



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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Web Address: <http://www.oregon.gov/LCD>

July 30, 2008



TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director
Carmel Bender, Measure 49 Communication & Compliance Coordinator

SUBJECT: **Agenda Item 4a, August 6-7, 2008, LCDC Meeting**

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

JEFFERSON COUNTY

I. RECOMMENDATION

The director recommends, based on the information contained in this report, that the Commission authorize the Department of Land Conservation and Development (department) to proceed as an intervening party on the side of respondent Jefferson County in the appeal of a Jefferson County decision to the Land Use Board of Appeals (LUBA). A Motion to Intervene in *Hoffman v. Jefferson County*, LUBA Case No. 2008-090, was filed with LUBA on July 3, 2008. The petitioner filed a Notice of Intent to Appeal on June 20, 2008 and the 21-day period for filing a motion to intervene concluded on July 11, 2008.

II. CASE SUMMARY

William and Delores Hoffman received county and state waivers under Measure 37 (state claim M118669) allowing them to divide the 187.74-acre subject property into 60 parcels and to develop a dwelling on each parcel, to the extent that use was allowed at the time they acquired the property in 1972. The claimants applied to the county for tentative plan approval of a 60-lot subdivision. The county administratively approved the application on November 21, 2007. A timely appeal was filed by Central Oregon Land Watch. The Planning Commission heard the appeal on January 24, 2008 and denied the application because the implementation of Measure 49 on December 6, 2007 invalidated the Measure 37 waivers that the decision was based upon. The applicants appealed that decision to the Jefferson County Board of Commissioners (Board). On April 2, 2008, and again on

reconsideration on June 4, 2008, the Board upheld the Planning Commission's denial of the application. On June 20, 2008, the applicants filed a Notice of Intent to Appeal with LUBA.

On April 2, 2008, the department submitted a written comment supporting the Planning Commission's denial of the application based the expiration of the underlying Measure 37 waivers, consistent with OAR 660-041-0060.

After receipt of the applicants' Notice of Intent to Appeal, the department filed a Motion to Intervene as described above.

Pursuant to Commission rules (OAR 660-001-0220), the department notified the property owner and Jefferson County of its intent to intervene in the appeal of 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 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 Requires Interpretation of a Statewide Planning Goal, Statute, or Rule

This case involves interpretation of Measure 49, ORS 195.305 et seq and specifically the application of Measure 49 to land use decisions initially determined prior to enactment of Measure 49 based on then-existing Measure 37 waivers, but remanded to the county from LUBA after enactment of Measure 49.

LCDC explained the application of Measure 49 to Measure 37 waivers in OAR 660-041-0060, 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 waivers of certain existing land use regulations provided under Measure 37, approval of the land use application would violate state laws that apply to the owners' use of the property. Based on a preliminary review of the underlying subdivision application, it appears that Goal 3 and the implementing statutes and rules that restrict subdivision and development in Exclusive Farm Use zones apply to the proposed use of the property.

(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 pursuant to Measure 37 waivers after December 6, 2007.

(c) Whether the Case has Important Enforcement Value

This case has important enforcement value, as it will ensure that state Goals, statutes and regulations are enforced by counties for land use applications that were originally based on Measure 37 waivers that are now expired.

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

The property involved is designated agricultural resource land under Goal 3.

(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 explained its position which supported the county's decision in the proceedings below, yet the applicant has chosen to appeal. At this point, participation in the appeal is the only option available for the department to affect enforcement of the applicable rules.

V. DEPARTMENT RECOMMENDATION AND DRAFT MOTION

The Department recommends that the Commission support the Director's recommendation and proceed with participation in the appeal of the Jefferson County land use decision.

Proposed Motion: I move that the Commission approve the department participation in the appeal of the subject decision from Jefferson 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 department participation in an appeal of the subject decision from Jefferson County because _____.

Attachments: Jefferson County Planning Commission Decision, January 29, 2008
DLCD comment letter, April 2, 2008
Jefferson County Board of Commissioners Order No. 0-55-08, April 9, 2008
Jefferson County Board of Commissioners Order No. 0-89-08, June 11, 2008
Applicant's Notice of Intent to Appeal
DLCD Motion to Intervene

In the Matter of the Appeal of an)	
Administrative Decision that approved an)	Application # 07-SD-03
Application for a 60-lot Subdivision based on)	
a Waiver under ORS 197.352 (Measure 37))	

I. Background

William and Delores Hoffman submitted an application for tentative plan approval of a 60-lot subdivision containing two acre each at 2384 NW Fir Lane, ¼ mile west of Columbia Drive, tax lots 10-13-09-400 and 600. The application is based on a waiver of current land use regulations under Ballot Measure 37. The primary issue is the approval by voters, in November 2007, of Ballot Measure 49, which modified Ballot Measure 37. The tentative plan was administratively approved by the Planning Director on November 21, 2007, subject to twenty one (21) conditions of approval. A timely appeal was filed by several different persons on December 11, 2007.

