

BOARD OF COMMISSIONERS

MINUTES OF THE BOARD SESSION – Regular Session

Wednesday, June 29, 2022

9:00 a.m.

Senator Hearing Room
555 Court Street NE
Salem, OR 97301

PRESENT: Commissioner Danielle Bethell, Commissioner Colm Willis, and Commissioner Kevin Cameron. Also present were Jan Fritz, chief administrative officer, Jane Vetto as county counsel, and Brenda Koenig as recorder.

Commissioner Bethell called the meeting to order at 9:00 a.m.

(Video Time 00:01:04)

PUBLIC COMMENT

Toby Green:

- Mr. Green is the Service Employees International Union (SEIU) organizer for the Marion County Employees Association (MCEA);
- There is a new telecommuting policy going into effect on July 1, 2022;
- 94 percent of MCEA members support having a teleworking policy;
- Having a telecommuting policy in place increases the desirability of Marion County as an employer; and
- The recently announced back to work policy requires employees to work in the office.

Brian Smith:

- Mr. Smith supports telecommuting;
- Telecommuting can help employees feel more grounded, they are able to complete their work, it supports a work-life balance, and it lessens stress;
- Employees feel more productive when telecommuting, and they are able to help their communities; and
- Mr. Smith requests that the Board take action to develop and implement a Marion County telecommuting policy.

Trish Straw:

- Ms. Straw works for Marion County Health and Human Services;
- She is president of MCEA;
- The Board has refused to meet with union representatives to discuss the county's decision to end telecommuting, and they refused to bargain over it;

- MCEA represents almost 1,000 employees; and
- MCEA hopes that the Board reconsiders their position on telecommuting.

Diana Downs:

- Ms. Downs works in the Marion County Assessor's Office;
- She is an MCEA officer and a member of the bargaining team;
- The most important issue to employees, outside of economic issues, is having the ability to telecommute;
- The county is missing an opportunity to save money by refusing to consider teleworking:
 - A state department effectively used teleworking and was able to give up their office space, saving the department several hundred thousand dollars.
- MCEA recognizes that teleworking does not work in every situation, but there are many areas where it can work effectively and efficiently;
- Teleworking could be a great money saving tool for the county;
- The infrastructure for teleworking is already in place with laptops being standard equipment;
- Teleworking would promote retention and hiring opportunities;
- With teleworking, county office space could be used more effectively making the need for buildings a lower priority and leaving funds available for other uses; and
- Ms. Downs requests that the Board considers teleworking.

Eleni Speropulos:

- Ms. Speropulos works as a mental health therapist for the county;
- Her department is having a difficult time finding therapists who want to work for the county:
 - One of the issues is the county's lack of flexibility.
- Telecommuting allows employees to have flexibility, and to save money on gas;
- Telecommuting also saves the county money on building costs, utilities, and other costs associated with maintaining office space;
- Many of her colleagues have needs that require them to be able to telecommute; and
- Allowing telecommuting would help to retain employees.

(Video Time 00:16:20)

Commissioner Cameron moved to move Human Resources item #9 and item #10 to immediately following Consent on the Agenda. Seconded by Commissioner Willis; motion carried. A voice vote was unanimous.

(Video Time 00:17:08)

CONSENT

BOARD OF COMMISSIONERS

Board Committee Appointments– Marion County Mental Health Advisory Committee

1. Approve an order appointing Nilly Essaides to the Marion County Mental Health Advisory Committee with a term ending June 29, 2026.

2. Approve resolutions adopting Community Development Block Grant (CDBG) and HOME Investment Partnerships program manuals, policies, plans, and procedures for the following:

- The CDBG Program Manual, the CDBG Program Manual for Public Service Projects, and the CDBG Program Manual for Acquisition and Infrastructure Projects;
- The HOME Investment Partnerships Program Policy and Procedures Manual;
- The Affirmative Marketing Policy;
- The Violence Against Women Act Transfer Plan;
- The CDBG/HOME Program Residential Anti-Displacement and Relocation Assistance Policy (RARAP);
- The Limited English Proficiency Plan; and
- The Section 3 Plan.

3. Approve a resolution adopting the Recapture Resale Policy under the Program Year 2021-2022 Community Development Block Grant and the HOME Investment Partnerships programs.

4. Approve a resolution adopting the Program Year 2022 through 2023 Annual Action Plan under the Community Development Block Grant and the HOME Investment Partnership Program.

