

MEMORANDUM

TO: Heather Hansen, Clatsop County Community Development Director

FROM: Christopher D. Crean, Special Counsel *cdc*

SUBJECT: Setback Requirements from Line of Non-Aquatic Vegetation

DATE: October 3, 2014

******Confidential Attorney-Client Privileged Communication******

In the course of the proceedings on the Francis and Walsh variance applications, as well as other unrelated projects, it has become clear that there is not a clear understanding among County staff and residents regarding how to interpret and apply the setback standard for non-aquatic vegetation. Because essentially the same provision is found in the development standards for multiple zones throughout the County, the issue can be expected to arise on a frequent basis. The purpose of this memorandum is to provide a legal analysis of the provision to assist County staff establish a uniform method for reviewing effected land use applications. In so doing, we review the phrase as it would be reviewed by a court under the applicable legal standards.

Background

In addition to other setback requirements, the Clatsop County Land and Water Development Ordinance (“LWDUO”) requires structures to be setback either 35 or 50 feet “from the line of non-aquatic vegetation.”¹ The term “non-aquatic” is not self-explanatory, in part because the term “aquatic” is not defined. Moreover, “non-aquatic” vegetation could be interpreted to include most of the county where there is not an aquatic resource. For these reasons, staff is required to interpret the phrase for each land use application that proposes development in one of the zones that is subject to the setback requirement and to apply it on a case-by-case basis. Because of a concern that this may lead to inconsistent decision-making, I am providing this legal analysis of the term.

¹ An abbreviated list includes the Arch Cape RCR zone, 3.068(15); Miles Crossing RCR zone, LWDUO 3.080(11); Knappa Svenson RCR zone, 3.096(7); Rural Community Commercial RCC zone, 3.262(4)(D); Residential Agriculture RA-2 zone, 3.208(10). Other examples of setback requirements include setbacks measured from the property line, public right-of-way or oceanfront.

Legal Standard

Oregon Courts review a local ordinance provision under the same standards the courts use to review a statute. *Maxwell v. Lane County*, 178 Or. App. 210 (2001) citing *Eduardo v. Clatsop Community Resource*, 168 Or. App. 383, 387 (2000). The purpose of the court's review is to determine the intent of the legislature when it enacted the provision. *State v. Gaines*, 346 Or. 160 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or. 606 (1993); ORS 174.010. When determining the meaning of a statute or local code provision, a court will look first at the text of the provision in context, including related code provisions and judicial decisions, and take into account any relevant legislative history. *Gaines* at 171-72. If the meaning of the provision is not clear after this first step, the court will rely on relevant doctrines of statutory construction. *Gaines* at 172. Finally, because the local governing body is in the best position to know what it intended when it enacted the provision, a court will defer to the local government's interpretation of its own code, provided the interpretation is "plausible." *Siporen v. City of Medford*, 349 Or. 247 (2010)("[W]hen a governing body is responsible for enacting an ordinance, it may be assumed to have a better understanding than LUBA or the courts of its intended meaning."); *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or. App. 543 (2012).²

Analysis

As noted above, the County's development standards in multiple zoning areas requires a structure to be setback a certain distance "from the line of non-aquatic vegetation." Neither the term "non-aquatic vegetation" nor the phrase "the line of non-aquatic vegetation" is defined in the LWDUO. As such, interpreting their meaning requires the County to look at the terms within the context in which they are used, including related code provisions in the LWDUO and County Comprehensive Plan.

1. Clatsop County Comprehensive Plan

The County Comprehensive Plan is the overall planning document for the County and is implemented by the LWDUO. The Comprehensive Plan includes a number of area plans, including the Northeast Community Plan. In a discussion of the County's goals for "Estuary Wetlands, Coastal Shorelands and Water Bodies," the Northeast Community Plan defines "aquatic areas" as:

AQUATIC AREAS. Aquatic areas include the tidal waters and wetlands of the estuary and non-tidal sloughs, streams, lakes and wetlands within the shoreland planning boundary. The upper limit of aquatic areas is the line of non-aquatic vegetation or, where such a line cannot be accurately determined, Mean Higher High Water (MHHW) in tidal areas or Ordinary High Water (OHW) in non-tidal areas.

² Note, this deference only extends to the governing body itself, not a lower tribunal such as a planning commission or hearings officer.

According to this definition, there are two types of “aquatic areas”: 1) tidal waters and wetlands of the Columbia River estuary; and 2) non-tidal sloughs, streams, lakes and wetlands that are “*within the shorelands planning boundary.*” The modifier “within the shorelands planning boundary” is significant because it limits non-tidal aquatic areas to the listed natural areas when those areas are also located within a designated shorelands area boundary.

