18 June 2013

VIA EMAIL

Coos County Board of Commissioners
C/o Coos County Planning Dept.
250 N. Baxter Street
Coquille, OR 97423

Re: Jordan Cove Energy Project: Appeal of Site Plan Approval SP-12-02
Interim Recommendation Regarding Standing and Related Procedural Issues.

Dear Honorable Members of the Board:

I. Introduction.

The Coos County Planning Department asked me to conduct an ad hoc hearing to respond to motions filed by Jordan Cove Energy Project (“JCEP”). JCEP challenges the standing of Citizens against LNG, Jody McCaffree, John Clarke, John Craig Neikirk and Richard F. Knablin, on the grounds that the appeals that these persons filed did not certain standards set forth in the Coos County Zoning and Land Development Ordinance (“CCZLDO”). The hearings officer accepted written testimony on the topic and conducted a telephone hearing on June 13, 2013. The telephone hearing provided all parties a broad opportunity to argue the merits of their position.

The hearings officer has broken the arguments into a series of six (6) questions and recommendations, which may be read in the manner of an Executive Summary. The hearings officer has also provided detailed legal analysis which could become the basis of findings necessary to survive review by LUBA and the courts.

II. Questions Presented & Recommended Answers.

Question 1. Does CCZLDO §5.7.300(4)(B) require a person who is filing an appeal on behalf of an organization such as CALNG to submit a “written authorization” at the time the appeal is filed, or risk having the appeal be dismissed pursuant to CCZLDO §5.8.100?

Recommended Answer: No. By its own terms, CCZLDO §5.7.300(4)(B) only applies when a person is “presenting testimony” on behalf of an organization. Filing an appeal is
not “presenting testimony.” Moreover, CCZLDO §5.7.300(4)(B) allows the written authorization letter to be submitted at any time during the open-record period. Finally, even if filing an appeal is considered to constitute the “presentation” of “testimony,” this does not expressly make a violation of CCZLDO §5.7.300(4)(B) a jurisdictional defect.

Question 2. Does an appellant’s failure to fill out the Notice of Appeal (“NOA”) form in a manner that is both complete and correct (and in particular, to correctly fill out the line in the form requiring a statement pertaining to standing), require the County to dismiss the appeal?

Recommended Answer: No. Although the CCZLDO does incorporate the language of the NOA form at CCZLDO §5.8.900, the code never expressly states that the NOA form must be filled out completely and correctly without error. Crowley v. City of Bandon, 48 Or. LUBA 545 (2005). Thus, the failure to correctly fill out the NOA form is merely a technical violation of the rules, and can be cured by filing an Amended NOA after the appeal period has run, upon request of the County. Siuslaw Rod and Gun Club v. City of Florence, 48 Or LUBA 163 (2004).

Question 3. Does the County have the authority to pre-screen, and ultimately dismiss an appeal prior to holding a hearing on the merits, by scrutinizing for legal and factual merit the reasons the appellant has set forth in the Notice of Appeal?

Recommended Answer: No. Although the CCZLDO requires the appellant to set forth the reasons for the appeal in the Notice of Appeal, the Code does not envision a process whereby those reasons can be tested or “pre-screened” for legal or factual merit prior to the hearing. Even if the CCZLDO did so, such a process would be inconsistent with ORS 215.416(11) and would violate the substantial right of the appellant to a full and fair hearing. Crowley v. City of Bandon, 48 Or. LUBA 545 (2005); Muller v. Polk County, 16 Or LUBA 771, 775 (1988).

Question 4. Can two or more appellants join together on one appeal form and thereby avoid paying multiple $250 appeal fees?

Recommended Answer: Although the law on this subject is unclear, the hearings officer recommends that the practice be allowed so long as the appellants all sign the appeal form and identify themselves as co-appellants on the appeal form. Granted, the present language of the CCZLDO provides no language which provides any indication that the practice should be allowed. To the contrary, the CCZLDO is written in the singular, and seems to assume that every appellant must file their own appeal form and pay their own fee. However, ORS 215.416(11) seems to limit the amount of money the County can collect to process an appeal:

“[i]f a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less.”
This language could be read to suggest that the County can only charge a maximum of $250 for the initial appeal hearing, irrespective of how many appeals are filed. Although the interpretation of this statute is not clear, there does not appear to be much practical effect to either allowing or disallowing the practice. So long as one of the appeals is allowed to move forward to hearing, then everybody will be allowed to appear at the de novo hearing and raise new issues, regardless of whether they filed their own appeal or not. See Dead Indian Memorial Road Neighbors v. Jackson Co., 188 Or App 503, 72 P23d 648 (2003). For this reason, the hearings officer believes that the County should err on the side of caution and only collect a total of $250 for the first appeal.

Question 5. When one appellant correctly files an appeal and pays the required fee, but then presumably seeks to add two more individuals as co-appellants by attaching to his NOA form two sheets of paper each containing the name, address and signature of another individual, do those attachments either constitute a valid filing of an appeal or otherwise validly confer co-appellant status to those two individuals listed in the attachments?

Recommended Answer: Although the Board of Commissioners has a fair degree of latitude to interpret the CCZLDO in whatever manner it chooses on this issue, the hearings officer recommends that the Board find that the two individuals did not file valid appeals. There is little, if any practical consequence to this recommendation, however, because these two individuals will still be allowed to testify at the hearing. See Dead Indian Memorial Road Neighbors, supra.

Question 6. Does ORS 9.320, which prohibits a person who is not an active member of the Oregon State Bar from representing another person in an “action, suit or proceeding,” apply in a manner which prohibits a person from representing another person, corporation, or organization in a local land use proceeding? If so, is dismissal of an appeal filed by a non-attorney on behalf of a corporation the property remedy for a violation of this statute?

Recommended Answer: “Yes” to the first question; “No” to the second question. Representation of corporations and non-profit organizations by non-attorneys at local land use hearings is an extremely widespread practice in Oregon, despite the fact that ORS 9.320, by its very terms, applies broadly to “proceedings.” Apparently, neither the Oregon courts nor the Oregon State Bar has taken a definitive position on the topic, although the Bar has apparently sanctioned some persons who are not members of the Bar for representing private parties in local land use proceedings. Also, an Oregon Attorney General opinion does conclude that ORS 9.320 applies to local land use proceedings. 36 Or Atty Gen. 960, 988 (1974). For this reason, the hearings officer’s recommended conclusion is that non-attorneys are unlawfully engaging in the practice of law if they file an appeal and represent an organization at a local land use proceeding, in violation of ORS 9.320.

