

## **PUBLIC HEARING – AUGUST 15, 2007**

### **#SUB 07-03, PAGE**

#### **PUBLIC WORKS – PLANNING**

A. Public hearing to consider appeal of planning commission's decision granting subdivision, case #SUB 07-03, Page, Clerk's File #5534. – Sterling Anderson

Sterling Anderson, planning manager, reported this hearing is based on an appeal of an application for conceptual and detailed approval to subdivide a 50-acre parcel into 33 lots for a planned development, and for an administrative review to reduce a special 200-foot setback. This is in an exclusive farm use (EFU) zone located at 10520 Sunnyview Road NE. This review is subject to the final order, for both Marion County and the State of Oregon, regarding a Measure 37 claim that was filed on this property. In this particular case the planning commission granted the approval for the subdivision, but denied the administrative review request to reduce the 200-foot setback to 100 feet. The applicant requested 33 lots and the Planning Commission approved a range from 10 to 33 lots. As a condition of approval, the Planning Commission required that no more than 10 lots with a minimum of 4.5 acres is allowed unless the applicant passes a hydrogeology review under the requirements of the sensitive groundwater overlay (SGO) zone.

In this case, both the applicant and the opponents appealed the Planning Commission's decision.

In the opponents appeal they argue that several conditions of approval require compliance with such things as vision clearance, storm water detention, evidence of adequate water supply for the subdivision, and lack of harm to other groundwater rights. There is lack of evidence that septic systems can be installed and the development can meet the fire district's standards. These conditions require follow-up analysis to determine whether or not they meet the standards for storm water detention, vision clearance at road intersections, and water and septic availability. They opponents argue that the requirements must be shown to meet or proof of feasibility is required and none of that has been provided. They also argue that the Measure 37 waiver was granted to Lena Page as an individual, and not to the Lena Page trust or its trustee. Their appeal states that the decision failed to notify the applicant that actions taken to implement any development of the property prior to the referendum regarding Measure 37 cannot be used to establish an invested right to develop the property.

The applicant's appeal argues that the Planning Commission had no authority to reduce the number of lots because the proposed 33 lots meet the SGO threshold size, and therefore, no additional review is required. They argue that the Planning Commission improperly interpreted or applied the applicants Measure 37 claim. They state that even though the setback was not waived under the claim, it still does not apply because they are not requesting non-farm dwellings that require the conditional use permit. Regarding the lack of evidence, the applicant offers to provide additional information to justify a reduced setback.

## TESTIMONY:

### Support:

Mark Shipman, 250 Church Street SE, attorney representing Lena Page and their trust. He said his purpose today was to outline the subdivision application. Mrs. Page initially acquired the property in 1962. Both the county and the state had approved waivers back to 1962 for her individual capacity. The property is in the trust and she is the trustee. She has signed the application as an individual and as a trustee. Her property consists of approximately 50 acres and the family is looking to subdivide the property into 33 parcels as shown in exhibit F. Mr. Shipman reiterated he was going to review the project and if Jerry Page arrives he will be able to explain the family's desire and intent are. If Mr. Page is unable to come, Mr. Shipman said he would then have Floyd Sypil, a licensed and bonded well driller and contractor. He also would ask Bill Lulay to give testimony and he is the principal engineer for North Santiam Paving.

Mr. Shipman said they are looking to have three turn-outs for fire purposes along the front piece of the subdivision coming off of Sunnyview Road. The road would be a private road and built to county standards in accordance with the Public Works Department. Each parcel would be served by individual, private wells, and/or septic systems. He said they have not installed any wells or tested all the properties, and typically, that is not done before the final approval of the subdivision. There is a current well on the property serving Mrs. Page's house. At this point in time, her well pumps at 15 gallons per minute. Mr. Sypil will talk about another well that has been installed on the property recently. Mr. Shipman said that the parcels really have sufficient room per the engineers for the individual wells and the individual septic systems. He added that this property is not in a SGO zone, and he believes this is critical in this case. He said the Planning Commission, purposely or inadvertently, put a condition on the subdivision as if they were in a SGO zone. He said the county's SGO zone mirrors the state's zone as well and this subdivision is outside of that.

