

**MEMORANDUM**

To: City of Newport Planning Commission  
From: Penelope McCarthy, City Attorney  
Date: June 25, 2010

**CITY OF NEWPORT - PROPOSED GEOLOGIC HAZARDS STATEMENT  
PURSUANT TO SECTION 2-4-7 - NEWPORT ZONING ORDINANCE**

The Planning Commission is considering modifications to the City of Newport Geologic Hazard ordinance. Their review includes a statement to be signed by a property owner prior to the City issuing a Geologic Permit (Statement). The Statement would be required only for property located within an active landslide area or within an active or high hazard zone within a bluff or dune backed shoreline area. Several jurisdictions in Oregon with geologic hazard or similar (e.g. landslide) ordinances have a similar code requirement. These jurisdictions include: Marion County, Oregon City, Hood River, City of La Grande and Salem (See Attachment A). The Planning Commission held public hearings and received public comment regarding the proposed Code and Statement.

The City's Community Development Department is responsible for the administration of Geologic Hazard Permits but is not responsible nor is staffed to review each Geologic Report received as to engineering accuracy or appropriateness. When a Geologic Hazard Permit is issued by the Department, it is issued on the basis of the completeness of the record submitted by an applicant.

Those who develop in geologically hazardous areas may find insurance covering Geologic Hazards expensive and difficult to obtain. A property owner, faced with damage or loss to property, may resort to litigation. This may include naming the City as a defendant for issuing a Geologic Hazard Permit. In defending the City, public dollars and time would be spent which may also cause an increase in the City's insurance rates. If public rights-of-way are damaged as a result of development activities performed under a Geologic Hazard Permit, public dollars would be used to repair the rights-of-way. Accordingly, City staff believe it is reasonable for property owners who choose to develop in certain geologically hazardous areas to sign a Statement accepting personal responsibility for development activities in those areas and thereby protect the public and public dollars.

As a result of public comment, the Statement has been substantially revised. This memorandum addresses some issues presented through public comment about the Statement.

### Recording the Statement with the County Recorder

One provision that no longer appears in the proposed Statement is for the recording of the Statement with the county recorder. Recording the Statement provides notice to the public that the property was developed subject to a Geologic Hazard Permit. This requirement was removed in response to public concerns about the effect of recording the Statement on property values and limitations and financial losses related to the selling of property and willing buyers. The City's insurer strongly recommends that the Statement be recorded. Jurisdictions with similar ordinances that require recording of a statement include Marion County, City of La Grande and Salem.

In regard to providing notice to potential buyers, the current Oregon seller's property disclosure statement requires that a seller represent that the seller knows if the "...property is in a designated slide or other geologic hazard zone".<sup>i</sup> This disclosure does not provide notice to the public (including potential buyers) that development activities may have occurred on the property, subject to a Geologic Hazard Report and subsequent Permit. Recording the Statement provides notice of this information to the public.

### Indemnification

Another provision that appears in the proposed Statement which has received public comment is indemnification of the City by the property owner. Indemnification is a complex concept in law. The indemnification provision in the Statement addresses third party claims against the City. Essentially, the provision requires a property owner who signs the Statement and obtains a Geologic Hazard Permit to defend the City should another party file a claim against the City for damage due to a Geologic Hazard affecting the property or other property. As a result of public comment, language was added to the provision so that: (i) indemnification only arises if damage or loss results from activities the property owner (or agents) undertake, and (ii) damages that result from the negligence or misconduct of the City are excluded. The City's insurer strongly recommends that the Statement include a provision indemnifying the City.

By way of example:

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The City appropriately issues a Geologic Hazard Permit to a property owner. The property owner builds a house on the property pursuant to the Permit. As a result of extended heavy rains, the house slides downhill onto an adjoining property. The adjoining property owner sues the property owner and the City, alleging that the City should not have issued the Permit. If the City was not indemnified by the property owner, the City and the City's insurer, City County Insurance Services, would have to defend the City from the claim. The defense may involve City staff time, amounts awarded by a court and an increase in insurance rates – all paid for with public funds. If the City is indemnified by the property owner, the property owner is required to 'step into the shoes' of the City and defend the City from any claims by the adjoining property owner and public funds are not used for this purpose.

The Statement was revised so that the indemnification responsibilities only apply to the applicant (current property owner) and not to any subsequent owner. This occurred as a result of public pressure and concerns about how (particularly without recording the Statement) the transfer of indemnification responsibilities would occur from one owner to the next.

#### Authority

The question arose regarding the City's authority to require the execution of a statement by a property owner as a part of the Geologic Hazard Code. The proposed code is a modification of the City's existing Code.