In spite of this, both LUBA and the Court of Appeals have refused to impose the harsh sanction of dismissal of an appeal for violations of ORS 9.320. League of Women Voters of Coos County v. Coos County, 14 Or. LUBA 45 (1985), aff’d, 76 Or App 705, 712 P2d 111 (1985). Although the precise facts of the LOWV case may turn on elements of waiver
which are not present here, the hearings officer finds that the legal landscape pertaining to this issue so unsettled that it would be unjust to dismiss an appeal on these grounds. The hearings officer further finds that the fact that CALNG and John Clarke are now represented by Ms. Corinne Sherton effectively cures any violation of ORS 9.320. The hearings officer recommends that the CALNG appeal be allowed to proceed on the merits despite the failure to comply with ORS 9.3290.

III. Detailed Legal Analysis.

1. Overview of Pertinent CCDLO Sections.

The first relevant code provision is CCZLDO §5.8.100, which provides as follows:

**SECTION 5.8.100.**

*Coos County has established an appeal period of 15 days from the date written notice of administrative or Planning Commission decision is mailed.*

*The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article.*

This section establishes a policy that an appeal must be dismissed if the “requirements of this article” are not “followed” by the appellant. LUBA has held that when a zoning code contains language of this sort, defects in appeals that do not meet the “requirements” are to be considered to be “jurisdictional” in nature. *Compare Breivogal v. Washington County*, 114 Or App 55, 834 P2d 473 (1992), and *Tipton v. Coos County*, 29 Or LUBA 474 (1995), aff’d w/o op. 137 Or App 633, 904 P2d 1094 (1995). These cases are discussed in detail on pages 7-8 of this recommendation.

Of course, the difficulty in implementing this requirement is that it is often challenging to figure out what is, strictly speaking, a “requirement.” As will be discussed in more detail below, LUBA does not favor the strict penalty of dismissal of an appeal, and will only affirm dismissals when the code language at issue is expressly clear that the individual “requirement” at issue is mandatory and demands the dismissal of the appeal if it is not complied with. *Golden v. City of Silverton*, 58 Or LUBA 399 (2009), aff’d without op. 228 Or. App. 757; 210 P.3d 945, rev. den., 347 Or. 42; 217 P.3d 688 (2009).

The second relevant provision of the CCZLDO §5.8.150, which governs the standing of an appellant to file an appeal of a local decision to the next higher level of local decision-maker.

**SECTION 5.8.150. Standing to Appeal.**

*A decision by the Planning Director, Hearings Body, or Board of Commissioners to approve or deny an application may be appealed as identified in the Sections below. The appeal must be filed within the appeal period and meet one of the following criteria:*
1. In the case of a decision by the Planning Director, the petitioner was entitled to notice of the decision; or

2. In the case of a decision by the Hearings Body, the petitioner was entitled to notice of the decision of the hearing; or

3. The person is aggrieved or has interests adversely affected by the decision.

In the case of an appeal of a Hearings Body decision to the Board of Commissioners, the petitioner must have appeared before the Hearings Body orally or in writing.

As discussed in more detail below, CCZLDO §5.8.150 creates two mandatory “requirements.” First, the appeal must be filed within the appeal period. Second, the appellant must be “aggrieved or has interests adversely affected by the decision.” As discussed below, the second of these requirements does not have to be based on facts set forth in the appeal itself.

Note that this provision is written in the passive voice, which creates confusion because it is unclear whether it creates mandatory requirements. As an example, while it is clear that the appellant must file the appeal within the initial 15-day appeal period, it is less clear whether the appeal itself must contain all of the facts and evidence needed to support a finding that the appellant is adversely affected or aggrieved. LUBA has interpreted similar language to simply require the decision-maker to evaluate whether the person that filed the appeal is adversely affected or aggrieved, using whatever facts and evidence is presented in the record during the hearing process. *Crowley v. City of Bandon*, 48 Or LUBA 545, 551 (2005). In other words, the determination of standing is not limited by the information set forth in the NOA.

Furthermore, the standards for establishing standing in a case such as this are exceedingly low. Under a typical Type II process such as has been undertaken in this case, staff will render an initial decision for a permit without providing an initial public hearing or comment period, and the

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1 In a typical case, a party is "aggrieved" where (1) a person's interests are recognized by the local decision maker; (2) the person asserts a position on the merits; and (3) the local decision maker renders a decision contrary to that position. *Jefferson Landfill Committee v. Marion County*, 297 Or 280, 284, 686 P2d 310 (1984) (*citing Benton County v. Friends of Benton County*, 294 Or 79, 653 P2d 1249 (1982)).

2 In *Jefferson Landfill*, 297 Or at 283, the Oregon Supreme Court provided the following explanation of the meaning of “adversely affected,” as that term was used in LUBA's 1979 enabling act:

"In the context of section 4(3) [of Oregon Laws 1979, chapter 772, as amended by Oregon Laws 1981, chapter 748, section 35], 'adversely affected' means that a local land use decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner. Examples of adverse effects would be noise, odors, increased traffic or potential flooding. *See, e.g., Yamhill County v. Ludwick*, 294 Or 778, 663 P2d 398 (1983) and *Benton County v. Friends of Benton County*, [294 Or 79, 653 P2d 1249 (1982)]."
notice of decision is sent to the notice list. In that situation, citizens are provided an opportunity to request a de novo appeal in front of a local appellate body (typically a hearings officer). In the context of this type of case, a person should be considered to be “aggrieved” by the decision merely by virtue of the fact that they disagree with it. Compare Flowers v. Klamath County, 98 Or. App. 384, 780 P.2d 227 (1989).

The third relevant provision is CCZLDO §5.8.200. This provision provides requirements for filing an appeal of an administrative decision, and specific what procedures govern the hearing process:


1. Notice of Appeal (NOA) shall be filed with the Department on the NOA form provided by the County along with any required filing fee. Upon receipt of an appeal, the Department shall schedule a public hearing before the Hearings Body and provide public notice as provided in Section 5.0.900(A). The hearing on appeal of an administrative decision shall be de novo (ORS 215.416).

