

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, March 25, 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 Jo Stonecipher as legal counsel and Kim Hulett as recorder.

PUBLIC COMMENT

None.

PRESENTATION

Marion County Oregon 150 Committee – Presentation of the Marion County Oregon 150 Passport and Relay brochure. – Amy Vandegrift, Nelsa Brodie and Glenis Chapin

Amy Vandegrift, executive director of the Marion County Historical Society and co-chair of the Marion County Oregon 150 Committee said that the committee has rolled out their relay pamphlet (passport). Calls are now coming in regarding the passport and relay brochure and the excitement is definitely growing. Ms. Vandegrift thanked all on the committee for their hard work along with Marion County Public Works who produced the large map. Ms. Vandegrift added that incorporated into the passport is the five-week relay event (attachment A).

Commissioner Carlson asked Ms. Vandegrift where constituents could pick up the passport. Ms. Vandegrift said that the passports are in city halls, libraries, TravelSalem, Mission Mill Museum and Courthouse Square.

CONSENT

BOARD OF COMMISSIONERS

OLCC APPLICATIONS – Recommend Approval

Butteville General Store, Butteville
Cinco De Mayo Deli & Mini Mart, Woodburn
Hitchin Post Tavern, Salem
7-Eleven Store #2352, Salem
Red Lobster #673, Salem
US Deli & Pub, Salem

BUSINESS SERVICES

Approve a three-year lease with Hoffman Construction Company for the use of a portion of county land located at the Juvenile Detention Campus as a staging area for the Oregon State Hospital replacement project.

PUBLIC WORKS – PLANNING

Notice of adoption of an administrative ordinance amending Marion County Ordinance No. 958, an administrative ordinance that amended the City of Idanha's urban growth boundary, by correcting exhibit B to the ordinance. Adoption is scheduled for April 1, 2009.

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

ACTION

SHERIFF

1. Consider approval of a three-year fee-for-service contract with Salem Hospital and West Valley Hospital to provide medical services for inmates on an as needed basis. – Undersheriff Jason Myers

Undersheriff Jason Myers reported that this is a three-year fee for service contract that is a result of work that began in the summer 2007. At that time, the Sheriff's Office was looking at their contracts with local medical providers trying to get the best service for the best possible cost. During that time, the county entered into an agreement with Salem Hospital for a 10 percent reduction in costs for medical services for jail inmates. Recently the hospital approached the Sheriff's Office regarding entering into a contract with a 15 percent discount and this contract is the result of that work.

Commissioner Carlson commented that once someone is incarcerated they lose their medical benefits under the federal government and this makes them ineligible for the Oregon Health Plan or Medicaid. The county is then responsible for picking up these medical expenses, which can be very expensive. She added that anything that can be done to help defray some of these costs is helpful.

Ms. Stonecipher added that the constitution prohibits cruel and unusual punishment, which means you cannot have people suffering illness or being subject to pain and suffering in the county's jail without providing them with suitable medical care. This is what is required by law to treat people in a humane and appropriate manner.

Commissioner Carlson stated that the Sheriff's Office said it spent approximately \$347,000 on medical services provided by Salem Hospital from fiscal year 2006-07 thru February 2009.

MOTION: Commissioner Carlson moved approval of a three-year fee-for-service contract with Salem Hospital and West Valley Hospital to provide medical services for inmates on an as needed basis. Seconded by Commissioner Brentano; motion carried. A voice vote was unanimous.

Commissioner Milne recessed the meeting at 9:20 a.m.

Commissioner Milne reconvened the meeting at 9:30 a.m. to begin the public hearing.

PUBLIC HEARING

9:30 a.m.

PUBLIC WORKS - PLANNING

A. Public hearing to consider appeal for zone change, case #ZC08-05, Fultz, Clerk's File #5597 and partition, case #P08-78, Fultz, Clerk's File #5596. – Sterling Anderson

Sterling Anderson, planning director, said the hearing today involves two applications. The first application is an appeal of a planning staff change to the zoning map to reflect the zoning of the subject property as exclusive farm use (EFU) on a 10-acre portion of an 85.9-acre parcel. This parcel is located at the 12100 block of Brick Road SE, Turner. In this case the hearings officer dismissed the zone change case finding that the zoning on the property was not changed from EFU to acreage residential (AR), nor from AR to EFU. The hearings officer added that the county is not estopped from enforcing its valid adopted zoning ordinance or from enforcing state law.

