

W. 9.9.

## AGENDA COVER MEMO

AGENDA DATE: September 15, 2004

TO: LANE COUNTY BOARD OF COMMISSIONERS

DEPT.: LANE COUNTY OFFICE OF LEGAL COUNSEL  
PUBLIC WORKS, LAND MANAGEMENT DIVISION

PRESENTED BY: Marc Kardell, Assistant County Counsel 2 *MK*  
Jeff Towery, Manager, Land Management Division *ST*

AGENDA ITEM TITLE: IN THE MATTER OF AMENDING CHAPTER 5 OF LANE CODE  
TO CLARIFY LIEN PRIORITY (LC 5.017)

### I. MOTION:

September 15, 2004: I MOVE TO SET A SECOND READING AND PUBLIC HEARING ON ORDINANCE 16-04 FOR SEPTEMBER 29, 2004, AT 1:30 P.M.

September 29, 2004: I MOVE THAT ORDINANCE 16-04 BE APPROVED, AMENDING LANE CODE CHAPTER 5 TO CLARIFY LIEN PRIORITY

II. **ISSUE OR PROBLEM:** Clarification of the priority of administrative civil penalty liens is needed to better ensure that these liens receive first priority in cases where the property is being foreclosed.

III. **DISCUSSION:** When a party in a secured first position forecloses on property lienied pursuant to LC 5.017, questions have been raised by certain title companies as to whether the County lien must be paid in the foreclosure. The language proposed should simplify matters by clarifying that the County lien shall receive priority over all liens, excepting those for taxes and assessment. The clarifying language is identical to that contained in LC 5.020, which deals with cases where the County may physically do the abatement upon property.

### IV. OPTIONS:

1. Approve the ordinance.
2. Do not approve the ordinance.

V. **RECOMMENDATIONS:** Recommend Option 1.

### VI. ATTACHMENTS:

1. Board Ordinance.
2. Lane Code 5.017

IN THE BOARD OF COUNTY COMMISSIONERS, LANE COUNTY, OREGON

ORDINANCE NO. 16-04

IN THE MATTER OF AMENDING CHAPTER 5 OF LANE  
CODE TO CLARIFY LIEN PRIORITY (LC 5.017)

The Board of County Commissioners of Lane County ordains as follows:

Chapter 5 of Lane Code is hereby amended by removing, substituting and adding new sections as follows:

**REMOVE THESE SECTIONS**

5.017  
located on pages 5-1 through 5-4  
(a total of 3 pages)

**INSERT THESE SECTIONS**

5.017  
located on pages 5-1 through 5-4  
(a total of 3 pages)

Said section is attached hereto and incorporated herein by reference. The purpose of this substitution and addition is to clarify lien priority (LC 5.017).

ENACTED this \_\_\_\_\_ day of \_\_\_\_\_ 2004.

\_\_\_\_\_  
Chair, Lane County Board of Commissioners

\_\_\_\_\_  
Recording Secretary for this Meeting of the Board

APPROVED AS TO FORM

Date 9-1-04 Lane County



OFFICE OF LEGAL COUNSEL

## Chapter 5

### ADMINISTRATIVE ENFORCEMENT

#### 5.005 Definitions.

For purposes of this chapter, the following terms are defined as follows:

- (1) Admissible Evidence. The standards of evidence found in LC 14.200(3) shall be applicable to hearings held for any failure to comply with Lane Code.
- (2) Administrative Civil Penalty. May include a monetary penalty, restitution, costs and assessments, and an order of abatement.
- (3) Failure to Comply. As defined in LC 1.010.
- (4) Director. The County Administrator, the Administrator's designee, or the Manager of the Land Management Division, or the Manager's designee.
- (5) Misdemeanor. As defined in LC 1.010.
- (6) Hearings Officer. A hearings officer appointed under Lane Code.
- (7) Responsible Person. For violations of or failure to comply with LC Chapters 5, 9, 10, 11, 13, 15, and 16, the owner of a building or property where a violation or failure to comply has occurred, the person in charge of the building or property, the violator or the person failing to comply with the ordinance, and where such person works for a contractor, either as an employee, subcontractor, or independent contractor, the contractor and/or other employer; and any licensee, permittee, or agent, manager, or person in charge.
- (8) Section. Enforcement Section.
- (9) Violation. As defined in LC 1.010. *(Revised by Ordinance No. 2-82, Effective 4.9.82; 21-83, 11.29.83; 4-85, 6.26.85; 13-86, 11.7.86; 1-93, 4.16.93; 1-00, 4.12.00)*

