



Oregon

Tina Kotek, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

Salem, Oregon 97301-2540

Phone: 503-373-0050

Fax: 503-378-5518

www.oregon.gov/LCD

March 15, 2023

Kenneth P. Dobson
324 S. Abernethy St.
Portland, OR 97239



Rob Bovett
Washington County Sr. Assistant County Counsel
155 N. First Ave, Suite 340, MS #24
Hillsboro, OR 97124

**SUBJECT: HEARINGS OFFICER RECOMMENDATION – WASHINGTON COUNTY
ENFORCEMENT PETITION**

Enclosed is the hearings officer recommendation on the Washington County Enforcement Petition filed by Mr. Kenneth Dobson.

The Land Conservation and Development Commission (commission) will consider this proposed order at its meeting on Thursday, April 20. At this time, the matter is the first item scheduled on the agenda after the lunch break, with a tentative start time of 1:00pm. The commission will conduct a public hearing to determine whether or not to issue an enforcement order in this matter, and what the contents of such an enforcement order would include. The meeting will be held electronically and in the Basement Hearing Room of the Oregon Department of Agriculture Building, 635 Capitol St. NE, Salem OR.

A party to this proceeding may file an exception to the Hearings Officer recommendation. The department must receive such exceptions by Thursday, March 30, 2023, at 5:00 PM. Parties must provide an electronic copy of an exception to the following individuals: Gordon H. Howard (gordon.howard@dlcd.oregon.gov), Laura Kelly (laura.kelly@dlcd.oregon.gov) and Casaria Taylor (casaria.taylor@dlcd.oregon.gov).

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.

Washington County Proposed Order
March 15, 2023
Page 2 of 2

If you have questions please contact Gordon Howard at gordon.howard@dlcd.oregon.gov or
Laura Kelly at laura.kelly@dlcd.oregon.gov.

Sincerely,



Gordon H. Howard
Community Services Division Director

cc: Theresa Cherniak (Washington County), Kirstin Greene, Brenda Bateman, Laura Kelly,
Amanda Punton, Casaria Taylor (DLCD) Steve Shipsey (DOJ)

program as significant Wildlife Habitat areas until the County has adopted amended code standards that comply with ORS 197.307(4).”

In October of 2020, the County adopted an ordinance, Ordinance No. 869, amending its code in an attempt to comply with the Commission’s enforcement order, *i.e.*, by adopting standards for protecting Goal 5 natural resources that were clear and objective. The enforcement order was subsequently terminated. However, Ordinance No. 869 was appealed to LUBA. LUBA remanded Ordinance No. 869 on several grounds, finding that aspects of the County’s Code were still not clear and objective. *Community Participation Organization 4M et al v. Washington County* (LUBA No. 2020-110, September 29, 2021), *aff’d w/o opinion*, 316 Or App 577 (2021) (*Community Participation Organization*).¹ As a consequence of that remand, Ordinance No. 869 is no longer effective, and the previous code provisions (the ones found by the County, LUBA and the Court of Appeals to be not clear and objective and thus unenforceable) apply.

Concluding that the County was once again out of compliance with Goal 5, in the exact same respect it was found to be out of compliance in 2020, Warren again sought an enforcement order against the County. On July 28, 2022, she notified the County of her intent to file a petition for enforcement with the Commission. In its September 26, 2022 response, the County explained that it is taking a broader approach to remedying its noncompliance than it took through Ordinance No. 869. It is undertaking a comprehensive update of the County’s Goal 5 program to protect natural resources under Goal 5. This includes an update of its 30+ year-old inventory of significant wildlife habitat and water resource sites, an environmental, social, economic, and energy (ESEE) analysis of inventoried wildlife habitat and water resource sites in relation to conflicting uses, and comprehensive plan and development code amendments to protect these resources. The County estimated that the Washington County Board of Commissioners would adopt an ordinance to implement this program in late 2023 or early 2024. The County also noted that it is requiring applicants for residential development projects to

¹ A companion case, decided December 8, 2021, remanded the County’s adoption of habitat assessment guidelines that were meant to implement the code provisions, because those guidelines were also not clear and objective. *Community Participation Organization 4M et al v. Washington County* (LUBA No. 2021-002, December 8, 2021).

address Statewide Planning Goal 5 directly and to agree to make findings based on the existing version of the development code, including those provisions that are not clear and objective.² These efforts by the County are referred to herein as the County’s “interim” measures.

