

House Bill 2538

Sponsored by Representative REARDON (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**.

Directs Land Use Board of Appeals to award prevailing party actual damages equal to economic loss due to project delays caused by proceeding initiated based on position not well-founded in law or on fact.

A BILL FOR AN ACT

1
2 Relating to damages; amending ORS 197.830 and 197.850.

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

4 **SECTION 1.** ORS 197.830 is amended to read:

5 197.830. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to
6 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Ap-
7 peals.

8 (2) Except as provided in ORS 197.620, a person may petition the board for review of a land use
9 decision or limited land use decision if the person:

10 (a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section;
11 and

12 (b) Appeared before the local government, special district or state agency orally or in writing.

13 (3) If a local government makes a land use decision without providing a hearing, except as
14 provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision
15 that is different from the proposal described in the notice of hearing to such a degree that the notice
16 of the proposed action did not reasonably describe the local government's final actions, a person
17 adversely affected by the decision may appeal the decision to the board under this section:

18 (a) Within 21 days of actual notice where notice is required; or

19 (b) Within 21 days of the date a person knew or should have known of the decision where no
20 notice is required.

21 (4) If a local government makes a land use decision without a hearing pursuant to ORS 215.416
22 (11) or 227.175 (10):

23 (a) A person who was not provided notice of the decision as required under ORS 215.416 (11)(c)
24 or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving
25 actual notice of the decision.

26 (b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who
27 is adversely affected or aggrieved by the decision may appeal the decision to the board under this
28 section within 21 days after the expiration of the period for filing a local appeal of the decision es-
29 tablished by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).

30 (c) A person who receives notice of a decision made without a hearing under ORS 215.416 (11)
31 or 227.175 (10) may appeal the decision to the board under this section within 21 days of receiving

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 actual notice of the nature of the decision, if the notice of the decision did not reasonably describe
 2 the nature of the decision.

3 (d) Except as provided in paragraph (c) of this subsection, a person who receives notice of a
 4 decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may not appeal the decision
 5 to the board under this section.

6 (5) If a local government makes a limited land use decision which is different from the proposal
 7 described in the notice to such a degree that the notice of the proposed action did not reasonably
 8 describe the local government's final actions, a person adversely affected by the decision may appeal
 9 the decision to the board under this section:

10 (a) Within 21 days of actual notice where notice is required; or

11 (b) Within 21 days of the date a person knew or should have known of the decision where no
 12 notice is required.

13 (6) The appeal periods described in subsections (3), (4) and (5) of this section:

14 (a) May not exceed three years after the date of the decision, except as provided in paragraph
 15 (b) of this subsection.

16 (b) May not exceed 10 years after the date of the decision if notice of a hearing or an adminis-
 17 trative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided.

18 (7)(a) Within 21 days after a notice of intent to appeal has been filed with the board under
 19 subsection (1) of this section, any person described in paragraph (b) of this subsection may intervene
 20 in and be made a party to the review proceeding by filing a motion to intervene and by paying a
 21 filing fee of \$100.

22 (b) Persons who may intervene in and be made a party to the review proceedings, as set forth
 23 in subsection (1) of this section, are:

24 (A) The applicant who initiated the action before the local government, special district or state
 25 agency; or

26 (B) Persons who appeared before the local government, special district or state agency, orally
 27 or in writing.

28 (c) Failure to comply with the deadline or to pay the filing fee set forth in paragraph (a) of this
 29 subsection shall result in denial of a motion to intervene.

30 (8) If a state agency whose order, rule, ruling, policy or other action is at issue is not a party
 31 to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on
 32 the same date the respondent's brief is due and shall be accompanied by a filing fee of \$100.

33 (9) A notice of intent to appeal a land use decision or limited land use decision shall be filed
 34 not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of
 35 intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to
 36 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is
 37 mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a
 38 statement identifying when, how and to whom notice was provided under ORS 197.615 does not
 39 render the notice defective. Copies of the notice of intent to appeal shall be served upon the local
 40 government, special district or state agency and the applicant of record, if any, in the local gov-
 41 ernment, special district or state agency proceeding. The notice shall be served and filed in the form
 42 and manner prescribed by rule of the board and shall be accompanied by a filing fee of \$200 and a
 43 deposit for costs to be established by the board. If a petition for review is not filed with the board
 44 as required in subsections (10) and (11) of this section, the filing fee and deposit shall be awarded
 45 to the local government, special district or state agency as cost of preparation of the record.

1 (10)(a) Within 21 days after service of the notice of intent to appeal, the local government, spe-
 2 cial district or state agency shall transmit to the board the original or a certified copy of the entire
 3 record of the proceeding under review. By stipulation of all parties to the review proceeding the
 4 record may be shortened. The board may require or permit subsequent corrections to the record;
 5 however, the board shall issue an order on a motion objecting to the record within 60 days of re-
 6 ceiving the motion.

