

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, February 27, 2008
Marion County Courthouse Square

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

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

Commissioner Brentano called the meeting to order.

PUBLIC COMMENT

None.

CONSENT

BOARD OF COMMISSIONERS

OLCC Applications:

AMF Firebird Lanes, Salem
Bethany Market, Silverton
Courthouse Athletic Club, Salem
The Monitor Inn, Woodburn
Plaid Pantry #41, Salem
Plaid Pantry #168, Salem
Toads Grocery & Deli, Brooks
Wall Street Bar & Grill, Keizer

BUSINESS SERVICES – HUMAN RESOURCES

Approve second amendment to the Flexible Benefits Plan, pro-rating contributions for Health Savings Accounts of new enrollee's eligible after January 1 of each year.

HEALTH

Approve amendment #24 to add \$1,177,431 to the Oregon Department of Human Services 2007-2009 intergovernmental agreement for the financing of community mental health, developmental disability and addiction services.

PUBLIC WORKS

Reset public hearing to consider vacation of walkway in block 5, Randall's Elk Horn subdivision #2, Clerk's File #2096R, from March 5, 2008, to April 2, 2008.

Reset public hearing to consider vacation of 4th Street in Brooks, Clerk's File #2097R, from March 5, 2008, to April 2, 2008.

PUBLIC WORKS – PLANNING

Receive hearings officer's decision denying conditional use, case #CU 07-58, Curtright, Clerk's File #5572.

Receive hearings officer's decision dismissing conditional use, case #CU 07-8, Clevenger, Clerk's File #5573.

SHERIFF

Approve amendment #1 to receive \$158,160 from the Oregon Department of Corrections to provide transitional and support services at the county correctional facility.

MOTION: Commissioner Carlson moved approval of the consent calendar. Commissioner Milne seconded; motion carried. A voice vote was unanimous.

ACTION

BOARD OF COMMISSIONERS

1. Consider approval of a proclamation designating February 25 through March 3, 2008, as Peace Corps Week in Marion County, Oregon. – Sam Brentano

Commissioner Brentano explained the proclamation designating February 25 through March 3, 2008, as Peace Corps Week in Marion County, Oregon. He said he admired the people that participate in the Peace Corps and do such good things around the world. Commissioner Milne said that the Peace Corps came into being in 1961 and said it was nice that the board could recognize this group. Commissioner Carlson agreed.

MOTION: Commissioner Milne moved approval of a proclamation designating February 25 through March 3, 2008, as Peace Corps Week in Marion County, Oregon. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

The commissioners then read the proclamation.

HEALTH

2. Consider approval of the 2009-2011 Biennial Implementation Plan for Treatment and Prevention Services of mental health, addictions and problem gambling. – Rod Calkins

Rod Calkins, health department administrator, Mary Beth Beall, division director behavior health services, and Tonya Johnson, rural and prevention services supervisor, attended to present the biennial plan. Mr. Calkins explained that today they would be talking about the 2009-2011 biennial implementation plan for behavior health services for Marion County. He said the plan, which is done every two years, incorporates many of the initiatives and ideas that were started in the current biennium (2007-2009). The 2009-2011 also incorporates the request for plan amendments, which included many new projects that were focused on parents in the child welfare system and people coming out of institutions such as jails or state

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hospitals. Mr. Calkins said the Health Department has a budget of approximately \$52 million and directly serves approximately 43,000 individuals each year. Many of these individuals receive multiple services.

Mr. Calkins said that when his staff creates this plan they consult with various community agencies. The plan speaks to what will be done with the money received in behavior health, which includes addictions treatment, prevention, mental health treatment and developmental disability services. Mr. Calkins said that page 26 of the plan talks about allocations by program. A little over \$5 million is going to addiction treatment; \$439,000 of prevention mainly focused on alcohol and drugs with some gambling; approximately \$11,522,000 for mental health treatment; and, \$15,934,000 for disability services. These monies are reflecting what is coming just to the Health Department; it does not reflect the pass through for the developmental disability system. Mr. Calkins said that the plan was due to the state shortly and they will ask for the commissioners to approve it after the presentation is completed.

