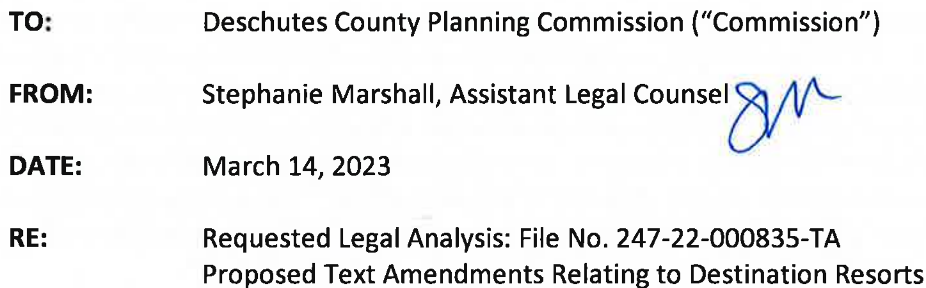
COUNTY LEGAL

MEMORANDUM



TO: Deschutes County Planning Commission ("Commission")

FROM: Stephanie Marshall, Assistant Legal Counsel

DATE: March 14, 2023

RE: Requested Legal Analysis: File No. 247-22-000835-TA
Proposed Text Amendments Relating to Destination Resorts

At the public hearing on the referenced proposed text amendment application on March 9, 2023, the Commission requested legal analysis to address several questions during a brief extended open record period. Below are Legal Counsel's responses to those questions to assist the Commission in its deliberations.

I. Conflict of Interest

DCC 2.52.090 Conflicts of Interest, states with respect to the Deschutes County Planning Commission:

> A member of the commission ***shall not participate*** in any commission proceeding or action in which any of the following have a ***direct, substantial financial interest***: the member or his or her spouse, brother, sister, child, parent, father-in-law, mother-in-law or any business which he or she is negotiating for or has an arrangement or understanding concerning prospective investment or employment. ***Any actual or potential interest shall be disclosed at the meeting of the commission where the matter is being considered***.

(emphasis added). The Planning Commission Policy and Procedures Manual (July 27, 2020) includes similar language:

> A member of the Planning Commission is a public official pursuant to ORS 244.020(15), and thereby must be mindful of actual and potential conflicts of interest.
>
> Generally, a member of the Planning Commission should not participate in any proceeding or action in which any of the following have a pecuniary benefit or detriment: the member, the member's spouse, parent, stepparent, child, sibling, stepsibling, son-in-law, or daughter-in-law; the member's spouse's parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law; any individual for whom the member has a legal support obligation or otherwise receives benefits arising from the member's employment; any business which the member or the aforementioned-listed relatives is associated. Any potential conflict of interest must be disclosed at the meeting of the Planning Commission where the matter is being considered.

Statutory definitions of "actual conflict of interest" and "potential conflict of interest" appear at ORS 244.020(1) and (13). A commissioner has an actual conflict if his or her participation and vote in the matter would result in "private pecuniary benefit or detriment" to the commissioner or relative. If a public official such as a county commissioner has

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an "actual conflict of interest," that official must declare the nature of the conflict and "refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue. However, if the "public official's vote is necessary to meet a requirement of a minimum number of votes to take official action" Be eligible to vote but not discuss or debate the issue. ORS 244.120(2)(b)(B). In other words, even in cases where there is an actual conflict of interest, a commissioner may nonetheless vote on the proposal if necessary to meet a quorum.

The Oregon Land Use Board of Appeals has considered the question of conflict of interest and bias in numerous decisions. In *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009), LUBA determined that a county commissioner's wife's testimony and the county commissioner's attendance at a planning commission hearing had no bearing on the question of whether the commissioner's participation in the matter would result in a private pecuniary benefit or detriment to the county commissioner. It stated, "The county commissioner's ownership of nearby property and a residence that is 1.2 miles away from the subject property, without more, is not sufficient to establish an actual conflict of interest." Citing *ODOT v. City of Mosier*, 36 Or LUBA 666, 680 (1999). "Based on the record in this appeal, the county commissioner's ownership of nearby property is at most a potential conflict of interest. A public official such as a county commissioner, when faced with a potential conflict of interest, is required to "announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official." The county commissioner announced the circumstances that petitioner believes leads to a conflict of interest, and petitioner does not challenge the adequacy of that disclosure."

