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Memorandum Date: June 26, 2007  
Order Date: NA

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**TO:** Board of County Commissioners

**DEPARTMENT:** Public Works / Land Management Division

**PRESENTED BY:** *CS* Craig Starr, Interim Manager  
Land Management Division

**AGENDA ITEM TITLE:** REPORT BACK – Action Items on Compliance Civil Penalty Worksheet, Process for Determining Civil Penalties, Appeal Fee, Civil Penalty Accrual During an Appeal, Appeal Process and Penalties for Cases Involving Commercial Gain

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**I. MOTION**

The Board may choose to adopt motions to establish direction to staff on each of the issues discussed in this memorandum. Following are proposed motions based on the staff recommendations:

1. Move approval for continuing use of the "Administrative Civil Penalty Worksheet" as it currently exists for implementing Lane Code 5.017-(5).
2. Move approval for continuing the current compliance process involving determination of civil penalties by the LMD Manager or designee and finalization of the civil penalty assessment by a Hearings Officer, as described in Lane Code 5.017.
3. Move to direct staff to prepare modifications to the Lane Code and/or Lane Manual to delete the requirement for a deposit in the amount of the monetary penalty in order to appeal a compliance order and to establish an appeal fee in the amount of \$1,500 which would be refundable if the appeal is upheld, and to bring such modifications back to the Board for consideration and adoption.
4. Move approval for continuing accrual of civil penalties when an appeal is filed and until the act or condition constituting the failure to comply is abated, as described in Lane Code 5.017-(7) and (8).
5. Move approval for continuing use of the current appeal process involving a Hearings Officer as described in Lane Code 5.017-(7) and (8).

6. Move to direct staff to prepare modifications to the Lane Code and/or Lane Manual to increase the maximum daily civil penalty from \$1,000 to \$2,500 and provide for tripling the calculated civil penalty for compliance actions involving commercial gain, and to bring such modifications back to the Board for consideration and adoption.

## II. AGENDA ITEM SUMMARY

The purpose of this action is to follow up on discussions by the Board at your March 21, 2007 meeting where several concepts were identified for further consideration.

## III. BACKGROUND/IMPLICATIONS OF ACTION

### A. Board Action and Other History

At your Board meeting on March 21, 2007, Jeff Towery, then the LMD Manager, presented an extensive written report regarding the Land Management Division's (LMD) Compliance Program. Following a brief oral introduction by Jeff, the Board discussed a variety of issues related to compliance. The issues you discussed were the worksheet used for calculating civil penalties, establishing a 3<sup>rd</sup>-party process for determining civil penalties, the fee charged for someone to appeal a civil penalty, suspending the accrual of civil penalties during an appeal, establishing a 3<sup>rd</sup>-party process for hearing appeals and increasing civil penalties for cases involving commercial gain.

The Board was also interested in exploring the matter of establishing a fund to be used for cleaning up sites that have been through the compliance process but still sit unresolved because the cost of a cleanup project may exceed the value of the property. Since that meeting, you have established such a fund to be derived from a portion of a recent increase of waste management fees collected by the Waste Management Division (WMD). I won't take time to address that issue at this time except to say that LMD and WMD staff will be working to come back to you with the processes to implement utilization of a cleanup fund.

### B. Policy Issues

None.

### C. Board Goals

None.

**D. Financial and/or Resource Considerations**

Two (2) of the issues discussed at your March 21<sup>st</sup> meeting involve use of 3<sup>rd</sup>-party panels in the compliance process. The discussion had the panels being involved at two different points in the compliance process – one involving establishment of the daily civil penalty and the other replacing the Hearings Officer in appeals and/or ordering the assessment of the fine. It doesn't seem appropriate to have the same panel performing both functions so the literal implementation of the Board's discussion could require forming and convening two separate panels.

