

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, March 12, 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 Jo Stonecipher as legal counsel and Kim Hulett as recorder.

Commissioner Brentano called the meeting to order.

PUBLIC COMMENT

None.

Commissioner Brentano mentioned that his brother-in-law works for Allied Waste, which has business before the board today. There is no direct conflict of interest involved, but he wanted to note this because of the new ethics laws.

CONSENT

BOARD OF COMMISSIONERS

OLCC Applications:

Cinco De Mayo Deli & Mini Mart, Woodburn
Freeloader Tavern, Salem
House of Dragon, Salem
Hubbard 76 Station, Hubbard
Los Dos Amigos Hacienda, Salem
Los Temos Taqueria & Mini Market, Salem
Marion Grocery, Turner
Swiss Village Restaurant, Mehama
Target Store T-0608, Salem
Taylor Park Inc., Salem
Wing-Wa Oriental Market, Salem

BUSINESS SERVICES

Notification of bid award to J.T. Stephens Construction for \$128,500 for the Marion County Juvenile Kitchen Improvement project.

Notification of bid award to R & H Construction for \$235,450 for the Marion County Courthouse Square Tenant Improvement project.

Approve amendment #5 to the contract with Olympic Security Services to extend the date through June 30, 2008, to allow additional time to prepare a request for proposal procurement process for security services to county facilities.

HEALTH DEPARTMENT

Approve amendment #27 in the amount of \$722,210 to the intergovernmental agreement with the Department of Human Services to provide community mental health, developmental disabilities and addiction programs.

PUBLIC WORKS

Approve renewal of an agreement for Walter Miller to lease three acres of land adjacent to the North Marion County Disposal Facility at \$125 per year until December 31, 2012.

Set a public hearing to consider a transfer of customers between Allied Waste of Marion County and Pacific Sanitation; suggested hearing date is April 9, 2008.

PUBLIC WORKS – PLANNING

Approve Planning Director's recommendation to dismiss Measure 37 claim, case #M07-09, Davis, Clerk's File #5574.

Receive hearings officer's decision granting partition, case #P07-73, Shaw, Clerk's File #5575.

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

ACTION

PUBLIC WORKS

1. Consider approval of a contract with Motorola, Inc. for \$139,725 for engineering services for an 800 MHz communication system in Marion County. – Bill Worcester, John Vanderzanden

John Vanderzanden is emergency manager for Marion County. He also facilitates the work of the Marion County Interoperability Council. As part of that work, they are in the process of developing a countywide interoperable communication system. One of the steps in that process is to do the technical engineering for the 800 MHz communication system for the City of Salem, as well as the most of the agencies that are dispatched by NORCOM 911 center in Woodburn. Since the City of Salem is already working with the Motorola system, they requested to keep this vendor for both the city and the North County region, and the county went through the contracting process to do this. He requested that this contract for services be approved by the Board of Commissioners for completion by the end of the grant period. The grant will be extended for an additional 90 days, so they will have through September to complete the engineering part of the project. This contract gets the technical plan in place to go ahead, and provides the information to implement the process. It does not provide the funding to implement the system. To pay for the process, they are using a \$150,000 planning grant they received last year from the U.S. Department of Homeland Security.

Commissioner Carlson asked how close the county would be to getting the interoperability project done once the technical side of the grant is in place. Mr. Vanderzanden said the contract with Motorola just provides them with the technical roadmap on how to get this

project done and the parts and pieces it would take to get it done. From there, they still need to go through the process of finding the funding to actually put the system in place. They could do that through grants, appropriations, set-asides and other methods. This contract gets the planning step closer, but they would still have to buy the systems they will need to put in place and find the funding for these systems.

Commissioner Carlson asked what the price tag would be for the project. Mr. Vanderzanden said they did not know yet, but at the end of this engineering services project, they would have information on costs for Salem and the North County areas. He said this would be an expensive project.

Commissioner Brentano said he attended a meeting about a year ago with the different agencies including the fire departments, police departments and the county. At that time, there was a debate over two different systems. He asked if by approving this contract, they are essentially approving the decision of going ahead with the 800 MHz system. Mr. Vanderzanden said that when the countywide communications study was completed last year, the recommendation was that they should ultimately go to an 800 MHz system throughout the county if it makes sense. In the Santiam Canyon Communications Center area, it may not work as well because it is a mountainous area. There would be a large investment required for additional repeater sites. Therefore, they may end up staying with a VHF system for the agencies dispatched by Santiam Canyon.

Commissioner Brentano asked how the two communication systems could be bridged together if they end up with two separate systems. Mr. Vanderzanden said this could be done with a computer switching system that provides all the connectivity and allows an 800 MHz user to switch to a particular channel to reach an agency using the VHF system. Commissioner Brentano asked how this worked and whether each vehicle would be required to carry both systems. Mr. Vanderzanden said that eventually, when the system is in place, the connectivity would allow each vehicle to connect through the computer switch, so they would not be required to have dual radios in each vehicle.

The commissioners asked Mr. Vanderzanden to keep the board posted on the progress of this project.