II. Applicable Criteria

2007 Jefferson County Zoning Ordinance Sections 301.6, 301.7, 301.8, 401, 402, 426, and 702 through 707; Section 12.18 of the 2002 Jefferson County Code; and the Statewide Planning Goals; except as those regulations were waived by County Waiver #2005-003 and State Waiver Final Order on Claim No. M18669 pursuant to Ballot Measure 37. Ballot Measure 49, which modified Ballot Measure 37, applies as well.

III. Public Hearing

A public hearing was held on January 10, 2008, during which time the Planning Commission reviewed the staff report and received testimony and written argument and evidence from the applicants, their agents, and those opposed to the application. Upon receiving a request to allow additional argument and evidence, and a request by the applicant to waive the 150 day timeline to allow an additional 30 days, the Planning Commission closed the public hearing but left the record open for seven days for additional written evidence to be submitted, and an additional seven days for final arguments from the applicant. The Planning Commission met for deliberation on January 24, 2008.

IV. Findings of Fact and Conclusion

The Jefferson County Planning Commission finds that Ballot Measure 49, which modified Ballot Measure 37, nullifies County Waiver #2005-003 and State Waiver Final Order on Claim No. M18669. As a consequence, this application does not meet all of the applicable criteria in the County Zoning Ordinance and State Goals.

V. Decision

The Jefferson County Planning Commission, having conducted a public hearing, reviewed the staff report, accepted testimony, and deliberated on the evidence presented, by a vote of 3 in favor and 2 opposed hereby denies Casefile 07-SD-03.

Signed Evan S. Thomas

Date 1/29/08

Evan Thomas, Vice Chair, Jefferson County Planning Commission

Appeal Information

This decision may be appealed to the Board of County Commissioners by any party who participated, either orally or in writing, on the record at the Planning Commission level. A petition for review (appeal) must be filed within fifteen (15) calendar days of the date written notice of the decision is provided (date mailed). The decision will not be final until the fifteen day appeal period has expired. A person who is mailed written notice of this decision cannot appeal the decision directly to the Land Use Board of Appeals (LUBA). Failure to raise an issue by the close of the record at or following the final evidentiary hearing, in person or by letter, or failure to provide sufficient specificity to afford the decision maker an opportunity to respond to an issue that is raised precludes appeal to LUBA based on that issue.

APPEAL PERIOD: Date Mailed 1/29/08 to 5:00 PM on 2/13/08
Appeal Due Date

This decision will be final if an appeal is not filed by the due date noted above.

An appeal must be made in writing and must contain the following:

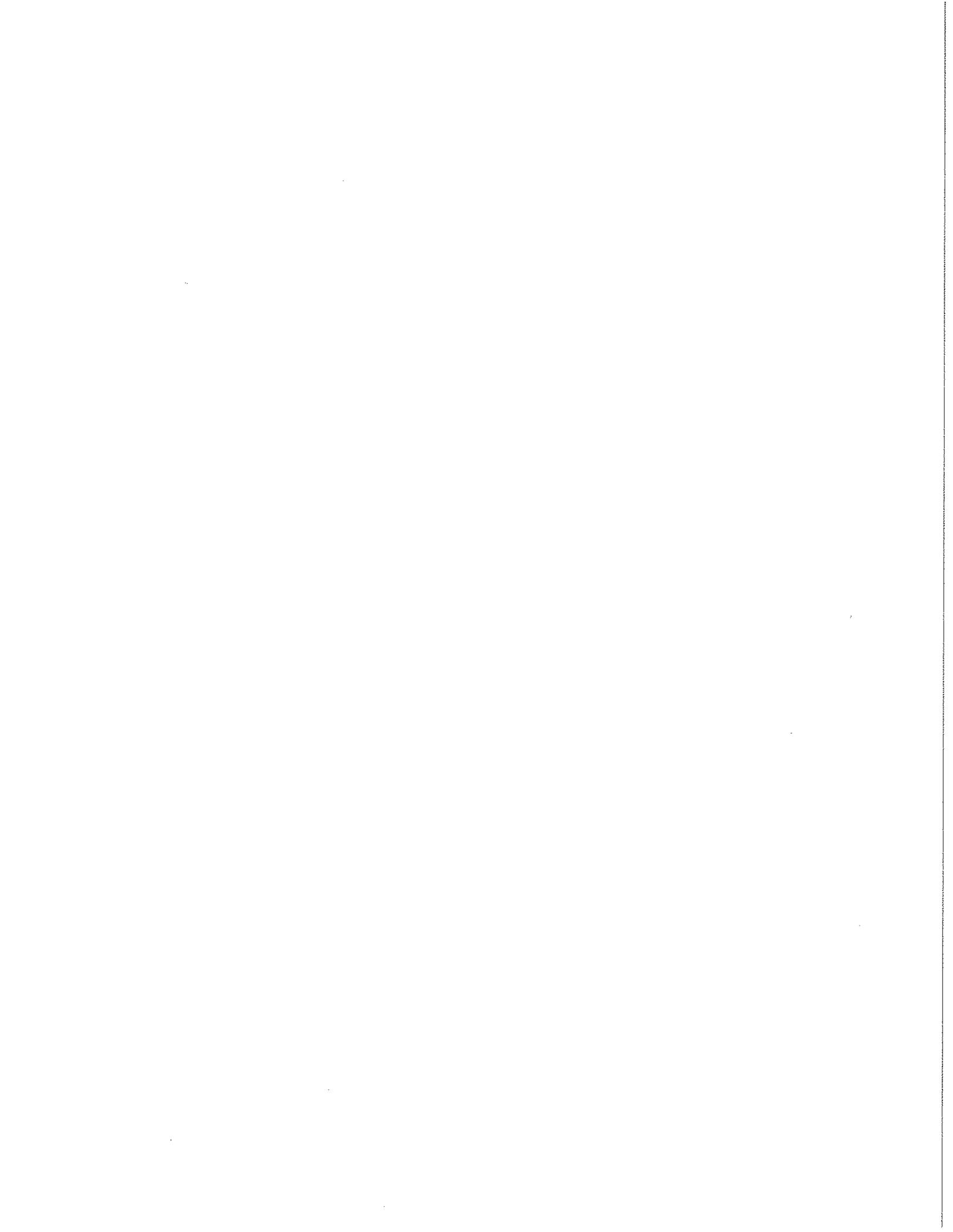
1. The name of the applicant and the County Planning Department Casefile number;
2. The name, mailing address and signature of each person filing the appeal;
3. The appeal should include a written statement of the specific grounds for the appeal and/or the specific condition(s) of approval being appealed;

