Tape 14, Side 2

0230 SEN. JERNSTEDT moved that SB 416 be amended; in line 14 of the bill, after "and" insert "encourage Oregon".

0237 CHAIRMAN HANNON, hearing no objection to the motion, declared the amendment adopted. Sen. Boe and Groener were excused.

0238 SEN. JERNSTEDT moved that SB 416, as amended be sent to the Floor with a DO PASS recommendation.

0281 The clerk called the roll with Sens. Ragsdale, Bullock, Groener, Jernstedt and Chairman Hannon voting AYE. Sen. Boe was excused.

0284 CHAIRMAN HANNON declared the motion CARRIED.

0284 SEN. JERNSTEDT will lead discussion on the Floor.

SB 435 - Relating to judicial review

The preliminary Staff Measure Analysis on SB 435 is hereby made a part of the record (SEE EXHIBIT B).

0301 J. ROBERT JORDAN, a practicing attorney in Portland, stated he served as Chairman of the Writ of Review Advisory Committee of the Law Improvement Committee. The Law Improvement Committee is a statutory committee appointed by the Legislative Council Committee.

He discussed the make up of the advisory committee and its functions regarding writs of review and reviewed a prepared statement (SEE EXHIBIT C)

0429 He added they have presented to the committee three separate documents. The "Explanatory Comments" document (SEE EXHIBIT D) was prepared by the Legislative Counsel Committee, and overall outline of the bill itself, exclusive of its land use features (SEE EXHIBIT E) prepared by Mr. Bill Love and an outline of the land use features (SEE EXHIBIT F) prepared by Mr. Steve Schnell.

0450 BILL LOVE stated he has, since the inception of the Law Improvement Committee, been involved in many of the projects in which they were involved. He no longer serves on the Law Improvement Committee, but he understands the process and he thinks they have served the State of Oregon very well.

0458 Their Savings and Loan Association as such does not get involved with matters that pertain to the subject matter of this bill, but they do have a wholly owned subsidiary which is one of the larger land developers in the state and therefore would be affected by what is or is not done as it relates to the land use planning. He wanted it made clear that their company does own a land development company that is used in the land use decision making.

0466 Before the committee is a statement called "A General Overview" (SEE EXHIBIT E). He reviewed the provisions of the bill as outlined on page 2 of the statement.

0491 He would like to touch on the highlights of the bill as it relates to the land use decisions, Sections 1 to 12. One of the things they wanted to do was simplify the process. In going through this they spent a lot of time and said what they need to protect everybody's interest is to have one

level of decision making by the appropriate administrative body to decide the policy matters, be it the city council, the county commissioners or whoever it is supposed to be. They will make the decision that they are embodied to do. From that there ought to be one level of appropriate judicial review to determine whether the decision was made according to the roles and within the goalposts that have been defined. And rather than have it go to a Circuit Court and have them look at the record, and these are reviews on record, so they don't go through a whole new trial and have them make a decision and if they don't like it then they go to the Court of Appeals--let's go directly to the Court of Appeals. That is done today. You go from a decision made by any state agency under the Administrative Procedures Act to the Court of Appeals and the Court of Appeals makes the legal decision. If the decision is made at the administrative hearing, there is one level of judicial review. There is always a second level if the Supreme Court of Oregon elects on its own to be able to review further because of the policy statement. The Supreme Court has the right to do so. That is what they have tried to follow here.

0517 They have added the evidence of giving some written notice to the poeple involved as to when the city, county, district's decision is made and filed, signed and becomes enforced. Heretofore one of the problems has been that the bodies quite frequently announce their decision and nobody is sure quite when it gets signed and when it gets filed. They provided for a method of giving notice to the people who are interested in having notification. At that point the so-called time factor starts to run.

0526 Item 4 on page 2 of the statement (SEE EXHIBIT E) has to do with the time for taking the appeal to the courts if you don't like the decision of an administrative body. They have reduced it from 60 days to 30 days. But it is 30 days after the notice is given, not after some oral decision is made. The concern they have, and this is one of the areas, is that many, many cases are not appealed. They had some evidence that out of 5,000 there were roughly maybe 50 ended up having writs of review filed. Conceivably the 4,950 are just sitting there and nobody knows until the 60th day whether an appeal is going to be filed or not. He would submit as someone involved with development and with lending, that on any significant project nobody is going to go in and do anything until that appeal period has expired knowing that a party may come in the next day and file an appeal. So what they want to do is provide a reasonable time for the people to be able to exercise their right of judicial review, but not delay beyond a reasonable time all of the public projects where they don't know if an appeal is going to be filed. The committee felt that 30 days provides a sufficient time for people involved to determined whether they are going to take the matter up for a review or are they going to abide what the decision is of the decision-making body. He thinks that is a very important factor in the bill, but he also emphasises it is 30 days from the day that written notice is given that the decision has been finalized by the body that determines the matter.

0560 Numbers 5 and 6 on page 3 of the bill have to do with where do you go when the right of judicial review-- 5) says is there is a quasi-judicial type case, generally that is something that involves a specific parcel of land, if anybody doesn't like the decision they can go straight to the Court of Appeals just like you would from an area of an administrative agency. There are other types of matters that are more legislative in nature, common policy decisions. The conclusion of the committee there is you get LCDC involved in those cases because they may be changing the goalposts.

Tape 14, Side 2

0571 It isn't a question of whether this falls within the parameters of the LCDC and the comprehensive. The question is in these cases should we change them, modify them or are they trying to write some whole new rules by which they play the game. In this case LCDC should be involved. If they are more of the minor nature, after comprehensive plans are involved there was strong feeling in the committee that the Circuit Court which is independent of the land use areas, then the Circuit Court in the area of the particular case should be the level of initial judicial review. They distinguished between so-called quasi-judicial and legislative types actions.

0583 On top of page 4 there are two more items and he wants to emphasize this is the role of LCDC. The conclusion was should we have all these cases go through an administrative body. The feeling of the committee was that there are already too many levels of review. LCDC can't be the judicial review because it is not a judicial body. It is a policy making body like the city, county or special districts. So if you are talking about a level of judicial review that the people ought to have, LCDC cannot provide it because it is not a judicial body. Likewise, people serve part-time like they don on the Racing Commission, Writs of Review Advisory Committee. If we are talking about trying to have a judicial reivew being done in the framework of the goalposts it should be done by a court and not by another level of an administrative body. So the conclusion was reached that we could accomplish all of these objectives if we say we are going to go from the city or county that makes the decision up to the Court of Appeals, but we have to give notice to LCDC when you do that. You file your petition and LCDC has the right to come in to the Court of Appeals and say to the court and say they are interested because it has some long-range significants and they want to get their message through and ultimately the Court of Appeals can take that into consideration in arriving at its decision.

0610 There are two areas where the status quo has been maintained One has to do with a defintion of what he has referred to as a quasi-judicial, legislative and administrative. The courts have said if it is quasi-judicial you have to proceed under different ground rules than a legislative body.

0629 The other thing they ended up not changing had to do with the bonding requirements tied in for a stay order. They went round and round on that and finally decided to maintain a status-quo on the existing law in this area because they couldn't agree on anything better, with one exception, and that was they felt the attorney's fees should follow the general rules and we shouldn't have a provision that the bond itself can be used as a basis for paying attorney fees to the other parties as the current law would now permit. They have struck that from the present law. They talked about increasing the bond to $10,000 and about reducing the bond and about not having it at all. As a developer he personally doesn't feel that the stay of the bond is a very crucial question because if you have contested matter before the city or county or somewhere and the decision of the body is favorable to the developer and the developer or company knows they are likely to go out and have a writ file or an appeal taken, they are willing to pick up the option. The developer isn't going to spend money to get started and get shut out of the box later. You spend you whells for 60 days to find out if anything is going to be done.

0664 STEVEN R. SCHNELL stated Mr. Love has been the referee for the Pack 8 and has given the committee a play-by-play and he would like to put it into the context of the rues a little bit. Most of his comments are in the written

text (SEE EXHIBIT C) and he would like to speak from the charts he has. He explained the charts showing the system relating to how land use decisions are made.

0754 He would like to speak about his reactions as an LCDC commissioner from 1973 to 1976. It is his feeling in looking at how the commission functioned, they were asking citizens with their legal experience to do jobs that were really suited for full time people and in addition he thinks fulltime lawyers. Those technical decisions were difficult to make. All in all he thinks the commission tried very valiantly to do that job, but because of the nature of the decisions, many of them were delegated to hearings officers and the result was that the commission or many of the members of the commissioner couldn't be much help. There were a series of functions the commission had to perform during that time and still has to perform. Only one of them has to do with dealing with quasi-judicial decision such as we are talking about here.

0768 The proposal before the committee would reduce the load on the commission and make that citizen body a more effective group. As the bill has indicated it separates the quasi-judicial and the legislative decisions. It would continue to send the legislative decision to LCDC for review. In SB 100, as amendment by SB 570, there is a provision for acknowledgment of comprehensive plans. Once a local government completes its plan it is shipped off to the LCDC. The LCDC is then supposed to review it against the goals to determine whether the minimum standards set out by that are met. If they are met, then in terms of individual decisions the goals drop out. They no longer have a functional role on individual decisions. The result as far as the committee is concerned is to put that right back into the local government decision-making process.

0786 He thinks the system will be improved if we eliminate the one layer of duplication by causing the quasi-judicial decisions to be appealed directly from the local government to the Court of Appeals.

0789 MR. JORDAN stated they have given the committee a chart prepared by Legislative Counsel showing a comparison between present provisions of the law and and the bill's provisions on the second page (SEE EXHIBIT F). Also, Elizabeth Stockdale of Legislative Counsel is prepared to answer any technical questions.

0800 CHAIRMAN HANNON asked how many cases are we talking about on an average that would be challenged.

0805 MR. SCHNELL stated the committee sent out a questinnaire and they got responses to that and they can make the available to the committee. It is not a complete report, but what they came out with, and Bob Stacey of 1,000 Friends of Oregon did the analysis on it, and he thinks the rough figures are there were 6,000 decisions mentioned. Out of that roughly 100 decisions are appealed to the Circuit Court in some fashion. A very small portion go on to the Court of Appeals. It is not a great number of decisions that are appealed, but what happens is that those decisions that are appealed affect all the other decisions that are being made. The concern there is to simplify the upper levels in order to get good decision making at the lower levels.

0831 CHAIRMAN HANNON stated it really intrigues him that each session we are trying to file other things through the Court of Appeals. He agrees

we need to speed up the process, but he is intrigued by their indication that the writ of review is a challenge to LCDC and we find people are using both avenues as a means of appealing, but are they in fact appealing on legitimate grounds are are they appealing as a means of trying to prevent a project. That is a concern he has--that is using a legal process as a means to impede something rather than guaranteeing the legal right to someone to chanllenge something.

0841 MR. SCHNELL stated there is a provision in the bill that if there are frivilous tales, there is a cost that has to be paid in an attempt to discourage some of that. He thinks there are legitimate grounds for appeal at this stage and in part because some of this law is relatively new. With the system they are talking about here, he thinks they will minimize the appeals in the future because what will happen is there will be an established body of interpretation available that people can draw on, mainly in the form of a Court of Appeals decision. Also it is very costly to handle each of these levesl of appeals. It is very costly to the citizens and as a lawyer who makes some of his living in this field, he can assure everyone he gets complaints about that. It is not fair to the public to have this complicated decision-making process. This bill would reduce the cost of handling these kinds of procedures.

0980 MR. JORDAN, in response to Sen. Ragsdale's question, stated they were unable to come up with a definition of "quasi-judicial".

1016 SEN. RAGSDALE stated he will withhold his question until a later time because there are other witnesses who want to testify.

1017 CHAIRMAN HANNON stated SB 435 is going to go to a subcommittee and he would like to have Mr. Love, Mr. Jordan and Mr. Schnell to help the committee as we delve into th bill deeper.

1022 MICHAEL MARCUS, Director of Litigation for Multnomah County Legal Aid, stated his concern is solely with the portion of the bill which abolishes the writ of review as a device for reviewing district court error. He has submitted written testimony (SEE EXHIBIT G). He has submitted testimony in the past to the Writ of Review Subcommittee and the Law Improvement Committee and has appeared before Mr. Jordan made essentially the same argument that he is making today. He reviewed the testimony.

1039 His suggestion is that Section 13 of this bill be rewritten expressly to recognize the continued availability of the writ of review to review district court error. The reason he makes that suggestion is that an appeal from the district court to the Court of Appeals is in practice unavailable to all but wealthy litigants. It is therefore unavailable to a great majority of the litigants who find themselves in district court who are individuals as opposed to institutions.

1096 MIKE REYNOLDS, Justice Department, stated he is was asked to appear on behalf of the Governor's Office. Mr. Johnson was unable to attend and asked that he appear and speak with regard to SB 435. In view of some of the comments and testimony that has been presented here today, he has a couple of brief comments he would like to make in his capacity as Assistant Attorney General and also as having been legal counsel assigned to LCDC

for the past almost two years. He will keep them brief because he knows we will be discussing them later.

1107 With respect to LCDC and most of his comments will be addressed to the impact SB 435 is going to have on LCDC and its appeal function, and secondarily on the writ of review statute, generally.

1109 With respect to LCDC, to give the committee a couple of basic facts about LCDC and in its appeal function and its performance in that capacity. Since July and with the speed that LCDC makes decisions, since 1977 they have rendered over 100 decisions on appeals and only 12 of those have been appealed to the Court of Appeals. To his knowledge none of those cases has been reversed by the Court of Appeals on the grounds LCDC applied the wrong legal principles in deciding the case.

1118 There was one case in which the decision was reversed because LCDC not only invalidated the decision but remanded the case back to the board of county commissioners to reconsider the matter. The Court of Appeals said all they had the authority to do was to invalidate, not remand and so it reversed the order of the commission on that basis, but it was more of a symatical problem than it was one of applying legal principles. It really didn't have anything to do with the principles at all. In another case involving the Fish and Wildlife Commission, the Court of Appeals held it involved a legal principle of exhaustion of the administrative remedies. If he remembers correctly the commission ruled that the petitioner in that case had not exhausted the administrative remedies by appealing a decision from the Planning commission to the board of county commissioners, but instead appealed directly from the planning commission to the LCDC. The commission ruled that since the petitioner had not taken that one administrative step available that the appeal was not properly before LCDC. The Court of Appeals said that LCDC could adopt that principle as long as it wanted to, but it had to apply it prospectively, it couldn't apply it retroactively to a decision that had already been made. It was a extrenous issue and not one that involved te legal principle in the land use area that is germaine to an appeal.

1149 The comments of the Governor's office with respect to SB 435 simply have to do with LCDC's review function. He thinks Sen. Ragsdale brought out one problem that SB 435 seems to have and that is when are we going to decide when a problem is quasi-judicial and when is it legislative. In this bill that makes a difference between where the appeal goes, either to LCDC or to the Court of Appeals. It is quite possible that we could wind up with a motion of transfer being filed with LCDC and their decision that yes, this is quasi-judicial and should be filed in the Court of Appeals. So it is filed in the Court of Appeals and the Court of Appeals happens to disagree and says it is legislative and hands it right back.

1156 The Governor's office would like to see all land use decisions that involve allegations that statewide goals have been violated to be decided by LCDC in the first instance. Essentially this would eliminate the writ of review for such land use decisions. There are numerous justifications for that. One is that it eliminates forum shopping which exists right now . Now a litigant who wants to challenge a basically quasi-judicial land use decision at the local level which may be a rezoning or whatever, can either go to the Circuit Court or it can go to the LCDC depending on where it feels it is likely to get the best treatment. This would eliminate that for all people. There would be one body to which the appeal would go. The second thing it does is produces a consistency of interpretation with respect to the statewide goal. When you have

36 circuit courts making different decisions and different interpretations of the goals it produces differing results. Thirdly it places the review responsibility with the body that has the expertise in the area of interpreting the statewide goal. There was some discussion earlier about when policy is being made by the commission and in passing upon petitions for review and when it isn't. He submits, at least it has been his experience that it doesn't make any difference whether a decision is quasi-judicial or is legislative as far as whether policy is being made by the commission. Policy is being made in both kinds of decisions and it is not just the legislative decision so if LCDC were not to have review of quasi-judicial decisions it would be stripped of an awful lot of policy making authority.

1175 The fourth justification of eliminating the writ of review for these land use decisions and also placing it in LCDC is that it reduces the case load of circuit courts. Placing the review authority with LCDC initially will also reduce the case load of the Court of Appeals.

1183 There may be some question as to how much this would increase the workload of the commission. The commission does intend, at least it is being discussed among the department staff and he thinks with the additional acknowledgment requests that will be coming in, there will be some streamlining of the existing appeals procedure for LCDC. Many of the cases in which there is now oral argument is probably that there will be more submission of cases on briefs alone without oral argument before the commission and the amount of time spent by the commission on these cases in public meetings can be significantly shortened so they can get on with more significant issues and issues such as compliance requests, etc.

1191 For those reasons, it appears consolidating the review authority of land use decisions with LCDC will significantly decrease the amount of time spent on the appeals and also the expense involved by the litigants and hopefully produce better results for everyone.

1195 The second point with respect to SB 435 that the Governor's office wishes to suggest is that the writ of review essentially be eliminated, at least for most cases in the Circuit Court because for the most part tends to be a useless step. Decisions which are significant that go by writ of review to the Circuit Court are then going to be appealed most likely to the Court of Appeals anyway and the Court of Appeals looks at the decision as though the Circuit Court had never even made a decision. There are usually legal questions and there is traditionally no deference given to the decision of the Circuit Court. This is not a big issue and is something that can be gotten into later in the subcommittee meetings on the bill.

1203 Essentially eliminating the writ of review would save time and money to the litgants and to the court system. It would free up Circuit Court time because they wouldn't have to deal with the writ of review procedures. It is also in accordance with the trend which Sen. Hannon mentioned earlier that administrative decisions are being reviewed in the Court of Appeals. This is te way it works with administrative agencies. Essentially the decisions made by cities and counties are no different from the decisions made by state agencies. They have to follow certain rules and make their decisions on the basis of certain factors and that is as easily reviewed in the Court of Appeals as it is in the Circuit Court.

1211 One other significant point that is not in SB 435 but which they would like to see in SB 435 would be a provision that would help the commission speed up its appeal process without seriously interfering with the petitioners'

rights before LCDC and that is a provision that would allow the commission to continue its review of a petition that has been filed with the commission which involves a comprehensive plan provision or a zoning subdivision, other ordinance or regulation. When this kind of a plan provision is already before the commission on an acknowledgement for compliance request, when jurisdictions have gotten their comprehensive plan adopted and implementing zoning ordinances, etc. and where they are in compliance with the goals, they submit a request to the commission and ask that the commission formally acknowledge those plans and implementing ordinances as being in compliance with the statewide goals. The problem is there is an awfully lot of activity usually toward the end of this process with adoptions and it is possible for a petitioner to also file a petition for review with LCDC challenging the very same plan provision. So the commission on one hand has an acknowledgment request before it in which it is asked to pass upon the validity of this particular plan provision in accordance with the goals and on the other hand it has a petition for review before it challenging the very same thing. An amendment or an addition to 197.300, the review procedure of LCDC, would enable the commission to continue its review of any petition alledging that a plan provision violates the statewide goal until such time it has issued an order on the acknowledgement process and if its findings contained in the acknowledgement order are dispositive of the matters that are raised in the petition, then it may dismiss the petition

1237 Mr. Johnson has indicated he would be more than happy to appear before the committee at any future hearings on the bill and offer his comments and would also appreciate to perhaps submit some amendments to SB 435 to incorporate the ideas he has mentioned today.

1296 TERRY MORGAN, an attorney practicing in Portland, stated he representing developers, and he is a member of the Home Builders Association, stated he comes today expressing his own viewpoints on the bill before the committee. He also has submitted some written testimony which is in the form of proposed amendments (SEE EXHIBIT H) which he thinks would be more appropriately addressed in the subcommittee or in a work session.

1301 He thinks this is a good bill and deserves to be passed out of committee and it is really needed. The reason primarily, at least from the developers' viewpoint or from a homeowners viewpoint, is that the major cost impact on housing today and the economic impact on individual members of the industry is delay. One thing this bill would do is cut off every development 30 days worth of delay. That is a significant improvement in cost savings to the consumer. Obviously the cost of financing the project waiting for that 60 day appeal period to fall are significant and it is passed along to the consumer in each instance by the developer insofar as possible. The bill will cut that appeal period from 60 days to 30 days. Mr. Love has emphasized the fact there is a waiting period which is a practice in the industry because of the investment that could potentially be lost if ground is broken.

1312 The second saving is on individual projects that are appealed. We are talking about Section 2 kinds of projects which most frequently falls in the quasi-judicial setting eliminating one layer of review.

1317 With respect to Section 2 he wholeheartedly supports this bill. He thinks it is a bonus both to the homebuilding industry and to the consumers of housing in Oregon. Therefore he would classify the amendments he has submitted as minor in nature and completely consistent with the intent of this bill.

Sen. Jernstedt left at 3:00 p.m.

Sen. Groener left at 3:04 p.m.

1324 MR. MORGAN added that LCDC has limited jurisdiction and only has jurisdiction over goal-related issues. Procedures and consititutional issues which frequently arise in the context of a quasi-judicial proceeding, a Circuit Court is the only one that is capable of handling those and has the authority to handle them under the present statute. Under the proposed bill the Court of Appeals would handle those issues. You could still end up with dual appeals from a quasi-judicial decision at the local level. Someone who wanted to delay a project, for example, could appeal on the constituional issues to the Circuit Court and to the LCDC on goal-related issues.

1332 The bill does provide in Section 7 for LCDC's input insofar as on quasi-judicial decisions there is a necessity for a consistent policy from the agency. That is provided through a brief to the Court of Appeals. He thinks that gives the commission an adequate basis for policy determinations and consistency. You also have to remember in a quasi-judicial decision you already have a project on line. This is where the cost impacts are going to be most heavily felt on the part of the developer, on the part of the consumers and so it is appropriate to cut the layers of review in such instances. He thinks that is the wisdom of this bill. He does differentiate the problems of quasi-judicial vs. legislative decisions. It is probably necessary to have a definition of those, at least in cases of annexations and others which could be problematic.

1341 The amendments he has suggested relate to two primary causes on Section 2. The first relates to frivilous appeals and ways of somewhat limiting those kinds of appeals. The second set of issues relates to the review of constitutional matters which can be discussed at another time.

1343 He would like to propose an alternative to Section 3 which again would turn legislative matters over to LCDC for review of goal-related issues. He would prefer to see review of legislative issues left as a choice to the petitioner. The reason is because constitutional issues can only be raised in a Circuit Court by means of a declaratory judgment proceeding. There will be many times when you will have constitutional issues present in a challenge to a comprehensive plan provision, for example, which also raises statewide goal violations. Therefore, under the scheme proposed in Section 3 you would have the problem where a petitioner would have to appeal on the constitutional issue to the Circuit Court and to the LCDC on goal-related issues. Under the present statute he has at least a choice. There is a provision in the amendments he has suggested that would allow LCDC to come in on policy related issues and to participate as a party in the proceedings. He thinks that would protect the interest of consistency in policy.

1359 CHAIRMAN HANNON requested that Mr. Morgan become involved in the workings of the subcommittee on the bill.

1362 BOB STACEY, staff attorney with 1,000 Friends of Oregon, submitted and summarized a prepared statement (SEE EXHIBIT I) supporting the basic premise of SB 435.

Tape 14, Side 2

1475 CHARIMAN HANNON asked that Mr. Stacey serve on the subcommittee also. He would also appreciate it if Bill Love, Steve Schnell, and Mike Reynolds would also participate. Sen. Ragsdale and he will serve on the committee as well.

1482 VINCE SALVI, Oregon Environmental Council, stated he and Mr. Reynolds discussed the statistics Mr. Reynolds presented to the committee on the number of petitions that had been filed before LCDC. He talked to one of the LCDC staff subsequent to Mr. Reynolds testifying before the committee. It is his understanding that all the statistics were correct other than the dates. He blieves the number of petitions that have been filed have been 126 since the inception of the commission in 1974. The 100 that had been decided and the 12 that had been appealed and the nine that had been affirmed by the Court of Appeals are correct statistics. He thinks what is significant with those statistics though is the fact the average time for the commission to make a determination and issue an order generally has been three and one-half months. That is supportive of one of the major points he wants to make today on behalf of the OEC. That is the change proposed under Section 5 (d) to remove quasi-judicial decisions from LCDC's authority, they feel, would be a move in the wrong direction. Primarily because taking a citizen's perspective, there would be an added cost to the citizen in going to te Court of Appeals and there would be an added time delay and those factors are penalizing factors to citizens' groups. Because of the penalty they feel it would be much more advisable to leave the statute as it is presently constituted and give greater flexibility to citizens' groups in considering whether or not to petition a quasi-judicial decision.

1499 They are certainly in support of the attempt to speed up the judicial review process as provided for in Section 2 and providing for the Court of Appeals to have jurisdiction. There is a minor point he wanted to address under Section 2 (3) and Sections 5 (2). There is wording in there which he thinks could create a problem that could easily be corrected for the benefit of citizens or anyone who petition for review. The wording as it is presently written allows for petitions to be filed not later than 30 days following the date of the written decision and either on the date on which it is signed or on the date it is mailed. They believe it would be easy enough and in all fairness to all the parties to provide for the date of mailing. He thinks the potential to lay there is significant and there is potential harm to a petitioner.

1513 There are two other provisions in the bill which he would like to address. One is under Section 2 (11) (b) whereby the bill is still providing for the $1,000 bond provision when a stay of proceedings is going to be requested. They are in very much in favor of that $1,000 bond being left at that figure.

1518 Section 3 (11) (e) has a provision making a change from the present statute. The present statute provides for attorney fees to be granted upon review and upon a court awarding actual damages. They feel that that is in error and they do not feel attorney fees ought to be granted under those type of circumstances. They are pleased with the provision being in the bill for actual damages. They feel it is reasonable.

Tape 14, Side 2

1526 CHAIRMAN HANNON, having determined there were no further witnesses, declared the hearing closed, and announced that the date of the subcommittee meeting will be set at a later date.

1528 SEN. RAGSDALE suggested that the Chair also refer SB 61 and SB 65 to the same subcommittee for consideration.

1528 CHAIRMAN HANNON referred SB 61 and SB 65 to the subcommittee to be considered along with SB 435

1529 CHAIRMAN HANNON declared the meeting adjourned at 3:26 p.m.

Respectfully submitted,

Annetta Mullins

Annetta Mullins
Committee Assistant

Exhibit Summary

A - Proposed amendments to SB 418
B - Preliminary Staff Measure Analysis on SB 435
C - Prepared statement, Steven R. Schnell
D - "Explanatory Comments" on SB 435, submitted by Bob Jordan
E - "A General Overview" of SB 435, submitted by Bob Jordan
F - Comparison chart showing present appeals procedures of land use decisions and proposed procedures under SB 435
G - Prepared statement, Michael H. Marcus, Legal Aid Services of Multnomah Co.
H - Prepared statement, Terry D. Morgan, representing himself
I - Prepared statement, Robert Stacey, 1,000 Friends of Oregon

Tape 17, Side 1

1118 ROY DWYER, Attorney, stated he is legislative chairman for the Oregon Trial Lawyers. He indicated it appears to him that what is being asked of the committee is really to pass some special interest legislation to help the insurance industry to make even more profits that it is making now. There is no question in his mind that the manufacturer, producers, and employers of this state are paying excessing amounts of money for premiums. He finds it hard to reconcile that with the fact that the insurance companies profits are higher than they have ever been.

1136 He gave some examples of insurance facts which were put out by the insurance information institute.

1192 He explained a situation that occurred in Kansas which related to products insurance premiums.

1208 He discussed further the insurance industry.

1235 He stated that in Oregon, punitive damages has been used on a very modest level. He can't understand the big problem. He indicated that a case came out that if you didn't exclude it in your insurance policy, it could be covered. He thinks what the insurance companies really want is insurability of punitive damages.

1261 He begged the committee to find some of these answers. He asked to find out if it is the lawsuits that are creating the problems for the manufacturers or is it the panic pricing by the insurance industry that is causing the problem for the manufacturer and then make a determination.

1268 CHAIRMAN HANNON announced that on Wednesday, March 28 at 1:00 p.m. in Hearing Room A, there will be a subcommittee meeting on SB 422. He also announced that on March 26 at 8:00 a.m. in Hearing Room S326 there will be a subcommittee meeting on SB 435. Sen. Ragsdale, Sen. Bullock and himself are the members of that subcommittee. Sen. Ragsdale is the chairman.

1274 The meeting was adjourned at 9:54 a.m.

The following exhibit submitted to the committee but not presented at the meeting in personal testimony is hereby made a part of the committee record: letter to Blanche Schroeder, Portland Chamber of Commerce, from Andrew H. Ulven, Ulven Forgining Company, Inc., dated March 19, 1979, regarding SB 422.

Respectfully submitted,

Carole M. Van Eck

Carole M. Van Eck
Committee Assistant

EXHIBIT SUMMARY:

A - Prepared statement from Richard Colvin, Alder Street Clock Shop, Inc., regarding SB 574
B - Prepared statement from Inman Akin, International Jewelry Workers Union, dated March 22, 1979, regarding SB 574
C - Letter to Robert Seiler from Bernard A Muller, Portland Better Business Bureau, Inc., dated March 20, 1979, regarding SB 574
D - Prepared statement from Arthur D. Schade, B. W. Cobb Watch & Clock Shop, Inc., dated March 22, 1979, regarding SB 574
E - Prepared statement from Dennis Allen, President, Oregon Watch & Clockmakers Guild, regarding SB 574

SENATE
LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

May 2, 1979 1:00pm Hearing Room A
State Capitol Building

Tape 24, Side I

Members Present: Senator Hannon, Chairperson
Senator Jernstedt, Vice-Chairperson
Senator Bullock
Senator Groener
Senator Ragsdale (alternate)

Members Excused: Senator Boe

Staff Present: Pat Middelburg, Executive Officer
Ellen K. Duke, Committee Assistant

Witnesses: Terry Morgan, Home Builders Association
Bob Stacey, 1000 Friends of Oregon
Mike Reynolds, Attorney General's Office
Steve Schell, Portland Attorney
Lee Johnson, Governor's Staff

0030 CHAIRPERSON HANNON started the meeting at 1:03pm, and reviewed the ajenda. The committee would meet joinly with the House Trade & Ec. Development Committee for a presentation from the department of Economic Development, at 2pm.

SB 435- Relating to judicial review

0200 PAT MIDDELBURG gave a staff report. The subcommittee is sending it back to committee without recommendation. She reviewed the three alternatives ways to handle appeal procedure for LCDC cases. SEE EXHIBIT A. SEE EXHIBIT B. SEE EXHIBIT C.

A newly introduced alternative is an ideal supported by SENATORS Hanlon and Day. The proposal is for a land use court which specializes. This idea was discussed but is not printed.

0275 The involved people came forward and sat at the witness table. They included TERRY MORGAN, Home Builders Association
BOB STACEY,
MIKE REYNOLDS, Attorney General's Office
STEVE SCHELL, Portland Attorney

There was a general discussion of the original bill and the proposed amendments.

0360 BOB STACEY quoted Bill Love's statement at the subcommittee meeting. "A land use court might not meet anyone's objectives. Including ours (~~LCDC~~'s) if it adds another step."

1:45 SENATOR GROENER leaves.

0400 STEVE SCHELL presented pros and cons of the original bill, Alternative #1, and Proposal 2, including the speed of decision and the number of cases that would be appealed.

0510 MIKE REYNOLDS reported that the number of cases appealed is unclear.

0534 SENATOR RAGSDALE said that he was leaning toward Alternative 1, but the number of cases that would be appealed is the key.

0576 LEE JOHNSON, Governor's Staff, came to the witness table. Most circuit court judges don't set up findings of fact. Hearing officers do.

0600 SENATOR HANNON asked the committee what steps they wanted to recommend. The alternatives are:
1--appeal to the Land Conservation Development Commission
2--appeal directly to the court of appeals
3--appeal through an appeal board of LCDC
4--appeal to a land use court

0625 SENATOR RAGSDALE concluded that the discussion addresses the pointe outlined in exhibit A. However Issue 3 is not one that is approriate for the committee to address.

Because of the overlap between goals and procedures he suggested having LCDC deal with policy goals. This addresses issue 1, 2 and 4 of exhibit A. He likes Alternative #1. SB 435 has the court set policy which is inappropriate. Suggested using a land use court, a division of LCDC, as the best conceptual approach to handling appeals.

0675 STEVE SCHELL responded that the citizen land use court sets a burden on a citizen commission to handle trival questions also being handled by this time consuming review process.

0700 SENATOR RAGSDALE moved the conceptual adoption of Alternative #1 (exhibit B)

0705 Roll call vote. SENATOR RAGSDALE, BULLOCK AND JERNSTEDT voted "aye". SENATOR HANNON voted "no". SENATOR BOE and GROENER excused.

0706 MEETING ADJOURNED.

EXHIBIT LIST

A- Staff report on SB 435
B-Alternative #1 proposed amendments to SB 435
C-Proposal #2 proposed amendments to SB 435

Respectfully submitted,

Ellen K. Duke

Ellen K. Duke
Committee Assistant

SENATE
LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

MAY I0,1979 8:00 am State Capitol Build. Hearing Room B

TAPE 26, Side I

MEMBERS PRESENT: SENATOR HANNON, CHAIRPERSON
SENATOR JETNSTED, VICE-CHAIRPERSON
SENATOR BULLOCK (arrived 8:]0 am)
SENATOR GROENER(arrived 8:57 am)
SENATOR RAGSDALE, Alternate

MEMBERS EXCUSED: SENATOR BOE

STAFF PRESENT: Pat Middelburg, Executive Officer
Ellen K. Duke, Committee Assistant

WITNESSES PRESENT: Mike O Malley, Oregon Pilots Association
Paul Burket, AERO Div, ODOT
Roger Ritchey, Deputy Aeronautics Administrator
Alan Probes, Private Airport Owner of Proves Field
George Miller, Department of Revenue
George Felt, Roseburg, OR airport
Bob Langmack, Sweethome Airport
Art Skipper, County Skipper Airport on Sandy

0030 The meeting started at 8: 04am.

SB 435-Relating to judicial review.

032SENATOR RAGSDALE Moved SB 435 be taken from the table.

0035 Roll call vote. SENATOR RAGSDALE, JETNSTED, HANNON voted "aye". SENATOR BOE excused. SENATOR BULLOCK, GROENER absent. Motion passed.

0045 SENATOR RAGSDALE moved SB 435 back to subcommittee. There was no objection. So ordered.

SB 540-Relating to auctions

0050 SENATOR RAGSDALE moved that SB 540 be sent to the Local Government Committee. No objection. Motion passed.

SB 926-Relating to property taxation

SEE EXHIBIT A, preliminary staff measure analysis.

SEE EXHIBIT B, revenue analysis of SB 926.

0080 MIKE O'MALLEY, Oregon Pilots Association, requested the bill also be considered by the Senate Transportation Committee. Testified in support of the bill, SEE EXHIBIT C. Urged support.

May 24, 1979

0337 ELAINE BENTKOVER, Senator Kulongoski's Staff,testified in support of the bill.(Spoke for a constituent that was ill and could not make it to the hearing.)

0370 SENATOR GROENER moved the adoption of amendments (Exhibit B) to A-engrossed HB 2248. No objections. So ordered.

0395 SENATOR HANNON reported that the bill will be held in committee until Monday because of possible conflicting legislation.

SB 422-Relating to actions in particular cases (product liability)

BLANCHE SCHROEDER and JIM MARKEE came forward and sat at the witness table.

04I5 SENATOR RAGSDALE gave a subcommittee report.

0442 The witnesses discussed the unsettled issues.

0508 CLAYTON PATRICK, came forward to discuss the application of Section 3.

0553 SENATOR RAGSDALE stated that the sub committee also decided to require insurance companies to report. Senator Brown has drafted legislation to this issue. It is a priority.

058I SENATOR RAGSDALE moved the adoption of amendments. (See exhibit C.) No objection. So ordered.

0660 SENATOR GROENER stated that if the insurance companies have not reduced their rates in two years that the legislature will take action.

0668 SENATOR JERNSTEDT moved SB 422 as amended to the floor with a "do pass" recommendation.

SB 435-Relating to judicial review

0670 PAT MIDDELBURG gave a staff report on the sub committee compromises. Introduced EXHIBIT D, E. (SEE EXHIBIT D, SEE EXHIBIT E)

ELIZABETH STOCKDALE AND MICHAEL REYNOLDS came forward and sat at the witness table for discussion, and questions.

0720 SENATOR JERNSTEDT moved SB 435 be engrossed, including the proposed amendments, and be returned to the Trade Committee for a meeting Wednesday. Roll call vote. SENATORS RAGSDALE, BULLOCK, GROENER, JERNSTEDT, HANNON all voted "aye". SENATOR BOE excused. Motion passed.

0730 SENATOR RAGSDALE complimented the staff and participants of the subcommittee on their work.

SB 9I5- Relating to air pollution

0745 PATRICIA MIDDELBURG gave a staff report, reviewing each section of the bill. (SEE EXHIBIT F. SEE EXHIBIT G, the amended bill.)

SENATE LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

May 30, 1979 1:32 p.m. Hearing Room A
State Capitol

Members Present: Sen. Lenn Hannon, Chairman
Sen. Dick Groener
Sen. Mike Ragsdale (alternate)

Tape 30, Side 2

Members Excused: Sen. Jason Boe
Sen. Richard Bullock
Sen. Ken Jernstedt

Staff Present: Patricia Middelburg, Executive Officer
Dennis Mulvihill, Senior Legislative Assistant
Carole M. Van Eck, Committee Assistant

Witnesses: Lee Johnson, Governor's Office
Gordon Fultz, Association of Oregon Counties
Mike Huston
Scott Parker, County Counsel Clackamas County
Steve Schell
Nancy Tuor, Department of Land Conservation and Development

0017 CHAIRMAN HANNON called the meeting to order at 1:32 p.m.

SB 435 - RELATING TO JUDICIAL REVIEW

0031 PAT MIDDELBURG indicated there are two proposed amendments to the bill (see Exhibits A and B). She briefly reviewed these.
0065 She stated that Nancy Tuor, Department of Land Conservation and Development, submitted a memorandum which gives the approximate land use board costs (see Exhibit C).

0073 There was brief discussion regarding the memo.

0117 LEE JOHNSON, Governor's Office, discussed the need for full-time hearings officers in relation to the budget.

0152 MS. MIDDELBURG indicated a letter has been written to the co-chairmen of the Ways and Means Committee informing them of the rewrite of this bill.

0182 MR. JOHNSON pointed out that their first concern all the way was, how can we expedite this process. The approach that was taken in the original SB 435 was simply to put it all in the Court of Appeal. This didn't take care of all the land use cases, because there are cases that are not writs of review. They are declaratory judgement acts.

0239 SEN. RAGSDALE clarified the concept of the proposed amendments.

0268 SEN. RAGSDALE moved adoption of the Legislative Counsel proposed amendments draft, dated 5/28/79, and the proposed amendment prepared by Legislative Counsel, dated 5/29/79, to SB 435.

0271 CHAIRMAN HANNON indicated that prior to the motion he would like to have Gordon Fultz, Association of Oregon Counties, speak on the bill.

Tape 30, Side 2

0278 GORDON FULTZ, Association of Oregon Counties, introduced Mike Huston, League of Oregon Cities, and Scott Parker, County Counsel, Clackamas County. He stated that they have come in opposition of the A-engrossed version of the bill along with the amendments. The problem that they are concerned with is where that board is placed and its function. He explained further what their concern were.

0370 We have consistently favored either SB 435 as originally proposed, where the appeals go to the Court of Appeals, or a separate land use court. We could even buy the appeals board as proposed if it were to have the functions of a complete review of all land use decisions without any appeals role of the commission itself.

0447 MIKE HUSTON briefly expressed their concerns about the effect of the this legislation and the commission. He stated that it is local government's interest as well as the state's interest to see that the commission does not face additional responsibilities to jeopardize their work on those plans. The review of those plans is the number one priority.

0486 SCOTT PARKER indicated one of the negative aspects that we have to consider is the political problem. He explained this further.

0524 CHAIRMAN HANNON suggested putting in a sunset clause for two years from now.

0537 MR. FULTZ stated that he thinks it would be a good idea. He feels that if this system were put in place, it is going to be there for awhile.

0545 KEN CANNON indicated they would support it.

0551 MR. JOHNSON indicated that is a reasonable proposal and he would support it.

0559 SEN. RAGSDALE feels that two years is not appropriate and suggested four years.

0564 AUDREY JACKSON stated she thinks four years would be more appropriate.

0570 STEVE SCHELL indicated that he likes two years because of the problem that is on hand.

0573 BOB STACY stated that we are only about a year away from issuing a sunset review. He had no objections to a sunset review.

0578 MS. MIDDELBURG pointed out that the bill does contain an effective date of January 1, 1980.

0580 There was further discussion on the effective date.

0703 SEN. RAGSDALE moved that the committee approve the amendments, dated 5/28/79, Legislative Counsel draft to A-engrossed SB 435, and the proposed amendment prepared by Legislative Counsel, dated 5/29/79. He added to his motion that the committee adopt an amendment to add a 4-yr. sunset review clause.

Tape 30, Side 2

0711 CHAIRMAN HANNON asked the clerk to call the roll. Senators Ragsdale, Groener, and Hannon voted "aye". Senators Boe, Bullock, and Jernstedt were excused. The motion was so ordered.

0720 STEVE SCHELL submitted and summarized his prepared statement (see Exhibit D). Three suggested amendments are attached to his statement. He explained these proposed amendments.

0766 SEN. GROENER asked Mr. Schell if these proposed amendments have been discussed with the Governor's office.

0768 MR. SCHELL stated they have not. He just received them yesterday. He pointed out that these proposals are technical and are not necessarily policy.

0840 SEN. GROENER moved the adoption of the proposed amendments, no. 2 and no. 3, submitted by Steve Schell, to A-engrossed SB 435.

0843 CHAIRMAN HANNON asked the clerk to call the roll. Senators Groener, Ragsdale, and Hannon voted "aye". Senators Boe, Bullock, and Jernstedt were excused. The motion was so ordered.

0846 SEN. RAGSDALE moved the committee send A-engrossed SB 435 to the floor with a do pass recommendation as amended.

0847 CHAIRMAN HANNON asked the clerk to call the roll. Senators Groener, Ragsdale, and Hannon voted "aye". Senators Boe, Bullock, and Jernstedt were excused. The motion was so ordered.

0850 CHAIRMAN HANNON assigned Sen. Ragsdale to carry the bill.

INTRODUCTION OF A BILL

0853 MS. MIDDELBURG indicated there is a measure that the committee requested to introduce which deals with memorializing the President to continue to pursue aggressive free trade policy among our trading partners (see Exhibit E).

0858 SEN. RAGSDALE moved the committee adopt a request for purposes of introduction, Legislative Counsel draft 2956, dated 5/29/79, memorializing the President and Congress to continue to pursue agressive free trade policy among our trading partners.

0863 CHAIRMAN HANNON asked the clerk to call the roll. Senators Groener, Ragsdale, and Hannon voted "aye". Senators Boe, Bullock and Jernstedt were excused. The motion was so ordered.

SB 666 - RELATING TO PROPERTY TAXATION

0872 MS. MIDDELBURG pointed out that on Monday, May 28, the committee voted to send SB 666 to the floor with a do pass recommendation. She stated that

LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

SUBCOMMITTEE ON SB 435, SB 61, and SB 65

March 26, 1979 | 8:00 a.m. | Room S-326 State Capitol

Members Present: Sen. Mike Ragsdale, Chairman
Sen. Lenn Hannon

Staff Present: Patricia Middelburg, Executive Officer
Annetta Mullins, Committee Assistant

Witnesses: Terry Morgan, Homebuilders Association

There was no tape recording made of the meeting due to technical difficulties. The minutes of the meeting were not done either because of unavailability of clerk's notes that related what happened.

Respectfully submitted,

Carole M. Van Eck

Carole M. Van Eck
Committee Assistant 7/19/79

SENATE
LEGISLATIVE COMMITTEE ON TRADE & ECONOMIC DEVELOPMENT

SUBCOMMITTEE MEETING ON SB 435

April 19, 1979 3:00pm Capitol Building
S-326
Tape 1, Side 1

Members Present: Senator Ragsdale, Chairperson
Senator Hannon

Staff Present: Patricia Middelburg, Executive Officer
Ellen K. Duke, Committee Assistant

Witnesses: Elizabeth Stockdale, Legislative Counsel
Bill Love, Writ Review Committee
Audrey Jackson, League of Women Voters
Nancy Tuor, Dept. of Land Conservation and Development
Michael D. Reynolds, LCDC
Bob Stacey, 1000 Friends of Oregon
Lee Johnson, Executive Assistant to Governor
John Partigan, M.S.D.
Bill Fox, Oregon State Home Builders
Gordon Fultz, Association of Oregon Counties
Paget Engen, City of Eugene
Scott Parker, Clackamas City Counsel
Kent Barnes, Court of Appearls
Dave O'Brien, State Housing Council
Judge Schwab, Court of Appeals

SB 435-Relating to judicial review

0030 SENATOR RAGSDALE started the meeting at 3:10pm. He stated that he understood that a compromise has not been reached.

0035 LEE JOHNSON agreed with Senator Ragsdale and introduced two approaches that had been developed. (SEE EXHIBIT A. SEE EXHIBIT B.)

0050 BILL LOVE summarized that the issue is whether the case goes first to LCDC or the Court of Appeals. He stated that conceptually the approach provided for in the bill is preferred.

0080 SENATOR RAGSDALE suggested that the plan for today's meeting is to get the right language for the things that are in agreement. Secondly the committee would deal with the conflicts.

There was a general discussion of the alternative ways to handle LCDC cases between Bill Love and Lee Johnson. LEE JOHNSON outlines the approaches of Alternative 1 (EXHIBIT A) and Proposal 2 (EXHIBIT B).

0300 JUDGE SCHWAB identified that there are two issues through out; principle and expedency. He supported having everything go through LCDC with established deadlines all the way through the proceedure.

0378 BILL LOVE offered rebuttal to this approach. (SEE EXHIBIT C).

There was a general discussion of the merits of LCDC and the COURT of APPEALS handling the cases. The group considered sending goal cases to LCDC and cases based mainly on proceedure going to Court of Appeals. (SEE EXHIBIT D.)

0895 SENATOR RAGSDALE summarized that no concensus of the subcommittee could be reached. The options had been throughly presented. Those options will be presented to the full committee for consideration.

0902 Adjourned at 4:30pm.

Exhibit List:
A-Proposed Amedments to SB 435-Alternative 1. Presented by LEE JOHNSON.

B-Proposed Amedments to SB 435-Proposal #2. Presented by LEE JOHNSON.

C-Prepared statement of William Love.

D- Prepared statement of Lee Johnson.

SENATE
LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

SUBCOMMITTEE MEETING ON SB 435

Members Present: Senator Ragsdale, Chairperson
Senator Hannon

Staff Present: Pat Middelburg, Executive Officer
Ellen Duke, Committee Assistant
Elizabeth Stockdale, Legislative Counsel

Witnesses: Steve Schell, Writ of Review Subcommittee
Audrey Jackson, League of Women Voters
Mike Reynolds, Land Conservation Development Commissi
Bob Stacey, 1000 Friends of Oregon
Nancy Tuor, Department of Land Conservation and Devel
ment
Ken Canon, Associated Oregon Industries
Gordon Fultz, Association of Oregon Counties
Lee Johnson, Governor's Office

MAY 14, 1979 9:00 am Hearing Room B
State Capitol Building

Tape I, Side 2

0020 CHAIRPERSON RAGSDALE started the meeting. The involved witnesses sat at the witness table.
SB 435- Relating to judicial review.

0025 CHAIRPERSON RAGSDALE set the tone for the meeting. We are dealing with the 5/10/79 legislative draft of SB 435. SEE EXHIBIT A. Section by section written statements have also been prepared by Bill Love. SEE EXHIBIT B. Basically each section will be reviewed. First a staff report, then response, discussion and repeat.

0070 STEVE SCHEDLL, AUDREY JACKSON AND LEE JOHNSON came forward and sat at the witness table.

General discussion of each section.
SECTION 2-board members do not need to be full-time. Delete lines 21-23. " refereee...full-time" Removal only for cause? No.
SECTION 3--outlines the jurisdiction

0400 STEVE SCHELL agreed to draft an alternative on the definition of land use decision.

SECTION 4--page 3, line 24-discussion of notice
Line 24 delete "did not receive notice of or otherwise."

0610 SENATOR HANNON moved to amend Sect. 4, Sub 3, to tie in lines 13-18 of the original SB 435. No objection. Passed.

THE committee agreed that on the line 13 & 19 the bill is to read "who is".

0640 Discussion of the definition of "final" as used on page 4, line. Discussion of "filing fee".

0740 Recessed at 9:52 am until 10:40 am.

747 Meeting reconviened at 10:58 am.

0774 SENATOR RAGSDALE conceptually moved to insert in Sect 4 a 70 day maximum for the Board and Commission to act on appeals. If the time is not extended as agreed by involved parties. No objection. Passed.

0980 SENATOR RAGSDALE moved that 10 calendar days after the transmittal of the record to the time frame. No objection. Passed.

1015 SENATOR RAGSDALE moved on Page 3 lines 5-9 of the original bill a substituion for Section 4 subsection 7. No objection. Passed.

The committee directed Elizabeth Stockdale to rephrase the langage on Page 5, lines 2-5 to remove the use of the word "judgement".

General discussion of the use of attorney fees. The use of including fees could cut the work load but it could also wipe out 1000 Friends of Oregon. The group decided to return to this issue later within the full committee setting.

1180 Discussion of the next meeting time. It was left unspecified.

II99 SENATOR HANNON moved to delete Section 4 subsection9. No objection. Passed.

1210 The meeting ended at II:45 am.

EXHIBIT LIST

A-proposed amendments to SB 435
B-response to 5/10/79 draft of SB 435 by William Love.

NOTE: A later exhibit includes a staff report on all sub committee action on SB 435.

Respectfully submitted,

Ellen K. Duke

Ellen K. Duke
Committee Assistant

SENATE
SENATE LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

MAY 23, I979 I:00 pm Hearing Room A
State Capitol Build.

SUBCOMMITTEE ON SB 435, Tape 2,II

SUBCOMMITTEE MEETING ON SB 435

Members Present: Senator Ragsdale, Chairperson
Senator Hannon

Staff Present: Pat Middelburg, Executive Officer
Ellen K. Duke, Committee Assistant
Elizabeth Stockdale, Legislative Council

Witnesses Present: Kent Hickam, Willamette University
Jerry Justice, Clackamas County
Gordon Fultz, Association of Oregon Counties
Bob Stacey, I000 Friends of Oregon
Audrey Jackson, League of Women Voters
William Love, Writ of Review Committee
Nancy Tuor, Land Conservation Development Commission
Steve Schell, Writ of Review Committee
Lee Johnson, Governor's Office

0020 The meeting started. Steve Schell, Lee Johnson came forward and sat at the witness table. The procedure was casual, with people speaking at will. The group reviewed proposed amendments, working from EXHIBIT A, comments by Chief Judge Schwab.

0255 SENATOR RAGSDALE moved to delete all of SECTION I9. No objection. Motion passed.

029I SENATOR HANNON moved to delete SECTION 25. Passed unanamously. Motion passed.

0345 SENATOR HANNON moved to delete SECTION 30 and 3I from the bill. Passed unanamously. Motion passed.

0375 SENATOR HANNON moved that SECTION I5 be removed from the bill. Passed unanamously. Motion passed.

0380 SENATOR HANNON moved that sections I3-29 as amended and approved by the subcommittee be submitted to the full Senate Trade and Economic Development Committee. Motion passed.

0390 PAT MIDDELBURG, gave a staff report. General discussion of exhibits. EXHIBIT B is the latest legislative draft. EXHIBIT C is exhibit B plus amendments. EXHIBIT D is comments on exhibit B. EXHIBIT E presents the time frame. (SEE EXHIBITS B,C,D,E.)

General discussion of the time frame.

06I0 SENATOR HANNON moved that on page 2, Section 4, line 2 the blank would be filled to read "20" days. Passed unamously.

0665 SENATOR HANNON moved that in Exhibit C, Section 4, line 8, the blank would become "$200". No vote. Motion died.

General discussion of awarding attorney's fees.
General discussion of the time frame.

0960 SENATOR HANNON moved that language be drafted to include discretionary attorney's fees. This proposed amendment will go to the full Trade committee without subcommittee recommendation.

General discussion and review of Section 6 & 7.

0998 SENATOR HANNON moved that the subcommittee adopt ; and recommend to the full committee SB 435, as amended and with the proposed revised amendments. Hannon also directed staff to prepare this draft for the full committee meeting on 5/24. Passed unamamously.

I025 Exhibit F was introduced and discussed. SEE EXHIBIT F.

I048 SENATOR HANNON moved the conceptual adoption of having LCDC decisions published.So ordered.

I063 SENATOR HANNON moved that in Exhibit F, Page 9, Section 6a, line]5 insert a period after the word "served" and delete the rest of the sentence. Also delete lines I6 through 2I. Motion passed.

I067 SENATOR HANNON moved that in Exhibit F, page I0, line I9 the languate be changed to read "20" days instead of "30" days. No objection. Motion passed.

I070 SENATOR HANNON moved that in Exhibit F, Page I0, Line 2I "the reviewing court" be specified to read "the Court of Appeals". No objection. Motion passed.

I075 SENATOR HANNON moved in Exhibit F, Page II, delete lines 6 through I4. No objection. Motion passed.

I090 SENATOR HANNON moved that a letter from the Trade Committee to the Ways & Means Committee be written directing the requirementso f SB 435 be considered before the LCDC budget is finalized. Motion passed.