This definition of the “aquatic area” is then reiterated in Comprehensive Plan Chapter 16 and Chapter 17 (Columbia River Estuary Land and Water Use Plan). These chapters implement Statewide Land Use Planning Goals 16 (Estuarine Resources) and 17 (Coastal Shorelands). As used in Chapters 16 and 17:

Aquatic areas include the tidal waters, including subtidal areas and wetlands of the estuaries, and non-tidal sloughs, streams, and wetlands within the shorelands area boundary. The lands underlying the waters are also included. The upper limit of aquatic areas is the upper limit of aquatic vegetation or, where such a line cannot be accurately determined, Mean Higher High Water (MHHW) in tidal areas or Ordinary High Water (OHW) in non-tidal areas.³

Here again, the definition breaks “aquatic areas” into two distinct categories: 1) tidal areas; and 2) non-tidal areas. Within the tidal category, “aquatic areas” include tidal waters, subtidal waters and estuary wetlands. In the non-tidal category, “aquatic areas” includes sloughs, streams and wetlands *within the shorelands area boundary.* Immediately following the definition of “aquatic areas,” the Comprehensive Plan then sets forth an extensive definition of “Coastal Shorelands.”

Thus, as used in the County Comprehensive Plan, “aquatic areas” includes certain tidal areas and certain non-tidal areas that are within a coastal shorelands boundary.

2. The Land and Water Development Ordinance

As noted above, the LWDUO does not define either aquatic or non-aquatic vegetation. However, Section 1.030 defines “Aquatic Areas” as:

Aquatic areas include the tidal waters, including subtidal areas and wetlands of the estuaries, and non-tidal sloughs, streams, and wetlands within the shorelands area boundary. The lands underlying the waters are also included. The upper limit of aquatic areas is the upper limit of aquatic vegetation or, where such a line cannot be accurately determined, Mean Higher High Water (MHHW) in tidal areas or Ordinary High Water (OHW) in non-tidal areas.

³ Columbia River Estuary Land and Water Use Plan, p.3.

Because the definition of “aquatic areas” in the LWDUO is nearly identical to the definitions in the Northeast Community Plan and Comprehensive Plan Chapters 16 and 17, and because the LDWUO is intended to implement the Comprehensive Plan, we conclude that the term as used in the LDWUO is intended to have the same meaning as used in the Comprehensive Plan. In short, as used in the LWDUO, “aquatic areas” includes: 1) certain tidal areas; and 2) certain non-tidal areas that are located within a coastal shorelands boundary.

Finally, with respect to the meaning of the term “non-aquatic vegetation,” because the term is not defined, we assume for purposes of this analysis that aquatic vegetation grows in aquatic areas and non-aquatic vegetation grows in non-aquatic areas. In addition, based on the relative importance the Comprehensive Plan places on separately managing and protecting aquatic areas as defined in the Plan, we conclude that the setback requirement in the LWDUO is the method the County chose to implement these policies protections.⁴

With respect to the actual setback provision, in each example noted above (see footnote 1), the LDWUO requires: “The setback for all structures shall be [35 or 50] feet from the line of non-aquatic vegetation.” Because aquatic vegetation is associated with aquatic areas, the line between aquatic and non-aquatic vegetation will also be found within (or coterminous with the boundary of) the subject aquatic area. Using the definition of “aquatic area” as tidal areas or certain non-tidal areas within a coastal shoreland boundary, we conclude that the setback requirement applies to structures that are proposed in a tidal area or within the boundary of a designated coastal shoreland.

Conclusion

The LWDUO requires a proposed structure to be setback either 35 or 50 feet “from the line of non-aquatic vegetation.” Placing the text of the setback requirement within the context of the related Comprehensive Plan policies and definitions, we conclude that the Board of County Commissioners intended the requirement to apply to proposed structures in an “aquatic area” as defined by LWDUO 1.030. Note, however, the Board may exercise its discretion to adopt a different interpretation provided that it is “plausible,” in which case a reviewing court, including LUBA, will defer to the Board’s interpretation.

We are available to answer any questions you may have regarding this matter.

⁴ See Comprehensive Plan, Chapter 16 and 17 Element, Use and Area Designations, p. 5-7. We were not able in the time available to research the legislative history of the Chapter 16 and 17 Element or the Northeast Community Plan. Thus, our conclusions regarding the interpretation of the LWDUO text is based primarily on the text in the context of the related County policies and provisions.