

IN THE DISTRICT COURT OF CLATSOP COUNTY
IN THE COUNTY OF CLATSOP
STATE OF OREGON

MINN SOUTHWY, ANTHONY ALI, COPELAND,
and KIM KROSS, JOHN C. APLIN, WAZEK,
ESTELLE, BETTY ROSS, HILL, MARY B,
BANKER, M. DANIEL L. PARKER, LEHR,
BOUCE OF and AN BOUCE OF, MICHAEL GRIFFO,
and MRS. CLEA DITIG, JELLY WIRTH,
CAROLYN DENKS OLSEN, CINDY CLARK,
ART MARTINAK AND JOYCE MARTINAK,
DEAN SCHROCK AND KATHY SCHROCK,

LIBA No. 2010-006

Petitioners,

RESPONDENT'S BRIEF

CLATSOP COUNTY

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1 **I. RESPONSE TO DLCD’S MOTION**

2 The county is not opposed to the department’s request to argue orally before the
3 Board.

4 **II. STANDING OF PETITIONERS**

5 Respondent does not contest that the petitioners have standing. The Department of
6 Land Conservation and Development (the “department”) did not appear or submit written
7 testimony to any decisionmaker in this case, does not have standing, and is not a party. The
8 county does not contest the department’s authority to file a state agency brief in this case.

9 **III. STATEMENT OF THE CASE**

10 **A. Nature of the Land Use Decision and Relief Sought**

11 Respondent county accepts petitioners’ description of the nature of the land use
12 decision, but not with their description of relief sought. Neither the petitioners’ nor the
13 department’s brief make a case for reversal of Linn County Resolution No. 2009-570, which
14 allows immediate, limited development of a County Park on Seven Mile Lane pending
15 completion of a master plan for the site. The underlying decision—that the applicant met all
16 of the standards applicable to issuance of a conditional use permit—is not contested in these
17 proceedings. Even if every error alleged by petitioners and the department is accepted by the
18 Board, the only remedy available in this case is remand.

19 The county objects to the department’s introduction and characterization of the
20 challenged decision, as being chiefly argument, and as containing a deceptive mixture of
21 facts and recitations not relevant to any applicable standard identified in the department’s
22 brief.

23 **B. Summary of the Arguments**

24 Petitioners’ summary of arguments contains numerous strained interpretations that
25 bear noting. Linn County did not “ignore” LCDC’s park planning rule (Pet. Br-1), but
26 adopted seven pages of findings addressing the rule, that petitioners have overlooked. The
27 phrase “urban type RV park” used by petitioners is not an accurate description of the
28 decision on review. A 50-space recreational vehicle campsite as a component of a 175-acre

1 park is not “urban.” A county’s decision to build the number of public restrooms needed by
2 the public, at a public park, is not a revolutionary idea. Nor is it unusual for a large, local or
3 State park to have a recreational vehicle campsite as a component of park amenities.

4 Both petitioners and the department present a distorted image of the decision on
5 review. The County Parks and Recreation Department requested permission to develop a
6 county park. Objections were raised, and the parks department conducted more studies,
7 chiefly to ensure that engineering solutions were feasible for serious traffic and drainage
8 issues related to use of the park. The park is located at a major freeway interchange and has
9 a pre-existing commercially-zoned property embedded into its northern boundary. The
10 location is near more than one urban growth boundary but is still (other than the ‘industrial’
11 transportation facility that characterizes Interstate Highway 5) a decidedly rural area.

12 Public parks are at once static and expected to evolve over time. Over decades and
13 centuries, the recreational and travel needs of the public change, and parklands around the
14 state will change, or not. Long-term planning for park use is a commitment of the county in
15 this case. That is why the county limited its parks and recreation department’s original
16 request of a “full-build out” recreational vehicle campsite, with clubhouses and other
17 amenities. The conditions of approval establish that almost none of the characterizations of
18 the decision petitioners or the department make in this case are accurate. As limited, the
19 decision reserves more than 90% of the site as open space. Future master planning is not
20 foreclosed by the county’s decision in this case.

