

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

**ORDER NO:** 18-06-12-07      IN THE MATTER OF ELECTING WHETHER OR NOT  
TO HEAR AN APPEAL OF A HEARINGS OFFICIAL  
DECISION AFFIRMING A PLANNING DIRECTOR  
REVOCATION OF AN APPROVED MEASURE 49  
EXCLUSIVE FARM USE DWELLING ON TAX LOT 100,  
ASSESSOR'S MAP 17-05-03 (FILE NO. 509-PA17-  
05309)

**WHEREAS**, the Lane County Hearings Official has made a decision to affirm a Planning Director Revocation of an Approved Measure 49 Exclusive Farm Use Dwelling on Tax Lot 100, Assessor's Map 17-05-03, identified as File No. 509-PA17-05309;

**WHEREAS**, the Lane County Planning Director has received an appeal of the Hearings Official's decision to the Board of County Commissioners pursuant to LC 14.515(3)(f)(ii), requesting that the Board elect not to further hear the appeal and to deem the Hearings Official decision the final decision of the County; and

**WHEREAS**, on April 23, 2018, the Lane County Hearings Official affirmed his April 5, 2018 decision on the application after reviewing the appeal; and


**WHEREAS**, Lane Code 14.600 provides the procedure and criteria that the Board follows in deciding whether or not to conduct an on-the-record hearing for an appeal of a decision by the Hearings Official; and

**WHEREAS**, the Board of County Commissioners has reviewed this matter at a public meeting of the Board.

**NOW, THEREFORE**, the Board of County Commissioners of Lane County **ORDERS** as follows:

1. That the appeal does not comply with the criteria of Lane Code 14.600(3) and therefore, the Board declines to further review the appeal and consider arguments therein. Findings of fact in support of this determination are attached as Exhibit "A."
2. That the Lane County Hearings Official decision dated April 5, 2018, and the letter affirming the decision dated April 23, 2018 attached as Exhibit "B," which found relevant approval criteria are not satisfied, are ratified and affirmed by the Board of County Commissioners as the County's final decision, and the Board expressly agrees with and adopts the Hearings Official's interpretations of provisions of Lane Code 14.700(3).

**ADOPTED** this 12th day of June, 2018

  
\_\_\_\_\_  
Jay Bozlevich, Chair  
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 5-31-18

  
\_\_\_\_\_  
LANE COUNTY OFFICE OF LEGAL COUNSEL

## ORDER EXHIBIT "A"

### FINDINGS IN SUPPORT OF THE ORDER

1. Findings herein are provided for the appeal of Department File No. 509-PA17-05309.
2. Notice of the Hearings Official's decision was mailed to the applicant and parties of record on April 5, 2018.
3. On April 17, 2018, William Sherlock of Hutchinson Cox Attorneys, representing the applicant, filed a timely appeal and requested that the Board of County Commissioners not conduct a hearing on the appeal and deem the Hearings Officer's decision the final decision of the County, pursuant to LC 14.515(3)(f)(ii).
4. On April 23, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.535(1).
5. A decision by the Board to hear the appeal on the record must conclude that a final decision by the Board can be made within the time constraints established by ORS 215.427. In this case, it appears that the deadline for a final decision by the County on this permit was due March 5, 2018, and therefore a final decision by the Board through holding an on-the-record hearing cannot be made within the time constraints of ORS 215.427.
6. In order for the Board to hear arguments on the appeal, Lane Code 14.600(3) requires the appeal to comply with one or more of the following criteria:
  - *The issue is of Countywide significance.*
  - *The issue will reoccur with frequency and there is a need for policy guidance.*
  - *The issue involves a unique environmental resource.*
  - *The Planning Director or Hearings Official recommends review.*
7. The practice of revoking Planning Director decisions made in error is rare. Staff are aware of only two instances where a Planning Director's decision has been revoked in the last several years, including this application.

The assignments of error brought before the Hearings Official have not been raised with frequency. Furthermore, issues raised in the appeal are largely specific to Department of Land Conservation and Development's terms of M49 final orders and provisions of ORS 215.416.

The Hearings Official has interpreted Lane Code 14.700(3), procedures for revocation of an application that was initially reviewed by the Planning Director pursuant to Lane Code 14.100. The Hearings Official's interpretations will provide guidance should similar issues arise in a subsequent application.

