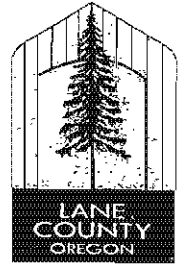


LANE COUNTY PLANNING DIRECTOR

EVIDENTIARY HEARING DECISION

SITE REVIEW (QUARRY)



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

Report Date: March 18, 2010

File No: PA 07-5298

I. PROPOSAL DESCRIPTION

- A. Applicant/Owner:
Donald J. Overholser & Rodney Mathews
30397 Cottage Grove-Lorane Hwy.
Cottage Grove, Or. 97424
- Agent:
Joseph J. Leahy
223 A St., Suite D
Springfield, Or. 97477
- B. Proposal: Site Review per LC 16.257(4), for a quarry extraction operation (20,000 cu. yds. annual) pursuant to LC 16.216(4)(a).

II. DECISION

Approval of the request subject to conditions shown on attached Attachment "A."

III. BACKGROUND AND SITE INFORMATION

A. Site Description/Background:

Property Description: the property (hereafter referred to as the "subject property") is identified as Map 21-03-02, tax lots 600 & 606. The property is 20+ acres in size, located approximately 2600' SW of the intersection of Mosby Creek Road and Quaglia Road, and 2 miles southeast of Cottage Grove. The subject property is zoned Quarry and Mine Operations Zone (QM) and located within the Rural Comprehensive Plan boundary.

The subject property was redesignated from an F-2/Impacted Forest Lands Zone to the present QM/Quarry Mine Operations Zone, and from a plan designation of Forest land to Natural Resource land in 1992 (file No. PA 3399-87). That action was appealed and twice remanded by the State Land Use Board of Appeals (LUBA), with the final supplemental findings adopted by the Lane County Board of Commissioners on September 18, 1996.

The subject property has a two-acre quarry pit (registered with the Or. Dept. of Geology and Mineral Industries as site No. 20-0125). The area containing marketable rock is

approximately five acres in size, with the remainder of the property to be retained as a buffer. The site is estimated to contain 600,000 to 700,000 cubic yards of rock. With an annual maximum output of 20,000 cubic yards, the site could remain active for 35 years. Blasting is expected to occur 2 or 3 times per year. The recipients for the rock will primarily be the BLM, US Forest Service, and private forest lands owners in the southeast portion of Lane County.

Traffic will utilize an access easement (recordation #8636318/Lane County Deeds & Records), which extends from the site eastward approximately 1800', to Quaglia Road. Trucks from the quarry would proceed north to Mosby Creek Road.

The Planning Director conducted an evidentiary hearing on September 24, 2007. The hearing was then closed but the record left open for submittal of evidence and comments. This open record period was extended several times, with the record finally closing on October 31, 2008.

B. Surrounding Area and Zoning

The subject property is surrounded by F-2 zoned parcels, with dwellings found on three of those adjoining tax lots (#1100, 601, & 604). Quarry traffic will exit the site by means of a private easement eastward to Quaglia Road, then north to Mosby Creek Road. Dwellings occur on every parcel adjoining Quaglia Road between the easement and Mosby Creek. The zoning of those lots is predominantly Rural Residential, although some F-2 zoned land occurs, mostly on the east side of Quaglia Road. On Mosby Creek Road, Rural Residential parcels are found to the immediate west of Quaglia Road, and Rural Residential and F-2 parcels found to the east of Quaglia Road.

C. Services

Access:	Private easement to Quaglia Road (county)
Sewer:	Not applicable
Water:	Not applicable
Fire:	South Lane County Fire & Rescue
Power:	EPUD

D. Referral Responses

The main issue of concern for this proposal was the truck traffic over Quaglia and Mosby Creek Roads. Both roads are under county jurisdiction. Numerous responses were received from County Transportation Planning over a period of time, updated as more data from the Applicant was submitted into the record. Please refer to the file record for those documents. The traffic related conditions listed in Exhibit A of this approval are largely derived from the latest referral responses.

Also noticed were the agencies and service providers listed below.
South Lane County Fire & Rescue
State Fire Marshall's Office

State Watermaster's Office
City of Cottage Grove
LandWatch Lane County
Or. Dept. of Fish & Wildlife
Or. Dept. of Geology and Mineral Industries
Or. Dept. of Environmental Quality
Or. Dept. of Forestry

Dozens of letters from neighboring land owners have been received. Their concerns center around traffic safety, dust, fumes, road capability, wildlife, water, streams, and impact on property values. Refer to the file record for those letters. These concerns are addressed under the Site Review standards below.

IV. APPROVAL CRITERIA AND ANALYSIS

A. Conformity with Lane Code 16.257/Site Review

The QM zone, LC 16.216(4), allows the proposal, subject to the Site Review standards of LC 16.257(4). LC 16.216(4) & (4)(a) reads as follows:

(4) Permitted Buildings and Uses. In the Quarry and Mine Operations District, the following types of buildings and uses are permitted as hereafter specifically provided for by this section, subject to the provisions of the Quarry and Mining Operations Reclamation Permit and additional Conditions and exceptions set forth in this Chapter:
(a) Extracting and storing of minerals, including equipment and materials necessary to carry out these functions.

LC 16.216(5) requires the Site Review, and reads as follows:

(5) Site Review Required. Uses permitted by LC 16.216(4)(a), (b), (c), (d) and (e) above shall be subject to the provisions of LC 16.257 (Site Review).

The Site Review criteria are found in LC 16.257(4), and are quoted below.

(4) Criteria for Site Review Evaluation. The following minimum criteria should be considered in evaluating Site Review Applications:

(a) That the location, design, size, shape and arrangement of the uses and structures are sufficient for the proposal intent and are compatible with the surrounding vicinity.

Planning Director response and finding of fact:

The subject property received county approval for a zone and plan designation for quarry mining in 1992 via Ordinance No. PA 951.

Per the submitted application, the proposed output is to be approximately 20,000 cubic yards of quarry rock annual. Equipment to be employed includes a 3 unit crusher (jaw, cone and rolls), a rock drill, a crawler tractor, two loaders, and a diesel powered generator. Rock hauling will be done by contract or by the purchasers of the material. Rock hauling will occur throughout the year, but the majority of the activity (75%) is expected to occur during construction season, June through October. The operation is proposed for six days a week, closed on Sundays. Peak truck traffic during the summer is projected at 16 truck trips daily. Access to county roads is via a private easement which runs east approximately 1800' to Quaglia Road. Trucks then proceed north to Mosby Creek Road. A traffic impact analysis was submitted on September 6, 2007, with supplements added throughout the open record period.

The nearest residence is approximately 900' north of the subject property, and 1500' from the quarry pit itself. The subject property is surrounded by lands zoned F-2/Impacted Forest Lands. These nearby tracts vary in size from 20 acres to 100+ acres, most are developed with dwellings. Some Weyerhaeuser and BLM owned land is found southwest of the subject property. Refer also to page 2 of the submittal, for a detailed breakdown of adjacent parcels.

Residentially developed land (RR-5/Rural Residential) is found along the truck route, Quaglia Road, as well as along Mosby Creek Road further to the north.

Rock quarries by nature are not silent or dust free operations. As stated earlier, dynamite will be employed 2-3 times annually to detach rock from the main rock block. The detached rock will be further reduced in size through the use of drills and a rock crusher. Once reduced to marketable size, the rock will be stockpiled on site, then loaded in dump trucks and hauled away.

Testimony concerning the proposal was received both through written comments and oral testimony provided at the evidentiary hearing of September 24, 2007. The Director has read all of the submittals as well as reviewed the tapes from the hearing.

Applicant's Position

Mr. Leahy, attorney for the Applicant comments (exhibits 70B and 128) on LC 16.257(4)(a) in regards to the "compatibility" aspect. Mr. Leahy maintains that LC 16.257(4)(a) is not to be construed as an inquiry as to whether or not the *quarry* is compatible with the "surrounding vicinity", but rather if the "*location, design, size, shape and arrangement*" (i.e., "characteristics", per Mr. Leahy) are sufficient to "implement the proposal intent", namely the quarry mining operation. Mr. Leahy maintains that the characteristics are the subject of the compatibility analysis, not the quarry itself. Mr. Leahy asserts that the latter was performed during the plan amendment/zone change to QM, which was resolved in 1996. He asserts that the appropriateness of the quarry itself is a fact accomplished by virtue of having the present zone designation.

Lane Code 16.216(5) clearly subjects the proposed use to a Site Review.

(5) Site Review Required. Uses permitted by LC 16.216(4)(a), (b), (c), (d) and (e) above shall be subject to the provisions of LC 16.257 (Site Review).

The proposal, as noticed, is per LC 16.216(4)(a):

(a) Extracting and storing of minerals, including equipment and materials necessary to carry out these functions.

Mr. Leahy's position appears to be that the quarry operation cannot be denied under LC 16.257(4)(a), provided the operating "characteristics" are compatible with the surrounding vicinity. Whereas this decision concludes that the proposal can be conditionally approved, the Director finds it unnecessary to resolve this issue.

Compatibility issues raised include noise from the crusher, blasting, and truck traffic. Other concerns include dust (primarily from loaded dump trucks), well water (effects on quantity and contamination), creek pollution, air pollution, chemical applications, traffic safety (both pedestrian and vehicular), road capacity (including construction standards and traffic flow), effects on livestock, easement use, hours/days of operation, health effects, and property values.

Testimony at the hearing was largely indicative of how the above concerns were described in the submitted letters.

Martin Gascoyne (resides at 78022 Pitcher Ln., Map # undetermined), expressed concern of contaminated water flowing into Carolina Creek, which is located east of the subject property.

Matt Snauer (78078 Pitcher Ln., Map 20-03-34, tax lot 2501) expressed concern over the potential use of sodium chloride and calcium chloride for road dust control.

Penelope Pilling (77752 Quaglia Ln., Map 21-03-02 #901) resides at the NW corner of the intersection of the easement serving the quarry and Quaglia Road. Ms. Pilling operates a daycare for handicapped children, who reportedly play or are discharged from school buses within the easement road, resulting in safety concerns.

