

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, April 9, 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

Recommend approval of:

Illaha Hills Country Club, Salem

FINANCE – CONTRACT REVIEW BOARD

Approve waiving minor informality and approve bid award to lowest responsible bidder, McDonald & Wetle, for the Jail C-Pod Lower Roof Replacement project.

HEALTH

Approve amendment #2 to receive \$12,852 from Salem Hospital for providing screening services for mental health patients at Salem Hospital and to extend the contract term through May 31, 2008.

Approve amendment #2 to receive \$79,500 from Salem Hospital and Mid-Valley Independent Physicians Association to provide prenatal care and extend the contract through August 31, 2008.

Consider approval of amendment #1 to a lease with LRT Village East Centre, LLC to add 6,120 square feet of office space to the existing lease for the Health Department's Lancaster offices and extend the term through June 30, 2016.

## PUBLIC WORKS - PLANNING

Receive hearings officer's recommendation to deny vested rights determination, case #M05-103, DeSantis, Clerk's File #5101.

Receive Planning Commission's decision granting conceptual and detail approval to subdivide and adjust setback, case #SUB/ADJ 08-1, Zaichenko, Clerk's File #5579.

Reschedule public hearing, case #CU07-058, Curtright, Clerk's File #5572, from April 16, 2008 to May 14, 2008.

Commissioner Carlson pointed out that legal counsel had advised her that final item on the agenda (rescheduling of Case #CU07-058, Curtright, Clerk's File #5572) was an addition to the original agenda that required a motion in order for it to be added to the agenda. This was done through the following motion:

**MOTION:** Commissioner Carlson moved approval to add an item to the consent calendar regarding case #CU07-058, Curtright, Clerk's File #5572. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

**MOTION:** Commissioner Milne moved approval of the consent calendar with the added item. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

## **ACTION**

### FINANCE – CONTRACT REVIEW BOARD

1. Consider granting an exemption allowing the use of an alternative solicitation pursuant to the Marion County Public Contracting Rules for energy savings performance contracting for the courthouse and work center renovation project (**TO BE ACTED ON FOLLOWING PUBLIC HEARING**). – Peggy Mitchell, Doug Ebanks/Bob Hutchinson

Commissioner Brentano said he was unsure how to handle this matter, since the board would decide this in their capacity as the Contract Review Board. Jo Stonecipher, legal counsel, said it would be best to defer this item until after this morning's public hearings, since they could not act on these items until that time.

### PUBLIC WORKS – PLANNING

2. Consider hearings officer's recommendation to grant vested rights determination, case #M05-106, Combs Living Trust, Clerk's File #5128. – Sterling Anderson

Sterling Anderson, planning manager, said this item is the Hearings Officer's recommendation regarding a vested rights determination application. A public hearing was duly held on this application on January 23, 2008. The application was to complete and continue a use that was granted to the applicants by the State of Oregon and Marion County under ORS 197.352 (Measure 37). The claims were initiated through Marion County Partitioning Cases P06-33 and P07-45 to divide property and place a dwelling on EFU (exclusive farm use) zoned land located at 9992 Saratoga Drive NE, Salem.

On January 23, 2008, the Marion County Hearings Officer conducted a hearing on this application. The hearings officer reviewed the evidence against the requirements for a vesting determination under common law and concluded that the applicants had met the necessary standards and criteria for a vested rights determination. The hearings officer recommended that the board grant the vested rights determination.

Commissioner Carlson said she was very pleased with the hearings officer's analysis in this case, which was very clear and thorough.

Commissioner Brentano asked about item 10 on page six of the recommendation report. He asked why the items for \$200 for Measure 37 fees and \$1,228.46 for back taxes were disallowed. Mr. Anderson said that some of the expenses the applicants were claiming fell into the preparation category. He said that under a vested rights claim, the only qualifying expenditures are those directly related to developing the use on the property. Items such as land use application fees and attorney fees as part of a Measure 37 claim would not qualify. These items are often included in claims by applicants, but the hearings officer and the state vested rights common law do not allow these items to be included as a part of direct expenditures to implement a development as opposed to preparing to implement the development. Expenditures incurred prior to an approval (such as the \$200 Measure 37 fee in this case) are questionable as well.

