# MEMORANDUM

TO: Clackamas County Planning Commission

FROM: Glen Hamburg, Senior Planner
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DATE: June 21, 2022

RE: June 27, 2022, Study Session on ZDO-283, *FY 2022 Minor and Time-Sensitive Comprehensive Plan and ZDO Amendments*

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## I – BACKGROUND

The adopted Long-Range Planning Work Program for 2021-2023 includes a project titled "Minor and Time-Sensitive ZDO Amendments", an effort intended to make relatively minor changes annually to the Comprehensive Plan and Zoning and Development Ordinance (ZDO) that are necessary to comply with state and federal mandates, clarify existing language, correct errors, and adopt optional provisions that require only minimal analysis. The last package of such "minor amendments" was Ordinance ZDO-280, which was adopted by the Board of County Commissioners (BCC) in September 2021.

This memo summarizes issues that members of the BCC and Staff suggest be considered in this year's package of "minor amendments". Staff intend to formally introduce text amendments as Ordinance ZDO-283 later this year and are seeking guidance from the Planning Commission on the scope and details of those prospective amendments before they are drafted.

## II – OPTIONS FOR CONSIDERATION

Amendments are being considered to address the following 17 optional measures in the ZDO-283 amendments package:

1. **Modify the ZDO's definition of "lot of record":**
   There are various ways to refer to a unit of land, depending on the purpose for the reference. For example, a "tax lot" is a unit of land with boundaries established by the tax assessor for their various tax assessment-related purposes. The ZDO, however, generally uses the term "lot of record" to refer to a unit of land for development purposes. The boundaries of a tax lot do not necessarily correspond to the boundaries of a lot of record; in other words, a unit of land defined for tax assessment purposes may not be separately developable according to the ZDO.

   In order to determine whether a property (e.g., a given tax lot) is separately developable according to the ZDO, or whether it can be divided or have its boundaries adjusted, it is

necessary to determine whether the property is a separate lot of record. A "lot of record" is currently defined in ZDO Section 202, *Definitions*, as:

> *A lot, parcel, other unit of land, or combination thereof, that conformed to all zoning and Subdivision Ordinance requirements and applicable Comprehensive Plan provisions, in effect on the date when a recorded separate deed or contract creating the lot, parcel or unit of land was signed by the parties to the deed or contract; except:*
>
> 1. *Contiguous lots under the same ownership when initially zoned shall be combined when any of these lots, parcels or units of land did not satisfy the lot size requirements of the initial zoning district, excluding lots in a recorded plat.*
>
> 2. *A unit of land created solely to establish a separate tax account, or for mortgage purposes, that does not conform to all zoning and Subdivision Ordinance requirements and applicable Comprehensive Plan provisions, in effect on the date when a recorded separate deed, tax account or contract creating it was signed by the parties to the deed or contract, unless it is sold under the foreclosure provisions of ORS Chapter 88.*

Determining whether a given unit of land meets this definition often requires a significant amount of research involving a review and documentation of the full ownership and zoning history of the subject property and adjacent properties, as well as an interpretation of old deed records and land use decisions. Prospective development can be on hold for an extended period of time until the lot of record status is determined.

Moreover, the County's existing lot of record definition treats some properties differently depending on who owned them, and how they were described on deed records, decades ago. For example, under the current definition:

- If two contiguous lots were owned by the same singular person on the date those properties were first zoned, and if one of those two lots was smaller than that initial zone's minimum lot size, they would be consolidated as one lot of record, even if they have always been described on separate deeds;

- Conversely, if the same two contiguous lots were under separate ownership at initial zoning, they would not be consolidated and would be considered separate lots of record, even if one of the lots was undersized at initial zoning. "Separate ownership" could mean: the two lots were owned by separate unrelated parties; one of the lots was owned by one spouse and the other owned by the other spouse; or even one person owning one of the lots on their own while owning the other lot together with their spouse or anyone else.

Consolidation of separately deeded properties for lot-of-record-purposes limits development potential. Consolidation based on past ownership history may also be

considered unfair. In addition, in some cases, it is not completely clear what the minimum lot size was at first zoning or County records from that era are incomplete regarding the precise date of first zoning.

