

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, September 2, 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

None.

CONSENT

BOARD OF COMMISSIONERS

OLCC APPLICATION – Recommend Approval

Salvador’s Bakery II, Salem
Shooters Café and Saloon, Salem

BUSINESS SERVICES

Approve acceptance of federal stimulus funding for energy conservation in the amount of \$609,000.

HEALTH

Approve renewal of a contract in the amount of \$162,000 with Hilliard Representative Payee, Inc. to provide representative payee services for 150 clients.

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

ACTION

BUSINESS SERVICES – HUMAN RESOURCES

1. Consider ratification of MCLEA collective bargaining agreement effective July 1, 2008, through June 30, 2011. – Pat Donenfeld

Pat Donenfeld, human resources, stated this collective bargaining contract is for July 1, 2008, through June 30, 2011. This is the Marion County Law Enforcement Association contract and covers most of the deputies and some of the support staff that works in the Sheriff’s Office. She said there was very good support from the Sheriff’s Office while bargaining this contract, which took approximately one and one-half years. This contract did go to binding arbitration and the

county's offer prevailed. In binding arbitration the arbitrator chooses either the county's last offer or the association's last offer.

Ms. Donenfeld summarized the main points of the last offer approved. There were some modifications made to MCLEA's ODS health plan. It had previously been a very rich plan and the modifications will bring it more in line with other plans that county employees have. The employees will start paying five percent of the premium.

Ms. Donenfeld said that modifications to wages include a retroactive COLA back to July 1, 2008 of 2.13% and there is no COLA for July 1, 2009. There is a two percent COLA for July 1, 2010, unless either party opens that part of the contract.

Commissioner Milne asked if there were any other minor issues? Ms. Donenfeld said most of the issues were mainly procedural and not contentious. The items that were holding up the contract were the wages and health insurance.

Commissioner Carlson asked about the compensation credits and how many weeks this unit has. Ms. Donenfeld replied that his bargaining unit has two weeks of compensation credits.

MOTION: Commissioner Brentano moved to ratify the MCLEA collective bargaining agreement effective July 1, 2008, through June 30, 2011. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Commissioner Carlson commented that she appreciated the hard work put into this contract by Ms. Donenfeld, management staff and the Sheriff's Office. She felt the Sheriff's Office really worked hard to get this contract settled.

Mr. Lattimer stated that this contract was bargained for over a year and a half and it was not easy. He said that Ms. Donenfeld deserves a lot of credit for getting this completed. She also spent a lot of time on the new union contract for the Juvenile Department, which was also very contentious.

Commissioner Milne recognized the work Ms. Donenfeld did and said that it is not easy work.

PUBLIC WORKS

2. Consider the approval of a three-way agreement between Marion County, Portland and Western Railroad, Inc. and Clear View II, LLC to construct improvements to the crossing over South River Road. – Cindy Schmitt

Cindy Schmitt, public works engineer, said this agreement is a three-way agreement between Marion County, Portland and Western Railroad and to provide improvements to the railroad crossing along South River Road. Ms. Schmitt showed a map illustrating South River Road as the main roadway in the area. There are portions of the road that are under the jurisdiction of Salem and portions that are under the jurisdiction of Marion County. There have been a couple of fairly large subdivision developments in the Illahe area that were within the City of Salem boundaries. Therefore, the land use process was controlled in the City of Salem. When the land use process was completed and approved by the Salem City Council it included a number of conditions that required the developer to do improvements to the county roads in the area. One of the conditions was to improve the intersection of Riverdale and River Road South. Another

condition was to seek improvements to the railroad crossing. In addition, there was a neighborhood organization that started legal action against the developer that forced him to deposit funds with the county to get the railroad crossing improved. Ms. Schmitt said that in order to improve a railroad crossing there has to be a rail order from the Oregon Department of Transportation (ODOT) rail. This crossing is considered a Marion County crossing. Marion County submitted the application and helped coordinate this project. An order was then issued to improve the railroad crossing, which states that Marion County is responsible for having the railroad do their work on the crossing and reimbursing the railroad for all costs. It also states that Marion County is responsible for all approach road, sidewalk and bike path work done. Ms. Schmitt said that the county has money on deposit, which was given by the developer. She said that she wanted some kind of protection for the county in the event of cost overruns or things that were out of the county's control that would halt the project. She said an agreement was created to address those concerns. She said that the agreement is between Marion County, Portland and Western Railroad and Clearview II, LLC. Clearview II, LLC. has an engineering firm and their own contractor who will be doing the physical roadway approach work.