2. The appeal hearing procedure shall be in accordance with Section 5.7.300.

As discussed below, all parties agree that this section, read together with CCZLDO §5.8.100 and §5.8.150, sets forth three jurisdictional “requirements” for appeals of an administrative decision made without a hearing. These three requirements are as follows:

- The appeal must be filed within 15 days of mailing of the decision. CCZLDO §5.8.150;
- The appeal must be filed on the county form. CCZLDO §5.8.200;
- The filing fee must be submitted with the appeal. CCZLDO §5.8.200.

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3 A de novo review is completely new review, without regard to prior legal interpretations made by the lower tribunal. In other words, the decision-maker is required to conduct an independent review of the record and is not bound by the lower decision-maker’s determination. In seeking to define the term de novo, LUBA has repeatedly cited the following definition from Black’s Law Dictionary: “[a] new; afresh; a second time.” Likewise, LUBA has noted that a de novo trial is defined as: “[t]rying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered.” See Black's Law Dictionary, 435 (6th ed. 1990). See also Friends of Linn County v. Linn County, 37 Or LUBA 280 (1997) ( A de novo review simply means that the board of commissioners is in no way bound by the planning commission's decision and the board of commissioners makes its decision as though the planning commission decision had not been made.). See generally, Waddill v. Anchor Hocking, Inc., 190 Or App 172, 78 P3d 570 (2003) (When we review a decision for errors of law, we do not give any deference to the trial court's decision; thus, we review the trial court's decision “de novo” as the Supreme Court uses the phrase.).

4 See, e.g., Century 21 Properties, Inc. v. City of Tigard, 99 Or App 435, 437-39, 783 P2d 13 (1989), rev den 309 Or 334 (1990) (If petitioners' appeal to the planning commission was not filed within the time required by the code, then the planning commission had no authority to review the appeal.).

If any of these three items are not complied with, the appeal must be dismissed. The code also makes clear that the hearing will be *de-novo*. The term *de novo* has a well-understood meaning under Oregon law. *See* Footnote 3, *supra*. 

Beyond that, however, the parties disagree as to whether there are additional aspects of Article 5.8 that set forth requirements that are jurisdictional in nature. Jordan Cove Energy Project (JCEP) argues that the county’s ordinance imposes additional jurisdictional requirements. According to JCEP, those requirements include:

- A local notice of appeal must include allegations of fact that establish the appellant's standing to appeal, and that the appellant’s failure to allege such facts warrants dismissal of the appeal. CCZLDO §5.8.900; CCZLDO §5.8.150(3);
- A local notice of appeal must include at least one issue that is deemed to be facially plausible or meritorious, CCZLDO §5.8.900, and
- A person filing the notice of intent to appeal on behalf of an organization must include a written authorization letter. CCZLDO §5.7.300(4)(B); §5.8.200(2).

*See* letter from Mark Whitlow, Perkins Coie, dated June 7, 2013. For the reasons discussed below, the hearings officer recommends that the Board of Commissioners decline the invitation to interpret the CCZLDO in the manner suggested by JCEP.

2. **Overview of Law Pertaining to “Jurisdictional Defects” Warranting Dismissal of an Appeal.**


JCEP correctly cites several authorities, including Breivogal v. Washington County, 114 Or App 55, 834 P2d 473 (1992), and Tipton v. Coos County, 29 Or LUBA 474 (1995), aff’d 137 Or App 633, 904 P2d 1094 (1995), for the proposition that where a local government’s filing requirements for local appeals are “jurisdictional,” failure to satisfy those requirements within the time prescribed deprives the local government of jurisdiction to hear the appeal. The hearings officer will attempt to summarize the existing case law on the topic, because it provides clear guidance on how this issue should be resolved.

Cases such as Breivogal and Tipton, which are discussed in detail below, stand for the proposition that where the local code makes clear that certain appeal requirements are jurisdictional, or mandatory prerequisites to an appeal, then the county must reject the appeal it is non-compliant with respect to any of those requirements. Furthermore, a “jurisdictional” requirement may not be waived by stipulation of the parties, City of Hermiston v. Employment Relations Board, 280 Or 291, 570 P2d 663 (1977). However, a local government may dismiss the appeal only if its code *expressly provides* that dismissal is the sanction for not complying with the
requirement. *Golden v. City of Silverton*, 58 Or LUBA 399 (2009), *aff’d without op.* 228 Or. App. 757; 210 P.3d 945, *rev. den.* 347 Or. 42; 217 P.3d 688 (2009); *Ratzlaff v. Polk County*, 56 Or LUBA 740, 745 (2008) (where nothing in local law governing payment of appeal fees states that failure to pay appeal fee is a jurisdictional requirement, it is not error for a county to hear the appeal).

The discussion should begin with one of the most-cited of the so-called “jurisdictional defects” cases: *Breivogel v. Washington County*, 114 Or App 55, 834 P2d 473 (1992). In *Breivogel*, the county code specifically required appellants to sign their appeals, and further specified that failure to sign the appeal “shall be a jurisdictional defect.” *Id.* at 57. The petitioners failed to sign the local notice of appeal and the county dismissed their local appeal. The Court of Appeals found that a local appellant's failure to comply with county notice of appeal requirements meant that the local appellant's appeal must be dismissed. The Court held that where a local government specifies that a local appeal requirement is "jurisdictional," a failure to comply with those "jurisdictional" requirements properly results in dismissal of the local appeal. *Id.* at 58-59.

In *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995), LUBA held that a city may reject an appeal where the code requires the appeal to be accompanied by the appeal fee, and the appellant fails to file with the fee. The code at issue in Ramsey provided as follows:

PCC 33.730.030(H): "[a]ppeals must comply with this subsection."

PCC 33.730.030(H)(1) (Content of the Appeal) provides, in relevant part:

"The appeal must be submitted on forms provided by the Director. All information requested on the form must be submitted in order for the appeal form to be accepted. The appeal request must include:

** * * * *

"The required fee." (Emphases added.)

Citing *Breivogel*, LUBA held that the code provision mandating that the appeal fee be included with the appeal creates a mandatory requirement, and that the failure to comply with that requirement demands the appeal be dismissed. See also *Beaverton v. Washington County*, 7 Or LUBA 121 (1983); *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 690, 693 (1988).