Therefore, the Planning Director does not believe that the implications of the decision are of countywide significance, that the issues will occur with frequency, or that there is a need for policy guidance.

8. The issues raised in this appeal do not relate to, or involve, a unique or Goal 5 inventoried environmental resource. This appeal involves interpretation of certain provisions of Lane Code 14.700(3), ORS 215.416, and terms of the State of Oregon Final Order E133363 through E133366. In general, issues raised in the appeal concern procedural requirements for processing of Planning Director revocations and of Planning

Director land use decisions made without a hearing, as well as the terms of the Department of Land Conservation and Development's M49 final order.

9. Based on the above analysis, the Planning Director recommends that the Board elect not to conduct an on-the-record hearing for the appeal, affirm and ratify the Lane County Hearings Official decision as the County's final decision, and expressly agree with and adopt the Hearings Official's interpretations of Lane Code 14.700(3). Additionally, the Hearings Official's decision and letter of affirmation does not include a recommendation that the Board of Commissioners conduct an on-the-record hearing for the appeal.
10. To meet the requirements of Lane Code 14.600(2)(b), the Board is required to adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal. The Board has reviewed this matter at its meeting on June 12, 2018, finds that the appeal does not comply with the criteria of Lane Code Chapter 14.600(3), declines to further review the application, and elects not to hold an on the record hearing for the appeal.
11. The Board therefore elects not to conduct an on-the-record hearing for the appeal, affirm and ratify the Lane County Hearings Official decision as the County's final decision, and expressly agree with and adopt the Hearings Official's interpretations of provisions of Lane Code 14.700(3).



April 23, 2018

Ms. Lydia Kaye, Manager  
Land Management Division  
3050 N. Delta Highway  
Eugene, OR 97408

Re: *Appeal of a decision affirming the Planning Director denial of the request (PA 17-05309) by Vannett Properties, LLC for a Measure 49 dwelling on Tax Lot 100, Assessor's Map 17-05-03.*

Dear Ms. Kaye:

On April 5, 2018, I issued a decision affirming the Planning Director's denial of the request (PA 17-05309) by Vannett Properties, LLC for a Measure 49 dwelling on Tax Lot 100, Assessor's Map 17-05-03. On April 7, 2018 this decision was appealed by Vannett Properties, LLC. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in that decision and that a reconsideration is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my April 5, 2018 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

A handwritten signature in blue ink that reads 'Gary Darnielle'. The signature is fluid and cursive, written over the printed name.

Gary L. Darnielle  
Lane County Hearings Official

cc: Amber Bell (file)



April 5, 2018


Ms. Lydia Kaye, Manager  
Lane County Land Management Division  
Public Service Building  
125 E. 8th Ave.  
Eugene, OR 97401

Re: *Appeal of the Planning Director revocation of an approval of the Vannett Properties, LLC request (PA 17-05309) for a Measure 49 dwelling on tax lot 100, assessor's map 17-05-03.*

Dear Ms. Kaye:

Please find the Lane County Hearings Official's decision affirming the Planning Director's revocation of an approval of the Vannett Properties, LLC request (PA 17-05309) for a Measure 49 dwelling on tax lot 100, assessor's map 17-05-03.

Sincerely,

  
\_\_\_\_\_  
Gary L. Darnielle  
Lane County Hearings Official

CC: Keir Miller (file)



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**LANE COUNTY HEARINGS OFFICIAL  
APPEAL OF A PLANNING DIRECTOR REVOCATION OF AN APPROVAL OF  
A MEASURE 49 DWELLING IN AN EXCLUSIVE FARM USE ZONE**

**Application Summary**

On March 31, 2017, the Lane County Land Management Division received a request for a Measure 49 dwelling in an Exclusive Farm Use Zone (PA 17-05309). The request was accepted as complete by the Planning Director on October 6, 2017 and on January 4, 2018, the application was approved. On January 16, 2018, the Planning Director revoked the January 4 approval. A timely appeal of the revocation decision was filed by Vannett Properties LLC on January 26, 2018.