Ms. Schmitt said they felt the money deposited by the developer was adequate to get the main parts of the project done. Construction of the project will begin in one week. If the board approves the agreement today, signs will be posted that the road will be closed for one week and a detour route given. She said there is approximately \$473,000 on deposit for the project and will pay for all the railroad's work at the crossing. The contractor and engineering firm working for the developer have previously been paid to do their approach roadwork. In total, this project will cost approximately \$750,000.

Commissioner Milne asked how long the project would take. Ms. Schmitt said the road could only be closed for one week. She said there would be a detour and then described it for the commissioners.

Commissioner Carlson asked if the neighborhood association had been notified. Ms. Schmitt said that a road closure notification has been mailed out, but they probably have not notified the neighborhood association. Mr. Lattimer said he is the president of the neighborhood association and if Ms. Schmitt would send him an email with all the details he would insure all the neighbors are notified.

Commissioner Brentano asked how frequently the train passes through this area and what safety measures will take place during the construction. Ms. Schmitt said that the existing flashers would remain in place until the new ones are installed. Mr. Lattimer said the trains tend to go through about 4:00 a.m.

MOTION: Commissioner Carlson moved approval of a three-way agreement between Marion County, Portland and Western Railroad, Inc. and Clear View II, LLC to construct improvements to the crossing over South River Road. Seconded by Commissioner Brentano, motion carried. A voice vote was unanimous.

PUBLIC WORKS – PLANNING

3. Consider appeal of Hearing Officer's denial of Administrative Review case #09-012, Levy, Clerk's File #5623; suggested hearing date is September 23, 2009. – Sterling Anderson

Sterling Anderson, planning director, stated the item before the board is an appeal of an application that was denied by the hearings officer for an administrative review to determine if a kennel is a legally existing non-conforming use in the exclusive farm use (EFU) zone. This is on property located at 5822 66th Avenue NE, outside Salem. The hearings officer denied this application due to the failure of the applicant to show compliance with the applicable criteria and prove that this is a non-conforming use. Specifically, the hearings officer found that on the date the applicants purchased the property, August 27, 1988, a kennel was not an allowed use in the county's EFU zone or under state statutes. Correctly finding that if the use is not listed as an allowed use in the zone that the establishment of a kennel, as a result, is an illegal use and not a non-conforming use. To qualify as non-conforming, the use first needs to be established legally to begin with and then the laws change, which would make it non-conforming. In this case, use was established at a time when kennels were not a permitted use or a conditional use in that zone. The appeal also argues that the hearings officer was incorrect in her application of a court of appeals case involving *Linn County vs. Hickey*. This is regarding the self-executing aspect of new statutes. The difference the hearings officer draws regarding this case is that in the Linn County case, the time period of the enactment of the new statutes in 1985, that clearly defined a kennel as not falling under the definition of farm use as animal husbandry, with six months between the new statute and the amendments to the Linn County code. However, in Marion County that time period was six and one half years. The hearings officer also correctly pointed out that in the Hickey case, the kennel was established many years prior to the land use regulations regarding kennels. While in this case the kennel was established many years after land use regulations were established that did not permit kennels in the EFU zone.

Mr. Anderson said the practice has always been when new statutes are passed regarding land use, they are applied directly, even if not actually in the zoning code at the time. Handouts would be developed identifying the changes in the statute and attach them to the zone copy. If anyone picked up a copy of the ordinance they would have the new statutes at that time. As a result, the hearings officer correctly rejected the applicability of the Hickey case to this particular application. The appeal also argues that if the county wanted to regulate kennels, it should have done so by adopting regulations. This ignores the fact that in 1988 and even prior to that date the county did regulate kennels by allowing them as a conditional use in the residential agricultural zone, the acreage residential zone and the industrial commercial zones only. Mr. Anderson said that staff recommends the board deny the appeal and adopt the hearings officer's decision.