#### 5.010 Establishment of Administrative Enforcement Procedures.

In furtherance of, and pursuant to, the Lane County Home Rule Charter, administrative enforcement procedures are hereby established for the purpose of providing for the remediation of any failure to comply with County ordinances, except for those ordinances providing for punishment by fine or incarceration. It is further intended that a civil administrative process be established to provide a convenient and practical forum for the administrative hearing and determination of cases arising out of any failure to comply with County ordinances, and for the hearing and determination of factual issues as may be relevant in connection with, but not limited to, nuisance abatement and license and permit revocation proceedings. *(Revised by Ordinance No. 2-82, Effective 4.9.82; 21-83, 11.29.83; 4-85, 6.26.85; 1-00, 4.12.00)*

#### 5.015 Organization.

- (1) The Section shall consist of one or more hearings officers and supporting clerical staff. The hearings officers shall be funded by contract with the County and shall be appointed by and shall be subject to removal by the Board.
- (2) Consistent with this chapter and other applicable law, the Director may establish rules for the performance of the functions assigned to the section. *(Revised by Ordinance No. 2-82, Effective 4.9.82; 1-93, 4.16.93; 1-00, 4.12.00)*

#### 5.017 Establishment of Administrative Civil Penalties.

- (1) When the Director determines that a responsible person has failed to comply with any provision of a chapter of this Code that contains a provision authorizing administrative enforcement, the Director may impose an administrative civil penalty as provided in LC 5.017(2) through (11) below. For purposes of this section, a responsible

person shall mean a responsible person as defined by LC 5.005(7) above, unless otherwise defined by the specific Code provision authorizing the administrative enforcement.

(2) Prior to imposing an administrative civil penalty under this section the Director shall pursue reasonable attempts to secure voluntary correction. Upon failure to secure voluntary correction, the Director may issue an order to comply to one or more of the responsible persons. Except where the Director determines that LC 5.017(4) applies, the time for correction shall not be less than five calendar days.

(3) Following the date by which the correction must be completed as required by an order to comply, the Director shall determine whether such correction has been completed. If the required correction has not been completed by the date specified in the order, the Director may issue a notice of failure to comply to each person to whom an order to comply was issued. Each day the failure to comply continues to exist after the date specified in an order to comply shall constitute a separate failure to comply.

(4) Notwithstanding LC 5.017(2) above, the Director may issue a notice of failure to comply without having issued an order to comply or made attempts to secure voluntary correction, where the Director determines that the failure to comply reasonably appears to:

- (a) pose an immediate threat to public health, safety or welfare, or
- (b) be immediately remediable by a person in charge of the property, or
- (c) be the same act or condition that served as the basis for a previous order to comply, or

- (d) be done deliberately by a responsible person who had knowledge that the actions in question would constitute a failure to comply, or

- (e) be a single incident identified by the relevant provision of the Lane Code as meriting the imposition of an administrative civil penalty for such a single failure to comply, which shall be evidenced by the classification of a failure to comply as described in LC 5.040.

(5) No monetary penalty imposed under this section shall exceed \$1,000 per day. In imposing a penalty authorized by this chapter, the Director shall consider:

- (a) The responsible person's past history in taking all feasible steps or procedures necessary or appropriate to correct the violation or failure to comply;

- (b) Any prior violations of, or failures to comply with statutes, rules, orders and permits;

- (c) The gravity and magnitude of the failure to comply;

- (d) Whether the failure to comply was repeated or continuous;

- (e) Whether the cause of the failure to comply was an inadvertent, negligent or an intentional act;

- (f) The alleged responsible person's cooperativeness and efforts to correct the failure to comply; and

- (g) Any relevant rule of the Director.