Mr. Shipman said Sunnyview Road is a county rural road and a total build-out could create over 300 trips per day coming out of the property. The reality is the family is not going to be going in and developing all 33 lots at one time. Their desire is to develop a few lots each year over time. Mr. Shipman said he contracted with DKS to go out and look at the traffic and a report is in the file. The engineer indicates even if there were a total build-out, the road is adequate for the anticipated trips. One of the things that Public Works requires is some significant improvements to Sunnyview with respect to the right-of-ways and along the property. Public Works initially wanted to impose a fee on this applicant as far as like an exaction, but wasn't allowed by the code. He said they initially took the position that the fee was illegal, but after talking with the Planning Commission, they acknowledged that an appropriate method, which they imposed, would be to require at the time of building, an added road surcharge. This could go into a dedicated fund or a fund that would be set aside for the improvement of Sunnyview, either at that location or some location in that area. He explained the highlighted areas on the map (Exhibit F) that relates to the special setbacks. Back in 1962 there were no setbacks. Mr. Shipman

explained that the planning staff acknowledged in their report that several lots were appropriate for having a 100 foot setback for the dwelling, 50 foot for accessory and the remainder having the 200 foot setback. Mr. Shipman said they generally agree with that, although they have adjusted it a bit based on where those setbacks lie in relation to the topography and parcel. He said what they would like to see on parcel one is a 50 foot setback for a dwelling. On parcels two, three and 33, and 13-19, they are requesting that there be a 100 foot setback for the dwellings. All other parcels on the east and west side of the proposed road, they are requesting a 200 foot setback. He said they are willing to live with the 200 foot setback on these properties.

Commissioner Brentano asked Mr. Shipman to explain the parcel that is by itself. Mr. Shipman said that part of the parcel heading down toward the river is steep topography. Commissioner Brentano asked if any part of this parcel was being actively farmed or was timberland. Mr. Shipman said it was not being farmed.

Mr. Shipman went on to say subdivisions are governed by the mandatory approval criteria contained in the Marion County subdivision/partition ordinance. The applicant has adequately addressed all of those approval criteria. Staff found that they adequately addressed those approval criteria. Mr. Shipman said they respectfully request that the board approve the subdivision application as submitted, for the 33 lots with appropriate conditions of approval. Mr. Shipman drafted proposed conditions of approval and submitted as Exhibit A. These conditions are blended from some the Planning Commission required and some that the planning staff required.

#### TESTIMONY:

##### Support:

Floyd Sippel, 7195 Lawnridge Street, Keizer, said he is a well drilling contractor and has been drilling wells in Salem for the last 20 years, and overall for 35 years. He said he was asked to talk about the water situation out there where the Page parcel is. The well on the Page property now is 300 feet deep and producing 15 gal min. He said the well they are drilling on that same property is 260 feet and it is producing 50 gal/min. He said there are wells in surrounding areas that are yielding good amounts. One of his customers just drilled an irrigation well and 300 gal./min. He gave some examples of other wells in the area that are getting 75 gal/min. Mr. Sippel said the water resource department monitors the irrigation wells. He said he hasn't been notified of any declines in the area and if there were, the Water Resource Department would stop issuing permits.

Commissioner Brentano said water resources has never come in and stopped residential wells. Mr. Sippel said it is just permitted wells, not residential. He then submitted his evidence for the record (Exhibit B).

Bill Lulay, North Santiam Paving, P.O. Box 516, Stayton, said he was a licensed engineer and surveyor. He said he has read the conditions of approval in regards to Public Works and he has met with the engineering staff, and feels confident that he can meet all of the

conditions that were laid out. The only thing unique about this project is that Public Works has said they will not take over the road itself as a county road, although they will be constructed to county standards. Mr. Lulay stated that as far as constructing the roadway and meeting the conditions that Public Works requested, he feels they are reasonable and can be met.

#### Opposition:

Jeff Kleinman, 1207 SW 6<sup>th</sup>, Portland, said he is the attorney for Diana Garnder and Judson Parsons, appellants. Mr. Kleinman said he did not have a copy of exhibit B that Mr. Sippel submitted for the record and asked if he could review it. He said he wanted to emphasize the amount of time that the Planning Commission has given to this subdivision. He said they actually heard this case on two separate occasions and met on a third to make a decision. Mr. Kleinman said they finally came up with the conditions of approval and the limitations. If the board is to approve this subdivision, he thought the least the board could do was keep the conditions created by the planning commission.