Karen Munsel (77882 Quaglia Rd., Map 21-03-02 #800) expressed concern over use of chemicals, as well as traffic on Quaglia Road.

Carletta Furgeson (78066 Pitcher Ln., Map 20-03-34 #2600), was concerned over the potential for pollution of her well.

Micky True (77742 Quaglia Rd., Map 21-03-02 #1000) lives adjacent and west of Ms. Pilling, and runs a foster care from his home. Like Ms. Pilling, he is concerned over traffic safety over the easement from which his access is taken, citing the potential for brake failure as the loaded gravel trucks descend from the pit. USGS Quad maps show an approximate elevation drop of 120' from the quarry pit to Mr. True's residence. The remaining portion of the easement from Mr. True's dwelling east to Quaglia Road is essentially level. He would like the county to have the Applicant build a fence to separate the traveled easement from his and Ms. Pilling's property.

Jens Moden (77742 Quaglia Rd., Map 21-03-02 #604) lives adjacent and to the east of the subject property. He wanted the hours of operation to be shortened to 9-5 (the hours were

originally proposed to be 7AM-7PM), wants wells to be tested, and has concerns over traffic safety on Quaglia Road, and especially over the small bridge on Quaglia.

Marjorie Nord and Janice Mellon (77812 Quaglia Rd., Map 21-03-02 #700) reside on 26 acres of F-2 zoned land used for a "small hoarse boarding and breeding facility" (per exhibit 65). The property contains a pond and (Carolina) creek, from which the horses drink. They were concerned with contamination of that water, as well as traffic safety on Quaglia Road, citing the pastoral use of the narrow road by bikers and horse riders. Their pasture fronts the haul road easement, and they have concern over horses foaling (per the hearing tape) and the blasting which would occur (exhibit 65). Ms. Nord, in objecting to the proposal, stated that her facility "...would go out of business". Liam Sherlock, an attorney representing some of the neighbors in opposition, later mentions the "sensitive agricultural uses", "horse breeding", and the summer noise, dust, and traffic from the quarry use (exhibit 63).

Brad Palmer (77591 Pitcher Ln. Map 21-03-03 #800) resides southwest of the subject property. His access consists of an easement which travels through the subject property, then northward along Pitcher Lane, to Mosby Creek Road. His concerns centered on the blocking of his access during the blasting (2-3 times/year), rock debris on the road from blasting, and interference with his access by dump trucks.

John Ulbricht spoke in behalf of the Ray and Barbara Graves, the owners at 77932 and 77982 Quaglia Ln. (Map 21-03-02.2.1 #1000 & #900) cited concerns over wells and the creek. He said that he wished to create an organic farm on this property, and was concerned with being able to get so certified.

Kathryn Balance (77677 Quaglia Rd., Map 21-03-02 #1204) stated that she had respiratory issues and was concerned with dust being carried down to her home by prevailing downdrafts. Her home is located off the southern end of Quaglia Road, approximately 3400' from the pit (line distance).

Marc Bass (78086 Mosby Crk. Rd., Map 21-03-02.2.1 #600) has submitted several letters/emails to the record (exhibits 25, 71, 78, 119, 121, 134). Mr. Bass expressed concerns over wells and, of most concern, traffic generated by the use. He also compared several existing quarries to the proposal, maintaining that the other quarries are found in less built-up, residential areas.

Attorney Liam Sherlock, representing some of the neighbors in opposition ("Families for A Quarry Free Neighborhood"), has also submitted numerous letters to the record (exhibits 63, 90, 120, 123, 127, 129). Most of Mr. Sherlock's comments concern traffic aspects, but also offers responses to many of the assertions made by the Applicant.

Dan Walker (78001 Pitcher Ln., Map 21-03-02 #601) lives adjacent and north of the subject property. He expressed general concerns over water, sound, and air pollution.

Dennis Johnson (77778 Quaglia Rd., Map 21-03-02 #900) mentioned the potential for a negative effect on property values, and loss of a "rural lifestyle" along the easement route.

Ronda Cramer (78155) Pitcher Ln. Map 20-03-35 #7300) discussed possible "spooking" of her horse by (blasting) noise, and traffic on Mosby Creek Road.

Analysis

Many of the comments in opposition to the proposal are related to traffic and road capabilities (or lack thereof) along the easement and nearby adjoining roads (Quaglia Rd., Pitcher Ln., and Mosby Crk . Rd.). These issues are discussed in depth under the standard of LC 16.257(4)(f) below. The Director's specific comments under LC 16.257(4)(f) are detailed below. In general, as explained under LC 16.257(4)(f), Quaglia Road in particular, and the easement intersection with Quaglia Road, is currently inadequate for the proposed use. It is the Director's opinion and finding that the proposed use will be compatible with the surrounding vicinity only if the required conditions of this approval are implemented by the Applicant.

Traffic issues notwithstanding for the moment, one of the concerns raised above was dust control along the easement route from the pit to Quaglia Road. The proposal calls for 20,000 cubic yards annual haul, during a 250 day period using 16 truck trips per day. Each truck will have a 10 cubic yard capacity. In addition, there will be 4 commute trips per day for employees. There are 3 dwellings within 200' of the easement (addresses of 77742, 77752, and 77778 Quaglia Rd.). The next closest dwelling is approximately 570' distant (77710 Quaglia Rd.).

One of the objections was the potential for use of sodium chloride and/or calcium chloride mixed with water for dust control along the easement route. The Applicant has testified (exhibit 70B) that such chemicals will not be used. The Applicant has also testified that dust control is under the jurisdiction of the Lane Regional Air Protection Agency (LRAPA). LRAPA would indeed regulate fugitive dust from both the crushing activity and ingress/egress along the easement. LRAPA regulatory jurisdiction is also mentioned in the documentation from the Applicant's consultant Geologist, mentioned below. LRAPA has several options for dust suppression, including biodegradable compounds, to restrict fugitive dust to acceptable limits. The Director agrees that any impacts due to dust are subject to LRAPA's regulatory control, and the biodegradable option is appealing from a compatibility viewpoint.

Other testimony included concerns over well water contamination and depletion. The Applicant has submitted a letter from EGR & Associates Senior Geologist Ralph Christensen in response. The letter, dated 10-19-07 (within exhibit 128) and with supporting documents (some of which were included in the record of the 1992 Plan/Zone change), concludes that blasting "...would not harm wells, groundwater flow or structures in the area." The letter also states that "[O]ther aquifer impacts from the excavation itself were shown to not be significant, and, in fact, are likely to be beneficial for those wells located at elevations lower [sic] the excavation".

The Christensen submittals also address the possibility of surface water runoff or seepage into Carolina Creek. A settling pond will capture and divert excess sediment, with DOGAMI and DEQ setting turbidity limits. The Planning Director finds this expert testimony to be reasonable and acceptable.

Other concerns covered in the Christensen letter include any wetlands within the quarry area. The seeps were found to be created as part of the (past) mining, and that "...wetland, by definition, can not be created by mining in a DOGAMI permitted use".

Lastly, the blasting itself was found by Mr. Christensen to be within regulated limits. A test blast was conducted as part of the plan/zone change process (exhibit 128). Neighbors along Quaglia Road and Pitcher Lane will receive 5 days notice prior to any blasting, which will occur 2-3 times per year.

Some loss of or change to the pastoral nature of the neighborhood is inevitable when development occurs. This includes more traffic over the easement route, which provides the Applicant with legal access. It was suggested at the hearing that the Applicant be responsible for installing fencing along the easement, especially adjacent to the two day care/foster care operations also served by the easement, to keep children out of the easement. Although the Applicant may choose to implement this suggestion, the Director finds that mandating such as a condition of this approval inappropriate, as the easement is designed for ingress/egress, not as a public use area. Likewise, the Applicant and any subcontractors are responsible for maintaining their trucks and equipment in operable condition, including truck brakes, as well as limiting speeds to 25 mph on both the easement and Quaglia Road. The Applicant is bound by the legal terms of the easement, with the responsibility to not hinder the other easement users. No quarry traffic is allowed on Pitcher Lane (north of the quarry), as so proposed by the Applicant. It is also noted that the Applicant's traffic study information and analysis did not include use of Pitcher Lane for quarry traffic.

The Applicant (file record #128) has modified the proposed hours of operation since the original proposal was submitted, to 6:30 AM-4:30 PM May through October, and 6:30 AM – 4 PM November through April. No aspect of the operation will occur on Sundays or legal holidays as listed in the conditions of this approval. No rock crushing is to occur on Saturdays. The hours appear reasonable in that the operation will not involve any artificial lighting of the operations, and approximates seasonal available daylight. The pre- 5:00 PM quitting time will afford nearby neighbors quite evenings, an important compatibility aspect.

Other concerns expressed fail to rise to the level of documenting the concern to a sufficient degree to oblige the Applicant to respond. These include the concern over a drop in property values (no appraisal testimony or comparisons submitted), potential effects on the nearby horse boarding operation (no testimony as to scale, documentation by a veterinarian, reasonable preventative measures or lack thereof), and a potential organic farm (no lease agreements, speculative in nature).

As stated earlier, the major concern over the proposal was traffic related. In that regard, documentation by county Transportation Planning (with some assistance by the provided testimony) was found adequate to impose road improvements as a condition of this approval. Again, this is covered under LC 16.257(4)(f) below.

The Director's approval of the present application is subject to 17 conditions set forth in Attachment "A". Conditions of approval #1-#9 are related to traffic. Condition #10 requires a 5-day notice for blasting activity, which Condition #11 forbids use of Pitcher Lane (north of the quarry site) for quarry traffic. Condition #12 limits the hours/days of

operation. The Director finds that this standard (LC 16.257(4)(a)) has been met, with the conditions imposed in Exhibit A.

(b) That there is no unnecessary destruction of existing healthy trees or other major vegetation, and that due consideration is given to the preservation of distinctive historical or natural features.