7 (b) Within 10 days after service of a notice of intent to appeal, the board shall provide notice
 8 to the petitioner and the respondent of their option to enter into mediation pursuant to ORS 197.860.
 9 Any person moving to intervene shall be provided such notice within seven days after a motion to
 10 intervene is filed. The notice required by this paragraph shall be accompanied by a statement that
 11 mediation information or assistance may be obtained from the Department of Land Conservation and
 12 Development.

13 (11) A petition for review of the land use decision or limited land use decision and supporting
 14 brief shall be filed with the board as required by the board under subsection (13) of this section.

15 (12) The petition shall include a copy of the decision sought to be reviewed and shall state:

16 (a) The facts that establish that the petitioner has standing.

17 (b) The date of the decision.

18 (c) The issues the petitioner seeks to have reviewed.

19 (13)(a) The board shall adopt rules establishing deadlines for filing petitions and briefs and for
 20 oral argument.

21 (b) At any time subsequent to the filing of a notice of intent and prior to the date set for filing
 22 the record, or, on appeal of a decision under ORS 197.610 to 197.625, prior to the filing of the
 23 respondent's brief, the local government or state agency may withdraw its decision for purposes of
 24 reconsideration. If a local government or state agency withdraws an order for purposes of recon-
 25 sideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision.
 26 If the petitioner is dissatisfied with the local government or agency action after withdrawal for
 27 purposes of reconsideration, the petitioner may refile the notice of intent and the review shall pro-
 28 ceed upon the revised order. An amended notice of intent shall not be required if the local govern-
 29 ment or state agency, on reconsideration, affirms the order or modifies the order with only minor
 30 changes.

31 (14) The board shall issue a final order within 77 days after the date of transmittal of the record.
 32 If the order is not issued within 77 days the applicant may apply in Marion County or the circuit
 33 court of the county where the application was filed for a writ of mandamus to compel the board to
 34 issue a final order.

35 (15)(a) Upon entry of its final order the board may, in its discretion, award costs to the pre-
 36 vailing party including the cost of preparation of the record if the prevailing party is the local
 37 government, special district or state agency whose decision is under review. The board shall apply
 38 the deposit required by subsection (9) of this section to any costs charged against the petitioner.

39 (b) The board shall also award [*reasonable attorney fees and expenses*] to the prevailing party
 40 against any other party who the board finds presented a position without probable cause to believe
 41 the position was well-founded in law or on factually supported information:

42 **(A) Reasonable attorney fees;**

43 **(B) Reasonable expenses; and**

44 **(C) Actual damages equal to any substantiated economic loss suffered by the prevailing**
 45 **party as a result of project delays caused by the review proceeding.**

1 (16) Orders issued under this section may be enforced in appropriate judicial proceedings.

2 (17)(a) The board shall provide for the publication of its orders that are of general public in-
 3 terest in the form it deems best adapted for public convenience. The publications shall constitute
 4 the official reports of the board.

5 (b) Any moneys collected or received from sales by the board shall be paid into the Board
 6 Publications Account established by ORS 197.832.

7 (18) Except for any sums collected for publication of board opinions, all fees collected by the
 8 board under this section that are not awarded as costs shall be paid over to the State Treasurer to
 9 be credited to the General Fund.

10 (19) The board shall track and report on its website:

11 (a) The number of reviews commenced, as described in subsection (1) of this section, the number
 12 of reviews commenced for which a petition is filed under subsection (2) of this section and, in re-
 13 lation to each of those numbers, the rate at which the reviews result in a decision of the board to
 14 uphold, reverse or remand the land use decision or limited land use decision. The board shall track
 15 and report reviews under this paragraph in categories established by the board.

16 (b) A list of petitioners, the number of reviews commenced and the rate at which the petitioner's
 17 reviews have resulted in decisions of the board to uphold, reverse or remand the land use decision
 18 or limited land use decision.

19 (c) A list of respondents, the number of reviews involving each respondent and the rate at which
 20 reviews involving the respondent have resulted in decisions of the board to uphold, reverse or re-
 21 mand the land use decision or limited land use decision. Additionally, when a respondent is the local
 22 government that made the land use decision or limited land use decision, the board shall track
 23 whether the local government appears before the board.

24 (d) A list of reviews, and a brief summary of the circumstances in each review, under which the
 25 board exercises its discretion to require a losing party to pay the attorney fees of the prevailing
 26 party.

27 **SECTION 2.** ORS 197.850 is amended to read:

28 197.850. (1) Any party to a proceeding before the Land Use Board of Appeals under ORS 197.830
 29 to 197.845 may seek judicial review of a final order issued in those proceedings.