21 The decision on review allows the county to develop a 50-space recreational vehicle
22 campsite as a fee-driven, revenue-producing component of the 175-acre public park, with
23 public restrooms, and a caretaker residence. The County Parks and Recreation Department
24 needs the authority to take initial, recommended steps toward park development. The limited
25 recreational vehicle campground allowed by the decision will address an identified public
26 need, and will also provide needed revenue to fund the improvement and development of
27 county parks. The decision on review allows the parks department to expedite public access

1 to the park, and to rehabilitate and secure the site for future public uses, to be established
2 through the master planning process available to the county under state law.

3 Fifty recreational vehicle campsites in a 175-acre site devoted almost entirely to open
4 space and wetland restoration is not an urban use. Camping is not an urban use. Placing
5 restrooms at various locations around a 175-acre public park, as needed, does not thereby
6 urbanize the park or the use.

7 The site is a large, treeless agricultural field immediately adjacent to I-5. Drainage
8 and wetland studies conducted by the county indicate that the site currently has drainage
9 problems and contains 50 acres of degraded wetlands and waterway.

10 Those problems also reflect the promise of the site to be a valuable public resource
11 for decades and centuries to come. The wetlands and waterway will be restored and
12 enhanced. Installing forested buffers and beginning reclamation and enhancement of the
13 waterway will take place in a manner clearly visible to the wide variety of visitors the county
14 hopes to draw to the park. The park is big enough to server I-5 travelers and the citizens of
15 Linn County, now and in perpetuity. The decision on review allows immediate improvement
16 of the park with public restrooms and a caretaker residence. These are appropriate park
17 management steps for this particular park property. No party to this proceeding has argued
18 that the county failed to establish compliance with established conditional use standards
19 requiring the minimization of all potential impacts.

20 Petitioners' first assignment of error appears to be the same as the allegation of error
21 in the department's brief: that the county was required to justify an exception to Goal 3.
22 Both petitioners and the department direct their arguments to the original county parks
23 department proposal, not the decision on review. The county's response to the department's
24 brief is also its response to petitioners' first assignment of error.

25 In their next two assignments of error, petitioners allege that the county misconstrued
26 applicable law in failing to justify an exception to Goals 11 and 14. Petitioners have
27 mischaracterized the proposed uses and misstated applicable law in their analysis of Goals 11
28 and 14. Finally, petitioners assert, incorrectly, that the county should have been required to

1 comply with OAR 660-012-0060(2), which, by its terms, only applies to comprehensive plan
2 amendments and zone changes. None of petitioners claims have merit.

3 The department (apparently) does not claim that the county misconstrued applicable
4 law by failing to take exception to Goals 11 and 14 or by failing to properly comply with the
5 Transportation Planning Rule, but only that the county failed to take an exception to Goal 3
6 or amend its plan to include a master plan for the park. As to Goal 3, the central argument by
7 both the petitioners and the department is that LCDC's Division 34 rule requires that the
8 county justify an exception to Goal 3, or adopt a "master plan" for the park (using procedures
9 established for State Parks and post-acknowledgement comprehensive plan amendments).

10 Neither petitioners nor the department is entirely clear on which parts of the county's
11 permit approval requires an exception to Goal 3 or a comprehensive plan amendment (nor
12 could they be, given the ambiguities in the rule). Instead of focusing on the limiting
13 conditions and findings for approval, petitioners arguments are directed at the originally-
14 proposed-but-not-approved 196 recreational vehicle campsites, even though the decision
15 expressly limits the number of such campsites to "no more than 50" campsites. (R-7,
16 condition of approval #2) The department bases its analysis on 196 campsites occupying 60
17 acres of the site, or 50 campsites occupying 60 acres of the site, when the approval is for no
18 more than 50 campsites, that conceptual site plans indicate will occupy less that 15 acres of
19 the 175 acre site. (R-56 and elsewhere throughout record)

20 Under established caselaw, ordinarily, uses that are allowed either outright or
21 conditionally by virtue of their description in ORS 215.213(1) and (2) or 215.283(1) and (2)
22 do not require an exception to Goal 3. LCDC knows how to describe uses and intensities of
23 uses that require an exception. The Division 33 rule does not directly list any specific use or
24 intensity of use that requires an exception. An ambiguous reference is not sufficient to
25 designate turn a listed, allowed use into one that requires and exception to Goal 3. An
26 exception is not needed for the county to approve uses in a public park that are on the
27 county's acknowledged list of allowed uses in a public park.

