause to proceed on some assertions of noncompliance in a petition, but not on others.
- (b) The commission may, under its own motion pursuant to ORS 197.324, proceed on related assertions of noncompliance not contained in the petition.
- (9) If the commission finds there is good cause to proceed, it shall initiate proceedings toward a contested-case hearing, as described in OAR 660-045-0100 to -0120.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*  
*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0100 Arranging the Contested-Case Hearing**

- (1) A contested-case hearing on a petition for enforcement shall be conducted before a hearings officer appointed by the commission, unless the commission decides to conduct the hearing itself.
- (2) When a hearings officer conducts a hearing, the commission shall delegate all its authority regarding the contested case to the hearings officer, except for its authority to act on the hearing officer's proposed order.
- (3) If the commission decides to have a hearings officer conduct the hearing, the hearings officer shall set a date for that hearing. The act of setting such a date must be done within 45 days of the date when the petition was received by the department.
- (4) If the commission decides that it will conduct the hearing itself, the department shall set a date for that hearing. The act of setting such a date must be done within 45 days of the date when the petition was received by the department.
- (5) The commission may delegate to the department the responsibility for appointing a hearings officer.
- (6) The department shall appoint a hearings officer to preside over pre-hearing matters, including, but not limited to, notice, party and limited party status, discovery, and pre-hearing conferences.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*  
*Implemented: ORS 197.319, ORS 197.320, ORS 197.324 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0110 Notice of the Contested-Case Hearing**

- (1) The department or hearings officer must mail notice of the contested-case hearing to the requester, affected local government or district, mediator (if any), and any other person who has requested notice.
- (2) The notice required in Section 1 shall contain the following:
  - (a) The date, time, and place of the hearing;
  - (b) A statement of the authority under which the hearing is to be held;

- (c) A reference to the specific provisions of the statutes and rules involved;
- (d) A short, plain statement of the matters asserted or charged;
- (e) A statement that, pursuant to ORS 183.457, parties and limited parties to the proceedings may be represented by an attorney or an authorized representative, subject to the other requirements of ORS 183.457 and OAR 137-003-0008;
- (f) A statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case, will automatically become part of the contested-case record upon default for the purpose of proving a prima facie case (per OAR 137-003-0001(1)(a));
- (g) A statement containing the following information about mediation:
  - (A) That mediation is available as an alternative to a contested-case hearing, if requested by both the requester and the affected local government or district;
  - (B) That DLCDD will provide mediation services;
  - (C) That choosing to enter into mediation will not affect one's right to a contested-case hearing if the matter is not resolved through mediation;
  - (D) The date by which both parties must request mediation.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*  
*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0120 Participation of Parties or Limited Parties in the Contested-Case Hearing**

- (1) Persons interested in the enforcement proceeding may request status as a party or limited party in accordance with OAR 137-003-0005 ("Participation as a Party or Limited Party"). Any such request must be filed with the department at least 21 days before the date of the contested case hearing. The department shall respond to such requests as is specified in OAR 137-003-0005.
- (2) In accordance with OAR 137-003-0007 ("Agency Participation as Interested Agency or

Party"), the department may designate another agency as an interested agency or party.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*  
*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0130 The Contested-Case Hearing**