Planning Director response and finding of fact:

The operation plan calls for enlarging the existing two acre pit to approximately five acres, and leaving the remaining 15 acres in its present state of brush and fir trees. Vegetation which is on top of the sections mined, as such progresses from east to west, will obviously be destroyed. The maintenance of a 50' excavation setback from property lines (of the subject property: tax lots 600 and 606) is listed on the operations plan submitted to DOGAMI (and within file exhibit 1). Vegetation on top of the presently undisturbed areas of the quarry includes Doug fir, with lesser quantities of White fir, Cedar, and Hazel bushes.

The site plan (attachment 3 to the application) also shows forested areas in excess of the 50' excavation setback north, east, and south of the pit, which will also be retained.

The interior access roads are already in place, so no further tree removal will be necessary.

On site restoration is part of the DOGAMI permit process. Condition of approval #17 puts the Applicant on notice to gain necessary permit approvals from DOGAMI.

There are no inventoried historical or natural features on the subject property.

This standard has been met.

(c) That the quantity, location, height and materials of walls, fences, hedges, screen planting and landscape areas are such that they serve their intended purpose and have no undue adverse effect on existing or contemplated abutting land use.

Planning Director response and finding of fact:

As stated above, the quarry pit itself will be buffered by retention of existing forested areas on the north, east, and south side of the excavation area. On the west side (the basic direction from which the excavation will progress) the adjoining F-2 zoned 40-acre tax lot is also owned by the Applicant, and is heavily forested. A minimum 50' setback from the property line of the QM zoned subject property will be maintained. The topography, which rises to the west, further shields the quarry from other properties farther to the west.

No fences are planned. The Applicant will post signs around the quarry pit.

As mentioned above, DOGAMI will regulate the eventual restoration of the site. As stated earlier, condition of approval #17 puts the Applicant on notice to gain necessary permit approvals from DOGAMI.

This standard has been met.

(d) That suitable planting of ground cover or other surfacing is provided to prevent erosion and reduce dust.

Planning Director response and finding of fact:

Retention of the forest buffer will minimize erosion. The quarry rock is solid (as opposed to aggregate gravel) and will retain its integrity until blasted or ripped by machinery. According to the consultant's Geologist, the geology of the rock is not subject to subsidence (exhibit 128).

The Lane Regional Air Pollution Authority (LRAPA) regulates dust emissions at the pit site as well as along the easement road. An air contaminant discharge permit will be required. As a response to testimony at the hearing, the Applicant has agreed not to use Sodium chloride or Calcium chloride in dust suppression. However, as mentioned above, LRAPA has other agents which can be used, including biodegradable ones. In any event, LRAPA's permitting process requires it to limit dust to acceptable levels. The Applicant is advised of the need to comply with LRAPA's requirements in condition of approval #16.

(e) That the location, design and size of the uses are such that the residents or establishments to be accommodated will be adequately served by community facilities and services or by other facilities suitable for the intended uses.

Planning Director response and finding of fact:

The site receives power from the Emerald Peoples Utility District (EPUD), and is covered by the South Lane County Fire & Rescue district. The quarry is not expected to necessarily cause a draw on these services, but in any event is adequately served by these community facilities. No telephone or school district services are required by the use.

This standard has been met.

(f) That, based on anticipated traffic generation, adequate additional right-of-way, road improvements, and on-site vehicular, bicycle and pedestrian improvements connecting directly to off-site roads, paths and sidewalks must be provided by the development in order to promote traffic safety and reduce traffic congestion. Consideration shall be given to the need and feasibility of widening and improving abutting streets to specifications of LC Chapter 15, "Roads," and also to the necessity for such additional improvements as lighting, sidewalks, bicycle lane and path connections, and turn and

deceleration/acceleration lanes. Improvements shall be consistent with access management, spacing standards, and other requirements of LC Chapter 15.

Planning Director response and finding of fact:

The easement road from the pit to Quaglia Road is a private easement, maintained by the easement parties.

The impact of the proposal on the intersection of the easement with Quaglia Road, as well as use of Quaglia Road and the immediate vicinity of its intersection with Mosby Creek Road have been the subject of extensive exchanges between the Applicant's team and County Transportation Planning, as well as comments from the neighborhood. The county's position is best summarized in the document of 9-9-08 (exhibit 144). The text below is pulled from that document. Exhibits referred to within the document are can be found with file record exhibit 144. The referral comments from Transportation Planning have been indented and printed in "Agency" font, in order to discern them from the remainder of this report.

Comments from Transportation Planning/Shashi Bajracharya/9-9-08:

Transportation Planning (TP) has completed review of the application for Site Review, file PA 07 -5298. The referral is for a proposal to operate a quarry site located on Assessors' Map 21 -03-02, Tax lots 600 and 606. In connection with the site review process, TP also reviewed the traffic related materials submitted by the applicant, prepared by Branch Engineering. TP's review focused primarily on the traffic safety and pavement structural condition of Quaglia Road, the county facility serving the subject property.

Existing Conditions

Quaglia Road is a County Road, functionally classified as a Local Road in the Lane County Transportation System Plan. It is a 0.66 mile long, 2-lane, 16-18 foot wide, paved, dead end road. The subject property's driveway access is located approximately at mile point 0.51. Although the Assessor's map shows a 50 foot wide right of way, utilities such as power poles and mail boxes are located within the right-of-way, close to the edge of the pavement. According to the County's traffic count taken in 2001, the road is used by about 190 vehicles per day (Average Daily Traffic, ADT), mostly traffic generated by the 14 -15 residential homes along the road.¹ The ADT is not anticipated to grow drastically on the road due to the rural land uses and zoning in the vicinity, and the fact that the road is a dead end road.

Quaglia Road also serves the subject property and timber lands, notably lands owned by Weyerhaeuser Company and the United States Bureau of Land Management (BLM). The level of traffic generated by forestry uses on a daily basis is unknown. The applicant indicates an unsuccessful attempt was made to contact Weyerhaeuser regarding its use of Quaglia Road. In the absence of that information, the applicants engineer

¹ Additional information about average daily traffic (ADT) was included in a form completed jointly by Branch Engineering and Lane County's Soils Testing Lab for the purpose of analyzing pavement design needs. The information is in a Lane County Materials Testing Lab form entitled "Traffic Analysis and Base Design", attached to a June 26, 2008 Branch Engineering memorandum. It indicates ADT of 240, developed from a p.m. hourly count taken on February 29, 2008 by Branch Engineering.

indicates he observed truck traffic on the road but was unable to accurately quantify average daily trips. County staff believes forest-related truck traffic is sporadic, since logging operations do not occur on a daily basis year-round.

As with other roads functionally classified as county roads, this road has been maintained by the County. The County did not build the road and it is substandard. Roadbed coring data and other road condition information indicate that the road was "black-topped" over an existing gravel roadbed and has been maintained in that minimal condition to serve existing, low-volume traffic. The existing pavement type, "surface treatment", is the common pavement type for such roads serving low volume daily traffic.

Maintenance records for Quaglia Road go back to 1978. Maintenance consists of brushing, sign repair, grass mowing, oil shot surfacing, surface and shoulder maintenance, ditch maintenance, culvert repair/replacement, shoulder blading, surface patching, pothole patching, and guardrail installation. The maintenance program does not enhance the structural capacity of the roadway.

The existing pavement structure varies greatly along the road as evidenced in the four core samples taken by Branch Engineering. The road structure constitutes asphalt concrete (AC) ranging from 1.625" to 5.5" thick, or an average 2.5" of AC, about 2" of good base rock, and varying depths of contaminated base rock. The road was not built to serve heavily loaded trucks, even though occasional truck traffic has been observed.

Quaglia Road crosses Carolina Creek at mile point 0.08. The bridge was inspected in November 2004, and was reported to be in a very good condition. The inspection report, however, indicated substandard bridge transitions, bridge rail, and end rail standards. Bridge inspection, maintenance, and repair are performed by Lane County according to county discretionary decision making and its allocation of limited financial and workforce resources. The bridge may be closed periodically for inspection, maintenance, repair, or bridge failure.

Applicant's Statement Regarding Proposed Quarry Traffic Impacts

The applicant's proposal to extract 20,000 cubic yards per year would involve rock crushing and hauling to sites from the subject property utilizing Quaglia Road. According to the August 31, 2007 Limited Traffic Impact Analysis prepared by Branch Engineering, the 20,000 cubic yards of minerals will be transported during a 250 day period annually using 8 truck trips a day (one way), each truck having a 10 cubic yard capacity. In other words, the applicant proposes to add 16 truck trips with an additional 4 non-truck (commute) trips for two regular employees a day onto Quaglia Road. With regard to truck traffic, the applicant's latest analysis indicates there will be a 48,000 Equivalent Single Axle Loads (ESALs). This is a measure of vehicular weight impacts to the pavement.

The applicant's engineer has provided varying numbers with regard to the number of truck trips and ESALs, and proposals to address pavement structure deficiencies have evolved over time.

In the August 31, 2007 Traffic Impact Analysis (TIA), the analysis recommends structure improvements to serve the proposed development, but no improvements to the width of the road. The Executive Summary Results states, *"No mitigation measures, other than vegetation removal to improve sight distance and an upgrade of the roadway paving structure, are necessary to accommodate the traffic generated by the quarry."* Under the Recommendation and Conclusion section it states that *"Based on the testing and design results, the estimated average overlay for Quaglia Road is 4.8 inches of AC thickness . . . A total of 7 inches of AC (including the existing asphalt) should be provided between the site and Mosbey [sic] Creek Road."*

In a technical memo dated April 25, 2008 from the applicant's engineer, Damien Gilbert of Branch Engineering, to Joe Leahy, the applicant's attorney, Mr. Gilbert states *"After performing the calculations, it became apparent that the expected impact of the proposed quarry traffic is negligible. Specifically, as shown in the attached revised calculation, the two Equivalent Single Axel [sic] Load (ESAL) values are within the allowable range in the AASHTO guidelines for this type of roadway, and there is no difference in the required paving sections. Therefore, if the road way paving section was adequate for the traffic that is adequate out there today, the quarry would not need to overlay the pavement to accommodate their traffic."* The memo continues to add *"...a total of 7 inches of asphaltic concrete (including the existing asphalt) should be provided between the site access and Mosbey [sic] Creek Road. This is recommended with or without the proposed quarry traffic."*

The April 25, 2008 memo recommended alternative ways, based upon either ESALs or ADT, to quantify the quarry traffic share of impacts to the pavement structure. In part, Mr. Gilbert states, *"...The projected ADT of 20 for the quarry is 8.33 percent of the total projected ADT of 240...The calculated 34,000 ESAL's generated after quarry startup is 26.1 percent increase from the existing 173,000 ESAL's."* It is unclear from where the number 173,000 ESALs were derived.

