



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street, Suite 150

Salem, OR 97301-2540

(503) 373-0050

Fax (503) 378-5518

www.lcd.state.or.us



NOTICE OF ADOPTED AMENDMENT

9/23/2010

TO: Subscribers to Notice of Adopted Plan
or Land Use Regulation Amendments

FROM: Plan Amendment Program Specialist

SUBJECT: City of Brookings Plan Amendment
DLCD File Number 004-10

The Department of Land Conservation and Development (DLCD) received the attached notice of adoption. A Copy of the adopted plan amendment is available for review at the DLCD office in Salem and the local government office.

Appeal Procedures*

DLCD ACKNOWLEDGMENT or DEADLINE TO APPEAL: Wednesday, October 06, 2010

This amendment was not submitted to DLCD for review prior to adoption pursuant to OAR 660-18-060, the Director or any person is eligible to appeal this action to LUBA under ORS 197.830 to 197.845.

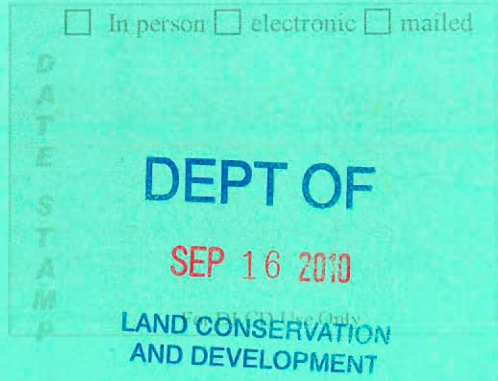
If you wish to appeal, you must file a notice of intent to appeal with the Land Use Board of Appeals (LUBA) no later than 21 days from the date the decision was mailed to you by the local government. If you have questions, check with the local government to determine the appeal deadline. Copies of the notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR Chapter 661, Division 10). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

***NOTE:** The Acknowledgment or Appeal Deadline is based upon the date the decision was mailed by local government. A decision may have been mailed to you on a different date than it was mailed to DLCD. As a result, your appeal deadline may be earlier than the above date specified. NO LUBA Notification to the jurisdiction of an appeal by the deadline, this Plan Amendment is acknowledged.

Cc: Dianne Morris, City of Brookings
Gloria Gardiner, DLCD Urban Planning Specialist

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Notice of Adoption



THIS FORM MUST BE MAILED TO DLCD WITHIN 5 WORKING DAYS AFTER THE FINAL DECISION PER ORS 197.610, OAR CHAPTER 660 - DIVISION 18

Jurisdiction: City of Brookings

Local file number: LDC-2-10

Date of Adoption: 9/14/2010

Date Mailed: 9/15/2010

Was a Notice of Proposed Amendment (Form 1) mailed to DLCD? No

- Comprehensive Plan Text Amendment
Land Use Regulation Amendment
New Land Use Regulation

- Comprehensive Plan Map Amendment
Zoning Map Amendment
Other:

Summarize the adopted amendment. Do not use technical terms. Do not write "See Attached". Chapter 17.04, Development Permits Procedures, needed a couple of housekeeping revisions to clarify process.

Does the Adoption differ from proposal? No, no explanation is necessary

Plan Map Changed from: n/a to: n/a

Zone Map Changed from: n/a to: n/a

Location: n/a Acres Involved: 0

Specify Density: Previous: N/A New: N/A

Applicable statewide planning goals:

- Goals 1-19 with checkboxes, goal 1 is checked

Was an Exception Adopted? YES NO

Did DLCD receive a Notice of Proposed Amendment...

45-days prior to first evidentiary hearing? Yes No

If no, do the statewide planning goals apply? Yes No

If no, did Emergency Circumstances require immediate adoption? Yes No

DLCD file No. 004-10 (

Please list all affected State or Federal Agencies, Local Governments or Special Districts:

n/a

Local Contact: **Dianne Morris**

Phone: **(541) 469-1138** Extension:

Address: **898 Elk Dr.**

Fax Number: **541-469-3650**

City: **Brookings**

Zip: **97415-**

E-mail Address: **dmorris@brookings.or.us**

ADOPTION SUBMITTAL REQUIREMENTS

This form **must be mailed** to DLCD **within 5 working days after the final decision**

per ORS 197.610, OAR Chapter 660 - Division 18.