PUBLIC WORKS

5. Approve a resolution initiating an amendment to the Marion County Rural Zone Code to operate an event business as a home occupation in the Exclusive Farm Use (EFU) zone, the Special Agriculture (SA) zone, and the Farm Timber (FT) zone and schedule a public hearing for August 3, 2022.

SHERIFF'S OFFICE

6. Approve Amendment #3 to the Contract for Services with Communications Northwest to add \$5,829.29 for a new contract total of \$282,102.66 for unforeseen expenses not included in the initial quote for the Marion County Jail Radio Project and extend the term date to June 30, 2022.

Board discussion:

- The CDBG/HOME Program has a down payment assistance component:
 - \$25,000 is the current limit for the amount of down payment assistance that will be provided; and

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- The Board can increase the limit to \$40,000 in the future:
 - The policy would have to be amended:
 - Amending the policy would require approving another resolution, and it would take less than one month.
- The CDBG/HOME Program also contains a recapture provision:
 - In the future, if the Board wants to change the amount of the recapture the policy would have to be amended:
 - Amending the policy would require approving another resolution, and it would take less than one month.

MOTION: Commissioner Willis moved for approval of the consent agenda. Seconded by Commissioner Cameron; motion carried. A voice vote was unanimous.

***** A scrivener's error was discovered while processing documents for item #2 on the Board Session Agenda. Resolution documents had a Board Session date of June 22, 2022. The date on documents should have been June 29, 2022, which is when the agenda item came to Board Session, was approved, and then signed by the Marion County Board of Commissioners.***

(Video Time 00:20:51)

ACTION

HUMAN RESOURCES

9. Consider approval of the ratification of the Marion County Employees Association (MCEA) Collective Bargaining Agreement (CBA) for 2022-2024. –Salvador Llerenas
(Motion made and approved to move item up on the agenda.)

Summary of presentation:

- The agreement is effective July 1, 2022;
- Following are some of the changes made to the collective bargaining agreement:
 - Article 4- cleaned up the reference to 7 ½ hour shifts, and clarified modified work hours;
 - Article 6- added Juneteenth to the list of holidays;
 - Article 7- clarified when vacation accumulation starts, changed 5 days to 40 hours, and clarified the definition of a unit;
 - Article 10- increased health benefit contributions;
 - Article 11- added a differential for work performed by the mobile crisis unit while they are working with law enforcement;
 - Article 14- per diem will be equal to Internal Revenue Service per diem;
 - Article 15- developed a policy between the Juvenile Department and MCEA;
 - Article 17- added language that stated the employer will not influence union membership;
 - Article 20- added steps for documentation to be copied to bargaining leadership;
 - Article 21- added a definition of “working days”, cleaned up language, and clarified types of discipline;

- Article 24- clarified layoff language;
- Article 26- clarified when the initial trial service period begins; and
- Article 33- addresses the terms of the agreement.
- The following letters of agreement were renewed:
 - Floater position;
 - Journeyman’s card or trades license;
 - Oracle pay incentive;
 - Sick leave conversion; and
 - Standby pay.
- A pandemic recognition pay letter of agreement was added.

Board discussion:

- The Commissioners thanked staff and the members of the union for coming to this agreement.

MOTION: Commissioner Cameron moved to approve the ratification of the Marion County Employees Association (MCEA) Collective Bargaining Agreement (CBA) for 2022-2024. Seconded by Commissioner Willis; motion carried. A voice vote was unanimous.

(Video Time 00:27:14)

10. Consider approval of the ratification of the Oregon Nurses Association (ONA) Collective Bargaining Agreement (CBA) for 2022-2024. –Salvador Llerenas
(Motion made and approved to move item up on the agenda.)

Summary of presentation:

- The agreement is effective July 1, 2022;
- Following are some of the changes made to the collective bargaining agreement:
 - Article 4- clarified the potential establishment of a 10-hour, 4-day workweek, with a 15-calendar day notice being given;
 - Article 6- added Juneteenth to the list of holidays;
 - Article 7- clarified when vacation accumulation begins;
 - Article 10- increased health benefit contributions;
 - Article 12- increased the cost-of-living adjustment;
 - Article 19- added a definition of “working days”, and added that a copy of any formal grievance should be sent to Human Resources; and
 - Article 24- addresses the terms of the agreement.
- The following letters of agreement are included:
 - Sick leave conversion; and
 - Pandemic recognition pay.

Board discussion:

None.

MOTION: Commissioner Willis moved to approve the ratification of the Oregon Nurses Association (ONA) Collective Bargaining Agreement (CBA) for 2022-2024. Seconded by Commissioner Cameron; motion carried. A voice vote was unanimous.