**MOTION:** Commissioner Carlson moved approval of the hearings officer's recommendation to grant vested rights determination, case #M05-106, Combs Living Trust, Clerk's File #5128. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

3. Consider hearings officer's recommendation to grant vested rights determination, cases #M05-49 and #M06-32, Higuera, Clerk's Files #5045 and #5163. – Sterling Anderson

Sterling Anderson, planning manger, reported that this is also a common law vested rights determination by the Hearings Officer. He said this case covers two Measure 37 claims by the applicant for two parcels that are located at 20321 and 20361 Olmstead Road NE west of Aurora. The applicant initiated the Measure 37 claims through Marion County Partitioning Cases P07-16 and P07-27, which were approved, to divide the land and place dwellings on the EFU-zoned property.

The hearings officer held a public hearing on this application on January 23, 2008. Based on the evidence, the hearings officer has recommended that the board approve this claim.

**MOTION:** Commissioner Milne moved approval of the hearings officer's recommendation to grant vested rights determination, case #M05-49 and #M06-32, Higuera, Clerk's Files #5045 and #5163. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

4. Consider appeal of hearings officer's denial of administrative review, case #AR07-45, Pir, Clerk's File #5578. – Sterling Anderson

Mr. Anderson reported that this request is an appeal of the hearings officer's denial of a request to replace a dwelling that was destroyed by fire on a 110.28-acre parcel zoned SA (special agriculture) located at 6835 Skyline Road South, Salem. The hearings officer

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held the hearing on December 19, 2007, and denied the application due to the failure of the applicant to show compliance with the applicable criteria. Specifically, the hearings officer found that the applicant did not have a dwelling on the property that met the required criteria. Mr. Anderson said that in order to replace a dwelling, the dwelling being replaced had to have the standard elements of a dwelling such as walls, a roof, a heating system, an electrical system, and a septic system. In this case, the hearings officer found that the dwelling was damaged by fire in the 1940s and ultimately demolished in July of 1991. Based on the length of time involved in this case, the hearings officer found that there was no dwelling at the site that had those basic elements of a dwelling.

In the appeal, the applicant states that this case raised questions regarding the strict or liberal interpretation of this particular Oregon statute. He said that the county has the authority to interpret the intent of the laws, and he hoped that the board would consider the special circumstances in this case. The applicant compared this case to a similar administrative review application in which the board did grant a replacement dwelling. That case was Administrative Review Case AR05-17, Ulven, in which the board allowed a property owner to replace a dwelling that had been destroyed by a fire a number of years before the owner submitted an application for the actual replacement.

Mr. Anderson said the board could choose to accept the appeal and remand the case back to the hearings officer for additional review, accept the appeal and hold its own hearing (suggested date would be May 17, 2008), or deny the appeal and accept the hearings officer's decision.

Commissioner Milne asked about the earlier case in which the replacement dwelling was granted. She asked what were the differences, if any, between the two cases. Mr. Anderson said that after the decision, the applicant in the current case came to the Planning Division to discuss options with staff and find out how he might proceed. At that time, staff pointed out the Ulven case as a similar case where a brush fire that spread to the house and burned it down. Apparently the property owners in the Ulven case had other dwellings and did not need to rebuild immediately, so they did not make an immediate application to replace the dwelling. Several years later, they decided to replace the dwelling and went through the process. They were denied twice before they brought the case before the Board of Commissioners, which felt that under the circumstances, the intent of the law would be met by allowing a replacement dwelling. There had not been a dwelling on the property for more than five years and less than ten years, and the board decided that this did not change the intent of the law, which was that if a dwelling had been present on the land, the owner had a right to replace it. Mr. Anderson said there has always been a question of how long a dwelling can be gone before it is determined to be totally lost. He said that in the past, the board has taken a fairly liberal interpretation of this question.

Mr. Anderson said that the Ulven case is somewhat different because in the current case, there was a second dwelling on the property. The dwelling the owner has applied to replace was the old farmstead, while there was a second dwelling on a different portion of the property that was not replaced until after the original homestead was demolished in 1991. In 1999, the property owner at the time had the intent to remove and replace the second dwelling on the property. That set of owners had their primary home in Southern California. When the second dwelling on the property burned down, those owners returned to Southern California. At that time, they sold the property to the current owner, who assumed that the process of replacing the dwelling was already going on, and was unaware that there would be any obstacle to his completing the process.

Commissioner Milne confirmed that there are currently no dwellings on the property. Mr. Anderson said that apparently the dwelling that burned down in the 1940s sat empty until it was demolished in July of 1991 because the owner at the time thought it was an attractive nuisance and a hazard. At that time, the second dwelling on the property was still viable. Mr. Anderson confirmed that there are now no dwellings on the property.

