

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 13-06-18-08

IN THE MATTER OF ELECTING WHETHER
OR NOT TO HEAR ARGUMENTS ON AN
APPEAL OF A HEARINGS OFFICIAL'S
DECISION UPON REMAND, APPROVING A
TEMPORARY PERMIT FOR AN OUTDOOR
EVENTS VENUE (FILE 509-PA 12-
05171/SHRIVES)

WHEREAS, the Lane County Hearings Official has made a decision upon remand, approving a Temporary Permit for an outdoor events venue, application 509-PA 12-05171; and

WHEREAS, the Lane County Planning Director has accepted an appeal of the Hearings Official's Decision to the Board of County Commissioners pursuant to LC 14.515; and

WHEREAS, the Lane County Hearings Official has affirmed his decision on application 509-PA 12-05171; and

WHEREAS, Lane Code 14.600 provides the procedure and criteria which 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, Lane Code 14.515(3)(f)(ii) provides the option that the appellant can request that the Board not conduct a hearing on the appeal and let the matter move forward to the Land Use Board of Appeals; 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 **Finds and Orders** as follows:

1. That the appeal does not comply with the criteria of Lane Code Chapter 14.600(3) and arguments on the appeal should, therefore, not be considered. Findings in support of this decision are attached as Exhibit "A" and are adopted by the Board.
2. That the Lane County Hearings Official decision dated April 23, 2013, implementing Board Order No. 13-02-26-12, attached as Exhibit "B", is affirmed.
3. That Board Order No. 13-02-26-12 affirmed the Lane County Hearings Official decision dated October 30, 2012, attached as Exhibit "C", except with respect to issue of whether the structures on the property constituted new or existing structures. As to that issue, Board Order No. 13-02-26-12 interpreted Lane Code 16.255(2)(a)(ii) as requiring that structures be in existence as of the date the land use application is deemed complete.

4. This Order together with Board Order No. 13-02-26-12 constitute Lane County's final written decision as of the date of adoption of this Order.

ADOPTED this 18th day of June, 2013.

Acting for *Jay Leiken*, Vice Chair
Sid Leiken, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM
Date 6/18/13 Lane County
[Signature]
OFFICE OF LEGAL COUNSEL

FINDINGS IN SUPPORT OF THE ORDER

1. Property involved in this action is identified as tax lot 201, map 19-03-25, located at 81930 Sears Road, with a base zone of F-2 (Impacted Forest Lands, LC 16.211). The entire parcel is located within the Willamette River Greenway (LC 16.254), and most of it is within the FEMA 100 year floodhazard zone (LC 16.244). The river, a Class 1 stream, is subject to the Riparian Regulations (LC 16.253). The property is within the jurisdiction of the Lane County Rural Comprehensive Plan and Lane Code Chapter 16.
2. In March, 2012, in the form of application 509-PA12-05171, the property owners and applicant, Margaret and Mark Shrives, requested that a Temporary Permit be granted by the Hearings Official for an outdoor events venue, pursuant to Lane Code 16.255(2)(a)(ii). After the provision of a traffic study, the application was deemed complete for processing on June 20, 2012.
3. On August 2, 2012, a public hearing was held. The record was left open until October 8, 2012 for written submittals, a site visit, and a sound test.
4. On October 30, 2012, the Hearings Official rendered his decision, conditionally approving the request.
5. On November 13, 2012, a timely appeal of the Hearings Official's decision was filed by a neighbor opposed to the request.
6. On November 14, 2012, the Planning Director accepted the appeal, and forwarded it to the Hearings Official for his review. On November 16, 2012, and after reviewing the appeal, the Hearings Official affirmed his decision.
7. On December 11, 2012, the appeal was taken before the Board of Commissioners, and the Board approved Order No. 12-12-11-10 to hear the appeal, with findings that it complied with the criteria of LC 14.600(3).
8. On February 5, 2013, the Board held the on the record hearing. The hearing was concluded on the same day, and the record left open until February 12, 2013 for written submittals.
9. On February 26, 2013, the Board held a public meeting and deliberated on the matter. The Board dismissed the first four assignments of error. Via Order 13-02-26-12, the Board remanded the appeal for a de novo hearing limited to taking testimony and making findings to determine whether the tent structure and gazebo were new or existing structures under LC 16.255(2)(a)(ii) as of the date the application was deemed complete.

10. On April 4, 2013, the Hearings Official conducted the de novo hearing upon remand. The record closed on April 10, 2013.
11. On April 23, 2013, the Hearings Official rendered his decision, finding that the tent structure and gazebo were “existing” within the context of LC 16.255(2)(a)(ii) on the date the application was deemed complete, June 20, 2012.
12. On May 6, 2013, a timely appeal of the Hearings Official’s decision upon remand was filed by opponent John White.
13. On May 7, 2013, the Hearings Official affirmed his decision.
14. The appeal states that the Approval Authority misinterpreted Lane Code, state law, and applicable criteria.
15. In order for the Board to hear arguments on the appeal, Lane Code 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeal:
 - *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.*
16. The Board of Commissioners finds that issues raised in the appeal to not be of county-wide significance, since Board Order No. 13-02-26-12 was properly utilized by the Hearings Official in the present application, and will be utilized in evaluating future Temporary Use Permits evaluated under LC 16.255(2)(a)(ii).
17. The Board of Commissioners finds that while the Hearings Official has issued 19 Temporary Permits since 1984, there is no need for further policy guidance since the issuing of Board Order No. 13-02-26-12.
18. The Board of Commissioners finds that there are no unique or rare environmental resources inventoried and located on the property.
19. Neither the Planning Director nor the Hearings Official has recommended review of the appeal.
20. 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.
21. The Board has reviewed this matter at its meeting of June 18, 2013, and finds that the appeal does not comply with the criteria of Lane Code Chapter 16.600(3), and elects to not hold an on the record hearing.
22. The Hearings Official’s decision is affirmed by the Board of Commissioners.

