

2007 WL 5813755 (Or.Cir.) (Trial Order)

Circuit Court of Oregon.

Lane County

Wesley H. HAFFNER, Trustee of the Wesley H. Haffner Revocable LIVING TRUST and Juanita R. Haffner, Trustee of The Juanita R. Haffner Revocable Living Trust, Relators,

v.

LANE COUNTY, Oregon, a political subdivision of the State of Oregon, Defendant,  
Brenda and David Paul Black, Nancy M. and Michael S. Holcomb, Gordon L. Dorn, Robert Cattoche, Annabelle Street, Bill Barnett, Chantal Gaboriau, Nancy L. Steele, Leslie A. Wolf, Stephen R. Stanley, Jonathan S. Levy, Mary Jane Thomas, Paul Rudinsky, Michael J. Rau, and Lisa Ziomkowski-Boten, Intervenor.

No. 16-07-16482.

October 2, 2007.

### **Opinion and Order**

[Karsten H. Rasmussen](#), Circuit Judge.

Todd R. Johnston argued the cause and filed the trial memorandum for Relators.

Liane I. Richardson argued the cause and filed the trial memorandum for Defendant.

Jannett Wilson argued the cause and filed a supplemental briefing for Intervenor.

### **SUMMARY**

Relators, Wesley H. Haffner and Juanita R. Haffner, seek a writ of mandamus compelling Defendant Lane County to issue final Preliminary Subdivision Approval on Relators' Preliminary Subdivision Approval Application. After reviewing the record and hearing oral arguments, this court grants the writ of mandamus.

### **DISCUSSION**

#### **I. Factual and Procedural Background**

The facts in this case are not in dispute. On January 30, 2007, Relators filed an Application for Preliminary Subdivision Approval (Application) with Defendant Lane County. Relators intend to divide a 178 acre parcel of land located at 29230 Gimpl Hill Road in Eugene, Oregon into thirty lots, each lot greater than five acres in size.

Prior to filing this Application, Relators filed for and obtained waivers of [ORS 197.352](#) (hereinafter Measure 37) from both the State<sup>1</sup> and County.<sup>2</sup> Relator Wesley H. Haffner acquired the property on October 18, 1972. At that time the land was zoned to allow land parcels of a minimum one acre in size. Subsequent to Wesley H. Haffners acquisition of the property, Lane County implemented a Rural Comprehensive Plan and land use ordinances, rezoning the property Impacted Forest Land (F-2). Parcels

of land zoned Impacted Forest Land (F-2) are required to maintain a minimum parcel size of 80 acres. Pursuant to Measure 37, Relators filed a claim seeking compensation for the reduction in value caused by rezoning. Both the State and County decided to waive the land use regulations that hindered Relators subdivision plan instead of paying compensation.

The Lane County application review and appeals procedures are contained within Chapter 14 of the Lane County Code (LC). LC 14.050(1)(c) requires that the application, “[a]ddress the appropriate criteria for review and approval of the application and shall contain the necessary supporting information.” In accordance with Lane County Code 14.050, Relators Application was deemed complete on March 6, 2007.<sup>3</sup> On April 12, 2007, an evidentiary hearing was held before Defendant Lane County's Planning Director in accordance with the review procedure in LC 14.100<sup>4</sup> and LC 14.110<sup>5</sup>. On July 11, 2007, the Lane County Planning Director issued a Notice of Pending Land Use Decision that included the Planning Director's approval of the Application with certain conditions.<sup>6</sup> This approval would have become final if no appeals were made before 5:00pm on July 23, 2007. An appeal to the approval of the Application was timely filed on July 23, 2007, and a hearing before Defendant's Hearing Official was set for August 16, 2007.

On August 6, 2007, before the scheduled appeals hearing, Relators filed a Petition for Alternative Writ of Mandamus (OJIN 1). Relators argue that under [ORS 215.427\(1\)](#)<sup>7</sup>, Defendant Lane County was required to take final action on their Application within 150 days from the date the Application was deemed complete. The Application being complete on March 6, 2007, Defendant Lane County had until August 3, 2007, to make a final decision. Having failed to execute a final decision within the required period of time, Relators, under [ORS 215.429](#), were entitled to file a petition for an alternative writ of mandamus commanding Defendant Lane County to issue its final approval of Relators' Application for Preliminary Subdivision Approval.