"As we have explained on many occasions, local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias." *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 141-44, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Halverson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001). "Local decision makers are only expected to (1) put whatever bias they may have to the side when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process." *Catholic Diocese of Baker, supra*.

"Given the nature of land use contested case hearings and the role played by public officials, LUBA does not lightly infer bias. The county commissioner's attendance at a planning commission hearing in this matter with his wife who opposed the application falls far short of the evidence that LUBA has required to support an allegation of bias." *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007); *Friends of Jacksonville*, 42 Or LUBA at 141-44; Halvorson-Mason Corp., 39 Or LUBA at 711. "In all of those cases, ***there was evidence of a strong emotional commitment by a decision maker to approve or to defeat an application for land use approval***. There simply is no such evidence in this case." *Catholic Diocese of Baker, supra* (emphasis added).

Assistant Legal Counsel Marshall observes that, as of the date of this memorandum, the record does not include any evidence that one or more members of the Commission have a direct, substantial financial interest with respect to the proposed text amendment under consideration.[1] Two members of the Commission disclosed potential conflicts of interest on the record[2] at the commencement of the February 23, 2023 hearing in compliance with DCC 2.52.090 and the Policy and Procedures Manual. Commissioner Cyrus's disclosure indicated that he would put aside any potential conflict of interest and participate in the proceedings in a neutral manner. There has been no objection to the adequacy of disclosures.

Absent any evidence of an actual conflict of interest, such as a showing of a direct, substantial financial interest of any Commissioner in the outcome of the Commission's proceedings on the proposed text amendment, the Commission does not err in continuing to deliberations and a vote with currently participating Commissioners. Any Commissioner may, at any time, reconsider his or her decision to continue participating in consideration of the proposal before the

[1] Objections to participation in the hearing, deliberations and vote on the proposed text amendments are included in the record.
[2]One Commissioner elected to recuse himself from all proceedings; one Commissioner has participated in the hearing. The matter has not been deliberated and no vote on a recommendation to the Board of County Commissioners has occurred as of the date of this memorandum.

Commission takes action. LUBA case law reflects the difficulty of local public officials participating in decision-making on matters that may have some impact on such officials and confirms that an inference of bias, without more, is not lightly made. County Legal Counsel opines that, on the basis of the record to date, applicable statutes, Code and policy provisions have been followed such that no procedural error has occurred.

II. M56 Notice

Assistant Legal Counsel Marshall reviewed the M56 Notice prepared by staff to confirm that the form and contents of the M56 Notice complies with ORS 215.503 requirements prior to dissemination of the M56 Notice to affected property owners. The record includes a copy of the M56 Notice and the mailing list, which sets forth all property owners to which the M56 Notice was mailed.

Measure 56 was intended to increase citizen participation in the decision-making process by providing advance, individual, written notice of proposed changes in local land use law to property owners affected by the changes before changes to allowed land uses under those laws can take effect. Official Voters' Pamphlet, General Election, November 3, 1998.
Cossins v. Josephine Cnty. (Or. LUBA 2018)

A challenge has been made to the manner of staff's providing notice of the proposed text amendments under ORS 215.503(4) which requires, in relevant part, "***a written individual notice*** of land use change ***to be mailed to the owner of each lot or parcel of property*** that the ordinance proposes to rezone." (emphasis added). Assistant Legal Counsel understands that a single M56 Notice was provided to the address of a property owner that owns multiple properties, all of which could be affected by the proposed text amendment. Staff confirmed at the March 9, 2023 hearing that multiple copies of the M56 Notice were not mailed to the same mailing address where a property owner owns more than one lot or parcel affected by the proposal.

The question is whether singular notice is legally deficient and, if so, whether the Commission may proceed to deliberations and a vote to recommend approval or denial by the Board of County Commissioners. Another question is whether the public should have access to additional public information prepared by staff to verify that notices were sent to all affected property owners, identified by tax number. This would essentially require a cross-check between the maps and the mailing list.

There is no statutory requirement under ORS 215.503 and/or ORS 215.223 to prepare separate, individual M56 notices that specifically identify the affected property by tax lot/parcel number in order to aid a property owner that owns more than one lot or parcel in Deschutes County in determining which (or all) of their properties are affected. The required information for a M56 Notice is set forth generally in ORS 215.503. County staff included all required information per statute. There is also no statutory requirement to include in the record a listing of affected lots or parcels, cross-checked between maps and the mailing list.[3]

The statutory notice required in ORS 215.503(5) broadly requires preparation of a single M56 notice regarding a proposed ordinance for broadcast mailing to the owners of all properties affected. As required by statute, the County's M56 Notice directs a property owner to inspect the proposed ordinance and to call the planning department to obtain additional information.

