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STAFF REPORT

March 9, 2018

To: Board of County Commissioners

From: Eric Walker, Principal Planner

CC: Jason Taylor, Apollo Land Holdings, LLC, Applicant (*via email*)
Michael Robinson, Applicant's Attorney (*via email*)
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Meriel Darzen, Appellant's Attorney (*via email*)
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RE: Remand #17-0237 of LUBA Opinion and Final Order
(Hood River Valley Residents Committee v. Hood River County – Dee Hotel)

Procedural History

On June 29, 2017, the Oregon Land Use Board of Appeals ("*LUBA*") issued an Opinion and Final Order (*#2017-014*) remanding the Board of Commissioners' ("*Board*") decision to approve, with conditions, a Commercial Land Use Permit Application (*File #15-0174*) filed by Apollo Land Holdings, LLC ("*Applicant*") to construct a 50 unit hotel on their property located at the former Dee Mill site.

On August 23, 2017, the applicant filed a written request asking the County to proceed with the application on remand, consistent with ORS 215.435. The application on remand involves the same proposal the County previously considered, although the applicant is requesting a *de novo* hearing in order to allow them the opportunity to modify their request by reducing the size of the hotel from 50 to 35 units. On February 22, 2018, notice of the Board's public hearing to consider the LUBA remand and the applicant's request was provided.

Scope of the Remand Hearing

Staff Findings/Recommendation:

Typically, public hearings before the Board, including remand hearings, are heard *on the record*, which means no new issues or evidence may be presented. However, as mentioned above, the applicant is requesting a *de novo* hearing in order to allow new evidence and testimony, but only as it relates to the proposed application change and the three assignments of sustained in the LUBA order (*as referenced in this staff report*). Given the limited scope of the material proposed and its relevance to the issues raised by LUBA, staff recommends that the Board accept the applicant's request for a *de novo* hearing.

Another item worth mentioning is the Board has the option to remand this appeal back to the Planning Commission to make a decision. However, staff recommends that the Board not remand the appeal in this case since the County only has until May 26, 2018 to make a final decision given the 120-day review clock provided under ORS 215.435. Given the strong likelihood of additional appeals regardless of the outcome, it is unlikely

that the matter could be sent back to the Planning Commission and then heard by the Board on appeal within the allotted timeframe.

Issues on LUBA Remand and Staff Recommendation

LUBA's remand Order #2017-014 included instructions for the County to address three assignments of error identified in their June 29, 2017 decision, which include the following:

1. **The Board must determine if a new reasons exception to Goal 14 is required in order to allow the proposed hotel.**

   Staff Findings/Recommendation:

   In making its initial decision, the Board concluded that the proposed hotel was an allowable use because commercial activities are listed in the County Zoning Ordinance as an outright permitted use in the County's Industrial (M-1) zone. The Board also concluded that the use was consistent with the exception taken for the Dee Mill site, as provided in the County Comprehensive Plan, because it had been acknowledged by the State in 1984 as consistent with all applicable statewide planning goals. Consequently, the Board concluded that the County's acknowledged Comprehensive Plan and Zoning Ordinance were controlling and that any changes to Goal 14, including limits on the intensity of certain commercial and industrial uses on rural lands resulting from the 1986 Oregon Supreme Court case known as "Curry County," did not need to be applied directly.

   However, LUBA determined that the Board erred in concluding that the County's M-1 zone had been acknowledged to comply with Goal 14. LUBA stated that the exception that was taken for the Dee Mill site, and acknowledged by the State, was actually limited to Goal 4 (*Forest Land*) and not Goal 14, and therefore the property remains "Rural Land." LUBA also found that the County Comprehensive Plan was not fully acknowledged until 1988 as a result of a 1000 Friends of Oregon appeal regarding Goal 5/Lava Beds, and that the Goal 14 portion of the plan was deferred to the cities of Hood River and Cascade Locks. As such, LUBA concluded that no urban uses may be allowed on the property without first taking an exception to Goal 14.

   As part of its decision (*footnote on Page 10*), LUBA references OAR 660-022-0030, which is the administrative rule concerning unincorporated communities. As part of this reference, LUBA points out that a "[m]otel and hotel, up to 35 units, if served by a community sewer system" is listed as an allowable use in one of the County's *rural* unincorporated community zones. LUBA states "[I]n our view, relevant context for determining whether the 50-unit hotel proposed in the present case is rural or urban use, for purposes of OAR 660-004-0018 and Goal 14, includes both OAR 660-022-0030 and the county's unincorporated community zone that allows hotels on rural land under limited circumstances." (Emphasis added.)

   In making this statement, LUBA appears to identify OAR 660-022-0030 in order to show that a 50 unit hotel would not likely be justified as a rural use since it exceeds the number of units that would be allowed in a rural unincorporated community. The idea being that the overall intensity of commercial and industrial development occurring on rural lands must not exceed what would be allowed within a recognized unincorporated community.