The second aspect of this hearing involves an application to divide a 10-acre indicated AR zoned parcel into three parcels of two acres, two acres and six acres at the same location on Brick Road SE. In this case, the hearings officer denied the application due to the property being legally zoned EFU and not zoned AR and that under county zoning and state law, the minimum lot size would be an 80 acre lot size and therefore the requested parcels would not meet those minimums. The hearings officer also found that the county could not violate state minimum lot size and dwelling placement laws requested in the application.

Mr. Anderson said that the board denied the original appeal from the hearings officer's decision. The appeal was then appealed to Land Use Board of Appeals (LUBA) and the county agreed to a remand to allow the board to reconsider its denial and scheduled this public hearing for today.

Commissioner Carlson stated that when the board originally heard this case they were advised to deny the appeal so it could move up to reach LUBA. She said now the board is being advised to bring this back and asked Ms. Stonecipher to speak to the legal issues. Ms. Stonecipher said the advice the commissioners were given when the original appeal came before them the first time was based on the understanding that while mistakes were made and there may be a basis for other claims or other remedies available. The problem was that there never was a change in the official zoning on the property from EFU to AR. The property is EFU zoned and under state law it was not possible to go forward. Since that time Ms. Stonecipher has spoken with the counsel for the petitioners and counsel believes if he was given the opportunity before the board, he could offer legal analysis that would demonstrate that it was possible, consistent with state law and case law, to go forward in this case. At counsel's request, Ms. Stonecipher brought this case back to the board to allow them to decide if they want to hear it again. Ms. Stonecipher said it was her suggestion that if someone could present a valid argument to the board that it could find in favor of the petitioners. She felt it definitely was in the county's interest to go forward to preserve the resources of going up on a LUBA appeal that might not have been necessary.

TESTIMONY:

Support:

Steve Abel, 900 SW Fifth Avenue, Portland, said he is the attorney for Randy and Kathy Fultz in this case. Mr. Abel then introduced Randy Fultz as the applicant. Mr. Abel filed a LUBA brief and issued it as part of the record and also submitted five exhibits (Exhibit A) to the board. He said the theme and the reality is they are seeking fairness. Mr. Abel said this is a consolidated action and arises from Mr. Fultz's request to partition a parcel of property into three residential lots in the county. In addition, there is a challenge to the zone change that the county counsel has indicated is in conjunction with this matter. The appeal has to do with an amendment that occurred to the maps after some mistakes were made.

Mr. Abel summarized the facts as they occurred over the time of ten years. Mr. Fultz purchased about 86 acres of land in 1999. Exhibit A shows the subject ten acres of the 86 acres that Mr. Fultz purchased in 1999. The remaining 76 acres per the zoning maps state it is EFU land. Between 1999 and 2007 Mr. Fultz, on a number of occasions, reviewed the county's maps and the 10 acres was zoned as AR. During this period of time Mr. Fultz was obligated to file with the assessor an ongoing statement that said he had farming activities on that AR piece so he could obtain tax deferral. The reason was because the 10-acre piece was being farmed and it was not zoned EFU land.

Mr. Abel said that late in 2007, Mr. Fultz asked the Marion County Planning Department about the development ability of the AR property. The AR property was found to be developable, but the problem was that it didn't have access to Brick Road. It is a landlocked piece and doesn't have access and is the sole obstacle in developing that parcel of land into three buildable lots. He added that there is a zoning map in exhibit A as it appeared on November 15, 2007, that shows the 10-acre parcel as AR. Mr. Abel said that about this same time a two-acre became available between the 10-acre parcel and Brick Road that would provide access to the AR parcel. Mr. Fultz again went to the Planning Department and asked if he acquired the two-acre parcel would he be able to develop the AR parcel. The Planning Department told him he would be able to develop this by dividing it into three lots, a two-acre, a two-acre and six-acre and that it would be a "slam dunk".

