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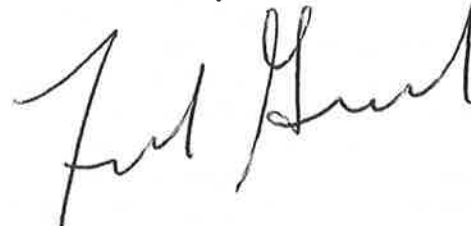


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STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

July 5, 2017

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

From the desk of:  


Re: Senate Bill 644-B and compliance with rules adopted by the Land Conservation and Development Commission

Dear President Courtney:

You asked whether the B-engrossed version of Senate Bill 644 requires compliance with rules adopted by the Land Conservation and Development Commission for the purpose of protecting the greater sage grouse. We conclude that the applicable provisions of SB 644-B unambiguously require compliance with commission rules adopted for this purpose.

The Department of Land Conservation and Development and the commission have broad power to adopt administrative rules to implement the land use laws of the state.<sup>1</sup> 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, which the commission implements as administrative rules.<sup>2</sup> The commission is required by statute to ensure that these plans comply with statute and rules adopted by the commission.<sup>3</sup>

A comprehensive plan and land use regulations adopted by a local government in compliance with commission rules operate to replace the rules as the applicable body of standards for a local government's land use decisions after the commission acknowledges the local government's comprehensive plan and land use regulations.<sup>4</sup> Therefore, when a local government makes a land use decision, it does not apply the rules directly, but applies the rules indirectly via the local government's acknowledged comprehensive plan and land use regulations.

Section 1 (3) of SB 644-B provides that county approval of a land use permit for mining operations for a significant mineral resource on land zoned for exclusive farm use that is located in Baker, Grant, Harney, Lake, Malheur, Union or Wallowa County is not subject to any statewide land use planning goal or any administrative rule relating to land use. However, subsection (4) requires the county to deny such an application if the county determines that the use will conflict with commission rules relating to greater sage grouse protection:

<sup>1</sup> ORS 197.040.

<sup>2</sup> Chapter 80, Oregon Laws 1973; ORS 197.175.

<sup>3</sup> ORS 197.225.

<sup>4</sup> 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 Action v. Land Conservation and Development Commission*, 121 Or. App. 497, 502 (1993), quoting *Cope v. City of Cannon Beach*, 115 Or. App. 11, 18 (1992). (Emphasis in original.)

(4) A county shall deny an application for a land use permit described in subsection (3) of this section if the county determines that the use will conflict with an administrative rule adopted for the purpose of implementing the Oregon Sage-Grouse Action Plan and Executive Order 15-18.

The Oregon Sage-Grouse Action Plan and Executive Order 15-18 prescribes requirements to protect the greater sage grouse.<sup>5</sup> The commission implements these requirements through a series of rules that establish a procedure by which local governments must review and approve or deny applications for development of areas containing greater sage grouse habitat. The rules require applicants to avoid, minimize or provide compensatory mitigation for the impacts of the development on the area.<sup>6</sup> Section 1 (4) of SB 644-B requires these counties to deny a permit application that is not otherwise subject to administrative rules relating to land use if the county determines that the use conflicts with the rules adopted to implement the order.

We note that section 1 (4) specifically references the administrative rules 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 its administrative rules as it determines necessary to implement the land use laws of the state,<sup>7</sup> the exception provided in section 1 (4) does not extend to rules adopted to protect the greater sage grouse pursuant to such an amendment. Put differently, if the commission were to amend an administrative rule relating to greater sage grouse protection in the future, a county described in section 1 (3) would not be required to deny an application for a use that conflicts with 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 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,

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Legislative Counsel



By  
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Deputy Legislative Counsel

<sup>5</sup> OAR 660-023-0000; 660-023-0115; Oregon Sage-Grouse Action Plan and Executive Order 15-18 (September 16, 2015).

<sup>6</sup> OAR 660-023-0115.

<sup>7</sup> ORS 197.040, 197.255