Not satisfied with the County’s response, Warren filed her petition for enforcement. After a recommendation from the Department of Land Conservation and Development (DLCD), the Commission determined there was good cause to initiate enforcement proceedings against the County to determine whether the County is in compliance with Goal 5. The Commission appointed a Hearings Officer to conduct the contested case proceeding and prepare findings of fact, conclusions of law, and recommended actions.

As identified in the Notice of Contested Case Hearing, four issues were considered in this proceeding:

- (1) Are the “interim” measures Washington County has been using to regulate development in significant natural areas and riparian corridors, after its code provisions were found invalid as not being clear and objective in 2019, clear and objective pursuant to ORS 197.307(4) or (6)?
- (2) If Washington County's “interim” measures are not clear and objective pursuant to ORS 197.307(4) or (6), are its SNR provisions out of compliance with the goals, in particular Goal 5?
- (3) If the county is not adequately protecting significant natural areas and riparian corridors as required by the county’s adopted Goal 5 protection program, then what measures should the commission take to provide a schedule for Washington County to adopt measures that return protection to these resources?
- (4) Should the Commission, as part of an enforcement order, issue a stay or temporary injunction on approvals of land use applications involving development within designated SNRs until the new ordinances are adopted pursuant to ORS 197.335(3)?

² The County acknowledged that that approach was, as of September, 2022, on appeal at LUBA. LUBA has since ruled on that appeal; that ruling, *Delmonico*, is discussed below.

The County submitted a hearing memorandum, and both the County and Warren provided oral argument on these issues. Based on the record, the Hearings Officer makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

There are no disputed facts.

CONCLUSIONS OF LAW

Introduction

At the outset, it will be helpful to understand the specific regulations at issue. In *Warren*, LUBA and the Court of Appeals held that three different Code provisions were invalid and unenforceable as not clear and objective—Community Development Code (CDC) 422-3.3, CDC 422-3.4, and CDC 422-3.6. Community Development Code Chapter 422 is entitled “Significant Natural Resources (SNR).” The SNRs are classified in the following categories: “Water Areas and Wetlands,” “Water Areas and Wetlands and Fish and Wildlife Habitat,” “Wildlife Habitat,” and “Significant Natural Areas.” Generally, CDC 422-3.3 restricts disturbance of soil and vegetation in riparian areas and provides various exceptions including enhancement of degraded areas. Section 3.4 sets forth a list of requirements for enhancements of riparian SNRs, including a wildlife survey, a biologist report, and review of the proposal by the Oregon Department of Fish and Wildlife. Finally, Section 3.6 applies to SNRs including Wildlife Habitat such as the upland Douglas fir area, and prohibits interference with SNRs unless the interference is mitigated.³ Warren focuses most of her attention on CDC 422-3.6, which she alleges is the only provision that affords protection to the Wildlife Habitat and that, once that provision is rendered inapplicable because it is not clear and objective, the Wildlife Habitat is left essentially completely unprotected.⁴

³ CDC 422-3.6 provides:

“For any proposed use in a Significant Natural Resource Area, there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated. This section shall not apply in areas where a Goal 5 analysis has been completed and a program decision has been adopted that allows a ‘conflicting use’ to occur pursuant to OAR 660-023-0040(5)(c).”

⁴ Ordinance No. 869 proposed to re-name the “Wildlife Habitat” designation as the “Upland/Wildlife Habitat” to distinguish it from the wildlife habitat found at lower elevations. Because, as discussed below, Ordinance No. 869 is no longer effective, this designation will be referred to herein as Wildlife Habitat.

Questions Presented

The County takes issue with the “Questions” presented in the Notice of Contested Case Hearing and contends that those are not the issues that necessarily naturally flow from the facts and law in this case. To some degree, the Hearings Officer agrees. The foundational issue that the Hearings Officer must determine, pursuant to OAR 660-045-0130(9),⁵ is whether there is good cause to believe that grounds for enforcement pursuant to ORS 197.320(1) to (10) or ORS 197.646(3) exist.⁶ The first two questions listed in the Notice attempt to address that foundational issue.