(6) The notice of failure to comply shall either be served by personal service or shall be sent by registered or certified mail and by first class mail. The notice may be in the form of a summons and complaint for those failures to comply subject to LC 5.017(4). Any such notice served by mail shall be deemed received for purposes of any time computations hereunder three days after the date mailed if to an address within this state, and seven days after the date mailed if to an address outside of this state. A notice of failure to comply shall include:

- (a) Reference to the particular Code provision or rule involved;

- (b) A short and plain statement of the matters asserted or charged;

- (c) A statement of the amount of the penalty or penalties imposed;

(d) The date on which the order to comply was issued and the date by which correction was to be made, or, if the penalty is to be imposed pursuant to LC 5.017(4) above, a short and plain statement of the basis for concluding that said subsection applies;

(e) Where appropriate, a statement that abatement is required and that failure to abate the act or condition may result in continued administrative penalties, accruing on a daily basis at the stated amount until proof of completion of abatement is received;

(f) A statement of the party's right to appeal the notice of failure to comply to a hearings officer, and

(g) A statement in substantial conformance with LC 5.040.

(7) Any person who is issued a notice of failure to comply may appeal the penalty to a hearings officer. All appeals shall be submitted in writing to, and received by, the Director within 10 days of when notice is deemed received. Appeals shall be accompanied by the necessary fee to help defray the costs of processing the appeal and a deposit in the amount of the monetary penalty accrued to the date the deposit is received. However, this fee and deposit may be waived for persons determined by the Director to be indigent. The appeal fee and the deposit shall be refunded if the appeal is upheld by the hearings officer. Filing of an appeal shall not cause the penalty to cease accruing on a daily basis. In the event the appeal is not upheld by the hearings officer, the accrued penalty shall immediately become due and payable, and the penalty shall thereafter continue to accrue until such time as the responsible person submits to the Director proof of having abated the act or condition constituting the failure to comply. The provisions of LC 5.030 shall govern any requested hearing.

(8) Any administrative civil penalty imposed shall become final upon expiration of the time for filing an appeal, unless the responsible person appeals the notice of failure to comply to a hearings officer pursuant to, and within the time limits established by LC 5.017(7) above. The hearings officer shall issue an order of civil penalty upon the civil penalty becoming final. If the responsible person appeals the civil penalty to the hearings officer, the civil penalty shall become final, if at all, upon issuance of the hearings officer's decision affirming the imposition of an administrative civil penalty and containing an order of civil penalty. An order of civil penalty shall include a statement identifying an amount of daily penalty that will continue to accrue until the failure to comply is rectified. An order of civil penalty may authorize the Director to take action to abate the failure to comply pursuant to LC 5.020.

(9) Any person who pays the monetary penalty within 10 days of when it was ordered shall only be required to pay 90 percent thereof. Failure to pay a penalty imposed hereunder within ten days after the penalty becomes final as provided in LC 5.017(8) above shall constitute a failure to comply with this section. Each day after the initial 10-day period for payment that the penalty is not paid shall constitute a separate failure to comply. The Director is also authorized to collect the penalty by any administrative or judicial action or proceeding authorized by LC 5.017(11) below, other provisions of this Code or state statutes, and may enforce delinquent liens or assessments pursuant to ORS 223.510.

(10) The administrative civil penalty authorized by this section shall be in addition to:

(a) assessments or fees for any costs incurred by the County in remediation, cleanup or abatement, and

(b) any other actions authorized by law.

(11) If an administrative civil penalty is imposed on a responsible person because of a failure to comply with any provision of this Code resulting from a prohibited

act, use or condition on real property, and notice thereof has been sent by certified mail to the person listed on the County tax records as the owner of the property, and the penalty remains unpaid 60 days after such penalty becomes final, the hearings officer's order of civil penalty may be recorded, as a lien, in the County Clerk's Lien Record. At the time such an assessment is made, the Director shall notify the responsible person and the aforementioned owner that the penalty has been assessed against the real property upon which the failure to comply occurred, and has been entered in the County Clerk's Lien Record. The lien may be enforced in the same manner as a judgment, or as a lien for street improvements, and shall bear interest at the rate prescribed in ORS 82.010. The interest shall commence from the date of the hearings officer's order of civil penalty. The lien shall be given priority over all liens except those for taxes and assessments. The County may sell or assign said lien, any such assignment to be made without recourse to the County.

