



Oregon

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March 12, 2013

TO: Land Conservation and Development Commission

FROM: Jim Rue, Director
Rob Hallyburton, Community Services Division Manager

SUBJECT: **Agenda Item 2, March 21, 2013 LCDC Meeting**

PETITION FOR ENFORCEMENT LANE COUNTY

I. AGENDA ITEM SUMMARY

A. Type of Action and Commission Role

This item responds to a petition by LandWatch Lane County (LandWatch) for the Land Conservation and Development Commission (commission) to order Lane County (county) to comply with statutory deadlines and other procedural requirements related to the county's processing of land use applications. (Attachment A). The commission's role is to determine whether there is good cause to proceed to a contested-case hearing (which hearing would provide the forum to decide whether or not to enter an enforcement order).

If the commission finds there is good cause to proceed to a contested-case hearing, the commission must also determine whether the commission or a hearings officer will conduct the contested-case hearing.

LandWatch alleges that Lane County has engaged in a pattern and practice of violating ORS 215.427 and its own code by routinely (1) failing to make land use decisions within required deadlines; (2) improperly granting extensions; and (3) failing to void incomplete applications. LandWatch further alleges that these practices damage parties' ability to participate in the land use process and citizens their right under Statewide Planning Goal 1 to participate in all phases of the planning process.

Lane County responds that it has taken various actions to address the deadlines and extensions, specifically (1) revising its form to make the length and ultimate limit of extensions clear; (2) revising its "incomplete" letter to warn applicants that incomplete applications become void after 180 days; (3) filling of vacant planning positions; and (4) revising its clerical procedures to assure that applications are placed in the correct category. Lane County also asserts a number of interpretative defenses, including arguing that the cited applications do not meet the definition of a "pattern or practice" because they involve applications across the county (not in the same or

similar geographic areas), in various plan designations and zones (again, not in the same or similar zones), and for multiple types of land use (not similar).

B. Staff Contact Information

If you have questions about this agenda item, please contact Rob Hallyburton, Community Services Division Manager, at (503) 373-0050 ext. 239-9453, or rob.hallyburton@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

For the reasons described in its report, the department recommends that the commission find that there is not good cause to proceed to a contested case hearing. The department's analysis is in section V of this report (see page 7).

III. BACKGROUND

A. Procedural Steps

On November 16, 2011, LandWatch notified Lane County its intent to petition the commission for an enforcement order against the county if the county did not take specific steps, enumerated in the notice, to stop what LandWatch alleges is a "pattern or practice of decision making" in violation of state and local land use regulations.¹ In its notice, LandWatch identified 66 specific instances within the previous three years where the county allegedly violated both statute (ORS 215.427) and the local development ordinance (Lane Code (LC) 14.050). In four of the cases, the applicants filed petitions for alternative writ of mandamus in Lane County Circuit Court seeking approval of the applications, allegedly eliminating the ability of LandWatch to participate in the process.

Lane County responded to the LandWatch notice on December 8, 2011. In its response to LandWatch, the county stated that it did not find that the instances cited by LandWatch resulted in a "pattern or practice of decision making" as defined in the OAR 660-045-0020(10) and (11).

Not satisfied with the county's response to its notice, on March 22, 2012, LandWatch submitted to the department a letter requesting the commission order Lane County to modify its "pattern and practice of decision making" so as to comply with timelines and other procedural requirements established by statute and Lane Code.

¹ OAR 660-045-0040 and 660-045-0050 set forth the requirements for a person ("requestor") to initiate a petition for an enforcement order against a local government. As is relevant here, OAR 660-045-0040 requires that the requestor first notify the affected local government of its intent to seek an enforcement order, which notice must contain a statement of facts that establish the basis for seeking enforcement and the corrective action the requestor seeks. OAR 660-045-0060 requires the local government respond within 60 days of such notice, identifying whether corrective action will be taken, and if so, the contents of such action. After receiving the response, the requestor may elect not to proceed with enforcement, enter into mediation, or petition the commission for enforcement. See OAR 660-045-0060(5) and (6).

On June 7, 2012, after completing its review of the request by LandWatch for an enforcement order on Lane County, the department rejected the request for enforcement on the basis that the request substantially prejudiced Lane County. *See* OAR 660-045-0070(3). The department found that the evidence cited in the petition differed from that in the notice provided to the county (the number of cases cited differed, which denied the county the ability to respond).

In response to the deficiency raised by the department, LandWatch submitted to the county a renewed notice of intent to petition on June 29, 2012. This notice alleged the same “pattern or practice of decision making” set forth in its November 2011 notice.

Lane County responded to the LandWatch notice on August 23, 2012 (Attachment B). In its response to LandWatch, while addressing the specific alleged violations of statute and Lane Code in greater detail, the county continued to assert that there was no discernible “pattern or practice of decision making” as defined in OAR 660-045-0020(10) and (11), because the alleged violations concerned dissimilar areas of the county, as well as dissimilar plan designations, zones, and types of land uses.

On October 11, 2012, the department received a renewed petition from LandWatch for enforcement (Attachment A). After completing its review as required in OAR 660-045-0070, the department accepted the petition as complete. LandWatch and Lane County have been notified pursuant to OAR 660-045-0071(7).

B. Alleged Violations and Proposed Remedies

The specific allegations are presented and explained in the petition (Attachment A). In summary, LandWatch alleges that Lane County has engaged in a pattern and practice of violating [ORS 215.427](#) and its own code ([LC 14.050](#)) by routinely (1) failing to make land use decisions within required deadlines, (2) improperly granting extensions, and (3) failing to void incomplete applications. LandWatch further alleges that these practices damage parties’ ability to participate in the land use process and citizens their right under Statewide Planning Goal 1 to participate in all phases of the planning process.

LandWatch has submitted evidence identifying 66 instances of alleged noncompliance during a three-year period (November 2008 to November 2011), with additional analysis of the 20 most recent of these cases. (The data is more than a year old because the department rejected LandWatch’s first petition and the requester resubmitted the original analysis.) The cases were all quasi-judicial land use applications that LandWatch alleges Lane County either did not act on within the time period mandated by statute and the county code, or improperly granted extensions, or both. Additionally, LandWatch cites at least one case where it alleges the county failed to void an application as required by [ORS 215.427\(4\)](#) and [LC 14.050\(3\)\(c\)](#).

LandWatch requests that the commission:

1. Direct the Lane County Board of Commissioners to issue an interpretation of its code explaining the correct interpretation and application of ORS 215.427(4) and LC 14.050(3)(c), instructing that an application is void under certain circumstances as prescribed by statute;

2. Direct the Lane County Board of Commissioners to issue an interpretation explaining the correct interpretation and application of ORS 215.427(5) and LC 14.050(5) and (3), instructing that extensions are to be granted only for a specified period of time, not to exceed a total of 215 days; and
3. To ensure compliance with ORS 215.427(1) and LC 14.050(5), which require that a county take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals, within 150 days after the application is deemed complete unless the timeline is extended or waived, direct the Lane County Board of Commissioners to adopt amendments to Lane Code Chapter 14.

C. County Response

Lane County, in its response to LandWatch's notice of intent to petition the commission for enforcement, contends that (1) LandWatch analyzed the wrong period, (2) several of the 66 instances of alleged noncompliance are in fact not land use decisions, are double-counted, or are outside the three-year period, leaving only 30 examples of late decisions or improper extensions, and (3) the applications are dissimilar in geographic location, plan designation, zoning, and land use type, so there is no "pattern" or "practice" of decision making that conflicts with relevant provisions.

In addition, the county itemized measures it has already taken to resolve its timeliness issues and documentation of extensions of deadlines. Finally, the county reports that it updated the relevant sections of its code in 2009 and did not receive any proposals such as those now requested by LandWatch, and that the county is not inclined to amend the code again so soon.

D. Additional Information

During the course of its investigation, the department asked the county to provide the number of applications received during the three-year period between July 2, 2009 and July 2, 2012. This number was not otherwise in the record. The department felt this data was important in order to put the number of alleged violations in the context of the overall activity at Lane County. The county informed the department that it received 757 applications for quasi-judicial land use decisions between July 2, 2009 and July 2, 2012. This number would likely be different if a different three-year period were inspected.

IV. REVIEW CRITERIA AND PROCESS

A. Decision-Making Criteria

OAR 660-045-0090(6) provides: "The commission shall find that there is good cause to proceed to a contested-case hearing if the information * * * contains substantial evidence of noncompliance."

OAR 660-045-0020(9) defines non-compliance:

Noncompliance means a state of not being in compliance with a currently applicable comprehensive plan, land use regulation, special district cooperative

agreement, urban growth management agreement, goal, rule, or other regulation or agreement, as described in ORS 197.320(1) to 197.320(10)² or in ORS 197.646.³ The term includes a failure to comply with applicable case law in making a land use decision. The term includes a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. Noncompliance is the problem that an enforcement order seeks to eliminate through corrective action. (Emphasis in original; footnotes added)

OAR 660-045-0020(10) defines “pattern of decision making”:

Pattern of decision making means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:

- (a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;
- (b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and
- (c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date. (Emphasis in original)

OAR 660-045-0020(11) defines “practice of decision making”:

Practice of decision making means a series or succession of decisions with these characteristics:

- (a) The decisions involved the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;
- (b) The decisions involved the same or similar geographic areas, plan designations, zones, or types of land use; and

² ORS 197.320 provides, in relevant part: The Land Conservation and Development Commission shall issue an order requiring a local government * * * to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe:
* * *

(6) A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. In making its determination under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions;

³ ORS 197.646 addresses local government implementation of new goals, rules, and statutes. It is not relevant to this case.

(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040. (Emphasis in original)

B. Procedural Requirements

OAR chapter 660, division 45 provides the process for department and commission consideration of petitions for enforcement. Beginning in OAR 660-045-0080, once the department has accepted a petition, it is to evaluate the alleged noncompliance and prepare recommendations to the commission. In evaluating the alleged noncompliance, OAR 660-045-0080(2) requires the department consider the following three matters and any others it deems relevant:

- (a) The noncompliance specified in the citizen's request to the affected local government or district;
- (b) The affected local government or district's response to the request; and
- (c) Facts known to the department or ascertained by its investigation.

After the department has completed its review, OAR 660-045-0080(3) requires that the department prepare recommendations to the commission that include findings on the following three matters and any others the department deems relevant:

- (a) Whether there is good cause to proceed to a contested-case hearing of the petition;
- (b) Whether the commission or a hearings officer should conduct the contested-case hearing, if one is to be held; and
- (c) A date for the contested-case hearing, if one is to be held.

OAR 660-045-0090(1) requires that the commission conduct a public hearing to determine whether there is good cause to proceed to a contested-case hearing. At the "good cause" hearing, only the department, LandWatch and Lane County may present testimony. OAR 660-045-0090(2). In addition, the commission may set limits on the time allowed for testimony OAR 660-045-0090(3). Finally, OAR 660-045-0090(4) allows LandWatch to present as evidence recent examples of noncompliant decisions made after they notified Lane County of the its intent to petition for enforcement.

At the conclusion of the "good cause" hearing, OAR 660-045-0090(5) requires that the commission consider the following in deciding whether to proceed with a "contested-case" hearing:

- (a) The department's recommendation;
- (b) The requester's petition;
- (c) The citizen's request notice to the affected local government or district;
- (d) The affected local government or district's response to the citizen's request;
- (e) Related facts known to or ascertained by the commission; and
- (f) Any testimony from parties to the enforcement proceeding.

If the above information contains “substantial evidence” of noncompliance, the “commission shall find there is good cause to proceed to a contested-case hearing * * *.” OAR 660-045-0090(6). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179 (1993). Applied here, good cause is established when the evidence and allegations in the petition, local government’s response, and department recommendation, together with any facts known or ascertained by the commission and testimony presented at the enforcement proceeding, would lead a reasonable person to determine that an applicable land use regulation had been violated. When the evidence in the record is conflicting, the commission must make a reasonable choice between the conflicting evidence in view of all the evidence in the record to reach its decision. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff’d* 133 Or App 258, 890 P2d 455 (1995).

Should the commission find there is not good cause to proceed with a contested-case hearing, it shall issue an order dismissing the petition and stating its reasons for doing so (OAR 660-045-0090(7)). Should the commission find there is good cause to proceed to a contested-case hearing based upon substantial evidence of noncompliance, the commission shall issue a written decision describing the reasons for its decision (OAR 660-045-0090(6)). In making its findings the commission may find good cause to proceed on some of the assertions, but not others. In addition, the commission may, under its own motion pursuant to ORS 197.324, proceed on related assertions of noncompliance not contained in the petition (OAR 660-045-0090(8)).

V. DEPARTMENT ANALYSIS

The department reviewed the petition and determined that LandWatch’s petition was complete and in compliance with the procedural requirements of ORS 197.319 to 197.325 and OAR 660-045-0040 to -0070. Consequently, the department accepted the petition and provided the required notice to LandWatch and the county. This acceptance is not a determination that the petition includes substantial evidence of noncompliance.

As described above, the petition includes allegations of noncompliance with ORS 215.427 and Lane County’s codification of these requirements at LC 14.050, and with Goal 1.

A. Noncompliance with Goal 1

Goal 1, “Citizen Involvement,” is, “To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.” This goal essentially requires local governments to adopt citizen involvement programs and implement them.

Lane County has an acknowledged citizen involvement program; LandWatch has not pointed out what provision of the program the county has failed to implement. Department staff reviewed the program and found no provisions regarding deadlines for acting on quasi-judicial applications or voiding incomplete applications. The county’s citizen involvement program does commit the county to provide timely notice of applications so that the public can participate; there has been no allegation that the county fails to provide proper notice.

The department does not find evidence that Lane County has failed to make quasi-judicial land use decisions, provided extensions improperly, or failed to void applications in order to circumvent its citizen involvement program. The nature and timing of the cases, especially those for which the applicants sought a Writ of Mandamus, were unrelated, and the number of such cases is small relative to the number of similar cases the county processed.

The department recommends that the commission find that there is not good cause to proceed to a contested-case hearing based on noncompliance with Goal 1.

B. Noncompliance with ORS 215.427 and LC 14.050

The processing of an application for a quasi-judicial land use decision is subject to a specific set of requirements, placing responsibilities and deadlines on the local government and on the applicant, which, taken together are intended to assure timely land use decisions and predictable criteria.

As relevant here, the process begins with submittal of an application to the county. The county must then determine if the application is complete. If it is not complete, the county must notify the applicant of what materials are missing within 30 days. ORS 215.427(2) and LC 14.050(3)(b). The applicant then must either submit missing materials or inform the county that the materials will not be submitted, or a combination of these two options. ORS 215.427(2) and LC 14.050(3)(b).⁴ If the applicant does not respond in one of these ways within 180 days, the application is deemed void. ORS 215.427(4) and LC 14.050(3)(c).

Once the application is deemed complete, the county is required to make a decision on an application, including all local appeals, within 150 days (120 days for applications inside an urban growth boundary). ORS 215.427(1) and LC 14.050(5).

An applicant may approve an extension of the 150-day approval deadline up to a maximum of 215 days. ORS 215.427(5) and LC 14.050(5)(a). In addition, an applicant may entirely waive the 150-day deadline, but the county may not compel such a waiver. ORS 215.427(9) and LC 14.050(5)(a); *see also Leathers Oil Co. et al. v. City of Newberg*, LUBA No. 2010-093 (Or. LUBA 3/29/2011). (interpreting ORS 215.427(5)).

Finally, if the county fails to make a final decision by the 150-day deadline, and no extensions or waiver have been given, ORS 215.429 authorizes an applicant to file a petition for writ of mandamus in circuit court to compel the local government to issue the approval. This mandamus remedy is optional – an applicant can elect to continue under the county regulations and process. ORS 215.429(4).

⁴ This 180-day rule is often referred to as the “fixed goal post rule” because it provides protection to applicants who submit complete applications, or who make the applications complete within 180 days, by “fixing” the review standards and criteria. Specifically, in such cases only the standards and criteria existing on the date the application was submitted govern the approval of the application, protecting applicants from changes in land use criteria. *See* ORS 215.427(3).

If an applicant does elect to file a petition for writ of mandamus, he or she must provide written notice of the petition to all persons entitled to notice under ORS 197.763 and those that participated in any evidentiary hearing on the application. ORS 215.427(3). Such persons can intervene in the writ of mandamus proceeding. However, in a mandamus proceeding, the burden of proof shifts from the applicant to prove satisfaction of the applicable land use regulations to the county and/or intervenors to prove that approval would violate substantive provisions of the county comprehensive plan or land use regulations. ORS 215.429(5).

In this case, LandWatch has presented credible evidence that Lane County did not adhere to these procedural requirements in a number of cases from 2008 to 2011. Lane County has submitted evidence admitting certain of these violations, and disputing others, while also identifying actions Lane County has to improve its processing of land use applications. In addition, Lane County contends that because the procedural violations involve dissimilar areas of the county, as well as dissimilar plan designations, zoning and land use types, LandWatch has not established a pattern or practice of noncompliance.

Because the parties dispute which three-year period should be used, the numbers of alleged violations differs. In addition, the parties present different information on whether the Therefore, the department offers the following summary:

Table 1. Number of Alleged Violations (Nov 2008 - Nov 2011)	
Initial No. of Alleged Violations	66
Adjusted No. of Alleged Violations (specific adjustment unknown, but assume at least the 19 applications identified in Table 2)	47
No. of Petitions for Writ of Mandamus	3
No. of Land Use Decisions	<i>unknown</i>

Table 2. Number of Alleged Violations (July 2009 to July 2012)	
Initial No. of Alleged Violations	53
Less No. of Duplicates ⁵	-2
Less No. with Extensions/Waivers ⁶	-6
Less No. of Non-Land Use Decisions ⁷	-11
Adjusted No. of Alleged Violations	34
No. of Petitions for Writ of Mandamus	1
No. of Land Use Decisions	757

The following analysis discusses whether Land Watch has provided substantial evidence of a pattern or practice of noncompliance.

⁵ Lane County identified two duplicates (PA 09-5520 and PA 09-5521) and (PA 10-5821 and PA 10-5824) in its response; which LandWatch did not contest.

⁶ Lane County identified 10 applications for which extensions or waivers were granted, and provided evidence of the extensions. However, in 4 of the cases (PA 08-6312, 08-6500, 10-5345, and 10-5618), the evidence provided did not rebut LandWatch's allegation, which was that the applicable deadlines were missed *even though* certain extensions were granted.

⁷ Lane County identified 11 applications as Measure 49 decisions, which are not "land use decisions" subject to the 150-day rule, which LandWatch did not contest.

1. OAR 660-045-0020(10)(c) and (11)(c): “The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request.”

As above, LandWatch and Lane County present different three-year periods. LandWatch believes the date for establishing the previous three years starts on November 16, 2011, the date LandWatch submitted its first notice of intent to the county. That petition, however, was later rejected by the department. Lane County believes the correct date for establishing the three-year period should be that of the renewed notice, July 2, 2012.

Determining the applicable three-year period could be significant because the period of review affects the number of instances evaluated in consideration of the allegations of a “pattern or practice of decision making.” LandWatch and the county have presented alternative analyses of the data, 47 or 34 cases,⁸ respectively, which do not comply with certain procedural requirements. OAR 660-025-0020(10) and (11) define the three year period as that preceding the date the requestor sent notice to the local government of its intent to initiate an enforcement order. That date is July 2, 2012, which is the date of LandWatch’s request that is culminating in this “good cause” hearing. Staff finds no authority to use an earlier date, and notes that using earlier data could result in skewed findings if the local government had already corrected its decision making.

In this instance, the determination of the three-year period may have little practical effect as the number of cases the county admits were out of compliance with its own code—34—is large enough that a pattern or practice of decision making could be a concern if other analyses suggested good cause to proceed to a contested-case hearing.

The department recommends that the commission find that the appropriate period for analysis of land use decisions under OAR 660-045-0020(10)(c) and (11)(c) is the three years preceding the latest request for enforcement, which in this case is July 2, 2012.

2. OAR 660-045-0020(10)(a) and (11)(a): “The decisions involve(d) the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement * * *.”

Using the adjusted numbers from Table 2, LandWatch argues that in 34⁹ separate instances the county failed to satisfy LC 14.050 relating to deadlines for processing land use applications and making a final decision on those applications, including all appeals. In its response, Lane County asserts that the instances identified by LandWatch represent different types of land use applications.

⁸ The department is using the adjusted numbers in Tables 1 and 2 above.

⁹ As discussed, LandWatch’s petition lists 66 applications, however, as explained in Table 2 and footnotes 5-7, certain of those applications were the subject of extensions or waivers, others were duplicates, and still others concerned non-land use decisions (Measure 49).

The decisions all involve the same procedural requirements of LC 14.050. We understand LandWatch's position to be that, since each application was subject to review under LC 14.050, they should be considered "the same land use regulation." To the extent that the procedures leading to a land use decision are a part of that decision, LandWatch is correct.

The county's position is based on the view that untimeliness of a decision or improper granting of an extension is not the decision. This view assumes that the process leading up to the final local action can be viewed separately from the decision itself. Each "decision," in the county's view, concerned a specific use or a zone change, and the 34 cited cases required the county to employ a variety of different provisions of the plan and land use code to reach the decision.

The statutes and rules containing the guidance for review of an enforcement request repeatedly refer to "decisions," which could be interpreted to only mean "land use decisions," not the day-to-day decisions a planning department makes in processing applications. This supports the county's view. However, to adopt this interpretation would make it difficult or impossible to address procedural defects in a county's decision making, an outcome the department does not believe was intended. Further, the definition of "pattern of decision making" includes a "mode" or "method" of decision making, which the department interprets to include the process of decision making. Accordingly, the department believes that procedural violations can be the basis of a "pattern of decision making" for an enforcement order if the requestor can show a prejudice or likely prejudice to the substantial rights of an applicant or participants in a land use matter (e.g., where a jurisdiction routinely fails to provide proper notice for a certain type of quasi-judicial application such as a land partition.).

Thus, the department recommends that the commission determine the decisions involved the same provision of an acknowledged land use regulation.

3. OAR 660-045-0020(10)(b) and (11)(b): "The decisions involve(d) the same or similar geographic areas, plan designations, zones, or types of land use."

LandWatch asserts that the decisions involve the same geographic area—the entire county. The county argues that the instances identified by LandWatch represent different geographic areas, plan designations and zones.

The department is hesitant to find that a county-wide violation could not be the basis for an enforcement order under this rule. Put differently, while it may be that the commission would entertain a petition based on procedural errors for only one area of the county, it seems unreasonable that the same procedural error – applied county-wide – would be without such remedy. Thus, the department recommends that the commission find that the petition has presented decisions involving the same geographic area.

However, the language of the rule is not unambiguous, and the department has not reviewed the legislative history for the rule. The interpretative question is whether the commission meant for this part of the definition to narrow consideration to a subset of decisions based on certain shared characteristics (e.g., geography, plan designation, or use), or, alternatively, whether the

commission intended that a requestor need not show county-wide or zoning-wide violations in order to be able to show “good cause” for enforcement, but instead that a subset of violations (based on shared geography, plan designation or use) was sufficient. As above, the department believes the latter interpretation is more consistent with the commission’s enforcement authority.

4. *Pattern or Practice of Decision Making.* A “pattern of decision making” is “a mode, method, or instance of decision making representative of a group of decisions” and a “practice” is “a series or succession of decisions” that have the characteristics described in subsections 1 through 3 of this section, above. The code provisions at issue, and the county’s implementation of them, can certainly be deemed a “method of decision making,” and the evidence suggests that whether the county erred 47 or 34 times, there is clearly a “group of decisions.” Therefore, the matter before the commission can be considered a “pattern of decision making” when considering the initial clause of the definition.

However, the “practice of decision making” is defined to only include a “series or succession of decisions,” a definition which does not contain a process element. Accordingly, the department does not find that procedural error can constitute a practice of decision making, as that term is defined in rule.

C. Good Cause

The matter before the commission is whether there is good cause to proceed to a contested case hearing. In its analysis of whether LandWatch has demonstrated whether the evidence shows the facts fit the relevant definitions, the department considered whether and to what extent the petitioner’s substantial rights have been or are likely to be affected.

1. *150-day Deadline and Extensions.* As we understand LandWatch’s petition, the public, including LandWatch, is excluded from participating in a land use decision that it could otherwise join when the county misses the 150-day deadline for a decision and the applicant seeks a writ of mandamus in circuit court. Thus, it is not the late decisions and improper or missing extensions that themselves cause harm to LandWatch or other participants, but rather the late decisions create an opportunity for harm. However, as LandWatch acknowledges, participants are not actually “cut out” of the mandamus process, they are entitled to intervene. The difference is that during a mandamus proceeding the burden is shifted from the applicant to the county and/or intervenors to demonstrate that an approval would violate a substantive provision of the comprehensive plan or land use regulations. The department addresses each of these aspects in turn.

First, for almost all of the alleged violations (regardless of which three-year period is used), the county could have cured the problem if it had obtained the proper extensions (*i.e.*, only one or two of the cases appear to have taken more than the maximum permitted extended timeline of 365 days). As discussed earlier, Lane County has identified measures it has already taken since the beginning of 2012 to resolve its timeliness issues and documentation of extensions of deadlines. *See* Lane County Response dated August 23, 2012 (Enclosures 1-3). The petition does not contain any allegations of violations in 2012 and at most four for 2011. Therefore, unless LandWatch demonstrates that such efforts have been ineffective, the department believes

Lane County has demonstrated that the issue has been adequately addressed, and there is not substantial evidence of noncompliance.

In addition, the department finds that 34 alleged violations out of 757 decisions results in a relatively small percentage of violations (approximately four percent). Further, of the 34 alleged violations, only one was the basis for a writ of mandamus. Thus, while the department agrees that there is not a numeric threshold which must be exceeded, the department concludes the relatively small number of alleged violations (including only one writ of mandamus) when compared to the overall workload of the county is inadequate to show substantial evidence of noncompliance.

Finally, as noted above, depending on which period pertains, either one or three cases were subject to a writ proceeding and removed from the local decision making process. LandWatch expresses concern that if the county's practices do not change that there would be more. The department could agree that this may be justification for commission enforcement if there was evidence that the county deliberately avoided making decisions in order to affect the outcome of a class of decisions based on a particular plan or code provision or designation, geographic area, or type of use. No such allegation is raised in LandWatch's petition, and Lane County's response demonstrates that the nature of the cases are unrelated both with respect to location and application type.

Therefore, the department recommends that the commission find that LandWatch has not shown good cause to proceed to a contested case hearing.

2. Void Applications. If an application becomes void as a matter of law and the county continues to process it under the regulations in effect at the time of the application, it could result in approval (or denial) of a request under the wrong set of criteria. The remedy for the county continuing to process an application after it should have been deemed void does not include the applicant seeking a writ of mandamus, rather the application remains subject to the county process and a participant can appeal the eventual decision to the Land Use Board of Appeals (LUBA). Here, LandWatch identified only one case, and even there has not alleged that the final decision was erroneous, but rather a concern that the hearings official's analysis and interpretation has become a precedent for future actions.¹⁰ However, the hearings officer interpretation will not get deference from LUBA. Therefore, if a similar case arises in the future, LandWatch will not be precluded from making an argument based on the merits of that case.

Since at most only one violation has been identified (which in fact is only described as a concern of interpretation), the department finds that LandWatch has not demonstrated a mode, method, or instance of decision making representative of a group of decisions or a series or succession of decisions. Therefore, the department recommends that the commission find that there is not good cause to proceed to contested-case hearing on this issue.

¹⁰ The department notes that LUBA has clarified its interpretation of ORS 215.427(4) in *Painter v. City of Redmond*, LUBA No. 2007-221 (Or. LUBA 3/13/2008).

VI. DEPARTMENT CONCLUSION, RECOMMENDATION AND DRAFT MOTIONS

A. Conclusion

For the reasons stated in chapter V of this report, the department finds that LandWatch has not provided substantial evidence of noncompliance, and therefore recommends that the commission find there is not good cause to proceed to a contested case hearing on the allegations contained in the petition. Specifically, the department finds that Lane County has identified changes in its forms and administrative practices which are capable of addressing the alleged violations, and LandWatch has not identified any violations since those procedures were put in place in early 2012. Further, the number of alleged violations is so small in comparison to the overall number of decisions, and only one mandamus action has resulted, that the department concludes the evidence is inadequate to show substantial evidence of noncompliance.

B. Recommendation

The department recommends that the commission find that there is not good cause to proceed to a contested-case hearing based on noncompliance with LC 14.050. The department further recommends that the commission find that there is not good cause to proceed to a contested-case hearing based on noncompliance with Goal 1.

660-045-0090(7) states: "If the commission finds there is not good cause to proceed, it shall issue an order dismissing the petition and stating its reasons for doing so. A commission order dismissing a petition on grounds that there is not good cause to proceed shall be a final order. If the commission finds there is not good cause to proceed, no contested-case hearing of the petition shall be conducted."

C. Recommended Motion

I move that the commission find there is not good cause to proceed to a contested-case hearing regarding LandWatch Lane County's petition alleging Lane County has engaged in a pattern and practice of decision making that violates ORS 215.4227 and Lane Code 14.050 and direct the director to issue an order dismissing the petition for the reasons stated in the staff recommendation.

D. Alternative Motions

1. I move that the commission find there is not good cause to proceed to a contested-case hearing regarding LandWatch Lane County's petition alleging Lane County has engaged in a pattern and practice of decision making that violates ORS 215.4227 and Lane Code 14.050 and direct the DLCD director to issue an order dismissing the petition based on [*state reasons if different than staff recommendation*].
2. I move that the commission find there is good cause to proceed to a contested-case hearing regarding [*some or all of the assertions in*] LandWatch Lane County's petition alleging Lane County has engaged in a pattern and practice of decision making that

violates ORS 215.4227 and Lane Code 14.050 based on [*findings*], direct the director to issue an order describing the reasons for this decision, and direct the director to appoint a hearings officer to conduct the contested-case hearing.

ATTACHMENTS

- A. LandWatch Lane County petition for enforcement
- B. Lane County response to LandWatch Lane County's notice of intent to petition for enforcement

Anne C. Davies

Attorney at Law

October 11, 2012

Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

DEPT OF
OCT 12 2012
LAND CONSERVATION
AND DEVELOPMENT

Re: Renewed Petition for Enforcement

Dear Members of the Commission:

In March of this year, LandWatch Lane County (LandWatch) filed a petition for enforcement seeking an order from the Land Conservation and Development Commission requiring Lane County to modify its patterns and practices of decision making so as to comply with timelines and other procedural requirements established by statute and Lane Code.

On June 7, 2012, Acting Director Jim Rue responded to that petition by rejecting it, based on OAR 660-045-00780(3). Mr. Rue directed that LandWatch submit a new request to Lane County that included the list of all of the alleged violations. On June 29, 2012, that Renewed Notice of Intent to Petition was submitted to the county. The county responded on August 23, 2012. A copy of that response is attached to this letter.

First, the county's response letter cites to OAR 660-045-0020(10) and (11), which require that the instances constituting the alleged "pattern or practice" must have occurred within the three years preceding the date on which the enforcement proceedings were initiated. The county uses the date of the renewed notice as the measuring date in this case and contends that 13 of the cases cited by Lane County occurred before that three-year cut-off date.

The initial date of submittal, March 22, 2012, should be used as the date from which the three years is counted. OAR 660-045-0020(10)(c) provides:

“The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date. “

The request described in OAR 660-045-0040 is the first request that was sent to the county on November 16, 2011. This process was initiated on that first date, and the renewed notice should not adjust the clock. Further, even if that were the date the Commission used, there are still plenty of instances to justify a finding of a pattern and practice of violations. OAR 660-045-0020(10(c) also provides for demonstration that the alleged violations “are likely to occur” after the date the initial request was sent to the county. Given that the county has recently cut staff and indicated its intent to de-emphasize land use, it is extremely likely that the alleged violations will continue to occur.

The county next contends that only four of the 66 alleged violations resulted in the filing of a writ of mandamus. The number of mandamus filings is irrelevant to the petition. It is the violations themselves that count as the pattern or practice. While it is true that it is the filing of the mandamus proceeding that actually cuts an opponent out of the process, it is the instances of violations that allow for the mandamus filings in the first place.¹ The more violations that occur, the more likely it is than an applicant will file a mandamus proceeding.