In *Tipton v. Coos County*, 29 Or LUBA 474 (1995), *aff’d w/o op.* 137 Or App 633, 904 P2d 1094 (1995), LUBA again required on *Breivogel* to find that an appeal must be dismissed since it did not comply with a mandatory requirement mandating that the appellant set forth the basis for standing in the appeal narrative. *Tipton* dealt with an earlier version of Coos County’s Land Development Ordinance. At the time, the CCZLDO §5.8.200 provided as follows:

"The notice of intent to appeal must clearly and specifically state:

"a. how the Planning Director erred in his decision, or how the HearingsBody
erred in its decision; and

"b. the issues the petitioner seeks to have reviewed; and

"c. the facts establishing that the petitioner has standing, pursuant to this Article:"
(Emphasis added).

In their NOA, the petitioners in Tipton simply alleged that they were "applicants." However, in reality they were the opponents, not the applicants. As a more critical failure, however, they did not allege that they were entitled to notice or that they were adversely affected or aggrieved, which is exactly what the code required. The Coos County Board of Commissioners rejected the appeal because the NOA failed to state facts establishing their standing to appeal the planning commission decision. LUBA affirmed, concluding that the filing requirement was "jurisdictional" and the county was mandated to dismiss the appeal. 29 Or LUBA at 477.

In contrast to the results in Breivogel, Ramsey, and Tipton, LUBA will not allow counties to dismiss cases for defects in the appeal when the code does not expressly make those issues mandatory requirements requiring dismissal. For example, the case of Siuslaw Rod and Gun Club v. City of Florence, 48 Or LUBA 163 (2004), addressed a provision of the City of Florence’s code that stated that a local appeal had to be initiated by a timely "notice of intent to appeal." According to the code, once that notice was filed, there was a 10-day deadline to file a "written petition." The city's code required that the written petition include a "certification" that the petition had been delivered or mailed to affected parties. After accepting petitioner's appeal in Siuslaw Rod and Gun Club, the city dismissed the appeal, citing petitioner's failure to file the required certification with the petition and its failure to file the required filing fee. Id. at 169. On appeal, LUBA recognized Breivogel and Tipton for the proposition that where a local filing requirement is expressly stated to be a "jurisdictional" defect, neither LUBA nor the local government may disregard that requirement. In contrast, LUBA noted that the City of Florence code did not make the failure to file the petition certification or pay the filing fee "jurisdictional" or mandatory prerequisites to an appeal. The Florence city code did, however, make failure to comply with certain other specified requirements jurisdictional or mandatory requirements that would lead to dismissal. The city's code also specified that measures short of dismissal were required for other missing information. Id. at 172-74. Because the failures cited by the city in dismissing the appeal were not "jurisdictional" or mandatory prerequisites, LUBA remanded the city's decision.

The case of Golden v. City of Silverton, 58 Or LUBA 399 (2009) aff’d without op. 228 Or. App. 757; 210 P.3d 945, rev. den., 347 Or. 42; 217 P.3d 688 (2009) provides another good example of a case where LUBA did not sanction the dismissal of an appeal due to the failure to strictly comply with requirements. The appellant in Golden forgot to provide the date of the decision being appealed. The Silverton Code section at issue, RSMC 18.02.800.010, set out the requirements for a notice of appeal as follows:

"A 'Notice of Appeal' shall contain:

"1. An identification of the decision sought to be reviewed including the date of the decision."
"2. A statement of the interest of the person seeking review and that he/she was a party to the initial proceedings.

"3. The specific policy or criteria relied upon for review.

"4. If de novo review is requested, a statement summarizing the new evidence which will be offered and the criteria to which it will relate.

The decision to grant a de novo hearing rests solely upon the discretion of the City Council." (Emphasis added.)

The notice of appeal form provided by the city included blank lines to specify the "Decision Body," "Original Decision," "Date of Decision," and "Effective Date of Decision." Petitioners, however, left those lines blank. LUBA noted that the Silverton zoning code did not expressly provide that a notice of appeal that deviates from specified requirements can subsequently be corrected by belatedly providing the required information. Rather, the RSMC was silent as to what the consequences of failing to comply with RSMC 18.02.800.010 are. LUBA found that the appeal could not be dismissed:

Dismissal of a local appeal for failure to comply with an informational requirement like specifying the date of the appealed decision in the local notice of appeal, however, is a sufficiently harsh sanction that we believe a local government may dismiss the appeal only if its code expressly provides that dismissal is the sanction for not including that date in the notice of appeal. We are not directed to any other provision of the RSMC indicating that dismissal of an appeal based on such a failure furthers the policy or purpose of the RSMC. Absent any indication in RSMC 18.02.800.010 or elsewhere in the RSMC that an appeal will be dismissed if required information is not supplied in precisely the manner directed in the code, we conclude the city misconstrued the applicable law by interpreting RSMC 18.02.800.010(1) to allow it to dismiss petitioners' local appeal based on petitioners' failure to specify the date of the appealed decision in the notice of appeal. (Emphasis added).

Id. at 406.

This case differs somewhat from Golden, since the Coos County Code states that “The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article.” Apparently, the Silverton Code did not have such a requirement. On the other hand, the Coos County Land Development Code does not have a requirement stating that the Notice of Appeal form must be filled out completely and correctly. Compare Golden, supra; Ramsey v. City of Portland, 29 Or LUBA 139 (1995)(Portland Code stated “All information requested on the form must be submitted in order for the appeal form to be accepted”). If the CCZLDO were specific that filling out the form correctly and completely was a requirement, then the hearings officer
would agree that the appeal that is not complete would have to be dismissed. However, as pointed out by CALNG attorney Corinne Sherton in her letter dated June 7, 2013, the CCZLDO does not expressly require that the form be filled out completely and correctly. As another example the CCZLDO does not state that the appeal itself must set forth the facts that establish the appellant’s standing. Rather, the Code states that “[t]he appeal must * * * meet one of the following criteria: The person is aggrieved or has interests adversely affected by the decision.”

Bolstering this conclusion is the fact that the CCZLDO has been modified since the time the Tipton case was decided. The previous version of the CCZLDO at issue in Tipton was similar to the current ordinance insomuch as it required that the hearings body to “summarily dismiss the appeal” if it found that the notice of intent to appeal did not comply with applicable filing requirements. Compare CCZLDO 5.8.100. However, unlike the current CCZLDO, the previous ordinance included a specific requirement that the appellant must state facts in the appeal establishing that the appellant has standing. That requirement has since been dropped from the code. In its place, the County created a “Notice of Appeal” form, that among other things, contain a requirement that the appellant provide “[a] statement of the standing of the appeal.” CCZLDO 5.8.900.

