



**CITY COUNCIL STAFF REPORT
LEGISLATIVE TEXT AMENDMENTS
SEPTIC SYSTEM MAINTENANCE REQUIREMENTS
ORDINANCE NUMBER 228**

City Council
Public Hearing Date: April 14, 2016 ~ 7:00 pm

Applicant: Initiated by Dunes City

Proposal: Legislative Text Amendment to the Dunes City Code to Amend the City’s Septic System Requirements

Staff: Gary Darnielle and Jacob Callister, LCOG

I. INTRODUCTION

Proposal

Ordinance 228 amends Title XV of the Dunes City Code by replacing Chapter 157 “Septic System Maintenance” with Chapter 142 “Subsurface Sanitation” and repeals Ordinance 203. Ordinances 228 and 203 primarily differ in the following ways:

Inspections

Ordinance 203 requires an inspection once every five years at a minimum. More frequent inspections are required when the quantity or characteristics of the wastewater discharge change due to enlargement of the structure or change in use. Commercial buildings must be inspected annually or at other time intervals specified by the City.

Under Ordinance 228, the time period for the required residential and commercial inspections and evaluations are set by a qualified inspector based upon the most current Oregon State University Extension Service Septic Tank Maintenance Table or other standards that are adopted by the City Council.

Inspectors

Under Ordinance 203, private system inspectors need only have a business license with the City. Under Ordinance 228, private system inspectors must have a business license with the City, be registered in accordance with ORS Chapter 700¹, and possess a current NSF International Onsite Wastewater Inspector accreditation.

¹ ORS 700.052-.053 require that a waste water specialist must have a bachelor’s degree with a substantial amount of soil science credits and be registered as an environmental health specialist or waste water specialist by a national association that is recognized by the Oregon Environmental Health Registration Board or is registered by the regulatory body of another state.

Inspection Form

Ordinance 203 requires that the inspector use the City's "Septic Maintenance Record and Inspection Report" and document the reasons why the inspector requires pumping. Under Ordinance 228, the inspector must use the form required by the DEQ and recommend when the system should be next inspected and provide reasons why pumping is required.

Compliance

Ordinance 203 provides for a penalty of \$250 per day for violations of Chapter 157. Ordinance 228 defers to Chapter 36 of the Dunes City Code for violations of Chapter 142, which provides for penalties, the recovery of abatement and administrative costs, and the ability to lien property.

Background

On January 14, 2010 the Dunes City Council adopted Ordinance No. 203 which put in place maintenance, inspection, and reporting requirements for septic systems in Dunes City. The Ordinance required an initial inspection, mapping and pumping of each septic system in Dunes City and well as periodic inspections every five years (more frequently if there was evidence to suggest a system failure).

On November 10, 2011, the Dunes City Council adopted Ordinance No. 211A, which repealed Ordinance 203 and replaced it with an educational program for septic system maintenance that was to be implemented within one year. In adopting Ordinance 211A, a majority of the Council was concerned that the regulatory program of Ordinance 203 unfairly burdened some residents and that there was little empirical evidence that water pollution in Woahink and Silcoos Lakes was caused by failing septic tank systems.

Ordinance 211A was appealed to Oregon Land Use Board of Appeals by the Oregon Coast Alliance, the Woahink Lake Association and Suzy Navetta. At the heart of this appeal was Dunes City Comprehensive Plan Policy (DCCP) E6 that provides: "The city shall adopt a program to improve maintenance of septic systems for the benefit of all residents." The City argued that this policy meant that the Council only had to require a program to improve septic system maintenance beyond the regulatory floor set by the state. The petitioners argued that the policy required that the city demonstrate how Ordinance 211A improved upon Ordinance 203. That is, that the educational program of Ordinance 211A would improve maintenance of septic systems compared to the mandatory maintenance program of Ordinance 203. LUBA remanded the case to the city because the City Council had not made a formal interpretation of DCCP Policy E6 and therefore there was no deference given to that argument. Ordinance 211A is not in effect as the City has not cured the cause of the remand.

On August 18, 2015, Dunes City initiated the adoption of Ordinance 228 by providing the Department of Land Conservation and Development with proper post acknowledgment notice. Ordinance 228 amends Title XIV of the Dunes City Code of Ordinances to add a new chapter 142 entitled "Subsurface Sanitation." The changes in the Code move the regulatory needle back closer to Ordinance 203 in that it requires a mandatory initial inspection/evaluation of each septic tank system in Dunes City. It differs from Ordinance 203 in that follow-up inspections/evaluations are determined by a qualified septic tank inspector who evaluates each system on its own merits, using an Oregon State University Extension

Service Maintenance Table as a guideline, instead of requiring new inspections every five years regardless of the size of a system and its loading.