An argument *could* be made that the single M56 notice to Mr. Katzaroff's client did not comply with ORS 215.503(4). However, as previously noted, multiple mailings to the same listed address of the property owner does not inform such owner as to which lot or parcel is affected; nor does the statute require that level of detail in a M56 Notice.

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[3] In the past, Destination Resort Map Amendments and the South County LWI, contained exhibit maps that allowed a property owner to determine on their own whether they were affected by the proposal.

There appears to be no dispute that all of the lots/parcels owned by Mr. Katzaroff's client are similarly situated and will be affected in the same way by the proposed text amendment. Mr. Katzaroff's client did, in fact, receive a M56 Notice, even if he did not receive multiple copies of the same Notice commensurate with the number of lots/parcels he owns.

There must be a showing that a property owner's substantial rights were prejudiced by the County's alleged failure to mail multiple copies of the M56 Notice to a property owner who owns more than one lot or parcel affected by the proposal. For a "procedural error" to be reversible by LUBA, it must "[prejudice] the substantial rights of the petitioner." ORS 197.835(9)(a)(B). LUBA has held that a local government's failure to provide notice of hearing required by local legislation constitutes a procedural error and could only provide a basis for reversal or remand if a petitioner's substantial rights were prejudiced by that failure. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146, 151 n.3 (1994); *Apalategui v. Washington County*, 14 Or LUBA 261, 267, *rev'd in part on other grounds*, 80 Or App 508, 723 P2d 1021 (1986). In *Lee v. City of Portland*, 57 Or App 798, 806, 646 P2d 662 (1982), the Court of Appeals explained that failure to provide required "notice of any action affecting the livability of the neighborhood" to a neighborhood association as required by city code provides no basis for remand where the neighborhood association fails "to demonstrate any prejudice resulting from the alleged notice violation." *Homebuilders Association of Metropolitan Portland v. City of Portland*, 37 Or LUBA 797 (2000).

Here, there is no allegation that any property owner to which notice is required did not receive a M56 Notice in advance of the first public hearing on the proposed text amendment. While multiple, individual copies of M56 Notices were not mailed to property owners that own more than one lot or parcel affected, there is no showing of substantial prejudice resulting from receipt of only one M56 Notice. This is particularly so given that the statutory form of a M56 Notice does not require specification of the individual propert(ies) potentially affected. Where a property owner owns multiple lots or parcels, that owner must take additional steps as directed in the Notice to obtain specific information. The County has complied with the intent of M56 Notices and there is no prejudice for failure to provide additional, individual notices to a single property owner that owns multiple affected parcels.

III. Legality of the Proposed Text Amendments

At the March 9, 2023 hearing, testimony was presented and comments and questions were presented about "bringing the County into compliance with state law," and whether the County could consider text amendments that reduce options for development of destination resorts on properties that have been mapped with a destination resort overlay.

Assistant Legal Counsel Marshall notes that the legality of the proposed text amendments which affect the type of destination resorts that may be proposed without a corresponding map amendment, if adopted, is a matter of first impression.

A. County's Compliance with ORS 197.455(1) DR Siting Criteria

The applicable statute, ORS 197.455(1), was originally adopted by the Oregon Legislature in 1987. Deschutes County adopted a DR overlay map in 1992 and amended it in 2008.[4] All mapped areas were approved by DLCD as consistent with state law. The County followed required statutory procedures and mapped the DR overlay in compliance with ORS 197.455(1), considering the on-the-ground conditions at the time.

In *Gould v. Deschutes County*, ___ Or LUBA ___ (June 16, 2022), LUBA rejected an argument that a property mapped with DR overlay in the County (Thornburgh) was nonetheless ineligible for destination resort siting because it is within 24 air miles of the City of Bend's UGB which now has a population of more than 100,000. It stated:

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[4]Until 2003, Oregon counties could not alter their destination resort maps. That year, the state Legislature passed a law allowing counties to remap destination resort zones. The state requires counties to adopt a process for remapping, and they must wait at least 30 months between updates.