In a memo dated June 26, 2008, Mr. Gilbert states *"Due to the calculations indicating that the existing paving structure is not adequate to accommodate the existing traffic over a typical design life, you and I agreed in our meeting to measure the impact of the quarry by dividing the quarry related ESAL's by the total number of ESAL's calculated to justify the agreed design paving section of 7-inches."* He continues stating, *"As previously indicated, the total available ESAL's in the design are 400,000 and the Quarry generated traffic equals 48,000 ESAL's. Therefore, the Quarry's share of the ESAL's would be 12 percent if the total available design ESAL's is assumed."*

Review of Applicant's Proposal

With regards to pavement structure needs, the recommended 4.8" thick AC overlay referenced on page 18 of the August 31, 2007 TIA appears to be adequate and reasonable for the quarry generated traffic. The applicant originally proposed the 4.8" thick AC overlay to provide structural capacity enhancement due to the proposed traffic but later changed the recommendation stating that a 4.8" thick AC overlay is needed with or without the proposed quarry traffic.

We agreed that the applicant's recommended 4.8" thick overlay provides the structural strength required to support the quarry traffic. The County Materials Lab reviewed and approved the proposal. The memo

from the lab supervisor is attached as Exhibit A. But we disagree that Quaglia Road needs additional overlay to serve the existing traffic for the following reasons:

- The existing pavement type, "Surface Treatment", is the common pavement type for roads such as Quaglia that serve local traffic with few heavy vehicles. Such surface treated pavements do not enhance the structural capacity of the roadway. The road was not built to take heavily loaded trucks, even though occasional truck traffic occurs during periodic logging operations. The existing maintenance program adequately, if minimally, serves existing traffic and has for the past 30 years. (See Exhibit B for maintenance history).
- The pavement management program identifies no immediate need for a treatment based on its high Pavement Condition Index (PCI) rating of B1. PCI reflects visual qualities, such as cracking, rutting, or deformations of a roadway based on visual inspection, but does not measure the structural strength of the pavement. The consistently high PCI ratings over past inspection cycles is evidence that the roadway does not have significant heavy truck traffic.
- As stated previously, the existing pavement structure consists of an average 2.9" of Asphalt Concrete (AC) and 2" of good base rock, sufficient to support current levels of traffic on the road. The County has maintained the road by applying a thin blade patch (chip seal) in 1981, 2000, and 2003 as set forth in Exhibit B.

There is no plan on the part of the county to provide an overlay for the existing, primarily residential traffic.

Lane County Public Works Department is unlikely to prioritize improvements to the road due to its low functional classification as a Local Road, budget constraints, and other, higher priority maintenance needs. The possibility of an overlay project for Quaglia Road is remote. The applicant's proposal to contribute to future improvements is therefore impractical insofar as they would not likely occur prior to proposed quarry development. The county is more likely to continue its program of surface treatment, and this is unlikely to be sufficient to support quarry operations.

With additional quarry traffic, cracking is expected to occur at significantly rapid pace, requiring more frequent pavement preservations. Lane County's Soils Lab engineer concurs with this conclusion.

In summary, since the applicant's proposal was initiated there has been a good deal of discussion between the applicant's representatives and county staff regarding the best approach to addressing traffic impacts. Initially the applicant proposed road improvements to serve the development, that later were asserted to be needed whether or not the quarry was in operation. The relative impacts were also revised to include an assertion that forest logging truck traffic must be included in evaluating the proportion of truck traffic that uses Quaglia Road; however, the applicant was unable to provide an estimate of daily forest logging truck traffic.

The most recent proposal is that Lane County will reconstruct the road and the applicant will contribute a proportional share. There has been no agreement on the proportion that is appropriate. The county

maintains the road in its present condition through routine maintenance and repair, and has served existing traffic and development in this manner for 30 years. The county has no plans to upgrade the road so the proposal to contribute to a road upgrade is impractical. Therefore, county staff is recommending minimum improvements that would be necessary to serve the proposed development.

Recommendation

The road is currently 16-18 feet wide. Given there will be 16 truck trips per day the applicant should be required, at minimum, to provide turnouts in order to provide for safe truck vehicular passage. Lane Code 15.706 specifies minimum turnout standards that were used as the basis of this recommendation.

With regard to pavement structure, it is reasonable to require the applicant to apply an overlay adequate to serve the quarry traffic in order to maintain the road in its present condition. The applicant agrees that 4.8 inches of AC would be sufficient to accommodate future traffic, including that generated by the proposed quarry. The County is maintaining the road now, and serving the existing traffic adequately without the need for an overlay.

***** (end of Transportation Planning response) *****

Based on the referral above, the Planning Director finds that evidence exists in the record showing that Quaglia Road, as currently constructed, is inadequate for additional heavy truck traffic. Additional road structure is required to maintain the road surface for additional truck traffic. Lane Code 15.707(6) sets forth *minimum* requirements for pavement structure of local roads having an ADT (Average Daily Trips) count of less than 400. That standard is 15" of base and 2" of Asphaltic Concrete (AC). However, the Director finds it unreasonably burdensome to require the Applicant to rebuild Quaglia Road to that standard. However, some level of additional structural improvement is necessary to offset the impact of the heavy truck traffic from the quarry. The Director concludes that an additional 2" asphaltic concrete overlay to Quaglia Road is a reasonable estimation of the needed additional road structure, and is, therefore, imposed as a condition of approval. This requirement is set forth in the condition number 1 in Attachment "A".

Transportation staff is also aware of the subsequent traffic related exhibits filed by the Applicant. All parties were given the opportunity to comment on new evidence submitted into the record.

The Applicant has reminded staff that any conditions of approval that constitute exactions such as above require a *Dolan* analysis be performed as required by that case². Applicant-specific development conditions requiring an applicant to conduct off-site improvements may constitute exactions triggering the need for a rough proportionality analysis under *Dolan*. See *Clark v. City of Albany*, 137 Or App 904 P2d 185, *aff'd* 322 Or

² See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994).

644 912 P2d 375 (1995); and *J. C. Reeves Corp. v. Clackamas County*, 131 Or App 615; 887 P2d 360 (1994). Given the comments above, this task is relatively straightforward.

The *Dolan* analysis is two fold. First, the exactions (conditions) imposed must have a nexus to the approval standards. Second, the exactions must be roughly proportional to the impacts from the proposed development.

Regarding the first test, LC 16.257(4)(f) requires that the proposal be evaluated in terms of anticipated traffic generation, and road improvements needed to promote traffic safety and to reduce congestion. It also requires that needed improvements be performed according to the requirements of LC 15.

Per the referral above, it is noted that Quaglia Road is currently adequate for the traffic it serves, which includes few heavy vehicles. The current road was not constructed for heavy vehicles of the type and the level of use to be employed for the quarry operation. The fact that the existing road is adequate for historic traffic loads is based on the Pavement Condition Index (PCI) ratings that have been performed by Transportation Planning for the last 30 years. Those ratings show no substantial historic deterioration as would be expected with the addition of the traffic from the proposed development (16 heavy truck trips daily, 10 cubic yard capacity, plus 4 additional trips by light employee vehicles, 250 days annual). The current condition of the road is documented. The historic pavement condition record indicates the roadway can be maintained to existing condition with minimal maintenance to serve the existing lightweight low volume traffic. This will not be the case when heavy vehicles use the road on daily basis. As county road engineering staff have concluded, the traffic generated by the proposed development will seriously degrade Quaglia Road unless improvements are made. Since the applicant proposes to use the substandard Quaglia Road for site access and hauling its products to market, the direct nexus between this development and improvement requirements set forth in Transportation Planning comments is established. The additional traffic generated by the proposal will require improvements to Quaglia Road as per the requirements of LC 15. The first portion of the *Dolan* test has been met.

Regarding the *rough proportionality* portion of the *Dolan* test, the improvements listed as conditions for roadbed structural strength improvements and turnouts is based on the weight, size, and frequency of the trucks to be used by the quarry, and their impact on the current road system. The minimum road improvement requirements are driven by LC 15 to address roadway safety and structural deficiencies. The General Purpose statement of Chapter 15 states that “[I]t is intended to establish *minimum* requirements for efficient, safe and attractive vehicular and pedestrian movement... and usable ingress and egress to properties, to protect the public investment in the County Road system and the capacity of existing transportation facilities...” In short, the additional, heavy traffic adds an estimated 35,200 new ESALs (Equivalent Single Axle Load) onto Quaglia Road. The ESAL estimate is based on the Oregon Department of Transportation Pavement Design Guide, ESAL Annual Conversion Factors table. A conversion factor of 110/per year for 16 three-axle truck traffic per day is considered to arrive at this proportional impact during the quarry’s

20-year assumed term of operation. Requiring the minimum 2" thick AC overlay as per LC15.707(6) table 13 and the minimum roadway safety improvements are roughly proportional to the impacts. The second portion of the *Dolan* test has been met.

With the recommended conditions of approval, the Director finds that the standard of LC 16.257(4)(f) has been met.

(g) That there is a safe and efficient circulation pattern within the boundaries of the development. Consideration shall include the layout of the site with respect to the location and dimensions of vehicular, bicycle, and pedestrian entrances, exists, drives, walkways, buildings and other related facilities.