Mary Beth Beall said that the format for this plan is one that the state requests. It does seem awkward at times, but is the requested format for submission of the county's information to the state. She said this is the third biennial plan she has had the pleasure of working on since she became a divisional director. She said the focus has been on having a process that can be built upon that is consistent and that involves input from stakeholders in the community. One of the roles of the county health department is to assess community needs. There is no way to assess those needs unless we ask the public and the entire county what is that they see the needs are for behavior health services in these areas. The process is one that has been fine-tuned and is really accomplishing that goal of what the needs are. Ms. Beall said they are using technology most often with a web-based survey that asks members of the community to rank those services that the Health Department provides. The survey also asks the members to rank what additional services might be provided if additional funding is available, or how to enhance existing services. Ms. Beall explained that there was a copy of the web based survey in the commissioners packets, as well as the comments on specific questions that were asked about the cultural appropriateness of county services, access to services and additional suggestions or thoughts that the public may have about what the county needs.

Ms. Beall said that this year they doubled the amount of responses received from the web-based survey, as well as comments received in hard copy. She said they also received more responses from out side the Salem area. Since we are a county organization, they have attempted to do more outreach to the rural areas. She said that page 13 of the plan shows the demographics and rankings of participants of the survey, where they resided and for the first time, an age demographic. She said that most folks that responded were over age 50 and gives them the idea where to focus next time to receive broad based input.

Ms. Beall went on to explain that 12 key themes emerged from the rankings of the survey. They are as follows:

- Lack of access due to lack of insurance, being low income/indigent or underinsured.
- Lack of services for older adults.
- Lack of understanding/knowledge of what services are available, how to access these services, and where to get information re: how to access services.

- The need for culturally appropriate, family system approaches in treatment, with education/information, supports, treatment, etc., including parent education and parenting classes.
- The lack of bilingual and bi-cultural providers (mental health, alcohol & drug clinicians).
- School-age services for children should be more community based vs. agency based.
- Provide more co-occurring services.
- Recognition of the need for trauma informed/focused services.
- The general public needs more information and education regarding the impacts of problem gambling; peer support services and methadone treatment.
- More availability and better access to residential services including housing and treatment facilities is needed.
- More services are needed in rural areas.
- Access to affordable medication and psychiatric services remains an issue.

In conclusion, Ms. Beall referred to page 24 where seven areas are listed that are high priority needs. They are as follows:

- Funding for care for people who are uninsured, low income, underinsured or indigent.
- Increase in services and supports for parents and families affected by mental health and substance abuse issues.
- Bilingual/bi-cultural services and providers.
- Public information and accessibility of services.
- Access to medication management services for children and adults and the need for an increase in the availability of prescribers in our community.
- Forensic mental health and alcohol and drug services.
- Services for people involved in the criminal justice system.

Ms. Beall said that Tonya Johnson was in charge of the prevention plan and her service area is required to submit a stand alone, as well as a prevention plan incorporated into the biennial plan.

Commissioner Milne said that Mr. Calkins presented this plan to the Public Safety Coordinating Council and all her questions were answered.

Commissioner Carlson said she thought the plan was very well laid out and very well written. She added that the process for soliciting public information input was excellent. She asked Mr. Calkins to speak about the state hospital and clarify the statistics regarding 94 new group homes being established.

Mr. Calkins said that the state hospital was not an issue that showed up in the survey because it hasn't been talked about a lot until just recently. He said it is one of the most important drivers in terms of what they are going to be doing in behavioral health over the next 10 years. He said that the estimated beds for the new state hospital in Salem is 620 beds and 300+ in Junction City. Over the next 10 years there is an estimate of an additional 900 community placements and these are folks that would be coming out of a state hospital after treatment or placements that would allow them not to go into the state hospital in the first place. These people would receive community based treatment placements for people with mental health issues. Mr. Calkins said there are a number of structured group homes in our community and Marion County has more structured homes than is average per capita across the state for counties. He said Page -4-

the community doesn't really need more group homes, but a continuum of residential care. People need to be able to be placed in a secure setting like the hospital if needed or an available structured group home setting when needed. Just as important, as they move along in their recovery and move toward more independence, there has to be a continuum of housing care that moves them towards more independence. Mr. Calkins said there is no reason to have someone in a very expensive, structured group home when they could be living in supported housing or independently with support from outpatient treatment wrapped around them to make them successful. In terms of supported housing, which is more independent and less structured, Marion County is well below average per capita for the state. Mr. Calkins explained this is an area of the housing continuum that really needs to be attended to in this community.