The number of mandamus filings is contingent on a particular applicant choosing to avail itself of the statutory remedy resulting from the county’s failure to render timely decisions. Anytime the county violates the statutory deadline, it is possible that an applicant will file a mandamus proceeding. The fact that, in the past, a relatively small percentage of court cases were filed does not change the fact of the county’s pattern and practice of

¹ The county contends that the opponents are not totally cut out of the process in a mandamus proceeding, as they are entitled to intervene. While that is technically true, the burden is shifted from the applicant to the opponent in the mandamus proceeding. In the mandamus proceeding, the court must approve the application unless an opponent, or the county, demonstrates that approval would violate an applicable substantive provision of the comprehensive plan or land use regulation.

violation. Further, the number of violations has increased in the past 5 or 6 years, and will likely continue to do so as certain applicants' attorneys in Lane County have clearly identified the advantages to their clients of seeking redress in the circuit court under the mandamus statutes. All three of the mandamus cases filed in Lane County Circuit Court in the past three years were filed by the same attorney.

The county also contends that the alleged violations do not satisfy a strict reading of the rule's definition of "pattern or practice" because "there is no discernable pattern that involves 'the same or similar geographic areas, plan designation, zones or types of land use.'" The Commission should not adopt such a constrained meaning of the term "pattern and practice." The patterns and practices of decision making identified by LandWatch do not involve substantive issues, but rather procedural ones. These procedural patterns and practices affect land use applications involving any or all plan designations, zones, and types of land use in the county. The entirety of Lane County is affected by the county's decisions.

Finally, the county argues that it should not have to amend its code provisions to address this issue because it amended the relevant chapter of its code in response to another watchdog organization in 2009. The fact that the code was amended for a different purpose almost four years ago has absolutely no bearing on whether the county should be required to adopt the proposed changes that would go along way to remedying the county's continuing violations. It also is completely irrelevant that the 2009 changes were made in response to requests by Goal One Coalition.

LandWatch Lane County hereby incorporates by reference the entirety of its original March 22, 2012 Petition for Enforcement.

LandWatch respectfully requests that the Commission order Lane County to correct the patterns and practices of noncompliance identified in this letter by undertaking the corrective actions identified above.

Sincerely,

A handwritten signature in cursive script that reads "Anne C. Davies".

Anne C. Davies

Cc: Lane County Board of Commissioners
Lane County Office of Legal Counsel

Anne C. Davies

Attorney at Law

Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

March 22, 2012

Re: Petition for Enforcement

Dear Members of the Commission:

LandWatch Lane County (LandWatch) hereby requests that the Land Conservation and Development Commission order Lane County to modify its patterns and practices of decision making so as to comply with timelines and other procedural requirements established by statute and Lane Code.

I. Authority of the Commission to order compliance.

ORS 197.320 requires that the Land Conservation and Development Commission (LCDC) issue an order requiring a local government to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe a local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. ORS 197.320(6).¹

¹ ORS 197.320(6) provides:

“The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe:

“(6) A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. In making its determination

“Pattern” and “practice” are defined at OAR 660-045-0020:

“(10) *Pattern of decision making* means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:

“(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

“(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and

“(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date.

“(11) *Practice of decision making* means a series or succession of decisions with these characteristics:

“(a) The decisions involved the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

“(b) The decisions involved the same or similar geographic areas, plan designations, zones, or types of land use; and

“(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040.”

Before petitioning the Commission for an enforcement order, a person must first request corrective action by the alleged offending local government. ORS 197.319(1). Corrective actions may include revisions to the local comprehensive plan, land use regulations, or decision-making process or that an action be taken regarding the local comprehensive plan, land use regulations, or decision-making process. ORS 197.319(1). Only after the petitioner has sought corrective action directly from the county, and any corrective action is inadequate to address the issue may the requester petition the Commission for an enforcement order.

under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions.”

II. LandWatch's request and Lane County's response

LandWatch submitted a request for corrective action, pursuant to ORS 197.319(1) to Lane County by hand delivery on November 15, 2011. ORS 197.319(2) requires that the local government issue a written response to the request within 60 days of the date the request is mailed to the local government or special district. Lane County issued a written response in a letter to LandWatch dated December 8, 2011. Lane County's response was timely. Pursuant to ORS 197.319(3), if the local government does not act in a manner in which the requestor believes is adequate to address the issues raised in the request, a petition may be presented to the Land Conservation and Development Commission under ORS 197.324. As explained more fully below, the county's response was insufficient, thus triggering this petition.

III. Nature of Lane County's patterns and practices of noncompliance

State statute requires counties to "exercise their planning and zoning responsibilities * * * in accordance with ORS chapters 195, 196 and 197 and the goals approved under ORS chapters 195, 196 and 197." ORS 197.175(1). Local governments must make land use decisions in compliance with the goals and with acknowledged comprehensive plans and land use regulations. ORS 197.175(2).

ORS 215.427(1) requires that a county take final action on all applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete. As relevant here, the only exception to that requirement is where the processing period is extended at the written request of the applicant for a specified period or periods of time not to exceed a total of more than 215 days. ORS 215.427(5). These statutory requirements are incorporated into Lane Code at LC 14.050(5).

ORS 215.427(4) directs that on the 181st day after first being submitted, an application is void if the applicant has been notified of missing information as required under ORS 215.427(2) and has not submitted: (a) all of the missing information; (b) some of the missing information and written notice that no other information will be provided; or (c) written notice that none of the missing information will be provided. These statutory requirements are incorporated at LC 14.050(3).

Failure to meet the statutory deadlines allows an applicant to file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval. ORS 215.429(1). In circuit court, the burden of proof is reversed; ORS 215.429(5) directs the court to issue a peremptory writ unless the governing body or any intervenor shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations.

While the statutory timeline is intended to, and perhaps does, protect an applicant from a local government's delay in processing its application, those opposed to an application are potentially gravely damaged by a county's failure to abide by the statutory timelines. Specifically, the systematic failure of a county to comply with ORS 215.427 and LC 14.050(5) to render final decisions in a timely manner results in citizens being denied their right under Statewide Planning Goal One to the opportunity to be involved in all phases of the planning process, specifically including implementation measures.²

Because redress is not available through other venues, LandWatch Lane County (LandWatch) hereby requests that LCDC order Lane County to correct the following patterns and practices:

² Statewide planning Goal 2 defines "implementation measures" as "the means to carry out the plan", and explains further:

"These are of two general types: (1) management implementation measures such as ordinances, regulations or project plans, and (2) site or area specific implementation measures such as permits and grants for construction, construction of public facilities or provision of services."

A. Alleged Violations

Lane County has shown the following patterns and practices of noncompliance:

1. Failing to reach a final decision within the 150-day deadline plus extensions established by ORS 215.427(1) and (5) and LC 14.050(5).
2. Allowing non-specific extensions of time, in violation of ORS 215.427(5) and LC 14.050(5)(a).
3. Failing to void an application on the 181st day after first being submitted when the applicant has been notified of missing information and has not submitted: 1) all of the missing information; 2) some of the missing information and written notice that no other information will be provided; 3) written notice that none of the missing information will be provided, as required by ORS 215.427(3) and LC 14.050(3)(c).

The patterns and practices of decision making identified by LandWatch do not involve substantive issues, but rather procedural ones. These procedural patterns and practices affect land use applications involving any or all plan designations, zones, and types of land use in the county. The entirety of Lane County is affected by the county's decisions..

B. Land use decisions that demonstrate a pattern and practice of noncompliance

1. Pattern and practice of noncompliance with ORS 215.427(1) and LC 14.050(5)

Four of the land use decisions demonstrating Lane County's pattern and practice of noncompliance with ORS 215.427(1) and LC 14.050(5) culminated in the filing of Petitions for Alternative Writ of Mandamus in the Lane County Circuit Court: PA 08-5795 (Circuit Court #16-09-04419, involving application for a forest template dwelling); PA 08-5928 (Circuit Court #16-09-11508, involving an application to rezone land from F-1, Non-Impacted Forest Land to F-2, Impacted Forest Land); and PA 09-5633 & PA 09-5634 (Circuit Court

#16-10-08780, involving a conditional use permit to allow a hospice facility in the rural residential zone.

2. Practice of noncompliance with ORS 215.427 and LC 14.050(5) and (3)

PA 09-5634 demonstrates a practice of ignoring the clear directives of ORS 215.427(5) and LC 14.050(5) and (3) that extensions be granted only for a specified period of time, not to exceed a total of 215 days; and of ORS 215.427(4) and LC 14.050(3)(c) that the application is void on the 181st day after first being submitted if the applicant has been notified of missing information as required and has not submitted: (a) all of the missing information; (b) some of the missing information and written notice that no other information will be provided; or (c) written notice that none of the missing information will be provided. Do we need to explain how 09-5634 demonstrates violation?

After receiving the County's response, LandWatch reviewed Lane County's files and identified at least 66 instances within the three-year period preceding November 15, 2011 in which Lane County failed to reach a final decision on land use applications within the 150-day period established by ORS 215.427(5) and (LC 14.050(5)(a). See Exhibit 1.

LandWatch reviewed the files in the most recent 20 of these cases in which the County failed to make a decision within the statutory time line (items # 47 – 66).

- In twelve (60%) of these cases, the files contained no evidence whatsoever of any extensions or waiver of the statutory time line (# 47, 49, 51-55, 57-59, 61, 66).
- Three files (15%) contained unambiguous written waivers of the statutory time line (# 50, 64, & 65).
- In two of the twenty cases (10%), the County accepted a "waiver" for an unspecified period of time, thus failing to meet the requirements for either an extension or a waiver (# 49 & 60).

- In two cases, the County accepted extensions for a specific period or periods of time. In a third case, the County accepted three requests that the application be placed “on hold” and that the time line be “waived” for 30 days, for a total of 90 days. In all these three out of the 20 cases (15%), the County failed to reach a final decision within the 150 period plus any extensions.

a. Practice of noncompliance with ORS 215.427(5) and LC 14.050(5) and (3)

ORS 215.427(4) and LC 14.050(3) provide that an application is void on the 181st day after first being submitted if the applicant has been notified of missing information and has not submitted: the missing information or written notice that missing information will not be forthcoming.³

The issue was directly raised in the county’s processing of PA 09-5730. The application in PA 09-5730 was first submitted on October 16, 2009. On November 13, 2009 a Notice of Incomplete Land Use Application was issued, notifying applicant’s representatives of specific information missing from the application.

On December 7, 2009, applicant’s representative submitted a completed Applicant Intent Form indicating the intent to submit the missing material identified in the Notice of Incomplete Land Use Application within the 180-day deadline. However, on May 11, 2010, applicant’s representative sent an email to the Lane County Land Management Division Manager stating, in relevant part:

“As we discussed yesterday, tomorrow (Wednesday May 12th) will be the 180th day since Lane County sent its incompleteness letter for PA 09-5730. In order to get the

³ ORS 215.427(4) provides:

“ On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

“(a) All of the missing information;

“(b) Some of the missing information and written notice that no other information will be provided; or

“(c) Written notice that none of the missing information will be provided.”

clock started so we do not have to file a new application, please deem our application complete as of tomorrow, May 12th. You will remember that the incompleteness letter identified 3 areas of incompleteness. We will be providing you with responses to items #1 and #3 today or tomorrow. We should have item #2, which requires the services of a traffic engineer to you in the coming weeks.”

Pursuant to applicant’s request, the application was deemed complete on either May 11 or May 12, 2010, and the application was immediately put on hold for 30 days, awaiting the submission of a traffic impact analysis (TIA). On May 12, 2010, Lane County received a submittal from applicant’s representative including information identified by the county as items #1 and #3. On June 29, 2010, a second 30-day extension was requested by the applicant and granted by the county. On October 20, 2010, the application was once again “put on hold” for the applicant to address referral comments. LandWatch is unaware of any information establishing that any request for this extension was either in writing or for a specified period of time. Lane County staff records indicate that this extension lasted 33 days.

On October 28, 2010, applicant’s representative once again submitted material identified by the county in its Notice of Incomplete Land Use Application as missing under item #1, suggesting that applicant’s earlier response to the county’s notice was insufficient or inadequate. The missing TIA was not submitted to the county until September 29, 2010, well past the 180 days specified in ORS 215.427(4).

Applicant’s response to the county’s request for missing information failed to comply with ORS 215.427(4) (a), (b), or (c) and LC 14.050(3)(c)(i), (ii), or (iii). Within the 180-day period after which the application becomes void by operation of law, applicant failed to comply with option 1: submit all of the missing information; option 2: submit some of the written information and provide written notice that no other information would be provided; or option 3: provide written notice that none of the missing information would be provided.

Rather, applicant submitted some of the missing information and provided written notice that additional information would be provided at an unspecified later date. This is not an option authorized by ORS 215.427(4) or by LC 14.050(3)(c). As none of the specified options was followed, the application was void on the 181st day after being submitted, pursuant to ORS 215.427(4).

Opponent argued before the hearings official in an appeal hearing that the application was void under ORS 215.427(4). However, the Hearings Official in a Ruling on a Motion to Dismiss the Application as Void declined to void the application, explaining:

“The 120-/150 day rule was written for the benefit of applicants; not for local governments nor for opponents of an application. Absent some evidence that a local government is processing an application in bad faith, with the intent to allow an applicant to qualify for a mandamus proceeding, I do not believe that a third party has standing to question a County’s determination to ignore the operation of ORS 215.427(4).”⁴

The Hearing Official’s decision establishes a Lane County practice of ignoring the clear directive of ORS 215.427(4) and LC 14.050(3)(c) that an application is void on the 181st day after being first submitted if the enumerated conditions are not satisfied. In reaching his decision, the Hearings Official relied on LUBA’s decision in *Caster v. City of Silverton*, 54 Or LUBA 441 (2007). However, the Hearing Official’s reliance on that decision is misplaced. LUBA did not hold that the invocation of ORS 215.427(4) (or rather, the city analog, ORS 227.178(4)) was a matter of discretion with the local government; rather, LUBA held that once the City of Silverton elected to proceed with review of the permit application rather than treat the incomplete permit application as void, it could

⁴ Following the February 9, 2011 Hearings Official decision on the “voidness” issue, PA 09-5730 has again been placed “on hold”. LandWatch is unaware of the date the application was placed on hold, or any information establishing that any request from applicant for the extension was either in writing or for a specified period of time.

Lane County records show extensions of the 150-day timeline totaled 93 days as of February 3, 2011. Assuming the application was “placed on hold” and latest extension began on February 10 (the day following the release of the Hearings Official decision), the 215 day maximum for total extensions was reached on September 14, 2011.

not then deny the application based solely on its incompleteness, but rather had to explain why the application failed to meet applicable approval standards. The essence of LUBA's holding was that ORS 227.178(4) (the city equivalent of ORS 215.427(4)) is not an approval criterion. Having failed to invoke ORS 227.178(4) and void the application at the local level, the City of Silverton could not raise the issue and argue the application is void before LUBA. More succinctly, the City of Silverton waived the right to raise the "voidness" issue at LUBA because it failed to raise it (thus voiding the application) at the local level. LUBA did not hold that a third party was precluded from raising the "voidness" issue at the local level or at LUBA. The Hearing Official's ruling is wrong; even more troubling, it establishes a Lane County precedent that will guide future County decisions unless corrective action is taken.

IV. LandWatch's evaluation of Lane County's proposed corrective actions

In its response Lane County declined to take the corrective action requested by LandWatch. Lane County's response first offers a summary of LandWatch's allegations of noncompliance:

"Specifically, the Notice contends that Lane County has failed to meet the 150 day rule for completing decisions (ORS 215.427(1)/LC 14050(5)); violated the 215 day timeline extension provision (ORS 215.427(5)/LC 14.050(5)(a)); and failed to void incomplete applications (ORS 215.427(4)/LC 14.050(3)(c)).

Lane County then offers the following defenses of its decision-making processes:

1. The instances of decision making cited by LandWatch do not fall within the definition of either "pattern" or "practice" under OAR 660-045-0020(10) or (11), respectively.
2. The Land Management Division has already taken measures to address the deadline issues raised by LandWatch.
3. The county was facing a backlog of applications during the "housing bubble" of 2006 and has now caught up.

4. Regarding the county's failure to void an application as required by ORS 215.427(4) and LC 14.050(3)(c), the county reiterates its position that a local government has the option not to void an application and asserts that the remedy available to LandWatch is to appeal the Hearing Official's decision.

5. LUBA's decision in *Leathers Oil Co. et al v. City of Newburg*, ___ Or LUBA ___ (LUBA No. 2010-093, March 29, 2011) gives local governments "reasonable latitude" in regards to "all of the above timelines".

For the reasons set forth below, Lane County's response is unsatisfactory and insufficient to ensure compliance.

A. Lane County's decision making constitutes a "pattern" or "practice" under OAR 660-045-0020(10) and (11).

Lane County argues that OAR 660-045-0020(10)(b) and (11)(b) require that "[t]he decisions involve the same or similar geographic areas, plan designations, zones, or types of land use", and that this requirement is not met.

The patterns and practices of decision making identified by LandWatch do not involve substantive issues, but rather procedural issues. The appropriate geographic area is thus the entirety of the county, as the county's procedural practices affect land use applications involving any or all plan designations, zones, and types of land use. The entirety of Lane County is a "geographic area" for purposes of OAR 660-045-0020(10)(b) and (11)(b) and is the appropriate geographic area to consider in this instance.

Lane County also argues that "[f]ive writs in 10 years do not, in our opinion, establish a pattern." A "pattern or practice" means more than an isolated or accidental instance of noncompliant conduct; it means an intentional, regular or repeated violation. *See* Black's Law Dictionary [cite?]. OAR 660-045-0020(10) explicitly provides that a "pattern" can be evidenced by a *single* "mode,

method, or instance of decision making representative of a group of decisions”[.]” OAR 660-045-0020(11) provides that a “practice” is evidenced by “a series or succession of decisions” – i.e., more than one.

The key question here is not the absolute number of noncompliant decisions identified, but whether those decisions are “representative of a group of decisions.” Since the county’s response, LandWatch has surveyed permit applications in Lane County over the last three years, and identified a total of 66 instances where the number of days between the date the application was deemed complete and the date of final decision exceeded 150 days.⁵ As discussed below, a review of the files in cases provides further support for the conclusion that the County has demonstrated a pattern and practice of failure to comply with ORS 215.427(1) and LC 14.050(5).

Lane County’s continued assertion that it has the option not to void an application as required by 215.427(4) and LC 14.050(3)(c) and that it has “reasonable latitude in regards to all of the above timelines” supports a conclusion that the County has demonstrated a pattern and practice of failure to comply with those provisions. Furthermore, it shows that the County believes it has the legal authority to continue that pattern and practice of decision making.

B. Measures already taken by Lane County are not sufficient to ensure compliance.

1. Compliance with the 150-day processing rule (ORS 215.427(1) and LC 14.050(5))

a. Revised clerical procedures and forms

In its response regarding the 150-day processing rule (ORS 215.427(1) and LC 14.050(5), Lane County states it has revised its clerical procedures to assure that applications are not placed in the wrong category of files. Even if clerical error can be cited as responsible for the noncompliance in the processing of PA 08-5928 as asserted by the County, that does not address the noncompliance in the processing of the other applications cited by LandWatch or the additional instances referenced above

⁵ See Exhibit 1.

and identified and discussed below. Further, the County has not provided any details or discussion regarding its clerical procedures or the revisions thereto and therefore the effectiveness of any revisions cannot be evaluated. The County is in essence saying, “trust me”. That is not enough.

Regarding compliance with ORS 215.427(5) and LC 14.050(5)(a), Lane County states that “earlier this year” (presumably 2011) it revised its “waiver form” (officially titled “Extension to Statutory Timeline Request Form”) so as to end non-specific waivers and to warn parties that the total extensions may not exceed 215 days. The county’s revised notice demonstrates that the county continues to conflate an “extension” with a “waiver”, as it is titled “*Extension to Statutory Timeline Request Form*” yet states within “I, applicant * * * do hereby *waive* the statutory time line requirements of ORS 215.427 for ____ days * * * ” (emphasis added.). Furthermore, the County’s form adds to the confusion by stating: “Per ORS 215.427(5), the total period of time an application can be put *on hold* by an applicant may not exceed 215 days.” (Emphasis added.) The County’s revised form is evidence that the County continues to conflate and confuse the statutory concepts of “extension” and “waiver”, and to further conflate and confuse both of those concepts with the County’s own concept of an application being placed “on hold”.

Because of the County’s confusion and interchangeable usage of “extension”, “waiver”, and “on hold”, the revised “Extension to Statutory Timeline Request” form is on its face not adequate to ensure compliance with ORS 215.427(5) and LC 14.050(5)(a). Even if the revised form were adequate, its existence does not in itself suffice to ensure that the forms are actually utilized and result in the county’s compliance. Again, the County is in essence saying, “trust me”. As the review of County files below establishes, trust is not enough.

b. Review of 2011 applications exceeding 150 days

Exhibit [x] lists 66 instances within the three-year period preceding November 15, 2011 in which Lane County failed to reach a final decision on land use applications within the 150-day period established by ORS 215.427(5) and LC 14.050(5)(a).

LandWatch reviewed the files in the last 20 of these cases in which the County failed to make a decision within the statutory time line (items # 47 – 66). **None of these files contained the “Extension to Statutory Timeline Request Form” the County relies upon to argue that no further corrective action is necessary.**⁶

In summary, a review of the County’s files reveals that *in no instance* did the County extend the time line for a specified period or periods of time at the written request of the applicant with the result that a final decision was reached within 150 days of the application being deemed complete plus extensions, thereby complying with ORS 215.427(5) and (LC 14.050(5)(a). In only three instances – 15% of the cases -- the County did comply with ORS 215.427(5) and LC 14.050(5)(a) because it obtained an unambiguous and permanent waiver of the application of those provisions.

In addition, LandWatch reviewed all applications appearing on the list appended as Exhibit [x] which involved a local appeal or appeals.⁷ Examination of these files revealed that in four cases, the files contained no waivers or extensions. In five cases, the files contained written extensions that were insufficient to bring the County’s date of final decision into compliance with ORS 215.427(5) and (LC 14.050(5)(a). These cases suggest the County finds it nearly impossible to reach a final

⁶ A summary of those files can be found *supra*, at pages 6-7. It should be noted that two files that are not on the list, PA 10-5542 and 11-5315, did contain a document that resembles the Extension to Statutory Timeline Request Form. However, decisions in those files were made within the 150-day timeline.

⁷ Exhibit 1 lists nine applications which involved local appeals. Lane County processed a total of eleven applications involving appeals. A review of the two file numbers not on the list revealed one (PA10-5542) contained a waiver of the statutory time line. The other (PA 10-5315) was appealed from a Planning Director decision to the Hearing Official. Rather than forward the matter to the hearings official, the Planning Director reconsidered the initial decision; the decision on reconsideration was not appealed. The file contained a written 60-day “waiver”.

decision within the mandated 150-day time line (plus extensions) if the local process includes one or more local appeals.

2. 215.427(4) and LC 14.050(3)(c)

Lane County states that it revised its “incomplete notice” form (officially titled “Applicant Intent Form”) to specifically warn applicants that the application is void on the 181st day after being deemed complete if the applicant has not submitted all of the information, or some of the missing information and written notice that no other information will be provided.

The mere existence of this form, along with the County’s “Notice of Void Application” form, is not sufficient to ensure compliance with 215.427(4) and LC 14.050(3)(c), especially in light of the precedential Hearings Official decision discussed above and the County’s position, discussed below, that it has “reasonable latitude in regards to all of the above timelines”.

C. The instances identified by LandWatch cannot be attributed to and cannot be excused by the “housing bubble”.

Lane County cites the “housing bubble” of 2006 as a reason for its failure to process applications within the 150-day timeline.

The four noncompliant instances identified by LandWatch were deemed complete as follows:

PA 08-5795	July 24, 2008
PA08-5928	July 30, 2008
PA 09-5633	October 16, 2009
PA 09-5730	May 11, 2010

All of these “deemed complete” dates are well after the alleged 2006 “housing bubble” period cited by Lane County. Further, Exhibit x identifies countless instances into 2010 in which the timelines were not complied with. Finally, neither ORS 215.427(1) nor LC 14.050(5) allow for a “housing bubble” or indeed any other excuse for not complying with the 150-day timeline.

D. The County may not ignore ORS 215.427(4) and LC 14.050(3)(c)

Lane County states that it has revised its “incomplete notice” to specifically warn applicants that the application is void on the 181st day after being deemed complete if the applicant has not submitted all of the information, or some of the missing information and written notice that no other information will be provided. As explained above, the mere revision of a form is not enough to ensure compliance. Further, the county continues to assert that it has the discretion to ignore the clear directive of ORS 215.427(4) and LC 14.050(3)(c). Lane County cites to a Lane County Hearing Official ruling on the voidness issue in PA 09-5730 and in essence says if LandWatch doesn’t like that ruling, the ruling may be appealed.

Lane County does not contest, however, LandWatch’s assertion that the Hearing Official’s ruling, if allowed to stand, will serve as precedent in Lane County and establish a Lane County pattern and practice. Rather, the County in its response relies on that Hearings Official decision in asserting that “the County has the option to not void an application.”

A final decision in PA 09-5730 has not been issued and indeed may never be issued; the application is still “on hold”, and the underlying application is likely to be withdrawn. In the absence of a final County decision or any interim County decision, no avenue of appeal will be available to LandWatch or anyone else. Even if an appeal to LUBA were available, that would not deprive LCDC of jurisdiction to address and resolve this issue.

ORS 215.427(4) and LC 14.050(3)(c) clearly provide that an application “is void” if the required information is not provided. The case cited by the Hearings Official, *Caster v. City of Silverton*, 54 Or LUBA 441 (2007), as explained above, did not address the issue raised here and does not support the County’s position that it has the option not to void an application.

E. LUBA’s holding in *Leathers Oil Co. et al v. City of Newburg* does not give local government “reasonable latitude” in regards to the timelines established by ORS 215.427(1) and LC 14.050(5).

The county states in its response that it reads *Leathers* “as giving local government reasonable latitude in regards to all of the above timelines.” LandWatch respectfully disagrees with the county’s reading of the *Leathers* case. *Leathers Oil Co. et al v. City of Newburg* involved a situation where an applicant had voluntarily and completely *waived* the timelines established by ORS 227.179(1) (the city equivalent of ORS 215.427). LUBA in its opinion explicated upon the difference between an “extension” and a “waiver”, and held that an applicant is free to waive the 120-day deadline (applicable to cities) entirely and give up its mandamus remedies as a result, and that nothing in statute prohibits such voluntary waiver or imposes an express limitation on a local government’s ability to act and rely on such a waiver.

LUBA’s holding does not, however, give a local government “reasonable latitude” in regards to the timelines established under ORS 215.427, as argued by the County. In its decision LUBA explained that “extensions” must be for a specified period of time not to exceed the total time established by statute and must be requested by the applicant in writing. In requesting such an extension or extensions, an applicant allows the local government a specific period of additional time to make a decision on a permit application, while retaining the right to seek a writ of mandamus in circuit court. LUBA also explained that the limitations applicable to extensions do not apply to a “waiver” under ORS 227.178(10) (the city equivalent of ORS 215.427(9)). While a local government may compel an applicant to request an extension, it may not compel an applicant to waive either the timeline or the right to file a petition for a writ of mandamus in circuit court.

The County’s response reveals that the County continues to confuse and conflate “extension” with “waiver”, in direct contradiction of LUBA’s decision clarifying the distinction, and supports a conclusion that corrective action as suggested by LandWatch is necessary and proper.

V. Corrective action sought by requester

LandWatch requests that Lane County correct the identified patterns and practices of:

A. Failing to reach a final decision within the 150-day deadline plus extensions established by ORS 215.427(1) and (5) and LC 14.050(5).

B. Allowing non-specific extensions of time, in violation of ORS 215.427(5) and LC 14.050(5)(a).

C. Failing to void an application on the 181st day after first being submitted when the applicant has been notified of missing information and has not submitted: 1) all of the missing information; 2) some of the missing information and written notice that no other information will be provided; 3) written notice that none of the missing information will be provided, as required by ORS 215.427(3) and LC 14.050(3)(c).

LandWatch requests that the Commission:

1. Direct the Lane County Board of Commissioners to issue an interpretation pursuant to LC 16.008 explaining the correct interpretation and application of ORS 215.427(4) and LC 14.050(3)(c), instructing that an application is void on the 181st day after first being submitted if the applicant has been notified of missing information as required and has not submitted: (a) all of the missing information; (b) some of the missing information and written notice that no other information will be provided; or (c) written notice that none of the missing information will be provided; and to distribute that Resolution and Order to Planning Division staff and Lane County Hearings Officials.

2. Direct the Lane County Board of Commissioners to issue an interpretation, pursuant to LC 16.008, explaining the correct interpretation and application of ORS 215.427(5) and LC 14.050(5) and (3), instructing that extensions are to be granted only for a specified period of time, not to exceed a total of 215 days; and to distribute that Resolution and Order to Planning Division staff and Lane County Hearings Officials.

3. To ensure compliance with ORS 215.427(1) and LC 14.050(5), which require that a county take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete unless the timeline is extended or waived⁸, direct the Lane County Board of Commissioners to adopt the following amendments to Lane Code Chapter 14:

a. LC 14.050(3)(b)(iii)

(iv) The Director shall mail written notice to the applicant when the application is deemed complete or accepted. **The notice of complete application shall be entered into and become part of the record.**

b. LC 14.050(5)(a)

(a) When an applicant waives or requests an extension of the required 120-day or 150-day period for final action. The period set in LC 14.050(5) above may be extended for a specified period of time at the written request of the applicant. **The written waiver or request for an extension shall be entered into and become part of the record.** The total of all extensions may not exceed 215 days.

c. LC 14.100(1)

(1) Decision Deadline. Unless the Director elects to schedule the application for a hearing with the Hearings Official pursuant to LC 14.110 below, an application which has been accepted by the Director shall be acted upon within 21 days of the date the application was accepted **deemed complete**. An application which has not been so acted upon may be appealed by the Applicant to the Hearings Official in the same manner as provided for in this chapter for appeals of Director decisions, ~~except that there will be no fee charged for the appeal~~ **shall be scheduled for a hearing with the Hearings Official no later than 49 days from the date the application was deemed complete, pursuant to LC 14.110 below, without fee.** The application processing timeline may be waived or extended for a reasonable **and specific** period of time at the **written** request of the applicant. **Any waiver or request for an extension shall be entered into and become part of the record.**

d. LC 14.200(9)(g)

⁸ ORS 215.427 provides that “extensions” must be for a specified period of time, may not total more than 215 days, and must be requested by the applicant in writing. These limitations do not apply to a “waiver” under ORS 215.427(9). In addition, while a county may compel an applicant to request an extension, it may not compel an applicant to waive either the timeline or the right to file a petition for a writ of mandamus in circuit court.

(g) Continue the hearing to a date certain and for a period of time not to exceed 31 days from the date of the hearing being continued. No further notice need be given for continuance of a hearing to a date certain. In the event that the continuance is requested by the applicant, the applicant shall first ~~agree to a waiver~~ **request in writing an extension for a specific period of time** of any statutory timelines **within** which Lane County must expedite processing of the application, and ~~s~~**Such waiver extension of time** shall be in addition to any other ~~waivers~~ **extensions** of the statutory application processing timelines requested by the applicant, **not to exceed 215 days in total; and shall be entered into and become part of the record.**

e. LC 14.300(6)

(6) Request for Interpretation of County Policy. When, prior to or in the course of a hearing, the Hearings Official finds that the case raises substantial question involving either the application or interpretation of a policy that has not been clarified in sufficient detail, the Hearings Official may submit that question of application or interpretation in written form to the Board for its determination. In the event the application or interpretation of policy is requested by the applicant, the applicant shall first ~~agree to a waiver~~ **request in writing an extension for a specific period of time** of any statutory timelines **within** which Lane County must expedite processing of the application, and ~~s~~**Such waiver extension of time** shall be in addition to any other ~~waivers~~ **extensions** of the statutory application processing timelines requested by the applicant, **not to exceed 215 days in total; and shall be entered into and become part of the record.**

The Board, at its discretion, may elect to accept or reject the Hearings Official's request. When such a question is accepted by the Board, those persons receiving notice of the Hearings Official hearing, the applicant and parties of record shall be notified that they may submit in writing their view as to what the policy application or interpretation should be. Such written views must be submitted to the Board and Department at least five days in advance of the Board's review of the request. Such persons shall restrict their statements to the issue of interpretation or application as stated by the Hearings Official and shall not present the Board with arguments or evidence immaterial to the determination sought, even though such evidence or argument may be relevant to the Hearings Official's final decision.