The appeal must be accompanied by a \$500 appeal fee. A portion of the fee will be refunded if the Board of Commissioner decides to uphold the Planning Commission decision and not accept the appeal for review, or if they decide to consider the appeal on the record or hold a partial de novo hearing.

The complete file is available at the Jefferson County Community Development Department for review.

For further information on filing an appeal, contact the Jefferson County Community Planning Department at (541) 475-4462.

NOTICE TO MORTGAGEE, LIENHOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST PROMPTLY BE FORWARDED TO THE PURCHASER.





Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

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April 2, 2008

By Email Margaret.Boutell@co.jefferson.or.us



Margaret Boutell
Jefferson County Community Development Department
85 SE "D" Street
Madras, Oregon 97741

*RE: File No. 07-SD-03; Hoffman Subdivision
State Claim # M118669*

Dear Ms. Boutell:

The Department of Land Conservation and Development (DLCD) has received the county's Notice of Board of Commissioner's Hearing for the above-referenced land use application. This application is based on a "waiver" of certain land use regulations previously granted by the county and the state pursuant to ORS 197.352 (Ballot Measure 37). Please consider the following comments regarding this proposal and include this letter in the record in this matter.

DLCD agrees with the Planning Commission's decision in this matter. Denial of the application was required because it did not meet the current applicable standards and criteria, nor did the applicant's possess a valid waiver of those standards and criteria.

Measure 49, which modifies Measure 37, went into effect on December 6, 2007. As of that date, state and local waivers issued under Measure 37 are no longer valid to waive land use regulations and cannot be the basis for a land use approval. OAR 660-041-0060. As a result, the provisions of chapter 424, Oregon Laws 2007 govern this matter. Section 5, under "temporary provisions relating to previously filed claims" redefines just compensation to include:

- (3) A waiver issued before the effective date of this 2007 Act [December 6, 2007] to the extent that the claimant's use of the property complies with the waiver and the claimant has a common law vested right on the effective date of this 2007 Act to complete and continue the use described in the waiver.

The determination whether or not the applicants' use allowed under their Measure 37 orders is vested involves complex legal analysis and factual determination. While there is not a bright line test, DLCD does believe that without even a tentative

April 2 2008

RE: File No. 07-SD-03; Hoffman Subdivision

subdivision approval, the applicant's cannot prove a common law vested right in the proposed 60-lot subdivision. DLCD and the Department of Justice have developed guidelines for applying vested right common law in the context of Measure 49. We offer the enclosed guideline document for the county to consider in reviewing this application and request that it be included in the record.

Additionally, the applicant's argument that the county's decision should be reversed because ORS 215.427(3) applies is without merit. Other than recognition of common law vested rights in chapter 424, Oregon Laws 2007, there is no authority for statutory vesting in the context of the transition from Measure 37 to Measure 49. In the case of *DLCD v. Jefferson County*, the Land Use Board of Appeals ruled that ORS 215.427(3), the so-called goal post rule, does not apply in the context of Measure 37. LUBA based its decision on the principle that when two statutes are in conflict, the more specific controls over the general and the later in time controls over the earlier in time. In this case, Measure 49, being last in time and the more specific in its application, prevails.

