



Oregon

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December 10, 2008

By Facsimile (541-774-6705) and Hand Delivery

Dennis C.W. Smith, Chair
Jackson County Board of Commissioners
Jackson County Courthouse, Room 200
10 South Oakdale
Medford, OR 97501

RE: Jackson County File No. SUB2007-00132 (Ferns)

Dear Chair Smith:

I am writing to express the support of the Oregon Department of Land Conservation and Development (DLCD) for the decision of the Jackson County Planning Commission concerning this proposed 12-lot subdivision on land zoned for exclusive farm use (EFU). DLCD previously submitted a comment to the Planning Commission on March 10, 2008 and requests that the Board of County Commissioners consider the Department's prior comments as well as this letter, and place both in the record.

The State agrees with the Planning Commission's conclusion that

[T]he application does not sufficiently address the current land division criteria and other County plan and zoning criteria that would be required for an approval of the subdivision based on the evidence in the record.

The Proposed Subdivision is Unlawful Under State Statutes and Rules

In addition to the Planning Commission's conclusion that the application does not comply with applicable county land use regulations, the application also does not comply with applicable state statutes and rules. Specifically, ORS 215.780(1)(a) provides that the minimum lot size in all counties for land zoned for exclusive farm use is at least eighty acres. In addition, ORS 215.263 also prohibits the creation of new lots on land zoned for exclusive farm use for the purpose of establishing nonfarm dwellings unless the lots exceed the size limitation set by ORS 215.780 (again, at least 80 acres).

These statutes apply directly to this application as standards and criteria regardless of the status of Jackson County's ordinances. It makes no difference whether the county's land use regulations are acknowledged or not, or whether the county's land use regulations have been waived or not, the statutes apply and must be followed. This proposition was confirmed in two separate cases under Ballot Measure 37 (the county was the defendant/respondent in both cases): *Jackson County v. All Electors*, Jackson County Circuit Court Case No. No. 05-2993-E-3(2) (Order on Cross Motions for Summary Judgment, dated January 19, 2007); and *DLCD v. Jackson County*, 53 Or. LUBA 580 (2007). In the first case, Jackson County had enacted an ordinance that directed its employees to grant land use permits based on county waivers under Measure 37, regardless of whether the state had granted a state waiver. The circuit court held that:

"* * * Section 2 of the Order purports to direct county employees to grant permits without consideration of, or regard for, state law. The Oregon Supreme Court and the Court of Appeals both have made it clear counties must consider applicable state laws when deciding whether to issue land use-related permits, even after the county's comprehensive plans have been acknowledged and accepted by the State. *Smith v. Clackamas County*, 313 Or. 519, 524, 524n5 (1992) ("sittings of nonfarm dwellings in EFU zones ... remain subject to certain statutes," e.g. ORS 215.263(3) & (4), even after the county's "comprehensive and implementing ordinances have been acknowledged"); *Foland v. Jackson County*, 311 Or. 167, 180 n10 (1991) ("[t]he local government's decision must, of course, also comply with any relevant statutes"); *Forster v. Polk County*, 115 Or. App. 475, 478 (1992) (both applicable state statutes and county ordinances and rules "must be interpreted and applied by the county in making its decision" whether to permit construction of a dwelling in an EFU zone"); *Kenagy v. Benton County*, 115 Or. App. 131, 136, 136 n3 (1992) ("relevant state statutes remain applicable to local land use decisions after acknowledgment," i.e., post-acknowledgment "the statutes are also applicable and the [county's] decisions must satisfy any statutory requirements that are not embodied in the local law"); *Marquam Farms Corp. v. Multnomah County*, 147 Or. App. 368, 380 (1997) ("relevant state statutes retain their independent applicability to local land use decisions after the local legislation has been acknowledged," in that case, increasing the size of a dog facility on EFU-zoned land).

Because the county could not lawfully approve land use permits for most uses without a waiver of state statutes and rules, the court declared sections 1 and 2 of the county's ordinance unenforceable and void. Similarly, a county decision to approve the proposed subdivision application at issue in this case without prior action by the state to waive applicable state statutes and rules¹ would also be unenforceable and void.

The Oregon Land Use Board of Appeals has agreed with DLCD and with the Jackson County Circuit Court. After the county approved a subdivision application based on a waiver of county ordinances, but prior to any waiver of state statutes or rules, DLCD appealed the decision to

¹ In addition to ORS 215.780 and 215.263, the proposed subdivision also is not permitted under applicable rules of the Oregon Land Conservation and Development Commission (LCDC). In particular, OAR 660-033-0100(1) also sets a minimum parcel or lot size for land zoned EFU of eighty acres.

LUBA. The county then conceded error, attempting to preserve a remand of the case (rather than an outright reversal). LUBA reversed the county's decision as "prohibited as a matter of law" and noted that:

"We agree with DLCD that nothing in the challenged decision or elsewhere cited to us authorizes the county to approve development that is inconsistent with applicable state laws and regulations, unless and until those state laws and regulations are waived or otherwise rendered without effect under Ballot Measure 37."

Jackson County has been directed twice already that it may not approve a land use permit for a use that is unlawful under state statutes or rules.