- (1) The contested-case hearing shall be conducted in accordance with ORS 183.413 to 183.470 ("Contested Cases"). The hearing also shall be conducted in accordance with the provisions of OAR Chapter 137, Division 3, Contested Case Proceedings. However, some provisions of OAR Chapter 137, Division 3, have been modified by commission rules pursuant to OAR Chapter 660, Division 3, or by this division. In such cases, the commission rules and this division shall apply.
- (2) Before the hearing begins, the commission or hearings officer shall inform all parties of certain rights, issues, and procedures as required by subsections (2) to (4) of ORS 183.413 and ORS 183.415(7).
- (3) The commission or hearings officer may conduct a prehearing conference, in conformance with OAR 137-003-0035 ("Prehearing Conferences").
- (4) As specified in OAR 660-001-0005 (2), parties to the contested-case hearing may be represented in three ways:
  - (a) A party may represent itself.
  - (b) A party may be represented by an attorney.
  - (c) Certain parties may be represented by an authorized representative who is not an attorney.
- (5) Pursuant to ORS 183.440, parties to the contested case may subpoena witnesses. A party that subpoenas a witness shall pay the fees and mileage of the witness in accordance with ORS 183.440 (1) and ORS 44.415 (2). Payment shall be made directly to the witness.
- (6) All discovery through means other than subpoena shall be done in accordance with OAR 137-003-0025 ("Discovery in Contested Cases").
- (7) At the hearing, the requester shall recommend whether the enforcement order should include interim measures as specified in ORS 197.335 (3)
  - (a) (on interim requirements pending compliance

with an order) and ORS 197.335(4) (on withholding grants or state-shared revenues). If the requester recommends that such measures be adopted, the requester must specify precisely what measures it recommends.

(8) At the hearing, the affected local government or district shall respond to the requester's recommendation on interim measures, and shall specify what measures, if any, the affected local government or district recommends.

(9) After the hearing and the record have been closed, the commission or hearings officer shall determine whether there is good cause to believe that grounds for enforcement pursuant to ORS 197.320 (1) to ORS 197.320 (10) or ORS 197.646 (3) exist.

(10) If it is determined that there is good cause to believe that grounds for enforcement exist, the commission must specify, or the hearings officer must recommend, appropriate corrective action.

(11) If it is determined that there is good cause to believe that grounds for enforcement exist, the commission may specify, or the hearings officer may recommend, one or more interim measures, in accordance with the provisions of ORS 197.335 (3) and (4).

*Stat. Auth.: ORS 183 & ORS 197 Stats.  
Implemented: ORS 197.319 - ORS 197.335 &  
ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef.  
9-23-98*

#### **660-045-0140 Procedures After a Hearing Conducted by a Hearings Officer**

(1) If a hearings officer conducts the contested-case hearing, the hearings officer shall complete the following actions within 30 days of the date when the record closed:

(a) Write a proposed order pursuant to ORS 197.328 (3) and complying with ORS 197.335;

(b) Send the proposed order to the commission.

(2) After the commission receives the proposed order from the hearings officer, the commission must do the following:

(a) Establish a date on which the commission will consider the proposed order;

(b) Mail the proposed order to all parties; and

(c) Mail to all parties the following information:

(A) The date on which the commission will consider the proposed order;

(B) A statement that the commission will limit its review as specified in Section (4) of this rule;

(C) A statement that exceptions to the proposed order may be filed by parties to the case; and

(D) A statement that exceptions to the proposed order must be received by the commission no later than 15 days after the order was mailed to the parties.

(3) At least 16 days after the proposed order is mailed to the parties, the commission shall consider the proposed order and adopt a final order. The commission may adopt the proposed order as the final order, modify parts of the proposed order, or not use any part of the proposed order.

(4) In reviewing the proposed order and adopting the final order, the commission shall not consider new evidence. The commission shall consider only the following:

(a) The record of proceedings before the hearings officer;

(b) Timely exceptions to the proposed order;

(c) Arguments concerning the proposed order and exceptions;

(d) Recommendations and information from the department.

(5) The final order shall include findings of fact and conclusions of law as specified in ORS 197.335. The final order shall meet the requirements of OAR 137-003-0070, "Final Orders in Contested Cases."

(6) The commission shall adopt its final order within 120 days of the date on which the requester filed its petition for enforcement with the commission.

(7) Within five days of the commission's adoption of the final order, the department shall mail to all parties a copy of that order and its findings and conclusions.