MOTION: Commissioner Carlson moved approval of a contract with Motorola, Inc. for \$139,725 for engineering services for an 800 MHz communication system in Marion County. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

2. Consider approval of a three-year contract with GeoDesign, Inc. for on-call geotechnical engineering services. – Bill Worcester

Bill Worcester, Public Works, explained the contract with GeoDesign. He said that at times there are various geological or geotechnical problems that require the expertise of a geotechnical engineer. This year, they have had problems with a major slide that closed one lane of North Fork Road. Public Works does not have any geotechnical engineers on staff. In the past, they have had a geotechnical engineer under a flexible services contract so they can bring someone in when needed to do specific projects. Last fall they issued a request for qualifications. Twelve firms requested the package, but only two firms responded. The selection committee looked at their qualifications and found that GeoDesign was the most qualified to do the

kind of work they are seeking. They budgeted \$50,000 for this year and \$60,000 for next year. This is a three-year contract with a total of \$195,000 as a ceiling. They may not actually use that entire amount. If the contract is approved, one of the first projects they would look at is the North Fork Road slide area to find out how to get the road back to two open lanes again.

Commissioner Milne asked for clarification, since the entire contract is for \$195,000, and these are on-call services. She asked if this meant that GeoDesign would be paid not on an as-needed basis but rather under more of a retainer process. Mr. Worcester said GeoDesign gives them a fee schedule, and when they actually use their services, they are paid an hourly rate. If their services are not being used, they do not get paid. Commissioner Milne asked what would happen if the entire dollar amount got used. Would an amendment to the contract be necessary? Mr. Worcester said that she was correct, and if they exceeded the ceiling with time still left on the contract, they would need to estimate the amount they would need and come back before the board with an amendment. However, he feels that the \$195,000 is a safe number based on what they are forecasting now.

Commissioner Carlson said she thought he said they had not had this sort of contract before, and asked how they handled these kinds of situations previously. Mr. Worcester said there might have been some confusion about this. They have had this kind of flexible services contract in the past for geotechnical engineering, but they have not contracted with this particular firm before. This has been an ongoing need because of capital improvement projects requiring soils work and because of slide problems such as the current North Fork Road situation. They also use the geotechnical engineering services under contract to help out other county departments that may be in need of these services. For example, when the Sheriff's Office built their evidence building, they used the Public Works geotechnical contract to get help with some soils work at that location. Commissioner Carlson asked if the \$195,000 estimate is based on their past use of these services. Mr. Worcester said it is based on prior experience and what they foresee for upcoming projects. The list of projects is somewhat shorter than in the past, but there have been more slide problems recently, so they are trying to allow for that as well.

MOTION: Commissioner Milne moved approval of a three-year contract with GeoDesign, Inc. for on-call geotechnical engineering services in the amount of \$195,000. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Commissioner Brentano asked Mr. Worcester about the Independence Bridge and whether there had been successful bids on the project. Mr. Worcester said the project had been designed and would be going out to bid shortly. They sent it out for bid last October, but rejected it because the bids were all too high. They are hoping for better results this time. If they can get suitable bids, they will be bringing forward a contract to the board.

PUBLIC WORKS - PLANNING

3. Consider appeal of hearings officer's decision denying case #CU 07-58, Curtright; suggested hearing date is April 16, 2008. – Sterling Anderson

Sterling Anderson, planning manager, reported that this item is an appeal of a conditional use application to place a personal use airport on a 213-acre parcel. The property is zoned SA (Special Agriculture) and is located at 4107 Wintercreek Road SE, Jefferson, OR. The application was later modified to include the applicants' adjacent 6.19-acre parcel at 4145 Paradise Hill Drive SE, Turner, OR. In this particular case, the hearings officer

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found that the applicant had failed to prove compliance with all the applicable criteria for this kind of use.

Specifically, the hearings officer found the applicant had failed to identify the types of farm and forest uses going on in the area to allow evaluation of the existing farm and forest uses and practices in the area. This information is necessary in order to evaluate the kind of impact this application would have on farm and forest uses in the area. The applicant failed to show that they have provided an adequate drainage system, and there was a lack of evidence on soil and slope stability on the property. The applicants also failed to provide evidence of compliance with state noise standards. The hearings officer pointed out that the applicants had not adequately signed and certified the necessary application form, and would need to do so to allow the county to further review the application. The appeal states that the hearings officer made material and substantial errors in reviewing this application, including applying the wrong criteria and standards to evaluate the use.

Mr. Anderson said the board has several options with appeals of this nature. They could accept the appeal and remand it back to the hearings officer for further consideration, or they could accept the appeal and schedule a hearing before the board (suggested date April 16, 2008). If they feel the hearings officer's decision was correct, they could deny the appeal and adopt the hearings officer's decision.

Commissioner Milne asked Mr. Anderson to comment on the letter from the attorney regarding why the appeal should be considered. There are many issues raised in this letter. Mr. Anderson said the appeal for the applicants in this case cited instances where they believe the hearings officer applied the wrong criteria. Mr. Anderson said this was not the case, and that the hearings officer did apply the correct criteria to this case. The applicant's attorney also argues that the SA zone is not a farm zone, and Mr. Anderson said this is clearly incorrect since under state law, it has to comply with all the same regulations required for farm zones such as an EFU (exclusive farm use) zone. The applicants also stated that they had signed the application. Mr. Anderson said they signed the first page of the application, but not the second page of the application, which is where the signature line is located along with the location where they would certify that the information they are providing is true and correct information. He said an error occurred at the staff level, because they should not have accepted the application in that case. He has made corrections to make sure this does not happen again. It was an unusual occurrence, and the applicants have offered to sign the application again if given the opportunity to have a hearing.

