

Senate Bill 452

Sponsored by Senator PROZANSKI (at the request of Central Oregon LandWatch) (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Limits amount of appeal fee that city or county may charge for quasi-judicial review of city or county decisions on land use application. Requires city or county to refund appeals fee and transcript fee when appellate authority of city or county declines to hear review.

Prohibits city or county from charging fee for appeal of final decision of county to Land Use Board of Appeals.

A BILL FOR AN ACT

1
2 Relating to fees for appeal of local land use decisions; creating new provisions; and amending ORS
3 197.835, 215.422 and 227.180.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 215.422 is amended to read:

6 215.422. *[(1)(a) A party aggrieved by the action of a hearings officer or other decision-making au-*
7 *thority may appeal the action to the planning commission or county governing body, or both, however*
8 *the governing body prescribes. The appellate authority on its own motion may review the action. The*
9 *procedure and type of hearing for such an appeal or review shall be prescribed by the governing body,*
10 *but shall not require the notice of appeal to be filed within less than seven days after the date the*
11 *governing body mails or delivers the decision to the parties.]*

12 *[(b) Notwithstanding paragraph (a) of this subsection, the governing body may provide that the*
13 *decision of a hearings officer or other decision-making authority is the final determination of the*
14 *county.]*

15 *[(c) The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred*
16 *in acting upon an appeal from a hearings officer, planning commission or other designated person. The*
17 *amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or*
18 *the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing*
19 *body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and*
20 *shall not exceed the actual cost of preparing the transcript up to \$500. In lieu of a transcript prepared*
21 *by the governing body and the fee therefor, the governing body shall allow any party to an appeal*
22 *proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted*
23 *at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the*
24 *transcript fee shall be refunded.]*

25 *[(2) A party aggrieved by the final determination may have the determination reviewed in the*
26 *manner provided in ORS 197.830 to 197.845.]*

27 **(1) The governing body of a county, by ordinance or resolution, may:**

28 **(a) Provide that the decision of a hearings officer or other decision-making authority of**
29 **the county is the final determination of the county; or**

30 **(b) Choose to act, or designate another entity to act, as an appellate authority to review**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 the decision of a hearings officer or other decision-making authority.

2 (2) If the governing body of the county establishes an appellate authority pursuant to
 3 subsection (1)(b) of this section, the governing body of the county, by ordinance or resolu-
 4 tion, shall prescribe the procedure and type of hearing to provide for review of a decision
 5 of a hearings officer or other decision-making authority, but the governing body may not
 6 require that a notice of appeal be filed less than seven days after the date the county mails
 7 or delivers the decision to the parties.

8 (3) If the governing body of the county establishes an appellate authority pursuant to
 9 subsection (1)(b) of this section:

10 (a) A party aggrieved by the action of a hearings officer or other decision-making au-
 11 thority may appeal the decision to the appellate authority; or

12 (b) The appellate authority may review the decision on its own motion.

13 (4) To defray the costs incurred in acting upon an appeal from a hearings officer or other
 14 decision-making authority, the governing body of the county, by ordinance or regulation,
 15 may prescribe:

16 (a) A reasonable fee that does not exceed 10 percent of the original application fee or
 17 \$1,000, whichever is less, and that excludes the cost to prepare a written transcript of the
 18 proceedings to be reviewed.

19 (b) A reasonable fee for the preparation of a written transcript of the proceedings to be
 20 reviewed that does not exceed the actual cost of preparing the transcript or \$500, whichever
 21 is less.

22 (5) If an appellate authority of a county declines to review the decision of a hearings of-
 23 ficer or other decision-making authority, the county shall refund the full amount of appeal
 24 and transcript fees collected by the county.

25 (6) In lieu of having the county prepare a transcript, a party to an appeal proceeding held
 26 on the record may elect to prepare a transcript of relevant portions of the proceedings con-
 27 ducted at a lower level at the party's own expense. The county still may charge the tran-
 28 script fee, but the county shall refund the transcript fee if the party prevails on appeal.