Ms. Beall said that she felt it important for the public to understand that folks who will be released from the State Hospital will be discharged to their community of origin. She added that there is also consumer choice involved, where the person being discharged can say they don't want to go to their area of origin.

Commissioner Carlson asked Ms. Beall to speak briefly about treatment effectiveness and how evidence based practices play into making treatment more effective or how we know that treatment is effective. Ms. Beall said it's basically adapting what has gone on in medical and physical health services for years; that physicians don't do something unless it is researched based and the advocacy has been approved. The challenge in the mental health system is because this is relatively new territory to have thoroughly researched and assessed outcomes in a clinical practice in a mental health field. Those that are proven to work with people who have mental health disorders or illnesses and because it is not something that you can biopsy or has physical tests for to determine cure rates and remission, it is much more challenging. Mental health personnel receive training and information about those practices that would be considered and qualified as evidence based. These bodies of research that have been done continue to be analyzed by the state. Ms. Beall added they have percents of services that need to be providing those evidence based services and some of them are very expensive. She gave an example of the assertive community treatment model that would indicate about a 12-14 maximum caseload per mental health specialist. At the current time their caseloads are 65-70. She said there is always the dilemma of weighing the cost of the service with the need.

Mary Beth Beall said that staff is constantly trained and assessed. She said the Health Department has a lot of skilled people that know what works with their individual clients. Ms. Beall said they are all committed to using those services that have research behind them or have shown to be promising practices. One of the very promising practices is the early psychosis program east and is one that the health department is involved in some research right now within Marion County.

Mr. Calkins added that part of the idea behind the evidence-based practices is ensuring that the system of care in Oregon can ensure the best outcomes without diverting any unnecessary money away from treatment. Rather than rolling out a program and having a outcome study done; if you adopt an evidenced based practice and replicate the conditions under which its been proved to be successful you can assume its going to produce good outcomes. Mr. Calkins said if you think about the 36 counties in Oregon and roll out a practice and have to do 36 outcome studies to show that it's working in your community, it takes a lot of money that could otherwise go to services. He said what they do is adopt effective practices that do have a research base and they are implemented with fidelity. It produces a guarantee that those practices are going to be effective to reach the goals that the county has set for treatment.

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Commissioner Carlson said Marion County has a hybrid of practitioners and contractors. She asked whether the contractors are actually looking at evidenced based practices and outcomes and if they are held accountable in the same way as the personnel at the health department. Mr. Calkins said that this was made very clear in the contracts that were done with the seven community agencies that provide the Oregon Health Plan mental health services. He added that target goals have been set in terms of the percentages and some financial incentives have been set to support people implementing these within the system.

Commissioner Carlson asked if this was the case with addictions treatment as well. Mr. Calkins said they do have evidenced based practices, but they are looking at request for proposal (RFP) in the future for that system. This will help define what they want across the county just as they did with the mental health this past year. He said it is much clearer in mental health what is expected and how technical assistance will be provided for people to get there.

Commissioner Carlson asked the new prevention coordinator, Tonya Johnson, what the plans were for implementing prevention strategies in Marion County. Ms. Johnson said the plans are very similar to what we've done in the past, but she is trying to increase the scale. She said they have a new parenting class that will be implemented at eight different times throughout Marion County starting now and going through June. She added that they are hoping the state will give more money so they increase the amount of parenting classes they can deliver. She said that the Strengthening Families Program 10-14 has proven to be twice as effective as other parenting classes in reducing adolescent alcohol and drug use. She said it is focused on setting clear standards and rules and guidelines for adolescents. Ms. Johnson said the new alcohol, tobacco and other drug data report unfortunately shows one-in-three eighth graders using alcohol in the past 30 days. Ms. Johnson said they are really going to focus on underage drinking in Marion County. This will include evidenced-based practices such as friendly persuasion to target sixth, seventh and eighth grade girls in underage drinking. She added that 80 percent of the kids believe that their parents don't think it's wrong to drink alcohol.