1. *Are the “interim” measures Washington County has been using to regulate development in significant natural areas and riparian corridors, after its code provisions were found invalid as not being clear and objective in 2019, clear and objective pursuant to ORS 197.307(4) or (6)?*
2. *If Washington County’s “interim” measures are not clear and objective pursuant to ORS 197.307(4) or (6), are its SNR provisions out of compliance with the goals, in particular Goal 5?⁷*

⁵ Pursuant to OAR 660-045-0130(9), the Hearings Officer’s initial determination is “whether there is good cause to believe that grounds for enforcement pursuant to ORS 197.320(1) to 197.320(10) or 197.646(3) exist.”

⁶ As relevant to this proceeding, ORS 197.320 provides:

“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 or actions into compliance with the goals, acknowledged comprehensive plan provisions, land use regulations or housing production strategy 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;

* * * * *

(10) A local government’s approval standards, special conditions on approval of specific development proposals or procedures for approval do not comply with ORS 197.307 (4) or (6).”

⁷ The Hearings Official believes that the second question should logically be answered first. That is, only after it is determined that the applicable, adopted provisions are out of compliance with Goal 5 is it appropriate to address whether the County’s “interim” measures are adequate to comply with Goal 5.

With regard to the foundational issue identified above, Warren argues that an enforcement order is authorized under ORS 197.320(1) and (10). While the Commission found good cause to proceed to a contested case hearing in this matter, it did not clearly articulate the statutory basis for the finding of good cause. Staff had recommended that good cause to proceed existed pursuant to subsection (1), but not subsections (2) or (10).⁸ In the Commission's previous order, the Commission concluded that subsection (1) did not apply. *See Exhibit 2 at 5-6.* For the same reasons articulated in that order, the Hearings Officer concludes that subsection (1) does not apply here.

With regard to ORS 197.320(10), the County asserts that it has an acknowledged Goal 5 plan and is in the process of amending that plan following an OAR Chapter 660, Division 23, Goal 5 process in accordance with the LUBA remand in *Community Participation Organization*. Accordingly, the Hearing Officer understands the County to assert that it is not out of compliance with Goal 5 and an enforcement order is thus not authorized.

The Hearings Officer disagrees. In its previous enforcement order, the Commission found grounds for an enforcement order under ORS 197.320(10) because local provisions that formed the basis for the Goal 5 plan were not clear and objective. In discussing the basis for an enforcement order under ORS 197.320(10) in the previous enforcement proceeding, the Commission explained as follows:

“The bottom line is that the County has a Goal 5 program that relies on the provisions of CDC 422, including CDC 422-3.3, 422-3.4, and 422-3.6 to implement the Goal 5 program. When those provisions are invalidated as to housing applications by ORS 197.307(4) and *Warren v. Washington County*, the County's Goal 5 program is no longer being fully implemented.” Exhibit 2 at 7.

In this case, the County argues that the Commission should not issue an enforcement order under ORS 197.320(10), at least in part based on the logic presented by staff in its staff report before the Commission's good cause hearing. The staff report provided:

“First, LUBA has shown itself able to review local government code provisions in the context of a specific development application, and able to reverse local government decisions using those provisions or affirm local government decisions

⁸ Staff also determined that subsection (2) applies only to state agencies. The Hearings Officer agrees and does not address subsection (2) further.

that decline to enforce such provisions. Commission enforcement proceedings for such provisions would duplicate LUBA's work. Second, if the commission were to be less selective and start entertaining petitions for enforcement for smaller individual violations of the clear and objective standards requirements of state law the commission would possibly be inundated with petitions for enforcement on such matters, to the detriment of the commission's other important work maintaining and improving the state's comprehensive land use planning system." See Exhibit 105, page 9.

The Hearings Officer disagrees with this rationale for several reasons. First, as asserted by Petitioner at the contested case hearing, where a hearings officer finds good cause to believe that grounds for enforcement exist, the hearings officer "*must* recommend, appropriate corrective action." OAR 660-045-0130(10) (emphasis added). In other words, once good cause is found, a hearings officer is required to recommend corrective action. The Hearings Officer agrees. Second, the Hearings Officer disagrees that issuing an enforcement order would duplicate the work of LUBA. LUBA does not have injunctive authority. LUBA's authority emanates from statute, and ORS 197.835 only authorizes LUBA to affirm, remand, or reverse a land use decision that is before it on appeal. Where LUBA determines an approval criterion is not clear and objective, that approval criterion cannot be applied to housing applications. Where that particular approval criterion was one of or the only standard protecting a Goal 5 resource, LUBA is ill equipped to manage the consequences of ruling that standard unenforceable. It is only the Commission, acting on an enforcement petition, that can order a local government to take specific actions to come into compliance with the Goals.