The Board shall render its written determination within 14 days after receipt of the question from the Hearings Official. Said decision shall be transmitted to the Hearings Official, who will then apply the interpretation to the application.

f. LC 14.400(3)(d)

(d) In the event that the remand is requested by the applicant, the applicant shall first ~~agree to~~ **request in writing** a ~~waiver of any statutory timelines in an~~ **extension for a specific period of time within** which Lane County must expedite processing of the application, and ~~s~~**Such waiver extension of time** shall be in addition to any other ~~waivers~~ **extensions** of the statutory application processing timelines requested by the applicant, **not to exceed 215 days in total; and shall be entered into and become part of the record.**

g. LC 14.535(4)

(4) Timeline Waiver. In the event a decision of the Hearings Official is being appealed by the applicant for the same application to be reconsidered by the Hearings Official, then to receive reconsideration by the Hearings Official, the applicant must first request **in writing an waiver extension for a specific period of time** of any statutory application timelines. **The written request for an extension shall be entered into and become part of the record.** ~~s~~Such a ~~waiver~~ **extension** shall be in addition to any other waivers already given **and not exceed 215 days in total.**

h. LC 14.300(7)(p)

(p) At the conclusion of the hearing, the Approval Authority shall either make a tentative decision and state findings which may incorporate findings proposed by any person or the Director, or take the matter under advisement for a decision to be made at a later date. If additional documents or evidence are provided by any party, the Approval Authority may allow a continuance or leave the record open to allow a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.428. The Approval Authority may request proposed findings and conclusions from any person at the hearing. The Approval Authority, before finally adopting findings and conclusions, may circulate the same in proposed form to parties for written comment. The written decision and findings shall be based on factual information, shall identify who has party status and shall be completed in writing and signed by the Approval Authority within 10 days of the closing of the record for the last hearing. A longer period of time may be taken to complete the findings and decision if the applicant submits a written request to the Approval Authority consenting and agreeing to a waiver **an extension for a specific period of time** of the 120-day or 150-day statutory time period for final action on the application equal to the amount of additional time it takes to prepare the findings. **The written request for an extension shall be entered into and become part of the record. If the Approval Authority fails to issue findings and a decision within 100 days of the date the application was deemed complete, plus any extensions, the application shall be scheduled for an On the Record Hearing before the Board pursuant to LC 14.600 below, without fee.**

i. LC 14.600(5)

(5) On the Record Appeal. If the Board's decision is to hear the appeal on the record, then such a hearing shall be:

(a) Scheduled for a hearing date with the Board and within 14 days of the date of the Board's decision.

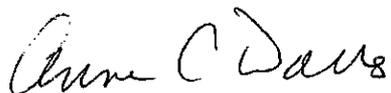
(b) Conducted pursuant to LC 14.200 and LC 14.400 above.

(c) The Board shall issue its findings and decision within 10 days of the close of the hearing and no later than 150 days from the date the application was deemed complete, plus any extensions.

V. Conclusion

LandWatch respectfully requests that the Commission order Lane County to correct the patterns and practices of noncompliance identified in this letter by undertaking the corrective actions identified above.

Sincerely,

A handwritten signature in cursive script that reads "Anne C. Davies".

Anne C. Davies

cc: Lane County Board of Commissioners (w/o attachments)
Lane County Office of Legal Counsel

APPENDIX

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	Permit #	Date deemed Complete	Final Decision	# of Days (approx.)	Waiver?	Extension?
1	07 5298 + a + b	4/2/10	4/29/11	383	No	No
2	07 5453	4/25/07	12/10/09	230		
3	07 6383	12/31/08	2/27/09	423		
4	07 6811	7/9/09	2/16/10	213		
5	08 5028	4/4/08	10/7/08	187		
6	08 5313 + a	12/15/08	"hold"	>150	No	No
7	08 5328	4/28/08	10/20/08	172		
8	08 5795 + a + b	7/16/08	2/19/09	213	No	No
9	08 5829	7/21/08	1/5/09	165		
10	08 5840 + a	7/24/08	2/18/09	210	No	Yes
11	08 5865	7/25/08	5/10/10	286		
12	08 5902	7/30/08	5/4/09	300		
13	08 5904	7/30/08	"hold"	>150		
14	08 5928	11/25/08	5/26/09	183		
15	08 5971	9/30/08	10/1/09	365		
16	08 5999	7/3/08	12/29/08	180		
17	08 6003	7/3/08	12/29/08	180		
18	08 6312	12/17/08	9/10/09	270		
19	08 6442	12/12/08	6/22/09	192		
20	08 6452	12/31/08	6/17/09	169		
21	08 6499 + a	1/8/09	8/5/09	208	No	Yes
22	08 6500 + a	1/8/09	8/17/09	217	No	Yes
23	08 6501 + a	1/8/09	6/23/09	195	No	Yes
24	08 6525	1/29/09	7/20/09	173		
25	08 6587	12/29/08	8/3/09	215		
26	08 6644	2/19/09	7/20/09	153		
27	09 5083	3/9/09	1/5/10	200		
28	09 5176	6/16/09	11/18/09	155		
29	09 5188	5/2/09	11/16/09	198		
30	09 5247	7/31/09	2/1/10	180		
31	09 5263 + a	7/20/09	1/7/10	172	No	No
32	09 5294	6/9/09	12/9/09	183		
33	09 5313	6/16/09	8/16/10	305		
34	09 5314	6/16/09	1/27/10	225		

Comments

1 . Appeal to Board *filed* after 150 day time limit exceeded

10 . 10-day extension 10/8/2008

21 30-day extension 7/2/2009

22 30-day extension 7/2/2009

23 30-day extension 7/2/2009

35	09 5325	6/25/09	3/2/10	247		
36	09 5351	5/29/09	12/4/09	185		
37	09 5381	7/8/09	12/28/09	173		
38	09 5431	7/22/09	1/11/10	174		
39	09 5477	8/12/09	2/1/10	173		
40	09 5478	8/12/09	2/1/10	173		
41	09 5490	8/12/09	1/25/10	166		
42	09 5491	8/12/09	1/28/10	169		
43	09 5512	8/26/09	2/17/10	175		
44	09 5515	8/27/09	4/13/10	226		
45	09 5520	8/30/09	5/30/10	275		
46	09 5521	8/30/09	5/30/10	275		
47	09 5522	8/25/09	2/10/10	166	No	No
48	09 5526	8/25/09	7/7/10	318	No	Yes
49	09 5528	9/4/09	2/10/10	156	No	No
50	09 5614	10/6/09	6/16/10	250	No	Yes
51	09 5622	10/6/09	3/10/10	154	No	No
52	09 5600	11/12/09	8/30/10	288	No	No
53	09 5633	10/16/09	4/20/10	188	No	No
54	09 5703	11/4/09	5/12/10	188	No	No
55	09 5725	11/14/09	5/17/09	183	No	No
56	09 5730 + a	5/12/10	pending	219+	Yes	No
57	09 5751	11/27/09	5/26/10	180	No	No
58	09 5753	11/27/09	5/26/10	180	No	No
59	09 5757	11/29/09	5/25/10	176	No	No
60	10 5221	4/16/10	2/23/11	307	No	Yes
61	10 5343	5/27/10	12/6/10	189	No	No
62	10 5345	6/15/10	2/28/11	253	Yes	No
63	10 5618	9/22/10	5/31/11	249	Yes	No
64	10 5821	3/30/11	pending	>150	Yes	Yes
65	10 5824	12/15/10	"hold"	>150	Yes	No
66	11 5286	6/14/11	12/27/11	193	No	No

48 "I hereby grant a waiver * * * until such time as I indicate it should be resumed"

50 "We are willing to waive the permit processing time line requirements * * * "

56 "Applicant hereby grants an extension of time" [to August 8, 2011].

60 "place the application on hold and proceed with the [LL]V process"

62 7 day extension requested 10/15/2010

63 "on hold", waiver" for 30 days, thrice total 90 days

64 "I hereby waive the 120-day statutory processing timeline * * * "

65 "I hereby waive the 120-day statutory processing timeline * * * "



P.O. Box 5347 Eugene, Oregon 97405

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401

November 16, 2011

Re: Notice of Intent to Petition for Enforcement

Dear Commissioners:

LandWatch Lane County (LandWatch) hereby submits this Notice of Intent to Petition for Enforcement and to offer Lane County an opportunity to respond and to modify its patterns and practices of decision making so as to comply with timelines and other procedural requirements established by state and Lane County law.. Counties must "exercise their planning and zoning responsibilities * * * in accordance with ORS chapters 195, 196 and 197 and the goals approved under ORS chapters 195, 196 and 197." ORS 197.175(1). Local governments must make land use decisions in compliance with the goals and with acknowledged comprehensive plans and land use regulations. ORS 197.175(2).

ORS 215.427(1) requires that a county take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete. As relevant here, the only exception to that requirement is where the processing period is extended at the written request of the applicant for a specified period or periods of time not to exceed a total of more than 215 days. ORS 215.427(5). These statutory requirements are incorporated into Lane Code at LC 14.050(5).

ORS 215.427(4) directs that on the 181st day after first being submitted, an application is void if the applicant has been notified of missing information as required under ORS 215.427(2) and has not submitted: (a) all of the missing information; (b) some of the missing information and written notice that no other information will be provided; or (c) written notice that none of the missing information will be provided. These statutory requirements are incorporated at LC 14.050(3).

Failure to meet the statutory deadlines allows an applicant to file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval. ORS 215.429(1). In circuit court, the burden of proof is reversed; ORS 215.429(5) directs the court to issue a peremptory writ unless the governing body or any intervenor shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations. The systematic failure of a county to comply with ORS 215.427 and LC 14.050(5) to render final decisions in a timely manner results in citizens being denied their right under statewide planning Goal One to the opportunity to be involved in all phases of the planning process, specifically including implementation measures.

OAR 660-045-0030(1) authorizes a person to petition the commission for an enforcement order against a local government in accordance with ORS 197.319 to 197.335 and 197.646 if the local government exhibits a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation.

LandWatch Lane County (LandWatch) is aware of three instances within the past three years in which Lane County has failed to meet the deadlines established by ORS 215.427 and LC 14.050(5), resulting in the applicants filing petitions for a writ of mandamus under ORS 34.130 in Lane County Circuit Court. In addition, LandWatch is aware of another instance where Lane County has granted extensions for non-specific periods of time that in total exceeded 215 days.

LandWatch therefore believes it is reasonable and appropriate to submit this Notice of Intent to Petition for Enforcement and to offer Lane County an opportunity to respond and to modify its patterns and practices. ORS 197.319(2)(a) requires that a local government respond to this notice within 60 days.

LandWatch sincerely hopes that the issues identified in this letter will be addressed in a spirit of partnership and cooperation, making further action unnecessary. Speedy resolution of the issues identified in this letter would be of widespread benefit to citizens of Lane County, not the least of which would be enhanced certainty and lessened legal and administrative expenses for property owners.

LandWatch Lane County (LandWatch) hereby requests that Lane County correct the following patterns and practices:

The pattern and practice of failing to meet the deadlines established by ORS 215.427 and LC 14.050(5) and of granting extensions for non-specific periods of time that in total exceeded 215 days.

LandWatch intends to seek enforcement proceedings through the Land Conservation and Development Commission (LCDC) against Lane County in accordance with ORS 197.319 if Lane County fails to satisfactorily respond to this request within sixty days from the date of this letter, as required by ORS 197.319(2)(a) and OAR 660-045-0050(1).

LandWatch seeks redress through the enforcement order process because redress through other venues is not available. LandWatch seeks redress from LCDC because LCDC has the authority to order Lane County to comply with all applicable land use regulations. ORS 197.320 provides, in relevant part:

“The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe:

“***

“(6) A local government has engaged in a pattern or practice of decision making that violates an acknowledged comprehensive plan or land use regulation. In making its determination under this subsection, the commission shall determine whether there is evidence in the record to support the decisions made. The commission shall not judge the issue solely upon adequacy of the findings in support of the decisions.”

I. Nature of Lane County’s non-compliance

Lane County has shown the following patterns and practices of noncompliance:

A. Failing to reach a final decision within the 150-day deadline plus extensions established by ORS 215.427(1) and (5) and LC 14.050(5).

B. Allowing non-specific extensions of time, in violation of ORS 215.427(5) and LC 14.050(5)(a).

C. Failing to void an application on the 181st day after first being submitted when the applicant has been notified of missing information and has not submitted: 1) all of the missing information; 2) some of the missing information and written notice that no other information will be provided; 3) written notice that none of the missing information will be provided, as required by ORS 215.427(3) and LC 14.050(3)(c).

H. Lands affected by the county’s decisions

Lands affected by Lane County's decisions are, in three instances, planned for farm or forest use and are in the county's resource zones: PA 08-5795, F2 (Impacted Forest Lands), 1.1 acres; PA 08-5928, F1 (Nonimpacted Forest Lands), 50 acres; and PA 09-5730, E-40 (Exclusive Farm Use), 1,033 acres. In the remaining instance, PA 09-5633 and PA 09-5634, the 6.8-acre unit of land is planned and zoned Rural Residential.

III. Land use decisions that demonstrate a pattern and practice of noncompliance

A. Pattern and practice of noncompliance with ORS 215.427(1) and LC 14.050(5)

The land use decisions demonstrating Lane County's pattern and practice of noncompliance with ORS 215.427(1) and LC 14.050(5) are: PA 08-5795; PA 08-5928; and PA 09-5633 & PA 09-5634, all of which culminated in the filing of Petitions for Alternative Writ of Mandamus in the Circuit Court of the State of Oregon for Lane County (petitions # 160904419, 160911508, and 161008780 respectively).

B. Practice of noncompliance with ORS 215.427(5) and LC 14.050(5) and (3)

PA 09-5634 demonstrates a practice of ignoring the clear directives of ORS 215.427(5) and LC 14.050(5) and (3) that extensions be granted only for a specified period of time, not to exceed a total of 215 days; and of ORS 215.427(4) and LC 14.050(3)(c) that the application is void on the 181st day after first being submitted if the applicant has been notified of missing information as required and has not submitted: (a) all of the missing information; (b) some of the missing information and written notice that no other information will be provided; or (c) written notice that none of the missing information will be provided.

1. Practice of noncompliance with ORS 215.427(5) and LC 14.050(5) and (3)

The application in PA 09-5730 was first submitted on October 16, 2009.

On May 11, 2010, the application was deemed complete at applicant's request and immediately put on hold for 30 days for submission of a traffic analysis.

On June 29, 2010, a second 30-day extension was requested by the applicant and granted by the county.

On October 20, 2010, the application was once again "put on hold" for the applicant to address referral comments. LandWatch is unaware of any information establishing that this request for an extension was either in writing or for a specified period of time. Lane County staff records indicate that this extension lasted 33 days. Following the February 9, 2011 Hearings Official decision on the "voidness" issue, PA 09-5730 has again been placed "on hold". LandWatch is unaware of the date the application was placed on hold, or any information establishing that any request from applicant for the extension was either in writing or for a specified period of time.

Lane County records show extensions of the 150-day timeline totaled 93 days as of February 3, 2011. Assuming the application was "placed on hold" and latest extension began on February 10 (the day following the release of the Hearings Official decision), the 215 day maximum for total extensions was reached on September 14, 2011.

Pursuant to ORS 215.429, applicant in PA 09-5730 could, at any time, file a petition for a writ of mandamus under ORS 34.130 to compel the governing body or its designee to issue an approval.

2. Practice of noncompliance with ORS 215.427(4) and LC 14.050(3)(c)

Applicant in PA 09-5730 did not meet the requirements of any of the three options as specified in ORS 215.427(4) (a), (b), or (c). Therefore the application should have been voided. However, the Hearings Official in a Ruling on a Motion to Dismiss the Application as Void declined to void the application, explaining: "The 120-/150 day rule was written for the benefit of applicants; not for local governments nor for opponents of an application. Absent some evidence that a local government is processing an application in bad faith, with the intent to allow an applicant to qualify for a mandamus proceeding, I do not believe that a third party has standing to question a County's determination to ignore the operation of ORS 215.427(4)."

The application in PA 09-5730 was first submitted on October 16, 2009. On November 13, 2009 a Notice of In-

complete Land Use Application was issued, notifying applicant's representatives of specific information missing from the application.

On December 7, 2009, applicant's representative submitted a completed Applicant Intent Form indicating the intent to submit the missing material identified in the Notice of Incomplete Land Use Application within the 180-day deadline. However, on May 11, 2010, applicant's representative sent an email to the Lane County Land Management Division Manager stating, in relevant part:

"As we discussed yesterday, tomorrow (Wednesday May 12th) will be the 180th day since Lane County sent its incompleteness letter for PA 09-5730. In order to get the clock started so we do not have to file a new application, please deem our application complete as of tomorrow, May 12th. You will remember that the incompleteness letter identified 3 areas of incompleteness. We will be providing you with responses to items #1 and #3 today or tomorrow. We should have item #2, which requires the services of a traffic engineer to you in the coming weeks."

On May 12, 2010, Lane County received a submittal from applicant's representative including information identified by the county as items #1 and #3. On October 28, 2010, applicant's representative once again submitted material identified by the county in its Notice of Incomplete Land Use Application as missing under item #1, suggesting that applicant's earlier response to the county's notice was insufficient or inadequate. The missing TIA was not submitted to the county until September 29, 2010, well past the 180 days specified in ORS 215.427(4).

Applicant's response to the county's request for missing information failed to comply with ORS 215.427(4) (a), (b), or (c) and LC 14.050(3)(c)(i), (ii), or (iii). Applicant failed to comply with option 1: submit all of the missing information within 180 days. Applicant failed to comply with option 2: submit some of the written information and provide written notice that no other information would be provided. Applicant failed to comply with option 3: provide written notice that none of the missing information would be provided.

Rather, applicant submitted some of the missing information and provided written notice that additional information would be provided at an unspecified later date. This is not an option authorized by ORS 215.427(4) or by LC 14.050(3)(c). As none of the specified options were followed, the application was void on the 181st day after being submitted.

The Hearing Official's decision establishes a Lane County practice of ignoring the clear directive of ORS 215.427(4) and LC 14.050(3)(c) that an application is void on the 181st day after being first submitted if the enumerated conditions are not satisfied. In reaching his decision, the Hearings Official relied on LUBA's decision in *Caster v. City of Silverton*, 54 Or LUBA 441 (2007). However, the Hearing Official's reliance on that decision is misplaced. LUBA did not hold that the invocation of ORS 215.427(4) (or rather, the city analog, ORS 227.178(4)) was a matter of discretion with the local government; rather, LUBA held only that the City of Silverton had waived the right to raise the "voidness" issue at LUBA because it had failed to raise it and thus void the application at the local level. The Hearing Official's ruling is wrong; even more troubling, it establishes a Lane County precedent that will be followed unless corrective action is taken.

IV. Corrective action sought by requester

LandWatch requests that Lane County correct the identified patterns and practices of:

A. Failing to reach a final decision within the 150-day deadline plus extensions established by ORS 215.427(1) and (5) and LC 14.050(5).

B. Allowing non-specific extensions of time, in violation of ORS 215.427(5) and LC 14.050(5)(a).

C. Failing to void an application on the 181st day after first being submitted when the applicant has been notified of missing information and has not submitted: 1) all of the missing information; 2) some of the missing

information and written notice that no other information will be provided; 3) written notice that none of the missing information will be provided, as required by ORS 215.427(3) and LC 14.050(3)(c).

LandWatch requests that Lane County:

1. Direct the Board of County Commissioners to adopt a Resolution and Order explaining the correct interpretation and application of ORS 215.427(4) and LC 14.050(3)(c), instructing that an application is void on the 181st day after first being submitted if the applicant has been notified of missing information as required and has not submitted: (a) all of the missing information; (b) some of the missing information and written notice that no other information will be provided; or (c) written notice that none of the missing information will be provided; and to distribute that Resolution and Order to Planning Division staff and Lane County Hearings Officials.

2. Direct the Board of County Commissioners to adopt a Resolution and Order explaining the correct interpretation and application of ORS 215.427(5) and LC 14.050(5) and (3), instructing that extensions are to be granted only for a specified period of time, not to exceed a total of 215 days; and to distribute that Resolution and Order to Planning Division staff and Lane County Hearings Officials.

3. To ensure compliance with ORS 215.427(1) and LC 14.050(5), which require that a county take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, Lane County shall adopt the following amendments to Lane Code Chapter 14:

a. LC 14.050(3)(b)(iii)

(iv) The Director shall mail written notice to the applicant when the application is deemed complete or accepted. The notice of complete application shall be entered into and become part of the record.

b. LC 14.050(5)(a)

(a) When an applicant waives or requests an extension of the required 120-day or 150-day period for final action. The period set in LC 14.050(5) above may be extended for a specified period of time at the written request of the applicant. The written waiver or request for an extension shall be entered into and become part of the record. The total of all extensions may not exceed 215 days.

c. LC 14.100(1)

(1) Decision Deadline. Unless the Director elects to schedule the application for a hearing with the Hearings Official pursuant to LC 14.110 below, an application which has been accepted by the Director shall be acted upon within 21 days of the date the application was accepted deemed complete. An application which has not been so acted upon may be appealed by the Applicant to the Hearings Official in the same manner as provided for in this chapter for appeals of Director decisions, except that there will be no fee charged for the appeal shall be scheduled for a hearing with the Hearings Official no later than 49 days from the date the application was deemed complete, pursuant to LC 14.110 below, without fee. The application processing timeline may be waived or extended for a reasonable and specific period of time at the written request of the applicant. Any waiver or request for an extension shall be entered into and become part of the record.

d. LC 14.200(9)(g)

(g) Continue the hearing to a date certain and for a period of time not to exceed 31 days from the date of the hearing being continued. No further notice need be given for continuance of a hearing to a date certain. In the event that the continuance is requested by the applicant, the applicant shall first agree to a waiver request in writing an extension for a specific period of time of any statutory timelines within which Lane County must expedite processing of the application, and such waiver extension of time shall be in addition to any other waivers extensions of the statutory application processing timelines requested by the applicant, not to exceed 215 days in total; and shall be entered into and become part of the record.

e. LC 14.300(6)

(6) Request for Interpretation of County Policy. When, prior to or in the course of a hearing, the Hearings Of-

Official finds that the case raises substantial question involving either the application or interpretation of a policy that has not been clarified in sufficient detail, the Hearings Official may submit that question of application or interpretation in written form to the Board for its determination. In the event the application or interpretation of policy is requested by the applicant, the applicant shall first agree to a waiver request in writing an extension for a specific period of time of any statutory timelines within which Lane County must expedite processing of the application, and such waiver extension of time shall be in addition to any other waivers extensions of the statutory application processing timelines requested by the applicant, not to exceed 215 days in total; and shall be entered into and become part of the record.

The Board, at its discretion, may elect to accept or reject the Hearings Official's request. When such a question is accepted by the Board, those persons receiving notice of the Hearings Official hearing, the applicant and parties of record shall be notified that they may submit in writing their view as to what the policy application or interpretation should be. Such written views must be submitted to the Board and Department at least five days in advance of the Board's review of the request. Such persons shall restrict their statements to the issue of interpretation or application as stated by the Hearings Official and shall not present the Board with arguments or evidence immaterial to the determination sought, even though such evidence or argument may be relevant to the Hearings Official's final decision.

The Board shall render its written determination within 14 days after receipt of the question from the Hearings Official. Said decision shall be transmitted to the Hearings Official, who will then apply the interpretation to the application.

f. LC 14.400(3)(d)

(d) In the event that the remand is requested by the applicant, the applicant shall first agree to request in writing a waiver of any statutory timelines in an extension for a specific period of time within which Lane County must expedite processing of the application, and such waiver extension of time shall be in addition to any other waivers extensions of the statutory application processing timelines requested by the applicant, not to exceed 215 days in total; and shall be entered into and become part of the record.

g. LC 14.535(4)

(4) Timeline Waiver. In the event a decision of the Hearings Official is being appealed by the applicant for the same application to be reconsidered by the Hearings Official, then to receive reconsideration by the Hearings Official, the applicant must first request in writing an waiver extension for a specific period of time of any statutory application timelines. The written request for an extension shall be entered into and become part of the record. Such a waiver extension shall be in addition to any other waivers already given and not exceed 215 days in total.

h. LC 14.300(7)(p)

(p) At the conclusion of the hearing, the Approval Authority shall either make a tentative decision and state findings which may incorporate findings proposed by any person or the Director, or take the matter under advisement for a decision to be made at a later date. If additional documents or evidence are provided by any party, the Approval Authority may allow a continuance or leave the record open to allow a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.428. The Approval Authority may request proposed findings and conclusions from any person at the hearing. The Approval Authority, before finally adopting findings and conclusions, may circulate the same in proposed form to parties for written comment. The written decision and findings shall be based on factual information, shall identify who has party status and shall be completed in writing and signed by the Approval Authority within 10 days of the closing of the record for the last hearing. A longer period of time may be taken to complete the findings and decision if the applicant submits a written request to the Approval Authority consenting and agreeing to a waiver an extension for a specific period of time of

the 120-day or 150-day statutory time period for final action on the application equal to the amount of additional time it takes to prepare the findings. The written request for an extension shall be entered into and become part of the record. If the Approval Authority fails to issue findings and a decision within 100 days of the date the application was deemed complete, plus any extensions, the application shall be scheduled for an On the Record Hearing before the Board pursuant to LC 14.600 below, without fee.

i. LC 14.600(5)

(5) On the Record Appeal. If the Board's decision is to hear the appeal on the record, then such a hearing shall be:

(a) Scheduled for a hearing date with the Board and within 14 days of the date of the Board's decision.

(b) Conducted pursuant to LC 14.200 and LC 14.400 above.

(c) The Board shall issue its findings and decision within 10 days of the close of the hearing and no later than 150 days from the date the application was deemed complete, plus any extensions.

V. Conclusion

LandWatch respectfully requests that Lane County correct its pattern and practice of noncompliance as identified in this letter by undertaking the corrective actions specified above.

Please respond in writing within 60 days, pursuant to OAR 660-045-0050. If satisfactory effort is not made to respond to this letter and initiate action to correct the County's pattern and practice of decision-making within sixty days, LandWatch intends to petition the Department of Land Conservation and Development to seek an Enforcement Order pursuant to ORS 197.320(6).

Sincerely,



Robert Emmons
President

Cc: Lane County Office of Legal Counsel
Department of Land Conservation and Development
Anne Davies, Attorney at Law
Jim Just, Goal One Coalition

APPENDIX

Table of Contents

Petitions for Alternative Writs of Mandamus

No. 160904419 (County File: PA 08-5795) A-1

No. 160911508 (County File: PA 08-5928) A-8

No. 161008780 (County Files: PA 09-5633, PA 09-5634) A-16

Hearings Official Ruling on Motion to Dismiss, PA 09-5730 A-27

PA 09-5730 timeline prepared by Lane County staff A-30

Statewide planning Goal 2 defines “implementation measures” as “the means to carry out the plan”, and explains further:

“These are of two general types: (1) management implementation measures such as ordinances, regulations or project plans, and (2) site or area specific implementation measures such as permits and grants for construction, construction of public facilities or provision of services.”

OAR 660-045-0020 sets forth the following definitions of “pattern” and “practice” of decision making:

“(10) Pattern of decision making means a mode, method, or instance of decision making representative of a group of decisions with these characteristics:

“(a) The decisions involve the same or related provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

“(b) The decisions involve the same or similar geographic areas, plan designations, zones, or types of land use; and

“(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040, or the decisions are likely to occur after that date.

“(11) Practice of decision making means a series or succession of decisions with these characteristics:

“(a) The decisions involved the same or similar provisions of an acknowledged comprehensive plan, land use regulation, or special district cooperative agreement;

“(b) The decisions involved the same or similar geographic areas, plan designations, zones, or types of land use; and

“(c) The decisions occurred within the three years preceding the date on which the requester sent the affected local government or district the request described in OAR 660-045-0040.”

FILED
AT 12:12 O'CLOCK P.M.

FEB 25 2009

Circuit Court For Lane County, Oregon
BY _____

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Lander of the letter*

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

State of Oregon ex rel MICHAEL,
LEROY,

Plaintiff-Relator,

vs.

LANE COUNTY,
an Oregon local government,

Defendant.

No. 16-09-04419

PETITION FOR ALTERNATIVE
WRIT OF MANDAMUS

Relating to Lane County
Approval of a Dwelling on
Forest Land

(County File: PA 08-5795)

On the relation of Michael LeRoy ("Relator"), being beneficially an interested party, the State of Oregon alleges:

1.

This is an action, brought under ORS 215.429, seeking to compel the issuance of a County approval for a "Forest Template" dwelling under Lane Code Chapter 16.211 on a parcel of land, about 1.1 acres in size, in Lane County, Oregon.

A-1

1 2.

2 Relator is a resident of Lane County, Oregon.

3 3.

4 Defendant Lane County ("County") is a validly existing local government
5 acknowledged by the State of Oregon.

6 4.

7 This court has jurisdiction over this proceeding pursuant to ORS 215.429 and
8 ORS 34.120. This court's jurisdiction is exclusive once this petition has been filed. ORS
9 215.429(2).

10 5.

11 This application involves an approximately 1.1 acre tract of land in Lane County
12 located about 175 feet north of Little Fall Creek Road and about 550 feet west of King
13 Ranch Road.

14 6.

15 The subject property is commonly identified as Assessor's Map 18-01-35, Tax
16 Lot 900. The legal description of the site appears as Exhibit "A" hereto.

17 7.

18 The subject property is owned by Relator, who desires to secure county approval
19 for a dwelling, construct a dwelling, and reside on the property.

20 8.

21 On June 24, 2008, Relator filed an application with Lane County for approval of a
22 dwelling in the Impacted Forest Land (F-2) Zone, pursuant to the "template test"
23 provisions of LC 16.211(5) and (8).

A-2

1 9.

2 The County staff did not request any additional information from the applicant to
3 make the application "complete" for processing in the meaning of ORS 215.427(2). The
4 application was, therefore, deemed complete for processing by operation of law upon the
5 passage of 30 days – that is, on July 24, 2008.

6 10.

7 On September 30, 2008, the County, by a letter from the Planning Director titled
8 "Notice of Pending Land Use Decision," approved the application subject to conditions.

9 11.

10 On October 13, 2008, the approval in paragraph 10 was appealed by Bob
11 Emmons, Nena Lovinger, and Mel Weaver.

12 12.

13 On November 20, 2008, the appeal was heard in a public hearing conducted by
14 the Lane County Hearing Official. At the close of the hearing the applicant requested
15 that the record be left open for 14 days. The Hearing Official then left the record open
16 until December 29, 2008, which is a total of 39 days from the November 20 hearing date.

17 13.

18 On February 9, 2009, the lane County Hearing Official issued his decision
19 affirming the decision of the Planning Director and approving the use subject to
20 conditions.

21 14.

22 On February 19, 2009, the decision of the Hearing Official was appealed by
23 opponents to the Lane County Board of Commissioners ("County Board").

A-3

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15.

2

On February 23, 2009, by letter from Associate Planner, Jerry Kendall, Lane

3

County accepted the appeal, explain that, consistent with county law, the appeal had

4

been forwarded to the Hearing Official for reconsideration, and that it would be

5

tentatively scheduled to be heard by the County Board on April 1, 2009.

6

16.

7

Relator's application is for a "land use decision" or a "limited land use decision,"

8

as those terms are defined in ORS 197.015(10)(a)(A) and ORS 197.015(12)(b),

9

respectively, and as those terms are used in ORS 215.427 and 215.429. Relator's

10

application concerns a decision that is wholly within the authority and control of the

11

Defendant.