It is unclear whether the intent of these changes was to simply use a different means to accomplishing the same overall goal, or whether the deletion of the express code requirement in favor of a mere form signaled an intent to be less draconian on applicants. In the absence of legislative history to the contrary, the hearings officer relies on the presumption that in enacting subsequent legislation, the legislature was aware of the policy underlying earlier enactments.” Fulmer v. Timber Inn Restaurant and Lodge, 152 Or App 334, 954 P2d 201 (1998)(quoting Plattner v. VIP’s Industries, Inc., 95 Or App 351, 768 P2d 440 (1989)). See State of Oregon, Mental Health Div. v. Lake County, 17 Or LUBA 1165 (1989). For this reason, the Hearing officer presumes that the removal of this language from the code was a purposeful attempt to lessen such “strict compliance” requirements, and reflects legislative intent to make the appeals process more forgiving for appellants.

With this background and legal framework in mind, the hearings officer turns to the specific issues for which JCEP seeks dismissal of CALNG’s and Mr. Clarke’s appeals.

3. CCZLDO §5.7.300(4)(B): The Written Authorization Required for Representative Who Presents Testimony on Behalf of an Organization Does not Have to be Filed With an Appeal.

JCEP argues that the appeal filed by Mr. Jody McCaffree must be dismissed because Ms. McCaffree did not include the letter required by CCZLDO §5.7.300(4)(B) as an exhibit to CALNG’s appeal. JCEP further argues that her failure is not repairable because it is too late to amend the appeal to include this letter (on account of the fact that the deadline for filing the appeal has passed).

CCZLDO §5.7.300 is entitled “Quasi-Judicial Land Use Procedures.” Among other things, it sets forth a requirement that a person who is “presenting testimony” on behalf of an organization provide a letter establishing that the person is authorized to appear on behalf of the organization.
CCZLDO §5.7.300(4)(B) provides as follows:

4. Representatives

A. A party may represent themselves or be represented by an attorney. Consultants and other non-attorney professionals may appear as fact witnesses for any party, but may not appear as a legal representative.

B. Any person presenting testimony on behalf of a group, company or any other organization, except an attorney, must enter written evidence into the record establishing that the person is authorized to appear on behalf of the organization. Such written authorization must:

(1) Be written on the group, company, or organization’s official letterhead;

(2) Name the person authorized to appear on behalf of the group, company or organization;

(3) Specify the scope of the authorization; and

(4) Contain the signature of a person with authority to grant the authorization.

As quoted above, CCZLDO §5.7.300(4)(B) does not state, directly, that an appeal must include the written authorization. In fact, by its very terms, CCZLDO §5.7.300(4)(B) does not become operative until a person wishes to “present testimony” on behalf of an organization. Contrary to JCEP’s argument, the act of filling out and filing an appeal form does not, in the hearings officer’s opinion, constitute “presenting testimony.” The term “testimony” consists of the written materials, statements, and exhibits submitted into the record, as well as the verbal presentation consisting or both evidence and argument presented to a decision maker at a public hearing. Thus, it appears that the intent of CCZLDO §5.7.300(4)(B) is to force a person who wishes to testify as a fact witness on behalf of an organization to provide proof that he or she is actually authorized to do so. That requirement is met at the land use hearing.

Moreover, although CCZLDO §5.7.300(4)(B) sets forth a mandatory requirement, it does not set forth a remedy for any violation of the requirement. It is unclear what remedy, if any, exists for a violation of CCZLDO §5.7.300(4)(B). JCEP argues that CCZLDO §5.8.100 requires dismissal, because it states “The Board of Commissioners or Hearings Body shall dismiss an appeal for failure to follow the requirements of this article.” JCEP argues that CCZLDO §5.7.300 is a “requirement of this article” by operation of CCZLDO §5.8.200, which states that “[t]he appeal hearing procedure shall be in accordance with Section 5.7.300.” The hearings officer finds that this cross reference is simply too vague and too indirect to form the basis of a jurisdictional defect.
that mandates that an appeal be dismissed. See ORS 215.422.\(^6\) Among other things, CCZLDO §5.8.200 discusses “appeal hearing procedure” being in compliance with CCZLDO §5.7.300, not the procedure associated with the Notice of Appeal itself. If anything, CCZLDO §5.8.200 bolsters the conclusion that CCZLDO §5.7.300(4)(B) applies to appeal hearings only, not the NOA.

Finally, there is some irony to the fact that JCEP seeks to trip up CALNG by using CCZLDO §5.7.300 (B)(4). The Board may recall that CALNG attempted to use CCZLDO §5.7.300 against Pacific Connector in the remand portion of the gas pipeline case. The undersigned hearings officer was unsympathetic to CALNG’s argument, finding that Pacific Connector was in fact represented by an attorney and that, in any event, Pacific Connector had cured any deficiencies by filing after-the-fact letters. In other words, the hearings officer to a practical approach to the issue, by ensuring that the overall intent of the provision was met while not allowing CCZLDO §5.7.300(4)(B) to be used as the basis of some ticky-tack reason to impinge on the substantive rights of the parties to present a full and fair case to the decision-maker. The hearings officer is equally unimpressed with JCEP’s attempt to knock out CALNG’s appeal on such a minor technicality.

**Conclusion:** The hearing officer strongly recommends that CALNG’s appeal not be dismissed on the grounds that Jody McCaffree did not provide written authorization under CCZLDO §5.7.300(4)(B) at the time she filed the appeal on behalf of CALNG.

4. **CCZLDO §5.8.100 -.200:** In this Case, Defects in the Manner in Which the Appellant Fills out the NOA Form Does Not Require Dismissal, so Long as the Appeal is Filed in a Timely Manner on a NOA Form and the Fee is Paid.

a. An Appeal Cannot Be Dismissed Merely Because the Statement of Standing is Inadequate.