(12) In addition to enforcement mechanisms authorized elsewhere in this Code, failure to pay an administrative civil penalty imposed pursuant to LC 5.017(8) above shall be grounds for withholding issuance of requested permits or licenses, issuance of a stop work order, if applicable, or revocation or suspension of any issued permits or licenses. *(Revised by Ordinance No. 1-93, Effective 4.16.93; 1-00, 4.12.00)*

#### **5.020 Abatement by County; Costs; Waiver; Lien.**

(1) If an order of abatement has been issued by the hearings officer and, 10 days following the notice mailed pursuant to LC 5.017(11) specifying said abatement, the act or condition remains unabated, the Director may cause abatement of the nuisance. Accurate record of the abatement costs shall be kept and shall include a surcharge of 25% of the cost of the abatement for administrative overhead. A billing for the amount of the costs shall be forwarded by certified or registered mail, return receipt requested, to the owner. Payment shall be due to the Director within 30 days from the date of the billing.

(2) The cost of abatement may be waived for indigent persons, if upon timely application it appears to the Director that the following conditions are met:

(a) The owner is indigent, as that determination is provided for in ORS 151.485;

(b) The owner is living on the property from which the nuisance is to be abated; and

(c) The nuisance is incapable of being remediated by the owner.

(3) Applications for waiver of abatement costs shall be filed with the Director on forms supplied by the county within ten days from the date of notice of the amount of cost of abatement. All information required to be given on the forms shall be supplied by and verified by the applicant. An application for waiver of nuisance abatement costs must be submitted for each cost of abatement notice sent to the applicant.

(4) The Director shall file a lien against the property if payment is not made as provided in LC 5.020(1) or waived under LC 5.020(2).

(5) The lien provided for in LC 5.020(4) shall be given priority over all liens except those for taxes and assessments and shall include interest at the legal rate accruing from the date billing is sent to the owner of property.

(6) The lien provided for in LC 5.020(4) shall be enforced in the manner prescribed in LC 5.017(11). *(Revised by Ordinance No. 2-82, Effective 4.9.82; 21-83, 11.29.83; 4-85, 6.26.85; 13-86, 11.7.86; 1-00, 4.12.00)*

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- (5) Misdemeanor. As defined in LC 1.010.
- (6) Hearings Officer. A hearings officer appointed under Lane Code.
- (7) Responsible Person. For violations of or failure to comply with LC Chapters 5, 9, 10, 11, 13, 15, and 16, the owner of a building or property where a violation or failure to comply has occurred, the person in charge of the building or property, the violator or the person failing to comply with the ordinance, and where such person works for a contractor, either as an employee, subcontractor, or independent contractor, the contractor and/or other employer; and any licensee, permittee, or agent, manager, or person in charge.
- (8) Section. Enforcement Section.
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- (2) Consistent with this chapter and other applicable law, the Director may establish rules for the performance of the functions assigned to the section. *(Revised by Ordinance No. 2-82, Effective 4.9.82; 1-93, 4.16.93; 1-00, 4.12.00)*

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(4) Notwithstanding LC 5.017(2) above, the Director may issue a notice of failure to comply without having issued an order to comply or made attempts to secure voluntary correction, where the Director determines that the failure to comply reasonably appears to:

- (a) pose an immediate threat to public health, safety or welfare, or
- (b) be immediately remediable by a person in charge of the property, or
- (c) be the same act or condition that served as the basis for a previous order to comply, or

- (d) be done deliberately by a responsible person who had knowledge that the actions in question would constitute a failure to comply, or

- (e) be a single incident identified by the relevant provision of the Lane Code as meriting the imposition of an administrative civil penalty for such a single failure to comply, which shall be evidenced by the classification of a failure to comply as described in LC 5.040.