On August 6, 2007, an Ex Parte Order Allowing Alternative Writ of Mandamus (OJIN 2) was granted. On August 8, 2007, an Order Continuing Proceeding (OJIN 11) until August 29, 2007, was granted allowing an opportunity for any intervenors to file a motion to intervene as allowed by [ORS 34.130\(4\)\(b\)](#)<sup>8</sup>.

Intervenors to this action, landowners near the proposed subdivision, filed their Motion to Intervene (OJIN 13) on August 14, 2007.<sup>9</sup> On August 29, 2007, a hearing was held granting Intervenors' Motion to Intervene (OJIN 21) and continuing the matter to September 14, 2007 (OJIN 24). On September 14, 2007, this court held oral arguments on Relators' Petition for Writ of Mandamus.

Intervenors argue the Application is not subject to a writ of mandamus, and, in the alternative, Relators' Application violates Lane County's Rural Comprehensive Plan and county land use regulations. The Parties agree that Defendant Lane County has failed to take action and make a final decision regarding Relators' Application. The parties further agree that the matter before the court is now whether the court should issue a writ of mandamus requiring Defendant Lane County to issue final approval of Relators' Application for Preliminary Subdivision Approval.

## II. Legal Analysis

This case comes before this court on Relators' Petition for Alternative Writ of Mandamus pursuant to [ORS 215.429](#). [ORS 215.429](#) states:

(1) Except when an applicant requests an extension under [ORS 215.427](#), if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as appropriate, after the application is deemed complete, the applicant may file a petition for a writ of mandamus under [ORS 34.130](#) in the circuit court of the county where the application was submitted to compel the governing body or its designee to issue the approval.

(4) If the governing body does not take final action on an application within 120 days or 150 days, as appropriate, of the date the application is deemed complete, the applicant may elect to proceed with the application according to the applicable provisions of the county comprehensive plan and land use regulations or to file a petition for a writ of mandamus under this section. If the applicant elects to proceed according to the local plan and regulations, the applicant may not file a petition for a writ of mandamus within 14 days after the governing body makes a preliminary decision, provided a final written decision is issued within 14 days of the preliminary decision.

(5) The court shall issue a peremptory writ unless the governing body or any intervenor shows that the approval would violate a substantive provision of the county comprehensive plan or land use regulations as those terms are defined in [ORS 197.015](#). The writ may specify conditions of approval that would otherwise be allowed by the county comprehensive plan or land use regulations.

Under [ORS 215.429\(5\)](#) this court must issue the writ unless the approval of Relators' Application would violate a substantive provision of the Lane County Rural Comprehensive Plan or land use regulations. When conducting this process the court is not reviewing any decisions of Defendant Lane County, but is making its own determination without deference to any previously made decisions. Thus, in this proceeding, unlike a writ of review (in which the court only reviews for errors<sup>10</sup>), the court is analyzing whether Relators' Application violates the county comprehensive plan or land use regulations as a matter of first impression.

The parties dispute what is included within the Application before this court. Relators and Defendant Lane County argue that Relators' Application consists of Relators' original Application as of March 6, 2007, and all subsequent augmentations. Intervenors argue that the writ of mandamus is to compel Defendant to approve the original, unchanged Application as presented when it was deemed complete.

The court holds that the Application before this court consists of the completed Application as filed by Relators on March 6, 2007, and all subsequent changes and amendments enacted before the filing of this mandamus proceeding. Thus, Relators' Application includes all of the conditions included in the Lane County Planning Director's Preliminary Subdivision approval dated July 11, 2007.<sup>11</sup>

#### **A. Justiciability<sup>12</sup>**

In order for a court to rule on any case the matter at issue must be justiciable. “A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests.”<sup>13</sup> The elements of justiciability include that the parties must be adverse, the case must be ripe and not moot, and the parties must have standing.

