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(pended from 10/1/08)

MEMORANDUM

Meeting Date: October 1, 2008
Memorandum Date: September 30, 2008

To: Board of County Commissioners

From: Andrew Clark, Assistant County Counsel

Subject: Second Avenue / Ocean Way, Florence – Report back to Board re access issue

Background

At its April 16, 2008 meeting, the Board asked for a report back from County Counsel regarding potential access issues at the intersection of Second Avenue and Ocean Way. As shown by tax lot maps of the area, tax lot 5300 lies at the intersection of Second Avenue and Ocean Way. TL 5300 is currently owned by Michael and Jamie Gaber, who requested and obtained from the county a legal lot verification for the lot on November 27, 2007. The legal lot verification indicates that TL 5300 was created by deed in 1971.¹

Residents in the area report that people have utilized the intersection at Second Avenue and Ocean Way as access to homes on Second Avenue for decades. Aerial photographs appear to support this contention. To date, staff is unaware of any attempts or threats to deny access through this area. Apparently, the Gaber's request for legal lot verification has engendered fears that TL 5300 may soon be developed and access would be jeopardized. Planning staff reports that the development potential of TL 5300 is very limited due to coastal overlays and limited septic drain field area. At least one area resident has also voiced concern that any uncertainty regarding access complicates the ability to sell homes located on Second Avenue.

This memorandum briefly discusses possible options for the Board to consider with respect to access to Second Avenue from Ocean Way and across TL 5300.

Options

1. Allow neighbors to address issues with County support as necessary.

This option recognizes that there is no present act or threat to deny access to Second Avenue, and there may be no need for the County to take immediate steps to "fix" the problem. Further, development options on the lot appear to be very limited, and

¹ The issue of ownership of the lot is complicated by plat maps recorded in 1915 and 1959, which may present some evidence that a significant portion of the lot may lie within the dedicated right of way of Second Avenue. However, the lot has been conveyed by private parties on at least three occasions, apparently without title concerns. A full title analysis is well beyond the scope of this discussion of options and we will presume title is vested with the Grabers.

interference with access arising from conflicts with development of the lot is unlikely at present. Possible options available to area neighbors with the County taking a very limited role or no role include:

- a. A negotiated resolution process encouraged by or initiated by County.
- b. Civil suit filed by interested parties asserting public access rights across TL 5300.
- c. In either situation above, the County could adopt a Resolution publically supporting open public access.

Utilization of County resources would likely be more limited than under the other options listed below.

2. Law suit filed by the County.

The County could take an active role by filing a law suit to assert public rights to continue to use the access that has been used for decades. Such a lawsuit would likely take the form of a quiet title claim or declaratory judgment action. Obviously, taking the active role in leading litigation would require utilizing County resources, both financial and staff time.

3. County purchase of TL 5300.

The County could purchase TL 5300, either voluntarily or through condemnation. My understanding is that the assessed value of the lot is roughly \$19,000. How accurate the assessment is I do not know. As noted above, the lot has limited development potential and a new appraisal might be warranted (or required for condemnation). Outside of the purchase price, the use of county resources, principally staff time, is anticipated to be fairly minimal.

4. County initiation of legalization proceedings.

The County can initiate road legalization proceedings under ORS 368.201. ORS 368.201 provides the following applicable standards for county road legalization:

- “(1) If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a public road.
- (2) If the location of the road cannot be accurately determined due to:
 - (a) Numerous alterations of the road;
 - (b) A defective survey of the road or adjacent property; or
 - (c) Loss or destruction of the original survey of the road.
- (3) If the road as traveled and used for 10 years or more does not conform to the location of a road *described in the county records.*”

It appears that Second Avenue was created and dedicated to the public by the Heceta Beach plat recorded in 1915. As platted, it does not appear that Second Avenue includes the property now identified as TL 5300, although the point is arguable because the written description accompanying the plat indicates that Second Avenue runs to the

“ocean beach.” Accordingly, there may be ambiguities in the plat sufficient to meet one or more of the above criteria. Based on information known to date, the evidence would likely support a finding that the current access to Second Avenue (across TL 5300) has been used for more than 10 years and that the road as used “does not conform to the location of a road described in the county records” – namely, Second Avenue as it appears on the plat.

Procedures for county road legalization include:

- Survey the road and design, and describe and map an alignment that matches the physical road.
- Establish its width on the basis of laws that existed at the time of original establishment, or if a width can’t be determined, to the standard width for roads of the same class under ORS 368.036. The Board may also legalize a road at a lesser width if it’s determined to be in the public interest.
- Prepare Director’s Report, including survey and other relevant information.
- Provide legal notice of proceedings by service to abutting owners and by posting.
- Conduct public hearing (this may not be required by statute, but has been our past practice).
- Upon approval of legalization, the final right of way must be surveyed and monumented, a survey map is prepared and filed, and various records are updated. The end result of the legalization process is a “county road”.

Legalization procedures are relatively extensive and will require significant work by county staff. Given the relatively low value of this property, an outright purchase of TL 5300 might be more cost effective than going through legalization procedures. Accordingly, the Board may wish to obtain cost estimates from County staff on this issue before initiating the legalization process.

5. Way of necessity proceedings initiated by the residents of Second Avenue.

Oregon law provides a means by which individuals can gain access to their property where such access does not otherwise exist. The situation as described by the area residents may meet the requirements for establishing a way of necessity under ORS 376.150 – 376.200. A way of necessity is a “road established under ORS 376.150 to 376.200 to provide motor vehicle access from a public road to land that would otherwise have no motor vehicle access.” ORS 376.150(2)(a). However, the statutes describe a process initiated by those seeking a way of necessity, not the County, and require various payments by the petitioner(s), including costs, attorney fees and compensation to the owner of the property over which the way of necessity travels.

This process is driven by the applicant rather than the County, although County staff would be available to offer assistance. County staff would be required to investigate and prepare a report. Costs are envisioned to be covered by the petitioner(s).