1. Send this Form and **TWO Complete Copies** (documents and maps) of the Adopted Amendment to:
ATTENTION: PLAN AMENDMENT SPECIALIST
DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
635 CAPITOL STREET NE, SUITE 150
SALEM, OREGON 97301-2540
2. **Electronic Submittals:** At least **one** hard copy must be sent by mail or in person, but you may also submit an electronic copy, by either email or FTP. You may connect to this address to FTP proposals and adoptions: webserver.lcd.state.or.us. To obtain our Username and password for FTP, call Mara Ulloa at 503-373-0050 extension 238, or by emailing mara.ulloa@state.or.us.
3. Please Note: Adopted materials must be sent to DLCD not later than **FIVE (5) working days** following the date of the final decision on the amendment.
4. Submittal of this Notice of Adoption must include the text of the amendment plus adopted findings and supplementary information.
5. The deadline to appeal will not be extended if you submit this notice of adoption within five working days of the final decision. Appeals to LUBA may be filed within **TWENTY-ONE (21) days** of the date, the Notice of Adoption is sent to DLCD.
6. In addition to sending the Notice of Adoption to DLCD, you must notify persons who participated in the local hearing and requested notice of the final decision.
7. **Need More Copies?** You can now access these forms online at <http://www.lcd.state.or.us/>. Please print on **8-1/2x11 green paper only**. You may also call the DLCD Office at (503) 373-0050; or Fax your request to: (503) 378-5518; or Email your request to mara.ulloa@state.or.us - ATTENTION: PLAN AMENDMENT SPECIALIST.

**IN AND FOR THE CITY OF BROOKINGS
STATE OF OREGON**

ORDINANCE 10-O-661

ORDINANCE 10-O-661, AN ORDINANCE AMENDING BROOKINGS MUNICIPAL CODE SECTIONS 17.04.050, 17.04.060, AND 17.04.070, OF CHAPTER 17.04, DEVELOPMENT PERMIT PROCEDURES, TITLE 17, LAND DEVELOPMENT CODE.

Sections:

- Section 1. Ordinance identified.
- Section 2. Amends Sections 17.04.050, 17.04.060, and 17.04.070.

The City of Brookings ordains as follows:

Section 1. Ordinance Identified. This ordinance amends Brookings Municipal Code Sections 17.04.050, 17.04.060, and 17.04.070, of Chapter 17.04, Development Permit Procedures, Title 17, Land Development Code.

Section 2. Amends Sections 17.04.050, 17.04.060, AND 17.04.070. Sections 17.04.050, 17.04.060 and 17.04.070, are amended as follows:

CHAPTER 17.04

DEVELOPMENT PERMIT PROCEDURES

17.04.050 Permit issuance, appeals of a City decision, and effective date of approval.

Development permits shall be issued by the City Manager or their designee according to the provisions of this Code. Neither the City Building Official nor any other state or local official shall issue a permit for use, development or occupation of a structure which has not been approved according to this Code.

An appeal of an administrative decision or a Planning Commission decision may be filed with the Planning Department no later than 15 days following the date of mailing (postmark date) of the notice of the final order, or 15 days following notification of the administrative decision..

The effective date of approval in any land use decision under this code is the date upon which the decision is no longer appealable. [Ord. 10-O-654 § 2; Ord. 09-O-632 § 2; Ord. 08-O-600 § 2. Formerly 17.04.030.]

17.04.060 Lands in violation.

The City Manager or their designee shall not issue a development permit for the partitioning, subdivision, development, or use of land that has been previously divided in violation of state or local codes then in effect, or divided in violation of this code subsequent to its adoption, or otherwise developed or used in violation of this Code, regardless of whether the permit applicant created the violation, unless the violation can be rectified as part of the proposed development in a manner provided by this code. [Ord. 10-O-654 § 2; Ord. 09-O-632 § 2; Ord. 08-O-600 § 2. Formerly 17.04.040.]