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- (d) The date on which the order to comply was issued and the date by which correction was to be made, or, if the penalty is to be imposed pursuant to LC 5.017(4) above, a short and plain statement of the basis for concluding that said subsection applies;



(e) Where appropriate, a statement that abatement is required and that failure to abate the act or condition may result in continued administrative penalties, accruing on a daily basis at the stated amount until proof of completion of abatement is received;

(f) A statement of the party's right to appeal the notice of failure to comply to a hearings officer, and

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(7) Any person who is issued a notice of failure to comply may appeal the penalty to a hearings officer. All appeals shall be submitted in writing to, and received by, the Director within 10 days of when notice is deemed received. Appeals shall be accompanied by the necessary fee to help defray the costs of processing the appeal and a deposit in the amount of the monetary penalty accrued to the date the deposit is received. However, this fee and deposit may be waived for persons determined by the Director to be indigent. The appeal fee and the deposit shall be refunded if the appeal is upheld by the hearings officer. Filing of an appeal shall not cause the penalty to cease accruing on a daily basis. In the event the appeal is not upheld by the hearings officer, the accrued penalty shall immediately become due and payable, and the penalty shall thereafter continue to accrue until such time as the responsible person submits to the Director proof of having abated the act or condition constituting the failure to comply. The provisions of LC 5.030 shall govern any requested hearing.

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(10) The administrative civil penalty authorized by this section shall be in addition to:

(a) assessments or fees for any costs incurred by the County in remediation, cleanup or abatement, and

(b) any other actions authorized by law.

(11) If an administrative civil penalty is imposed on a responsible person because of a failure to comply with any provision of this Code resulting from a prohibited act, use or condition on real property, and notice thereof has been sent by certified mail to the person listed on the County tax records as the owner of the property, and the penalty remains unpaid 60 days after such penalty becomes final, the hearings officer's order of civil penalty may be recorded, as a lien, in the County Clerk's Lien Record. At the time such an assessment is made, the Director shall notify the responsible person and the aforementioned owner that the penalty has been assessed against the real property upon

which the failure to comply occurred, and has been entered in the County Clerk's Lien Record. The lien may be enforced in the same manner as a judgment, or as a lien for street improvements, and shall bear interest at the rate prescribed in ORS 82.010. The interest shall commence from the date of the hearings officer's order of civil penalty. **The lien shall be given priority over all liens except those for taxes and assessments.** The County may sell or assign said lien, any such assignment to be made without recourse to the County.

(12) In addition to enforcement mechanisms authorized elsewhere in this Code, failure to pay an administrative civil penalty imposed pursuant to LC 5.017(8) above shall be grounds for withholding issuance of requested permits or licenses, issuance of a stop work order, if applicable, or revocation or suspension of any issued permits or licenses. *(Revised by Ordinance No. 1-93, Effective 4.16.93; 1-00, 4.12.00)*

#### **5.020 Abatement by County; Costs; Waiver; Lien.**

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(2) The cost of abatement may be waived for indigent persons, if upon timely application it appears to the Director that the following conditions are met:

(a) The owner is indigent, as that determination is provided for in ORS 151.485;

(b) The owner is living on the property from which the nuisance is to be abated; and

(c) The nuisance is incapable of being remediated by the owner.

(3) Applications for waiver of abatement costs shall be filed with the Director on forms supplied by the county within ten days from the date of notice of the amount of cost of abatement. All information required to be given on the forms shall be supplied by and verified by the applicant. An application for waiver of nuisance abatement costs must be submitted for each cost of abatement notice sent to the applicant.

(4) The Director shall file a lien against the property if payment is not made as provided in LC 5.020(1) or waived under LC 5.020(2).

(5) The lien provided for in LC 5.020(4) shall be given priority over all liens except those for taxes and assessments and shall include interest at the legal rate accruing from the date billing is sent to the owner of property.

(6) The lien provided for in LC 5.020(4) shall be enforced in the manner prescribed in LC 5.017(11). *(Revised by Ordinance No. 2-82, Effective 4.9.82; 21-83, 11.29.83; 4-85, 6.26.85; 13-86, 11.7.86; 1-00, 4.12.00)*