Mr. Anderson said some of the points raised in the appeal were not valid, since the hearings officer did apply the correct criteria. The applicant now offers to provide all the evidence that the hearings officer said was lacking, but so far they have not provided that evidence for the hearings officer to adequately evaluate the proposal.

Commissioner Carlson said she felt the board needed to give the applicant a chance to provide the additional information. She wanted to accept the appeal and schedule the public hearing. She said she would be open to listening to the applicant's arguments about whether or not the correct criteria were applied, but she is hoping the necessary additional information will be submitted so the board will have a complete application and be able to weigh the evidence.

MOTION: Commissioner Carlson moved to accept the appeal of the hearings officer's decision denying case #CU 07-58, Curtright, and approve the public hearing date of April 16, 2008. Seconded by Commissioner

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Milne; motion carried by a margin of two for, one against. Commissioner Brentano voted against the motion.

Commissioner Milne said that she has always preferred to accept an appeal when there is information that could be provided to clarify any aspects of the case. Often, a new look at a case with additional information can be helpful. There was some emotion involved in the hearings officer's hearing for this case, and she feels a fresh look at the appeal would be a fair way to approach this. She asked the applicants to provide any further information that could help provide clarity for this case.

Commissioner Brentano said he would not be voting for the appeal or the public hearing. After examining the attorney's letter, he found the attorney's claims refuted in the hearings officer's report. He said he did not understand what the applicant's ultimate goal was in this case, and there are aspects of the application that he finds troublesome.

Commissioner Carlson said she is not interested in having the case go beyond the scope of what is allowed under the law. She said compromises have been made in the past to allow applicants to do what they want to do, but only within the scope of what the law allows. If the applicants are willing to do that and are willing to provide the evidence, she is willing to support it.

SHERIFF

4. Consider approval of receipt of the 2006 State Criminal Alien Assistance Program grant and supplemental award in the amount of \$233,738. – Commander Jason Myers

Commander Myers was not present. Commissioner Brentano read the description of the grant from the Contract Review Sheet. The State Criminal Alien Assistance Program (SCAAP) provides federal payments to states and localities that have incurred costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for violation of state or local law and who were incarcerated for at least four consecutive days during the period between July 1, 2004, and June 30, 2005. This reimburses the county for some of the costs of incarcerating these individuals.

Commissioner Carlson said the board had recently approved another grant from this same program, and now they are receiving additional dollars. She wondered if they are now receiving higher reimbursements because the county is now more involved in the program. These dollars are reimbursements for costs already incurred, and therefore they go into the Public Safety fund.

MOTION: Commissioner Milne moved approval of the receipt of the 2006 State Criminal Alien Assistance Program grant and supplemental award in the amount of \$233,738. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

PUBLIC HEARINGS 9:30 A.M.

Commissioner Brentano explained the procedure for public hearings. Each hearing begins with a staff presentation of the issue, followed by the proponent's explanation of their case, the opponents' case (if any), a chance for rebuttal by the applicant, and a final summation by the staff member. The commissioners may ask questions at any time.

BOARD OF COMMISSIONERS

A. Final public hearing on City of Millersburg's petition to withdraw three parcels of land from the Jefferson Rural Fire Protection District. – Gloria Roy

Gloria Roy, assistant legal counsel, reported that this is the last step the commissioners need to consider to finalize the withdrawal of three parcels of land currently owned by the City of Millersburg from the Jefferson Rural Fire Protection District. At the public hearing on February 20, 2008, the board considered testimony that because of the proposed heavy industrial use of these parcels, the Jefferson Rural Fire Protection District would not be in a position to respond to emergencies involving the hazardous types of materials that might be used at those sites. The board found that it would not be feasible for Jefferson to serve those parcels, which is the criterion for withdrawal. The intent was that these parcels would then be annexed into or considered for annexation into the Albany Rural Fire Protection District. The board approved the petition for withdrawal of the parcels at that time.

The next step to withdraw from a special district is a final public hearing (in this case, today's hearing), where members of the district have the opportunity to request an election on the withdrawal from the district. This is similar to an annexation vote. In this case, if enough electors of the district (in this case 100 electors of the Jefferson Rural Fire Protection District) had filed a written request for an election, then the withdrawal would have gone to the next available election. The request for an election could be filed up to or at this public hearing. As of right now, they have received no written request for an election. Therefore, the board may take the final action, which is to approve the final order declaring that these parcels are withdrawn from the Jefferson Rural Fire Protection District.

Marion County has been in coordination with Linn County on this topic, and Linn County has a public hearing scheduled for 9:45 this morning to discuss the annexation of these parcels. They are waiting contingent upon this board's final action to determine whether or not there had been a request for an election. Ms. Roy said that after the board takes its final action today, she would contact Linn County and let them know the result of the meeting so they can proceed with their public hearing. In this way there would be no gap in fire protection for these parcels.

TESTIMONY:

None.

MOTION: Commissioner Carlson moved to close the public hearing and approve the order of final approval of withdrawal of certain land from the Jefferson Rural Fire Protection District. Commissioner Milne seconded; motion carried. A voice vote was unanimous.