The Dunes City Planning Commission held two public hearings on Ordinance 228. The majority of the testimony was in opposition to the adoption of the ordinance, arguing that Ordinance 228 reduced the effectiveness of Ordinance 203. Testimony also was heard that complained that the City's inspection program of septic tank systems was behind schedule. At its November 19, 2015 meeting the Commission, by a two to one vote, passed a motion to recommend to the City Council that it take no action on Ordinance 228.

Current Status

Currently, new septic systems are inspected by the Lane County sanitarian. Contractors who install new systems in Dunes City are required to obtain a Land Use Compatibility Statement (LUCS) from the City. Staff has focused on getting initial compliance from all property owners. At the time that Ms. Mills began filling in for the past City Recorder there were 83 property owners waiting for a notice from the City for a re-inspection. Today there are less than 75.

Since the adoption of Ordinance 203, 45 property owners have replaced all or a portion of their system and there have been 20 new systems installed. Septic inspections and pumping from between \$600 and \$800 and whole system replacement can cost between \$8,000 and \$10,000.

Compliance has been a problem. Currently, there are 13 lake-front properties with older systems (pre-1974) that have not complied with the ordinance. Under Chapter 36 of the Dunes City Code, the City can fine, abate, assess and deny permits. In 2011, following the LUBA remand, the City Council directed staff not to enforce the septic ordinance. The current City Council has not addressed this issue and staff has re-initiated the enforcement of the ordinance, with emphasis on lake-front properties. In this regard, letters continually go out the property owners based upon their proximity to the lakes. There are 161 lake-front, older systems that are due for a second inspection and letters to these individuals are scheduled for mailing during the week of March 21.

II. ADOPTION PROCEDURES AND APPROVAL CRITERIA

Adoption Procedures

In compliance with Code requirements, notice was mailed directly to all property owners within Dunes City regarding the first hearing before the Planning Commission and published in the Siuslaw News prior to the Planning Commission and City Council public hearings. The notices stated the nature of the proposal, how to participate and the date, time and location of the public hearings as required by state law and the city code. The specifics of the notice dates are contained in Exhibit A to Ordinance 228.

Notice of the proposed code amendment was sent to the Department of Land Conservation and Development (DLCD) not less than 35 days prior to the first evidentiary hearing, as required by State law. Referrals were sent to the Dunes City Building Official, Lane County Sanitation Department, the Oregon Department of Environmental Quality and the DLCD Regional Representative notifying them of the proposed amendments, public hearing dates and requesting comments.

Approval Criteria

The proposed amendment is a legislative amendment to the Dunes City Code and the following criteria apply to this matter.

- Dunes City Code of Ordinances, Title 15 *Land Usage*, Chapter 155 *Zoning and Development*, Section 155.4 *Applications and Review Procedures*, Subsection 155.4.1.7 *Type IV Procedure (Legislative)*
- Dunes City Comprehensive Plan Elements: *Citizen Involvement, Land Use, and Air, Land and Water Quality*
- Oregon Revised Statutes (ORS) 197.610 *Local government notice of proposed amendment or new regulation; exceptions; report to commission.*
- ORS 227.186 *Notice to property owners of hearing on certain zone change; form of notice; exceptions; reimbursement of cost.*
- Statewide Planning Goals

Exhibit A contains detailed findings addressing each of the applicable criteria in the above-listed documents. Based upon the 2011 LUBA remand, however, the most important criterion is DCCP Sewage Systems Policy E6 which states: “*The city shall adopt a program to improve maintenance of septic systems for the benefit of all residents.*”

When reviewing Ordinance No. 211A in light of Policy E6, LUBA was faced with two arguments. One argument, made by the opponents, was that Policy E6 required that any new septic tank maintenance ordinance must improve upon the standards of existing regulations. Ordinance No. 211A was not consistent with this interpretation as it replaced Ordinance 203 with an education program and there was no evidence in the record that an education program would improve the maintenance of septic systems. The City’s argument was that Policy E6 should be interpreted to mean that the City merely had to adopt a maintenance program that improved upon the state standards. LUBA opined that since the City Council had not formally adopted this latter interpretation the City could not rely upon this interpretation and remanded the appeal back to the City to allow the Council to better address this issue.

If the City Council wishes to adopt Ordinance 228 and be able to successfully defend it in an appeal to LUBA, it must state that Policy E6 means that the City must adopt a program the improves the maintenance of septic systems over that required by the State. The findings in Exhibit A would point out that the State does not require any maintenance program for septic tank systems and only gets involved when they fail.

If the City Council decides not to adopt Ordinance 228 then they need do nothing further other than to direct staff to notify DLCD that the ordinance was not adopted and is no longer being considered by the City.