As a starting point for estimating the cost for a compliance appeals process involving 3<sup>rd</sup>-party panels, I spoke with Marle Hoehne who is responsible for administration of the Board of Property Tax Appeals. Marle indicated that his budget for administering that board was \$71,000 and 0.4 FTE in FY 06-07. The cost includes the stipends for the board members at \$12.50 per hour, the cost of materials and supplies associated with administering the board, and the cost for the 0.4 FTE staff. While the stipends for that board may be significantly greater than for a panel involved with the compliance process because of the dramatically greater volume of tax appeals, the staffing requirement may actually be greater for a compliance appeals board because the need for the board would be year-round rather than seasonal. However, for a starting point, the cost of \$71,000 and 0.4 FTE seems reasonable for administering an advisory compliance appeals panel. If there are two separate panels to administer, I would anticipate about a 50 percent increase in the cost and staffing time to be required for an annual total of \$106,500 and 0.6 FTE. If the compliance appeals panel will replace the Hearings Officer as the primary legal compliance appeal opportunity, the costs for legal assistance to the panel will increase the cost very substantially in order to be certain that the panel's findings are adequate for subsequent appeals in court to be sustained. On the other hand, this added cost for legal review work would be offset to some extent by savings from no longer having costs associated with the Hearings Officer process.

It is probably worth noting that the entire revenue from compliance fines has been far less than \$106,500 in every year of the last eight (8) years except for one (FY 05-06) and that such revenues only exceeded \$71,000 in two (2) of the eight (8) years.

**E. Analysis**

It is important to briefly review the compliance process as it currently exists before considering changes to the process. Compliance investigations are driven (for the most part) by complaints. When a violation is found to have occurred, the Board's stated goal in Lane Code (LC) 5.017-(2) is to achieve

voluntary compliance rather than imposing fines to the property owner or other responsible party. There are five (5) steps in the compliance process, including (1) a request for voluntary compliance (RVC), (2) the order to comply (OTC), (3) the notice of failure to comply (NFC) which includes the initial assessment of the daily civil penalty, (4) the order of civil penalty (OCP) which formally assesses the accumulated fine to date and (5) establishment of the lien(s) to insure collection of the fine.

Following is the compliance history for the last five (5) years (2001-2006):

Action	RVC	OTC	NFC	OCP	Lien
Total #	1,212	109	20	8	6
% corrected	91.0	7.3	1.0	0.2	0.5

It is important to note that 98.3 percent of all compliance actions have been corrected in one of the first two steps, i.e., before a civil penalty is actually levied. It appears that the Board's concerns relate only to the less than two (2) percent of compliance actions that actually result in a civil penalty being levied. I suspect it is only a faint hope that making changes in the compliance process is going to accomplish anything meaningful or productive with respect to those situations that make up that final 1.7 percent of compliance actions.

### **Civil Penalty Worksheet**

In LC 5.017-(5), the Board of County Commissioners has established the factors to be considered in determining the amount of a civil penalty. Most of the Board's discussion in this area centered around the "Administrative Civil Penalty Worksheet", a document used by LMD staff pursuant to Lane Manual (LM) 5.020 to determine the amount of civil penalties in a manner consistent with LC 5.017-(5). I know from personal experience that the compliance worksheet is very similar to the worksheets used by DEQ and OR-OSHA in determining their civil penalties. I suspect that the worksheet is very similar to most every other civil penalty worksheet used by a wide variety of agencies in Oregon and elsewhere.

The concerns expressed in the Board meeting seemed to be that the worksheet is too subjective and complicated. In fact, the worksheet is an attempt to create some structure, objectivity and consistency around a process that is otherwise rife with subjectivity. There is obviously some judgment that is required to use the worksheet appropriately, but it is a far less subjective judgment than would be needed without the structure provided by the worksheet. Anyone who evaluates compliance actions with

any frequency would quickly be able to use the worksheet in a manner that is appropriate, consistent and repeatable.

The worksheet appears to be more complicated at first glance than it actually is. Completing the worksheet obviously involves doing some math, but simply reading the form is more difficult than doing the math. The math is very simple addition and multiplication that someone with even just an elementary school education should be able to do with no trouble.

