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EXHIBIT: _____
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: _____
PAGES: _____
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October 10, 2007

Land Conservation and Development Commission
c/o Cora Parker, Acting Director
635 Capitol Street NE
Suite 150
Salem, OR 97301-2540

DEPT OF
OCT 12 2007

Re: Appeal to LUBA of Application No. 07-SD-01; Burk Subdivision
State Claim No. M121394

**LAND CONSERVATION
AND DEVELOPMENT**

Dear Commission:

This office represents the Estate of William Burk. Thank you for the opportunity to correspond with you concerning this appeal. I will not be able to attend the Commission hearing but wanted to communicate to you our request that this appeal not be pursued by the Department. The facts of this matter are, in many respects, similar to the Arnett situation. Mr. Burk purchased this property in 1947. In June, 2005, he made a claim with the State of Oregon requesting a waiver of Goals 3, 11 and 14 so that he could divide the property into 50 or more lots.

The State did not provide any opportunity for a hearing or any adequate time for a response. The State's order issued in this case provided for the following:

The action by the State of Oregon provides the State's authorization to the claimant to use the property for a use described in this report subject to the standards in effect on November 25, 1947.

In reliance upon that waiver order and in particular paragraph 2, my client proceeded to submit a plan with Jefferson County. The initial plan was for more than 50 lots. Based upon objections from the State wherein they opined that their order only allowed 50 lots even though their order in and of itself allowed approximately 50 lots (whatever that means).

Because of the State's enforcement of either a mythical limitation of the number of lots or regulations adopted 26 years after his date of acquisition, my client was not able to proceed with his application in an orderly fashion and was delayed approximately 8 months. He also had to revise his application.

On July 1, 2007, Mr. Burk died.

The Jefferson County Board of Commissioners heard this matter in August, 2007, and approved the subdivision based upon two factors. First, the application did not concern the transfer of a waiver. The rights under ORS 197.352 which were acquired by Mr. Burk were exercised by him while he was alive. Pursuant to ORS 215.427(3)(a), the land use application became vested as of the date that application was filed. Therefore, his death did not affect the ability of his estate to complete the application process or the development of the property.

Second, the County found that Goals 11 and 14 were not in effect in November, 1947. Paragraph 2 of the State's order means what it says. That is, the State has authorized Mr. Burk to use the property as he could have in 1947.

Based upon the foregoing, the Commission should deny the Director's requested based upon the following factors.

1. This case does not require any interpretation of current statewide planning statutes, goals or rules. The issue is fairly straightforward. Did the State in its order authorize Mr. Burk to use the property as he could have in 1947. I think any court looking at that paragraph and the statute would reach the same conclusion.
2. Did Mr. Burk transfer a waiver right? The answer is clearly no. This case is not about a transfer of waiver. In fact, the undersigned counsel agrees that waivers are probably not transferable. However, once a waiver right is exercised by filing a land use application, the provisions of ORS 215.427(3)(a) come into play and there is a statutory vesting through that statute in the land use application. Measure 37, as part of ORS Chapter 197, is to be read consistent with other state's planning statutes. To be consistent with ORS 215.427(3), one must conclude that once a waiver right is exercised by the filing of a land use application, there is a statutory vesting.
3. There are no important enforcement values in this case.
4. There are no significant natural, cultural or economic resources on the subject property. The property was used for grazing and hay production in the past. It is not an important agricultural resource.
5. This case does not appear to advance or detract from the agency's strategic plan.

I should point out that if Measure 49 passes, it is very doubtful that this development will go forward. There would simply be insufficient time to vest this property under the common law principle in Measure 49.

Thank you for this opportunity to comment.

Very truly yours,



Edward P. Fitch

EPF/mcm

Enclosures - orig letter plus 20 copies

cc: Steve Shipsey

Cora Parker, Acting Director

G:\Clients\BPF\Burk, Jerry\Burk, Jerry LUBA\Commissioners101007.WPD(mcm)