**LANE COUNTY HEARINGS OFFICIAL
REMAND OF A HEARINGS OFFICIAL DECISION APPROVING A
TEMPORARY USE PERMIT FOR A COMMERCIAL EVENTS OPERATION**

Remand Summary

This is a remand from the Lane County Commissioners, per Board Order No. 13-02-26-13 to the Hearings Official for a de novo hearing limited to taking testimony and making findings to determine whether a tent structure and gazebo were "new" or "existing," per Lane Code 16.255(2)(a)(ii), as of the date the application was deemed complete (June 20, 2012).

Remand History

Remand Hearing Date: April 4, 2013
(Record Kept Open Until April 10, 2013)

Remand Decision Date: April 23, 2013

Appeal Deadline

An appeal must be filed within 12 days of the issuance of this decision, 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 16.211 Lane Code 16.255(2)(a)(ii)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as assessor's map 19-03-25, tax lot 201; and has a property address of 81930 Sears Road. The findings of fact of the October 30, 2012 decision in this matter are incorporated by reference except where explicitly modified.
2. The application for a temporary use permit was submitted on March 28, 2012. It was deemed complete on June 20, 2012.
3. The applicant purchased the tent on July 11, 2011 and the gazebo on July 5, 2011. The tent was purchased on July 11, 2011 from the AA Tent Company, and set up

on July 21, 2011. The concrete slab underlying the tent and gazebo were poured in June and early July of 2011. The rebar for the slab was inspected by the Lane County Building Inspector on June 16, 2011.

Rivers Edge Events, LLC, the applicant for this temporary use permit, became a business on August 25, 2011. The tent and the gazebo for first officially used at the wedding of the Shrives' daughter on August 6, 2011. The first "business" event on the subject property took place on May 28, 2012. Photographs show the tent and gazebo in existence at the wedding of Shrives' daughter (8/6/11); a banquet for the Creswell Chamber of Commerce (5/31/12); and a breakfast for the Creswell High Senior Class (7/27/12).

An advertisement regarding the availability of the event center as a public venue was created and posted on the Internet on August 22, 2011. This posting offered various amenities including the use of a 30' x 50' white tent and a white Bavarian gazebo.

4. A September 1, 2011 article in the Creswell Chronicle notes that Ms. Shrives began planning her daughter's wedding on June 1, 2011 and stated that she decided to become the proprietor of a special events venue not far into the construction process. The article also quotes Ms. Shrives as already booking several weddings for 2012.
5. On August 4, 2008, Ms. Shrives applied for the assumed business name of "River's Edge Special Events" with the Oregon Secretary of State. Ms. Shrives applied again on May 18, 2011 for the same assumed business name but with a different description of the business. The applicant, Rivers Edge Events, LLC was registered with the Oregon Secretary of State, Corporation Division, on August 25, 2011. Ms. Shrives is the registered agent for this business.

Decision

UNDER THE TERMS OF THE REMAND OF BOARD OF COMMISSIONER'S ORDER 13-O2-26-12, THE TENT AND GAZEBO ASSOCIATED WITH THE RIVER EDGE EVENTS, LCC APPLICATION (PA 12-5171) FOR A TEMPORARY USE PERMIT WERE EXISTING AT THE TIME THAT THE APPLICATION WAS DEEMED COMPLETE (JUNE 20, 2012).

Justification for the Decision (Conclusion)

By way of background, the application for this temporary use requested approval under Lane Code 16.255(2)(a)(iii) which involves open land uses that do not involve structures with a combined value of \$1,000. On its face, the application did not satisfy this criterion since it involved a tent, gazebo, a temporary mobile home, and the use of the primary residence. (Note that prices on the invoices for the tent and gazebo are redacted.)

Rather than deny the application outright, I chose to apply Lane Code 16.255(2)(a)(ii) as well as (a)(iii) to the proposal. The latter criterion does not distinguish between "new" and "existing" structures and this distinction is important. The applicant has pointed out that at the time the application was submitted, and under the approval criterion chosen, the distinction was not relevant and that the terms "new" and "existing" were used to differentiate the relative age of the residence as opposed to the relatively recent construction of the tent and gazebo. This explanation makes sense.

As stated above, the mandate of the remand is to determine whether a tent structure and gazebo were "new" or "existing," per Lane Code 16.255(2)(a)(ii), as of the date the application was deemed complete (June 20, 2012). There are three different points in time that one might use to determine whether a structure is "new" for purposes of a temporary use permit. The Board has elected to choose the date an application has been deemed complete as this date. For reasons that I will explain, I believe that using this date may lead to undesirable results and undermine any meaningful distinction between the terms "new" and "existing."

Under ORS 215.427, local governments have 30 days in which to judge whether an application is complete. If an application is deemed incomplete, the applicant is given another 180 days in which to cure its incompleteness. An application can theoretically be deemed complete almost seven months after it is submitted. Thus, under the remand language, an applicant can turn in an application for a temporary use permit on January 1, 2013, have the application deemed incomplete on January 31, and then have until July 30 to build a structure that would qualify as "existing" for the purposes of the temporary use permit. I do not believe that is the intent of the code. Nevertheless, under the remand interpretation, the two structures must be deemed "existing" for the purposes of this application as they were physically in existence on the subject property by July 21, 2011, eleven months prior to the application being deemed complete (June 20, 2012).