Mr. Abel said that Mr. Fultz purchased the additional property to get access to Brick Road because he relied upon the information provided by the Planning Department, the county zoning map, and the ongoing history of the county assessor filing tax statements for deferral. Mr. Fultz was told he could develop the 10-acre parcel in accordance with the AR zone if he had access.

Mr. Abel said that on December 31, 2007, Mr. Fultz filed an application to partition. He called attention to a copy of the application that noted the property was zoned AR. In 2008, staff denied the application based upon a belief that the property was not actually AR, but instead is zoned EFU. Mr. Abel said this was probably a surprise to everyone that has been in the process from 1999 through the end of 2007.

Mr. Abel said that he had also included the deed in the exhibit that confirms Mr. Fultz purchased the two-acre parcel. He thought it important to note that the deed included the statutory disclaimer that the state mandates are in sale documents. The disclaimer basically states that all

buyers should check with the local planner to insure that the property is zoned for the purposes intended so the purchaser can feel assured that they haven't thrown away their money. Mr. Abel said that basically this is what Mr. Fultz did. Not only in anticipation of purchasing the property, but also in the course of dealing with the county over the time frame of eight to nine years. Mr. Abel said he takes the position that the disclaimer has meaning because state statute requires that disclaimers be put in sale documents.

A month later on January 30, 2008, the county amended its map and this property was taken out of AR. Mr. Abel said they took a challenge to the amendment in conjunction with the challenge of the denial of the application for the partition. The denial of the application for the partition was based upon the fact that the property wasn't zoned AR and you couldn't partition EFU lands. They are separate appeals, but consolidated for purposes of intellectually viewing the problem as it occurred. Mr. Abel said that exhibit E shows the partitioning notice of decision issued by the county's staff on February 14, 2008, and the map attached continued to show the property as listed AR. He said that in summary this is a sad story and not the kind of story where Mr. Fultz comes in on a single occasion; it is the course of a very long time. He reiterated that Mr. Fultz and himself were here seeking fairness and it is certainly in the province of the board of commissioners to consider.

Mr. Abel said that sometimes the law does seek fairness and it is not such a mechanical thing. One of the things that exist within the law is that the board as a governing body has the discretion to run the affairs of the county. He said the board could make the determination that the property is zoned AR and he believes the property should be zoned AR and the subdivision approved.

Mr. Abel said there is a concept in the law called estoppel and the hearing's officer said that estoppel did not apply to this case. He said there was a case that came out of the Oregon Supreme Court in the fall of 2008 called Loosli vs. City of Salem. The Loosli case was about an used car dealer in the City of Salem who wanted to put in a used car dealership and the Oregon Department of Motor Vehicles code requires that in order to have a license you get a permit from the state to operate a used vehicle dealership. This requires that you go to the local government and get zoning confirmation. The used card dealer went to the City of Salem and gets zoning confirmation that permits him to have a used car dealership on that particular parcel. It is later discovered that the representation from the City of Salem was incorrect and the City of Salem moved the used car dealer off the property. He said this is what happens sometimes in an estoppel setting because estoppel arises out of this protection of government against lawsuits. Estoppel is about the only reason when a government makes a representation that representation can be relied upon. In the case of Loosli, the auto dealer had no remedy against the city. The city made a mistake and it was tough luck. Mr. Abel said what is interesting about the Loosli case and the reason the court said tough luck is that the representation that was made and the requirement in state statute that a representation be made is for the protection of the general public. He explained that the zoning confirmation is there so that the general public is assured that the auto dealership is appropriately located. It points the direction for future estoppel circumstances just like the Fultz case, by saying that Mr. Fultz isn't in the class that is to be protected by the requirement for getting zoning confirmation. He said this is a 180 degrees from the circumstance where the people to be protected by the requirement in the deed is exactly Mr. Fultz. The Oregon Supreme Court case in Loosli, while not exactly the same facts, is 180 degrees pointing toward Mr. Fultz and the reason why Mr. Fultz has an estoppel claim.