*Stat. Auth.: ORS 183 & ORS 197 Stats.  
Implemented: ORS 197.319 - ORS 197.335 &  
ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef.  
9-23-98*

### **660-045-0150 Procedures After a Hearing Conducted by the Commission**

(1) If the commission conducts the contested-case hearing, the commission shall adopt a final order within 30 days of the date when the record closed. The commission may adopt a final order on the same day that it conducts the contested-case hearing, or it may adopt a final order at a subsequent meeting within 30 days of the hearing.

(2) The final order shall include findings of fact and conclusions of law as specified in ORS 197.335. The final order shall meet the requirements of OAR 137-003-0070, "Final Orders in Contested Cases."

(3) The commission shall adopt its final order within 120 days of the date on which the requester filed its petition for enforcement with the commission.

(4) Within five days of the commission's adoption of the final order, the department shall mail to all parties a copy of that order and its findings and conclusions.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0160 Mediation and Settlement**

(1) During the 60-day period specified in OAR 660-045-0050(1), the requester or the affected local government or district may request mediation services from the department. The department may provide such services. If the requester and the affected local government or district jointly request such services, the department must provide them, pursuant to ORS 197.319 (2)(b).

(2) A proceeding under this division may be delayed at any time to allow for mediation if both the requester and the affected local government or district agree to enter into such mediation. If either party withdraws from such mediation, the proceeding toward enforcement shall be resumed.

(3) A proceeding under this division may be stopped at any time and disposed of through stipulation, agreed settlement, consent order, or

default. A stipulation, agreed settlement, or consent order must be in writing and must be signed by both the requester and the affected local government or district.

(4) A deadline set forth in this division may be altered or waived under these two conditions:

(a) The requester and the affected local government or district both agree to such a change before the deadline is reached; and

(b) The commission or hearings officer approves of such a change before the deadline is reached.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 183.415, ORS 197.319, ORS 197.320 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0170 Terminating an Enforcement Order**

(1) The commission shall terminate an enforcement order if the commission finds that any one of these conditions exists:

(a) The affected local government or district has complied with the requirements of the order;

(b) A substantial change in circumstances has eliminated the need for corrective action of the type required by the order; or

(c) A change in the applicable laws has rendered the enforcement order moot or has eliminated the need for corrective action of the type required by the order.

(2) The commission may initiate proceedings to terminate an enforcement order without having received a request to terminate the order. If the commission decides to initiate such proceedings, it shall notify all parties and provide for their participation under the provisions of OAR 660-045-0110 to -0130.

(3) An affected local government or district, a requester, or the department may request that an enforcement order be terminated. If the commission receives such a request, it shall notify all parties and provide for their participation under the provisions of OAR 660-045-0110 to -0130.

(4) The commission may write an enforcement order so that it terminates automatically when a specified date is reached or when an action

specified in the order has been completed by the affected local government or district. If an order specifies such a termination date or action, the order shall terminate without notice to the parties and without further action by the department or commission when the termination date passes or when the termination action is completed. If an enforcement order contains no provision for automatic termination, then it shall remain in effect until the commission terminates the order in accordance with this rule.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 & ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

### **660-045-0180 Requests for Terminating an Enforcement Order**

(1) A party requesting termination of an enforcement order shall mail its request to the commission. On the same day that it mails its request to the commission, the party shall mail copies of the request to all other persons who were parties to the enforcement proceeding.

(2) A request to terminate an enforcement order shall be in the form of a letter containing the following items:

(a) A statement asking that the commission terminate the enforcement order;

(b) Citation to the subsection of OAR 660-045-0170 (1) on which the request for termination is based;

(c) A description of how the affected local government or district's corrective action, a substantial change of circumstances, or a change in the applicable laws justifies termination of the order;

(d) Documentation of the corrective action, substantial change of circumstances, or change in the applicable laws that justifies termination of the order.

(3) Within 30 days of the date on which the request for termination was mailed, the department shall review the request to determine whether it is complete and complies with this rule. On or before the thirtieth day, the department shall convey the results of its review to the commission and to all parties to the order.