> *Limitations on resort siting in ORS 197.455(1) apply at the time that a county adopts maps identifying lands eligible for siting destination resorts. **After a county has adopted such maps, the limitations in ORS 197.455(1) do not apply to specific applications for destination resorts**. Instead, the adopted maps control whether a specific property is eligible for destination resort siting.*

(emphasis added). The proposed text amendments are not required for the County to comply with ORS 197.455(1).

B. Text Amendments vs. Map Amendment

One concern expressed at the public hearing and in written comments is that the proposal is a map amendment in "text amendment" clothing. However, the applicant does not seek to preclude a destination resort from being sited in any area that has been mapped with DR overlay and thus, is not proposing a map amendment. The proposed text amendments would curtail the residential uses within a new proposed DR to those necessary for the staff and management of the resort.

The applicant is not proposing to amend the County's destination resort overlay zone map. The siting requirements in the definition of "Destination Resort" in DCC 18.04.030 are not proposed to change. Only the range of residential uses that may potentially be included in a proposed new destination resort would change if the application is approved by the Board of County Commissioners. If the proposed text amendments are adopted, any destination resort proposed within an area mapped with DR overlay could only be approved if (among other things) a housing component is limited to serve employees of the resort. Nearly all such mapped lands are within 24 air miles of a UGB boundary that includes more than 100,000 in population.

The proposed text amendments would incorporate the siting criteria in ORS 197.455(1), which were properly applied by the County when it adopted the DR overlay map, and require them to be applicable through amended code provisions given the current-day circumstances. Without the text amendments, any person with property within the DR overlay of an appropriate size theoretically could apply to develop a destination resort with no limitations on housing uses.

The proposed amendments are not clear as to whether they would be limited to new destination resorts, or if they would similarly apply to expansion of existing resorts. If the Commission votes to recommend approval of the application, it could also consider recommending an amendment to the proposed text to include limiting language.

C. Comprehensive Plan Policies

The current Deschutes County Comprehensive Plan was last updated in 2011. Chapter 3.9 addresses Destination Resort Policies. Among other things, the Background section of this Chapter states:

> In order to allow destination resorts within the county, ***Goal 8 requires that Deschutes County adopt a map showing which lands are available for destination resort development***. The purpose of the map is to provide greater certainty concerning destination resort siting than is available under the exceptions process. To protect forest and farm resources, Goal 8 prescribes that certain classes of lands are off limits to destination resort development. ***The final map must reflect exclusion of such areas***. However, although a property is mapped as eligible for a destination resort, a destination resort may not be permitted outright in that location. In order to be approved, a proposal for a resort must be processed as a conditional use and must comply with the specific standards and criteria established by the county for destination resorts.

(emphasis added). Note again that no amendments to the County's destination resort map are proposed. The County's DR overlay map has been reviewed by DLCD and found in compliance. Moreover, there is no state law, nor any reported decision that requires a county to update DR mapping pursuant to Goal 8 when "on the ground" conditions change, such as population increase within a city UGB. Nonetheless, that is not what is proposed here.

The applicant cited several policies of the Comprehensive Plan and argues that, without the proposed text amendments, the County Code will be inconsistent with the Plan.

The County Comprehensive Plan policies on which the applicant relies are Policy 3.9.1 and Policy 3.9.3. These state:

> **Policy 3.9.1** Destination resorts shall only be allowed within areas shown on the "Deschutes County Destination Resort Map" and when the resort complies with the requirements of Goal 8, ORS 197.435 to 197.467, and Deschutes County Code 18.113.
>
> **Policy 3.9.3** Mapping for destination resort siting
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> a. To assure that resort development does not conflict with the objectives of other Statewide Planning Goals, destination resorts shall pursuant to Goal 8 not be sited in Deschutes County in the following areas:
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> 1. Within 24 air miles of an urban growth boundary with an existing population of 100,000 or more unless residential uses are limited to those necessary for the staff and management of the resort;
> 2. On a site with 50 or more contiguous acres of unique or prime farm land identified and mapped by the Soil Conservation Service or within three miles of farm land within a High-Value Crop Area;
> 3. On predominantly Cubic Foot Site Class 1 or 2 forest lands which are not subject to an approved Goal exception;
> 4. On areas protected as Goal 5 resources in an acknowledged comprehensive plan where all conflicting uses have been prohibited to protect the Goal 5 resource;
> 5. Especially sensitive big game habitat, and as listed below, as generally mapped by the Oregon Department of Fish and Wildlife in July 1984 and
> as further refined through development of comprehensive plan provisions implementing this requirement.
>   i. Tumalo deer winter range;
>   ii. Portion of the Metolius deer winter range;
>   iii. Antelope winter range east of Bend near Horse Ridge and Millican;
> 6. Sites less than 160 acres.