Authority for the City to implement appropriate regulations related to land use can be found in state statute, particularly, as it relates to land use, in ORS Chapter 197. ORS 197.005 (3) states: "...cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions" and section (5) "City and county governments are responsible for the development of local comprehensive plans". ORS 197.175 states: "(1) Cities and counties shall exercise their planning and zoning responsibilities, including, but not limited to..." (2)(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission; (b) Enact land use regulations to implement their comprehensive plans.."

Newport's Comprehensive Plan Goal 1, Natural Features Section, states the City's interest in Geologic Hazards: "To protect life and property, to reduce costs to the public, and to minimize damage to natural resources of the coastal zone that

might result from inappropriate development in environmentally hazardous areas.”

By state statute, the City is vested with the authority and responsibility to manage the local aspects of development for the best interests of the people of Newport. A part of this management is the implementation and setting of goals of the Newport Comprehensive Plan. The Statement attached to the proposed Geologic Hazard Code is consistent with and implements Goal 1 in that it aims to protect life and property and reduce costs to the public.

**Attachment A**  
**Similar Ordinances from Other Oregon Jurisdictions**

**Marion County – Geologic Hazard Overlay**

**182.080 DECLARATORY STATEMENT.** Before a building permit is issued for property in a landslide hazard or excessive slope area as identified and regulated in this chapter, the property owner shall **record** a declaratory statement with the county clerk that the property and the approved development lies within a landslide hazard or excessive slope area as defined by this chapter. The statement shall indicate that restrictions on use or the alteration of the site may exist due to natural conditions of the site and resulting regulation, and that all approved assessments or reports for such property are on file with the county.

**City of La Grande - GEOLOGIC HAZARD WAIVER NOTICE – Article 3.4**

REGARDING ERECTION AND MAINTENANCE OF BUILDING IN AREAS SUBJECT TO INUNDATION OR PHYSICAL HAZARDS OF A GEOLOGICAL NATURE

I (We) desire to build on said property and require a Building Permit from the City of La Grande for construction. I am (we are) fully aware of the fact that the site is in an area subject to inundation, slides and/or unstable soils, and that I (we) in consideration of the issuance of said Building Permit from the City of La Grande, agree to **indemnify, defend and hold the City of La Grande harmless** from any loss, claim or liability arising in any manner out of use of the above described property for damages that may occur to our property or buildings thereon due to water or soil conditions, including but not limited to slides, water run-off, caving, or other such natural phenomena due to erosion whether such damage occurs to me (us) or adjoining land owners, and **further agree to release and hold harmless the City of La Grande from any damages, law suits, or liability arising therefrom.** I (We) assume all risk arising out of the use of the above described property and the City shall have no liability in connection with the issuance of said Building Permit to me (us) for any condition existing thereon. This agreement is appurtenant to the real property described herein, and shall run with the land and shall bind and inure to my (our) successors, assigns, heirs, and executors and **shall be recorded** in the deed records of Union County.

**Salem – Chapter 69; LANDSLIDE HAZARDS**

69.0130 As a condition of city permits or approvals of regulated activities located in areas of High Landslide Risk Assessments, the owner 1) shall **record** a declaratory statement with the county clerk stating that the property lies within a potential landslide hazard area and that all approved geotechnical reports for such property

are on file with the city and 2) shall provide evidence of such recording to the city department approving or permitting the regulated activity.

**Hood River County – Article 45 - Geologic Hazard Zone; Appendix A**

The owner and/or contractor understand that the property for which the attached building permit is issued, may be located within an area of Hood River County that has been identified in the Comprehensive Plan as a Geologic Hazard area and zoned Geologic Hazard. In consideration of the issuance of the permit, the owner and/or contractor agree that the **County shall not be liable for any damage, loss, expense, cost or inconvenience** which either or both of them may suffer if there is an earth movement which affects the structure for which this permit is issued, or which affects the property on which it is designated to be located. The owner and/or contractor further understand and agree that the **issuance of this permit and the acceptance of it by them shall operate as a disclaimer of all responsibility and liability on the part of the County for any of the foregoing.**

**Oregon City – Chapter 17.44 – Geologic Hazards: Section 17.44.120**

Approval of an application for development on land subject to this chapter shall not imply any liability on the part of the city for any subsequent damage due to earth slides. Prior to the issuance of a building permit, **a waiver of damages and an indemnity and hold harmless agreement shall be required which release the city from all liability** for any damages resulting from the development approved by the city's decision.

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<sup>i</sup> Certain parties are excluded from completing the seller's property disclosure statement. They include: (i) first sale of a dwelling never occupied; (ii) sale by a financial institution that acquired the property as custodian, agent or trustee, or by foreclosure or deed in lieu of foreclosure; (iii) seller is a court appointed receiver, personal representative, trustee, conservator or guardian; and (iv) sale or transfer is by a governmental agency.