(Video Time 00:31:20)

BOARD OF COMMISSIONERS

7. Consider approval of the Community Development Block Grant Subrecipient Agreement with the Center for Hope and Safety in the amount of \$250,000 for the HOPE Plaza Construction Project through December 31, 2023. –Tim Glisson

Summary of presentation:

- The county will be reimbursing the Center for Hope and Safety for architect, engineering, and permit fees for the public facility portion of the new building being built;
- The agreement is in alignment with the consolidated plan and the annual action plan; and
- The Center for Hope and Safety is required to annually report the number of clients assisted that are within the county’s entitlement jurisdiction:
 - The county’s entitlement jurisdiction does not include the City of Salem or the City of Gates.

Board discussion:

None.

MOTION: Commissioner Cameron moved to approve the Community Development Block Grant Subrecipient Agreement with the Center for Hope and Safety in the amount of \$250,000 for the HOPE Plaza Construction Project through December 31, 2023. Seconded by Commissioner Willis; motion carried. A voice vote was unanimous.

(Video Time 00:33:26)

CLERK’S OFFICE

8. Consider approval of Amendment #8 to the Contract for Services with Avenu Insights and Analytics, LLC to add \$240,000 for a new contract total of \$2,091,853 for services related to the Land Records Management System Licensing and Recording Project and extend the term date to June 30, 2023. –Bill Burgess

Summary of presentation:

- The amendment gives the county the ability to cancel the contract within 60 days:
 - The county is working on moving to a new system:
 - Staff is looking at eight proposals that were submitted:
 - Implementation of a new system will take nine months or longer.
- The Clerk’s Office is working on the November 2022 election, and they will start working on the May 2023 election in January 2023.

Board discussion:

- The request for proposals (RFPs) was published on January 28, 2022, it closed on April 19, 2022, and review of the RFPs began on April 29, 2022;
- Commissioner Willis asked when the review of the RFPs would be completed:
 - Mr. Burgess said they should be completed within the next few weeks.
- The Commissioners would like to know why the review of the RFPs is taking so long:
 - The Commissioners think that two months is plenty of time to review the submissions, and to make a decision.
- The Clerk's Office has been using the current system for over 20 years;
- The Clerk's Office wants to make sure that they choose the right system, and that it is configured properly;
- The May election caused a delay in the RFP review process;
- The Clerk's Office needs to finish the RFP process before they get busy with another election;
- Commissioner Willis would like the Clerk's Office to commit to a date the review for the new system will be done, and a date for implementation;
- The scoring of RFPs is done;
- Staff needs to review the scoring, determine the next steps, determine where more information is required, and set up demonstrations; and
- Ms. Fritz will coordinate with the Clerk's Office to provide the Commissioners with a date for the close of the RFP review, and she will participate in the process to help move it forward.

MOTION: Commissioner Willis moved to approve Amendment #8 to the Contract for Services with Avenu Insights and Analytics, LLC to add \$240,000 for a new contract total of \$2,091,853 for services related to the Land Records Management System Licensing and Recording Project and extend the term date to June 30, 2023. Seconded by Commissioner Cameron; motion carried. A voice vote was unanimous.

(Video Time 00:41:49)

Marion County Clerk, Bill Burgess provided an update on the recent election:

- There was approximately a 35 percent turnout;
- Over 76,640 ballots were received:
 - 75,419 ballots were counted;
 - 458 ballots were received too late; and
 - 765 ballots had signature issues that were not resolved.
- The district attorney and the appellate judge position 8 races were recounted:
 - The hand counts for the precincts that were recounted were the same as the machine count.
- The Salem City Council Ward 4 race was also recounted:

- The hand count was the same as the machine count.
- The Clerk's Office is still receiving requests for information on the November 2020 election; and
- A couple of key employees are retiring, and they will need to be replaced.

(Video Time 00:20:51)

HUMAN RESOURCES

9. Consider approval of the ratification of the Marion County Employees Association (MCEA) Collective Bargaining Agreement (CBA) for 2022-2024. –Salvador Llerenas
(Motion made and approved to move item up on the agenda.)

(Video Time 00:27:14)

10. Consider approval of the ratification of the Oregon Nurses Association (ONA) Collective Bargaining Agreement (CBA) for 2022-2024. –Salvador Llerenas
(Motion made and approved to move item up on the agenda.)