II33 SENATOR HANNON moved that in Exhibit F, Page I5, Section 7 b, subsection 3, line I2, legisilative council be authorized to revise the inadgquate language so that the cross reference is accurate and appropriate. Passed without objection.

II39 SENATOR HANNON moved the adoption of the amendments. Passed without objection.

II43 SENATOR HANNON moved SB 435 as amended be forwarded to the full committee. Passed without objection.

II57 SENATOR HANNON moved to include language in the bill that would urge the Court of appeals to act rapidly in these matters. Authorized Legislative Council to conceptually draft language which would reflect that "time is of the essence". Motion passed without objection.

II58 SENATOR HANNON moved to include the urging language in the bill which would be sent to full committee. Motion passed.

II60 The meeting adjourned.

EXHIBIT LIST

A-Comments by Chief Judge Schwab on Sections I3-3I of SB 435

B-Revised Proposed amendments to SB 435, legislative counsel 5/]7/79

C-Hand engrossed revised proposed amendments to SB 435, legislative counsel 5/I7/79

D-Explanation of the revised proposed amendments and of the proposed amendments to the revised proposed amendments to SB 435 prepared by the Governor's Office 5/23/79

E-Review time under latest proposal

F-Proposed amendments to SB 435 dated 5/I0/79

Respectfully submitted,

Ellen K. Duke

Ellen K. Duke
Committee Assistant

SENATE
LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 14, 1979
EXHIBIT B 1 Pg exhibit

OREGON STATE SENATE

60th Legislative Assembly

PRELIMINARY STAFF MEASURE ANALYSIS

Measure: Senate Bill 435, Relating to Judicial Review

Committee: on Trade and Economic Development

Hearing Dates: 3/14

Explanation Prepared By: Patricia K. Middelburg

Title: Executive Officer

Problem addressed. This bill addresses two problems. First, when local governing bodies make a decision on a land use matter, an individual who wants to contest that decision may request a review of that decision by filing a writ of review with either the circuit court or the Land Conservation and Development Commission. Second, existing statutes allow decisions by certain local or state bodies to be appealed using the writs of review procedure, when in fact it would be more appropriate to follow the appeals procedure prescribed in the Administrative Procedures Act.

Function and purpose of measure Sections 1 to 12 remove city, county or special district land use decisions from writ of review and provide for separate judicial review proceedings especially designed for such land use decisions. It gives the Court of Appeals jurisdiction over appeals alledging that a quasi-judicial decision by these governing bodies violates the state-wide planning goals or the comprehensive plan or zoning, subdivision, or other land use ordinances or regulations. It prescribes the manner of review of legislative land use decisions, depending on whether or not LCDC has formally acknowledged the plan to be in compliance with state-wide planning goals. If a petitioner seeks a stay of proceedings on the land development project, then he/she must file a $1,000 bond. Upon judicial review of the decision, the Court of Appeals may award costs to any party.

Sections 13 to 31 would remove the writ of review process from certain governing bodies and prescribes that any appeals procedure must follow the process outlined in the Administrative Procedures Act.

Major issues discussed.

Effect of committee amendments.

(Attach additional sheets as necessary)

SB 435

TESTIMONY OF STEVEN R. SCHELL BEFORE THE
TRADE AND ECONOMIC DEVELOPMENT COMMITTEE

MARCH 14, 1979

Gentlemen:

I am a lawyer in private practice in Portland. I am appearing as a member of the Writ of Review Subcommittee of the Law Improvement Committee and not on behalf of any client. I served on the LCDC from 1973 to 1976 and have litigated several land use cases, including a Writ of Review proceeding and an LCDC proceeding as part of one land use decision.

How land use decisions are made in Oregon.

In Oregon land use decisions are made basically in five tiers. At the lowest tier are decisions about building permits. Permits are granted as a matter of right or denied on the basis of basic codes such as the Uniform Building Code.

The second tier consists of those basic decisions concerning subdivisions. Can you get the firetruck to the house, or how will water, streets and sewers be supplied?

The third tier consists of decisions about zoning. Do you want to avoid having the steel foundry next to the residential area? These decisions are discretionary.

The fourth tier consists of comprehensive plannning. Discretionary decisions made at this level have to do with growth over the next several years. How many more people will be in the area and where will the roads need to be placed in order to take care of increased transportation?

The top tier is the overall planning goals established by the LCDC. These goals establish or reiterate state policy, provide minimum standards for comprehensive planning and zoning and set up procedures for consideration of these state policies in local decision making.

These tiers are bound together by two court cases, Fasano and Baker, and SB 100. Once local governments complete their comprehensive planning, the plans are submitted to LCDC for "acknowledgment." Once the plans are "acknowledged" the goals no longer play a role in normal local decisions.

The hearings process.

While no two jurisdictions have exactly the same hearings process, traditional local law can be coupled with state enabling legislation and the LCDC goal requirements to allow us to generalize a procedure by which land use decisions are made. This procedural framework has seven levels to it. At the level closest to the grass roots is the citizens' planning organization, a group of people usually confined to a geographical area who will be directly affected by a particular land use decision. LCDC Goal No. 1 requires that this advisory body be consulted in the decision making process.

The second level is the Planning Commission which makes decisions or recommendations with regard to plans and zoning. Sometimes hearings officers make certain decisions rather than planning commissions. In almost all jurisdictions it is not possible to get to the City Council or County Commissioners until the Planning Commission has had a chance to make its recommendation or determination on a land use question.

A third layer of decision making is at the County Commission or City Council level. for quasi-judicial decisions, i.e., those affecting relatively small parcels of land, there are rigorous procedural requirements that must be followed. These procedural requirements take time. They also result, under normal circumstances, of the development of a rather extensive record on a controversial decision.

After a decision is made by a City Council or County Commission it can be reviewed by a court, a fourth layer, and, under normal circumstances, by the LCDC, a fifth layer. The procedure for court review is through the Writ of Review. The procedure for LCDC review is a petition to that state agency. The LCDC's jurisdiction is limited to review of goal questions.

Once the LCDC and/or the court have reviewed the decision and made their determinations, those decisions can be appealed to the Court of Appeals, a sixth layer. The Court of Appeals conducts its review on the record made before the Board of County Commissioners or the City Council, as the case may be.

Then an optional review is available to the Supreme Court, a seventh layer, if that body is willing to accept review on the subject.

Where all of these procedures are applied, they can result in decisions taking as long as four years.

Personal statement and comment on weaknesses of present system.

I believe in Oregon's land use system. I believe that the goals attempt to crystalize overall state policy in a form that can be applied by local jurisdictions in their land use decision making. Notwithstanding this belief, there are weaknesses in the present system. Those weaknesses stem from the procedural and structural difficulties of the institutions that make the decisions regarding land use matters. One of the most significant weaknesses is the delay caused by these complicated levels of decision making. Another significant weakness is the cost of participation by a private individual in these various levels of decision making.

Justice delayed is justice denied. Overpriced justice is also justice denied. The Bill before you attempts to solve those problems without undermining the basic structure of the land use decison making process in Oregon.

Previous attempts to solve the problem.

In the 1977 Legislature, Senate Bill 570 was passed. With regard to appeals, Senate Bill 570 said that an individual could not have two petitions making the same or substantially similar allegations pending before the LCDC and the Circuit Court. Clever petitioners and their lawyers took one look at that and got two or more groups together, one to file a petition to the LCDC and one to file a Writ of Review proceeding. Thus, notwithstanding the Legislature's valiant attempt to rectify the weaknesses in the past system, there were no substantial improvements as far as the multiple filings, delay and costs are concerned.

Types of land use decision, "quasi-judicial" and "legislative."

Quasi-judicial type decisions are those decisions that affect one parcel or a limited number of parcels of land. They are site-specific and frequently come up in the context of a plan or zone change. Legislative decisions, in the other hand, affect broad categories of land, such as all the industrial land in a particular county or all the land in one particular part of a county. In Senate Bill 435, Section 2 deals specifically with quasi-judicial decisions and Section 3 deals with legislative type decisions.

The committee argued at length about a proper definition for the terms, "quasi-judicial" and "legislative." Right now there is a considerable body of case law helping to clarify what these terms mean. The committee was urged by one Supreme Court Justice to provide a definition in the statutes rather than depending on case law. However, the committee itself could not arrive at a satisfactory agreement, and so decided to depend on evolving case law.

Quasi-judicial decision making under SB 435.

As mentioned earlier, the way Oregon's land use system has grown up, several layers of decision making and review have been imposed over time. Section 2 cuts through some of those layers by eliminating from the review process for quasi-judicial matters both the review of the LCDC and the review of the Circuit Court. Under the Bill, an appeal is taken directly from the Board of County Commissioners or the City Council on a quasi-judicial land use matter to the Court of Appeals.

Section 2 recognizes that City Councils and Boards of County Commissioners should not be placed in an inferior position to state administrative agencies in terms of how appeals are handled. With some exceptions, administrative agency decisions are directly reviewed by the Court of Appeals. Under this change, decisions of the local governments will be reviewed in the same manner.

The Fasano decision requires that an adequate record be made before the Board of County Commissioners or the City Council. This record then serves as a basis for the review of the Court of Appeals.

As an earlier member of the LCDC and one who later had a case before it, I submit that the burdens on citizen members of boards and commissions are such that complicated legal matters cannot be adequately understood and reviewed by most members of the LCDC. Hearings Officers are relied on to make determinations which in many cases are rubber stamped by the Commission. The time of the Commissioners

needs to be directed more toward the review of comprehensive plans and less toward small property disputes.

In addition, Writs of Review are relatively infrequent and many Circuit Court Judges lack the experience or interest necessary to handle these matters swiftly and fairly.

Standing is a question that has occurred frequently, both in Oregon case law and under the United States Constitution. Standing is whether you have the right to go into court to challenge a particular decision. In Oregon, in land use matters standing depends both on participation below and on how one is affected by the decision. If one is in close proximity to the decision, such as an adjacent land owner, one obviously has standing to challenge a particular development. The committee talked long and hard about what should be required for standing. A person from Utah and interested in energy should not necessarily have the right to challenge a quasi-judicial decision in Oregon on the ground that it violated the energy goal. On the other hand, certainly a neighbor next door should have the right to challenge a decision on the ground that it affects, for example, his agricultural land. The courts have worked hard to draw the line between the two positions. SB 435 would leave that decision to the courts, based on the body of decisions that presently exist and that evolve in the future.

Sometimes standing and other matters such as ex-parte contacts, cannot be determined from the record developed at the Board of County Commissioners or City Council level. Under these circumstances the Bill provides that the Court of Appeals can appoint a master to obtain the necessary facts on these limited matters. There is a funding appropriation for $50,000 in order to help the Court of Appeals finance this position. The committee believes that this money can be saved both on the basis of work loads of Circuit Court judges and in terms of the number of appeals that LCDC would not have to handle.

Time between hearing and appeal.

For both quasi-judicial and legislative decisions, SB 435 reduces the time from 60 to 30 days. The question arose in committee as to when the 30 days should run from. Four choices were available to the committee: (1) the date of the hearing, (2) the date of the signing, (3) the date of filing with the County Clerk, and (4) the date of a mailed notice. What the committee chose was the date of the signing or the date of the mailing of a written notice, whichever last occurs.

The change from 60 to 30 days has the twin advantages of shortening the time necessary to arrive at a final decision and decreasing the cost of getting that decision determined. Furthermore, because the Court of Appeals will publish its decisions, over time the change will result in a standard body of law that can be drawn upon to eliminate disputes in the future.

The standards for review.

Once the quasi-judicial decision gets to the Court of Appeals, the Court of Appeals is bound by the record (except for any additional facts that the master needs to develop in very limited areas). The grounds for an appeal are very similar to those presently found in the Writ of Review statute, namely that the City or County exceeded its jurisdiction, it failed to follow the procedure applicable to the matter before it, the decision wasn't supported by substantial record evidenced in the record as a whole, or that the local government improperly construed the applicable law. A new category is added, namely, that the decision is unconstitutional. A host of constitutional questions can arise in land use decisions, and they are basically legal questions. These types of decisions include such things as inverse condemnation, lack of due process, violations of home rule or local control, and equal protection. The committee felt that there was no reason to avoid decisions on these matters if they are raised, by requiring a separate proceeding in another forum.

The $1000 bond.

The committee was aware that the Legislature would have before it several Bills dealing with increases in the bond required to obtain review of a particular land use decision. After considerable discussion, the committee basically decided not to change the law as it exists, but to make it a part of the quasi-judicial review section [see SB 435 § 2(11)]. The attorneys' fee provision in the present law was eliminated because it did not appear to run both ways.

Legislative decisions. Section 3 of SB 435 places on the LCDC the responsibility for reviewing legislative decisions against the goals, at least as far as comprehensive plans and major revisions of these plans are concerned. Assuming that a comprehensive plan or major revision has been acknowledged, any legislative decision regarding a zoning subdivision or other ordinance or regulation would be reviewed in the Circuit Court or the County. As mentioned earlier, because the goals drop out after acknowledgment, the Circuit Court would just be reviewing the decision against the comprehensive plan. The committee felt that this in essence would be a matter of local law and could best be done in the county where the dispute arose.

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Butler
Schell
Mr Jordan

SB 135

SENATE
LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 14, 1979
EXHIBIT D 8 pg exhibit

EXPLANATORY

COMMENTS

WRITS OF REVIEW

Sections 1 to 12 of the bill remove city, county and special district land use decisions from writ of review and provide for separate judicial review proceedings especially designed for such land use decisions.

Section 2 gives the Court of Appeals jurisdiction over appeals alleging that a quasi-judicial decision by a city, county or special district violates the state-wide planning goals or the comprehensive plan or zoning, subdivision or other land use ordinances or regulations. The qualifications for standing in section 2(2) are that petitioner must: (1) Be a party below (see ORS 34.020); and, (2) Either have suffered injury to some substantial interest or be entitled to notice and hearing as a matter of right.

Under section 2(3) time for appeal begins to run when the decision is signed or the date written notice of the decision is given, whichever last occurs; the petition must be filed within 30 days thereafter.

Standing is to be determined before consideration of the merits of the petition as specified in section 2(4). Section 2(6) allows the Court of Appeals to appoint a Master to make findings of fact concerning a petitioner's standing to appeal. Under sections 2(4) and 2(7), LCDC is served with the petition and given an opportunity to submit a brief to the court.

Under sections 2(4), 2(5) and 2(8), the city, county or special district is served with the petition, is given 30 days to transmit the record to the court, and is given an opportunity to participate

in the proceedings. Under section 2(6) judicial review is limited to the record but the court may appoint a Master to make findings on procedural irregularities which do not appear in the record, such as unconstitutionality (e.g., discrimination), ex parte contacts and standing. Under section 2(10) the grounds for review are substantially the same as the writ of review under ORS 34.040 except that unconstitutionality of the decision has been added.

Sections 2(11) and 2(12) replace ORS 34.055 (repealed) and 34.070 (amended), respectively, relating to the $1,000 undertaking which may be required (for costs and damages) if a petition alleges error in approval of a land development project and requests a stay of proceedings. Sections 2(11) and 2(12) are substantially equivalent to ORS 34.055 and 34.070 except that attorney fees would not be compensible from the undertaking.

Section 3 specifies the manner of review of <u>legislative</u> land use decisions, depending on whether or not LCDC has formally acknowledged the city or county comprehensive plan to be in compliance with the state-wide planning goals. Under section 3(1), if LCDC has not acknowledged compliance, legislative decisions alleged to be in violation of the goals are to be appealed to LCDC under its petition for review procedure (ORS 197.300 to 197.315). On the other hand, under section 3(2), if LCDC has acknowledged compliance, then LCDC has jurisdiction only over the appeal of major plan revisions alleged to violate the goals [section 2(2)(a)] and the circuit court has jurisdiction over legislative decisions alleged to violate the comprehensive plan of the city or county [section 2(2)(b)]. Section 2(3) resolves jurisdictional questions

where compliance acknowledgment is granted while LCDC is considering a case. (Note: LCDC goals drop out upon compliance acknowledgment by LCDC, leaving the plans as the standard against which land use decisions are to be tested.)

Section 3a is for the purpose of saving an otherwise proper appeal filed with the wrong forum (circuit court, LCDC or Court of Appeals) by requiring transfer of the appeal to the proper forum.

The remainder of sections 4 to 11 are generally conforming amendments. Most notable is the repeal of ORS 34.055 which was a special writ of review bond requirement where a stay of proceedings was requested in a land development project, which would be replaced by section 2(11) as described in the comments above. Under section 6, LCDC jurisdiction over petitions for review by persons would be accordingly limited to those involving legislative decisions; and LCDC's overlapping jurisdiction provision (ORS 197.300(3)) would be eliminated as no longer necessary due to the elimination of overlapping Circuit Court-LCDC jurisdiction. (Compare governmental initiated petitions for review by LCDC, which have been retained under ORS 197.300(3).) Moreover, under section 6, the time for filing a petition for review with LCDC is changed from 60 days (from date of final adoption or approval) to 30 days (from date of decision or date written notice is given, whichever last occurs).

In section 7 a biennial appropriation of $50,000 is made to the Court of Appeals to fund the additional administrative expenses incurred in appointing a Master to make preliminary fact finding on matters outside the record under section 2(6) (i.e. allegations of

unconstitutionality, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand). The committee anticipates that no more than one Master would be needed and that the $50,000 figure would be adequate to cover travel, secretarial and other costs required.

Under section 9, ORS 34.050 is amended to remove the court's authority under the general writ of review statutes to reduce the amount of the undertaking from $100 to an amount not less than $50. Moreover, references to "judge" are removed as surplusage from current writ of review statutes under sections 9, 9a and 10 because references to "court" appear to be sufficient to include circuit courts and county courts which may hear writ of review cases.

Section 10 is a conforming amendment to ORS 34.070 which has been amended as discussed above.

Sections 10a and 10b amend existing land use statutes to require notice of certain city and county decisions to be given in writing to all parties to the proceeding. This was believed to be necessary to assure a time certain for the beginning of the running of the time for appealing quasi-judicial decisions under section 2 of the bill.

Under section 11, ORS 215.422 is amended to remove the existing, possibly ambiguous language (requiring that land use appeals within county government be "based upon but not limited to the record") so as to clarify that the county has discretion to hear a case de novo or on the record under language in ORS 215.422

(providing that "the procedure and type of hearing shall be prescribed by the governing body").

Finally, sections 11 and 12 amend existing city and county planning statutes to fit quasi-judicial land use decisions within the new judicial review to the Court of Appeals under section 2.

Section 13 removes writ of review for district court decisions for the reason that district courts were made courts of record with appeal to the Court of Appeals under ORS 46.330 to 46.350. Also, the additional ground of unconstitutionality is added to the present grounds for issuance of the writ.

This amendment also removes the masculine gender from the jurisdictional grounds and changes the language in the substantial evidence ground to conform to the language used for the substantial evidence test under the contested case provisions of the APA (see ORS 183.482(8)(d)).

Section 15 would allow for writ of review of municipal court interlocutory orders involving the constitutionality of a statute or ordinance or the proceedings in the same manner as set forth in ORS 157.070 for such interlocutory orders of justice's courts.

Section 16 replaces writ of review with appeal under the contested case provisions of the APA for decisions of the Oregon State Police Trial Board.

Section 17 is an amendment to the special district law deleting the 30-day time period for contesting certain formations and organization changes and imposes a uniform 60-day time period for both writ of review and review proceedings conducted under ORS 33.720. It also replaces judicial review of circuit court decisions

by the Supreme Court with judicial review as in other proceedings (by the Court of Appeals).

Section 18 is in response to the recent Court of Appeals decision in League of Women Voters v Lane County Boundary Commission, 26 Or App 53 (1978). This amendment would recognize the implied repeal of the writ of review provision for boundary commission orders by the League of Women Voters case, replacing same with an explicit reference to appeal under the contested case provisions of the Administrative Procedures Act. In addition, the amendment removes reference to the 30-day time limit for such an appeal, thereby invoking the time limit for appealing contested cases under the APA, i.e., 60 days from the date the order is served or petition for rehearing is deemed denied, ORS 183.482(1).

Sections 19 and 20, amending ORS 203.060 and repealing ORS 203.200, bring the judicial review of county decisions together into one section by providing that (except as provided for in land use cases under sections 2 and 3): Legislative decisions are subject to declaratory judgment proceedings (ORS chapter 28); that quasi-judicial decisions are subject to writ of review (ORS 34.010 to 34.100); and all other county decisions (generally administrative or ministerial acts) are subject to writ of mandamus (ORS 34.110 to 34.240).

Section 21 changes judicial review of certain tax exemption denials under ORS 311.860 by replacing the writ of review with an appeal to the Department of Revenue under ORS 305.275.

Section 22 changes judicial review of school district boundary board actions under the boundary change procedures set forth in ORS

330.101 by replacing the writ of review with appeal to the Court of Appeals under the contested case provisions of the APA (ORS 183.482).

Section 23 changes judicial review of the division of assets and liabilities when school district boundaries are changed by replacing the writ of review with the statutory means for appealing arbitration decisions generally (ORS 33.320 to 33.340).

Section 24 changes the judicial review of decisions by the State Board of Education regarding administrative school district reorganization plans by replacing the writ of review with an appeal to the Court of Appeals under the contested case provisions of the APA (ORS 183.482).

Section 25 changes judicial review of community college boundary adjustment denials by the board of education of a community college district by replacing the writ of review with appeal to the Court of Appeals under the contested case provisions of the APA (ORS 183.482).

Section 26 changes the judicial review of the division of assets and liabilities when community college district boundaries are changed by replacing the writ of review with the statutory means for appealing arbitration decisions generally (ORS 33.320 to 33.340).

Section 27 restricts the use of writ of review by eliminating the use of the writ for challenging the decision of a county to bring suit to abate a solid waste nuisance and limiting use of the writ to challenging the county board's order to abate a solid waste nuisance.

Section 28 changes the judicial review of orders by the Fire Standards and Accreditation Board by replacing the writ of review with appeal to the Court of Appeals under the contested case provisions of the APA (ORS 183.482).

Section 29 clarifies that any appropriate judicial proceeding may be used for judicial review of decisions by the State Fire Marshal to close buildings under ORS 479.195.

Section 30 eliminates the appeal to the Court of Appeals from a writ of review to circuit court involving an appraisal of the benefits and damages to land located within a water control subdistrict when construction is undertaken. In its place the amendment substitutes a discretionary appeal (certiorari) to the Supreme Court from a condemnation proceeding in circuit court.

Section 31 eliminates the appeal to the Court of Appeals from a writ of review to circuit court on water control district taxes and assessments and, instead, provides for a discretionary appeal (certiorari) of the writ decision to the Supreme Court.

Bill Love
Bob Jordan

SENATE
LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 14, 1979
EXHIBIT E 4 pg exhibit

SENATE BILL 435
WRITS OF REVIEW

BEFORE SENATE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT

A GENERAL OVERVIEW

Project

Senate Bill 435 is a Law Improvement Committee (LIC) project. The LIC is a statutory committee established by the legislature to review areas of the law deemed to need comprehensive evaluation. In the past, the LIC has revised the insurance laws, forestry laws, banking code, probate code, etc.

Specific projects are undertaken by the creation of special advisory committees appointed by the LIC which receive staff assistance from Legislative Counsel's office.

Writ of Review

The Writ of Review is of English common-law origin and has been carried over to the American legal system. It is a limited-purpose writ whereby a court can demand of a lower tribunal or decision-making body that certain items be brought before it for review on the existing record (it does not result in a new trial with new evidence, witnesses, etc.).

It became embodied many years ago in what is now ORS Chapter 34. Over the years, either by reference to Writ of Review in the statutes or by express reference to ORS Chapter 34, it became a convenient vehicle for use by the legislature in attempting to provide for some level of judicial review of actions by prescribed administrative bodies even though traditionally or logically it was not really the appropriate remedy.

In more recent years, most of the attention to the statutes and procedures specifically describing the writ have involved land use cases and appeals.

Advisory Committee Makeup

The members of the Advisory Committee (the Committee) are all lawyers from varied backgrounds and areas of the state. Two (the Chairman and Vice Chairman) are also members of the LIC. The Committee consisted of a circuit judge, a district court judge, a county counsel, a deputy city attorney, a law professor, two practicing lawyers--one of whom is also a former member of LCDC--and one attorney engaged in business and no longer in the active practice. Areas represented included Southern Oregon, Central Oregon, the mid-Willamette Valley as well as the metropolitan Portland area.

Meetings

The Committee held monthly meetings over a two-year period, all public notices given to interested and affected persons from an established mailing list. All of the meetings were held in the Capitol building in Salem. Members of the public and other interested groups and persons were encouraged to appear, submit memoranda, and provide input to the Committee. Among those appearing were the homebuilders, Legal Aid, 1000 Friends and League of Women Voters. The Committee also met with a justice of the Oregon Supreme Court and with the court administrator of the Oregon Court of Appeals.

Project Objective

The Advisory Committee was charged with the task of reviewing and evaluating all of the Oregon laws dealing with the Writ of Review and to determine to what extent these laws should be continued, repealed or modified.

THE BILL

The 31 sections of the Bill can be grouped in three categories:

1) Section 1-12 relate to land use cases. Because of the significance of these sections, they will be highlighted separately below. The Committee established a separate procedure for review of land use cases in lieu of the writ.

2) Section 13 eliminates the use of the writ as an alternative appeal route to the circuit courts for decisions of the Oregon District Court. Because the District Courts are now courts of record in this state and appeal is available directly to the Oregon Court of Appeals from its decisions, the continuation of the writ, with its potential for misuse and duplicity, appears no longer justified. This section also specifically adds "unconstitutionality" as a basis for review where the writ otherwise is appropriate.

3) Section 14-31 relate to all of the other provisions of Oregon law where reference to the writ is made. Each of these areas was considered separately and appropriate recommendations made. Basically, it was the Committee's opinion that judicial review would be simplified and expedited in most cases if it was done by appeal to the Oregon Court of Appeals under procedures comparable to the Administrative Procedures Act (ORS Chapter 183) for appeals from most state agencies.

Land Use Decisions (Sections 1-12)

Basic objectives, factors and conclusions include:

1) Simplifications - Simplify the procedure and avoid duplicate or alternate routes of appeal and review if at all possible.

2) One Level of Decision-Making Hearings; One Level of Review - Clearly define one level of decision-making authority which would encourage citizen participation, plus one--and only one--level of judicial review as a matter of right in most cases. Judicial review would not be encouraged and is not the appropriate arena for broad citizen participation on the merits; however, it clearly is retained as a right with adequate notice and time provisions involved to protect the interests of all concerned.

3) Written Notice - Provide for written notice of the governing body's decision be given to the parties involved and other people who file timely written requests.

4) Expedite Appeal Filing - Reduce the time for appeal from 60 days to 30 days (after the written notice is given) since this waiting period has the effect of delaying action in thousands of cases where no appeal is ultimately filed. Time represents money and costs. The decision-making process should be expedited while at the same time preserving adequate time for interested persons to coordinate an effective appeal if deemed appropriate.

5) Quasi-Judicial Appeals - For typical or normal cases involving specific parcels of land and basic issues such as zoning, variances, subdividing, specific building use (commonly referred to as quasi-judicial issues), the appeal route is directly from the governing body to the Oregon Court of Appeals. If the case involves some facts outside of the record, provision is made for appointment of a master to assist the Court of Appeals in establishing the basic facts.

6) Legislature-Type Actions-Appeals - If what is at issue is the broader based question of land utilization (generally involving much larger areas of land), commonly referred to as legislative-type decisions, the appeal shall be:

   (a) to LCDC if the governing body does not have an adopted comprehensive plan formally approved and acknowledged by LCDC (these plans are supposed to be completed per present law within the next two years).

   (b) if LCDC has so approved and acknowledged such a comprehensive plan, then to:

      1) LCDC if it involves a major revision of a comprehensive plan alleged to be in violation of state-wide planning goals.

      2) To the Circuit Court for the county if it involves zoning, subdivisions or other ordinances or regulations.

7) LCDC - In addition to being the initial review body for certain legislative-type acts described above, in all quasi-judicial type cases LCDC is to receive copies of petitions for judicial review and has the right to file briefs with the Oregon Court of Appeals if it deems the issues involve state-wide planning goals.

8) Status Quo - Two areas where the Committee made no basic changes from the status quo because agreement could not be reached after hearing testimony, arguments and lengthy Committee discussions:

(a) Definition of quasi-judicial, legislative and administrative type acts. There has developed an established body of law giving guidelines in many of these areas, and the Committee concluded it could not feasibly come up with anything better. This issue probably received more Committee attention than any other.

(b) The status and amount of a bond if a stay order is requested while the appeal is pending, and the utilization of the proceeds of any such bond to cover certain costs. The existing law was retained except that payment of attorneys fees from the bond proceeds has been eliminated. The Committee noted that realistically the bond has little effect since responsible developers and lending institutions will not go forward with a development while an appeal is pending. Attention is directed to the fact that several other bills have been introduced relating to bonding, costs, and the damage question.

Jordan

SENATE
LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 14, 1979
EXHIBIT F 2 pg exhibit

SB 435

REVIEW OF DECISIONS OF CITY, COUNTY OR SPECIAL DISTRICT GOVERNING BODY ALLEGED TO BE IN VIOLATION OF STATE-WIDE PLANNING GOALS

	WRIT OF REVIEW	PETITION FOR REVIEW
STANDING	A party to the proceeding before a city, county or special district governing body whose rights are substantially injured by its decision	A person or group of persons whose interests are substantially affected
REVIEWING BODY	Circuit Court	Land Conservation and Development Commission
GROUNDS FOR REVIEW	1. Body has exceeded its jurisdiction 2. Procedural error 3. Body's decision is not supported by substantial evidence 4. Body improperly construed applicable law	A comprehensive plan, zoning, subdivision or other ordinance or regulation violates the state-wide planning goals
UNDERTAKING	Maximum of $1,000 if a stay of proceedings is sought by petitioner	None
TIME FOR APPEAL	60 days from date of decision	60 days from date of decision

If duplicate suits are filed, later filed must be rejected under ORS 197.300

Both quasi-judicial and legislative decisions are reviewable under each procedure

ANALYSIS OF SENATE BILL 435

	QUASI-JUDICIAL DECISIONS	LEGISLATIVE DECISIONS
STANDING	A person appearing before the governing body of a city, county or special district, who was either entitled to notice and hearing or who has a substantial interest in the decision	A person or group of persons whose interests are substantially affected
REVIEWING BODY	Court of Appeals	If no acknowledged comprehensive plan - LCDC If acknowledged comprehensive plan - LCDC review of major revision of comprehensive plan Circuit Court review of ordinances or regulations
GROUNDS FOR REVIEW	1. Body has exceeded its jurisdiction 2. Procedural error 3. Body's decision is not supported by substantial evidence 4. Body improperly construed applicable law 5. Decision is unconstitutional	If no acknowledged comprehensive plan - Comprehensive plan, zoning or other ordinance or regulation is in violation of state-wide planning goals If acknowledged comprehensive plan - Major revision of comprehensive plan is in violation of goals -Zoning, subdivision or other ordinance is in violation of comprehensive plan
UNDERTAKING	$1,000 maximum if stay of proceedings is sought by petitioner	None
TIME FOR APPEAL	30 days from later of date of written decision or mailing of notice of decision	30 days from later of date of written decision or mailing of notice of decision

SENATE TRADE AND ECONOMIC DEVELOPMENT COMMITTEE SB 435

Testimony of Michael H. Marcus
Director of Litigation
Legal Aid Service, Mult. Bar

March 14, 1979

SENATE
LEGISLATIVE COMMITTEE ON
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MARCH 14, 1979
EXHIBIT G 1 Pg Exhibit

The sole concern of my testimony is Section 13 of SB 435, lines 4 and 5, which codifies the Court of Appeals' opinion in Hoffman v. French, 36 Or. App. 739 (1978), review granted, by eliminating the writ of review as a device to review district court errors.

My nine years of legal services experience convinces me that nonwealthy litigants -- meaning those unable to afford $1500 to $2500 -- are unable to use an appeal to correct district court errors. Even with 1977 amendments permitting waiver, reduction, or limitation of appellate undertakings, bonds which are adequate to protect both parties given normal appellate delays are beyond the reach of most litigants, and attorney fees on an appeal are unavoidable for those who are not poor enough to qualify for legal aid.

The writ of review should be reinstated as a parallel device for the review of district court error because it makes review available to the nonwealthy by drastically decreasing the expense of review:

1. By permitting the resolution of review in a matter of a few weeks instead of the many months normally consumed by an appeal, the writ renders a much smaller undertaking sufficient to protect both sides pending resolution of the legal controversy;

2. Because a writ proceeding, as a device for the review of district court error, amounts to a motion hearing in circuit court, the expense of legal representation is much lower than for a typical appeal.

Bonding practices and rising legal expenses have simply put appeal beyond the means of the nonwealthy litigants who comprise the majority of individual district court litigants. Retaining the writ of review as an appellate device will go far in preventing wealth from being a prerequisite to fair access to the legal system.

Accordingly, I request that SB 435 be amended to read, in pertinent part:

Section 13. ORS 34.040 is amended to read:
34.040. The writ shall be allowed in all cases where the district court, inferior court, officer, or tribunal other than an agency as defined in subsection (1) of ORS 183.310 in the exercise of judicial or quasi-judicial functions appears to have:

* * * *

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EXHIBIT H 7 Pg exhibit

BEFORE THE SENATE TRADE AND ECONOMIC DEVE[illegible]

Testimony of Terry D. Morgan concerning SB 435

Proposed Amendments to Section 2

Section 2(2)(b) is amended to read:

"Was a person entitled as of right to notice and hearing prior to the decision to be reviewed, or was a person who has [a substantial interest in the decision] an injury of some substantial right, and not otherwise.

Comment: This revision retains the language in the present ORS 34.040. The term "substantial interest" is too broad. The principle that a petitioner must have some injury peculiar to him and not just an "interest" which is common to large numbers of persons is well established in Oregon law, and under federal court decisions interpreting standing requirements. See Raper v Dunn, 53 Or 203 (1909); Eacret v Holmes, 215 Or 121 (1958); Warth v Seldin, 422 US 490 (1975); Simon v Eastern Ky. Welfare Rights Organization, 426 US 26 (1976); Sullivan, From Kroner to Fasano: Analysis of Judicial Review of Land Use Regulation in Oregon, 10 WLJ 358 at 376 (1974).

Section 2(6) is amended to read as follows:

"Review of a decision under this section shall be confined to the record; the court shall not substitute its judgment for that of the city, county or special district governing body as to

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any issue of fact. In the case of disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the Court of Appeals pursuant to rules adopted by the court to carry out this subsection, [may] shall refer the allegations to a Master appointed by the court to take evidence and make findings of fact upon them."

Comment: It is important to realize that most administrative records will not contain factual matters bearing on disputed allegations of unconstitutionality, standing, ex parte contacts or other procedural irregularities referred to in the present wording of the section. The Court of Appeals should not be given discretion in referring the matters to a master. The purpose of inserting unconstitutionality as a basis for review in Subsection 10 is to enable the Court of Appeals to review all allegations pertaining to the validity of the decision. The suggested revision further supports this purpose.

Section 2(10)(c) is amended as follows:

"The decision was not supported by substantial evidence in the whole record or the record fails to contain adequate findings and reasons for review;"

Comment: The suggested change reflects current judicial

thinking on land use decisions. Roseta vs County of Washington, 254 Or 161, 170 (1969); Green vs Hayward, 275 Or 693, 706-708 (1976); Petersen vs Klamath Falls, 279 Or 249, 256-257 (1977); West Linn Land Company vs Board of Commissioners, 36 Or App 39, 42-43 (1978); Commonwealth Properties vs Washington County, 35 Or App 387, 398-399 (1978).

Since a statement of findings and reasons is an elementary requirement of the writ of review proceeding, requirement should be embodied in the statute so as to give notice to all jurisdictions and the general public.

Section 2(11) is amended to add a new section (f) as follows:

"(f) If the court affirms a decision approving or authorizing the project, and the court determines that the grounds for the petition for review were frivolous in their entirety, the court shall award reasonable attorney's fees and costs to the developer."

Comment: ORS 34.055(6) allows damages in the form of reasonable attorney's fees and costs and actual damages to the developer only if the petitioner seeks a stay of the development project and only in the amount of the undertaking submitted. In effect, however, the filing of a writ itself will cost delay in the development of the project without the issuance of a stay. The proposed language is designed only to discourage frivolous petitions and hence would not limit access to the proceedings by

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genuinely aggrieved parties.

Under existing case law, a successful defender of an approval may not seek damages for delay, regardless of the frivolous nature of the petition. See Bay River vs Environmental Quality Commission, 26 Or App 717 (1976), wherein the Court of Appeals reversed a Circuit Court determination awarding $100,000 in damages for arbitrary and malicious delay by the agency and for attorney's fees. The Court held that there was no statutory authority for such a remedy.

Similarly, Courts have held that there can be no award of attorney's fees for abuse of process merely because an appeal was taken frivolously. The proposed revision provides a limited statutory right.

Section 2 is amended by adding a new subsection 13 as follows:

"(13) Nothing in this section is intended to prevent a party from seeking damages for inverse condemnation suffered as a result of a quasi-judicial decision by a city, county or special district governing body.

Comment: Section 2 is designed to provide a petitioner with an exclusive forum for appealing land use decisions by cities, counties and special districts. Accordingly, under subsection 10, the Court of Appeals may review a decision for violation of constitutional provisions. However, there is no provision in the section for award of damages which may result from the confiscation of a petitioner's property by "inverse condemnation".

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The Fifth Amendment of the United States Constitution and Article I, Section 18 of the Oregon Constitution prohibit the taking of private property for public use without just compensation. Insofar as quasi-judicial decisions by governing bodies may deprive a petitioner of all reasonable value of his property, he is entitled to seek damages caused as a result thereof. The proper forum for developing such a claim is the Circuit Court. The proposed amendment simply reserves this right in view of the fact that the section creates an otherwise exclusive remedy.

Amendments to Sections 3 and 6

Section 3 is deleted in its entirety and the following language is substituted:

> Section 3. Any legislative decision regarding any zoning, subdivision or other ordinance or regulation alleged to be in violation of the comprehensive plan shall be by the Circuit Court of the county in which the decision was made in the manner provided in ORS Chapter 28 or 32. In the event that the decision is alleged to be in violation of statewide planning goals, the Land Conservation and Development Commission may submit to the court a brief upon any alleged violation of the statewide planning goals as applied to the facts before the court, or may intervene and participate as a party

in the proceedings pursuant to applicable court rules.

Section 6 is amended by reviving ORS 197.300(3).

Comment: The suggested revisions preserve an aggrieved party's right to a choice of forum in challenging a legislative decision alleged to be in violation of statewide planning goals. Under the present statutory scheme, a person or group may file a petition with the Land Conservation and Development Commission pursuant to ORS 197.300(1)(d) against the legislative decision alleged to be in violation of statewide planning goals. On the other hand, the person or group may decide to challenge the decision by a declaratory judgment proceeding in circuit court pursuant to ORS Chapter 28. The latter course of action will be pursued when constitutional issues are of paramount importance and are interwoven with issues involving the interpretation of statewide planning goals.

An example would be challenge of a comprehensive plan revision after acknowledgment of compliance which effectively precludes low and moderate income housing in the jurisdiction. While such a legislative decision arguably violates the housing goal, it also arguably contravenes the equal protection clauses of the United States and Oregon Constitutions. Under the present construction of Section 3, a petitioner in this situation would be forced to proceed in two forums: LCDC for prosecution of the statewide planning goals issues and the

Circuit Court for prosecution of the constitutional violations. This contrasts with the present statutory scheme under ORS 197.300(3), which requires the petitioner to choose his forum with respect to the prosecution of statewide planning goals. While a party must choose its forum, he at least has the privilege of prosecuting all issues in a single forum.

The primary argument against the present statutory scheme is that the LCDC is more competent to formulate policy and interpret the applicability of statewide goals to legislative decisions than a circuit court, which must necessarily decide such issues on an ad hoc basis. This concern is addressed by the proposed revision permitting intervention by the LCDC concerning statewide planning goals.

1000 FRIENDS OF OREGON

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SENATE
LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MARCH 14, 1979
EXHIBIT I 409 exhibit

TESTIMONY OF ROBERT STACEY,
1000 FRIENDS STAFF ATTORNEY
TO SENATE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT
ON SENATE BILL 435

March 14, 1979

1000 Friends of Oregon supports the primary objective of Senate Bill 435: elimination of unnecessary delay in the review of local government land use decisions. The major step taken by the bill to accomplish this objective is to bypass the circuit courts in writs of review involving land use, and to assign such cases directly to the Court of Appeals.

Court of Appeals Chief Judge Herbert M. Schwab told this committee on February 7 that circuit court proceedings in land use writs of review generally take from three to five months, that nearly all important cases are appealed to the Court of Appeals, and that the circuit court's proceedings are a waste of judicial resources as well as time because the Court of Appeals must base its decision on the local government record and decision, not the circuit court decision. Judge Schwab supported the elimination of the circuit court step as the most effective way to eliminate delays. He expressed confidence that his court can handle the resulting workload.

1000 Friends of Oregon concurs in the Chief Judge's position. We urge the committee to address the problem of delay in the land development process through this constructive step - elimination of circuit court review - rather than by adoption of the punitive provisions of Senate Bills 61 and 65.

However, 1000 Friends opposes the changes in LCDC review authority made by Sections 3 and 6 of Senate Bill 435. These changes would remove LCDC's present authority to review a narrow class of quasi-judicial decisions, and would exempt certain plan amendments and all amendments of zoning and other ordinances from the statewide planning goals after acknowledgment of compliance. The first change creates more problems than it solves. The second goes far beyond the subject of this bill - reform of judicial review - to make major changes in the substantive land use law of the State of Oregon.

At present, any person who alleges that LCDC goals were violated by a subdivision approval, conditional use permit, variance, planned unit development approval or nearly any other decision authorizing a land development project, must seek court review of that local government decision. No person can appeal such decisions to LCDC. Only other governmental bodies can.

Individual citizens can only appeal to LCDC when a comprehensive plan provision or local ordinance or regulation violates the goals. (ORS 197.300(1)(d).) Therefore, the only time a person can obtain LCDC review of a specific project is when that development requires a plan amendment or zone change.

These cases are infrequent, but when they occur they are usually significant. A Jackson County zone change, for example, affecting only 70 acres under one ownership led to a key LCDC decision interpreting Goal 3's definition of "agricultural land" (Lord and Skrepetos v. Jackson County, LCDC No. 77-001, January 6, 1978). The volume of such cases is not large enough to present a burden to LCDC. It is not necessary to remove them from the commission's jurisdiction.

Removal would also be undesirable. Unlike the circuit courts, LCDC has specific expertise in the proper application of its own

goals. Unlike the circuit courts, LCDC prepares a detailed written opinion in every case of reversal, explaining how the local government violated applicable goals. When the Court of Appeals reviews a writ of review case, it looks solely at the local government decision. When the court looks at an LCDC review proceeding, it looks at LCDC's decision, and only corrects for errors of law.

This is the proper distribution of roles in judicial review. LCDC looks at questions of land use policy; the court looks at questions of law. There is no duplication. And because LCDC review is speedier than circuit court writ of review, there is less delay.

Senate Bill 435 would eliminate this handful of quasi-judicial LCDC petitions by individuals by permitting only legislative zone and plan changes to come before the commission on citizen appeal. Unfortunately, using the legislative/quasi-judicial distinction may create more problems than it solves. Judges disagree in specific cases about the proper application of the distinction (see, e.g., Neuberger v. City of Portland, 37 Or App 13 (1978)). SB 435 would resolve this problem by requiring LCDC, if it receives a petition which seeks review of a decision that LCDC thinks is quasi-judicial, to transfer the petition to the Court of Appeals (Section 3a). Of course, the Court of Appeals may disagree with LCDC's characterization of the case, and so ship it back to LCDC. The time lost by this kind of paper shuffling would more than offset any theoretical time savings in bypassing LCDC.

The second limit on LCDC is in Section 3. This is even more serious because it goes beyond determining what body should review violations of land use laws. Section 3 appears to change the present law - ORS 197.275(2) - by exempting minor plan amendments and all amendments of zoning and subdivision ordinances from the goals. Under the current law - ORS 197.251 - LCDC issues an

acknowledgment of compliance only when it is satisfied that a city or county's entire body of land use regulations - the plan and implementing ordinances - comply with the goals. After acknowledgment, actions taken pursuant to the plan and ordinances are exempt from LCDC goals. ORS 197.275(2).

However, changes in the plan or ordinances are not exempt under current law. They remain subject to LCDC review. Section 3 appears to change this. It assigns post-acknowledgment review of a "major revision of a comprehensive plan" to LCDC, but it does not define "major," nor does it declare how or whether "minor" revisions are to be reviewed for goal violations. Further, it specifies that review of zoning or other ordinances be by the circuit court, and appears to limit review to allegations of violation of the comprehensive plan, not the goals.

It is not certain that Section 3 has this effect. The provision is unclear. But if it is interpreted to exempt post-acknowledgment zone changes from the goals, Section 3 is a major policy mistake. LCDC is presently reviewing and acknowledging local plans and ordinances on the assumption that they are a package, and that future changes in either the plan or the zoning can be reviewed for goal compliance.

Finally, 1000 Friends does not support the reduction in filing time for a land use appeal from the present 60 days to 30 days. (See Sections 2(3) and 6.) ORS 183.482, governing appeals of agency orders and the present writ of review statute both prescribe 60-day filing periods, as does ORS 197.300 in the case of LCDC review. If the committee adopts this change, however, it should certainly include and clarify the provisions requiring that written notification of the decision be provided to all parties in the local government decision.

PROPOSED AMENDMENTS TO SB 435 - ALTERNATIVE NO. 1

Delete Sections 1 through 7 and insert the following:

Section 1. ORS 197.015 is amended to read:

197.015. As used in ORS 197.005 to 197.430 and 469.350, unless the context requires otherwise:

(1) "Activity of state-wide significance" means a land conservation and development activity designated pursuant to ORS 197.400.

(2) "Board" means the Land Use Board of Appeals.

[(2)] (3) "Commission" means the Land Conservation and Development Commission.

* * *

Section 2. ORS 197.040 is amended to read:

197.040. (1) The commission shall:

* * *

(e) Appoint members to the Land Use Board of Appeals.

SECTION 3. SECTIONS 4, 5, 6 and 7 are added to and made a part of ORS 197.005 to 197.410.

SECTION 4. (1) The Land Use Board of Appeals is established within the Department of Land Conservation and Development. The Board shall consist of a chief hearings referee and such other referees as the commision may from time to time appoint. The members of the board shall hold their position at the pleasure of the commission and their salaries shall be fixed by the commission unless otherwise provided by law.

SENATE
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April 19, 1979
EXHIBIT A 10 pg. exhibit

(2) The board shall conduct review proceedings with respect to those matters which may be brought before it as provided in sections 5A and 7A of this Act.

(3) In conducting review proceedings, the members of the board may sit together or separately, as the chief hearings referee shall decide.

(4) The chief hearings referee shall apportion the business of the board among the members of the board. Each member shall have the power to hear and issue orders in petitions and in all issues arising under the petitions, subject to section 7 of this Act.

SECTION 5. As used in Sections 6 and 7 of this 1979 Act:

(1) "Land use decision" means a final decision of a city, county or special district which concerns the adoption or application of the statewide planning goals, a comprehensive plan provision, or a zoning, subdivision or other ordinance or regulation which implements a comprehensive plan. "Land use decision" also includes for purposes of review under Section 7 of this Act, a final decision of a state agency concerning the application of the statewide planning goals.

(2) "Person" means any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization of any character.

(3) A person has "standing" if that person's interests are adversely affected or aggrieved by the decision to be reviewed. Provided, however, that if a person whose interests are adversely affected or aggrieved received written notice prior to the hearing on the decision to be reviewed and failed to appear

before the city, county or special district or state agency in some manner, orally or in writing, then that person shall be deemed not to have standing to petition for review.

SECTION 6. (1) Except as provided in Section 7 of this 1979 Act, exclusive jurisdiction to review any land use decision of a city, county or special district governing body is conferred upon the board.

(2) Any person who has standing may petition the board for review under this section, or may within a reasonable time after a petition has been filed, intervene in and be made a party to any review proceeding pending before the board.

(3) The petition shall be filed not later than 30 days from the date of the final order. Copies of the petition shall be served upon the city, county or special district governing body and the applicant of record in the city, county or special district governing body proceeding.

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

(A) The facts which establish that the interests of the petitioner have been adversely affected or aggrieved.

(B) The date of the decision, unless otherwise stated on the decision; and

(C) The issues which the petitioner seeks to have reviewed.

(b) A petition which has been timely filed may be amended once as a matter of right within 30 days from the date of filing, and may thereafter be amended only at the discretion of the board.

(5) Within 20 days after service of the petition, or within such further time as the board may allow, the city, county or

special district governing body shall transmit to the board the original or a certified copy of the entire record, if any, of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened.

(6) Review of a decision under this section shall be confined to the record, if any; however, the board may require or permit subsequent corrections or additions to the record. The board shall not substitute its judgment for that of the city, county or special district governing body as to any issue of fact for which there is substantial evidence in the whole record. If the record is incomplete for determination of any issues raised in the petition for review, then the board shall conduct such hearing as is necessary to complete the record.

(7) Upon review of a decision under this section, the board may, in its discretion, award reasonable attorney's fees and costs to the prevailing party.

(8) Except as provided in Section 7 of this 1979 Act, the board may affirm, reverse or remand the decision. The board shall reverse or remand the decision only if it finds that:

(a) The city, county or special district governing body exceeded its jurisdiction;

(b) The city, county or special district governing body failed to follow the procedure applicable to the matter before it;

(c) The decision was not supported by substantial evidence in the whole record;

(d) The city, county or special district governing body improperly construed the applicable law; or

(e) The decision is unconstitutional.

(9)(a) as used in this subsection:

(A) "Developer" means a person or persons proposing a land development project.

(B) "Land development project" or "project" means any proposed use of land for which approval or authority is required pursuant to ORS 215.010 to 215.190, 215.402 to 215.422, 227.010 to 227.300, or any ordinance or rule adopted pursuant thereto.

(b) Where a petition for review under this section alleges that a city or county governing body has erred, based upon one or more of the grounds described in subsection (8) of this section, in approving or authorizing a land development project, then before allowing a stay of proceedings authorized by subsection (10) of this section, the board shall require the petitioner to give an undertaking with good and sufficient surety, to be approved by the board, in an amount not to exceed $1,000.00, to the effect that the petitioner will pay actual damages of the developer in an amount not to exceed the amount of the undertaking if the board affirms the decision approving or authorizing the project.

(c) The petitioner may request a hearing on the amount of the undertaking required by the board under paragraph (b) of this subsection. The board may conduct a hearing and take evidence

and make findings of fact. At such hearing the developer shall offer proof as to the amount of his investment in the project and actual damages which may be caused by delaying the land development project.

(d) Based upon the length of time which it may take for the board to render a judgment on the matter being reviewed, the amount of the developer's investment in the project and the actual damages which may be caused by delaying the project, the board shall set the amount of the undertaking which the petitioner will be required to give.

(e) If upon a review, described in this section, the board affirms the decision approving or authorizing the project, the board may award actual damages to the developer in an amount not to exceed the amount of the undertaking required under this subsection.

(10)(a) Except as otherwise provided in paragraph (b) of this subsection, the board, in its discretion, may require that the developer desist from further proceedings in the matter to be reviewed, whereupon the proceedings shall be stayed accordingly.

(b) The board reviewing a land development project as defined in subsection (9) of this section may not require the developer to desist from further proceedings regarding the project unless the undertaking required by subsection (9) of this section has been given to the board.

(11) Final orders of the board may be appealed to the Court of Appeals in the manner provided in ORS 183.482 for appeals of

orders in contested cases.

SECTION 7. (1) Where a petition for review filed with the board under this 1979 Act alleges that a city, county, special district or state agency in making a land use decision violated the state wide planning goals adopted pursuant to ORS 197.240, the board shall prepare a recommendation only as to such allegations which shall be reviewed by the commission in accordance with the provisions of this section and such rules as the commission deems appropriate.

(2) At the conclusion of the review proceedings, the board shall prepare a recommendation for commission action upon the matter and shall submit a copy of its recommendation to the commission and to each party to the proceeding. Such recommendation shall include a general summary of the evidence contained in the record, proposed findings of fact and conclusions of law. The recommendation shall also state whether the petition raises matters of such importance that the commission should hear oral argument from the parties.

(3) Each party to the proceeding shall have the opportunity to submit written exceptions to the board's recommendation, including that portion of the recommendation stating whether oral argument should be allowed. The exceptions shall be filed with the board and submitted to the commission for review.

(4) The commission shall review the recommendation of the board and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the

commission unless the board recommends that oral argument not be allowed and the commission concurs with the board's recommendation. The commission shall not substitute its judgment for that of the city, county, special district or state agency as to any issue of fact for which there is substantial evidence in the record. Unless the commission determines that additional time not to exceed 90 days absent consent of all the parties is necessary, the commission shall adopt, reject or amend the recommendation of the board within 90 days of the date the petition was filed with the department.

(5) No order of the commission issued under subsection (4) of this section is valid unless all members of the commission have received the recommendation of the board in the matter and at least four members of the commission concur in its action in the matter.

(6) The commission may, in its sole discretion, continue its review of a petition which alleges that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to ORS 197.251(1). Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the order are dispositive of the

matters raised in the petition, in which event the commission may dismiss the petition.

(7) Any party to a review proceeding before the commission who is adversely affected or aggrieved by the order issued by the commission in the matter may appeal the order of the commission in the manner provided in ORS 183.480 for appeals from final orders in contested cases.

(8) The commission may enforce orders issued under subsection (4) of this section in appropriate judicial proceedings brought by the commission therefor.

(9) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings under this 1979 Act.

SECTION 7A. Section 7B of this Act is added to and made a part of ORS 34.010 to 34.100.