Mr. Fultz is in the class of citizens to be protected by the phrase that is required in the sale agreement in 1999 when he purchased the property. He then quoted a statutory disclaimer that is in the state statutes. He said that disclaimer is there for a reason and it's not for a meaningless step of going in and checking the zone and having someone tell the person that the zoning is "x" and then apologizing for being wrong. Mr. Abel said this is the reason why he believes that Mr. Fultz has a case that the board of commissioners can resolve. He continues to believe that the zoning is AR and yes mistakes were made. Those mistakes have led to the reliance of Mr. Fultz and the board could say the property is zoned AR and approve the partition. This case would then be concluded.

Mr. Fultz, 10047 Stayton Road SE, Aumsville, said this 86-acre parcel he purchased in 1999 actually consists of four parcels, a 30-acre, a 40-acre, a 10-acre and a 5-acre parcel. He said that when he purchased the property in 1999 he was told, in addition to being shown the maps that the 30 and 40-acre parcels were zoned EFU and the 5 and the 10-acre parcels were zoned AR. Over the years he said he was aware he should be able to divide his AR ground into some two-acre parcels if he had access to the property.

Mr. Fultz stated that he had probably visited the planning department at least five times over the years about different issues regarding property. He said he had talked with planning several times about the property being discussed today. He said the issue was he could never break it up because he didn't have any access. He said he had asked planning if he could break up some of his EFU ground so he could put a road in and get to is AR ground. He said the answer was always a definite no. In 2005 or 2006, a piece of ground became available for sale on Brick Road and he thought it would come into his 10-acre parcel of ground. During that time he contacted John Baker, a realtor, who did some checking and decided that this property for sale would not meet up with Mr. Fultz's 10-acre parcel to give him access back to the other property. Mr. Fultz said that in 2007 another piece of property at 12196 Brick Road was listed for sale. He again contacted Mr. Baker to do research on the piece of property for sale. This two-acre parcel went right to the center of Mr. Fultz's 10-acre parcel and provided great access. Mr. Fultz again went to the county planning office and again discovered his property was zoned AR and the two acre piece would give him access to the property. He also found out at that time there wouldn't be any problem developing his ten-acre parcel into two-acre parcels.

Mr. Fultz said at that time he contacted Mr. Baker and he immediately did some investigation of this two-acre property and found out there was someone else that was writing an offer on this piece of property. Mr. Baker told Mr. Fultz that he would have to act very quickly to get this property. Mr. Fultz said he offered \$5,000 more than the asking price of this piece of property. After the offer was accepted, Mr. Fultz immediately went to the county planning office and made application for septic approval on the 10-acre parcel. He dug the test holes and the sanitarian came out and gave Mr. Fultz his septic approval. He said he had this approval before the closing on the property. In addition, Mr. Fultz said approximately every two years he would get a letter from the Marion County Assessor's office asking if his property was being farmed so he could keep his farm deferral status on the five-acre parcel and the 10-acre parcel. Each time he received those inquiries he would fill them out and return them to keep the farm deferral on his AR ground.

Mr. Fultz said that although his property was changed to EFU, he still received another letter from the Assessor's Office stating that his ground was still AR and they knew he was farming it and didn't need him to fill out the information again.

Mr. Fultz said that in 2008 he closed on the two-acre parcel in late December. On December 31, 2008, he filled out an application to partition his property into three parcels. It was approximately two weeks later when Mr. Fultz received a phone call from Patti in the Planning Department. She said that they had found out that Mr. Fultz's ground was not AR ground, but that it was EFU. He said he then had many conversations with the county at that time about the fairness of this entire situation. At this point in time was when Mr. Fultz hired Mr. Abel to help him resolve the situation. He said he was just asking for some fairness today.