Planning Director response and finding of fact:

Refer to the submitted site plan, attachment 3. Trucks entering the subject property will utilize the loop layout to avoid the need to "back out" in order to exit the property after they are loaded (outside of the easement route). The trucks will enter, load, exit and weigh at the site in a forward motion. The interior looped road system and scales are accommodated within the subject property.

This standard has been met.

(h) That there are adequate off street parking and loading/unloading facilities provided in a safe, efficient and pleasant manner. Consideration shall include the layout of the parking and loading/unloading facilities and their surfacing, lighting and landscaping.

Planning Director response and finding of fact:

See comments above, incorporated herein. The operation will be conducted in daylight hours, no lighting is necessary. Security lighting is permissible, provided it be hooded and directed away from adjoining properties. On site parking for five trucks is provided.

This standard has been met.

(i) That all signs and illumination are in scale and harmonious with the site and area.

Planning Director response and finding of fact:

A maximum of two signs are proposed. These signs will be less than 200 square feet in surface area, with no flashing illumination. The signs will not be capable of movement. This requirement is reflected in conditions of approval #13 and #14.

This standard has been met.

(j) That adequate methods are provided to ensure continued maintenance and normal replacement of facilities, landscaping and other improvements, etc. that are required by Site Review Permit.

Planning Director response and finding of fact:

The easement road used for access (recorder's reception No. 2002-100045 and No. 2003-033050) specifies continuing maintenance obligations.

The settling pond shown on the site plan will be maintained in accordance with DOGAMI and DEQ requirements.

The site will be reclaimed as required by DOGAMI regulations. Again, condition of approval #17 advises the Applicant of the need to comply with DOGAMI regulations.

This standard has been met.

(5) Conditions. Reasonable conditions may be established in connection with a Site Review Permit as deemed necessary to secure the purpose and requirements of this section. Guarantees, evidence, dedications or bonding may be required to ensure that such conditions will be met.

Planning Director response and finding of fact:

The conditions of approval, as allowed under this standard, are found in Attachment A. The Director believes the conditions to be reasonable per the *Dolan* test, and in response to the Site Review standards. If the conditions are not met, the proposal will not be allowed to operate.

This standard has been met.

B. Conclusion

The proposal, together with the conditions in attachment A, satisfies the standards of LC 16.257 (4) & (5).

C. Attachments*

- A. Conditions of Approval
- B. Vicinity Map
- C. Approved Site Plan

* The complete record is available for review at the Land Management Division office, and copies can be provided at a reasonable cost.

ATTACHMENT "A"

CONDITIONS OF APPROVAL

PA 07-5298

(Overholser Quarry)

Prior to the start of the quarry operation, the Applicant must complete conditions #1-#6. Per LC 14.700(4), these conditions shall be completed within two years of the date of this decision becoming final, and when all appeal remedies are exhausted, whichever occurs later. Extension(s) can be requested per LC 14.700(2).

1. The Applicant shall improve the structural capacity of Quaglia Road by applying adequate asphalt concrete overlay required to handle the estimated 35,200 quarry-generated Equivalent Single Axle Load (ESAL). A minimum 2" thick asphalt concrete overlay is required from the private access easement to the intersection of Mosby Creek Road. Alternatively, the Applicant may propose an alternative structural improvement design that adequately serves the ESAL demand by the quarry. The Applicant may pursue such alternative structural design in satisfaction of this condition only if approved in writing by the County.

2. The Applicant shall improve the intersection of the private (easement) driveway and Quaglia Road to provide safe departure sight triangle. The Applicant must keep the sight triangles at the intersection of Quaglia Road and the private driveway free of visual obstructions 3.5 feet above the ground for a minimum distance of 425 feet either side of the intersection. Applicant must obtain written permission of the property owner for any vegetative clearing on neighboring property.

3. The Applicant shall improve the roadway safety of Quaglia Road by providing the following geometric improvements:

- i.) Widened the road surface at select locations to provide for truck turnouts to a minimum of 20 feet, for a distance of 30 feet with 15 feet taper length at both ends (see LC15.710 diagram 15 for detail).
- ii) Space road turnouts no more than 400 feet apart.
- iii) For other areas, where turnouts are not provided, provide a minimum two-foot wide clear zone from the edge of the travel lane on both sides. The slope of such clear zones must not exceed a ratio of 1 Vertical to 3 Horizontal.

4. The Applicant is responsible for the cost of any removal of appurtenances within the right-of way necessary for improvements specified in (1), (2), and (3).

5. The Applicant shall submit Oregon registered-engineer prepared documentation certifying that conditions (1), (2) and (3) have been duly fulfilled.

6. The Applicant shall obtain a facility permit to implement road improvements specified above and shall meet the requirements specified in the facility permit.
7. Applicant must restrict truck size shall to 19.4 foot long wheel base, 8 foot wide, and 30.2 foot overall length.
8. Applicant must ensure that daily truck traffic to and from the site does not exceed the proposed 16 trips in any day.
9. Applicant must ensure that the travel speed of the quarry trucks does not exceed 20 mph along the entire route, from the rock pit to the intersection of Quaglia Road and Mosby Creek Road (as proposed by the Applicant).
10. The Applicant shall provide a minimum 5-day advance mailed notice for blasting activity to all landowners taking access off Quaglia Road and Pitcher Lane. In addition, the Applicant must post sign notification of the blasting 5 days in advance along Quaglia Road, Pitcher Lane, and the private easement which serves the quarry. Applicant must keep blasting records as required by LC 16.216(7)(b).
11. No quarry related ingress/egress is allowed through Pitcher Lane (except for sign posting per above).
12. Hours of operation are limited to 6:30 AM – 4:30 PM for May through October, and 6:30 AM - 4:00 PM for November through April. No quarry operations are permitted on Sundays, nor on the following holidays: New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. Rock crushing is permitted on an “as needed” basis, but forbidden on Saturdays. (in addition to the preceding time/date restrictions).
13. Identification signs (two) are limited per LC 16.216(4)(m). Small, nonilluminated signs posted in the immediate quarry area for purposes of notice of no trespass and dangerous conditions, are exempt from LC 16.216(4)(m).
14. The above condition notwithstanding, no (additional) lighting is permitted, except for security lights, which shall be hooded and directed away from adjoining properties.

The following conditions are advisory to the Applicant:

15. For informational purposes there is a bridge crossing Carolina Creek at mile point 0.08. Applicant should be aware that the bridge may be closed periodically for inspection, maintenance, repair, or bridge failure, and Lane County assumes no liability for any disruption to the quarry operation as a result. Bridge inspection, maintenance, and repair are performed by Lane County according to county discretionary decision making and its allocation of limited financial and workforce resources.

16. Obtain necessary permit approvals from the Lane Regional Air Protection Agency (LARAPA). In the event that LARAPA conditions conflict with the conditions of PA 07-5298, the more restrictive conditions apply.

17. Obtain the required permits for conducting the operation from the Department of Geology and Mineral Industries (DOGAMI). In the event that DOGAMI permit conditions conflict with the conditions of PA 07-5298, the more restrictive conditions apply.



LAND MANAGEMENT DIVISION

APPEAL OF A DIRECTOR'S DECISION ON THE RECORD

PUBLIC WORKS DEPARTMENT 125 E 8th AVENUE, EUGENE OR 97401 Planning: 682-380

For Office Use Only: FILE # PA075298A CODE: HORECORD FEE: \$2,277.20

PXS

Appellant: Donald J. Overholser and Rodney Mathews

Mailing address: 30397 Cottage Grove-Lorane Hwy, Cottage Grove, OR 97424

Phone: 541-942-7677 Email: mtbreetimber@msn.com

Signature: [Handwritten signatures of Donald J. Overholser and Rodney Mathews]

Appellant's Representative: Joseph J. Leahy

Mailing address: 188 West B Street, Building N, Springfield, OR 97477

Phone: 541-746-9621 Email: jjl@emeraldclaw.com

Signature:

Required submittals. Your appeal application will be rejected if it does not contain all the required information.

1. A copy of the decision being appealed, with the department file number: PA 07-5298

2. The \$2,277.20 appeal fee, payable to Lane County.

3. The appeal deadline, as stated in the Director's Decision: March 30, 2010

4. Check one of the items below to identify your party status with the right to appeal the Director's decision:

I am the owner or contract purchaser of the subject property;

XX I am the applicant for the subject application;

Prior to the decision by the Director, I submitted written testimony into the record

I am not one of the persons mentioned above, but wish to appeal the Director's decision for the reasons explained in my letter.

5. A letter that addresses each of the following three standards:

a. The reason(s) why the Director's decision was made in error or why the Director should reconsider the decision;

b. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:

- The Director exceeded his or her authority;
The Director failed to follow the procedure applicable to the matter;
The Director rendered a decision that is unconstitutional;
The Director misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.

c. The Director should reconsider the decision to allow the submittal for additional evidence not in the record that addresses compliance with the applicable standards or criteria.

6. Any additional information in sup

BCC EXHIBIT #4-789

FILE # PA
EXHIBIT # 162A-7P



188 West B Street, Bldg. N
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(541) 746-9621
FAX (541) 746-4109

Joseph J. Leahy
Bill Van Vactor
Matthew J. Cox
Mary Bridget Smith
Kay Hyde-Patton

March 30, 2010

Kent Howe, Planning Director
Lane County Land Management
125 East 8th Avenue
Eugene, OR 97401

Re: Appeal (Including Request for Reconsideration) of Director's Decision PA 07-5298

Dear Mr. Howe:

The Applicant initially requests that you reconsider your decision. In the event reconsideration occurs but the result does not modify the conditions, then the reasons stated for reconsideration also serve as reasons for the appeal to Lane County Hearing's Official. At this point in time, we are requesting that reconsideration/appeal be based upon the record reserving the right to request the record be reopened for certain limited purposes if the need should so arise. This application has a lengthy history with different documents coming in over about a two (2) year period. For ease of understanding, Applicant believes the best approach would be for the County to assemble the record. Then, all reference to what is or is not in the record can be found on a single reference point. This should greatly aid the parties and the decision maker.