(Video Time 00:45:30)

JUVENILE DEPARTMENT

11. Consider approval of Amendment #9 to the Contract for Services with Trinity Services Group, Inc. to add \$150,000 for a new contract total of \$550,000 and extend the term date to June 30, 2023, for food service management services. –Troy Gregg

Summary of presentation:

- Trinity Services Group, Inc. provides lunches, dinners, and snacks for the Guaranteed Attendance Program and detention at the juvenile facility.

Board discussion:

None.

MOTION: Commissioner Cameron moved to approve Amendment #9 to the Contract for Services with Trinity Services Group, Inc. to add \$150,000 for a new contract total of \$550,000 and extend the term date to June 30, 2023, for food service management services. Seconded by Commissioner Willis; motion carried. A voice vote was unanimous.

(Video Time 00:47:16)

PUBLIC WORKS

12. Consider approval of Amendment #2 to the Agriculture and Engineering Professional Services Agreement with DOWL, LLC. to add \$370,316.36 for a new contract total of \$1,172,879.28 to restructure the existing preliminary engineering and construction engineering tasks, add the final design tasks and deliverables for the North Fork Slide Stabilization Project, and extend the contract through July 31, 2025. –Lani Radtke

Summary of presentation:

- Four slides occurred on North Fork Road;
- One slide was addressed approximately ten years ago;
- The three remaining slides are between mile posts 4.9 and 5.5;
- The county hired DOWL, LLC to do the geotechnical analysis, concept design, and cost estimates for the three slides;
- Slide #2 was identified as the greatest hazard, the most expensive to fix, and the highest priority;
- Western Federal Lands is providing the county with an additional \$3.1 million to work on mitigating slide #2;
- The contract amendment includes the following tasks to complete the final design, environmental, and right of way phases:
 - Environmental permitting;
 - Drainage design;
 - Utility coordination;
 - Roadway design;
 - Traffic engineering; and
 - Cost estimating.
- Construction on the project would occur in 2025 and 2026.

Board discussion:

- The project is eligible for Western Federal Lands funding because North Fork Road provides access to federal lands; and
- Oregon has received the most Western Federal Lands funding of any state in the country.

MOTION: Commissioner Willis moved to approve Amendment #2 to the Agriculture and Engineering Professional Services Agreement with DOWL, LLC. to add \$370,316.36 for a new contract total of \$1,172,879.28 to restructure the existing preliminary engineering and construction engineering tasks, add the final design tasks and deliverables for the North Fork Slide Stabilization Project, and extend the contract through July 31, 2025. Seconded by Commissioner Cameron; motion carried. A voice vote was unanimous.

(Video Time 00:52:48)

Commissioner Bethell recessed the general meeting and opened a public hearing.

PUBLIC HEARINGS

9:30 A.M.

PUBLIC WORKS

A. Public hearing to consider an appeal of the hearings officer's decision denying Administrative Review (AR) Case #21-038/Joshua Fogarty. –Lindsey King and Scott Norris

Summary of presentation:

- This public hearing is to consider an appeal of the hearings officer's decision denying the application for an administrative review to determine whether a Measure 49 remains valid on a 13.53-acre property consisting of two tax lots in an Exclusive Farm Use zone;
- On January 21, 2022, the planning director issued a recommendation of denial based on available evidence that the ten-year timeline expired on June 14, 2010;
- The hearings officer held a public hearing on March 10, 2022, and the record was left open until March 31, 2022;
- On May 13, 2022, the hearings officer issued a decision of denial based on all submitted evidence;
- On May 31, 2022, the decision of denial was appealed to the Board of Commissioners;
- In the executive summary of the decision, the hearings officer stated that the ten-year timeline had expired on June 14, 2010, at the conveyance of the property to the beneficiaries;
- The hearings officer concluded that the distribution of the property from the trustee to the beneficiaries by warranty deed on June 14, 2010, triggered the development clock, and no dwelling was established within that time frame;
- Since no dwelling was established within the allowed timeframe, measure 49 was rendered void, and the property is no longer eligible for a homesite through the Measure 49 order;
- The following are the applicant's grounds for appeal:
 - The hearings officer's interpretation of "owner" as used in measure 49 contradicts the text and context of applicable Oregon law;
 - The death of the claimant does not affect Measure 49 rights; and
 - A conveyance from a trustee to the claimant, and current owner of the property, does not trigger the ten-year period.
- The Board has the following options:
 - Remand the matter back to the hearings officer requiring an agreement from the applicant to extend the 150-day decision making deadline;
 - Deny the request and uphold the hearings officer's decision; or
 - Approve the request, stating the facts and evidence upon which the approval is based.