   In the past when addressing Goal 14 as it related to legislative code modifications or quasi-judicial land use applications, the County has taken the general position that the intensity of commercial and industrial uses proposed on rural lands must be somewhat less (*around 25 percent less*) than those that would otherwise be allowed within an unincorporated community (*urban or rural*). The County's approach is consistent with previous LUBA holdings and Oregon case law. Specifically, in *Friends of Yamhill County v. Yamhill County*, LUBA held that Goal 14 implicitly requires that the intensity of uses allowed on rural lands outside unincorporated communities be less than the maximum intensity allowed inside unincorporated communities. *See Friends of Yamhill County v. Yamhill County,* 49 Or LUBA 529 (2005). Notably, however, LUBA also held that building size "is not the only, and perhaps not even the best, approach to demonstrating whether uses allowed on rural lands outside unincorporated communities are consistent with Goal 14." Id. at 8 (citing

original opinion, *Friends of Yamhill County,* 47 Or LUBA at 170). LUBA went on to state that the "location of the proposed facility, its proximity to [urban growth boundaries], and its operational characteristics, particularly the population it is likely to serve," were all factors that could be considered. Id.

Similarly, the Oregon Supreme Court has declined to apply a bright line rule with regard to the line between urban and rural uses. In *1000 Friends of Oregon v. LCDC*, the Supreme Court accepted 1000 Friends' concession that "one house per ten acres is generally 'not an urban intensity,'" and also accepted LCDC's concession that "'half-acre residential lots to be served by community water and sewer' are 'urban type.'" *1000 Friends of Oregon v. LCDC (Curry County),* 301 Or 447 at 504-05, 724 P2d 268 (1986). Significantly, the Supreme Court noted that because LCDC had not seen fit to attempt to draw a bright line between urban and rural uses, the court would not attempt to do so either. Id.

Here, LUBA appears to be indicating in its decision that a 35 unit hotel could, arguably, be considered a rural use even though the subject property is located outside of an unincorporated community. *Friends of Yamhill County* supports this interpretation of LUBA's decision because there, LUBA held that building size "is not the only…approach to demonstrating whether uses allowed on rural lands outside of urban communities are consistent with Goal 14." However, as of writing this report the applicant has not provided any other factors or relevant information to reasonably justify allowing a hotel of the maximum size. Consequently, staff cannot recommend approval of their request for 35 units at this time. Instead, staff recommends that the Board either:

1. Maintain the County's current practice of limiting the size of industrial and commercial uses, including hotels, to approximately 25% of what is allowed in an unincorporated community. This would reduce the size of the hotel to 26 units or less; or

2. Approve some other number of units between 26 and 35 if the applicant can adequately identify other factors that the Board might be able to use to justify a larger sized hotel in this case.

Regardless of which option the Board decides to pursue, staff further recommends that, if this application is approved, an additional condition be implemented that limits the size of the hotel to whatever number of units the Board ultimately settles on.

2. The Board must determine if the proposed hotel is an allowed use given the M-1 zoning of the property and the original Dee Mill Exception.

Staff Findings/Recommendation:

Similar to the Goal 14 argument reference under item 1 above, the Board found as part of its initial decision that a new goal exception was not required to allow the proposed hotel because an exception had already occurred for the Dee Mill site as part of the County's original Comprehensive Plan. As part of this exception, the Board found that the State had recognized the County Comprehensive Plan as complying with all statewide planning requirements. The Board also concluded that the State had accepted the County's zoning designation of the property as M-1, as well as the County Zoning Ordinance, including Article 31 (*Industrial Zone*), which explicitly identified commercial uses as an outright use the M-1 zone.

In making its decision, LUBA disagreed with the Board's justification, finding instead that "the M-1 zone was not acknowledged to comply with Goal 14, and therefore the rules that apply to and restrict urban uses on rural land apply" to the application. LUBA also found that just because an exception was taken to one goal, in this case Goal 4, it does not automatically mean that the exception applies to other goals, such as Goal 14. LUBA concluded as part of its decision (*page 11*) that the County must determine if the proposed hotel is: (a) "A rural use that will maintain the land as Rural Land" and (b) Consistent with all other applicable goal requirements."