Commissioner Carlson stated she understands the fairness argument and wants to understand the rationale that the board would have to find other than what the hearings officer did, because the board relies on the hearings officer to review the legalities of cases. She said that she read the transcript and she read Mr. Abel's brief. She stated that the arguments that Mr. Abel is making to the board are similar to the arguments made to the hearings officer. She said if government made a mistake, according to the hearings officer, there might be a different remedy. She said it might not be a good remedy, but they could sue the county and state the county made a mistake or were incompetent. But she understands that is not going to get them to the point where the county changes the designation from EFU to AR. She said it could also be said that the county made a false representation and then an estoppel comes into play. If an estoppel comes into play can the board find that they could move forward with the designation as it was made? Mr. Abel clarified how he viewed this case. He said the first question comes before "did the government make a mistake." He said there is evidence that the board can rely on that says the government's only mistake is in believing the property is EFU. Planning has maps since 1999 that say the property is AR, the assessor is saying the property is AR and there are repeated checks by Mr. Fultz who was told it was AR. He reiterated that the board could conclude as the elected body that the property is AR. Mr. Abel believes that is the appropriate outcome and then the estoppel question is not even reached.

Commissioner Carlson said the counter to that is the official version of the map, if there is such a thing, was incorrect and everything else is correct. Mr. Abel commented that was correct and that at no time did anyone at the county tell Mr. Fultz that there was an official map in the back room. He said there is a disclaimer on the county's website that states a person should come in physically and look at the map. When Mr. Fultz went to planning and looked at the map he saw that it said AR. Mr. Abel said in his point of view there are a stack of facts that say this property is AR. He said there is only a limited fact of a secret map in the backroom that would say it is contrary. Mr. Abel reiterated that he believes the property is AR. He said that when the county changed the maps to EFU he took a challenge to that and a challenge to the denial of the partition application.

Commissioner Carlson asked if a false representation meant there has to be intent like a malicious intent or does the false representation mean that there is a pattern. It may have been an innocent representation in the sense that everyone in planning is looking at the display maps and seeing that it is AR, but neglecting to go to the map in the backroom to see if there is a discrepancy. She asked how you define a false representation. Mr. Abel said you don't need malicious intent and he doesn't need to find that someone on the staff intended to defraud Mr. Fultz. He said there is a need to find that there was some representation that was negligent. There is a representation that was relied upon by Mr. Fultz.

Mr. Abel said the estoppel analysis is that the government made a bunch of mistakes and they don't have to stand behind their word. Mr. Abel said estoppel is relatively difficult to prove

because the government is protected. Mr. Abel said that he believes that Mr. Fultz is in the class to be protected and therefore has an estoppel claim against Marion County.

Commissioner Carlson said that in the Loosli case the court decided that the city owed no duty to the plaintiffs. The plaintiffs were the car dealers that had the misrepresentation made to them. She clarified that Mr. Abel stated that even though the broad general public is protected, the plaintiffs weren't considered part of that broad general public. Mr. Abel said that the plaintiffs in the case were not protected. If the car dealership loses the case he is not in the class to be protected by the statute. The court said it is the general public to be protected. Mr. Abel said that Mr. Fultz is in the class and is the buyer that is being told by the state, through the statute, to go to the local government and get information. Mr. Fultz relied upon that information and therefore, is in that class to be protected. While the Loosli case isn't factually the same case, it's 180 degrees from Mr. Fultz's case. Mr. Abel said that if they have to go to circuit court, which he doesn't want to do, their argument will be that Mr. Fultz is in the class to be protected. He said the board is the elected body and manage the affairs of the county. The board has the opportunity to look at this particular set of circumstances and make a conclusion that gives Mr. Fultz what he thought he was buying, which was property zoned AR zone and allowed to subdivide. He reiterated that the commissioners are the elected body and have the opportunity to fix this mistake.

Commissioner Carlson stated it is not a question whether the official map is correct or the display map is correct, it is what was submitted in the initial land use designations through the comprehensive planning. She asked Jo Stonecipher if that was a correct statement. Commissioner Carlson said she was assuming that the official map was consistent with the information filed at DLCD or that someone has checked to make sure it was consistent. Ms. Stonecipher stated that only the Board of Commissioners has the authority to zone property in Marion County and it is done pursuant to the county's zoning ordinance. Only the commissioners can adopt an ordinance. Ms. Stonecipher said she understood there was a period of time when this error not only occurred, but also perpetuated throughout the entire county system because of the change to a digital mapping system. This error was made in the late 90s. The point is that it was an error then and she doesn't see how we can go back when a Board of Commissioners adopted an ordinance zoning this property. There has been no subsequent ordinance changing the zoning on that property. She understands what is being argued, but consistent with the state law and the county ordinances concerning how property is zoned and rezoned she doesn't see how it can be said the property is AR just because it was thought the property was zoned AR. Commissioner Carlson confirmed that the ordinance had been verified. Ms. Stonecipher said that was correct and when this problem arose was when the correction was made on the unofficial maps.