Finally, staff articulate a concern that finding an enforcement order justified under ORS 197.320(10) in instances where provisions are determined to be not clear and objective would open the floodgates and potentially inundate the Commission with petitions for enforcement in such matters. The Hearings Officer disagrees with staff on this point. First, an enforcement order is not justified in every instance where an approval criterion for a housing application is not clear and objective. An enforcement order would only be justified in a case such as this where the ruling that an approval criterion is not clear and objective leaves the local government out of compliance with Goal 5. That will not always be the case. Second, even if the Commission's workload were increased as a result of issuing an enforcement order in circumstances like this one, the Hearings Officer believes that the circumstances warrant action, and an enforcement order would likely be the only or best way to address the fact that the

unenforceability of certain provisions renders the local government out of compliance with the Goals. If the Commission is inundated with such cases, the legislature would be the appropriate venue for a fix.⁹

The provisions that are currently in effect are the same provisions that were in effect during the 2020 enforcement proceedings. For the same reasons articulated in the 2020 enforcement order, the County's provisions are out of compliance with Goal 5. See Exhibit 2, pages 5-7. Specifically, CDC 422-3.6 is the only regulation that applies to protect the upland habitat. Following LUBA's and the Court of Appeal's decision in *Warren*, that provision was determined to be not clear and objective and were thus unenforceable.

That said, the County asserts that it is enforcing "interim" measures to ensure the County is adequately protecting its inventoried significant natural resources in a manner that complies with Goal 5.¹⁰ As the Hearings Officer understands the interim measures, they include a requirement to apply Goal 5 directly to housing applications and that an applicant for residential development in the protected area voluntarily agree to be bound by the Code standards that the Court of Appeals determined in *Warren* were not clear and objective and thus unenforceable.

The interim measures were employed in a recent housing application. Westwood Homes submitted an application for a subdivision creating 15 single-family residential lots on land designated as Wildlife Habitat. The County approved the application, and on a local appeal of that decision, the local hearings official¹¹ affirmed the approval, essentially agreeing that the County's interim measures were adequate to comply with Goal 5. The hearings official concluded, first, that the LUBA remand of Ordinance No. 869 rendered those regulations adopted by that ordinance no longer effective. The application was thus subject to the acknowledged provisions of former CDC Chapter 422 that were in effect prior to the adoption of Ordinance No. 869. The hearings official then concluded that "Goal 5 is not directly applicable to this application" but that, even if Goal 5 did apply directly, "the application complies [with Goal 5], based on the [applicant's] ESEE analysis." The hearings official noted that the

⁹ The Hearings Officer believes that staff's reasoning is more appropriately addressed to the third question presented—*i.e.*, assuming good cause is found, what is the appropriate remedy for a county's provisions that are not in compliance with the Goals?

¹⁰ The question is not only whether the interim measures are clear and objective. It is also whether the interim measures are adequate to bring the County into compliance with Goal 5.

¹¹ To avoid confusion, this recommended order will refer to the DLCD Hearings Officer as "Hearings Officer" and to the local hearings official as the "hearings official."

applicant in that case agreed to comply with the acknowledged approval criteria that were not clear and objective rather than applying Goal 5 directly. *See Delmonico* decision, Exhibit 109. The hearings official indicated that “[t]his is allowed by ORS 197.307(6). * * * [The *Warren* decisions] did not preclude applicants from agreeing to apply these provisions as a subjective alternative approval process allowed by ORS 197.307(6).” *See* Exhibit 109 at 24.

That decision was appealed to LUBA, and LUBA affirmed. Importantly, however, the petitioner in that case did NOT challenge the hearings official’s finding that Goal 5 did not apply directly. Because the petitioner did not make that argument, LUBA was left to assume, but did not decide, that the hearings official was correct that Goal 5 did not apply directly.¹² Because that issue was not on the table, the County’s decision was affirmed.¹³

First, the Hearings Officer disagrees with the hearings official’s determination that ORS 197.307(6) authorizes a local government to process a housing application and apply non-clear and objective approval criteria so long as the applicant agrees to be so bound. ORS 197.307(6) provides:

“In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government *may adopt and apply an alternative approval process* for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

- (a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;

¹² LUBA held:

“The hearings officer concluded that intervenor’s application ‘is subject to the acknowledged provisions of former CDC 422 that was in effect prior to the adoption of Ordinance 869. Therefore, Goal 5 is not directly applicable to this application.’ Petitioner does not challenge that finding or otherwise explain why Goal 5 applies directly to the application. Although petitioner asserts that, ‘[i]n the absence of a viable and acknowledged Goal 5 program for Wildlife Habitat, the County must apply statewide Goal 5 rules to the application,’ petitioner does not explain why, even if Ordinance 869 is not effective after our remand, the county lacks an acknowledged Goal 5 program. As explained above, prior to the adoption of Ordinance 869, the county’s Goal 5 program was acknowledged. We assume, based on petitioner’s lack of challenge to the hearings officer’s finding that Goal 5 does not apply, that the hearings officer was correct that Goal 5 does not apply.” *Delmonico v. Washington County*, ___ Or LUBA ___ (LUBA No. 2022-072, November 11, 2022), slip op. 9-10 (citations omitted).

¹³ Further, because that issue was not actually decided by LUBA, the Hearings Officer believes it is an open question whether Goal 5 can be applied directly where the applicable approval criteria are out of compliance with Goal 5.

- (b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and
- (c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.” (Emphasis added).¹⁴

The Hearings Officer does not agree that ORS 197.307(6) authorizes an applicant to simply agree to be bound by approval criteria that have been determined to be not clear and objective. Subsection (6) authorizes a local government to “adopt” and “apply” an alternative, non-clear and objective approval process, so long as the applicant still has the option of proceeding under the clear and objective track. That alternative non-clear and objective process must be formally “adopted” in the code in order to satisfy subsection (6). The CDC does not have a non-clear and objective alternative track for processing housing applications.

Further, as Petitioner pointed out at the contested case hearing, without an enforcement order in place, the County would be required to process an application even if the applicant refused to be bound by the non-clear and objective approval criteria. If the County denied the application on that basis, and the applicant appealed to LUBA, LUBA would be forced to follow the law and overturn the denial because the non-clear and objective approval criteria would be unenforceable as a matter of law and thus could not provide a basis for denial.¹⁵

In summary, the County’s duly adopted regulations are not in compliance with Goal 5 for the same reasons articulated in the Commission’s 2020 enforcement order. Further, the “interim” measures the County is relying on are not adequate, in part because they are not clear

¹⁴ ORS 197.307(4) provides:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

¹⁵ Further, under ORS 197.843, a local government could be liable for attorney fees if LUBA overturns a local decision denying an application for needed housing when that denial is based on non-clear and objective approval criteria.

and objective, to ensure compliance with Goal 5.¹⁶ Accordingly, the Hearings Officer agrees with Petitioner that there is good cause to believe that grounds for enforcement exist pursuant to ORS 197.320(10).

3. If the county is not adequately protecting significant natural areas and riparian corridors as required by the county's adopted Goal 5 protection program, then what measures should the commission take to provide a schedule for Washington County to adopt measures that return protection to these resources?

The Hearings Officer, and thus the Commission, has broad discretion to determine the appropriate remedy once it is determined that there is good cause to believe that grounds for enforcement exist. Once the Hearings Officer determines good cause exists, they “must” recommend appropriate corrective action (OAR 660-045-0130(10)) and “may” recommend one or more interim measures, in accordance with ORS 197.335(3) and (4).¹⁷ OAR 660-045-0130(11).

¹⁶ At the hearing, Petitioner explained that applying Goal 5 directly was not sufficient because that exercise is not “clear and objective.” The Hearings Officer agrees that there are few exercises less clear and objective than conducting an ESEE analysis, which is what would ultimately be required if Goal 5 were applied directly to a housing application. Accordingly, an order directing the County to apply Goal 5 directly to housing application would not be an adequate process for determining compliance with Goal 5.

¹⁷ ORS 197.335(3) provides:

“(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.” (Emphasis added).

ORS 197.335(4) authorizes the Commission to withhold grant funds and is not applicable here.