Board discussion:

- Commissioner Willis noted that in the hearings officer's decision, the hearings officer states that the "applicant correctly states that if the trust had not existed, the right to prosecute the Measure 49 claim and establish a homesite on the subject property would have passed to the living children of Mary Ruhl Dodds without triggering the ten-year development period":
 - Mr. Norris stated that the above paragraph concludes with "but, the trust did exist, and that right passed to the trustee when the trust became irrevocable"; and
 - Mr. Norris thinks that the hearings officer stated the above because of section 10 of Measure 49 which states the following:
 - If a claimant is an individual, the entitlement to prosecute the claim under section 6, 7, or 9 of Chapter 424 Oregon laws 2007, and an authorization to use the property provided by a waiver under section 6, 7, or 9 of Chapter 424 Oregon laws 2007 is:
 - (a) not affected by the death of the claimant if the death occurs on or after December 6, 2007; and
 - (b) passes to that person that acquires the property by devise or operation of law.
- Commissioner Willis stated that if the Board finds that the property passed to Gretchen Rhyne and Justine Fogarty by devise or operation of law, the triggering event would not be June 14, 2010:
 - The triggering event would be when Gretchen Rhyne transferred her interest to Justine Fogarty in 2015;
 - Mr. Norris stated that the key terms in subsection 10 of Measure 49 is located in subsection b which states "passes to the person that acquires the property by devise or operation of law":
 - The following questions need to be answered:
 - What is the property that transfers in terms of operation of law; and
 - In the context of this case does the death of the settlor of a revocable trust pass the fee title to the property to the beneficiaries by operation of law, as opposed to by operation of the terms of the trust.
- Commissioner Willis wanted to clarify that the reason why, if there wasn't a trust, they would be able to develop the property is because of section 10:
 - If the Board were to find that the claimant, an individual, died on or after December 6, 2007, and the property passed to the person that acquired the property by devise or operation of law, then the applicant could move forward and develop the property; and
 - Mr. Norris agreed that the above would have to be the Board's findings for the applicant to have a favorable decision.

Testimony:
Support:

Alan Sorem, attorney for the applicant:

- This case comes down to a narrow statutory interpretation and context of Measure 49;
- The Dodds family acquired the property in the late 1950s:
 - At that time the property and surrounding area were in the county, and there was no active zoning restricting the right to develop a home.
- Currently the property is surrounded by land zoned urban transition and acreage residential (AR);
- In the 1970s all the land in the area was zoned AR;
- The date of acquisition for the purpose of the Measure 49 claim was deemed to be 1979;
- For estate planning purposes the property was transferred to a third party, and then reacquired in 1979:
 - The Department of Land Conservation and Development (DLCD) stated that even though the property was zoned AR, it was subject to the interim statewide land use planning goals:
 - Between 1973 and 1981 the state had their first draft of statewide planning goals, but it was confusing on how to apply them:
 - The state said that if a property was less than 20 acres, one house could be built on the property; and
 - If the property was bigger than 20 acres, additional houses could be built.
- The state acknowledged that the family would be able to develop at least one homesite;
- In 2006 Mary Dodds applied for a Measure 37 claim:
 - The law was changed in late 2007:
 - The state sent out notices to claimant holders that they needed to refile:
 - Ms. Dodds refiled in May 2008.
 - Ms. Dodds passed away in October 2008 while her claim was being processed;
 - The state issued its Measure 49 order in June 2010, granting its approval:
 - In a footnote of the order the state acknowledged that they were aware that Ms. Dodds had died;
 - The footnote stated that under Measure 49, if a claimant dies on or after December 6, 2007, entitlement to prosecute the claim passes to the person who acquires the claim property by devise or by operation of law; and
 - The order does not say that it expires in ten years.
- At the time the Measure 49 order was issued by the state, the property was in a trust that was established in 1992:
 - The trust assets were professionally managed.
- When Ms. Dodds died, her two daughters, Gretchen and Justine, were her beneficiaries;
- The following is defined under Oregon trust law:

- The beneficiary is the person that has a present or future beneficial interest in the trust, whether vested or contingent;
- The interests of a beneficiary under a revocable or irrevocable trust vest when the trust become irrevocable; and
- When an individual dies their trust becomes irrevocable and cannot be changed.
- Following is a definition of owner as outlined in Measure 49:
 - If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust is the owner, except that when the trust becomes irrevocable only the trustee is the owner.
- The following Measure 49 rule applies when an individual dies and there is a transfer of property:
 - There is no time limit on when an authorization granted under section 6, 7, or 9 of the 2007 Act must be carried out, except that once the owner who obtained the authorization conveys the property to a person other than the owner's spouse or the trustee of a revocable trust in which the owner is the settlor, the subsequent owner of the property must create the lots or parcels and establish the dwellings authorized by a waiver under section 6, 7 or 9 of the 2007 Act within 10 years of the conveyance.
- When an individual conveys a property to their spouse, or a trustee of a revocable trust, the ten-year period is not triggered;
- The following action would trigger the ten-year period:
 - The owner who obtained the authorization conveys the property, then the subsequent owner must create the lots.
- The hearings officer deemed the subsequent owners of the property to be the beneficiaries of the trust, Gretchen and Justine:
 - The applicant states that Gretchen and Justine are not subsequent owners, that they had a current possessory ownership interest in the property that was vested when their mother died.
- One of the alternative findings the applicant would like the Board to consider and grant, is that the right to the dwelling was established prior to the expiration date in June 2020:
 - Mr. Fogarty acquired the land, obtained permits, constructed an outbuilding, and completed more than 50 percent of the expenditures to build a residence.

Board discussion:

- Commissioner Willis stated that the issue is with section 10 that explicitly acknowledges a situation where a property is conveyed to someone other than the owner's spouse or the trustee of a revocable trust;
- The hearings officer acknowledged that if Gretchen and Justine had received the property through a will, or if Ms. Dodds had died without a will, then the ten-year time period would not apply;
- Commissioner Willis stated that the determination the Commissioners have to make is whether when the property passed to Gretchen and Justine, did they acquire it by devise or operation of law:

- If Gretchen and Justine acquired the property by operation of law the ownership analysis is irrelevant; and
- If Ms. Dodds is an individual, and she died after 2007, and if the individuals who inherited the property acquired it by operation of law, then the ten-year time period does not apply.
- The term operation of law means that even if there is not an expressed act, an event has occurred, such as an individual's interest becoming vested;
- Under the Uniform Trust Code if someone has a revocable trust that becomes irrevocable upon their death, when they die the beneficiary's real property interest immediately vests by operation of law;
- Gretchen and Justine acquired a real property interest by operation of law at the time of Ms. Dodds' death;
- On documentation submitted by DLCD, in footnote 2, they state that because Ms. Dodds died, at the time of death, that was a conveyance;
- The state disagrees with the hearings officer and says that under any circumstances the ten-year period would be triggered:
 - The applicant disagrees with the state.
- The hearings officer's position is that conveyance of the deed actually conveys the property to an individual;
- All of the following interests transfer by operation of law, at the moment of death, to the beneficiaries:
 - The right to use a property, to enjoy the profit from the property, to be responsible for the losses, and to physically possess it.
- Only the legal title requires the deed to move from one person to another;
- There are fraudulent transfers of deeds:
 - There are many events where a deed is not the trigger.
- Once Justine Fogarty transferred the property to Joshua Fogarty, Joshua Fogarty became the subsequent owner under section 7 and the ten-year time period began when he received title to the property.

Joshua Fogarty:

- Mr. Fogarty is the applicant;
- He has been playing on, maintaining, and developing the property for 45 years;
- Immediately after buying the land, he obtained multiple permits and invested approximately \$300,000 to get the property to the point where he could build a house, including the following tasks:
 - Permitted and invested in building a driveway;
 - Permitted and brought in 440-amp power service to service a pole barn and a house;
 - Permitted and built a septic system that can service a pole barn and a house; and
 - Permitted a well and filed with the state which cost just under \$50,000.
- Mr. Fogarty planned on borrowing approximately \$300,000 to build a house;

- The land has never been, and never will be farmed because it is poor farmland;
- Mr. Fogarty would not have made such a large investment in the property if he had known that he could not build a house;
- He has installed all the infrastructure and utilities required to build a house;
- He was not able to obtain final permits for the house before the deadline that DLCD and the hearings officer believe applies to the property:
 - Wildfires, an ice storm, and a worldwide pandemic that resulted in staggering material prices and a lack of contractors, all played a role in his delay in filing for the house permit.
- Mr. Fogarty purchased his house plans in November 2019;
- He does not agree with the claim by Friends of Marion County that getting permits and inspections has not been affected by the pandemic;
- He is not asking to develop farmland; he is asking to develop a house on class six soil; and
- He would like the property to remain a home site within his family.