29 [(3)] (7) [No] A decision or action of a planning commission or the governing body of the
 30 county [governing body shall be] is not invalid due to ex parte contact or bias resulting from ex
 31 parte contact with a member of the decision-making body, if the member of the decision-making body
 32 receiving the contact:

33 (a) Places on the record the substance of any written or oral ex parte communications con-
 34 cerning the decision or action; and

35 (b) Has a public announcement of the content of the communication and of the parties' right to
 36 rebut the substance of the communication made at the first hearing following the communication
 37 [where] at which action will be considered or taken on the subject to which the communication
 38 related.

39 [(4)] (8) A communication between county staff and the planning commission or governing body
 40 [shall not be considered] is not an ex parte contact for the purposes of subsection [(3)] (7) of this
 41 section.

42 [(5)] (9) Subsection [(3)] (7) of this section does not apply to ex parte contact with a hearings
 43 officer approved under ORS 215.406 (1).

44 (10) A party aggrieved by the final decision of a county may have the final decision re-
 45 viewed by the Land Use Board of Appeals in the manner provided in ORS 197.830 to 197.845.

1 **(11) A county may not charge a fee for appeal of a final decision of the county to the**
 2 **board.**

3 **SECTION 2.** ORS 227.180 is amended to read:

4 227.180. *[(1)(a) A party aggrieved by the action of a hearings officer may appeal the action to the*
 5 *planning commission or council of the city, or both, however the council prescribes. The appellate*
 6 *authority on its own motion may review the action. The procedure for such an appeal or review shall*
 7 *be prescribed by the council, but shall.]*

8 *[(A) Not require that the appeal be filed within less than seven days after the date the governing*
 9 *body mails or delivers the decision of the hearings officer to the parties;]*

10 *[(B) Require a hearing at least for argument; and]*

11 *[(C) Require that upon appeal or review the appellate authority consider the record of the hearings*
 12 *officer's action. That record need not set forth evidence verbatim.]*

13 *[(b) Notwithstanding paragraph (a) of this subsection, the council may provide that the decision of*
 14 *a hearings officer or other decision-making authority in a proceeding for a discretionary permit or zone*
 15 *change is the final determination of the city.]*

16 *[(c) The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred*
 17 *in acting upon an appeal from a hearings officer, planning commission or other designated person. The*
 18 *amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or*
 19 *the actual cost of the appeal, excluding the cost of preparation of a written transcript. The governing*
 20 *body may establish a fee for the preparation of a written transcript. The fee shall be reasonable and*
 21 *shall not exceed the actual cost of preparing the transcript up to \$500. In lieu of a transcript prepared*
 22 *by the governing body and the fee therefor, the governing body shall allow any party to an appeal*
 23 *proceeding held on the record to prepare a transcript of relevant portions of the proceedings conducted*
 24 *at a lower level at the party's own expense. If an appellant prevails at a hearing or on appeal, the*
 25 *transcript fee shall be refunded.]*

26 *[(2) A party aggrieved by the final determination in a proceeding for a discretionary permit or zone*
 27 *change may have the determination reviewed under ORS 197.830 to 197.845.]*

28 **(1) The governing body of a city, by ordinance or resolution, may:**

29 **(a) Provide that the decision of a hearings officer or other decision-making authority of**
 30 **the city is the final determination of the city; or**

31 **(b) Choose to act, or designate another entity to act, as an appellate authority to review**
 32 **the decision of a hearings officer or other decision-making authority.**

33 **(2) If the governing body of the city establishes an appellate authority pursuant to sub-**
 34 **section (1)(b) of this section, the governing body of the city, by ordinance or resolution, shall**
 35 **prescribe the procedure and type of hearing to provide for review of a decision of a hearings**
 36 **officer or other decision-making authority, but the governing body may not require that a**
 37 **notice of appeal be filed less than seven days after the date the city mails or delivers the**
 38 **decision to the parties.**

39 **(3) If the governing body of the city establishes an appellate authority pursuant to sub-**
 40 **section (1)(b) of this section:**