Local jurisdictions have some authority to define for their own purposes what they consider to be a lot of record, and many other jurisdictions do not include a lot consolidation provision similar to Clackamas County's.

Staff recommends considering amendments to the lot of record definition that would no longer require the consolidation of contiguous properties that, while separately deeded, were under common ownership at initial zoning, even if one of the separately deeded and lawfully created lots was smaller than the minimum lot size of the initial zoning applied to the property. Such amendments could afford more uniform development rights that aren't based on who owned the property in the past, sometimes half a century ago. In many cases, it would also make the process of determining a property's lot of record status more efficient, as it would reduce the need to review the ownership history of adjacent properties. As part of considering this policy change, it should be noted that, due to the property-specific nature of the lot of record definition, it will not be feasible to determine, or even to estimate, the number of additional developable lots of record that would result from an amendment.

In amending the lot of record definition, staff also proposes to "sunset" an existing provision that establishes as a lot of record a unit of land sold under foreclosure provisions of ORS Chapter 88, as staff have not identified authority under state law to have such a provision, particularly where it would override state-mandated minimum lot sizes.

Furthermore, staff proposes to make certain non-substantive clarifications to the lot of record definition, such as a clarification that a platted lot is a lot of record under the current definition.

2. **Align the County's requirements for forest template dwellings with the minimum requirements under state law:**
   The Ag/Forest (AG/F) and Timber (TBR) Districts are the two zoning districts that implement the Comprehensive Plan's Forest land use plan designation. Residential development in the AG/F and TBR Districts is restricted and generally requires approval of a land use permit application showing that criteria for the limited opportunities for residential development are/can be satisfied.

   One of the pathways for approval of a forest land dwelling application is through the "template test" methodology in ZDO Section 406, *Timber District (TBR)*. Broadly, the template test considers the amount of parcelization and residential development that existed in a 160-acre rectangular area centered on the subject property on January 1, 1993; if there were enough separate lots of record and lots of record with dwellings within the area on that date, the subject property itself can potentially qualify for a dwelling. The number of lots and lots with dwellings within that 160-acre "template" area

that are needed to qualify is based on the subject property's soil productivity, with a minimum number established by state law.

The County's requirements for template dwellings exceed the minimums required by state law. For example:

- For a template dwelling on a property with soils capable of producing 50-85 cubic feet per acre per year of wood fiber, ORS 215.750(2)(b) only requires there to be **three** lots of record in the template area with a dwelling on them on January 1, 1993, yet the County requires **four** such lots of record;
- For a property with soils capable of producing more than 85 cubic feet per acre per year of wood fiber, ORS 215.750(2)(c) only requires there to be **three** lots of record in the template area with a dwelling on them on January 1, 1993, yet the County requires **five** such lots of record; and
- The County does not currently allow lots of record larger than 80 acres, nor dwellings on lots of record larger than 80 acres, to count toward the minimum within the template area required to qualify the subject property for a dwelling, but state law allows such lots and dwellings to count if the County so chooses.

This issue was raised to the Board by the representative of a forestland property owner, and staff committed to bring this forward for consideration of conforming the County's requirements for template dwellings to the minimum requirements under state law.

3. **Allow public restrooms in the Rural Tourist Commercial (RTC) District as a conditional use:**
The RTC District, which applies in areas of the Mt. Hood Corridor (e.g., in Wemme/Welches, Rhododendron, and Government Camp), does not expressly allow for public restroom facilities that are not accessory and incidental to some other permitted land use. As part of discussions occurring with the Government Camp community, Oregon Solutions, and the Board, staff committed to bring forward the consideration of an allowance for "stand alone" public restroom facilities that are not necessarily accessory and incidental to another permitted land use, but which nonetheless may help to support local tourism.

Staff recommends considering an allowance in ZDO Section 513, *Rural Tourist Commercial (RTC) and Rural Commercial (RC) Districts*, for public restrooms in the RTC District as a conditional use. Conditional uses require a public hearing and consideration of factors such as the characteristics of the subject property, potential impacts on the surrounding area, and consistency with existing goals and policies of the Comprehensive Plan.

