

UMATILLA COUNTY BOARD OF COMMISSIONERS
Meeting of Thursday, August 16, 2012 1:30 p.m.
Umatilla County Justice Center, Media Room
Pendleton, Oregon

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COMMISSIONERS PRESENT: Larry Givens (Chairman), Dennis Doherty, Bill Hansell.

COUNTY COUNSEL: Doug Olsen

STAFF: Tamra Mabbott, Gina Miller
Mike Robinson, attorney

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NOTE: THE FOLLOWING IS A SUMMARY OF THE MEETING. A RECORDING OF THE MEETING IS AVAILABLE AT THE PLANNING DEPARTMENT OFFICE.

CALL TO ORDER:

Chairman Givens called the hearing to order at 1:30 p.m. and read the opening statement.

NEW HEARING:

Update of Umatilla County Development Code, #T-12-046. Amendment to Conditional Use Section 152.616 (HHH) of the Umatilla County Development Code and establishing standards for an adjustment to the two (2) mile setback between wind turbine tower and rural residences. Applicant is Umatilla County. Applicable Criteria are found in UCDC Section 152.750-152.755 Amendments.

MINUTES:

Chairman Givens stated that the minutes from the June 7, 2012 hearing were ready to be adopted. Commissioner Hansell moved to adopt the minutes as presented and Commissioner Doherty seconded the motion. Motion carried 3:0.

Chairman Givens called for abstentions, conflicts of interest, or declaration of ex-parte` communications. Commissioner Doherty commented that he had communications with people on this matter, and Chairman Givens and Commissioner Hansell both stated that people have visited with them on this topic. The commissioners stated that they felt that they could make a fair decision in this matter. There were no objections to jurisdiction.

Staff Report: Mrs. Mabbott presented the staff report. She reviewed the packet sent to the Commissioners and the additional materials submitted since the last hearing. She advised that Mike Robinson would be acting as additional counsel to Umatilla County on this matter. Mrs. Mabbott explained that the Board also had findings and draft minutes from the Planning Commission to consider for this hearing. There was also information in their packets from the May 4, 2012 Work Session, where parties representing the

Planning Commission, wind developers, and property owners participated in a discussion. Mrs. Mabbott referred to a letter dated July 16, 2012 from Nicole Hughes, Element Power, which included suggestions for the language. The letter also suggested using the current language in the Development Code to identify replacement dwellings as part of this proposed setback adjustment language. Mrs. Mabbott stated that the Board had four new items to be included into the record; letters from Dana Perkins, Elaine Albrich, Bruce White representing Jim Hatley, and Rebecca Heise.

Commissioner Hansell moved to enter these four items into the record as Exhibit #1-4, and Commissioner Doherty seconded the motion. Motion carried 3:0.

Mr. Olsen suggested adding the 10 additional items in their packets as Exhibits #1-10, and making these four new items Exhibits #11-14.

Commissioner Hansell resubmitted his motion to amend the Exhibit #'s to 1-10 in the packets and the four new items as Exhibits #11-14, and Commissioner Doherty seconded the motion. Motion carried 3:0.

Commissioner Doherty asked Mrs. Mabbott to clarify the replacement dwelling definition in context, and asked if this would apply to any standing structure. Mrs. Mabbott read aloud the standards found in the Development Code; a structure must have intact exterior walls and roof, functional indoor plumbing in the form of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior electrical wiring and a heating system. Discussion followed on what constitutes a replacement dwelling. Mrs. Mabbott explained that occupancy is not a standard.

Commissioner Hansell asked for clarification on what options they had to consider at this hearing. Mr. Olsen explained the four options that he, Mr. Robinson and Mrs. Mabbott had drafted based on the results from the May 4th work session and the Planning Commission hearing on July 19th. The first option was to adopt the language drafted at the May 4th work session, the second option was to adopt the language recommended by the Planning Commission striking the "good faith" language, the third option was to include the rural residences for which an application had been submitted based on the date when a wind power application had been submitted, and the fourth option was to include existing rural residences that met the replacement dwelling standards and for rural residences not yet in existence for which a Zoning Permit had been issued before the wind power application submittal date. Commissioner Hansell asked to confirm that Mr. Robinson was suggesting Option #4 as the best recommendation for adoption.