PUBLIC WORKS – PLANNING

B. Public hearing to consider hearings officer's recommendation denying zone change/comprehensive plan amendment, case #ZC/CP 07-4, Manning, Clerk's File #5567. – Sterling Anderson

Sterling Anderson, planning manager, reported this matter comes before the board to change the zoning from AR-10 (Acreage Residential – 10 acre minimum parcel size) to AR-2 (Acreage Residential – 2 acre minimum parcel size), and to take an exception to

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Statewide Planning Goal 14 (Urbanization) with an accompanying comprehensive plan amendment on a 7.82-acre parcel in the 3800 block of Blanchet Avenue NE, St. Paul.

In this case, the hearings officer found the applicant had failed to meet all the necessary criteria. The hearings officer said the applicant offered two alternatives regarding goal 14. The first stated that no new goal exception would be required because an exception had already taken when the property was originally included in the St. Paul urban growth boundary and then subsequently removed. The hearings officer rejected this alternative because the Court of Appeals had apparently rejected this same argument on a previous appeal regarding this property.

The hearings officer then looked at the second alternative, which is based on what is called a committed exception. This exception requires evidence that the property is irrevocably committed to urban levels of development. The hearings officer found that the property is vacant, and that surrounding uses and the lack of urban sewer and water services on the property do not commit the property to urban levels of development. One of the factors for a goal exception is whether rural use can be made of the property. The hearings officer found that the property could be developed with a rural residential use under the current zoning for that property. This would allow a single dwelling to be placed on this property. As a result, the hearings officer concluded that the applicant had failed to justify a committed goal exception to Goal 14. The hearings officer also concluded that since the applicant failed to meet the goal exception, they also failed to meet the requirements for the zone change and comprehensive plan change criteria. However, the hearings officer found that if the goal exception could be met, the applicant would meet the other criteria. In effect, this says that the key to this particular application is evidence showing compliance with the goal 14 exception requirements.

Commissioner Carlson said that at the conclusion of the hearings officer's report, under item #25, it says, "Because of that, applicants' only apparent alternative is to modify the application to request a reasons exception...." This is followed by a list of Oregon Administrative Rules. She asked Mr. Anderson if he could contrast the differences between the types of exceptions he described earlier and explain what the conditions for a reasons exception would be. If the applicants were to modify their request to ask for a reasons exception, could they do so at this hearing, or do they have to start over through the entire land use process again?

Mr. Anderson said there are three types of exceptions. They are the irrevocably committed, developed, and reasons. The committed exception is based on the uses of other properties surrounding the subject property. It takes effect when these uses result in a commitment of the property to uses not allowed by the current zone, or to uses at an urban level. The developed exception is that the property itself is physically developed to a certain level. The fact that this property is not developed is why the developed exception was not considered in this case. The reasons exception opens up many different areas where an applicant can show there are reasons other than committed and developed that this property should not be zoned AR-10 in this case but should instead be zoned AR-2. The reasons exception is more complicated since it is not so much based on what is physically occurring on and around the property. However, there are other reasons that can then be used to justify the exception to goal 14. Goal 14 is one of the more difficult exceptions. Goal 3, the farm goal, is one the board is used to dealing with where exceptions are concerned. For goal 14, there have been very few goal exceptions processed. He said this might be one of the first for this kind of goal exception going from an AR-10 to an AR-2 zone.

Mr. Anderson addressed Commissioner Carlson's other question of whether the applicant could move from one approach or exception to another. He said he believed it is possible to do this as long as the evidence provided at or before the public hearing shows that the applicant can meet the exception criteria for the type of exception or exceptions being sought. In this case, they took the committed approach initially.

Commissioner Carlson asked Mr. Anderson for an example of a reasons exception as opposed to the other two types. He said the reasons exceptions bring other factors into play such as physical aspects of the land itself, public facilities services issues, environmental factors, and any other reasons that might be used to justify a zone change. It is a broad category of possible reasons that can be used. When applicants take a reasons exception, they usually end up having to limit it in some way. The limited use overlay zone is an example of this. The reasons exception is sometimes known as a needs exception as well. There may be a need for a particular use in a particular area, and this particular property could be justified as the right property for that use. These are the kinds of reasons that can be used to justify that use. A reasons exception, for example, might be something like a motor speedway located in the middle of farmland. The reasons would be that there is no other place it could be put without having the same impacts, results, and issues come up.

Jo Stonecipher, legal counsel, said she had just reviewed the notices and wanted to confirm that the notices talk about an exception to goal 14 and refer to it, but there is no indication that a particular type of exception is being sought. Commissioner Brentano asked Sterling Anderson to remind him about the previous history of this property, since he remembers having some kind of case before the board a few years ago that involved this property or other property close by. Mr. Anderson said that this particular property was at one point located within the urban growth boundary of the City of St. Paul. The City of St. Paul decided back in the early 1990s that they would pull their UGB closer in, and this property was identified for removal from the UGB. He believes it was designated industrial at that time in their comprehensive plan. Mr. Anderson said there was much controversy and objections surrounding this parcel and the other lands that were removed from the UGB at the time, so it was a long and arduous process. The result was that this particular property was rezoned to what he believes was an SA (special agriculture) or EFU zone. The applicant then applied for and was given approval to rezone the property to an AR-10 zone. It was in AR-10 because the State of Oregon required that any new acreage residential land coming into effect after they adopted the Rural Communities Rule had to have a 10-acre minimum unless an exception was granted to goal 14 to reduce it down to the lowest category applicable under state law and Administrative Rules, which is the 2-acre minimum. That is the smallest parcel that can be allowed under acreage residential zoning. This property has gone through a long history of different zoning, and now the applicants are trying to get it rezoned to an AR-2 as opposed to the 10-acre minimum.