MOTION: Commissioner Carlson moved approval of the 2009-2011 Biennial Implementation Plan for Treatment and Prevention Services of mental health, addictions and problem gambling. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

PUBLIC WORKS – BUILDING INSPECTION

3. Consider approval of the form of intergovernmental agreement and memo of understanding for collection of construction excise tax on behalf of school districts. – Warren Jackson, Scott Norris

Scott Norris, legal counsel, explained that Senate Bill 1036 was passed by the 2007 legislature. The bill allows school districts to impose a construction excise tax and the tax is collectable at the time of issuance of a building permit. He added that the law also allows school districts to contract with government entities to collect the tax on their behalf. Mr. Norris said the county had been contacted by several school districts to have the county collect the tax on their behalf. Staff has been working with the school districts to come up with acceptable language for an intergovernmental agreement (IGA) and memorandum of understanding (MOU). The IGA covers the basics of the agreement between a school district and the county, and the MOU covers the details of what is or is not taxable.

Mr. Norris said the superintendents of the school districts in the county have reviewed the terms of the IGA and the MOU that is before the commissioners. They agreed to the language that is in both documents. He explained the reason these are brought before the board is for two reasons. The first is the board's approval of the terms of the IGA and the MOU and these two documents would then be used with the school districts as the school districts come to the county seeking collection of the taxes on their behalf. The second is for a delegation of authority to the building official who is Warren Jackson to execute, and as necessary, revise the MOU to allow the county to expedite the updating of the terms of what is and what is not taxable as unique situations present themselves.

Warren Jackson, public works building official, said the decision to impose a tax rests solely with the school districts and their boards, not with the county. The county does have the ability to decide whether or not to collect a tax on behalf of the school districts. Mr. Jackson said if the board does chose to collect the taxes, entering into a standardized IGA and MOU agreement makes it more efficient and less expensive. Mr. Jackson said the 1 percent fee should be fairly close to covering the county's costs. The county currently has the technical ability to collect the monies and to track for distribution using the current permitting software application. Mr. Jackson explained he was requesting approval of the formats today due to his concern for his customer's service levels. He said it would be easier on the county's customers if they only had one place to go during the permitting process rather than requiring them to go to another location to pay this tax.

Commissioner Milne said the board had a couple work sessions and conversations regarding this matter. She asked if Mr. Norris and Mr. Jackson could explain the county's responsibility and the individual responsibility on the school districts.

Mr. Norris said that in terms of the IGA, the county would be collecting the tax at the time it collected fees for building permit being issued. Any issues as to collections of the tax or any refunds, which may be due is under the terms of the IGA, a matter between the building permit applicant and the school district. He added that the county is not involved in those issues he just stated. Commissioner Milne asked if the viewers were coming in for a single family home or whatever, it is going to be a new tax for people. She wanted the public to know what the process was and what the cost would be.

Mr. Jackson said his plan is to have a brochure and information available in the planning office as well as on the website explaining the tax. He said it is his intention to make this information as clear as possible on what types of projects will be affected and how to approximately calculate the tax for each individual project. He said if the county is not involved in the collection process it could be more difficult to make all the specifics available.

Commissioner Milne asked him to provide more detail for the public watching.

Mr. Jackson said the county had been approached by several school districts and each district has indicated they plan on charging the maximum tax possible under the provisions of the statute, which would be \$1.00/square foot on residential construction. Any new single-family dwelling or new addition to a home may be taxed at \$1.00/square foot. The tax is \$.50 a square foot with a maximum of \$25,000 for commercial and industrial properties. He added that there are provisions in the bill for adjusting for inflation annually. Mr. Jackson said the amount of the tax

rests with the school districts, other than the cap. He said that to date they had not been approached by a school district that's suggesting that they are planning to adopt anything less than the maximum.