(a) If the department finds that the request for termination is incomplete or fails to comply with this rule, the commission shall not consider the request.

(b) If the department finds that the request for termination is complete and that it does comply with this rule, the department shall evaluate the request and recommend to the commission whether the enforcement order should be terminated. The department must mail its recommendation to the commission and to all parties within 90 days of the date the request for termination was mailed to the commission.

(4) Any party to an enforcement order may comment on a request for termination of that order. Such a comment shall be mailed to the commission within 30 days of the date on which the request for termination was mailed. On the same day that it mails its comment to the commission, the responding party shall mail a copy of the comment to all other parties to the order.

(5) Only those persons who were parties to an enforcement order may participate in proceedings to terminate that order.

(6) A party's comment on a request for termination shall be in the form of a letter to the commission containing the following items:

(a) A statement indicating whether the party supports or opposes termination of the enforcement order;

(b) A description of how the affected local government or district's corrective action, a substantial change of circumstances, or change in the applicable laws justifies or fails to justify termination of the enforcement order;

(c) Documentation of the corrective actions, substantial change of circumstances, or change in the applicable laws referred to in the description required by subsection 6(b).

(7) Within 60 days of the date when the department mails its recommendation to the commission, the commission shall decide whether to terminate the enforcement order. The commission shall issue a written decision stating reasons for its decision.

(8) Within five days of the commission's decision, the department shall mail copies of that decision to all parties to the enforcement order.

*Stat. Auth.: ORS 183 & ORS 197 Stats.*

*Implemented: ORS 197.319 - ORS 197.335 &*

*ORS 197.646 Hist.: LCDD 5-1998, f. & cert. ef. 9-23-98*

## Enforcement Order Examples from Jackson and Deschutes Counties

### Jackson County

The Jackson County Citizens League was formed in 1991. A small group of Jackson County citizens were alarmed at the rate at which the County issued permits to build dwellings in farm and forest zones. A thorough review of recent land use decisions reinforced what residents saw happening: permits for dwellings in farm and forest zones in Jackson County accounted for 23% of the statewide total in those zones. By contrast, Jackson County has only 5% of the state's population.

What followed was an extensive research effort, which involved selecting an appropriate time period and sample of decisions on land use applications, securing copies of the necessary files, and combing each one of those files to identify a pattern of decision-making which was inconsistent with the local ordinances and/or state law. The research identified 22 different TYPES of violations, affecting hundreds of permits. An enforcement order can be much smaller in scope and concern only a handful of decisions, and argue that only one type of violation of the law has consistently occurred.

Once the “patterns and practices of violation” were documented, the groups set about strategizing how they would present the allegations, both to the county (as the statute requires) and to the press and the public. Rather than simply mail the requisite letter to the County, JCCL opted to make this a public event. They were a new organization and this was an excellent opportunity to get some publicity for both the new organization and their cause.

They decided to hold a press conference on the steps of the County Courthouse just prior to handing over the letter. Before the event, they met with the editor of the local paper to explain what they were doing and why. Then they distributed press advisories to the media several days in advance, telling them where and what time, but not divulging any more than necessary about what they were up to. They kept an aura of secrecy to prevent the press from approaching the County first for their reaction, thereby preempting the announcement of the enforcement order and the force of JCCL's assertions.

Meanwhile, 1000 Friends worked with the League to prepare a press release and rehearse the press conference. Each of three people prepared brief, pointed speeches underscoring the League's main assertions in its letter to the County, and illustrating them with clear examples. The rehearsal also included fielding anticipated questions, which were lumped into three categories – ignorant and confused, hostile, and thoughtful questions needing clear, well-considered responses.

The press conference went well. Many of the area's print, radio, and television media attended, and JCCL members hand-delivered written press releases to those absent immediately following the press conference. When the League's representatives walked into the County Commissioners' office to hand over the letter, one of the Commissioners was heard to say from his office “I'm not here.”

