



Oregon Natural Desert Association

By Email to planning@co.harney.or.us

January 6, 2010

Mr. David Arntz, Chair
Harney County Planning Commission
c/o Brandon McMullen, Harney County Planning Director
450 N. Buena Vista #11
Burns, OR 97720

Re: Revisions to Harney County Zoning Ordinance

Dear Commissioner Arntz, Mr. McMullen and Members of the Planning Commission:

Please accept the following comments and testimony of Parties of Interest Oregon Natural Desert Association (“ONDA”) and Audubon Society of Portland (“Audubon”) regarding the proposed revisions to the Harney County Zoning Ordinance. These comments are based on the January 2010 draft of the Zoning Ordinance Draft and Staff Report posted on the Harney County Planning Department website as of January 4, 2010.

Supplemental Zoning Criteria (Article 4.130)

ONDA and Audubon support the Planning Commission’s intention to include the supplemental zoning criteria from Comprehensive Plan (Appendix 2009) 8.3(5) in the revised Zoning Ordinance. This is consistent with the concerns expressed in the Comprehensive Plan of ensuring that use of agricultural land in Harney County not be “threatened by incompatible land uses adjoining or encroaching on their area.” Comprehensive Plan (Appendix 2009) 7.10.4. Non-farm uses are allowed only if “certain stringent requirements are met conforming to the provisions of ORS Chapter 215.” Comprehensive Plan (Appendix 2009) 7.10.4. To ensure that proposed non-farm uses comply with ORS Chapter 215, the Planning Commission has taken an important step of replicating the provisions in Comprehensive Plan (Appendix 2009) 8.3(5) in the revised Zoning Ordinance at Section 4.130.

The preamble of Section 4.130 and the context of these provisions in the prior Comprehensive Plan (now wholly retained as an Appendix in the 2009 Comprehensive Plan)

ONDA & Audubon Comments on Proposed Revisions to Zoning Ordinance – January 6, 2010

make it clear that the supplemental zoning criteria are meant to apply to proposed “uses” and place the burden of proof on the applicant – for example, stating that the criteria “shall be one of the factors for consideration and decision making on zoning and subdivision matters” and “[t]he applicant bears the burden of proof of these criteria and the Commission and/or Court must make specific findings that these criteria are met or not met.” Similarly, the requirements in proposed Section 4.130(A)-(B) that “the *proposed use* is in conformance with both the land use map and goals and policies of the ‘Harney County Comprehensive Plan’” and that “the *applicant* must make this case [that a public need exists for the proposed use] based on documentable public need evidence for this specific proposed land use activity” show that the criteria are intended to apply to the review of applications for specific uses that are potentially incompatible with the Zoning Ordinance and Comprehensive Plan.

Such applications for uses are typically Type III decisions, such as partitions which require modifications and/or adjustments to the minimum zoning criteria, conditional use permits, variances, and code interpretations or use determinations. Because the County Court decided to retain the prior Harney County Comprehensive Plan in its entirety, the provisions of the Comprehensive Plan Chapter 8.3(5) will apply in any event to conditional use permits, variances, and similar Type III zoning and subdivision matters. In addition, certain Type II decisions (such as the verification of nonconforming use) appear to fall within the intention of the supplemental zoning criteria to add an important layer of protection for the assigned zoned use of land, particularly farm and ranch land.

However, the last sentence of the preamble introduces an unnecessary ambiguity in this section. The Planning Commission should clarify expressly that the Supplemental Zoning Criteria apply to the Planning Commission’s Type III Decisions, and therefore that applications for uses that result in Type III Decisions (such as for conditional use permits or variances) must satisfy the supplemental zoning criteria in proposed Section 4.130.

In addition, certain Type IV Decisions, such as zone changes, annexations, and Comprehensive Plan amendments, often do not involve individual applicants, but nevertheless implicate some of the supplemental zoning criteria. In these situations, we recommend that the Planning Commission and/or County Court assume the obligation to ensure that the supplemental criteria are met. We recommend that the language of the preamble be updated to clarify how the supplemental criteria are to be met when there is no individual application.

Finally, to ensure consistent application of the supplemental zoning criteria in protecting authorized land uses and to conform to the requirements of ORS 215, the County Court’s review on appeals of Type III Decisions must ensure that the applicant has carried its burden of proving that the supplemental zoning criteria are met for the proposed use. Accordingly, the last sentence of the preamble needs to be changed to ensure that this is part of the County Court’s review. It appears that the intention of the last sentence, as written, is to provide that the applicant does not need to make a *separate* showing before the County Court – but it is nevertheless necessary that the County Court review, in an appeal, whether the applicant made the necessary showing that the supplemental criteria were met in the Planning Commission’s Type III Decision.

To address these concerns, we recommend replacing the last sentence of the preamble to Section 4.130 with the following:

The supplemental zoning criteria in this section must be met in Type III Decisions and Type IV Decisions described in Table 2 of Harney County Comprehensive Plan Chapter 2 (Harney County Decision-Making Processes). In Type IV Decisions that do not involve an individual applicant (such as a legislative annexation, Comprehensive Plan amendment or zone change), the Planning Commission and/or County Court must ensure that the supplemental zoning criteria are satisfied where the Type IV Decision affects specific land uses. In a Type IV Decision involving an appeal of a Type III Decision, County Court's review shall include whether the applicant has met the supplemental zoning criteria.

Outdoor Lighting Standards (Article 4.140)

ONDA and Audubon support the adoption of the provision to encourage mitigation of light pollution and a provision for adopting site-specific standards. However, we encourage the Planning Commission to use the opportunity of revising the Zoning Ordinance to adopt a county-wide standard for mitigating light pollution. Examples of lighting ordinances that could serve as models are available from the International Dark Sky Association's website at <http://www.darksky.org/mc/page.do?sitePageId=56442>.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Becker", with a long horizontal flourish extending to the right.

Dave Becker
Staff Attorney
Oregon Natural Desert Association
917 SW Oak Street, Suite 409
Portland, OR 97205
Of Attorneys for ONDA and Audubon