Mr. Jackson said they have come up with a standard agreement indicating that if the school districts agree to follow a certain set of guidelines the county would be willing to collect the tax for them. Ultimately, a school district could adopt a tax different than what the MOU indicates. He said the bill is rather vague as far as what is or is not taxed.

Commissioner Milne said she was referring to the MOU, and that hopefully, because there has been discussion between the school districts and other folks that this does not include garden sheds and shops. Mr. Norris said the MOU basically addresses the items not specifically addressed in the bill, but the items that the county has thought of so far. After speaking with other jurisdictions that have entered into these types of agreements, there have been some issues that have come along about specifics having to do with carports, detached garages, accessory buildings and decks. Mr. Norris stated that was the reason for the two different documents with the IGA covering the basics of the agreement and the MOU covering more of the details of what is and is not taxable. He added that is also why they asked to have the board delegate the authority to execute and revise as necessary, the MOU as unique situations present themselves.

Commissioner Milne said her concern is that this MOU has been signed off of and everyone agrees, but then there are opportunities to make adjustments or exceptions and she felt that there would not be uniformity. Mr. Norris explained they are working with a brand new statute, and as a result, are doing the best they can with the terms of the statute and through the experience of other jurisdictions that have entered into these agreements.

John Lattimer said one of the concerns he raised with the superintendents was that elected boards could make their own decision about how they process this tax. He said he was hopeful that the school boards would listen to their superintendents and follow the approach that is in the IGA and MOU. One of the things he felt important for everyone to understand is that while Marion County's top goal is customer service. He said this is exactly the type of thing we need to do to provide the best customer service we can, particularly to the building community. This would create a one-stop shop for those people.

Commissioner Carlson reiterated that SB 1036 was passed by the legislature, not by the Board of Commissioners and it was widely supported in the legislature. She felt that its public purpose was that school facilities are aging and resources are diminishing for actually updating schools. She said this was a tool that the legislature provided to school districts. She clarified that in the law the school district is required to come up with a plan and the plan is to be attached to this MOU. She said the county doesn't have any role in determining whether the plan is a good plan or a bad plan. Commissioner Carlson said she supported the process that the county was going through because builders, developers or people who are remodeling that come in for building permits can pay this tax at the same time that they pay their building permits. It makes it easier for these people making one stop and it also makes it easier for staff. She clarified that the county would be collecting this tax only for building in the unincorporated parts of Marion County. She added that there would be cities in other jurisdictions that also issue building permits such as the City of Salem and asked if they will be collecting their own tax.

Scott Norris confirmed that the IGA between the counties and school districts would strictly be for the collection of tax in the unincorporated areas of the school district.

The school district would have to contract with the cities within the district separately for collection of the tax within those cities. Commissioner Carlson confirmed that the agreement stated the distribution to the school district would be quarterly. Mr. Norris said that was correct.

Commissioner Brentano said this is to make it easier for someone to come in and get everything done at once. He said he was somewhat surprised about the adjustability of the MOU and asked the board be notified if there were some changes. Mr. Norris said he would be glad to notify the board if there were any changes or adjustments to the MOU.

John Lattimer said the problem with this law is it's not very specific. He said the county over time would be dealing with the possibility of court cases that change how this MOU is administered. Mr. Lattimer reiterated that this is not a county tax, but employees here in the county are here to solve problems.

Commissioner Milne said the way the IGA is written it is confusing and she wanted to clarify the record and read the following statement. "The county agrees to collect the CETs on behalf of school district for those properties within the school district and within the unincorporated areas of the county." She said that statement could lead someone to believe that it is any property in the school district. Mr. Norris said that under the IGA and within the control of the county, the collection of the tax is only within the boundaries of the school district and in the unincorporated areas. Both of these things need to happen together in order for the county to be collecting the tax on behalf of the school district. Commissioner Milne felt this was an unfunded mandate and it was going to cause problems.

Jo Stonecipher suggested a change to page 2, section 4. The sentence says, "county agrees to collect the CET on behalf of the school district for those properties within school district and within the unincorporated areas are of the county. Ms. Stonecipher said that if the "and" was taken out and "that are also" was added it would clarify that both need to be happening for the county to collect the taxes.