TESTIMONY:

Support:

Ron Manning, 14650 Stag Hollow Road, Yamhill OR 97148, applicant, and W. C. Cox, 244 SW California Street, Portland OR 97219, attorney representing applicants Ron and Kellie Manning. Mr. Cox said he had handed out copies of **Exhibit A**, the applicant's response to the hearings officer's decision.

Commissioner Milne asked if there was not some way the board could have received this information sooner. Ms. Stonecipher said the record for the case was left open, so the information could have been submitted at any time. Mr. Cox said he had requested to have this information included in the packets, but the response from someone in planning was that the information couldn't be put into the packets and that they do not believe it is legally correct to do so. He said he has been doing this for 30 years and thought the information could go into the packets, but he had not wanted to argue about it. Mr. Anderson said there was apparently some confused communication regarding the information packet. The response had been that planning would not give the applicant's information directly to the commissioners, but that the standard is that it goes to the board secretary, who puts it into the board's packets in preparation for the hearing.

Commissioner Brentano suggested a break of 10 to 15 minutes for the board to review the handout. Commissioner Milne said that said the board gets their binders a few days before their board session, which gives them the opportunity to review the materials and come prepared to the meeting. She apologized for the confusion and said she hopes this does not happen again.

Commissioner Brentano recessed the meeting at 9:50 a.m. so the commissioners could read the additional information.

Commissioner Brentano reconvened the meeting at 10:10 a.m.

Mr. Cox resumed his presentation. He said that the land in this case was already found to be non-resource land. He said the board took an exception to goal 3 regarding this land, not because they decided it was better as AR-10 land than AR-2 land, but because of the Land Conservation and Development Commission's rule adopted in 2000, which in effect made people apply the goal 14 (urbanization) standards to land outside the urban growth boundary. He said it is counterintuitive to try to do that, but this was the rule they made. At that time, the board decided to bring the land in as AR-10 zoned land, rather than taking an exception to Goal 14, and they told the applicants they could come back and ask for a goal 14 exception if they wanted it later on. At this time, they are asking for that exception to goal 14 to show that this is land developed to urban levels, even though it is outside the urban growth boundary.

Mr. Cox said an almost upside-down kind of thinking is required to try to apply a zoning provision such as Goal 14 in the manner that they are trying to do here. He said it is a very poorly written process, but that is what they deal with. When they first submitted their application, Mr. Cox said he struggled with how it was even relevant. He took the position at the time that it made no sense, given that this land had already been inside the Urban Growth Boundary at one time. When they removed it from the UGB, he did not see why there was a need to take an exception to Goal 14 if the land had already been inside the city and its UGB. He said this argument did not fly very well with Marion County's staff or with DLCDC. They informed him they did not believe his argument, so he submitted an addendum in which he revised the argument and attempted to comply more closely with what he understood the standard to be. They sent that addendum after the DLCDC staff member had issued his opinion that he was not in agreement with the applicants' earlier argument. The hearings officer did not address that addendum, and although it was sent to DLCDC, they did not respond to it. He did not know whether that meant they agreed with him or not. Mr. Cox said that in the hearings officer's decision, she made her recommendation based on the earlier letter from DLCDC, which is no longer applicable. He said she did not seem to fully understand, as do very few, how that entire process works.

Mr. Cox said Mr. Anderson has described the process very well, and he wishes that he could have summarized it as clearly. As Mr. Anderson stated earlier, there are three types of exceptions: the kind they are asking for (irrevocably committed), the built or developed exception (which they are not requesting), and the reasons exception, which they do not believe they could ever comply with, and which is so expensive that they purposely did not ask for it. The hearings officer, in his view, mixed developed and irrevocably committed together. She looked at the site itself and said there was nothing on it, and that therefore there was no use. Mr. Cox said that was not the kind of exception they had requested. They requested an irrevocably committed exception, which looks at the property around the subject property. Second, she said there was no use on the land, but he disagreed with this on the basis that use is defined as what is allowed on the property, not what currently exists on the property.

Mr. Cox said the use of the property has already been determined to be rural residential. He said that based on the history of the property and the surrounding uses, which are almost entirely urban, it would be better to use this property to achieve the goal in the comprehensive plan that states the desire to provide rural residential opportunities to citizens. In the comprehensive plan at the time it was originally written, there was a need for about 5500 new rural residential living sites. He asked what place would be better to provide these living experiences. This would also be in keeping with statewide goal 10, which states the need to provide housing for all aspects across the community, so this property should be used for that purpose.

Mr. Cox pointed out the subject property and surrounding properties on a map. Looking at the property and surrounding land, he said nearby property is in the city and has been zoned as urban transitional. That is an urban zone inside the urban growth boundary that allows building on the land, but without services, because the city does not provide services to that area. The services currently in the city, water and sewer, end at Neil Street. The surrounding parcels that are zoned UT are one-half acre, and some have not been built on. One of them is subject to being split up into smaller lots. The subject property is surrounded by urban uses including the roadway, the sewer line, and all the other development in the area.