In response to this assignment of error, the attorney representing the applicant suggests as part of his February 22, 2018 letter that the Board can simply find that it has deference in interpreting its own ordinance based on the Oregon Supreme Court case of *Siporen v. City of Medford* (2010). In that case, the Court determined that "a legislative body's interpretation of its own enactment will be deferred to if the interpretation is plausible." However, this interpretation appears to be at odds with LUBA's decision, which already rejected this argument. LUBA states in its decision (*page 15*) that "we conclude that the County's interpretation of the Dee Mill Exception and the M-1 zoning as authorizing the propose hotel use is contrary to the exception statutes and the rule that implements the exception statutes of OAR 660-004-0018." LUBA goes on to say that it "is not required to affirm a county interpretation of an exception that is contrary to the exception statutes and LCDC's implementing rules." What staff believes LUBA is saying is that the Board cannot just rely on its own interpretation in this case, but must also give due consideration to applicable State statutes and rules, including, in this case, Goal 14. Although, staff agrees that a reduction in the hotel's size from 50 to 35 or fewer units may adequately address Goal 14 issues, the applicant has still not addressed the exception statutes and LCDC rules per OAR 660-004-0018(2)(b)(A) – (C) and (3), as explicitly required by LUBA (*pages 20 and 25*). Until this is done, staff cannot conclude that the proposed hotel, whether 50 units, 35 units, or fewer is an allowed use in the M-1 zone.

The appellant expands upon the above issue somewhat by identifying at least two statements from LUBA's decision concerning the issue of whether or not the Dee Mill Exception actually authorizes a hotel to be established on the subject property at all. The appellant states that the applicant must explain "how the M-1 zone allows the hotel, but also how the hotel (or any hotel) is allowed by the exception." Staff agrees that the applicant must more thoroughly explain how the proposed hotel is consistent with the Dee Mill Exception, which was justified primarily based on the industrial use of the site at the time; however, staff does not accept the appellant's assertion that just because a hotel is not explicitly authorized in the original exception that a hotel cannot be permitted, especially in light of LUBA's conclusion concerning this issue found on page 20 of their decision. Here, LUBA states "OAR 660-004-0018(3) makes reasonably clear that a proposed different use of land from the use for which an exception was originally taken may be 'approved' [but] only if the proposed new use is consistent with maintaining the exception area as 'rural land,' pursuant to OAR 660-004-0018(2)(b)." Among other things, this OAR requires findings that demonstrate the following:

(A) The rural uses, density, and public facilities and services will maintain the land as 'Rural Land'…

(B) The rural uses, density, and public facilities and services will not commit adjacent or nearby resource land to uses not allowed by the applicable goal…

(C) The rural uses, density, and public facilities and services are compatible with adjacent or nearby resource uses.

Based on LUBA's conclusion, staff finds that the appellant has misconstrued certain LUBA statements without giving due consideration to its conclusion, which appears to say that the County can potentially allow a commercial use in its M-1 zone even though the original exception was based on an industrial use, but only if the commercial use (*in this case a hotel*) maintains the exception area as Rural Land and if it can be demonstrated that the above exception language from OAR 660-004-0018(2)(b) are met.

Based on the above information, staff concludes that the applicant has not yet adequately demonstrated that the proposed 35-unit hotel is an allowed use in the County's M-1 zone.

3. The Board must determine if Goal 11 (*Public Facilities and Services*) is violated by the proposed use?

Staff Findings/Recommendation:

As provided under OAR 660-011-0060, Goal 11 restricts public sewer systems to be established or extended outside of an urban growth boundary or unincorporated community without an exception. OAR 660-011-0060(1)(f) defines a sewer system as "a system that serves more than one lot or parcel." The Board's decision

did not address Goal 11 because no community sewer system was proposed. Instead, the application involved a single septic system located on the same parcel as the proposed hotel, which is allowed under Goal 11.

In making its decision, LUBA did not conclude that an error had occurred on his issue, but did request that the County determine whether or not the sewer system proposed to accommodate the hotel is consistent with Goal 11.

Staff finds that the Board's initial decision to allow a hotel that utilizes a private septic system that is located on the same parcel as the proposed hotel does not violate Goal 11. This conclusion is based on the fact that the proposed sewer system will be a private system operated by the property owner for only the hotel and, potentially, other permitted uses occurring on the subject property. With an additional condition precluding the proposed septic system from being used to serve any use occurring on another parcel, staff finds that the requirements of Goal 11 will be met.

Staff Conclusion:

Based on the above findings of fact and conclusions of law, staff recommends that the Board not approve the amended application until and/or unless the applicant can be adequately demonstrate compliance with LUBA's decision, including the requirements of OAR 660-004-0018(2)(b).

If the Board decides after considering additional findings that the applicant has adequately addressed the outstanding LUBA requirements addressed above and decides to approve the application, staff recommends that the final decision contain the original conditions included as part of the Board's February 1, 2017 decision, together with the following new additional conditions:

- The size of the proposed hotel shall be limited to __ units or less. (*The ultimate number of units allowed shall be based on whatever number the Board decides represents an appropriate sized rural hotel*).

- The septic system proposed to serve the hotel shall not serve any other use(s) located on an adjacent parcel.