Assistant Legal Counsel Marshall notes that Policy 3.9.1 broadly refers to the siting of destination resorts on those areas mapped with a DR overlay, and when the proposed resort complies with Goal 8, ORS 197.435 to 197.467 and DCC 18.113. Notably, the reference in this policy to a resort that complies with "ORS 197.435 to 197.467," includes within that range ORS 197.455(1)(a) which sets forth the limitation on destination resorts within 24 air miles of a UGB with a population of 100,000 or more. Counsel observes that this policy could be read to require the County to adopt new development regulations when the Bend UGB reaches 100,000, as it now has.

Policy 3.9.3, while more specifically requiring that destination resorts not be sited in Deschutes County "within 24 air miles of an urban growth boundary with an existing population of 100,000 or more unless residential uses are limited to those necessary for the staff and management of the resort," this policy expressly applies to "**Mapping for destination resort siting**." The proposed text amendments do not request any revision to the DR overlay maps. Therefore, it is arguable that this policy is not controlling. Notably, Policy 3.9.4 provides direction on "**Ordinance provisions**," and does not include any directive to the County to update its development regulations in the Code applicable to those areas mapped with a DR overlay when the Bend UGB population reaches 100,000.

Case law provides that a comprehensive plan has a controlling effect on land use planning and zoning controls. *Baker v. City of Milwaukee*, 271 Or 500, 514, 533 P2d 772 (1975), which ruled, in relevant part:

> *"Comprehensive Plan is the controlling land use planning instrument. City assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinance to it."*

See also *Fasano v. Washington Co. Comm.*, 264 Or. 574, 582, 507 P.2d 23, 27 (1973) ("The basic instrument for county or municipal land use planning is the `comprehensive plan.' * * * The plan has been described as a general plan to control and direct the use and development of property in a municipality. * * *"). ORS 197.835(8) requires LUBA to reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if the regulation is not in compliance with the comprehensive plan.

The Planning Commission must consider in its recommendation to the Board whether Policy 3.9.1 directs text amendments to the Code as proposed, or whether the County complied with Policy 3.9.3 at the time it adopted the DR overlay mapping such that no text amendment is required for consistency with the comprehensive plan, absent a proposed revision to the DR overlay maps.
In general, LUBA will defer to the Board's interpretation of comprehensive County plan policies and land use regulations pursuant to ORS 197.829(1), unless LUBA determines that such interpretation:

(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

E.g. Siporen v. City of Medford, 349 Or 247, 259, 243 P3d 776 (2010).

IV. Potential Liability of Deschutes County for M49 Claims

The County determined that the proposed text amendments under consideration constituted a "zoning change" for purposes of requiring M56 notice to affected landowners. Following passage of M56, the Oregon Department of Justice prepared a letter of advice to DLCD that opined that a local government "limits * * * land uses previously allowed in the affected zone" when it changes standards for uses presently allowed in the zone, and the change either physically restricts or constrains those uses, or narrows the circumstances under which the use may occur at all. ORS 215.503(9) provides that "property is rezoned" when the governing body of the county either (1) changes the base zoning classification of the property or (2) "[a]dopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone." *Murray v. Multnomah County*, LUBA No. 2007-191 (Or. LUBA 2008).

Because the proposed text amendments on their face, restrict the range or extent of permissible uses of the property, compared to existing County Code provisions, M56 notice was mailed to all owners of property within the DR overlay zone. The County's compliance with M56 notice requirements is discussed above. Accordingly, if the proposed text amendments are adopted, residential uses within new proposed destination resorts will be restricted and affected property owners may file a claim under M49. Such a claim must be filed with the County within five years of the date the text amendments are adopted. All claims must include an appraisal that follows the requirements in ORS 195.300-336.

The question is whether a property owner filing a M49 claim can establish that amendments to the DCC destination resort provisions reduce the fair market value of a property. A M49 claim seeks either compensation for loss in property value or a waiver from the new provision, "to the extent necessary to offset the reduction in the fair market value of the property."

Therefore, the County must be mindful of potential M49 claims when considering approval of the proposed text amendments. At this point, it is unclear whether the County would elect to waive the new restrictions in response to a supported M49 claim, which would then require the claimant to apply the preexisting regulations to a destination resort application.