4. **Streamline administrative processes and eliminate application requirements for construction management plans (CMP), without changing standards**
Broadly, a CMP is a plan to ensure construction activities associated with proposed development will not impact certain protected areas. A CMP must include specified erosion prevention and sediment control measures and must be approved prior to

development on any property with a Habitat Conservation Area (HCA) or Water Quality Resource Area (WQRA) overlay, even if the development is not within those overlays. A CMP requires approval of an application addressing only clear and objective criteria, and therefore the existing application process does not include public notice or opportunity for appeal.

Staff believes that the existing criteria for approval of a CMP could be reviewed, and conditions applied, to the same kinds of development, as part of building permit review and without the need for a formal for-cost land use application. Staff proposes to amend the ZDO, including Section 1307, *Procedures*, to no longer require the application. This proposal would not change the current review process, with notice, that applies to development within an HCA or WQRA.

5. **No longer require an application for HCA map verification when a developer chooses to concur with adopted HCA maps**
   For development or a land division of a property with an HCA overlay, the boundaries of the HCA must be verified though a separate land use application. The County has official maps of the HCA, which can be contested or refined through the verification process. However, the ZDO currently requires HCA map verification even when an applicant for development or a land division concurs with the County's official maps, despite the fact that there are no approval criteria to apply.

   Staff recommends no longer requiring an application for HCA map verification when a developer chooses to concur with the adopted HCA maps. This proposal would not change the current review process, with notice, that applies to development within an HCA or WQRA.

6. **Explore ways to allow for consolidated applications for development within both an HCA and a WQRA in order to streamline administrative processes and eliminate costs associated with multiple separate applications, without changing standards or criteria**
   Existing ZDO provisions can require multiple separate applications for the same development if the development is both in an HCA and a WQRA. Staff are interested in amendments that would allow for such development to only need one land use application, without changing the applicable standards or criteria.

7. **Allow a duplex on a two-acre property zoned RA-1 without a conditional use permit:**
   The RA-1 District is a rural residential zoning district that, outside of the Portland Metropolitan Urban Growth Boundary (UGB), generally has a one-acre minimum lot size requirement for newly-created lots. The RA-1 District allows as a primary use one detached single-family dwelling or manufactured dwelling per lot of record, including newly created one-acre lots. It also allows, as a conditional use, the development of a duplex on a lot of record that is at least two acres in area. Essentially this means that a property owner is able to develop a single duplex on a two-acre lot or divide that lot into two one-acre lots, each of which can be developed with one single-family dwelling.

Despite the fact that there is no increase in density beyond what would be permitted on two, one-acre lots, the conditional use permit process required of a duplex includes a mandatory pre-application conference and a public hearing, and the conditional use permit application is costly. Staff proposes to allow a duplex on a lot of record zoned RA-1 as a primary use (i.e., to allow it "outright"), provided the lot of record is at least two acres in area. The duplex would still need to meet existing lot line setback requirements and be connected to necessary utilities, water, and wastewater services.

8. **Extend the nonconforming use discontinuance period from 12 to 24 months:**
   A nonconforming use is the use of any structure or land that was lawful when the use was originally established, but is now prohibited under current regulations. Both state and County laws protect these "legacy" land uses by allowing them to continue despite not generally being permitted by current regulations, provided the use was never interrupted or abandoned since it became prohibited.

   ORS 215.130(10)(b) allows the County to establish its own criteria for determining when a nonconforming use in our jurisdiction has been "interrupted or abandoned". Currently, the County considers a nonconforming use to be interrupted if it has discontinued for 12 consecutive months, except in certain circumstances for nonconforming surface mines and nonconforming uses lost to particular wildfires, where state law establishes the discontinuance standard.

   Staff have heard from members of the public that the 12-month discontinuance period is too short, particularly when the law does not consider the reasons for the discontinuance (again, except for certain nonconforming surface mines and uses lost to wildfire). A nonconforming business, for example, is at risk of being considered "discontinued" if it is unable to operate for 12 consecutive months, even if the reasons it cannot operate are because of a public health emergency, hiring difficulties, or supply chain issues.

