



MEMORANDUM

August 29, 2011

TO: Gorge Commission

FROM: Jill Arens, Executive Director, and Jeff Litwak, Counsel

SUBJECT: Staff Report for Temporary/Emergency Rulemaking Hearing for Sept. 13, 2011

Action Requested:

Hold a public hearing on the attached proposed temporary/emergency rule¹ and adopt the proposed text, which would be effective for 120 days beginning October 13, 2011; also authorize staff to file appropriate forms to initiate rulemaking to make permanent rules (hearing to be held February, 14, 2012).

Recommendation of the Rules Committee

The Rules Committee met on July 6, 2011 and recommended the Commission adopt a continuing temporary rule identical to the rule it adopted in June. The Rules Committee recommended this because to date there had not (and still have not) been any development review applications ready for a decision since the initial temporary rule became effective on June 14, 2011; as such, the Commission has not had any experience with how the temporary rule has worked. The Rules Committee thus was hesitant to recommend either eliminating the temporary rule or making the temporary rule into a permanent rule.

Background and Reason for Temporary/Emergency Rule (from June staff report):

The Commission has reduced its planning staff from 4.5 FTE down to 1.5 FTE during the past biennium. The Commission's 2011–2013 budget has forced the Commission to further reduce staff. As a result, the Executive Director can no longer assure that she can review applications for completeness within 14 days or issue development review decisions within 72 days, which the Commission's rules specify. The Executive Director anticipates meeting these time periods in most cases, but needs the flexibility of surpassing them to manage overall workload and staff resources. In February, 2011, the Commission adopted several rule changes to eliminate hard deadlines and streamline other rules (including the plan amendments and urban area boundary revisions rules). At that time, the Commission did not want to change the time periods for issuing development review decisions. However, as a result of the reduction in staff that will be necessary in response to the 2011–2013 budget, the Commission must now change those time periods too.

¹ Oregon uses the term “temporary rule.” Washington uses the term “emergency rule.”

Summary of Text of Temporary/Emergency Rule:

The text of the temporary/emergency rule is attached; it is the same text that the Commission adopted in June. The new text is shown in underlining; deleted text is shown in ~~strikeout~~. The text does not propose new hard time periods, but rather sets the 14-day and 72-day time periods as goals. This is consistent with the changes that the Commission made to the many time periods in the Plan Amendment and Urban Area Boundary Revision rules earlier this year.

Follow-Up on Temporary/Emergency Rules

Washington law (RCW 34.05.350(2)) prohibits consecutive emergency rules if the content is identical or substantially similar, except that an agency may adopt such an emergency rule if the agency has filed notice of its intent to adopt the rule as a permanent rule, and is actively undertaking the appropriate procedures to adopt the rule as a permanent rule. Here, the Commission would need to file a notice of its intent to adopt the rule as a permanent rule (which would be at the February, 2012) meeting. The Commission is justified in filing this consecutive temporary rule to allow additional time to study the effect of the emergency rule to inform whether it needs to adopt the permanent rule.

Filing a notice of intent to adopt the rule as permanent does not in any way bind the Commission to actually adopt the proposed permanent rule. It only means that the Commission will take this issue up at its February 2012 meeting and give the proposed permanent rule full consideration then. The Commission can choose to adopt a permanent rule then, or not.

Proposed Temporary Rules

Amendatory Section

350-081-0036

Acceptance of Application

~~Within 14 days of the receipt of an application,~~ The Executive Director shall review the application for completeness and if complete, shall accept the application for review.

(1) No application shall be accepted until all documented omissions and deficiencies have been corrected by the applicant. The Executive Director shall notify the applicant of all omissions and deficiencies in writing ~~within 14 days of receipt of the application.~~ The Executive Director shall review supplemental application materials ~~within 14 days after receipt of the materials~~ to determine if the application is complete.

(2) No application for a proposed use, which is explicitly prohibited by this ordinance, shall be accepted.