12

17.

13

Relator and Defendant have not agreed to mediation.

14

18.

15

Pursuant to ORS 215.427(1), Defendant was required to take final action on

16

Relators' application within 150 days after Relators' application was deemed complete.

17

19.

18

Defendant accepted Relators' application as complete for processing in the

19

meaning on ORS 215.427 on July 24, 2008.

20

20.

21

Under ORS 215.427(1), the Defendant was required to take final action on

22

Relators' application within 150 days, or not later than Monday, December 22, 2008. If

23

the 39 days that the record was left open when the matter was before the Hearing Official

1 (November 21 to December 29, 2008) were to be excluded from the 150-day time period
2 for making a final local decision, then a final local decision was required not later than
3 January 29, 2009.

4 21.

5 Relators have not waived their statutory right to a final decision within 150 days
6 at any time during this proceeding.

7 22.

8 Notwithstanding its obligation under ORS 215.427, Defendant failed to take final
9 action on Relator's application within the 150 days allowed by the statute, and it has
10 failed to take final action on Relator's application as of the date of the filing of this
11 action.

12 23.

13 Approval of the application would not violate any applicable substantive
14 provisions of Defendant's comprehensive plan or land use regulations, as defined by
15 ORS 197.015.

16 24.

17 Relator has performed all conditions precedent to Relator's entitlement to relief,
18 and there exist no facts which would excuse Defendant from performing its obligations
19 under ORS 215.427(1).

20 25.

21 Relator is without a plain, speedy, and adequate remedy in the ordinary course of
22 law.

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26.

Pursuant to ORS 215.427(7), the applicant is entitled to a refund of the unexpended portion of any fees and deposits or 50 percent of such fees and deposits, whichever is greater.

27.

The applicant paid a filing fee to the County for the application.

28.

Pursuant to ORS 34.210(2), the applicant is entitled to an award of attorneys' fees, costs, and disbursements.

29.

Pursuant to ORS 215.429, Relator is entitled to apply for a Writ of Mandamus with this court to compel Defendant to issue an approval of Relator's' application for a forest template dwelling, which writ the court must issue unless the Defendant shows that the approval would violate an applicable substantive provision of Defendant's comprehensive plan or land use regulation as defined in ORS 197.015.

WHEREFORE, Relators petition this Court to:

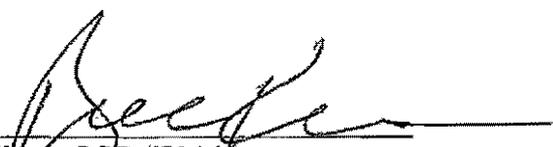
- A. Issue its writ directed to Defendant commanding Defendant as follows:
 - 1. Immediately upon receipt of the writ to issue its approval of the Application;
 - 2. To appear before this Court or a judge hereof, at a time and place specified by the Court, to show cause why Defendant has not issued approval of the Application; and
- further,

- 1 3. To return the writ then and there, with Defendant's certificate annexed,
- 2 showing Defendant has issued approval of Relator's Application or showing the cause of
- 3 Defendant's omission to do so;
- 4 B. Award Relator his reasonable attorneys fees and costs under ORS 34.210(2);
- 5 C. Issue its order directing reimbursement of 50% of the processing fees paid to the
- 6 County; and
- 7 D. Grant such other and further relief as the Court deems just and equitable.

8 Dated this 25th day February, 2009.

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LAW OFFICE OF BILL KLOOS PC

By: 
Bill Kloos, O8B #81140

Attorney for Plaintiff-Relator

Law Office of Bill Kloos, PC
375 W. 4th St., Suite 204
Eugene, OR 97401
Phone: 541-343-8596
Fax: 541-343-8702

Exhibit "A" to Petition: Legal Description

A-7

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

State of Oregon ex rel CJK, LLC,)	No. 160911508
)	
Plaintiffs-Relator,	)	PETITION FOR ALTERNATIVE
	)	WRIT OF MANDAMUS
vs.)	
	)	Relating to Lane County
LANE COUNTY,	)	Denial of a Zone Change
an Oregon local government,)	
)	
Defendant.	)	(County File: PA 08-5928)
)	

TO: Interested persons:

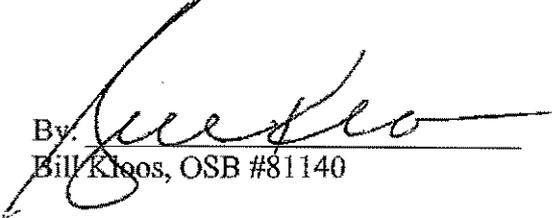
The applicant for approval of a rezoning from F-1 to F-2 has elected to remove the approval process to circuit court, as provided for in state statutes. See ORS 215.429. The removal is accomplished by filing a petition in circuit court. The petition was filed today, May 22, 2009. A copy of the filed petition is enclosed. When a petition like this is filed, the petitioner is required to give written notice and a copy of the petition to those persons who participated orally or in writing while the application was before the County, as well as to all those who were entitled to notice under ORS 197.763. You are receiving this notice because you are one of those persons, along with the other persons listed on Exhibit A. You may have a right to participate in this proceeding in circuit court. You should seek the advice of your own attorney in deciding whether to do so.

A-8

1 Dated this 22nd day May, 2009.

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LAW OFFICE OF BILL KLOOS PC

By. 
Bill Kloos, OSB #81140

Attorney for Plaintiff-Relator

Law Office of Bill Kloos, PC
375 W. 4th St., Suite 204
Eugene, OR 97401
Phone: 541-343-8596
Fax: 541-343-8702

Attachments:

- A Notice List
- B Filed Petition

A9

EXHIBIT B

FILED
MAY 22 2009
Circuit Court For Lane County, Oregon
BY

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

State of Oregon ex rel CJK, LLC,)	No. <u>160911508</u>
)	
Plaintiff-Relator,	)	PETITION FOR ALTERNATIVE
	)	WRIT OF MANDAMUS
vs.)	
	)	Relating to Lane County
LANE COUNTY,	)	Denial of a Zone Change
an Oregon local government,)	
)	
Defendant.	)	(County File: PA 08-5928)
_____)	

On the relation of CJK, LLC, ("Relator"), being beneficially an interested party,
the State of Oregon alleges:

1.

This is an action, brought under ORS 215.429, seeking to compel the issuance of
a County approval for a rezoning of about 50 acres of land from F-1 (Nonimpacted
Forest) to F-2 (Impacted Forest) in Lane County, Oregon.

2.

1 Relator is a limited liability company registered and active in the State of Oregon.

2 3.

3 Defendant Lane County ("County") is a validly existing local government
4 acknowledged by the State of Oregon.

5 4.

6 This court has jurisdiction over this proceeding pursuant to ORS 215.429 and
7 ORS 34.120. This court's jurisdiction is exclusive once this petition has been filed. ORS
8 215.429(2).

9 5.

10 This application involves an approximately 50-acre tract of land in Lane County
11 located about 1.4 miles south Highway 58, between the communities of Trent and Dexter.

12 6.

13 The subject property is commonly identified as Assessor's Map 19-01-08, Tax
14 Lot 4200, and 19-01-17, Tax Lot 1800. The legal description of the site and the
15 respective Tax Lots appears as Exhibit "A" hereto.

16 7.

17 The subject properties are owned by Relator CJK, LLC, which desires to have the
18 county zoning changed from F-1 to F-2.

19 8.

20 On June 30, 2008, Relator CJK, LLC filed an application with Lane County for
21 approval of a change of zoning of the subject property from F-1 to F-2, under the relevant
22 provisions of Lane Code ("LC") 16.252(2). The application is identified as county file
23 number PA 08-5928.

A-10

1 9.

2 The County staff did not request any additional information from the applicant to
3 make the application "complete" for processing in the meaning of ORS 215.427(2). The
4 application was, therefore, deemed complete for processing by operation of law upon the
5 passage of 30 days – that is, on Wednesday, July 30, 2008.

6 10.

7 On December 18, 2008, a public hearing was conducted by the Lane County
8 Hearing Official on the application for rezoning. At the close of the hearing the applicant
9 requested that the record be left open for up to seven days. The applicant then requested,
10 on December 19, 2008, that the record be closed. The decision of the Hearing Official
11 reflects that the record was left open until December 19, 2008.

12 11.

13 On May 15, 2009, the Lane County Hearing Official issued his decision denying
14 the application. That decision gave notice that his denial was subject to appeal to the
15 Lane County Board of Commissioners.

16 12.

17 Relator's application is for a "land use decision" or a "limited land use decision,"
18 as those terms are defined in ORS 197.015(10)(a)(A) and ORS 197.015(12)(b),
19 respectively, and as those terms are used in ORS 215.427 and 215.429. Relator's
20 application concerns a decision that is wholly within the authority and control of the
21 Defendant.

22 13.

23 Relator and Defendant have not agreed to mediation.

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14.

Pursuant to ORS 215.427(1), Defendant was required to take final action, including exhausting the local appeal to the County Board of Commissioners) on Relator's application within 150 days after Relator's' application was deemed complete.

15.

Based on Relator's application being complete for processing in the meaning on ORS 215.427 on July 30, 2008, under ORS 215.427(1), the Defendant was required to take final action on Relator's application within 150 days, or not later than December 27, 2008. If the seven days that the applicant requested the record be left open is added to the 150 day limit, then the Defendant was required to take final action on Relator's application within 150 days, or not later than Monday, January 5, 2009.

16.

Relator has not waived its statutory right to a final decision within 157 days (including the seven days the applicant requested the record be left open) at any time during this proceeding.

17.

Notwithstanding its obligation under ORS 215.427, Defendant failed to take final action on Relator's application, including exhausting the appeal available to the County Board of Commissioners, within the 157 days allowed by the statute, and it has failed to take final action on Relator's application as of the date of the filing of this action.

18.

A-12

1 Approval of the application would not violate any applicable substantive
2 provisions of Defendant's comprehensive plan or land use regulations, as defined by
3 ORS 197.015.

4 19.

5 Relator has performed all conditions precedent to Relator's entitlement to relief,
6 and there exist no facts which would excuse Defendant from performing its obligations
7 under ORS 215.427(1).

8 20.

9 Relator is without a plain, speedy, and adequate remedy in the ordinary course of
10 law.

11 21.

12 Pursuant to ORS 215.427(7), the applicant is entitled to a refund of the
13 unexpended portion of any fees and deposits or 50 percent of such fees and deposits,
14 whichever is greater.

15 22.

16 The applicant paid a filing fee to the County for the application in the amount of
17 \$3872.50.

18 23.

19 Pursuant to ORS 34.210(2), the applicant is entitled to an award of attorneys'
20 fees, costs, and disbursements.

21 24.

22 Pursuant to ORS 215.429, Relator is entitled to apply for a Writ of Mandamus
23 with this court to compel Defendant to issue an approval of Relator's' application for the

A-13

1 rezoning, which writ the court must issue unless the Defendant shows that the approval
2 would violate an applicable substantive provision of Defendant's comprehensive plan or
3 land use regulation as defined in ORS 197.015.

4 WHEREFORE, Relator petitions this Court to:

5 A. Issue its writ directed to Defendant commanding Defendant as follows:

6 1. Immediately upon receipt of the writ to issue its approval of the Application;

7 2. To appear before this Court or a judge hereof, at a time and place specified by
8 the Court, to show cause why Defendant has not issued approval of the Application; and
9 further,

10 3. To return the writ then and there, with Defendant's certificate annexed,
11 showing Defendant has issued approval of Relator's Application or showing the cause of
12 Defendant's omission to do so;

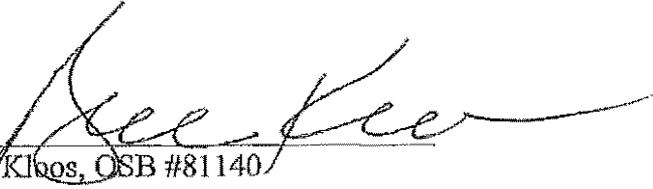
13 B. Award Relator its reasonable attorneys fees and costs under ORS 34.210(2);

14 C. Issue its order directing reimbursement of 50% of the processing fees paid to the
15 County; and

16 D. Grant such other and further relief as the Court deems just and equitable.

17 Dated this 22nd day May, 2009.

18
19 LAW OFFICE OF BILL KLOOS PC

20
21
22
23 By: 
24 Bill Kloos, OSB #81140

25
26 Attorney for Plaintiff-Relator

27
28 Law Office of Bill Kloos, PC
29 375 W. 4th St., Suite 204

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Eugene, OR 97401
Phone: 541-343-8596
Fax: 541-343-8702

Exhibit "A" to Petition: Legal Description

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

State of Oregon ex rel WILLAMETTE)
COMMUNITY HEALTH SOLUTIONS,)
an Oregon nonprofit corporation, dba)
CASCADE HEALTH SOLUTIONS,)
Plaintiff-Relator,)
vs.)
LANE COUNTY,)
an Oregon local government,)
Defendant.)

No. 161008780
NOTICE OF FILING OF
PETITION FOR ALTERNATIVE
WRIT OF MANDAMUS.
Relating to Lane County
Denial of a Special Use Permit
and a Greenway Permit
(County Files: PA 09-5633;
PA 09-5634)

35 TO: Interested persons:

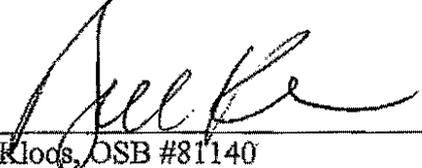
36
37 The applicant for approval of a special use permit and greenway permit for a 12-bed hospice
38 facility has elected to remove the approval process to circuit court, as provided for in state
39 statutes. See ORS 215.429. The removal is accomplished by filing a petition in circuit court.
40 The petition was filed today, April 19, 2010. A copy of the filed petition is enclosed. When a
41 petition like this is filed, the petitioner is required to give written notice and a copy of the
42 petition to those persons who participated orally or in writing while the application was before
43 the County, as well as to all those who were entitled to notice under ORS 197.763. You are
44 receiving this notice because you are one of those persons, along with the other persons listed on

A-16

1 Exhibit A. You may have a right to participate in this proceeding in circuit court. You should
2 seek the advice of your own attorney in deciding whether to do so.
3

4 Dated this 19th day of April, 2010.

5
6 LAW OFFICE OF BILL KLOOS PC
7

8
9
10 By: 
11 Bill Kloos, OSB #81140

12 Attorney for Plaintiff-Relator

13
14
15 Law Office of Bill Kloos, PC
16 375 W. 4th St., Suite 204
17 Eugene, OR 97401
18 Phone: 541-343-8596
19 Fax: 541-343-8702
20

21 Attachements:

- 22
23 A Notice List
24 B Filed Petition
25
26

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EXHIBIT B

FILED

10 APR 19 AM 10:00
CIRCUIT COURT OF OREGON
FOR LANE COUNTY

BY _____

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

State of Oregon ex rel WILLAMETTE)
COMMUNITY HEALTH SOLUTIONS,)
an Oregon nonprofit corporation, dba)
CASCADE HEALTH SOLUTIONS,)
)
Plaintiff-Relator,)
)
vs.)
)
LANE COUNTY,)
an Oregon local government,)
)
Defendant.)
_____)

No. 161008780

PETITION FOR ALTERNATIVE
WRIT OF MANDAMUS

Relating to Lane County
Denial of a Special Use Permit
and a Greenway Permit

(County Files: PA 09-5633;
PA 09-5634)

On the relation of Cascade Health Solutions, ("Relator"), being beneficially an interested party, the State of Oregon alleges:

1.

This is an action, brought under ORS 215.429, seeking to compel the issuance of County approvals for development permits related to a hospice facility on land zoned for Rural Residential use in Lane County, Oregon.

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2.

Relator is a nonprofit corporation registered and active in the State of Oregon.

3.

Defendant Lane County ("County") is a validly existing local government acknowledged by the State of Oregon.

4.

This court has jurisdiction over this proceeding pursuant to ORS 215.429 and ORS 34.120. This court's jurisdiction is exclusive once this petition has been filed. ORS 215.429(2).

5.

This application involves an approximately 6.8-acre tract of land in Lane County located on the east side of River Loop #1, north of the City of Eugene, and about 1,000 feet east of the Eugene-Springfield Metropolitan Plan (Metro Area Plan). The subject property is zoned Rural Residential, is located inside the Metro Area Plan, and is subject to the provision Lane Code 15.321 (Rural Residential).

6.

The subject property is commonly identified as Assessor's Map 17-04-01, Tax Lot 101.

7.

The subject property is owned by Relator.

8.

On September 16, 2009, Relator filed three applications with Lane County related to its development proposal. These applications were: (a) for a special use permit to

A-19

1 allow a 12-bed hospice care facility (identified as county file PA 09-5633; (b) for a
2 Willamette River Greenway development permit for the same use (identified as county
3 file PA 09-5634); and (c) for a 25-space variance from county parking lot requirements
4 (identified as county file PA 09-5637). In this proceeding Relator is not seeking to
5 compel issuance of the variance from the parking standards.

6 9.

7 The County staff did not request any additional information from the applicant to
8 make the applications "complete" for processing in the meaning of ORS 215.427(2). The
9 applications were, therefore, deemed complete for processing by operation of law upon
10 the passage of 30 days – that is, on Friday, October 16, 2009..

11 10.

12 On February 18, 2010, a public hearing was conducted by the Lane County
13 Hearing Official on the applications. At the close of the hearing opponents of the
14 proposed use requested that the record be left open for further evidence. The Hearing
15 Official left the record open for submissions by the parties until March 18, 2010, when
16 the record closed.

17 11.

18 On April 8, 2010, the Lane County Hearing Official issued his decision denying
19 the applications. The decisions gave notice that his denial was subject to appeal to the
20 Lane County Board of Commissioners within 12 days, or by April 20, 2010.

21 12.

22 Relator's applications are for a "land use decision" or a "limited land use
23 decision," as those terms are defined in ORS 197.015(10)(a)(A) and ORS

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1 197.015(12)(b), respectively, and as those terms are used in ORS 215.427 and 215.429.

2 Relator's applications concern a decision that is wholly within the authority and control
3 of the Defendant.

4 13.

5 Relator and Defendant have not agreed to mediation.

6 14.

7 Pursuant to ORS 215.427(1), Defendant was required to take final action on
8 Relator's applications, including exhausting the local appeal to the County Board of
9 Commissioners, within 150 days after Relator's application was deemed complete.

10 15.

11 Based on Relator's application being complete for processing in the meaning on
12 ORS 215.427 on October 16, 2009, under ORS 215.427(1), the Defendant was required
13 to take final action on Relator's applications within 150 days, or not later than Monday,
14 March 15, 2010.

15 16.

16 Relator has not waived its statutory right to a final decision within 150 days or at
17 any time during this proceeding.

18 17.

19 Notwithstanding its obligation under ORS 215.427, Defendant failed to take final
20 action on Relator's applications, including exhausting the appeal available to the County
21 Board of Commissioners, within the 150 days allowed by the statute, and it has failed to
22 take final action on Relator's applications as of the date of the filing of this action.

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18.

Approval of the applications for the special use permit and the greenway development permit would not violate any applicable substantive provisions of Defendant's comprehensive plan or land use regulations, as defined by ORS 197.015.

19.

The hospice house would be occupied by, and have housekeeping facilities for, a full-time House Resident in addition to the patients who are using the facility on a temporary basis.

20.

The hospice house special proposal would be a "nursing home" in the meaning of the definitions in Lane Code (LC). A "nursing home" is defined in LC 16.090 as: "Nursing Home. Any home, place or institution which operates and maintains facilities providing convalescent or chronic care, or both, which exceeds that as defined by "Residential Home." The zone that applies to the subject property, LC 16.231 (Rural Residential), allows nursing homes in the subject to certain standards stated in LC 16.231(5).

21.

The provisions of the Rural Residential zone that apply outside the Metro Area Plan boundary are stated in LC 16.290 and were adopted in 2002. The provisions of this zone are acknowledged by the Land Conservation and Development Commission (LCDC) as being in compliance with all the Statewide Planning Goals, including Goal 14 (Urbanization).

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22.

LC 16.290 allows nursing homes subject to certain standards and limitations. LC 16.290(4)(c) describes the following nursing home use as allowed in the zone, subject to certain standards:

“Not more than one nursing home on a lot or parcel and in a dwelling, . . . manufactured dwelling or duplex allowed by LC 16.290(2)(a) through (c) above. A "nursing home" is any home, place or institution which operates and maintains facilities providing convalescent or chronic care, or both, which exceeds that permitted for a residential home by LC 16.290(2)(f) above. The occupancy of the dwelling for a nursing home shall comply with the requirements of the building code as defined in ORS 455.010(8) and administered in ORS 455.150 and .153.”

23.

The proposed hospice house use is a nursing home in meaning of the code language in LC 16.290(4)(c) quoted in the paragraph immediately above. It is in compliance with all Statewide Planning Goals, including Goal 14 (Urbanization), because LC 16.290 is in compliance with the goals.

24.

The proposed hospice house use will generate traffic associated with the House Resident, patients, visitors, and staff. When it is fully developed, it is estimated the use will generate 69-70 vehicle trips per day on River Loop #1.

25.

The traffic generated by the proposed use would not significantly impact uses on adjacent and nearby lands and other uses permitted in the Rural Residential zone, in the meaning of LC 16.231(5)(a).

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26.

Relator has performed all conditions precedent to Relator's entitlement to relief, and there exist no facts which would excuse Defendant from performing its obligations under ORS 215.427(1).

27.

Relator is without a plain, speedy, and adequate remedy in the ordinary course of law.

28.

Pursuant to ORS 215.427(7), the applicant is entitled to a refund of the unexpended portion of any fees and deposits or 50 percent of such fees and deposits, whichever is greater.

29.

The applicant paid a filing fee to the County for the applications in the amount of: \$5170.00 for the special use permit; \$2610.00 for the greenway permit; and \$2610.00 for the variance.

30.

Pursuant to ORS 34.210(2), the applicant is entitled to an award of attorneys' fees, costs, and disbursements.

31.

Pursuant to ORS 215.429, Relator is entitled to apply for a Writ of Mandamus with this court to compel Defendant to issue an approval of Relator's applications, which writ the court must issue unless the Defendant shows that the approvals would violate an

A-24

1 applicable substantive provision of Defendant's comprehensive plan or land use
2 regulation as defined in ORS 197.015.

3 WHEREFORE, Relator petitions this Court to:

4 A. Issue its writ directed to Defendant commanding Defendant as follows:

5 1. Immediately upon receipt of the writ to issue its approval of the applications
6 for the special use permit and the greenway development permit; or

7 2. To appear before this Court or a judge hereof, at a time and place specified by
8 the Court, to show cause why Defendant has not issued approvals of these applications;
9 and further,

10 3. To return the writ then and there, with Defendant's certificate annexed,
11 showing Defendant has issued approval of Relator's applications or showing the cause of
12 Defendant's omission to do so;

13 B. Award Relator its reasonable attorneys fees and costs under ORS 34.210(2);

14 C. Issue its order directing reimbursement of 50% of the processing fees paid to the
15 County; and

16 //

17 //

18 //

19 //

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21 //

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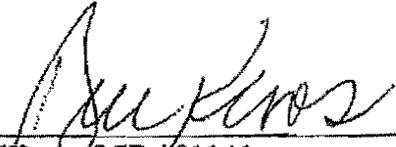
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1 D. Grant such other and further relief as the Court deems just and equitable.

2 Dated this 19th day of April, 2010.

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LAW OFFICE OF BILL KLOOS PC

By: 
Bill Kloos, OSB #81140

Attorney for Plaintiff-Relator

Law Office of Bill Kloos, PC
375 W. 4th St., Suite 204
Eugene, OR 97401
Phone: 541-343-8596
Fax: 541-343-8702

A-26

LANE COUNTY HEARINGS OFFICIAL

**IN THE MATTER OF
RULING ON A MOTION TO DISMISS THE KING ESTATE WINERY
APPLICATION (PA 09-5730) FOR A COMMERCIAL USE IN CONJUNCTION
WITH A FARM USE AS VOID**

FACTS

King Estates Winery, LP, hereinafter referred to as the Applicant, submitted an application to Lane County for a commercial use in conjunction with a farm use (restaurant, special events, etc.) on October 1, 2009. On November 13, 2009 the County notified the Applicant that its application was missing three essential items and therefore had been deemed incomplete.

Subsequently, the Applicant supplied two of the missing items and on May 11, 2010, 179 days after the application was deemed incomplete, requested in writing that the County deem the application complete and that it be put on hold in order to allow time for the eventual submission of the last piece of information, a traffic study. The traffic study was submitted on September 29, 2010. Ultimately, the Lane County Planning Director approved the application and his decision was appealed to the Lane County Hearings Official by Goal One Coalition, hereinafter referred to as the Appellant.

APPLICABLE LAW

ORS 215.427(1) provides, in part, that except for land located within an urban growth boundary or applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete. Subsection (2) of this statutory section requires that the governing body or its designee to notify the applicant if the application is incomplete and that the applicant thereafter has three options: (a) provide all of the missing information; (b) provide some of the missing information and give written notice that no other information will be provided; or (c) give written notice that none of the missing information will be provided.

ORS 215.427(4) provides that on the 181st day after first being submitted, an application is void if the applicant has been notified of the missing information as required under subsection (2) of that section and has not responded with one of the three options granted by that subsection.

ARGUMENT

The Appellant has argued that the Applicant's failure to supply all of the missing information prior to requesting that the application be deemed complete was inconsistent with ORS 215.427(4) and therefore automatically void by operation of that statute. The

Applicant, relying in part on the Oregon Land Use Board of Appeal's (LUBA) decision in *Caster v. City of Silverton, et al.*, 54 Or LUBA 441 (2007), argues that the application is not void because the County choose to continue processing the application after the statutory deadline had expired.

DISCUSSION

I believe that the Appellant underestimates the scope of LUBA's decision in the *Caster* case. While it was unclear whether the petitioner in that case provided any written notice regarding his intent to comply with ORS 227.178(2), the analog to ORS 215.427(2), LUBA nevertheless addressed the worst case scenario: where the applicant failed to provide any of the notice required by ORS 227.178(2). In that situation, LUBA opined that the city had the discretion to overlook the violation and to continue to process the application. While this statement might be considered dicta, it nevertheless seems to send a clear message that LUBA understood that the invocation of ORS 227.178(4) was a matter of discretion with the city.

Any distinction between the *Caster* case, where the city had proceeded to final judgment, and in the current situation, where a final local decision has not been rendered, appear to be inconsequential. In both cases, the local government made a determination to continue processing an application despite irregularities regarding ORS 227.178(2)/ 215.427(2). The Appellant argues that the purpose of the 120/150 Rule is not to allow applicants to endlessly sit on applications. I agree with that observation but must point out that the Legislature has addressed this issue with the ORS 215.427(5) limitation on timeline extensions.

In the present case, the Applicant responded with a variation of ORS 215.427(2)(b). It notified the County to deem the application complete within the proscribed 180 days and indicated to the County that it intended to supply the missing information. As a practical matter, this written notice had no different effect upon the County's processing of the application than had the Applicant told the County that it would not provide additional information. Along with its request that the County deem its application complete, the applicant stopped the 150-day clock. Reading ORS 215.427 as a whole, I do not believe that a County has the discretion to disregard such a request as long as it is consistent with the 215-day limitation expressed by ORS 215.427(5). The clock then restarted when the missing information was submitted into the record. The Applicant's notice to the County did not put the County in any greater processing disadvantage than if it had elected to give notice under ORS 215.527(4)(c). To the contrary, it consistently displayed an intention to comply with processing timelines as best that it could. Further, it relied upon the continued processing of the application by the County to expend funds to complete the traffic study.

The 120-/150-day rule was written for the benefit of applicants; not for local governments nor for opponents of an application. Absent some evidence that a local government is processing an application in bad faith, with the intent to allow an applicant to qualify for a mandamus proceeding, I do not believe that a third party has standing to

question a County's determination to ignore the operation of ORS 215.427(4). Indeed, from the standpoint of administrative efficiency, it makes no sense to force the County to void an application where, under Lane Code 14.700(5), the Applicant could immediately re-file its application since (1) the voiding of an application is not equivalent to a denial on the merits and (2) even if that were true, the basis for the denial would have been eliminated by such an action.¹

CONCLUSION AND DETERMINATION

The right to declare an application void for violation of ORS 215.427(4) is discretionary with the County although that discretion must be exercised within a reasonable time following the 181st day following notification that an application was incomplete. In the present case, Lane County has chosen to ignore the statutory deadline and therefore I do not believe that the application can be judged to be void.

A site view of the subject property shall occur on February 14, 2011 as scheduled. The February 3, 2011 hearing is continued to March 3, 2011 at the time and place announced at the initial hearing.

Respectfully submitted on this 9th day of February, 2011.


Gary Darnielle
Lane County Hearings Official

¹ Lane Code 14.700(5) provides an exception to a one-year moratorium upon resubmission of a denied application " ...if it can be demonstrated that the basis for the original denial has been eliminated."

PA 09-5730 Timeline as of 02/03/11

10/16/09	Application submitted
11/13/09	Application deemed incomplete
05/11/10	Application deemed complete per applicant's request and put on hold for traffic analysis
	05/11/10 to 06/10/10 First 30 day waiver
	06/29/10 to 07/29/10 Second 30 day waiver
09/29/10	Traffic analysis submitted
10/04/10	Referral notice sent
10/14/10	Referral period ended
10/20/10	Application put on hold to address referral comments
11/22/10	Response to referral comments submitted
12/07/10	Decision issued
12/20/10	Appeal received
02/03/11	Appeal Hearing

Application Incomplete:	11/13/09 to 05/11/10	= 179 days from date deemed incomplete
	10/16/09 to 05/11/10	= 207 days from date submitted
Application on Hold:	05/11/10 to 06/10/10	= 30 days
	06/29/10 to 07/29/10	= 30 days
	10/20/10 to 11/22/10	= 33 days
Total Hold		= 93 days
Application Active:	06/11/10 to 06/29/10	= 18 days
	07/30/10 to 10/20/10	= 82 days
	11/22/10 to 02/03/11	= 73 days
Total Active		= 173 days

Timeline based on assumption that application was on hold until traffic analysis was submitted

<i>Application on Hold:</i>	<i>05/11/10 to 09/29/10</i>	<i>= 141 days</i>
	<i>10/20/10 to 11/22/10</i>	<i>= 33 days</i>
<i>Total Hold</i>		<i>= 174 days</i>
<i>Application Active:</i>	<i>09/29/10 to 10/20/10</i>	<i>= 21 days</i>
	<i>11/22/10 to 02/03/11</i>	<i>= 73 days</i>
<i>Total Active</i>		<i>= 94 days</i>

Attachment: Rena Loring

Exhibit 3



P.O. Box 5347 Eugene, Oregon 97405

Lane County Board of Commissioners
125 East 8th Avenue
Eugene, OR 97401
November 15, 2011

RECEIVED

NOV 15 2011

LANE COUNTY
BOARD OF COMMISSIONERS

Re: Notice of Intent to Petition for Enforcement

Dear Commissioners:

LandWatch Lane County (LandWatch) hereby submits this Notice of Intent to Petition for Enforcement and to offer Lane County an opportunity to respond and to modify its patterns and practices of decision making so as to comply with timelines and other procedural requirements established by state and Lane County law.

Counties must "exercise their planning and zoning responsibilities * * * in accordance with ORS chapters 195, 196 and 197 and the goals approved under ORS chapters 195, 196 and 197." ORS 197.175(1). Local governments must make land use decisions in compliance with the goals and with acknowledged comprehensive plans and land use regulations. ORS 197.175(2).

ORS 215.427(1) requires that a county take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete. As relevant here, the only exception to that requirement is where the processing period is extended at the written request of the applicant for a specified period or periods of time not to exceed a total of more than 215 days. ORS 215.427(5). These statutory requirements are incorporated into Lane Code at LC 14.050(5).

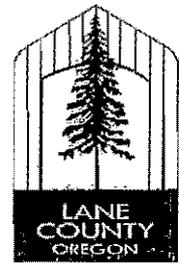
ORS 215.427(4) directs that on the 181st day after first being submitted, an application is void if the applicant has been notified of missing information as required under ORS 215.427(2) and has not submitted: (a) all of the missing information; (b) some of the missing information and written notice that no other information will be provided; or (c) written notice that none of the missing information will be provided. These statutory requirements are incorporated at LC 14.050(3).