Mr. Robinson stated that the only real difference between what was drafted at the May 4th work session and the Planning Commission hearing was the additional language defining a rural residence with the existing standards for a replacement dwelling. He stated that if the Board wanted to adopt Option #4, they just needed to decide what language they would adopt for the rural residence. Mr. Robinson stated that Option #4 seemed to capture the elements that most people were looking for in the proposed language. Commissioner Hansell said it would be helpful to hear from people testifying which

option they supported. Mr. Olsen stated that Option #4 had been posted on the website for nearly a week for review.

Mrs. Mabbott clarified that the language being recommended today was a result of the May 4th work session, with some changes to the definition of a rural residence. She summarized by saying that the Board had ordered the Planning Commission to develop standards and a process to grant an adjustment to the 2-mile setback distance from a wind turbine and a rural residence. Most of the letters received as additional materials and entered into the record were in support of Option #4.

Commissioner Doherty asked to address a letter that was submitted during the hearing from a courier representing Bruce White. He asked for the attachments to the letter to be entered into the record as Exhibit #13. Mr. Olsen clarified what the attachments were. Commissioner Hansell moved to amend Exhibit #13 to include the new attachments just submitted. Mr. Robinson asked how many attachments were included with the letter from Mr. White. Chairman Givens stated that there was a list of the attachments. Mrs. Mabbott clarified that the person who delivered the packet stated that the page listed as Exhibit #6 was not in the packet she had just submitted. Mr. Robinson stated that they needed to be clear on the record, in the event of an appeal to LUBA (Land Use Board of Appeals). Commissioner Hansell stated that his motion was to accept the attachments just delivered into the record as an amendment to Exhibit #13, as #1-5 and #7 as there was no #6 in the packet. Commissioner Doherty seconded the motion. Motion carried 3:0.

Public Testimony: Dave Price, 80488 Zerba Rd, Athena, Oregon. He was not at the Planning Commission hearing in July, but had listened to the audio record. He was bothered that even though Chairman Randall stated that testimony would be limited to the subject of the setback adjustments, many people still entered testimony about the 2-mile setback. He stated that this was inappropriate and should not be allowed into the record. He requested that the record be examined and have all testimony pertaining to the 2-mile setback removed. Mr. Price stated that he supports the setback adjustment process as proposed. He discussed several issues that concern him about the proposed process; the difference between a proposed project at the application stage versus the actual project as it is built, how the terrain limits development in many areas, and how in the future there will be less people in the project areas. Mr. Price also talked about the Department of Environmental Quality (DEQ) state noise standards and how they are ineffective as a standard. He felt that these issues needed to be addressed sooner rather than later. Mr. Price said that his next issue of concern was the definition of the rural residence. He stated that the problem would come with property owners who have the right to establish a dwelling but haven't built anything yet. He described two examples of how he had already seen this happen. He suggested a possible solution to this problem. Instead of using the "deemed complete" date, the wind developer could be asked to publish a public notice to notify land owners that the wind developer has intentions of submitting an application for a wind energy facility in the area. This would give land owners who had future intentions of developing a rural residence an opportunity to file their own application in time. To summarize, Mr. Price requested that

the record be examined, that the Board look for a way to deal with rural residences that could be built in the future and how to protect them, and he asked the Board to consider the notification suggestion he proposed.

Commissioner Hansell moved to accept Mr. Price's letter into the record as Exhibit #15, and Commissioner Doherty seconded the motion. Motion carried 3:0.

Commissioner Doherty asked for staff input on Mr. Price's suggestion of a public notice requirement during the pre-application stage. Mrs. Mabbott responded that this sounded like a good idea, but it was a new idea and would need to be first considered at the Planning Commission level to amend a different section of the code.

Chairman Givens asked staff to explain the timeline for acquiring a permit to build a rural residence. Mrs. Mabbott stated that if someone comes to the counter to apply for a replacement dwelling and the existing structure does not meet the replacement dwelling criteria, they do not get a permit. The only exception to this is if the existing dwelling is destroyed, the property owner has one year to apply for the replacement dwelling permit to retain the right to build.

Mrs. Mabbott responded to Mr. Price's concern about the record from the Planning Commission hearing. She stated that the Planning Commission tries to allow everyone the opportunity to speak, but only the applicable information is used in the findings. Chairman Givens asked about amending testimony that was already a part of the record. Mr. Robinson stated that anyone can speak during a public hearing, but it is up to the deciding body to weigh what is said when making a decision. It is not possible to strike testimony after the hearing is closed. That was a quasi-judicial hearing and people can say anything they want to. He also stated that the chair could limit testimony to the subject at hand.