(a) The application shall be returned to the applicant.

(b) A letter, signed by the Executive Director, stating that the proposed use is prohibited and citing the guideline which explicitly prohibits the proposed use, shall be sent to the applicant.

(c) Issuance of this letter shall not prohibit the applicant from appealing the decision pursuant to 350-70.

(3) As a goal, the Executive Director shall attempt to accept the application as complete or notify the applicant of omissions and deficiencies within 14 days of receipt of the application. The Executive Director shall attempt to review supplemental materials within 14 days of receipt. The 14-day time periods in this rule are effective retroactively to all development review applications that have been submitted to the Commission and for which the Executive Director has not made a decision.

Amendatory Section

350-081-0042

Decision of the Executive Director

(1) In making a decision on a proposed use or development the Executive Director shall:

(a) Consult with the applicant and such agencies as the Executive Director deems appropriate;

(b) Consider information submitted by the applicant and all other relevant information available;

(c) Consider all comments submitted pursuant to Commission Rule 350-81-040; and

(d) Solicit and consider the comments of the Forest Service.

(2) The Executive Director shall approve a proposed use or development only if it is consistent with the standards of section 6 and the purposes of P.L. 99-663 and Commission Rule 350-81.

(a) In approving a proposed development action, the Executive Director may impose conditions as necessary to ensure consistency with the guidelines of Commission Rule 350-81.

(b) Conditions attached to approval of a proposed development action shall be recorded in county deeds and records to ensure notice of the conditions to successors in interest. The Executive Director's decision shall include this requirement.

(3) The Executive Director shall issue a decision on a proposed use or development including findings of fact and conclusions of law and any conditions to ensure consistency with the standards of section 6 and the purposes of P.L. 99-663 and Commission Rule 350-81. As a goal, the Executive Director shall attempt to issue a decision within 72 days after acceptance of the application. ~~within 72 days after acceptance of the application except in one or more of the following situations:~~

~~(a) The applicant consents to an extension of time.~~

~~(b) The Executive Director determines that additional information is required pursuant to Commission Rule 350-81-040.~~

~~(c) The Executive Director determines that additional information is necessary to evaluate land use issues and the impacts of the proposed use to scenic, cultural, natural, and recreation resources.~~

~~(d) Unforeseen circumstances including, but not limited to, weather, illness, etc.~~

(4) The Executive Director shall send a copy of the decision to the applicant, the Forest Service, the applicable state, the four Indian tribal governments, the applicable county and/or city and each person who submitted comments under Commission Rule 350-81-040. The decision shall set forth the rights of appeal under Commission Rule 350-70.

(5) The decision of the Executive Director shall be final unless a Notice of Appeal is filed in accordance with Commission Rule 350-70. An applicant who chooses to proceed with an approved development during the appeal period shall assume all associated risks and liabilities.

(6) The 72-day time period in this rule is effective retroactively to all development review applications that have been submitted to the Commission and for which the Executive Director has not made a decision.

Amendatory Section

350-081-0054

Procedures for Expedited Review Process

(1) Applications

(a) Prior to initiating any use or development which requires review and approval by the Executive Director, an application shall be completed pursuant to 350-81-054.

(b) The Executive Director shall accept and review the application pursuant to 350-81-054 for consistency with the appropriate guidelines of this rule.

(c) The Commission may charge a fee for review of applications after a public hearing. The Gorge Commission shall set the fee.

(d) Standard application forms shall be available at the Commission Office, and shall be provided to county and city planning offices for which this ordinance is effective and the Forest Service.

(e) Applications for uses eligible for expedited review shall include the information required for review uses listed in 350-81-032(5). They shall also include elevation drawings if the proposed development would be visible from a key viewing area. The drawing shall show natural grade and finished grade.

(2) Acceptance of Application

~~(a) Within 14 days of the receipt of an application,~~ (a) The Executive Director shall review the application for completeness, and if complete, shall accept the application for review.

