

2006 Oregon State Bar *Litigation Journal*

Mandamus in Land Use Cases

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Although most land use permit applications in Oregon are handled exclusively through local government administrative hearings and the Land Use Board of Appeals, Oregon law also gives land use permit applicants a circuit court mandamus remedy if a permit application has been pending without a final decision for more than 120 days in urban areas and 150 days outside urban areas.

This article outlines the development of the land use mandamus remedy, the practical advantages and disadvantages of using this alternative and how these cases are handled in circuit court.

Development of Land Use Mandamus

ORS 215.427 and ORS 227.178 set a 120-day time limit for, respectively, counties and cities to review and decide land use permit applications for property within urban growth boundaries and a 150-day time limit for applications on property outside.¹ The time periods begin at the point an application is deemed “complete.” Although ORS 215.427(2) and ORS 227.178(2) contain detailed definitions of the term “complete,” it generally means the point that an application has all of the information required for the local government to proceed with its review or 30 days following the submission of the application if the local

government has not informed the applicant that additional information is necessary. The time periods may be extended at the request of the applicant under ORS 215.427(4) and ORS 227.178(5). But excluding extensions requested by the applicant, the local government must take “final action” within the respective 120 or 150-day periods after an application is deemed complete. “Final action” under ORS 215.427(1) and ORS 227.178(1) means a decision on the application, including, importantly for the calculation of the 120 or 150-day time limit, the resolution of all appeals at the local (*i.e.*, pre-LUBA) level.² If the local government does not meet the relevant time deadline, it must also return a portion of the application fees under a formula set out in, respectively, ORS 215.427(7) for counties and ORS 227.178(8)-(9) for cities.

Since they were adopted as companion statutes in 1983, the land use mandamus provisions now found in ORS 215.429 and 227.179³ have allowed land use permit applicants to petition the circuit court in the county concerned for a writ of mandamus compelling the county or city involved to approve an application if the local government failed to meet the relevant time limits.⁴ Nonetheless, the mandamus remedy was not used frequently until the mid-1990s for two primary reasons.

First, local governments could—and did—obtain waivers of the time limit from applicants. In 1995, however, the Legislature amended the mandamus statutes to generally prohibit local governments from compelling these waivers.⁵

Those provisions are now found at, respectively, ORS 215.427(8) for counties and ORS 227.178(10) for cities.

Second, the Oregon Court of Appeals had held that a circuit court lost jurisdiction if the local government took final action while the mandamus action was pending.⁶ Given the investment of time and expense often involved in a circuit court case, the practical effect of this decision was to discourage the use of the mandamus remedy because a local government could defeat the mandamus action simply by making a final decision on the application prior to judgment. In 1994, however, the Oregon Supreme Court held in *State ex rel Compass Corp. v. City of Lake Oswego*, 319 Or 537, 878 P2d 403 (1994) (*Compass*), that a city could not divest a circuit court of mandamus jurisdiction (and, by implication, its counterpart dealing with counties) by taking final action on a land use application once the applicant had filed a timely mandamus action. The Legislature later codified this aspect of *Compass* in ORS 215.429(2) for counties and ORS 227.179(2) for cities.

Since *Compass* and the statutory changes of the mid-1990s, mandamus has expanded as a tool for land use lawyers and litigators. Although many counties and cities in response began tracking mandamus time limits more carefully and began requesting voluntary waivers, land use mandamus still provides an important potential remedy to land use applicants.

Practical Advantages and Disadvantages of the Mandamus Remedy

The “political” dynamics of a particular land use application will usually dictate whether an applicant, as a practical matter, should stay within the local government’s permit approval system or consider the mandamus remedy. For example, if the local government has indicated that an application will be approved but simply hasn’t completed its processing within the time-limit, most applicants will wish to stay within the local government’s system.⁷ In those cases in which the local government does not appear close to taking final action within the deadline, however, mandamus does offer an alternative route.

There are four principal practical advantages from an applicant’s perspective in using the mandamus remedy.

First, if successful, this remedy does not just compel the local government to make a decision on the application. Rather, ORS 215.429(5) and ORS 227.179(5) compel the *approval* of the application. See *Compass, supra*, 319 Or at 544-45. Like a land use approval, the writ may impose conditions. Under ORS 215.429(5) and ORS 227.179(5), however, the conditions must be consistent with the local government’s comprehensive plan and land use regulations.

Second, in contrast to land use proceedings conducted by counties and cities, the burden of proof in a mandamus case is shifted from the applicant to the local government. ORS 215.429(5) and ORS 227.179(5) direct that the court

“shall” issue the writ unless the local government proves that approval of the application would violate a substantive provision of its comprehensive plan or land use regulations. See *Compass, supra*, 319 Or at 544-45.