A second interpretation is that a structure is deemed "existing," for purposes of a temporary use permit, if it is physically in place on the subject property prior to submission of the application for the temporary use permit. I believe this is the more traditional way of measuring whether a structure is "existing" as it allows the public and the local government to evaluate how a structure's "location, size, design and operating characteristics" might be compatible with the livability of the surrounding vicinity at the time notice of the proposed use is sent to surrounding property owners. Under this interpretation, the two structures in question were also "existing," for purposes of Lane Code 16.255(2)(a)(ii), because they were physically in existence on the subject property about eight months prior to the submission of the application (March 28, 2012).

Finally, the appellant White has suggested a third interpretation. The touchstone for this interpretation is the date that the "project" began. There is some support for this argument in the language of the Code. Thus, the first sentence of subsection (2)(a)(ii) posits the use of existing structures and premises that are designed and "*intended*" for a use that is not allowable in the applicable zone. (*emphasis mine*) The language in this sentence suggests

that the relevant point in time is when the applicant intended the structures to be utilized in furtherance of the temporary use.

It can be argued that the first concrete evidence of the applicant's intent to operate a commercial "events center" is an advertisement regarding the availability of the event center that was posted on the Internet on August 22, 2011. This posting, which alluded to various amenities including the use of a 30' x 50' white tent and a white Bavarian gazebo, occurred about one month and one-half after the purchase of the Gazebo and about one month after the installation of the tent. The September 1, 2011 Creswell Chronicle article, however, suggests that the decision to operate a commercial events center occurred shortly after construction begun, sometime after June 1, 2011. The concrete slabs were put in place to support the tent and the gazebo at least by June 16, 2011.

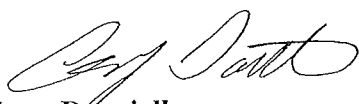
If the interpretation suggested by Mr. White was applied to Lane Code 16.255(2)(a)(ii) then the burden would be on the applicant to prove when the intent to conduct a special events center on the subject property was first formulated. In the present case, the applicant could point to the August Internet posting and the burden would shift to the appellant to prove an earlier date. I'm not sure the land use decision-making process is set up to get to the *mens rea* of an applicant as it is often hard enough just to establish when a use or structure has physically come into being.

While not part of this remand, the appellant raised the issue of whether the gazebo and tent are truly temporary structures. I believe that they are. The gazebo was constructed off-site and transported to the subject property. It can just as easily be removed and transported off the property. By the same token, a tent is much easier to dismantle and remove than, say, the sides and roof of a building. The tent theoretically does not require a cement slab although one would not expect it to be erected on bare ground. Presumably it can be fairly easy to detach from the slab for removal.

Summary

The tent and gazebo satisfies what I believe was the Board's interpretation of Lane Code 16.255(2)(a)(ii); that they be physically in existence at the time the application for the temporary use permit was deemed complete by Lane County.

Respectfully Submitted,



Gary Darnielle
Lane County Hearings Official



May 7, 2013

Mr. Matt Laird, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: *Appeal of Hearings Official decision to approve the Shrives temporary use permit application (PA 12-5171) for a commercial events operation.*

Dear Mr. Laird:

On April 23, 2013, I issued a decision approving, on remand, the Shrives request (PA 12-5171) for a temporary use permit to allow a commercial events operation. On May 6, 2013 John White appealed my decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my April 23, 2013 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Jerry Kendall (file)

**LANE COUNTY HEARINGS OFFICIAL
REQUEST FOR A TEMPORARY USE PERMIT FOR A COMMERCIAL
EVENTS OPERATION
(CONTESTED)**

Application Summary

Hearings Official Review of a Temporary Permit request by Margaret and Mark Shrives to allow a commercial outdoor events operation within the F-2 Impacted Forest Lands Zone as provided by Lane Code 16.211. The application was deemed complete on June 20, 2012.

Parties of Record

Margaret & Mark Shrives	Lori Segal	Nick Siezmore
Jacob Daniels	Wayne Tobin	John White
Robert Emmons	P. Veluscek	Joe Shaddick
Steve & Sulayh Fuller	William & Judy Griffith	Kim O'Dea
Martin & Sharlene Neff	Tony Marquess	Jeanne Olson
Christina Deschiane	Nancy Solomon	Carolyn Allen
Dorothy Schick	Ed Gunderson	Nancy Solomon
Ruby Miller	Sue Wolling	Don Walken
Theresa Loreman	Don Hansen	Gary Mounce
Todd Hamilton	Sid Voorhees	Sherry Smith
Jacob Daniels	Paul Veluscek	LaVae Robertson
Duane & Jann Toman	Gene Stevens	Sayer Strauch
Maureen Hudson		

Application History

Hearing Date: August 2, 2012
(Record Kept Open Until October 8, 2012)

Decision Date: October 30, 2012

Appeal Deadline

An appeal must be filed within 12 days of the issuance of this decision, 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 16.211

Lane Code 16.255(2)(a)(ii)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the “subject property,” can be identified as assessor’s map 19–03–25, tax lot 201; and has a property address of 81930 Sears Road. The subject property is 20.83 acres in size and is located on the west side of Sears Road, about 2.2 miles south of the intersection with Cloverdale Road to the north. Development on the property is comprised of an existing dwelling, a septic system, a temporary hardship manufactured dwelling, a swimming pool, gazebo, and detached carport.

Access to the subject property is via Sears Road, a minor collector. Sears Road, at its intersection with Cloverdale Road, has a Level of Service (LOS) of B. The LOS at this location will remain at B except when impacted by outbound traffic generated by Saturday “main” events, when it will be reduced to a LOS of C.

