



# Oregon

Theodore R. Kulongoski, Governor

## Department of Land Conservation and Development

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February 26, 2009

TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director  
Judith Moore, Division Manager, Measure 49 Services

SUBJECT: **Agenda Item 9(b) – March 11-13, 2009, LCDC Meeting**

### **REVIEW OF A DIRECTOR'S DECISION TO APPEAL TO THE LAND USE BOARD OF APPEALS (LUBA)**

#### **JACKSON COUNTY**

#### **I. RECOMMENDATION**

The director recommends, based on the information contained in this report, that this commission authorize the Department of Land Conservation and Development (department) to proceed with the appeal of a Jackson County decision to the Land Use Board of Appeals (LUBA). A Notice of Intent to Appeal was filed with LUBA (LUBA No. 2009-025) on February 9, 2009. The 21-day period for filing an appeal concluded on February 10, 2009.

#### **II. CASE SUMMARY**

On January 20, 2009, Jackson County approved Robert Ferns' application for preliminary plat approval for a 12-lot subdivision for his property located on Hillcrest Road near Ashland, Oregon (T37S, R1E, Section 30, Tax Lot 300 and Section 31, Tax Lots 100 and 500). The property is the subject property of state Measure 37 Claim No. M130020, the final order of which authorized the claimant to divide the 446.07-acre property and develop dwellings on each resulting vacant parcel. Jackson County also approved a "Measure 37 waiver" for Robert Ferns (claimant).

Jackson County accepted claimant's subdivision application on January 9, 2008, after the expiration of claimant's state Measure 37 waiver on the effective date of Measure 49 (December 7, 2007). Claimant also applied to the county for a vesting determination that, as of December 7, 2007, he had acquired a common law vested right to complete and continue the use described in the Measure 37 waivers issued by the State and county. The county vesting officer determined that claimant was not vested.

The county Planning Commission (Commission) held five hearings on claimant's subdivision application between January and October 2008 and denied the application on October 23, 2008. On

January 20, 2009 the county Board of Commissioners (Board) reversed the Commission's decision after two public hearings. The Board approved the application with conditions, including:

- 9) **Prior to final plat approval**, the Applicant shall provide the County Planning Staff with an operative and legally valid waiver by the State of Oregon of state land use regulations governing minimum lot sizes and nonfarm housing in the EFU zone or proof of a final LUBA or Court Order of Judgment to which the Applicant was a party holding that such a waiver is legally unnecessary to allow the land division and development. The sufficiency, status and validity of the waiver or offer of proof will be determined by the County through an appropriate procedure under the Land Development Ordinance.

The department timely appealed this decision to LUBA as described above.

Pursuant to OAR 660-001-0220, the department notified the property owner and Jackson County of its intent to appeal the county's decision. In the notice, the department indicated that an opportunity exists to appear before the commission to discuss the merits of the department's appeal. Parties were also informed about the factors in OAR 660-001-0230(3) upon which the commission will base its decision on whether or not to direct the department to proceed with this appeal.

### **III. APPEAL FACTORS**

To proceed with an intervention of an appeal, the commission must base its decision on one or more of the following factors from OAR 660-001-0230(3):

- (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 objectives of the agency's Strategic Plan; or
- (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) Whether the Case will Require Interpretation of a Statewide Planning Statute, Goal or Rule;**

This case involves interpretation of Measure 49, ORS 195.300 *et seq* and whether state Measure 37 waivers can serve as the basis for a land use decision after the effective date of Measure 49. LCDC explained the application of Measure 49 to Measure 37 waivers in OAR 660-041-0040, which provides:

Any authorization for a Claimant to use Measure 37 Claim Property without application of a DLCD Regulation provided by a DLCD Measure 37 Waiver expired on December 6, 2007, as did the effect of any order of DLCD denying a Claim. A

Claimant may continue an existing use of Measure 37 Claim Property that was authorized under ORS 197.352 (2005). A Claimant may complete a use of Measure 37 Claim Property that was begun prior to December 6, 2007, only if the Claimant had a common law vested right to complete and continue that use on December 6, 2007, and the use complies with the terms of any applicable DLCD Measure 37 Waiver.

Without state Measure 37 waivers of certain existing land use regulations, Jackson County's decision violates state law. Goal 3, and the implementing statutes and rules that restrict subdivision and residential development in the Exclusive Farm Use zone, apply to the property and prohibit the approved use. By approving the subdivision, while simultaneously recognizing that it violates state law, the County's decision is subject to being reversed by LUBA.

**(b) Whether a Ruling in the Case will Serve to Clarify State Planning Law;**

A ruling in this case will further clarify that under Measure 49, counties may not issue permits contrary to state law based on a Measure 37 waiver after December 6, 2007, even if the county conditions the approval on subsequent state recognition of a "substitute" for Measure 37 waivers.

**(c) Whether the Case has Important Enforcement Value;**

This case has important enforcement value to confirm and clarify the effect of Measure 49 on the viability of Measure 37 waivers.

**(d) Whether the Case Concerns a Significant Natural, Cultural or Economic Resource;**

The property involved includes approximately 446.07 acres of agricultural land, a Goal 3 resource.

**(e) Whether the Case Advances the Objectives of the Agency's Strategic Plan; or**

This factor is not applicable.

**(f) Whether there is a Better Way to Accomplish the Objective of the Appeal, such as Dispute Resolution, Enforcement Proceedings or Technical Assistance.**

The department sought to resolve the matter with the County by advising it of the State's position on the enforcement state land use regulation after the effective date of Measure 49 in the department's written comments dated March 19, 2008 and December 10, 2008. The County's decision is final unless appealed to LUBA, so this action is the only option available for enforcing the applicable rules.

**V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION**

The department recommends that LCDC support the Director's recommendation and proceed with an appeal of the Jackson County land use decision.

**Proposed Motion:** I move that LCDC approve a department appeal of the subject decision from Jackson County to the Land Use Board of Appeals because the information included in this report demonstrates that OAR 660-001-0230(3) (a), (b), (c) and (d) apply.

***Alternative motion:*** I move the Commission not approve an appeal of the subject decision from Jackson County because \_\_\_\_\_.