JCEP seeks to have the County dismiss John Clarke’s appeal on the grounds that Mr. Clarke “provides no explanation of how he is aggrieved or has interests that are adversely affected ***. See Letter from Mark Whitlow, dated June 7, 2013, at p. 7. This argument is a carbon copy of an argument that LUBA rejected in Crowley v. City of Bandon, 48 Or. LUBA 545 (2005).

In Crowley, the planning commission determined that an appeal of an administrative decision was not properly filed because 1) it failed to address relevant criteria for the permit at issue, and, 2) failed to establish standing by addressing how the appellant was either a party to the initial proceeding or was adversely affected or aggrieved by the decision. LUBA stated that the appeal was improperly dismissed:

All of the petitioners assert standing on the basis that they are "adversely affected or aggrieved" by the Community Development

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\(^6\) ORS 215.422 requires that “[t]he procedure and type of hearing for such an appeal or review shall be prescribed by the governing body.” LUBA has interpreted that language to require “not only that a [county] adopt procedures for conducting appeals, but implicitly requires that those procedures clearly communicate to potential appellants what is expected of them in order to perfect an appeal and what the scope of the appeal will be.” See Orr v. City of Eugene, 6 Or. LUBA 206 (1982).
Director's decision. Without expressing any position on the merits of petitioners' current arguments that they satisfy that standing requirement, we agree with petitioners that the city erred in dismissing their appeal based on petitioners' failure to demonstrate in their notice of local appeal that they are adversely affected or aggrieved by the Community Development Director's decision.

The problem with the city's decision regarding standing is that BMC 17.124.010(C)(2) merely requires that a local appellant include a "statement of the interest of the person seeking the review." BMC 17.124.010(C)(2) does not inform local appellants of a permit that is rendered administratively without a hearing that if they are appealing as a person who is "adversely affected or aggrieved" their only opportunity to demonstrate that they are "adversely affected or aggrieved" is in the notice of local appeal. The city cannot require that local appellants of permit decisions that are rendered without a public hearing demonstrate in their notice of local appeal that they are "adversely affected or aggrieved" when BMC 17.124.010(C)(2) does not require that they do so. The city erred in not allowing petitioners an opportunity for a de novo evidentiary hearing at which they would have an opportunity to demonstrate that they are "adversely affected or aggrieved." While it may be that the city could require that local appellants make that demonstration in the local notice of appeal, if the BMC imposed that requirement, nothing in BMC 17.124.010(C)(2) reasonably informed petitioners that such a showing must be made in their notice of local appeal in this case. (Emphasis added, Footnotes omitted).

Id. at 51. There is simply no basis to distinguish Crowley from the facts of this case. The CCCZLDO is functionally no different than the City of Bandon code at issue in Crowley.

Conclusion: For the reason set forth above, the County cannot dismiss an appeal simply due to the fact that the appellant did not adequately set forth the basis for their standing in the Notice of Appeal.

b. An Appeal Cannot Be Dismissed Merely Because the Issues Set Forth in the NOA are Without Legal or Factual Merit.

JCEP also seeks to have the County dismiss CALNG’s appeal on the grounds that CALNG “fails to state the adequate grounds in her appeal as required by section 5.8.200(1) [and NOA form at 5.8.900].” See Letter from Mark Whitlow, dated June 7, 2013, at p. 2. Once again, the case of Crowley v. City of Bandon, 48 Or. LUBA 545 (2005) controls. In Crowley, LUBA rejected the exact same argument on two separate grounds:

The first problem is that the city apparently reads [City of Bandon
zoning Code Section 17.124.010(C)(3) to impose requirements that it does not impose. The first sentence of BMC 17.124.010(C)(3) only requires that petitioners state their "specific grounds" for review. Petitioners stated several specific grounds for review. While the city may ultimately determine that those grounds do not provide a basis for reversing the Community Development Director's decision, resolution of the merits of those stated grounds must take place following the required de novo hearing.

We turn to the second and more fundamental problem with the city's decision to dismiss petitioners' appeal for inadequately specifying the bases for appeal. ORS 227.175(10)(a)(E)(ii) was adopted in 2001 and provides that, at the de novo appeal hearing required by ORS 227.175(10)(a)(D), "the presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal[.]" Or Laws 2001, ch 397, sec 2. ORS 227.175(10)(a)(E)(ii) guarantees local appellants of permits that are rendered without a prior public hearing the opportunity for a de novo hearing at which they may raise any relevant issue, without regard to whether the issue was specified in the local notice of appeal. It seems highly unlikely that the legislature could have intended that a city may nevertheless dismiss a local appeal, without first providing a de novo hearing, because the appellant's local notice of appeal did not sufficiently identify the issues to be asserted on appeal.

Id. at 552.

On June 13, 2013, the hearings officer conducted a telephone hearing with the parties to the appeal. During that telephone hearing, JCEP argued via counsel that the NOA serves a gatekeeping function by allowing the County to pre-screen an appeal for legal and factual merit. According to JCEP, if the County decision-maker determines that none of the issues raised in the NOA are plausible, or all of the issues are otherwise devoid of merit, the County must dismiss the appeal without a hearing.

As noted in Crowley, there are numerous problems with JCEP’s arguments, none the least of which is that the CCZLDO simply does not authorize the pre-screening process that JCEP envisions. Many zoning codes require the appellant to state the reasons for the appeal in the NOA. When the appeal is not conducted under ORS 215.416(11), this is typically required as a means to limit the scope of the issues raised at the hearing. It also has the benefit of putting the county and other parties on notice as to the issues that appellant seeks to discuss. However, the hearings officer is not aware of any jurisdiction that uses these requirements as a mechanism to pre-screen the appeal for legal or factual merit. To do so would seem to violate an appellant’s right to a full and fair hearing. Muller v. Polk County, 16 Or LUBA 771, 775 (1988)("The substantial rights of the parties include “the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing.”").
Beyond that, however, both ORS 215.416(11)(a) and CCZLDO §5.8.200 mandate that the County provide a *de novo* hearing to the appellant in this situation; a provision which is impossible to harmonize with any sort of pre-screening requirement. *See* Exh. A (Setting out text of ORS 215.416(11)). ORS 215.416(11)(a)(E)(ii) further states that the issues that will be the subject of the *de novo* hearing cannot be limited to the issues that are set forth in the notice of appeal. As a result, even if all of the issues that are set forth in the NOA are devoid of legal merit, the appellant still has the opportunity to dream up an entirely new set of issues at the appeal hearing. ORS 215.416(11)(a); *Crowley v. City of Bandon*, 48 Or. LUBA 545 (2005). LUBA has held that a local government is not permitted to limit a hearing held pursuant to ORS 215.416(11) to those issues that are raised in the notice of appeal. *See* *Sisters Forest Planning Committee v. Deschutes County*, 48 Or. LUBA 78 (2004).