SECTION 7B. Notwithstanding ORS 34.030, judicial review of any land conservation and development action, comprehensive plan provision or any zoning subdivision or other ordinance or regulation of a city, county or special district governing body otherwise reviewable under 34.010 to 34.100 shall be as provided in Sections 5 through 7 of this 1979 Act.

On page 7, line 30 after "reviewed" delete "under" and insert:

"In the manner provided in Sections 5 through 7 of this 1979 Act."

Delete line 31.

On page 8, lines 1 and 2, after "ORS 34.010 to 34.100"

delete remainder of line, delete line 2 and insert:

"Sections 5 through 7 of this 1979 Act."

On page 9, line 36, after "in", delete rest of line and insert:

"Sections 50 through 7 of this 1979 Act."

Insert the following sections:

SECTION 32. ORS 197.300 through 197.315 are repealed.

SECTION 33. This Act takes effect on January 1, 1980.

B

PROPOSED AMENDMENTS TO SB 435 - PROPOSAL #2

Delete Sections 1 through 7 of the printed bill and insert the following sections:

SECTION 1. Sections 2 through 6 are added to and made a part of ORS 197.005 to 197.410.

SECTION 2. As used in Sections 3 through 6 of this 1979 Act:

(1) "Land use decision means a final decision of a city, county, state agency or special district which concerns the adoption or application of the statewide planning goals, a comprehensive plan provision, or a zoning, subdivision or other ordinance or regulation which implements a comprehensive plan.

(2) "Person" means any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization of any character.

(3) A person has "standing" if that person's interests are adversely affected or aggrieved by the decision to be reviewed. Provided, however, that if a person whose interests are adversely affected or aggrieved received written notice prior to the hearing on the decision to be reviewed and failed to appear before the city, county or special district or state agency in some manner, orally or in writing, then that person shall be deemed not to have standing to petition for review.

SECTION 3. (1) Exclusive jurisdiction to review any land use decision alleged to violate the statewide planning goals is conferred upon the commission.

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EXHIBIT B 9 pg. exhibit

(2) Except as provided in subsection 1 of this section, jurisdiction to review any quasi-judicial land use decision is conferred upon the Court of Appeals.

SECTION 4. (1) Any person who has standing may petition for review under this section.

(2) The petition shall be filed not later than 30 days from the date of the final order. Copies of the petition shall be served upon the state agency, city, county or special district governing body and the applicant of record in the state agency, city, county or special district governing body proceeding.

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

(A) The facts which establish that the interests of the petitioner have been adversely affected or aggrieved.

(B) The date of the decision, unless otherwise stated on the decision; and

(C) The issues which the petitioner seeks to have reviewed.

(b) A petition which has been timely filed may be amended once as a matter of right within 30 days from the date of filing, and may thereafter be amended only at the discretion of the court.

(4) Within 20 days after service of the petition, or within such further time as the reviewing body may allow, the state agency, city, county or special district governing body shall transmit to the reviewing body the original or a certified copy of the entire record of the proceeding under review, but, by sti-

pulation of all parties to the review proceeding, the record may be shortened.

(5) Review of a decision under this section shall be confined to the record; however, the reviewing body may require or permit subsequent corrections or additions to the record. The reviewing body shall not substitute its judgment for that of the state agency, city, county or special district governing body as to any issue of fact for which there is substantial evidence in the whole record. If the record is incomplete for determination of any issues raised in the petition for review, the court may refer the matter to the circuit court in which the decision was made to conduct such hearing as is necessary to complete the record.

SECTION 5. When a petition for review is to be reviewed by the Court of Appeals:

(1) The court may, in its discretion, award reasonable attorney's fees and costs to the prevailing party.

(2) The court may affirm, reverse or remand the decision. The court shall reverse or remand the decision only if it finds that:

(a) The state agency, city, county or special district governing body exceeded its jurisdiction;

(b) The state agency, city, county or special district governing body failed to follow the procedure applicable to the matter before it;

(c) The decision was not supported by substantial evidence

in the whole record;

(d) The state agency, city, county or special district governing body improperly construed the applicable law; or

(e) The decision is unconstitutional.

(3)(a) as used in this subsection:

(A) "Developer" means a person or persons proposing a land development project.

(B) "Land development project" or "project" means any proposed use of land for which approval or authority is required pursuant to ORS 215.010 to 215.190, 215.402 to 215.422, 227.010 to 227.300, or any ordinance or rule adopted pursuant thereto.

(b) Where a petition for review under this section alleges that a city or county governing body has erred, based upon one or more of the grounds described in subsection (2) of this section, in approving or authorizing a land development project, then before allowing a stay of proceedings authorized by subsection (4) of this section, the court shall require the petitioner to give an undertaking with good and sufficient surety, to be approved by the clerk of the court, in an amount not to exceed $1,000.00, to the effect that the petitioner will pay actual damages of the developer in an amount not to exceed the amount of the undertaking if the court affirms the decision approving or authorizing the project.

(c) The petitioner may request a hearing on the amount of the undertaking required by the court under paragraph (b) of this subsection. The court may appoint a master to conduct such

hearing and take evidence and make findings of fact upon them. At such hearing the developer shall offer proof as to the amount of his investment in the project and actual damages which may be caused by delaying the land development project.

(d) Based upon the length of time which it may take for the court to render a judgment on the matter being reviewed, the amount of the developer's investment in the project and the actual damages which may be caused by delaying the project, the court shall set the amount of the undertaking which the petitioner will be required to give.

(e) If upon a review, described in this section, the court affirms the decision approving or authorizing the project, the court may award actual damages to the developer in an amount not to exceed the amount of the undertaking required under this subsection.

(4)(a) Except as otherwise provided in paragraph (b) of this subsection, the court, in its discretion, may require that the defendant desist from further proceedings in the matter to be reviewed, whereupon the proceedings shall be stayed accordingly.

(b) The court reviewing a land development project as defined in subsection (9) of this section may not require the defendant to desist from further proceedings regarding the project unless the undertaking required by subsection (9) of this section has been given to the court.

SECTION 6. When a petition for review is to be reviewed by the commission:

(1) The petition shall be assigned to a hearings officer who may be an employe of the department. The hearings officer shall conduct the review proceedings in accordance with rules adopted by the commission.

(2) At the conclusion of the review proceedings, the hearings officer shall prepare a recommendation for commission action upon the matter and shall submit a copy of his recommendation to the commission and to each party to the proceeding. Such recommendation shall include a general summary of the evidence contained in the record, proposed findings of fact and conclusions of law. The recommendation shall also state whether, in the opinion of the hearings officer, the petition raises matters of such importance that the commission should hear oral argument from the parties.

(3) Each party to the proceeding shall have the opportunity to submit written exceptions to the hearings officer's recommendation, including that portion of the recommendation stating whether oral argument should be allowed. The exceptions shall be filed with the hearings officer and submitted to the commission for review.

(4) The commission shall review the recommendation of the hearings officer and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the commission unless the hearings officer recommends that oral argument not be allowed and the commission concurs with the hearings officer's recommendation. Unless the commission

determines that additional time not to exceed 90 days absent consent of all the parties is necessary, the commission shall adopt, reject or amend the recommendation of the hearings officer within 90 days of the date the petition was filed with the department.

(5) No order of the commission issued under subsection (4) of this section is valid unless all members of the commission have received the recommendation of the hearings officer in the matter and at least four members of the commission concur in its action in the matter.

(6) The commission may, in its sole discretion, continue its review of a petition which alleges that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to ORS 197.251(1). Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the order are dispositive of the matters raised in the petition, in which event the commission may dismiss the petition.

(7) Any party to a review proceeding before the commission who is adversely affected or aggrieved by the order issued by the commission in the matter may appeal the order of

the commission in the manner provided in ORS 183.480 for appeals from final orders in contested cases.

(8) The commission may enforce orders issued under subsection (4) of this section in appropriate judicial proceedings brought by the commission therefor.

(9) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings under this 1979 Act.

SECTION 7. Section 7A is added to and made a part of ORS 34.010 to 34.100.

SECTION 7A. Notwithstanding ORS 34.030, judicial review of any land conservation and development action, comprehensive plan provision or any zoning subdivision or other ordinance or regulation of a city, county or special district governing body otherwise reviewable under 34.010 to 34.100 shall be as provided in Sections 2 through 6 of this 1979 Act.

On page 7, line 30 after "reviewed" delete "under" and insert:

"In the manner provided in Sections 2 through 6 of this 1979 Act."

Delete line 31.

On page 8, lines 1 and 2, after "ORS 34.010 to 34.100" delete remainder of line, delete line 2 and insert:

"Sections 2 through 6 of this 1979 Act."

On page 9, line 36, after "in", delete rest of line and insert:

"Sections 2 through 6 of this 1979 Act."

Insert the following sections:

SECTION 32. ORS 197.300 through 197.315 are repealed.

SECTION 33. This Act takes effect on January 1, 1980.

LAW OFFICES OF
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April 18, 1979

HAND DELIVERED

SENATE
LEGISLATIVE COMMITTEE ON TRADE
AND ECONOMIC DEVELOPMENT
April 19, 1979
EXHIBIT C 2 pg. exhibit

William E. Love, Esq.
1300 S. W. Sixth Avenue
Fifth Floor
Portland, Oregon 97201

Reference: SB 435 and the Meeting of April 17, 1979

Dear Bill:

In thinking about the major issues dividing all of the people at the meeting Lee Johnson called on April 17, I came up with several policy objectives that you may want to raise with the Ragsdale-Hannon subcommittee. These policy objectives are:

1. Reduce the length of time it takes to get through the appeals system once a decision has been made by a local government.

2. Reduce the number of decision-making levels.

3. Provide a "one-stop" review.

4. Obtain LCDC participation on policy questions of significance.

5. Provide a "clean" record before the reviewing body.

6. Avoid the ability to "double" and "triple" shoot an appeal.

7. Make sure the "local" decision is respected.

8. Eliminate the need to distinguish procedurally between the "legislative" and "quasi-judicial."

9. Maintain the proper relationships between state and local authorities.

In our conversation on April 18, you and I tentatively agreed that the results of the discussion of the group at the breakfast meeting some weeks ago should be readvanced as a substitute for SB 435, as well as alternatives 1 and 2 proposed by Mr. Johnson. As I understand those results, all quasi-judicial decisions would be appealed directly to the Court of Appeals. Copies of briefs would be filed with the LCDC. At any point prior to the hearing by the Court of Appeals, the LCDC could decide that a major policy issue concerning the Goals was at stake in the case and could set the matter down for argument. The briefs in the Court of Appeals would be used before the LCDC and after the LCDC's decision (which should be rendered within 60 days after its decision to take jurisdiction) could be challenged to supplemental briefs on an abbreviated briefing schedule.

Feel free to use what seems worthwhile out of the above when you meet with the subcommittee on April 19.

Very truly yours,

SRS:iwb

D

SENATE
LEGISLATIVE COMMITTEE ON TRADE
AND ECONOMIC DEVELOPMENT
April 19. 1979
EXHIBIT D 5 pg. exhibit

Testimony by Lee Johnson -- Senate Bill 435
Senate Trade and Economic Development Committee
April 19, 1979

The thrust of Senate Bill 435 was to provide for direct filing in the Court of Appeals for writs of review that related to land use decisions. The purpose of this proposed change in the law was to ensure more expeditious adjudication of land use cases. Unfortunately the legislation does not attack the central problems that contribute to protracted litigation in land use cases. Before devising a solution, we must first identify the problems. The problems as we see them are as follows.

1. The quasi-judicial versus legislative dichotomy. The issue raised in many cases is whether an action is legislative or quasi-judicial. If it is quasi-judicial the appropriate remedy is a writ of review. If legislative, the remedy is by declaratory judgment. In most cases the substantive issues are the same. Prior to Fasano a local government action could be identified as legislative if it was something enacted by ordinance. Otherwise it was administrative and usually quasi-judicial. Fasano eliminated that mechanical distinction and now employs a qualitative test where we look to the number of land owners affected, the size of the property, etc. Unfortunately no one can predict with any certainty which cases the courts are going to say are legislative or quasi-judicial.

2. The Fasano rules. In Fasano the Oregon Supreme Court laid down certain rules that local governments must apply in making land use decisions. They include the requirements for notice, hearing, adequate record, findings of fact and conclusions of law, public need, comparative land, etc. These issues have provided the source for a great deal of litigation. Many of these cases can be quickly disposed of.

Often, the cases involve allegations of errors by local government bodies which occur because the body has acted without the assistance of counsel in the first instance. When the writ is filed counsel becomes aware of the decision and often advises the local government to withdraw their decision and correct the deficiency. Usually the deficiency involves such things as inadequate findings or incomplete record.

3. Interpretation of the LCDC Goals and Guidelines. The most difficult cases for both the Court of Appeals and the Supreme Court to decide are those cases wherein it is contended that the local government decision does not comply with the LCDC goals and guidelines. Those goals and guidelines are quite general and often conflicting. Thus, their interpretation becomes a pure matter of policy. The policy-making function for land use planning in Oregon is LCDC's responsibility. The appellate courts when deciding a case before it which has been reviewed by LCDC is placed in the difficult position of attempting to ascertain what LCDC's policy might be. This necessarily is a difficult decision for any court to make.

Under present law only some parties can challenge a local government decision by an appeal to LCDC. Thus the only method of review is through the courts by Writ of Review. Other parties have the option of either taking the case to LCDC or to the courts. It seems the more appropriate course would be to permit and indeed require that for any party having standing to obtain review of a local land use decision through LCDC. In that manner LCDC will be making the initial policy decision in interpreting its own goals.

Appellate courts upon review should not have much difficulty in reviewing those decisions particularly in light of the Supreme Court's recent decision in Republic Development Co. v. Employment Div. The net effect of that decision is that as long as the administrative agency has acted within its general statutory authority and in accordance with its own rules, the court will uphold its decision.

The effect of requiring LCDC to review all these cases will however substantially increase the agency's workload. Thus, it becomes incumbent that the agency adopt procedures which provide for expeditious handling of cases.

We suggest two alternate methods of attacking these problems. We prefer Alternate 1, which is described below.

Alternate 1.

1. Under these amendments to Senate Bill 435 there would be established a Land Use Board of Appeals within the Department of Land Conservation and Development. The Board would consist of a chief hearings referee and such other referees as the commission may appoint. The referees could either sit singly or in banc depending upon the direction of the chief hearings referee.

2. Appeal to the Land Use Board of Appeals would be the exclusive means for appealing all land use decisions whether legislative or quasi-judicial. The board would hear the case based upon the record made before the local government body, but could in its discretion hear evidence where there are unresolved factual questions.

3. With respect to non-LCDC goals questions, the board's decision would be final subject only to direct appeal to the Court of Appeals under the Administrative Procedures Act.

4. With respect to appeals that raise the issue of whether the land use decision complies with the statewide goals and guidelines, the board referee would hear the case and then prepare recommendations for the commission. The recommendations would include a summary of the evidence, proposed findings of fact and conclusions of law. The recommendation would also state whether the petition raises matters of such import that the commission should hear oral arguments. Each party then would have an opportunity to submit written exceptions to the board's recommendations. The case would then be submitted to the commission. If the Board of Land Use Appeals recommends against oral arguments, and the Commission concurs, then there would be no oral arguments. The Commission could either adopt or reject recommendations of the board. The Commission's decision must be made within 90 days from time of filing.

The advantages of this proposal are as follows:

1. It would in many cases eliminate the issue of whether the matter were legislative or quasi-judicial. In any event, there would be a single form to adjudicate the dispute regardless of what category it fell in.

2. The Board should be able to expeditiously handle those appeals which involve non-LCDC goals issues. The hearings officers would be able to hold those hearings in the local area concerned. Presumably, it would bring about more uniformity in decision-making at this level and will cull out many cases and thus avoid overloading the Court of Appeals.

3. The proposal ensures that there will be an initial LCDC determination where the issue is in compliance with statewide goals and guidelines. This decision could also be reviewed by the Court of Appeals, but it is presumed that the appellate review would be a limited and expeditious one.

Alternative 2.

Under Alternative 2 there would be no Land Use Board of Appeals. Rather the writ of review and declaratory judgment actions would be retained as the means of contesting local land use decisions which do not involve LCDC goals. Review would be direct to the Court of Appeals, thus eliminating the circuit court.

With respect to the challenge of local land use decisions on the grounds that they violate the LCDC goals, the method of appeal would be to LCDC. LCDC would retain its hearings officers and would follow much the same procedure as is outlined under Alternative 1.

Alternative 2 is a compromise which more or less retains many of the elements of the existing system. The chief disadvantages are that it may lead to a multiciplicity of lawsuits because parties would have to take certain questions to the Court of Appeals direct and other questions to LCDC. Many of these issues overlap.

LEGISLATIVE COMMITTEE ON TRADE
AND ECONOMIC DEVELOPMENT
ROOM H-197, STATE CAPITOL
SALEM, OREGON 97310
(503) 378-8811

April 24, 1979

Memo to: Senate Members, Legislative Committee on Trade and Economic Development

From: Patricia K. Middelburg, Executive Officer

Subject: Senate Bill 435 -- Relating to Judicial Review

This memorandum is designed to assist the Committee members during their deliberations on Senate Bill 435.

After lengthy discussions on the land use appeals process, the Subcommittee voted to return the bill to full Committee without recommendation. To assist the Committee, I feel the discussions should be divided into three phases.

Phase I should be spent on making a decision on Sections 1 - 12 of Senate Bill 435. With respect to these sections, there are two proposals before the members today. One is Senate Bill 435; the other, Alternative I, comes to you from Lee Johnson, Governor's Office. Surrounding both proposals are at least four key issues that need to be addressed. These issues and relating policy questions are included within this memorandum. After a decision is made on the policy items, the staff can begin drafting appropriate language for your consideration.

Phase II would be a review of the draft language, if any, proposed for Sections 1 - 12 of this measure.

Phase III would center on Sections 13 - 31 and resolving any technical matters raised during earlier hearings.

Finally, I think this Committee owes a special thank you to the many people who spent valuable time assisting both the members and staff in understanding this topic area. To single out any one person would be unfair to the many who spent long hours discussing, both during public hearings and in private conversations, the complexity of the issues before you today.

POLICY ISSUES RELATING TO SECTIONS 1 - 12
OF SENATE BILL 435

ISSUE 1 Should the statutes further define who has standing for undertaking a writ of review in a land use appeals case?

Under existing statutes, there already appears language defining who has standing in a writ of review matter or petitions for review. ORS 34.020 states *"Any party to any process or proceeding before or by any inferior court, officer or tribunal may have the decision or determination thereof reviewed for error...".* ORS 34.040 further defines when a party may seek a writ by stating: *"The writ shall be allowed in all cases where the inferior court, officer or tribunal other than an agency as defined in subsection (1) of ORS 183.310 in the exercise of judicial or quasi-judicial functions appears to have:*

(1) Exceeded its or his jurisdiction;

(2) Failed to follow the procedure applicable to the matter before it or him;

(3) Made a finding or order not supported by reliable, probative or substantial evidence; or

(4) Improperly construed the applicable law;

to the injury of some substantial right of the plaintiff, and not otherwise.".

Under the Administrative Procedures Act, ORS 183.310 defines "party" for purposes of appealing a state agency ruling or regulation. It states, *"'Party' means:*

(a) Each person or agency entitled as of right to a hearing before the agency; or

(b) Each person or agency named by the agency to be a party; or

(c) Any person requesting to participate before the agency as a party which the agency determines either has an interest in the outcome of the agency's proceeding or represents a public interest in such result."

ORS 183.480 further defines a party's standings as *"Any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order.".*

The two definitions make a distinction for who has standing for undertaking a review of a body's decision. For appealing decisions by an inferior body, there must be "injury of some substantial right of the party". Appeals of state agency rulings may be undertaken by "any person adversely affected

or aggrieved by an order" as well as "any party to an agency proceeding". It was the Fasano v. Washington County Commissioners case that further clarified when a person has standing. Both Senate Bill 435 and Alternative 1 incorporates language from Fasano in further defining "standing". However, which definition to use must be decided by the Committee.

Senate Bill 435 makes a distinction on defining standing depending on whether the issue is quasi-judicial or legislative. If it is quasi-judicial, then it is a person who: (a) appeared before the city, county or special district governing body in some manner, orally or in writing; and (b) Was a person entitled as of right to notice and hearing prior to the decision to be reviewed, or was a person who has a substantial interest in the decision. If the matter was legislative in nature, then a person of standing is defined as: any person or groups of persons whose interests are substantially affected.

Alternative 1 does not make a distinction between quasi-judicial or legislative matters in terms of defining standing. Instead, a person has standing if: "that person's interests are adversely affected or aggrieved by the decision to be reviewed. Provided, however, that if a person whose interests are adversely affected or aggrieved received written notice prior to the hearing on the decision to be reviewed and failed to appear before the city, county or special district or state agency in some manner, orally or in writing, then that person shall be deemed not to have standing to petition for review.".

The policy questions before the Committee then become:

1. Should the Committee further define "standing" to incorporate case law?
2. Which definition should the Committee use, that which appears in Senate Bill 435 or in Alternative 1?
3. Should the Committee attempt to define "affected or aggrieved" and if so, should the definition be in terms of dollar impact?

****

ISSUE 2 Should the state mandate the length of time local government has to make a final decision on a land use matter?

If the objective is to streamline the land use appeals process, then the

Committee should consider time delays that occur at the local decision-making level. Testimony before the Committee indicates that local governments may delay signing the final order on a land use matter (i.e., subdivision, conditional use permits, zone changes) anywhere from 1 week to 4 months after the final hearing date. The Committee may want to statutorily impose a time restriction on when local governments should issue its final written order. If this is the Committee's desire, then it should address the following policy questions:

1. How many days should the local government be allowed between the date of the final hearing and the date the decision is served?
2. Should the local government be allowed to extend this deadline under certain conditions?
3. Should the statutes specify that the decision served is to be in writing on the deadline date?
4. In some areas, planning commissions have jurisdiction over land use matters, with the party given a set time for appealing the decision to the local elected governing body.
   (a) Should the statutory deadline suggesting in (1) be extended to the date local planning commissions make a decision?
   (b) Local governments specify by ordinance the length of time for appealing the planning commission's decision. However, there is no time requirement on the local elected governing body to schedule the appeals case. Should the state statutorily impose such a restriction on local elected governing bodies?
   (c) On applications for permits, there is a discrepancy in the statutes for approving or denying permit applications depending on the location of the land. If it is within city jurisdiction, applications must be acted on within 60 days; for land in county jurisdictions, permits have 90 days before being approved or denied. Should there be a uniform time schedule on permit applications?
5. How many days after the final order is signed should written notification be sent to interested parties?

****

ISSUE 3 After the local governing body serves its decision on a land use matter, how many days should interested parties who have standing be allowed for filing a writ of review?

ORS 34.030 allows a petitioner 60 days from the date of decision for filing a writ of review. In keeping with the intent of this legislation, part of the Committee's objective should be to provide reasonable time for people to exercise their right of judicial review, but not delay beyond a reasonable time all land use projects. Therefore, the policy question before the Committee is:

1. Should people seeking a review be allowed 60 days to file that petition, or should that time be reduced to 30 days, as proposed in both Senate Bill 435 and Alternative 1?

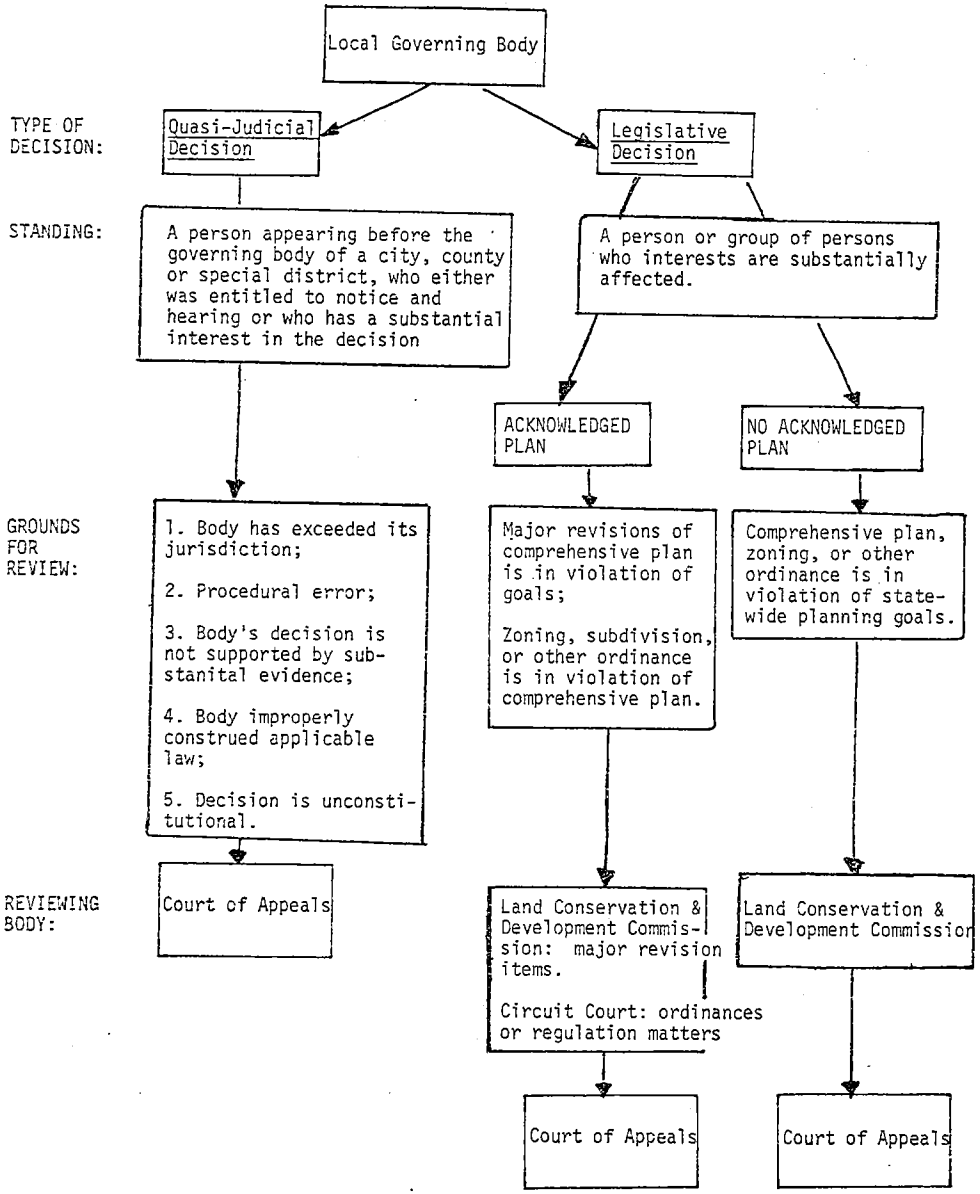
****

ISSUE 4 What should be the proposed steps for undertaking a review process?

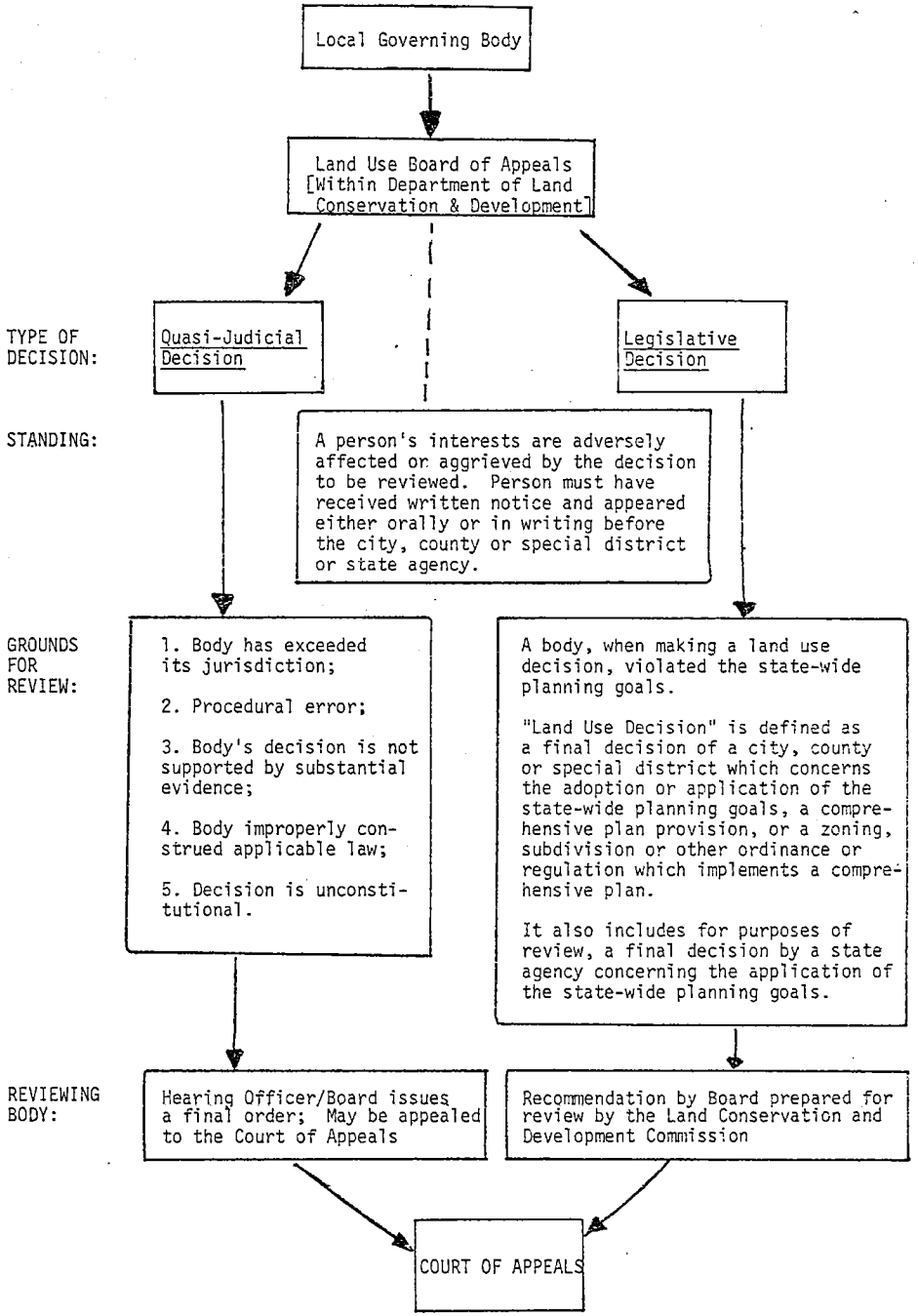
The Committee has before it two options, Senate Bill 435 and Alternative 1. Portrayed on the next two pages are the review steps proposed under the options. The policy questions for the Committee are:

1. Should the appeals be directed to the Land Conservation and Development Committee first, or should it go directly to the Court of Appeals, with the Commission given an opportunity to submit comments?
2. Which body should interpret the statewide land use planning goals -- the Land Conservation and Development Commission or the Court of Appeals?
3. Can the Court of Appeals take on an additional case load?
4. To what extent should the Land Conservation and Development Commission be allowed to comment on land use decisions after the comprehensive plans are acknowledged?

Review Process under Senate Bill 435



Review Process under Alternative 1



PROPOSED AMENDMENTS TO SB 435 - ALTERNATIVE NO. 1

Delete Sections 1 through 7 and insert the following:

Section 1. ORS 197.015 is amended to read:

197.015. As used in ORS 197.005 to 197.430 and 469.350, unless the context requires otherwise:

(1) "Activity of state-wide significance" means a land conservation and development activity designated pursuant to ORS 197.400.

(2) "Board" means the Land Use Board of Appeals.

[(2)] (3) "Commission" means the Land Conservation and Development Commission.

* * *

Section 2. ORS 197.040 is amended to read:

197.040. (1) The commission shall:

* * *

(e) Appoint members to the Land Use Board of Appeals.

SECTION 3. SECTIONS 4, 5, 6 and 7 are added to and made a part of ORS 197.005 to 197.410.

SECTION 4. (1) The Land Use Board of Appeals is established within the Department of Land Conservation and Development. The Board shall consist of a chief hearings referee and such other referees as the commision may from time to time appoint. The members of the board shall hold their position at the pleasure of the commission and their salaries shall be fixed by the commission unless otherwise provided by law.

(2) The board shall conduct review proceedings with respect to those matters which may be brought before it as provided in sections 5A and 7A of this Act.

(3) In conducting review proceedings, the members of the board may sit together or separately, as the chief hearings referee shall decide.

(4) The chief hearings referee shall apportion the business of the board among the members of the board. Each member shall have the power to hear and issue orders in petitions and in all issues arising under the petitions, subject to section 7 of this Act.

SECTION 5. As used in Sections 6 and 7 of this 1979 Act:

(1) "Land use decision" means a final decision of a city, county or special district which concerns the adoption or application of the statewide planning goals, a comprehensive plan provision, or a zoning, subdivision or other ordinance or regulation which implements a comprehensive plan. "Land use decision" also includes for purposes of review under Section 7 of this Act, a final decision of a state agency concerning the application of the statewide planning goals.

(2) "Person" means any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization of any character.

(3) A person has "standing" if that person's interests are adversely affected or aggrieved by the decision to be reviewed. Provided, however, that if a person whose interests are adversely affected or aggrieved received written notice prior to the hearing on the decision to be reviewed and failed to appear

before the city, county or special district or state agency in some manner, orally or in writing, then that person shall be deemed not to have standing to petition for review.

SECTION 6. (1) Except as provided in Section 7 of this 1979 Act, exclusive jurisdiction to review any land use decision of a city, county or special district governing body is conferred upon the board.

(2) Any person who has standing may petition the board for review under this section, or may within a reasonable time after a petition has been filed, intervene in and be made a party to any review proceeding pending before the board.

(3) The petition shall be filed not later than 30 days from the date of the final order. Copies of the petition shall be served upon the city, county or special district governing body and the applicant of record in the city, county or special district governing body proceeding.

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

(A) The facts which establish that the interests of the petitioner have been adversely affected or aggrieved.

(B) The date of the decision, unless otherwise stated on the decision; and

(C) The issues which the petitioner seeks to have reviewed.

(b) A petition which has been timely filed may be amended once as a matter of right within 30 days from the date of filing, and may thereafter be amended only at the discretion of the board.

(5) Within 20 days after service of the petition, or within such further time as the board may allow, the city, county or

special district governing body shall transmit to the board the original or a certified copy of the entire record, if any, of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened.

(6) Review of a decision under this section shall be confined to the record, if any; however, the board may require or permit subsequent corrections or additions to the record. The board shall not substitute its judgment for that of the city, county or special district governing body as to any issue of fact for which there is substantial evidence in the whole record. If the record is incomplete for determination of any issues raised in the petition for review, then the board shall conduct such hearing as is necessary to complete the record.

(7) Upon review of a decision under this section, the board may, in its discretion, award reasonable attorney's fees and costs to the prevailing party.

(8) Except as provided in Section 7 of this 1979 Act, the board may affirm, reverse or remand the decision. The board shall reverse or remand the decision only if it finds that:

(a) The city, county or special district governing body exceeded its jurisdiction;

(b) The city, county or special district governing body failed to follow the procedure applicable to the matter before it;

(c) The decision was not supported by substantial evidence in the whole record;

(d) The city, county or special district governing body improperly construed the applicable law; or

(e) The decision is unconstitutional.

(9)(a) as used in this subsection:

(A) "Developer" means a person or persons proposing a land development project.

(B) "Land development project" or "project" means any proposed use of land for which approval or authority is required pursuant to ORS 215.010 to 215.190, 215.402 to 215.422, 227.010 to 227.300, or any ordinance or rule adopted pursuant thereto.

(b) Where a petition for review under this section alleges that a city or county governing body has erred, based upon one or more of the grounds described in subsection (8) of this section, in approving or authorizing a land development project, then before allowing a stay of proceedings authorized by subsection (10) of this section, the board shall require the petitioner to give an undertaking with good and sufficient surety, to be approved by the board, in an amount not to exceed $1,000.00, to the effect that the petitioner will pay actual damages of the developer in an amount not to exceed the amount of the undertaking if the board affirms the decision approving or authorizing the project.

(c) The petitioner may request a hearing on the amount of the undertaking required by the board under paragraph (b) of this subsection. The board may conduct a hearing and take evidence

and make findings of fact. At such hearing the developer shall offer proof as to the amount of his investment in the project and actual damages which may be caused by delaying the land development project.

(d) Based upon the length of time which it may take for the board to render a judgment on the matter being reviewed, the amount of the developer's investment in the project and the actual damages which may be caused by delaying the project, the board shall set the amount of the undertaking which the petitioner will be required to give.

(e) If upon a review, described in this section, the board affirms the decision approving or authorizing the project, the board may award actual damages to the developer in an amount not to exceed the amount of the undertaking required under this subsection.

(10)(a) Except as otherwise provided in paragraph (b) of this subsection, the board, in its discretion, may require that the developer desist from further proceedings in the matter to be reviewed, whereupon the proceedings shall be stayed accordingly.

(b) The board reviewing a land development project as defined in subsection (9) of this section may not require the developer to desist from further proceedings regarding the project unless the undertaking required by subsection (9) of this section has been given to the board.

(11) Final orders of the board may be appealed to the Court of Appeals in the manner provided in ORS 183.482 for appeals of

orders in contested cases.

SECTION 7. (1) Where a petition for review filed with the board under this 1979 Act alleges that a city, county, special district or state agency in making a land use decision violated the state wide planning goals adopted pursuant to ORS 197.240, the board shall prepare a recommendation only as to such allegations which shall be reviewed by the commission in accordance with the provisions of this section and such rules as the commission deems appropriate.

(2) At the conclusion of the review proceedings, the board shall prepare a recommendation for commission action upon the matter and shall submit a copy of its recommendation to the commission and to each party to the proceeding. Such recommendation shall include a general summary of the evidence contained in the record, proposed findings of fact and conclusions of law. The recommendation shall also state whether the petition raises matters of such importance that the commission should hear oral argument from the parties.

(3) Each party to the proceeding shall have the opportunity to submit written exceptions to the board's recommendation, including that portion of the recommendation stating whether oral argument should be allowed. The exceptions shall be filed with the board and submitted to the commission for review.

(4) The commission shall review the recommendation of the board and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the

commission unless the board recommends that oral argument not be allowed and the commission concurs with the board's recommendation. The commission shall not substitute its judgment for that of the city, county, special district or state agency as to any issue of fact for which there is substantial evidence in the record. Unless the commission determines that additional time not to exceed 90 days absent consent of all the parties is necessary, the commission shall adopt, reject or amend the recommendation of the board within 90 days of the date the petition was filed with the department.

(5) No order of the commission issued under subsection (4) of this section is valid unless all members of the commission have received the recommendation of the board in the matter and at least four members of the commission concur in its action in the matter.

(6) The commission may, in its sole discretion, continue its review of a petition which alleges that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to ORS 197.251(1). Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the order are dispositive of the

matters raised in the petition, in which event the commission may dismiss the petition.

(7) Any party to a review proceeding before the commission who is adversely affected or aggrieved by the order issued by the commission in the matter may appeal the order of the commission in the manner provided in ORS 183.480 for appeals from final orders in contested cases.

(8) The commission may enforce orders issued under subsection (4) of this section in appropriate judicial proceedings brought by the commission therefor.

(9) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings under this 1979 Act.

SECTION 7A. Section 7B of this Act is added to and made a part of ORS 34.010 to 34.100.

SECTION 7B. Notwithstanding ORS 34.030, judicial review of any land conservation and development action, comprehensive plan provision or any zoning subdivision or other ordinance or regulation of a city, county or special district governing body otherwise reviewable under 34.010 to 34.100 shall be as provided in Sections 5 through 7 of this 1979 Act.

On page 7, line 30 after "reviewed" delete "under" and insert:

"In the manner provided in Sections 5 through 7 of this 1979 Act."

Delete line 31.

On page 8, lines 1 and 2, after "ORS 34.010 to 34.100"

delete remainder of line, delete line 2 and insert:

"Sections 5 through 7 of this 1979 Act."

On page 9, line 36, after "in", delete rest of line and insert:

"Sections 50 through 7 of this 1979 Act."

Insert the following sections:

SECTION 32. ORS 197.300 through 197.315 are repealed.

SECTION 33. This Act takes effect on January 1, 1980.

PROPOSED AMENDMENTS TO SB 435 - PROPOSAL #2

Delete Sections 1 through 7 of the printed bill and insert the following sections:

SECTION 1. Sections 2 through 6 are added to and made a part of ORS 197.005 to 197.410.

SECTION 2. As used in Sections 3 through 6 of this 1979 Act:

(1) "Land use decision means a final decision of a city, county, state agency or special district which concerns the adoption or application of the statewide planning goals, a comprehensive plan provision, or a zoning, subdivision or other ordinance or regulation which implements a comprehensive plan.

(2) "Person" means any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization of any character.

(3) A person has "standing" if that person's interests are adversely affected or aggrieved by the decision to be reviewed. Provided, however, that if a person whose interests are adversely affected or aggrieved received written notice prior to the hearing on the decision to be reviewed and failed to appear before the city, county or special district or state agency in some manner, orally or in writing, then that person shall be deemed not to have standing to petition for review.

SECTION 3. (1) Exclusive jurisdiction to review any land use decision alleged to violate the statewide planning goals is conferred upon the commission.

SENATE LEGISLATIVE COMMITTEE ON
TRADE AND ECONOMIC DEVELOPMENT
MAY 2,, 1979
EXHIBIT C
SB 435 9 pages

(2) Except as provided in subsection 1 of this section, jurisdiction to review any quasi-judicial land use decision is conferred upon the Court of Appeals.

SECTION 4. (1) Any person who has standing may petition for review under this section.

(2) The petition shall be filed not later than 30 days from the date of the final order. Copies of the petition shall be served upon the state agency, city, county or special district governing body and the applicant of record in the state agency, city, county or special district governing body proceeding.

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

(A) The facts which establish that the interests of the petitioner have been adversely affected or aggrieved.

(B) The date of the decision, unless otherwise stated on the decision; and

(C) The issues which the petitioner seeks to have reviewed.

(b) A petition which has been timely filed may be amended once as a matter of right within 30 days from the date of filing, and may thereafter be amended only at the discretion of the court.

(4) Within 20 days after service of the petition, or within such further time as the reviewing body may allow, the state agency, city, county or special district governing body shall transmit to the reviewing body the original or a certified copy of the entire record of the proceeding under review, but, by sti-

pulation of all parties to the review proceeding, the record may be shortened.

(5) Review of a decision under this section shall be confined to the record; however, the reviewing body may require or permit subsequent corrections or additions to the record. The reviewing body shall not substitute its judgment for that of the state agency, city, county or special district governing body as to any issue of fact for which there is substantial evidence in the whole record. If the record is incomplete for determination of any issues raised in the petition for review, the court may refer the matter to the circuit court in which the decision was made to conduct such hearing as is necessary to complete the record.

SECTION 5. When a petition for review is to be reviewed by the Court of Appeals:

(1) The court may, in its discretion, award reasonable attorney's fees and costs to the prevailing party.

(2) The court may affirm, reverse or remand the decision. The court shall reverse or remand the decision only if it finds that:

(a) The state agency, city, county or special district governing body exceeded its jurisdiction;

(b) The state agency, city, county or special district governing body failed to follow the procedure applicable to the matter before it;

(c) The decision was not supported by substantial evidence

in the whole record;

(d) The state agency, city, county or special district governing body improperly construed the applicable law; or

(e) The decision is unconstitutional.

(3)(a) as used in this subsection:

(A) "Developer" means a person or persons proposing a land development project.

(B) "Land development project" or "project" means any proposed use of land for which approval or authority is required pursuant to ORS 215.010 to 215.190, 215.402 to 215.422, 227.010 to 227.300, or any ordinance or rule adopted pursuant thereto.

(b) Where a petition for review under this section alleges that a city or county governing body has erred, based upon one or more of the grounds described in subsection (2) of this section, in approving or authorizing a land development project, then before allowing a stay of proceedings authorized by subsection (4) of this section, the court shall require the petitioner to give an undertaking with good and sufficient surety, to be approved by the clerk of the court, in an amount not to exceed $1,000.00, to the effect that the petitioner will pay actual damages of the developer in an amount not to exceed the amount of the undertaking if the court affirms the decision approving or authorizing the project.

(c) The petitioner may request a hearing on the amount of the undertaking required by the court under paragraph (b) of this subsection. The court may appoint a master to conduct such

hearing and take evidence and make findings of fact upon them. At such hearing the developer shall offer proof as to the amount of his investment in the project and actual damages which may be caused by delaying the land development project.

(d) Based upon the length of time which it may take for the court to render a judgment on the matter being reviewed, the amount of the developer's investment in the project and the actual damages which may be caused by delaying the project, the court shall set the amount of the undertaking which the petitioner will be required to give.

(e) If upon a review, described in this section, the court affirms the decision approving or authorizing the project, the court may award actual damages to the developer in an amount not to exceed the amount of the undertaking required under this subsection.

(4)(a) Except as otherwise provided in paragraph (b) of this subsection, the court, in its discretion, may require that the defendant desist from further proceedings in the matter to be reviewed, whereupon the proceedings shall be stayed accordingly.

(b) The court reviewing a land development project as defined in subsection (9) of this section may not require the defendant to desist from further proceedings regarding the project unless the undertaking required by subsection (9) of this section has been given to the court.

SECTION 6. When a petition for review is to be reviewed by the commission:

(1) The petition shall be assigned to a hearings officer who may be an employe of the department. The hearings officer shall conduct the review proceedings in accordance with rules adopted by the commission.

(2) At the conclusion of the review proceedings, the hearings officer shall prepare a recommendation for commission action upon the matter and shall submit a copy of his recommendation to the commission and to each party to the proceeding. Such recommendation shall include a general summary of the evidence contained in the record, proposed findings of fact and conclusions of law. The recommendation shall also state whether, in the opinion of the hearings officer, the petition raises matters of such importance that the commission should hear oral argument from the parties.

(3) Each party to the proceeding shall have the opportunity to submit written exceptions to the hearings officer's recommendation, including that portion of the recommendation stating whether oral argument should be allowed. The exceptions shall be filed with the hearings officer and submitted to the commission for review.

(4) The commission shall review the recommendation of the hearings officer and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the commission unless the hearings officer recommends that oral argument not be allowed and the commission concurs with the hearings officer's recommendation. Unless the commission

determines that additional time not to exceed 90 days absent consent of all the parties is necessary, the commission shall adopt, reject or amend the recommendation of the hearings officer within 90 days of the date the petition was filed with the department.

(5) No order of the commission issued under subsection (4) of this section is valid unless all members of the commission have received the recommendation of the hearings officer in the matter and at least four members of the commission concur in its action in the matter.

(6) The commission may, in its sole discretion, continue its review of a petition which alleges that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to ORS 197.251(1). Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the order are dispositive of the matters raised in the petition, in which event the commission may dismiss the petition.

(7) Any party to a review proceeding before the commission who is adversely affected or aggrieved by the order issued by the commission in the matter may appeal the order of

the commission in the manner provided in ORS 183.480 for appeals from final orders in contested cases.

(8) The commission may enforce orders issued under subsection (4) of this section in appropriate judicial proceedings brought by the commission therefor.

(9) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings under this 1979 Act.

SECTION 7. Section 7A is added to and made a part of ORS 34.010 to 34.100.

SECTION 7A. Notwithstanding ORS 34.030, judicial review of any land conservation and development action, comprehensive plan provision or any zoning subdivision or other ordinance or regulation of a city, county or special district governing body otherwise reviewable under 34.010 to 34.100 shall be as provided in Sections 2 through 6 of this 1979 Act.

On page 7, line 30 after "reviewed" delete "under" and insert:

"In the manner provided in Sections 2 through 6 of this 1979 Act."

Delete line 31.

On page 8, lines 1 and 2, after "ORS 34.010 to 34.100" delete remainder of line, delete line 2 and insert:

"Sections 2 through 6 of this 1979 Act."

On page 9, line 36, after "in", delete rest of line and insert:

"Sections 2 through 6 of this 1979 Act."

Insert the following sections:

SECTION 32. ORS 197.300 through 197.315 are repealed.

SECTION 33. This Act takes effect on January 1, 1980.

EXHIBIT A
S. LEG. COM ON T & EC. D.
SUBCOMMITTEE ON SB 435
MAY 14, 1979
17 pages SB 435

Legislative Counsel
05/10/79 (34) (30)
SB 435-2

PROPOSED AMENDMENTS TO SENATE BILL 435

On page 2 of the printed bill, line 1, after "ORS" insert "34.020,".

In line 3, delete "197.300" and insert "197.015, 197.252, 197.265, 197.395".

In line 5, after "34.055" insert ", 197.300, 197.305, 197.310, 197.315" and after the semicolon delete "and" and after "money" insert "; and prescribing an effective date".

In line 7, delete ", 3 and 3a" and insert "to 6a".

Delete lines 9 through 38 and pages 3 and 4.

On page 5, delete lines 1 through 37 and insert:

"SECTION 2. (1) The Land Use Board of Appeals is established within the Department of Land Conservation and Development. With the approval of the Governor, the commission shall appoint a chief hearings referee and such other referees as the commission considers necessary to serve as members of the board. The members of the board shall hold their positions at the pleasure of the commission and their salaries shall be fixed by the commission unless otherwise provided by law.

"(2) Referees appointed under subsection (1) of this section shall be members in good standing of the Oregon State Bar. Referees shall not hold any other office or position of profit, but shall devote their entire time to the duties of the board.

"(3) The members of the board shall not be assigned any duties that would interfere with or influence the discharge of their duties under sections 2a and 4 of this 1979 Act.

"SECTION 2a. (1) The board shall conduct review proceedings upon petitions filed in the manner prescribed in section 4 of this 1979 Act.

"(2) In conducting review proceedings the members of the board may sit together or separately as the chief hearings referee shall decide.

"(3) The chief hearings referee shall apportion the business of the board among the members of the board. Each member shall have the power to hear and issue orders on petitions filed with the board and on all issues arising under those petitions, except as provided in section 6 of this 1979 Act.

"(4) The board shall adopt rules governing the conduct of review proceedings brought before it under sections 4 to 6 of this 1979 Act.

"SECTION 3. As used in sections 4 to 6 of this 1979 Act:

"(1) 'Land use decision' means:

"(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of the state-wide planning goals, a comprehensive plan provision or a zoning, subdivision or other ordinance that implements a comprehensive plan; or

"(b) A final decision or determination of a state agency with respect to which the agency is required to apply the state-wide planning goals.

"(2) 'Person' means any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind.

"SECTION 4. (1) Review of land use decisions under sections 4 to 6 of this 1979 Act shall be commenced by filing a petition with the Land Use Board of Appeals. Subject to the provisions of section 6a of this 1979 Act relating to judicial review by the Court of Appeals, the board shall have exclusive jurisdiction to review any land use decision of a city, county or special district governing body or a state agency in the manner provided in sections 5 and 6 of this 1979 Act.

"(2) Except as provided in subsection (3) of this section, any person whose interests are adversely affected or aggrieved by a land use decision may petition the board for review of that decision or may, within a reasonable time after a petition for review of that decision has been filed with the board, intervene in and be made a party to any review proceeding pending before the board.

"(3) Any person whose interests are adversely affected or aggrieved by a quasi-judicial land use decision and who failed to appear in some manner, whether orally or in writing, before the city, county or special district governing body or state agency that made the decision must demonstrate to the satisfaction of the board that that person did not receive notice of or otherwise had no reasonable opportunity to participate in any hearings or proceedings on the subject of the decision to be reviewed.

"(4) A petition for review of a land use decision shall be filed not later than 30 days after the date the decision sought to be reviewed becomes final. Copies of the petition shall be served upon the city, county or special district governing body or state agency and the applicant of record, if any, in the city, county or special district governing body or state agency proceeding.

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

"(A) The facts that establish that the interests of the petitioner have been adversely affected or aggrieved.

"(B) The date of the decision.

"(C) The issues the petitioner seeks to have reviewed.

"(b) A petition that has been timely filed may be amended once as a matter of right within 30 days after the date of filing, and may thereafter be amended only at the discretion of the board.

"(6) Within 20 days after service of the petition, or within such further time as the board may allow, the city, county or special district governing body or state agency shall transmit to the board the original or a certified copy of the entire record, if any, of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections or additions to the record.

"(7) Review of a decision under sections 4 to 6 of this 1979 Act shall be confined to the record, if any, except that if the record is incomplete for determination of any issues raised in the

petition for review, then the board may conduct a hearing and make findings necessary to decide those issues. The board shall not substitute its judgment for that of the city, county or special district governing body or state agency as to any issue of fact for which there is substantial evidence in the whole record.

"(8) Upon review of a decision under sections 4 to 6 of this 1979 Act, the board may, in its discretion, award reasonable attorney fees and costs to the prevailing party.

"(9) Orders issued under this section may be enforced in appropriate judicial proceedings brought by the board therefor.

"SECTION 5. (1) Where a petition for review contains only allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and proceed as provided in section 6 of this 1979 Act.

"(2) Where a petition for review contains no allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and prepare a final order affirming, reversing or remanding the decision.

"(3) Where a petition for review contains both allegations that a land use decision violates the state-wide planning goals and other allegations of error, the board shall review the decision and proceed as provided in section 6 of this 1979 Act with respect to the allegations of violation of the state-wide planning goals, and prepare an order addressing all issues not related to the state-wide planning goals. The decision of the board concerning any issues not related to the state-wide planning goals shall be final,

but no final order shall be issued until the commission has reviewed the recommendation of the board on the issues concerning the state-wide planning goals under section 6 of this 1979 Act and issued its determination. The board shall incorporate the determination of the commission into the final order to be issued under this subsection.