As the County has explained, it is currently in the process of revamping its Goal 5 program, which includes a new inventory of significant Goal 5 natural resources, revised comprehensive plan provisions, and adoption of clear and objective Code provisions. This endeavor is currently entirely voluntary on the part of the County, as LUBA does not have injunctive authority, and the Commission's 2020 enforcement order was terminated once Ordinance No. 869 was adopted. The County's choice to conduct a more comprehensive review of its Goal 5 program, however, should not be used against it in this proceeding. As the Commission found in its 2020 order, the County was not necessarily required to conduct such a comprehensive review in order to bring its Goal 5 program into compliance with Goal 5. That said, the County will, at the very least, be required to amend the non-clear and objective Code standards that were invalidated by the *Warren* decisions.

The County asserts that it has secured funding and can complete its current proposed work program within 18 months.¹⁸ The Hearings Officer believes that a compliance date of July 1, 2024 should afford the County sufficient time to complete its required work program.¹⁹

4. Should the Commission, as part of an enforcement order, issue a stay or temporary injunction on approvals of land use applications involving development within designated SNRs until the new ordinances are adopted pursuant to ORS 197.335(3)?

Petitioner argues that a stay is necessary to ensure that development is not approved on protected lands in violation of Goal 5 pending the County's adoption of Goal 5-compliant regulations. The County, predictably, argues that, notwithstanding the fact that its applicable Code provisions might be out of compliance with Goal 5, an enforcement order should not issue because it is already doing everything that an enforcement order would require of it. The County also contends that a stay is not necessary, at least in part because its "interim" measures are sufficient to ensure compliance with Goal 5. As discussed above, the County's "interim" measures are not adequate to bring the County's Goal 5 program into compliance with Goal 5.

¹⁸ When clarification was sought at the contested case hearing, the County indicated that that timeline would begin January of 2023.

¹⁹ To be clear, the "required" work program; *i.e.*, the work subject to the proposed enforcement order would only include the adoption of clear and objective approval criteria. The remainder of the County's current work program is entirely voluntary and not "necessary" to bring their Goal 5 program into compliance with Goal 5.

Pursuant to ORS 197.335(5), quoted in n. 17 above, where the Hearings Officer finds that it would be contrary to the public interest in the conservation or sound development of land to allow the continuation of processing applications, the Hearings Officer is required to “*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.*” Petitioner seeks such a stay here. The County counters that a stay is not necessary and would interfere with the County’s efforts to provide much needed housing. Petitioner responded by pointing out the limited acreage of lands designated Wildlife Habitat, approximately 300 acres, and the limited duration of the stay—18 months. According to Petitioner, the amount of acreage impacted by a stay and the relatively short duration will not significantly interfere with the County’s efforts at providing needed housing. The Hearings Official agrees with Petitioner that, on balance, the need to protect the significant resource from development outweighs the minimal impact the stay would have on the County’s efforts to provide needed housing.

The Hearings Officer finds that, because CDC 422-3.6 is the only regulation protecting the upland habitat, and because it is unenforceable because it is not clear and objective, the upland habitat is currently not being protected, as required by Goal 5. Accordingly, the County’s processing of housing applications in the area of the upland habitat with no protections is contrary to the public interest in the conservation and sound development of those lands. The Hearings Officer therefore recommends that the Commission order the County to cease processing housing applications for land use approvals on land designated Wildlife Habitat pending the County’s adoption of a compliant Goal 5 program.

RECOMMENDATION

Based on the preceding findings of fact and conclusions of law, the Hearings Officer recommends that the Commission issue an enforcement order pursuant to ORS 197.320(10) directing Washington County to amend its development code provisions, discussed above, which provide protections to the County’s Goal 5 designated significant natural resources.

Specifically, the Hearings Officer recommends the following:

- (1) Commission direct the County to amend its Code standards that apply to protection of the Wildlife Habitat Goal 5 resource so that they comply with ORS 197.307(4) on or before June 30, 2024; and
- (2) Commission order the County to limit its approval of land division and development applications to those applications that do not propose residential development on lands designated in the County's comprehensive plan and Goal 5 protection program as significant Wildlife Habitat until the County has adopted amended code standards that comply with ORS 197.307(4).
 - a. This limitation does not prohibit the County from approving residential land division and development applications on lands that partially consist of Wildlife Habitat if the application proposes no development on that portion of the application site designated Wildlife Habitat.
 - b. This limitation on approving such residential land divisions and development applications applies during the interim period starting from the date the Commission issues its order until the date the County adopts amended code standards, along with findings demonstrating compliance with ORS 197.307(4), regardless of whether any party petitions for review of the County's adoption to LUBA or other appellate body.



Anne C. Davies
Hearings Officer

March 14, 2023