

AGENDA COVER MEMO

MEMO DATE: September 9, 2011

HEARING DATE: September 27, 2011

TO: **BOARD OF COUNTY COMMISSIONERS**

DEPARTMENT: Public Works

PRESENTED BY: Mark Rust, AICP, Associate Planner
Land Management Division

AGENDA ITEM TITLE: Order No. _____/In the matter of electing to hold a hearing on the record or declining to further review the appeal of a measure 49 partition and dwelling approval. (Mark Rust, Associate Planner) (file PA 10-5929 & PA 10-5930/Bottem)

I. MOTION

Motions for the Board of Commissioners to consider:

1. Move to approve the attached Order, electing to not hear the appeal, affirming the Hearings Official decision of August 24, 2011 and adopting this decision as the County's final decision, and to remain silent in regard to any interpretations of comprehensive plan policies or implementing ordinances made by the Hearings Official in the decision.
2. Move to approve the attached Order, electing to not hear the appeal, affirming the Hearings Official decision of August 24, 2011 and adopting this decision as the County's final decision, and to expressly agree with and adopt the interpretations of the Lane County Rural Comprehensive Plan policies, and implementing ordinances made by the Hearings Official in the decision.
3. Move to not approve the attached order, electing to hear the appeal on the record and direct staff to return with an order to hear the appeal pursuant to LC 14.400.

II. AGENDA ITEM SUMMARY

An appeal to the Board, contesting the Hearings Official approval of a Measure 49 partition and dwelling, was received by the Director on September 2, 2011. The Appellant has filed the appeal under the option of LC 14.515(3)(f)(ii), requesting that the Board not conduct a hearing on the appeal thus enabling the applicant to subsequently appeal to the Land Use Board of Appeals (LUBA). This will deem the Hearings Official decision as the final decision of the County. Pursuant to LC 14.600, the Board must adopt an order deciding whether or not to hear the appeal by applying the criteria set forth in Lane Code 14.600(3).

III. BACKGROUND

On January 6, 2011 the applicant (Dennis Bottem) submitted the subject Measure 49 partition and dwelling applications requesting approval to divide a 31.98 acre property, zoned Exclusive Farm Use (EFU), into two parcels (a 30.22 acre and 1.76 acre parcel) and approval to locate a dwelling on the new 1.76 acre parcel. There is an existing dwelling on the parent parcel. This partition and dwelling approval is in response to an enforcement action to remedy an existing dwelling on the adjacent property.

On March 3, 2011 the applicants modified the application to revise the access in an effort to address some of the concerns by the Appellants (Ronald and Kathleen Lenn) in regard to access for the property.

The Planning Director issued a decision approving the applications on May 17, 2011.

The Planning Director decision was appealed on May 31, 2011.

A Hearings Official hearing was conducted on July 21, 2011. The Hearings Official affirmed the Planning Directors decisions on August 24, 2011.

The Appellants (Ronald and Kathleen Lenn) appealed the Hearings Official decision on September 2, 2011.

The Hearings Official affirmed the decision on September 9, 2011.

The 150 day statutory time limit for issuing a final local decision expires on September 30, 2011.

IV. DISCUSSION

The primary issues raised throughout the proceedings and in the appeal are in regard to access across an existing access easement, and the issue of if a nuisance is created by the use of the access easement.

In both the Planning Directors decision and Hearings Official decision it was found that the applicant meets the applicable standards for access. The issue of nuisance is discussed under the provision of Measure 49 and it is found that there are not any conflicts that could rise to the level of a nuisance.

The appellants claim that the Hearings Official failed to follow the procedure applicable to the matter by granting an invalid extension to open the record period.

Additionally the appellant claims that the Hearings Official exceeded his jurisdiction and misinterpreted the Lane Code, State Law and other applicable criteria. More specifically, the Hearings Official erred by finding that there is adequate access, that the proposed access meets the necessary road standards, and that the access does not create a nuisance.