The interests of the parties in this case are adverse. The parties to this case have genuinely opposing interests in the outcome. Intervenors are all residents of the Gimpl Hill area in Eugene, Oregon, who believe they would be negatively impacted by the subdivision proposed by Relators.<sup>14</sup> Relators are seeking a writ of mandamus from the court and Intervenors want the court to deny that writ.

The case before the court is ripe.<sup>15</sup> This case comes to this court before a final and complete administrative process could be completed.<sup>16</sup> Intervenors submitted testimony to the Planning Director regarding Relators' Application at the Planning Director's evidentiary hearing.<sup>17</sup> Accordingly, Intervenors should have had a right to appeal the Planning Director's decision through the administrative process.<sup>18</sup> Relators, by filing their alternative writ of mandamus,<sup>19</sup> have prevented the administrative process from continuing to the appeals phase.<sup>20</sup> A determination by the court is the sole avenue for Intervenors to be heard. The relief sought by both sides is not prospective. The parties in this case are not asking for an advisory opinion. A decision by the court to grant or not grant the writ will have a practical effect on the rights of the parties. For these same reasons the controversy is not moot.<sup>21</sup>

Intervenors also have standing. [ORS 34.130\(4\)\(a\)](#) states that “any adverse party may intervene in the mandamus proceeding as a matter of right.”<sup>22</sup> The definition of who is an “adverse party” is contained in [ORS 34.105](#). In this statute, an “adverse party” is “a beneficially interested party to a judicial or administrative proceeding from which a mandamus proceeding arises, whose interests are adverse to the relator”<sup>23</sup> The Intervenors in this case are “beneficially interested” in the proceeding. Intervenors have raised the issue of whether Relators' Application violated the Lane County Rural Comprehensive Plan or land use regulations. As described above, Intervenors are all residents of the Gimpl Hill area in Eugene, Oregon, who believe they would be negatively impacted by the development.<sup>24</sup> Intervenors also submitted testimony to the Planning Director regarding Relators' Application.<sup>25</sup> Intervenors are “adverse parties” within the meaning of [ORS 34.105](#). Accordingly, as “adverse parties,” Intervenors have standing under [ORS 34.130\(4\)\(a\)](#).

All the elements of justiciability having been satisfied, the parties have brought a justiciable controversy before this court.

### **B. Use of Mandamus Proceeding**

Intervenors argue that Relators' Application is not subject to a writ of mandamus because it is not a land use permit, limited land use decision, or a zone change application as required by [ORS 215.429](#). Intervenors argue Relators' Application, by not fitting into one of these three categories, is not subject to the 150 day time limitation under [ORS 215.427\(1\)](#) and therefore a writ of mandamus is inappropriate.

[ORS 215.402](#)(4) defines “permit” as “discretionary approval of a proposed development of land under [ORS 215 provisions] or county legislation or regulation adopted pursuant thereto.” Because the Application seeks approval (from Defendant Lane County) of a proposed development of land (a subdivision) on property that is currently zoned Impacted Forest Land (F-2), the Application is a “permit” as described in [ORS 215.402](#)(4) and is thus subject to the 150 day time limitation contained within [ORS 215.427](#).

### **C. The Application does not violate Lane County's Rural Comprehensive Plan**

Intervenors argue that Relators' Application violates both Goal 4 and 14<sup>26</sup> of Lane County's Rural Comprehensive Plan (RCP). However, when Lane County waived the applicable land use regulations that provided the basis for the Relators' Measure 37 claim in their Measure 37 waiver, Lane County waived the restrictive provisions in both Lane County Code (LC) 16.211 and those provisions of the RCP that were implemented by LC 16.211. Additionally, in waving the restrictive provisions of LC 16.211, Lane County also waived those sections of the Lane County Code that were incorporated by reference. This includes the sections of LC chapter 13 dealing with minimum lot size within land zoned Impacted Forest Land (F-2).