Commissioner Carlson said one argument is the property is AR because everyone said it was, but the original documentation says it was not and there was some error in the GIS mapping system so everyone has been acting as if it was AR. She said the commissioners can't change the zone because originally it was and then the second piece of the argument is because the county has been misrepresenting to Mr. Fultz all this time, does the county have some duty to him to be able to rectify this wrong. She asked do we just admit we made a mistake and tell him we are sorry or does he take us to a court and sue the county. He might be able to get back his attorney fees, but he doesn't get the AR zone or the ability to partition his property. She asked if the estoppel argument being made has some bearing on this case. She asked Ms. Stonecipher if she thought

the county in committing this error made a false representation and how the county deals with this legally.

Ms. Stonecipher said there are two aspects of estoppel and the one that has caused the county a problem in recognizing this as AR land is that no matter what estoppel requires, it cannot require to a government to act against the existing laws. She felt this is what the county is being asked to do. There is one set of facts that the board has heard so far and obviously in a court of law there would be more information brought forward. Ms. Stonecipher said she sees their point that there are probably aspects of the standards for estoppel and obviously an incorrect representation was made. The county doesn't dispute that fact. Ms. Stonecipher said she honestly didn't know if the county would be liable. She said she has had conversation with one commissioner concerning the possibility of going forward with a comprehensive plan/zone change, recognizing the fairness issue as part of that process.

Commissioner Milne asked about the comprehensive plan/zone change and if the information could be put in the deed. She said Ms. Stonecipher had suggested that the board has the authority to change the zoning and wanted to know what would disallow the board from doing that? Ms. Stonecipher said there would have to be proper notice and the process would have to be followed for notice to DLCD regarding a comprehensive plan and zone change. She said there would be additional information concerning the status of the property and why it is being considered developable land. She said all this would be a basis to move forward with the change. The board would have to hold a hearing and determine the reasons for going forward with the change. She said this would be her recommendation to the board as the way to insure that they do not violate state law and end up in an adverse position with the DLCD. The DLCD would not be happy about the prospect of just declaring property a certain zone because it was said that it was that zone for a length of time.

Commissioner Carlson reiterated what the original zoning was and that even if estoppel comes into play, it doesn't negate the original zoning. She said if the board did a comprehensive plan and zone change it would take some additional findings and time. She asked if the board had authority to waive the fee for comprehensive plan/zone change because the applicant has already paid \$940.00 for the partition. Ms. Stonecipher said the board could do this; they have authority by ordinance to waive the fees upon application by the petitioner.

Commissioner Brentano said the county could admit all the wrong in the world, but it doesn't get the applicant where he wants to go. There would be a fight with the state that the county would be involved with. He clarified that the board could hold a hearing, but that it cannot be determined now if this will give the applicant what he wants. The board would have additional findings to review. Commissioner Brentano suggested that we continue this public hearing to a later date.

Mr. Abel said when you put any two lawyers in a room there is going to be a disagreement with what the law is and what the resolution is going to be. He said he didn't agree with what was being discussed and he felt the board has the authority to make a declaration that the property is AR. He said he wasn't promoting the case that says just because everyone said it is AR then it is AR. He said he has people who have been involved with the property, who have relied on the county's map and the county's own words that it is AR. He reiterated that he believes the board has the authority today to resolve this matter. He said he didn't have a lot of confidence in another process. The original hearing with the county was in April 2008 and it is now near the

end of March 2009. Comprehensive plan amendments and zone changes are not short processes either and during this time the economy has collapsed as well.