To the extent that ORS 197.352 provides any standards and criteria, those were not actually applied to this application. *Davenport v. City of Tigard*, 121 Or App 135 (1993) (the no moving the goal post rule applies only to standards and criteria that were actually applied to the application). By its provisions, ORS 215.427 applies only to applications for permits, limited land use decisions or zone changes. ORS 215.427(1). The application at hand is one for a permit—that being the tentative approval of a subdivision. However, the application for just compensation, out of which the state waiver is derived, is not an application to a county (ORS chapter 215 applies only to counties, *City of Mosier v. Hood River Sand and Gravel*, 206 Or App 292 (1993)) for a permit, limited land use decision or zone change.

In construing this statute—the no moving the goal post rule—we apply the same rules of statutory construction as we do to any statute, as directed by the Oregon Supreme Court case of *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). *PGE v. BOLI* instructs us to interpret a statute according to the intent of the legislature which is, in turn, determined, primarily and at the first level of inquiry, from the text and the context of the statute. Only if the intent of the legislature cannot be determined from the text and context of the statute do we look to other factors such as legislative history and maxims of construction. The intent of the legislature is clear from the text and context of ORS 215.427. Further inquiry is neither required nor justified.

First, ORS 215.427(1) clearly applies only to permits, limited land use decisions and zone changes issued by counties. It specifically applies to the governing bodies of counties, not to the State of Oregon. The state does not issue permits, limited land use decisions or zone changes under chapter 215 and is not a governing body of a county. Hence, by its definition, ORS 215.427 does not provide any standards and criteria to be used in state just compensation determinations under Measures 37 or 49. Therefore, ORS 215.427 does not create any statutory vested rights binding on the state of Oregon.

Margaret Boutell, Jefferson County
April 2 2008
RE: File No. 07-SD-03; Hoffman Subdivision

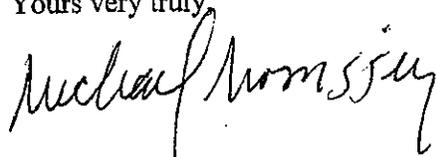
Page 3 of 3

Second, as mentioned above and as follows from and as made comprehensible by the foregoing paragraph, the goal post rule only applies to standards and criteria that were actually applied to the application. *Davenport v. City of Tigard*, 121 Or App 135 (1993). Measure 49 does not change the criteria or standards that a county applies to land use decisions. Those standards and criteria are found in the comprehensive plan and zoning ordinances and only in state law to the extent that a county does not have an acknowledged comprehensive plan or applicable zoning ordinance. The standards and criteria that were actually applied at the outset of this process have not been changed, except perhaps by the county itself, and were not provided by state law for the reason that state law, particularly Measure 37 or Measure 49, did not provide any standards and criteria that have been applied, actually applied, to this application for a permit in the form of a tentative plat approval.

For the foregoing reasons, DLCD believes the Planning Commission's decision denying the subdivision application should be upheld, and that the application for a vested rights determination should also be denied. Please notify us of your decision and any further action taken on the application. If you would like to discuss this further, feel free to contact me at (503) 373-0050 ext. 320, or Carmel Bender at (503) 373-0050 ext. 326.

Thank you for your courtesies.

Yours very truly,



Michael Morrissey
Manager
Measure 49 Services Division

Enclosure

cc: Virginia Gustafson, DOJ (by email)
Richard Whitman, DLCD (by email)
Jon Jinings, DLCD (by email)

BEFORE THE BOARD OF COMMISSIONERS OF JEFFERSON COUNTY

In the Matter of the Appeal of a Planning)
Commission Decision that denied an)
Application for a 60-lot Subdivision based on)
a Waiver under ORS 197.352 (Measure 37))

ORDER NO. 0-55-08
Application # 07-SD-03

I. Background

William and Delores Hoffman submitted an application for tentative plan approval of a 60-lot subdivision of two acres each at 2384 NW Fir Lane, ¼ mile west of Columbia Drive, tax lots 10-13-09-400 and 600. The application was administratively approved on November 21, 2007, based on a waiver of current land use regulations under Ballot Measure 37. A timely appeal was filed by Central Oregon Land Watch and another group of 14 individuals.

The Planning Commission held a public hearing on the appeal of the Planning Director's decision. On January 24, 2008, the Planning Commission upheld the appeals and denied the tentative subdivision application. The primary issue was the approval by voters, in November 2007, of Ballot Measure 49, which modified Ballot Measure 37. This decision was subsequently appealed by the applicant.

The Board of Commissioners elected to review the Planning Commission record, rather than hold a public hearing.

II. Applicable Criteria

2007 Jefferson County Zoning Ordinance Sections 301.6, 301.7, 301.8, 401, 402, 426, and 702 through 707; Section 12.18 of the 2002 Jefferson County Code; and the Statewide Planning Goals; except as those regulations were waived by County Waiver #2005-003 and State Waiver Final Order on Claim No. M18669 pursuant to Ballot Measure 37. Ballot Measure 49, which modified Ballot Measure 37, applies as well.

III. Planning Commission Record Review

On April 2, 2008, the Board of Commissioners met to review the Planning Commission's decision and related documents, including the application. Commissioner Mike Ahern recused himself due to a conflict of interest.