Commissioner Milne asked about the applicants being informed that a kennel was allowed on the property. Mr. Anderson said that in 1988 all staff clearly understood that if something is not listed in the zone as a use, then it is not allowed. The zone only identifies what is allowed, which is the same as the statutes. The statutes may not list many things as allowed in the EFU zone, but that doesn't mean they are allowed. He said this is a standard and has always been the consistent interpretation and application of statutes and regulations when it pertains to zoning. He explained that if the use is not there in the zone, then it isn't there. Mr. Anderson said he strongly believes that the kennel being allowed was never told to the applicants.

Commissioner Milne asked about the issue of an incorrect interpretation of the hearings officer with regard to the Hickey case. Ms. Roy said there are other cases that support the principle that you apply the state statutes directly after a change. She said this is the practice that Marion County has utilized in terms of changes in law. She said it does take some amount of time to change the code, but certainly the difference between six months and six and one half years is different. She said the code and the statutes are prescriptive and there has to be a list of what is

allowed. She said the only difference would be if the kennel would fall under animal husbandry. Ms. Roy said that in the Hickey case as opposed to a straight out kennel, which our code allows in other zones, but did not specify it in the EFU. She said there are some factual differences between Marion County and Linn County in how they apply state law and what their codes specify. Ms. Roy stated that this comes down to how the codes are interpreted.

Commissioner Brentano stated that he always looks for ways to help applicants with their uses on their property, but he felt that there may not be a way legally in this case.

Commissioner Carlson asked Mr. Anderson what brought this particular case to the attention of Marion County after 21 years. Mr. Anderson stated that this particular parcel has had a long and ongoing enforcement action against it regarding the operation of a business on the property without permits and construction of buildings without permits. Some of these issues have been resolved over time through the enforcement process. He said there was a recent application for a home occupation to legalize the business, which was denied at all levels including the board of commissioners. The kennel was part of the reason for the denial because there was an illegal kennel being operated on the property called "Abiqua Kennels" and because there is an illegal activity on the property no land use permit can be approved. He said the home occupation was a "catch 22" because the kennel operation was the illegal operation. The applicants then submitted this application trying to argue that they were a non-conforming use at the time they established the kennel back in 1988. The hearings officer correctly concluded that it was an illegal use because the use was not allowed by statute or by the zone code in 1988.

Commissioner Carlson asked how long the ongoing enforcement action been happening. Mr. Anderson said approximately two years. She said that meant the applicants were operating for 19 years and she wanted to know what brought it to the attention of Marion County. Mr. Anderson said they had complaints from neighbors regarding the activities on the property. The neighbors initially complained about the use of the property for the business. Upon an inspection to the property other violations were discovered that were ongoing.

Commissioner Carlson reiterated that the applicant had been operating a business for 21 years and are now being told they can't operate it any longer. She asked if there was any remedy for the applicants under the law. Mr. Anderson said there would have to be legislative changes to allow kennels in the EFU zone. Commissioner Carlson asked if there was any conditional use option. Mr. Anderson said the only authority is for an expansion of a legally existing kennel, which in this case it is not a legally existing kennel. Therefore, there is no option. New kennels cannot be established and have not been allowed in statute or the EFU zone since the late 70s. Commissioner Carlson reiterated that since the 1970s it has been a statutory prohibition to have a kennel on EFU property.

Commissioner Brentano asked if the size of the kennel would matter or if the applicants could scale their operation back to be legal. Mr. Anderson said the issue is the breeding; sales and showing that are being conducted on the property. In addition, they have a legitimate business name and a website set up advertising the breeding of the dogs. Three dogs is the limit and once you have four or more, it is considered a kennel. The definition is in the county ordinance and has been the same definition since the 1970s. Ms. Roy added that the difference between this kennel and the Hickey case in Linn County is that although they are both long standing kennels, the kennel in Linn County predated the change in state law. State law had already been changed before the Abiqua Kennel had been established in that zone.

