



Oregon

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October 3, 2007

TO: Land Conservation and Development Commission

FROM: Cora Parker, Acting Director
Carmel Bender, Compensation Claims Planning Specialist

SUBJECT: **Agenda Item 5a, October 17-19, 2007, LCDC Meeting**

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

DOUGLAS COUNTY

I. RECOMMENDATION

The acting director recommends, based on the information contained in this report, that the Commission authorize the department to proceed with the appeal of a Douglas County decision to the Land Use Board of Appeals (LUBA). The department filed a Notice of Intent to Appeal with LUBA (LUBA No. 2007-176) on September 11, 2007. The 21-day period for filing an appeal concluded on September 12, 2007.

II. CASE SUMMARY

The approval for a 3-lot partition of the subject property, (identified as township 23S, range 4W section 15 tax lot 600 and section 22 tax lot 200) is based on a Measure 37 waiver of certain land use regulations. The department brings this appeal because the claimant who was granted a Measure 37 waiver is now deceased, and therefore no longer owns the subject property. The waiver cannot be transferred to another party and therefore cannot be exercised for this application. Without a waiver of certain land use regulations, the proposed development does not meet the applicable approval criteria.

The state Measure 37 claim was filed on August 29, 2005, by then owner of the subject property, Percy Langdon. The department determined that his claim was valid and issued a waiver (M122095) on July 7, 2006. On October 28, 2006 Percy Langdon died. As the

property was no longer owned by the claimant, the waiver became void. The County's waiver (M37-45) was not granted until December 8, 2006, after Percy Landon's death, and therefore should not have been approved.

The applicants, Dan and Dick Langdon, personal representatives of the Percy Langdon Estate, submitted the partition application at issue on January 9, 2007, with the intent of exercising Percy Langdon's waiver on behalf of his estate. At the time the department first received notice of the application, it was not apparent that the applicants were acting on behalf of the estate. The department sent a letter dated February 5, 2007, explaining that a Measure 37 waiver is not transferable, and that Percy Langdon would need to be a party to the application in order to exercise the waiver. In response to this letter, the applicants advised the department that they were Percy Langdon's estate's personal representatives.

On February 23, 2007, the department sent an additional letter to the county explaining that the estate cannot exercise Percy Langdon's waiver because rights granted under ORS 197.352(8) are specific to the present owner of the property and cannot be transferred. The present owner of the property is the beneficiary of Percy Langdon's estate. Since Percy Langdon's Measure 37 waivers are not applicable to Dan and Dick Langdon's partition application, it must be reviewed consistent with all current land use regulations. As proposed, the partition does not meet the minimum lot size standards currently in effect, and the application should be denied.

On March 30, 2007, the planning director approved the partition as submitted by Dan and Dick Langdon. The staff report relied on County Counsel's advice that provisions of Oregon probate law can be interpreted to allow the personal representative of an estate to act upon the Measure 37 waivers issued to the deceased.

The department appealed the director's decision to the Douglas County Planning Commission. A hearing was held on June 21, 2007. DLCDC staff attended the hearing and presented the department's position, based on Department of Justice (DOJ) advice, that waivers are not transferable, even in the circumstance of a deceased claimant. The Planning Commission recognized that the county's and state's legal interpretations of ORS 197.352 are at odds.

The Planning Commission upheld the director's decision. On July 26, 2007, the department appealed the decision to the Douglas County Board of Commissioners. The Board of Commissioners declined to hear the appeal, letting the decision stand. In its order, the Board explains, "In the interest of allowing the matter to move forward for the sake of the applicants by eliminating an additional hearing before the Board, the Board opted to decline review of this matter."

On September 11, 2007, the Oregon Department of Justice filed a Notice of Intent to Appeal to LUBA, on behalf of the department. Pursuant to Commission rules (OAR 660-001-0220), the department notified the property owner and Douglas County of its intent to request Commission approval to pursue an appeal of Douglas County's decision. In

the notice, the department informed the parties of 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 and indicated that an opportunity exists to appear before the Commission to discuss those factors.

III. APPEAL FACTORS

To proceed with 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;
- (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 the interpretation of ORS 197.352, because the county decision authorizes a land partition in violation of state laws that still apply to the property. The county's decision is based on a state Measure 37 waiver issued to a claimant who is no longer the owner of the subject property.

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

DOJ has consistently advised that Measure 37 waivers are not transferable, and has held that this is also the case when a claimant's ownership interest is transferred through devise or intestate succession. This appeal will allow for a ruling on this position that will have statewide applicability.

(c) Whether the Case has Important Enforcement Value

This case has important enforcement value, as it will ensure that local governments do not apply Measure 37 waivers to land use applications where the claimant is no longer the owner of the subject property.

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

The subject property includes over two-hundred forty-one acres of agricultural land, a Goal 3 resource.

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

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 did seek to resolve the matter with the county by advising it of the state's position on the transferability of Measure 37 waivers, twice before the decision was made, and upon appeal to the Douglas County Planning Commission. The department's appeal request to the Board of County Commissioners was declined. The LUBA appeal is the only option available to pursue enforcement of the applicable land use regulations for this application.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

The department recommends that the Commission support the director's recommendation and proceed with an appeal of the Douglas County land use decision.

Proposed Motion: I move that the Commission approve a department appeal of the subject decision from Douglas 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 Douglas County because _____.

Attachments: Douglas County Board of County Commissioners Order,
Planning Dept. File No. 07-005, dated August 23, 2007;
Notice of Intent to Appeal