MOTION: Commissioner Milne moved to approve the form of the IGA and the MOU for collection of construction excise tax on behalf of the school district. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

PUBLIC WORKS – PLANNING

4. Consider adopting an ordinance amending the Marion County Comprehensive Plan Urbanization Element, Urban Growth Management Framework test thereby completing a Marion County periodic review work task LCDC approval order, by emergency procedure. – Les Sasaki

Les Sasaki, planning, reported that in August 2007, the board initiated amendments to the comprehensive plan urbanization element, specifically the urban growth management framework section of the plan. The amendments involved some required language changes to the framework plan. He added that there are some other housekeeping and textural changes, as well as modifications to the land efficiency guidelines of the framework plan itself. He said the board and the Planning Commission held hearings on these amendments and following the hearing the board did make a decision. He explained that what was before the board is the ordinance that reflects the board's decision regarding these amendments.

The first of the two ordinances deals with the language changes under the periodic review order from the Land Conservation Development Commission (LCDC). It addresses those particular changes that the county was required to make.

MOTION: Commissioner Carlson moved the chair read the ordinance by title only twice. Commissioner Milne seconded; motion passed. A voice vote was unanimous.

Commissioner Brentano then read the ordinance by title twice.

MOTION: Commissioner Carlson moved approval of the ordinance. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

5. Consider adopting an ordinance amending the Marion County Comprehensive Plan Urbanization Element, Urban Growth Management Framework text and land efficiency guidelines of the framework, by emergency procedure. – Les Sasaki

Les Sasaki, planning, reported that this ordinance addresses other amendments other than the LCDC approval order requirements. These amendments deal with the housekeeping issues to address the goal 14 changes and update the plan according to those changes, as well as textural changes clarifying that land efficiency guidelines are one component of quality of life issues relative to the community. It also addresses the modifications to land efficiency guideline provisions of the framework plan in specifying that the guideline is in fact a range, and that also the population ranges that are applied as part of the guideline have been modified. This will address which communities correspond with which guidelines in the framework plan.

MOTION: Commissioner Milne moved that the chair read the ordinance by title only twice. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Commissioner Brentano read the ordinance by title twice.

MOTION: Commissioner Milne moved approval of the ordinance. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Commissioner Carlson said that for the record she had a monthly breakfast meeting with South Marion County in Aumsville. She said Mayor Harold White was in attendance as well as Mayor Virginia Honeywell and other city councilors. She said there was great delight and surprise that the commissioners were going to approve these ordinances. Commissioner Carlson confirmed with Mr. Sasaki that he received a letter from Mayor Honeywell in support of this action.

Commissioner Brentano stated that in the letter Mayor Honeywell was also concerned with the

projected population of Stayton out to 2050. He asked Mr. Sasaki the status of the population studies that the county has begun, because it will answer the questions that Mayor Honeywell has.

Mr. Sasaki said they are in the initial stages of the county population study. Portland State University is under contract with Marion County to do the study and they have begun the initial stages of the project. He said the county should be receiving material back from them approximately late spring or early summer. Commissioner Brentano said that we really want the cities to get a good look at them so they can compare with what they think. Mr. Sasaki said they will be looking at 2030 numbers.

Commissioner Brentano called a recess at 10:20 a.m.
Commissioner Brentano reconvened the meeting at 10:30 a.m.

PUBLIC HEARINGS

9:30 A.M.

PUBLIC WORKS – PLANNING

A. Public hearing to consider appeal of subdivision, case #SUB07-14, McKillip, Clerk's File #5566. – Sterling Anderson

Sterling Anderson, planning manager, reported the item before the board today involves the application to adjust the property lines on an 83.58 acre parcel and a 3.17 acre parcel to create a 79.44 acre and 7.31 acre parcel. Under waivers granted under ORS 197.352 (Measure 37), obtain conceptual and detailed approval to subdivide the resulting 79.44-acre parcel, as a planned development, into 47 lots and an administrative review to reduce the special 200-foot dwelling and 100 foot accessory structure setbacks. This is property located in an exclusive farm use zone (EFU) at 4505 St. Paul Highway NE and the 4300 block of Wilson Street NE, St. Paul. Mr. Anderson said that review of this property was also subject to state and county Measure 37 waivers.