17.04.070 Exemptions from requirement to do improvements to public infrastructure.

The developments and activities listed below are exempt from the requirements to do improvements to public infrastructure, but are nevertheless subject to the provisions of this code:

A. Remodel, addition, alteration, repair, or replacement of an existing residence for residential use, or siting of an accessory structure:

B. Remodel, alteration or repair to a commercial structure resulting in no greater impacts or intensity of use:

[Ord. 10-O-654 § 2; Ord. 09-O-632 § 2; Ord. 08-O-600 § 2. Formerly 17.04.050]

First Reading: September 13, 2010
Second Reading: September 13, 2010
Passage: September 13, 2010
Effective Date: October 13, 2010

Signed by me in authentication of its passage this 14th day of September, 2010



Mayor Larry Anderson

ATTEST:


City Recorder Joyce Heffington

FINDINGS

CITY OF BROOKINGS

COUNCIL AGENDA REPORT

Meeting Date: August 23, 2010

Dianne Morris
Signature (submitted by)

Originating Dept: Planning

City Manager Approval

Subject: A hearing on File LDC-2-10 for consideration of revisions to Chapter 17.04, Development Permits, Brookings Municipal Code (BMC).

Recommended Motion: Motion approving revisions to Chapter 17.04, Development Permits, BMC.

Financial Impact: None

Background/Discussion: Staff noted there was a revision needed in Chapter 17.04, Development Permit, to be consistent with case law. Dolan vs the City of Tigard was decided in favor of Dolan after the City required an easement for a public pedestrian path on his property as a condition of approval. It was found the path was not necessary to mitigate impacts that would occur from the proposed use. This case determined there must be a direct nexus, or connection, between expected impacts from the proposed development and the requirements imposed in the approval process. Two other revisions are also proposed. The following is a summary:

- 17.04.070, Exemptions, lists circumstances when a property owner is exempt from the requirement to do public infrastructure improvements. The draft language adds "replacement" of a dwelling to the list of circumstances that are exempt. This is in keeping with case law. If a use is no more intense than what was there previously, the jurisdiction can not require new, additional improvements.
- 17.04.050, Permit Issuance, describes the notification process for a decision. An Administrative Decision does not require a Final Order, so language was added to clarify that a notification will be sent. This is important as it starts the appeal period.
- 17.04.060, Lands in Violation, presently states a permit will not be issued for lands "developed" in violation of the Code. Draft language has been added to include lands "used" in violation of the Code. This will mean property with outstanding violations, such as storage of inoperable vehicles or living in an RV, two of the more common violations, will not be able to get a permit to further develop the property until the violations have been resolved.

The Planning Commission reviewed this Chapter and recommended approval of revisions to Sections 17.04.050 and 17.04.060 to the City Council. Commissioner Bismark expressed concern about whether the case law referred to in the revisions to 17.04.070, Dolan vs. City of Tigard, covered this situation and requested additional information be provided to the Council. Other Commissioners agreed the revision made sense but approved the motion to request additional information. Commissioner Bismark put his comments concerning this in writing and it is attached. The details of the Dolan vs. City of Tigard case are different than our

APPROVED BY CITY COUNCIL ON

8-23-10 *JH*

“replacement of a dwelling” situation but in the 16 years since that case was decided a broader interpretation has evolved. You’ll recall a few years ago the County applied for a conditional use permit to use an existing building on Railroad Ave. and initially they were required to do street improvements. Our Land Use Attorney, Jim Spickerman, was consulted and recommended the removal of that condition due to no greater impact by the proposed use than had existed previously. Staff did not locate any additional court cases on this topic.

Following this report is the draft version of Chapter 17.04 (Attachment B).