INTRODUCTION:

It is critical to understand the context of this case. The subject property is planned and zoned for quarry/mining operations. This is not a decision as to whether or not to allow sand and gravel extraction, it is instead solely a site review application seeking to determine the appropriate development of the subject property. It is an inquiry as to how the quarry is to operate, not whether it should operate. Accordingly, the Applicant agrees with the County's decision to approve the application. However, the Applicant believes serious errors were made in setting the conditions of approval. We will address the errors in the conditions in the same sequence used by the County.

- 1. The Application shall improve the structural capacity of Quaglia Road by applying adequate asphalt concrete overlay required to handle the estimated 35,200 quarry-generated Equivalent Single Axle Load (ESAL). A minimum 2" thick asphalt concrete overlay is required from the private access easement to the intersection of Mosby Creek Road. Alternatively, the Applicant may**

Kent Howe, Planning Director

March 30, 2010

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RE: Appeal of Director's Decision PA 07-5298

propose an alternative structural improvement design that adequately serves the ESAL demand by the quarry. The Applicant may pursue such alternative structural design in satisfaction of this condition only if approved in writing by the County.

ARGUMENT:

Site Review Condition 16.257(7)(4)(f) provides:

(f) That, based on anticipated traffic generation, adequate additional right-of-way, road improvements, and on-site vehicular, bicycle and pedestrian improvements connecting directly to off-site roads, paths and sidewalks must be provided by the development in order to promote traffic safety and reduce traffic congestion.

Consideration shall be given to the need and feasibility of widening and improving abutting streets to specifications of LC Chapter 15, "Roads," and also to the necessity for such additional improvements as lighting, sidewalks, bicycle lane and path connections, and turn and deceleration/acceleration lanes. Improvements shall be consistent with access management, spacing standards, and other requirements of LC Chapter 15.

Note that this criterion of the Site Review procedure addresses traffic safety and reducing congestion. The requirement to improve capacity is not specified.

In addition, significant error occurred when the County drafted the condition and did not set forth the essential nexus of the condition to the proposal nor provide a particularized analysis demonstrating that the required off-site improvements to Quaglia Road's structural capacities are proportional to the impact of the development. *Nollan v. California Coastal Commission*, 483 US 825 (1987) and *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

Without agreeing that any structural capacity improvements are appropriate, should the County remain insistent on this condition, we would point out that the substantial evidence in the record as a whole demonstrates that the Applicant's proportionate share is between 8.33 and 12% of the capacity improvements, not 100%.

Finally, we would note that if Lane County is going to require capacity improvements, it should look at the entire impact of the proposal on the county road system. As noted, when the property was planned and zoned for quarry/mining, Ordinance 951 Finding of Fact J,

Kent Howe, Planning Director

March 30, 2010

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"The quarry's proximity to market will result in overall reduction in the use of the general road system due to a shorter haul distance."

In sum, Applicant believes Condition 1 is in error as a violation of the Applicant's constitutional rights.

- 2. The Applicant shall improve the intersection of the private (easement) driveway and Quaglia Road to provide safe departure sight triangle. The Applicant must keep the sight triangles at the intersection of Quaglia Road and the private driveway free of visual obstructions 3.5 feet above the ground for a minimum distance of 425 feet either side of the intersection. Applicant must obtain written permission of the property owner for any vegetative clearing on neighboring property.**

ARGUMENT:

The Applicant agrees that this condition focuses on safety and it is appropriate for Lane County to impose these types of conditions in proportion to the impact of the development. In this particular case, after the record is assembled by the County, the Applicant is prepared to point out to the Planning Director or Hearing's Official where to find substantial evidence in the record which supports the Applicant assisting in certain improvements including safe departure triangles and removing visual obstructions located in the right of way. Applicant does not believe it is reasonable for the Applicant to be responsible to obtain landowner consent for removal of the visual obstructions. Applicant does not object to removing its proportional share of the visual obstructions within the County road right of way but does object to being required to remove them when they are beyond the County's right of way. It is important to point out that this is a site review for a use already approved by Lane County. What would happen if the neighboring landowner does not grant consent? Requiring the Applicant to obtain nearby landowners consent for certain operations is in essence transferring approval authority from the County to private property owners. Obtaining consent may not be possible. In that circumstance, this condition is unreasonable.

- 3. The Applicant shall improve the roadway safety of Quaglia Road by providing the following geometric improvements:**
 - i) Widened the road surface at select locations to provide for truck turnouts to a minimum of 20 feet, for a distance of 30 feet with 15 feet taper length at both ends (see LC 15.710 diagram 15 for detail).**
 - ii) Space road turnouts no more than 400 feet apart.**

Kent Howe, Planning Director

March 30, 2010

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iii) For other areas, where turnouts are not provided, provide a minimum two-foot wide clear zone from the edge of the travel lane on both sides. The slope of such clear zones must not exceed a ratio of 1 Vertical to 3 Horizontal.

ARGUMENT:

Again, this is an appropriate subject for conditions. However, the substantial evidence in the whole record supports making the improvements in proportion to the impact of the development and we will point these out when the County has assembled the record. We would point out that the road is used by school buses, log trucks and other large vehicles, and is owned and maintained by Lane County. Why is making all these improvements solely the responsibility of the Applicant? The Applicant is willing to perform its share of this work based upon a particularized analysis proportional to the development's impact. As explained under condition 2, to the extent the condition requires work outside of the right of way, it is unreasonable and error to require Applicant to obtain the landowners consent as described above.

Substantial evidence in the record will demonstrate that some turnouts are appropriate. However, spacing every 400 feet is excessive and not proportional. Likewise, the minimum of 2' wide clear zone on both lanes is not in proportional to the development. The turnouts will handle the occasional conflict. Likewise, the slope of the clear zone is not appropriate if it extends outside of the County right of way.

- 4. The Applicant is responsible for the cost of any removal of appurtenances within the right-of way necessary for improvements specified in (1), 2), and (3).**

ARGUMENT:

The Applicant is not sure of the scope and breadth of this condition. Assuming Lane County will be the party actually removing the appurtenances, the Applicant will be prepared to cover the cost proportional to the development. It is improper to impose a condition without specification of which appurtenances. After that is provided, the County must explain the connection (nexus) between those tasks and the development. Finally, the County must provide a particularized analysis which examines the totality of road usage and then apportions the cost to be borne by the Applicant.

Kent Howe, Planning Director

March 30, 2010

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RE: Appeal of Director's Decision PA 07-5298

5. The Applicant shall submit Oregon registered-engineer prepared documentation certifying that conditions (1), (2) and (3) have been duly fulfilled.

Assuming that through the appeal process the conditions of approval are modified to meet the substantial evidence of the whole record standard and current constitutional limitations on the County's authority (and do not reappear in the requirements for a facility permit), the Applicant does not object to this condition.

6. The Applicant shall obtain a facility permit to implement road improvements specified above and shall meet the requirements specified in the facility permit.

Assuming that through the appeal process the conditions of approval are modified to meet the substantial evidence of the whole record standard and current constitutional limitations on the County's authority (and do not reappear in the requirements for a facility permit), the Applicant does not object to this condition.

7. Applicant must restrict truck size to 19.4 foot long wheel base, 8 foot wide, and 30.2 foot overall length.

Is this condition, applicable to all users? Does it apply to Weyerhaeuser when it hauls timber out in log trucks? Does it apply to the Bureau of Land Management when they harvest timber? The local school district's school buses? Absent the particularized analysis limiting the scope in proportion to its impact, the condition is unfair to Applicant and in error.

In an effort to minimize the impact to the neighborhood, Applicant would like to explore with the Planning Director upon reconsideration or the Hearing's Official upon appeal, the possibility of amending this condition to allow tandem trailers and thereby significantly reduce the number of daily trips.

8. Applicant must ensure that daily truck traffic to and from the site does not exceed the proposed 16 trips in any day.

The substantial evidence of the whole record supports the limitation be written as an average per day over a calendar year. Best quarry management and business practice indicate most loads are hauled during the summer months. The effect of this condition is to greatly increase the number of haul days. It is error to impose this limitation

Kent Howe, Planning Director

March 30, 2010

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RE: Appeal of Director's Decision PA 07-5298

absent a demonstration of the rational nexus to the development and particularized analysis of the proportional impact arising because of the development. It is also in error as substantial evidence in the whole record supports using the 16 trips as an average; not an absolute daily limit.

9. **Applicant must ensure that the travel speed of the quarry trucks does not exceed 20 mph along the entire route, from the rock pit to the intersection of Quaglia Road and Mosby Creek road (as proposed by the Applicant).**

Substantial evidence in the whole record supports the designation of Quaglia Road at 25 mph, not 20 mph. The Applicant would point out that speed limits are set by the State, ORS 810.180. There is no basis to single out the Applicant and impose a condition contrary to state law.

Respectfully submitted,

LEAHY, VAN VACTOR & COX, LLP

JOSEPH J LEAHY

Joseph J. Leahy

JJL:rdg:ljc

cc: Clients

N:\OVERHOLS.DON\Current Corresp 2010\Ltr to Kent Howe.wpd



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Springfield, OR 97477-4500

(541) 746-9621
FAX (541) 746-4109

Joseph J. Leahy
Bill Van Vactor
Matthew J. Cox
Mary Bridget Smith
Kay Hyde-Patton

March 24, 2011

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

RE: PA.07-5298

Dear Jerry:

In the application summary, the Hearings Official correctly ruled that the appellants were subject to the code provisions that existed at that time. Those rules required them to appeal the Planning Director's decision if they disagreed with its approval or conditions. The Hearings Officer ruled that the appellants, after having participated fully in an evidentiary hearing before the Planning Director, failed to appeal that decision and were not entitled to a second evidentiary hearing. We therefore do not believe they have authority to appeal the Hearings Officer's decision. However, we recognize that option (ii) under LC 14.515(3)(f) is designed to allow the parties to go directly to LUBA. Accordingly, applicant enters this appearance for the sole purpose of preserving applicant's position on all disputed issues including that the Families for a Quarry Free Neighborhood as an Association and as individual members of the organization failed to appeal the Planning Director's Decision, and having failed to exhaust administrative remedies have no further right of appeal. Applicant believes that the Hearings Official comprehensively and correctly interpreted the record in this proceeding and there is no need to further delay a land use process which commenced in February 2007.