41 **(a) A party aggrieved by the action of a hearings officer or other decision-making au-**
 42 **thority may appeal the decision to the appellate authority; or**

43 **(b) The appellate authority may review the decision on its own motion.**

44 **(4) To defray the costs incurred in acting upon an appeal from a hearings officer or other**
 45 **decision-making authority, the governing body of the city, by ordinance or regulation, may**

1 **prescribe:**

2 (a) **A reasonable fee that does not exceed 10 percent of the original application fee or**
 3 **\$1,000, whichever is less, and that excludes the cost to prepare a written transcript of the**
 4 **proceedings to be reviewed.**

5 (b) **A reasonable fee for the preparation of a written transcript of the proceedings to be**
 6 **reviewed that does not exceed the actual cost of preparing the transcript or \$500, whichever**
 7 **is less.**

8 (5) **If an appellate authority of a city declines to review the decision of a hearings officer**
 9 **or other decision-making authority, the city shall refund the full amount of appeal and**
 10 **transcript fees collected by the city.**

11 (6) **In lieu of having the city prepare a transcript, a party to an appeal proceeding held**
 12 **on the record may elect to prepare a transcript of relevant portions of the proceedings con-**
 13 **ducted at a lower level at the party's own expense. The city still may charge the transcript**
 14 **fee, but the city shall refund the transcript fee if the party prevails on appeal.**

15 [(3)] (7) **[No] A decision or action of a planning commission or city governing body [shall be] is**
 16 **not** invalid due to ex parte contact or bias resulting from ex parte contact with a member of the
 17 decision-making body, if the member of the decision-making body receiving the contact:

18 (a) Places on the record the substance of any written or oral ex parte communications con-
 19 cerning the decision or action; and

20 (b) Has a public announcement of the content of the communication and of the parties' right to
 21 rebut the substance of the communication made at the first hearing following the communication
 22 where action will be considered or taken on the subject to which the communication related.

23 [(4)] (8) A communication between city staff and the planning commission or governing body
 24 *[shall not be considered]* **is not** an ex parte contact for the purposes of subsection [(3)] (7) of this
 25 section.

26 [(5)] (9) Subsection [(3)] (7) of this section does not apply to ex parte contact with a hearings
 27 officer.

28 (10) **A party aggrieved by the final decision of a city may have the final decision reviewed**
 29 **by the Land Use Board of Appeals in the manner provided in ORS 197.830 to 197.845.**

30 (11) **A city may not charge a fee for appeal of a final decision of the city to the board.**

31 **SECTION 3.** ORS 197.835 is amended to read:

32 197.835. (1) The Land Use Board of Appeals shall review the land use decision or limited land
 33 use decision and prepare a final order affirming, reversing or remanding the land use decision or
 34 limited land use decision. The board shall adopt rules defining the circumstances in which it will
 35 reverse rather than remand a land use decision or limited land use decision that is not affirmed.

36 (2)(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.

37 (b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte
 38 contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities
 39 not shown in the record that, if proved, would warrant reversal or remand, the board may take ev-
 40 idence and make findings of fact on those allegations. The board shall be bound by any finding of
 41 fact of the local government, special district or state agency for which there is substantial evidence
 42 in the whole record.

43 (3) Issues shall be limited to those raised by any participant before the local hearings body as
 44 provided by ORS 197.195 or 197.763, whichever is applicable.

45 (4) A petitioner may raise new issues to the board if:

1 (a) The local government failed to list the applicable criteria for a decision under ORS 197.195
2 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applica-
3 ble criteria that were omitted from the notice. However, the board may refuse to allow new issues to be
4 raised if it finds that the issue could have been raised before the local government; or

5 (b) The local government made a land use decision or limited land use decision which is different
6 from the proposal described in the notice to such a degree that the notice of the proposed action
7 did not reasonably describe the local government's final action.