Mr. Cox said the applicants are not trying to do something that would force the City of St. Paul to expand their Urban Growth Boundary again. In effect, they are complying with the urban transitional zone, so they are showing that they are committed to the same type of use. However, they are still rural, and he recalled that the old Marion County code used to say that there could be from 2-acre up to 10-acre lots in rural residential. Before LCDC passed its 10-acre minimum rule that they are now dealing with, the county had also said that lots could be below two acres and even down to one acre. That is what LCDC said was wrong with Marion County's code, so when the county redid it, they took out the one-acre but still kept the two, four, six, eight, and ten-acre options. They believe that everything going on around this property has committed it to urban levels of development that can be served by rural services, i.e., onsite services.

Mr. Cox said he had explained in his memorandum why he believes the hearings officer went astray. He said it seems she has attempted to test this as a developed exception rather than as an irrevocably committed exception. She does that in the way she defines use and in referencing the site rather than the area. He has gone ahead and attempted to make findings that would support the AR-2 zone decision, should the board come to such a decision. The applicants believe the board should decide for the AR-2 zone. Mr. Cox said this has been a long, harrowing experience. He said 1000 Friends of Oregon often gets involved in cases such as this one, but they have advised the applicants and the attorney that they have no interest in

this case. There is no appeal coming from them. If someone were to appeal the case, it would go to LCDC. He said the 10-acre minimum is LCDC's rule, so if the board rules in favor of the applicant, it would be LCDC's place to decide if the board had ruled correctly or not. Mr. Cox and the applicants would defend the decision before LCDC, so there would be no expense to the board. They believe it is more logical for the county to use this property to implement its rural goals in 2-acre parcels instead of one parcel of nearly eight acres. The Mannings believe the property, which has not been surveyed, would be eight acres if surveyed (it is currently described as 7.82 acres). If it does not total eight acres, they would only be able to partition it into three parcels instead of four. If the parcel were actually eight acres, they would have to prove this at the time the plat was submitted.

Mr. Cox said Mr. Anderson had correctly described the types of exceptions allowed in a case such as this one. Mr. Cox stated that the hearings officer dealt with this case as if it were a developed exception, which means looking at the property itself. The applicants did not ask for this, but instead asked for an irrevocably committed exception, which deals with the property's relation to all the other property around it. They already know that this is not farmland. The hearings officer said that the applicants have not shown that it is impracticable to put only one house on the property. He said that is technically correct, but it still would not be a good use of the land. Since they would not be growing crops on the land, he feels it would be valuable to achieve another county goal of providing housing. As the comprehensive plan says, many people want to live in a rural setting, and these parcels would provide that opportunity. He asks that they disregard the hearings officer's recommendation and approve the zone change to AR-2.

Commissioner Milne clarified that this change would mean going from AR-10 to an AR-2 zone, which seems relatively simple. She asked if there was anything in the code that would disallow this. Mr. Cox said he did not believe there was anything in the code that would disallow this, and the only thing the board is dealing with here is a poorly written code from LCDC. He said that nobody has ever submitted a case such as this one to LCDC before. Mr. Cox said they believe there is no better example of a piece of property that could actually meet the test, since the land was originally in the urban growth boundary. There was no exception taken to remove the property from the UGB. It was assumed that by putting the property into the UGB initially, an exception had been taken because it was not being used as resource land. There was an assumption that when the property was taken out of the UGB, it automatically returned to EFU zoning on the assumption that it were not urban, it must then be rural or EFU land. Mr. Cox said this required the applicants to attempt to demonstrate in the hearing that the land was not EFU land, but there was no evidence to show that this was not in fact urban land to begin with. That would be their argument if this case were returned to the courts. The Court of Appeals has dealt with a similar question, but they avoided this very basic question because they said there was no evidence in the record. He said there would never be evidence in the record that an exception was taken at the time of Urban Growth Boundary designation.

Commissioner Carlson said she was trying to follow the logic of what has been said here. Under item #5 in the hearings officer's report, there is a mention of Manning v. Marion County. Commissioner Carlson said she assumed that was the issue Mr. Cox just mentioned, where she said the applicants provided no additional proof that a goal 14 exception was ever taken. They cannot provide that evidence because there is none. Commissioner Carlson said that he appears to be trying to make the argument that because the property was in the UGB before, it theoretically must have had the exception, but the Court of Appeals did not accept that argument. Mr. Cox said they did not address the argument itself, but instead addressed the amount of record provided, so he is unsure what they would have said if the record had been

different. Commissioner Carlson this did not sound like a strong enough argument on which to hang any sort of legal case. Mr. Cox said that this is true, and that he needs to provide that record in case there is a need to return to the Court of Appeals again. Commissioner Carlson said that the board is not in the position to change law. She said the applicants are rejecting the reasons exception for very detailed reasons explained in a footnote, and they are confirming that the developed exception obviously does not apply here, which leaves them with only the committed exception. The hearings officer found that the subject property was not irrevocably committed to urban levels of development. Commissioner Carlson did not understand how the hearings officer arrived at that conclusion. She noted Mr. Cox's argument that the hearings officer had mixed the developed and irrevocably committed exceptions.