Commissioner Brentano confirmed that Mr. Anderson was only talking about the first house. He asked if there could be a possible second application for the second house. Mr. Anderson said the hearings officer took the position that if the applicant wanted to address the replacement of the second house, a second application would be required. He said it appears from the hearings officer's discussion that this was based primarily on the fact that the other dwelling was not mentioned, was at a different site on the property, and was not part of the original application. Therefore, a new application would be required before considering any possible replacement of the second dwelling.

Commissioner Milne said there was a lot of information in this case that the board did not have, and this raised more questions in her mind about what might be considered. She said she would be willing to accept the appeal and hold a public hearing but would definitely need more information in order to be able to make any decisions regarding the case.

Commissioner Carlson asked about the liberal interpretation of the statutes in the Ulven case. She asked how recent the case was. Mr. Anderson said the case was decided in 2005. She confirmed that the house was completely burned down and had been burned down for a long time before the case was decided. She said that the statute provides a 12-month time frame and wanted to know how a liberal interpretation of the statute would allow someone to get around the statute. Mr. Anderson said that he thought the applicant was hoping the board would consider taking a look at that aspect of the case in terms of the intent of the law. He said the intent of the law was to prohibit people from taking an accessory structure, converting it into a dwelling, and then coming in and replacing it with another house. He said it was not intended to keep people who had valid dwellings from being able to replace them after a fire. Mr. Anderson said the county has struggled with this issue and has tried to establish some parameters. One of the ways they have done this is to require the application for replacement to be filed within a year of the fire. However, they have not insisted on this in every single case, and the Ulven case is an example of an exception.

Commissioner Carlson asked if the requirement to initiate the replacement application within a year is a county ordinance or a state statute. Mr. Anderson said it is a policy, not an ordinance or a statute. He said he has spoken with the staff at the Department of Land Conservation and Development who drafted the language and ran it through the legislature. It was clearly their intent that some situations be left open-ended to allow local governments some flexibility, since there is no absolute time limit.

Commissioner Brentano said that in this case, the house was destroyed in the 1940s and torn down in 1991, and he felt this was too long. He said he might be willing to consider an application for the second dwelling. He said he read the applicant's letter, which stated that this is not being used as farmland. He said that in his view, farming would be a better use of the land than having the land vacant, but he felt the timeline was just too long in this case.

Commissioner Carlson said she had also felt that the time in this case was too long, but she was unclear about what was statute and what was policy regarding the length of

time in cases such as this one. She said she would be interested in seeing the file from the Ulven case to refresh her memory about the circumstances in that case. She said that for the purpose of getting more information about the current case, she would be willing to accept the appeal.

Commissioner Brentano said there were many old home sites around Marion County, and he would not want to set a precedent that might allow people to make claims to allow building on these sites. Commissioner Carlson that when the board decides on these cases, they do not actually set precedents. Commissioner Brentano said that in this case, with the mention of the previous Ulven case, the applicant might have thought that the board could set a precedent.

**MOTION:** Commissioner Carlson moved to accept the appeal of the hearings officer's denial of administrative review, case #AR07-45, Pir, Clerk's File #5578. Seconded by Commissioner Milne; motion carried. Two for, one against; (Commissioner Brentano voted against).

**MOTION:** Commissioner Carlson moved to schedule the public hearing on case #AR07-45, Pir, Clerk's File #5578 on May 7, 2008, at 9:30 a.m. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

Commissioner Brentano recessed the meeting at 9:25 a.m. until 9:30, when the public hearings would begin.

Commissioner Brentano reconvened the meeting at 9:30 a.m.

## **PUBLIC HEARINGS 9:30 A.M.**

### PUBLIC WORKS

A. Public hearing to consider transfer of customers between Allied Waste of Marion County and Pacific Sanitation. – Jeff Bickford

Commissioner Brentano gave a disclaimer and made note of the fact that he has a brother-in-law who works for Allied Waste.

Jeff Bickford reported that they received a request from Allied Waste to transfer 100 customers to Pacific Sanitation. He said the primary reason is that the Pacific Sanitation area is up in the Santiam Canyon, which makes it much more convenient for Pacific Sanitation to serve these customers. He said the ordinance said that any change in the franchise area requires a public hearing, so the hearing is being carried out today.

**MOTION:** Commissioner Milne moved to close the public hearing and approve the transfer of customers between Allied Waste of Marion County and Pacific Sanitation. Seconded by Commissioner Carlson; motion carried. A voice vote was unanimous.