Having preserved the issues, applicant is ready to defend their position at the next level if required to do so.

Sincerely,

LEAHY, VAN VACTOR & COX, LLP

Bill Van Vactor
BVV:rdg
cc: client
Dan Stotter

BCC EXHIBIT # 5-10 pp.

FILE #	PA
EXHIBIT #	267

KENDALL Jerry

From: Bill Van Vactor [bvvd@emeraldllaw.com]
Sent: Thursday, April 07, 2011 1:27 PM
To: KENDALL Jerry
Cc: Joe Leahy
Subject: PA 07-5298
Attachments: SKMBT_C652D11040712200.pdf

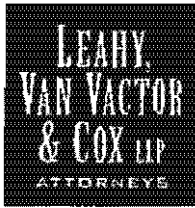
Jerry,

Attached for filing is Applicant Overholser's response to the Hearings Officials letter of March 25, 2011. We will mail paper copies today. Thank you.

Bill

04/08/2011

FILE #	PA
EXHIBIT #	269-A



188 West B Street, Bldg. N
Springfield, OR 97477-4500

(541) 746-9621
FAX (541) 746-4109

Joseph J. Leahy
Bill Van Vactor
Matthew J. Cox
Mary Bridget Smith
Kay Hyde-Patton

April 7, 2011

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

Re: Option 2 Appeal of Hearings Official Decision
PA 07-5298

Dear Chair Stewart and Members of the Board:

Attached please find Applicant Overholser's response to the Hearings Official's March 25, 2011, letter. As you consider this appeal, please keep in mind:

1. This Application has been pending before the County for approximately 4 years. It has been the subject of extensive public comment, public hearings, staff scrutiny, and Hearings Official review. The Hearings Official provided approval only after imposing 10 conditions.
2. The Hearings Official ruled that the Families for a Quarry Free Neighborhood were not parties to the proceeding before the Hearings Official as they did not appeal the Planning Director's approval.
3. The appeal they did file with the Board is under Option 2, which fulfills the exhaustion requirement and allows them a direct appeal to LUBA (assuming they meet all applicable criteria, which Applicant will dispute). They were able to do this for the fee of \$250.00.
4. The normal appeal criterion under LC 14.515(3)(d) do not apply as this is solely a step to exhaust remedies under LC 14.515(4)(f)(ii).
5. The Applicant requests that if you elect to hear the matter in order to address the Hearings Official's interpretation, you do so on the record without the participation by Applicants or Appellants. Otherwise, the entire purpose of Option 2, fulfillment of exhaustion requirement is lost and you will be required to conduct an expensive proceeding without being able to recover the costs by an

FILE #	PA
FILE #	269-B-5p

Lane County Board of Commissioners
Faye Stewart, Chair
April 7, 2011
Page 2

appropriate fee. If you concur with the Hearings Official, we ask that you simply affirm his interpretation and not reopen the proceeding.

Sincerely,

LEAHY, VAN VACTOR & COX, LLP



Bill Van Vactor
BVV:ljc
Enc.

cc: Clients
Daniel Stotter, Attorney

N:\OVERHOLS.DON\Current Corresp 2011\Ltr to Board of Commissioners L.wpd

BEFORE THE LANE COUNTY BOARD OF COMMISSIONERS

**APPLICANT'S RESPONSE TO HEARINGS OFFICIAL
MEMO OF MARCH 25, 2011**

April 7, 2011

File No. PA 07-5298

A. Introduction - Procedural Background

The site review proposal was originally submitted on February 23, 2007. Because County Planning received letters in opposition to the request, a full and complete Planning Director evidentiary hearing was held on September 24, 2007. The record was closed on October 31, 2008. The Planning Director approved the site review permit, with conditions, on March 18, 2010. A timely appeal by the Appellants (Applicants Don Overholser and Rodney Mathews) to the Director's decision (seeking only to modify the conditions) was filed and the Director affirmed his decision on April 2, 2010. A hearing before the Lane County Hearings Official was subsequently scheduled.

B. The Families for a Quarry Free Neighborhood did not file an appeal

However, they did seek to appear before the Lane County Hearings Official and sought a second "de novo" hearing. Applicants, citing the Lane Code chapter provisions in effect at the time of the application, filed a motion to: 1) limit the appeal to those who had appealed, 2) limit the appeal to the issues raised in the appeal, and 3) continue with the "on the record" appeal process rather than a second "de novo" hearing. In response to this motion, the Hearings Official ruled:

"The hearing before the Lane County Hearings Official was held on May 6, 2010. This hearing was scheduled to be "on the record" and restricted to "parties" to the appeal. Lane Code 14.500(1), as it existed at the time of the submission of the application, the subsequent determination of completeness and the Planning Director's evidentiary hearing, restricted the testimony to parties to an appeal of Planning Director decisions that were based upon an evidentiary hearing. However, changes to Chapter 14 of the Lane Code, which became effective on December 4, 2009, eliminated the option for evidentiary hearings before the Planning Director and required that all hearings before the Hearings Official be "de novo". Opponents of the site review permit Appellants have argued that they therefore had a right to testify at the Hearings Official's May 6 hearing.

At the May 6 hearing, I ruled that the opponents would not be allowed to testify because an evidentiary hearing had already been held, essentially locking in the Code provisions that restricted appellate rights at the County level. Not allowing the opponents to testify at an "on the record" hearing would not prejudice the

opponents, as their testimony from the prior proceeding is already in the record and would be considered by the Hearings Official. The corollary, however, in allowing the opponents to testify at a "de novo" hearing would prejudice the Appellants as the decision-making process has already taken more than three years from the time the application was deemed complete, a timeframe that is contrary to the provisions of ORS 215.427(5) that limit the County's ability to extend the local decision-making process to a maximum of 215 days beyond the initial 150-day deadline." *Hearings Official decision affirming the Planning Director's approval, with conditions, of March 8, 2011.*

On March 19, 2011, the Families for a Quarry Free Neighborhood appealed the Hearings Official ruling. Under the new Lane Code Section 14.515(4)(f)(ii) they could do so by paying \$250.00. In which case their action constitutes exhaustion of the administrative remedies requirements for purposes of further appeal.

On March 24, 2011, Applicant/Appellant Overholser informed Lane County that in view of the Appellant selecting Option 2, Applicant wished to appear solely to incorporate and preserve all their prior arguments. We further informed the County that if the Opponents continued their appeal that Applicant was prepared to defend the Hearings Official's decision.

Thereafter, on March 25, 2011, Gary Darnielle, Lane County Hearings Official, informed the Planning Director the following:

"On March 8, 2011, I issued a decision affirming, with modification, the Planning Director's conditional approval of the Overholser request for a site review permit for a quarry operation on tax lots 600 and 606, Assessor's Map 21-03-02. On March 19, 2011, opponents of the application appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

The March 8, 2011 Hearings Official decision contained a ruling based upon an interpretation, regarding the applicability of the recently amended Lane Code Chapter 14, that denied the appellants party status. I strongly recommended that the Board of Commissioners review this ruling. If the Board affirms the Hearings Official's interpretation then that interpretation should receive deference before the Oregon Land Use Board of Appeals. If the Board does not agree with the interpretation then it could remand the matter for a de novo hearing before the Hearings Official.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my March 8, 2011 decision without further consideration. Please advise interested parties of this decision."

The Hearings Official is correct. The Oregon Supreme Court ruled as follows:

"[I]n reviewing a [local government's] land use decision, [the Land Use Board of Appeals (LUBA)] is to affirm the [local government's] interpretation of its own ordinance [that is part of an acknowledged comprehensive plan,] unless LUBA determines that the [local government's] interpretation is inconsistent with express language of the ordinance or [its apparent purpose or policy. LUBA lacks authority to substitute its own interpretation of the ordinance unless the [local government's] interpretation was inconsistent with that ordinance, including its context." *Clark v. Jackson County*, 313 Or. 508, 515, 836 P.2d 710 (1992).

Thereafter, the Court of Appeals then applied this deference standard to a City of Portland Hearings Official decision and the Oregon Supreme Court reversed saying the deference given to the interpretation of a local ordinance only applied when the interpretation was provided by the governing body of that local government. *Gage v. City of Portland*, 319 Or. 308 (1994).

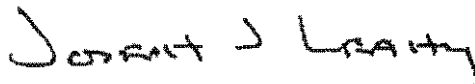
In this case, the Hearings Official's interpretation of the Lane Code is correct and Applicants request Lane County Board of County Commissioners affirm his interpretation by keeping the proceeding on that record without the participation of the Applicant or Appellant.

Respectfully submitted,

LEAHY, VAN VACTOR AND COX, LLP



William Van Vactor



Joseph J. Leahy

KENDALL Jerry

From: Bill Van Vactor [bvva@emeraldslaw.com]
Sent: Friday, April 08, 2011 12:54 PM
To: KENDALL Jerry
Cc: dstotter@qwestoffice.net; Joe Leahy
Subject: PA 07-5298

Mr. Kendall,

Due to the shortness of time you have to prepare the agenda packet I will respond to Mr. Stotter's email of late yesterday via email and with a copy to Mr. Stotter.

Applicant does not believe the appellants have standing to bring this appeal as they did not appeal the Planning Directors approval. We are prepared to deal with that issue at the next level. Initially they were entitled to and did receive a full and complete de novo hearing. Proceedings since the Planning Directors decision have been "on the record". In view of the fact the appellants selected option two and only paid \$250.00, there is no basis to now allow them to offer "factual matters". Applicant did not offer any new factual information but appeared initially solely to preserve its legal position and thereafter solely to respond to the legal issue raised in the Hearings Officials March 25, 2011 letter.