Third, unlike land use proceedings, the court interprets any land use regulations at issue independently rather than according deference to the local government’s interpretation. See *State ex rel Coastal Management, Inc. v. Washington County*, 159 Or App 533, 540-42, 979 P2d 300 (1999); *State ex rel Currier v. Clatsop County*, 149 Or App 285, 289-90, 942 P2d 847 (1997).

Fourth, under a related provision governing mandamus actions generally—ORS 34.210(2)—attorney fees are available to a successful applicant at the discretion of the trial court using the standards set out in ORS 20.075.⁸ See generally *State ex rel Aspen Group v. Washington County*, 150 Or App 371, 378-380, 946 P2d 347 (1997), *rev denied*, 327 Or 82, 961 P2d 216 (1998), *appeal after remand*, 166 Or App 217, 222-27, 996 P2d 1032 (2000); accord *State ex rel Coastal Management, Inc. v. Washington County, supra*, 159 Or App at 543-52.

There are three primary practical disadvantages to using mandamus in the land use context.

First, moving a land use application to court can sometimes polarize dealings between the local government and the applicant. Therefore, mandamus is often best reserved for situations in which there is already significant friction

between the local government and the applicant and, as a result, the applicant is not likely to make much headway by continuing to pursue the development through the usual permitting process.

Second, unless the local trial court is willing to handle a mandamus on an expedited basis, it will follow the same track toward a trial as other civil litigation. Therefore, mandamus is often best suited for situations where the traditional permitting process would also be a comparatively long or “fatal” road.

Third, because most land use applications are handled outside the trial courts, trial judges typically do not deal frequently with the esoteric world of land use and zoning codes. This counsels choosing cases for mandamus relief that are built around a few straightforward issues.

How Mandamus Cases Are Handled in Circuit Court

Although the substantive right to the mandamus remedy in land use cases is created by ORS 215.429 and ORS 227.179, the procedural mechanics are largely controlled by ORS 34.105-.240—which govern writs of mandamus generally in circuit court.⁹

Mandamus cases against either a county or a city are begun by filing a petition for an alternative writ of mandamus with the circuit court of the county in which the land use application is pending.¹⁰ The petition generally tracks the language of the statutes and recites the date on which the application was complete, the fact that the local government has not taken final action on the

application and that the 120 or 150-day clock has run since the application was complete. The writ is an “alternative” one because it commands the local government to either approve the application involved or, in the alternative, to show cause why it has failed to do so. The petition is usually supported by an affidavit from the applicant or the applicant’s attorney authenticating a copy of the application and confirming that the 120 or 150-day period has expired.

In most counties, copies of the petition and supporting affidavit are presented at *ex parte* and, if granted, the judge signs an order directing the clerk to issue the alternative writ. The contents of the writ largely mirror the petition. Typically, the writ is prepared by the applicant’s lawyer along with the other initial papers and should be available for the judge’s review at *ex parte*. The original writ is then signed by the clerk and returned to the applicant’s lawyer for service.

The original writ is served on the local government in the same manner as a summons. Copies of the writ are also served on any other parties to the underlying land use proceeding and the class of nearby property owners who would be entitled to notice in a land use proceeding under ORS 197.763. ORS 215.429(3) and ORS 227.179(3) require that the notice to other parties be served by mail or by hand the same day the petition is filed. The applicant then files a proof of service with the court. Under ORS 34.130(4)(b), motions to intervene by third parties such as neighborhood groups must be filed within 21 days of the filing of the mandamus petition.

There is no particular response time fixed by either the land use or general mandamus statutes. Rather, the court will normally pick a “return” date (with 30 days being typical) and include it in the writ. The writ is “returned” by the local government by filing the original writ with the court along with a “certificate,” which is a statement indicating whether it has or has not approved the application involved. If the local government has approved the application in response to the alternative writ, then the case is over. If not, then the local government must also file an answer stating affirmatively why the approval would violate its comprehensive plan or land use regulations. The local government can also move to dismiss the writ if it fails to meet the statutory prerequisites.

Once the local government has answered, discovery and further motion practice are conducted in the same way as other civil cases.

The trial, too, is conducted in the same manner as other non-jury civil actions—with three main exceptions.

First, in some counties, mandamus cases are handled on the show cause or expedited docket rather than the general trial calendar.