Commissioner Carlson asked what it would take for the board to reach the decision that this is an irrevocably committed exception. She did not see the criteria described plainly in the text, although the addendum by Mr. Cox appears to show what the criteria for the irrevocably committed exception would be. Commissioner Carlson said she understood that nobody is here to oppose the applicants, and no one has successfully taken a Goal 14 exception before. He said there are several provisions of Oregon Administrative Rules that state the same factors in various ways, but OAR 660-004-0028(6) seems to be the most inclusive, which is why he addressed that particular rule. Commissioner Carlson asked if the standards starting on page 11 of Mr. Cox's March 12 addendum were the standards from that particular administrative rule. She asked if that was the rule allowing the county to say in its code that ten acres is the minimum but the county has some discretion to go down to two acres, although only if they can make the case that two acres is not onerous and does not violate the rural nature of the area. She sees that he is in something of a bind because on the one hand the land is supposed to be rural, but on the other hand, with Goal 14, it is necessary to prove that it is urban, though it is not urban. Under the current zoning, they could build one house on the parcel, but she said it appears they want to build four. Mr. Cox confirmed that they would like to build up to four houses depending on the exact acreage they are found to have once the property is surveyed. Commissioner Carlson said they would be required to take setbacks into consideration so it could be a total of three houses instead of four.

Mr. Cox asked to make a point about the language in this case. It is not urban development, but urban-level development that they are trying to show. If it were urban development, they would be back in the urban growth boundary. He said they have taken an otherwise accepted concept of urbanization and tried to make it work outside the UGB, and it has been very difficult for those who practice in that area of law to understand how this could be applied. Commissioner Carlson said that from what she has been able to get from the hearings officer's report and from Mr. Anderson's testimony, if they could get past goal 14, everything else would be in order. It appears that goal 14 is the real stumbling block in the entire process. Mr. Cox said that in the hearings officer's remainder, she addresses many of the same issues that he did, and she addresses them favorably. However, he feels that she got hung up on the application of the term "use" and "site" versus "area," and that she mixed the developed exception with the irrevocably committed exception. Commissioner Carlson said that if it were impossible to get a goal 14 exception, it would make no sense for anyone to go through the process. Mr. Cox said that he has asked that question himself, since if they did not mean for this exception process to work, why did they create it as opposed to just saying no? Commissioner Carlson said she is not familiar with all the OARs in this case, and Mr. Cox has addressed one, while the hearings officer addresses a number of them. She wanted to be sure they would not be violating the interplay of these different administrative rules if they were to rule on the basis of one rule only. Mr. Cox said he tried to address that with the footnotes, where he tried to

give all the standards that were applicable, and his conclusion is that they all boil down to one test.

Commissioner Milne referred to page seven, where the hearings officer tends to agree with the applicants, but then denies their request. Mr. Cox said that he has reviewed this extensively and can only come back to the areas he has pointed out, where he believes that the hearings officer confused the developed and irrevocably committed exceptions and misused the word “use” to mean existing development rather than approved zoning issues.

Sterling Anderson, planning manager, came back to the table. He said he would comment on goal 14, the urbanization goal, and exceptions to this goal under these circumstances. He said he would agree that it is very difficult, if not impossible, to take a reasons exception under these circumstances, although that may end up being the approach that would best justify this, but when looking at the committed and developed exceptions and trying to apply them in a situation such as this one, it is almost a catch-22 where you can't get there from here without going urban, but you can't be urban. This is a very difficult thing to try and justify. He knows that the intent was not to prohibit a goal exception, or otherwise the state would have simply said that no goal exceptions were allowed to the 10-acre minimum. They did allow all the existing AR zones statewide to stay at their two-acre minimum or other acreage minimum depending on the individual county's rules. In Marion County, most of it was a two-acre minimum. At the time, the state more or less said they would consider those lands committed to those lot sizes. They may never have specified that, but that ended up being the ultimate result, and they acknowledge those as being committed to AR-2, AR-5, or whatever acreage level was in place. If an applicant wanted to go under that level, they had to take a goal exception to the urbanization goal.

Mr. Anderson said the urbanization goal is applied in this case because of a 1981 Curry County case where the State Supreme Court basically found that one acre is an urban-sized lot, ten acres is a rural-sized lot, but they did not know how to define the sizes in between one and ten acres. It took DLCD twenty years to try and come up with some rules to respond to that Curry County case, which they did with the Rural Community Rules. He said he could understand the difficulties of the applicants' situation as they attempt to apply a goal exception. He agrees with them that this probably has not been done because it is very difficult to understand how to apply the criteria to a situation like this. When the Rural Community Rule was developed at DLCD, Mr. Anderson contacted their staff to determine if they were going to develop specific goal exception criteria for Goal 14 separate from the criteria the county has been applying under goal 2, which sets out the goal exception criteria. DLCD understood that the goal exception criteria as they exist in goal 2 were not very applicable to a goal 14 exception, but they did not have anything else, and they were not going to develop anything else to do it. In his view, they gave up, since this particular issue in the Curry County case had been a headache to them for many years. Therefore, once they got the Rural Community Rule adopted, they decided to leave it alone and move on to other things. They did indicate that they understood the complexity of the goal exception criteria and that they really were not very applicable to a goal 14 exception, but that was all they had and they were not going to come up with anything else until instructed to do so by the state Land Conversation Development Commission. Since this has not yet arisen as a major issue or problem, they have not responded to it. Mr. Anderson agrees that the process is there, but it is very difficult if not impossible to try to apply it to this situation. He believes this is why it has not been done before to his knowledge.