After deliberation, Commissioners Bill Bellamy and John Hatfield voted unanimously to deny the appeal and uphold the Planning Commission's decision to deny the tentative subdivision application.

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LAND CONSERVATION
AND DEVELOPMENT

FINDINGS OF FACT

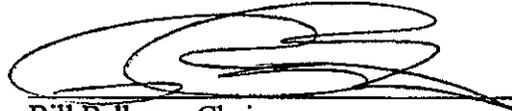
The Jefferson County Board of Commissioners finds that Ballot Measure 49, which modified Ballot Measure 37, nullifies County Waiver #2005-003 and State Waiver Final Order on Claim No. M18669. As a consequence, this application does not meet all of the applicable criteria in the County Zoning Ordinance and State Goals.

ORDER

NOW, THEREFORE, the Jefferson County Board of Commissioners hereby **ORDERS** that Casefile 07-SD-03, an application for tentative subdivision plan approval to create a 60-lot subdivision on tax lots 10-13-09-400 and 600 is **DENIED**.

DATED this 9TH day of April, 2008.

FOR THE BOARD OF COMMISSIONERS:



Bill Bellamy, Chair

Attest:



Appeal Information

Planning Casefile #07-SD-03

This decision may be appealed to the Land Use Board of Appeals within 21 days of the Jefferson County Board of Commissioners Decision. Oregon Revised Statute (ORS) 197.830 sets forth the review procedures. Copies of the Board of Commissioners decision and the state statute are available from the Community Development Department located at 85 SE "D" Street, Madras, Oregon 97741.

Board of Commissioners adoption date: April 9, 2008

The complete file is available for review at the Jefferson County Community Development Department. For further information, contact the Community Development Department. Phone (541) 475-4462.

BEFORE THE BOARD OF COMMISSIONERS OF JEFFERSON COUNTY

In the Matter of the Reconsideration of a)
Board of Commission Decision that denied an)
Application for a 60-lot Subdivision based on)
a Waiver under ORS 197.352 (Measure 37)

ORDER NO. 0 - 89 - 08
Application # 07-SD-03

I. Background

William and Delores Hoffman submitted an application for tentative plan approval of a 60-lot subdivision of two acres each at 2384 NW Fir Lane, ¼ mile west of Columbia Drive, tax lots 10-13-09-400 and 600. The application was administratively approved on November 21, 2007, based on a waiver of current land use regulations under Ballot Measure 37. A timely appeal was filed by Central Oregon Land Watch and another group of 14 individuals.

The Planning Commission held a public hearing on the appeals of the Planning Director's decision. On January 24, 2008, the Planning Commission upheld the appeals and denied the tentative subdivision application. The primary issue was the approval by voters, in November 2007, of Ballot Measure 49, which modified Ballot Measure 37. The applicant subsequently appealed this decision.

The Board of Commissioners elected to review the Planning Commission record, rather than hold a public hearing, and on April 2, 2008, by a decision of 2-0 (Commissioner Ahern abstaining), the application was denied.

Upon a request by the Applicant, the Board elected to reconsider the decision and to conduct a de novo hearing on the application. After required notice, a de novo hearing on reconsideration was conducted on June 4, 2008.

II. Applicable Criteria

2007 Jefferson County Zoning Ordinance Sections 301.6, 301.7, 301.8, 301.9, 401, 402, 426, and 702 through 707; Section 12.18 of the 2002 Jefferson County Code; and the Statewide Planning Goals; except as those regulations were waived, if any, by County Waiver #2005-003 and State Waiver Final Order on Claim No. M18669 pursuant to Ballot Measure 37. Ballot Measure 49, which modified Ballot Measure 37, applies as well.

III. Public Hearing

A public hearing on reconsideration was held on June 4, 2008, during which time the Board of Commissioners reviewed the staff report and received testimony and written argument and evidence from the applicants, their agents, and those opposed to the application. Commissioner Mike Ahern recused himself due to a conflict of interest.

After deliberation, Commissioners Bill Bellamy and John Hatfield voted unanimously to deny the land use application.

FINDINGS OF FACT

1. Jefferson County Zoning Ordinance Section 705.1 states: *The County may approve a tentative plan for a subdivision, partition or replat upon finding that it complies with the following:*

A. *The tentative plan complies with all applicable standards of the Comprehensive Plan and this Section, meets the minimum lot size, setback and other requirements of the zone in which the property is located, and complies with any other applicable standards of this Ordinance such as Wildlife Area Overlay Zone dimensional standards. The area to the centerline of a road right-of-way that will be created as part of the land division may be included when calculating the size of a proposed lot or parcel.*

Finding: The subject property is in the EFU A-1 zone, which has a minimum lot size of 80 acres for new parcels. JCZO 301.8 Subdivisions are prohibited in the EFU A-1 zone. JCZO 301.9(G)(1). The application proposes an impermissible subdivision in the EFU A-1 zone and proposes impermissible lot sizes of less than 80 acres.