Sears Road is 22 feet wide and has no shoulders.¹ A 24-foot wide travel surfaced road with 6-foot wide shoulders may safely have a daily traffic volume of 8,500 vehicles. The capacity of Sears Road would therefore be somewhat lower. However, Sears Road has an existing daily traffic volume of 700 vehicles at the intersection of Cloverdale Road and therefore the impact of the proposed use on Sears Road, in terms of its volume to capacity ratio, does not appear to be a significant concern as its level of service will only change during Saturday main events (outbound traffic). A maximum-sized “main” event at River’s Edge Events (100 vehicles) could increase the average daily traffic volume by about 14 percent.

The driveway into the subject property is 470 feet long, 40 feet wide at its approach, and has an average width of 15 feet, about 14 feet of which is paved. Because of the width of the driveway’s travel surface, and the fact that its topography will not allow its expansion, the driveway will have to be one-way during events. For this reason traffic attendants will be necessary.

Sight distance on Sears Road, at the driveway intersection, is 1125 feet to the north and 1800 feet to the south. Required stopping distances for the posted speed limit (55 mph) is 610 feet to the south and 530 feet to the north. The existing sight distances are adequate to support stopping distances for speeds in excess of 70 mph.

¹ The LOS of Sears Road at the subject property’s driveway is A and will remain so during “main” events.

Flaggers will be used to manage traffic flow to keep Sears Road and the driveway free from congestion. Flaggers working within the County right-of-way shall be certified and shall comply with guidelines of the Oregon Temporary Traffic Control Handbook.

The subject property is zoned Impacted Forest Lands and is located entirely within the Willamette River Greenway. The parcel's western side abuts the Coast Fork of the Willamette River and about $\frac{3}{4}$ of the parcel lies within the 100-year flood hazard area. As the Willamette River is a Class I stream the riparian setback standards of 16.253 are also generally applicable.

The subject property is zoned F-2 Impacted Forest Land; as is tax lot 1100, adjacent to the south. Property bordering the subject property on the east is zoned F-1 Non-Impacted Forest Land and is subject to commercial forestry management. Property adjacent to the north and to the west, across the South Fork of the Willamette River, are zoned RR-5 Rural Residential, 5-acre minimum.

2. The applicant proposes an operation of outdoor events, primarily for weddings, retirements, anniversaries, graduations, banquets and family reunions. The business name for the venue is River's Edge Events. The applicant asks that activities be allowed from May 15 through September 30. At the hearing on this matter, the applicant clarified that the swimming pool would not be used in conjunction with any of the events.

The proposed use will consist of two types of events: all-day, "main" events, and weekday "floating" events. Main events will occur on Fridays, Saturdays and up to five Sundays per season, with only one event per day. These events will start no earlier than 10:00 a.m. and music will end by 10:00 p.m. All guests, caterers, and music providers will be off the property by 11:00 p.m. Clean-up will end by 11:30 and all lights associated with the event will be turned off at this time. "Main" events have the potential to attract up to 250 guests that will generate about 100 automobiles (10 for support personnel and 86 for guests) arriving or leaving in the peak hour.²

Floating events will occur on two days per week. There will be no more than one afternoon and one evening event during a floating event day. Evening weekday floating events will start no earlier than 6:00 p.m. and music, if used, will end by 10:00 p.m. All clean-up will conclude by 11:30 p.m. and all lights associated with the event will be turned off at this time. Afternoon events of less than 25 persons will occur between the hours of 11:00 a.m. and 2:30 p.m. on floating days. All guests and caterers will be off the property by 2:30 p.m.

Weekday events will start no sooner than 6:00 p.m. with all persons off the property by 11:00 p.m. Weekend events will start no sooner than 10:00 a.m. and

² Based upon the applicant's traffic impact analysis.

all persons will be required to be off the property by 11:00 p.m. The number of guests will be limited to 250 with the usual number between 50 and 150. The maximum potential of the proposed use would be somewhere in the nature of 123 evening events (four evenings per week plus five Sunday evenings per season) representing over 50 percent of the days during the four and one-half month operating season.

The proposed use has been operating since August of 2011 at which time it hosted a graduation party. During 2012, the applicants hosted 13 events, ten of which were weddings. Alcohol, served by bartenders certified by the OLCC, are allowed at the events and sound amplification systems are used by disk jockeys and for live and recorded music. All food is catered. Narrative from DJs and music from loudspeakers were considered to be intrusive and disruptive by residents living on River Drive. After becoming aware of the potential for adverse noise impacts the applicants began monitoring the impact of sound levels from their events on properties across the river on River Drive. Because of this monitoring, the last two events hosted by the applicants had minor sound impacts on those residents.

Events occur within two areas of the subject property. Parking occurs in a mowed pasture area that is about 4 acres in size. The main parking area can accommodate 100 vehicles and an overflow area to the north has a capacity for another 100 vehicles. The former parking area is over 200 feet from the river and the latter about 150 feet. The actual events generally occur within a one-acre area. One room in the single-family dwelling is used as the "bridal cottage" and the manufactured dwelling has been used for the "groom's cabin." A temporary tent is erected over a concrete pad and is occupied with tables and chairs. Sanitation is provided by two portable toilets. An existing playground may also be used during an event.

The manufactured dwelling is subject to a Temporary Medical Hardship permit for the mother of Mr. Shrives. This individual passed away recently and the mobile home will now be used by Mr. Shrives' mother-in-law for the same purpose. At the time the permit must be renewed, the applicants must verify that the mobile home meets the medical hardship standards for the new resident. The fact that this structure will be used for about one-hour during each wedding does not change that fact that its primary use will remain as residential.