Policy Considerations: N/A

Attachment(s): **A. Commissioner Bismark’s comments**
 B. Draft version of Chapter 17.04, Development Permit , BMC

Argument Brief: Applicability of Regulatory Takings Jurisprudence with Regard to Conditioning Building Permits to Exactions for Street Improvements

1. Regulatory takings claims arising from permit conditions are substantiated on the basis of two tests outlined in *Agin v. City of Tiburon* (1980) thirty years ago:
 - A. The imposed condition(s) “does not substantially advance legitimate State interests.”
 - B. The imposed condition(s) “denies an owner economically viable use of his land.”
2. Only if a government-imposed condition satisfies one of these these two tests is it a candidate for a regulatory takings claim under 5th/14th Amendment objections.
3. The U.S. Supreme Court decision in *Nollan vs. California Coastal Commission* (1987) resulted in the “essential nexus” principle as a case-specific test for 1A above.
4. In *Dolan vs. City of Tigard* (1994), the Court added a second prong to the “essential nexus” test:” the “rough proportionality” test, i.e., once the existence of an essential nexus has been confirmed, the “degree of connection” between the imposed condition and the “projected impact” of the proposed development must be “roughly proportional.”
5. In both *Nollan* and *Dolan*, the basis for a regulatory takings claim was a **possessory exaction**: the creation of a new public easement on land that was under the applicants' private ownership as of the date of permit application – **NOT the financial onus of building the required infrastructure thereon**. The fact that the imposed condition required a conveyance of land from private to public ownership in both cases is a critical point.
6. The notion that the doctrine laid out in *Nollan-Dolan* is elastic enough to also cover **nonpossessory exactions** – wherever it came from – did not come from the U.S. Supreme Court. If there are binding case-law decisions for Oregon that establish this, I would like to see them.
7. More importantly, what is in need of disambiguation here is exactly why the City can require street improvements in the case of new development, but not in the case of a replacement dwelling on a lot where the public easement already exists. The “essential nexus” test of *Nollan* is not a useful tool to parse this distinction. The essential nexus between requiring street improvements as an exaction, and the legitimate state interests served by doing so is the same whether there was a preexisting dwelling on the lot or not (and without an essential nexus question, the applicability of *Dolan* never comes up). There's no conveyance of land and the nature of the exaction is unquestionably related to the impact of the proposed development.
8. I really don't see how imposing street improvements as a building-permit condition for a replacement dwelling trips either the 1A or 1B test above. The improvements do substantially advance legitimate state interests: they provide for full implementation of the pedestrian and bicycle accommodation requirements of the Transportation Planning Rule, OAR 660-12-0001(c). Neither does the imposed condition deny an owner of economically viable use of his land if the easement already exists (it's not really “his land” anymore). Only in cases where no sidewalk easement was ever created could such an argument be made, and even then, the economic viability of the narrow strip of land immediately bordering a public street is highly questionable.

17.04 Development Permit**Draft 6-25-10**

Proposed text in ***bold and italicized*** type.

Text to be omitted has ~~strikethroughs~~.

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CITY OF BROOKINGS PLANNING COMMISSION
STAFF REPORT

SUBJECT: Land Development Code Amendment
FILE NO: LDC-2-10
HEARING DATE: Aug. 3, 2010

REPORT DATE: July 23, 2010
ITEM NO: 7.1

GENERAL INFORMATION

APPLICANT: City Initiated.
REPRESENTATIVE: City Staff.
REQUEST: Revisions to Chapter 17.04, Development Permit,
Brookings Municipal Code (BMC).
PUBLIC NOTICE: Published in local newspaper.

BACKGROUND INFORMATION

Staff noted there was a revision needed in Chapter 17.04, Development Permit, to be consistent with case law. Two other revisions are also proposed. The following is a summary:

- 17.04.070, Exemptions, lists circumstances when a property owner is exempt from the requirement to do public infrastructure improvements. The draft language adds “replacement” of a dwelling to the list of circumstances that are exempt. This is in keeping with case law. If a use is no more intense than what was there previously, the jurisdiction can not require new, additional improvements.
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Following this report is the draft version of Chapter 17.04 (Attachment A).

RECOMMENDATION

After careful consideration, and any input the public may provide, Staff supports a Planning Commission recommendation of approval of file LDC-2-10, Chapter 17.04, Development Permit, BMC, to the City Council.

17.04 Development Permit

Draft 6-25-10

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CITY OF BROOKINGS

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