At the June 13 telephone hearing, JCEP took issue with the argument set forth above, arguing that the failure to pre-screen the appeal renders the Code requirement to set forth issues in the appeal document itself a nullity. Perhaps that is correct - the requirement serves no useful purpose in this particular context. *See generally* *McKeown v. City of Eugene*, 46 Or LUBA 494, 502-03 (2004); *Sisters Forest Planning Committee*, supra. However, it is important to keep in mind that the appeal form set forth in CCZLDO §5.8.900 applies to many different types of appeals, and the fact that one of its requirements may in fact be a nullity in the context of a specific type of appeal (*i.e.* an appeal of an administrative decision under ORS 215.416(11)) is of no consequence. The hearings officer agrees that in the context of an appeal of an administrative decision, the requirement to set forth appeal issues in the NOA does not serve any useful function, other than to help the other parties prepare for the hearing. Nonetheless, state law is clear on this point and effectively trumps any local code provision to the contrary. *See* *McKenzie v. Multnomah County*, 27 Or LUBA 523, 53 (1994) (noting that the requirement for a *de novo* hearing set forth in ORS 215.416(11) “must be observed regardless of contrary provisions in the local code.”); *Forester v. Polk Co.*, 115 Or App 475, 478, 839 P2d 241 (1992).

JCEP further argues that, contrary to the hearings officer’s conclusion, there is really no conflict between JCEP’s interpretation of the CCZLDO and state law, because ORS 215.416(11) specifically recognizes that the County has a gate-keeping function for appeals. JCEP cites to ORS 215.416(11)(a)(C), which states:

> “[t]he notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county’s land use regulations.” (Emphasis added).

JCEP places emphasis on the language underlined above, and argues that the County can, as a consequence of this language, pre-screen an appeal for legal and factual merit. The hearings officer disagrees. The underlined language quoted above recognizes that the County may, as an example, require the appellant to submit an appeal on a County-prescribed form within the specified time frame, as well as enforcing other requirements which do not conflict with state law. However, there is simply no way to read the underlined language consistent with the express

Conclusion: The issue raised by JCEP is without merit: the County may not dismiss an appeal merely because the issues raised in the NOA may be devoid of merit. The appellant is entitled to a de novo appeal hearing regardless of whether the issues set forth in the NOA are devoid of legal or factual merit.

Note: the resolution of this issue brings up a practical question regarding what a county can do about appeals that are filed without desirable amounts of detail. Short of amending the code to expressly make specific defects a jurisdictional issue, the County can demand that the appellant cure deficiencies by amending the NOA after the fact. In Siuslaw Rod and Gun Club v. City of Florence, 48 Or LUBA 163 (2004), LUBA stated the following:

[I]t seems to us that the city's actions on remand potentially include at least the following. First, the city council could provide petitioner the required written notice and opportunity to cure the two identified deficiencies by a date certain and proceed to a hearing on the merits of the appeal if petitioner does cure, or dismiss the appeal if petitioner does not. In addition, if the appeal goes forward, to the extent it is consistent with the city code or other applicable authority, the city council could consider one or both of the additional grounds raised by intervenor in his response brief, and reject the appeal on those grounds.

Id. at 175.

5. Petitioners May File One Appeal as Co-Appellants if the Notice of Appeal Form is Signed by All of the Appellants.

The appeal filed by Mr. John Clarke raises the question of whether two or more persons can join on one appeal as co-appellants, and if so, what procedures must be followed to perfect those appeals.

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In this case, Mr. Clarke filed an appeal using the NOA form set forth at CCZLDO 5.8.900. At the time he submitted the NOA form and fee, Mr. Clarke attached two separate pieces of paper containing the names, addresses, and signatures of two other persons: John Craig Neikirk and Richard F. Knablin. These two individuals did not sign the NOA form, but did sign the attached paper. However, the NOA form signed by Mr. Clarke gives no indication that Mr. Neikirk and Mr. Knablin are intending to be co-appellants with Mr. Clarke. In fact, there is no indication on any of the documents submitted with the 15-day appeal period that Mr. Neikirk and Mr. Knablin intend to be co-appellants. After the appeal deadline passed, Mr. Knablin submitted a letter explaining why he had standing to appeal.

CCZLDO provides no language which gives any indication that the two or more persons should be allowed to join in one appeal and thereby only pay one appeal fee. The CCZLDO is written in the singular, and even the appeal form is written in a matter that presupposes that only one person will fill it out. As an example, there are no places for co-appellants to sign the NOA form.

However, state law appears to add a wrinkle that must be considered. With regard to land use process conducted pursuant to ORS 215.416(11), state law states:

“[i]f a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less.”

This language could be read to suggest that the County can only charge a maximum of $250 for the initial appeal hearing, irrespective of how many appeals are filed. On the other hand, it could simply be interpreted as addressing how much the County can charge for each appeal. The hearings officer is not aware of any case law that is directly on point.

The closest case is Yantis v. Josephine County, 55 Or LUBA 619 (2008). In Yantis, LUBA addressed a situation similar to the one presented here. The Josephine County Rural Land Development Code contained provisions similar to the CCZLDO, insomuch as it required the appeal to be submitted on the County form and to be accompanied by an appeal fee. In that case, a petitioner named Yantis sought to appeal a Planning Commission decision to the Board. He filled out the County’s appeal form and submitted the correct $1,550 appeal fee. Another appellant, Mr. Sommer, submitted his appeal by filling out a second appeal form. But instead of providing a second appeal fee check, he crossed out the portion of the form addressing fees and wrote “Join appeal by Mr. Yantis.” Mr. Sommer signed the second appeal form in the space provided for “co-appellant.” The County dismissed Mr. Sommer’s appeal on the basis that he did not pay the required fee. LUBA upheld the dismissal, finding that the County was within its interpretive discretion to deny the second appeal for failure to pay the appeal fee. LUBA stated:

Petitioner does not explain why the county's interpretation of RLDC 33.040 governing appeals is incorrect or why its conclusion
based on that interpretation and the evidence in the record that Yantis and Sommer were not co-appellants is incorrect. We think the county's interpretation of its local code provisions governing appeals in a manner that requires "co-appellants" to either submit the same appeal form and sign in the spaces provided on the appeal form as "appellant" and "co-appellant," or otherwise indicate on separate appeal forms that each appeal is a co-appeal, is reasonable. The Yantis appeal application does not identify a co-appellant and in fact, indicates that there was no co-appellant. ***. Based on that appeal application, it was reasonable for the county to view the Sommer application as a separate appeal application from the Yantis application and to require the Sommer application to be accompanied by a separate filing fee as required by RLDC 33.040.