3. The subject property receives fire protection from the South Lane County Fire and Rescue District. Police protection is available from the Lane County Sheriff's Department and the Oregon State Police.
4. Two sound tests have been conducted on the subject property. The first one occurred during a wedding held on September 1, 2012 and the second was during a site view held during the afternoon of September 10, 2012. On both occasions, sound level meters conforming to the standards of Lane Code 5.610(1) were used and calibrated by an acoustic consultant certified in audio engineering and

acoustics. The tests were conducted so that a known sound volume from the subject property was measured at one or more properties of the opponents who live on River Drive, to the west across the river. During the first test, where the sound source was located at the dance floor/main event area, the ambient sound level at the opponent's property was 58.9 dB,A and the sound level from the wedding at that location was recorded at an average of 59.2, with measurements varying between 58.5 and 60 dB,A. Passing traffic ranged between 75 to 80 dB,A. A chainsaw near the sound meter at this location registered 85 dB,A and a lawnmower at 71 dB,A. Generally, the sound from the wedding was barely audible at this location.

The second sound test was more structured than the first in the sense that the sound (music) was generated both at a level in excess of that which would be allowed during an event and also at a level consistent with what would be allowed. Also, during the second sound test, a measurement was taken with the sound source located in the river lawn area as well as at the dance floor/main event area. The ambient sound level at the sound source was 48 dB,A (dance floor) and 54 dB,A (lower terrace) and 55 dB,A and 57 dB,A, respectively, at the two locations on River Drive.

During the second sound test, two locations on River Drive, about 100 yards apart, were used. At both locations, the sound from a maximum level consistent with what is proposed for future events (91 dB,A), generated at the dance floor, had the same dB,A level as the ambient, background sound level. The low frequency of the sub woofer speaker was audible, however. River Lawn area measurements were barely audible and showed no measurable change over ambient levels. Car traffic varied between 73 dB,A and 77 dB,A and motorcycle traffic varied between 83 dB,A and 92 dB,A.

5. The best evidence of the subject property's ordinary high water line vis à vis the Willamette River is the base of the embankment that separates the lower terrace from the upper terrace. This determination, developed as part of a supplemental hearings official staff report in PA 0857-97, was primarily based upon the location of the water table and scour lines. The subsequently scheduled site inspection by DSL personnel to verify staff's assumption was cancelled. The applicants apparently agree with this assumption as Mrs. Shrives is on record stating that the walkway down to the lower terrace was terminated at the base of the embankment between the two terraces so that it would not be washed away. The lower terrace is clearly wider where it is adjacent to the existing dwelling but it is unclear from aerial photographs as to whether it runs the entire length of the western perimeter of the subject property. Thus, the ordinary high water line may be the top of the riverbank in other locations. It is not possible to determine, based upon the limited evidence in the record, whether the gazebo is within the riparian setback, but there is no evidence that the project has resulted in the removal of any riparian vegetation.

Decision

THE MARGARET AND MARK SHRIVES REQUEST (PA 12-5171) FOR A TEMPORARY USE PERMIT TO ALLOW A COMMERCIAL WEDDING AND EVENTS OPERATION ON TAX LOT 201, ASSESSOR'S MAP 19-03-25 IS APPROVED SUBJECT TO THE FOLLOWING CONDITIONS:

1. The temporary use permit shall be operated in a manner proposed by the applicants and conditioned by this decision. In regard to the latter, neither the large tent proposed by the applicants nor the gazebo may be included in the proposed use. (Without the tent the concrete dance floor is not a structure and may be used by the applicants.)
2. The days and hours of operation are limited as described in Finding of Fact #2.
3. Driveway improvements and traffic control procedures shall be completed as recommended in the Traffic Impact Analysis (TIA), the fire protection district, and Lane County Transportation staff. These include:
 - a. Increasing the driveway turnout to 12' x 60' at its current location and providing a 60,000 pound all-weather compaction surface.
 - b. Widen the east shoulder at the driveway approach so that it is a minimum of seven feet wide and 75 feet long to allow some vehicle access queuing.
 - c. Obtain a Lane County Facility Permit, supported by a special event traffic control plan prepared consistent with the Oregon Temporary Traffic Control Handbook (latest edition).
 - d. Utilize a minimum of four traffic control attendants for each main event: one at the driveway intersection with Sears Road, one at the event parking gate, and two in the parking lot areas to direct guest parking. Fewer attendants may be used for floating events provided that vehicle queuing does not occur on Sears Road. All attendants will have communication devices to coordinate parking. If any traffic control occurs within the County right-of-way or if any flaggers work within the right-of-way the work shall be consistent with the Oregon Temporary Traffic Control Handbook and the flaggers shall be certified.
 - e. A "No Parking-Fire Lane" sign shall be posted on the driveway.
 - f. Two temporary "Event Ahead" signs (Orange, retro-reflective roll-up sheeting) will be required to be located about 500 feet from the driveway for each event.
4. Parking lot improvements shall conform to the TIA conceptual site plan and shall include clearly marked exit locations. The roadway approach and parking area shall be delineated by physical barriers, such as landscaping, to minimize traffic conflicts.