8 (5) The board shall reverse or remand a land use decision not subject to an acknowledged
9 comprehensive plan and land use regulations if the decision does not comply with the goals. The
10 board shall reverse or remand a land use decision or limited land use decision subject to an ac-
11 knowledged comprehensive plan or land use regulation if the decision does not comply with the
12 goals and the Land Conservation and Development Commission has issued an order under ORS
13 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to
14 apply the goals to the type of decision being challenged.

15 (6) The board shall reverse or remand an amendment to a comprehensive plan if the amendment
16 is not in compliance with the goals.

17 (7) The board shall reverse or remand an amendment to a land use regulation or the adoption
18 of a new land use regulation if:

19 (a) The regulation is not in compliance with the comprehensive plan; or

20 (b) The comprehensive plan does not contain specific policies or other provisions which provide
21 the basis for the regulation, and the regulation is not in compliance with the statewide planning
22 goals.

23 (8) The board shall reverse or remand a decision involving the application of a plan or land use
24 regulation provision if the decision is not in compliance with applicable provisions of the compre-
25 hensive plan or land use regulations.

26 (9) In addition to the review under subsections (1) to (8) of this section, the board shall reverse
27 or remand the land use decision under review if the board finds:

28 (a) The local government or special district:

29 (A) Exceeded its jurisdiction;

30 (B) Failed to follow the procedures applicable to the matter before it in a manner that preju-
31 diced the substantial rights of the petitioner;

32 (C) Made a decision not supported by substantial evidence in the whole record;

33 (D) Improperly construed the applicable law; or

34 (E) Made an unconstitutional decision; or

35 (b) The state agency made a decision that violated the goals.

36 (10)(a) The board shall reverse a local government decision and order the local government to
37 grant approval of an application for development denied by the local government if the board finds:

38 (A) Based on the evidence in the record, that the local government decision is outside the range
39 of discretion allowed the local government under its comprehensive plan and implementing ordi-
40 nances; or

41 (B) That the local government's action was for the purpose of avoiding the requirements of ORS
42 215.427 or 227.178.

43 (b) If the board does reverse the decision and orders the local government to grant approval of
44 the application, the board shall award attorney fees to the applicant and against the local govern-
45 ment.

1 (11)(a) Whenever the findings, order and record are sufficient to allow review, and to the extent
 2 possible consistent with the time requirements of ORS 197.830 (14), the board shall decide all issues
 3 presented to it when reversing or remanding a land use decision described in subsections (2) to (9)
 4 of this section or limited land use decision described in ORS 197.828 and 197.195.

5 (b) Whenever the findings are defective because of failure to recite adequate facts or legal
 6 conclusions or failure to adequately identify the standards or their relation to the facts, but the
 7 parties identify relevant evidence in the record which clearly supports the decision or a part of the
 8 decision, the board shall affirm the decision or the part of the decision supported by the record and
 9 remand the remainder to the local government, with direction indicating appropriate remedial
 10 action.

11 (12) The board may reverse or remand a land use decision under review due to ex parte contacts
 12 or bias resulting from ex parte contacts with a member of the decision-making body, only if the
 13 member of the decision-making body did not comply with ORS 215.422 [(3)] (7) or 227.180 [(3)] (7),
 14 whichever is applicable.

15 (13) Subsection (12) of this section does not apply to reverse or remand of a land use decision
 16 due to ex parte contact or bias resulting from ex parte contact with a hearings officer.

17 (14) The board shall reverse or remand a land use decision or limited land use decision which
 18 violates a commission order issued under ORS 197.328.

19 (15) In cases in which a local government provides a quasi-judicial land use hearing on a limited
 20 land use decision, the requirements of subsections (12) and (13) of this section apply.

21 (16) The board may decide cases before it by means of memorandum decisions and shall prepare
 22 full opinions only in such cases as it deems proper.

23 **SECTION 4. The amendments to ORS 197.835, 215.422 and 227.180 by sections 1 to 3 of this**
 24 **2011 Act apply to quasi-judicial review by a city or county of the decisions made by a hearings**
 25 **officer or other decision-making authority at the city or county level on and after the ef-**
 26 **fective date of this 2011 Act.**

27 _____