Failure to meet the statutory deadlines allows an applicant to file a petition for a writ of mandamus under ORS 34.130 in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval. ORS 215.429(1). In circuit court, the burden of proof is reversed; ORS 215.429(5) directs the court to issue a peremptory writ unless the governing body or any intervenor shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations. The systematic failure of a county to comply with ORS 215.427 and LC 14.050(5) to render final decisions in a timely manner results in citizens being denied their right under statewide planning Goal One to the opportunity to be involved in all phases of the planning process, specifically including implementation measures.

OAR 660-045-0030(1) authorizes a person to petition the commission for an enforcement order against a local government in accordance with ORS 197.319 to 197.335 and 197.646 if the local government exhibits a pattern

December 8, 2011

LandWatch Lane County
 Robert Emmons, President
 P.O. Box 5347
 Eugene, Or. 97405



LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

Re: LandWatch Notice of Intent to Petition for Enforcement

Dear Mr. Emmons:

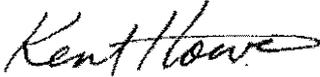
Lane County received the above cited Notice on 11-15-11. To the extent necessary, this letter serves as the County's response.

As you are aware, the Notice was served per the citizen-initiated enforcement order process of ORS 197.319-197.353 and OAR 660, Division 45. The Notice alleges a "pattern and practice" by Lane County of disregard for meeting the timelines for processing limited land use decisions as so codified in ORS 215.427 and its analog, LC 14.050. Specifically, the Notice contends that Lane County has failed to meet the 150 day rule for completing decisions (ORS 215.427(1)/LC 14.050(5)); violated the 215 day timeline extension provision (ORS 215.427(5)/LC 14.050(5)(a)); and failed to void incomplete applications (ORS 215.427(4)/LC 14.050(3)(c)). LandWatch further alleges that such "pattern and practice" has resulted in Applicants filing writs of mandamus, eliminating your organization's ability to partake in the local process. The Notice cites four past land use actions in support of those allegations. LandWatch seeks revisions to LC 14 as corrective action.

It appears that you have attempted to describe circumstances that meet the definitions of OAR 660-045-0020(10) & (11) in establishing a "pattern and practice" of alleged erroneous decision making. These provisions require the subject decisions to involve "...the same or similar geographic areas, plan designation, zones, or types of land use." In that regard, we note that of the four land use proposals raised, two (PA 08-5795 & PA 08-5928) are approximately 3 miles apart, the other two (PA 09-5730 and PA 09-5633/PA 09-5634) are respectively a minimum of 25 miles and 20 miles distant from the first two proposals, and 18 miles apart from each other. Topographically, the sites range from Cascade foothills for the first two proposals, Coast Range foothills for the third and level Willamette River floodplain for the fourth. In addition, the respective Plan designations are Forest Land for the first two proposals, Agriculture for the third and Rural Residential for the fourth. The respective zone designations were, at time of application, F-2, F-1, EFU, and RR. Types of land uses were vacant forest land for the first two actions, vineyards, crops, a winery and livestock on the third and vacant land for the fourth, respectively. The proposals were evaluated under entirely different provisions, LC 16.211(5), LC 16.252, LC 16.212(4)(c), and LC 16.231(4)(k)/LC 16.254(4), respectively. While the Department of Land Conservation and Development will have to make its own ruling, the cited proposals do not appear to meet the definition of "pattern" and "practice" required by the OAR.

In closing, this letter serves as notice per OAR 660-045-0050(2)(b) that the County will not be taking the corrective action(s) outlined in your Notice. The recent actions taken and described above are viewed as adequate to address the circumstances raised in the Notice.

Sincerely,



Kent Howe/LMD Planning Director

Enclosures:

- #1. Timeline extension form -1p.
- #2. Excerpt from Incomplete notice-1p.
- #3. Void form letter-1p.
- #4. Hearings Official ruling on void issue-3p.
- #5. Excerpt from LUBA No. 2010-093-4p.

C: DLCD
Lane County Board of Commissioners
Matt Laird, LMD Manager
Stephen Vorhes, Legal Counsel

Applicant Intent Form

Date: ^

Department File No.: PA ^

Received On: ^

In order to help us process your application, please:

1. Check one box;
2. Sign & date at the bottom;
3. Return in enclosed self-addressed stamped envelope.

- I intend to submit the missing or incomplete materials as identified in the **Incomplete Notice**. I understand that according to State law I have up to 180 days from the date the application was submitted to provide the missing information, and that, on the 181st day after first being submitted, the application is void if I have not submitted:
- (a) All of the missing information; or
 - (b) Some of the missing information and written notice that no other information will be provided.
- I do not intend to submit the missing or incomplete materials as identified in the **Incomplete Notice**. I understand that Lane County will proceed to review the application materials previously submitted. I understand that incomplete applications may not provide the necessary supporting information to demonstrate compliance with applicable criteria and standards and may result in the denial of my application.
- I wish to withdraw the application. I understand that Lane County will refund any portion of the application fee that has not been expended in the review of the application.

Signature of Applicant / Agent

Date

Notice of Void Application

Date: [Date]

Applicant:

[Name]

[Address]

Agent:

[Name]

[Address]

Owner:

[Name]

[Address]

Subject: PA [Application Number]

Received: [Date]

Proposal: [Application Description]

This letter is to inform you that more than 180 days have past since land-use application PA [Application Number] was submitted on [Date]. The land-use application was deemed incomplete on [Date]. Per ORS 215.427(4), an incomplete land-use application is void on the 181st day after submission if not subsequently completed by the applicant within the 180-day timeframe. As of the date of this letter, Lane County has not received the missing information necessary to complete the land-use application. **Per ORS 215.427(4), PA [Application Number] is now VOID.**

If you have any questions, please contact [Name], [Position], at 541-682-XXXX.

Sincerely,

Kent Howe
Planning Director
Lane County Land Management Division
125 E 8th Ave
Eugene OR 97401

LANE COUNTY HEARINGS OFFICIAL

**IN THE MATTER OF
RULING ON A MOTION TO DISMISS THE KING ESTATE WINERY
APPLICATION (PA 09-5730) FOR A COMMERCIAL USE IN CONJUNCTION
WITH A FARM USE AS VOID**

FACTS

Estates Winery, LP, hereinafter referred to as the Applicant, submitted an application to Lane County for a commercial use in conjunction with a farm use (restaurant, special events, etc.) on October 1, 2009. On November 13, 2009 the County notified the Applicant that its application was missing three essential items and therefore was deemed incomplete.

Subsequently, the Applicant supplied two of the missing items and on May 11, 2010, 179 days after the application was deemed incomplete, requested in writing that the County deem the application complete and that it be put on hold in order to allow time for the final submission of the last piece of information, a traffic study. The traffic study was submitted on September 29, 2010. Ultimately, the Lane County Planning Director approved the application and his decision was appealed to the Lane County Hearings Official by Goal One Coalition, hereinafter referred to as the Appellant.

APPLICABLE LAW

215.427(1) provides, in part, that except for land located within an urban growth boundary or applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on all other applications for a permit, limited use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete. Subsection (2) of this statutory provision requires that the governing body or its designee to notify the applicant if the application is incomplete and that the applicant thereafter has three options: (a) provide the missing information; (b) provide some of the missing information and give written notice that no other information will be provided; or (c) give written notice that the remaining information will be provided.

215.427(4) provides that on the 181st day after first being submitted, an application is deemed void if the applicant has been notified of the missing information as required under subsection (2) of that section and has not responded with one of the three options granted in that subsection.

ARGUMENT

The Appellant has argued that the Applicant's failure to supply all of the missing information prior to requesting that the application be deemed complete was inconsistent with ORS 215.427(4) and therefore automatically void by operation of that statute. The

Applicant, relying in part on the Oregon Land Use Board of Appeal's (LUBA) decision in *Caster v. City of Silverton, et al.*, 54 Or LUBA 441 (2007), argues that the application is not void because the County choose to continue processing the application after the statutory deadline had expired.

DISCUSSION

I believe that the Appellant underestimates the scope of LUBA's decision in the *Caster* case. While it was unclear whether the petitioner in that case provided any written notice regarding his intent to comply with ORS 227.178(2), the analog to ORS 215.427(2), LUBA nevertheless addressed the worst case scenario: where the applicant failed to provide any of the notice required by ORS 227.178(2). In that situation, LUBA opined that the city had the discretion to overlook the violation and to continue to process the application. While this statement might be considered dicta, it nevertheless seems to send a clear message that LUBA understood that the invocation of ORS 227.178(4) was a matter of discretion with the city.

Any distinction between the *Caster* case, where the city had proceeded to final judgment, and in the current situation, where a final local decision has not been rendered, appear to be inconsequential. In both cases, the local government made a determination to continue processing an application despite irregularities regarding ORS 227.178(2)/ 215.427(2). The Appellant argues that the purpose of the 120/150 Rule is not to allow applicants to endlessly sit on applications. I agree with that observation but must point out that the Legislature has addressed this issue with the ORS 215.427(5) limitation on timeline extensions.

In the present case, the Applicant responded with a variation of ORS 215.427(2)(b). It notified the County to deem the application complete within the proscribed 180 days and indicated to the County that it intended to supply the missing information. As a practical matter, this written notice had no different effect upon the County's processing of the application than had the Applicant told the County that it would not provide additional information. Along with its request that the County deem its application complete, the applicant stopped the 150-day clock. Reading ORS 215.427 as a whole, I do not believe that a County has the discretion to disregard such a request as long as it is consistent with the 215-day limitation expressed by ORS 215.427(5). The clock then restarted when the missing information was submitted into the record. The Applicant's notice to the County did not put the County in any greater processing disadvantage than if it had elected to give notice under ORS 215.527(4)(c). To the contrary, it consistently displayed an intention to comply with processing timelines as best that it could. Further, it relied upon the continued processing of the application by the County to expend funds to complete the traffic study.

The 120-/150-day rule was written for the benefit of applicants; not for local governments nor for opponents of an application. Absent some evidence that a local government is processing an application in bad faith, with the intent to allow an applicant to qualify for a mandamus proceeding, I do not believe that a third party has standing to

1 headlights from vehicles exiting the fueling station onto Springbrook Road will have only a
2 “minimal impact” on the drive-in theater.¹³

3 Respondents respond, and we agree, that the city’s findings are adequate to explain
4 why it found that because light impacts from the fueling station will be minimal and will be
5 further mitigated by landscaping and other conditions of approval, the proposed fueling
6 station is compatible with the drive-in theater. Further, we agree with respondents that the
7 city’s findings are supported by substantial evidence in the record. Intervenor submitted a
8 photometric plan showing the effects of lighting from the fueling station, and also agreed to
9 remove two existing lights in the parking lot and shield two additional lights in the existing
10 Fred Meyer Store. Record 178-79. The canopy lights will be recessed. Finally, condition 10
11 requires intervenor to add trees to the landscape buffer along the western property line and to
12 add a sight-obscuring fence. That evidence is evidence that a reasonable person could rely
13 on to determine that the proposed fueling station will have minimal impacts on the drive-in
14 theater.

15 The seventh assignment of error is denied.



16 **NINTH ASSIGNMENT OF ERROR**

17 ORS 227.178(1) sets forth what is commonly referred to as the “120-Day Rule,”
18 which requires cities to take final action on a permit application within 120 days after the
19 application is deemed complete. If the city does not take final action within 120 days, then
20 ORS 227.179(1) provides a remedy for applicants: the right to seek a writ of mandamus in
21 circuit court to compel the city to approve the permit application.

22 ORS 227.178(5) allows an applicant to extend the 120-day deadline for a final
23 decision on a permit application for a specified period of time for up to 245 days, and

¹³ The map at Record 499 indicates that the exit from the fueling station onto Springbrook Road is a right-out exit, and the location of the drive-in theater tends to indicate that headlights using that right-out exit would not be directed at the drive-in theater.

1 city took final action on the application (September 23, 2010). According to petitioner, ORS
2 227.178(5) divests cities of jurisdiction to act on applications beyond the maximum time
3 period of 365 days set forth in that portion of ORS 227.178, and such applications essentially
4 become “void.”

5 ORS 227.178(5) does not say that an extension beyond 365 days divests the city of
6 jurisdiction over the application or “voids” the application, and in fact the relevant statutes
7 do not specify what consequences, if any, flow from a written extension of the 120-day
8 deadline beyond the period prescribed in ORS 227.178(5). ORS 227.178(4), which
9 petitioner cites, concerns a different situation, where the applicant fails to provide one of the
10 three permissible responses to the city’s request to provide missing information within 180
11 days of the date the application was submitted, in order for the 120-day deadline to
12 commence.

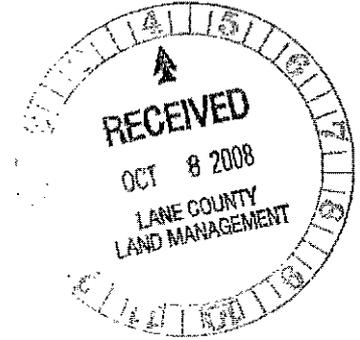
13 Respondents argue, essentially, that ORS 227.178(5) specifies no consequences for a
14 written extension of the 120-day deadline beyond the 365 days provided in ORS 227.178(5),
15 and in that circumstance the city retains full authority to issue its decision within the
16 extended deadline and, if the city exceeds the extended deadline, the applicant retains the
17 legal right to seek a mandamus remedy under ORS 227.179(1). We need not address that
18 issue, because the present case does not involve a written extension of the deadline for a
19 specified period of time beyond the 365th day. Instead, as explained above, intervenor
20 voluntarily and completely “waived” the 120-day deadline and the associated right to seek a
21 mandamus if the city exceeded that deadline.

22 The city’s findings conclude that intervenor *waived entirely* the provisions of ORS
23 227.178(1) that required the city to make a final decision within 120 days, and petitioner
24 does not challenge those findings. Record 40. We do not understand petitioner to dispute
25 that such a voluntary verbal waiver of the 120-day deadline occurred. As explained above,
26 an applicant is free to waive the 120-day deadline entirely and give up its mandamus

#10 PA 08-5840

Exhibit 5

LANFEAR
CONSULTING
LLC



October 8, 2008

HAND DELIVERED

Jerry Kendall, Associate Planner
Lane County Land Management Division
125 East 8th Avenue
Eugene, OR 97401

Dear Mr. Kendall:

Re: PA 08-5840 F-2 Template Dwelling

On behalf of the applicant Michael Cowan, I request that the processing of the application for Template Dwelling (PA 08-5840) be placed on hold for ten days to allow the applicant opportunity to respond to issues raised during the comment period by a nearby land owner.

The applicant also extends the statutory timelines of ORS 215.427 for this time period as authorized by ORS 215.427(5). Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Thom Lanfear".

Thom Lanfear
Lanfear Consulting LLC

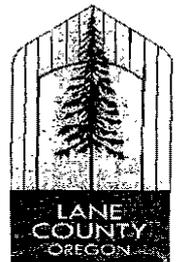
Cc. Michael Cowan

FILE # PA _____
EXHIBIT # 6-1p.

#21
22
23

08-6488 08-6500
08-6499 08-6501

July 2, 2009



Helen F. Quade/James T. Quade
83246 Lorrane Hwy.
Eugene, Or. 97405

LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD

RE: Appeal of PA 08-6498, PA 08-6499, PA 08-6500 & PA 08-6501; for non-farm dwellings

Subject Property: Map 19-05-13, tax lots 402, 502, 403, & 400

This Notice is to inform you that your appeals for the above-cited applications have been accepted by the Planning Director. Furthermore, the appeals have been reviewed as per Lane Code 14.520/14.525/14.530, and the Director has agreed to reconsider the decisions based on the new information you have provided. Lane Code is available on the internet at www.lanecounty.org/, under "Quick Links".

You have granted a 30 day waiver of the statutory processing timelines. Please expect the reconsidered decisions to be issued no later than July 30, 2009.

Sincerely,

Jerry Kendall (541-682-4057)
Associate Planner

09-5526
KENDALL Jerry

From: James W Spickerman [spickerman@gleaveslaw.com]
Sent: Monday, February 08, 2010 9:18 AM
To: KENDALL Jerry
Subject: RE: Stewart variance/PA 09-5526

Jerry--

I'll get back to you shortly on this. I have a little catching up to do.

In the meantime, on behalf of the applicant, I grant a waiver of the timeline until such time as I indicate it should be resumed.

Jim

From: KENDALL Jerry [mailto:Jerry.KENDALL@co.lane.or.us]
Sent: Friday, February 05, 2010 3:58 PM
To: James W Spickerman
Subject: Stewart variance/PA 09-5526

Jim: After I left the voicemail for you to call me I dug deeper into the history of this property. Here are some bullet points for you to consider:

- You state that the ..."garage itself has recently been replaced in the footprint of the old garage", yet I see no evidence to document that statement. What I do see is a tax appraisal card that shows the old "port" being 30' wide, whereas the current structure, including BP 08-1257 to be 76' wide.
- I note that the site plan for BP 08-1257 shows 32'4" clearance to the property line in question, whereas the site plan submitted with the variance now shows 18'3". In any event, **it appears that the need for the variance is driven in large part by the design of BP 08-1257, apparently failing LC 16.256(2)(a), (c) & (e), at a minimum. No sufficient accounting for this is in the present application.** Note that LC 16.256(2)(c) requires conformity with the purposes of this chapter. In this regard, see LC 16.003(1). Is the proposal an overbuild for the room available?

If you wish more time to restate/add to the argument, consider granting a waiver to the statutory processing timelines to a date certain. Such waiver would need to be provided by Tuesday, February 9. If a waiver is not granted, I am forced to proceed, and do not think the present application bears approval.

FYI but not necessarily your concern, I am off Feb 12-17. Next week I have two "big ticket items" that will consume most of my time.

Jerry Kendall/Associate Planner/Lane County Oregon
 PSB/LMD
 125 E. 8th Ave.
 Eugene, Or. 97401
 ph: 541-682-4057
 FAX: 541-682-3947
 Jerry.Kendall@co.lane.or.us

02/08/2010

KENDALL Jerry

From: KENDALL Jerry
Sent: Friday, February 05, 2010 4:56 PM
To: 'James W. Spickerman'
Subject: RE: Stewart variance/PA 09-5526

Also, if the "no build easement" with the Grange property is to be a serious consideration in the variance request, consider submitting, in the least, a letter from the Grange indicating their agreement to the proposed easement.

I have pending a SUP in which the Applicant claimed that getting an easement to expand their access route through a neighboring property would be no problem. It has been appealed, and the neighbor stated that she has no intention to grant such easement.

Jerry Kendall/Associate Planner/Lane County Oregon
PSB/LMD
125 E. 8th Ave.
Eugene, Or. 97401
ph: 541-682-4057
FAX: 541-682-3947
Jerry.Kendall@co.lane.or.us

From: KENDALL Jerry
Sent: Friday, February 05, 2010 3:58 PM
To: 'James W. Spickerman'
Subject: Stewart variance/PA 09-5526

Jim: After I left the voicemail for you to call me I dug deeper into the history of this property. Here are some bullet points for you to consider:

- You state that the ... "garage itself has recently been replaced in the footprint of the old garage", yet I see no evidence to document that statement. What I do see is a tax appraisal card that shows the old "port" being 30' wide, whereas the current structure, including BP 08-1257 to be 76' wide.
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If you wish more time to restate/add to the argument, consider granting a waiver to the statutory processing timelines to a date certain. Such waiver would need to be provided by Tuesday, February 9. If a waiver is not granted, I am forced to proceed, and do not think the present application bears approval.

FYI but not necessarily your concern, I am off Feb 12-17. Next week I have two "big ticket items" that will consume most of my time.

Jerry Kendall/Associate Planner/Lane County Oregon
PSB/LMD
125 E. 8th Ave.
Eugene, Or. 97401
ph: 541-682-4057
FAX: 541-682-3947
Jerry.Kendall@co.lane.or.us

#48 p2

50 095614

SEBBA Rafael

From: SEBBA Rafael
Sent: Monday, January 25, 2010 9:12 AM
To: 'Rdjaros@aol.com'
Subject: RE: PA 09-5614 F-2 Template dwelling

Derek,

No problem, I will put the application on hold until you submit the additional information. We can review the re-notice issue at that time. Could you verify whether you are willing to waive the permit processing time line requirements of ORS 215.427?

Thanks,

Rafael

Rafael Sebba
 Associate Planner
 Lane County Public Works/Land Management Division
 541.682.4620

Rdjaros@aol.com [mailto:Rdjaros@aol.com]
Sent: Monday, January 25, 2010 8:33 AM
To: SEBBA Rafael
Subject: PA 09-5614 F-2 Template dwelling

Rafael,

Re: Pa 09-5614
 180523 104 Template dwelling
 January 25, 2010

Could you please put this application on temporary hold. We had to perform a small lot line adjustment to remedy a fence situation. An updated legal lot verification for the new configuration is being reviewed by Jeremy. As soon as that is complete I will forward it along with updated exhibits impacted by the adjustment. The adjustment is rather minor. The development area will not change and the adjustment makes no changes to the template count. I assume that you will need to re-notice for comments once the new information is provided and the application is removed from hold.

Thank You!

-Derek Jaros

#52 pl

SEBBA Rafael

From: Rdjaros@aol.com
Sent: Monday, January 25, 2010 12:39 PM
To: SEBBA Rafael
Subject: Re: PA 09-5614 F-2 Template dwelling

In a message dated 1/25/2010 9:12:00 AM Pacific Standard Time, Rafael.SECCA@co.lane.or.us writes:

| waive the permit processing time line requirements of ORS 215.427?

We are willing to waive the permit processing time line requirements of ORS 215.427

Derek Jaros
Dianne Jaros

#50 p 2

56 09-5730

SEBBA Rafael

From: Micheal Reeder [mreeder@agsprp.com]
Sent: Thursday, May 12, 2011 2:24 PM
To: DARNIELLE Gary L; acdavies@qwestoffice.net
Cc: SEBBA Rafael
Subject: RE: King Estate Winery, LP - SUP Extension of Time

Thank you Gary. The Applicant hereby grants an extension of time pursuant to ORS 215.427(5).

Micheal M. Reeder
Arnold Gallagher Percell Roberts & Potter, P.C.
800 Willamette Street, Suite 800
Eugene, OR 97401
Phone: (541) 484-0188
Fax: (541) 484-0536
Email: mreeder@agsprp.com
www.agsprp.com

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TAX ADVICE DISCLAIMER: Pursuant to federal law, you are advised that any federal tax advice contained in this communication (including attachments) was not intended or written to be used, and it cannot be used, by you for the purpose of (1) avoiding any penalty that may be imposed by the Internal Revenue Service or (2) promoting, marketing or recommending to another party any transaction or matter addressed herein.

-----Original Message-----

From: DARNIELLE Gary L [mailto:GDARNIELLE@lcog.org]
Sent: Thursday, May 12, 2011 12:47 PM
To: Micheal Reeder; acdavies@qwestoffice.net
Cc: SEBBA Rafael
Subject: RE: King Estate Winery, LP - SUP Extension of Time

Micheal and Anne,

Consider this email as an approval of an extension of the King Estates SUP timelines back to August 8, 2011.

Gary Darnielle
Lane County Hearings Official

From: Micheal Reeder [mreeder@agsprp.com]
Sent: Thursday, May 12, 2011 10:53 AM
To: DARNIELLE Gary L; acdavies@qwestoffice.net
Cc: SEBBA Rafael
Subject: King Estate Winery, LP - SUP Extension of Time

Gary and Anne:

#56 p1

09.5730

SEBBA Rafael

From: DARNIELLE Gary L
Sent: Thursday, May 12, 2011 12:47 PM
To: Micheal Reeder; acdavies@qwestoffice.net
Cc: SEBBA Rafael
Subject: RE: King Estate Winery, LP - SUP Extension of Time

Micheal and Anne,

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Gary Darnielle
Lane County Hearings Official

From: Micheal Reeder [mreeder@agsprp.com]
Sent: Thursday, May 12, 2011 10:53 AM
To: DARNIELLE Gary L; acdavies@qwestoffice.net
Cc: SEBBA Rafael
Subject: King Estate Winery, LP - SUP Extension of Time

Gary and Anne:

Gary, I hope you are doing better. I am sorry to hear about your unfortunate detour during your photo-vacation.

Since the winery legislation is working its way through the Capital, I recommend that we extend the time on this appeal until after the legislative session is over. By then we will know whether there is new legislation that would address the issues that we are dealing with in this appeal. I believe the legislative session ends July 11th. I am not sure how long it may take the governor to consider all the bills, but perhaps we should extend to August 1st (or 8th) to be safe. The applicant would of course grant an extension of the timeline for a final decision per ORS 215.427(5).

Thanks!

Yours,

Mike

Micheal M. Reeder
Arnold Gallagher Percell Roberts & Potter, P.C.
800 Willamette Street, Suite 800
Eugene, OR 97401
Phone: (541) 484-0188
Fax: (541) 484-0536
Email: mreeder@agsprp.com<mailto:mreeder@agsprp.com>
www.agsprp.com<http://www.agsprp.com/>

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#56 p2

105221 #60

RUST Mark E

From: NORMAN TRACY WATERBURY [utopiadesigns@msn.com]
Sent: Thursday, May 27, 2010 2:45 PM
To: RUST Mark E
Subject: RE: Almberg F2 template application PA 10-5221

Mark,, That's fine... Norm

From: Mark.RUST@co.lane.or.us
To: utopiadesigns@msn.com
CC: Jeremy.SHERER@co.lane.or.us
Date: Thu, 27 May 2010 14:01:03 -0700
Subject: Almberg F2 template application PA 10-5221

Norm,

As we have discussed, in regard to the Almberg property, 20-03-13 TL 1001 (PA 10-5221), this property has not been established as a legal lot of record. The reference you make in the application to Partition R 581/94058 in 1973 is not a partition. That reference is a deed that apparently split off the current configuration of the property in 1973, but was not an actual partition. The Land Use compatibility statement (LUCS) that you applied for June 2, 2008 (PA 08-5866) found that the subject property "could qualify as a legal lot..." but that it is "neither [a] preliminary legal lot verification nor a final legal lot determination." The LUCS further states that "Lane County Planning Department will recognize the parcel's legal lot status if and when a preliminary legal lot verification and notice have [been] applied for and complete."

So, I can proceed with processing the application as is, but it will not meet the requirements for approval. Therefore, as we have discussed, I have asked if you to place the application on hold and proceed with the legal lot verification process.

Let me know if you need more information.

Thanks.

Mark Rust, AICP
Planner
Lane County Land Management
125 E. 8th Ave.
Eugene, OR 97401
541.682.4541 Phone
541.682.3947 Fax
mark.rust@co.lane.or.us

#60 p1

RUST Mark E

From: NORMAN TRACY WATERBURY [utopladesigns@msn.com]
Sent: Thursday, May 27, 2010 1:48 PM
To: RUST Mark E
Subject: RE: Almborg F2 template application.

Mark, That would be my understanding, The 150 day provision would be waived or whatever until we can establish legal lot status.

Could you do me a favor an write a not to me requesting the legal lot verification for this application. It sure is a lot easier when dealing with my clients to say well they did it. (Just kidding)... Thanks Norm.

If there is a form to fill out re the 150 day waiver let me know...

From: Mark.RUST@co.lane.or.us
To: utopladesigns@msn.com
Date: Thu, 27 May 2010 12:32:57 -0700
Subject: RE: Almborg F2 template application.

Thanks Norm. So for PA 10-5221 I can put it on hold. In order to do so, I need you to also stop the statutory 150 day time processing provision for the same period of time the application is on hold pending a legal lot determination.

Please let me know.

Thanks.

Mark Rust, AICP
Planner
Lane County Land Management
125 E. 8th Ave.
Eugene, OR 97401
541.682.4541 Phone
541.682.3947 Fax
mark.rust@co.lane.or.us

From: NORMAN TRACY WATERBURY [mailto:utopladesigns@msn.com]
Sent: Thursday, May 27, 2010 12:27 PM
To: RUST Mark E
Subject: Almborg F2 template application.

Mark Rust
Lane County LMD

Dear Mark,

As per our meeting this morning, please put a hold on the Almborg application, (tax lot 1001), until we can file, or have the subject lot approved as a legal lot. We will apply for a legal lot determination shortly.

Norm

#60 F2

105618 #63

KENDALL Jerry

From Thom Lanfear [tlanfear@pacinfo.com]
Sent Friday, January 14, 2011 11:27 AM
To KENDALL Jerry
Subject PA 10-5618

Re: PA 10-5618 F-2 Template Dwelling (Laughlin)

Mr. Kendall,

On behalf of the applicants Caleb & Jessica Laughlin, I request that the application for approval of an F-2 Template Dwelling (PA 10-5618) be placed on hold for an additional 30 days.

The applicant grants a waiver to the statutory timelines of ORS 215.427 for this time period. Thank you for your consideration.

Thom Lanfear
Lanfear Consulting LLC
541 Willamette St. Suite 402
Eugene, OR 97401
541-345-8139

#63 p1

KENDALL Jerry

From: Thom Lanfear [mailto:tlanfear@pacinfo.com]
Sent: Monday, January 03, 2011 3:16 PM
To: KENDALL Jerry
Subject: FW: PA 10-5618

Hi Jerry

Thanks for the contact. Here is a copy of the last waiver submitted. I have met with the neighbors and am trying to work out a solution. I will let you know more by January 14.

Thom

From: KENDALL Jerry [mailto:Jerry.KENDALL@co.lane.or.us]
Sent: Wednesday, December 15, 2010 14:23
To: 'Thom Lanfear'
Subject: RE: PA 10-5618

OK, Thank you

Jerry Kendall/Associate Planner/Lane County Oregon
PSB/LMD
125 E. 8th Ave
Eugene, Or 97401
ph 541-682-4057
FAX 541-682-3947
Jerry.Kendall@co.lane.or.us

From: Thom Lanfear [mailto:tlanfear@pacinfo.com]
Sent: Wednesday, December 15, 2010 2:22 PM
To: KENDALL Jerry
Subject: PA 10-5618

Re: PA 10-5618 F-2 Template Dwelling (Laughlin)

Mr. Kendall

On behalf of the applicants Caleb & Jessica Laughlin, I request that the application for approval of an F-2 Template Dwelling (PA 10-5618) be placed on hold for an additional 30 days.

The applicant grants a waiver to the statutory timelines of ORS 215.427 for this time period. Thank you for your consideration.

Thom Lanfear
Lanfear Consulting LLC
541 Willamette St. Suite 402
Eugene, OR 97401
541-345-8139

#63 P2

01/03/2011

KENDALL Jerry

From KENDALL Jerry
Sent Tuesday, December 14, 2010 3:35 PM
To MILLER Teresa F
Subject RE: PA10 5618
Attachments RE: access issue for PA 10-5618

Tere the agent, Thom Lanfear, placed this application on Hold until Dec 15, in order to study/respond to your fax of 10-22-10. I think the enclosed email will bring you up to the current status.

I will be out from next week through Jan 3, and with other issues to attend to even if the agent took it off hold, I won't get to it until January.

Jerry Kendall/Associate Planner/Lane County Oregon
PSB/LMD
125 E 8th Ave
Eugene, Or 97401
ph 541-682-4057
FAX 541-682-3947
Jerry.Kendall@co.lane.or.us

From: MILLER Teresa F [mailto:Teresa.F.Miller@ci.eugene.or.us]
Sent: Tuesday, December 14, 2010 2:55 PM
To: KENDALL Jerry
Subject: PA10 5618

Hi Jerry,

I'm just checking on the status of PA 10 5618. I haven't heard anything from anyone and was wondering. Any information is appreciated. Your help.

Tere Miller
Parts and Supply Specialist
Eugene Fire & EMS Logistics
541-682-7170
541-682-7158 fax
teresa.f.miller@ci.eugene.or.us

 Please consider the environment before printing this e-mail or any attachments.