2. Measure 37 and Measure 49

Finding: Measure 37 was adopted through the initiative process in the 2004 general election and was codified at ORS 197.352 (2005). Measure 37 was amended by Ballot Measure 49, Oregon Laws 2007, chapter 424, section 4, and renumbered as ORS 195.305. Measure 37 required public entities that enact and enforce land use regulations to pay a landowner whose property is affected by any such regulations "just compensation," which the statute generally defines as an amount equal to the "reduction in the fair market value of the affected property interest" resulting from enforcement of any land use regulation enacted after the date of acquisition of the property by the landowner or a family member of the landowner. ORS 197.352(1) - (3) (2005). In the November 2007 general election, the voters adopted Ballot Measure 49 (2007) (Measure 49), which amended Measure 37 and added provisions that altered the claims and remedies available to landowners whose property values are adversely affected by land use regulations.

Section 5 of Measure 49 provides:

"A claimant that filed a claim under ORS 197.352[, i.e., Measure 37,] on or before the date of adjournment sine die of the 2007 regular session of the Seventy-fourth Legislative Assembly is entitled to just compensation as provided in:

"(1) Sections 6 or 7 of this 2007 Act, at the claimant's election, if the property described in the claim is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;

Sections 6 and 7, referenced in subsection 5(1), generally provide that claimants whose claims relate to land *outside* any urban growth boundary are limited to three home site

approvals, unless their land is not high value farm or forest land, in which case they *may* be eligible for up to ten home site approvals, if certain requirements are met.

Recently, the Oregon Supreme Court decided *Corey v. DLCD*, DLCD M119478; CA A129905; SC S054995 (May 8, 2008) which stated in part:

"The text and context of Measure 49 conveys a clear intent to extinguish and replace the benefits and procedures that Measure 37 granted to landowners. Measure 49 pertains to *all* Measure 37 claims, successful or not, and regardless of where they are in the Measure 37 process. Subsection 2(13) then defines 'just compensation' purely in terms of Measure 49 remedies, *i.e.*, "[r]elief under sections 5 to 11 of this 2007 Act for land use regulations enacted on or before January 1, 2007". At the same time, section 4 of Measure 49 extensively amends ORS 197.352 (2005) (Measure 37) in a way that wholly supersedes the provisions of Measure 37 pertaining to monetary compensation for and waivers from the burdens of certain land use regulations under that earlier measure.

A statement of legislative policy at section 3 of Measure 49 confirms that the legislature intended to create new forms of relief in place of the ones available under Measure 37: "The purpose of sections 4 to 22 of this 2007 Act and the amendments to Ballot Measure 37 (2004) is to modify Ballot Measure 37 (2004) to ensure that Oregon law provides *just compensation for unfair burdens while retaining Oregon's protections for farm and forest uses and the state's water resources.*" (Emphases in original.)

The Court's ruling means that the only landowners who may continue to develop property under Measure 37 are those who completed enough of the permitted development to require the government to allow full completion. A landowner who has not sufficiently developed property under a Measure 37 waiver retains no rights under Measure 37.

The burden is on the applicant to show sufficient development has occurred to retain any rights under Measure 37. The County finds applicant has not met this burden with substantial evidence in the record. The County finds that the applicant has not sufficiently developed the property to retain any rights under Measure 37.

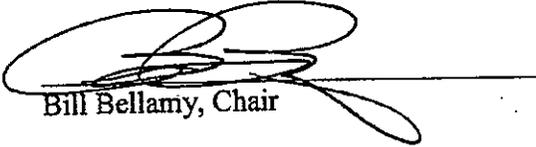
Accordingly, Jefferson County lacks legal authority to approve this land use application.

ORDER

NOW, THEREFORE, the Jefferson County Board of Commissioners hereby **ORDERS** that Casefile 07-SD-03, an application for tentative subdivision plan approval to create a 60-lot subdivision on tax lots 10-13-09-400 and 600 is **DENIED**.

DATED this 11TH day of June, 2008.

FOR THE BOARD OF COMMISSIONERS:


Bill Bellamy, Chair

Attest:

**Appeal Information**

Planning Casefile #07-SD-03

This decision may be appealed to the Land Use Board of Appeals within 21 days of the Jefferson County Board of Commissioners Decision. Oregon Revised Statute (ORS) 197.830 sets forth the review procedures. Copies of the Board of Commissioners decision and the state statute are available from the Community Development Department located at 85 SE "D" Street, Madras, Oregon 97741.

Board of Commissioners adoption date: June 4, 2008

The complete file is available for review at the Jefferson County Community Development Department. For further information, contact the Community Development Department. Phone (541) 475-4462.

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

WILLIAM AND DARLENE HOFFMAN,)
)
) Petitioner,)
)
) v.)
)
) JEFFERSON COUNTY, OREGON,)
)
) Respondent.)
 _____)

LUBA Case No. _____

NOTICE OF INTENT TO APPEAL

1.