Commissioner Milne asked if there was any evidence that supported the applicants' statement that they were given approval to operate the kennel. Mr. Anderson said there was no evidence and he maintains that staff would have been very clear that it would not be allowed.

Commissioner Carlson reiterated the statute change, however, the average citizen does not generally follow statute changes. She gave a scenario that maybe an intern gave the advice to the applicants that a kennel was approved. The applicants rely on that advice and for 21 years they have a kennel on the property. She asked how the average person would know whether or not they are abiding by the statutes and what is the remedy. Ms. Roy said they have no options under the land use laws. Commissioner Carlson asked if there was any other remedy than the applicants moving their business. She asked if conditional use was an option and Ms. Roy said no. Ms. Roy said she wasn't aware of any options at the applicant's current location other than decreasing the number of dogs they have.

Mr. Anderson said that there is a primary business on the property and that is the reason they received complaints. There is a land clearing and excavation business operated by the owners. If the kennel weren't a violation they would be very likely be able to get a home occupation approval that was previously denied. He added that the hearings officer stated in her report that if the kennel violation didn't exist or was resolved, then the land excavation and clearing business would probably fit under the provisions for a home occupation. He said there were some other violations regarding building permits and they have been taken care of. He said another violation was access to the property actually crossed another person's property. There was a narrow strip of separate ownership that separated the subject property from the county road. The applicants were accessing that separate ownership strip without permission. This violation has been taken care of as well.

Commissioner Carlson suggested that the board accept the appeal so they can hear both sides of the information. Commissioner Milne said she would like to help resolve this situation.

MOTION: Commissioner Brentano moved to accept the appeal and schedule a public hearing for September 23, 2009. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

TREASURER

4. Consider approval of a resolution authorizing the loan of funds from public works environmental services to the county's general fund in an amount of not more than \$10,000,000.
– Laurie Steele

Marion County Treasurer, Laurie Steele, requested that the commissioners approve a resolution authorizing the loan of funds from public works environmental services to the county's general fund in an amount of not more than \$10,000,000.00. She said she requests this every year to help the county with cash flow until property taxes come in, which is mid-November. Ms. Steele said that in the past the county has borrowed tax anticipation notes, but the cost of these notes far exceeds the benefit. If the money is borrowed from the Public Works Environmental Services Fund it is a much shorter-term loan and a lower rate of interest. In addition, there are not all of the fees associated with selling tax anticipation notes.

John Lattimer said this is a sign of the times and also a sign of the difficult fiscal year for 2010. He said the budget that was just completed was difficult, but the next budget will be more difficult.

Commissioner Carlson commented that the county did have money in reserves, but spending is at a higher rate than the revenues coming in and so the reserves are being spent down. The general fund is not coming in at what it has in the past and it is at a precariously low level right now.

Mr. Lattimer said property taxes are key for the general fund. Over the last few years there have been less than five percent increases a year in property tax. The state and our Council of Economic Advisors project that the increase next year will be 1.6 percent. With the kinds of increases in salaries that the county gets into with the unions, it clearly can't keep up. He added that he tries to let the employees know that as long as the county has to bargain these kind of increases that employees will be lost, which means since employees provide the services, services will be cut to the citizens of Marion County.

MOTION: Commissioner Carlson moved approval of a resolution authorizing the loan of funds from public works environmental services to the county's general fund in an amount of not to exceed \$10,000,000. Seconded by Commissioner Brentano; motion carried. A voice vote was unanimous.

Commissioner Brentano asked about the interest rate paid on this inter fund loan. Ms. Steele said that historically the commissioners have chosen to pay interest on these loans. The interest is at the rate of the local government investment pool and is an investment opportunity that local governments have with the State Treasurer's Office. The rate at the time of this paperwork was prepared was at .85 percent and is the rate the board has approved for loans from one fund to another.

**PUBLIC HEARING
9:30 a.m.**

None.

Commissioner Milne adjourned the meeting at 10:03 a.m.

Attachments:

ABOVE MINUTES APPROVED

CHAIR

COMMISSIONER

COMMISSIONER

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