#63 p3

12/14/2010

From: ROGERS Chris A [mailto:Chris.ROGERS@co.lane.or.us]
Sent: Tuesday, December 14, 2010 13:46
To: MILLER Teresa F
Subject: RE: PA10 5618

Hi Tere,

I show that Jerry has it on hold. I don't know if he still needs anything to finish it. You might want to call or e-mail Jerry Kendall (682-4057) so he can tell you why.

Thanks,

Chris

From: MILLER Teresa F [mailto:Teresa.F.Miller@ci.eugene.or.us]
Sent: Tuesday, December 14, 2010 1:25 PM
To: ROGERS Chris A
Subject: PA10 5618

Hi Chris,

Would it be possible for you to tell me the status of PA 10 5618?? I believe Jerry Kendall was working on it. Thanks for your help.

Tere Miller
Parts and Supply Specialist
Eugene Fire & EMS Logistics
541-682-7170
541-682-7158 fax
teresa.f.miller@ci.eugene.or.us

 Please consider the environment before printing this e-mail or any attachments.

#63 p4

12/14/2010

KENDALL Jerry

From Thom Lanfear [tlanfear@pacinfo.com]
Sent Wednesday, December 15, 2010 2:22 PM
To KENDALL Jerry
Subject PA 10-5618

Re: PA 10-5618 F-2 Template Dwelling (Laughlin)

Mr. Kendall

On behalf of the applicants Caleb & Jessica Laughlin, I request that the application for approval of an F-2 Template Dwelling (PA 10-5618) be placed on hold for an additional 30 days.

The applicant grants a waiver to the statutory timelines of ORS 215.427 for this time period. Thank you for your consideration.

Thom Lanfear
Lanfear Consulting LLC
541 Willamette St. Suite 402
Eugene, OR 97401
541-345-8139

#63 p5

12/15/2010

KENDALL Jerry

From Thom Lanfear [tlanfear@pacinfo.com]
Sent Tuesday, December 07, 2010 11:34 AM
To KENDALL Jerry
Subject RE: access issue for PA 10-5618

Jerry

Thanks for the information. I am working with my clients to examine several options available to us. One of those options would be to obtain additional width from Mr. Kirkpatrick. My previous request for hold runs until Dec 15th. I will let you know by then if we need additional time to address the issue. Thanks for your consideration of the request.

Thom Lanfear

From: KENDALL Jerry [mailto:Jerry.KENDALL@co.lane.or.us]
Sent: Tuesday, December 07, 2010 08:17
To: 'Thom Lanfear'
Subject: FW: access issue for PA 10-5618

Does this mean you might try the deviation route?

Jerry Kendall/Associate Planner/Lane County Oregon
PSB/LMD
125 E 8th Ave
Eugene, Or 97401
ph 541-682-4057
FAX 541-682-3947
Jerry.Kendall@co.lane.or.us

Jeremy A
December 07, 2010 7:55 AM
Access Issue for PA 10-5618

Dear Mr. Kendall

I tend to agree with Mr. Kirkpatrick's assessment. Upon further review of LC 15.055(4), I will have to reverse my previous determination and conclude that these parcels will have to be served by a 30-foot wide easement in order to meet the minimum private access road requirements.

Sincerely,

Jeremy A. Sherer, PLS
Engineering Associate
Lane County Planning Department

ry

12/07/2010

#63 p6

KENDALL Jerry

From: Thom Lanfear [tlanfear@pacinfo.com]
Sent: Monday, November 15, 2010 9:00 AM
To: KENDALL Jerry
Subject: RE: PA 10-5619 F-2 Template Dwelling

Hi Jerry

You are so right. Please place PA 10-5618 on hold. I will drop off a revised letter today. Thanks

Thom

From: KENDALL Jerry [mailto:Jerry.KENDALL@co.lane.or.us]
Sent: Monday, November 15, 2010 08:28
To: 'Thom Lanfear'
Subject: RE: PA 10-5619 F-2 Template Dwelling

Oops, the Laughlin Template is PA 10-5618. Can you confirm this is the one to be placed on hold?

(PA 10-5619 is the Childers accessory farm dwell.)

Jerry Kendall/Associate Planner/Lane County Oregon
PSB/LMD
125 E 8th Ave
Eugene, Or 97401
ph 541-682-4057
FAX 541-682-3947
Jerry.Kendall@co.lane.or.us

From: KENDALL Jerry
Sent: Monday, November 15, 2010 8:10 AM
To: 'Thom Lanfear'
Subject: RE: PA 10-5619 F-2 Template Dwelling

OK, thanks

Jerry Kendall/Associate Planner/Lane County Oregon
PSB/LMD
125 E 8th Ave
Eugene, Or 97401
ph 541-682-4057
FAX 541-682-3947
Jerry.Kendall@co.lane.or.us

11/15/2010

#63 p 7

From: Thom Lanfear [mailto:tlanfear@pacinfo.com]
Sent: Friday, November 12, 2010 8:19 AM
To: KENDALL Jerry
Subject: PA 10-5619 F-2 Template Dwelling

Hi Jerry

On behalf of the applicants Caleb & Jessica Laughlin, I request that the application for approval of an F-2 Template Dwelling (PA 10-5619) be placed on hold for 30 days to provide an opportunity to review the comments submitted by the neighboring property owner

The applicant grants a waiver to the statutory timelines of ORS 215.427 for this time period. Thank you for your consideration. A hard copy of this request is being placed into the mail today.

Thom Lanfear

11/15/2010

#63 p 8

LANFEAR
CONSULTING
LLC

HAND DELIVERED

November 15, 2010

Jerry Kendall, Associate Planner
Lane County Land Management Division
125 East 8th Avenue
Eugene, OR 97401

Re PA 10-5618 F-2 Template Dwelling

Dear Mr Kendall

On behalf of the applicants Caleb & Jessica Laughlin, I request that the application for approval of an F-2 Template Dwelling (PA 10-5618) be placed on hold for 30 days to provide an opportunity to review the comments submitted by the neighboring property owner

The applicant grants a waiver to the statutory timelines of ORS 215 427 for this time period Thank you for your consideration

Sincerely,



Thom Lanfear
Lanfear Consulting LLC

KENDALL Jerry

From Thom Lanfear [tlanfear@pacinfo.com]
Sent Friday, November 12, 2010 8:19 AM
To KENDALL Jerry
Subject PA 10-5619 F-2 Template Dwelling

Hi Jerry

On behalf of the applicants Caleb & Jessica Laughlin, I request that the application for approval of an F-2 Template Dwelling (PA 10-5619) be placed on hold for 30 days to provide an opportunity to review the comments submitted by the neighboring property owner.

The applicant grants a waiver to the statutory timelines of ORS 215.427 for this time period. Thank you for your consideration. A hard copy of this request is being placed into the mail today.

Thom Lanfear

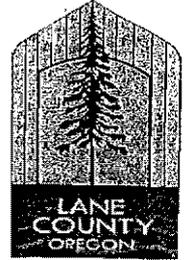
#63 p10

11/15/2010

#64 ST. 10-5821

March 31, 2011

Application Completeness Notice



**EGR & Associates
Clint Beecroft
2535 B Prairie Rd.
Eugene, Or. 97402**

LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

Subject: PA 10-5821 (62 lot subdivision for Benedick Holdings LLC)
Received on 11-18-10

The land use application(s) referenced above has/have been deemed complete and accepted for processing pursuant to Lane Code (LC) 14.050(3). Acceptance as a complete application does not involve determining if the application is approvable based on the applicable approval criteria. It is the responsibility of the applicant to demonstrate that the application meets the approval criteria. The information provided by the applicant may or may not be adequate for this purpose.

Staff are required by LC 14.050(3)(b)(iv) to mail this written notice to the applicant when an application is deemed complete. Staff will process your application(s) according to LC 14.050(4). A referral notice will be sent to the applicant, agent, agencies and surrounding property owners allowing a minimum 10 day comment period. Following the comment period, staff will process your application and evaluate whether the approval criteria are met. A land use decision with findings of fact and conditions of approval will then be mailed to the applicant, parties of record and surrounding property owners. Absent an appeal and upon expiration of the 12 day appeal period, your land use decision becomes final.

I have also taken PA 10-5824 (the variance application) off of "hold" status.

If you have any questions concerning this letter, please contact me at the number below, email, Jerry.Kendall@co.lane.or.us.

Sincerely,

Jerry Kendall/Associate Planner (541-682-4057)

#64

61 10-5821
65 10-5824

December 13, 2011

REC'D DEC 18 2011

Jerry Kendall/Associate Planner
PSB/LMD
125 E. 8th Ave.
Eugene, Or. 97401

Re: Subdivision and Variance applications PA 10-5821 and PA 10-5824

Dear Mr. Kendall:

In response to your email dated 12-1-11, I hereby waive the 120-day statutory processing timeline of ORS 215.427(1) and LC 14.050(5), as well as the attendant partial refund provision found in LC 14.050(5) for the above cited applications. In addition, I agree to not file a writ of mandamus with the Circuit Court against the County if the 120-day timeline is exceeded.

I also understand that the revised application submitted on 12-1-11 requires a renounce fee of \$512 to enable a new notice and referrals be sent, to minimize any procedural risk upon an appeal by any party in that regard.

Sharla A Whitten

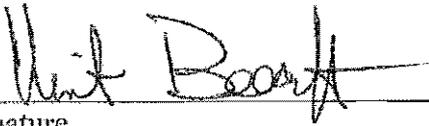
Signature of Owner/Applicant/Benedick Holdings LLC

#64-65 p1

FILE # PA _____
EXHIBIT # 63

TIMELINE WAIVER

I, Clint Beecroft, as authorized representative of the owner for PA 10-5821 and PA 10-5824, do hereby waive the statutory time line requirements of ORS 215.427 for the period of May 3, 2011 to August 1, 2011 in order to evaluate whether or not to submit additional information for these applications and, if so, then to prepare supplemental information during this period.



Signature

5-3-11

Date

WILKINSON Sarah W

10-5542

From: WILKINSON Sarah W
Sent: Thursday, February 03, 2011 2:52 PM
To: 'Ron Rice'
Subject: RE: PA 10-5542 - Timeline Waiver

Ron,

Per our earlier conversations, the preliminary application has been on hold since October 28, 2010, pending completion of the legal lot verification. If you wish to proceed with the processing of the preliminary partition absent the legal lot verification, please convey your request in writing (email will suffice) and I will resume processing the partition.

Best,

Sarah

Sarah W. Wilkinson
Planner
Lane County Land Use Management
125 E 8th Avenue
Eugene, Oregon 97401
(P) 541.682.4054
(F) 541.682.3947

From: Ron Rice [mailto:ronrice@geomax.us]
Sent: Thursday, February 03, 2011 2:10 PM
To: WILKINSON Sarah W
Subject: Re: PA 10-5542 - Timeline Waiver

Hi Sarah,

When will this partition be tentatively approved.

It has been a month now and we have not heard anything.

Are we stalled on something?

The Dugans (and us) would really like to finish this!!!!!!

Can you give me a status update please????

Geomax, Inc.
Ronald D. Rice, PE. PLS
Senior Principal

02/03/2011

Extension to Statutory Timeline Request Form

I, Ronald D. Rice, Geomax, Inc., as the owner or authorized representative of the
Name of Applicant (Please Print)

owner of the subject parcel known as Assessor's Map and Tax Lot(s) 21-03-05-00-00400 that is the
subject of this request, do hereby waive the statutory timeline requirements of ORS 215.427 in order to
submit additional information for application file number PA 10-5542.



Signature

January 5, 2011

Date Signed

This request will be granted provided it is fully completed, signed and dated.

Submit to:

Sarah Wilkinson
Lane Count Land Management Division
Public Service Building
125 E. 8th Avenue
Eugene, OR 97401

10-5542 p2

1/4/2011 8:32 AM, WILKINSON Sarah W wrote:

Ron,

I am writing in regard to your application for a Preliminary Partition for the Dugan's.

Per state law, the County is required to review your application within 150 days of submittal. On October 28, 2010, you provided a 45-day waiver. We are now nearing the end of the extended 195-day period. It is my understanding that the required legal lot verification is not complete. I recommend providing the County with an additional waiver to the 150-day time period. I have attached an example to this email. Please return the completed waiver as soon as possible, ideally by the end of day Wednesday, January 5, 2011. Absent an additional waiver, I have no choice but to complete processing your application without a completed legal lot verification.

If you have any questions, please give me a call or send me an email.

Best,

Sarah

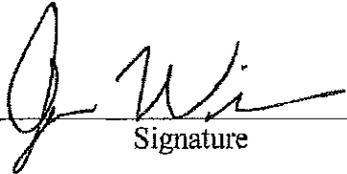
Sarah W. Wilkinson
Planner
Lane County Land Use Management
125 E 8th Avenue
Eugene, Oregon 97401
(P) 541.682.4054
(F) 541.682.3947

10-5542 ↑ 3

11-5315

Extension to Statutory Timeline Request Form

I, Jason Winslow (ES&A Sign and Awning Co.), as authorized representative of the owner of the subject parcel known as Assessor's Map and Tax Lot(s) 18-02-34-00-04002 that is the subject of this request, do hereby waive the statutory time line requirements of ORS 215.427 for 60 days* for application file number PA 11-5315.



Signature

09/16/11

Date Signed

This request will be granted provided it is fully completed, signed, and dated.

Return to: Sarah Wilkinson
Lane County Land Management Division
Public Service Building
125 E. 8th Avenue
Eugene, OR 97401

* Per ORS 215.427(5), the total period of time an application can be put on hold by an applicant may not exceed 215 days.

215.427 Final action on permit or zone change application; refund of application fees.

(1) Except as provided in subsections (3), (5) and (10) of this section, for land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, except as provided in subsections (3), (5) and (10) of this section.

(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of:

(a) All of the missing information;

(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

(c) Written notice from the applicant that none of the missing information will be provided.

(3)(a) If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.

(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

(a) All of the missing information;

(b) Some of the missing information and written notice that no other information will be provided; or

(c) Written notice that none of the missing information will be provided.

(5) The period set in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (10) of this section for mediation, may not exceed 215 days.

(6) The period set in subsection (1) of this section applies:

(a) Only to decisions wholly within the authority and control of the governing body of the county; and

(b) Unless the parties have agreed to mediation as described in subsection (10) of this section or ORS 197.319 (2)(b).

(7) Notwithstanding subsection (6) of this section, the period set in subsection (1) of this section does not apply to a decision of the county making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610.

(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

(9) A county may not compel an applicant to waive the period set in subsection (1) of this section or to waive the provisions of subsection (8) of this section or ORS 215.429 as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

(10) The periods set forth in subsection (1) of this section and the period set forth in subsection (5) of this section may be extended by up to 90 additional days, if the applicant and the county agree that a dispute concerning the application will be mediated. [1997 c.414 §2; 1999 c.393 §§3,3a; enacted in lieu of 215.428 in 1999; 2003 c.800 §30; 2007 c.232 §1; 2009 c.873 §15; 2011 c.280 §10]

Lane Code
CHAPTER 14 CONTENTS

APPLICATION REVIEW AND APPEAL PROCEDURES

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- 14.015 Definitions.
- 14.050 Application Requirements, Acceptance and Investigation.
- 14.070 Notice Contents.
- 14.100 Director Review Procedure.
- 14.110 Director Elective Hearing Procedure.
- 14.150 Limited Land Use Decision Procedure.
- 14.160 Special Notice and Review Requirements for a Dwelling or Mobile Home Subject to Director Approval in the Exclusive Farm Use Zone, LC 16.212(3)(c).
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APPLICATION REVIEW AND APPEAL PROCEDURES

14.010 Purpose.

This chapter is intended to establish procedures for the submittal, acceptance, investigation and review of applications and appeals, and to establish limitations upon approved or denied applications. *(Revised by Ordinance No. 16-83; Effective 9.14.83)*

14.015 Definitions.

For the purpose of this Code, certain abbreviations, terms, phrases, words and their derivatives shall be construed as specified in this chapter. Words used in the singular include the plural and the plural the singular. Words used in the masculine gender include the feminine, and the feminine the masculine.

Where terms are not defined, they shall have their ordinary accepted meanings within the context in which they are used. Webster's Third New International Dictionary of the English Language, Unabridged, copyright 1981, principal copyright 1961, shall be considered as providing accepted meanings.

Acceptance. Received by and considered by the Director as sufficiently complete to begin processing according to the application or appeal review procedures of this chapter.

Appearance. Submission of testimony or evidence in the proceeding, either oral or written. Appearance does not include a name or address on a petition.

Approval Authority. A person, or a group of persons, given authority by Lane Code to review and/or make decisions upon certain applications according to the review procedures of this chapter.

Argument. The assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. Argument does not include facts.

Board. The Lane County Board of Commissioners.

County Official. The Director of a Lane County Department or Division, or any Lane County advisory committee or commission acting in its official capacity.

Day. A calendar day, computed consistent with ORS 174.120.

Department. The Lane County Department of Public Works.

Director. The Director of the Land Management Division of the Lane County Public Works Department, or the Director's delegated representative within the Department. The Director shall approve or deny land use applications as authorized by this chapter.

Evidence. The facts, documents, data or other information offered to demonstrate compliance or non-compliance with the standards believed by the proponent to be relevant to the decision.

Hearings Official. A person who has been appointed by the Board to serve at their pleasure and at a salary fixed by them. The Hearings Official shall conduct hearings on applications as authorized by this Code.

Land Use Decision.

(1) A final decision or determination made by a Lane County Approval Authority that concerns the adoption, amendment or application of

- (a) The Goals;
- (b) A comprehensive plan provision;
- (c) A land use regulation; or
- (d) A new land use regulation.

(2) A land use decision does not include a decision made by a Lane County Approval Authority:

- (a) That is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
- (b) That approves or denies a building permit issued under clear and objective land use standards;
- (c) That is a limited land use decision;
- (d) That determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations;
- (e) That is an expedited land division as described in ORS 197.360;
- (f) That approves, pursuant to ORS 480.450(7), the siting, installation, maintenance or removal of a liquid petroleum gas container or receptacle regulated exclusively by the State Fire Marshall under ORS 480.410 to 480.460; or
- (g) That approves or denies approval of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan; or
- (h) That authorizes an outdoor mass gathering as defined in ORS 433.735, or other gathering of fewer than 3,000 persons that is not anticipated to continue for more than 120 hours in any three-month period; or
- i) A land use approval in response to a writ of mandamus.

Land Use Regulation. Any zoning ordinance, land division ordinance adopted under ORS 92.044 to 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.

Legal Interest. An interest in property not confined solely to ownership or possessory interest, but including all interests in property which, in the discretion of the Director, are not inconsistent with the intent and purposes of this chapter. Such interests may include, but are not limited to, the following: owner, contract purchaser, lessee, renter, easement, resolution or ordinance of necessity to acquire or condemn adopted by a public or private condemnor.

Limited Land Use Decision.

(1) Means a final decision or determination made by a Lane County Approval Authority, as defined in LC 14.015, pertaining to a site within an urban growth boundary and which concerns:

- (a) The approval or denial of a subdivision or partition plan, as described in ORS 92.040 (1).
- (b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review pursuant to the Site Review Procedures of LC 10.335.

(2) Does not mean a final decision made by a Lane County Approval Authority, as defined in LC 14.015, pertaining to a site within an urban growth boundary that concerns approval or denial of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan.

New Land Use Regulation. A land use regulation other than an amendment to an acknowledged land use regulation adopted by Lane County.

Party. With respect to actions pursuant to LC 14.100 and 14.200 below, the following persons or entities are defined as parties:

- (1) The applicant and all owners or contract purchasers of record, as shown in the files of the Lane County Department of Assessment and Taxation, of the property which is the subject of the application.
- (2) Any person who makes an appearance before the Approval Authority.

Permit.

(1) A discretionary approval of a proposed development of land under ORS 215.010 to 215.293, 215.317 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto.

(2) "Permit" does not include:

(a) A limited land use decision;

(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary;

(c) A decision which determines final engineering, design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations;

or

(d) An action under ORS 197.360(1).

Person. Any individual, his or her heirs, executors, administrators or assigns, or a firm, partnership or corporation, its heirs or successors or assigns, or the agent of any of the aforesaid, any political subdivision, agency, board or bureau of the State or public or private organization of any kind.

Planning Commission. The Planning Commission of Lane County, Oregon.

Planning Director. See Director.

Received. Acquired by or taken into possession by the Director. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96; 12-97, 11.20.97; 3-09, 12.4.09; 6-10, 9.18.10)*

14.050 Application Requirements, Acceptance and Investigation.

(1) Contents. Applications subject to any of the review procedures of this chapter shall:

- (a) Be submitted by any person with a legal interest in the property.
- (b) Be completed on the form prescribed by the Department and submitted to the Department.
- (c) Address the appropriate criteria for review and approval of the application and shall contain the necessary supporting information.
- (d) Be accompanied by the filing fee to help defray the costs of the application.

(2) Combinable Applications. Applications for the same property may be combined and concurrently reviewed as a master application, subject to the following permissible combination schemes and required review procedures:

(a) Applications subject to the review procedures of LC 14.100 below may be combined with other applications subject to the review procedures of LC 14.100 below, and the required review shall be by the Director according to LC 14.100 below.

(b) Applications subject to Hearings Official approval, according to the review procedures of LC 14.300 below, may be combined with other applications subject to Hearings Official approval according to LC 14.300 below and the required review procedure shall be by the Hearings Official according to LC 14.300 below.

(c) Applications subject to the review procedures of LC 14.100 below may be combined with applications subject to Hearings Official approval according LC 14.300 below, and the required review procedure shall be by the Hearings Official according to LC 14.300 below.

(d) A zone change application may be combined with an application for an amendment to the Comprehensive Plan, and the combined application shall be

concurrently reviewed by the Planning Commissions and Board according to the review procedures of LC Chapters 12 and 14 for a plan amendment.

(3) Acceptance. Applications subject to any of the review criteria of this chapter:

(a) May be received by the Director at any time and shall not be considered as accepted solely because of having been received;

(b) Shall be, within 30 days of receipt, reviewed by the Director to determine if they meet the requirements of LC 14.050(1) and (2) above and are complete. Applications shall be determined to be complete and shall be accepted by the Director when they include the required information, forms and fees.

(i) If the application for a permit, limited land use decision or zone change is incomplete, the Director shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information.

(ii) The application shall be deemed complete upon receipt by the Director of :

(aa) All of the missing information;

(bb) Some of the missing information and written notice from the applicant that no other information will be provided; or

(cc) Written notice from the applicant that none of the missing information will be provided.

(iii) If the application was complete when first submitted or the applicant submits additional information, as described in LC 14.050(3)(b)(ii) above, within 180 days of the date the application was first submitted, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

(iv) The Director shall mail written notice to the applicant when the application is deemed complete or accepted.

(c) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under LC 14.050(3)(b)(i) and has not submitted:

(i) All of the missing information;

(ii) Some of the missing information and written notice that no other information will be provided; or

(iii) Written notice that none of the missing information will be provided.

(d) Within 10 days of acceptance of an application, the Director shall mail information explaining the proposed development to the persons identified in LC 14.100(4) and, if applicable, notice required by LC 14.160. Persons receiving notice pursuant to LC 14.160 shall have 15 days following the date of postmark of the notice to file written objections as required by LC 14.160(1)(c). All other persons shall have 10 days from the date information is mailed to provide the Director with any comments or concerns regarding the proposed development. After the end of the applicable comment period, the Director shall complete the investigation report and mail notice of a decision or elect to schedule the application for a Hearings Official evidentiary hearing.

(4) Investigation and Reports. The Director shall make, or cause to be made, an investigation to provide necessary information to ensure that the action on each application subject to any review procedure of this chapter is consistent with the criteria established by this chapter and other chapters of Lane Code requiring the review. The report of such investigation shall be included within the application file and, in the event of a hearing, presented to the Approval Authority before or during the hearing.

(5) Timelines for Final Action. For development sites located within an urban growth boundary, except as provided in LC 14.050(5)(a) through (d) below, the Approval Authority shall take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete. For development sites located outside an urban growth boundary, except as provided in LC 14.050(5)(a) through (d) below, the Approval Authority shall take final action on an application for a permit, limited land use decision or zone change within 150 days after the application is deemed complete. Except when an applicant requests an extension under LC 14.050(5)(a) below, if Lane County does not take final action on such an application within the required 120 or 150 days after the application is deemed completed, Lane County shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional Lane County land use fees or deposits for the same application incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application. Exceptions to the requirement to take final action on an application within 120 or 150 days are:

(a) When an applicant waives or requests an extension of the required 120-day or 150-day period for final action. The period set in LC 14.050(5) above may be extended for a specified period of time at the written request of the applicant. The total of all extensions may not exceed 215 days.

(b) When an application is for an amendment to an acknowledged comprehensive plan or land use regulation or adoption of a new land use regulation that was forwarded to the Director of the Department of Land Conservation and Development under ORS 197.610(1).

(c) When a decision is not wholly within the authority and control of Lane County.

(d) When parties have agreed to mediation as described in ORS 197.318(2)(b). *(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-84, 9.8.84; 10-89, 10.4.89; 4-96; 11.29.96; 3-98, 7.8.98; 3-09, 12.4.09; 6-10, 09.18.10)*

14.070 Notice Contents.

(1) Notice of a decision by the Director pursuant to LC 14.100 below shall contain:

(a) Identification of the application by Department file number.

(b) Identification of the contiguous property ownership involved by reference to the property address, if there is one, and to the Lane County Assessment map and tax lot numbers.

(c) Identification of the property owner and applicant.

(d) An explanation of the nature of the application and the proposed use or uses that could be authorized by the decision.

(e) A list of the criteria from Lane Code and the comprehensive plan that apply to the application and decision.

(f) The name of the Department representative to contact and the telephone number where additional information may be obtained.

(g) A statement that the application, all documents and evidence relied upon by the applicant, and the applicable criteria are available for inspection at the Department at no cost and copies will be provided at reasonable cost.

(h) A statement that a copy of the staff report is available for inspection at no cost and copies will be provided at reasonable cost.

(i) Identification of whether the decision is to approve or deny the application, a disclosure of any conditions of approval and the time and date on which the decision shall become final unless appealed.

(j) The deadline for and manner in which an appeal of the decision may be made.

(k) A statement that failure of an issue to be raised in a hearing, in person or by writing, or failure to provide statements or evidence sufficient to afford the Approval Authority an opportunity to respond to the issue precludes raising the issue in an appeal to the Land Use Board of Appeals.

(l) The following statement, "NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE FORWARDED TO THE PURCHASER."

(2) Notice of a hearing pursuant to the procedure of LC 14.300 below shall contain:

(a) The information required by LC 14.070(1)(a) through (g) and (l) above.

(b) The time, date and location of the public hearing.

(c) Identification of which Approval Authority will conduct the hearing.

(d) Disclosure of the requirements of this chapter for the submittal of written materials prior to the hearing and a general statement of the requirements of this chapter for submission of testimony and the procedure for conduct of hearings.

(e) If the hearing is an appeal, identification of the appellant's name, if different than the property owner's name or applicant's name.

(f) A statement that failure of an issue to be raised in a hearing, in person or by writing, or failure to provide statements or evidence sufficient to afford the Approval Authority an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals on that issue.

(g) A statement that at least seven days prior to the hearing a copy of the staff report for the hearing will be available for a free inspection at the Department and copies will be provided at a reasonable cost.

(3) Notice of a hearing pursuant to the procedures of LC 14.400 below shall contain:

(a) The information required by LC 14.070(2) above.

(b) A statement regarding the purpose of the hearing and whether or not testimony will be limited to the record.

(c) The names of parties who may participate in the Board hearing.

(d) Where to receive more information.

(4) The records of the Lane County Department of Assessment and Taxation shall be used for notice as required by this chapter to nearby property owners. Persons whose names and addresses are not on file at the time of the filing of the application need not be notified of the action. The failure of a property owner to receive notice shall not invalidate the action if the Director can demonstrate by affidavit of compliance that such notice was given. The Director shall cause to be filed certification of compliance with the notice provisions of this section.

(5) Notice of a hearing to be posted on the property shall meet the following requirements:

(a) The design and size of the signs shall be determined by the Director, but shall be at least 22 inches x 28 inches in size and have a brightly colored background.

(b) The sign shall identify the time, date and place of the public hearing.

(c) The sign shall identify the Department file number.

(d) The sign shall identify the general nature of the proposal.

(e) The sign shall identify where more information may be received.

(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96)

14.100 Director Review Procedure.

All applications subject to this subsection shall be reviewed as follows:

(1) Decision Deadline. Unless the Director elects to schedule the application for a hearing with the Hearings Official pursuant to LC 14.110 below, an application which has been accepted by the Director shall be acted upon within 21 days of the date the application was accepted. An application which has not been so acted upon may be appealed by the Applicant to the Hearings Official in the same manner as provided for in this chapter for appeals of Director decisions, except that there will be no fee charged for the appeal. The application processing timeline may be extended for a reasonable period of time at the request of the applicant.

(2) Director Review. The Director shall review the application and prepare a written investigation report. The Director may elect to schedule the application for a hearing with the Hearings Official pursuant to LC 14.110 below.

(3) Director Decision. The Director shall determine if the evidence supports a finding that the required criteria have been met and shall approve, approve with conditions or deny the application. The Director's approval or denial shall be in writing, shall be based on factual information, and shall include express written findings on each of the applicable and substantive criteria.

(4) Notice. Within two days of the decision, the Director shall mail notice meeting the requirements of LC 14.070(1) above to the applicant, to all parties, to all neighborhood or community organizations recognized by the Board and whose boundaries include the site and to the owners of record of property on the most recent property tax assessment roll where such property is located:

(a) Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;

(b) Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is outside an urban growth boundary and not within a farm or forest zone;

(c) Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is within a farm or forest zone. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96; 3-98, 7.8.98; 3-09, 12.4.09)*

14.110 Director Elective Hearing Procedure.

(1) Purpose. This section establishes the procedure and criteria which the Director shall follow in electing to have an evidentiary hearing for the application with the Hearings Official for a land use application otherwise subject to review pursuant to LC 14.100 above without a hearing. The purpose of the evidentiary hearing by the Hearings Official is to provide interested persons with a hearing and an opportunity to contribute statements or evidence to the land use decision.

(2) Procedure.

(a) Where an application is subject to review by the Director without a hearing under LC 14.100 above, the Director may instead elect to have an evidentiary hearing for the application with the Hearings Official, to review the application pursuant to LC 14.300 below.

(b) The evidentiary hearing by the Hearings Official shall be scheduled for a date no later than 35 days from the date of application acceptance.

(c) At least 20 days in advance of the evidentiary hearing and before the end of the 21-day action period provided in LC 14.100(1) above, the Director shall provide the applicant with a copy of his or her written report that addresses compliance with LC 14.110(3) or (4) below and that identifies the hearing date.

(3) Hearing Criteria. An election by the Director to have an evidentiary hearing for the application with the Hearings Official must comply with one or more of the following criteria:

(a) An application raises an issue which is of countywide significance.

(b) An application raises an issue which will reoccur with frequency and is in need of policy guidance.

(c) An application involves a unique environmental resource based upon evidence provided by a state or federal agency, or by a private professional with expertise in the field of the resource of concern.

(d) An application involves an existing use with a compliance action pending against it and with neighborhood opposition against it.

(e) An application involves persons with opposing legal arguments regarding unresolved interpretations of applicable state laws or regulations.

(f) An application involves a contemplated use which would be a different kind of use than the uses of nearby properties and the owners of three or more nearby properties object to the use or request a hearing.

(g) An application involves a contemplated use which would result in any of the following offsite impacts based upon information provided to the Director: the introduction of new commercial or industrial traffic, or ongoing truck traffic, on local roads in a residential neighborhood; or the introduction of noise, odors or dust into a residential neighborhood.

(h) An applicant requests a hearing. *(Revised by Ordinance No. 4-96; Effective 11.29.96; 3-98, 7.8.98; 3-09, 12.4.09)*

14.150 Limited Land Use Decision Procedure.

Notwithstanding LC 14.100 above, all applications for Limited Land Use Decisions shall be reviewed as follows:

(1) Decision Deadline. An application which has been accepted by the Director shall be acted upon within 21 days of the date the application was accepted. An application which has not been so acted upon may be appealed by the applicant to the Hearings Official in the same manner as provided for in this chapter for appeals of Director decisions, except that there will be no fee charged for the appeal.