5. Music and loudspeakers shall be oriented towards the west and sound levels shall be limited to 91 dBA, as measured at one meter from the sound source. The applicant shall have a properly operating and calibrated sound meter, consistent with the specifications of Lane Code 5.610(1), for all events to ensure that sound volume does not exceed the maximum level. The applicant shall also monitor low frequency sound, live music, and crowd noise so as not to be audible to residents along River Drive.
6. Event lighting apparatus shall be properly shielded so as to point downward and to the east.
7. The applicants shall sign a forestry management easement in favor of tax lot 102, assessor's map 19-03-36.
8. The applicants shall maintain a Temporary Medical Hardship permit for the accessory structure that is used by the groom's party during weddings.
9. The applicants shall provide a sufficient number of portable toilets to comply with Lane County Environmental Health Department standards.
10. The applicants shall inspect the parking area within 24 hours of its last use and remove any soil contaminated by leakage from a vehicle. The contaminated soils shall be disposed of according to DEQ/EPA guidelines.
11. The duration of the temporary use permit shall be for five years from the date of this decision. An evidentiary hearing shall be held prior to the resumption of the temporary use in 2014 to address one issue: the adequacy of noise standards and the implementation thereof. I am most concerned about the ability of the applicants to control the sound level of live music and guests. This decision may be modified accordingly to address the noise-related impact of the proposed use on the livability of the affected neighborhood.

Justification for the Decision (Conclusion)

Consistency with OAR Chapter 660

Chapter 16 of the County's zoning code, including Lane Code 16.255 in its current form, was acknowledged by LCDC. It is well understood that acknowledgment of compliance represents a certification that the comprehensive plan and land use regulations comply with the Statewide Planning Goals. *McKay Creek Valley Assoc. v. Washington County*, 18 Or LUBA 71, 75 (1989)

Acknowledgment of compliance does not, however, establish that a comprehensive plan or land use regulations comply with state statutes or administrative rules. *Blosser v. Yamhill County*, 18 Or LUBA 253, 268 (1989) If possible, however, an acknowledged local code provision must be interpreted consistent with a statute, goal or rule that the

provision implements. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617, 623 (1994)

Landwatch of Lane County has cited the *Central Oregon Landwatch v. Douglas County* case³ for the proposition that the temporary use permit application must be denied as being inconsistent with Oregon Administrative Rule Chapter 660, Division 6. I agree that this case is instructive in the determination of this issue. In *Central Oregon Landwatch*, LUBA distinguished between situations where the substance of an acknowledged provision is being challenged as being contrary to a goal or administrative rule and where an acknowledged provision may be subject to an interpretation that is inconsistent with a goal or administrative rule. In the former situation, LUBA suggests that *Opus Development Corp. v. City of Eugene*, 141 Or App 249, 255–56 (1996) is controlling and has opined that the acknowledged status of a code provision cannot be retroactively challenged. In the latter situation, *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 46, *rev den* 323 Or 136 (1996) is controlling and prohibits a vague, acknowledged code provision from being interpreted in a manner that is inconsistent with a goal or administrative rule.

It is clear that the proposed use is not a use that is authorized by OAR 660–006–0025 to be sited in a forest zone, either outright or conditionally. It is also clear that Lane Code 16.255 allows temporary uses in any zone. There is no ambiguity about this situation and there is a clear disconnect between Lane Code 16.255 and the administrative rule. For this reason I believe that *Opus Development Corp.* is controlling in the present case. Thus, whatever inconsistency exists between the code and the administrative rule is shielded by the acknowledgment of compliance of the Lane Code and Rural Comprehensive Plan.

Compliance with Other Provisions of Lane Code Chapter 16

The opponents have argued that a temporary use must also comply with other zoning regulations, such as riparian setbacks, flood hazard criteria and Willamette River Greenway standards. They point to Lane Code 16.255(b), which talks about giving consideration to “any other relevant impact of the use.” The factors listed in this provision, however, are limited to an analysis of how the criteria of Lane Code 16.255(a)(i) and (ii) are to be applied and cannot be read to incorporate other code provisions into the temporary use permit approval standards.

The applicants have responded that temporary uses, because they are temporary in nature and “may be permitted in any zone,” are exempt from the application of those and similar regulations. Consistent with the applicants’ position is the fact that there is no language in LC 16.255, found in many Chapter 16 zones, that mandates that a temporary use must also be in “compliance with other general provisions of Ch 16.” Riparian setback, flood hazard and Willamette River Greenway regulations implement standards found in OAR Chapter 660, Division 15 (adoption of the Statewide Planning Goals as administrative

³ 52 Or LUBA 582 (2006)

rules) and Division 23 (Goal 5). A temporary use may do as serious damage to the resources protected by these administrative rules as a permanent use and even though I disagree with the Planning Director that the proposed use does not represent an intensification of use within the Willamette River Greenway, I reluctantly must again conclude that acknowledgment of compliance shields this temporary use from the requirements imposed by administrative rule and other provisions of the Lane Code.

The only application before this hearings official concerns compliance with Lane Code 16.255. Therefore, any determination on the issue regarding the applicability of other sections of the Lane Code to the proposed use must be considered as *dicta*. Even if the regulations cited by the opponents were applicable, this hearings official has no authority to apply them in the context of this application.

Proper Interpretation of Lane Code 16.255(a)(ii)

According to the applicants' statement, the "project" began on June 1, 2011 with the construction of the swimming pool. Subsequent improvements related to the project included a concrete dance floor that would serve as the foundation for a steel-framed tent, a gazebo with concrete foundation, and connecting concrete walkways.

My interpretation of Lane Code 16.255(a)(ii) is that it differentiates between the use of new and existing structures. Existing structures are primarily measured against the standards contained in Lane Code 16.255(2)(a)(ii)(aa) & (bb) and Lane Code 16.255(2)(b). In addition to the aforementioned criteria, new structures and their use must also be shown to be necessary for the physical and economic welfare of an area.

Lane Code 16.090 defines a structure as being synonymous with a "building" and provides that driveways and walks not more than six inches higher than the ground are not considered to be a building. The connecting walkways are not more than six inches above ground but I believe that the tent and gazebo, including their foundations, must be considered as "structures" for purposes of this application. The "permanency" of these structures can be adequately dealt with through conditions of approval but their use must be supported by a showing of how they are necessary to the physical and economic welfare of the area. As the opponents have pointed out, Emerald Valley Resort, located three miles from the subject property, offers indoor and outdoor facilities for weddings, banquets and other events.

