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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

June 20, 2017

Senator Peter Courtney
President of the Senate
900 Court Street NE S201
Salem OR 97301

Re: Senate Bill 432-11 amendments and compliance with rules adopted by the Land Conservation and Development Commission

Dear President Courtney:

You asked whether the Senate Bill 432-11 amendments require compliance with rules adopted by the Land Conservation and Development Commission (commission) for the purpose of protecting the greater sage grouse. We conclude that the applicable provisions of the SB 432-11 amendments are sufficiently broad to require compliance with commission rules adopted for this purpose.

The Department of Land Conservation and Development and the commission have broad power to establish statewide land use planning goals and to ensure that local governments adopt comprehensive plans and land use regulations that comply with the goals.¹ The commission implements statewide land use planning goals through administrative rulemaking.² In 1973, the Legislative Assembly statutorily authorized local governments to exercise land use planning responsibilities to establish, modify and enforce comprehensive plans or regional framework plans that comply with Oregon's statewide land use planning goals.³ These plans have to be consistent with statutes and with the land use planning goals and other rules adopted by the commission.⁴

A comprehensive plan and land use regulations adopted by a local government in compliance with the statewide land use planning goals operate to replace the goals as the applicable body of standards for a local government's land use decisions after the local government's comprehensive plan and land use regulations are acknowledged to comply with the goals.⁵ Therefore, when a local government makes

¹ ORS 197.225, 197.230, 197.235; *Oregonians in Action v. LCDC*, 121 Or. App. 497, 500-502 (1993).

² ORS 197.040.

³ Chapter 80, Oregon Laws 1973; ORS 197.175.

⁴ ORS 197.225.

⁵ This is the process that is in place, though as the court noted, local "legislation that complies *facially* with the statewide requirements can be interpreted in ways that are inconsistent with state law." *Oregonians in*

land use decision, it does not apply the statewide land use planning goals directly, but applies the goals indirectly via the local government's acknowledged comprehensive plan and land use regulations.

Section 2 of SB 432-11 permits a county with a population less than 50,000 that did not experience population growth between the 2000 and 2010 federal decennial censuses to adopt an exception to any statewide land use planning goal using an expedited procedure. However, section 2 (6) creates an exception to this provision, stating that a county meeting the above description "may not adopt an exception to a statewide land use planning goal relating to natural resources adopted for the purpose of implementing the Oregon Sage-Grouse Action Plan and Executive Order adopted on September 16, 2015."

The statewide land use planning goal relating to natural resources is Goal 5, which is implemented as a series of administrative rules, including procedures and requirements to protect the greater sage grouse as prescribed by the Oregon Sage-Grouse Action Plan and Executive Order (order).⁶ Goal 5 establishes a procedure by which local governments must review and approve or deny applications for development of areas containing greater sage grouse habitat to avoid, minimize or provide compensatory mitigation for the impacts of the development on the area.⁷

Section 2 (6) of the SB 432-11 amendments prohibits a county to which the subsection applies from adopting an exception to the rules contained in Goal 5 that the commission adopted for the purpose of implementing the order. Because statewide land use planning goals are implemented as rules, the provisions of section 2 (6) are sufficiently broad to require these counties to comply with commission rules relating to greater sage grouse protection.

We note that section 2 (6) specifically references the statewide land use planning goal relating to natural resources adopted to implement the order dated September 16, 2015. This means the exception applies only to commission rules adopted to implement the provisions contained in the order on September 16, 2015. While the commission has the discretion to amend Goal 5 as it determines necessary to implement the land use laws of the state, the exception provided in section 2 (6) does not extend to rules adopted to protect the greater sage grouse pursuant to a Goal 5 amendment.⁸ Put differently, if the commission were to amend a provision of Goal 5 relating to greater sage grouse protection in the future, a county described in section 2 (1) would be authorized adopt an exception to that amended provision.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used

Action, 121 Or. App. at 502, quoting *Cope v. City of Cannon Beach*, 115 Or. App. 11, 18 (1992). (Emphasis in original.)

⁶ OAR 660-023-0000, 660-023-0115; Oregon Sage-Grouse Action Plan and Executive Order 15-18 (September 16, 2015).

⁷ OAR 660-023-0115.

⁸ ORS 197.040, 197.225.

as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

A handwritten signature in black ink, appearing to read 'D.A. Johnson', with a long horizontal flourish extending to the right.

By
Emily M. Maass
Deputy Legislative Counsel