1 The Board owes no deference to the department for its post-hoc rationalizations
2 concerning LCDC's Division 34 rule. Department staff obtained permission from LCDC to
3 file a brief in this case by mischaracterizing the County's approval, mischaracterizing the
4 Division 34 rule, and mischaracterizing applicable caselaw. Both the department's director
5 and a majority of commissioners have acknowledged, in open meeting, that the Division 34
6 rule is not clear in its description of what (if any) types of uses or density of uses proposed
7 for a public park require an exception to Goal 3 or other comprehensive plan amendment.

8 Finally, the county notes that neither the petitioners nor the department have
9 contested any of the findings demonstrating the County Parks and Recreation Departments
10 met each and every standard in the county's zoning ordinance for obtaining a conditional use
11 permit for uses in a public park. None of the findings of compatibility with surrounding farm
12 uses required by ORS 215.296(1) are contested by petitioners or the department, nor has any
13 claim been made that the record does not contain substantial evidence to support findings
14 justifying conditional use approval in this case. The petitioners' and department's theories
15 regarding exceptions case law theories, or proffered Division 34 interpretations, are without
16 merit.

17 **C. Summary of Material Facts**

18 Respondent rejects petitioners' summary of material facts, and the department's
19 statement of facts in its introduction and statement of the case, because they contains
20 inaccuracies, and are selectively misleading. Petitioners' summary is misleading, and the
21 department has accepted petitioners' summary, "to the extent they provide objective and
22 relevant factual background."¹ The county offers the following background and summary
23 of material facts:

24 The Board of County Commissioners is the duly elected governing body of Linn
25 County. In 2007, the Board purchased 175-acres of EFU land (two contiguous tax lots) at the
26 southwest corner of Seven Mile Lane and Oregon Highway 34, for use as a public park. The

¹ In this manner, the department takes the same tack that it traveled when it drafted OAR 660-034-0035 and -0040.

1 land occupies the southeast corner of the I-5 is adjacent to Interstate Highway 5, and the
2 Interstate 5-Oregon Highway 34 interchange. (R-55-56)² There is a large truckstop that
3 extends into the northern boundary of the site, which is zoned “Freeway Interchange
4 Commercial” and currently includes a gas station and restaurant. (R-1209, 55-56) A second
5 truck stop is located immediately across Highway 34. (R-148) There are no dwellings on
6 the site, which is a large open field.

7 The site is zoned for Exclusive Farm Use, and is currently planted entirely with grass.
8 Historic aerial photographs indicate that the property has been cultivated since at least 1936.
9 (R-1248) Pre-pioneer and pre-agriculture water and wetland features on the site have all
10 been destroyed through plowing, the construction of ditches and the installation of drain tile.
11 (R-1248; Preliminary Drainage Report and Wetland Delineation, R-853-981) Interstate
12 Highway 5 was constructed adjacent to the site in 1958. (R-1248) By 1971, the still-existent
13 truckstop that extends into the site, had been constructed. (Id.)

14 The site topography is characterized by a “relatively flat alluvial terrace,” flat to very
15 gently sloping from southeast to northwest, with concave subtle swales that drain to the
16 northwest and adjacent convex areas.” (R-1249) The original wetland report indicated that
17 the site contained approximately 56 acres of degraded and farmed “terrace wetlands,” all of
18 which have been stripped of native vegetation, plowed and planted with grass. (R-1250) A
19 minor tributary to Oak Creek present on the property has been ditched and farmed. (R1247-
20 48 and 51) Two hydric soil units comprise 40 percent of the soils on the property. (R-1248)
21 Approximately 50 acres of the site consists of eight delineated (but farmed) wetlands, and a
22 watercourse. (R-884-85)

23 Linn County has an extensive system of parks, and many of them contain
24 campgrounds. The county’s parks are all located on rural resource land, and many of them

² A site diagram and the conceptual site plan are located in the record at R-55-56. The conceptual plan is also in the record at 170, 211, 1018, 1089, 1245, 1321, 1336, and 1365. More legible color versions, and a large display version of the conceptual plan, were presented to the public at public hearings.

