

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, March 11, 2009
Marion County Courthouse Square

9:00 a.m. Board Session
Senator Hearing Room

PRESENT: Commissioner Patti Milne, Commissioner Janet Carlson and Commissioner Sam Brentano. Also present were John Lattimer as chief administrative officer, Jo Stonecipher as legal counsel and Kim Hulett as recorder.

PUBLIC COMMENT

CONSENT

MOTION: Commissioner Brentano moved to add the additional OLCC applications received to the consent calendar (list is following). Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Additional OLCC applications: Broadacres Store, Aurora; Domaine Margelle LLC, Salem; Evergreen Golf Course, Mt. Angel; Giorgio’s Bar and Grill, Salem; Los Dos Amigos Hacienda, Salem; Middle Grove Market, Salem; Safeway, Inc. #0429, Salem; Su Casa Imports, Salem; Taylor Park Inc., Lyons; The Point After, Salem; and Wooden Nickel Pub & Eatery, Silverton.

BOARD OF COMMISSIONERS

OLCC APPLICATIONS – Recommend Approval

Arco AM/PM, Salem
Aurora Fuel N’ Mart, Aurora
Brandon’s on the Tee, Salem
Chang’s Mongolia Grill, Salem
Columbia Aviation Association, Aurora
Iggy’s Bar & Grill, Brooks
MaCley Country Inn, Salem
Marion Grocery, Turner
Pink Elephant Tavern, Salem
Red Robin Burgers & Spirits, Salem
Shooters Café & Saloon, Salem
Wall Street Bar & Grill, Keizer

Approve an order distributing \$21,000 of video lottery receipts to the City of Turner to promote economic development in Marion County.

MOTION: Commissioner Brentano moved approval of the consent calendar. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

ACTION

BOARD OF COMMISSIONERS

1. Consider approval of a proclamation committing Marion County as a partner with the 2010 Census. – Gladys Romero, partnership specialist, Seattle Regional Census

Gladys Romero, partnership specialist with the Seattle Regional Census, said she was here to remind everyone that the census 2010 is quickly approaching and how very important the census is for the entire nation. She said there is about \$300 billion distributed yearly based on the count of the census. Representation in the House of Representatives is based on the count as well as redistricting. The Census Bureau hires thousands of people for this endeavor that is done every ten years and has been done since 1790. Ms. Romero said she was here to ask the board for a proclamation in support of Census 2010, as well as to form a Complete Count Committee, which involves leaders in the community that would assist in reaching communities that are harder to count.

Commissioner Milne asked what exactly Marion County government would be doing as a partner. Ms. Romero replied that the county would be helping with outreach to the community.

Commissioner Carlson said there are a lot of programs that are triggered by the census numbers and it is very important to obtain as accurate a count as possible.

MOTION: Commissioner Carlson moved approval of a proclamation committing Marion County as a partner with the 2010 Census. Seconded by Commissioner Brentano; motion carried. A voice vote was unanimous.

The commissioners then read the proclamation.

FINANCE

2. Consider adoption of second supplemental budget for fiscal year 2008-09 (**TO BE ACTED ON FOLLOWING PUBLIC HEARING**). – Jeff White, Richard Minaker and Jerry Woelke

Commissioner Milne said this would be acted on following the public hearing that begins at 9:30 a.m.

PUBLIC WORKS – PLANNING

3. Receive and consider appeal of hearings officer's decision granting partition, case #P08-17, Hart, Clerk's File #5610; suggested hearing date is March 25, 2009. – Joe Fennimore

Joe Fennimore, planning, said this is an appeal of an application to divide a 4.55-acre parcel into a 2.3-acre parcel and a 2.35-acre parcel. The property is zoned acreage residential (AR) and is located at 3288 Little Haven Lane South, Salem.

After holding a public hearing, the hearings officer found the criteria was satisfied and approved the request. The appellant argues that the conclusions set forth in the decision are not sufficient to demonstrate that the proposal complies with all the requirements of the zoning ordinance.

Specifically, they argue that the applicant has failed to demonstrate that utility easements have been or can be provided to newly created lots and disagree with the hearings officer's conclusion that the applicant already has or can feasibly obtain easements for utilities. In addition, it is argued that some of the conditions of approval are inadequate to insure compliance with the applicable approval criterion and they, in fact, defer discretionary compliance decisions in the future proceeding where no notice and hearing will be provided in violation of ORS 197.763.

Mr. Fennimore said the applicant cites the comments and conditions recommended by public works related to site distance at the Little Haven Lane/Viewcrest Road intersection, as one example of a condition requiring development of the lot must meet the requirements of Chapter 182. Findings by the hearings officer addressed these issues and in each case concluded that the criterion was satisfied if the conditions were met.

Commissioner Carlson said her concern was that the letter appears to be arguing points that had been argued in the hearings officer's hearing. She asked Mr. Fennimore if there was anything new that could be added to the discussion if the board accepted the appeal. Mr. Fennimore stated it appeared the arguments were the same as in the hearing. Commissioner Carlson said it is not as if there was missing evidence.

