



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 5b, October 17-19, 2007, LCDC Meeting**

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

JEFFERSON 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 Jefferson County decision to the Land Use Board of Appeals (LUBA). The department filed a Notice of Intent to Appeal with LUBA (LUBA No. 2007-177) on September 11, 2007. The 21-day period for filing an appeal concluded on September 12, 2007.

II. CASE SUMMARY

The approval for a 60-lot subdivision of the subject property, (located at 7916 and 7970 SW Kent Lane, near Culver) 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 July 13, 2005, by then owner of the subject property, William Burk. The department determined that his claim was valid and issued a waiver (M121394) on May 23, 2006 authorizing the claimant to divide the 153 acre subject property into fifty lots.

In January 2007, William Burk submitted an application for a 100-lot planned unit development. The planning director denied the application because it did not comply with the terms of the state and county Measure 37 waivers.

On April 4, 2007, the Board of Commissioners of Jefferson County initiated a review of the decision, setting a public hearing on May 23, 2007. On May 21, 2007, the department submitted a comment letter to the county objecting to the development because, as proposed, it exceeded the scope of development authorized in the Measure 37 waivers - both the county and state waivers were based on claims that identified the desired use as fifty lots. The applicant subsequently submitted a revised tentative plan for a 59-lot subdivision (application was for fifty-nine lots, but the final approval allowed sixty lots) and requested the hearing be continued.

The hearing was continued June 27th, July 11th, July 25th, and August 1st for review and deliberation of the revised plan and additional testimony. During that process, William Burk died on July 1, 2007. On July 10, 2007, the department submitted an additional letter to the county explaining that the rights granted under ORS 197.352(8) are specific to the present owner of the property and cannot be transferred, and as William Burk is no longer the owner of the property, his waiver cannot be applied to the development application. On August 22, 2007, the Board of Commissioners approved the applicant's revised subdivision application.

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 Jefferson County of its intent to request Commission approval to pursue an appeal of Jefferson 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 division 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

The Department of Justice has advised that Measure 37 waivers are not transferable. 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 apply appropriate state goals, statutes and regulations to Measure 37 permit applications, and do not exceed the scope of state Measure 37 waivers.

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

The property involved includes approximately one hundred fifty-three 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. The matter was taken up by the Board of Commissioners, so the decision is a final land use decision, appealable only to LUBA.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

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

Proposed Motion: I move that the Commission approve a department appeal of the subject decision from Jefferson County to the Land Use Board of Appeals because the information included in this report demonstrate 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 Jefferson County because _____.

Attachments: Jefferson County Board of County Commissioners Order No. 0-134-07,
for application # 07-SD-01, dated August 22, 2007;
Notice of Intent to Appeal