1 have camping facilities that accommodate camping trailers and vehicles, very generally and
2 collectively referred to as “Recreational Vehicles.”

3 There is little similarity between an “RV park” like those operated by some of the
4 opponents of the park, and a camping component of a State or county park that also provides
5 accommodation for recreational vehicles. Most Oregonians, no matter where they live,
6 expect some unit of government to provide places where they can camp, take hikes, view
7 wildlife, play a game in a field, jog, or have a picnic. We all use public parks and we all
8 have personal knowledge and experience to support a reasonable conclusion that a
9 recreational vehicle camping area that is a component of a State or local Oregon park is not
10 the same as most existing private recreational vehicle parks.

11 After purchasing the Seven Mile Lane property in 2007, the County budgeted money
12 to produce a design for the park and to fund the application process, which was undertaken
13 by the County Parks and Recreation Department. The department and its consultants
14 produced a conceptual site plan and narrative and began the process of delineating wetlands
15 on the site and identifying off-site transportation mitigation measures that would need to be
16 implemented related to ‘worst case’ impacts from full park development. (R-1247-1300)

17 The plans were presented to the Planning Commission on April 8, 2008. The
18 planning commission continued the hearing to May 13, 2008 to provide the Parks and
19 Recreation Department with additional time to address three issues:

- 20
21 “(1) Access and transportation system impacts;
22 (2) Drainage issues along the property’s southern boundary with Mr.
23 Swatzka’s property; and
24 (3) potential conflicts with agricultural uses.” (R-1042)

25 The hearing was then continued, at the applicant’s request, to October 14, 2008, and then to
26 January 13, 2009. The April 14, 2009 hearing was then continued to May 12, 2009. (R-
27 1042, 1050) On June 9, 2009, the Planning Commission denied the application, based on
28 findings that the potential traffic impacts on surrounding farm uses had not been successfully
29 resolved by the applicant. (R-1039-1040; on a 3-4 vote, R-6) The County Parks and
30 Recreation Department appealed the decision to the Board of County Commissioners, which

1 held a public hearing on October 21, 2009. (R-108) The County Board deliberated on
2 December 9, 2009, and voted unanimously to approve limited, 'first step' development of the
3 park. (See conditions of approval, R-7-9)

4 Between acquisition of the site in 2007 and the decision to allow limited 'first step'
5 improvements made on January 5, 2010, and to fully address the applicable conditional use
6 standards for approval of a county park on EFU land, the following studies were assembled:

7 (1) A conceptual site plan, showing most of the site as forest and open fields (R-
8 56, 170, 1365 and throughout the record). The plans show that a vegetative buffer would be
9 established around the entire perimeter of the park, as much as 200 feet thick, including the
10 entire frontage on I-5. (Id.) The conceptual plan also showed approximately 195
11 recreational vehicle campsites in the northwest corner of the site along Highway 34, between
12 the truckstop and Seven Mile Lane. (Id.) A narrative outlined a broad range of possible uses
13 for the park. (R-1227-1243) Parts of the narrative were revised and incorporated into the
14 findings for approval. (R-11-15)

15 The "full build-out" plan presented originally to the Planning Commission included
16 an "RV park area" that included accessory buildings; one permanent dwelling for a full-time
17 park ranger; and five "restroom and shower buildings" that would be located in the fully built
18 recreational vehicle camping area. (R-56) Day use areas are also shown, including
19 conceptual locations for picnic shelters and additional public "restrooms/showers." The
20 application described each restroom building as having three stalls each for men and women,
21 and three unisex shower stalls. (R-1228)