The applicant has made a persuasive case that small family businesses can benefit a local economy and I do not doubt that River's Edge Events has directly benefited local "caterers, florists, cake makers, photographers, party rental companies, limousine services" as well as the local gas station, restaurants, grocery stores and hotels. However, demonstrating that a use has a positive physical and economic benefit to the welfare of an area is not the same as proving that it is necessary to that welfare. Thus, the tent and the gazebo may not be approved under the proposed temporary use permit. The gazebo cannot be used as a part of an event under the temporary use permit but may remain if it

is consistent with Willamette River Greenway, floodplain or riparian setback regulations that may be applicable.

The applicant's proposal for a commercial wedding operation will therefore occur within existing structures and the request properly falls under the standards contained in Lane Code 16.255(2)(a)(ii):

(a) *The following are allowable Temporary Uses and may be permitted in any zone, subject to the following criteria and limitations:*

(ii) *Use of existing structures and premises which are designed and intended for a use which is not allowable in the applicable zone and new structures and premises and use thereof necessary for the physical and economic welfare of an area; provided it is determined by the Hearings Official that the location, size, design and operating characteristics of the proposed use and new structure, if applicable:*

(aa) *Will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding vicinity; and*

The first step in an analysis that considers an approval standard that measures the impacts of a proposed use against the livability of abutting properties and surrounding vicinity is to identify the qualities or characteristics constituting 'livability.'⁴ The second step is to establish that the proposed use will not have an adverse effect upon these qualities or characteristics. The use of language "not adversely affect" within a mandatory approval standard is a very stringent standard.⁵

The area surrounding the subject property is characterized as to include Interstate 5, located about 1,800 feet west of the subject property. Interstate 5 is included within the area of inquiry because it is a major noise-generating feature in the vicinity of the subject property.

The subject property is zoned F-2 Impacted Forest Land and land to the north, south, and east is resource land (zoned F-1, F-2, or EFU) that is sparsely developed. Property to the west is predominantly zoned RR-5 and is generally developed with residences. In terms of topography, the subject property is bordered on the west by the Willamette River, River Drive, and

⁴ *McCoy v. Linn County*, 16 Or LUBA 295, 301-302 (1987), *aff'd* 90 Or App 271, 276 (1988).

⁵ *West Hill & Island Neighbors, Inc. v. Multnomah County*, ___ Or LUBA ___ (LUBA No. 83-018; June 29, 1983), *aff'd* 68 Or App 782, 683 P2d 1032, *rev den* 298 Or 150 (1984).

Hillview Road, and on the east by Sears Road. On the east side of Sears Road is a hill that runs north/south in a linear fashion.

The “desirable character of the neighborhood” is large-lot residential on the west side of the Willamette River and residences on large resource land adjacent to the river on the east, with commercially managed resource land east of Sears Road. The dwelling subject to the proposed use is not appreciably larger than other residences in the area and the scale and bulk of the proposed use, which includes a large parking area, a series of concrete pathways and a large concrete dance floor might be out-of-place if situated amongst more traditional residential uses located along River Drive. However, these improvements are largely screened from the residents in this area by distance and foliage. Whether the proposed use is inconsistent with the desirable character of the neighborhood is largely determined by negative impacts from that use.

A number of concerns about adverse impacts from the proposed use have been raised. These concerns include noise, traffic safety, river contamination, what may best be described as light pollution, and nuisance lawsuits. These impacts are addressed as follows:

Noise

Noise sources affecting the livability of the area include normal rural residential sounds, such as lawnmowers, barking dogs, music, cars, etc., sounds from cars on the local roads and Interstate 5, and the Willamette River. Ambient sound level along River Drive appears to be primarily determined by Interstate 5 and the nearby Willamette River. While the noise from Interstate 5 can be expected to dissipate at night, the sound from the river can be assumed to be constant. Contrary to some testimony, there is no evidence that the hills to the west of Sears Road create an amphitheater effect for sound.

Sound tests indicate that if artificial sound devices are limited to 91 dB,A at the dance floor (with speakers directed towards the east) and 70 dB,A on the lower terrace (speakers also directed towards the east) that the ambient sound level at the residences on River Road will not be exceeded. However, the opponents have rightly pointed out that sound meters are not completely determinative in measuring acceptable levels of sound from an event. Audible sounds that are not characteristic of an area and which are not so constant as to become “background” noise may also be disturbing.

Thus, low frequency (bass) sounds, live music, and high-pitched human speech generated by the proposed use are a concern.

Electronic equipment used to enhance speech and music is sophisticated enough to allow the control of low frequency sound as well as the volume of the sound generated. Therefore, I believe that it is feasible for the applicant to control low frequency sound so that it is not audible or easily detectable by residents living along River Drive. I also believe that the applicants can control the unenhanced, natural level of human speech and live music at the events so that they will not become disturbing to residents across River Drive.

I believe that it is feasible for the applicants to prevent sound from the proposed events from adversely affecting surrounding properties. Conditions of approval that limit the volume and type of sound produced, that control the orientation of loudspeakers, and require sound measuring equipment to be utilized for all events will operate to promote this outcome. Also, there will be an evidentiary hearing required to be held prior to the 2014 season to measure the effectiveness of these measures.

Traffic

The size of the events is limited to 250 people, which is equivalent to fewer than 90 cars. Sight distance at the intersection of the subject property's driveway with Sears Road is more than adequate for the posted speed limit and the traffic generated by the proposed use will not change the LOS of Sears Road near the subject property. The potential for dangerous vehicle stacking on Sears Road is addressed by improvements to the driveway approach, required signage, and the presence of traffic control attendants.