   It may be worth extending the discontinuance period from 12 to 24 months, particularly in conjunction with Action 9 below.

9. **Align the nonconforming use discontinuance period with the implementation period for approved nonconforming use alterations:**
   An existing nonconforming use can be altered, subject to certain existing standards, criteria, and application procedures. A nonconforming restaurant in a residential zone, for example, can potentially be altered to a florist shop, provided the alteration is approved in a Type II application that shows the existing nonconforming use being altered (the restaurant) is lawful and that the proposed alteration (the florist shop) will have no greater adverse impact on the neighborhood.

   Nonconforming use alteration requires verification that the use being altered is lawfully nonconforming, which in turn requires a showing that the existing nonconforming use has never been discontinued for 12 consecutive months. ZDO Subsection 1206.08(A) gives an applicant four years to implement an approved alteration. "Implemented" means

all major development permits needed for the development are obtained and maintained, or if no major development permits are required, implemented means all other necessary County development permits (e.g., grading permit, building permit for an accessory structure) are obtained and maintained.

This existing four-year implementation period for an alteration is longer than the 12-month discontinuance period, and the ZDO is ambiguous as to whether an approved alteration can still be implemented if the nonconforming use being altered has already discontinued for 12 months. This ambiguity can imply a need for applicants to get additional – and costly – determinations by the County that their existing, previously-verified nonconforming use has *still* not discontinued for 12 consecutive months before the four-year implementation period for an approved alteration expires. Making the discontinuance period and the implementation period the same would resolve these issues.

Staff observes that two years is typically enough time for applicants to implement an approved nonconforming use alteration. The County also already allows one two-year time extension on approved alterations and, if the approved alteration is still not implemented within the time extension period, an applicant can re-apply for new alteration approval. Therefore, Staff supports proposing a reduction in the implementation period for approved alterations from four years to two years, but only if the discontinuance period is also extended from 12 months (one year) to 24 months (two years), as proposed in Action 8 above.

10. **Explore ways to reduce the number of circumstances when a nonconforming use alteration application is required:**
Nonconforming use alteration applications have a fee and typically take about two months to process when including a required 20-day public notice period. An application for nonconforming use alteration is required whenever someone proposes changes to a nonconforming use that exceed general maintenance. This existing process may be overly burdensome when the proposed alteration would almost certainly have no greater adverse impact on the neighborhood than the existing nonconforming use, such as when the owner of a lawful single-family dwelling in a zone that doesn't generally allow such uses (e.g., a medium density residential zone) proposes a detached accessory shed for personal storage.

It may be beneficial to amend the ZDO in order to identify certain types of new uses and development as allowed in order to avoid the need for nonconforming use alteration approval. Staff proposes to offer amendments that would expressly identify the following as permitted uses:

- Existing single-family dwellings in medium- and high-density residential zones and urban industrial zones that were constructed prior to a certain date; and
- Uses and structures customarily accessory and incidental to existing and lawfully-established dwellings.

11. **Repeal requirements that silos, towers, and other specialized storage or processing structures in the Business Park (BP) and Light Industrial (LI) Districts be fully enclosed:**
    Currently, silos, towers, and other specialized storage or processing structures are prohibited in the BP and LI Districts, unless they are enclosed in a building that complies with certain aesthetic standards or are approved as part of a conditional use.

    Staff has heard from prospective developers and business operators that this requirement is overly burdensome, and the requirement may not be necessary for these zoning districts. Staff suggests considering amendments to ZDO Section 1005, *Site and Building Design*, to allow these structures without being enclosed in a building and without approval of a conditional use permit.