22 (2) Preliminary wetland delineation (May, 2007) by Environmental Science &
23 Assessment, LLC (R-1247-1264) (additional copy R-1091-1109 and 213-230)

24 (3) Wetland delineation (October 2008) identifying 46.9 acres of "farmed
25 wetland" on the site, miscellaneous other degraded wetlands, and degraded, farmed and
26 "'ditched' watercourses. (R-884, 896, 898; 888-981; 212-230)

1 (4) Oregon Department of State Lands acceptance of wetland delineation,
2 identifying eight wetlands on the site totaling approximately 50.41 acres; (R-884-887), all
3 farmed, ditched and otherwise degraded.

4 (5) Identification of land suitable for drainfields capable of accommodating full
5 build-out of the park as proposed. (R-1265)

6 (6) County Department of Health Services identification of appropriate locations
7 for on-site disposal of up to 25,000 gallons per day of “residential strength wastewater.” (R-
8 111-1113; same at 231-235)

9 (7) Engineering review and confirmation that there is “ample space” to
10 accommodate, on-site, all sewage associated with full build-out of the initial conceptual plans
11 for the site. (Supp R-852a)

12 (8) A drainage report for the site. (R-853-887) The report is based on full
13 potential buildout of a 200-space RV park and other “worst case” factors, and concludes that

14
15 “the proposed Conceptual Site Plan * * * development has adequate land
16 available to construct the required storm drainage conveyance system, storm
17 drainage detention system, and storm water quality system to ensure upstream
18 and downstream properties will have no adverse drainage impacts. In fact it is
19 my expert opinion that proper design and development of the property will
20 improve the drainage system in the subject drainage basis.” (R-857)

21 (9) An economic analysis concluding that full development of the conceptual
22 plan would not negatively impact the farming economy of the area or region, and would not
23 negatively impact private RV parks in the area. (R-119-125)

24 (10) With regard to transportation planning and establishment of an impact
25 minimization and facility improvement plan with ODOT:

26 (a) Completion of a Draft Traffic Impact Analysis dated February, 2008
27 by PTV America, Inc. (R-1271-1300);

28 (b) Signal warrant analysis conducted by PTV America, Inc. dated June 3,
29 2008 (R-1182-1186);

30 (c) ODOT Traffic Impact Analysis Scope of Work dated October 29,
31 2007 R-307-313) At R-307 that “the limits of the project” must be

1 defined in the analysis, and the draft must be pre-approved by Linn
2 County and ODOT before ODOT will continue the evaluation. (Id. at
3 307) (R-316-853 are data sheets)

4 (d) Consideration of 2008 base year and 2030 design year traffic volumes
5 and intersection design by Kittleson & Associates, Inc. (R-1187-1240)
6 The report also compared the relative merits of a roundabout traffic
7 signal at the intersection of Seven Mile Lane with Oregon Highway
8 34, which is currently not signalized. (Id.)

9 (e) Traffic signal request submitted by the Linn County Roadmaster to
10 ODOT, based on both the Kittleson and PTV analyses. (R-1169-1180)

11 (f) An updated and/or resubmitted Traffic Impact Analysis dated
12 September, 2009. (Supp R-271-332)³ The study modeled predicted
13 impacts of all of the uses contemplated at the site, and up to 300 RV
14 spaces. (Id. at 299-300, 328) Year 2026 predicted volumes were
15 modeled and considered. (Supp R-293) Completion of additional
16 transportation impact studies and consultation with ODOT was
17 ongoing throughout the approval process. By the time the proposal
18 was presented to the Board of County Commissioners, ODOT had
19 indicated its acceptance of the mitigation plan and the State Highway
20 improvements proposed by the County. The mitigation plans are
21 required to be implemented prior to intensification of uses at the park,
22 and are predicted to accommodate every conceptually proposed long-
23 term use of the site, even camping facilities for up to 196 recreational
24 vehicles. (R-8)