"(4) The board shall reverse or remand the land use decision under review only if:

"(a) The board finds that the city, county or special district governing body:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

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

"(D) Improperly construed the applicable law; or

"(E) Made a decision that was unconstitutional; or

"(b) After review in the manner provided in section 6 of this 1979 Act, the commission has determined that the city, county or special district governing body or state agency violated the state-wide planning goals.

"(5) Final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6a of this 1979 Act.

"SECTION 6. (1) At the conclusion of a review proceeding under sections 4 and 5 of this 1979 Act, the board shall prepare a

recommendation to the commission concerning any allegations of violation of the state-wide planning goals contained in the petition and shall submit a copy of its recommendation to the commission and to each party to the proceeding. The recommendation shall include a general summary of the evidence contained in the record and proposed findings of fact and conclusions of law concerning the allegations of violation of the state-wide planning goals. The recommendation shall also state whether the petition raises matters of such importance that the commission should hear oral argument from the parties.

"(2) Each party to the proceeding shall have the opportunity to submit written exceptions to the board's recommendation, including that portion of the recommendation stating whether oral argument should be allowed. The exceptions shall be filed with the board and submitted to the commission for review.

"(3) The commission shall review the recommendation of the board and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the commission unless the board recommends that oral argument not be allowed and the commission concurs with the board's recommendation. The commission shall not substitute its judgment for that of the city, county, special district or state agency as to any issue of fact for which there is substantial evidence in the record. The commission shall issue its determination on the recommendation of the board within 90 days after the date the petition was filed with the board and return the determination to the board for inclusion

in the board's order under section 5 of this 1979 Act. If the commission determines that additional time is necessary, it may postpone the date of its action for an additional 90 days. If additional time beyond 90 days is required, the commission shall obtain the consent of the parties.

"(4) No determination of the commission issued under subsection (3) of this section is valid unless all members of the commission have received the recommendation of the board in the matter and at least four members of the commission concur in its action in the matter.

"(5) The commission may, in its sole discretion, continue its review of a petition alleging that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to subsection (1) of ORS 197.251. Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the acknowledgment order are dispositive of the matters raised in the petition, in which event the commission may dismiss the allegations of violation of the state-wide planning goals in the petition.

"(6) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings brought before it for determination under this section.

"SECTION 6a. (1) Any party to a proceeding before the Land Use Board of Appeals under sections 4 to 6 of this 1979 Act, may seek judicial review of a final order issued in those proceedings.

"(2) Notwithstanding the provisions of ORS 183.480 to 183.500, judicial review of orders issued under sections 4 to 6 of this 1979 Act shall be solely as provided in this section.

"(3) Jurisdiction for judicial review of proceedings under sections 4 to 6 of this 1979 Act is conferred upon the Court of Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 30 days only following the date the order upon which the petition is based is served unless otherwise provided by statute. If the board does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 30th day following the date the petition was filed, and in such cases, petition for judicial review shall be filed within 30 days only following such date. Date of service shall be the date on which the board delivered or mailed its order.

"(4) The petition shall state the nature of the order the petitioner desires reviewed. Copies of the petition shall be served by registered or certified mail upon the board, and all other parties of record in the board proceeding.

"(5) (a) The filing of the petition shall not stay enforcement of the board order, but the board may do so upon a showing of:

"(A) Irreparable injury to the petitioner; and

"(B) A colorable claim of error in the order.

"(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the board shall grant the stay unless the board determines that substantial public harm will result if the order is stayed. If the board denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.

"(c) When the board grants a stay it may impose such reasonable conditions as the giving of a bond or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time.

"(d) Denial of a motion for stay by the board is subject to review by the Court of Appeals under such rules as the court may establish.

"(6) Within 30 days after service of the petition, or within such further time as the court may allow, the board shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to

the record when deemed desirable. Except as specifically provided in this subsection, the cost of the record shall not be taxed to the petitioner or any intervening party. However, the court may tax such costs and the cost of transcription of record to a party filing a frivolous petition for review.

"(7) At any time subsequent to the filing of the petition for review and prior to the date set for hearing the board may withdraw its order for purposes of reconsideration. If the board withdraws an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the board action after withdrawal for purposes of reconsideration, the petitioner may file an amended petition for review and the review shall proceed upon the revised order.

"(8) Review of an order issued under sections 4 to 6 of this 1979 Act shall be confined to the record, the court shall not substitute its judgment for that of the board as to any issue of fact.

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

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

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record.".

In line 39, delete "Court of Appeals" and insert "Department of Land Conservation and Development".

On page 6, line 1, delete "$50,000" and insert "$_____" and after "incurred" delete the rest of the line and lines 2 and 3 and insert "by the Land Use Board of Appeals under sections 4 to 6 of this Act.

"Section 7a. ORS 197.015 is amended to read:

"197.015. As used in ORS 197.005 to 197.430 and 469.350, unless the context requires otherwise:

"(1) 'Activity of state-wide significance' means a land conservation and development activity designated pursuant to ORS 197.400.

"(2) 'Board' means the Land Use Board of Appeals or any member thereof.

"[(2)] (3) 'Commission' means the Land Conservation and Development Commission.

"[(3)] (4) 'Committee' means the Joint Legislative Committee on Land Use.

"[(4)] (5) 'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the governing body of a state agency, city, county or special district that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational systems,

recreational facilities, and natural resources and air and water quality management programs. 'Comprehensive' means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. 'General nature' means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. 'Land' includes water, both surface and subsurface, and the air.

"[(5)] (6) 'Department' means the Department of Land Conservation and Development.

"[(6)] (7) 'Director' means the Director of the Department of Land Conservation and Development.

"[(7)] (8) 'Goals' mean the mandatory state-wide planning standards adopted by the commission pursuant to ORS 197.005 to 197.430.

"[(8)] (9) 'Guidelines' mean suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.

"[(9)] (10) 'Special district' means any unit of local government, other than a city or county, authorized and regulated by statute and includes, but is not limited to: Water control districts, irrigation districts, port districts, regional air quality control authorities, fire districts, school districts, hospital districts, mass transit districts and sanitary districts.

"[(10)] (11) 'Voluntary association of local governments' means a regional planning agency in this state officially designated by the Governor pursuant to the federal Office of Management and Budget Circular A-95 as a regional clearinghouse.

"Section 7b. ORS 197.252 is amended to read:

"197.252. (1) Even if a city or county has not agreed to a condition in a compliance schedule under ORS 197.251, the commission may condition the compliance schedule for the city or county to direct the city or county to apply specified goal requirements in approving or denying future land conservation and development actions if the commission finds that past approvals or denials would have constituted violations of the state-wide planning goals and:

"(a) The commission finds that the past approvals or denials represent a pattern or practice of decisions which make continued utilization of the existing comprehensive plan, ordinances and regulations ineffective in achieving the state-wide planning goals through performance of the compliance schedule; or

"(b) The commission finds that a past approval or denial was of more than local impact and substantially impairs the ability of the

city or county to achieve the state-wide planning goals through the performance of the compliance schedule.

"(2) Conditions may be imposed under this section only at the time of:

"(a) Annual phased review of the satisfactory progress of the city or county;

"(b) Approval of a planning assistance grant agreement with the city or county; or

"(c) Revision of a compliance schedule due to delays of 60 days or more in the approved compliance date by the city or county.

"(3) Nothing in this section is intended to limit or modify the powers of the commission under ORS 197.251[, 197.300 to 197.315] or 197.320. The powers of the commission under this section are intended to be in addition to, and not in lieu of, ORS 197.005 to 197.430 (1975 Replacement Part) and 197.251 and 197.320.

"Section 7c. 197.265 is amended to read:

"197.265. (1) As used in this section, "action or suit" includes but is not limited to a [writ of review] proceeding under [ORS 34.010 to 34.100 and any review proceeding conducted by the commission pursuant to ORS 197.300] sections 4 to 6 of this 1979 Act.

"(2) If any suit or action is brought against a city or county challenging any comprehensive plan, zoning, subdivision or other ordinance or regulation or action of such city or county which was adopted or taken for the primary purpose of complying with the state-wide planning goals approved under ORS 197.240 and which does

in fact comply with such goals, then the commission shall pay reasonable attorney fees and court costs incurred by such city or county in the action or suit including any appeal, to the extent funds have been specifically appropriated to the commission therefor.

"Section 7d. ORS 197.395 is amended to read:

"197.395. (1) Any person or public agency desiring to initiate an activity which the state may regulate or control which occurs upon federal land shall apply to the cities or counties in which the activity will take place for a permit. The application shall contain an explanation of the activity to be initiated, the plans for the activity and any other information required by the city or county as prescribed by rule of the commission.

"(2) If the city or county finds after review of the application that the proposed activity complies with state-wide goals and the comprehensive plans of the cities or counties affected by the activity, it shall approve the application and issue a permit for the activity to the person or public agency applying therefor. Action shall be taken by the governing body within 60 days of receipt of the application, or the application is deemed approved.

"(3) The city or county may prescribe and include in the permit any conditions or restrictions that it considers necessary to assure that the activity complies with state-wide goals and the comprehensive plans of the cities or counties affected by the activity.

"(4) Actions pursuant to this section are subject to review [pursuant to ORS 197.300] under sections 4 to 6 of this 1979 Act.

"Section 8. ORS 34.020 is amended to read:

"34.020. Except for a proceeding resulting in a land use decision as defined in section 3 of this 1979 Act for which review is provided in sections 4 to 6 of this 1979 Act, any party to any process or proceeding before or by any inferior court, officer, or tribunal may have the decision or determination thereof reviewed for errors, as provided in ORS 34.010 to 34.100, and not otherwise. Upon a review, the court may review any intermediate order involving the merits and necessarily affecting the decision or determination sought to be reviewed.".

On page 7, line 30, delete "under" and insert "in the manner provided in sections 4 to 6 of this 1979 Act.".

Delete line 31.

On page 8, line 1, after "under" delete the rest of the line and line 2 and insert "sections 4 to 6 of this 1979 Act.".

On page 9, line 36, delete "2 and 3" insert "4 to 6".

On page 16, after line 6, insert:

"SECTION 32. ORS 34.055, 197.300, 197.305, 197.310 and 197.315 are repealed.

"SECTION 33. This Act takes effect on January 1, 1980.".

Equitable Savings is people.

HOME OFFICE
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P.O. BOX 72, 97207
PORTLAND, OR 97201
(503) 243-1611

May 14, 1979

Senate Committee on Trade
and Economic Development
State Capitol
Salem, Oregon 97310

Re: SB 435 -- Land Use Appeals

Attention: Land Use Subcommittee

Gentlemen:

My purpose is to share with you a few comments regarding the provisions set forth in the proposed amendments to SB 435. A prior commitment in the east has me traveling and unable to appear at the subcommittee meeting.

I am aware that the Senate Committee has made the decision -- at least tentatively -- to establish a Board of Appeals (Board) within the LCDC (Commission) strcture. With regard to the merits of that decision, I call attention to the following:

I. The Writ of Review Committee (Committee), acting under the auspices of the Law Improvement Committee, considered as one of the alternatives the basic concept of appealing to LCDC, and rejected that procedure in favor of a direct appeal to the Court of Appeals.

II. A basic objective of the Committee was to eliminate an existing layer of review between the entry of the decision-makers order and the filing of the case with the Court of Appeals for judicial review. SB 435 accomplished this; the proposed amendments would replace the layer with at least one and in most significant cases two layers of administrative review and decision making. Note below:

EXHIBIT B
S. LEG. COM ON T & Ec. D.
SUBCOMMITTEE ON SB 435
MAY 14, 1979
5 page exhibit SB 435

Current Procedure	SB 435	Proposed Amendments
Decision by City or County	Same	Same
Circuit Court (writ of review)	Eliminate	Board of Land Use Appeals LCDC (if goal question)
Court of Appeals (as a matter of right)	Same basically	Same
Supreme Court (by invitation)	Same	Same

III. Among the fundamental concers of the Committee were:

(1) Simplification. Have one level of administrative decision making, and one of judicial review.
(2) Accellerate the final decision -- reduce the time involved.
(3) Reduce the costs involved in obtaining a final decision
(4) Maintain or improve the quality of the final decision.
(5) Improve consistency and uniformity.

It would appear that the proposed amendments would be a step backward as to the first three, should be a step forward as to (5) and would not materially affect step (4).

As to the specifics of the proposed amendments, I comment as follows:

1. Time Factor. Nowhere do I see in the bill a time limitation placed on the Board. There is one placed on the Commission on matters referred to it, but nothing on the final orders of the Board. Recognizing that we would have a full-time Board, it would appear reasonable to indicate that the Board must execute its final order 60 days after the petition is received when the Commission is not involved, and 90 days from the date of the petition when the Commission is involved. Without some such time limitation, the matter could labor with the Board forever.

2. Acknowledged Comprehensive Plans. When the plans are approved and certified, the goals drop out. Appeals should be limited to and measured by compliance with the plans. I do not have the feeling that the proposed amendments contemplates this fact.

3. Page 1, lines 20-24 -- Full-time Referees. Query: How is the work flow handled? What happens when there are not enough referees to keep current, or too many referees to keep busy?

4. Page 2, lines 20-21 -- Final Decisions. It is my understanding that subdivision approvals, variances, conditional use permits, etc., are handled by resolution, not be ordinance. Does this mean that these items are not "Land Use Decisions" subject to this procedure? Do we mean that every variance, conditional use or subdivision is to be subject to to a petition for review to the Board?

5. Page 3, lines 12-26 -- Standing. This is broader than the Committee contemplated. The intent of the Committee was to ob tain all of the citizen input at the decision-making level prior to the decision being made. If one did not so participate, the person should not be entitled to initiate a review.

6. Page 4, line 3 -- Final Decision. When does the decision become final? The Committee sought to resolve this by spelling out finality for appeal purposes. The amendment leaves the question open.

7. Page 4, lines 3-6 -- Notice of Petition for Review. This is more narrow than the Committee contemplated. The Committee deemed it important that notice be given to all persons who had participated below or indicated in some manner in writing a desire to receive a copy of the decision and notice of the petition.

8. Page 4, lines 13-15 -- Amendment of Petition. Petitioners should be encouraged in the interest of time, cost and simplification to file a quality petition the first time. Allowing an amendment once as a matter of right discourages this. Amendments should only be allowed at the discretion of the Board for good cause.

9. Page 4, line 22 -- Additions to the Record. The record is what in fact took place at the decision-making level. Nothing should be allowed to be added to this record by way of supplements, etc. Obviously, if the record is not correct or is incomplete, then the appropriate adjustments are in order to make it truly the correct and complete record of the proceedings below.

10. Page 4, Lines 25-26 -- Additions to the Record. This has been expanded beyond existing law and SB 435. The presentation of any new testimony or evidence should be carefully limited to those items which clearly must be decided based upon matters outside of the record made below. In no case should the failure of a party to make a full and complete record on an issue decided below provide the basis for allowing the submission of additional evidence on that issue.

11. Page 5, lines 4 and 5 -- Issue of Fact. There should be a period after the world "fact" on line 4 with the rest of the sentence deleted. This makes it consistent with existing law, SB 435 and also the language used on page 11, line 18 in dealing with the review mandate of the Court of Appeals from the Board. The Board is a reviewing body, and neither the Board or the Court should be allowed to review the evidence to determine the existence or non-existence of any particular fact found by the decision maker. (This is to be distinguished from the authority to set aside a decision where the decision as a whole is not supported by substantial evidence in the whole record as provided in current law, SB 435 as well as the proposed amendments.

12. Page 5, lines 6-9 -- Attorneys Fees and Costs. While I personally favor this approach, I call attention to the fact that the Committee considered this carefully and a majority concluded that attorney fees should not be so allowed because it would have an intimidating effect on the right of genuinely interested persons to bring an appeal.

13. Page 5, Line 11ff -- Allegations. Whether a matter is to go to the Commission shall be based on the allegations in the petition regardless of whether the Board finds that the allegations have merit. Since submitting allegations is easy, one would have to contemplate that they would normally include land-goal challenges. Perhaps there could be some method for the Board to rhow out such allegations which are obviously without merit, or of the Commission imposing some form of stiff fine if it determines that allegations were included for purpose of delay and are without merit. This becomes more important once the comprehensive plans are acknowledged and certified, and the land-use goals drop out of the picture except for unusual cases.

14. Page 7, lines 16-20 -- Oral Argument. The emphasis should be changed. Oral argument should only be allowed before the Commission when the Commission affirmatively concludes that the circumstances so warrant. Keep in mind that the parties have already had an opportunity to argue their case before the Board.

15. Page 7, Line 23 -- Issue of Fact. For reasons previously indicated, a period should be placed after the word "fact" and the rest of the sentence deleted.

16. Page 7, Line 25. -- 90-Day Time Period. The matter of time was discussed at the outset. The 90 days should run from the filing of the petition until the final order of the Board, and should include the period for Commission review and action if necessary.

17. Page 8, lines 2-5 -- Time Period. Clarification is needed. If abuse is not to take place, the limit beyond 90 days should not be allowed except with consent of the parties. With a full-time Board, this time limit should create no problems.

18. Page 8, lines 7-8 -- Recommendations. Read literally, it might indicate that the members might actually have to receive the recommendations. It is possible that a member is out of the area and has not in fact received anything. The basis for determining validity should be whether the recommendations were forwarded in the ordinary course of business, not the actual receipt.

19. Page 8, lines 11-24 -- Extra Time. I would urge the deletion of this section since it, in effect, allows the Commission to declare a moritorium on reviews that could last several months while it ponders the pros and cons of a comprehensive plan submitted for compliance acknowledgement. Keep in mind that what is being reviewed is a decision of the same governing body which has requested the compliance acknowledgment. That body has already determined that the specific decision should be made and reviewed under existing ground rules.

20. Page 9, lines 16-20 -- Petition for Reconsideration. It should be made clear that the filing of such a petition is optional, and that there is no necessity that such a petition be filed before judicial review can be sought.

21. Page 10, line 19 -- Time to Perfect the Record. I would recommend 20 days rather than 30 days. If the city or county can perfect is record in 20 days (page 4, line 16) without benefit of full-time staff, the Board ought to be able to perfect its record within the same amount of time.

22. Page 11, lines 6-14.-- Withdrawal of Order. Once a petition for judicial review is filed with the Court of Appeals, the Board and Commission properly have lost control of the proceeding which now rests with the Court. At best, it should only have the right to petition the Court for an opportunity to withdraw its order or reconsider the matter which should be allowed only for cause. Certainly, the withdrawal should not exist as a matter of right.

Thank you.

Sincerely

William E. Love

Sections 11 and 12 are conforming amendments to ORS 215.422 and 227.180. No comment.

Section 13 would make some changes -- seemingly mostly minor -- in ORS 34.040. The above comments about § 9 are applicable to the extent that this presupposes continuing some circuit court writ-of-review jurisdiction. Section 13 would also specifically provide that circuit courts do not have writ-of-review jurisdiction over district courts. This would codify the Court of Appeals decision to the same effect in Hoffman v. French, 36 Or App 739, 585 P2d 730 (1978), Supreme Court review allowed and now under advisement in the Supreme Court. It is a desirable change for the reasons stated in Hoffman v. French, i.e., the fact that district courts are now courts of record with the availability of direct appeal to the Court of Appeals.

Section 14 is "housekeeping" in nature. No comment.

Section 15 grants circuit courts writ-of-review jurisdiction over certain interlocutory orders of municipal courts. The same circuit court authority to review interlocutory orders of justice court now exists in ORS 157.070. This raises an interesting policy question. If a defendant were charged with a major felony in circuit court, the court's interlocutory orders would not be immediately appealable; only the final judgment is appealable, at which time the trial court's prior orders would be reviewable. Felonies, of course, cannot be tried in justice

or municipal court. The cases tried in those courts are much more petty in nature. So the proposal is to grant persons facing minor charges in justice and municipal court a right to appeal from interlocutory orders that is not available, under current law, to a person facting a major charge in circuit court. The rationale for granting greater appeal rights to persons facing minor charges is not immediately apparent. Indeed, it could reasonably be argued that § 15 should be rejected and ORS 157.070 should be repealed so that all parties, both in the serious and the petty cases, would have the same appeal right -- to appeal only from the final judgment, not from any interlocutory orders.

Section 16 replaces circuit court writ-of-review jurisdiction with Court of Appeals APA contested-case jurisdiction for decisions of the State Police Trial Board. This change is desirable. It has been strong legislative policy that state agency decisions should be reviewed in the Court of Appeals under the APA. See School Dist. No. 48 v. Fair Dis. App. Bd., 14 Or App 35, 512 P2d 799 (1973). Section 16 is an extension of that policy.

Section 17 proposes minor amendments to ORS 198.785 which involves formation and change of special districts. No comment.

Section 18 involves review of boundary commission decisions. It would repeal the language now found in ORS

199.461(3) which says such decisions can be reviewed by writ of review, and replace it with language to the effect that review shall be in the Court of Appeals pursuant to the APA. This would codify the Court of Appeals decision in League of Women Voters v. Lane County Boundary Commission, 32 Or App 53, 573 P2d 1255 (1978). As stated in the above comments under § 16, it is desirable to have all state agency decisions, and the boundary commissions are state agencies, reviewed under the APA.

Section 19 would amend ORS 203.060 apparently to attempt to provide a comprehensive summary of the various judicial review alternatives for all county decisions. It would be another expression of the distinction, previously criticized, between different types of quasi-judicial decisions, with the land-use ones going to the Court of Appeals, and the others going to circuit court on writ of review. If desirable, it would be incomplete: if there is to be a summary of review alternatives for county decisions, there should also be a summary of review alternatives for city decision.

Section 20 would repeal ORS 203.200, which now seems to state that all county decisions shall be reviewed by writ of review. Repeal (or at least amendment) is probably desirable because ORS 203.200 is at least misleading because local legislative action cannot be reviewed by writ of review.

Section 21 amends ORS 311.860. That statute now

provides for writ-of-review appeal from certain tax-exemption denials. That would be replaced with an appeal to the Department of Revenue. No comment.

Section 22 amends ORS 330.101, which involves the State Board of Education adjudicating school district boundary disputes, by eliminating reference to judicial review of the Board by writ of review and replacing it with judicial review under the APA. As stated above in the comments under § 16, it is desirable to have all state agency decisions reviewed under the APA.

Section 23 would amend ORS 330.123 to make a specialized type of arbitration decision subject to the general statutes on review of arbitration decisions rather than subject to writ of review. No comment.

Section 24 amends ORS 330.557 to provide for APA review, rather than writ of review, of certain decisions of the State Board of Education. As stated above in the comments under § 16, it is desirable to have all state agency decisions reviewed under the APA.

Section 25 proposes amending ORS 341.185 to provide for APA review, rather than writ of review, of certain decisions of the boards of community colleges. Although it is desirable to have all state agency decisions reviewed under the APA, community colleges are not state agencies. Extending the APA

EXHIBIT B
Sen. Leg. Comm. on Trade & Ec. Development
SUBCOMMITTEE ON SB 435
MAY 23, I979 7 pages

Legislative Counsel
05/17/79 (34) (30)
SB 435-3

REVISED PROPOSED AMENDMENTS TO SENATE BILL 435

"SECTION 4. (1) Review of land use decisions under sections 4 to 6 of this 1979 Act shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals. Subject to the provisions of section 6a of this 1979 Act relating to judicial review by the Court of Appeals, the board shall have exclusive jurisdiction to review any land use decision of a city, county or special district governing body or a state agency in the manner provided in sections 5 and 6 of this 1979 Act.

"(2) Except as provided in subsection (3) of this section, any person whose interests are adversely affected or who is aggrieved by a land use decision may petition the board for review of that decision or may, within a reasonable time after a petition for review of that decision has been filed with the board, intervene in and be made a party to any review proceeding pending before the board.

"(3) Any person whose interests are adversely affected or who is aggrieved by a quasi-judicial land use decision may petition the board for review of the decision if the person:

"(a) Appeared before the city, county or special district governing body or state agency in some manner, orally or in writing; and

"(b) Was a person entitled as of right to notice and hearing prior to the decision to be reviewed or was a person who has a substantial interest in the decision.

"(4) A notice of intent to appeal a land use decision shall be filed not later than 15 days after the date the decision sought to be reviewed becomes final. Copies of the notice shall be served upon the city, county or special district governing body or state agency and the applicant of record, if any, in the city, county or special district governing body or state agency proceeding. The notice shall be filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $ _____.

"(5) Within 20 days after service of the notice of intent to appeal, or within such further time as the board may allow, the city, county or special district governing body or state agency shall transmit to the board the original or a certified copy of the entire record, if any, of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record.

"(6) Within 10 days after the date of transmittal of the record, a petition for review of the land use decision shall be filed with the board. The petition shall include a copy of the decision sought to be reviewed and shall state:

"(a) The facts that establish that the interests of the petitioner have been adversely affected or aggrieved.

"(b) The date of the decision.

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

"(7) Review of a decision under sections 4 to 6 of this 1979 Act shall be confined to the record, if any. In the case of

disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the city, county or special district governing body or state agency for which there is substantial evidence in the whole record.

"(8) The board shall issue a final order within 90 days after the date of filing of the petition. If the order is not issued within 90 days, the decision being reviewed shall be considered affirmed.

"(9) Upon review of a decision under sections 4 to 6 of this 1979 Act, the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the city, county or special district governing body or state agency whose decision is under review. The board may award attorney fees in an amount not to exceed $ _____ if the board finds that any of the allegations in the petition are wholly without merit or the petition was filed solely for the purpose of delay.

"(10) Orders issued under this section may be enforced in appropriate judicial proceedings.

"SECTION 5. (1) Where a petition for review contains only allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and proceed as provided in section 6 of this 1979 Act.

"(2) Where a petition for review contains no allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and prepare a final order affirming, reversing or remanding the decision.

"(3) Where a petition for review contains both allegations that a land use decision violates the state-wide planning goals and other allegations of error, the board shall review the decision and proceed as provided in section 6 of this 1979 Act with respect to the allegations of violation of the state-wide planning goals, and prepare an order addressing all issues not related to the state-wide planning goals. The decision of the board concerning any issues not related to the state-wide planning goals shall be final, but no final order shall be issued until the commission has reviewed the recommendation of the board on the issues concerning the state-wide planning goals under section 6 of this 1979 Act and issued its determination. The board shall incorporate the determination of the commission into the final order to be issued under this subsection.

"(4) The board shall reverse or remand the land use decision under review only if:

"(a) The board finds that the city, county or special district governing body:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

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

"(D) Improperly construed the applicable law; or

"(E) Made a decision that was unconstitutional; or

"(b) After review in the manner provided in section 6 of this 1979 Act, the commission has determined that the city, county or special district governing body or state agency violated the state-wide planning goals.

"(5) Final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6a of this 1979 Act.

"SECTION 6. (1) At the conclusion of a review proceeding under sections 4 and 5 of this 1979 Act, the board shall prepare a recommendation to the commission concerning any allegations of violation of the state-wide planning goals contained in the petition and shall submit a copy of its recommendation to the commission and to each party to the proceeding. The recommendation shall include a general summary of the evidence contained in the record and proposed findings of fact and conclusions of law concerning the allegations of violation of the state-wide planning goals. The recommendation shall also state whether the petition raises matters of such importance that the commission should hear oral argument from the parties.

"(2) Each party to the proceeding shall have the opportunity to submit written exceptions to the board's recommendation, including that portion of the recommendation stating whether oral argument

should be allowed. The exceptions shall be filed with the board and submitted to the commission for review.

"(3) The commission shall review the recommendation of the board and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the commission unless the board recommends that oral argument not be allowed and the commission concurs with the board's recommendation. The commission shall not substitute its judgment for that of the city, county, special district or state agency as to any issue of fact for which there is substantial evidence in the record. The commission shall issue its determination on the recommendation of the board and return the determination to the board for inclusion in the board's order under section 5 of this 1979 Act within such time as is necessary to allow the board to prepare and issue a final order in compliance with the requirements of section 4 of this 1979 Act. If additional time is required, the commission shall obtain the consent of the parties for a postponement.

"(4) No determination of the commission issued under subsection (3) of this section is valid unless all members of the commission have received the recommendation of the board in the matter and at least four members of the commission concur in its action in the matter.

"(5) The commission may, in its sole discretion, continue its review of a petition alleging that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a

request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to subsection (1) of ORS 197.251. Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the acknowledgment order are dispositive of the matters raised in the petition, in which event the commission may dismiss the allegations of violation of the state-wide planning goals in the petition.

"(6) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings brought before it for determination under this section.".

EXHIBIT C
Senate Legislative Committ.
on Trade & Econ. Develop.
SUBCOMMITTEE ON SB 435
MAY 23, 1979 7 pages

Legislative Counsel
05/17/79 (34) (30)
SB 435-3

REVISED PROPOSED AMENDMENTS TO SENATE BILL 435

"SECTION 4. (1) Review of land use decisions under sections 4 to 6 of this 1979 Act shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals. Subject to the provisions of section 6a of this 1979 Act relating to judicial review by the Court of Appeals, the board shall have exclusive jurisdiction to review any land use decision of a city, county or special district governing body or a state agency in the manner provided in sections 5 and 6 of this 1979 Act.

"(2) Except as provided in subsection (3) of this section, any person whose interests are adversely affected or who is aggrieved and who has filed a notice of intent to appeal as provided in subsection (4) of this section by a land use decision may petition the board for review of that decision or may, within a reasonable time after a petition for review of that decision has been filed with the board, intervene in and be made a party to any review proceeding pending before the board.

"(3) Any person who has filed a notice of intent to appeal as provided in subsection (4) of this section ~~whose interests are adversely affected or who is aggrieved by a quasi-judicial land use decision~~ may petition the board for review of a quasi-judicial land use ~~the~~ decision if the person:

"(a) Appeared before the city, county or special district governing body or state agency ~~in some manner~~, orally or in writing; and

"(b) Was a person entitled as of right to notice and hearing whose interests were adversely affected or who was aggrieved by the decision prior to the decision to be reviewed or was a person ~~who has a substantial interest in the decision~~.

"(4) A notice of intent to appeal a land use decision shall be filed not later than 30 ~~15~~ days after the date the decision sought to be reviewed becomes final. Copies of the notice shall be served upon the city, county or special district governing body or state agency and the applicant of record, if any, in the city, county or special district governing body or state agency proceeding. The served a ~~[illegible]~~. notice shall be filed in the form and manner prescribed by rules of the board and shall be accompanied by a filing fee of $ 200. (Sentence)

"(5) Within 20 days after service of the notice of intent to appeal, or within such further time as the board may allow, the city, county or special district governing body or state agency shall transmit to the board the original or a certified copy of the entire record, if any, of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record.

"(6) Within 20 ~~10~~ days after the date of transmittal of the record, a petition for review of the land use decision with supporting brief shall be filed with the board. The petition shall include a copy of the decision sought to be reviewed and shall state:

"(a) The facts that establish that the ~~interests of the petitioner have been adversely affected or aggrieved~~ has standing.

"(b) The date of the decision.

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

"(7) Review of a decision under sections 4 to 6 of this 1979 Act shall be confined to the record, if any. In the case of

disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the city, county or special district governing body or state agency for which there is substantial evidence in the whole record.

"(8) The board shall issue a final order within 90 days after the date of filing of the petition. If the order is not issued within 90 days, the decision being reviewed shall be considered affirmed.

"(9) Upon ~~review of a decision under sections 4 to 6 of this 1979 Act~~ entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the city, county or special district governing body or state agency whose decision is under review. ~~The board may award attorney fees in an amount not to exceed $_____ if the board finds that any of the allegations in the petition are wholly without merit or the petition was filed solely for the purpose of delay.~~

"(10) Orders issued under this section may be enforced in appropriate judicial proceedings.

"SECTION 5. (1) Where a petition for review contains only allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and proceed as provided in section 6 of this 1979 Act.

"(2) Where a petition for review contains no allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and prepare a final order affirming, reversing or remanding the decision.

"(3) Where a petition for review contains both allegations that a land use decision violates the state-wide planning goals and other allegations of error, the board shall review the decision and proceed as provided in section 6 of this 1979 Act with respect to the allegations of violation of the state-wide planning goals, and prepare an order addressing all issues not related to the state-wide planning goals. The decision of the board concerning any issues not related to the state-wide planning goals shall be final, but no final order shall be issued until the commission has reviewed the recommendation of the board on the issues concerning the state-wide planning goals under section 6 of this 1979 Act and issued its determination. The board shall incorporate the determination of the commission into the final order to be issued under this subsection.

"(4) The board shall reverse or remand the land use decision under review only if:

"(a) The board finds that the city, county or special district governing body:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

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

"(D) Improperly construed the applicable law; or

"(E) Made a decision that was unconstitutional; or

"(b) After review in the manner provided in section 6 of this 1979 Act, the commission has determined that the city, county or special district governing body or state agency violated the state-wide planning goals.

"(5) Final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6a of this 1979 Act.

"SECTION 6. (1) At the conclusion of a review proceeding under sections 4 and 5 of this 1979 Act, the board shall prepare a recommendation to the commission concerning any allegations of violation of the state-wide planning goals contained in the petition and shall submit a copy of its recommendation to the commission and to each party to the proceeding. The recommendation shall include a general summary of the evidence contained in the record and proposed findings of fact and conclusions of law concerning the allegations of violation of the state-wide planning goals. The recommendation shall also state whether the petition raises matters of such importance that the commission should hear oral argument from the parties.

"(2) Each party to the proceeding shall have the opportunity to submit written exceptions to the board's recommendation, including that portion of the recommendation stating whether oral argument

should be allowed. The exceptions shall be filed with the board and submitted to the commission for review.

"(3) The commission shall review the recommendation of the board and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the commission unless the board recommends that oral argument not be allowed and the commission concurs with the board's recommendation. The commission shall ~~not substitute its judgment for that of the~~ be bound by any finding of fact of the city, county, special district or state agency ~~as to any issue of fact~~ for which there is substantial evidence in the record. The commission shall issue its determination on the recommendation of the board and return the determination to the board for inclusion in the board's order under section 5 of this 1979 Act within such time as is necessary to allow the board to prepare and issue a final order in compliance with the requirements of section 4 of this 1979 Act. If additional time is required, the commission shall obtain the consent of the parties for a postponement.

"(4) No determination of the commission issued under subsection (3) of this section is valid unless all members of the commission any exceptions thereto which were timely filed with the board and have received the recommendation of the board in the matter and at least four members of the commission concur in its action in the matter.

"(5) The commission may, in its sole discretion, continue its review of a petition alleging that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a

request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to subsection (1) of ORS 197.251. Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the acknowledgment order are dispositive of the matters raised in the petition, in which event the commission may dismiss the allegations of violation of the state-wide planning goals in the petition.

"(6) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings brought before it for determination under this section.".

Governor's Office
5/23/79
SB 435

EXPLANATION OF THE REVISED PROPOSED AMENDMENTS (dated 5/17/79) AND OF THE PROPOSED AMENDMENTS TO THE REVISED PROPOSED AMENDMENTS (dated 5/23/79) TO SB 435

The REVISED PROPOSED AMENDMENTS to SB 435 amend the PROPOSED AMENDMENTS to SB 435 dated 5/10/79 which the Trade and Economic Development committee voted to utilize as an approach to amending the current procedure for securing review of land use decisions. The full committee, after deciding to use the approach set forth in the PROPOSED AMENDMENTS, referred SB 435 back to the subcommittee.

The subcommittee met on May 10, 1979, and reviewed the PROPOSED AMENDMENTS. The subcommittee took the following action:

1. Voted to recommend deletion of the second sentence in paragraph (2) of Section 2 which required that members of the board not hold any other position of profit.

2. Voted to recommend substituting the language in the printed bill concerning standing to file a petition for review (paragraph (2) of SECTION 2 of the printed bill) for the language in paragraph (3) of SECTION 4 of the PROPOSED AMENDMENTS.

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3. Voted to recommend amending the time within which the board and commission must decide petitions for review. The PROPOSED AMENDMENTS provided in SECTION 6 that the commission had 90 days from the time of filing the petition to make its determination with respect to goal issues, but that the commission could extend its review time for an additional 90 days if necessary. The sub-committee voted to reduce this time period to a maximum of 70 days from the time of transmittal of the record to the board and to make this 70 day period apply to the board as well as the commission. The sub-committee also voted to recommend that the decision below would be considered affirmed if the board and commission were unable to complete the review within the 70 day period.

4. Voted to substitute the language in the printed bill, page 3, lines 5-9, for the language in paragraph (7) of SECTION 4 of the PROPOSED AMENDMENTS pertaining to the board's conducting a hearing in order to make findings necessary to decide issues for which the record was inadequate.

5. Voted to amend lines 2-5 on page 5 to read: "The board shall be bound by any findings of fact of the city, county or special district governing body or state agency for which there is substantial evidence in the whole record."

6. Voted to recommend deleting paragraph (9) of SECTION 4.

Legislative Counsel assisted the Governor's office in preparing some additional amendments which were submitted to the sub-committee on May 17, 1979. However, the sub-committee meeting scheduled for that day was canceled and the REVISED PROPOSED AMENDMENTS were not considered at that time. These amendments incorporated the changes voted upon by the sub-committee as well as modified some of the changes voted upon by the sub-committee. The changes voted upon by the sub-committee and incorporated into the REVISED PROPOSED AMENDMENTS without change include those denoted in (2), (4) and (5) above. The changes incorporated into the REVISED PROPOSED AMENDMENTS with some modification are as follows:

1. Instead of commencing the review proceeding by filing a petition for review and then allowing an amendment of that petition after transmittal of the record, the REVISED PROPOSED AMENDMENTS propose that the review process be instituted by filing a notice of intent to appeal which would be a simple form statement indicating that the decision would be appealed. The notice would have to be filed within 15 days of the date of the decision sought to be reviewed. The record would be transmitted within 20 days of the filing of the notice and the petition for review would be filed within 10 days of transmittal of the record. A filing fee would be required to

accompany the filing of the notice of intent to appeal.

2. The REVISED PROPOSED AMENDMENTS propose that the board have 90 days from the filing of the petition to decide the petition for review and issue a final order. The sub-committee had voted to recommend 70 days from transmittal of the record. Upon further consideration of this issue, it was decided that 70 days from transmittal of the record would not give the board adequate time within whic h to complete the review process, hence, the proposed increase to 90 days from the filing of the petition.

3. While the sub-committee had voted to recommend deleting the provision relating to enforcement of board orders (paragraph (9) of SECTION 4), it was felt that deleting the entire paragraph might leave the impression that the legislature did not intend for board orders to be enforceable in any judicial proceedings. The intent of the sub-committee was simply to take the board out of the position of being the enforcer, not to remove the ability of someone being able to enforce a board order. Therefore, the REVISED PROPOSED AMENDMENTS propose that the enforcement provision remain, but be amended so as to delete the reference to the board being the one to enforce the orders. See REVISED PROPOSED AMENDMENTS, SECTION 4(10)

The REVISED PROPOSED AMENDMENTS also made some changes not considered by the sub-committee. These include:

1. Amending the attorneys fees and costs provision contained in paragraph (8) of SECTION 4 of the PROPOSED AMENDMENTS. The REVISED PROPOSED AMENDMENTS suggest only

awarding attorneys fees if the board finds that either the petition was filed solely for the purpose of delay or that any of the allegations in the petition were wholly without merit. A dollar limit is also suggested. The PROPOSED AMENDMENTS allowed attorneys fees to be awarded to the prevailing party in the discretion of the board. It was believed that this provision would severely restrict the number of petitions which would otherwise be filed, and that if it was frivolous petitions to which the attorneys fees provision was directed, then the provision should be limited to such petitions.

2. Amending SECTION 6 of the PROPOSED AMENDMENTS so as to delete the requirement that the commission act within 90 days on the goal issues. In order to make it clear that the commission's determination on the goal issues would be incorporated into the board's order and that the commission would have to make its determination within the time limits placed upon the board (90 days from filing of the petition), SECTION 6 was amended to so state.

The PROPOSED AMENDMENTS TO THE REVISED PROPOSED AMENDMENTS are for the purpose of solving some questions arising from the previous amendments, as follows:

1. By adopting the standing requirement in quasi-judicial proceedings from SB 435, the printed bill, a possible discrepancy existed because of the use of the test "adversely affected or who is aggrieved" for review of legislative decisions, and the "substantial interest" test (if the person did not other-

wise receive notice) for review of quasi-judicial decisions. Thus, the PROPOSED AMENDMENTS of 5/23/79 seek to apply the same standard --that of "adversely affected or who was aggrieved"-- for both legislative and quasi-judicial decisions.

2. While considerable sentiment has been expressed for the switch to filing a notice of intent to appeal to begin a review proceeding, rather than the filing of the petition with a right to amend the petition after transmittal of the record, it seems to be the consensus that 15 days from the date of the final decision is to short of a time to enable many persons to file the notice unless the governmental body mails notice to those persons requesting notice. Either 30 days from the date of the decision is needed or mailed notice is required. The PROPOSED AMENDMENTS suggest that 30 days be adopted because the alternative, mailed notice, places an extreme burden on the governmental body, both administratively and financially.

3. It is suggested that in the event a petition is not filed after transmittal of the record, or is filed but not timely, then the filing fee be awarded to the local governmental body or state agency to compensate it for its costs in preparing the record for transmittal.

5. To speed up the review process, it is suggested that the petitioner's brief be filed at the same time as the petition is filed. Hence, the petitioner is given an extra 10 days, a total of 20 days from transmittal of the record, to file the petition and supporting brief.

6. It is suggested that the provision for awarding attorney fees be deleted. The filing of frivolous petitions does not appear to be a problem at present. Whatever benefit may be derived in using the award of attorney fees to prevent the filing of what the board may determine to be frivolous petitions is outweighed by the deterent which such a provision might have on the filing of legitimate petitions. Accordingly, it is recommended that the provision be dropped altogether.

7. Subsection (6) of SECTION 4 requires the petitioner to allege in his petition those facts showing that his interests were adversely affected or aggrieved. While this may be required if a person did not receive notice of a quasi-judicial proceeding, it is not required if the person did receive notice. Moreover, this requirement does not allege all facts necessary to show standing for a quasi-judicial proceeding, since one need not allege whether he appeared at the hearing. It seems preferable to simply require that the petitioner allege those facts needed to show that he has standing to file the petition. For a legislative proceeding, this would mean that he would have to allege facts showing that his interests were adversely affected or that he was aggrieved by the decision. For a quasi-judicial proceeding, he would have to allege that he appeared and either that he received notice or that his interests were adversely affected or that he was aggrieved by the decision.

8. The sub-committee decided to amend the language pertaining to the board's not substituting its judgment for that of the city, county, special district or state agency on any findings of fact for which there was substantial evidence in the record by stating simply that the board would be bound by any such findings. Similar language appears in SECTION 6 pertaining to the commission's review of goal issues, and this wording should also be changed to coincide with the change made in the board's review of findings of fact.

9. Paragraph (4) of SECTION 6 provides that the commission must have received the recommendation of the board in order for its determination to be valid. Because parties are presumably going to take the time to file exceptions to the board's recommendation, it is appropriate also to require the commission to have received those exceptions which were timely filed in order for the commission's determination to be valid. Hence, the section is proposed to be amended to require that the commission both receive the recommendation of the board and the exceptions filed thereto in order for the determination to be valid.

EXHIBIT E
Sen. Leg. Com. on Trade & Economic Development
SUBCOMMITTEE ON SB 435
MAY 23, 1979 I page

Review time under latest proposal:

Day	
1	Decision below becomes final
2-15	Notice of Intent to Appeal filed with Board
16-18	Notice of Intent to Appeal served on parties
18-35	Transmittal of Record below
36-45	Petition for review filed with Board
45-48	Petition served on parties
48-58	Petitioner's brief filed
58-73	Respondent's brief filed
74-100	Hearing before Board and preparation of final order and/or recommendation for commission action
100-103	Board recommendation sent to parties
104-110	Exceptions filed to recommendation
111-135	Commission meeting, final decision, final Order issues.

90 days

EXHIBIT F
Sen. Leg. Com. on Trade & Economic Development
SUBCOMMITTEE ON SB 435
MAY 23, 1979 17 pages

Legislative Counsel
05/10/79 (34) (30)
SB 435-2

PROPOSED AMENDMENTS TO SENATE BILL 435

On page 2 of the printed bill, line 1, after "ORS" insert "34.020,".

In line 3, delete "197.300" and insert "197.015, 197.252, 197.265, 197.395".

In line 5, after "34.055" insert ", 197.300, 197.305, 197.310, 197.315" and after the semicolon delete "and" and after "money" insert "; and prescribing an effective date".

In line 7, delete ", 3 and 3a" and insert "to 6a".

Delete lines 9 through 38 and pages 3 and 4.

On page 5, delete lines 1 through 37 and insert:

"SECTION 2. (1) The Land Use Board of Appeals is established within the Department of Land Conservation and Development. With the approval of the Governor, the commission shall appoint a chief hearings referee and such other referees as the commission considers necessary to serve as members of the board. The members of the board shall hold their positions at the pleasure of the commission and their salaries shall be fixed by the commission unless otherwise provided by law.

"(2) Referees appointed under subsection (1) of this section shall be members in good standing of the Oregon State Bar. Referees shall not hold any other office or position of profit, but shall devote their entire time to the duties of the board.

"(3) The members of the board shall not be assigned any duties that would interfere with or influence the discharge of their duties under sections 2a and 4 of this 1979 Act.

"SECTION 2a. (1) The board shall conduct review proceedings upon petitions filed in the manner prescribed in section 4 of this 1979 Act.

"(2) In conducting review proceedings the members of the board may sit together or separately as the chief hearings referee shall decide.

"(3) The chief hearings referee shall apportion the business of the board among the members of the board. Each member shall have the power to hear and issue orders on petitions filed with the board and on all issues arising under those petitions, except as provided in section 6 of this 1979 Act.

"(4) The board shall adopt rules governing the conduct of review proceedings brought before it under sections 4 to 6 of this 1979 Act.

"SECTION 3. As used in sections 4 to 6 of this 1979 Act:

"(1) 'Land use decision' means:

"(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of the state-wide planning goals, a comprehensive plan provision or a zoning, subdivision or other ordinance that implements a comprehensive plan; or

"(b) A final decision or determination of a state agency with respect to which the agency is required to apply the state-wide planning goals.

"(2) 'Person' means any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind.

"SECTION 4. (1) Review of land use decisions under sections 4 to 6 of this 1979 Act shall be commenced by filing a petition with the Land Use Board of Appeals. Subject to the provisions of section 6a of this 1979 Act relating to judicial review by the Court of Appeals, the board shall have exclusive jurisdiction to review any land use decision of a city, county or special district governing body or a state agency in the manner provided in sections 5 and 6 of this 1979 Act.

"(2) Except as provided in subsection (3) of this section, any person whose interests are adversely affected or aggrieved by a land use decision may petition the board for review of that decision or may, within a reasonable time after a petition for review of that decision has been filed with the board, intervene in and be made a party to any review proceeding pending before the board.

"(3) Any person whose interests are adversely affected or aggrieved by a quasi-judicial land use decision and who failed to appear in some manner, whether orally or in writing, before the city, county or special district governing body or state agency that made the decision must demonstrate to the satisfaction of the board that that person did not receive notice of or otherwise had no reasonable opportunity to participate in any hearings or proceedings on the subject of the decision to be reviewed.

"(4) A petition for review of a land use decision shall be filed not later than 30 days after the date the decision sought to be reviewed becomes final. Copies of the petition shall be served upon the city, county or special district governing body or state agency and the applicant of record, if any, in the city, county or special district governing body or state agency proceeding.

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

"(A) The facts that establish that the interests of the petitioner have been adversely affected or aggrieved.

"(B) The date of the decision.

"(C) The issues the petitioner seeks to have reviewed.

"(b) A petition that has been timely filed may be amended once as a matter of right within 30 days after the date of filing, and may thereafter be amended only at the discretion of the board.

"(6) Within 20 days after service of the petition, or within such further time as the board may allow, the city, county or special district governing body or state agency shall transmit to the board the original or a certified copy of the entire record, if any, of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections or additions to the record.

"(7) Review of a decision under sections 4 to 6 of this 1979 Act shall be confined to the record, if any, except that if the record is incomplete for determination of any issues raised in the

petition for review, then the board may conduct a hearing and make findings necessary to decide those issues. The board shall not substitute its judgment for that of the city, county or special district governing body or state agency as to any issue of fact for which there is substantial evidence in the whole record.

"(8) Upon review of a decision under sections 4 to 6 of this 1979 Act, the board may, in its discretion, award reasonable attorney fees and costs to the prevailing party.

"(9) Orders issued under this section may be enforced in appropriate judicial proceedings brought by the board therefor.

"SECTION 5. (1) Where a petition for review contains only allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and proceed as provided in section 6 of this 1979 Act.

"(2) Where a petition for review contains no allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and prepare a final order affirming, reversing or remanding the decision.

"(3) Where a petition for review contains both allegations that a land use decision violates the state-wide planning goals and other allegations of error, the board shall review the decision and proceed as provided in section 6 of this 1979 Act with respect to the allegations of violation of the state-wide planning goals, and prepare an order addressing all issues not related to the state-wide planning goals. The decision of the board concerning any issues not related to the state-wide planning goals shall be final,

but no final order shall be issued until the commission has reviewed the recommendation of the board on the issues concerning the state-wide planning goals under section 6 of this 1979 Act and issued its determination. The board shall incorporate the determination of the commission into the final order to be issued under this subsection.

"(4) The board shall reverse or remand the land use decision under review only if:

"(a) The board finds that the city, county or special district governing body:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

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

"(D) Improperly construed the applicable law; or

"(E) Made a decision that was unconstitutional; or

"(b) After review in the manner provided in section 6 of this 1979 Act, the commission has determined that the city, county or special district governing body or state agency violated the state-wide planning goals.

"(5) Final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6a of this 1979 Act.

"SECTION 6. (1) At the conclusion of a review proceeding under sections 4 and 5 of this 1979 Act, the board shall prepare a

recommendation to the commission concerning any allegations of violation of the state-wide planning goals contained in the petition and shall submit a copy of its recommendation to the commission and to each party to the proceeding. The recommendation shall include a general summary of the evidence contained in the record and proposed findings of fact and conclusions of law concerning the allegations of violation of the state-wide planning goals. The recommendation shall also state whether the petition raises matters of such importance that the commission should hear oral argument from the parties.

"(2) Each party to the proceeding shall have the opportunity to submit written exceptions to the board's recommendation, including that portion of the recommendation stating whether oral argument should be allowed. The exceptions shall be filed with the board and submitted to the commission for review.

"(3) The commission shall review the recommendation of the board and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the commission unless the board recommends that oral argument not be allowed and the commission concurs with the board's recommendation. The commission shall not substitute its judgment for that of the city, county, special district or state agency as to any issue of fact for which there is substantial evidence in the record. The commission shall issue its determination on the recommendation of the board within 90 days after the date the petition was filed with the board and return the determination to the board for inclusion

in the board's order under section 5 of this 1979 Act. If the commission determines that additional time is necessary, it may postpone the date of its action for an additional 90 days. If additional time beyond 90 days is required, the commission shall obtain the consent of the parties.

"(4) No determination of the commission issued under subsection (3) of this section is valid unless all members of the commission have received the recommendation of the board in the matter and at least four members of the commission concur in its action in the matter.

"(5) The commission may, in its sole discretion, continue its review of a petition alleging that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to subsection (1) of ORS 197.251. Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the acknowledgment order are dispositive of the matters raised in the petition, in which event the commission may dismiss the allegations of violation of the state-wide planning goals in the petition.

"(6) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings brought before it for determination under this section.

"SECTION 6a. (1) Any party to a proceeding before the Land Use Board of Appeals under sections 4 to 6 of this 1979 Act, may seek judicial review of a final order issued in those proceedings.

"(2) Notwithstanding the provisions of ORS 183.480 to 183.500, judicial review of orders issued under sections 4 to 6 of this 1979 Act shall be solely as provided in this section.

"(3) Jurisdiction for judicial review of proceedings under sections 4 to 6 of this 1979 Act is conferred upon the Court of Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 30 days only following the date the order upon which the petition is based is served unless otherwise provided by statute. If the board does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 30th day following the date the petition was filed, and in such cases, petition for judicial review shall be filed within 30 days only following such date. Date of service shall be the date on which the board delivered or mailed its order.

"(4) The petition shall state the nature of the order the petitioner desires reviewed. Copies of the petition shall be served by registered or certified mail upon the board, and all other parties of record in the board proceeding.

"(5) (a) The filing of the petition shall not stay enforcement of the board order, but the board may do so upon a showing of:

"(A) Irreparable injury to the petitioner; and

"(B) A colorable claim of error in the order.

"(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the board shall grant the stay unless the board determines that substantial public harm will result if the order is stayed. If the board denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.

"(c) When the board grants a stay it may impose such reasonable conditions as the giving of a bond or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time.

"(d) Denial of a motion for stay by the board is subject to review by the Court of Appeals under such rules as the court may establish.

"(6) Within 30 days after service of the petition, or within such further time as the court may allow, the board shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to

the record when deemed desirable. Except as specifically provided in this subsection, the cost of the record shall not be taxed to the petitioner or any intervening party. However, the court may tax such costs and the cost of transcription of record to a party filing a frivolous petition for review.

"(7) At any time subsequent to the filing of the petition for review and prior to the date set for hearing the board may withdraw its order for purposes of reconsideration. If the board withdraws an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the board action after withdrawal for purposes of reconsideration, the petitioner may file an amended petition for review and the review shall proceed upon the revised order.

"(8) Review of an order issued under sections 4 to 6 of this 1979 Act shall be confined to the record, the court shall not substitute its judgment for that of the board as to any issue of fact.

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

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

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record.".

In line 39, delete "Court of Appeals" and insert "Department of Land Conservation and Development".

On page 6, line 1, delete "$50,000" and insert "$_____" and after "incurred" delete the rest of the line and lines 2 and 3 and insert "by the Land Use Board of Appeals under sections 4 to 6 of this Act.