Id. at 624.

The facts in Yantis differ from the present case in one important respect: the Josephine County appeal form did envision that multiple people could file one land appeal as “co-appellants”. The CCZLDO gives no indication that this practice is allowed or encouraged.

The hearings officer is somewhat ambivalent as to the correct way to interpret the code in this particular situation, and recognizes that the Board could likely exercise its interpretational judgment to arrive at differing results. Nonetheless, it is the hearings officer’s recommendation that Mr. Neikirk and Mr. Knablin not be granted appellant status. In this case, it is clear that neither of these appellants complied with the requirement to file an appeal on a County NOA form, which is a jurisdictional defect. Furthermore, there is simply not enough indication on the Clarke NOA form to indicate conclusively that Mr. Clarke, Mr. Neikirk, and Mr. Knablin intended to be co-appellants, even assuming the County forms allow that approach. We are left to speculate as to what Mr. Clarke intended by attaching those two extra pages to his appeal form. Under that circumstance, Mr. Neikirk, and Mr. Knablin cannot be said to have successfully filed appeals.

However, this recommendation has little, if any practical significance for Mr. Neikirk and Mr. Knablin. Since the appeal hearing is de novo, Mr. Neikirk, and Mr. Knablin can still participate and gain standing to appeal to LUBA so long as one or both of the other appeals (CALNG or Clarke) is allowed to move forward. See Dead Indian Memorial Road Neighbors v. Jackson Co., 188 Or App 503, 72 P23d 648 (2003). As set forth elsewhere in this recommendation, it is clear to the hearings officer that both CALNG’s appeal and Mr. Clarke’s appeal should be allowed to proceed to the merits.

6. ORS 9.320

Citing ORS 9.320, JCEP argues that CALNG’s appeal must be dismissed because Jody McCaffree is not an attorney, and, as a result, cannot file an appeal as a “representative” of CALNG.

It is common practice in Oregon for land use consultants, surveyors, engineering firms,
architects, and land use planning firms to submit both land use applications and appeals, as well as representing private citizens and corporations in local land use proceedings. As far as the hearings officer is aware, neither the Oregon Courts nor the Oregon State Bar have ever taken a formal position on the matter. ORS 9.320 states:

9.320 Necessity for employment of attorney; effect of employment. Any action, suit, or proceeding may be prosecuted or defended by a party in person, or by attorney, except that the state or a corporation appears by attorney in all cases, unless otherwise specifically provided by law. Where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of the client of the attorney as between the client and the adverse party, except as provided in ORS 9.310.

In situations where ORS 9.320 applies, only an individual human being can appear "in person." Oregon Peaceworks Green, PAC v. Secretary of State, 311 Or. 267, 810 P.2d 836 (1991).

ORS 9.320 applies to “actions,” “suits,” and “proceedings.” Thus, a threshold question is whether the current land use appeal constitutes a “proceeding” within the contemplation of ORS 9.320. The statute does not define these three terms, although it seems relatively clear that this appeal does not constitute an “action” or a “suit.” On the other hand, the term “proceeding” is more broad in its scope. Although there is no case law on point, it does seem relatively obvious that a local land use hearing is a “proceeding” within the meaning of ORS 9.320. An Attorney General opinion written in 1974 supports this conclusion. 36 Or Atty Gen. 960, 988 (1974). Furthermore, ORS 9.160 provides relevant context to this interpretation, and bolsters the conclusion that a local land use proceeding are a proceeding. The process of filing out appeal forms and effectively representing a person at a land use hearing does require the exercise of legal and factual judgment as well as the interpretation of law. These are precisely the types of matters that ORS 9.160 states should be handled by attorneys.

Having said that, the remedy that JCEP seeks to have the County impose is not fairly suggested by the language of ORS 9.160 or ORS 9.320. LUBA has stated that “other consequences may attend violation of the requirement for legal representation; however, we do not believe forfeiture of the right of appeal should be imposed.” League of Women Voters of Coos County v. Coos County, 14 Or. LUBA 45 (1985), aff’d, 76 Or App 705, 712 P2d 111 (1985).

The second question is whether the letter sent by attorney Corinne Sherton dated June 7, 2013 cures any deficiency that might otherwise exist. In light of both LUBA’s and the Court of Appeal’s decision in the League of Women Voters of Coos County case, the hearings officer believes that it does.

Conclusion: Whatever violation of ORS 9.320 existed by virtue of the fact that Jody McCaffree filed an appeal on behalf of CALNG without using the services of an attorney, denial of the appeal is not an appropriate remedy. Furthermore, the fact that CALNG is now represented by attorney Corinne Sherton cures whatever violation occurred, at least for purposes of the disposition of this appeal proceeding.
Respectfully submitted this 18\textsuperscript{th} day of June 2013,

\textbf{ANDREW H. STAMP, P.C.}

\textit{Andrew H. Stamp}

Andrew H. Stamp

AHS:ahs
(11)(a) (A) The hearing officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearing officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.

(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.

(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county’s land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

(D) An appeal from a hearing officer’s decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearing officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:
   (i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
   (ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and
   (iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing.

(b) If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site.

(c) (A) Notice of a decision under paragraph (a) of this subsection shall be provided to the applicant and to the owners of record of property on the most recent property tax assessment roll where such property is located:
   (i) Within 100 feet of the property that is the subject of the notice when the subject property is wholly or in part within an urban growth boundary;
   (ii) Within 250 feet of the property that is the subject of the notice when the subject property is
outside an urban growth boundary and not within a farm or forest zone; or

(iii) Within 750 feet of the property that is the subject of the notice when the subject property is within a farm or forest zone.

(B) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(C) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.