Board discussion:

- The finding that the dwelling was essentially established was not made before the hearings officer, but it was included in the original application materials:
 - Ms. Vetto suggested that the application could be remanded back to the hearings officer with an extension if the applicant wanted to make that argument;
 - The timeline in the original application materials included the permit record history; and
 - The Board could make the finding that the dwelling was essentially established within the required timeline.

Justine Fogarty:

- Shortly after her mother died, Ms. Fogarty called DLCD and they explained to her that the ten-year time limit would not start until the property was no longer in her and her sister's names:
 - She received no documentation regarding the conversation; and
 - She does not know the name of the individual she spoke with.
- Her family beholds and loves the property.

Chuck Sheketoff:

- Mr. Sheketoff lives on the adjoining property in the original home built by Dr. and Mrs. Dodds;
- He has submitted written comments to the administrative hearing and to the Board;
- The county has already given passive approval for a house by approving the driveway, electrical, and septic system;
- The issue of ownership consistent with trust law needs to be considered;
- Measure 49 is poorly worded and does not make sense; and

- Mr. Sheketoff thinks that the application should be approved.

Board discussion:

- The hearings officer stated that the trust was the claimant, but Mr. Sorem says the original claimant is Mary Dodds:
 - The statutory definition of claimant is the person who files the claim; and
 - The trust did not file the claim, Mary Dodds filed the claim.

Testimony:

Opposition:

Roger Kaye:

- Mr. Kaye is President of Friends of Marion County;
- Friends of Marion County is an independent 501(c)(3) farmland protection organization founded in 1998:
 - Their mission is to protect farm and forest land, parks, and open space in Marion County.
- Friends of Marion County oppose and request denial of the administrative review to grant a Measure 37 claim on a 13.53-acre property consisting of two tax lots in an EFU zone located in the 14300 block of Evans Valley Road NE in Silverton;
- Friends of Marion County submitted letters on 12/30/2021, 3/10/2022, and appeared at the 5/13/2022 public hearing:
 - They followed up with a detailed analysis in their letter today of why the property development history requires a decision of denial.
- DLCD submitted comments on 1/3/2022 which argued that the application should be denied;
- The Marion County planning administrator also says the application should be denied;
- On 5/13/2022, the Marion County hearings officer found that the application should be denied;
- The legal arguments presented by Friends of Marion County show that the homesite approval should be denied, and they show that the development history arrives at the same conclusion;
- The application was filed with the planning division on 12/17/2021, approximately 6 months after the ten-year deadline for the homesite had expired;
- The applicant began permitting and construction on the property on 4/3/2019, continuing to 6/22/2020:
 - The construction included septic service, driveway access, utility service, and an agricultural exempt building:
 - Agricultural exempt buildings are permitted uses on EFU lands and are not subject to the Measure 37/49 statute; and
 - The septic work, driveway access, plumbing, and utility permits were designed to service both the agricultural exempt and residential buildings:

- The specific permits and inspection reports are attached to the letter submitted by the Friends of Marion County.
- There were no restrictions to filing permit applications or obtaining permit inspections due to COVID-19:
 - The planning division was fully operational through email, fax, phone, and zoom communications, therefore the applicant was not prevented from getting his applications submitted, properly inspected, and permits approved; and
 - The planning division opened to in-person service in May or June 2020.
- The applicant discovered that the ten-year time period had expired when he filed for a residential building permit;
- The Measure 37 statute states that the subsequent owner “must create the lots or parcels” and “establish the dwellings” within ten years of the conveyance;
- Merriam-Webster defines “establish” as “to institute permanently by enactment or agreement”;
- Marion County uses a certificate of residential occupancy to determine if the dwelling meets the definition of “establish the dwellings” under the statute:
 - The certificate is issued only if all the permits, inspections, and health and safety requirements have been met; and
 - If the certificate of residential occupancy had preceded the ten-year deadline of the conveyance, then the county could approve the application for the dwelling:
 - The applicant failed this criterion, and the application was denied.
- The beneficiaries of the trust should have realized that the ten-year deadline for development required them to develop the homesite;
- The homesite was not developed in the time permitted, and therefore became ineligible to take advantage of the waiver;
- The Friends of Marion County oppose and request denial of AR21-038;
- Attached to the submitted letter is a copy of the certificate of residential occupancy, and it states the following:
 - This structure has been inspected and approved according to the applicable codes, regulations, and laws that were in effect at the time the permit was issued, all filings have been completed and this dwelling is approved for occupancy.
- The application under review has not received a certificate of residential occupancy.