"Section 7a. ORS 197.015 is amended to read:

"197.015. As used in ORS 197.005 to 197.430 and 469.350, unless the context requires otherwise:

"(1) 'Activity of state-wide significance' means a land conservation and development activity designated pursuant to ORS 197.400.

"(2) 'Board' means the Land Use Board of Appeals or any member thereof.

"[(2)] (3) 'Commission' means the Land Conservation and Development Commission.

"[(3)] (4) 'Committee' means the Joint Legislative Committee on Land Use.

"[(4)] (5) 'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the governing body of a state agency, city, county or special district that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational systems,

recreational facilities, and natural resources and air and water quality management programs. 'Comprehensive' means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. 'General nature' means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. 'Land' includes water, both surface and subsurface, and the air.

"[(5)] (6) 'Department' means the Department of Land Conservation and Development.

"[(6)] (7) 'Director' means the Director of the Department of Land Conservation and Development.

"[(7)] (8) 'Goals' mean the mandatory state-wide planning standards adopted by the commission pursuant to ORS 197.005 to 197.430.

"[(8)] (9) 'Guidelines' mean suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.

"[(9)] (10) 'Special district' means any unit of local government, other than a city or county, authorized and regulated by statute and includes, but is not limited to: Water control districts, irrigation districts, port districts, regional air quality control authorities, fire districts, school districts, hospital districts, mass transit districts and sanitary districts.

"[(10)] (11) 'Voluntary association of local governments' means a regional planning agency in this state officially designated by the Governor pursuant to the federal Office of Management and Budget Circular A-95 as a regional clearinghouse.

"Section 7b. ORS 197.252 is amended to read:

"197.252. (1) Even if a city or county has not agreed to a condition in a compliance schedule under ORS 197.251, the commission may condition the compliance schedule for the city or county to direct the city or county to apply specified goal requirements in approving or denying future land conservation and development actions if the commission finds that past approvals or denials would have constituted violations of the state-wide planning goals and:

"(a) The commission finds that the past approvals or denials represent a pattern or practice of decisions which make continued utilization of the existing comprehensive plan, ordinances and regulations ineffective in achieving the state-wide planning goals through performance of the compliance schedule; or

"(b) The commission finds that a past approval or denial was of more than local impact and substantially impairs the ability of the

city or county to achieve the state-wide planning goals through the performance of the compliance schedule.

"(2) Conditions may be imposed under this section only at the time of:

"(a) Annual phased review of the satisfactory progress of the city or county;

"(b) Approval of a planning assistance grant agreement with the city or county; or

"(c) Revision of a compliance schedule due to delays of 60 days or more in the approved compliance date by the city or county.

"(3) Nothing in this section is intended to limit or modify the powers of the commission under ORS 197.251[, 197.300 to 197.315] or 197.320. The powers of the commission under this section are intended to be in addition to, and not in lieu of, ORS 197.005 to 197.430 (1975 Replacement Part) and 197.251 and 197.320.

"Section 7c. 197.265 is amended to read:

"197.265. (1) As used in this section, "action or suit" includes but is not limited to a [writ of review] proceeding under [ORS 34.010 to 34.100 and any review proceeding conducted by the commission pursuant to ORS 197.300] sections 4 to 6 of this 1979 Act.

"(2) If any suit or action is brought against a city or county challenging any comprehensive plan, zoning, subdivision or other ordinance or regulation or action of such city or county which was adopted or taken for the primary purpose of complying with the state-wide planning goals approved under ORS 197.240 and which does

in fact comply with such goals, then the commission shall pay reasonable attorney fees and court costs incurred by such city or county in the action or suit including any appeal, to the extent funds have been specifically appropriated to the commission therefor.

"Section 7d. ORS 197.395 is amended to read:

"197.395. (1) Any person or public agency desiring to initiate an activity which the state may regulate or control which occurs upon federal land shall apply to the cities or counties in which the activity will take place for a permit. The application shall contain an explanation of the activity to be initiated, the plans for the activity and any other information required by the city or county as prescribed by rule of the commission.

"(2) If the city or county finds after review of the application that the proposed activity complies with state-wide goals and the comprehensive plans of the cities or counties affected by the activity, it shall approve the application and issue a permit for the activity to the person or public agency applying therefor. Action shall be taken by the governing body within 60 days of receipt of the application, or the application is deemed approved.

"(3) The city or county may prescribe and include in the permit any conditions or restrictions that it considers necessary to assure that the activity complies with state-wide goals and the comprehensive plans of the cities or counties affected by the activity.

"(4) Actions pursuant to this section are subject to review [pursuant to ORS 197.300] under sections 4 to 6 of this 1979 Act.

"Section 8. ORS 34.020 is amended to read:

"34.020. Except for a proceeding resulting in a land use decision as defined in section 3 of this 1979 Act for which review is provided in sections 4 to 6 of this 1979 Act, any party to any process or proceeding before or by any inferior court, officer, or tribunal may have the decision or determination thereof reviewed for errors, as provided in ORS 34.010 to 34.100, and not otherwise. Upon a review, the court may review any intermediate order involving the merits and necessarily affecting the decision or determination sought to be reviewed.".

On page 7, line 30, delete "under" and insert "in the manner provided in sections 4 to 6 of this 1979 Act.".

Delete line 31.

On page 8, line 1, after "under" delete the rest of the line and line 2 and insert "sections 4 to 6 of this 1979 Act.".

On page 9, line 36, delete "2 and 3" insert "4 to 6".

On page 16, after line 6, insert:

"SECTION 32. ORS 34.055, 197.300, 197.305, 197.310 and 197.315 are repealed.

"SECTION 33. This Act takes effect on January 1, 1980.".

EXHIBIT D
SENATE LEGISLATIVE COMMITTEE ON
TRADE AND ECONOMIC DEVELOPMENT
MAY 24, I979
SB 435 I8 pages
Legislative Counsel
05/23/79 (34) (33)
SB 435-4

PROPOSED AMENDMENTS TO SENATE BILL 435

On page 2 of the printed bill, line 1, after "ORS" insert "34.020,".

In line 3, delete "197.300" and insert "197.015, 197.252, 197.265, 197.395".

In line 5, after "34.055" insert ", 197.300, 197.305, 197.310, 197.315" and after the semicolon delete "and" and after "money" insert "; and prescribing an effective date".

In line 7, delete "2, 3 and 3a" and insert "1a to 6a".

Delete lines 9 through 38 and pages 3 and 4.

On page 5, delete lines 1 through 37 and insert:

"SECTION 1a. It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting sections 1a to 6a of this 1979 Act to accomplish these objectives.

"SECTION 2. (1) The Land Use Board of Appeals is established within the Department of Land Conservation and Development. With the approval of the Governor, the commission shall appoint a chief hearings referee and such other referees as the commission considers necessary to serve as members of the board. The members of the board shall hold their positions at the pleasure of the commission and their salaries shall be fixed by the commission unless otherwise provided by law.

"(2) Referees appointed under subsection (1) of this section shall be members in good standing of the Oregon State Bar.

"(3) The members of the board shall not be assigned any duties that would interfere with or influence the discharge of their duties under sections 2a and 4 of this 1979 Act.

"SECTION 2a. (1) The board shall conduct review proceedings upon petitions filed in the manner prescribed in section 4 of this 1979 Act.

"(2) In conducting review proceedings the members of the board may sit together or separately as the chief hearings referee shall decide.

"(3) The chief hearings referee shall apportion the business of the board among the members of the board. Each member shall have the power to hear and issue orders on petitions filed with the board and on all issues arising under those petitions, except as provided in section 6 of this 1979 Act.

"(4) The board shall adopt rules governing the conduct of review proceedings brought before it under sections 4 to 6 of this 1979 Act.

"SECTION 3. As used in sections 4 to 6 of this 1979 Act:

"(1) 'Land use decision' means:

"(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of:

"(A) The state-wide planning goals;

"(B) A comprehensive plan provision; or

"(C) A zoning, subdivision or other ordinance that implements a comprehensive plan; or

"(b) A final decision or determination of a state agency with respect to which the agency is required to apply the state-wide planning goals.

"(2) 'Person' means any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind.

"SECTION 4. (1) Review of land use decisions under sections 4 to 6 of this 1979 Act shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals. Subject to the provisions of section 6a of this 1979 Act relating to judicial review by the Court of Appeals, the board shall have exclusive jurisdiction to review any land use decision of a city, county or special district governing body or a state agency in the manner provided in sections 5 and 6 of this 1979 Act.

"(2) Except as provided in subsection (3) of this section, any person whose interests are adversely affected or who is aggrieved by a land use decision and who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of that decision or may, within a reasonable time after a petition for review of that decision has been filed with the board, intervene in and be made a party to any review proceeding pending before the board.

"(3) Any person who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of a quasi-judicial land use decision if the person:

"(a) Appeared before the city, county or special district governing body or state agency orally or in writing; and

"(b) Was a person entitled as of right to notice and hearing prior to the decision to be reviewed or was a person whose interests are adversely affected or who was aggrieved by the decision.

"(4) A notice of intent to appeal a land use decision shall be filed not later than 20 days after the date the decision sought to be reviewed becomes final. Copies of the notice shall be served upon the city, county or special district governing body or state agency and the applicant of record, if any, in the city, county or special district governing body or state agency proceeding. The notice shall be serve and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $200. In the event a petition for review is not filed with the board as required in subsection (6) of this section, then the filing fee shall be awarded to the city, county, special district or state agency as cost of preparation of the record.

"(5) Within 20 days after service of the notice of intent to appeal, or within such further time as the board may allow, the city, county or special district governing body or state agency shall transmit to the board the original or a certified copy of the entire record, if any, of the proceeding under review. By

stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record.

"(6) Within 20 days after the date of transmittal of the record, a petition for review of the land use decision and supporting brief shall be filed with the board. The petition shall include a copy of the decision sought to be reviewed and shall state:

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

"(b) The date of the decision.

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

"(7) Review of a decision under sections 4 to 6 of this 1979 Act shall be confined to the record, if any. In the case of disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the city, county or special district governing body or state agency for which there is substantial evidence in the whole record.

"(8) The board shall issue a final order within 90 days after the date of filing of the petition. If the order is not issued within 90 days, the decision being reviewed shall be considered affirmed.

"(9) Upon entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of

preparation of the record if the prevailing party is the city, county or special district governing body or state agency whose decision is under review.

"(10) Orders issued under this section may be enforced in appropriate judicial proceedings.

"(11) The board shall provide for the publication of its orders which are of general public interest in the form it deems best adapted for public convenience. Publications shall constitute the official reports of the board and shall be made available for distribution in the manner provided in ORS 2.160 and 9.790.

"SECTION 5. (1) Where a petition for review contains only allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and proceed as provided in section 6 of this 1979 Act.

"(2) Where a petition for review contains no allegations that a land use decision violates the state-wide planning goals, the board shall review the decision and prepare a final order affirming, reversing or remanding the decision.

"(3) Where a petition for review contains both allegations that a land use decision violates the state-wide planning goals and other allegations of error, the board shall review the decision and proceed as provided in section 6 of this 1979 Act with respect to the allegations of violation of the state-wide planning goals, and prepare an order addressing all issues not related to the state-wide planning goals. The decision of the board concerning any issues not related to the state-wide planning goals shall be final,

but no final order shall be issued until the commission has reviewed the recommendation of the board on the issues concerning the state-wide planning goals under section 6 of this 1979 Act and issued its determination. The board shall incorporate the determination of the commission into the final order to be issued under this subsection.

"(4) The board shall reverse or remand the land use decision under review only if:

"(a) The board finds that the city, county or special district governing body:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

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

"(D) Improperly construed the applicable law; or

"(E) Made a decision that was unconstitutional; or

"(b) After review in the manner provided in section 6 of this 1979 Act, the commission has determined that the city, county or special district governing body or state agency violated the state-wide planning goals.

"(5) Final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6a of this 1979 Act.

"SECTION 6. (1) At the conclusion of a review proceeding under sections 4 and 5 of this 1979 Act, the board shall prepare a

recommendation to the commission concerning any allegations of violation of the state-wide planning goals contained in the petition and shall submit a copy of its recommendation to the commission and to each party to the proceeding. The recommendation shall include a general summary of the evidence contained in the record and proposed findings of fact and conclusions of law concerning the allegations of violation of the state-wide planning goals. The recommendation shall also state whether the petition raises matters of such importance that the commission should hear oral argument from the parties.

"(2) Each party to the proceeding shall have the opportunity to submit written exceptions to the board's recommendation, including that portion of the recommendation stating whether oral argument should be allowed. The exceptions shall be filed with the board and submitted to the commission for review.

"(3) The commission shall review the recommendation of the board and any exceptions filed thereto. The commission shall allow the parties an opportunity to present oral argument to the commission unless the board recommends that oral argument not be allowed and the commission concurs with the board's recommendation. The commission shall be bound by any finding of fact of the city, county, special district or state agency for which there is substantial evidence in the record. The commission shall issue its determination on the recommendation of the board and return the determination to the board for inclusion in the board's order under section 5 of this 1979 Act within such time as is necessary to

allow the board to prepare and issue a final order in compliance with the requirements of section 4 of this 1979 Act. If additional time is required, the commission shall obtain the consent of the parties for a postponement.

"(4) No determination of the commission issued under subsection (3) of this section is valid unless all members of the commission have received the recommendation of the board in the matter and any exceptions thereto that were timely filed with the board and at least four members of the commission concur in its action in the matter.

"(5) The commission may, in its sole discretion, continue its review of a petition alleging that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, if the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to subsection (1) of ORS 197.251. Following entry of an order on the request for compliance acknowledgment, the commission shall resume its review of the petition, unless the findings and conclusions in the acknowledgment order are dispositive of the matters raised in the petition, in which event the commission may dismiss the allegations of violation of the state-wide planning goals in the petition.

"(6) The commission shall adopt such rules as it considers necessary for the conduct of review proceedings brought before it for determination under this section.".

"SECTION 6a. (1) Any party to a proceeding before the Land Use Board of Appeals under sections 4 to 6 of this 1979 Act, may seek judicial review of a final order issued in those proceedings.

"(2) Notwithstanding the provisions of ORS 183.480 to 183.500, judicial review of orders issued under sections 4 to 6 of this 1979 Act shall be solely as provided in this section.

"(3) Jurisdiction for judicial review of proceedings under sections 4 to 6 of this 1979 Act is conferred upon the Court of Appeals. Proceedings for review shall be instituted by filing a petition in the Court of Appeals. The petition shall be filed within 30 days only following the date the order upon which the petition is based is served. Date of service shall be the date on which the board delivered or mailed its order.

"(4) The petition shall state the nature of the order the petitioner desires reviewed. Copies of the petition shall be served by registered or certified mail upon the board, and all other parties of record in the board proceeding.

"(5) (a) The filing of the petition shall not stay enforcement of the board order, but the board may do so upon a showing of:

"(A) Irreparable injury to the petitioner; and

"(B) A colorable claim of error in the order.

"(b) When a petitioner makes the showing required by paragraph (a) of this subsection, the board shall grant the stay unless the

board determines that substantial public harm will result if the order is stayed. If the board denies the stay, the denial shall be in writing and shall specifically state the substantial public harm that would result from the granting of the stay.

"(c) When the board grants a stay it may impose such reasonable conditions as the giving of a bond or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within specified reasonable periods of time.

"(d) Denial of a motion for stay by the board is subject to review by the Court of Appeals under such rules as the court may establish.

"(6) Within 20 days after service of the petition, or within such further time as the court may allow, the board shall transmit to the court the original or a certified copy of the entire record of the proceeding under review, but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable. Except as specifically provided in this subsection, the cost of the record shall not be taxed to the petitioner or any intervening party. However, the court may tax such costs and the cost of transcription of record to a party filing a frivolous petition for review.

"(7) Review of an order issued under sections 4 to 6 of this 1979 Act shall be confined to the record, the court shall not substitute its judgment for that of the board as to any issue of fact.

"(8) The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:

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

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record.".

Delete lines 38 and 39.

On page 6, delete lines 1 through 3 and insert:

"Section 7. ORS 197.015 is amended to read:

"197.015. As used in ORS 197.005 to 197.430 and 469.350, unless the context requires otherwise:

"(1) 'Activity of state-wide significance' means a land conservation and development activity designated pursuant to ORS 197.400.

"(2) 'Board' means the Land Use Board of Appeals or any member thereof.

"[(2)] (3) 'Commission' means the Land Conservation and Development Commission.

"[(3)] (4) 'Committee' means the Joint Legislative Committee on Land Use.

"[(4)] (5) 'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the governing body of a state agency, city, county or special district that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational systems, recreational facilities, and natural resources and air and water quality management programs. 'Comprehensive' means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. 'General nature' means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. 'Land' includes water, both surface and subsurface, and the air.

"[(5)] (6) 'Department' means the Department of Land Conservation and Development.

"[(6)] (7) 'Director' means the Director of the Department of Land Conservation and Development.

"[(7)] (8) 'Goals' mean the mandatory state-wide planning standards adopted by the commission pursuant to ORS 197.005 to 197.430.

"[(8)] (9) 'Guidelines' mean suggested approaches designed to aid cities and counties in preparation, adoption and implementation of comprehensive plans in compliance with goals and to aid state agencies and special districts in the preparation, adoption and implementation of plans, programs and regulations in compliance with goals. Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.

"[(9)] (10) 'Special district' means any unit of local government, other than a city or county, authorized and regulated by statute and includes, but is not limited to: Water control districts, irrigation districts, port districts, regional air quality control authorities, fire districts, school districts, hospital districts, mass transit districts and sanitary districts.

"[(10)] (11) 'Voluntary association of local governments' means a regional planning agency in this state officially designated by the Governor pursuant to the federal Office of Management and Budget Circular A-95 as a regional clearinghouse.

"Section 7a. ORS 197.252 is amended to read:

"197.252. (1) Even if a city or county has not agreed to a condition in a compliance schedule under ORS 197.251, the commission may condition the compliance schedule for the city or county to direct the city or county to apply specified goal requirements in approving or denying future land conservation and development actions if the commission finds that past approvals or

denials would have constituted violations of the state-wide planning goals and:

"(a) The commission finds that the past approvals or denials represent a pattern or practice of decisions which make continued utilization of the existing comprehensive plan, ordinances and regulations ineffective in achieving the state-wide planning goals through performance of the compliance schedule; or

"(b) The commission finds that a past approval or denial was of more than local impact and substantially impairs the ability of the city or county to achieve the state-wide planning goals through the performance of the compliance schedule.

"(2) Conditions may be imposed under this section only at the time of:

"(a) Annual phased review of the satisfactory progress of the city or county;

"(b) Approval of a planning assistance grant agreement with the city or county; or

"(c) Revision of a compliance schedule due to delays of 60 days or more in the approved compliance date by the city or county.

"(3) Nothing in this section is intended to limit or modify the powers of the commission <u>on the board</u> under ORS 197.251, [197.300 to 197.315] <u>sections 4 to 6 of this 1979 Act</u> or 197.320. The powers of the commission under this section are intended to be in addition to, and not in lieu of, ORS 197.005 to 197.430 (1975 Replacement Part) and 197.251 and 197.320.

"Section 7b. 197.265 is amended to read:

"197.265. (1) As used in this section, "action or suit" includes but is not limited to a [writ of review] proceeding under [ORS 34.010 to 34.100 and any review proceeding conducted by the commission pursuant to ORS 197.300] sections 4 to 6 of this 1979 Act.

"(2) If any suit or action is brought against a city or county challenging any comprehensive plan, zoning, subdivision or other ordinance or regulation or action of such city or county which was adopted or taken for the primary purpose of complying with the state-wide planning goals approved under ORS 197.240 and which does in fact comply with such goals, then the commission shall pay reasonable attorney fees and court costs incurred by such city or county in the action or suit including any appeal, to the extent funds have been specifically appropriated to the commission therefor.

"Section 7c. ORS 197.395 is amended to read:

"197.395. (1) Any person or public agency desiring to initiate an activity which the state may regulate or control which occurs upon federal land shall apply to the cities or counties in which the activity will take place for a permit. The application shall contain an explanation of the activity to be initiated, the plans for the activity and any other information required by the city or county as prescribed by rule of the commission.

"(2) If the city or county finds after review of the application that the proposed activity complies with state-wide goals and the comprehensive plans of the cities or counties

affected by the activity, it shall approve the application and issue a permit for the activity to the person or public agency applying therefor. Action shall be taken by the governing body within 60 days of receipt of the application, or the application is deemed approved.

"(3) The city or county may prescribe and include in the permit any conditions or restrictions that it considers necessary to assure that the activity complies with state-wide goals and the comprehensive plans of the cities or counties affected by the activity.

"(4) Actions pursuant to this section are subject to review [pursuant to ORS 197.300] under sections 4 to 6 of this 1979 Act.

"Section 8. ORS 34.020 is amended to read:

"34.020. Except for a proceeding resulting in a land use decision as defined in section 3 of this 1979 Act for which review is provided in sections 4 to 6 of this 1979 Act, any party to any process or proceeding before or by any inferior court, officer, or tribunal may have the decision or determination thereof reviewed for errors, as provided in ORS 34.010 to 34.100, and not otherwise. Upon a review, the court may review any intermediate order involving the merits and necessarily affecting the decision or determination sought to be reviewed.".

On page 7, line 30, delete "under" and insert "in the manner provided in sections 4 to 6 of this 1979 Act.".

Delete line 31.

On page 8, line 1, after "under" delete the rest of the line and line 2 and insert "sections 4 to 6 of this 1979 Act.".

Delete lines 15 through 20.

In line 21, delete "16" and insert "14".

In line 25, delete "17" and insert "15".

On page 9, line 7, delete "18" and insert "16".

In line 27, delete "contested cases" and insert "agency orders".

Delete lines 35 through 38.

On page 10, delete lines 1 through 7.

In line 8, delete "20" and insert "17".

In line 9, delete "21" and insert "18".

In line 38, delete "22" and insert "19".

On page 12, line 6, delete "23" and insert "20".

In line 38, delete "24" and insert "21".

On page 13, delete lines 17 through 23.

In line 24, delete "26" and insert "22".

On page 14, line 14, delete "27" and insert "23".

In line 18, delete "28" and insert "24".

In line 28, delete "29" and insert "25".

On page 15, delete lines 13 through 39 and page 16 and insert:

"SECTION 26. ORS 34.055, 197.300, 197.305, 197.310 and 197.315 are repealed.

"SECTION 27. This Act takes effect on January 1, 1980.".

EXHIBIT E
SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MAY 24, 1979
SB 435 I page exhibit

Review time under SB 435, as amended

DAY	
1	Decision below becomes final
2-20	Notice of intent to appeal filed with board
21-23	Notice of intent to appeal served on parties
23-40	Transmittal of record below
41-60	Petition for review with supporting brief filed
61-63	Petition served on parties
64-83	Respondent's brief filed with board
83-85	Respondent's brief served on parties
86-90	Reply brief filed
91-115	Hearing before board and preparation of final order and/or recommendation for commission action
116-118	Board recommendation sent to parties
119-125	Exceptions filed to recommendation
126-150	Commission meeting, final decision, final order issues

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MAY 30, 1979
EXHIBIT A (SB 435)
2 pg. exhibit

Legislative Counsel
05/28/79 (34) (30)
SB 435 A-Eng.

PROPOSED AMENDMENTS TO PRINTED A-ENGROSSED SENATE BILL 435

On page 1 of the printed A-engrossed bill, line 3, after "197.015," insert "197.090,".

Delete lines 12 through 16 and insert:

"SECTION 2. (1) There is hereby created a Land Use Board of Appeals consisting of not more than five members appointed by the Governor. The board shall consist of a chief hearings referee and such other referees as the Governor considers necessary. The members of the board shall hold their positions at the pleasure of the Governor and their salaries shall be fixed by the Governor unless otherwise provided for by law.".

Delete lines 19 and 20.

On page 8, after line 2, insert:

"Section 7a. ORS 197.090 is amended to read:

"197.090. Subject to policies adopted by the commission, the director shall:

"(1) Be the administrative head of the department.

"(2) Coordinate the activities of the department in its land conservation and development functions with such functions of federal agencies, other state agencies, cities, counties and special districts.

"(3) Appoint, reappoint, assign and reassign all subordinate officers and employes of the department, prescribe their duties and fix their compensation, subject to the State Merit System Law.

"(4) Represent this state before any agency of this state, any other state or the United States with respect to land conservation and development within this state.

"(5) Provide clerical and other necessary support services for the Land Use Board of Appeals.".

PROPOSED AMENDMENT TO SENATE BILL 435

A-ENGROSSED

On page 1 of the proposed amendments to A-engrossed Senate Bill 435, line 7, before the period insert "subject to confirmation by the Senate in the manner provided in CRS 171.560 and 171.570":

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MAY 30, 1979
EXHIBIT B (SB 435)
1 pg. exhibit

Prepared by Legislative Counsel
5/29/79

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MAY 30, 1979
EXHIBIT C (SB 435)
2 pg. exhibit

Department of Land Conservation and Development

1175 COURT STREET N.E., SALEM, OREGON 97310 PHONE (503) 378-4926

GOVERNOR

MEMORANDUM

May 30, 1979

TO: Pat Middleburg,
Staff, Joint Trade & Economic Development Committee

FROM: Nancy R. Tuor,
Department of Land Conservation and Development

Last Thursday, the Committee asked for a rough idea of the fiscal impact of SB 435 on the Department's budget. In this memo, I am supplying rough budget figures, but first, allow me my "caveats". It is very difficult to anticipate the work load that will be generated by this change. The Circuit Court has no records of writ of review/land use cases, so the numbers are very uncertain.

Land Use Board Costs

We have estimated that three full time referees would be necessary. The Commission now has under contract the equivalent of about 1 3/4 hearings officers. Thus we are estimating an increase of 1 1/4 referees over current levels. If the number of referees increases, the dollar amounts increase significantly (about $53,500 per referee per biennium for salary). For the land use board we have roughly calculated the following costs:

3 Board members (1 at $59,009/2 at $53,538)	$166,085
Coordinator	46,166
Secretary	22,556
Clerical Specialist (2)	42,947
Indirect Costs	30,000
	$307,754
Supplies and Services	$130,000
Total Costs	$437,754

It is possible that reorganization of the above listed staff could result in further savings. This cannot be determined until specific staff tasks can be outlined.

Current LCDC Appeals Allocation	1979-81
Hearings Officers Costs (including clerical)	$187,000
Appeals Coordinator	46,166
Secretary (1/2 time)	11,278
Clerical Assitant (1/2 time)	9,171
Indirect Costs	20,000
	$273,615
Supplies and Services	$121,000
Total Costs	$394,615

SB 435 Fiscal Impact

The additional funds needed would be approximately $50,000. It is realistic to assume that the additional increment resulting from SB 435 would range from $35,000 to $65,000 for the biennium. If the workload was greater than anticipated, additional funds would be necessary. I would like to point out that the time frame included in the bill could result in increased overtime pay if the Board is not adequately staffed.

These figures have not been reviewed by the Executive Department so they should be considered preliminary in nature.

If you have further questions, please give me a call.

NRT:cf

SENATE LEGISLATIVE COMMITTEE ON
TRADE & ECONOMIC DEVELOPMENT
MAY 30, 1979
EXHIBIT D (SB 435)
8 pg. exhibit

A-ENG. SB 435

TESTIMONY TO THE SENATE TRADE AND ECONOMIC DEVELOPMENT COMMITTEE

by

Steven R. Schell

1:00 P.M., May 30, 1979

The Writ of Review Subcommittee of the Law Improvement Committee, on which Bill Love and I served, drafted Senate Bill 435 as the best theoretical solution to the problems confronting litigants in land use cases. The basic needs as we perceived them were to:

(1) Cut down the number of appeal steps;

(2) Accelerate the final decision-making process for litigated cases;

(3) Avoid delays on cases not litigated;

(4) Center the policy decisions in LCDC and get other decisions decided by the courts; and

(5) Maintain the carefully crafted compromise between state and local land use decisions that was found in Senate Bill 100.

To solve these problems, SB 435 distinguished between quasi-judicial and legislative decisions of local governments and referred the quasi-judicial decisions directly to the Court of Appeals and the legislative decisions to the LCDC.

However, the hearings process has revealed some problems with 435. The first problem is that the Court of Appeals is overburdened and probably cannot handle the land use cases. The second problem is that the Court of Appeals does not receive a "clean" record in that questions regarding standing, ex-parte contacts and constitutionality may not have initially been resolved.

1. Land Use Court. Recognizing the problems that have been revealed, both Bill Love and I regard the land use court as the better solution. It solves the Court of Appeals burden and preparation of record problems. It provides an independent and prestigious decision-making forum. It will provide court rather than additional administrative review. With a "collegial" land use court and appeals therefrom being only by petition discretionarily granted to the Supreme Court, it solves the problem of one decision and one review.

However, several problems have been revealed with this solution. First of all, there is no funding. Second, there is no place to house this court without considerable shuffling. Last, in the legislative process we are late in this 1979 session.

2. Governor Appointed Board of Appeals. A subcommittee of your Trade and Economic Committee has labored long and hard over Senate Bill 435, after a conceptual adoption of a Board of Appeals by the full committee some weeks ago. The result is A-Engrossed Senate Bill 435, which is presently before you. I believe this bill still has weaknesses. One of the proposals,

in addition to A-Engrossed SB 435, is a set of amendments which would enable the Governor to appoint the members of the Board. Because of the increased chance of this not being an appeal from decision by a Board appointed by the Governor, both Bill Love and I favor this over the bill as engrossed. However, the proposed amendments make the body too political. I strongly urge you to remove the politics from land use decision making as much as possible. The LCDC is intended to be a political body. The board of appeals should not be one. To solve that problem, I suggest that the members of the board of appeals not hold their positions merely at the pleasure of the Governor but rather may only be removed for cause. An Amendment accomplishing that result is attached hereto as Amendment No. 1.

With the proposed amendments, as amendned, and notwithstanding the fact that SB 435 as originally drafted provides a better theoretical solution and a land use court solves the practical problem of litigation better, I support A-Engrossed 435.

3. A-Eng. SB 435. Others are in a position to explain the time line set out in the engrossed bill in more detail that I. However, both Bill Love and I participated actively with your subcommittee in A-Eng. 435's preparation, and I would like to make several points for the record:

1. On page 2, line 10, the term "application" includes a conditional use permit, a variant or a building permit.

2. On page 3, line 5, the term "corrections" does not include the presentation of additional facts that would be nice to have, for example, because an attorney became involved late in the proceedings. What the term "corrections" means is any unclarity in the record because of transcription or something that was included in the original record but has not been forwarded to the board of appeals.

3. On page 3, line 23, the statement that orders issued by the board may be enforced in appropriate judicial proceedings means that the board will not enforce its own decisions, but the LCDC or the litigants might.

4. On page 3, lines 24 through 26, the provision of official reports of the board's decisions is excellent. I urge you to amend this to include not only the publication of the board's orders, but also the orders previously issued by the LCDC. There is attached as Amendment 2 language that would accomplish that result.

5. On page 4, line 35, et seq., as subparagraph (5) presently reads, the Commission is allowed to suspend its review of a petition if a request for acknowledgment has been received by a city or county. I believe that this will not produce as good a result as if the board were allowed to continue its review

of the petition. The reason is that a filed petition means that there will be advocacy on both sides. Staff review simply cannot be as thorough as litigants are on a particular issue. Therefore, the board should continue its review even if a request for acknowledgment has been received by the LCDC. Language to accomplish this result is attached as Amendment No. 3.

I respectfully request adoption of these Amendments and thank you for the courtesy and privilege you have shown in allowing us to participate in these proceedings.

-oOo-

AMENDMENT NO. 1

TO PROPOSED AMENDMENTS TO PRINTED A-ENGROSSED SB 435

On page 1 of the proposed Amendments to printed A-Engrossed Senate Bill 435, delete lines 9 and 10 and insert in their place the following:

"Governor may remove any member of the Board for cause. Salaries of the Board members shall be fixed by the Governor."

AMENDMENT NO. 2

TO A-ENG. SB 435

On page 3, line 24, after the word "orders", insert the following:

"and those previously issued by the Commission."

On page 3, line 25, after the word "Board", insert the following:

"and Commission."

AMENDMENT NO. 3

TO A-ENG. SB 435

On page 4, delete all of lines 35 through 41 and on page 5 delete all of lines 1 and 2 and substitute in their place the following:

"(5) The Board shall ~~continue~~ proceed with its review of the petition alleging that a land use decision violates the state-wide Goals, even if the Commission has received a request from a city or county asking that the Commission grant a compliance acknowledgment pursuant to Subsection (1) of ORS 197.251. The Commission may suspend its review of the request until the Board has issued its Final Order. Following issuance of the Final Order, the Commission shall resume its review of the request, if it has not yet granted the acknowledgment requested."

0172 REP RICHARDS stated that she would like to see this pass out with a "do pass" recommendation, but she did not think the members were present to allow this.

0174 CHAIRMAN FROHNMAYER stated that he felt the measure discriminated against minor political parties.

0177 CHAIRMAN FROHNMAYER closed the work session and opened the public hearing.

SB 435B - Relating to judicial review

0185 SEN MIKE RAGSDALE, district 4, Washington County, spoke in support of SB 435.

SB 435 is the result of a significant amount of work in the senate relating to many of the policy issues embodied in the bill. A great deal of work was done on the first 12 sections. That is where the major policy issues are.

Trade and Economic Development Committee worked on the bill. The decision was made at that time that some of the items in the final sections of the bill were the purview of the Judiciary Committee and that he would bring the bill to this committee and advise it that Trade and Economic Development did not give a judiciary committee type review to the technicalities of the language in the latter sections.

The bill addresses a concern which Trade and Economic Development had a problem substantiating. That concern is the fact that it is perceived (and probably accurately) that in the land use hearings procedure in the State of Oregon there are some legitimate changes needed. Every time the committee tried to get specific documentation that problems do exist (i.e. delay, forum shopping, etc.), it had a difficult time getting data because it could not get information from the circuit courts relating to cases on land use as to which fell under the purview of the statutes and which didn't. The committee could not factually and accurately determine what the percent of the problem was, but it agreed that there is a problem which ought to be addressed.

It is not a problem with a tremendous amount of volume, but it is at least a problem procedurally which needs to be addressed in one case; and, therefore, justifies legislation.

The concern is to be able to speed up the process on land use appeals and to cut down the potential for forum shopping in land use appeals. The concern was also to cut down the opportunity to divide the question and go into multiple forums.

The question was addressed as to whether or not there should be an attempt to set up a land use court or whether to go in the direction SB 435 has gone. The committee decided to go with the Land Use Board of Appeals inside the Land Conservation and Development Commission (LCDC) rather than go for a separate court.

The overriding basis for that decision was the committee's concern that if a separate land use court is set up, it would be cutting down on the comfort

level of the average citizen to appeal. The feeling was that setting up the land use court would create an environment where the average citizen would feel somewhat intimidated as the average citizen is by the judicial process. If the same concept and, hopefully same procedural type of board, were put into LCDC, the average citizen would feel more comfortable.

Another reason for the decision to go in this direction was very pragmatic. LCDC testified before the committee that while it could not specifically idenitify what it would cost to set up that board within LCDC (because it could not identify how many cases would be heard), it would be able to absorb all or part of the cost by a change in the procedure it currently has. The funding and structure for hearings officers exist now. This gave a place to house the decision-making apparatus without having to set up a new court or bureaucracy.

The committee decided to set up a procedure for land use appeals where the appeal would go to the board that is the Land Use Appeals Board identified in the bill. The board would look at the issue before it and if the issue were quasi-judicial or dealt with the goals and policies of LCDC, it would refer that to LCDC. If the issue is legislative, the board would make the decision. In the case of a quasi-judicial issue, LCDC would review it and make a decision. That part of the decision would be sent back to the board for the final order. That would be a final decision by LCDC but it would be incorporated in the final order that came from the board. This was done because the idea is that generally there will be a mix of legislative and quasi-judicial issues.

In arriving at that sort of technique, the committee made another major policy decision. The most persuasive testimony relative to the decision came from Lee Johnson and from Judge Schwab. That was a concern of those sitting on the Court of Appeals in judging the cases. The cases are coming before them without having been reviewed by LCDC. In the quasi-judicial areas, the policy-making areas, as a panel, the court has been making land use decisions that appropriately should be made by LCDC. The cases are correctly appealed to the Court of Appeals, but the nature of the decisions are policy-setting LCDC responsibility rather than a pure judicical responsibility. The court is uncomfortable making land use policy. The court requested that some sort of structure be set up where LCDC would be able to make the policy decisions by judging on the quasi-judicial issues.

Procedurally, the legislative issues would be decided by the board and the quasi-judicial issues would be decided by LCDC.

He believes that the process set up, in conjunction with the maximum time limits that are allowed under the bill, will expedite land use appeals decisions in Oregon to the benefit of everyone--the developer, the aggrieved citizen, and both the protesters and supporters of the decision. Expediting the decision-making process is to everyone's advantage.

By setting up the Land Use Board of Appeals and tightening up the procedure that is gone through, the ability to abuse the system by forum shopping is cut down.

Overall, SB 435 is a good bill and he has come before the committee today to give a background of the bill. Elizabeth Stockdale, from Legislative Counsel, has worked extensively on the bill and would be able to answer the committee's questions and give a section by section outline.

0309 REP RICHARDS asked if LCDC's budget accommodated the expense of the board. There is a subsequent referral to Ways & Means on the bill.

0312 SEN RAGSDALE replied that the belief was that it did not totally accommodate the expense. The problem is that the bill allows the formation of a board composed of from 1 to 5 members. It is unknown how many members will be necessary because it is unknown how many appeals there will be. It is anticipated that there will be 2 or 3 people on the board. If it is 3, it is anticipated that during the biennium the LCDC funding will be about $50,000. If it is 2, the present budget will probably be accurate. He felt that was the reason for the subsequent referral.

It is the reason for the language of the bill allowing for 1 to 5 members. It is anticipated that during the two-year period while the comprehensive plans are being completed, there will be a much larger number of appeals than there will be in the future. It is also anticipated that while 3 members might be necessary now, in the future 1 or 2 will probably be enough.

0329 REP COHEN asked if the board members would function independently, similar to hearings officers, rather than as a body.

0331 SEN RAGSDALE replied that the bill allows both. It allows the chief hearings officer to make the decision whether to set up as independent hearings officers or as a panel which sits together. The bill creates the capability of going in either direction. He contemplated that in the noncontroversial issues, it would be a single hearings officer and that the board would only sit as a panel on the controversial issues. The discretion is left to the chief hearings officer.

0341 REP BUGAS asked what the vote in the senate was.

0342 SEN RAGSDALE stated that he believed there were 20 "aye" votes. It passed by a wide margin. He thought there were 8 "no" votes. It unanimously passed out of the senate committee.

0347 LEE JOHNSON, representing the Governor's officer, submitted written testimony (Exhibit A, SB 435) in support of SB 435.

Regarding the budget, he was not aware that the bill had a subsequent referral to Ways & Means.

0354 MR. BROMKA stated that the bill did not have a subsequent referral.

0355 MR. JOHNSON stated that the subsequent referral did not seem to be necessary. He has examined LCDC's budget and it looked to him as though 3 referees could easily be financed as the budget now exists. In any event, LCDC will have to go back to the Emergency Board to re-organize the positions which it has allocated at present, if the bill passes. He does not see any difficulty with that.

LCDC has quite a generous budget for hearings officers at the present. It has been hiring outside attorneys at $50 an hour.

The most vexatious area of litigation confronting courts and administrative agencies is the land use cases. This has sometimes resulted in conflicting legal rules and inordinate delays. These delays have severely hampered local government in making land use decisions which have substantial public impact and generally thwarted the land use planning process. The costs of housing and commercial projects have been magnified to a prohibitive level because of these delays. Much of the delay results from the procedural morass in which land use litigation is conducted. The purpose of SB 435 is to bring about an orderly and expeditious process for the resolution of land use issues.

The solutions proposed in the bill are to a degree novel and complex. The reasons for the complexity are embodied in the land use process itself. In the first place, a process is being dealt with which contains elements of legislative policy-making by politically accountable bodies and also administrative and quasi-judicial elements. In Fasano, the Oregon Supreme Court held that many land use decisions which had been deemed to be legislative in nature are now quasi-judicial. The court has left unanswered where the line between legislative and quasi-judicial lies.

0388 REP BUGAS asked what made Mr. Johnson think that a body such as the legislature will make the delineation any better than the courts can.

0391 MR. JOHNSON stated that he felt that ultimately the delineation will be made by the courts. The fact is that this segregation does exist. If it is quasi-judicial under the present law, there is a writ of review. If it is legislative, there is a declaratory judgment.

0396 REP BUGAS asked if this would eliminate the writ of review.

0397 MR. JOHNSON stated that it would in effect eliminate both those remedies in land use cases and consolidate them into one remedy.

He stated that he had tried to lay out in his prepared testimony (Exhibit A, SB 435) why there is this prodecural morass and what is being dealt with. Until this is really understood, it is hard to understand why the solution in the bill was decided on.

The original bill simply provided for elimination of the circuit court in the writ of review process and to go directly to the Court of Appeals. That does not answer one of the main problems in the area which is causing the greatest delay. That is delay at the appellate level. It is the case where a party alleges a violation of an LCDC goal. If the court has not had the benefit of LCDC's interpretation in the first place, the court is in effect supposed to be guessing what LCDC has decided. Without the benefit of this interpretation, it puts the court in the position of being the land use planning agency and of interpreting what LCDC said. It substitutes the court's judgment for LCDC's judgment.

He feels the whole charge to LCDC is that it is to be the state-wide land use planning agency, not the courts. For that reason, it is much

more appropriate that LCDC makes that preliminary determination.

Upon review, there is still an area of judicial review. That is to determine whether the interpretation LCDC adopts is reasonably consistent with the provisions of that goal and whether the interpretation is within LCDC's statutory authority. Those are relatively easy questions to handle upon review and the courts should have little difficulty in disposing of them.

In contrast, in the situations now where the courts are interpreting the goals, there has been a great deal of internal argument within the courts. That argument will go on, without this bill, because it is making judges into land use planners and that is not an appropriate function for the courts.

Sen. Ragsdale classified the difference between legislative and quasi-judicial. MR. JOHNSON thought this bill was really saying that the referees will have the authority to enter a final order on the administrative level, in the cases where Fasano issues alone are raised. Fasano issues are essentially procedural in nature. It is almost a procedural checklist system. Did the local body give notice? Did it hold a hearing? Did it consider alternative sites and the public interests? Did it make adequate findings of fact and conclusions of law? If it did all of these things, then the decision is affirmed. If it did not, the case has to be sent back to the local agency to correct the deficiencies. Those are relatively simple legal issues at this stage of the game. Fasano has been flushed out between the Supreme Court and the Court of Appeals. He foresees a continuing decrease in Fasano type litigation because cities and counties are now becoming educated and using legal counsel carefully.

The type of case where LCDC will actually come in (where the referee in effect becomes just a hearings officer) is the case where there is the allegation of an LCDC goal violation. That is the essence of the bill--to consolidate all of these into a single administrative proceeding where there would be direct administrative review by the Court of Appeals.

One other significant feature of the bill is that it does have a very tight time table concerning the length of time this matter can be pending before the administrative agency. If the time table is not met, it is an automatic affirmance. LCDC feels it can live within this time limit.

0469 REP MASON asked if there wasn't a little more to Fasano than just procedure.

0471 MR. JOHNSON said that he thought it was essentially procedure.

0472 REP MASON stated that he thought it had to be found that the use that was being applied for was consistent with the comprehensive plan.

0473 MR. JOHNSON stated that was right.

0474 REP MASON stated he thought that was substantive.

0475 MR. JOHNSON stated that it could be classified as substantive, but it essentially is a matter of matching up the plan against the decision.

0496 BILL LOVE, representing the Writ of Review Committee (a committee created by the Law Improvement Committee which is a statutory committee created by the legislature), presented the committee with a summary (Exhibit B, SB 435) of writs of review.

The summary indicates what the committee went through in arriving at the original SB 435.

The committee met over a two-year period. It consisted primarily of lawyers representing a cross section of advisory committees and its purpose was to work on the entire area of writs of review.

The bill could be divided into three areas. Sections 1 - 12 relate to land use planning. This is the area which got most attention from both the senate committee and the Writ of Review Committee.

Section 13 is the second major area. It purports to limit the alternate use of the writ to go from district court to circuit court in a lot of cases. The feeling is that the judicial procedure needs to be simplified and now that the district court is a court of record, it is no longer justified to have that procedure. There was testimony that there were abuses in this area. This section has the support of Judge Schwab and members of the judiciary with whom MR. LOVE has talked.

The rest of the bill, sections 14 - 29, go through the whole process of the Oregon Code which refers to various segments where the so-called writ of review statutes apply to some of the procedures. Those have been examined and most of those procedures would be better through the Administrative Procedures Act. The senate committee made a few changes at the suggestion of Judge Schwab. The Court of Appeals staff spent a fair amount of time on that.

Page 3 of the summary (Exhibit B, SB 435) indicates some of the legislative procedure that took place. In the senate, there were a lot of hearings and work sections. A lot of lawyers were involved representing all of the vested and non-vested interests that might be involved. A bill was not developed that could please all the people all of the time. SB 435B is a compromise.

Out of five main points the Writ of Review Committee sought to achieve, SB 435B satisfies probably four of them.

The current situation is that a land use case goes before the administrative body and then has two levels of judicial review--the circuit court and the Court of Appeals. The approach of this bill is to eliminate the circuit courts and just leave one level of judicial review and one level of administrative review. That is the objective. That did not come about when the bill was amended by the senate. The Court of Appeals felt that it could not handle the additional work load of all those reviews with its present staff. The compromise replaced one level of administrative review and two levels of judicial review with two levels of administrative review

and one level of judicial review. The process goes from the city council or the county planning commission, to the Land Use Board, and then to the Court of Appeals.

Hopefully, by including some time frames, the process will be expedited.

The Writ of Review Committee felt that the notice provision is very important. The provision says that if a person wants to go to the Board of Appeals, 20 days notice will be given after the decision is made by the city council or the county commissioner. The purpose is that for every land use case that is appealed, there are 40 or 50 that are not. There is at present a 60 day period that can go by before the developer feels safe in beginning work. The notice provision is to reduce that gap and still reserve the right of appeal. The 20 day preliminary notice of intent to appeal is very important. It means that in all of those cases in which there are not going to be any appeals, the developers or other people can start to work 40 days early.

0572 STEVE SCHELL, representing the Writ of Review Committee, explained the way land use decisions are made at present. There are three remedies that can be used: 1) mandamus, 2) writ of review, and 3) declaratory judgment. The process in this bill is not to affect mandamus, just declaratory judgment and writ of review.

When LCDC was created under SB 100 in 1973 a fourth remedy was added. That was a remedy before LCDC for violation of the goals. The difficulty with that particular provision was that it did not grant the right to citizens to appeal to LCDC on permit-type matters. Local Government was concerned over this. Only plan changes or zone changes could be taken before LCDC by a citizen. The result is that the courts got goal questions which came up through various mechanisms without any LCDC input on the interpretations. This allowed people to double-shoot the process. One group of people could go to the courts and another could go to LCDC on a same basic dispute. This caused two procedures over the same issue.

The Committee saw this problem and realized the cost and time that it took to handle this kind of matter. Last legislature, there was an attempt to resolve this problem through SB 570. The attempt was to the effect that if there was a proceeding pending in one place, a procedure could not be filed with the same or similar allegations in the other place. The first one filed with took precedence. Attorneys realized that an easy way around this was to have different groups file on the same issue.

It seemed to the Writ of Review Committee that the appropriate technique to solve the problem was to say that the cities and counties are charged with making a decision and applying the goals. They should make the cut. After that, it is a court matter. The suggestion then was that all of the quasi-judicial matters should be appealed to the Court of Appeals.

Mr. Johnson just testified that the Court of Appeals was very concerned about those cases. It felt there was not adequate background and consideration given by the administrative agency and that the administrative

agency ought to make the first attempt at interpreting its own rules. That caused the modifications that came out in SB 435B.

As a broad policy issue, MR. SCHELL feels there are four basic choices. The system could be left as it is; that would mean there would still be the ability to double-shoot the system. Another choice would be to go back to the original version of SB 435 which was for all quasi-judicial matters to go directly from the local government decision directly to the Court of Appeals; the Court of Appeals objected to this because it does not get a clean record and it does not get good interpretations of the initial decisions by the agencies responsible. The third choice would be a land use court; some favor the land use court, but there are objections to specialized courts. It was felt that the tax court works very well in this situation. The difficulty with this solution, particularly at this time in the session, is that it would require independent funding and a whole new body would have to be created. The choice then was to go to a board of referees as is structured in the bill.

One of the areas of controversy which still exists between the interested parties is that there is a dispute about the balance between state and local government. It was felt that SB 100 was rather carefully crafted to maintain that relationship between state and local government. The state was to set minimum policies as far as the goal was concerned. The local government was to apply those concerns. There is a concern that this balance is upset. He had some concern about that himself. The result of those concerns was to build a basically independent body--the Board of Appeals. The board would have final decision making power on non-goal questions in the land use area, with the exception of mandamus type issues. That means that all of the Fasano type questions or any type of declaratory judgment type questions that do not involve goals will be decided by the board. The circuit courts would not have any role in that anymore. Then there would be appeal from this administrative body to the Court of Appeals. After the goal question, the plan under the bill, is to submit that goal question to the LCDC for a determination. That determination comes back to the board of appeals, is integrated with the non-goal question and the whole thing is rendered in a final decision by the board, which in turn is appealable to the Court of Appeals.

The time for appeal is also of concern. The question is should it remain at 60 days, should it be thirty days or should it be 20 days. After the time of appeal, the question is on the cases that are not appealed. The Writ of Review Committee did some figuring and sent out a questionnaire. The results were not comprehensive, but it was determined that there are about 6,000 cases that are taken on as decisions in the land use process. Only about 200 of those cases are appealed. The 200 cases govern what is done on all 6,000 cases in terms of the time frame. It is the other 5800 cases that there is some concern about. These are not firm figures.

Another area of controversy is the sunset provision. Should this bill receive a four year or two year sunset review. Right now it is set up with a four year sunset review. It was felt by the senate committee that

a four year provision was necessary because the board would merely be gearing up by the time the next review period came around.

There is also some concern about the adequacy of funding for the referees. The referees will be getting in the neighborhood of $27,000. The question is if that is going to draw the kind of people necessary for that position. It is the governor's administrative assistant's feeling that it will.

0671 REP MASON stated that he would disagree with that. He felt that it should at least be equivalent to a district court judge.

0672 MR. SCHELL stated that the budget impact had to be looked at. Right now, three referees at this figure would yield about $50,000 more than LCDC has in its budget for the biennium for this particular function.

0676 REP MASON stated that he did not see how good people could be got without paying for them.

0678 MR. SCHELL stated that he thought the governor's office would be responsive to a concern of that nature if an Emergency board funding or something else were necessary to get appropriate salaries.

MR. SCHELL felt this was a possible problem.

Another possible problem is the independence of the board of referees. There was a concern that the board of referees was really subservient to LCDC in some way. In SB 435A LCDC was going to appoint the referees. Now, in SB 435B the referees are independently appointed by the governor. There should be independence from LCDC now.

0687 REP FROHNMAYER stated that being subject to confirmation is not usually a requirement for a purely executive appointee, but then they are serving at the pleasure of the governor. This could raise questions about the independence from the executive branch.

0691 MR. SCHELL stated that he had asked questions about the referees serving at the pleasure of the governor. The answer he got, he found difficult to rebut. At this level and with this salary, the referees will be fairly young in the business and an incompetent may be appointed. The question is how could this person be removed. If the referee is not serving at the pleasure of the governor, he cannot be removed. If the salaries were increased, it might bring in better people and take away that problem.

He does believe this a problem, but that the governor's office has been responsive to it.

0700 CHAIRMAN FROHNMAYER asked in what sense the governor's office was responsive. He asked if the governor was responsive in the sense of entertaining a proposed amendment.

0701 MR. SCHELL stated that would have to be discussed with the governor's office and with LCDC, in terms of its budget.

0702 REP MASON stated that there are a few inconsistencies. It sounds like what is really wanted is a court.

0704 MR. SCHELL replied that he did not think a court was practical at this stage and he is not sure the present system is fair. That is really the compromise and why the sunset provision is in the bill.

0707 REP MASON stated that Mr. Schell liked the attributes of the court.

0708 MR. SCHELL stated that the board should be independent and competent.

It should be understood that all of the LCDC goal type questions will go to LCDC and then will go back to the board. There will be no split between the quasi-judicial and the legislative type decisions in terms of the procedure.

0722 JIM FISHER, Washinton County Commission Vice-Chairman; GREG HATHAWAY, county counsel; and LARRY FRASIER, planning director, presented the committee with an amendment (Exhibit C, SB 435). The amendment is is to provide safe-keeping for people who live in Washington County.

0725 MR. FISHER reiterated that Washington County is in complete cooperation in working with LCDC and 1000 Friends of Oregon for proper land use planning within Washington County. However, Washington County is in a rather unique situation in that the county adopted the comprehensive plan in 1973 and one of the provisions of the plan was to designate certain lands within Washington County as AF5 or AF10 (buildable lots of 5 acres or 10 acres). Since 1973, quite a few lots have been developed that qualify under these designations. Many of these people have purchased property in good faith and have intended to build homes on these properties. The concern now is that property might be confiscated from these people unduly if the provisions of ORS 197.252 will require the application of state-wide goal 3, agriculture, and goal 4, forestry, to these small parcels of 5 and 10 acres.

0741 GREG HATHAWAY, county counsel for Washington County, stated that the Board of County Commissioners authorized the three people from Washington County to speak on behalf of the county.

The proposed amendments (Exhibit C, SB 435) would amend the provisions of ORS 197.252.

The county concern is that the county is in the process of requesting from LCDC a one year extension for the comprehensive plan update. It has come to the attention of the county that it is a possibility that LCDC will impose a condition pursuant to ORS 197.252 which would require that the state-wide goals, in particular 3 and 4, be applied to the issuance of building permits.