TESTIMONY:

Support:

Donald G. Stacey, 12180 Brick Road SE, Turner, said his property is directly between Fultz's property and Brick Road. Mr. Stacey said that he purchased his property in 1978 and bought it because it was zoned AR and later changed to RA. He said it was his understanding that the 10 acres behind him was also the same zoning. He said he also went to the county to check the zoning on the 10 acres and he was told it was AR. He said when that 10 acres came up for sale again in the late 80s he checked with the county again as to the zoning. He was told that the 10 acres was AR and he was showed the map on the desk in the planning room. He wanted to purchase the 10 acres, but Mr. Fultz beat him to it. He said he feels it unfair that the county represented it as AR and then when someone wants to develop it the zoning is EFU.

Mr. Stacey said that he felt Mr. Fultz's partition should be approved and the zoning should be how it was represented.

John Baker, 2339 State Street, Salem, thanked the commissioners for the opportunity to testify. He said he has been a real estate broker for over 30 years is also a partner with Mr. Fultz in some homes. Mr. Baker believes that he has above average knowledge as far as real estate transactions and the duties of an agent to a client. He was involved with the sale of the property that Mr. Fultz purchased in 1999. He said he could attest that he met Mr. Fultz in about 1982-1983 and was a Salem Police Officer and a homebuilder on the side. He said he has had a long-term relationship with Randy Fultz. He said Mr. Fultz goes above average and is the most diligent on doing due diligence on any of his purchases. Mr. Baker said he had talked with Mr. Fultz many times and he wanted to build some upscale homes on his property, but he didn't have access. Property at 12196 Brick Road came on the market in July of 2007. Mr. Baker and Mr. Fultz wrote a proposal to purchase the property and Mr. Fultz said he was going to the county one last time to check the property. He said they were relying on the county who said it was zoned AR to provide access to his other property. In a span of two weeks the county contacted Mr. Fultz and told him the property was actually zoned EFU. Mr. Baker said the county has an obligation to make a representation of what the zonings are. The fact that someone said last spring that they needed to check an official map. He said he has never heard that someone needs to take the extra step to check the official map in a back room. He said he didn't think that any other real estate practitioner or homebuilder would know to ask that question. Mr. Baker said he remembers when he got the phone call from the county that it was zoned incorrectly. He said that the county said they have to check an official map and he has never heard that in his entire career. Mr. Baker said the board is elected officials and they have the ability to correct this issue. He said the county needs to make things right. Mr. Fultz made no mistakes and the neighbors have knowledge back before 1989 that this was AR zoned. The value of the property is centered on how that property can be used and how it is zoned. Mr. Fultz made a \$200,000 purchase that he wouldn't have if the property had been properly represented.

Betty Hilton, 12503 Brick Road, Turner, said she has property across the road from Fultzs. She said she grew up in the area and wanted to say that this is a good area for subdivision and small acreages.

Mr. Abel returned to the table to say there was no opposition testimony so he didn't really have any rebuttal. He said he understood that the board has to weigh the evidence and make a decision. He said the facts are there.

Sterling Anderson commented that the error that was made in the digitizing process for the county appears to have occurred in about 1998. Until that time the county display maps showed this subject property as zoned EFU. At no time prior to that did any of the maps in the county show this property, the 10 acres or other areas, as being anything but EFU. So if anyone would have come in prior to the update of those display maps the acreage was zoned EFU.

Commissioner Carlson said with regard to the email from Gary Fish of the DLCD, it talks about the information his department has on the case and that an exception has not been approved or acknowledged since the property was originally zoned EFU by the county. The zone change to an exception zone (AR) would not be legal absent the approved and acknowledged exception to Goal 3. Commissioner Carlson asked if the approved and acknowledged exception would have to take place in the context of a comprehensive plan/zone change process. Mr. Anderson said that was correct and that Goal 3 is agricultural lands. She asked what would be the standard for getting an exception to Goal 3.