Mr. Olsen responded to Mr. Price's concern and stated that if a wind turbine was built within the 2-mile setback, the developer would be in breach of the ordinance. They would have to either provide an adjustment or move the turbine. Commissioner Doherty asked about discussing the suggestion of a "pre-application" notice requirement, and Mr. Olsen explained that this was beyond the scope of the hearing today, but the Board could direct the Planning Commission to consider this suggestion at a later hearing.

Chairman Givens asked Mr. Price to clarify what he meant by the placement of future turbines in relationship to future rural residences. Mr. Price stated that he was referring to rural residences that were not in the project area during the application process, but because of the considerable difference between proposed and "as-built" wind projects, could possibly change.

Public Testimony: Debbie Kelley, 146 SW 11th Street, Milton-Freewater. Ms. Kelley stated that she was representing the Blue Mountain Alliance. She read her written statement aloud, and asked that it be entered into the record.

Commissioner Hansell moved to accept their written testimony into the record as Exhibit #16, and Commissioner Doherty seconded the motion. Motion carried 3:0. Commissioner Hansell asked Ms. Kelley what she thought of the other options. Ms. Kelley replied that they were not aware of the other options at their meeting and could not offer an opinion.

Public Testimony: Cindy Severe, 82422 Vansycle Rd, Helix, Oregon. Mrs. Severe read her written statement aloud, and asked that it be entered into the record.

Commissioner Hansell moved to enter Mrs. Severe's letter into the record as Exhibit #17, and Commissioner Doherty seconded the motion. Motion carried 3:0.

Commissioner Doherty commented that the Board should only be allowing testimony pertaining to the four options for the proposed adjustment options. Discussion followed on what should be and what should not be discussed during this hearing. Chairman Givens stated that testimony should be limited to the adjustment options language for the remainder of this hearing.

Mrs. Mabbott said that a courier from Mr. Bruce White had just delivered additional copies of the attachments submitted earlier. Mr. Olsen explained that these new documents would be considered Exhibit # 8 and Exhibit #9 for the record. Commissioner Hansell moved to amend the previous motion to accept Exhibit #8 and #9 into the record, and Commissioner Doherty seconded the motion. Motion carried 3:0.

Public Testimony: Greg Shannon, PO Box 400, Helix, Oregon. Mr. Shannon stated that he supported the 2-mile setback. Commissioner Givens advised that the Board was not taking testimony on the 2-mile setback, only the four options for an adjustment to the setback standard.

Mr. Olsen explained the procedure of what people should be providing testimony for at this hearing. This hearing was only for considering proposed language to establish an adjustment standard to the 2-mile setback, as remanded by the Board of Commissioners to the Planning Commission. The 2-mile setback standard was appealed to the Land Use Board of Appeals (LUBA), and LUBA required some additional findings from the Board. The additional findings were not appealed, so the 2-mile setback standard and findings were adopted and are currently in place. Mr. Shannon stated that he does not support any adjustments.

Public Testimony: Nicole Hughes, Element Power, Portland, Oregon. Ms. Hughes stated that she had submitted a letter on Stoel-Rives letterhead. Chairman Givens advised that her letter was Exhibit #15 in the record. She acknowledged the effort put into this process by the Board and citizens of the county. Ms. Hughes stated they support adopting the adjustment language with Option #4.

Public Testimony: Sara Parsons, 1125 NW Couch Street, Portland, Oregon. Ms. Parsons stated that she represented Iberdrola Renewables. Ms. Parsons stated that they have been involved in this process for a long time, and they support the adjustment provision. She stated that Option #4 resolves most of the concerns and issues identified at the May 4th work session. She explained micro-siting and corridors for a wind farm project. Ms. Parsons said that while they support Option #4 for the adjustment provision, they would still like to caution the county that by leaving the decision to landowners, this could be subject to challenge by LUBA. This could be construed as improper delegation of authority, as noted in their findings from the last appeal. A single land owner could stop a project from being built by not signing the adjustment application. This would preclude development in the county and this would not be consistent with the county Comprehensive Plan or the statewide planning goals.

Commissioner Hansell asked how a single land owner could preclude development. Ms. Parsons replied that the adjustment provision requires an application, signed by the landowner, to be submitted. This results in delegating authority to the land owners. Mr. Robinson stated that he disagreed with her statement. He said that state law requires that the property that is the subject of the permit application must have the signatures and consent of the property owners. Mr. Robinson stated that the issue LUBA had was with who makes the decision, not that an application has to be signed by the property owner. LUBA stated in their findings that the Board could not delegate its decision making authority to a property owner. Mr. Robinson cited a Supreme Court case that supported his interpretation. He said that it was very clear that the decision making authority remained with the county through this adjustment process. There was no third party involved in the decision process.