**Parties of Record**

Vannett Properties LLC	Milton & Mary Decker
Liam Sherlock (Applicant's Representative)	Mike Reeder (Decker's Representative)
Molly Jones	Dan Tocalino
Steve Jones	Richard and Geri Burton
Mike Vannett	Betty Lou Snyder

**Application History**

Hearing Date: February 22, 2018  
(Record Held Open Until March 22, 2018)

Decision Date: April 5, 2018

**Appeal Deadline**

An appeal must be filed within 12 days of the issuance of this decision and final order, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

**Statement of Criteria**

Lane Code 16.212(10)  
Lane Code 16.245  
OAR 660-041-0180

**Findings of Fact**

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lot 1000, assessor's map 17-05-03. The subject

property is owned by Vannett Properties LLC and is zoned E-40 Exclusive Farm Use Zone.

2. Exhibit "B" Supplemental findings Regarding Measure 49 Dwelling Authorization 509-PA17-05309 to the January 16, 2018 "Notice of Revocation of a Previous Land Use Decision and Issuance of a New Decision by the Lane County Planning Director" is adopted herein by reference.
3. Steven Schudel, Manager of Schudel Enterprises, LLC negotiated for the purchase of the subject property in 2011. By way of affidavit, Mr. Schudel related that he had purchased the property for agricultural purposes only and that there was no negotiation for or discussion of the Decker's Measure 49 development rights. He verified that he purchased the property with the understanding that he would not be able to construct a dwelling on the property under its existing zoning.
4. Mr. Kenneth Baldwin purchased the property from Schudel Enterprises, LLC in 2015. There was no discussion of Measure 49 development rights at this time and the property was sold as agricultural property. Subsequently, Mr. Baldwin, through his agent Lisa Johnson, negotiated with the Deckers for a Measure 49 development right. Correspondence between Ms. Johnson and Mr. Reeder, attorney for the Deckers, documents that Mr. Baldwin was aware that the Deckers had not intended to transfer one of their Measure 49 development rights with the sale of this property. The parties never reached an agreement and no Measure 49 development right was transferred to Mr. Baldwin.

### **Decision**

THE PLANNING DIRECTOR'S REVOCATION OF APPROVAL OF THE VANNETT PROPERTIES LLC REQUEST (PA 17-05309) FOR A MEASURE 49 DWELLING ON TAX LOT 1000, ASSESSOR'S MAP 17-05-03 IS AFFIRMED.

### **Justification for the Decision**

The background of this appeal is straightforward. Milton and Mary Decker were granted authorization for three home sites under section 6 of Measure 49. The Decker's Measure 49 claim included 15 lots or parcels and one existing dwelling, and the State's Final Order and Home Site Authorization allows the Deckers two additional dwellings but no additional lots or parcels. The subject property was one of the 15 lots or parcels that were subject to the claim. Therefore, the Deckers had the right to place two additional dwellings on two of the remaining vacant 14 lots or parcels.

The Decker's sold the subject property to Schudel Enterprises, LLC on July 5, 2011. (See Document No. 2011-031146, Lane County Deeds and Records.) Schudel Enterprises, LLC then sold the property to Kenneth Baldwin on March 28, 2014. (See Document No. 2014-011511, Lane County Deeds and Records.) Mr. Baldwin sold the



property to Vannett Properties, LLC on February 10, 2017. (See Document No. 2017-007298, Lane County Deeds and Records.)

The following are the allegations of error raised by the Applicant/Appellant:

1. ***The Planning Director's decision to revoke the January 4, 2018 decision was tainted by an ex parte contact with a member of the Board of Commissioners.***

The Appellant questions the timing of a contact between staff and a member of the Board of Commissioners. That contact occurred after the issuance of the initial approval for the requested Measure 49 dwelling and the subsequent revocation of that decision by the Planning Director.

The appeal before the Hearings Official is de novo. I have declared that I have had no ex parte contacts regarding this appeal and this disclosure has not been challenged. Any possible ex parte contact issue concerning the Planning Director is cured through this de novo review.

*This allegation of error is dismissed.*

2. ***The Planning Director exceeded his jurisdiction by revoking the January 4, 2018 decision approving the Measure 49 development right for the subject property.***

The Applicant/Appellant argues that there are only two options for appeal under ORS 215.416(11): the decision becomes final or opponents to the application get to file a local appeal. The statute does not say this. ORS 215.416(11)(a)(C) notes a permit decision issued under ORS 215.416 is not final until the local appeal period has expired. In the present case, the appeal period did not expire until January 16, 2108. The Planning Director revoked his decision prior to the end of that business day.