On December 4, 2007, the Marion County Planning Commission issued a decision finding that the applicant had met the burden of proof for compliance and granted an approval for the property line adjustment and the subdivision of the 79.14 acre parcel into eight lots as described in phase 1 of the proposed PUD subdivision. However, the Planning Commission found that the applicant failed to meet the burden approving compliance with the applicable criteria for phase 2 of the subdivision and the administrative review. Therefore, phase 2 was denied and the administrative review application.

On December 27, 2007, the board received a request from the applicant to call up the decision and assume jurisdiction over the case. On January 2, 2008, the board agreed to assume that jurisdiction and remanded the case to the Planning Commission to issue a new decision clarifying its decision regarding phase 2 of the subdivision. On January 14, 2008, the Planning Commission issued that new decision clarifying its denial of phase 2. On January 18, 2008, the applicants appealed that decision again. On February 6, 2008, the board exercised its authority under the zoning ordinance again to call up this application and assume jurisdiction over the case and set the public hearing for today.

In the appeal the applicants argue that the Planning Commission's decision is legally incorrect. It states that Marion County is required to review this decision based on the criteria in Measure 37, not Measure 49, which subsequently was passed by voters in November 2007, and went into effect on December 6, 2007. The applicants also argue that Measure 49 will not survive constitutional review by the courts, and therefore, they argue the board should grant the application in its entirety.

Mr. Anderson stated that in this case, the authority to subdivide this property is derived or based on the provisions of Measure 37. With the passage of Measure 49 the state, by adoption of administrative rule, effectively voided all Measure 37 waivers. As a result, this property is currently, as it was before, in an EFU zone, and is covered by ORS 215 and the Oregon administrative rules that deal with farm zoned land, as it exists today without the waivers. As a result, there does not appear to be any basis or authority to grant this application that is before the board. As a result, staff recommends that it be denied.

Commissioner Brentano asked if this recommendation from staff included the lot line adjustment. Mr. Anderson said it would be included and could not be approved because the property is 83.58 acres and the minimum lot size in the EFU is 80 acres. The property line adjustment would reduce it down to 79 acres going below the 80 acres. As a result, the property line adjustment would not appear to be viable under the 80-acre minimum.

TESTIMONY:

Support:

Charles Herrall, Gunn Kane & Kinney, 700 Deborah Road, Suite 250, Newberg, thanked the board for calling up this case for a public hearing. Mr. Herrall said Sterling Anderson accurately laid out the procedural history of this case. Mr. Herrall said he was here to argue that Measure 49, as passed, oversteps its bounds with regard to approved Measure 37 claims. He said he would like to highlight a couple of the most important points in the materials that the board has. He said these points could help the board approve this subdivision with support from case law and statute.

Mr. Herrall spoke about the Corey vs. LCDC case. He said that was a case where the claimant had received Measure 37 waivers. He said the Coreys did not like what they received so they sued the state and ended up in the Court of Appeals. Mr. Herrall said the Court of Appeals statement says, "thus, at least since 1972 to determine whether a particular interest amounts to a constitutionally protected property we look to state law and ask whether that law entitles certain persons to specific benefits. We have no difficulty concluding that Measure 37 creates in some real property owners a claim of entitlement either to compensation or to the waiver of restrictive regulations." Mr. Herrall stated that applying the *Koskela* analysis in the Measure 37 context lead the Court of Appeal "inexorably to the conclusion that petitioners here have a property interest in the waivers." The Court of Appeals said later that, "that being the case, petitioners have a protected property interest in the waivers." Mr. Herrall added that the Corey case is on appeal at the Supreme Court and arguments are being heard today. He said that Corey is good law and it says that Measure 37 waivers are a protected property right. Mr. Herrall said he wasn't sure how Measure 49 could suddenly just take the property right away.