Applicant objects to any submittal by the appellants. When they appealed, they selected option 2. Under LC 14.515(3) (f) that section reads:

(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.

If you read that section in conjunction with the fee structure what you see is that the appeal fee for option one is \$3,812.00. If an appellant selects that option they have the right to assert the reasons why the Board should hear the appeal under LC 14.600(3). Then they are entitled to a partial refund if the Hearings Official declines to reconsider or Board elects to not hear the appeal. They receive no refund if the Board elects to hear the appeal. Under option 2 there is no basis for the appellant to be entitled to offer anything let alone whether the Board should elect to hear this matter. Under the option they have voluntarily selected they have fully and completely waived their right to ask the Board to conduct a hearing. Thank you.

Bill Van Vactor

FILE #	PA
EXHIBIT #	271

04/08/2011

KENDALL Jerry

From: Daniel Stotter [dstotter@qwestoffice.net]
Sent: Friday, April 08, 2011 2:25 PM
To: KENDALL Jerry
Cc: Joe Leahy; Bill Van Vactor; Daniel Stotter
Subject: Re: PA 07-5298

Dear Mr. Kendall:

Please include this email in the Board of Commissioner's packet for the above referenced matter.

Contrary to the arguments submitted by the attorney for the the Applicants, the Appellants clearly have standing for this appeal to the Board of Commissioners, as a matter of law, pursuant to ORS 215.422, which expressly requires review by the governing body for any party that is aggrieved by a decision of a Hearings Official. See e.g. Lamb v. Lane County, 70 Or App 364 (1984). That statute provides: "A party aggrieved by the action of a hearings officer or other decision-making authority may appeal the action to the planning commission or county governing body, or both, however the governing body prescribes" See ORS 215.422; see also LC 14.500 (2).

The Appellants, neighbors of the proposed quarry operation, are aggrieved parties who fully participated in the Planning Director proceedings in this matter, and did not appeal the Planning Director's March 18, 2010 decision to the Hearings Official based upon the fact that the initial Planning Director decision expressly approved this quarry mining site review application subject to 9 mandatory conditions of approval, designed to address traffic safety and to otherwise limit other adverse impacts to the compatibility with the surrounding vicinity pursuant to the LC 16.257(4) approval criteria, which the Planning Director's decision expressly indicated could be met only with the inclusion of these 9 conditions.

The Applicant then appealed the Planning Director's decision on the grounds that it did not wish to comply with the above referenced conditions of approval to promote traffic safety and to address compatibility with the surrounding community in order to meet the approval criteria.

Appellants are aggrieved (and therefore have standing for this appeal) because the Hearings Official's subsequent decision of 3/21/11 significantly modified and removed the above referenced conditions of approval in the Initial Planning Director decision, without meeting (or even addressing) the traffic safety and compatibility criteria required for site review approval. In addition, the Hearings Official also held that the neighbors, who participated in the Planning Director proceedings, had no right to participate in the appeal proceedings to address the need (and legal reasons) for retaining these conditions of approval in order to promote traffic safety and compatibility with the surrounding community per the applicable approval criteria.

The Board of Commissioners currently has the option of either electing to set this matter for a hearing, or electing to affirm the Hearings Official's order pursuant to LC 14.600. The Hearings Official's decision of March 25, 2011 in this appeal expressly stated he "strongly recommended" that the Board of Commissioners elect to review the ruling in this appeal, and the Appellants fully concur with that recommendation.

In the present appeal proceedings, the applicant has recently submitted new materials to the Board of Commissioners prior to the Board's determination pursuant to LC 14.600 to review this matter. Clearly, these new materials must either be excluded, or in the alternative, the Appellants must be similarly allowed to respond to all of the issues which are set forth in the Applicant's recent submissions. The county must provide equal opportunity for presenting materials to both the applicant and the appellant. The Applicant argues that they should be the only ones allowed to submit materials to the Board, but fail to present any legal authority for that position.

The Board Commissioners can affirm without review, or can elect to review this matter as has been suggested by the Hearings Official. However, if the Board elects to review, it must provide equal

FILE #	PA
EXHIBIT #	273-2p

04/08/2011

opportunities for all submissions, responses and testimony to all parties to this appeal.

Sincerely,

Daniel J. Stotter
Stotter & Associates LLC
408 SW Monroe Ste. L163
Corvallis, OR 97333
(541) 738-2601
dstotter@qwestoffice.net

KENDALL Jerry

From: DARNIELLE Gary L
Sent: Friday, April 08, 2011 12:55 PM
To: KENDALL Jerry
Subject: Re: clarification on Overholser

Jerry, I'm not sure a hearing is required as all the arguments are in the record but it is an option if they wish to hear from the parties. I really don't have a recommendation on this issue.

Sent from my iPhone

On Apr 8, 2011, at 12:16 PM, "KENDALL Jerry" <Jerry.KENDALL@co.lane.or.us> wrote:

> And is it also correct to assume that to resolve the party status issue, you favor that the Board conduct a limited hearing?

>
>
> 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

> -----Original Message-----
> From: DARNIELLE Gary L
> Sent: Friday, April 08, 2011 8:22 AM
> To: KENDALL Jerry
> Subject: RE: clarification on Overholser

> That is a correct interpretation.

> -----
> From: KENDALL Jerry
> Sent: Friday, April 08, 2011 7:59 AM
> To: DARNIELLE Gary L
> Subject: clarification on Overholser

> I interpret your letter of March 25 to recommend that the Board rule on the "party status" issue only, but, otherwise you are not recommending review by the Board of the other issues.

> Is that correct?

>
>
> 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

BCC EXHIBIT #6-1A.

FILE #	PA
EXHIBIT #	572

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Strikethrough indicates material being deleted

BOOK 273 PAGE 0067

LEGISLATIVE
FORMAT

14.010

Lane Code

14.015

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 ~~with or without~~ hearings 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 Lane County 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.

BCC EXHIBIT # 7-1988

- (2) A land use decision does not include a decision made by Lane County:
- (a) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgement;
 - (b) Which approves or denies a building permit issued under clear and objective land use standards;
 - (c) Which is a limited land use decision;
 - (d) 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;
 - (e) Which is an expedited land division as described in ORS 197.360; or
 - (f) 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. 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:

- (1) The approval or denial of a subdivision or partition.
- (2) 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.

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

14.050

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14.050

(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*)

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. When the Director determines that an application is not complete, the Director shall mail written notice to the applicant and disclose exactly what information, forms or fees are lacking.

273 0040

14.050

Lane Code

14.050

~~The application shall be deemed complete by the Director upon receipt of the missing information, forms or fees. If the applicant has submitted the required processing fee into the possession of the Director, but refuses to submit the missing information or forms, the application shall be deemed complete for review and action on the 31st day after the Director first received the application.~~

(c) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information 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.**

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

(de) 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 a-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:

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14.070

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(a) When an applicant waives or requests an extension of the required 120-day or 150-day period for final action. **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)*

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 conduct a hearing to review the application pursuant to LC 14.110 below, or 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.~~

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(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 ~~or to conduct an evidentiary hearing and to review the application 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 750-500 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*)

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 ~~or in electing for the Director to conduct an evidentiary hearing 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 Director or Hearings Official is to help the Director or Hearings Official resolve unique land use issues by providing~~ 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 ~~conduct an evidentiary hearing, or 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 ~~Director or 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) Director-Hearing Criteria. An election by the Director to ~~conduct a Director-~~ 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.

~~(4) Hearings Official Hearing Criteria. An election by the Director to have an evidentiary hearing for the application with the Hearings Official shall demonstrate that the application involves persons with opposing legal arguments regarding unresolved interpretations of applicable state laws or regulations. (Revised by Ordinance No. 4-96; Effective 11.29.96; 3-98, 7.8.98)~~

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.

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(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 appeal of a decision made by the Director with a hearing pursuant to LC 14.300, 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 10 days from the date of acceptance of the appeal and no later than 28 days from the date that the appeal was accepted.~~

(be) 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.

(cd) 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 210 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. ~~If the Approval Authority is the Director, then 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) to the persons identified in LC 14.300(3)(a) through (f) below. If the Approval Authority for the hearing is the Hearings Official, and the hearing is to consider an appeal from a decision by the Director for which the Director held a hearing, then at least ten days in advance of the hearing the Director shall mail notice of the hearing which meets the requirements of LC 14.070(3) to the persons identified in LC 14.400(6) below. For any other hearing, 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~~900 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.

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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)*

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

(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. ~~Decisions made by the Director with an evidentiary hearing pursuant to LC 14.100 above may be appealed, and upon Director acceptance of an appeal, shall be reviewed on the record by the Hearings Official pursuant to LC 14.400 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)*

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 120 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)*

14.515 Appeal Content Requirements.

All appeals shall:

(1) Be submitted in writing to, and received, by the Department within the 120 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 ~~on-the-record appeal to the Hearings Official~~ or appeal to the Board was raised before the close

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of the record at or following the final evidentiary hearing and whether the appellant wishes the application to be approved, denied or conditionally approved; and

(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

(gf) 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)

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 120 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 120 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)*

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 made without an evidentiary hearing pursuant to LC 14.300 above, 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 Director that was made with an evidentiary hearing pursuant to LC 14.300 above, notice of the appeal acceptance shall be mailed to all persons who qualified as parties at the hearing with the Director. The notice shall disclose the tentative date on which the Hearings Official will hear the appeal and the requirements of this chapter for the submission of written materials prior to the hearing; and~~

~~(23) 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)~~

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)*

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 ~~then~~ the 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.**

(43) 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.

(54) Appeal of Reconsideration Decisions. Reconsidered decisions may be appealed to the Board within 120 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)*

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 ~~and~~ 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:

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Bold indicates material being added
~~Strikethrough~~ indicates material being deleted
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- (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)*