Mr. Kleinman said it is a mandatory approval standard that any subdivision, whether Measure 37 or not, prove adequate water supply. He said that this claim did not and the most credible evidence in the record is from the hydrogeologist, Rick Kanely, who has done extensive work for the county before. Mr. Kleinman then read the conclusive paragraph from Mr. Kanely's report. He states: Consequently, the development is a new use of ground water that will in our opinion exacerbate the existing deficit and increase the decline. Addition of over 50 acre feet of use per year including lawn watering would in our opinion, seriously exacerbate the present severe budget deficit and presently moderate ground water decline. In our opinion, this increase in decline rate would negatively impact the established water rights and exempt wells. The practical effect of this impact would be to jeopardize for the proposed new lots, hence, the applicant has failed to prove the adequacy of water for this proposal.

Mr. Kleinman explained how the two issues relating to water tie together. The fact that this is not in the SGO zone really is irrelevant to the considerations that arose here. The existing water rights in the area and the existing exempt wells are senior to the 33 wells that are proposed for this subdivision. First of all there is the substantial question now and Mr. Kanely found the applicant had not met its burden of showing that there is enough water as it is for the exempt wells, but the second thing is, if as expected, there is a major declining ground water, wells running dry and that sort of thing as a result of these newer wells, then Water Resources will be coming in and yanking the junior rights, which are these exempt wells. Again, there will not be adequate water for the new homes on the new lots. There is really no credible evidence to the contrary on that point. The Planning Commission attempted a compromise here rather than saying look, you just haven't proven the availability of water. He said the Planning Commission should of said go ahead with 10 lots, and then if you want to do more, a hydrogeology review will be needed. This is a means of determining the adequacy of water, it's a procedure that exists that can be applied if there are a number of lots proposed that exceed the amount the Planning Commission thought there would be enough water for. This is another way

of saying if you want more than 10 lots, you better really prove there is enough water and the way he thinks they should do it is through the hydro-review.

Mr. Kleinman made note of one little bit of testimony in the record from one of the neighbors, Bart Guertin, who is across the street from the entrance of the proposed subdivision. Mr. Guertin said that even now, water is a severe problem and that by the end of the summer, he can only run one of the 15 rainbirds that he has set out for irrigation. There is not enough water for the other 14 and if he wants to take a shower, he can't run the one rainbird because there is scarcely enough just to have a shower. Mr. Kleinman clarified these are current conditions. Mr. Kleinman reiterated that there view is supported by a hydrogeologist who has worked for the county previously and that evidence is far more credible than anything that the applicant has provided.

Mr. Kleinman said with respect to the buffering (setback). The required buffering is 200 feet, but under certain circumstances it can be adjusted to a 100 feet from adjacent farms. The record is full of evidence of serious conflicts, serious impacts on farming practices on the immediately adjacent farms, if any of the buffers are reduced, much less than 50 feet. He feels this is ridiculous and knows of no time when the county has reduced buffers to that distance. There is no question that the applicant has not met its burden with respect to the impacts on farm practices on adjacent lots, and the applicant does not qualify for any reduction whatsoever in the buffers.

Mr. Kleinman said he has spoke with Jo Stonecipher about one thing that doesn't appear in the decision. He said she has agreed that it should be in the decision and that is if any subdivision be approved pursuant to this application, that there be a condition of approval that says this subdivision approval passes away if the Measure 37 appeal is sustained, and there is no waiver. You cannot have a subdivision unsupported by a Measure 37 waiver, so that issue remains.

Mr. Kleinman said he talked briefly about the inadequacy of the applicant showing of being able to meet approval standards through conditions of approval and failure to provide evidence of feasibility. He added there is a third possibility that is on the unresolved issues to have a public process when those come up for review, but the way this entire proceeding is structured, that would not be possible, because compliance is only required before recording the final plat. There is no opportunity for public process.

Mr. Kleinman then touched on a few points that were raised earlier in the testimony. He said the suggestion that the applicant only wants to develop a few lots per year is not relevant to any consideration here and would not be binding in any event that's not a condition of approval. The notion of actually just setting back the dwelling 50 feet as Mr. Shipman suggested is way out of line and totally unjustifiable in respect to the 200 foot setback requirement. He reiterated that nothing has come into the record that adds to the support for this application and makes this application sustainable. Again, the Planning Commission was unbelievably diligent on this and if the board does approve a subdivision, it should be along the lines of what they so hard to come up with to try to make it work.