Second, because the local government bears the burden of proving that the proposed development would violate its comprehensive plan or land use regulations, the local government—even though it is the defendant—may essentially proceed first at trial if it has already admitted the background

allegations in the alternative writ and the only issues remaining for trial relate to its affirmative defenses. See generally *State ex rel Lowell v. Eads*, 158 Or App 283, 286-87, 974 P2d 692 (1999) (discussing the burden of proof); see, e.g., *State ex rel Forman v. Clackamas County*, 181 Or App 172, 179, 45 P3d 491 (2002).

Third, if the court finds for the applicant, it can attach conditions to the approval that are permitted in the local government’s comprehensive plan or land use regulations under ORS 215.429(5) and ORS 227.179(5).

If the applicant prevails at trial, the final judgment is in the form of a “peremptory” writ of mandamus to the local government directing it to approve the application with any conditions the court may have imposed.

An appeal may be taken in the same way as in any other civil case. Because a mandamus ruling is not classified as a “land use decision” under ORS197.015(11)(e)(A), any appeal is to the Court of Appeals rather than to LUBA. Mandamus proceedings are considered an action at law and, therefore, appellate review under ORS 34.240 is not de novo. Rather, an appellate court reviews the trial court’s findings to determine if they are supported by the evidence. See *Coastal Management, Inc. v. Washington County*, *supra*, 159 Or App at 539-40.

Conclusion

Although the mandamus remedy is not appropriate in every situation in which a land use permit application has been pending for more than the applicable 120-day or 150-day time limit, it provides another tool to developers navigating the approval process with local governments.¹¹

ABOUT THE AUTHOR

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¹ ORS 215.427(1) includes permits for mineral aggregate extraction wherever they are located within the 120-day time limit. ORS 215.427(6) and ORS 227.178(7) exclude comprehensive plan amendments and the adoption of land

use regulations from the mandamus remedy. ORS 215.433 [counties] and ORS 227.184 [cities] impose 240-day time limits for supplemental applications submitted following an initial denial of an application by a local government. ORS 215.435 [counties] and ORS 227.182 [cities] impose 90-day time limits for final action on land use applications remanded from LUBA.

² Decisions that are subject to the mandamus remedy are those “wholly within the authority and control of the governing body” of the respective county or city. See ORS 215.427(5)(a) [counties]; ORS 227.178(6)(a) [cities]. The fact that other agencies must approve other elements of an overall project, however, does not excuse the county or city involved from making its decisions within the applicable time periods. See *State ex rel Aspen Group v. Washington County Board of Commissioners*, 150 Or App 371, 374, 946 P2d 347 (1997), *rev denied*, 327 Or 82, 961 P2d 216 (1998), *appeal after remand*, 166 Or App 217, 996 P2d 1032 (2000). Under ORS 215.427(3) [counties] and ORS 227.178(3) [cities], “approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.”

³ When they were originally enacted, the land use mandamus provisions were at former ORS 215.428(7) and former ORS 227.178(7). In 1999, the Legislature moved the mandamus remedy to, respectively, ORS 215.429 and ORS 227.179. See Or Laws 1999, ch 393, §2 and ch 533, §§ 6-7 [counties]; Or Laws 1999, ch 533, §§ 8-10 [cities].

⁴ Under ORS 215.429(4) and ORS 227.179(4), a mandamus cannot be filed within 14 days after a local government makes a preliminary decision on an application as long as a final written decision follows within 14 days after the preliminary decision.

⁵ See Or Laws 1995, ch 812, § 2 [counties], § 3 [cities].

⁶ See *Edney v. Columbia County Board of Commissioners*, 119 Or App 6, 849 P2d 1125, *aff'd on other grounds*, 318 Or 138, 863 P2d 1259 (1993).

⁷ As a practical matter any extensions of time accorded a local government should be documented in writing and should not be open-ended.

⁸ ORS 34.210(2) is a “prevailing party” statute. Attorney fees, therefore, can also be entered *against* a losing mandamus petitioner.

⁹ The land use mandamus statutes as enacted originally did not contain a specific link to ORS Chapter 34. See *generally Murphy Citizens Advisory Com. v. Josephine County*, 325 Or 101, 934 P2d 415 (1997). The Legislature amended the land use mandamus statutes to provide that specific link in 1999. See Or Laws 1999, ch 533, §§ 7 [counties], 10 [cities].

¹⁰ ORS 34.160 allows a peremptory writ at the outset “[w]hen the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus shall be allowed in the first instance; in all other cases, the alternative writ shall be first issued.”

¹¹ The author would like to thank Steve Abel, his former land use colleague at Stoel Rives LLP, for his insightful review and comments on the draft of this article.