When Lane County waived requirements of LC 16.211 its intent was to avoid paying any compensation under [ORS 197.352](#) (Measure 37).<sup>27</sup> This intent would not be satisfied if by issuing a Measure 37 waiver there were still additional components of the RCP that would require the payment of compensation. The waiver of LC 16.211 waived those portions of the RCP that hinder the proposed development and require the payment of compensation; this includes waving the operation of Lane County Goals 4 and 14.

### **D. The Application does not violate Lane County's Land Use Regulations**

The Application in its amended form does not violate any county land use regulations. Arguments on both sides focus on whether the Application would violate LC 13.050(13)(b)<sup>28</sup>, requiring adequate water availability. Intervenors must prove by a preponderance of evidence that there is an inadequate supply of potable water at the proposed development site.<sup>29</sup>

The record reflects differing views by experts on the issue of water availability.<sup>30</sup> Relators have filed the report of EGR & Associates, Inc. (EGR) dated January 29, 2007, in which EGR comes to the conclusion that water is adequate for the proposed development with no adverse impact on existing wells. In addition, Relators filed EGR's Aquifer Test Report conducted February 2007, a report by Bergeson-Boese & Associates dated March 19, 2007, and a report by PBS Engineering and Environmental. The latter two reports both support the methods and conclusions of EGR.

Intervenors have filed numerous letters written by those living near the proposed development site expressing concern for the water situation in the area, letters by two experts expressing concern over EGR's method of testing, and a letter by Jonathan D. Williams, R.G. of Groundwater Science Applications written May 3, 2007, expressing potential adverse effects of the proposed development.

When reviewing the original application, this court takes notice that the Lane County Planning Director, based on the entire record, adopted the findings of EGR & Associates and concluded that there was an adequate supply of water at the time of development.<sup>31</sup>

Intervenors have failed to prove by a preponderance of evidence that there is an inadequate supply of water as required by LC 13.050(13)(b). From the Intervenors standpoint, at best, the evidence on this matter is in equipoise. Accordingly, Intervenors have failed to prove by a preponderance of evidence that the approval of this Application would violate any county land use regulation.

Relators petition for a writ of mandamus is ALLOWED.

IT IS HEREBY ORDERED that the clerk of the court shall issue a writ of mandamus in accordance with the petition, commanding Defendant Lane County to issue its final approval of Relators' Application for a final Preliminary Subdivision Approval.

Relators' attorney shall draft the writ in accordance with this Order.

Dated: October 2, 2007.

<<signature>>

Karsten H. Rasmussen, Circuit Judge

#### Footnotes

<sup>1</sup> In the Matter of the Claim For Compensation under [ORS 197.352](#) (Ballot Measure 37) of Wesley H. and Juanita R. Haffner, claimants (State Measure 37 waiver), Proposed Intervenors' Response to Petition for Writ of Mandamus (OJIN 15), Appendix B.

<sup>2</sup> In the Matter of Considering A Ballot Measure 37 Claim and Deciding Whether to Modify, Remove or Not Apply Restrictive Land Use Regulations in Lieu of Providing Just Compensation (Haffner/PA06-6276) (County Measure waiver), Proposed Intervenors' Response to Petition for Writ of Mandamus (OJIN 15), Appendix C.

<sup>3</sup> Under LC 14.050(3) an application is deemed complete when it “includes the required information, forms and fees.”

<sup>4</sup> LC 14.100 contains the Lane County Planning Director review procedure for applications.

<sup>5</sup> Under LC 14.110(2) the Director may schedule an evidentiary hearing conducted pursuant to the procedure in LC 14.110.

<sup>6</sup> Lane County Planning Director Preliminary Subdivision Approval dated July 11, 2007, Proposed Intervenors' Response to Petition for Writ of Mandamus (OJIN 15), Appendix G.

<sup>7</sup> [ORS 215.427](#)(1) states: “The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under [ORS 215.422](#), within 150 days after the application is deemed complete, except as provided in subsections (3) and (4) of this section.” (Subsections (3) and (4) are not applicable in this case).