The Status of State Measure 37 Waivers for Robert Ferns

The state granted a waiver to Mr. Robert Ferns under Measure 37 (Final Order on Claim No. M130020). In that order, the state waived "applicable provisions of Goal 3, ORS 215 and OAR 660, division 33 to allow Mr. Ferns to divide his property into up to 28 lots or parcels, and to establish a dwelling on each lot or parcel."²

However, the Oregon Supreme Court has held that the state's waivers under Measure 37 are no longer in effect. *Corey v. DLCD*, 344 Or 457 (2008) ("Measure 49 by its terms deprives Measure 37 waivers -- and *all* orders disposing of Measure 37 claims -- of any continuing viability, with a single exception that does not apply to plaintiffs' claim. Thus, after December 6, 2007 (the effective date of Measure 49), the final order at issue in the present case had no legal effect.). The Court of Appeals also has held that any rights an owner had under Measure 37 are converted to rights under Measure 49, and must be analyzed under that law. *Frank v. DLCD*, 217 Or App 498 (2008).

In addition, LCDC rules implementing Measure 49 clearly provide both that a state waiver is required in this situation:

"OAR 660-041-0040. Before a Claimant could lawfully use Measure 37 Claim Property for a use under a Measure 37 Waiver, the Claimant must have obtained a DLCD Measure 37 Waiver for that use of the Measure 37 Claim Property in all cases where that use was restricted by a DLCD Regulation or by a city, county or Metro Land Use Regulation that implements a DLCD Regulation. These cases include, but are not limited to, all cases where the use is a use of land, and the Measure 37 Claim Property includes:

(1) Land zoned for farm use under Goal 3; * * *"

and that "[a]ny authorization for a Claimant to use Measure 37 Claim Property without application of a DLCD Regulation provided by a DLCD Measure 37 Waiver expired on

² The property described in the Measure 37 claim by Mr. Ferns to the state is the same as the property at issue in this land use application (T37S, R1E, Section 30, Tax Lot 300 and Section 31, Tax Lots 100 and 500).

December 6, 2007, as did the effect of any order of DLCD denying a Claim." OAR 660-041-0060.

In sum, under the terms of Measure 49, applicable court decisions, and LCDC rules and irrespective of the status of the county's Measure 37 waivers, the county may not lawfully approve a land use permit for the proposed subdivision because that subdivision is unlawful under state statutes and rules and the state's waiver of those statutes and rules is no longer in effect.

Effect of the CFCC Decision

The State anticipates that applicants will argue that the application must be approved because a federal judge has recently determined that the *county's* Measure 37 waivers in the twenty cases at issue in that litigation are contracts. See *Citizens for Constitutional Fairness, et al., v. Jackson County, et al.*, USDC Civ. No. 08-3015-PA (Findings of Fact and Conclusions of Law issued November 12, 2008) The *Citizens* case has no legal relevance to the county's decision on this land use application for two reasons.

First, the federal decision applied only to the Measure 37 waivers issued by the County to the named plaintiffs in the *Citizens* case. The court did not enter a general judgment as to all county waivers under Measure 37, and did not analyze the county's waiver to Mr. Ferns.

Second, the State was not a party to the lawsuit, and the decision does not reinstate the State waivers which, as explained above and in DLCD's March 10, 2008 comment, expired under the terms of Measure 49.³ As both the State circuit court and the Land Use Board of Appeals have held, Measure 37 requires land owners to get waivers from both the state and the county before developing property. The federal court's decision in the *Citizens* case does not change this requirement. Accordingly, even if the county honors its own waivers, without a valid state waiver the Planning Commission's decision denying the Ferns' application must be upheld because the applicants do not have a valid State waiver of the state statutes and rules that prohibit the proposed subdivision.

Conclusion

We understand that there may be some discussion of approving the proposed subdivision, subject to a condition requiring Mr. Ferns to obtain a state waiver prior to dividing the property. We do not believe the county may lawfully follow this route under the circumstances of this case unless there is some evidence that the applicant has a vested right to complete the proposed subdivision and is pursuing a vested rights determination.

³ The State disagrees with the Federal decision's interpretation of Measure 37 and believes that it is inconsistent with Oregon State Supreme Court decisions *Corey v. Dept of Land Conser. and Develop*, 344 Or 457 (2008) and *MacPherson v. DAS*, 340 Or 117 (2006). *Corey* determined that the effect of Measure 37 waivers was extinguished under Measure 49 unless the claimant had vested a use that was consistent with his or her Measure 37 waivers, which has not occurred here. *Macpherson* determined that Measure 37 did not create a contract. *Corey* and *Macpherson* are binding on the State, the County and all Measure 37 claimants.

We appreciate your careful consideration of these comments. We understand that the court's decision in the *Citizens* case has caused confusion in light of the dual requirements for county and state waivers established in other cases, and we will continue to try and work to resolve the resulting uncertainty as quickly as possible.

Please notify us of your decision and any further action taken on the application. If you would like to discuss this further, feel free to contact me at (503)373-0050 x 280.

Yours very truly,

A handwritten signature in black ink, appearing to read "R. Whitman", with a long horizontal flourish extending to the right.

Richard Whitman
Director

cc: Francisco Hernandez, Planner
Mike Jewett, Special Counsel
Frank Hammond, County Counsel
John Renz, DLCD Regional Representative
Stacey Posegate, Oregon DOJ

rw/rw/