Commissioner Doherty commented on the procedural context of the adjustment application process and land owner consent. Mr. Robinson explained he would not characterize it as land owner consent, and that the code required that the adjustment application be submitted with the land owner's signature. Commissioner Doherty stated that the key to this was that the application for the adjustment could potentially be denied by the county. Mr. Robinson agreed and said that the decision stayed with the county and this satisfied the LUBA remand findings. Chairman Givens summarized the process by stating that the adjustment application, when signed by the land owner, was simply acknowledging that the project is within the 2-mile setback of their rural residence and they agree to that. The county would make the decision as to whether or not the adjustment was approved or not.

Public Testimony: Steve Corey, representing Cunningham Sheep Company. He stated that he was the secretary of the Cunningham Sheep Company, a tax paying land owner in Umatilla County. He stated that they may have wind projects on their land in the future. He asked if his letter from the May 4th work session was a part of the record. Mr. Olsen confirmed that his letter was in the record as Exhibit #9. Mr. Corey also said that his map from Iberdrola was not in the packet. Chairman Givens confirmed that the map was in the record as part of Exhibit #9. Mr. Corey stated that they support Option #4 as the best solution, giving them certainty for their wind projects. He also stated that they do

not agree with any of the options and do not believe that a rural residence should be able to deter wind development. He discussed why Options #1-3 would change the location of where a turbine could be placed. Option #4 was the closest to satisfying their needs, but they would like to see another option suggested. Mr. Corey commented that they did not believe that a consensus was reached at the May 4th work session, and was uncomfortable with this being discussed at the end of the work session.

Commissioner Doherty asked Mr. Corey if Option #4 did not include all the things that they wanted to see, and Mr. Corey agreed with this assessment. They wanted a way to identify certainty of placement for the developer's projects. Chairman Givens asked Mr. Corey if he thought that someone would take out a permit to build a home with no intention to build that home, just to stop the wind project development. Mr. Corey confirmed that he thought this could happen. He also commented on what constituted a valid replacement dwelling. Mrs. Mabbott clarified that a land use decision on resource land was valid for six (6) years. She commented that the language pertaining to what constituted a replacement dwelling was not included in the motion approved by the Planning Commission. A land use decision (LUD) or Conditional Use Permit (CUP) was approved first, and then a Zoning Permit (ZP) was required to submit a site plan for the proposed development.

Mr. Robinson discussed the "good faith" language that was drafted at the May 4th work session, and why it was developed. He compared the decision for a LUD as opposed to the site plan requirement for the Zoning Permit. He heard concerns from the developers about needing siting certainty and that was why he suggested using the Zoning Permit option. This option helps both developers and property owners with certainty.

Mrs. Severe asked for explanation on what the Board will be basing their decision on. Commissioner Doherty stated that the 2-mile setback has withstood appeal and was in place. The only thing that will be considered today are the four options pertaining to the adjustment to the 2-mile setback provision. They are dealing with setting up a process to establish standards for the setback adjustment.

Public Testimony: Elaine Albrich, representing Stoel-Rives. 900 SW 5th Suite 2600, Portland, Oregon. Ms. Albrich said that she had not intended to testify at this hearing, but decided to after hearing some of the comments made earlier. She discussed what components should be going into the decision making process for the Board, referencing Page 4 of the findings packet. She expressed concern about the potential of having the rural residence land owner signature as a requirement to file an adjustment application, as this could still be construed as unlawful delegation of authority by the county. Ms. Albrich encouraged the Board to adopt Option #4 to resolve the on-going discussion and move forward. This would provide a bright line test for staff, land owners and developers when submitting and processing wind energy facility applications. Option #4 eliminates some of the concerns that have been present during this process, but there are still ongoing challenges yet to be resolved.

Commissioner Doherty asked Ms. Albrich if the Board selected Option #4, how she would justify her comment that the Board was still embodying an unlawful delegation of power by requiring the land owner to consent to the application. Ms. Albrich replied that the Board should consult County Counsel on this question. She explained that Options #1-4 do not address the unlawful delegation question, they go towards the “snapshot” in time for processing an application and when the setback standards would be applied.