Mr. Herrall spoke about the goalpost rule and quoted from it, "the land use application has to be approved or denied under the criteria in place when it was submitted and

accepted. He said the subject application was accepted in August or September, well before Measure 49 was passed. Therefore, under the goalpost rule, the requirement is that you can't apply Measure 49. He said that LUBA has weighed in on this in a case called *DLCD vs. Jefferson County*. In this case the claimant had died and their children were pursuing the claim, which was more than enough of a basis for LUBA to deny the claim. However, LUBA chose the need to address goalpost rule, and in this case, they determined that the goalpost rule and Measure 49 conflict. LUBA then applied a statutory construction and said if the two conflict then the general statute and the specific statute need to be looked at. Mr. Herrall said he felt LUBA is wrong that Measure 49 and the goalpost rule conflict. Measure 37, by its terms, says it's not a land use application and is something new in the process that wasn't there before and is a new first stage. To qualify for Measure 37 the criteria and requirements have to be met when the applicant acquired the property. Once the waivers are received, then the applicants process to the next stage, which is the land use application. He doesn't believe that Measure 49 and the goalpost rule conflict, they apply at different times. Measure 49 and Measure 37 applies as a new first stage and once the stage is reached for making a land use application, then the goalpost rule applies and it says you can't apply Measure 49.

Greg McKillip – no comment.

Dolores McKillip – no comment.

Candace Robera – no comment.

Opposition:

Jody Grebow, 20540 Main Street, St. Paul, commented that what he understood was the proposed access to this new construction area definitely impedes a neighbor and himself. He said he thought Wilson Street was the access street and the neighborhood had built their homes and their life around the edge of the urban growth boundary (UGB). He said they know that all the streets in the area are dead end streets and the proposed access on Wilson greatly affects the neighbors' lives dramatically. He said the neighbors are not opposed to the development at all and they respect the fact that the McKillips owned that property for a very long time and should be able to do what they want with it. He said the major concern is the 24-7 traffic and construction.

Mr. Herrall noted that when the McKillips acquired the property in 1957 it was actually in the UGB at that time and remained in St. Paul UGB until 1990 when it was removed. When the property was acquired it had lots platted for development. He said it has not always been EFU property.

Commissioner Brentano said he had been told the commissioners have no authority to approve it. Mr. Anderson said this case was very unfortunate and these folks are not alone in this particular situation. Mr. Anderson said there are many legal battles under Measure 49 and he is not sure how this is going to play out in the courts. He said it was the opinion of planning staff and legal counsel that at this time the state has effectively voided the waiver they granted. Whether that vacation is valid under law is something the courts will have to decide. At this time it doesn't appear that the board can grant something that isn't consistent with existing zoning and state administrative rules and state law that apply to the property because the state essentially turned back the clock by voiding those Measure 37 waivers to what was in effect at the time they applied for the waiver. Unfortunately, he didn't feel there was any authority to approve this. Mr. Anderson said that the board has to apply what they have and that is the existing EFU zone and the requirements in the law.

Jo Stonecipher said she would like to correct one thing. The Corey case is not currently law. The appellate courts issue a mandate when a case is final and that doesn't happen until its been finally resolved by both the Court of Appeals and the Supreme Court. Until the Supreme Court acts, the Corey case is not binding. It doesn't change the fact that the county has administrative rules and Measure 49 statutes that are controlling the county, as is LUBA's decision.

Commissioner Milne said she doesn't disagree with the arguments Mr. Herrall is making. Unfortunately, the county is caught up in the mess that all these measures have created. She said this is a good example of a case that is going to take a lot of legal action to allow the applicants to move forward. She said that since Measure 49 passed there really isn't anything that the board can do and it is very difficult.

Commissioner Carlson said the time today was not wasted because the applicants were able to bring their arguments forward, create a record here and have exhausted their legal remedies at the local level. They are now able to take this to LUBA and move on in the process.

Jo Stonecipher said since the board called this up in the first instance and clarified the decision, it provided the opportunity for this appeal.

MOTION: Commissioner Carlson moved to close the public hearing, deny the application because the State of Oregon, by administrative rule, has determined the state waivers have expired and the county does not have authority under goals 3 and 14 and Oregon Revised Statutes, Chapter 215, and the new provisions under Measure 49 to approve this application. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

Commissioner Brentano read the weekly calendar.
Commissioner Brentano adjourned the meeting at 11:00 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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