Commissioner Milne asked about lot #1 and said Mr. Kleinman said it was unjustifiable to reduce the setback and she asked him to explain why he thought this. Mr. Kleinman said the county usually only reduces setbacks to a 100 feet and has not been known to do this. The notion to cut the original setback of 200 feet by three-quarters just because of the self-imposed, selected design of the subdivision is not right. There are many ways to reconfigure the subdivision.

Commissioner Brentano asked if Mr. Kleinman was speaking earlier about a separate appeal or was he talking about Measure 49. Mr. Kleinman said he was talking about the original Measure 37 appeal. The original waiver is still up on appeal in the Court of Appeals, and will be argued this fall. Ms. Stonecipher explained the board's approval of this Measure 37 claim was subject to a writ of review by opponents. It was decided by the Circuit Court in the county and applicants favor. The opponents have then appealed that decision of the Circuit Court to the Court of Appeals.

Bart Guertin, 10495 Sunnyview Road, NE, Salem, said his property is right across the street from the roadway subdivision. He said he definitely has a water problem and he is losing water availability from his well. There is no large aquifer underneath the property out there. He said he has a well that's over 300 feet deep and has lived there 35 years. He said he used to have enough water to run all of his sprinklers, but now he can run only about two and cannot run a sprinkler while he is showering. At the end of the summer, he will be down to one sprinkler. Mr. Guertin asked if someone could explain why there is a 200 foot setback. Commissioner Brentano explained it is for farming practices. Mr. Guertin said if we are going to have a 200 ft setback rule, then we need to keep to that rule. He said this subdivision is so totally out of character and it is just a project for greed, to make money.

Louise Michels, 1684 Hibbard Road, Salem, has two main objections to this subdivision being put in. She said her water is already low enough and of poor quality and she is concerned that these 33 homes are going to increase the pressure on the water aquifer. She said Mr. Sippel said he knows of good wells in that area, but Ms. Michels said we all know well-drilling isn't a science. She said she has declines in her water, but who does she complain too. A couple years ago she drilled another well that got her 4 gallons a minute and in two years it was dried up. She said this property is prime farmland and should remain prime farmland. These people that will buy in this subdivision will not be used to noise, dust, spraying, etc. She feels that since Measure 37 has passed we no longer have any land use plans. We used to be known for our land use and be a model state.

Tim Thompson, 10380 Sunnyview Road, Salem, said he is an active farmer, fourth generation on a small family farm. He said he was the guilty party providing dust on Mr. Guertin's property because he farms and is working the ground. He spoke of field burning and the Page property is between his and the Guertins. He then spoke on the water issue. He said the applicant did not tell you that the well his mother used went dry several years ago. He said in the file there have been pictures submitted for traffic issues

regarding farm equipment using the roadway. He said he would appreciate the commissioners taking all this into consideration.

Mark Mueller, 10570 Sunnyview Road NE, Salem, read his statement (exhibit C), attached.

Michael Muller, 10570 Sunnyview Road NE, Salem, read his statement (exhibit D), attached.

Matthew Mueller, 10570 Sunnyview Road NE, Salem, read his statement (exhibit E).

Charles Mueller 10570 Sunnyview Road NE, didn't want to speak. (no further testimony)

Jenny Char (didn't want to speak)

Mark Shipman returned to the table. He said he wanted to address the water issue again. Mr. Sippel said he has been referred to as non-credible or reliable and he said those records he submitted are from water resources and this is where he did his research. He said they are not seeing a lack of water when they are drilling wells. The water geologists review the area and the well drilling. If there wasn't sufficient water, they wouldn't allow it. He said there are several reasons a well could go dry. He said they have to look at the entire aquifer. He said he believes there is enough water to service the subdivision.

Commissioner Brentano asked about 33 lots planned and do you factor in that some will not have enough water or septic. Mr. Shipman said based on a single plain, you can satisfy the requirements for the wells and setback, but as they get out there and start doing the septic they might find they can't put in as many wells or may not be able to put in a septic. Mr. Shipman said the conditions apply and if they don't apply, they can't develop that parcel.