### FINANCE

B. Public hearing to consider granting an exemption allowing the use of an alternative

solicitation pursuant to the Marion County Public Contracting Rules for energy savings performance contracting for the courthouse and work center renovation project. – Peggy Mitchell, Doug Ebanks, Bob Hutchinson

Peggy Mitchell, contracts compliance analyst from the Marion County Finance Department, introduced Doug Ebanks and Bob Hutchinson of Facilities Management. Ms. Mitchell reported they were present before the board to request an exemption allowing the use of an alternative solicitation process pursuant to the Marion County Public Contracting Rules for an Energy Savings Performance Contracting (ESPC) for the Marion County Courthouse and Work Center Renovation project.

Ms. Mitchell said the contracting rules have the provision to use Energy Savings Performance Contracts, but the Board of Commissioners is required to make this determination in its role as the Contract Review Board. The rules require that because this is a public improvement, a public hearing be held on the issue of allowing an alternative to the standard bid process. The county has advertised the public hearing and has requested comments, but there have been no comments received by the deadline of 5:00 p.m. on Monday of this week. Ms. Mitchell said that another thing the board needs to take into consideration is the possible costs savings of using the ESPC process. The ESPC process is more involved than the standard bid process, since it involves a small number of selected companies who are qualified to do this sort of contracting. The company selected to carry out the project would do an extensive energy savings audit of the buildings before proceeding with the work. By using a request for proposals, they could take a more technical approach to selecting the contractor they would eventually use.

Ms. Mitchell turned the presentation to Bob Hutchinson and Doug Ebanks to give a summary of the possible cost savings. Mr. Hutchinson explained that the Marion County Business Services Department has identified the Energy Services Performance Contract (ESPC) method as the best option for these projects as opposed to the standard bid process. He said that they have explored what can be done using the ESPC, and have found that by combining the two projects, they can carry the project out more effectively and add to the cost savings involved. There are certain tax credits they can get by including the Work Center along with the Courthouse in the project.

Ms. Mitchell added that she and the county's legal counsel have reviewed the RFP process, and have found that the ESPC process is more involved than the standard process of requesting bids. They would start by identifying and selecting an ESCO (Energy Savings Company) to do the work from among the qualified companies that submit proposals. The contract would be a three-phase process: During phase 1, the ESCO will do a technical energy audit and a project development plan. At any point during phase 1, the county can decide to terminate the project. They will have other options to terminate as time goes on. Phase 2 includes design, engineering, and completion of the project. Phase 3 is a monitoring phase and includes the measurement and verification of the guaranteed cost savings to the county. As a part of the project development plan, the county will be able to choose which energy savings components they wish to include.

Commissioner Carlson clarified for the audience that the Work Center issue is an air quality problem, and the county has been exploring alternatives for this building for some time. She said the Courthouse has significant problems with heating, temperature control, and windows. She said this looked like a good opportunity to save on utility costs and make the needed improvements. Mr. Hutchinson said that in the process of reviewing both of these projects, an

engineering firm was hired to see how the projects should be done. He said the suggestions and recommendations from the firm's reports might also be incorporated into the upcoming project.

Commissioner Carlson requested that the Board of Commissioners, County Administrative Officer, and Deputy County Administrative Officer be apprised regularly of the progress of the work and the costs as the project is carried out. Ms. Mitchell said she believed that the three-phase process ESPC process would help them to have a better idea of what the costs would be over the entire length of the project.

Commissioner Brentano said that energy savings, cost savings, and improved comfort and efficiency sounded like good reasons to approve this process. He said he was somewhat concerned about the possibility that the progress of the work might be slowed down by the use of the ESPC process. Mr. Hutchinson said that because of the increased technical specifications involved, the ESPC process might slow the work down slightly, but the difference should not be significant.

Commissioner Brentano asked Ms. Stonecipher if there needed to be an extra motion to clarify that the board was acting as the Contract Review Board. Ms. Stonecipher said this would not be necessary.

Commissioner Brentano said no members of the public had signed up to speak on this issue.

**MOTION:** Commissioner Carlson moved to close the public hearing and approve the board order that grants using an alternative solicitation pursuant to the Marion County Public Contracting Rules for energy savings performance contracting for the courthouse and work center renovation projects. Seconded by Commissioner Milne; motion carried. A voice vote was unanimous.

Commissioner Brentano read the weekly calendar.

Commissioner Brentano adjourned the meeting at 9:55 a.m.

**Attachments:** Agenda

ABOVE MINUTES APPROVED

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CHAIR

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COMMISSIONER

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COMMISSIONER

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