30 (2) Notwithstanding the provisions of ORS 183.480 to 183.540, judicial review of orders issued
 31 under ORS 197.830 to 197.845 is solely as provided in this section.

32 (3)(a) Jurisdiction for judicial review of proceedings under ORS 197.830 to 197.845 is conferred
 33 upon the Court of Appeals. Proceedings for judicial review are instituted by filing a petition in the
 34 Court of Appeals. The petition must be filed within 21 days following the date the board delivered
 35 or mailed the order upon which the petition is based.

36 (b) Filing of the petition, as set forth in paragraph (a) of this subsection, and service of a peti-
 37 tion on all persons identified in the petition as adverse parties of record in the board proceeding is
 38 jurisdictional and may not be waived or extended.

39 (4) The petition must state the nature of the order the petitioner desires reviewed. Copies of the
 40 petition must be served by first class, registered or certified mail on the board and all other parties
 41 of record in the board proceeding.

42 (5) Within seven days after service of the petition, the board shall transmit to the court the
 43 original or a certified copy of the entire record of the proceeding under review, but, by stipulation
 44 of all parties to the review proceeding, the record may be shortened. The court may tax a party that
 45 unreasonably refuses to stipulate to limit the record for the additional costs. The court may require

1 or permit subsequent corrections or additions to the record when deemed desirable. Except as spe-
 2 cifically provided in this subsection, the court may not tax the cost of the record to the petitioner
 3 or any intervening party. However, the court may tax such costs and the cost of transcription of
 4 record to a party filing a frivolous petition for judicial review.

5 (6) Petitions and briefs must be filed within time periods and in a manner established by the
 6 Court of Appeals by rule.

7 (7)(a) The court shall hear oral argument within 49 days of the date of transmittal of the record.

8 (b) The court may hear oral argument more than 49 days from the date of transmittal of the
 9 record provided the court determines that the ends of justice served by holding oral argument on
 10 a later day outweigh the best interests of the public and the parties. The court shall not hold oral
 11 argument more than 49 days from the date of transmittal of the record because of general congestion
 12 of the court calendar or lack of diligent preparation or attention to the case by any member of the
 13 court or any party.

14 (c) The court shall set forth in writing a determination to hear oral argument more than 49 days
 15 from the date the record is transmitted, together with the reasons for its determination, and shall
 16 provide a copy to the parties. The court shall schedule oral argument as soon as practicable there-
 17 after.

18 (d) In making a determination under paragraph (b) of this subsection, the court shall consider:

19 (A) Whether the case is so unusual or complex, due to the number of parties or the existence
 20 of novel questions of law, that 49 days is an unreasonable amount of time for the parties to brief
 21 the case and for the court to prepare for oral argument; and

22 (B) Whether the failure to hold oral argument at a later date likely would result in a miscar-
 23 riage of justice.

24 (8) Judicial review of an order issued under ORS 197.830 to 197.845 shall be confined to the re-
 25 cord. The court shall not substitute its judgment for that of the board as to any issue of fact.

26 (9) The court may affirm, reverse or remand the order. The court shall reverse or remand the
 27 order only if it finds:

28 (a) The order to be unlawful in substance or procedure, but error in procedure is not cause for
 29 reversal or remand unless the court finds that substantial rights of the petitioner were prejudiced
 30 thereby;

31 (b) The order to be unconstitutional; or

32 (c) The order is not supported by substantial evidence in the whole record as to facts found by
 33 the board under ORS 197.835 (2).

34 (10) The Court of Appeals shall issue a final order on the petition for judicial review with the
 35 greatest possible expediency.

36 (11) If the order of the board is remanded by the Court of Appeals or the Supreme Court, the
 37 board shall respond to the court's appellate judgment within 30 days.

38 (12) A party must file with the board an undertaking with one or more sureties insuring that
 39 the party will pay all costs, disbursements and attorney fees awarded against the party by the Court
 40 of Appeals if:

41 (a) The party appealed a decision of the board to the Court of Appeals; and

42 (b) In making the decision being appealed to the Court of Appeals, the board awarded [*attorney*
 43 *fees and expenses*] **attorney fees, expenses and damages** against that party under ORS 197.830
 44 (15)(b).

45 (13) Upon entry of its final order, the court shall award attorney fees and expenses to a party

1 who prevails on a claim that an approval condition imposed by a local government on an application
2 for a permit pursuant to ORS 215.416 or 227.175 is unconstitutional under section 18, Article I,
3 Oregon Constitution, or the Fifth Amendment to the United States Constitution.

4 (14) The undertaking required in subsection (12) of this section must be filed with the board and
5 served on the opposing parties within 10 days after the date the petition was filed with the Court
6 of Appeals.

7