Commissioner Carlson asked if the county rezoned the subject property into AR-10 before or after the 2000 rule. Mr. Cox said it was rezoned in 2005. Commissioner

Carlson clarified that the board had told the applicants that they could come back for an exception. She said the developed and reasons exceptions do not apply to this case, but the irrevocably committed exception is difficult or impossible to prove, although the applicants have tried to do so by articulating what the standards could be and then responding to each of them in their March 12 addendum. Mr. Anderson agreed that her impressions were correct. Commissioner Carlson asked what would happen if she agreed with them that there is no applicable path for them in the exceptions. If the board were to try to create a path for them, how could Mr. Anderson present their case, and what could happen after that? Mr. Anderson said that if the board agreed that there is evidence to justify this goal exception, the staff would offer the applicant's attorney the opportunity to prepare those findings, taking the material from previous submittals and the March 12 addendum. Then staff would put together a set of findings, which staff and legal counsel would review prior to presenting it to the board for adoption. In this way they could make sure they have addressed as many of the issues as possible. This would always have to be done with the understanding that this is new ground, and sometimes when forging new ground it is necessary to go ahead as best one can in unknown territory.

Commissioner Carlson said that there are no opponents on record for this case, and asked if this would mean that nobody could appeal the case. Would it be possible that the case could go on to DLCD, who might then take the board to court about the case if they objected to the outcome? Mr. Anderson said that there have probably been some opponents who have commented at the local level, and DLCD would probably be an example of this and would have standing to appeal if they chose to do so. Mr. Anderson said that an appeal, because this is a quasi-judicial land use case, would go to the Land Use Board of Appeals (LUBA) as opposed to going to the Land Conservation and Development Commission (LCDC).

Commissioner Carlson asked if the applicants would be able to build a single home on this land even if they lost the appeal for some reason. Mr. Anderson said that this would be the case. Commissioner Carlson noted that in this case, then, the major distinction would be whether they could build one home or up to four, and Mr. Anderson confirmed this as well. She asked if a decision by the board to approve this appeal would set a precedent for applicants to come forward from other areas around St. Paul. Mr. Anderson said it would probably not be an opening of floodgates for additional cases because each case has different circumstances and a different history. Mr. Anderson said the history of this property is very unusual since it has been both in and out of the UGB and has been rezoned several times. Mr. Anderson said that the property is substantially surrounded by urban uses or rural/urban uses in the case of the parcels to the north, which are rural-sized lots that are within the city limits but use rural services. This creates another odd set of circumstances that would be unlikely to apply in the case of other properties near St. Paul, let alone other parts of the county.

Commissioner Milne, after rereading some of the hearings officer's comments, felt this case could almost have been a coin toss. In this case, she is comfortable with the idea of breaking new ground. She has not heard any legal reason against proceeding. The board is here to protect the county's interests, but also to serve the people. She has not heard any legal reasons that would prohibit the board to change the zoning for this property from AR-10 to AR-2. This has not been tried before, but she does not believe that is sufficient reason to deny the appeal or to uphold the hearings officer's decision. In her view, the hearings officer had considerable uncertainty about this case, because her ruling noted on numerous occasions that there appeared to be every reason to approve the application. Commissioner Milne said she favors approval, although she understands this decision would put the Mannings in a position

where they would still have much work ahead of them in this matter. The board's role here is to either support the hearings officer's decision or make a new decision, and she is prepared to make a new decision.

Commissioner Brentano said he agreed with the other two commissioners. In his view, the board already made a decision on this matter in 2005 when they said this was not really farm ground, and now they are arguing about the density. He said it seems strange to him that the state wants all the population density in the cities, but on the edges of the cities they appear to want the parcels to be as big as possible. He feels that if they are going to declare that this is not farmland, the land should then be used as efficiently as possible. In his view it is more efficient in this case to have more homes rather than fewer homes. He said that in 2005, the board essentially invited the Mannings to come back for an exception in the future if they needed one. He would prefer to remain consistent with this earlier board action.

Commissioner Milne asked Ms. Stonecipher to help clarify what the board would be doing by coming up with its own new decision. She said they would change the AR-10 zoning to AR-2, and asked Ms. Stonecipher what other things would be legal requirements for the board to include in their decision. Mr. Anderson said that a goal exception is involved here, and a goal exception is a comprehensive plan amendment, so that language would also need to be included.

MOTION: Commissioner Milne moved to close the public hearing in Case #ZC-CP 07-4, Manning, Clerk's File #5567; approve the comprehensive plan amendment change with the goal exception for Goal 14, and approve a zone change from AR-10 to AR-2. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

Commissioner Carlson said she hoped that today's board action might encourage DLCD to come up with some exception criteria for Goal 14.

Ms. Stonecipher said that the motion would need to come back to the board as an administrative ordinance because it is a comprehensive plan change. It will need to be noticed and then approved on the regular board calendar.

Commissioner Milne said that planning would be working with legal counsel to make sure all the issues get addressed and put in the proper legal format.

Commissioner Milne noted that she has been on the board for 10 years now, and the Mannings' case has come before the board several times during that period. She said the term "orphan" was used frequently to refer to this property, and the word truly did apply in this case, since the property has been pushed and pulled around for years. She hoped that today's board action would finally allow the applicants to use their property functionally within their community.

Commissioner Brentano read the weekly calendar.
Commissioner Brentano adjourned the meeting at 10:35 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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