If the Board wishes to modify the worksheet, direction should be provided regarding the changes desired.

### **3<sup>rd</sup>-Party Civil Penalty Determination Process**

Currently, LM 5.017-(3) provides for the LMD Manager to determine the necessity for and amount of a civil penalty when the compliance process reaches the stage of a Notice of Failure to Comply (NFC). Further, following either an affirmed appeal or expiration of the appeal period, a Hearings Officer reviews the compliance record, including the determination of a civil penalty, and issues the order of civil penalty which makes the accumulated civil penalty final to that point in time. In this process, the Hearings Officer serves as an independent reviewer of the LMD staff's adherence to the compliance process established in LC 5.017, including the determination of the civil penalty amount.

Some members of the Board expressed interest in replacing the current process with a concept of establishing an independent (from the Compliance Program and/or LMD) panel which would review compliance cases and determine civil penalties. It was unclear from my review of the webcast of the March 21<sup>st</sup> meeting whether the Board interest was only to have the 3<sup>rd</sup>-party panel only replace the LMD Manager in the process of determining the civil penalty amount or to have that panel replace the involvement of both the LMD Manager and the Hearings Officer in the compliance process. In the former case, the Hearings Officer would still serve as an independent reviewer of the compliance process, including the 3<sup>rd</sup>-party panel's determination of the civil penalty amount. In the latter case, there would be no independent review of the 3<sup>rd</sup>-party panel's determination of the civil penalty amount.

I've never known of a compliance organization that has turned over the responsibility for establishing and reviewing civil penalties to an independent 3<sup>rd</sup>-party panel, but I suppose it's possible that it could work. The Board should consider whether and how you want a 3<sup>rd</sup>-party panel to be involved in the compliance process (other than in the appeals process which will be discussed later) and provide direction.

## **Appeal Fee**

The payments required to appeal the determination of a civil penalty for an NFC is established in LC 5.017-(7), as follows:

*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.*

Most individuals involved in a compliance action probably use the phrase "appeal fee" to refer both to the fee and to the deposit of the applicable monetary penalty. However, it is important to note that the actual appeal fee for a hearing on a compliance action is only \$100. This fee covers only a small part (probably on the order of 1/15<sup>th</sup> to 1/20<sup>th</sup>) of the total cost of conducting an appeal before a Hearings Official. Both the appeal fee and the monetary deposit are refunded if the appeal is upheld. Also, there is a provision for waiver of the fee and deposit for persons determined to be indigent.

The Board could simply decide to eliminate the requirement for a deposit of the monetary penalty as a condition for being able to appeal a compliance action. However, it is the deposit of the monetary penalty that makes the "nominal" \$100 appeal fee at all reasonable from the perspective of covering LMD's costs when a hearing result affirms the compliance action. That is, if the compliance action is affirmed, the deposited monetary penalty is available to cover the cost of the hearing without need for further legal action to recover those funds from the appellant. If the Board wishes to eliminate the requirement for a deposit of the monetary penalty in order to initiate an appeal, the Board may also wish to establish an appeal fee which more closely covers the cost of an affirmed appeal.

If the Board wishes to modify the appeal fee and/or the deposit requirement, direction should be provided regarding the changes desired.

## **Suspending Civil Penalty Accrual During an Appeal**

Some members of the Board expressed a concern that civil penalties continue to accrue when an individual has filed an appeal in order to contest a compliance action. This occurs pursuant to LC 5.017-(7), as follows:

*Filing of an appeal shall not cause the penalty to cease accruing on a daily basis.*

The purpose for this kind of language in a compliance process is to encourage early abatement of the violation and to minimize the likelihood

that an individual or company will file an appeal simply to drag the process out. If the appeal fee remains fairly "nominal", the requirement for a deposit of the accrued penalty is eliminated and penalties cease to accrue when an appeal is filed, it should be expected that more compliance appeals will be filed with an attendant increase in program costs.