Commissioner Brentano said it appears the utilities are in place, but the appellant argues that they are not. He asked Mr. Fennimore to comment. Mr. Fennimore said there is a section in the order where the hearings officer talks about the original property being owned by the applicant's parents. The property was divided and the appellant bought one of the resulting parcels and left the original piece without using the easement to get to his piece. The applicant said the easement was granted at that time back to the piece that is now being divided. The applicant claims the easement is there and planning agrees because there are utilities at the back property now. In addition, this same property was divided two years ago and there was no question raised at that time about the availability of utilities.

Commissioner Milne said she was in agreement with what both of the commissioners were saying. She too agrees that if there is any new evidence provided then the board would hear it. She said the appellant's argument is the same as in the hearings officer's hearing. In addition, the property owner is going to have to go through a number of steps and verify that the utilities are there. If it were to turn out the utilities were not there or available that would be determined quite early in the process.

MOTION: Commissioner Brentano moved to deny the appeal and uphold the hearings officer's decision granting partition, case #P08-17, Hart, Clerk's File #5610. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

4. Consider appeal of hearings officer decision denying conditional use, case #CU08-46, Levy, Clerk's File #5611; suggested hearing date is April 8, 2009. – Sterling Anderson

Sterling Anderson, planning, said this is a request to accept an appeal of an application to amend the conditions of approval on a conditional use case #CU05-06, which approved an excavation business as a home occupation on a seven acre parcel. The property is zoned exclusive farm use (EFU) and is located at 5822 66th Avenue NE, Salem.

The applicants requested to amend conditions of approval to allow multiple commercial vehicles on the property in conjunction with the home occupation that allows a land clearing excavation and construction business. They also request the definition of a commercial vehicle be based on gross vehicular weight, the number of people the vehicle was designed to transport and transportation of hazardous waste. The applicants also argue that a condition that limits the number of employees in the business should be interpreted to allow a limit of five employees on the property and not five employees in the business. The hearings officer did agree with this interpretation.

In this case, the hearings officer denied the conditional use due to the existence of an illegal kennel and dog breeding operation on the property, and correctly applied the limit of one commercial vehicle in conjunction with the home occupation. The hearings officer found that a commercial vehicle is any vehicle used for business purposes, used for transportation of persons for compensation or profit, or designed or used primarily for the transportation of property. Mr. Anderson said the definition that this condition applies too insures that traffic and vehicle storage associated with home occupation is kept to a minimum. This interpretation is also consistent with how planning has applied this particular limitation for over 30 years; one commercial vehicle in conjunction with a home occupation.

Mr. Anderson said the hearings officer also found the applicants need to correct violations of building code and to obtain legal access to a public road. The property currently accesses the public road over an adjoining property without permission from that property owner. The applicant's representative does offer to correct those violations.

In conclusion, the hearings officer found that if there were no violations, the request to amend one condition of approval to allow up to five employees on the property and not limit the number of employees in the business to five, could be approved. This would require that the illegal kennel and dog breeding operation cease and that building permits and legal access be obtained.

In the appeal, the applicant's representative argues that the kennel operation is grandfathered in because the applicants initiated the kennel operation in 1988. The problem with this argument is that the property was zoned EFU in 1988. The definition of kennel at that time was even more restrictive than in the current definition. As a result, in 1988 just as today, the kennel was a prohibited use in that zone. The grandfather argument is not valid in this case.

The applicant's representative argues that there is no enforcement action regarding this violation. Mr. Anderson said this is also incorrect because a citation has been issued to the applicants for the operation of the kennel that includes the sale, lease, boarding, showing and training of dogs, which is consistent with the definition of kennel. The applicants admit to a breeding operation, which by county adopted interpretation is also prohibited. The applicants' representative argues that the applicants are not operating a kennel, which is a direct conflict with the applicants' own statements. The evidence contained in the record includes the fact that the applicants are registered as Abiqua Kennels at the subject property and are on an international website, as well as others as the breeders of Hungarian Pumis and other breeds. The hearings officer concluded

that the preponderance of evidence indicates that a breeding operation and a kennel, as defined in the county zoning code, exists on the property in violation of the zone code. The applicants' representative also argues that the breeding of dogs is not prohibited and should be allowed as a farm use because the definition of farm use allows animal husbandry. This argument is incorrect because the accepted construction of a zoning code is that it identifies what is allowed on the property, not what is prohibited. In this argument the applicant's representative cites the court of appeals decision that concludes that a kennel is a farm use. However, the appeal fails to note that the case involved a non-conforming kennel, which doesn't apply to this kennel and that the subsequent changes to state law render that decision moot. The hearings officer found that the applicants are breeding, training, showing and raising dogs in violation of the exclusive farm use zone, and therefore, the requested conditional use cannot be granted unless the violations cease. To date those violations continue. Mr. Anderson said that in this case and based on all the clear and convincing evidence, staff does recommend that the board deny the appeal and uphold the hearings officer's decision.

Commissioner Carlson asked what kind of a zone would allow a kennel. Mr. Anderson said that the acreage residential zone does allow kennels as a conditional use. He added that under state law and county code the only type of kennel allowed is a pre-existing nonconforming kennel or one that meets very specific standards on non-high value soils.

