



Oregon

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January 4, 2013

TO: Land Conservation and Development Commission (LCDC)

FROM: Jim Rue, Director
Matt Crall, Planning Services Division Manager

SUBJECT: **Agenda Item 4 – Request to Appeal, January 25, 2013, LCDC Meeting**

**REVIEW OF A DIRECTOR'S DECISION TO PARTICIPATE IN
A CASE BEFORE THE LAND USE BOARD OF APPEALS**

COLUMBIA COUNTY

I. RECOMMENDATION

The director recommends, based on the information contained in this report, that the commission authorize the department to proceed with an appeal of a Columbia County decision to the Land Use Board of Appeals (LUBA).

The department filed a Notice of Intent to Appeal with LUBA (LUBA 2013-001) on January 2, 2013. Because there was no meeting of the commission scheduled prior to the close of the 21-day period for filing an appeal, this request to proceed is being brought to the next commission meeting, as specified in Oregon Revised Statutes (ORS) 197.090(2)(d).

II. CASE SUMMARY

On February 8, 2010, the department issued a Measure 49 final order (File E132324) authorizing Priscilla Jauron to establish two new parcels and two new dwellings on property located at 32549 Cater Road, near St. Helens, in Columbia County. The final order included a condition stating:

“the home site authorization does not authorize new lots or parcels that exceed two acres if the new lots or parcels are located on high-value farmland, on high-value forestland or on land within a ground water restricted area”

This condition is a requirement of Section 11(3) of Measure 49 (Chapter 424, Oregon Laws 2007) to maximize the suitability of the remnant parcel for farm or forest use. The property is identified as high-value forestland, so the two-acre limit applies.

In 2011 Columbia County approved a partition consistent with the Measure 49 final order to create two new 2-acre parcels, leaving a 54.64-acre remnant parcel.

On September 20, 2012, the department received notice of a proposed property line adjustment (Attachment A) that would enlarge the two, 2-acre parcels to 19 acres each and reduce the 54.64-acre remnant parcel to 19 acres, in violation of the requirements of Section 11(3) and the conditions of the final order. The department responded with written comments on October 9 and 17, 2012 (Attachment B) advising the county that the proposed line adjustment was not lawful. The second letter included legal guidance from the Department of Justice (DOJ) explaining why counties may not approve adjustments that are inconsistent with the maximum parcel size restrictions of section 11(3).

On November 7, 2012, the Columbia County Board of Commissioners deliberated and tentatively approved the property line adjustment. The final order was issued December 17, 2012 (Attachment C).

On January 2, 2013 the department filed a Notice of Intent to Appeal with LUBA (LUBA 2013-001), and copies were sent to the county and the applicants.

The department will notify the county and the applicants, as required by Oregon Administrative Rule (OAR) 660-001-0220, that this request to proceed with the appeal is going to be presented to commission. The notice will include the factors in OAR 660-001-0230(3) upon which the commission will base its decision and inform the county and the applicants that they have an opportunity to appear before the Commission to discuss those factors.

III. APPEAL FACTORS

The commission has previously adopted factors in OAR 660-001-023(3) to be used when making decisions about whether or not to appeal local land use decisions:

- (a) Whether the case will require interpretation of a statewide planning statute, goal or rule;
- (b) Whether a ruling in the case will serve to clarify state planning law;
- (c) Whether the case has important enforcement value;
- (d) Whether the case concerns a significant natural, cultural or economic resource;
- (e) Whether the case advances the objective of the agency's Strategic Plan;
- (f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance.

IV. ANALYSIS

A. Background on Measure 49 Litigation

The department is currently involved in and monitoring multiple court cases regarding Measure 49 implementation. Most of these cases do not involve "land use decisions" as defined in ORS 197.015. Measure 49 explicitly states in section 16(1) that most determinations under the measure are not land use decisions. For example, the department's decision on a final order under sections 6 or 7 is not a land use decision, and neither is a vested rights determination by a local government. As a result, most of the department's legal activity related to Measure 49 is

not covered by ORS 197.090(2)(c) and (d) and does fall into the procedures of OAR 660-001-0201 through 0230.

This case, however, involves a property line adjustment, which would ordinarily be a land use decision. There is a possibility, however, that this matter will be determined not to be a land use decision because the case involves interpretation of Measure 49. The department has initially treated the case as a land use decision and filed at the Land Use Board of Appeals (LUBA); however, the department has also taken steps to preserve the ability to challenge the decision in circuit court if LUBA finds that it does not have jurisdiction.

B. Appeal Factors

(a) Whether the case will require interpretation of a statewide planning statute, goal or rule

The case involves the interpretation of Measure 49 (Chapter 424, Oregon Laws 2007). The most relevant portion is within Section 11:

“(3)(a) A city or county may approve the creation of a lot or parcel to contain a dwelling authorized under sections 5 to 11 of this 2007 Act. However, a new lot or parcel located in an exclusive farm use zone, a forest zone or a mixed farm and forest zone may not exceed:

(A) Two acres if the lot or parcel is located on high-value farmland, on high-value forestland or on land within a ground water restricted area; or

(B) Five acres if the lot or parcel is not located on high-value farmland, on high-value forestland or on land within a ground water restricted area.

(b) If the property is in an exclusive farm use zone, a forest zone or a mixed farm and forest zone, the new lots or parcels created must be clustered so as to maximize suitability of the remnant lot or parcel for farm or forest use.”

(b) Whether a ruling in the case will serve to clarify state planning law

This court’s decision in this case will clarify state planning law, and other counties will apply this clarification when they receive applications for property line adjustments on parcels created by Measure 49.

(c) Whether the case has important enforcement value

The case will establish that the parcel size limitations in section 11(3) are an ongoing requirement that counties must enforce.

(d) Whether the case concerns a significant natural, cultural or economic resource

There is the potential for cumulative adverse impacts on agricultural and forest lands if parcels created by Measure 49 are subsequently adjusted to fragment agricultural and forest land.

(e) Whether the case advances the objectives of the agency’s strategic plan

One of the Guiding Principles in the strategic plan is, “Provide fairness and equity to all Oregonians.” A judicial resolution of this case, regardless of which way the decision comes out,

will help provide fairness to property owners by clarifying what requirements, if any, continue to apply to parcels that were originally created through Measure 49.

One of the department's Strategic Goals is, "Preserve coastal, farm, forest, riparian and other resource lands." If the DOJ advice is upheld in the courts, the ongoing parcel size requirements will preserve farm and forest land, thus advancing this goal.

(f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance

Other means (e.g., dispute resolution, or technical assistance) would not provide the precedent that would apply to other counties evaluating proposed property line adjustments on parcels created by Measure 49. Enforcement proceeding are not appropriate until the legal issues are clarified through this appeal.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

The department recommends that the commission support the director's decision to appeal the Columbia County decision.

Proposed Motion: I move to authorize the department to proceed with the appeal of the Columbia County decision described in the staff report based on the analysis in the staff report that address the factors in OAR 660-001-0230(3).

Alternative Motion: I move that the commission not authorize the department to proceed with the appeal of the Columbia County decision described in the staff report.

ATTACHMENTS

- A. Columbia County, Notice of Public Hearing
- B. DLCD comment letters, including guidance from the Department of Justice
- C. Columbia County Final Order 52-2012
- D. Notice of intent to appeal