Board discussion:

Scott Norris:

- The core of the applicant’s claim is that the beneficiaries’ interest in a revocable trust vests fee title in the beneficiaries upon the death of the person who created the trust:
 - Mr. Norris does not believe this is correct;
 - Commissioner Willis stated that the operative language is “acquires the property”:
 - Fee title is a type of property ownership, but it is not the only type.
 - Mr. Norris referenced the following which is part of subsection 10 of Measure 49:
 - An authorization to use the property passes to the person that acquires the property by devise or by operation of law.

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- Oregon has adopted the Uniform Trust Code that states the following:
 - The interests of a beneficiary of a revocable or irrevocable trust vest when the trust becomes irrevocable, and not later:
 - It is the interest of the beneficiary that vests, not fee title or outright ownership.
- Commissioner Willis stated that at the moment a trust becomes irrevocable the trustee can make certain decisions with regards to the property, but cannot make other decisions with regards to the property, in a similar way the beneficiary has interests in the property that vest when the trust becomes irrevocable:
 - A focus on fee title is not necessary to determine that the person acquired the property at the time that the trust became irrevocable.
- Oregon statute describes the fiduciary duties of a trustee as follows:
 - “The trustee can exercise all powers over the trust property that an unmarried financially capable owner has over individually owned property, and any other powers appropriate to achieve the proper investment, management, and distribution of the trust property.”
- A trustee has broad powers over the management of trust property consistent with the terms of the trust and with the trustee’s fiduciary duties;
- If the beneficiaries had ownership over the property upon the death of the settlor, then the deed from the trustee to the beneficiaries was a meaningless act;
- Commissioner Willis does not think they have to get into the ownership question:
 - Ownership is a statutorily defined term in Measure 49.
- Commissioner Willis stated that when section 10 is being interpreted, the issue becomes whether the person acquired the property by devise or operation of law:
 - The term ownership does not have to be interpreted to determine if the person acquired the property by devise or operation of law; and
 - It needs to be determined if the beneficiaries in this case acquired the property by operation of law:
 - It can be said that they did acquire the property by operation of law because the trustee could not have transferred the property to whoever he wanted to at the time of the settlor’s death.
- Commissioner Willis stated that the Board has to find the following:
 - That the claimant was an individual, Mary Dodds;
 - That the claimant died after December 2007; and
 - That Ms. Dodds’ beneficiaries acquired the property by operation of law.
- There is nothing in law that compels a settlor to distribute the residue of a trust to the beneficiaries:
 - The settlor could create the trust to distribute the residue to a charity, another trust, or in some other way; and
 - It is the terms of the trust itself that compels the distribution.
- Commissioner Willis stated that at the time of the settlor’s death the terms of the trust cannot be changed, the trust is irrevocable;

- The issue of vested rights and actions that have been taken since the acquisition of a Measure 49 order has not been legally explored; and
- Measure 49 may not be the applicant's only avenue for obtaining a permit for the construction of a residence.

Testimony:

Support:

Alan Sorem, attorney for the applicant:

- Mr. Sorem would like to make the following points in closing:
 - There is ambiguity in the statute;
 - Measure 49 claims both the right to prosecute the claim and the right to use the Measure 49 orders expressly by the text, not affected by the death, and they go to the individuals who inherit them by devise or by operation of law;
 - Beneficiaries do have a vested property interest, an ownership interest, and by operation of law they did inherit that; and
 - The dwelling was established prior to the expiration date suggested by the state and the hearings officer.

Board discussion:

- Mr. Sorem asked the Board to close the hearing and close the record:
 - The applicant has no new evidence to present to the Board.

MOTION: Commissioner Willis moved to close the public hearing and approve the request with the following findings: That we find that Mary was the claimant, and she is an individual; that we find that she died after December 6, 2007; and that we find that Gretchen and Justine acquired the property by operation of law; and that we find that Joshua established dwelling prior to the year 2020. Seconded by Commissioner Cameron; motion carried. A voice vote was unanimous.

(Video Time 02:20:48)

Commissioner Bethell returned to the regular agenda.

Commissioner Cameron read the calendar.

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



CHAIR



COMMISSIONER



COMMISSIONER

Board Sessions can be viewed on-line at

<https://www.youtube.com/playlist?list=PLSUQ1gg6M78UsBE3q6w4rdf59Z5rXkEi5>