The County's response was essentially: "much of the land is mis-zoned anyway; we'll fix it when we update our comprehensive plan and land use ordinances in the coming year." This was unsatisfactory to the League – which didn't want the ordinances changed to fit the crime, but to comply with existing law – and, soon after the 60-day limit, they petitioned the Land Conservation and Development Commission (LCDC) to pursue an enforcement order. After an initial examination of the allegations, LCDC opted to look into them further, and appointed a hearings officer to do so.

Both sides presented oral and written arguments, and the hearings officer rendered findings: he upheld the League in 11 of the 22 alleged types of violations. LCDC, after hearing further arguments, upheld one more. They then issued their "final order," detailing the findings and the remedial actions necessary to correct the deficiencies in the County's decision-making.

The remedial actions didn't have the teeth that the League would have liked. They called for:

1. the County to set a two-year time limit on the validity of land use permits, meaning that if permits weren't utilized within two years, applicants would need to re-apply;
2. the implementation of new land use application forms, to require a more complete set of information on which to make a decision;
3. more stringent criteria to be used in evaluating permits in forest and farm zones;
4. a workshop for planning staff conducted by trained hearing officers; and
5. review of preliminary staff decisions on permit applications by the county counsel or hearings officer.

These remedial actions were, and continue to be, the subject of much grumbling by the County.

## **Deschutes County**

Deschutes County has undergone a tremendous development boom, with in-migration and growth rates far exceeding the state average. Key members of ARLU-DeCo (the Alliance for Responsible Land Use in Deschutes County) had been involved in testimony and appeals of local land use decisions for some time, but saw very little change in the way the County made decisions, even when they prevailed in some of their appeals. One member remarked that the county was running a permit mill and not doing planning. Coincidentally, the County was five years behind in updating its plan and ordinance.

Already exhausted and seeing little change as a result of its efforts on individual permits, ARLU opted to pursue an enforcement order as well. The strategy was very similar to that followed by the League in Jackson County. The only difference was that the Planning Director, County Counsel, and one County Commissioner came slinking around the corner of the courthouse as the news conference began, and stood looking dejected and disgusted as ARLU made their presentation and fielded questions from the press.

The outcome in Deschutes County was rather different, however. The County's reply was much the same as Jackson's – there may be problems, but we'll fix them in the upcoming periodic

review. But when ARLU-DeCo took their case to LCDC, instead of proceeding to appoint a hearings officer to look into the allegations, they asked the two parties – ARLU-DeCo and the County – to attempt to negotiate a settlement. This resulted in a meeting – later dubbed the Kay-Nee-Tah accords by the local press – attended by representatives from both sides, at which mutually agreed-on remedial actions were hammered out.

Ironically, while the alleged violations were never evaluated by LCDC and, thus, did not result in an enforcement order, the outcome was much better in terms of farmland protection. This is partially because the collective attitude of the Deschutes County Government was more favorable to a settlement.

The result was:

1. new application forms for farm and non-farm dwellings, developed jointly by ARLU-DeCo and the County, and requiring more evidence from applicants for decision-making;
2. all farmland decisions are heard by a county hearings officer, and later by the county commissioners, until the county's periodic review is completed, with the opportunity for individuals to testify without paying an appeal fee; and,
3. an early 1993 audit of prior farmland decisions, conducted by a third-party land use expert, and paid for by DLCD.

It is still too early to judge to what extent the outcomes of these two citizen-initiated enforcement actions have changed the way these two counties make land use decisions. That will be the subject of the final and very important phase of this whole undertaking – follow-up monitoring. Once the press has died down and the activists are tired and perhaps directing their attentions elsewhere, there is every reason to believe that the old patterns will re-emerge. And the only way to prevent this is to continue to monitor decisions. The knowledge gained in original enforcement order research should help in this.