12. **Expressly allow accessory buildings/uses on separate but contiguous lots of record under the same ownership:**
    The ZDO generally allows for buildings and land uses that are subordinate and clearly incidental to that of a permitted main building or use (i.e., the primary use) on the same lot. An example of an accessory building/use could be a utility shed accessory to a lawful single-family dwelling on the same lot. However, the ZDO is ambiguous as to whether the same "lot" means a "lot of record" or some other unit of land. Moreover, some lots of record, such as those that were platted in the early twentieth century, are practically too small to include both the accessory building/use and the primary use to which it is accessory while also complying with lot line setback requirements and other standards. Staff proposes to expressly allow accessory buildings/uses on separate lots of record that are contiguous to the lot of record with the associated primary use, provided the lots of record are under common ownership.

13. **Waive lot line setback requirements for lot lines separating lots of record under common ownership, under limited circumstances:**
    The ZDO requires all structures to observe certain minimum setback distances from lot lines, even when the lot line separates two properties owned by the same party/parties. Staff proposes to allow a primary use structure (e.g., a dwelling in a residential zone) to cross a lot line separating lots of record under common ownership. Staff also proposes to *not* require accessory structures (e.g., a shed) to be set back any specific distance from lot lines separating lots of record under common ownership, provided the adjacent lot of record is developed with the primary use to which the structure is accessory.

14. **Reduce the lot line setback requirements for smaller accessory structures, such as well houses, detached A/C units, and utility cabinets:**
    A "structure" is defined in the ZDO as "anything constructed or erected, which requires location on the ground or attached to something having a location on the ground". All structures generally need to meet certain minimum lot line setback requirements, and in many zones, including rural residential and natural resource zones, those setbacks are the same regardless of the structure's size, purpose, or necessity. The existing setback requirements can make it difficult to site certain structures, such as a well house, which may need to be located within the setback area to serve their function. While it is possible

to get approval of a variance to setback requirements, the variance application process can be burdensome and requires the applicant to demonstrate their variance request is consistent with subjective approval criteria.
The existing side and rear setback requirements for detached accessory structures in urban low density residential zones are based on the area and height of the structure, as shown in the table below:

| | **Building Height** | | | |
|---|---|---|---|---|
| **Building Area** | ≤ 8 feet | > 8 feet and ≤ 10 feet | > 10 feet and ≤ 15 feet | > 15 feet |
| ≤ 100 square feet | None | 3 feet side and rear | 5 feet side and rear | 5 feet side, 10 feet rear |
| > 100 square feet and ≤ 200 square feet | 3 feet side and rear | 3 feet side and rear | 5 feet side and rear | 5 feet side, 10 feet rear |
| > 200 square feet and ≤ to 500 square feet | 5 feet side and rear | 5 feet side and rear | 5 feet side and rear | 5 feet side, 10 feet rear |
| > 500 square feet | 5 feet side; 10 feet rear | 5 feet side; 10 feet rear | 5 feet side, 10 feet rear | 5 feet side, 10 feet rear |

Staff recommends considering whether detached accessory structures in other zones should be allowed to have reduced lot line setback requirements so they may be permitted without the need for a variance application. The reduction could be based on the size of the structure, as is the case for accessory structures in urban low density residential zones, or even based on the function of the accessory structure.

**15. Reduce the number of pages automatically mailed with a notice of decision on that application:**

The ZDO requires that a copy of the written decisions on Type II land use applications be mailed to owners of property within a specified distance of the subject property. In some cases, the mailing list can include hundreds of separate parties and with the length of some decisions running upwards of 20 pages, these mailings require significant resources for staffing, materials, and postage, and the procedure may not result in public awareness commensurate with those resources. For Hearings Officer decisions, the ZDO requires that a copy of the written decision be mailed to anyone who provided oral or written testimony State law requires a notice of decision with certain information be mailed but does not require mailing of a full copy of the decision.

Staff is looking to propose ways to minimize the resources dedicated to decision notices, without reducing the public's opportunity to learn about proposed development or exercise their appeal rights. One suggestion may be to send a single-page mailer with a link or QR code to the decision that is already available online, rather than sending a full paper copy of the decision. The mailer could also include instructions on how to obtain a paper copy if that's preferred.