0754 REP COHEN asked if the amendment bore directly on the board that is being proposed in SB 435 or is the amendment just being submitted because of the relating clause.

0756 MR. HATHAWAY replied that he believed it was with regard to the relating clause. SB 435 refers to an amendment to ORS 197.252. The amendment being proposed is an additional amendment to that.

The concern the county is expressing is the possibility that LCDC will require as a condition of the compliance schedule, the requirement that the county impose state-wide goals 3 and 4 prior to the issuance of building permits. The county feels this concern has been expressed by LCDC because previous to this date Washington County has not had a minor partitioning ordinance; and, therefore, there have been a number of lots partitioned and created in Washington County which may not conform to the state-wide goals. LCDC is suggesting, or will suggest, that before those permits can be issued for the parcels, it will require that the goals be applied before building permits can be issued.

As Mr. Fisher indicated, the county's concern is that the property owners have created parcels in Washington County in conformance with the county's existing laws. Because of that, there might be potential inequities in attempting to apply the state-wide goals at this late date to the property owners. There is also the concern that there may be some administration problems.

0773 REP COHEN stated that she would like to get on with the bill and not address amendments to the relating clause until some of the basic problems of the bill have been handled.

0777 REP MASON stated that he was uncomfortable with this proposed amendment. It does not have anything to do with the Land Use Board of Appeals.

0779 MR. HATHAWAY replied that it did not have anything to do with the board. The county is in the position where the session is just about ready to close and it has just come to the county's attention that this problem might exist. Therefore, the county is trying to maximize its alternatives and options by coming before the committee. The county would be willing to listen to any alternative suggestion.

0783 REP MASON stated that he was not saying that Washington County was not presenting a good point. He was just uncomfortable with some of the things coming down because of the relating clause.

0791 CHAIRMAN FROHNMAYER stated that the principle purpose of this hearing is to address the merits of the bill to determine whether any action will be taken. The proposed amendment will be taken up during the work session.

0794 MR. HATHAWAY stated that the amendments would define the term "land conservation and development action" as being one of a discretionary type and that would require a public hearing pursuant to state or local law. As a result of that, it is implicit that a land conservation and development action would not include administrative acts such as the issuance of the building permit. This would limit the ability of LCDC to impose a condition to require goals to apply to building permits to Washington County and other counties which might be similarly affected.

0801 CHAIRMAN FROHNMAYER asked if the amendment has been given to LCDC.

0802 MR. HATHAWAY replied that LCDC had not yet been given the amendment, but that it would be.

0803 CHAIRMAN FROHNMAYER stated that at the time of the work session, the committee would want to know the position of LCDC, of Mr. Love, of Mr. Schell, of the Writ of Review Committee, of 1000 Friends of Oregon, and of other people who have an interest in the bill.

0812 JIM ALLISON, representing Washington County Land Owners Association, stated that the proposed amendment from Washington County (Exhibit C, SB 435) is germane to the bill and to the issue because if this legislature does not define the term and if LCDC imposes what has been proposed, every building permit outside of the urban area in Washington County will be subject to appeal. There will be litigation. Failure to define the term in ORS 197.252 will lead to unnecessary litigation and appeals to this new board.

He presented the committee with proposed amendments (Exhibit D, SB 435). He stated that his amendments are not germane to this issue. He is upset because he believes, based on legal advice, that LCDC has unlawfully delegated duties to its director. The only place that can be corrected is in this bill because this is the only bill dealing with ORS 197.252. He urged that the committee give careful consideration to defining this term which should have been defined two years ago.

0839 AL JOHNSON presented the committee with prepared testimony (Exhibit E, SB 435).

He does feel there is a substantial problem with the basic appointment provisions in the bill. It is very important that the bill have some sort of amendment which will assure the kind of independence that is necessary to an agency which is involved in adjudication. His testimony had language borrowed from Chapter 240 to provide that members of the board not be dismissed without cause. It would give board members specific terms that could be set and would also provide for some standard pay.

He stated that he is a hearings officer with LCDC. He stated that he probably hears the majority of the cases because he is on retainer with LCDC so his services cost less than others. He has been a hearings officer with LCDC for two years.

Concerning the matter of compensation, he felt there were few hearings officers now with the board who would be willing to take a position at the kind of pay proposed. He feels that appropriate compensation would be an element in having a quality appeals board.

0865 CHAIRMAN FROHNMAYER asked if Mr. Johnson felt the bill was responsible to some of the concerns that have been raised about the multiple and overlapping jurisdiction.

0867 MR. JOHNSON replied that he felt it did go some distance in solving the problem of overlapping jurisdictions. However, there are a lot of other issues that cannot be broken down into quasi-judicial or Fasano, and he is not quite sure what the board would do with these.

As far as the question of delay goes, he pointed out that LCDC does have a current 90-day limit which can be extended to 180 days. He closed out his last case filed in 1978 in April of 1979. He does not believe that any of the hearings officers or the board have any cases pending from 1978, with the exception of one that has been withdrawn from the Court of Appeals.

The delay comes from the same place here as it does in worker's compensation. It comes from the number of levels of appeals. This bill does nothing to eliminate those levels of appeals. There is still the appeal to LCDC, then the Court of Appeals, and then the Supreme Court. The Supreme Court in the past month has accepted review in two more cases. It now has five LCDC cases under review. The typical lapse between the time an LCDC final order is entered and the Court of Appeals comes back with a decision is 1 1/2 years. The delay comes primarily at the level of the Court of Appeals.

He suggested that the problems with the bill could be solved by simply letting the Supreme Court review land use cases. It could be substituted for the board for two years and then the issue could be addressed by the legislature next session.

His basic point is that he feels some independence should be secured from the agency.

0895 CHAPIN MILBANK stated that he is the outgoing chairman of the Local Government Committee of the Oregon State Bar but is just representing himself. That committee has considered SB 435 but he is not representing the position of the Bar.

0901 REP SMITH asked what the committee's position was.

0902 MR. MILBANK replied that the committee unanimously abhorred the elimination of the circuit court judge in the writ of review procedure. This was partly because of tradition and partly because there is the belief that if it has to be submitted to an arbiter, it should be submitted at the county or local level and to someone who would be reasonably impartial. It can be done in the circuit court and it can be done successfully.

As a citizen, the creation of the Land Use Appeals Board scares him. He senses that the board will become locked into its own particular view of matters.

He stated that in land use matters now, there is as much of a delay at the grass roots level. He has seen plans go to the Marion County Planning Commission that have been on the table for two and three years. There is plenty of delay there and lots of delay at any step in the process. It seems unfair to him to come down on the circuit court or the writ of review procedure without considering all the other delays.

Every county and city is now trying to develop the comprehensive plan to comply with LCDC goals and quidelines. Ultimately, the spirit of compromise will resolve most of the problems and there will be some new set rules and regulations. He stated that in every case, he felt that an LCDC guideline and goal argument could be raised, as well as any of the other arguments. He does not see that much of a speeding up of the procedure in the bill.

He is opposed to the bill generally. He likes the circuit court way.

The chief judge has a very heavy load and generally reduces the case to one issue. The oral argument now has generally been reduced from 30 minutes to about 30 seconds. The writ of review at the circuit court level does allow the time to work on these cases.

0946 BILL BLAIR, representing the City of Salem and the League of Oregon Cities, stated that he was appearing generally in favor of SB 435 but with reservations.

Both the city and the League supported the original SB 435 because it did take LCDC out of the business of judging contested cases. The distinction between quasi-judicial and legislative matters is critical. It is a poorly understood distinction and one that is greatly misunderstood by laymen.

The first question is why take LCDC out of the process. There are three very important reasons. For one, LCDC has been devoting an expanding majority of its time over the past two years to land use appeals. Next year LCDC will have to consider some 240 comprehensive plans from local governments. Many of those will be from large cities and counties and will involve considerable controversy. He is afraid that LCDC will not have the time to do justice to both of its roles--its role in the legislative forum of determining and acknowledging comprehensive plans and its role in considering contested cases.

The second reason is one that concerns him as an attorney. LCDC in the past has been plagued with the problem of using contested cases as vehicles for making major shifts in policy. It is his belief that new policies should be adopted through the rule-making process with a fuller opportunity for citizen input.

The third reason relates to the second. Although there is nothing legally wrong with delegating adjudicatory functions to the same body that does the rule-making, as a matter of philosophy, Oregon is ingrained with the concept of separation of powers and of checks and balances. It is very important that the body that makes the laws not be the same body which decides contested cases under the law.

The concept of streamlining the morass of procedures which surrounds land use cases is extremely attractive. However, LCDC is kept in an adjudicatory rule in SB 435. This is his primary objection. There is a split up of jurisdiction between the board and LCDC. It is his feeling that the Land Use Court concept is a good one. This could

be accomplished by taking LCDC out of the adjuducatory situation, leave it with rule-making authority, and let the board of appeals make the specific case by case decisions.

SB 435 does nothing to reduce LCDC's caseload. Just about every land use case can be said to have goal related issues; most of them now do. The most common way to challenge a land use decision is to fire into as many forums as possible with as many different plaintiffs and parties as possible.

The problem of forum shopping and splitting questions is still left open by SB 435 in its present form. The easiest and most obvious suggestion is to remove section 6 and all reference to it from the bill. All types of land use decisions would then be left to the Land Use Appeals Board. From a procedural standpoint then, it does not make any difference whether what is being done is quasi-judicial or legislative. There was considerable sentiment in the senate to move toward the Land Use Court type of process. That could be done within the existing budget and within the confines of SB 435.

He would concur that the board members ought to be as independent and competent as possible. Mr. Schell gave the argument for allowing the members to serve at the pleasure of the governor so that an incompetent member could be removed. MR. BLAIR's response to that argument is that if the person is incompetent, he should be removed for cause, but do not allow the appearance of politics to enter into a judicial type function.

1024 CHAIRMAN FROHNMAYER asked Mr. Blair to present his proposed suggestions in writing to the committee.

1025 REP BUGAS asked if Mr. Blair had talked about removing all of section 6.

1026 MR. BLAIR responded that he tried to keep it has simple as possible. The basic concept of LCDC review of goal related questions is involved in section 6. Removal of that with all of the other references will accomplish what he feels is needed.

He would prepare written amendments.

1038 BOB STACEY, representing 1000 Friends of Oregon, stated that he was a member of the real estate and land use section of the Bar committee on legislation. His subcommittee recommended no action with respect to the bill. The Executive Committee has taken no action.

SB 435B has as one of its primary objectives major improvements in the process for review of land use decisions. 1000 Friends of Oregon strongly supports the primary and basic premises of the bill and the structure which the bill establishes to carry out its objectives.

Another important objective is to cut the cost to those involved in the land development industry by cutting out unnecessary delays in the process of judicial and administrative review in land use decisions. This bill proposes the elimination of the writ of review in the circuit court. The procedure in the circuit court is agreed by all to be time consuming. Most agree that it achieves no real purpose in cases of

controversy which almost always involve a subsequent appeal to the Court of Appeals which ultimately makes a review of the same decision reviewed by the circuit court.

Substituted for that writ of review and declaratory judgment proceedings is a review by LCDC of goal issues. Goal issues are the primary stumbling blocks in terms of policy decisions for the Court of Appeals in its present cases. It requires that the process of decision making itself be shortened by establishing a 90-day time frame within which the decision of the board must be issued. It imposes an automatic affirmance requirement whenever that deadline is not met.

Finally, the bill cuts the period for filing an appeal of a local government land use decision from 60 days under writ of review to 20 days. That requirement is contained in section 4 subsection 4.

1072 REP SMITH asked if the automatic affirmance was not a vehicle by which the board could decide that it did not need to hear the appeal and just let the 90 days expire and it will affirm itself. The board would then not be fulfilling its obligation to serve as an appellate body.

1077 MR. STACEY responded that it was possible for that to occur.

1078 REP SMITH stated that provision really bothered him. He asked how that was addressed in the senate.

1079 MR. STACEY replied that Mr. Johnson expressed the view that in a case that was appealed from such an automatic affirmance, the Court of Appeals would have little choice but to reverse the board and remand the matter for a decision. That would be the remedy available to a petitioner who felt thwarted by such an action.

MR. STACEY said that he was not certain that would be the effect. The board, in any event, would be expected to handle cursorily any case that fell within the situation described where other cases had been decided on the same issue. The Court of Appeals is handling by memorandum decision a number of fact only cases because of the concern about the case load. One would expect that if there were a case load problem for the board, it would result to some mechanism to control that.

If the Court of Appeals would reverse for failure to support the decision any decision which resulted in an automatic affirmance, a petitioner would have that protection against an arbitrary failure to act.

Most of the decisions proposed in this bill for cutting into the time that a review takes impose upon either the law practitioner or the deciding body the requirement of efficiency and discipline in order to get the job done quickly. Cutting the appeals period from 60 days to 20 days imposes that kind of efficiency requirement upon those who are probably least well trained or disposed to accommodate that objective. Within that 20 day period, a citizen who is not represented by counsel at a local government decision-making hearing and who is dissatisfied with that decision must find and retain competent legal counsel. The citizen must then weigh the chance of winning on the merits against the cost of litigation. There is also a $200 non-refundable deposit which

must be filed within 20 days of the decision and accompany the notice of appeal. The 20 days causes a last minute rush for the least well trained part of the decision reviewing process. He suggested that there is no basis for cutting the period that is presently available. He stated he would submit an amendment in writing to change that 20 days to 30 days simply to add a few more days in which a citizen or an applicant for development approval would have to make the decision whether to appeal or not. He has basically been addressing the citizen appellant because that is usually the party who is not represented by counsel at the proceeding and usually does not have the luxury of making a second application for approval.

In that same subject, on line 35, he proposed changing the filing fee of $200 to a filing fee of $50 with a $150 refundable deposit which would be applied to costs if those costs are awarded against the petitioner and which would be refunded in the case where the petitioner prevailed. Under the current law in writ of review, a petitioner pays his $35 or $37 filing fee and makes a $100 deposit to cover costs awarded against the petitioner. The converse is true in SB 435. The petitioner would pay $200 for the privilege of filing the petition and then if he did not prevail, he would have costs awarded against him in addition to the $200. The $200 does not act as a deposit to defray any portion of the costs. He would also submit a written amendment on this.

This bill is a substantial improvement in the manner in which review of land use decision is conducted. It promises to greatly aide the development community and all other citizens by giving prompt decisions before tribunals which are capable of making good decisions, of separating policy law, and of assigning those responsibilities appropriately to either the policy making body or the legal review body.

1145 SCOTT PARKER, Clackamas County Counsel, representing the Association of Oregon Counties, stated that AOC (Association of Oregon Counties) was strongly in support of SB 435 as originally presented.

AOC has a basic disagreement with Mr. Johnson's philosophy on the amendments. AOC opposes SB 435 as amended.

He presented the committee with proposed amendments (Exhibit F, SB 435).

Clackamas County has more experience than any other county or city in the policy of speeding up the process and cutting costs for development or getting a finality in the decision. Clackamas County gets sued more by either side than any other county in the state.

There is a lot of growth pressure in Clackamas County. He is concerned that SB 435B is not going to speed up the process; he believes that it will complicate and slow down the process. He suggested that the committee examine the claim that this is going to save the counties money.

The concern is specifically with section 6. The fact is, in his judgment, that every good lawyer is going to come up with a goal

related question in every case. He believes that every case where there is a principle or money involved, it will be carried through as far as possible which will be the Court of Appeals and then the Supreme Court.

Becuase of the way the bill is written and because of local governments' decision making process, those legislative decisions would be better made in the rule-making process rather than by substituting for the local decision, LCDC. The question is the balance between local government and state government. As Mr. Schell pointed out in a letter to the senate committee dated May 10, 1979, this proposal upsets that balance.

He feels LCDC should tell local government what those goals mean, but he thinks it is inappropriate for LCDC to substitute its judgment. The problem with SB 435 is that the definition of land use decision covers everything. Section 6 does not exclude the building permit application or the minor partition. Potentially, the board is going to be the hearings officer for LCDC in every case. That does not portend speeding up the process and making the cost of review cheaper.

The policy making should really be in the rule-making, legislative process. It is analogous to the legislature and the appellate courts. The people making the laws are not judging them.

The review of the process on page 4 indicates that LCDC can set aside a judgment of a local body after review in the matters set out in section 6 if LCDC has determined that the city, county or special district has violated the state planning goal. There is no substantial evidence test. There is no requirement for LCDC to give weight to the county's judgment in that matter.

There is a statement further down in section 6 that LCDC shall be bound by findings of fact, but the task given in SB 100 to the local government is that it is to apply the law as it is to the facts in the case. It is self-defeating to allow LCDC to say that in a quasi-judicial case, the rule is going to change or that it wants to set it aside. The Supreme Court and Court of Appeals does make policy in quasi-judicial matters, but they do it very cautiously and in a deliberate way. They do not like to do that and that is not their job. This bill encourages quasi-judicial policy making. He feels that is wrong. In a general way, it is talking about a violation of the separation of powers.

He would like to see LCDC take advantage of its duties in the legislative process and make the policy decision. That is where he disagrees with Mr. Johnson and with AOI.

He is very concerned about the scope of review of the local bodies. The counties and cities spend a lot of time applying the law as they understand it. This bill will essentially say that LCDC is going to have to look at every case. That is not going to save time or money.

He submitted that the original version of SB 435 is the one which should be passed.

1237 MICHAEL TAYLOR, representing Legal Aid Service for Multnomah County, presented the committee with prepared testimony (Exhibit G, SB 435).

He stated that Legal Aid's interest in the bill had nothing to do with land use planning. His interest was in page 10 of the bill, lines 12 and 13. Section 13 of this bill codifies a decision of the Court of Appeals in Hoffman v. French. This is now on review to the Supreme Court. Section 13 writes the Court of Appeals decision in to law.

He stated that he would be satisfied with deleting the language which codifies the Court of Appeals decision and allowing the Supreme Court to do its work through the judicial system.

1248 REP LOMBARD asked if this wasn't considered on a bill earlier.

1249 MR. TAYLOR said a related issue, the writ of mandamus, was considered. The writ of review is used more commonly.

1252 GORDON FOLSE, representing the Association of Oregon Counties, stated that the proposed amendments from AOC (Exhibit F, SB 435) make all appeals go to the board under LCDC.

AOC's position is in support of the original SB 435. It's second preference is the separate land use court. The proposed amendments will be much better in creating the impartial body that AOI feels should be reviewing those decisions.

1260 CHAIRMAN FROHNMAYER closed the hearing and adjourned the meeting at 3:30 p.m.

Submitted,

Pearl Bare
Committee Assistant

Exhibits

Exhibit B, SB 227 - Attorney General's opinion
Exhibit A, HB 2196 - Proposed amendments
Exhibit A, SB 435 - Testimony of Lee Johnson
Exhibit B, SB 435 - Summary of writs of review from Writ of Review Committee
Exhibit C, SB 435 - Testimony of Washington County representatives
Exhibit D, SB 435 - Proposed amendments from Jim Allison
Exhibit E, SB 435 - Testimony of Allen Johnson
Exhibit F, SB 435 - Proposed amendments from AOI
Exhibit G, SB 435 - Testimony of Michael Taylor

0713 REP. RUTHERFORD asked if there was any interest to include an amendment which would provide that punitive damages would not be insurable.

No one made a motion.

0720 REP. RUTHERFORD stated that the insurance industry was very supportive of that concept during the interim.

0725 REP. FROHNMAYER moved SB 422 as amended to the floor with a "do pass" recommendation and that it be printed engrossed.

0731 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Frohnmayer, Gardner, Mason, Richards, Rutherford, Smith. Excused: Lombard.

SB 435 - Relating to judicial review

0739 ELIZABETH STOCKDALE, legislative counsel, stated that sections 1 through 12 of the bill relate to the Land Use Board of Appeals, that is created in the bill to pick up the writ of review of local government land use decisions and also to cover appeals from state agency orders that involved the statewide planning role.

The Land Use Board of Appeals created by the bill would be of not more than five members. How many members will be up to the governor. The board will have the authority to hear land use appeals and decide them. It will be able to operate somewhat like the Court of Appeals in that the board can sit together or individually to review the cases. The board will have final decision-making authority on any appeal that does not have in it an allegation of the violation of a statewide planning goal.

In the case of an allegation of a statewide planning goal violation, that issue alone will be referred to the LCDC court. In its review, the court will hear any argument and review the records on appeal. It will prepare a recommendation and send that to LCDC. LCDC will consider the recommendation and have the option of hearing oral arguments and will then make a determination which it will send back to the board. The board must incorporate those findings in its final order on the appeal. The board's order will then be reviewable in the Court of Appeals. This is very similar to a state agency order under the Administrative Procedure Act.

The board will be independent of LCDC. It will be appointed by the governor and serve at the pleasure of the governor. Members will be subject to confirmation by the senate.

The board would receive its administrative support services from the Department of Land Conservation and Development.

The second half of the bill, starting with section 13, is changes that were made in various sections of ORS that relate to writ of review. They are pretty much the original work of the Writ of Review Advisory Committee that originally wrote SB 435.

The sections that relate to the Board of Appeals have a sunset clause. The sections would take effect on January 1, 1980 and would be repealed July 1, 1983.

0781 CHAIRMAN GARDNER stated this was one of the most significant decisions the committee would make this session and he wanted to go through the bill very carefully section by section.

0790 MS. STOCKDALE stated that section 1(a) of the bill states the policy in enacting the Land Use Board of Appeal to try to shorten the system while still preserving the sound review principles of land use decisions.

Section 2 creates the Land Use Board of Appeals. The board shall consist of not more than five members, who are to be appointed by the governor, subject to confirmation by the senate, and shall consist of a chief hearings referee and other referees. The governor has the discretion to determine how many members. The members serve at the pleasure of the governor and their salaries will be fixed by the governor. The members must be members in good standing of the Oregon State Bar.

The first issue for the committee's consideration relates to section 2. The question raised in the hearing was whether or not the board would be sufficiently independent to really serve the policy of the bill. The suggested changes were that the members be given fixed terms; that they be appointed and could only be removed with cause; and that the salaries be fixed by law.

0805 REP. RICHARDS stated she generally concurred with the remarks by Alan Johnson in this area. She feels that unless there are established firm guidelines about the service of the Appeals Board, that it is creating at the very minimum an appearance of potential inpropriety.

0812 CHAIRMAN GARDNER suggested highlighting all the issues of the bill, then going back through and dealing with each one.

0813 MS. STOCKDALE stated that section 3 defines what a land use decision is and effectively describes the jurisdiction of the board. A land use decision is a final decision or determination that is made by a city, county, or special district governing body concerning the adoption, amendment, or application of the statewide planning goals, a comprehensive plan provision, or a zoning subdivision or other ordinance that implements a comprehensive plan. Land use decision also includes a final decision or determination of a state agency in which the agency is required to apply the statewide planning goals. There is only one suggested amendment in this section. That is in line 11, on page 2 of the bill, after the first word "agency," the words "other than the Land Use Conservation and Development" be inserted so that LCDC is not reviewing its own decisions.

0828 REP. FROHNMAYER stated that if it is the application of a comprehensive plan provision, then he assumes that any zoning variance granted by a city council would be subject to appeal through this process. He asked if the same would be so for any amendment to the plan and any determination of a nonconforming use.

0831 MS. STOCKDALE stated that was correct for an amendment and would be so for any determination of a nonconforming use as long as in applying an ordinance, the nonconforming use provision would be contained within an ordinance.

0834 REP. FROHNMAYER stated that theoretically all state agencies, in most of their major decisions that have any impact on land, have to consider LCDC goals. Therefore, it would apply to Department of Agriculture, DEQ and right on down

the line.

0839 MS. STOCKDALE stated that was correct. Any agencies that have programs that affect land use would be involved.

0840 REP. FROHNMAYER stated that this was because these were already required by statute to adhere to LCDC goals. He asked if this was a problem or if this issue was discussed in the senate.

0841 MS. STOCKDALE replied "yes."

0842 REP. FROHNMAYER asked if the implication were fully understood.

0843 MS. STOCKDALE stated that the committee was aware that currently LCDC has the power to review any state agency action that affects the land use planning goals under ORS 197.300. The understanding was that the same kind of review would go into this Land Use Board of Appeals and still stay in LCDC because if it were a goal issue, LCDC would consider it, under the bill as it is now written.

0846 REP. FROHNMAYER asked if that section was required to go by LCDC in its siting or is it exempted out.

0847 NANCY TOUR, representing the Department of Land Conservation and Development, stated that in the state agency coordination program the Engergy Facilities Siting Council has agreed to apply the goals and local comprehensive plans to their actions.

An informal Attorney General's opinion is that their statute is so broad and their ability to act in the state interest is such that they could take an action which could be read to not be in compliance with the local comprehensive plan.

0853 REP. FROHNMAYER asked if this bill was setting up a situation in which the siting of a nuclear facility could in essence be challenged collaterally through the Land Use Appeals Court.

0856 MS. TOUR replied "nothing more than now currently exists," because jurisdictions can contend that through the commission now.

0859 LEE JOHNSON, Executive Assistant to the Governor, pointed out that the language says "is required to apply the statewide planning goals." Other statutes would have to be looked to. He did not think it broadens or diminishes the present scope of review.

0862 REP. FROHNMAYER stated there could be a number of different challenges to the siting of a power facility. Is there anything farther on in the bill that will make the land use challenge determinative of other issues that may be involved in such as siting decisions?

0865 MR. JOHNSON stated he thought the special provisions in the siting council preempt all other provisions.

0867 REP. FROHNMAYER stated he thought that overrides other provisions.

0868 MS. TOUR stated it did override.

0869 MS. STOCKDALE stated that ORS 469.400 provides first that the only judicial review of a site certificate approval is by the Supreme Court, and subsection 5 of that section says any certificate that is signed and issued by the state and all cities, counties and political subdivisions as to approval of the site. That would probably preempt any challenge to LCDC based on the goals.

0873 MS. TOUR stated that it was her department's intent that it had no jurisdiction over those.

0875 MS. STOCKDALE stated that section 4 grants exclusive jurisdiction over the review of land use action to the Board of Appeals. The review will be commenced by the filing of a notice of intent to appeal with the board.

Subsections 2 and 3 provide the standing requirements in order to appeal. Subsection 2 provides the general standards that any person whose interests are adversely affected or who is aggrieved by a land use decision and who has filed a notice of intent to appeal may petition the board for review of a land use decision or may, within a reasonable time after petition has been filed, intervene and be made a party to any review proceedings. Subsection 3 provides one exception to that general rule. That is that in a quasi-judicial land use proceeding or decision that would now come under writ of review, the person who appeals must have appeared before the governing body or state agency either orally or in writng and either have been entitled as of right to notice and hearing prior to the decision or was the person whose interest was adversely affected or who was aggrieved by their decision. That is pretty much the standard a person has to meet now under writ of review. If a legislative decision is being appealed, any person who is adversely affected or aggrieved can appeal and under the quasi-judicial kind of decisions, the person has to at least appear and either be entitled to notice or be affected or aggrieved by the decision.

0892 REP. MASON asked if subsection 4 related back to subsection 3.

0893 MS. STOCKDALE stated that subsection 4 states a time limit for the notice of intent to appeal. The time line is that once a land use decision has been made, the issue then becomes final. Any person who qualified, who has standing, can file a notice of intent to appeal within 20 days of the date that decision became final. The notice of intent has to be served on the city or the county or whoever has made the decision and has to be accompanied by a filing fee of $200.

0899 REP. MASON stated that subsection 2 talks about intervention as opposed to subsection 4 which talks about the party.

0900 MS. STOCKDALE stated that was correct. Subsections 2 and 3 really describe the standing of a person to get involved in any one of the appeals. Subsection 4 begins to describe the procedure a person has to go through in order to begin the appeals process.

0903 REP. FROHNMAYER asked if intervenors had full party status.

0904 MS. STOCKDALE replied that they would.

0905 REP. FROHNMAYER stated that intervention was not limited for particular purposes and once the individual is admitted to the proceeding then it is as a party with all the rights.

0906 MS. STOCKDALE stated that was correct.

0907 REP. FROHNMAYER stated that was going to create a multi-party situation.

0908 MS. STOCKDALE stated that it could in a really large case, although any person who sought to intervene would still have to have standing.

0910 REP. FROHNMAYER stated that Ms. Stockdale was fully aware of the problem with the APA in having omitted unwisely limited party status or intervenors status and making the proceedings potentially subject to 25 different parties and counsels with all rights of cross-examination.

0913 MS. STOCKDALE continued that subsection 5 states that within 20 days after the notice of intent to appeal is served or within such further time as the board allows, the record must be transmitted to the board by the body from which the decision is being appealed.

Subsection 6 states that 20 days after the record is served, the final formal petition has to be filed and a supporting brief must be filed with it. Lines 6, 7, and 8 on page 3 outline the minimum requirements for inclusion in the petition.

Subsection 7 of section 4 states that the review has to be confined to the record, but allows the board to conduct a hearing for the purpose of determining the facts necessary if there are allegations of unconstitutionality, standing, ex-parte contact, or other procedural irregularities that are not shown in the record. Otherwise the board is bound by any finding of fact of the governing body or state agency for which there is substantial evidence in the whole record. It cannot substitute a judgment.

0929 REP. FROHNMAYER stated that in the first line on page 9, the review will be confined to the record, if any. He asked what it would be confined to if there is no record.

0931 MS. STOCKDALE stated the board would probably have to conduct a hearing.

0932 REP. FROHNMAYER stated that the language does not say that.

0933 MS. STOCKDALE stated that two kinds of action were trying to be accommodated. In a legislative action, like the adoption of a comprehensive plan or the adoption of an ordinance, there is not going to be a formal contested case type of hearing record. It is within the legislative process. So what the board will be reviewing is that action, ordinance or plan against usually a legal standard. There will not be a question of fact. It will be a question of law in interpretation or application of the goals or statutory provisions or the constitution. That is why the "if any" is there.

If there is a record, the board is confined to it. That would probably be the quasi-judicial type of decision.

0940 REP. FROHNMAYER stated that if there isn't a record, it does not say the board can open it up to a limited or unlimited de novo consideration. He did not know what was intended there.

0942 MS. STOCKDALE asked if Rep. Frohnmayer was thinking of the situation where there would be a quasi-judicial decision and no record.

0943 REP. FROHNMAYER replied in the affirmative.

0944 MS. STOCKDALE stated there would have to be a record or the decision would be remanded because the governing body would not have followed the appropriate procedures. The decision would have to be overturned.

0945 REP. FROHNMAYER stated there might be something other than a quasi-contested proceeding. There might be an ordinance making or rule making action taken by that jurisdiction. His question was what is the record for those purposes. What is the record if a city passes an ordinance which is alleged to be in violation of the statewide planning goals?

0949 MS. STOCKDALE stated there might not be a record.

0950 REP. FROHNMAYER stated the record could be the ordinance itself. It could be a record of whatever open meeting or public hearing was taken prior to that time.

0951 MS. STOCKDALE stated that perhaps some statement should be made in the cases where there is not a record or if it is a legislative decision, what the review would be limited to, as was done in the APA.

0952 MR. JOHNSON stated that it was still governed by Fasano. This does not change Fasano. There does have to be a record of the appropriate findings of fact or it will be reversed. There may not be a record of the legislative proceeding. There may just be the ordinance.

0954 REP. FROHNMAYER stated that is his point. He was talking about those land use decisions which are other than Fasano type decisions which require a quasi-judicial record.

0957 MR. JOHNSON stated that is covered in the next sentence.

0958 REP. MASON stated that would be a procedural irregularity.

0960 REP. FROHNMAYER thinks that line 9 does not say everything it is supposed to say.

0961 BOB STACEY, representing 1000 Friends of Oregon, stated that the measure limits its application to review of the application of the goals and ordinances, or to the adoption of those measures. The only standard for review of a legislative enactment would be a constitutional one or one imposed by statutory requirements that are applicable. The statewide planning goals when applicable to a process of legislative ordinance adoption have been held by the commission to specifically require the adoption of findings based upon a record that is before the city council, both on the theory that the city council or the board of commissioners is applying state standards or that there is a specific requirement in the text of those goals for such land use. This mechanism is sufficient for assuring that kind of review because there will be a record in those cases. If there is no goal applicable to that ordinance adoption, the record is the ordinance.

0975 MR. JOHNSON stated his point was that it permits the evidence to be received if it is legislative declaratory judgment type action. This is the only evidence that could be received.

The point is that there could be cases where there is no record. If it is a quasi-judicial case and there is not a record, that is grounds for reversal. If it is a legislative case, there may not be a record. The only areas in which evidence can be received are the areas set forth in the next three lines.

0984 CHAIRMAN GARDNER stated that the ordinance itself would stand against the goal.

0985 HERBERT SCHWAB, Chief Judge of the Court of Appeals, stated he thought the problem might be in the words "if any." Lots of times when a record is being talked about, a transcript or document is thought of. Record really in the broader sense means pleadings, judgments or orders. There will also be a record in the sense that there will always be an ordinance. There will be some ultimate order. He thought the words "if any" created confusion.

0990 CHAIRMAN GARDNER asked for some clarification in the amendments of what the record is.

0992 MS. STOCKDALE continued that the board is bound by any finding of fact of the local governing body or state agency for which there is substantial evidence in the record.

Subsection 8 requires the board to issue its final order on a petition for review within 90 days after the date of filing of the petition. That would still possibly be 40 days after the notice of appeal had been filed, but the record will have been filed so that it can begin right away once the petition has been filed. If the order is not issued within that 90 day period, the decision being reviewed is to be considered affirmed.

Subsection 9 allows the board the discretion to award costs to the prevailing party, including the cost of preparation of the record if the prevailing body is the governing body or the state agency.

Subsection 10 authorizes enforcement of the orders in appropriate judicial proceedings.

Subsection 11 requires the board to publish its orders in official reports so that there is a body of law being built that people can use in subsequent cases. The board is also required to publish the orders of the commission that have been issued in past cases under ORS 197.300. This is like the tax court reports or the Court of Appeals reports.

The issues that came up in section 4 go back to subsection 4. Those are the ones that were prepared by 1000 Friends of Oregon (Exhibit H, SB 435). Those suggestions are that the time for filing the notice of intent should be extended to thirty days, and that instead of having a filing fee of $200, there be a forfeiture if the petition is not filed. The breakdown would be a $50.00 nonrefundable filing fee and a deposit of $150.00 to cover costs. The deposit would be refundable unless the petition were finally acted upon and the petitioner lost. Then it would be applied to costs charged against the petitioner.

The other issue that was raised was in subsection 8, the automatic affirmance if the order were not issued within 90 days.

Section 5 starts to set out the procedure for review.

Subsection 1 of that section says that where a petition for review contains only allegations that a statewide goal has been violated, the board reviews the decision and proceeds as provided in section 6 of the bill, which states the process for referring a recommendation to LCDC.

Subsection 2 states that if the petition states no allegations of statewide planning goals violations, the board reviews the decision and will issue a final order either affirming, reversing or remanding the decision.

Subsection 3 states that when a petition is a mixed petition and has allegations not dependent on the goals and allegations dependent on the goals, the board reviews the decision in its entirety and with respect to the goal issue, will prepare its recommendation to be referred to LCDC. The board will hold its final order until LCDC has made its determination and returned it to the board. LCDC's determination is incorporated into the board's final order and the final order is issued.

Subsection 4 states the grounds upon which the board can reverse or remand a land use decision. Those are if the board finds that a city, county or special district governing body has exceeded its jurisdiction; failed to follow applicable procedures; made a decision not supported by substantial evidence; improperly construed applicable law; or made a decision that was unconstitutional. This is the same as writ of review standards for reversal, with the addition of unconstitutionality. Another ground is the commission has determined, with respect to a goal issue, that the city, county, or special district governing body or the state agency violated the statewide planning goals in making the decision.

1045 REP. MASON stated this was supposed to embody Fasano. He thinks that this does leave out one aspect of Fasano and that is that if the decision was inconsistent with the comprehensive plan.

1050 MR. JOHNSON stated that was in (d), improperly construed the applicable laws. The law requires that the comprehensive plan is followed.

1053 REP. MASON asked if it would be improper to say that it is legislative intent that indeed the applicable law does include the comprehensive plan, because this reads like a laundry list, yet it does not say that.

1056 MR. JOHNSON stated these are just a rewrite of the writ of review statutes. That is what Fasano is based on.

1058 CHAIRMAN GARDNER stated if Rep. Mason felt that way, the Chair had no problem with it.

1060 MS. STOCKDALE continued that subsection 5 says that final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6(a).

There were no issues that came up in the hearing with respect to section 5.

Section 6 provides a procedure for referring board recommendations to the commission whenever there is a goal allegation in a petition for review. After the review proceedings are conducted by the board, the board must prepare recommendations to the commission concerning those goal allegations and submit its recommendations to the commission and to the parties to the proceeding. The recommendation has to include a summary of the evidence. Included in that

recommendation is a recommendation of whether or not the commission should hear oral arguments. The recommendation goes to LCDC. LCDC can decide independently whether or not it should hear oral arguments and then make a determination on the goal issues only. LCDC will return its determination to the board. The board will incorporate that in its final order.

The only issue raised with respect to section 6 was whether or not it should be there at all. The League of Oregon Cities and the counties both question the ability of LCDC to handle review of these issues along with its comprehensive plan review functions.

1083 CHAIRMAN GARDNER asked if this would allow a review of nongoal and goal issues.

1084 MS. STOCKDALE replied "only goal issues." The nongoal issues would have been decided by the board. The thing that differs from judicial review is that if the board were going to reverse based on a nongoal issue, it would not moot out the goal issues. The goal issues would still go to LCDC for a decision. There might be more than enough grounds to reverse or remand an order, given decisions from both bodies.

1088 REP. COHEN stated she wanted some discussion on the justification for that in the sense of why, if there are five people who are permanently appointed for six-years, why they wouldn't be as familiar with the goals as LCDC.

1092 CHAIRMAN GARDNER stated that discussion would be deferred until later because that question has been raised in some proposed amendments to some degree.

1094 REP. BUGAS stated that the board will make a finding. He asked if that was reviewable by LCDC.

1095 MS. STOCKDALE stated that was not exactly reviewable by LCDC. The board, if there is an allegation that the statewide planning goals have been violated, will conduct its review, but on that question alone it will operate like a hearings officer. It will make a recommendation to LCDC, but LCDC will make the final decision on that question. On questions that are not related to the goals, the board does have the final authority. The board does issue the final order in all cases. It is just bound by what LCDC says whenever there is the allegation of a statewide planning goal violation.

1107 REP. MASON asked what was the logic behind allowing oral arguments before the commission.

1108 MS. STOCKDALE replied that in some cases of major policy interpretation of the goals, and significance of the issues, the commission would want to hear arguments and receive briefs itself on those questions. There are others where an allegation of a goal violation might come in the path of some other LCDC decision and it is clear that it is a violation. LCDC could then just adopt the board's recommendation without the need of any additional oral arguments.

1115 REP. MASON stated it seemed to him it should be in the terms of no argument allowed unless the board allows it, instead of argument allowed unless the board does not allow it. He would like to see that the major thrust of oral argument is before the Board of Appeals instead of before the commission. As a matter of course, if the major oral arguments are presented before the commission, it will start to diminish the importance of the board down to the point that the board is merely a preliminary body.

1120 REP. COHEN asked if they weren't arguing different items.

1122 MS. STOCKDALE replied that the board would be hearing everything. It would hear goal and nongoal. It would review the record on goal and nongoal. On the goal issues, it will only prepare a recommendation; it will not prepare a final order.

1124 MR. JOHNSON stated this is one of the most important parts of the bill from his standpoint. Judge Schwab also feels this way. The interpretation of the goals is a policy question which should be decided by the policy board that is charged with that responsibility. This is LCDC.

That is the problem with the whole system today. Some cases go to LCDC; some cases don't. The courts are left trying to guess how LCDC might interpret its own goals. The whole concept here is to have the body charged with that responsibility do it.

As far as allowing oral argument, in a lot of these cases there are extremely important issues which LCDC has got to address. That is why in those cases, there should be oral argument. On the other hand, in a lot of these cases the goal allegation is not the thrust of the case.

1140 MS. TOUR stated that there is a lot of parallel between the way the board is set up and the way the commission now handles its business. There are now hearings officers who make recommendations to the commission. This basically just puts the board in that role on the goal question.

1147 MIKE REYNOLDS, representing the Attorney General's office, stated that one way this does depart from the existing structure is that it will allow the commission not to hear oral argument in certain cases. At present, the commission is bound by the APA and it has to hear oral argument from the parties in every case.

As Mr. Johnson pointed out, there will also be some cases where the hearings officer's recommendation suffices to answer the question and the commission does not need any further amplification from the parties.

1165 MS. STOCKDALE continued that the question with respect to section 6 and whether it should be there or not is raised by the cities and the counties. The arguments are in Exhibit I, SB 435 and Exhibit J, SB 435. Basically their arguments are the time factor. The city makes a fairness argument that it appears that LCDC should expand upon the goals through the rule-making process and not on a case-by-case basis. There are some other arguments in these exhibits.

Subsection 5 of section 6 allows the commission to suspend its consideration of a compliance acknowledgement request if it is pending when one of these petitions comes up and the goal question really bears upon the compliance request. The commission can hold off and wait until the order is issued and the question has been resolved. Then it can go back to the compliance acknowledgement process.

Section 6(a) is parallel to the APA judicial review of agency orders. The only differences are that a petition for review from an order of the board has to be filed within 30 days. Under the APA, it is 60 days. Also, the board has 20 days to transfer the record. An agency has 30 days under the APA.

The standard of review is the same as the APA. Review is confined to the record. The court may affirm, reverse, or remand if the order is unlawful in a substantive way, for error in procedure only if substantial rights of the petitioner were prejudiced, the order is unconstitutional or the order is not supported by substantial evidence in the whole record.

That is the guts of this part of the bill.

Section 7 (a), (b), (c) and (d) are all conforming amendments that stuff the board into Chapter 197 and establish the responsibility of the department to provide support services.

Section 8 removes review of land use decisions from writ of review.

Sections 9 (a) and 10 are amendments that were drafted by the original Writ of Review Advisory Committee. They have not been changed through the engrossments of SB 435. ORS 34.055, which provided for a special undertaking if a land use decision was being reviewed under Writ of Review, has been repealed. Some of these amendments accommodate that repeal.

Section 10 (a) and (b) relate to the city and county orders when they make a land use decision approving or denying subdivision approval, variance or conditional use.

Subsection 7 on line 24, page 9 and subsection 3 on line 35 of that page both require that written notice of the decision has to be given to all parties.

1200 REP. COHEN asked if these were additional changes that the locals are going to have to file. She wanted to know how much of their process was being changed.

1202 MS. STOCKDALE stated the only change in their process would be that once a decision is finally made, the parties to the case have to be notified in writing of what the decision was.

On line 26, the Writ of Review Advisory Committee inserted two words "Notice of." The sentence does not make sense because it is the standard for the approval or denial of a permit, not for giving notice. She suggested that those words come out. The intent of that is accommodated in subsection 3.

Sections 11 and 12 are conforming amendments removing references to writ of review and inserting references to the Land Use Board of Appeals.

Section 13 revises the current writ of review statute for all other cases. That does two things. First, it codifies the decision of the Court of Appeals in the case of Hoffman v. French which was that since the District Court is a court of record, it is no longer subject to writ of review by the circuit court. It can be reviewed directly in the Court of Appeals.

1214 CHAIRMAN GARDNER stated that was an issue that may be taken up at a later time and perhaps reversed.

1215 MS. STOCKDALE stated it was on appeal now to the Supreme Court. Review has been granted. The memo from Michael Marcus (Exhibit G, SB 435, June 18, 1979) asks that at the minimum, the new language on line 13 referring to the

district court be deleted so that whatever the Supreme Court holds will be the law and that this does not necessarily have to go into the statutes or that the committee make an affirmative amendment saying that disregarding Hoffman v. French, a district court order can still be reviewed in circuit court on writ of review.

The substantial change in that section is on line 20, adding a new standard for review, and that is the decision being unconstitutional.

The Writ of Review Committee also changed line 21. The substantial right of the plaintiff was changed to substantial interest being injured in order to give standing for writ of review.

The remainder of the bill are changes that were done by the original committee and do not affect the Land Use Board of Appeals.

Section 14 is a housekeeping amendment. The sections referred to have been repealed.

Section 16 involves the review of boundary commission decisions. The League of Women Voters v. Lane County decision in the Court of Appeals held that a local government boundary commission is a state agency and, therefore, subject to review under the APA and not under writ of review. On lines 21 and 22, reference to the appeal for a boundary change, the writ of review statutes are removed and reference is now made to the APA. There was a suggestion made after the bill left the senate committee that perhaps some reference to the Land Use Board of Appeals needs to be made in line 22 so that it is clear that as a state agency, if the local government boundary commission makes a decision in which it needs to apply the goals, that the decision will go through the Land Use Board of Appeals.

Section 17 repeals ORS 203.200 which states that county decisions should be reviewed by writ of review. That is being changed so that they will go through the board.

Section 18 amends ORS 311.860 which provides for writ of review for tax exemption denial. This is replaced by an appeal to the Department of Revenue since they do now currently have appeal procedures for denial of exemption. That is consistent with current practice.

Section 19 involves the State Board of Education, adjudicating school boundary disputes and would place this under the APA review rather the circuit court.

Section 20 on page 13 would make a very specialized type of arbitration decision subject to the general statute on review of arbitration rather than the writ of review.

These sections are all changed based upon the decisions of the original committee.

Section 21 provides for APA review of certain decisions of the State Board of Education which is a state agency. This review is being made consistent with the APA.

Section 22 is again an arbitration decision.

1257 REP. MASON asked how the State Board of Education got into this.

1258 MS. STOCKDALE stated that as she understood it, the Writ of Review Advisory Committee went through the ORS and found where a decision from anybody was subject to a writ of review. The committee looked at the type of decision and tried to decide whether it was best to retain that review by a circuit court, to have review by the Court of Appeals, or to have review in some other manner. That is what these changes are.

Section 23 involves county orders on abatement on solid waste nuisances. It was apparently left in the writ of review.

Section 24 was changed to a 60-day notice provision for decisions of the Fire Standards Accreditation Board and moved that to review by the Court of Appeals rather than the circuit court.

In section 25, orders of the Fire Marshall are removed from specific reference to writ of review and just substituted by appropriate judicial proceedings.

Section 26 repeals ORS 34.055, the special undertaking of land use decisions, and ORS 197.300 to 197.315 which is the current statute for petition for review to LCDC on goal matters. These are being repealed because of the creation of the Land Use Board covering these kinds of appeals.

Section 27 provides the effective date for the Land Use Board of Appeals as January 1, 1980.

Section 28 susents it on July 1, 1983. The remainder of section 28 is the transition for anything pending before the Land Use Board of Appeals if it dies. It can continue and make the final decision if it goes past the sunset date.

Section 29 is the application date. If petitions for review were filed with LCDC prior to the effective date, LCDC would continue through final resolution of that decision. Only petitions filed after the effective date would begin with the Land Use Board of Appeals.

1283 CHAIRMAN GARDNER stated that the committee was at the point of going back through the bill to start amending it.

1350 REP. RICHARDS stated that the first policy decision was in the construction of the board itself, the manner in which they are paid, and how they are appointed.

She moved, conceptually, that the members be appointed for a fixed term, that they be able to be removed only for cause, and that statutory salary be established. She suggested a six-year term.

1354 MS. STOCKDALE stated the constitutional limit was four years.

1356 REP. MASON stated he would go with four year terms, five members, removal for cause only, the chief referee's salary equal that of a circuit court judge, and the four other referees' salaries equal that of a district court judge.

1360 REP. RUTHERFORD asked if the committee would accept "not more than five."

1361 REP. RICHARDS stated she would.

1362 REP. MASON stated he was not wedded to a specific number.

1364 MR. JOHNSON stated that everyone anticipates that over time the caseload is going to decline.

He can understand why the committee would want removal for cause only, but the other side of the coin is that the very critical thing is that there be a confidence level between the referees and LCDC otherwise it will end up being a protracted procedure. If LCDC is confident in its recommendations of referees and the referees picked, LCDC will be more likely to sign off on a lot of the cases. If that confidence is not there, LCDC will end up hearing oral arguments on every case and have to carefully review every case. That is the only problem.

The appointments are subject to confirmation.

He would not like the salary fixed because the bill would have to go to Ways & Means. LCDC's budget has passed. The intention is to go to the Emergency Board if that budget has to be revised. LCDC feels there is plenty of money in their budget to pay an adequate salary to these referees. If it does not have an adequate budget for this, it feels the Emergency Board would grant it.

1384 REP. MASON stated that the thrust of his concern is that the board have not more than five members. The thrust of the four years and the salary was to give them a certain amount of independence and prestige. He feels LCDC will end up paying the members that much money anyway. Otherwise it would not get competent people.

The removal for cause gives the members a certain amount of independence.

1390 REP. RUTHERFORD asked if Mr. Johnson had an amendment that met the objections raised about the potential adjustment of the salary.

1393 MR. JOHNSON did not think that was important and felt that members of the committee were overemphasizing the independence. This is a unique position. The board members are part judge and part traditional hearings officer. The most difficult cases are going to be those in which the members function as hearings officers. It is important that there be a high level of confidence between the commission and the hearings officer. Personality conflicts could develop and the commission might lose confidence in the hearings officer's work. The commission should then be able to get rid of the board member quickly. That is his concern.

His main concern is that he feels it is a mistake to try to fix the salaries. He feels that what will happen to a great extent is that LCDC will go out and find someone it feels is competent, then figure the salary it will cost to get that individual and finally figure out what to do with the budget.

1404 REP. RUTHERFORD stated the concern raised by the committee is that the salary can be adjusted. If the governor is not happy with the decision the member is rendering, the salary could be adjusted. The Committee is saying that it would like an objective standard by which the salary has been set.

When that was suggested, Mr. Johnson stated he didn't want that because he did not want the bill to go to Ways & Means. He asked again if Mr. Johnson

had any suggestion that would meet the concern of the committee and of Mr. Johnson.

1410 MR. JOHNSON stated that if a salary is fixed in the bill, an appropriation will have to be gotten. The committee could say "as otherwise provided by law."

1414 REP. RUTHERFORD stated that Ms. Stockdale had suggested saying that the salary could not be reduced after it was established. That might be a solution. By having it fixed by law, it puts the legislature in the business of having to fix it.

1416 CHAIRMAN GARDNER stated that part of the problem is the position the board member is taking is really that of the circuit court judge. Some of the concerns raised, particularly by home builders is that there may be some circuit court judge who is not particularly competent in land use decisions but who is independent of the governor and LCDC. The home builders have taken a stand in opposition to the bill because it is more concerned with the lack of impartiality than the lack of competence.

1425 MR. JOHNSON stated he was aware of the home builders position. It has been his view that this position is antithetical to the home builders own interest because what this bill is trying to do is somehow consolidate all this in one proceeding. There has got to be this referee playing a dual role to operate right.

He has no strong objections to the removal for cause. He thinks the committee is being oversensitive.

He has no objection to making a provision that the salary cannot be reduced.

1433 CHAIRMAN GARDNER asked if Mr. Johnson's main concern is whether the bill would go to Ways & Means.

1434 MR. JOHNSON stated that was right on the salary issue. He stated that LCDC might want to pay more than a circuit court judge to the chief referee.

1435 REP. MASON stated that if the language read "not less than the salary," that would allow this. However, he is not impressed with the idea that LCDC is going to go to the Emergency Board rather than Ways & Means. He does not like putting the decisions off on the Emergency Board.

1442 CHAIRMAN GARDNER stated under section 2, the board members are going to be paid something. There is not question about that. There is a fiscal impact in the bill whether or not it is spelled out at a certain amount.

1446 REP. FROHNMAYER stated he did not really think the committee should peg the salaries. This Act is technically going to last only four years. Certainly no person is going to take this job thinking it is for a lifetime or is a super-judgeship. It may well be that someone can be found who simply wants to go into public service for a few years and may be willing to serve substantially below the salary of a circuit judge.

He is much more concerned about the dismissal for cause and would be amenable to an amendment that did not allow reducing the salaries during the term. He does not think it is necessary in the start up of the bill to peg the salaries to any public office.

1453 MS. TOUR stated this issue has been discussed with the Way & Means subcommittee before the budget was passed out. The subcommittee was aware that the bill was coming and aware that nobody knew what the fiscal impact would be because the circuit court does not keep records of its land use cases so no one knows how many cases there will be. That was one reason why the number of people appointed to the board was to be flexible because nobody knew what the case-load was. The subcommittee also knew that the salaries would be set at a future time and that after the first year the Emergency Board would be given a status report. There is $400,000 in the department's budget for the appeals process. That is about what it has been costing under the current procedures. The subcommittee felt that was substantial to get the board started for a year. In January of 1980, the department would be in the position to go to the Emergency Board with some kind of indication. The subcommittee has discussed this and is fully aware of the situation; it just felt this was a little "iffy" to be making any changes in the budget based on a project work-load.

1465 REP. RICHARDS stated she moved a conceptual motion of fixed terms, removal for cause only, and a salary established by statute. She would be amenable to an amendment which spoke to not decreasing salaries after they were established.

1467 CHAIRMAN GARDNER stated that he would take each of the issues one-by-one.

1469 REP. RICHARDS moved that the term of office of the referees in section 2 of the bill be a four year term.

1470 REP. BUGAS stated that he had no objection to that except that the staggered time was for the purpose of allowing continuity and retention of experience.

1475 CHAIRMAN GARDNER stated the bill would be over in four years.

1477 MIKE REYNOLDS stated it says that the bill will be sunseted in four years so that another look may be taken at it.

1479 MR. JOHNSON stated it was really 3 1/2 years. The term of office might be just until July 1, 1983.

1481 MR. JOHNSON advocated not fixing a term because it will be removal for cause. The term may create some real problems; one because the Act does expire before four years. He is not sure in the future that people should all come up at the same time.