³ The report's "draft" label does not detract from its value as substantial evidence on which the county could reasonable rely in making its decision under applicable standards. The word "draft" on the report simply reflected that no project that will change a State transportation facility can be "finalized" with ODOT prior to "pre-approval" by the county. (R-307)

1 (g) State Traffic Engineer approval of the transportation system mitigation
2 proposed by the County, based on the draft analysis of full park build-
3 out conditions, and requiring ODOT approval of “final signal design
4 plans.” (R-102)

5 (h) ODOT comments regarding the County’s park plans dated October 21,
6 2009, stating that “ODOT required the applicant to submit a traffic
7 impact study (TIS) to quantify transportation impacts. This has been
8 done.” (R-100) The letter also advises that more detailed plans will be
9 required prior to installing traffic mitigation facilities proposed by the
10 County. (Id.)

11 Resolution No. 2009-570 became a final land use decision on January 5, 2010. (R-6-
12 37) Condition #1 prohibits development of any uses that are not “described in the findings
13 for approval, or listed as ‘park’ uses in LCC 920.100(B)(208), and not otherwise limited by
14 these conditions.” Condition #2 limits development of the originally proposed recreational
15 vehicle campsite component of the project. (R-7) Condition #2 states:

16
17 “2. A recreational Vehicle (RV) camping facility, having no more than 50
18 Recreational Vehicle spaces may be developed on the site, without prior,
19 additional public process or Board of Commissioners review, in accordance
20 with law. Additional public process and Board of Commissioners review are
21 required prior to construction of more than 50 RV camping spaces at the park.
22 A caretaker dwelling, interpretive kiosks and trails may be developed as
23 operations of the park warrant.”

24 In combination, Conditions #1 and #2 do not allow development of clubhouses, or more than
25 50 RV camping spaces at the park. As with most public parks, the county Parks and
26 Recreation Department is also allowed to provide necessary bathroom facilities at the park
27 for users of both the campsite and day-use areas of the park.⁴

28 The decision on review also clearly states that approximately 60 acres were projected,
29 in the Parks Department’s original conceptual plans, to be occupied by RV camping spaces,

⁴ These facts, clear in the text of the conditions of approval, defeat the department’s argument beginning at page 13, line 17 of its brief. No use that is prohibited in a local park has been approved by Resolution No. 2009-570.

1 “at full build-out.” (findings 1.2, 2.5.2, 2.5.5 and 2.5.5) By limiting development to 50
2 recreational vehicle campsites, the proposed campground is expected to occupy
3 approximately 15 acres of the 175-acre site. (R-56)

4 The decision on review also clearly prevents any development of the park beyond
5 what is allowed by the conditions of approval, “without additional public process or Board of
6 Commissioners review, in accordance with law.” Additional public process and Board of
7 Commissioners review are required prior to construction of more than 50 RV camping spaces
8 at the park.” (R-7, condition 2; R-10 findings; R-21, paragraph 5) The findings reference the
9 requirement or utility of “master planning” of the site and state, in relevant part:

10
11 “To ensure goal compliance, a condition has been proposed to limit the
12 number of recreational vehicle campsites that can be installed under this
13 Conditional Use Permit to no more than 50. This will allow the park to
14 prove itself prior to full build-out, with additional consideration by the public
15 and Board of Commissioners. Arguments regarding Goal 14 and master
16 planning for parks are more properly addressed at that time, as “densities” and
17 intensities of uses increase beyond the nominal level proposed for immediate
18 approval.” (R-21)

19 **IV. JURISDICTION**

20 Respondent and does not contest the jurisdiction of the Land Use Board of Appeals
21 over this appeal.

22 **V. ARGUMENT**

23 24 **ANSWER TO AGENCY BRIEF**

25 26 **A. The Department Brief was Improvidently Filed, Because Approval** 27 **of the Decision to File the Brief Was Predicated on the Department’s** 28 **Mischaracterizations of the County’s Approval to its Commission.**

29 The county concedes that the Department of Land Conservation and Development
30 has the authority, under ORS 197.830(8), to file a non-party brief. The department’s rule is
31 at issue in this case. The county nevertheless believes that it was improvident for the
32 department to file the brief.