Concern has been raised about the adverse impact on the use of Sears Road for recreational bicycling and admittedly, without shoulders, Sears Road is probably not the most safe rural road for that activity. However, the road is designed for a much higher vehicle capacity than at present, including the addition of the proposed use, and the mere increase in traffic does not make it inherently unsafe to bicyclists.

River Contamination

Opponents speculate that the applicant's parking lot will cause oil, gas, and other petroleum-based contaminants to enter the river. Maps of the project indicate that the parking lots vary from

between 200+ feet to 150 feet from the riverbank. There are no channels or drainage ways that lead from the parking areas to the river and it seems unlikely that contaminants would reach the river from this distance. As a condition of approval, to prevent pooled contaminants from being washed into the river during large storm events, the applicants will be required to inspect the parking area within 24 hours of its last use and remove any soil contaminated by leakage from a vehicle. The contaminated soils shall be disposed of according to DEQ/EPA guidelines.

Light Pollution

The opponents agree that tree foliage along the riverbank screen adequately screen light from evening events on the subject property during the Summer and Fall but not in the late Spring. In today's world, it is normal for both rural and urban residents to have security lighting around their structures. Some of this lighting is episodic, triggered by nearby movement, and some of it is continuous during times of darkness. As long as the lighting is pointed inward and downward, and not directed off one's property, I believe that it does not adversely affect an adjacent or nearby property owner. In the present case, lighting from the proposed use will be required to be directed inward and downward, with no lights pointed towards the west.

Nuisance Lawsuits

The wedding operations will be contained on the subject property and there is no evidence that adjacent forestry uses have adversely affected the operation of the proposed use. However, testimony by a senior vice president of the company that manages the land implies that customary forestry practices, which include harvest, slash burning, and the application of chemicals, may be conducted on the property adjacent to the east. The proposed forestry management easement is a reasonable condition to limit liability against nuisance lawsuits resulting from normal, non-negligent forestry operations on that property.

In conclusion, the proposed use, as warranted by the applicants and conditioned by this decision will not adversely affect the livability or appropriate development of abutting properties and the surrounding vicinity.

- (bb) *Will not be adversely affected by the development of abutting properties and the surrounding vicinity.*

The area around the subject property is largely rural residential to the north and west, across the Willamette River, and commercial forestry adjacent to the east. As noted above, there is no evidence that adjacent forestry uses have adversely affected the operation of the proposed use. It can be concluded that the proposed use will not be adversely affected by the development of abutting properties and the surrounding vicinity.

- (b) *In applying the criteria for allowable temporary uses provided in LC 16.255(2)(a)(i) and (ii) above, consideration may be given to harmony in scale, bulk, coverage and density; to the availability of public facilities and utilities; to the harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets and roads; and to any other relevant impact of the use.*

The “considerations” listed in this approval criterion have been applied to the analysis in LC 16.255(2)(a)(i) and (ii), above.

- (c) *No structural alterations may be made to a nonconforming structure to be utilized by a temporary use which would materially prolong the economic life of the structure.*

No structural alterations are proposed.

- (d) *Where new structures and use thereof and new open land uses are permitted, the premises shall be required to be restored to the prior state within three months of the termination of the permit. A performance bond shall be required, if determined necessary by the Hearings Official, at the time of approval in sufficient amount to cover the estimated cost such restoration.*

No structural alterations are proposed.

- (e) *Temporary Permits for any one permit shall be approved for a maximum of five years.*

As a condition of approval, the temporary use permit shall be granted for a maximum duration of five years.

Summary

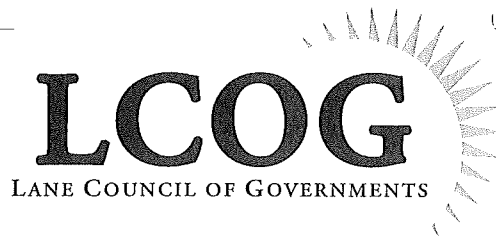
The proposed commercial wedding operation, as described by the applicant and conditioned in this decision, will not adversely affect the livability or the appropriate

development of abutting properties and the surrounding vicinity nor will it be adversely affected by the development of abutting properties and the surrounding vicinity.

Respectfully Submitted,

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

Gary Darnielle
Lane County Hearings Official



November 16, 2012

Mr. Matt Laird, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: *Appeal of Hearings Official conditional approval of the Shrives' request (PA 12-5171)
for a temporary use permit for commercial outdoor events operation on tax lot 201,
assessor's map 19-03-25.*

Dear Mr. Laird:

On October 30, 2012, I issued a decision approving, with conditions, a request from Margaret and Mark Shrives for a temporary use permit to allow a commercial outdoor events operation within the F-2 Impacted Forest Lands Zone. On November 13, 2012, this decision was appealed by John White. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

Nevertheless, I think it appropriate to take this opportunity to refute Mr. White's allegation that the notice of this land use matter was faulty. While the applicants originally applied under Lane Code 16.255(2)(a)(iii), this intent was changed prior to notice being sent out to interested parties and adjacent property owners. The record contains a copy of an email where Mr. Shrives acknowledges that the application should be processed under Lane Code 16.255(2)(a)(ii). Subsequently, notice of the hearing cited Lane Code 16.255(2)(a)(ii) as the applicable approval standard. In accordance with ORS 197.763(5)(a), both the staff and the hearings official announced at the August 2, 2012 hearing on this matter that Lane Code 16.255(2)(a)(ii) was the applicable substantive criteria.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my October 30, 2012 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Jerry Kendall (file)