Mr. Anderson said there are three basic types of exceptions to Goal 3. One is the committed, meaning the property is committed to development, not allowed by the EFU zone due to surrounding or existing development in the area. There is the developed exception, which means the property is developed for uses that are not allowed by the EFU zone and the third, which is the reasons exception. The reason exceptions includes a variety of possible reasons why the property should be zoned something other than EFU. The reason exception is one of the most difficult to try to justify. The committed and developed exceptions are generally very fact based. There is either development on the property or there isn't. The committed is usually development in the area that then commits to the property to something other than EFU. The reasons exception is more open ended in terms of the factual basis. The first two are generally more straightforward and the reasons exception is somewhat more difficult with fewer applications under this exception.

Commissioner Carlson asked what impact the purchase of the additional property has to Mr. Fultz's original property. She wanted to know if it became one. Mr. Anderson said it doesn't necessarily have to be one. The two-acre portion was zoned and a goal exception granted during the original acknowledgement process so it was and is currently zoned AR. The 10-acre is not a separate parcel; it is part of 85.9-acre parcel that under previous owners the two-acre was partitioned off of the Fultz's total ownership. The partitioning consolidated the tax lots that the Fultz's previous owners had into one 85.9-acre EFU zone parcel. The partitioning map filed implements that decision. Assuming you could get a comprehensive plan/zone change goal exception for the 10 acre area you would also at the same time have to partition that from the 85.9 acre parcel. The two-acre piece is the access piece and would not have to become part of those 10 acres. If the Fultzs wanted it as part of the 10 acres they could just do a property line adjustment.

Commissioner Milne said it sounds like there is a desire on the part of the board to try to find a way to make something work so the Fultzs could proceed and use the property as they want. She said sometimes things happen and she didn't feel there was any ill intent, but a mistake was

definitely made and she apologized for that. She said the board is here to instill confidence in government and felt this was a horrific mistake and put Mr. Fultz into an unbelievable dilemma. She felt that the board has a burden or responsibility to correct that mistake, but she also recognizes that they cannot change state law.

Commissioner Brentano said he didn't feel the board had the authority to just change the zone. He said there is a path to correct this mistake and that is the one he wants to follow.

MOTION: Commissioner Brentano moved to close the public hearing and request that Mr. Fultz make an application for a zone change/comprehensive plan amendment and partitioning of the ten-acres for which the county will waive the application fee (not acted on).

Mr. Anderson asked legal counsel about the time limits on the pending case. Ms. Stonecipher said there are time limits and they would have to be waived. She said there is also a limit on how long the time limit can be waived now or the board would have to render a decision in this case. Ms. Stonecipher said she would be more than happy to work with Mr. Abel if he was willing to follow the rest of the process. This would allow him to bring a challenge to the board's decision, but stay this matter at LUBA.

Mr. Abel commented that at LUBA you can put cases on the shelf and suspend them indefinitely. He said the rule on processing is at the local level. He said that one option is to put this case today on the shelf at LUBA through that period of time that it takes to do the comprehensive plan, zone change and partition. Ms. Stonecipher reminded the board that this was a remand from LUBA so they would have to deny the case today and Mr. Abel would file a LUBA appeal. Commissioner Milne stated that the board doesn't have to do anything today on this case. She said the board could come back to it next week because it is an unusual case. Mr. Abel said that a reasons exception would be what he would have to do for this case and they are difficult. He also spoke of an alternatives test, which means there are no reasonable alternatives to putting the three houses or partitions on this particular property. He said this is a difficult standard, but maybe able to write some findings. This would be if no one exercises their right in that process to come in and challenge it. Mr. Abel said that he respects going down a pathway that will lead to a solution, but is questionably optimistic.

Mr. Anderson said that when it comes to the goal exception, it would have to be a double goal exception. It would have to be Goal 3 and the urbanization Goal 14. Mr. Anderson recalled a similar case around St. Paul in which they approved both goals.

MOTION: Commissioner Brentano moved to close the public hearing and set deliberations within the next two weeks for a motion or decision. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Commissioner Carlson commented that she wants to help with this and gain some kind of resolution.

Commissioner Milne read the calendar.

Commissioner Milne adjourned the meeting at 11:25 a.m.

Attachments: Agenda

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.

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