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LEGAL MEMORANDUM

TO: Heather Hansen
FROM: Tim Ramis
DATE: May 28, 2015
RE: **Land Use Questions**
File No. 44548-28156

I am confirming that I can be available on June 1 to participate via Skype or phone. In addition, this memo will summarize my responses to the various questions. My comments are general because the specific facts in any given circumstance are critical to determining the outcome.

Protection of Subdivision Plats

Development on lots with plats inside urban growth boundaries and approved after September 9, 1995 are given special protection from subsequent changes in local government regulations. Under ORS 92.040 (2), construction on these lots may only be subject to local government laws that were in effect at the time that the subdivision application was filed. While subsequent laws, such as wetland regulations administered by the Corps of Engineers and Department of State Lands can be applied by those agencies, cities and counties may not apply new regulations through their own processes. Specific to your question, subsequently adopted overlays and setbacks may not be applied, except by the choice of the land owner. Testimony about local updated wetlands regulations and mapping is irrelevant when ORS 92.040 (2) applies.

Regulations applicable to site development processes in place when the plat was applied for continue to be applicable. If a discretionary site review process to review development on platted lots was in place when the subdivision was applied for, the county may continue to apply that procedure.

Knowledge of Regulatory Limitations

The knowledge of the owner allowed land use restrictions at the time of purchase is not a factor under criteria I am familiar with.

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Wetland Regulations, Takings, and Measure 49

Wetland regulations can and have triggered regulatory takings claims, especially where the owner is left, after imposition of the regulation, with no beneficial use of the land. The most practical way to minimize the risk of a claim is to be sure that some part of each affected parcel retains a reasonably possible economic use. The use may be farming or recreational, but defending these kinds of claims will require some showing that all economic use has not been taken. If the planning process appears to be leaving an owner without a plausible use of the land, the county should consult with land use legal counsel regarding the risks and alternatives.

Wetland protections can also trigger Measure 49 claims, unless the regulation is “required to comply with federal law.” This provision will exempt some wetland regulations from Measure 49, but not all such regulations. Changes in regulations which reduce residential densities should therefore be closely reviewed for their Measure 49 implications.

Reasonable Use

This is a test which appears in many codes relating to variances and other discretionary permits. It is not the language typically used in the context of judicial takings cases. The more usual test of a taking is the “loss of all economically beneficial use.” This term is used because the focus of this type of taking case is on the degree of economic injury caused by the government’s restrictive regulation. For a loss of beneficial use taking claim based on a zoning restriction to prevail, there must be a very strong showing of economic harm that satisfies this test. These cases are relatively rare, but where land use regulations take all allowed economically viable uses away, a successful case is possible. This could happen in any zones, residential, commercial or agricultural, so absolute prohibitions on any development must be considered with caution.