<sup>8</sup> [ORS 34.130](#)(4)(b) allows for a motion to intervene to be filed within twenty one days of the filing of a petition for an alternative writ of mandamus.

9 Under [ORS 34.130](#)(4)(b) any adverse party must file their motion to intervene within twenty one days of the filing date the of the petition for writ.

10 [ORS 34.020](#) (“[M]ay have the decision or determination thereof reviewed for errors, as provided in [ORS 34.010](#) and [ORS 34.100](#), and not otherwise”).

11 Lane County Planning Director Preliminary Subdivision Approval dated July 11, 2007, Proposed Intervenor's Response to Petition for Writ of Mandamus (OJIN 15), Appendix G.

12 At this juncture the court must convey its discomfort with the lack of clarity in the statutes regarding this arguably quasi-judicial determination. Since Defendant Lane County's failed to take prompt action as required by statute, this court must now make a determination which is arguably policy in nature and which this court feels would best be dealt with using the process that is in place.

13 *Brown v. Oregon State Bar*, 293 Or 446, 449 (1982).

14 Affidavits of Proposed Intervenor-Defendants, Intervenor's Motion to Intervene (OJIN 13).

15 The question to be asked is, “is this case brought prematurely?” *McIntire v. Forbes*, 322 Or 426, 433 (1996).

16 [ORS 215.429](#)(2) (“Upon filing a petition under ROS 34.130, jurisdiction for all decisions regarding the application, including settlement, shall be with the circuit court”).

17 Record of Lane County (PA-07-5174) regarding Wesley H. Haffner and Juanita R. Haffner's Application for Preliminary Subdivision Approval.

18 LC 14.500-14.600.

19 OJIN 1.

20 [ORS 215.429](#)(2).

21 A case is moot if “a decision no longer will have practical effect [s] on or concerning the rights of the parties.” *Brummett v. Psychiatric Security Review Board*, 315 Or 402, 406 (1993).

22 ORS 32.130(4)(a).

23 ORS 32.130(1).

24 Affidavits of Proposed Intervenor-Defendants, Intervenor's Motion to Intervene (OJIN 13).

25 Record of Lane County (PA-07-5174) regarding Wesley H. Haffner and Juanita R. Haffner's Application for Preliminary Subdivision Approval.

26 For the text of Lane County Goal 4 and 14 see Proposed Intervenor's Response to Petition for Writ of Mandamus (OJIN 15), Appendix E.

27 Lane County, when issuing its Measure 37 waiver stated:

[T]he Board hereby elects not to pay just compensation but in lieu of payment, the request of Wesley H. and Juanita R. Haffner shall be granted and the restrictive provisions of LC 16.211 that limit the development of dwellings and the division of land in the F2 (Impacted Forest) Zone shall not apply to Wesley, H. and Juanita R. Haffner, so they can make application for approval to develop the property. In the Matter of Considering A Ballot Measure 37 Claim and Deciding Whether to Modify, Remove or Not Apply Restrictive Land Use Regulations in Lieu of Providing Just Compensation (Haffner/PA06-6276), Proposed Intervenor's Response to Petition for Writ of Mandamus (OJIN 15), Appendix C.

28 LC 13.050(13)(b) states:

Individual Water Systems. When lots or parcels are to be served by individual water systems, sufficient evidence shall be submitted to show that each parcel or lot will have available at the time of development



an adequate supply of potable water which will meet minimum County standards for drinking water. Aquifer and quality tests as discussed in LC 13,050(13)(c) below may be required.

29 A standard of review in making a determination on a writ of review under [ORS 215.429](#) is not specified. The parties proceeded under the preponderance of evidence standard. No Oregon case law was found indicating any higher standard.

30 Record of Lane County (PA-07-5174) regarding Wesley H. Haffner and Juanita R. Haffner's Application for Preliminary Subdivision Approval.

31 Lane County Planning Director Preliminary Subdivision Approval, dated July 11, 2007, Proposed Intervenor's Response to Petition for Writ of Mandamus (OJIN 15), Appendix G, at 17.