16. **Expand allowances for who can initiate an application for a project in a public road right-of-way or public utility easement, and specify when a property owner's signature is and is not needed for a land use application in a public road right-of-way or public utility easement:**
    The ZDO generally requires that Type I, II, and III land use permit applications be initiated by the owner or contract purchaser of the subject property, or by the agent of the owner or contract purchaser. The ZDO also requires that such applications be signed by the owner, contract purchaser, or agent. These requirements can be burdensome for larger-scale projects that span extensive distances, such as public utility lines in road rights-of-way wherein numerous individual parties may "own" the land already within dedicated public right-of-way or recorded easement.

    Other jurisdictions, such as Deschutes and Multnomah Counties and the City of Eugene, have exceptions from their standard application initiation and signature requirements for public and government agencies, particularly those that have the power of eminent domain. Staff suggests considering whether to similarly allow land use permit applications to be initiated by a public agency, and perhaps also entities with operations similar to public utilities such as cable or broadband providers, for projects entirely within existing public right-of-way or an existing public utility easement, without the signatures of "underlying" property owners.

17. **Expressly allow electronic signatures:**
    Staff proposes to amend the ZDO to expressly state that electronic signatures are an acceptable alternative to traditional signatures on application forms.

## III – CLARIFICATIONS & CORRECTIONS

Staff have so far identified the following eight categories of clarifications and corrections to the Comprehensive Plan and/or ZDO that warrant being addressed with ZDO-283:

1. **Clarify that "lot coverage" does not apply to architectural features:**
   Certain zones have maximum lot coverage standards. "Lot coverage" is defined as "the area of a lot covered by a building or buildings expressed as a percentage of the total lot area", and a "building" is defined as "any structure used or intended for supporting or sheltering any use or occupancy". Staff proposes to codify in the lot coverage definition an existing policy that expressly excludes the areas covered by architectural features from lot coverage. "Architectural features" include, but are not limited to, cornices, canopies, sunshades, gutters, chimneys, fireplaces, flues, and eaves, and do not include any portion of a structure built for the support, occupancy, shelter, or enclosure of persons or property of any kind.

2. **Clarify existing regulations and policies related to nonconforming uses:**
   ZDO Section 1206, *Nonconforming Uses and Vested Rights*, has standards, criteria, and procedures under which a nonconforming use may be continued, restored, replaced, maintained, altered, changed, and verified. Staff proposes to: reorganize without

substantively changing some of Section 1206's provisions to have a more logical and understandable flow; clarify distinctions between alterations, changes, restorations, replacements, and re-establishment; and clarify the approval period for nonconforming uses that are approved for restoration or replacement.

3. **Clarify that a "sidewalk" includes a concrete pedestrian facility along not just a public road but also along a private road**

4. **Codify existing state laws related to outdoor mass gatherings in natural resource zones and existing notification requirements for renewable energy facilities**

5. **Clarify that a recreational vehicle (RV) is considered a dwelling when permitted as a temporary dwelling**

6. **Identify that replats in a natural resource zone that do not create additional lots of record are already subject to certain state regulations necessitating a Type II application process**

7. **Make the terminology used in the ZDO to reference setback areas more consistent**

8. **Correct and update citations, clarify other existing terms and requirements, and fix typos**

## IV – NEXT STEPS

Staff will take the direction from the Planning Commission and discuss that direction with the Board of County Commissioners during a July 13 policy session. Following that, staff will prepare necessary legislative text amendments in anticipation of holding public hearings in the fall of 2022 if staffing levels permit.

## LINKS

- Long-Range Planning Work Program for 2021-2023
- Oregon Revised Statutes (ORS) Chapter 215, *County Planning; Zoning; Housing Codes*
- ZDO Section 202, *Definitions*
- ZDO Section 406, *Timber District (TBR)*
- ZDO Section 513, *Rural Tourist Commercial (RTC) and Rural Commercial (RC) Districts*
- ZDO Section 1005, *Site and Building Design*
- ZDO Section 1206, *Nonconforming Uses and Vested Rights*
- ZDO Section 1307, *Procedures*
- Mt. Hood Corridor Zoning Map (including areas zoned RTC)
- Non-Urban Area Zoning Map (including areas zoned AG/F, RA-1, and TBR)
- North Urban Area Zoning Map (including areas zoned BP and LI)