Notice is hereby given that Petitioners intend to appeal the final land use decision of Respondent entitled Order No. 0-89-08 - Case File 07-SP-05 with the following description of the action:

In the Matter of the Reconsideration of a Board of Commission Decision that denied an Application for a 60-lot Subdivision based on a Waiver under ORS 197.352 (Measure 37) (Exhibit 1)

The Board of Commissioner's decision was orally rendered June 4, 2008, signed by the Board on June 11, 2008, and mailed on or about June 17, 2008. Pursuant to the Jefferson County Code, the decision was not final until signed by the Board. (Exhibit 2). From this, the challenged decision was final for purposes of LUBA review on June 11, 2008, and is a final land use decision. Petitioners have standing to appeal because they participated before the Hearings Officer in person, in writing or through their attorney and exhausted or attempted to exhaust their available local remedies. Accordingly, LUBA has review jurisdiction over the challenged decision.

Page 1 of 3 - **NOTICE OF INTENT TO APPEAL**

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BRYANT, EMERSON & FITCH, LLP

ATTORNEYS AT LAW

888 S.W. EVERGREEN AVENUE
P.O. BOX 457
REDMOND, OREGON 97756-0103
TELEPHONE (541) 549-2151
FAX (541) 548-1895

2.

Petitioners are represented by Edward P. Fitch, OSB No. 782026, whose address is Bryant, Emerson & Fitch, LLP, 888 SW Evergreen Avenue, P.O. Box 457, Redmond, Oregon (phone 541-548-2151).

Respondent Jefferson County has as its mailing address: 85 S.E. D Street, Madras, Oregon 97741, and is represented by County Counsel.

3.

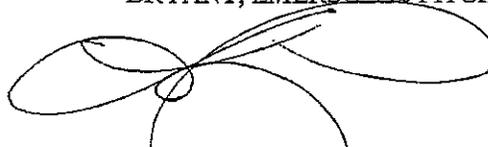
The applicants for the challenged decision were Petitioners. The County records indicate that Notice of the Board of Commissioners Final Decision in this matter was also sent to the people listed on the attached distribution list.

4.

NOTICE: Anyone referred to in paragraph 3 who desires to participate as a party in this appeal before the Land Use Board of Appeals must file with the Board a Motion to Intervene in this appeal proceeding as required by OAR 661-10-0050.

Respectfully submitted this 20th day of June 2008.

BRYANT, EMERSON & FITCH, LLP



EDWARD P. FITCH, OSB #782026
LISA DT KLEMP, OSB #040012
Of Attorneys for Petitioners
888 SW Evergreen Avenue - P.O. Box 457
Redmond, OR 97756
541.548.2151 - 541.548.1895 (fax)
Email: ed@redmond-lawyers.com
Email: lisa@redmond-lawyers.com

CERTIFICATE OF FILING

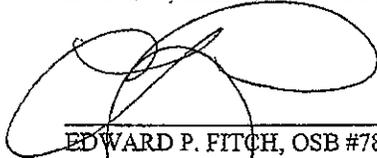
I hereby certify that on June 20, 2008, I filed the original of this Notice of Intent to Appeal to Intervene,
together with one copy, with the

Land Use Board of Appeals
550 Capitol Street NE, Suite 235,
Salem, OR 97301-2552

by certified mail.

DATED this 20th day of June 2008.

BRYANT, EMERSON & FITCH, LLP



EDWARD P. FITCH, OSB #782026
LISA DT KLEMP, OSB #040012
Of Attorneys for Petitioners

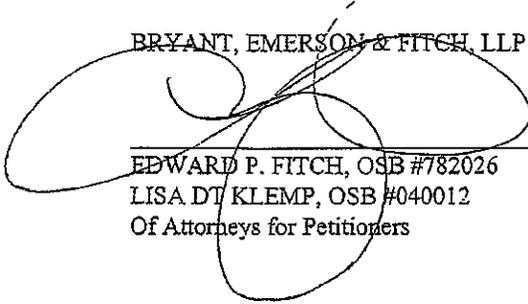
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Notice of Intent to Appeal on June 20, 2008, by mailing to
said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to
said parties or their attorney as follows:

Jefferson County Counsel
66 D Street, Suite A
Madras, OR 97741

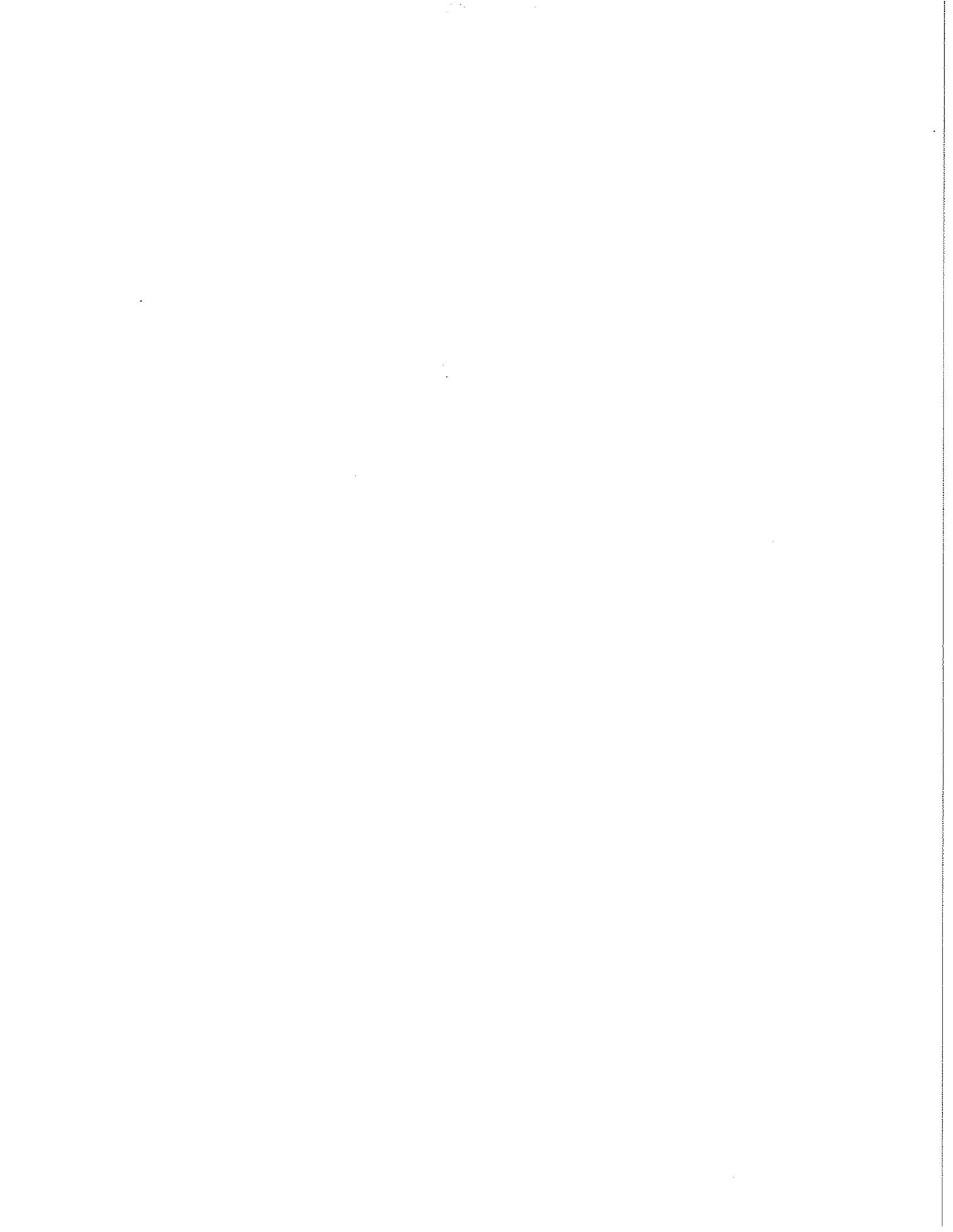
DATED this 20th day of June 2008.

BRYANT, EMERSON & FITCH, LLP



EDWARD P. FITCH, OSB #782026
LISA DT KLEMP, OSB #040012
Of Attorneys for Petitioners

BRYANT, EMERSON & FITCH, LLP
ATTORNEYS AT LAW
288 S.W. EVERGREEN AVENUE
P.O. BOX 457
REDMOND, OREGON 97756-0103
TELEPHONE (541) 548-2151
FAX (541) 548-1895



BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

WILLIAM AND DARELENE HOFFMAN,)
)
Petitioner,)
)
v.) LUBA Case No. 2008-090
)
JEFFERSON COUNTY,)
)
Respondent.)
_____)

MOTION TO INTERVENE

I.

The Department of Land Conservation and Development (DLCD) moves to intervene on the side of Respondent in the above-captioned appeal. DLCD is represented by Cal Souther and Virginia Gustafson, Oregon Department of Justice, whose addresses and phone numbers are as follows:

Calvin N. Souther, Jr.
Oregon Department of Justice
Trial Division
Commercial, Condemnation &
Environmental Section
1162 Court Street NE
Salem, OR 97301
(503) 947-4700
(503) 947-4792 (Fax)

Virginia Gustafson
Oregon Department of Justice
General Counsel Division
Natural Resources Section
1162 Court Street NE
Salem, OR 97301
(503) 947-4500
(503) 378-3802 (Fax).

II.

The facts establishing movant's rights to intervene include the following: By letters dated March 26, 2008 and April 2, 2008, DLCD appeared before Jefferson County in this matter. See Attachments A and B. This motion to intervene is timely filed within 21 days of

June 20, 2008, the date on which petitioners certify that they filed their notice of intent to appeal.

DATED this 3rd day of July 2008.

Respectfully submitted,

HARDY MYERS
Attorney General



Virginia L. Gustafson, OSB #85221
Assistant Attorney General
Of Attorneys for Oregon Department of Land
Conservation and Development,
State of Oregon, Intervenors