One other thing is that there will probably be a caseload that will start going down substantially. He anticipates that within three or four years more than one referee will not be needed.

1489 REP. RICHARDS withdrew her motion and then moved that the term of office be co-existent with the start up date and the termination date of the Act.

1493 MR. JOHNSON stated his concern was that if two or three are hired to start with and two or three years later, one is needed only, he is not sure but what nothing can be done.

1497 REP. RICHARDS amended her motion to the effect so long as the workload requires as reviewed on an annual basis.

1499 REP. MASON stated he saw independence as connected with tenure. If someone decides someone is not needed anymore, it could be overt and the real reason is because the person's decisions are not liked. He feels that fixed terms give some independence to the referees. If they are not independent, he sees no purpose for the bill.

1504 REP. FROHNMAYER stated fixing the term for the first 3 1/2 years of the Act is totally redundant. That is all the life there is. He sees the for cause requirement in the sense of a tenurial protection. He feels that if this is done, the term does not need to be fixed. When the Act is reviewed, and if it is re-enacted, would be the appropriate time to set a term of office. It could then be staggered and the technical details could be worked out.

1508 CHAIRMAN GARDNER stated if a referee can only be removed for cause and there is no term of office set, the term continues until the Act ends.

1509 REP. MASON stated he did not mind that.

1510 REP. FROHNMAYER stated that is greater protection than establishing a term.

1511 REP. MASON said he was referring to the idea that the referee could be let go as the workload decreases because some decision has to be made as to which one will be let go.

1511 CHAIRMAN GARDNER asked what the definition of "cause" was. Would lack of workload be cause for removal.

1512 REP. RICHARDS stated it was very narrow and involved mal-administration of the job.

1513 CHAIRMAN GARDNER stated that wouldn't be a concern here then.

1514 REP. MASON stated he was speaking to Rep. Richards motion that the referees could be let go because of lack of work.

1515 REP. RICHARDS withdrew her motion.

1516 CHAIRMAN GARDNER stated he thought the proper motion would be to basically say that referees shall not be removed for other than cause. Since once they are appointed, they continue until there is cause for dismissal or until the Act ends and since there will be an opportunity to look at this later, the terms of office and the number could be fixed by the legislature later.

1520 REP. MASON stated he hoped that when that comes up again someone does remember that these referees are serving under the Act. If someone doesn't remember, there will be more federal judges for life.

1523 CHAIRMAN GARDNER moved, conceptually, that referees only be removed for cause.

1524 REP. RICHARDS asked for what terms shall the referees be appointed.

1525 CHAIRMAN GARDNER stated that the referees will be appointed when they are appointed and that the term will end when the Act sunsets or until the legislature determines what their term of office shall be.

1526 REP. RICHARDS asked if specific language was needed to say that.

1527 CHAIRMAN GARDNER stated that was implicit within the language in the bill that this will occur.

1530 Hearing no objection to the motion, the CHAIR ordered the motion adopted.

1531 REP. RUTHERFORD moved that the salary of the referees, once having been set, shall not be reduced.

1534 REP. BUGAS asked in what area of compensation Mr. Johnson was thinking about in salary.

1536 MR. JOHNSON stated that the chief referee would probably receive from $35,000 to $45,000. The other referees would probably be from $30,000 to $40,000.

1541 Hearing no objection to the motion, the CHAIR ordered the motion adopted.

1546 MS. STOCKDALE stated the next possible amendment is the suggestion that on page 2 of the bill, line 11, after the first "agency" the words "other than the Land Conservation and Development Commission" be inserted.

1548 CHAIRMAN GARDNER moved the language as outlined by Ms. Stockdale.

1549 Hearing no objection, the CHAIR ordered the motion adopted.

1550 REP. COHEN asked exactly what was going to be allowed to go to the board. She asked whether it would be any local zoning variance or amendment to the plan or nonconforming use that is alleged to violate the goals.

1555 CHAIRMAN GARDNER stated that he thought it was any land use decision that could have otherwise been appealed to the circuit court by writ of review plus any final decision or determination of a state agency, other than LCDC, with respect to that agency's requirement to apply the statewide planning goals.

1558 MR. JOHNSON stated that was correct. It is designed to cover any land use decision that is at present under a writ of review or could be classified as legislative and be a declaratory judgment. Likewise, it embodies the LCDC's present jurisdiction under which it can review most, but not all, land use decisions for compliance with LCDC goals.

1562 MS. STOCKDALE stated it does not pick up anything that is not already reviewable by somebody.

The next issue is subsection 4. These are the amendments which were suggested by 1000 Friends of Oregon (Exhibit H, SB 435) to increase the period of time in which a person can file a notice of intent from 20 days, as it is in the bill, to 30 days and to divide the filing fees into a $50 nonrefundable fee and a $150 deposit. The deposit will be retained only if there were costs charged against the petitioner at the end of the proceedings.

1572 MR. STACEY stated the third amendment (Exhibit H, SB 435) which is an amendment to line 36, page 2, has added "and deposit" to the fee so that in the case where a petitioner files a notice of appeal and then drops the case, the present bill requires that the $200 goes to the local government for the cost of preparing the record. The amendment does not change that

requirement. The $50 filing fee plus the $150 deposit is forfeited and goes to the local government for the preparation of the record. The change comes in the case where it is litigated on the merits and the petitioner loses. The costs that are awarded to the respondent against the petitioner are at least partially covered by the deposit.

The purpose of the fee at present is to indemnify the city or county in any case where a notice of appeal is filed, but the petitioner never follows up. The local government has been required to go through and prepare a record, but there is no review. The local government gets the $200. In the other case, that $200 goes to the Land Use Appeals Board, presumbably for administrative costs. Upon the termination of the proceedings, the board has discretion in subsection 9 to award costs to the prevailing party. If the petitioner files and the petition goes to the merits, the petitioner pays a $200 filing fee and then has $200 awarded against it as cost of preparing the record under this bill. That is $400 total. All this change does is say that $150 of the first $200 can apply to the costs that are judged against a petitioner. That is the current law in the writ of review. A petitioner pays a $35 filing fee that covers court administrative costs and puts up a $100 cost bond. If the petitioner wins, or if the undertaking is dissolved, the $100 is refunded. If the petitioner loses, that $100 is applied to the costs awarded against the petitoner.

1594 MR. JOHNSON stated that the support of the sentiment behind the $200 was to put a filing fee that would discourage people for maliciously filing.

He has no objection to the amendment.

1596 REP. BUGAS asked if Mr. Johnson had any objection to the 30-days rather than the 20-days.

1597 MR. JOHNSON stated that they had been trying to get the time deadline as fast as possible. He did not buy Mr. Stacey's argument that 30 days were needed.

1602 REP. FROHNMAYER stated that as a practical matter an administrative order of a body of this kind has a pretty low level visibility. It might require a little time for people to take advantage of it.

1605 CHAIRMAN GARDNER asked what the period of time was for notice of appeal to the Court of Appeals from the circuit court.

1606 REP. FROHNMAYER stated it was 30 days.

1607 MR. STACEY stated it was 60 days in the case of a judgment from the circuit court. It is 30 days in an administrative agency proceeding. It is also 30 days to petition the Supreme Court for review of a Court of Appeals decision. There is no period he is aware of in the statutes that is less than 30 days. That is for lawyers to do their business. The distinction here is that this is what nonlawyers do before they get a lawyer. Anybody can file a notice of appeal; the problem is that there is a $200 liability.

1611 REP. RUTHERFORD stated that Mr. Stacey raised a good point. Very often these cases are not handled by attorneys in the first instance and the people need time to consult. Secondly, even if they are, the people who are making the decisions are not the attorneys and the time is not spent in filling out the forms; it is spent in deciding whether or not the person wants to

take the case up and whether he has the money.

He thinks that 20 days is too short of a time.

He moved the 30 days.

1616 CHAIRMAN GARDNER stated that the amendments could be taken at the same time as the proposed amendments relate to subsection 4 of section 4 on page 2, the effect of which is to have $50 as a filing fee and the other $150 placed with that to be available as an offset against costs, and to change "20" days in line 30 to "30" days.

1621 REP. BUGAS stated that one of the chief complaints from people who are contesting land use decisions is that they never get answers. Balance that against the desire for speedy determination, he felt the additional 10 days would not be effective. He wanted to keep the 20 days, but he would vote for the money amendment. He wanted the issues separated.

1630 CHAIRMAN GARDNER stated the first motion would be to adopt the third and fourth amendments on Exhibit H, SB 435.

1634 REP. RICHARDS asked if that was an increase of some $70 of what the current rate is.

1635 MS. STOCKDALE stated that was at the circuit court level.

1636 MR. STACEY stated that the expense right now in every case in the circuit court is a $35 filing fee. This makes a $200 fee. There is a $100 refundable bond now. There is an increase under this measure.

1640 REP. COHEN asked if it was clear what that $150 was to be used for.

1643 MS. STOCKDALE stated under Mr. Stacey's amendment, if the appeal is dropped, the $150 would still be lost. That $150 is preserved to compensate the local government because it would have already prepared the report before it knew the appeal was dropped.

1645 CHAIRMAN GARDNER stated he thought this was equitable because it was part of the cost of the case.

1647 REP. RICHARDS stated that under the bill the petitioner has to come up with $200 period. At present it is only a lost $35 filing fee.

1648 CHAIRMAN GARDNER stated he thought that was accurate.

1649 MS. STOCKDALE stated that the amendment would have a $50 nonrefundable corresponding to the $35. The $150 would be refundable if the petitioner prevailed, just like the undertaking in the circuit court that the petitioner gets his $100 bond back.

1651 REP. RICHARDS thought that $150 was going to be used in any case for the local government costs.

1652 MS. STOCKDALE stated it was lost only if the petitioner did not go on with the appeal. It would be the same as it now is in the circuit court.

1657 In response to a roll call vote, the Chair declared the motion passed.
Voting Aye: Cohen, Frohnmayer, Gardner, Rutherford, Smith.
Voting No: Bugas, Mason, Richards.
Excused: Lombard.

1658 REP. RUTHERFORD moved that the 20 days available for notice to be filed be changed to 30 days.

1662 In response to a roll call vote, the CHAIR declared the motion passed.
Voting Aye: Cohen, Frohnmayer, Mason, Richards, Rutherford, Smith.
Voting No: Gardner, Bugas.
Excused: Lombard

1663 MS. STOCKDALE stated there was no language in the bill which appropriates the $50 nonrefundable portion of the fee to the board or to the general fund. She asked if the committee wished to insert some language that says where that $50 goes.

1667 MR. STACEY stated this board is part of the department and there is provision in the department statute that provides that all monies received by the department go to the account of the department.

1668 MS. STOCKDALE stated that the board is not a part of the department; administratively it is served by the department.

1670 MS. TOUR stated that the board would be budgeted by the department, but it is not physically a part of the department.

1673 REP. RICHARDS moved to adjourn at 4:00 p.m.

1678 In response to a roll call vote, the CHAIR declared the motion failed.
Voting Aye: Bugas, Mason, Richards, Smith.
Voting No: Cohen, Frohnmayer, Gardner, Rutherford.
Excused: Lombard.

1682 MS. STOCKDALE stated she believed language was needed directing where that $50 should go.

1683 REP. SMITH moved that clarifying language be inserted in subsection 4 of section 4 to the effect that the $50 be sent to the general fund.

1685 Hearing no objection, the CHAIR ordered the amendment adopted.

1686 REP. BUGAS moved on page 3, line 9, to put a period after the word "record" and to delete the words "if any."

1688 REP. RUTHERFORD asked what would be done in the case of a legislative decision which has no record.

1690 MS. STOCKDALE stated a record was not just a transcript of the proceedings. It included the petition, the ordinance, and the statutes that apply to it.

1691 CHAIRMAN GARDNER stated that the record could be something as simple as a copy of the ordinance.

1692 REP. RICHARDS stated there needed to be a conforming amendment on line 40, page 2.

1692 MS. STOCKDALE stated that was right.

1693 REP. RUTHERFORD stated that suppose the appeal was from lack of notice. He asked if that was part of the record in a legislative decision.

1695 MS. STOCKDALE and CHAIRMAN GARDNER stated that would be a procedural irregularity.

1696 REP. RUTHERFORD asked that if it was confined to the record, is that part of the record.

1697 CHAIRMAN GARDNER stated the bill excepted procedural irregularities not shown in the record. That would be lack of notice.

1699 MS. STOCKDALE stated it wouldn't be part of the record, but it would be something that could be considered in making the decision because it is specifically authorized.

1700 REP. FROHNMAYER stated that would require introduction of evidence.

1701 MS. STOCKDALE stated there would have to be an additional hearing by the board on that kind of an allegation. The fact that it was alleged in the petition would be what would trigger the hearing for that limited purpose.

1704 CHAIRMAN GARDNER stated that the motion was to delete the words ", if any," on page 2 of the bill, line 40, and ", if any" and insert a period on page 3, line 9.

1710 In response to a roll call vote, the CHAIR declared the motion passed.
Voting Aye: Bugas, Gardner, Mason, Richards, Smith.
Voting No: Cohen, Frohnmayer, Rutherford.
Excused: Lombard.

1711 REP. SMITH stated that any automatic finding by any action bothered him. He asked how that worked. This concerned line 16.

1712 MR. JOHNSON stated that there is a time line now in the LCDC statute and the Attorney General's opinion that concurs with it, that it is merely directory, it is not mandatory. If it is going to be made mandatory, something has to happen at the end of that time period. If a mandatory time period is wanted, it is standard to say that it is affirmed. It wouldn't want to be said that it was reversed because it is talking about a local government's decision and the presumption is that it is valid.

1717 REP. RUTHERFORD stated that suppose the case was heard by a hearings officer who died after the hearing of the case but before making his decision.

1720 MR. JOHNSON stated that some reasonableness had to be expected on the part of lawyers that it would probably be stipulated to extend the time period.

1721 REP. RUTHERFORD stated that could not be done. It is a matter of law.

1722 MS. TOUR stated that if both parties agreed, it could be done.

1723 MS. STOCKDALE stated that was for the commission, not for the board.

1724 REP. MASON stated suppose a hard case was brought to the board and the board just did not want to decide it, so it just sat on it. The board could just say it did not make a decision. This provides a nice out for the board.

1727 MR. STACEY said section 6, subsection 3, lines 27 and 28, page 4, says that if additional time is required, the commission shall obtain the permission of the parties for postponement. This is the mechanism used at the commission level for gathering more time. That could be added to subsection 8, section 4 in order to give the board the same discretion. These kinds of situations could then be avoided. If one party were being unreasonable, that would be manifestly apparent to the Court of Appeals on review.

1732 REP. RUTHERFORD moved that conforming language from lines 27 and 28, page 4, referring to the board, be inserted in subsection 8 of section 4 on page 3 of the bill.

1735 REP. RICHARDS stated that the whole goal of the appeals board is to cut down and add more certainty to the appeals process. She would feel more comfortable if that postponement could be for up to 30 days. She did not want it left open-ended.

1737 CHAIRMAN GARDNER stated that the consent of the parties was necessary.

1738 REP. MASON stated he thought it was good language and he was really uncomfortable with leaving in the automatic affirmance.

1740 CHAIRMAN GARDNER stated that if this motion is successful, he did not see the need for the other language subsumed by the amendment.

1741 REP. RUTHERFORD amended his motion to delete "if the order is not issued within 90 days, the decision being reviewed shall be considered affirmed" and insert the language that appears on lines 27 and 28, of page 28, worded to refer to the board.

1744 REP. BUGAS stated that this was changing from silence being affirmation to mandating action in 90 days unless there is an agreement to extend.

1745 MR. JOHNSON stated that the point is that there is left a hiatus. The deadline might as well be removed. Automatic affirmance is a standard technique in many statutes.

1748 REP. SMITH asked if that affirmance was appealable.

1749 CHAIRMAN GARDNER stated it was.

1750 MR. JOHNSON stated otherwise there cannot be a judicial review because there is not an order. That is the whole concept.

1751 MR. STACEY stated that one problem with the appealability of these orders is that if a commission's or board's orders are required to contain findings of fact and there is an affirmance by nonaction, there is a real question as to what the Court of Appeals is going to do with that order in reviewing it. That problem has existed with boundary commissions because there is a similar provision in the boundary commission statute. No case has been appealed to the Court of Appeals to deal with that question. There is substantial argument that could be made that it would have to be reversed.

1754 MR. JOHNSON stated the point is that it is a triggering device. As a practical matter, it is telling the board it has to stay within this time line. It is important to have the triggering mechanism there if the board doesn't.

1756 REP. BUGAS stated this was part of the problem on the local level. An answer cannot be gotten. This gives an answer.

1758 MR. JOHNSON stated a lot of the testimony in the senate was for a fixed deadline. He knows of no way to do this.

1759 REP. RICHARDS stated that was why she proposed a maximum 30 day postponement for a decision.

1760 CHAIRMAN GARDNER asked what would happen after the 30 days.

1761 REP. RICHARDS stated the board would have to make a decision.

1762 REP. BUGAS stated the problem was that there was no mechanism to enforce this.

1763 REP. MASON asked if there wasn't some law regarding circuit court judges that if they do not render a decision within so many days, their pay stops.

1764 MR. JOHNSON asked how many times that had been imposed.

1765 CHAIRMAN GARDNER stated his father used it once.

1766 REP. MASON stated that was not a bad provision.

1767 REP. BUGAS stated this is one time it should be simplified and the citizen thought of. The citizen ought to have an answer.

1768 REP. RUTHERFORD stated Rep. Bugas was right, but the existing language gives one party a hammer. The party with the hammer is the one who won at the lower level.

1770 REP. BUGAS stated that not getting an answer is the biggest complaint he has heard about land use problems.

1774 MR. JOHNSON stated that as a practical matter he did not think the commission would go over the statutory time limits. There might be an accident sometimes where it would go over. The automatic affirmation triggers an event so that someone can get judicial review. It is a simple device used in a lot of other statutes.

1778 REP. COHEN stated that if the affirmation were left in and the language was added saying that an additional period of time could be added, that was the compromise that the committee is looking for in some sense.

1780 MR. JOHNSON stated it did not need to be spelled out that the parties can stipulate; the parties can always stipulate.

1781 REP. RUTHERFORD asked how parties could waive a statute.

1782 MR. JOHNSON stated it was their right.

1783 REP. BUGAS stated he did not object to Rep. Cohen's suggestion.

1784 CHAIRMAN GARDNER stated the motion before the committee was to add the language from page 4, lines 27 and 28, relating to the board, and to delete the automatic affirmance in lines 15 and 16.

1787 REP. RUTHERFORD responded to Rep. Cohen about her suggestion being a compromise. The reason why the 90 days being the automatic affirmance is not the compromise is that it gives one party the automatic hammer on the case.

1789 REP. FROHNMAYER stated the other factor to consider was that the matter would have been adjudicated below and there is no reason to grant some kind of a presumption of irregularity or going forward.

1790 CHAIRMAN GARDNER stated the net effect was giving the board discretionary review.

1791 REP. SMITH stated that meant there will not be a decision.

1792 CHAIRMAN GARDNER stated there are decisions in the same sense as the Supreme Court. If it does not decide, the decision of the next lower court is affirmed.

1794 REP. SMITH stated the Washington County case that comes up before the board that is not reported anywhere will never set any precedent if the appeals board merely sits back and allows everything go by 90 days because it likes the lower court's decision.

1975 MR. JOHNSON stated this was triggering judicial review. What will happen when it goes up for judicial review is that the court would probably have to reverse it if it were an LCDC case. It could decide a Fasano case. The court will surely chew the commission's ear pretty hard. He feels a bub-a-boo is being raised that is not there.

1799 REP. FROHNMAYER stated he thought Mr. Johnson was right. The effect is that if it goes to the Court of Appeals on an APA contested case review, there are no findings of fact and conclusions of law. Therefore, it would be reversed. The hammer that the winner had at the lower level would be reversed.

If the board is under a mandatory command to issue a decision and it doesn't do it, that is cause under the definition of cause for removal of the commissioners.

He thinks the checks and balances are in there and the incentive system is there for decisions to be made.

1804 REP. BUGAS stated that was if the automatic affirmation were taken out.

1805 REP. FROHNMAYER replied in the affirmative because the automatic affirmation in effect would result in automatic reversal above. There will be no findings. The risk of the automatic reversal would be very high.

1806 MR. JOHNSON stated the point is that the parties get to the court and get the question decided quickly.

1807 REP. BUGAS asked about the comment about the testimony in the senate and would there be any problem with concurrence.

1808 MR. JOHNSON stated there was a lot of very strong sentiment for this.

1809 REP. RUTHERFORD stated that Rep. Frohnmayer had given Rep. Bugas further cause to be concerned about not taking it out. That is that if it triggers automatic appeals from the board, it would require additional time for appeals.

He feels the pressure is being put at the wrong place. The problem is not that the parties are delaying. It is that the board is not making the decision in 90 days. The parties are being penalized for the board not acting. The board should be penalized. Say that the hearings officer does not get paid.

1814 CHAIRMAN GARDNER stated the motion was by Rep. Rutherford to delete the automatic affirmation language on lines 15 and 16 of page 3, and insert the language on lines 27 and 28 on page 4 for allowance of time, but relating to the board instead of the commission.

1818 REP. BUGAS stated he would vote for it and offer a conceptual amendment about salary.

1822 In response to a roll call vote, the CHAIR declared the motion passed.
Voting Aye: Bugas, Cohen, Gardner, Mason, Richards, Rutherford, Smith.
Voting No: Frohnmayer.
Excused: Lombard.

1824 REP. BUGAS moved, conceptually, that in order to keep the board moving that if there is not a decision within 90 days, the salary stop, unless the parties stipulate for a time extension.

1826 CHAIRMAN GARDNER stated this would basically take the judicial language about the circuit court judges.

1827 REP. RUTHERFORD stated that if the parties can stipulate to extend, it is alright.

1831 REP. FROHNMAYER stated this was bordering on tying their hands, stringing them up, and hanging them by their feet. There may be something totally beyond the control of the board. He feels this is overkill.

1834 MR. REYNOLDS stated one possible reason for delay in the board's order is that the commission has not acted on a bifurcated appeal. This would effectively be suspending the pay of the board members for a possible delay on the part of the commission.

In response to a roll call vote, the CHAIR declared the motion failed.
Voting Aye: Bugas, Mason.
Voting No: Cohen, Frohnmayer, Gardner, Richards, Rutherford, Smith.
Excused: Lombard.

1840 REP. SMITH moved to adjourn the meeting.

1843 In response to a roll call vote, the CHAIR declared the motion passed.
Voting Aye: Bugas, Cohen, Frohnmayer, Mason, Richards, Smith.
Voting No: Gardner, Rutherford.
Excused: Lombard

1844 CHAIRMAN GARDNER adjourned the meeting at 4:00 p.m.

Submitted,

Pearl Bare, Committee Assistant
Harriet Civin, Final Typist

Exhibits:

Exhibit D, SB 422 - Proposed amendments
Exhibit H, SB 435 - Proposed amendments from 1000 Friends of Oregon
Exhibit I, SB 435 - Letter from city of Salem
Exhibit J, SB 435 - Letter from Clackamas County

0688 MR. YOUNG stated that it would affect all judgments maintained in the Department of Human Resources. Approximately $200,000 a year would be collected. It would go to the Department of Human Resources to offset welfare costs.

SB 435B - Relating to judicial review

0709 CHAIRMAN GARDNER opened the work session on SB 435.

0711 ELIZABETH STOCKDALE, Legislative Counsel, stated that the committee was just finishing Section 4 at the last work session.

She presented the committee with a letter from Steve Schell (Exhibit K, SB 435) and a set of proposed amendments (Exhibit L, SB 435) prepared by Mike Reynolds for Lee Johnson at the Chairman's request.

These amendments (Exhibit L, SB 435) are on the issue of the 90-day automatic affirmance of any decision that the board does not review within 90-days. The suggestion is to insert after "days" on page 3, line 16, the words "and no extension of time has been stipulated to by the parties" and on line 16, after "affirmed", insert ", the decision may then be appealed in the manner provided in Section 6a". In Section 6a the the rest of the language of the proposed amendments would be inserted.

This is kind of a compromise to try to get the committee to retain automatic affirmance.

0736 CHAIRMAN GARDNER stated that if a person appeals and an order goes up and is affirmed within 60-days, the Court of Appeals would look at the same criteria that the board would look at.

0740 REP MASON asked if the bill hadn't been amended to remove the automatic 90-day affirmation.

0741 CHAIRMAN GARDNER stated that he thought the committee had at one point in time.

0742 MS. STOCKDALE stated that the committee had amended that subsection on Saturday to require that the decision be issued within 90-days unless an extension is stipulated to be all parties. The language on automatic affirmance was removed.

The amendments (Exhibit L, SB 435) would reinstate the language on automatic affirmance and would specify that the Court of Appeals would then review the decision using the same standards that the board would have to use. There would still be a stipulation for extension of time.

This is the end of Section 4.

There is an insertion on two pages. One is on page 3 in subsection a of Section 4. Then there would be an insertion on page 6 after line 1. That would go at the end of Section 6(a). If the committee were to adopt this, it would revoke the committee's previous amendments at Section 6(a).

0756 REP SMITH stated that he wanted to make sure that it was clear that this does not make it easier to push this into the Court of Appeals who then will only look at the county's or city's determination and there will be no record whatsoever in the appeal board. He feels that is an appropriate approach.

The proposed language (Exhibit L, SB 435) says that it will reverse or remand only if the city, county, special district, etc., has used other things. There is not reference to the board at all. If the docket gets pretty heavy, all people have to do is allow some time period to elapse and then jump to the Court of Appeals.

He asked if the 90 days had been removed once and for all.

0768 CHAIRMAN GARDNER stated that he thought the 90 days was still in there.

0769 REP SMITH stated that the way he read the proposed language, after appealing a decision to the board, the board could sit on it for 90 days, an appeal would be taken, and the Court of Appeals would only remand if there was something inadequate in the determination of the county.

0773 CHAIRMAN GARDNER replied that basically the language in the second half of the amendments is just the writ of review language. That is the exact language of what the scope of review would be on a land use decision to the Court of Appeals anyway.

0776 REP SMITH stated that his concern was simply that the simple, expedited procedure that Rep Bugas was talking about the other day could be lost if there were a volume of appeals from county commissions that simply sat on the board for 90 days and then went to the Court of Appeals at a much greater expense. The Court of Appeals would simply look back at the county record because there was no board record whatsoever.

0783 CHAIRMAN GARDNER stated that from a practical point of view what is going to happen is that if it does in fact go to the board and the board makes a controversial decision, there will be an appeal to the Court of Appeals anyway.

The proposed amendments recognize that in reality a lot of decisions are going to find their final resting place in the board decisions . If someone wants to go passed that, he will appeal anyway.

If there is no decision from the board, the Court of Appeals will look back and place itself in the position of the board in making the decision. That is not unreasonable to him because it preserves the ability for things to end in the board and yet preserves the right of the people to have review in the Court of Appeals.

It is a question of who is ultimately going to be making the decisions. It could utlimately be either the Court of Appeals or the board. This at least allows for the automatic affirmance in 90 days.

0797 REP SMITH asked where the decision goes, at present, after the county commission makes it.

0798 MS. STOCKDALE replied that it went to the circuit court.

0799 REP SMITH stated that it would then go to the Court of Appeals.

0800 CHAIRMAN GARDNER stated that was right.

0801 REP SMITH stated that this has surplanted the circuit court then. The circuit court does not have the ability now to sit on something 90 days and have it automatically affirmed.

0802 MS. STOCKDALE replied that was right.

0803 LEE JOHNSON stated that as a practical matter the idea is not to give some grounds for automatic affirmance. He could not imagine the commission or the board letting cases go just because this would be an easy way to decide them.

It may happen some time and the point is to guarantee that the parties can get the decision resolved. The Court of Appeals is going to be substituting its judgments for the judgment of the board and the board is not going to want to cede that authority. The whole concept is that the board should have that authority.

MR. JOHNSON stated that he thought the amendments improved the bill because otherwise if there were not findings of facts and conclusions of the law, the court might automatically have to reverse it.

0817 REP FROHNMAYER stated that he was much happier with something that defined the scope of review, whatever that was, than leaving it open-ended with the court.

0819 REP SMITH asked if it were necessary to have sub (E) in the amendments.

0820 MR. JOHNSON stated that was just a restatement of the writ of review standards which are in this bill and in other places also.

0822 CHAIRMAN GARDNER moved adoption of the proposed amendments (Exhibit L, SB 435).

0825 MS. STOCKDALE asked if that motion included revoking the prior amendments.

0826 CHAIRMAN GARDNER replied in the affirmative. That was the amendment that deleted the automatic affirmance. Reinstating the automatic affirmance is part of his motion.

0838 Hearing no objections, the CHAIR order the amendments adopted.

0839 MS. STOCKDALE stated that there were no suggested amendments to Section 5.

There were two issues in Section 6. The first one was whether or not the Land Conservation and Development Commission should be deciding the goal questions at all. This is a question that was raised by the cities and counties. They suggested that LCDC not be involved at all in these review processes and that the board be the sole authority before the Court of Appeals having to do with land use decisions.

Section 6, page 4, provides for the referral of goal issues by the board to LCDC for its determination. That determination is binding on the board and to be incoporated in the board's order.

The cities and counties are suggesting that Section 6 be deleted in its entirety and that the board be the final authority for all aspects of the review of the land use decision whether they are related to the state-wide planning goals or not.

0856 REP MASON stated that in Section 6, motions have to do with whether or not oral arguments can be denied as a matter of course or if that would be the exception.

0857 MS. STOCKDALE stated that the first thing is whether or not it stays.

0859 CHAIRMAN GARDNER asked if there was any interest in deleting this section. There was no response from the committee members.

0860 MS. STOCKDALE stated that in subsection 3 of that section, the current language provides that the commission is to allow the parties an opportunity to present oral argument unless the board recommends that oral argument not be allowed and the commission agrees with the board's recommendation. There was some discussion on Saturday that that should be the other way and that oral arguments should not be allowed unless the board recommends that they be allowed.

0864 REP MASON moved that oral arguments should not be allowed unless the board recommends that they be allowed and the commission concurs.

0867 MIKE REYNOLDS, representing the Attorney General Office, stated that the reason this was worded this way is because if it is worded the other way, the board has control over whether or not oral argument will be allowed because if the board does not recommend oral argument, the commission has no way to invoke oral argument. The problem is that the commission may think a case is important that the board does not. Worded this way, the intent is that the commission can request oral argument even though the baord does not want oral argument.

0874 REP MASON stated that he had no objection to the actual form. His point was that he thought oral arguments before the commission should be the exception. It did not matter to him whether the board granted the exception or the commission granted the exception. The way the bill is written at present, oral argument before the commission is the norm. That is what his objection is. He would like to see people concentrating on the board instead of thinking they will just make a record with the board and then get down to the nitty-gritty with the commission.

0881 CHAIRMAN GARDNER stated that he thought Rep Mason was saying that there should be some provision to say that oral arguments should not be allowed unless the board allows it.

0882 REP MASON asked if Mr. Reynolds wanted the commission to make the decision.

0883 CHAIRMAN GARDNER stated that he thought Mr. Reynolds had said just the opposite and that Mr. Reynolds did not want the commission deciding whether or not the board should give oral argument.

0884 MR. REYNOLDS replied "no". The argument in this situation is before the commission. The language was written so that the commission will have the final say and be able to decide whether it should hear oral arguments on any goal related issue.

0889 REP MASON stated that the way it is written, oral argument before the commission is a matter of course.

0890 REP BUGAS stated that he did not agree.

0892 REP MASON stated that it took an affirmative action on the part of the board to preclude oral argument.

He would like to see it written so that it took an affirmative act on the part of the commission to allow oral argument.

0894 CHAIRMAN GARDNER stated that is what Rep Mason's motion was.

0897 REP RUTHERFORD suggested saying that the argument before the board shall be on the record and in a written brief unless the commission allows oral argument.

0900 CHAIRMAN GARDNER stated that was the motion in essence.

0901 MR. JOHNSON stated that he wondered why the committee did not just take out the whole sentence that starts at the end of line 20. The main thing he wanted to get in was that the board should make a recommendation regarding oral argument.

He thought if that sentence were deleted, the problem would be solved.

902 REP MASON stated that would be okay with him.

He withdrew his former motion and then moved to delete the sentence starting on line 20 with "The" and ending on line 22, on page 4 of the bill.

0914 REP FROHNMAYER asked about the conforming language that appears on lines 15 and 16 dealing with when that opportunity is or is not presented.

He did not see any great need to change the language in the bill. If any indication is written in that the parties will have less of a right to oral argument, he thought this would send up a red flag to people who think they will be denied their right to be heard. That could essentially jeopardize the fate of the bill.

0922 CHAIRMAN GARDNER suggested voting on the motion before the committee. If that motion passes, the committee can then look at conforming language.

0925 REP BUGAS stated that he was having trouble with Section 6. His notes say that on the question of violation of LCDC goals, LCDC has the final determination. He asked if that was technically correct.

0929 MR. JOHNSON replied that that was correct within the administrative level.

0930 REP BUGAS asked if he were correct in saying that LCDC had the final say, but that it did not initiate the hearing on the complaint or the objection on the goal.

0934 MR. JOHNSON stated that the intent under Section 6 is that the board not be acting like a judge and that it does not have quasi-judicial powers. All the referee on the board is is like a hearings officer in any kind of administrative proceeding. The referee puts the record together, listens to

the arguments and makes a recommendation to the commission as to how he thinks the case ought to be resolved. The commission then reviews that record. It may review it; it may not, at its own discretion.

0942 REP BUGAS asked if the referee decided that it was fundamentally a goal issue and if he split out the issues.

0943 MR. JOHNSON stated that he thought the decision as to whether it is a goal issue or not will be decided by the allegations.

0944 REP BUGAS asked who made that decision when it goes before the board.

0945 MR. JOHNSON replied that the board would typically be faced with a petition which had a series of allegations. The referee would decide which of those allegations were allegations of a goal violations. He would then make some recommended findings of fact and conclusions of law. He would also recommend whether or not there should be oral arguments. His recommendations would then go to the commission and the commission would have to dispose of the issues that pertained to the goals.

0952 REP BUGAS asked whether the commission would set the hearing date on a Fasano type issue.

0953 MR. JOHNSON replied that the referee would set that date.

Most of the hearings are not going to be evidentiary. There will be a record and about all there is to hear is arguments anyway. Only in a few cases will there be evidence. It is not a typical evidentiary hearing.

0957 CHAIRMAN GARDNER stated that the motion is to delete the sentence beginning on line 20, page 4, regarding oral arguments.

0959 MR. REYNOLDS stated that the existing APA requires oral arguments before the decision making body. If this language is taken out, in reference to oral argument, with the existing APA, oral argument will be required in all cases. It has to be limited in some respect and there has to be some language in the bill that it is going to be limited. That is the reason that language was put in rather then having it be left up to the commission.

0964 MR. JOHNSON stated that if the motion is successful, oral argument will be made a matter of right. That is the problem.

0965 CHAIRMAN GARDNER stated that the sense of Rep Mason's motion was not to make it a matter of right. If this motion passes, Rep Mason's concern will then be dealt with.

0967 REP BUGAS stated that when in petition comes in with allegations, there could be a goal violation intermingled with Fasano type allegations.

0974 MR. JOHNSON stated that the first thing a person does, following the steps of the bill, is to file a notice of appeal. This notifies the board that there will be an appeal on a decision by the local governing body. That notice goes to the commission. It puts everybody on notice.

0978 REP BUGAS stated that it now goes to the board. That is a change.

0979 MR. JOHSON replied that was right.

That puts everybody on notice and it is a directory to the local governing body which then puts together the record and sends it to the board.

The record, in 95% of the cases, will have been made entirely at the local governing level.

20 days after the record arrives at the board, the person has to file a petition in which he stipulates what he feels the error in the decision of the local governmental body was. The brief is also filed at that time. The petition may be alleging Fasano errors and may be separately alleging goal violations. If they are Fasano, the board's referee's decision, as far as the administrative level, is final. If they are goal questions, the referee prepares recommended findings and conclusions and sends them to the commission. The commission then enters its findings.

1002 In response to a roll call vote on Rep Mason's motion, the CHAIR declared the motion failed. Voting aye: Mason, Richards. Voting no: Bugas, Cohen, Frohnmayer, Lombard, Smith, Gardner. Excused: Rutherford.

1003 REP RICHARDS stated that she voted "aye" because she thought there ought to be oral arguments.

1004 MR. JOHNSON stated that the California Supreme Court, for example, for many years never permitted oral arguments. The Court of Appeals is considering rules to abolish oral arguments there because in cases in litigation, parties ought to be able to write briefs in which they state their arguments. Oral arguments really play a questionable role in most review type proceedings. Oral arugment is very important in a jury trial.

1014 CHAIRMAN GARDNER stated that there were questions raised about the time limits on page 5.

1015 MS. STOCKDALE stated that this was discussed concerning the difference between this bill and the APA.

1016 MR. JOHNSON stated that he thought the committee adopted entirely the amendments from 1000 Friends.

1018 REP FROHNMAYER stated that was just with respect to the initial filing of notice.

1020 CHAIRMAN GARDNER asked if anyone had any desire to change the time period in Section 6(a). No one responded.

1025 NANCY TOUR stated that at the hearing on SB 435 some representatives of Washington County asked that Section 7(a), which amends ORS 197.252, be further amended to define the term "land conservation and development action". The only amendment in that section now is a conforming amendment to refer to the board of appeals sections in the bill.

This section deals with LCDC imposing conditions on compliance schedules. There has been some disquiet among some people as to how far that authority goes. Both the Washington County counsel and Mr. Jim Allison brought amendments relating to the substance of that section. At the time of that discussion, some members of the committee responded that they were not sure whether the amendments were germane to the bill because the title is relating to judicial review and not to substantive land use.

1043 MR. JOHNSON stated that he basically felt the amendments were inappropriate to this bill because they deal with a substantive issue as to what the effect of LCDC goals are, particularly during this period for acknowledgement, and what the effect of those goals is on the issuance of building permits.

He thought they raised a substantive issue which is not related to this bill. He felt this would cause a firestorm. He did not want to take a position one way or the other. He believes that the courts have already held that issuance of a building permit can be challenged by a writ of review on the grounds that it does not comply with the LCDC goals.

In effect, those amendments are trying to take that right away.

This bill is not trying to curtail or enlarge the legal rights of the parties.

.057 MS. TOUR stated that she did not think the amendments were germane to the bill. The issue came up because one of the commission's charges is to yearly give grants of money and time extensions along to its jurisdictions to do planning. Washington County has received numerous extensions, as have many jurisdictions. Some questions have been raised about a number of minor partitioning and questionable building permits that have been issued, so the Director who has the authority to condition grants, is currently dealing with the Washington County situation. One of the things the Director is considering in placing a condition on another year's extension to their grant is that Washington County may have to apply the goals to building permits. She does not think that is anything new; it is a condition that has been included in the enforcement orders that have been placed on a couple of counties. It has not been contested.

It is something that is not germane to the bill and has not even yet been decided. It is in the process of being reviewed by the Director and the commission.

Mr. Allison has raised a related question. That is the question of the delegation of authority and whether the commission can delegate the authority to set those grant condition to the Director. She believes that it can. It has been done by administrative rule. There is still the ability to get to the commission if a person does not like the conditions the Director sets. The rule itself allows for a hearing in front of the commission and commission action if the city or county does not like the conditions. That provides adequate ability for the concerned party to place that question in front of the commission. The definition of "party" is broad enough so that an individual landowner would have the ability to get to the commission.

1078 REP SMITH stated that the germaneness is going to be a major issue. He has not settle in his own mind that if the relating clause contains a number of statutes, the bill can be a vehicle for any substantive change.

1081 MR. JOHNSON stated that he would not argue that the subject was not germane in the legal sense.

It is a bill that is strictly confined to procedure. There is no effort in the bill to enlarge or contract anyone's rights. He feels that is unquestionably what the intention of the amendment is.

1087 CHAIRMAN GARDNER stated that he did not think that Mr. Johnson could make that argument. The Washington County amendments are basically to define something for the purposes of procedural use. That would come within the relating cause. He would rule that the amendments are germane.

1092 REP FROHNMAYER stated that he thought the amendments were getting into substantive language and policy. He was not well equipped to deal with that. He did not know what the unintended ramifications might be. He felt that it was an extremely broad definition and because of that the ramification might go far beyond the immediate concerns of Washington County.

1096 CHAIRMAN GARDNER asked if there were any interest on the committee to insert that in the bill.

1097 REP BUGAS stated that the letter that Rep Smith has from Washington County does not mention the county commissioners. It is talking about either the planning commission or the county counsel being here.

1102 MS. TOUR stated that they were at the last hearing.

1104 CHAIRMAN GARDNER stated that Mr. Allison was here Saturday, but he did not remember anyone being here from the commissioner's office.

1105 REP COHEN stated that she would not be inclined to take either one of the two amendments that were discussed. She had a hard enough time with the bill as it was without tacking on a lot of other things.

1108 CHAIRMAN GARDNER stated that the record would show that the issue was raised.

1111 MS. STOCKDALE stated that the next proposed amendment was on page 9, Section 10(B). On line 26, the original Writ of Review Committee inserted the words "notice of" at the beginning of the sentence. The sentence does not make sense. The intent was to require that notice be given of a final decision. That is accomplished in line 35.

1116 CHAIRMAN GARDNER moved deletion of the words "notice of" in line 26 on page 9 of the bill.

That would leave the language as it was before and is now existing law.

1121 REP FROHNMAYER stated that it would just make it grammatically correct.

1122 Hearing no objection, the CHAIR ordered the amendment adopted.

1123 MS. STOCKDALE stated that the next requested amendment is in Section 13 on page 10, line 13.

The Writ of Review Advisory Committee inserted the words "a district court or" in order to codify the decision in Hoffman v. French. That decision from the Court of Appeals was that the district court is now a court of record, review should be directed to the Court of Appeals, and now longer should the writ of review be available to the circuit court. The request for the proposed amendments came from Multnomah County Legal Aid. The request was that the committee at least consider deleting the language so that the Supreme Court decision on Hoffman v. French would prevail no matter what that decision is. The request was also for the committee to affirmatively state that district court decisions could still be taken on writ of review to the circuit court.

1134 CHAIRMAN GARDNER asked that if by deleting the words "district court or", is there sufficient legislative record in Ms. Stockdale's opinion to allow writ of review from the district court.

The matter is before the committee from a legislative history viewpoint. He asked if extra language was necessary for legislative intent.

1139 MS. STOCKDALE stated that she thought, given the status of the case itself--it is on review to the Supreme Court, review has been granted, but the decisions hasn't been made--it might be safer to make an affirmative statement if the committee wished to overrule Hoffman v. French and have the district court decision subject to writ of review in the circuit court. It should be affirmatively stated; for example, on line 12, the writs will be allowed in all cases where the inferior court, officer or tribunal, and then insert "including a district court" rather than "other than a district court". This would make an affirmative statement.

1145 CHAIRMAN GARDNER so moved.

1146 Hearing no objection, the CHAIR ordered the amendment adopted.

1147 MS. STOCKDALE stated that on page 11, line 22, this section amends the local government boundary commission statute to codify the decision in the League of Women Voters v. Lane County case. The local government boundary commission is a state agency and is therefore subject to the APA. Since this section is being amended in the same bill that creates the Land Use Board of Appeals, it was felt that it would be necessary to refer specifically to the land use board review section so that the amendment could not be read to preclude local government boundary commission decisions that do apply to the state planning goals from being reviewed by the board of appeals.

In line 22, the suggestion is to include language that refers to Sections 4-6 of the bill so that there would be no question that a local government boundary commission decision that did require application of the state-wide planning goals would be reviewable by the board and by LCDC under this bill.

1160 CHAIRMAN GARDNER moved that language be added to include decisions by the local government boundary commissions.

1162 Hearing no objection, the CHAIR ordered the amendment adopted.

1163 CHAIRMAN GARDNER stated that the committee has taken action on the language referring to the district court. That was conceptual language that would allow the district court decisions to be reviewable by this review. There was no intent there to include the agency in the writ of review.

1168 MS. STOCKDALE suggested that the language read "writs shall be allowed in all case where the inferior court, officer or tribunal, including the district court, other than an agency".

1170 CHAIRMAN GARDNER so moved.

1171 Hearing no objection, the CHAIR so ordered.

1172 REP RICHARDS asked what the procedure for appeal on a boundary commission decision is now and if this is adding another layer of appeal to those particular decisions.

1173 MS. STOCKDALE replied that a local government boundary commission was held to be a state agency in League of Women Voters v. Lane County. Therefore, they are precluded from writ of review and would be reviewed by the Court of Appeals if they had a contested case or they would go under the APA review to the circuit court if there was no contested case and there was no record. The circuit court would make a record on a substantial review in the Court of Appeals.

1177 MR. JOHNSON stated that they are also as a state agency subject to LCDC.

1178 MS. STOCKDALE replied in the affirmative.

1180 REP GARDNER stated that the substance of the committee's amendment would be to have the decisions go the the Land Use Board of Appeals.

1183 MS. STOCKDALE replied in the affirmative if they apply to the state-wide planning goals.

1184 MR. JOHNSON stated that if it were a goal question it would go to the board, otherwise it would go through APA.

1185 MR. REYNOLDS stated that inserting that language would not change the existing situation at all. Goal questions would continue to go to LCDC and non-goal questions would continue to go to the Court of Appeals. The board under this approach would act as a hearings officer and prepare recommendations on a goal question. Non-goal questions would continue to go to the Court of Appeals. The board would act the same as a hearings officer does right now. The board would not have jurisdiction over non-goal questions of state agencies.

1191 CHAIRMAN GARDNER asked what the amendment was really doing.

1192 MR. JOHNSON replied that the amendment is really doing what the law already says to do. It is a codification of case law.

1192 CHAIRMAN GARDNER replied that it was a codification except that the board would review the goal questions by the amendment and send them up.

1193 MR. JOHNSON stated that was right.

1194 MS. STOCKDALE stated that the language that is being inserted says that orders of the boundary commission are to be appealed in accordance with the provisions of the APA relating to judicial review of agency orders. It could be construed since the language is not in the same bill that this is an express exclusion of local government boundary commissions from the LCDC process and review. She felt it was necessary to include that language in Sections 4-6 to clarify that they would still be subject to review by LCDC on goal issues.

There is one final question. On the last page of the bill there is the sunset clause. This would repeal the board effective July 1, 1983. All that would leave then for review of the decisions that would be coming under this board would be writ of review and the current APA for state agencies. There would no longer be LCDC review of goal issues because Section 26 has not been repealed. ORS 197.300, 305 and 315 provide for that so they would have to be affirmatively re-enacted if the committee wanted to return to the status quo.

1206 CHAIRMAN GARDNER stated that an amendment was necessary to say that the goal issues were reviewable be LCDC.

1208 MS. STOCKDALE stated that an amendment would be needed to affirmatively re-enact those sections that have been repealed. It could just be left alone with the hope that the next legislature will fix it.

1210 REP SMITH asked why there was a repealer and a sunset.

1211 MS. STOCKDALE replied that the senate committee adopted the sunset in order to assure the counties that the legislature would review the effectiveness and desirability of having the Land Use Board.

1212 REP SMITH asked if continuation was anticipated.

1213 MS. STOCKDALE stated that was her understanding from that committee. The way it is drafted now, the legislature would have to take some affirmative action to continue the board.

1216 REP SMITH wanted to make sure that it was not anticipated that within that period of time the body would develop such a body of law that nothing was left to be decided. The sunset, then, is merely a review for the sake of review.

1218 MS. STOCKDALE responded in the affirmative.

1219 REP RICHARDS stated that this was looking at substantial compliance and a lot more validity in the land use picture at the end of that time.

1221 CHAIRMAN GARDNER moved that Section 27, page 15, of the bill be amended by deleting "January 1, 1980" and inserting "October 1, 1979".

1224 MR. JOHNSON stated that should also be done in Section 29.

1225 CHAIRMAN GARDNER stated that the purpose of his motion was to get this thing going a little earlier.

1126 REP FROHNMAYER wanted to make sure this could be done. The board will probably have to adopt or at least amend its rules and procedures under the APA to deal with some of the finer matters given to it. He asked if it would be able to do that by that time.

1228 MR. JOHNSON replied that he did not think there was any problem.

1229 MS. STOCKDALE stated that she thought an emergency clause would be needed.

1230 REP FROHNMAYER stated that it would need an emergency clause and then an effective date for October 1.

1231 MS. STOCKDALE stated that it was getting awfully close to the 90-days effective date.

1231 MR. JOHNSON stated that he did think there was a desirability in these judicial type bills for a firm date. He suggested November 1.

1233 CHAIRMAN GARDNER withdrew his motion.

He moved that in line 4, page 15 of the bill, "January 1, 1980" be deleted and "November 1, 1979" be inserted and that there be a corresponding amendment in line 10, page 16.

1238 In response to a roll call vote, the CHAIR declared the motion passed. Voting aye: Bugas, Frohnmayer, Richards, Rutherford, Gardner. Voting no: Smith. Excused: Cohen, Lombard, Mason.

1239 REP RICHARDS asked what is was in the house rules that did not allow a simple objection to be noted and the time not wasted in a mandatory roll call.

1241 CHAIRMAN GARDNER stated that he asked for a roll call because he was not sure where other members of the committee stood on the motion.

1243 MR. JOHNSON stated that he was talking with 1000 Friends and League of Women Voters about the provision with regard to the fixed term and removal for cause. All are concerned about that because if a mistake is made in the appointment process or if there is a personal conflict that develops, the level of confidence between the referees and LCDC could breakdown.

He suggested as an alternative that no referee could be removed without the concurrence of the governor and the commission.

1254 REP RICHARDS stated that if removal for cause was not retained and that measure of independence was not granted to the appeals board, she would vote "no" on the bill.

1256 REP FROHNMAYER stated that there might be something to the suggestion by Mr. Johnson. The committee amended the bill to say "removal for cause" but

it did not say who would do the removing or how the "for cause" hearing, if any, would be conducted. The grounds that would constitute "cause" were not specified. This has been left incomplete. He was not sure but what requiring the concurrence of the governor and the commission wasn't adequate protection. A similar thing was done on a bill involving education. He was satisfied that that was sufficient protection.

1263 REP RICHARDS asked Rep Frohnmayer if there were removal for cause precedent elsewhere in the body of law in Oregon and a general understanding of what that term means.

1264 REP FROHNMAYER replied that it is usually specified by statute or administrative rule, although sometimes in very broad terms.

1267 REP RICHARDS asked if there was a standard in the APA for removal for cause.

1268 CHAIRMAN GARDNER asked who would determine what removal for cause was if the language were left in.

1269 REP FROHNMAYER replied that there would be a review in court.

1270 CHAIRMAN GARDNER stated that LCDC would by rule determine what cause was and then take action.

1271 MR. JOHNSON stated that the way the bill was written, the governor would have to remove the referee. Presumably the referee would have the right to a proceeding and it would probably be a mandamus proceeding.

1273 CHAIRMAN GARDNER asked who would determine by administrative rule what "cause" was.

1274 REP FROHNMAYER replied that no one would be necessary by administrative rule.

1275 CHAIRMAN GARDNER asked if the governor would then determine what "cause" was and the court would review upon the governor's determination.

1276 REP FROHNMAYER stated that was right according to the way the bill is now written.

1277 CHAIRMAN GARDNER stated that it seemed to him that the committee needed to spell out what "cause" was if it wanted to take care of Rep Richards' concern that the board be independent.

1278 REP BUGAS asked how that could be done. Would getting along with LCDC be one of the requirements?

1279 REP RICHARDS replied that she did not think it should be. There are any number of people in the state who are qualified to serve on the board. She could not buy the argument about making a mistake about competence.

1281 MR. JOHNSON stated that the point he was trying to get across is that he had the same problem when he was an Attorney General. A chief counsel would be assigned to an agency. There was an occasion where he fully disagreed with the agency. The agency said that it could not work with the chief counsel because it did not like him and it did not have confidence in the work he was doing.

If the commission is receiving recommendations from referees it does not have confidence in, the commission is, in effect, going to reopen the whole case which will make it a much longer case.

He feels that by having to have concurrence of the governor and the commission--including the back-up of the senate confirmation in the first place--Rep Richards' concern is not well taken.

1292 REP RICHARDS asked Rep Frohnmayer if this was essentially the same process, why was there a pressing need to make the suggested change.

Rep Frohnmayer had stated that it was essentially the same sort of quality check.

She did not understand the problem with "removal for cause".

1294 REP FROHNMAYER stated that there were two problems identified. One is that any removal for cause does require a hearing. The statute has been left silent as to the hearing, the nature of the charges that constitute adequate cause, and what happens to the person pending the proceeding for removal. All of those under normal disciplinary statutes take up most of the statutes for a given profession. He was saying that the concurrence of the governor and the commission would accomplish the same objective without having to spend a lot of time right now having to decide what would constitute adequate cause.

1303 REP RICHARDS asked that counsel prepare a mechanism for removal for cause.

1305 CHAIRMAN GARDNER stated that was a little broad. He asked if Rep Richards had specific grounds.

1306 MR. JOHNSON suggested the same grounds that employees are on on the merit system.

1307 REP RICHARDS stated that she would like to see that in writing, but it sounded good.

1308 CHAIRMAN GARDNER stated that it was his intention, if possible, to take action on the bill to send it out today. He asked if Rep Richards were satisfied with that standard.

1310 REP RICHARDS stated that she would like to see it. She asked for counsel to supply the committee with copies of the section Mr. Johnson had referred to.

1312 REP FROHNMAYER stated that he wanted to try another way of resolving the issue.

He moved to further amend the bill by providing for removal of the hearings officer upon concurrence of the governor and the commission.

1315 CHAIRMAN GARDNER stated that Rep Frohnmayer moved that Section 2 of the bill be further amended to provide for removal of a member of the hearings board by concurrence of the governor and the LCDC commission.