If the Board wishes to modify the current provision that civil penalties continue when an appeal is filed, direction should be provided regarding the changes desired.

### **3<sup>rd</sup>-Party Appeal Process**

The process for appealing a civil penalty in an NFC is established in LC 5.017-(7), as follows:

*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 (i.e., the LMD Manager or designee) within 10 days of when notice is deemed received.*

Some members of the Board expressed interest in replacing the current compliance appeal process with a concept which would establish an independent (from the Compliance Program and/or LMD) panel to hear compliance appeals in a process similar to that used with the Board of Property Tax Appeals. It is important to note that the process and criteria for property tax appeals is very structured in State law and this is clearly not the case with respect to compliance actions. While property tax appeals can usually be addressed adequately with financial evidence and a very terse order, compliance appeals require more of an exercise of legal judgment and most often require a fairly extensive analysis and consideration of legal issues in order to be upheld in the event of further appeal in Circuit Court. It appears unlikely to me that a lay panel modeled after the Board of Property Tax Appeals could work effectively as the sole body to hear compliance appeals.

If the Board wants to pursue a 3<sup>rd</sup>-party panel as part of the appeal process, it might be possible to establish an informal appeals panel which would supplement, but not replace, the more formal appeals process involving a Hearings Officer. An appeal could be made to a lay advisory panel, perhaps for some reasonably modest appeal fee (say, \$300-500), which would render an informal judgment regarding the compliance action and related civil penalty. The judgment of the appeal panel would not be subject to appeal directly, but either party (the County or the appellant) could subsequently choose to initiate the formal appeal process involving a Hearings Officer as currently provided in LM 5.017-(7). If the County was

bringing the appeal to a Hearings Officer, there could be no fee to the appellant. Otherwise, the appellant would be required to pay the appeal fee. Adding this informal step to the compliance appeal process would add time, expense and, possibly, additional accrual of penalties to the process.

The Board should consider whether and how you want a 3<sup>rd</sup>-party board to hear compliance appeals and provide direction.

### **Civil Penalty for Cases Involving Commercial Gain**

Some members of the Board indicated an interest in increasing the civil penalty in cases where the current penalty might be accepted as “a cost of doing business” by an individual or company involved in a commercial activity. Currently, LC 5.017 does not distinguish between commercial and non-commercial situations either with respect to the maximum daily civil penalty or in the determination of the civil penalty. LC 5.017-(5) could be easily modified to establish a higher maximum daily penalty for such cases and/or to add another factor (e.g., a multiplier) for determining the daily civil penalty in such cases.

The Board should consider whether you want to increase civil penalties for cases involving commercial gain and provide direction.

#### **F. Alternatives/Options**

The Board may discuss other options relating to the Compliance Program and provide direction.

#### **IV. TIMING/IMPLEMENTATION**

Depends on Board direction.

#### **V. RECOMMENDATIONS**

I recommend the following:

1. Except for changes related to increasing penalties for cases involving commercial gain (see Recommendation 6 below), continue use of the civil penalty worksheet by the Compliance Program staff as it currently exists.
2. Continue to utilize the current process involving determination of the civil penalty by the LMD Manager or designee and finalization of the civil penalty assessment by a Hearings Officer.



3. Eliminate the existing requirement for a deposit of the monetary penalty in order to appeal a civil penalty, but increase the appeal fee from \$100 to \$1,500. This fee could later be adjusted (up or down) based on actual experience with the costs associated with appeals.
4. Continue accrual of civil penalties when an appeal is filed and until the act or condition constituting the failure to comply is abated.
5. Continue the current appeal process involving a Hearings Officer.
6. Increase the maximum daily civil penalty from \$1,000 to \$2,500 and provide for tripling the calculated civil penalty for compliance actions involving commercial gain.

**VI. FOLLOW-UP**

Depending on direction from the Board, staff will prepare the necessary agenda items so that the Board can take formal action to implement changes to the current LC provisions or make other changes.

**VII. ATTACHMENTS**

None.