Lane Code (LC) 14.515(3)(f) provides for two appeal options. The Applicant can:

*(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(II)(b).*

The applicant chose the second option (LC 14.515(3)(f)(ii)), and paid the associated fee of \$250. The appellant requests the Board not hear the appeal, thus enabling the applicant to subsequently appeal to the Land Use Board of Appeals (LUBA).

C. Elective Board Review Procedure

The Elective Board Review Procedure in Lane Code (LC) 14.600(2)(c) and (d) provides the Board with three options:

- To hear the appeal on-the-record,
- To not hear arguments on the appeal and to remain silent on the Hearings Official's decision, or
- To not hear arguments on the appeal, affirm the Hearings Official's decision and expressly agree with any interpretations of the Lane County Rural Comprehensive Plan policies and implementing ordinances made by the Hearings Official in the decision being appealed.

The applicable subsections of LC 14.600(2) are:

LC14.600(2)(c) The Board 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.

LCI 4.600(2)(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.

In order for the Board to hear the appeal, the Decision Criteria of LC 14.600(3) requires that one or more of the four criteria cited below, be satisfied:

(3) Decision Criteria. A decision by the Board to hear the appeal on the record must conclude that a final decision by the Board can be made within the time constraints established by ORS 215.427(1) and that the issue raised in the appeal to the Board could have been and was raised before the close of the record at or following the final evidentiary hearing. The Board's decision to hear the appeal must comply with one or more of the following criteria:

a) The issue is of Countywide significance.

- b) The issue will reoccur with frequency and there is a need for policy guidance.*
- c) The issue involves a unique environmental resource.*
- d) The Planning Director or Hearings Official recommends review.*

Analysis of Elect-to-Hear Criteria

In regard to the "time constraints" referred to in LC 14.600(3), ORS 215.427(1) requires that a decision be reached within 150 days of the application being deemed complete. The 150 day time frame expires on September 30, 2011. Per LC 14.600(3), the Board is advised that it cannot reach a final decision within the time constraints of ORS 215.427(1).

Each provision of Lane Code 14.600(3)(a)-(d) is presented below with the Director's analysis:

- a. The issue is of Countywide significance.*

The appeal involves a set of circumstances and a fact pattern particular to the subject property. While the appeal raises issues concerning interpretation of Lane Code 15.706(3)(a) and 15.055(4), the issues raised in the appeal are adequately dealt with in the Hearings Official's decision of August 24, 2011, which was affirmed by the Hearings Official letter dated September 9, 2011.

- b. The issue will reoccur with frequency and there is a need for policy guidance.*

The appeal involves a set of circumstances and a fact pattern particular to the subject property. The partition and dwelling approval is granted under a Measure 49 Final Order from the State. The issues raised in this appeal do not occur with frequency and there is no need for policy guidance.

- c. The issue involves a unique environmental resource.*

No unique or rare environmental resources on the subject property have been identified in the record.

- d. The Planning Director or Hearings Official recommends review.*

The Planning Director and Hearings Official do not recommend review of the appeal.

V. ALTERNATIVE/RECOMMENDATION

Staff recommends that the Board adopt the proposed motion 1 specified above in this memo. Alternatively, the Board could choose under Lane Code 14.600 to agree with the Hearings Official interpretations made in the August 24, 2011 decision. Although, staff does not find any significant interpretations were made.

Another option for the Board would be to choose to conduct a hearing on the appeal. The appellant themselves have requested the Board not hear the appeal. Additionally, there is not adequate time for the Board to hear the appeal given the 150 day statutory time frame. The appellants in this case are not the applicants and do not have the ability to extend the time frame.

Not making a final local decision within the 150 day statutory time frame would set up the possibility for the Applicant to file a Writ of Mandamus in Circuit Court to get a final decision.

VI. ATTACHEMENTS

1. Board Order electing not to hear the appeal, including Exhibit A, Findings in support of the Order.
2. The Lane County Hearings Official August 24, 2011 decision.
3. Appeal of the Hearings Officials decision, dated September 2, 2011.

The entire file record is available for review at the Land Management Division.