Commissioner Milne asked if there was any way at all for the applicant to do something by changing what they do or how they do it. Mr. Anderson said that to date, in spite of repeated attempts by county enforcement and planning staff to obtain compliance, the applicants have refused to comply with the limitations that they should be able to operate under. If they had three or fewer dogs, they would fall under the definition of pets as opposed to the definition of kennels. However, the applicants indicated they have 17 dogs on the property and a number of those were breeding dogs. Some were show dogs and those have to be trained.

Commissioner Milne asked if they reduced the number of dogs would they then be in compliance. Mr. Anderson said they have repeatedly tried to get them to reduce the number of dogs to comply and they have refused to do so. He added that at this point there is an ongoing violation, which the county code states a conditional use, building permit or land use approval cannot be issued. The violation has to be corrected first. Commissioner Milne said if the board denies the appeal they still have the opportunity to make some corrections on their own and move forward with what they want to do.

Commissioner Carlson said if there had not been a violation the hearings officer stated a number of conditions and said the request would be granted. If the violation is resolved at some point and the board upholds the hearings officer's recommendation now, does that mean the applicants have to start over again to get the approval for the number of employees. Mr. Anderson said the applicants would not have to start over and planning would abide by the hearings officer's interpretation of that provision and the wording in the county code. If the applicants wanted to argue the commercial vehicle issue again, they would then have to reapply.

Commissioner Milne said the number of employees was initially granted, but they have the violations of the kennel. She reiterated that if the board did not accept the appeal there are still opportunities for the applicants to proceed if they comply with county code. Mr. Anderson said the access and building permit issues could be resolved fairly easily. To be in compliance the applicants would have to scale back their kennel to comply with county code.

Mr. Anderson said if the kennel violation is ceased then he would ask the hearings officer to dismiss the revocation, and the original conditional use for the home occupation would still be valid. This would be subject to the condition of one commercial vehicle, but not subject to the five employees. He would then work with the applicant and property owner to clarify the number of dogs and how they are used on the property. He said he would have to clarify their limitations and if they can abide by those limitations, then there would be no problem with the number of dogs as long as they weren't going to breed any more than three.

MOTION: Commissioner Carlson moved to deny the appeal and uphold the hearings officer's decision, which denies the conditional use in case #CU08-46, Levy, Clerk's File #5611. Seconded by Commissioner Brentano; motion carried.

PUBLIC HEARING

9:30 a.m.

FINANCE

A. Public hearing to consider adoption of second supplemental budget for fiscal year 2008-09 **(TO BE ACTED ON FOLLOWING PUBLIC HEARING)**. – Jeff White, Richard Minaker and Jerry Woelke

Richard Minaker, senior budget analyst, said the purpose of supplemental budgets is to adjust the current budget to reflect unanticipated resources or occurrences that require additional appropriation authority.

Mr. Minaker said that this is the second of three supplemental budgets scheduled for the 2008-09 fiscal year. He added that although supplemental implies a budget increase, this particular supplemental budget decreases the total county budget by \$1,569,919. This decrease reduces the total budget from \$335,876,817 to \$334,306,898. The Board of Commissioners reviewed this supplemental budget in detail at a recent management update and there have been no changes since that time. The second supplemental details may be found on Marion County's internet website and copies are also available in the board's office (Attachment A).

Mr. Minaker reported that the total decrease was driven by a reduction of \$5.2 million in the facility renovation fund. A previously anticipated Oregon Department of Energy loan for courthouse energy efficient windows, HVAC, and lighting systems will not come to accrual this fiscal year. The general fund will transfer \$164,000 to the capital improvement projects fund for the purchase of vote tally machines for the Clerk's Office. State grant funds of \$72,000 will go directly to the capital improvement projects fund to assist with this purchase. The children and families fund will receive \$166,000 for the Kids First Initiative Grant via transfer from the non-departmental grants fund. The health fund will have \$114,000 increase due to increases in several types of federal, state and other intergovernmental grants and contracts. The public works fund will increase by \$2.5 million in the recognition of the Secure Rural Schools Act funding received after adoption of the original fiscal year budget. These funds are for road servicing projects.

MOTION: Commissioner Brentano moved to close the public hearing and adopt the second supplemental budget for fiscal year 2008-09. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Commissioner Milne read the calendar.

Commissioner Milne adjourned the meeting at 9:52 a.m.

Attachments: A – Second Supplemental Budget for fiscal year 2008-09

ABOVE MINUTES APPROVED

CHAIR

COMMISSIONER

COMMISSIONER

If you require interpreter assistance, an assistive listening device, large print material or other accommodations, call 503-588-5212 at least 48 hours in advance of the meeting. TTY 503-588-5168.

Si necesita servicios de interprete, equipo auditivo, material copiado en letra grande, o culaquier otra acomodacion, por favor llame al 503-588-5212 por lo menos 48 horas con anticipacion a la reunion. TTY 503-588-5168 Marion County is on the Internet at: www.co.marion.or.us