III. PLANNING COMMISSION RECOMMENDATION

The Planning Commission recommends the City Council not adopt Ordinance Number 228.

IV. CONCLUSION & RECOMMENDATION

Staff does not have a recommendation to pass to the City Council but does believe that the City can adopt findings of fact supporting Ordinance 228 that will survive legal scrutiny. As noted in the Background section above, Ordinances No. 210A and 211A were remanded by LUBA on the basis that the City Council had not adopted a formal interpretation of DCCP Policy E6. If the Council wishes to adopt Ordinance No. 228, then it must formally interpret DCCP Policy E6 to mean that this policy only requires the City to adopt a program to improve septic system maintenance beyond the regulatory floor set by the state. Both Ordinance 203 and 228 would be consistent with this policy interpretation. If the City chooses not to adopt Ordinance 228 at this time they merely need to notify DLCD of this decision. If the City Council decides to adopt Ordinance No. 228, adoption of the findings of fact in Exhibit A to Ordinance No. 228 would meet all applicable criteria of the Dunes City Code, Dunes City Comprehensive Plan and Oregon State Laws.

If the City Council wishes to adopt Ordinance No. 228, staff would recommend the following changes to the Exhibit B (Title XIV, Chapter 142) of the draft ordinance:

1. Section 142.005 should be changed to read:

“NOTICE. A written notification from the City to the owner of a wastewater disposal or septic system within the city limits. A notice should be considered given:

- 1) *On the date of delivery if delivered in person.*
- 2) *On the day after deposit if delivered by overnight courier; or*
- 3) *Three (3) days after deposit if delivered by placing in the U.S. mail, first-class, postage prepaid.*

2. Section 142.030.A.2. should be changed to *June 1, 2016* for compliance with the ordinance. The current date is March 31, 2016.

3. The second sentence of Section 142.030(B) should be changed to read:

“The time period for the required inspection and evaluation shall be the interval identified by the qualified inspector in the prior inspection and evaluation report, provided there has been no change in the usage of the system since the date of last inspection, but in any event, shall not be greater than Seven (7) years.”

4. Add a new paragraph F to Section 142.030 that reads as follows:

“F. Transfer of ownership.

Prior to the consummation of the sale or transfer of a parcel of real property located within Dunes City that has an onsite wastewater disposal system, the current property owner, regardless if the proposed transfer is to a relative or to a family trust, will have the system inspected and evaluated at their expense by a qualified inspector and cause the inspection report, together with any requisite administrative fees, to be delivered to Dunes City within Forty-five (45) days of the date of inspection.”

5. Add the following after the last word (*guideline*) in Section 142.060.B.”

“provided, however, that the next inspection date shall not be more than Seven (7) years from the current inspection date.”

6. Change Section 142.080.A to read:

“A. Owners of buildings served by onsite wastewater disposal systems shall have their system inspected and evaluated as provided in this Chapter 142 at such intervals as identified by the qualified system inspector, provided, however, that there has been no change in the use of the system and that such interval shall not exceed Seven (7) years.”

7. Change the first sentence of Section 142.100 to read:

“For violations of this Ordinance, the City may take the following actions: stop work orders, denial of permit applications, issuance of notice of violation, issuance of cease and desist orders, abatement, execution of a stipulated agreement, imposition of penalties and fines, assessment and collection of City costs, placement of liens for non-payment, and/or commencement of other civil proceedings as provided in Chapter 36 of the Dunes City Code of Ordinances.”

8. The City Council may want to consider contracting on a flat rate basis with its own septic system inspector who does NOT do septic pumping for a living. The language of the Ordinance would need to be changed to reflect that owners can contract with the inspector of their choosing, or can pay for the City’s inspector to do the job.

V. EXHIBITS

- A. Ordinance Number 228, “An Ordinance Amending Title 14 of the Dunes City Code of Ordinances by Repealing Chapter 157 Entitled “Septic System Maintenance,” Amending Title XIV of the Dunes City Code of Ordinances by adding Chapter 142 Entitled “Subsurface Sanitation,” and Repealing Ordinance Number 203.”
- B. Exhibit A to Ordinance 228, Findings of Fact
- C. Exhibit B to Ordinance 228, Chapter 142 of Title XIV of the Dunes City Code.
- D. Comments to proposed changes to Ordinance 203 from citizens (received in September, 2014)
- E. Citizen comments received prior to the October 2015 Planning Commission meeting. (Comments include an email from George Ehlers, Lane County Environmental Health Specialist)
- F. Citizen comments received by the Planning Commission at its October 29, 2015 meeting.
- G. Citizen comments received by the Planning Commission at its November 19, 2015 meeting.