



# Oregon

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Deschutes County Planning Commission  
c/o Nick Lelack, Community Development Director  
117 NW Lafayette Avenue  
Bend, Oregon 97701

SENT VIA E-MAIL

**RE:** HB 2229 question regarding scope of review

Deschutes County planning staff has requested the opinion of the Department of Land Conservation and Development (the department) on whether HB 2229 requires all, or most, farm- or forest-zoned lands in a county to be considered in a “reacknowledgment” process, or whether smaller, non-contiguous tracts could be considered as the first phase of a multi-phase reacknowledgment process.

County staff described several non-contiguous problem areas. The county stated that its goal was “for partially platted subdivisions zoned for EFU or Forest to be legislatively rezoned to MUA-10.” Department staff consulted with county staff on these areas, and studied maps of five of the areas and past county attempts to find solutions. The total acreage of these areas equals about 840 acres.

### Analysis

HB 2229 is memorialized at Chapter 873 Oregon Laws 2009. The relating clause “Relating to recommendations of the Oregon Task Force on Land Use Planning...” gives an indication that certain themes in the bill originated with “The Big Look.” A theme that wound through the Big Look was that land use laws should treat different regions of the state fairly, recognizing the geographical, ecological and cultural aspects of each region. Section 2(B) of HB 2229, for example, directs that the Land Conservation and Development Commission to “consider the variation in conditions and needs in different regions of the state and encourage regional approaches to resolve land use problems.”

For this discussion, section 5 of HB 2229 is applicable. A portion of section 5 is provided below.

**SECTION 5.** (1) For the purposes of correcting mapping errors made in the acknowledgment process and updating the designation of farmlands and forestlands for land use planning, a county may conduct a legislative review of lands in the county to determine whether the lands planned and zoned for farm use, forest use or mixed farm and forest use are consistent with the definitions of “agricultural lands” or “forest lands” in goals relating to agricultural lands or forestlands.

(2) A county may undertake the reacknowledgment process authorized by this section only if the Department of Land Conservation and Development approves a work plan, from the county, describing the expected scope of reacknowledgment. The department may condition approval of a work plan for reacknowledgment under this section to reflect the resources needed to complete the review required by sections 7 and 13 of this 2009 Act. The work plan of the county and the approval of the department are not final orders for purposes of review.

(3) A county that undertakes the reacknowledgment process authorized by this section shall provide an opportunity for all lands planned for farm use, forest use or mixed farm and forest use and all lands subject to an exception under ORS 197.732 to a goal relating to agricultural lands or forestlands to be included in the review.

This states that the county may undertake a “reacknowledgement” process by conducting a legislative review for the purpose of correcting mapping errors made during its original acknowledgment. Determining whether a proposal is a “legislative review” requires consideration of three questions:

1. Is the process bound to result in a decision?
2. Is the decision bound to apply preexisting criteria to concrete facts?
3. Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?

This is not a “bright line” test. The more definitively these questions are answered in the negative, the more likely the process is legislative. In this case, the answer to question 1 is clearly no. Regarding question 2, the project would be subject to existing criteria in (at least) Goals 3 and 4 and HB 2229; it is typical for goals and statutes to apply to local legislative decisions, however, so this is not determinative but it does lend additional weight to question 3. Regarding question 3, the department is uncomfortable determining that the county is proposing a legislative review when it includes only 840 acres in five areas. We don’t know the number of “persons” it would be directed at, but the number can’t be very large.

Section 5 states the review is of “lands in the county” and that the county must provide an opportunity for all lands in a resource zone to be provided an opportunity for consideration. While the phrase “lands in the county” is not entirely clear, the department’s understanding of the legislative intent is that the reference to “lands in the county,” when combined with the “legislative review” language, is that counties are not authorized to (1) set up a framework in the comprehensive plan and then require individual applications for re-designation of land or (2) pick and choose small areas to review. While we do not find that the county must review *all* land in the county, we would be most inclined to approve a work program that includes some major region defined by geographic characteristics rather than by property or subdivision boundaries.

Additionally, the county may not pre-determine specific areas for review, as subsection 5(3) requires the county to provide an opportunity for all farm and forest land to be considered. If the

county receives a request to review an area that is not included in the original proposal, the county must review it. As explained above, we believe that this area must be a geographic area of the county and not individual properties or subdivisions.

Regarding phasing of review, the department would entertain a work program that lays out the project in pieces, but those pieces should each address a substantial part of the county and address all the other requirements of HB 2229.

### **Additional Consideration**

Considering other aspects of HB 2229 not related to your question, the department has been unable to determine the nature and scope of the mapping error the county intends to address. It is not apparent why the areas the county has shared with the department were incorrectly zoned at acknowledgment, and this is a fundamental aspect of the bill. If the county chooses to move forward with a work program, the county will need to demonstrate that the HB 2229 process is an appropriate vehicle for addressing the county's needs.

### **Summary**

The department does not read HB 2229 to require the county review all farm and forest lands in the county under the provisions of section 5 of the law. On the other hand, we do not find that it permits the county to look only at small areas defined by existing subdivisions, but instead requires a review of a substantial part of the county.

We look forward to working with Deschutes County as it considers whether to submit a work program for a project to correct mapping errors in its rural zones under HB 2229. We hope this adequately answers your question, but we are available for further consultation if it does not.

Sincerely,



Rob Hallyburton  
Community Services Division Manager

cc: Scott Edelman, Regional Representative  
Jon Jinings, Community Services Specialist  
Michael Morrissey, Rural Policy Analyst