Mr. Robinson asked Ms. Albrich to clarify her comments. He asked Ms. Albrich if the developers were concerned that this was more of a practical issue than a legal issue and would this requirement potentially make it more difficult for developers to submit applications if they had to get property owners to sign the adjustment form. Ms. Albrich responded that she believed it was both a practical and legal issue. Mr. Robinson asked Ms. Albrich if he had correctly stated their practical concern, and she replied that he had. It was a realistic concern for developers that it would not be feasible for them to obtain adjustments.

Commissioner Doherty asked Mr. Robinson to clarify his point on the delegation of authority. Mr. Robinson explained that this was not a delegation issue. The delegation issue occurs in who decides whether the adjustment was granted or not. LUBA agreed with the petitioner at the last appeal because it was the property owner making the decision, not the county. Mr. Robinson stated that this was now more of a practical issue for the developers. If the developer wanted to place a turbine nearer to a rural residence than the 2-mile setback, they could apply for an adjustment which will be decided by the county. The application must be signed by the property owner. The practical issue comes from the developer potentially not being able to obtain a land owner signature. Mr. Robinson wanted to distinguish the practical effect versus the legal effect. Commissioner Hansell stated that the flexibility was meant for the land owners, and the flexibility was built in by letting the land owner decide if they would sign the adjustment or not. Mr. Robinson said that was a good point. The adjustment to the 2-mile setback process was not an improper delegation of authority, according to LUBA. The improper delegation would occur only if the county gave the decision authority to the property owner or another third party. Mr. Robinson stated that this was not a legal issue, but a practical issue because the wind developer might not be able to make the adjustment application.

Ms. Albrich asked to clarify her position for the record. She wanted to ensure that she was not misinterpreted or intentionally waiving an argument pertaining to the practical effect versus the legal effect. She does believe that there could potentially be a legal effect in the sense of requiring the land owner signatures up front that could be seen as a denial at the onset of the process. She wanted to preserve for the record that they are not waiving any arguments that they could make in the future.

Chairman Givens commented that they will not be able to please all parties, so what if they decided to not have an adjustment process at all and stay with the 2-mile setback. Mrs. Mabbott stated that they could accept an application for a variance, but that would create even more uncertainty for all parties involved. The variance process has a very

high bar and vague language, and was typically used for minor setbacks to a property line for a proposed structure.

Mr. Robinson explained that he recommended the adjustment process over the variance process because there was an abundance of case law following variances, and they are difficult to deliberate. Adjustment language was easier to work with because the county could draft their own language.

Mrs. Mabbott commented on some previous testimony. It had been said that if an adjustment application was not signed by the land owner, it could potentially kill an entire project. She stated that the adjustment was typically between a single turbine and a single residence. Turbines are built in strings and the likelihood of a single turbine killing an entire project was very small. If the single turbine could not be moved, it could simply not be built.

Public Agency: no testimony was offered.

Chairman Givens closed the hearing and moved to deliberation. Discussion on closure of the record.

Commissioner Doherty said that he has not changed his feelings since last June. He wants to find balance where the industry has certainty to develop projects and that there is flexibility in the process to ensure protection for land owners. He supports Option #4 as the product of collaboration between all parties. Commissioner Doherty stated that he also wanted to have the Planning Commission consider the suggestion from Mr. Price regarding a notification requirement to be added to the pre-application process.

Commissioner Hansell said that he agreed with Commissioner Doherty that the adjustment process needed certainty and flexibility. Staff also needs to be able to implement the process. He supports Option #4 as being the best choice for staff and land owners.

Chairman Givens discussed earlier comments made about the Commissioner's role to protect the citizens of the county. He said this was not an easy issue to deal with, and not everyone will be satisfied with the decision they make today. They will listen to and consider all sides of the issue. Chairman Givens stated that he supports Option #4.

Commissioner Doherty moved to accept the decision of the Planning Commission with the Option #4 provision, and direct staff to modify the findings accordingly. Commissioner Hansell seconded the motion. Motion carried 3:0.

Chairman Givens asked about the suggestion from Mr. Price. Mr. Olsen advised that the Board could direct staff to bring this before the Planning Commission. Commissioner Hansell said that he would like to see the staff review before it was sent on to the Planning Commission, and Commissioner Doherty agreed with this suggestion.

Commissioner Hansell moved to direct staff to further review the public notice requirement during the pre-application conference suggested by Mr. Price, and report back to the Board for discussion. Commissioner Doherty seconded the motion. Motion carried 3:0.

Chairman Givens adjourned the hearing at 3:42 p.m.

Respectfully submitted,

Gina Miller, Secretary