Lane Code 14.700(3)(a) authorizes the Planning Director to revoke the approval of an application. Under this code provision, the Planning Director's authority to revoke a decision extends well beyond a decision becoming final. In the present case, the Planning Director revoked his January 4, 2018 decision under Lane Code 14.700(3)(a)(iv) on the basis that it was approved in error prior to it becoming final. The Planning Director was within his statutory and code authority to revoke the January 4, 2018 decision.

*This allegation of error is dismissed.*



3. *A Measure 49 dwelling authorization runs with the land and is transferred on a "First Come, First Serve" basis.*
4. *The warranty deed from the Deckers to Schudel Enterprises, LLC transferred all rights including the Measure 49 dwelling authorization.*

The Appellant/Applicant relies upon the language of LCDC's final order that states that a home site approval authorized by the order runs with the property and transfers with the property. The Appellant/Applicant further notes that warranty deeds transfer all of an owner's right to property and the warranty deed from the Deckers to Schudel Enterprises, LLC did not have any exclusion regarding their Measure 49 authorizations. Therefore, the Appellant/Applicant concludes that the dwelling authorization automatically transferred with the sale of the subject property because the warranty deed did not specifically exclude the dwelling authorization.

The two eligible Measure 49 dwelling authorizations held by the Deckers must be categorized as "inchoate" rights. By legal definition, an "inchoate" right is one that is not ripe, has not vested and has not been perfected. The two authorizations possessed by the Deckers attached equally to 14 properties. The question is what event vests those rights in property. The Appellant/Applicant argues that one of those rights vested with the sale of the first eligible property. The Deckers argue that it is when they explicitly transfer that right to another with the sale of the property.

The Appellant/Applicant points to a Jefferson County case where similar situation existed in 2013. In that case, an individual purchased one parcel from another individual who had approval for several Measure 49 dwelling authorizations for multiple parcels. There was no language in the deed, preliminary title report or sales agreement that addressed building rights. The County issued a building permit to the buyer apparently because of its inability to determine the intent of the seller. While not expressed in the deed transaction, the intent of the Deckers in their first sale of the subject property was clear. The buyer acknowledges this intent and it was apparently reflected in the sales price.

The State's Final Order and Home Authorization states a home site approval runs with the property and transfers with the property. However, the Order also states, "*If the number of lots, parcels or dwellings existing on the property on which the claimants are eligible for M49 relief exceeds the number of home site approvals the claimants qualify for under a home site authorization, the claimants may select which existing lots, parcels or dwellings to convert to authorized home sites.*"

Under the present fact pattern, the Order authorizes, but does not mandate, that the Deckers choose which vacant lots or parcels would receive their two Measure 49 dwelling authorizations. Arguably, they can even let their rights lapse. With the sale of the subject property, the intent of the Deckers was clear. They did not

want to transfer a dwelling authorization with the subject property and preferred that the property remain in agricultural use. They exercised their right to select which lot to convert to an authorized home site. The purchase price was consistent with this understanding. The State's Final Order and Home Authorization makes it clear that a Measure 49 recipient has a choice where the number of qualifying parcels exceeds the number of approved home sites. As a matter of fairness, this choice must be an affirmative expression of the intent to transfer the Measure 49 dwelling authorization.

This is not a case where property was purchased under the misleading assumption that there was a right to develop a homesite. The original purchaser was not under this misunderstanding nor was the second purchaser. There are no allegations that any of the purchase prices represented more than the value of the subject property for agricultural purposes.

*For the reasons expressed above, this allegation of error is dismissed.*

#### **Conclusion**

While the language of Measure 49 is not written to address the current situation, one of the prevailing sentiments expressed in the Arguments in Favor of Measure 49 in the Voter's Pamphlet is that Measure 37 should be modified to allow for the transferability of authorizations to divide property or establish dwellings. Since these arguments are intended to give greater control and use of Measure 49 dwelling authorizations to a claimant, I believe that the Measure should be interpreted in the most reasonable and liberal manner to accomplish that result. To that end, in situations where the number of qualifying parcels exceeds the number of approved home sites, the claimant's intent must be clearly apparent before a dwelling authorization is transferred with the sale of a qualifying property. In the present case, that intent was clearly lacking.

**Respectfully Submitted,**

  
**Gary Darnielle**  
**Lane County Hearings Official**