(2) Director Review. The Director shall review the application and related materials.

(3) Director Decision. The Director shall determine if the evidence supports a finding that the required criteria have been met and shall approve, approve with conditions or deny the application. The Director's approval or denial shall be in writing and shall include express written findings on each of the applicable and substantive criteria. A staff report shall not be required prior to the decision.

(4) Notice. Written notice shall be provided to owners of property within 100 feet of the entire contiguous site for which the application is made and to all neighborhood or community organizations recognized by the Board and whose boundaries include the site. The property owner's list shall be compiled from the most recent property tax assessment roll. At the time that notice is provided, the Director shall place in the record an affidavit or other certification that such notice was given. The notice and related procedures shall:

- (a) Provide a 14-day period for submission of written comments prior to the decision.
- (b) State that issues which may provide the basis for an appeal to the Oregon State Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. The notice shall state that issues must be raised with sufficient specificity to enable the Director to respond to each issue.
- (c) List, by commonly used citation, the applicable criteria for the decision.
- (d) Set forth the street address or other easily understood geographical reference to the subject property.
- (e) State the place, date and time that comments are due.
- (f) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost.
- (g) Include the name and phone number of a Lane County contact person.
- (h) Provide notice of the decision to the applicant and any person who submits comments under LC 14.150(4)(a) above. The notice of decision must include an explanation of appeal rights.
- (i) Briefly summarize the decision-making process for the limited land use decision being made. *(Revised by Ordinance No. 4-96, Effective 11.29.96)*

14.160 Special Notice and Review Requirements for a Dwelling or Mobile Home Subject to Director Approval in the Exclusive Farm Use Zone, LC 16.212(3)(c).

- (1) When reviewing an application for a dwelling or mobile home conditionally permitted by LC 16.212(3)(c), the Director shall:
 - (a) In addition to the requirements of LC 14.050(3)(c), specify in the notice that "persons have 15 days following the date of postmark of the notice to file a written objection on the grounds only that the dwelling or mobile home, or activities associated with either residence, would force a significant change in or significantly increase the costs of accepted farming practices on nearby lands devoted to farm use."
 - (b) In addition to the persons identified in LC 14.100(4) above, notice shall be mailed to persons who have requested notice of such applications and who have paid a reasonable fee imposed by the County to cover the cost of such notice.
 - (c) If an objection received within 15 days of the notice specifies that the residence or activities associated with it would force a significant change in or a significant increase in the costs of accepted farming practices in nearby lands devoted to farm uses, the application shall then be set for hearing pursuant to LC 14.300. *(Revised by Ordinance No. 4-96, Effective 11.29.96)*

14.170 Special Notice Requirements When Sole Access to Land Includes a Railroad-Highway Crossing

- (1) If a railroad-highway crossing provides or will provide the only access to land that is the subject of an application for a land use decision, a limited land use decision or an expedited land division, the applicant must indicate that fact in the application submitted to the Planning Director.
- (2) The Planning Director shall provide notice to the Department of Transportation and the railroad company whenever the Approval Authority receives the information described in LC 14.170(1) above. For the purposes of LC 14.170, "railroad company" has the meaning given that term in ORS 824.200 and includes every corporation, company, association, joint stock association, partnership or person, and

their lessees, trustees or receivers, appointed by any court whatsoever, owning, operating, controlling or managing any railroad. *(Revised by Ordinance No. 6-10, Effective 09.18.10)*

14.200 General Hearing Rules.

Review of applications or appeals subject to any of the public hearing procedures of this chapter shall also be subject to the following, general hearing rules:

(1) Procedures Directory. The procedures and the limits set forth in this chapter to be followed by the Approval Authority are directory and not mandatory, and failure to follow or complete the action in the manner provided shall not invalidate the decision.

(2) Burden of Proof. The burden of proof in a hearing shall be as allocated by law. In general, the burden shall be upon the proponent of the application, except that for an appeal on the record, the burden of proof shall be upon the appellant.

(3) Standards of Evidence.

(a) The Approval Authority may receive all evidence offered at a hearing, unless excluded by motion of the Approval Authority with a finding that such evidence is inconsistent with any of the provisions of this chapter.

(b) Evidence received at any hearing shall be of the quality that reasonable persons rely upon in the conduct of their everyday affairs.

(c) Evidence received at any hearing shall be made a part of the record for the application.

(d) No factual information or evidence not part of the record shall be considered in the determination or decision for the application.

(e) Documentary evidence may be received in the form of copies or excerpts.

(f) The Department's file for the application shall be considered part of the record before the Approval Authority.

(g) All Federal, State and local laws and regulations shall be considered part of the record before the Approval Authority.

(h) The Approval Authority may take notice of judicially cognizable facts, and he or she, or any member of the Approval Authority, may utilize his or her experience, technical competence and special knowledge in evaluation of the evidence presented at the hearing.

(i) Erroneous admission of evidence by the Hearings Official shall not preclude action by the Hearings Official or cause reversal upon appeal to the Board, unless shown to have substantially prejudiced the rights of a party.

(j) All documents or evidence relied upon by the Applicant shall be submitted to the Approval Authority.

(k) Upon request, the application file and all of its contents shall be made available to the public by the Department for inspection at no cost and copies will be provided at reasonable cost.

(4) Personal Conduct.

(a) No person shall be disorderly, abusive, or disruptive of the orderly conduct of the hearing.

(b) No person shall testify without first receiving recognition from the Approval Authority and stating his or her full name and address.

(c) No person shall present irrelevant, immaterial or unduly repetitious testimony or evidence. The rules of evidence of this chapter shall apply.

(d) Audience demonstrations such as applause, cheering and display of signs, or other conduct disruptive of the hearing shall not be permitted. Any such conduct may be cause for immediate suspension of the hearing.

(5) Ex Parte Contacts. The Approval Authority shall reasonably attempt to avoid:

(a) Communication, directly or indirectly, with any person or their representatives in connection with any issue involved, except upon notice and opportunity for all interested persons to participate. This disclosure rule applies to contacts with staff members as well as members of the public and is to be interpreted to provide full disclosure of prehearing considerations and posthearing predetermination discussion when arriving at a decision. A communication between County staff and the Planning Commission or Board shall not be considered an ex parte contact.

(b) Taking notice of any communications, reports, staff memoranda or other materials prepared in connection with the particular case, unless the interested persons are afforded an opportunity to contest the material so noted.

(c) Inspecting the site with any interested person, or his or her representatives, unless all interested persons are given an opportunity to be present. The circumstances of the inspection must be put into the record.

(6) Conflicts of Interest. No member of the Approval Authority shall participate in a hearing or a decision upon an application when he or she:

(a) Is a party to or has a direct personal or pecuniary interest in the proposal.

(b) Is in the business with the proponent, or

(c) For any other reason, has determined that he or she cannot participate in the hearing and decision in an impartial manner.

(7) Challenges for Bias. Any proponent or opponent may challenge the qualification of any member of the Approval Authority based upon the allegations that such a member has conflicts of interest or has had ex parte contacts which bias his or her judgment. The challenge must be in the form of a sworn affidavit and in writing and state the facts relied upon to support the allegation and shall be incorporated into the record of the hearing.

(8) Qualification of a Member of the Approval Authority Absent At a Prior Hearing. If a member of the Approval Authority has been absent from a prior public hearing on the same matter which is under consideration, that member shall be qualified to vote on the matter if he or she has reviewed the record of the matter in its entirety and announces, prior to participation that this has been done. If the member does not review the record in its entirety, that member shall not be qualified to vote and must abstain.

(9) Hearing Conduct Authority. In the conduct of a public hearing, the Approval Authority shall have the authority to:

(a) Regulate the course, sequence and decorum of the hearing.

(b) Dispose of procedural requirements or similar matters.

(c) Rule on offers of proof and relevancy of evidence and testimony. Irrelevant, unduly repetitious or immaterial or cumulative evidence may be excluded.

(d) Impose reasonable limitations on the number of witnesses heard and set reasonable time limits for oral presentation, cross-examination of witnesses and rebuttal testimony.

(e) Take such other action appropriate for conduct commensurate with the nature of the hearing.

(f) Grant, deny or, in appropriate cases, attach such conditions to the matter being heard or that may be necessary to comply with the applicable approval criteria or, in appropriate cases, formulate a recommendation for the Board.

(g) Continue the hearing to a date certain and for a period of time not to exceed 31 days from the date of the hearing being continued. No further notice need be given for continuance of a hearing to a date certain. In the event that the continuance is

requested by the applicant, the applicant shall first agree to a waiver of any statutory timelines in which Lane County must expedite processing of the application, and such waiver shall be in addition to any other waivers of the statutory application processing timelines requested by the applicant.

(h) Allow the applicant to withdraw the application. Subsequent to the application withdrawal, any new application for the same property must be submitted and reprocessed in compliance with the provisions of this chapter.

(10) Record of Proceeding.

(a) A verbatim record of the hearing shall be made by mechanical means. In all cases, the tape, transcript of testimony or other evidence of the hearing shall be part of the record.

(b) All exhibits received shall be marked so as to provide identification upon review.

(c) All actions taken by the Approval Authority pursuant to adopting findings and conclusions shall be made a part of the record. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96)*

14.300 De Novo Hearing Procedure.

All applications or appeals, unless otherwise specified, subject to this section shall be reviewed as follows:

(1) Hearing Deadlines.

(a) An appeal of a decision made without a hearing and pursuant to LC 14.100 above, and which has been accepted by the Director pursuant to LC 14.520 below, shall be scheduled for the next regularly scheduled hearing before the Hearings Official for appeals no sooner than 21 days from the date of acceptance of the appeal and no later than 35 days from the date that the appeal was accepted.

(b) An application for review by the Hearings Official, and which has been accepted by the Director, shall be scheduled for the next regularly scheduled hearing for such review no sooner than 20 days from the date of application acceptance and no later than 35 days from the date of application acceptance.

(c) An application for review by the Planning Commission and a subsequent action by the Board, if accepted by the Director, shall be scheduled as follows:

(i) The Planning Commission hearing shall be no sooner than 45 days from the date of application acceptance and no later than 60 days from the date of application acceptance.

(ii) The Board hearing shall be no sooner than 60 days from the date of application acceptance and no later than 75 days from the date of application acceptance.

(2) Publication of Notice. For a zone change application and/or plan amendment application, the Department shall cause to be published in a newspaper of general circulation, at least 21 days in advance of the hearing, a notice of the hearing which contains the information required by LC 14.070(2) above.

(3) Mailing of Notice. At least 20 days in advance of the hearing, the Director shall mail notice of the hearing which meets the requirements of LC 14.070(2) above to the persons identified in 14.300(3)(a) through (f) below.

(a) The applicant;

(b) The property owner, if different than the applicant;

(c) The appellant, if there is one, and if the appellant is different than the applicant or property owner; and

(d) The owners of record of all property on the most recent property tax assessment roll where such property is located:

(i) Within 100 feet of the exterior boundaries of the contiguous property ownership which is the subject of the notice if the subject property is wholly or in part within an urban growth boundary;

(ii) Within 250 feet of the exterior boundaries of the contiguous property ownership which is the subject of the application, is outside an urban growth boundary and not within a farm or forest zone; or

(iii) Within 750 feet of the exterior boundaries of the contiguous property ownership which is the subject of the application if the subject property is within a farm or forest zone.

(e) All neighborhood or community organizations recognized by the Board and whose boundaries include the site.

(f) Any person who has made an appearance.

(4) Posting Notice. At least 14 days in advance of the hearing, for initial application reviews and not appeals of Director decisions, the Director shall cause notice to be conspicuously posted on one or more locations on the subject property, and such notice shall comply with LC 14.070(5) above.

(5) Challenges for Bias. Challenges for bias must meet the standards of LC 14.200(7) above and must be delivered to and received by the Director at least five days in advance of the hearing. The Director shall then, prior to the hearing, forward a copy of the challenge to the Approval Authority or member of the Approval Authority who is being challenged.

(6) Request for Interpretation of County Policy. When, prior to or in the course of a hearing, the Hearings Official finds that the case raises substantial question involving either the application or interpretation of a policy that has not been clarified in sufficient detail, the Hearings Official may submit that question of application or interpretation in written form to the Board for its determination. In the event the application or interpretation of policy is requested by the applicant, the applicant shall first agree to a waiver of any statutory timelines in which Lane County must expedite processing of the application, and such waiver shall be in addition to any other waiver of the statutory application processing timelines requested by the applicant.

The Board, at its discretion, may elect to accept or reject the Hearings Official's request. When such a question is accepted by the Board, those persons receiving notice of the Hearings Official hearing, the applicant and parties of record shall be notified that they may submit in writing their view as to what the policy application or interpretation should be. Such written views must be submitted to the Board and Department at least five days in advance of the Board's review of the request. Such persons shall restrict their statements to the issue of interpretation or application as stated by the Hearings Official and shall not present the Board with arguments or evidence immaterial to the determination sought, even though such evidence or argument may be relevant to the Hearings Official's final decision.

The Board shall render its written determination within 14 days after receipt of the question from the Hearings Official. Said decision shall be transmitted to the Hearings Official, who will then apply the interpretation to the application.

(7) Order of Procedure. In the conduct of a public hearing, and unless otherwise specified by the Approval Authority, the Approval Authority shall:

(a) Announce the nature and purpose of the hearing and summarize the rules for conducting the hearing, including a statement made to those in attendance that:

(i) Lists the applicable substantive criteria;

(ii) States that evidence and testimony must be directed toward the criteria described in LC 14.300(7)(a)(i) above or other criteria in the comprehensive plan or land use regulations which the person believes apply to the decision; and

(iii) States that failure to raise an issue accompanied by statements or evidence sufficient to afford the Approval Authority and the parties an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals based upon that issue.

(b) Announce to all persons present whether or not the hearing about to commence is their only opportunity to enter information into the record and whether or not only those persons who qualify as a party may appeal the Approval Authority's decision.

(c) Disclose any ex parte contacts. A communication between County staff and the Planning Commission or Board shall not be considered an ex parte contact.

(d) Call for abstentions based upon any conflicts of interest or biases due to ex parte contacts, and any member of the Approval Authority may respond to any challenges for bias meeting the standards of this chapter. No decision or action of the Planning Commission or Board shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the Planning Commission or Board, if the Planning Commission or Board member receiving the contact:

(i) Places on the record the substance of any written or oral ex parte communications concerning the decisions or action; and

(ii) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication is related.

(e) Request the Director to present his or her introductory report, explain any graphic or pictorial displays which are a part of the report, read findings and recommendations, if any, and provide such other information as may be requested by the Approval Authority.

(f) Allow the applicant to be heard first, on his or her own behalf, or by representative.

(g) Allow persons in favor of the applicant's proposal to be heard next.

(h) Allow other persons to be heard next in the same manner as in the case of the applicant.

(i) Upon failure of any person to appear, the Approval Authority may take into consideration written material submitted by such person.

(j) Allow the Director to present any further comments or information in response to testimony and evidence offered by any interested persons.

(k) Allow the applicant to rebut, on his or her own behalf or by representative, any of the testimony or evidence previously submitted.

(l) Conclude the hearing.

(m) Questions may be asked at any time by the Approval Authority. Questions by interested persons, or the Director, may be allowed by the Approval Authority upon request. Upon recognition by the Approval Authority, questions may be submitted directly to the persons being questioned. The persons questioned shall be given a reasonable amount of time to respond solely to the questions.

(n) An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the Approval Authority. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the Approval Authority and the parties an adequate opportunity to respond to each issue.

(o) If the hearing is an initial evidentiary hearing, any participant may request an opportunity to present additional evidence or testimony regarding the application. The Approval Authority shall grant such request by continuing the public hearing pursuant to LC 14.300(7)(o)(i) below or leaving the record open for additional written evidence or testimony pursuant to LC 14.300(7)(o)(ii) below.

(i) If the Approval Authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence and testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence or testimony for the purpose of responding to the new written evidence.

(ii) If the Approval Authority leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven days. Within 5 days from the close of the record, any participant may file a written request with the Approval Authority for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is timely filed, the Approval Authority shall reopen the record pursuant to LC 14.700(7)(o)(v) below.

(iii) A continuance or extension granted pursuant to LC 14.300(7)(o) shall be subject to the limitations of ORS 215.428 unless the continuance or extension is requested or agreed to by the applicant.

(iv) Unless waived by the applicant, the Approval Authority shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence.

(v) When the Approval Authority reopens the record to admit new evidence or testimony, including a response to new evidence allowed pursuant to LC 14.300(7)(o)(ii) above, any person may raise new issues which relate to the new evidence, testimony or criteria for decision-making which apply to the matter at issue.

(p) At the conclusion of the hearing, the Approval Authority shall either make a tentative decision and state findings which may incorporate findings proposed by any person or the Director, or take the matter under advisement for a decision to be made at a later date. If additional documents or evidence are provided by any party, the Approval Authority may allow a continuance or leave the record open to allow a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.428. The Approval Authority may request proposed findings and conclusions from any person at the hearing. The Approval Authority, before finally adopting findings and conclusions, may circulate the same in proposed form to parties for written comment. The written decision and findings shall be based on factual information, shall identify who has party status and shall be completed in writing and signed by the Approval Authority within 10 days of the closing of the record for the last hearing. A longer period of time may be taken to complete the findings and decision if the applicant submits a written request to the Approval Authority consenting and agreeing to a waiver of the 120-day or 150-day statutory time period for final action on the application equal to the amount of additional time it takes to prepare the findings.

(8) Decision and Findings Mailing. Within two days of the date that the written decision adopting findings is signed by the Approval Authority, the Director shall mail to the applicant, and all parties of record, a copy of the decision and findings; or if the decision and findings exceed five pages, the Director shall mail notice of the decision.

(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96; 3-98, 7.8.98; 3-09, 12.4.09)

14.400 On The Record Hearings Procedure.

All appeals subject to this section shall be reviewed as follows:

(1) Review on the Record. The review of the decision by the Approval Authority shall be confined to the record of the proceeding before the previous Approval Authority except as provided in LC 14.400(2) and 14.400(3) below.

(2) Limited Additional Testimony. The Approval Authority may admit additional testimony and other evidence without holding a de novo hearing, if it is satisfied that the testimony or other evidence could not have been presented at the initial hearing. In deciding such admission, the Approval Authority shall consider:

- (a) Prejudice to parties.
- (b) Convenience or availability of evidence at the time of the initial hearing.
- (c) Surprise to opposing parties.
- (d) When notice was given to other parties of the intended attempt to admit the new evidence.
- (e) The competency, relevancy and materiality of the proposed testimony or other evidence.
- (f) Whether the matter should be remanded for a de novo hearing under LC 14.400(3) below.

(3) De Novo Hearing/Remand. The Approval Authority may elect to hold a de novo hearing or remand the appeal for a supplemental de novo hearing before the previous Approval Authority if it decides that the volume of new information offered by a party proceeding under LC 14.400(2) above would:

- (a) Interfere with the Approval Authority's agenda; or
- (b) Prejudice parties; or
- (c) If the Approval Authority determines that the wrong legal criteria were applied by the previous Approval Authority. On remand, the previous Approval Authority shall apply the procedures of LC 14.300 above. If an appeal is desired from the previous Approval Authority's decision on remand, the appropriate procedures of LC 14.500 below, for an appeal of a decision shall be followed.

(d) In the event that the remand is requested by the applicant, the applicant shall first agree to a waiver of any statutory timelines in which Lane County must expedite processing of the application, and such waiver shall be in addition to any other waivers of the statutory application processing timelines requested by the applicant.

(4) Hearing Deadlines. An appeal of a Hearings Official decision which has been reviewed by the Board pursuant to LC 14.600 below and for which an on the record hearing has been approved, shall be heard by the Board within 14 days of the date of the decision by the Board to conduct the on the record hearing.

(5) Publication of Notice. For a zone change application, the Department shall cause to be published, at least 10 days in advance of the hearing and in a newspaper of general circulation, a notice of the hearing which contains the information required by LC 14.070(3) above.

(6) Mailing of Notice. At least 10 days in advance of the hearing, the Director shall mail notice of the hearing which meets the requirements of LC 14.070(3) above to:

- (a) The applicant;
- (b) The property owner, if different than the applicant;
- (c) The appellant, if the appellant is different than the applicant or property owner; and

(d) All persons who qualified as parties at the hearing before the Hearings Official.

(7) Written Material. Unless otherwise specified by the Approval Authority, all written materials exceeding two pages in length and for submission into the record of the hearing or for consideration at the hearing must be submitted to and received by the Department at least five days in advance of the hearing. Upon request, the application file containing these materials shall be made available to the public by the Department. The Approval Authority may allow written materials to be submitted and received after this five-day deadline if:

(a) The written materials are solely responsive to the written materials submitted at least five days in advance of the elective review for on- the-record appeal hearing and,

(b) The responsive, written materials could not have been reasonably prepared and submitted at least five days in advance of the Board's elective review hearing and,

(c) Copies of the written materials have been provided to all parties to the on-the-record appeal.

(8) Challenges of Bias. Challenges for bias must meet the standards of LC 14.200(7) above and must be delivered to and received by the Director at least five days in advance of the hearing. The Director shall then, prior to the hearing, forward a copy of the challenge to the Approval Authority or member of the Approval Authority who is being challenged.

(9) Order of Procedure. In the conduct of a hearing on the record, and unless otherwise specified by the Approval Authority, the Approval Authority shall:

(a) Announce the nature and purpose of the hearing and summarize the rules for conducting the hearing.

(b) Announce to all persons present that the hearing is on the record from the hearing of the previous Approval Authority, that only the persons identified in LC 14.600(4) will be allowed to participate in the on-the-record hearing , and that the issues discussed will be limited to those raised in the notice of appeal.

(c) Disclose any ex parte contacts. A communication between County staff and the Board shall not be considered an ex parte contact.

(d) Call for abstentions based upon any conflicts of interest or biases due to ex parte contacts, and any member of the Approval Authority may respond to any challenges for bias meeting the standards of this chapter. No decision or action of the Board shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the Board, if the Board member receiving the contact:

(i) Places on the record the substance of any written or oral ex parte communications concerning the decisions or action; and

(ii) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication is related.

(e) Request the Director to present his or her introductory report, explain any graphic or pictorial displays which are a part of the report, read findings and recommendations, if any, and provide such other information as may be requested by the Board.

(f) Allow the appellant to be heard first, on his or her own behalf or by representative.

(g) Allow the applicant, if different from the appellant to be heard next in the same manner as in the case of the appellant.

(h) Upon failure of any party to appear, the Approval Authority may take into consideration written material submitted by such party.

(i) Allow the appellant to rebut, on his or her own behalf or by representative, any of the arguments previously presented to the Approval Authority.

(j) Conclude the hearing.

(k) Questions may be asked at any time by the Approval Authority.

Questions by the parties or Director may be allowed by the Approval Authority upon request. Upon recognition by the Approval Authority, questions may be submitted directly to the persons being questioned. The persons questioned shall be given a reasonable amount of time to respond solely to the questions.

(l) At the conclusion of the hearing, the Approval Authority shall either make a tentative decision and state findings which may incorporate findings proposed by any person or the Director, or may continue the hearing to a date certain. The Approval Authority may request proposed findings and conclusions from any party to the hearing. The Approval Authority, before finally adopting findings and conclusions, may circulate the same in proposed form to parties for written comment.

(10) Written Decision or Final Order. Upon the adoption of findings, the Approval Authority shall enter a written decision or final order affirming, reversing or modifying the decision of the previous Approval Authority. The decision or final order shall be based on factual information. The Director shall, within two working days of the date of the written decision or final order, mail a copy of the written decision or final order to all parties of record. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96; 3-98, 7.8.98)*

14.500 Appealable Decisions and Manner of Review.

(1) Decisions made by the Director without an evidentiary hearing pursuant to LC 14.100 above may be appealed, and upon Director acceptance of an appeal, shall be reviewed by the Hearings Official with an evidentiary hearing pursuant to LC 14.300 above.

(2) Decisions by the Hearings Official pursuant to LC 14.300 or 14.400 above may be appealed to the Board. Upon Director acceptance of such an appeal, the Board may elect to hear or not hear the appeal, and shall follow LC 14.600 below in deciding whether or not to hear the appeal. Appeals heard by the Board shall be reviewed according to LC 14.400 above. A decision on any application appealed to the Board shall become final upon signing of an order by the Board to not hear the appeal or specifying the final decision in an appeal the Board elected to hear. A decision not to hear an appeal shall affirm the appealed decision pursuant to LC 14.600(2)(d) below.

(3) Unless appealed, a decision on any application shall be final upon expiration of the period provided by this chapter for filing an appeal. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 4-96; 11.29.96; 3-98, 7.8.98; 3-09, 12.4.09)*

14.510 Appeal Period.

A decision by the Director or Hearings Official, once reduced to writing and signed, shall be appealed as provided in LC 14.500 above, within 12 days of the date of signing of the decision provided notice of the decision occurs as required by law. When the last day of the appeal period so computed is a Saturday, Sunday, a Federal or County holiday, or a day during which the Department is closed because of a temporary work furlough, the appeal period shall run until 5:00 o'clock p.m. on the next business day. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 4-96; 11.29.96; 3-09, 12.4.09)*

14.515 Appeal Content Requirements.

All appeals shall:

- (1) Be submitted in writing to, and received, by the Department within the 12 day appeal period;
- (2) Be accompanied by the necessary fee to help defray the costs of processing the appeal; and
- (3) Be completed on the form provided by the Department, or one substantially similar thereto, and shall contain the following information:
 - (a) The name, address and telephone number of the person filing the appeal;
 - (b) How the person filing the appeal qualifies as a party;
 - (c) A reference to the Department file number for the application being considered with the appeal;
 - (d) An explanation with detailed support specifying one or more of the following as assignments of error or reasons for reconsideration;
 - (i) The Approval Authority exceeded his or her jurisdiction;
 - (ii) The Approval Authority failed to follow the procedure applicable to the matter;
 - (iii) The Approval Authority rendered a decision that is unconstitutional;
 - (iv) The Approval Authority misinterpreted the Lane Code or Manual, State Law (statutory or case law) or other applicable criteria;
 - (v) The Approval Authority rendered a decision that violates a Statewide Planning Goal (until acknowledgment of the Lane County Comprehensive Plan, or any applicable portion thereof has been acknowledged to be in compliance with the Statewide Planning Goals by the Land Conservation and Development Commission); or
 - (vi) Reconsideration of the decision by the Approval Authority in order to submit additional evidence not available at the hearing and addressing compliance with relevant standards and criteria.
 - (e) The position of the appellant indicating the issue raised in an appeal to the Board was raised before the close of the record at or following the final evidentiary hearing and whether the appellant wishes the application to be approved, denied or conditionally approved;
 - (f) An election between the following two options:
 - (i) Request that the Board conduct a hearing on the appeal, or
 - (ii) Request that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County. An appellant's election under this section shall constitute exhaustion of administrative remedies for purposes of further appeal of the County's final decision. The fee under this option shall not exceed the amount specified in ORS 215.416(11)(b); and
 - (g) The signature of the appellant. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 4-96; 11.29.96; 3-98, 7.8.98; 3-09, 12.4.09)*

14.520 Director Review.

Within two working days of the date that the appeal is received by the Department, the Director shall review the written appeal to determine if it was received within the 12 day appeal period and if it contains the contents required by LC 14.515 above. If it was not received within the appeal period or does not contain the required contents, within this same two day period, the Director shall reject the appeal and mail to the appellant the appellant's appeal submittal contents and a disclosure in writing identifying the

deficiencies of content. The appellant may correct the deficiencies and resubmit the appeal if still within the 12 day appeal period. Appeals which are not so rejected by the Director shall be assumed to have been accepted. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 3-09, 12.4.09)*

14.525 Notice of Appeals and Review.

Within two days of the date of acceptance of an appeal pursuant to LC 14.520 above, the Director shall mail notice of the appeal acceptance in compliance with the following:

(1) For an appeal of a decision by the Director, notice of the appeal acceptance shall be mailed to the applicant, the applicant's representative, and to the appellant, if the appellant is different than the applicant. The notice shall disclose the tentative hearing date for the appeal and the requirements of this chapter for the submission of written materials prior to the hearing; and

(2) For an appeal of a decision by the Hearings Official, notice of the appeal acceptance shall be mailed to all persons who qualified as parties at the hearing with the Hearings Official. The notice shall disclose the tentative date on which the Board will elect whether or not to consider the appeal. *(Revised by Ordinance No. 10-89, Effective 10.4.89; 4-96; 11.29.96; 3-98, 7.8.98; 3-09, 12.4.09)*

14.530 Director Reconsideration.

Within two working days of receipt of an appeal of a decision by the Director, the Director may affirm, modify or reverse the decision in compliance with the following:

(1) Affirmation. To affirm the decision, no action by the Director is necessary.

(2) Modification or Reversal. To modify or reverse the decision, the Director must conclude that the final county decision can be made within the time constraints established by ORS 215.427(1) and shall prepare a written modification or reversal of the decision, together with supporting findings and give notice pursuant to LC 14.100(3) and (4) above.

(3) If the Director elects to reconsider a decision without being requested to do so by the appellant, that appellant shall not be required to pay a fee for a subsequent appeal of the Director's decision on reconsideration. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 3-09, 12.4.09)*

14.535 Hearings Official Reconsideration.

Within two working days of acceptance of an appeal of a Hearings Official's decision, the Director shall forward a copy of the appeal to the Hearings Official. The Hearings Official shall have full discretion to affirm, modify or reverse his or her initial decision and to supplement findings as necessary. When affirming, modifying or reversing the initial decision, the Hearings Official shall comply with either LC 14.535(1) or (2).

(1) Affirmation. Within seven days of receipt and acceptance of the appeal by the Director, if the Hearings Official wishes to affirm the decision without further consideration, the Hearings Official shall mail to the appellant and give to the Director written notice of his or her decision to affirm the original decision.

(2) Reconsideration. If the Hearings Official wishes to reconsider his or her decision, the Hearings Official must conclude that a final County decision can be made within the time constraints established by ORS 215.427(1). A reconsideration shall comply with either LC 14.535(a), (b) or (c) below:

(a) On the Record. If the reconsideration is limited to the existing record, then within seven days of acceptance of the appeal, the Hearings Official shall develop a reconsideration decision and supplemental findings.

(b) **Brief of Additional Issues.** If the reconsideration is not limited to the existing record, and if the Hearings Official wishes to allow written materials to be submitted briefing additional issues, then the Hearings Official shall:

(i) Within seven days of acceptance of the appeal by the Director, mail notice to all persons who qualified as parties at the hearing or hearings for the decision which is being reconsidered. The notice shall disclose the limited issues to be addressed for the reconsideration and timelines for submittal of new materials and rebuttal by the applicant.

(ii) Within 14 days of the close of the hearing record, issue a decision and supplemental findings. The decision and findings shall be, within two working days of issuance, mailed to all persons mentioned in LC 14.535(2)(b)(i) above.

(c) **Limited Hearings.** If the reconsideration is not limited to the existing record and if the Hearings Official wishes to reopen the record and to conduct a hearing to address limited issues, then the Hearings Official shall:

(i) Within seven days of acceptance of the appeal by the Director, mail notice to all persons who qualified as parties at the hearing or hearings for the decision which is being reconsidered. The notice shall disclose the same information required by LC 14.070(3) above. LC 14.200 and LC 14.300 above shall be followed in the conduct of the hearing.

(ii) Within 10 days of the close of the hearing record, issue a reconsideration decision and supplemental findings, and within this same time period, mail copies of the decision and findings to persons who have qualified as parties.

(3) If the Hearings Official elects to reconsider a decision without being requested to do so by an appellant, that appellant shall not be required to pay a fee for a subsequent appeal of the Hearings Official decision on reconsideration.

(4) **Timeline Waiver.** In the event a decision of the Hearings Official is being appealed by the applicant for the same application to be reconsidered by the Hearings Official, then to receive reconsideration by the Hearings Official, the applicant must first agree to a waiver of any statutory application timelines, and such a waiver shall be in addition to any other waivers already given.