Mr. Shipman said that Mr. Kleinman noted the Kingley report. He did provide a hydrologist report. Mr. Kingley appears to base most of his information as the county as a whole, not this specific area for the subdivision. He said he has provided information that relates to this area not the county as a whole. He then spoke about the setbacks. He said again that back in 1962 there were no setbacks or zoning. He said they are not asking for non farm dwellings and the code speaks to non-farm dwellings as far as conditional use. He said they are not looking at this. He said there are many of these lots that satisfy the 200 ft setback, he said they are talking about lots 13 through 19 which they are asking 100 ft setback.

Mr. Shipman talked about the dust, noise and smoke. He said it is an issue. The Planning Commission said that one of the conditions is that a standard declaratory statement be added to .....LTT.

Commissioner Brentano asked if Shipman would be opposed to adding CCR to the approval if approved.

Mr. Kleinman and Mr. Thompson came back up for rebuttal. He said that Mr. Sipple is a credible person and just wanted to remind the commissioners about some wells being good and bad.

Mr. Kleinman added the failure to prove was spoken by Mr. Shipman when he said maybe shared wells, etc. Mr. Kleinman said they need to show proof. LTT because he is reiterating what he had said before. He said it is unusual to have your lead expert be a well driller. LTT to summarize all he is saying. He spoke again about the Kingley report????? He said the only reason that the dwellings are technically a non-farm dwelling. Listen to TAPE. He said the minimum setback should be 200 ft to protect the farmers and the homeowners in the subdivision. He said the ccr's that Commissioner Brentano spoke about doesn't do it

Mr. Shipman came back and he clarified obtaining septic approvals before getting the subdivision being approved. The code doesn't say all this has to be done when you submit the application, it does before the subdivision. Under Oregon Law you can have up to three homes on a shared well.

Sterling Anderson clarified that estate planning and .....there has to be an approved septic site before it can be filed. Wells are not required beforehand.

Commissioner Brentano asked what's the rationale for the 200 ft setback. Sterling Anderson said it is based on two considerations, one to avoid conflicts that is farm and non-farms situations. The space is to prevent the farm activity to have an impact on the non-farm dwelling. Commissioner Brentano asked if Sterling Anderson had comments on the proposed conditions of approval that Mr. Shipman submitted. Sterling Anderson said if the board feels that the CCRs are appropriate, we could list these if the board feels it appropriate. This is usually done in an SGO zone. Mr. Anderson said there is a variety of things that could be added. Commissioner Brentano asked again if Sterling Anderson thought there should be ccr's. Sterling Anderson said he thought there should be some conditions added to the water. Commissioner Milne said she is not ready to put SGO conditions on all land use cases.

Sterling Anderson said there are some policy items that need to be considered. LTT He said in case like this where there is evidence, that the board could add some extra conditions.

Commissioner Milne said she is not basing a decision on the Kingsley report.

Commissioner Milne said she has review the proposed conditions of approval from Mr. Shipman. She said there are only two things that need to be questions. One is the number of lots and the other things is the setbacks. She said one thing to keep in mind is this is not in a SGO zone. It is not a non-farms conditional use application. She doesn't

see a reason to cut this back to 10 lots and regarding setbacks she is comfortable to what Mr. Shipman has proposed.

Commissioner Brentano said he didn't disagree, maybe not at all. He mentioned setbacks and struggled with them being health and welfare. He disagree a little bit with the water and asked if something could be in there to help with the water issue. Most of what he heard today is anti Measure 37 than anti subdivision. He added if a lot doesn't have water, it won't be a lot.

Commissioner Milne said she is not opposed to conserving water. She said there is probably something that could be put in the ccr's that addresses water conservation, but she wants to be careful that it doesn't sound like the wording in the SGO. She said perhaps we could get an informal acknowledgement or agreement here that if it is a sufficient ther is adesire to address the conservation of water, but not SGO language.

Sterling Anderson said one option is to have a condition that specifies that the cfer's be reviewed by the county.....LTT and leave general.

**MOTION: Commissioner Milne moved to close the public hearing, to approve the application for subdivision using the proposed conditions that Mr. Shipman provided (same conditions as planning commission) and the setbacks identified in #15 and some language be added in the ccr's regarding water conservations approved by the planning director. Seconded by Commissioner Brentano; motion carried.**