1316 REP SMITH asked if that would be a unanimous decision of the commission or a majority decision.

1315 MR. JOHNSON stated that he thought since it was phrased "by the commission" it would require a majority vote.

1318 REP FROHNMAYER stated that he amended his motion to make it by a unanimous vote of the commission.

1321 REP BUGAS stated that he thought this would get to an impasse.

1326 In response to a roll call vote, the CHAIR declared the motion failed. Voting aye: Frohnmayer. Voting no: Bugas, Lombard, Richards, Rutherford, Smith, Gardner. Excused: Cohen, Mason.

1328 REP RICHARDS suggested deferring action until the committee had a chance to look at the section of the statute that provides for removal for cause.

1330 CHAIRMAN GARDNER stated that the committee would take up again at 1:30 p.m. and at that time he would like to have some language on grounds for removal for cause that are in other places in the statutes and some alternate proposals for concurrence of the commission.

It was his intention to resolve that issue at that time and then take a vote on the bill.

1335 CHAIRMAN GARDNER adjourned the meeting at 12:30 p.m.

Submitted,

Pearl Bare

Pearl Bare
Committee Assistant

Exhibits

SB 142, Exhibit A - Letter from Mental Health submitted by David A. Isom
SB 142, Exhibit B - Letter from Gerard S. Lobosco

SB 207, Exhibit A - Testimony of Lawrence Young

SB 435, Exhibit K - Letter from Steve Schell submitted by Elizabeth Stockdale
SB 435, Exhibit L - Proposed amendments

CHAIRMAN GARDNER called the meeting to order at 1:40 pm and opened the work session.

SB 435B - Relating to judicial review

0065 ELIZABETH STOCKDALE, Legislative Counsel, statements were inaudible. She presented the committee with pertinent ORS (Exhibit M, SB 435).

Questions and comments from Reps. Gardner and Bugas and Ms. Stockdale's replies were inaudible.

0140 REP. RICHARDS stated that she thought the latitude ought to be as broad as the comments that were heard in committee, ORS 656.714 does that.

By two phrases that she has heard mentioned and comments from ORS 656.724, she believes they should be court proceedings. The list could read (inaudible) or unfitness to render effective service. That would be a combination of the grounds for cause in ORS 656.714 to 656.724. ORS 656.714 would be grounds of incompetence. Unfitness to render effective service could be added to the list on the fourth line of 656.714 and subsection 3, which bars the right of review by court could be deleted.

Discussion between Reps. Frohnmayer and Richards was inaduible.

0168 REP. RICHARDS stated ORS 240.465. The reason she recommended it was because it is public record available easily to the public when it is on file (inaudible) ORS 240.075. It was fine if the committee felt it was not necessary.

REP. RICHARDS moved that removal cause in SB 435 be substituted as the language in ORS 656.714, subsection (1), with the addition of grounds of incompetence and unfitness to render effective service and that subsections 2 and 3 of that section be deleted.

Discussion following the motion was inaudible.

0195 Hearing no objections, the CHAIR ordered the amendment adopted.

0197 REP. FROHNMAYER moved that SB 435 as amended be sent to the floor with a "do pass" recommendation and that it be printed engrossed.

Discussion following was inaudible.

0344 REP. RICHARDS stated that she concurred with Rep. Cohen's requirement and believed that the next session should take a careful look at the performance.

0355 In response to a roll call vote on the motion to send SB 435 as amended to the floor with a "do pass" recommendation and that it be printed engrossed, the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Frohnmayer, Gardner, Lombard, Mason, Richards, Rutherford, Smith.

HB 3121 - Relating to interest rate on judgment and decrees

0370 The motion made to table HB 3121.

In response to a roll call vote the CHAIR declared the motion passed. Voting aye: Bugas, Cohen, Gardner, Lombard, Mason, Richards, Rutherford, Smith. Excused: Frohnmayer.

SB 632A - Relating to legal rate of interest

House Committee on Judiciary
Exhibit A, SB 435
June 18, 1979 - 1:37 p.m.
5-pages

Testimony by Lee Johnson
Senate Bill 435
House Judiciary Committee

June 18, 1979

The most vexatious area of litigation confronting courts and administrative agencies are land use cases. This has resulted in the development of confusing and sometimes conflicting legal rules and inordinate delays. The delays have severely hampered local government in making land use decisions which have substantial public impact and generally thwarted the land use planning process. The costs of housing and commercial projects have been magnified to a prohibitive level because of these delays. Much of this delay results from the procedural morass in which land use litigation is conducted. The purpose of Senate Bill 435 is to bring about an orderly and expeditious process for the resolution of land use issues.

The solutions proposed in the bill are to a degree novel and complex. The reasons for the complexity are embodied in the land use planning process. In the first place, we are dealing with a process which contains elements of legislative policy-making by politically accountable bodies, and is also administrative and quasi-judicial. In Fasano the Oregon Supreme Court held that many land use decisions which heretofore were deemed to be legislative are now quasi-judicial. The Court has left unanswered where the line between legislative and quasi-judicial lies. Furthermore, even though the Court has delineated certain types of decisions as quasi-judicial, it cannot be ignored that such decisions also appropriately retain elements of political policy making. The simplest zone change usually involves the weighing of competing public concern.

Landuse planning is further complicated by the multi-layered decision process. First, there is the decision at the local level. Here, the process is often two-tiered involving the city or county planning commissions and the respective governing body. In the metropolitan area, we have another layer in the Metropolitan Service District. Coupled with these two elements, LCDC plays a major role in the land use decision process. Cities, counties and other governmental bodies can appeal any local land use decision to LCDC on the grounds that it is inconsistent with LCDC goals. Private parties, however, can only appeal certain decisions to LCDC. For example, a private party can appeal a zone change but not a subdivision approval.

Superimposed over this elaborate planning agency structure is judicial review. The most common form is the writ of review to the circuit court. The scope of writ is generally limited to a review of the record, but evidence can be taken with regard to such questions as standing, adequacy of the record and ex parte contacts. Writ of review is the appropriate remedy for raising the Fasano issues: i.e., was there adequate notice, hearing, findings of fact and law, and did the local governing body adequately consider the public interest and whether there is other available land. The writ can also be used to attack a local land use decision on the grounds it violates LCDC goals. Thus, in effect the circuit courts have concurrent jurisdiction with LCDC over LCDC goal issues. Indeed, in some cases the circuit court has exclusive jurisdiction over LCDC goal questions because of the limited right of appeal to LCDC afforded private parties under ORS 197.300.

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The circuit court decision in a writ of review case is subject to appeal to the Court of Appeals with discretionary review by the Supreme Court. It should be noted that since the scope of the review is on the record, the circuit court's findings generally are not given weight by the appellate courts.

If the local land use decision is legislative, then the appropriate remedy is by declaratory judgment. This interjects another complexity because often it is difficult for the litigants to determine whether a decision is legislative or quasi-judicial. In some instances, the party seeking judicial review files both a writ of review and a declaratory judgment action.

Finally, there is one other avenue of judicial review available. If a party appeals to LCDC, then the Commission's decision is subject to appeal under the Administrative Procedures Act, ORS chapter 183.

This procedural nightmare is further complicated by the fact that Fasano and LCDC goal issues often overlap. To illustrate, failure to provide adequate notice or hearing may violate Fasano, and likewise would be a violation of Goal 2 of the LCDC goals.

A final, and probably the most important concern, is that the present system violates sound administrative law principles. Under Senate Bill 100 LCDC was vested by the legislature as the state land use planning agency with the policy making function of developing statewide goals. However, these goals like any statement of policy and law require interpretation. Indeed, it is in the process of interpretation and application that the goals will take on flesh and substance in governing the day to day planning decisions of other governmental bodies. It should seem apparent that

interpretation and construction of the goals should properly be the function of LCDC since it is the agency vested initially with the task of drafting and implementing the goals. Under the existing process, this is not always true. A party can allege violation of an LCDC goal in a writ of review proceeding, and the court must then interpret the goal often without benefit of any previous decision by LCDC. Thus, instead of LCDC performing its role as the state's land use planning agency, the courts are compelled to take on this task -- a role which courts are singularly unfit to perform. Such a procedure not only leads to incongruous and conflicting results, but creates cases which are difficult and time-consuming for the courts to decide. It would be more desirable that LCDC initially interpret its own goals. The courts would then confine its review of LCDC's decision to determine whether the interpretation was consistent with the language of the goal and is consistent with LCDC's authority.

The procedural principles embodied in Senate Bill 435 are to consolidate all issues in land use cases in a single administrative proceeding. The bill establishes a Land Use Board of Appeals which will have both quasi-judicial authority and will also act as the hearings referee. The Board consists of a chief hearings referee and such other referees as the Governor may appoint. The referees must be members of the Bar.

Under the bill, the Board has exclusive jurisdiction to review all land use decisions, whether legislative or quasi-judicial in nature. If the decision involves issues other than the LCDC, the referee hears the case and enters a final order either affirming, remanding, or reversing the local government decision. In these cases,

the referee would be guided by judicial precedent and would perform essentially the same functions that a circuit court judge does in a writ of review or declaratory judgment action. If the case involves an LCDC goal issue, the referee prepares recommended findings of fact and conclusions of law. The litigants may prepare exceptions. The case is then submitted to LCDC for final decision on the goal issue. Parties may appeal any final decision by the referee or LCDC to the Court of Appeals in the same manner as other administrative appeals.

In order to expedite this review process, the Board and LCDC are placed under tight deadlines.

(1) The notice of intent to appeal must be filed within 20 days of the local government decision.

(2) The record must be submitted to the Board within 20 days unless an extension is granted.

(3) The appealing party must submit his petition and brief within 20 days of receipt of the record.

(4) The Board and the Commission have 90 days from the filing of the petition to render a final decision.

It is the position of the Governor's Office that SB 435 will substantially improve both the quality and the manner of disposition of land use litigation in the following particulars.

(1) The bill reduces the present procedural complex into a single adminsitrative proceeding in which all issues must be raised and promptly disposed of.

(2) It requires that LCDC goal issues will be initially decided by the Commission.

(3) It provides for an expeditious time table for handling of land use decision at the administrative level.

(4) Under the bill the issue presented for judicial review will be presented in an orderly straightforward manner, thus expediting judicial resolution.

# # # #

Steve Schell
Bill Love

House Committee on Judiciary
Exhibit B, SB 435
June 18, 1979 - 1:37 p.m.
3-pages

SENATE BILL 435 (B-ENGROSSED)
WRITS OF REVIEW

BEFORE HOUSE COMMITTEE ON JUDICIARY
A GENERAL OVERVIEW

Project

Senate Bill 435 was originally a Law Improvement Committee (LIC) project. The LIC is a statutory committee established by the legislature to review areas of the law deemed to need comprehensive evaluation. In the past, the LIC has revised the insurance laws, forestry laws, banking code, probate code, etc.

Specific projects are undertaken by the creation of special advisory committees appointed by the LIC which receive staff assistance from Legislative Counsel's office.

Writ of Review

The Writ of Review is of English common-law origin and has been carried over to the American legal system. It is a limited-purpose writ whereby a court can demand of a lower tribunal or decision-making body that certain items be brought before it for review on the existing record (it does not result in a new trial with new evidence, witnesses, etc.).

It became embodied many years ago in what is now ORS Chapter 34. Over the years, either by reference to Writ of Review in the statutes or by express reference to ORS Chapter 34, it became a convenient vehicle for use by the legislature in attempting to provide for some level of judicial review of actions by prescribed administrative bodies even though traditionally or logically it was not really the appropriate remedy.

In more recent years, most of the attention to the statutes and procedures specifically describing the writ have involved land use cases and appeals.

Advisory Committee Makeup

The members of the Advisory Committee (the Committee) are all lawyers from varied backgrounds and areas of the state. Two (the Chairman and Vice Chairman) are also members of the LIC. The Committee consisted of a circuit judge, a district court judge, a county counsel, a deputy city attorney, a law professor, two practicing lawyers--one of whom is also a former member of LCDC--and one attorney engaged in business and no longer in the active practice. Areas represented included Southern Oregon, Central Oregon, the mid-Willamette Valley as well as the metropolitan Portland area.

Meetings

The Committee held monthly meetings over a two-year period, all public notices given to interested and affected persons from an established mailing list. All of the meetings were held in the Capitol building in Salem. Members of the public and other interested groups and persons were encouraged to appear, submit memoranda, and provide input to the Committee. Among those appearing were the homebuilders, Legal Aid, 1000 Friends and League of Women Voters. The Committee also met with a justice of the Oregon Supreme Court and with the court administrator of the Oregon Court of Appeals.

Project Objective

The Advisory Committee was charged with the task of reviewing and evaluating all of the Oregon laws dealing with the Writ of Review and to determine to what extent these laws should be continued, repealed or modified.

THE BILL

The 29 sections of the B-Engrossed Bill can be grouped in three categories:

1) Section 1-12 relate to land use cases. Because of the significance of these sections, they will be highlighted separately below. The Committee established a separate procedure for review of land use cases in lieu of the writ.

2) Section 13 eliminates the use of the writ as an alternative appeal route to the circuit courts for decisions of the Oregon District Court. Because the District Courts are now courts of record in this state and appeal is available directly to the Oregon Court of Appeals from its decisions, the continuation of the writ, with its potential for misuse and duplicity, appears no longer justified. This section also specifically adds "unconstitutionality" as a basis for review where the writ otherwise is appropriate.

3) Section 14-29 relate to other provisions of Oregon law where reference to the writ is made. Each of these areas was considered separately and appropriate recommendations made. Basically, it was the Committee's opinion that judicial review would be simplified and expedited in most cases if it was done by appeal to the Oregon Court of Appeals under procedures comparable to the Administrative Procedures Act (ORS Chapter 183) for appeals from most state agencies.

Legislative Procedure

Following the introduction of the original Bill, numerous work sessions were held involving a Senate subcommittee, Legislative Counsel staff, members of the Writ of Review Committee, LCDC, the Attorney General's office, Lee Johnson of the Governor's staff who reflected upon his experience both as the Attorney General and as a Judge of the Court of Appeals, builders and developers, cities and counties, 1000 Friends of Oregon, Chief Judge Herb Schwab of the Court of Appeals and his Chief Administrator and others.

Senate Bill 435 B-Engrossed is a result of that collective input, while not 100% satisfactory in all of its aspects to everyone, it does reflect a compromise concensus.

Among the fundamental concerns of the Writ of Review Committee with regard to land use cases were:

1) Simplification. Have one level of administrative decision making and one of judicial review.
2) Accelerate the final decision; reduce the time involved.
3) Reduce the costs involved in obtaining a final decision.
4) Maintain or improve the quality of the final decision.
5) Improve consistency and uniformity.

SB 435 (B-Engrossed) would meet all but the first of the Writ of Review Committee's objectives.

Greg Hathaway
John Fisher
Larry Frazier

House Committee on Judiciary
Exhibit C, SB 435
June 18, 1979 - 1:37 p.m.
2-pages

WASHINGTON COUNTY

ADMINISTRATION BUILDING — 150 N. FIRST AVENUE
HILLSBORO, OREGON 97123

June 15, 1979

DANIEL O. POTTER
COUNTY ADMINISTRATOR
ROOM 418
(503)648-8676

Representative Norm Smith
Room H-470
State Capitol Building
Salem, Oregon 97310

Dear Representative Smith:

It would appear that LCDC may impose conditions on Washington County under the provisions of ORS 197.252 which will require the application of state-wide goals 3 (agricultural) and 4 (forestry) to the issuance of building permits.

The County is concerned that such a requirement would be extremely difficult to administer and will result in litigation over the definition of a "land conservation and development action" as that term is undefined in ORS 197.252.

It is our opinion that it was not the intent of the legislature to require the application of any goal to ministerial acts such as the issuance of a building permit.

Failure of the legislature to define the term will result in an expensive delay in our planning process to update our comprehensive framework plan for acknowledgement by LCDC.

Therefore, enclosed is a tentative proposed amendment to Senate Bill 435. The Board of County Commissioners will consider final action on the proposed amendment Monday morning. I anticipate that Greg Hathaway, County Counsel, and Larry Frazier, Planning Director, will be in attendance at the judiciary committee's hearing Monday afternoon to discuss the Board's proposal.

We would appreciate your thoughts and your consideration of the proposed amendment.

Sincerely,

Daniel O. Potter
County Administrator

DOP;GSH:lh

WASHINGTON COUNTY'S TENTATIVE PROPOSED AMENDMENT TO B-ENGROSSED SENATE BILL 435

On page 7 of the B-Engrossed Bill, after line 6, insert a new paragraph (c) to read as follows:

> "(c) As used in this subsection, 'land conservation and development action' means a discretionary action by a county or city involving a proposed development of land requiring a public hearing pursuant to state or local law."

Proposed amendments to B-Eng. SB 435

Submitted by: Jim Allison June 18, 1979.

TO: House Judiciary Committee.

1--On page 6, lines 36 to 40, (ORS 197.252) define term "land conservation and development action."

2--On page 7, of the B-Eng. bill, after line 15, add the following two sections:

" (4) Prior to imposing conditions upon a city or county as provided in subsection (1) of this section, the commission shall notify the county or city of the proposed conditions and shall conduct a public hearing prior to making the required findings. Notice of the hearing shall be given in a manner provided by law. (or in a manner established by the commission.)

(5) The duties of the commission in this section shall not be delegated."

House Committee on Judiciary
Exhibit E, SB 435
June 18, 1979 - 1:37 p.m.
4-pages

To: House Judiciary Committee

From : Allen L. Johnson

Re: SB 435 -- Land Use Board of Appeals

Date: June 18, 1979

I respectfully submit these comments as my personal observations and recommendations concerning Senate Bill 435. They do not represent the views of any person or organization with which I am affiliated.

As a matter of background, I am an attorney with a Eugene law firm. I have represented both developers and opponents of development in land use matters. At present, I serve on the Continuing Legal Education Committee of the Oregon State Bar as well as on the executive committee of the Bar's section on Real Estate and Land Use. I am also a member of the Administrative Law Section of the American Bar Association.

For the past two years, I have spent from half to three-quarters of my time processing land use appeals as a contract hearings officer for the Land Conservation and Development Commission.

Because SB 435 affects me personally, I do not offer an opinion on whether it should pass. The purpose of this memorandum is to identify and attempt to solve certain serious problems with the bill as adopted by the Senate.

Independence:

As drawn, SB 435 would radically politicize review of land use decisions. At present, local land use decisions are reviewed either by the courts or by the semi-autonomous LCDC. The same is true of state agency decisions affecting land use.

SB 435 places initial review of local land use decisions in the hands of five administrative officers whose salaries and job security are made subject to the "pleasure" of the chief political officer of the state. Such a system triply undermines the integrity of the quasi-judicial administrative process. It creates a basket of patronage plums that would tempt a philospher-king. It places intense pressure on the hearings officials to reach decisions that will please their patron. And, even if the governor and the referees are blameless in fact, it creates an appearance of impropriety and unfairness to parties and the public.

At the very minimum, the officials should be appointed for fixed terms, subject to removal only for cause, and their salaries should be made uniform and not subject to reduction during their terms of office.

These limitations would be consistent with good administrative law practices and with the powers of the legislature. The United States Supreme Court has ruled that while Congress may not limit or participate in the President's decisions to remove cabinet and other officials whose duties are primarily "executive" in nature, it may impose limits on the removal of quasi-judicial officers, saying:

> "The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." Humphrey's Executor v. United States, 295 U.S. 602, 627-29, 55 S Ct. 869, 79 L Ed 1611 (1935).

I have found nothing in Oregon case law to suggest that the legislature does not have the same authority. The model for an amended SB 435 might be the State Merit System Law, ORS Chapter 240. Adapting ORS 240.065-075, I have redrafted Section Two of SB 435 as follows:

> SECTION 2. (1) There is hereby created a Land Use Board of Appeals consisting of not more than five members appointed by the Governor subject to confirmation by the Senate in the manner provided in ORS 171.560 and 171.570. The board shall consist of a chief hearings official and such other hearings officials as the Governor considers necessary.
>
> (2) Members of the board shall be appointed for terms of six years, except that the members first appointed to each position shall serve in the following manner:
>
> (a) The chief hearings official shall serve for a term ending June 30, 1983.
>
> (b) The next two hearings officials to be appointed shall serve for terms ending June 30, 1982.
>
> (c) The next two hearings officials to be appointed shall serve for terms ending June 30, 1981.
>
> (3) Each member shall be appointed for a term ending six years from the date of the expiration of the term of that member's predecessor, except that a person appointed to fill a vacancy shall be appointed for the remainder of the term.

(4) Members shall be and remain during their service members in good standing of the Oregon State Bar.

(5) Members shall be paid in accordance with the provisions of ORS 240.240 at salary and benefit levels established by the Governor to be reasonably commensurate with those of circuit court judges, except that the chief hearings officialmay be paid an additional amount not to exceed ____ in excess of the salary levels of the other hearings officials.

(6) A member of the Board shall be removable by the Governor only for cause, after being given a copy of the charges and an opportunity to be heard publicly on such charges before the Governor. A copy of the charges and a transcript of the record of the hearing shall be filed with the Secretary of State.

I use the term "official" because the term "referee" is simply not accurate. A referee is an official to whom a question is referred by a court or other body. See ORS 17.705-765. An even more accurate term would be "Appeals Officer," because these officers will not normally be conducting contested case hearings but will be deciding cases based on the record, briefs, and oral argument.

An alternative approach would be to make the hearings officials subject to the procedural provisions of the State Merit System Law, with no set terms of office. This type of arrangement would encourage the development of career professional hearings officials and would assure them the kind of independence that was contemplated in the draft bill attached to the final report of the Legislative Counsel Committee's Subcommittee on Administrative Procedure Act. The untitled bill would create a hearings bureau.

Delay:

SB 435 does nothing significant to reduce the delays which are part of the land use appeals process today. Those delays have less to do with how rapid review is at each level than with how many levels there are. The LCDC has issued final orders in all cases filed in 1978, but many of those will be appealed to the Court of Appeals, and from there to the Supreme Court, which is accepting review of land use cases all out of proportion to their number. Under the present system, there are three levels of appeal whether the parties start in circuit court, with a writ of review, or before LCDC under ORS 197.300. SB 435 preserves the three levels. It simply reduces the number of routes.

My suggestion here is that the court of appeals be cut out of the land use appeals ladder. It has no lack of other things

to occupy its time. The Oregon Supreme Court, on the other hand, has a relatively open agenda. It also has judges with national reputations in land use and administrative law. Oregon's land use law is still developing rapidly and will continue to do so for some time to come. It is important public law of the kind the Supreme Court ought to be occupying its time with, at least for the next few years.

I have two suggestions. One would be to give the Supreme Court discretionary review of final decisions of the Land Use Board and LCDC on appeals under SB 435. The other would be to make review mandatory.

Mandatory review could be provided for by substituting the Supreme Court for the Court of Appeals in Section 6a of SB 435. Discretionary review could be accomplished by allowing the Supreme Court to refer an appeal to a panel of the Court of Appeals or by making the Land Use Appeals Board a court of equal dignity with the Court of Appeals.

In my view, the best solution would be a land use court subject to discretionary review by the Supreme Court. The land use court could be required to refer goal questions to the LCDC, just as federal courts currently refer questions within the expertise of federal agencies to those agencies. That solution, however, will no doubt have to await another session of the legislature.

Thank you for your consideration of these suggestions.

Scott Parker Assoc. of Oregon Counties
6/18/79

House Committee on Judiciary
Exhibit F, SB 435
June 18, 1979 - 1:37 p.m.
3-pages

PROPOSED AMENDMENTS TO SB 435 (B-Engrossed)

On page 2, line 1, delete "except as provided in section 6 of this 1979 Act."

On page 2, line 3, delete "4 to 6" and insert "4 and 5".

On page 2, line 15, delete "4 to 6" and insert "4 and 5".

On page 2, line 19, delete "4 to 6" and insert "4 and 5".

On page 3, line 9, delete "4 to 6" and insert "4 and 5".

On page 3, lines 21-22, delete "and those previously issued by the commission".

On page 3, line 23, delete "and the commission".

On page 3, delete lines 25 through 41, and on page 4, delete lines 1 through 9, and insert:

"SECTION 5: (1) After the board has reviewed the land use decision it shall prepare a final order affirming, reversing or remanding the decision.

(2) The board shall reverse or remand the land use decision under review only if the board finds that the city, county or special district governing body:

(a) Exceeded its jurisdiction;

(b) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

(c) Made a decision that was not supported by substantial evidence in the whole record;

(d) Improperly construed the applicable law; or

(e) Made a decision that was unconstitutional.

(3) Final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6a of this 1979 Act."

On page 4, delete lines 10 through 41 and insert:

"SECTION 6. If a petition for review is filed with the board alleging that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, and the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgement pursuant to subsection (1) of ORS 197.251, the commission may suspend its consideration of the request for compliance acknowledgement until the board has issued its final order pursuant to section 5 of this 1979 Act."

On page 5, delete lines 1 and 2.

On page 5, line 3, delete "4 to 6" and insert "4 and 5".

On page 5, line 6, delete "4 to 6" and insert "4 and 5".

On page 5, line 7, delete "4 to 6" and insert "4 and 5".

On page 5, line 35, delete "4 to 6" and insert "4 and 5".

On page 7, line 13, delete "4 to 6" and insert "4 and 5".

On page 7, line 19, delete "4 to 6" and insert "4 and 5".

On page 8, line 1, delete "4 to 6" and insert "4 and 5".

On page 8, line 15, delete "4 to 6" and insert "4 and 5".

On page 10, line 2, delete "4 to 6" and insert "4 and 5".

On page 10, line 10, delete "4 to 6" and insert "4 and 5".

HOUSE JUDICIARY COMMITTEE
~~SENATE TRADE AND ECONOMIC DEVELOPMENT COMMITTEE~~ SB 435-B

Testimony of Michael H. Marcus
Director of Litigation
Legal Aid Service, Mult. Bar Assn.
June 18,
~~March 14~~, 1979

The sole concern of my testimony is Section 13 of SB 435, p. 10, lines ~~12~~ 12 and ~~5~~ 13, which codifies the Court of Appeals' opinion in Hoffman v. French, 36 Or. App. 739 (1978), review granted, by eliminating the writ of review as a device to review district court errors.

My nine years of legal services experience convinces me that nonwealthy litigants -- meaning those unable to afford $1500 to $2500 -- are unable to use an appeal to correct district court errors. Even with 1977 amendments permitting waiver, reduction, or limitation of appellate undertakings, bonds which are adequate to protect both parties given normal appellate delays are beyond the reach of most litigants, and attorney fees on an appeal are unavoidable for those who are not poor enough to qualify for legal aid.

The writ of review should be reinstated as a parallel device for the review of district court error because it makes review available tc the nonwealthy by drastically decreasing the expense of review:

1. By permitting the resolution of review in a matter of a few weeks instead of the many months normally consumed by an appeal, the writ renders a much smaller undertaking sufficient to protect both sides pending resolution of the legal controversy;

2. Because a writ proceeding, as a device for the review of district court error, amounts to a motion hearing in circuit court, the expense of legal representation is much lower than for a typical appeal.

Bonding practices and rising legal expenses have simply put appeal beyond the means of the nonwealthy litigants who comprise the majority of individual district court litigants. Retaining the writ of review as an appellate device will go far in preventing wealth from being a prerequisite to fair access to the legal system.

Accordingly, I request that SB 435 be amended to read, in pertinent part:

Section 13. ORS 34.040 is amended to read:
34.040. The writ shall be allowed in all cases where the district court, inferior court, officer, or tribunal other than an agency as defined in subsection (1) of ORS 183.310 in the exercise of judicial or quasi-judicial functions appears to have:

* * * *

House Committee on Judiciary
SB 435, Exhibit H
June 23, 1979 - 10:10 a.m.
1-page

1000 FRIENDS OF OREGON

PROPOSED AMENDMENTS TO SENATE BILL 435

B-ENGROSSED

JUNE 19, 1979

On page 2 of the printed bill, line 31, substitute "30" for "20."

In line 35, delete "$200" and add: "$50 and a deposit for costs of $150."

In line 36, after the word "fee," add "and deposit."

On page 3, at the end of line 19, add: "The deposit required by subsection (4) of this section shall be applied to any costs charged against the petitioner."

CITY OF SALEM, OREGON
City Hall / 555 Liberty St. S.E.
Zip Code 97301
LEGAL DEPARTMENT
Telephone (503) 588-6003
William J. Juza
City Attorney

House Committee on Judiciary
Exhibit I, SB 435
June 23, 1979 - 10:10 a.m.
4-pages

June 19, 1979

Hon. Mark Gardner, Chairman
House Judiciary Committee
Oregon House of Representatives
Capitol Building
Salem, Oregon 97310

Re: B-Engrossed SB 435

Dear Rep. Gardner:

At the request of Rep. Frohnmayer, I am forwarding herewith proposed amendments to B-Engrossed SB 435. Further, I would like to take this opportunity to summarize my testimony before the Committee yesterday afternoon. I would appreciate it if this letter could be made part of the record and made available to the members of the Committee.

First, some background. The City of Salem and the League of Oregon Cities supported the original SB 435, which provided for elimination of the circuit court review of land use actions and sent them directly to the Court of Appeals. That support was based upon the premises that the existing system is too complex and inefficient, and that land use appeals are too important to be placed in the hands of a non-judicial body. Specifically, it was our concern that LCDC be taken out of the adjudicatory process.

Why get LCDC out of the process? We believe there are three good reasons.

First, LCDC has been devoting an ever-expanding majority of its time over the past two years to land use appeals. Next year LCDC will face some 240 comprehensive plans clamoring for acknowledgement. That number includes Oregon's larger cities and counties with the most controversial plans. LCDC will simply not have time to do justice to both its legislative and quasi-judicial roles.

Second, LCDC has, in the past, demonstrated a disturbing tendency to use contested cases for making major shifts in policy. We believe that new policies should be adopted through the rule-making process with fuller opportunity for citizen input and without the unsavory appearance of changing the rules after the game has started.

Third, although it is probably not legally wrong, it is contrary to the Oregon philosophy of separation of powers and checks and balances to have the same individuals write the rules and then decide contested cases under them. One of the more obvious vices inherent in such a scheme is the opportunity for rule-making in the guise of adjudication.

With that background, let me stress that we still support the basic concept inherent in SB 435. While the Land Use Board of Appeals would not be a part of the judicial branch of government it is a legally trained quasi-judicial body having the necessity for developing considerable expertise and uniformity in the application of the law to land use cases. We believe only that SB 435 does not go quite far enough.

Several of the witnesses before your Committee decried the splits of jurisdiction and forum shopping which go on under the present system. That will not end with B-Engrossed SB 435. Just about any land use case can be said to involve LCDC Goal issues. The canny appellant will phrase his appeal to include both procedural and goal-related challenges, thus earning two hearings before two bodies, one of which is a lay commission with a demonstrated propensity for policy making under the guise of adjudication. At best, the bill does nothing to reduce LCDC's staggering workload.

The amendments forwarded with this letter on behalf of the League of Oregon Cities accomplish only one change in the bill. They transfer jurisdiction for all land use appeals to the Land Use Board of Appeals, leaving LCDC as the rule-making body which sets policy and reviews comprehensive plans for acknowledgement.

One other matter of concern to us was raised by the testimony yesterday. That is the two-fold concern of obtaining administrative law judges who are both competent and independent. A reasonable salary should insure the most competent and qualified

applicants; tenure providing for removal only for cause should produce independence. Without proposing specific amendments to subsection (1) of Section 2, we suggest the Committee carefully review all options for revision of that subsection.

Finally, let me express my thanks for your attention, courtesy and consideration.

Yours very truly,

William G. Blair
Assistant City Attorney

WGB:ss
cc: Michael Huston
Grace Crunican

PROPOSED AMENDMENTS TO
B-ENGROSSED SB 435

6/19/79 - League of Oregon Cities

On page 2, line 1, insert a period after "petitions" and strike the remainder of the line.

On page 3, strike lines 25 through 38.

On page 3, line 39, strike "(4)" and insert "(1)" in it's place.

On page 4, strike line 6 in it's entirety.

On page 4, line 7, insert at the beginning of the line "(b) The board finds that".

On page 4, delete lines 10 through 41.

On page 5, delete lines 1 and 2.

On page 7, line 13, strike "6" and insert "6a" in it's place.

On page 7, line 19, strike "6" and insert "6a" in it's place.

On page 8, line 1, strike "6" and insert "6a" in it's place.

On page 8, line 15, strike "6" and insert "6a" in it's place.

On page 10, line 2, strike "6" and insert "6a" in it's place.

On page 10, line 10, strike "6" and insert "6a" in it's place.

House Committee on Judiciary
Exhibit J, SB 435
June 23, 1979 - 10:10 a.m.

OFFICE OF COUNTY COUNSEL

CLACKAMAS COUNTY

906 MAIN STREET • OREGON CITY, OREGON 97045 • (503) 655-8362

8-pages

COUNTY COUNSEL
Michael D. Montgomery
Scott H. Parker

ASSISTANT COUNTY COUNSEL
Keith Kinsman
Beth Blount

June 20, 1979

House Judiciary Committee
State Capitol
Salem, OR 97310

Dear Committee Members:

The Association of Oregon Counties (AOC) submits for the Committee's consideration the enclosed proposed amendments to the B-Engrossed SB 435. These amendments are submitted because, while AOC favored the original version of SB 435 and is in agreement with its basic thrust, streamlining the process of resolving land use disputes, we feel that the present version of the Bill is a poor solution to the problem.

The major flaw in the amended version of SB 435 presently before the Committee is that it would set up a system in which the Land Conservation and Development Commission frequently would be making quasi-judicial decisions. The proper role for the Commission is the development of broad land use policy and the general interpretation of the state-wide goals. This function can and should be performed through the rule-making and acknowledgment processes. The Commission should not be in the business of applying the goals to individual land use decisions; that is the responsibility of local government bodies. The present Bill has the result of giving this responsibility and power to the Commission.

Under the B-Engrossed version of the Bill the Commission would decide questions relating to the application of the goals while the new Land Use Board of Appeals would handle other land use questions. While on its face this scheme may appear to focus the Commission towards policy decisions, experience and common sense make it clear that things will not work out that way in practice! The fact is that almost any land use decision down to the smallest zone change may involve questions (or allegations) concerning the proper application of the goals. Very few challenges to the land use actions of local governments do not include allegations

that one or more goals have been violated. Therefore, the result of the passage of this Bill in its present form would be that the Commission would be constantly reviewing quasi-judicial land use decisions of local governments. AOC would prefer that such decisions be left in the hands of local governments subject to review by the Court of Appeals, as proposed in the original version of this Bill. (For an excellent discussion of this and related points, see the attached copy of a letter from Steve Schell to the Senate Committee on Trade and Economic Development.) Failing that, it is preferable that the new appeals board, rather than the Commission, make such decisions. That would be the effect of the amendment we propose.

Our amendment would remove the Commission from the role of deciding contested cases which involve the state-wide goals. Instead, the new board would make decisions on all contested land use issues, including those involving the goals. This change would eliminate one level of review of land use decisions, which is consistent with the goal of the Bill. In addition, it would restrict the Commission to its proper function of setting general policy through rule-making and the acknowledgment process. This is far preferable to the proposal currently before this committee.

We would also like to briefly respond to the suggestion of 1000 Friends of Oregon that the $200 filing fee be reduced or eliminated. There is a good reason for retaining this feature of the Bill. On the filing of a notice of intent to appeal, the local government body is required to collect, prepare and transmit the entire record of the contested proceeding. If the party filing the notice then decides to drop the appeal, the local body will have expended its time and effort for no reason and with no compensation. The filing fee provision answers that problem. It will discourage frivolous appeals and compensate the local government in the event they do occur.

Your careful consideration of this proposed amendment is appreciated.

Sincerely,

Scott H. Parker
County Counsel

SHP/MJ:bk

cc: Steven R. Schell
Robert E. Stacey, Jr.
Gordon G. Fultz

LAW OFFICES OF
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JAMES E. PETERSEN
ALBERT J. BANNON
RONALD T. ADAMS
DAVID P. ROY
STEVEN E. WYNNE
LAILA E. AARNAS

May 10, 1979

Senate Committee on Trade
and Economic Development
State Capitol
Salem, Oregon 97310

Reference: SB 435 -- Conceptual Approval of Board of Appeals

Gentlemen:

At your last meeting, you approved in concept the creation of a Board of Appeals within the LCDC to handle appeals from all local government decisions dealing with land use. My impression is that the approval might have been founded on mistaken policy assumptions. At least from one vantage point, that of a practitioner, a former member of the LCDC, and a member of the Writ of Review Subcommittee that drafted the original SB 435, creation of a Board of Appeals is not a solution to the problems in this area for several reasons.

1. It upsets the balance between state and local government. Senate Bill 100, as adopted in 1973, was a carefully crafted compromise between state and local govenment. The state was supposed to provide policy statements and local governments were supposed to carry out those policy statements through comprehensive planning and zoning ordinances. The new state administrative agency would not review permit type decisions raised by individual persons. You may recall that the State Senate passed SB 100 by a relatively close vote, and the House was informed that the carefully crafted compromise could be torn asunder if the House changed a comma in the Bill, so it did not. The Board of Appeals proposal undermines this carefully crafted compromise.

2. The Board of Appeals proposal will not result in any time savings. By cutting down the number of layers of appeal, the Writ of Review Subcommittee intended to speed up the process. The Board of Appeals proposal merely takes away the Circuit Courts and substitutes in their place the Board of Appeals. Thus, there will be little, if any, time savings because the

issues will still be heard by two bodies, namely the LCDC and the Board of Appeals.

3. The proposal does not follow the principle of having only one executive-legislative decision and only one court review of that decision. A major tenant of the Writ of Review Subcommittee's effort in SB 435 was to eliminate multiple review in as many situations as possible. Because the Board of Appeals is merely a substitute for the Circuit Court, this is not accomplished.

4. The proposal will result in increased litigation. The Board of Appeals, being merely an administrative body, will not give sufficient certainty to land use decisions, and therefore will result in increased litigation and appeals. Appointment of legally trained personnel at top Hearings Officers' salaries will not solve this problem. It is solved by court review.

5. The number of appeals before the LCDC will not be reduced. The Board of Appeals proposal does not in any way limit the number of decisions having to go before the LCDC, a group of unpaid citizens, most of whom are not legally trained.

6. The proposal does not cut down on the costs of litigation. In addition to petitions and other pleadings and motion practice as well as hearings, there will be three briefs and quite possibly three arguments, one before the Board of Appeals, one before the LCDC and one before the Court of Appeals. While most lawyers are willing to defend their clients down to the clients' last dollar, it seems patently unfair to the client to engender so much litigiousness.

What is the solution to these problems? As to the above problems, it appears that SB 435 as drafted is a far superior solution. The three major problems raised by opponents to the present draft of SB 435 are: (1) it would increase the workload of the Court of Appeals by possibly 50-200 cases per year; (2) the Court of Appeals would not receive a "clean record"; and (3) the LCDC would not participate adequately in policy decisions and interpretation of the goals.

As to point (1), representatives of the Court of Appeals have admitted that from a theoretical point of view it is better for all decisions to go to the Court of Appeals, because review process is, in fact, an "appeal." While there

would be some increase in the workload of the Court, with the number of decisions coming down, the LCDC's increasing use of rules, and the publication of policy papers by the LCDC, it is suggested that the Court of Appeals workload will not be increased dramatically by SB 435 as drafted.

As to point (2), SB 435 has provided a "master" in the limited number of situations where a record does need to be "cleaned up." While this is a new situation for the Court of Appeals it is not new in the law and the Court should have little trouble adapting to it.

As to point (3), SB 435 provides a mechanism whereby the LCDC can participate in any quasi-judicial decision before the Court of Appeals through briefs. While the Subcommittee was in existence, amendments were offered which would strengthen the role of the LCDC should it desire to take jurisdiction. This seems to be a much more satisfactory decision than creating a Board of Appeals.

Of the four decisions confronting the Committee, i.e., do nothing, create a Board of Appeals, create a land use court, or go with SB 435 as drafted, from the vantage point of the undersigned, it appears advantageous to go with SB 435 with slight amendments. A land use court solves the problems far better than does a Board of Appeals within the LCDC. It appears to me that doing nothing would be a better solution in terms of the "carefully crafted compromise" than would the creation of a new administrative sub-agency, another layer of government.

Yours very truly,

Stan R. Shull

SRS:il

PROPOSED AMENDMENTS TO B-ENGROSSED SENATE BILL 435

On page 2, line 1, delete "except as provided in section 6 of this 1979 Act."

On page 2, line 3, delete "4 to 6" and insert "4 and 5".

On page 2, line 15, delete "4 to 6" and insert "4 and 5".

On page 2, line 19, delete "4 to 6" and insert "4 and 5".

On page 3, line 9, delete "4 to 6" and insert "4 and 5".

On page 3, lines 21 and 22, delete "and those previously issued by the commission".

On page 3, line 23, delete "and the commission".

On page 3, delete lines 25 through 41, and on page 4, delete lines 1 through 9, and insert:

"SECTION 5. (1) After the board has reviewed the land use decision it shall prepare a final order affirming, reversing or remanding the decision.

"(2) The board shall reverse or remand the land use decision under review only if the board finds that the city, county or special district governing body:

"(a) Exceeded its jurisdiction;

"(b) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"(c) Made a decision that was not supported by substantial evidence in the whole record;

"(d) Improperly construed the applicable law; or

"(e) Made a decision that was unconstitutional.

"(3) Final orders of the board may be appealed to the Court of Appeals in the manner provided in section 6a of this 1979 Act."

On page 4, delete lines 10 through 41 and insert:

"SECTION 6. If a petition for review is filed with the board alleging that a comprehensive plan provision or a zoning, subdivision or other ordinance or regulation is in violation of the state-wide goals, and the commission has received a request from the city or county which adopted such comprehensive plan provision or zoning, subdivision or other ordinance or regulation asking that the commission grant a compliance acknowledgment pursuant to subsection (1) of ORS 197.251, the commission may suspend its consideration of the request for compliance acknowledgment until the board has issued its final order pursuant to section 5 of this 1979 Act."

On page 5, delete lines 1 and 2.

On page 5, line 3, delete "4 to 6" and insert "4 and 5".

On page 5, line 6, delete "4 to 6" and insert "4 and 5".

On page 5, line 7, delete "4 to 6" and insert "4 and 5".

On page 5, line 35, delete "4 to 6" and insert "4 and 5".

On page 7, line 13, delete "4 to 6" and insert "4 and 5".

On page 7, line 19, delete "4 to 6" and insert "4 and 5".

On page 8, line 1, delete "4 to 6" and insert "4 and 5".

On page 8, line 15, delete "4 to 6" and insert "4 and 5".

On page 10, line 2, delete "4 to 6" and insert "4 and 5".

On page 10, line 10, delete "4 to 6" and insert "4 and 5".

House Committee on Judiciary
Exhibit K, SB 435
June 25, 1979 - 7:30 a.m.
5-pages

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June 21, 1979

House Judiciary Committee
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Reference: B-Eng. SB 435

Dear Committee Members:

This letter is written in support of B-Eng. SB 435. The major policy change in the Bill before you is the creation of a Land Use Board of Appeals. When the concept of a Land Use Board of Appeals was first proposed before the Trade and Economic Development Committee, the Board was a subsidiary agency to the Land Conservation and Development Commission and was appointed by them. As the concept evolved, the position of the Board of Appeals has been strengthened substantially. In addition, a rigorous but fair time schedule has been set up for the various functions that must go on in considering an appeal from a local government land use decision or a decision of a state agency applying state-wide planning goals. These changes solve some of the delay and forum shopping problems that have become so evident in the present scheme of appeals. With the solution of these problems, it becomes highly beneficial to the state's interest to adopt B-Eng. SB 435 during this session of the Legislature, even though it may not be ideal from everyone's point of view. I strongly urge you to pass the Bill out with a "do pass" recommendation.

At Monday's hearing, several comments were made and impressions may have been left that deserve some answer. I have chosen the specific ones that seem most relevant to me for comment. I apologize for not being able to be present at your Saturday morning work session in order to deliver them personally.

1. AOC's desire to remove LCDC from the contested case decision making process. In its testimony, the Association of Oregon Counties asked that the LCDC be removed from the decision making process. With his letter of June 20, 1979, Scott Parker submitted amendments to accomplish that result.

Within the land use decision making process, there are three categories of decisions to be made. The first of these concern decisions on such matters as building permits. The second deals with decisions by the governing body of a local government or a state agency on discretionary matters, the so-called "quasi-judicial" decisions. The third set of decisions has to do with broad policy questions, generally referred to as legislative matters and having to do with major revisions or adoptions of comprehensive plans or zoning ordinances. Under Section 3 of B-Eng. SB 435, it is clear that a "land use decision" does not include a building permit. The reason is that building permits are generally granted by building officials, not "governing bodies."

What AOC would do with its amendments of 6/18/79 is to remove the LCDC from both the quasi-judicial and legislative decision making process in contested cases. With respect to "legislative" matters, the question is whether the local government or state agency met the minimums set by the goals in adopting its comprehensive plan, zoning ordinance or other implementing ordinance. It appears to me that review in this situation is a proper function for the LCDC. Therefore as to legislative matters I would reject the AOC's amendments.

With regard to the "quasi-judicial" matters, however, the question is closer. Here the question is whether a citizen body or a group of judges is better capable of applying several goals to a specific fact situation dealing with a small parcel of land. The Governor's office, particularly Mr. Lee Johnson, is of the opinion that the LCDC has the capability of applying several goals in these limited circumstances. The AOC, of course, through its amendments disagrees. The policy question is whether the Legislature wants politicians or judges reconciling and interpreting possibly conflicting goals. (It should be recognized that it is inevitable that the goals conflict. The state has several policies that must be addressed. For example, there is little doubt that it is cheaper to build houses on flat land than on hills, and yet preservation of flat agricultural lands is extremely important in the long run. These goals conflict. Somebody has to reconcile their application). The policy question of who is for the Legislature to decide.

I also strongly object to the AOC's proposal on page 3, lines 21 through 23 be changed. It is necessary to find some standard way to get hold of previous LCDC decisions. They are not readily available now. Publication of those decisions as specified in Section 4(11) is necessary if we are to have consistent land use policy throughout the state.

2. Change from 20 to 30 days in the time to file a Notice of Intent to Appeal. 1000 Friends of Oregon proposed that the time for filing the Notice of Intent to Appeal under Section 4(4) be changed from 20 to 30 days. Right now a Petition for Writ of Review must be filed within 60 days of a final decision. The reduction in time from 60 to 20 days I believe is justified. The reason lies in the way decisions are made by local government. When a decision is before a governing body there is normally a hearing. Either there will be additional testimony taken or there will be arguments on the record or sometimes both. Then the hearing will be closed. After that the local governing body will make an oral decision; sometimes this decision is made immediately following the hearing, and sometimes it is made at a subsequent meeting. At this time any participant knows the outcome of the proceeding. At the time of the decision either the staff or one of the parties is requested to prepare findings. Preparation of these findings may take anywhere from a few days to several months. Normally this time is two to three weeks. The governing body then reviews the findings, modifies them as it deems appropriate and adopts the modified findings. Only upon adoption of the findings and signing of the final ordinance, resolution, order or whatever does the 20-day period commence to run. The citizen has had the time between the initial oral decision and the adoption of the findings, plus 20 additional days in which to make a decision as to whether he wants to appeal. I submit that this time is sufficient to seek counsel or do whatever is necessary to make that decision, and the 20 days should not be raised to 30 days.

3. Independence of the Board of Appeals. The remaining question has to do with the independence of the Board of Appeals not only from the LCDC but also from the Governor. One way to assure that the Board of Appeals is independent is to pay its people adequate salaries. Adequate salaries could be based on those paid to Circuit and District Court Judges. An amendment to that effect is attached hereto.

Another way to assure independence is to provide that referees may be removed only for cause. If adequate salaries

are paid then people with proven track records can be attracted to these positions. Hence the need to remove for inefficiency should be less evident. To make sure that these people can be removed, however, the same rules governing removal as applied by the Judicial Fitness Commission could be used.

I urge you to give this Bill prompt consideration. What it does is set up a procedure whereby a Notice of Intent to Appeal must be given within 20 days after the final decision is rendered and Findings adopted in the matter. Twenty additional days are given to the local government or state agency to forward the record to the Land Use Board of Appeals. After the record has been submitted, a petition must be prepared and filed within 20 days. The Board of Appeals, whether or not the LCDC participates, then has 90 days from that date in which to render its decision. The initial 20 days affects not just those appeals that are filed, a relatively small percentage, but it also affects those appeals that are not filed. It is worthwhile to obtain speedy decisions in these kinds of cases because the price of housing and development may be significantly increased by delays. This improvement is beneficial not only to neighbors opposing projects and developers proposing them, but also to the public interest.

I urge your support for this Bill.

Very truly yours,

R. Sidell

SRS:il

Enclosure

cc: Scott H. Parker, Esq.
Mr. William Love
Rep. Mark Gardner
Rep. Dave Frohnmayer
Rep. Ted Bugas
Rep. Joyce Cohen
Rep. Kip Lombard
Rep. Tom Mason
Rep. Sandy Richards
Rep. Bill Rutherford
Rep. Norm Smith

AMENDMENT TO B-ENG. SB 435

On page 1, line 16, add a period after the first word, "Governor." and delete everything that follows.

On page 1, between lines 18 and 19, add the following:

"(3) The chief hearings referee shall be paid an annual salary equivalent to that of a Circuit Court Judge under ORS 292.415. The other referees shall be paid not less than the salary of a District Court Judge under ORS 292.420."

DF

House Committee on Judiciary
Exhibit L, SB 435
June 25, 1979 - 7:30 a.m.
1-page

SB 435 B-Engrossed

On page 3, line 16, after "days", insert:

"and no extension of time has been stipulated to by the parties".

On line 16, after "affirmed ", insert:

",the decision may then be appealed in the manner provided in Section 6a"

On page , insert the following subsection to Section 6(a):

"(9) If a land use decision is affirmed in the manner provided in (8) of Section 5 of this 1979 Act, the decision may be appealed as provided in this section. The Court of Appeals shall reverse or remand that decision only if it determines that

(a) The city, county, special district governing body or state agency violated the state wide planning goals, or

(b) The city, county or special district governing body

(A) Exceeded its jurisdiction;

(B) Failed to follow the procedure applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

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

(D) Improperly construed the applicable law; or

(E) Made a decision that was unconstitutional.

656.724 Referees; appointment; qualifications; term; removal procedure. (1) The board shall employ referees to hold hearings pursuant to ORS 656.001 to 656.990. A referee must be a member in good standing of the Oregon State Bar, or the bar of the highest court of record in any other state or currently admitted to practice before the federal courts in the District of Columbia. Referees shall qualify in the same manner as members of the board under subsection (2) of ORS 656.722. The board may appoint referees to serve for a probationary period of one year or less prior to regular employment.

(2) Referees are in the unclassified service under ORS chapter 240, and the board shall fix their salaries in accordance with ORS 240.245.

(3) (a) The employment of each referee shall be subject to formal review by the board every four years. Complaints and comments filed with the board regarding the official conduct, competence or fitness of a referee, as well as the board's records, shall be reviewed by the board.

(b) In accordance with paragraph (c) of this subsection, a referee may be removed at the time of such formal review or at any time, for official misconduct, incompetence, inefficiency, indolence, malfeasance or other unfitness to render effective service.

(c) If the board believes there is reasonable cause to remove a referee, the record of complaints, comments and other data considered by the board shall be submitted to the Chief Judge of the Court of Appeals. He shall thereupon convene a review panel consisting of himself, the presiding judge of the Multnomah County Circuit Court and the President of the Oregon Circuit Judges Association. The panel shall examine the record and, if it believes the charges warrant, conduct a hearing on whether the referee should be dismissed; otherwise the charges shall be dismissed. The record and the hearing shall be confidential unless the referee elects otherwise. The decision of the review panel after hearing shall be final.

(4) Referees have the same powers granted to board members or assistants under paragraphs (a), (b), (c) and (d) of subsection (2) of ORS 656.726.

(5) A presiding referee shall be elected by a majority vote of the referees; but if a majority of the referees are unable to agree upon a presiding referee, the presiding referee shall be appointed by the board. The term of a presiding referee under any one election or appointment shall not extend for a period of more than one year. The presiding referee shall administer the Hearings Division and shall be responsible solely and directly to the board. The presiding referee may designate another referee to serve as acting presiding referee during any period when the presiding referee is absent or disabled.

(6) It is the declared purpose of this section to foster and protect the referees' ability to provide full, fair and speedy hearings and decisions.

[1965 c.285 §53a; 1965 c.564 §6; 1967 c.180 §1; 1971 c.695 §9; 1973 c.774 §1]

240.555 Suspension, reduction, demotion or dismissal. [(1) The division shall establish by rule a procedure in accordance with this chapter whereby] the appointing authority in any division of the service may suspend, reduce, demote or dismiss an employe thereof for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service.

[(2) The appointing authority may suspend a regular employe for disciplinary reasons and without pay for a period not exceeding 30 days in any 12 months.]

[Amended by 1969 c.80 §77; 1975 c.427 §11]

240.075 Removal of members. A member of the board shall be removable by the Governor only for cause, after being given a copy of charges against him and an opportunity to be heard publicly on such charges before the Governor. A copy of the charges and a transcript of the record of the hearing shall be filed with the Secretary of State.

656.714 Removal of board member. (1) The Governor may at any time remove any member of the board appointed by him for inefficiency, neglect of duty or malfeasance in office. Before such removal he shall give the member a copy of the charges against him and shall fix the time when he can be heard in his own defense, which shall not be less than 10 days thereafter. Such hearing shall be open to the public.

(2) If the member is removed, the Governor shall file in the office of the Secretary of State a complete statement of all charges made against such member and his findings thereon, with a record of the proceedings.

(3) The power of removal is absolute and there is no right of review in any court whatsoever.

[Formerly 656.406]