~~(b) No application shall be accepted until all documented omissions and deficiencies have been corrected by the applicant. The Executive Director shall notify the applicant of all omissions and deficiencies in writing within 14 days of receipt of the application. The Executive Director shall review supplemental application materials within 14 days after receipt of the materials to determine if the application is complete.~~

(c) As a goal, the Executive Director shall attempt to accept the application as complete or notify the applicant of omissions and deficiencies in writing within 14 days of receipt of the application. The Executive Director shall attempt to review supplemental application materials within 14 days of receipt of the materials.

(3) Notice of Development Review

(a) Within 7 days of the acceptance of an application, the Executive Director shall issue notice of a proposed development review. The notice shall provide the following information:

(A) The name of the applicant;

(B) The general and specific location of the subject property;

(C) A brief description of the proposed action;

(D) The deadline for rendering a decision; and

- (E) The deadline for filing comments on the proposed action.
- (b) The notice shall state that the application and supporting documents are available for inspection at the Commission office during normal working hours.
- (c) The notice shall state the applicant must comply with all applicable local, state, and federal laws.
- (d) The notice shall be mailed to the Forest Service, the four Indian tribal governments, applicable county or city planning office(s), libraries and other agencies and interested parties that request a notice or that the Executive Director determines should be notified.
- (e) A copy of the notice shall be filed in the records of the Commission.
- (4) Comment Period: Any interested person or party shall submit written comments within 10 days from the date a notice is sent.

(5) Written Decision

- (a) In making a decision on a proposed use or development the Executive Director shall:
 - (A) Consult with the applicant and such agencies as the Executive Director deems appropriate;
 - (B) Consider information submitted by the applicant and all other relevant information available;
 - (C) Consider all comments submitted pursuant to 350-81-054(4); and
 - (D) Solicit and consider the comments of the Forest Service.
- (b) The Executive Director shall approve a proposed use or development only if it is consistent with the standards of section 6 and the purposes of P.L. 99-663 and Commission Rule 350-81.
 - (A) In approving a proposed development action, the Executive Director may impose conditions as necessary to ensure consistency with the guidelines of Commission Rule 350-81.
 - (B) Conditions attached to approval of a proposed development action shall be recorded in county deeds and records to ensure notice of the conditions to successors in interest. The Executive Director's decision shall include this requirement.
- (c) The Executive Director shall issue a decision on a proposed use or development including findings of fact and conclusions of law and any conditions to ensure consistency with the standards of section 6 and the purposes of P.L. 99-663 and Commission Rule 350-81 ~~within 30 days after acceptance of the application.~~ As a goal, the Executive Director shall attempt to issue a decision within 30 days after acceptance of the application.
- (d) The decision of the Executive Director shall be final unless a Notice of Appeal is filed in accordance with Commission Rule 350-70. An applicant who chooses to proceed with an approved development during the appeal period shall assume all associated risks and liabilities.
- (6) Notice of Decision and Opportunity to Appeal
 - (a) The Executive Director shall send a copy of a decision issued under the expedited review process to the four Indian tribal governments, the Forest Service, landowners within 200 feet of the perimeter of the subject parcel, and anyone who submitted comments pursuant to 350-81-054(4).
 - (b) Any person shall be allowed to appeal a decision issued under the expedited review process in accordance with Commission Rule 350-70.
- (7) Expiration of Approvals. Approvals issued under the expedited review process shall expire in accordance with the standards for expiration of approvals for review uses (Commission Rule 350-81-044, above).
- (8) Changes or Alterations to an Approved Action. Changes or alterations to an approval issued under the expedited review process shall be made in accordance with the standards for changes or alterations to approved actions for review uses (Commission Rule 350-81-046, above).
- (9) The time periods in this rule are effective retroactively to all expedited review applications that have been submitted to the Commission and for which the Executive Director has not made a decision.