(5) **Appeal of Reconsideration Decisions.** Reconsidered decisions may be appealed to the Board within 12 days of the date of the decision and in the same manner as provided for appeals of Hearings Official decisions in LC 14.500 above. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 4-96; 11.29.96; 3-09, 12.4.09)*

14.600 Elective Board Review Procedure.

(1) **Purpose.** This section establishes the procedure and criteria which the Board shall follow in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official.

(2) **Procedure.**

(a) The Board shall determine whether or not they wish to conduct an on the record hearing for the appeal after an indication from the Hearings Official not to reconsider the decision and within 14 days of the expiration of the appeal period from the Hearings Official's decision.

(b) Within seven days of the determination mentioned in LC 14.600(2)(a) above, the Board shall adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal.

(c) The Board order shall specify whether or not the decision of the Board is to have a hearing on the record for the appeal and shall include findings addressing the decision criteria in LC 14.600(3) below. If the Board's decision is to have a hearing on the record for the appeal, the Board order shall also specify the tentative date

for the hearing on the record for the appeal and shall specify the parties who qualify to participate in the hearing on the record for the appeal.

(d) If the decision of the Board is to not have a hearing, the Board order shall specify whether or not the Board expressly agrees with or is silent regarding any interpretations of the comprehensive plan policies or implementing ordinances made by the Hearings Official in the decision being appealed. The Board order shall affirm the Hearings Official decision.

(3) Decision Criteria. A decision by the Board to hear the appeal on the record must conclude that a final decision by the Board can be made within the time constraints established by ORS 215.427(1) and that the issue raised in the appeal to the Board could have been and was raised before the close of the record at or following the final evidentiary hearing. The Board's decision to hear the appeal must comply with one or more of the following criteria:

(a) The issue is of Countywide significance.
 (b) The issue will reoccur with frequency and there is a need for policy guidance.

(c) The issue involves a unique environmental resource.
 (d) The Planning Director or Hearings Official recommends review.

(4) Participation Criteria. Persons who may participate in a Board on-the-record hearing for an appeal are:

(a) The applicant and the applicant's representative.
 (b) The Director.
 (c) The appellant and the appellant's representative.

(5) On the Record Appeal. If the Board's decision is to hear the appeal on the record, then such a hearing shall be:

(a) Scheduled for a hearing date with the Board and within 14 days of the date of the Board's decision.

(b) Conducted pursuant to LC 14.200 and LC 14.400 above. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96; 3-09, 12.4.09)*

14.700 Limitations Upon Approved and Denied Applications.

Applications approved or denied according to the provisions of this chapter shall be subject to the following limitations:

(1) Vesting of Approval.

(a) If an application subject to approval or denial under any of the provisions of this chapter was complete when first submitted or if the applicant submits the requested information within 180 days of the date the application was first submitted, then approval or denial of the application shall be based upon the provisions of this chapter and other Chapters of Lane Code in effect at the time the application was first submitted.

(b) Approval of an application for which all rights of appeal have been exhausted shall not be invalidated by subsequent revision of this Code, unless specifically provided otherwise in the revision or conditions of approval.

(2) Compliance With Conditions of Approval. Compliance with conditions of approval and adherence to submitted plans as approved is required. Any substantial departure from these conditions of approval and approved plans constitutes a violation of the applicable sections of Lane Code and may constitute grounds for revocation or suspension of the application unless modifications are approved as provided in LC 14.700(2)(a) through (d) below. Conditions of approval may be modified by the same type of Approval Authority that issued the final land use decision for the application subject to compliance with the following requirements:

(a) The application for modification of conditions meets the following completion requirements:

(i) The application is in writing and on the form provided by the Department;

(ii) The application is accompanied by the fee charged by the Department to defray the costs of processing the application;

(iii) The request is submitted to the Department prior to the expiration of the approval period or any approved extension;

(iv) The application states the reasons that prevented the applicant from complying with the conditions for which the modification is requested;

(v) The application identifies any standards or criteria that the original conditions addressed; and

(vi) The application addresses the compliance of the requested modifications with any applicable standards or criteria.

(b) The applicable criteria for the final land use decision have not changed.

(c) The Approval Authority who reviews the application for the modification of conditions shall be the same Approval Authority who made the final land use decision.

(d) An exception to subsections (b) and (c) in this paragraph is an application for an extension of the development period. Approval of an extension shall be done by the Director and is not subject to appeal. The Director may grant an extension subject to compliance with the following requirements:

(i) The Director determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible;

(ii) One extension period may be granted for up to twelve months; and

(iii) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.

(3) Revocation or Suspension.

(a) The Director may suspend or revoke approval of an application which was initially reviewed and approved or denied pursuant to LC 14.100 above and/or approved upon appeal. When taking such action, the Director shall follow LC 14.100(3) and (4) above in giving notice and addressing one or more application conflicts with the following criteria:

(i) The site has been developed in a manner not authorized by the approval of the application;

(ii) The applicant has not complied with the conditions of the approval;

(iii) The applicant has secured the approval with false or misleading information; or

(iv) The application was approved in error.

The Director's decision to suspend or revoke approval is appealable to the Hearings Official in the same manner provided in LC 14.500 above for appeals to the Hearings Official.

(b) For applications which were initially reviewed and approved or denied pursuant to LC 14.300 above, the Director may initiate a review by the Hearings Official to suspend or revoke application approval. The procedures of LC 14.300 above shall be followed by the Hearings Official, and the Hearings Official may suspend or revoke approval of an application if the application is found to conflict with one or more

of the criteria mentioned in LC 14.700(3)(a) above. The Hearings Official's decision to suspend or revoke approval of an application is appealable to the Board in the same manner as provided for in LC 14.500 above for appeals to the Board.

(4) Expiration of Approvals. Unless provided otherwise in the approval of an application or by other Chapters of Lane Code, conditional or tentative approval of an application shall be valid for a two-year period during which all conditions of tentative approval or the development authorized by the conditional approval must be completed. Such approval shall become null and void after two years from the date of approval, unless extended through the provisions for extensions contained in other applicable chapters of Lane Code. Not all applications have extension provisions in Lane Code and therefore, cannot be extended.

(5) Limitations on Refiling Applications. An application for which a substantially similar application has been denied within the previous year shall be reviewed or heard by the Approval Authority only after the expiration of a one-year period from the last decision to deny the previous application. An earlier refiling may occur if it can be demonstrated that the basis for the original denial has been eliminated. *(Revised by Ordinance No. 16-83; Effective 9.14.83; 10-89, 10.4.89; 4-96; 11.29.96)*

DEPT OF

AUG 27 2012

LAND CONSERVATION
AND DEVELOPMENT



23 August 2012

Anne Davies
433 W. 10th Ave.
Eugene, OR 97401

**RE: LandWatch Lane County Enforcement Order
Renewed Notice of Intent to Petition**

LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

Dear Ms. Davies,

Lane County received the above cited Renewed Notice on July 2, 2012. To the extent necessary, this letter serves as the County's response.

The referenced Renewed Notice was served by LandWatch Lane County per the citizen-initiated enforcement order process of ORS 197.319 – 197.353 and OAR 660 Division 45. The Renewed Notice incorporates the Petition for Enforcement, dated March 22, 2012 and alleges a “pattern and practice” by Lane County of disregard for meeting the timelines for processing limited land use decisions as so codified in ORS 215.427 and its analog, LC 14.050.

Specifically, the Renewed Notice and Petition for Enforcement contends that Lane County has failed to meet the 150 day Rule for completing decisions (ORS 215.427(1)/LC 14.050(5)); violated the 215 day timeline extension provision (ORS 215.427(5)/LC 14.050(5)(a)); and failed to void incomplete applications (ORS 215.427(4)/LC 14.050(3)(c)). LandWatch Lane County further alleges that such “pattern and practice” has resulted in Applicants filing writs of mandamus, eliminating your organization's and other citizen's ability to partake in the local process. The original Notice cites four past land use actions in support of those allegations. The Renewed Notice has attached a table of cases listing 66 instances in which you allege Lane County failed to reach a final land use decision on land use applications within the 150-day period established by ORS 215.427(5) and LC 14.050(5)(a). LandWatch seeks revisions to Lane Code Chapter 14 as corrective action.

As an initial concern, pursuant to OAR 660-045-0020(10) and (11) to establish a “pattern and practice” of alleged erroneous decision making, the decisions you reference must have occurred within the three years preceding the date on which you sent Lane County your request to initiate enforcement proceedings. As mentioned above, we received your Renewed Notice on July 2, 2012. Therefore, we consider the decisions you reference that were made before July 2, 2009, invalid cases to include in your allegation of a “pattern and practice” of disregard for meeting the statutory processing timelines. Your table includes 13 decisions that were made before July 2, 2009.

In addition, only four of the 66 referenced land use decisions resulted in a filing of any Petition for Alternative Writ of Mandamus actions. Two of those were made before July 2, 2009, and are, therefore, irrelevant to LandWatch's claim. (PA 08-5795 was for a

forest template dwelling and PA 08-5928 involved an application to rezone land from Nonimpacted Forest Land (F-1) to Impacted Forest Land (F-2). Those actions also involved land approximately 3 miles apart and were different types of applications. The other two, PA09-5730 for a commercial activity in conjunction with farm use, and PA 09-5633/PA 09-5634 for a hospice in the residential zone, are respectively a minimum of 25 miles and 20 miles distant from the first two proposals, 18 miles apart from each other.

It appears that you have attempted to describe circumstances that meet the definitions of OAR 660-045-0020(10) & (11) in establishing a “pattern and practice” of alleged erroneous decision making. These provisions require the subject decisions to involve “the same or similar geographic areas, plan designation, zones, or types of land use.”

The Renewed Notice table of cases lists 66 instances in which you allege Lane County failed to reach a final land use decision on land use applications within the 150-day period. As indicated previously, thirteen of those decisions were made before July 2, 2009, leaving 53 alleged violations. Of the remaining 53 decisions, 11 are related to M49 dwellings or partitions, which the courts have ruled are not land use decisions¹, 2 are duplicate applications on the same property, and 10 are documented with waivers or extensions to the statutory timelines, leaving 30 applications to explain.

The attached Map and Table demonstrate that the subject decisions do not involve “the same or similar geographic areas, plan designation, zones, or types of land use” that would establish a “pattern and practice” of erroneous decision making. The Map illustrates that the decisions are scattered throughout central and western Lane County, many of them a singular decision within a 36 square mile area. Topographically, the sites range from Cascade foothills to the Coast Range (a distance of 65 miles) with the majority falling within the Willamette Valley but ranging from the Coburg and Junction City areas to the Cottage Grove area (a distance of 48 miles).

These decisions represent different land use applications in different plan designations and zones ranging from Nonimpacted Forest Land (F-1) and Impacted Forest Land (F-2) and Exclusive Farm Use (E25, E30 and E40) and Quarry Mining (QM) to Nonresource (NRES) and Residential (RA, RR2 and RR5) as shown in Table of Applications Since July 2, 2009 (Attachment #6). This table demonstrates that the requested uses are as varied as the use provisions in Lane Code from quarry operations and floodway development permits to home occupations, forest template dwellings, group care homes, telecommunication facilities, nonfarm dwellings and partitions and subdivisions. There is no discernable pattern that involves “the same or similar geographic areas, plan designation, zones, or types of land use.” that would represent a practice of erroneous decision making under the definitions of OAR 660-045-0020(10) & (11). The cited cases do not meet the definition of “pattern and practice” required by the OAR.

¹ ORS 195.318(1); *Maguire v. Clackamas County*, __ Or LUBA __ (LUBA No. 2011-040, November 14, 2011), *aff'd* 350 Or App 146, __ P3d __ (2012); and *Lenn v. Lane County*, __ Or LUBA __ (LUBA No. 2011-092, July 9, 2012).

As you may know from our previous correspondence the Land Management Division has already taken measures to address the statutorily codified deadlines that you raise.

- Regarding the 215 day limit on extensions, earlier this year we revised our waiver form (enclosure #1) to warn parties that the total extensions cannot exceed 215 days, and to list the specific number of days requested, in an attempt at ending non-specific waivers.
- Regarding the voiding of incomplete applications after 180 days, we have revised our “incomplete notice” (excerpt per enclosure #2) to specifically warn applicants of that fact, and have voided 13 incomplete applications since February 2010 (see void form, enclosure #3). We also note that in the case of the pending PA 09-5730, the Hearings Official had ruled in February 2011 (enclosure #4) that the County has the option to not void an application. The opportunity to appeal that ruling is part of the decision process that is available for participants in that proceeding to exercise.
- Regarding the 150 day processing rule, we have revised our clerical procedures to assure that applications are not placed in the wrong category of files (as was the case for PA 08-5928). With the 2011 filling of vacant Planner positions, the Land Management Division caught up on the backlog of applications we were processing during the “housing bubble” of 2006.
- We also read the recent LUBA decision in *Leathers Oil Co. et al vs. City of Newberg* (LUBA No. 2010-093, March 29, 2011; enclosure #5) as giving local governments reasonable latitude regarding all of the above timelines.

Your Renewed Notice and Petition for Enforcement claims that exceeding the 150 day processing timeline has prejudiced LandWatch’s ability to partake in local proceedings because petitions for writs of mandamus were filed in three of the 66 alleged violations. This office notes that the first land use related writ filed against Lane County occurred in 2001 (PA 00-5806, Oregon National Guard Armory). In addition to the three writs cited in your Notice, a writ was also filed in 2007 for a Measure 37 subdivision (Haffner, PA 07-5174). In the same period, 2001-present, this office has completed 3,128 land use actions. Five writs in 10 years do not, in our opinion, establish a pattern. In addition, each of those writ proceedings provided an opportunity for any party in the local proceeding to participate.

We note that your suggested corrective action in your Renewed Notice and Petition for Enforcement calls for revisions to LC 14. We remind you that in 2009, revisions to LC 14 were made by the Board in response to requests made by your affiliate, Goal One Coalition. The opportunity to propose additional changes as stated in the Notice was not exercised by LandWatch or Goal One at that time. Considering additional revisions at this time is not an efficient use of the County staff resources needed for such an undertaking, even if we agreed with your proposed changes to LC 14. For the reasons described above, retaining flexibility and the authority to manage and process applications consistent with state law seems to be the most appropriate course of action.

In closing, this letter serves as notice per OAR 660-045-0050(2)(b) that the County will not be taking the corrective action(s) outlined in your Renewed Notice. The recent actions taken and described above are viewed as adequate to address the circumstances raised in your Renewed Notice to the extent it is sufficient under the applicable law.

Sincerely,

A handwritten signature in blue ink that reads "Kent Howe". The signature is fluid and cursive, with the first name "Kent" being more prominent than the last name "Howe".

Kent Howe, LMD Planning Director

Enclosures:

- #1. Timeline extension form – 1p.
- #2. Excerpt from Incomplete notice – 1p.
- #3. Void form letter – 1p.
- #4. Hearings Official ruling on void issue – 3p.
- #5. Excerpt from LUBA No. 2010-093 – 4p.
- #6. Table of Applications Since July 2, 2009
- #7. Map of Distribution of Decision Locations

C: DLCD

Lane County Board of Commissioners
Matt Laird, LMD Manager
Stephen Vorhes, Legal Counsel

Extension to Statutory Timeline Request Form

I, _____, as owner or authorized representative of the owner of
Applicant (please print)

the subject parcel known as A&T Map and Tax Lot(s) _____, do hereby waive

the statutory time line requirements of ORS 215.427 for _____ days* in order to submit

additional information for application file number PA _____.

Signature

Date Signed

This request will be granted provided it is fully completed, signed, and dated.

Return to: Lane County Land Management Division
Public Service Building
125 E. 8th Avenue
Eugene, OR 97401

* Per ORS 215.427(5), the total period of time an application can be put on hold by an applicant may not exceed 215 days.

Applicant Intent Form

Date: ^

Department File No.: PA ^

Received On: ^

In order to help us process your application, please:

1. Check one box;
2. Sign & date at the bottom;
3. Return in enclosed self-addressed stamped envelope.

- I intend to submit the missing or incomplete materials as identified in the Incomplete Notice.** I understand that according to State law I have up to 180 days from the date the application was submitted to provide the missing information, and that, on the 181st day after first being submitted, the application is void if I have not submitted:
- (a) All of the missing information; or
 - (b) Some of the missing information and written notice that no other information will be provided.
- I do not intend to submit the missing or incomplete materials as identified in the Incomplete Notice.** I understand that Lane County will proceed to review the application materials previously submitted. I understand that incomplete applications may not provide the necessary supporting information to demonstrate compliance with applicable criteria and standards and may result in the denial of my application.
- I wish to withdraw the application.** I understand that Lane County will refund any portion of the application fee that has not been expended in the review of the application.

Signature of Applicant / Agent

Date

3

Notice of Void Application

Date: [Date]

Applicant:

[Name]

[Address]

Agent:

[Name]

[Address]

Owner:

[Name]

[Address]

Subject: PA [Application Number]

Received: [Date]

Proposal: [Application Description]

This letter is to inform you that more than 180 days have past since land-use application PA [Application Number] was submitted on [Date]. The land-use application was deemed incomplete on [Date]. Per ORS 215.427(4), an incomplete land-use application is void on the 181st day after submission if not subsequently completed by the applicant within the 180-day timeframe. As of the date of this letter, Lane County has not received the missing information necessary to complete the land-use application. **Per ORS 215.427(4), PA [Application Number] is now VOID.**

If you have any questions, please contact [Name], [Position], at 541-682-XXXX.

Sincerely,

Kent Howe
Planning Director
Lane County Land Management Division
125 E 8th Ave
Eugene OR 97401

LANE COUNTY HEARINGS OFFICIAL

**IN THE MATTER OF
RULING ON A MOTION TO DISMISS THE KING ESTATE WINERY
APPLICATION (PA 09-5730) FOR A COMMERCIAL USE IN CONJUNCTION
WITH A FARM USE AS VOID**

FACTS

King Estates Winery, LP, hereinafter referred to as the Applicant, submitted an application to Lane County for a commercial use in conjunction with a farm use (restaurant, special events, etc.) on October 1, 2009. On November 13, 2009 the County notified the Applicant that its application was missing three essential items and therefore had been deemed incomplete.

Subsequently, the Applicant supplied two of the missing items and on May 11, 2010, 179 days after the application was deemed incomplete, requested in writing that the County deem the application complete and that it be put on hold in order to allow time for the eventual submission of the last piece of information, a traffic study. The traffic study was submitted on September 29, 2010. Ultimately, the Lane County Planning Director approved the application and his decision was appealed to the Lane County Hearings Official by Goal One Coalition, hereinafter referred to as the Appellant.

APPLICABLE LAW

ORS 215.427(1) provides, in part, that except for land located within an urban growth boundary or applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete. Subsection (2) of this statutory section requires that the governing body or its designee to notify the applicant if the application is incomplete and that the applicant thereafter has three options: (a) provide all of the missing information; (b) provide some of the missing information and give written notice that no other information will be provided; or (c) give written notice that none of the missing information will be provided.

ORS 215.427(4) provides that on the 181st day after first being submitted, an application is void if the applicant has been notified of the missing information as required under subsection (2) of that section and has not responded with one of the three options granted by that subsection.

ARGUMENT

The Appellant has argued that the Applicant's failure to supply all of the missing information prior to requesting that the application be deemed complete was inconsistent with ORS 215.427(4) and therefore automatically void by operation of that statute. The

Applicant, relying in part on the Oregon Land Use Board of Appeal's (LUBA) decision in *Caster v. City of Silverton, et al.*, 54 Or LUBA 441 (2007), argues that the application is not void because the County choose to continue processing the application after the statutory deadline had expired.

DISCUSSION

I believe that the Appellant underestimates the scope of LUBA's decision in the *Caster* case. While it was unclear whether the petitioner in that case provided any written notice regarding his intent to comply with ORS 227.178(2), the analog to ORS 215.427(2), LUBA nevertheless addressed the worst case scenario: where the applicant failed to provide any of the notice required by ORS 227.178(2). In that situation, LUBA opined that the city had the discretion to overlook the violation and to continue to process the application. While this statement might be considered dicta, it nevertheless seems to send a clear message that LUBA understood that the invocation of ORS 227.178(4) was a matter of discretion with the city.

Any distinction between the *Caster* case, where the city had proceeded to final judgment, and in the current situation, where a final local decision has not been rendered, appear to be inconsequential. In both cases, the local government made a determination to continue processing an application despite irregularities regarding ORS 227.178(2)/ 215.427(2). The Appellant argues that the purpose of the 120/150 Rule is not to allow applicants to endlessly sit on applications. I agree with that observation but must point out that the Legislature has addressed this issue with the ORS 215.427(5) limitation on timeline extensions.

In the present case, the Applicant responded with a variation of ORS 215.427(2)(b). It notified the County to deem the application complete within the proscribed 180 days and indicated to the County that it intended to supply the missing information. As a practical matter, this written notice had no different effect upon the County's processing of the application than had the Applicant told the County that it would not provide additional information. Along with its request that the County deem its application complete, the applicant stopped the 150-day clock. Reading ORS 215.427 as a whole, I do not believe that a County has the discretion to disregard such a request as long as it is consistent with the 215-day limitation expressed by ORS 215.427(5). The clock then restarted when the missing information was submitted into the record. The Applicant's notice to the County did not put the County in any greater processing disadvantage than if it had elected to give notice under ORS 215.527(4)(c). To the contrary, it consistently displayed an intention to comply with processing timelines as best that it could. Further, it relied upon the continued processing of the application by the County to expend funds to complete the traffic study.

The 120-/150-day rule was written for the benefit of applicants; not for local governments nor for opponents of an application. Absent some evidence that a local government is processing an application in bad faith, with the intent to allow an applicant to qualify for a mandamus proceeding, I do not believe that a third party has standing to

question a County's determination to ignore the operation of ORS 215.427(4). Indeed, from the standpoint of administrative efficiency, it makes no sense to force the County to void an application where, under Lane Code 14.700(5), the Applicant could immediately re-file its application since (1) the voiding of an application is not equivalent to a denial on the merits and (2) even if that were true, the basis for the denial would have been eliminated by such an action.¹

CONCLUSION AND DETERMINATION

The right to declare an application void for violation of ORS 215.427(4) is discretionary with the County although that discretion must be exercised within a reasonable time following the 181st day following notification that an application was incomplete. In the present case, Lane County has chosen to ignore the statutory deadline and therefore I do not believe that the application can be judged to be void.

A site view of the subject property shall occur on February 14, 2011 as scheduled. The February 3, 2011 hearing is continued to March 3, 2011 at the time and place announced at the initial hearing.

Respectfully submitted on this 9th day of February, 2011.



Gary Barnielle
Lane County Hearings Official

¹ Lane Code 14.700(5) provides an exception to a one-year moratorium upon resubmission of a denied application "...if it can be demonstrated that the basis for the original denial has been eliminated."

1 headlights from vehicles exiting the fueling station onto Springbrook Road will have only a
2 “minimal impact” on the drive-in theater.¹³

3 Respondents respond, and we agree, that the city’s findings are adequate to explain
4 why it found that because light impacts from the fueling station will be minimal and will be
5 further mitigated by landscaping and other conditions of approval, the proposed fueling
6 station is compatible with the drive-in theater. Further, we agree with respondents that the
7 city’s findings are supported by substantial evidence in the record. Intervenor submitted a
8 photometric plan showing the effects of lighting from the fueling station, and also agreed to
9 remove two existing lights in the parking lot and shield two additional lights in the existing
10 Fred Meyer Store. Record 178-79. The canopy lights will be recessed. Finally, condition 10
11 requires intervenor to add trees to the landscape buffer along the western property line and to
12 add a sight-obscuring fence. That evidence is evidence that a reasonable person could rely
13 on to determine that the proposed fueling station will have minimal impacts on the drive-in
14 theater.

15 The seventh assignment of error is denied.

16 **NINTH ASSIGNMENT OF ERROR**

17 ORS 227.178(1) sets forth what is commonly referred to as the “120-Day Rule,”
18 which requires cities to take final action on a permit application within 120 days after the
19 application is deemed complete. If the city does not take final action within 120 days, then
20 ORS 227.179(1) provides a remedy for applicants: the right to seek a writ of mandamus in
21 circuit court to compel the city to approve the permit application.

22 ORS 227.178(5) allows an applicant to extend the 120-day deadline for a final
23 decision on a permit application for a specified period of time for up to 245 days, and

¹³ The map at Record 499 indicates that the exit from the fueling station onto Springbrook Road is a right-out exit, and the location of the drive-in theater tends to indicate that headlights using that right-out exit would not be directed at the drive-in theater.

1 potentially gives the city up to one year to take final action. Only the applicant can seek to
2 extend the 120-day deadline, and such a request or requests must be made in writing.¹⁴ In
3 requesting such an extension or extensions, an applicant allows the city a specific period of
4 additional time to make a decision on a permit application, while retaining the right to seek a
5 writ of mandamus in circuit court under ORS 227.179(1) if an extension expires without final
6 action by the city. *See State ex rel West Main Townhomes, LLC v. City of Medford*, 233 Or
7 App 41, 44, 225 P3d 56 (2009) (applicant sought a writ of mandamus in circuit court to
8 compel the city to approve its application after two separate extensions of the 120-day
9 timeline expired without a preliminary verbal or final written decision by the city).

10 In the present case, intervenor did not seek a written extension from the city to allow
11 the city to issue the decision later than 120 days after the application became complete, under
12 ORS 227.178(5). Instead, the city found and the parties do not dispute that intervenor
13 informed the city, orally, that it “waived” the 120-day deadline. Although ORS 227.178
14 does not expressly provide for “waiver” of the 120-day deadline and the associated right to
15 seek mandamus, ORS 227.178(10) prohibits the city from *compelling* the applicant to waive
16 the 120-day deadline, which suggests that *voluntary* waiver of the deadline is a permissible
17 option. At intervenor’s request, and based on intervenor’s voluntary waiver of the 120-day
18 deadline, the city ultimately took more than 365 days after the application became complete
19 to issue its decision.

20 In its ninth assignment of error, petitioner argues that under ORS 227.178(5) the city
21 lost jurisdiction to take final action on the application when more than 365 days passed
22 between the date the application was deemed complete (January 9, 2009) and the date the

¹⁴ ORS 227.178(5) provides in relevant part:

“The 120-day period set forth in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions * * * may not exceed 245 days.”

1 city took final action on the application (September 23, 2010). According to petitioner, ORS
2 227.178(5) divests cities of jurisdiction to act on applications beyond the maximum time
3 period of 365 days set forth in that portion of ORS 227.178, and such applications essentially
4 become “void.”

5 ORS 227.178(5) does not say that an extension beyond 365 days divests the city of
6 jurisdiction over the application or “voids” the application, and in fact the relevant statutes
7 do not specify what consequences, if any, flow from a written extension of the 120-day
8 deadline beyond the period prescribed in ORS 227.178(5). ORS 227.178(4), which
9 petitioner cites, concerns a different situation, where the applicant fails to provide one of the
10 three permissible responses to the city’s request to provide missing information within 180
11 days of the date the application was submitted, in order for the 120-day deadline to
12 commence.

13 Respondents argue, essentially, that ORS 227.178(5) specifies no consequences for a
14 written extension of the 120-day deadline beyond the 365 days provided in ORS 227.178(5),
15 and in that circumstance the city retains full authority to issue its decision within the
16 extended deadline and, if the city exceeds the extended deadline, the applicant retains the
17 legal right to seek a mandamus remedy under ORS 227.179(1). We need not address that
18 issue, because the present case does not involve a written extension of the deadline for a
19 specified period of time beyond the 365th day. Instead, as explained above, intervenor
20 voluntarily and completely “waived” the 120-day deadline and the associated right to seek a
21 mandamus if the city exceeded that deadline.

22 The city’s findings conclude that intervenor *waived entirely* the provisions of ORS
23 227.178(1) that required the city to make a final decision within 120 days, and petitioner
24 does not challenge those findings. Record 40. We do not understand petitioner to dispute
25 that such a voluntary verbal waiver of the 120-day deadline occurred. As explained above,
26 an applicant is free to waive the 120-day deadline entirely and give up its mandamus

1 remedies under ORS 227.179(1) as a result, and no party disputes that that is what occurred.
2 Nothing in ORS 227.178(5) or anything else cited to us prohibits such voluntary waiver or
3 imposes any express limitation on the city's ability to act and rely upon such a waiver.

4 We also understand petitioner to argue that the city misconstrued applicable law and
5 committed a procedural error that prejudiced petitioner's substantial rights in taking final
6 action more than 365 days after January 9, 2009.¹⁵ Petition for Review 45. However,
7 petitioner's argument that the city committed procedural error is premised on its contention
8 that ORS 227.178(5) divested the city of jurisdiction to make a final decision more than 365
9 days after the application was deemed complete. Because we reject that argument above,
10 petitioner's argument that the city committed procedural error in making a final decision on
11 the application provides no basis for reversal or remand of the decision.

12 The ninth assignment of error is denied.

13 The city's decision is affirmed.

¹⁵ ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a decision where the local government "[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner."

Table of Applications Since July 2, 2009 Referenced by LandWatch

PA	APPLICATION	MAP	ZONE	Waiv/Ext
1. 07-5298	quarry operation	210302	QM	
2. 07-5453	group care home (men)	180421	RR5	
3. 07-6811	M49 partition	160214	F2	
4. 08-5313	partition	170419	E40	
5. 08-5865	addition to church	190102	RR5	
6. 08-5904	variance for fence	160428	RR5	
7. 08-5971	partition	160836	RR5	
8. 08-6312	road setback variance	180328	NRES	
9. 08-6499	nonfarm dwelling	190513	E40	Y
10. 08-6500	nonfarm dwelling	190513	E40	Y
11. 08-6525	telecom collocation	160312	F1	
12. 08-6587	family farm help dwelling	180218	E25	
13. 08-6644	dwelling replacement (new site)	170222	E30	
14. 09-5083	telecom collocation	160213	F2	
15. 09-5176	home occupation	150516	E40	
16. 09-5188	home occupation	170105	F2	
17. 09-5247	riparian modification for deck	160718	RR2	
18. 09-5263	partition	180224	RR5	
19. 09-5294	M49 dwelling	170401	E30	
20. 09-5313	M49 partition	180219	RR5	
21. 09-5314	group care home (women)	180421	RR5	
22. 09-5325	forest template dwelling	190102	F2	
23. 09-5351	text amendment to LC Ch 14			
24. 09-5381	road setback variance	160718	RR2	
25. 09-5431	temp use permit for wedding	170408	E40	
26. 09-5477	M49 partition	160428	E40	
27. 09-5478	M49 dwelling (same prop above)	160428	E40	
28. 09-5490	M49 partition	170127	E30	
29. 09-5491	M49 dwelling (same prop above)	170127	E30	
30. 09-5512	partition	170511	RR5	
31. 09-5515	floodway development permit	181129	E25	
32. 09-5520	replacement dwelling in new site	200326	F2	
33. 09-5521	partition (same prop above)	200326	F2	
34. 09-5522	mod proposed dwelling location	180613	F2	
35. 09-5526	property line variance	180324	E30	Y
36. 09-5528	M49 partition	160332	RR2	
37. 09-5614	forest template dwelling	180523	F2	Y
38. 09-5600	nonfarm dwelling	160709	E40	
39. 09-5622	partition	200335	RR2	
40. 09-5633	SUP for hospice	170401	RR5	
41. 09-5703	partition	160233	RR5	
42. 09-5725	forest template dwelling	200325	F2	
43. 09-5730	comm act in conj w/ farm use	200502	E40	Y

44. 09-5751	M49 partition	190412	F2	
45. 09-5753	M49 dwelling (same prop above)	190412	F2	
46. 09-5757	M49 partition	190316	RR5	
47. 10-5221	forest template dwelling	200313	F2	Y
48. 10-5343	nonconforming use increase	210224	F2	
49. 10-5345	subdivision replat	191225	RR5	Y
50. 10-5618	forest template dwelling	191516	F2	Y
51. 10-5821	subdivision	181210	RA	Y
52. 10-5824	variance (same prop above)	181210	RA	Y
53. 11-5286	dwelling replacement new site	160309	E40	

11 related to M49

2 are duplicate applications on same prop

10 requested waiver/extension

leaving 30, none of which filed a writ nor show a geographic, zone or use pattern

type of land