1 ORS 197.830(8) allows the department's brief to be filed "on the same date the
2 respondent's brief is due." As a courtesy, the department served and filed its brief one week
3 early.

4 At the Land Conservation and Development Commission meeting held April 22,
5 2010, in Lincoln City, the department's director and staff requested permission from the
6 commission to file an agency brief in this case.⁵ The position that emerged from that
7 discussion was that the director and commission agree that the rule is ambiguous.⁶
8 Department staff mischaracterized to the commission, through its agenda and staff report, the
9 nature of the county's approval in this case. Those same mischaracterizations appear to have
10 originated with petitioners; to have been adopted by agency staff as true; and to have been
11 conceded by the department's legal counsel, perhaps partly due to unrealistic briefing
12 deadlines.

13 Throughout this process, the department has asserted a number of different
14 interpretations of its policy regarding public parks on "farmland;" public parks on "resource
15 land;" public parks on "rural land;" public parks within three miles of an urban growth
16 boundary. Is the department asserting that Division 34 prohibits conditional use approval of
17 any development in a public park without a Goal 3 exception? If some is allowed, how
18 much? What are the characteristics of "passive" uses that make them more or less likely to
19 be allowed in a can be approved in a public park under conditional use authority, and what
20 does "passive" or "passive recreation" mean? What qualifies as a "low-intensity" use, and
21 why? These terms are not in any statute or rule that the county can find, regulating the
22 development of nonfarm uses in farm zones.

23 The department has also presented this case to LCDC and this Board in a manner that
24 mixes standards for public parks and public parks. This seems disingenuous, because these

⁵ OAR 660-001-0201 to 660-001-0230 describe the LCDC's process for granting authority to the Director of DLCD to file an agency brief. In a case such as this, where important policy choices are being made by LCDC, the process is flawed, with great potential for inner and inter-department politics to triumph over reason, and non-lawyer staff members practicing law.

⁶ Personal knowledge from attendance.

1 two categories of uses are treated like apples and oranges in ORS 215.283 and by Divisions
2 33 and 34 of LCDC's rules. Contrary to the innuendo of the department and petitioners,
3 there is no state law or DLCD rule that prohibits recreational vehicle utility hook-ups in
4 public park campgrounds, and public parks are allowed within three miles of an Urban
5 Growth Boundary, without an exception or other comprehensive plan amendment.

6 In this case, the applicant is a County Parks and Recreation Department, the property
7 owner is the county, and all of the improvements to be made to the park are for the public
8 benefit of the residents and visitors to Linn County. There is obvious political accountability.
9 The fact that public parks are "public" and managed for the benefit of the public is a strong
10 rationale for treating the two types of parks—public and private—differently. DLCD should
11 not have requested permission to file an agency brief in this matter based on an inaccurate
12 description of the county's decision. The department and LCDC have, at least since 2007,
13 known that the rule was ambiguous, and should have addressed the ambiguity by amending
14 the rule. LCDC's approval of the brief was improvident. The county's use of statutory and
15 local code conditional use authority to initiate development of a local park prior to adopting a
16 comprehensive plan/master plan governing all possible future uses of the site, was
17 appropriate in this instance.

18
19 **B. The Department Should be Granted No Deference for the Post-hoc**
20 **Interpretations it has Provided, of OAR 660-034-0035 and OAR 660-034-**
21 **0040.**

22
23 In Friends of the Columbia Gorge v. Columbia River Gorge Com'n,⁷ the Court
24 considered the federal Chevron doctrine, and how that doctrine differs from Oregon law. As
25 explained in Friends, a state agency is entitled to no deference for the post hoc
26 rationalizations of the employees of the department.⁸ That principle applies in this case

⁷ Friends of the Columbia Gorge v. Columbia River Gorge Com'n, 346, Or 366, 213 P3d 1164 (2009)

⁸ Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) The Oregon Supreme Court stated: [Chevron] holds that, when a federal agency has been charged by Congress with implementing a federal statute, courts should defer to that

