

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 19-02-05-04 In the Matter of Electing Whether or Not to Hear an Appeal of a Hearings Official Decision both Dismissing the Appeal and Affirming the Planning Director's Decision to Approve a Template Dwelling in the Impacted Forest Lands Zone (F-2) on Tax Lot 2403, Assessor's Map 17-06-10 (File No. 509-PA18-05289; J&K Timber, Jones, and Lanfear)

WHEREAS, the Lane County Hearings Official has made a decision to reverse the Planning Director's acceptance of an appeal of the Planning Director's decision and to affirm the Planning Director's approval of a template dwelling application for Assessor's Map and Tax Lot 17-06-10-00-02403, identified as File No. 509-PA18-05289;

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 14.080(4)(d)(ii) and (vi), 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 December 13, 2018, the Lane County Hearings Official affirmed his November 27, 2018 decision on the application after reviewing the appeal; and

WHEREAS, Lane Code 14.080(4)(d) 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 14.080(4)(d)(iii) 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 November 27, 2018, and the letter affirming the decision dated December 13, 2018 attached as Exhibit "B," which reversed the acceptance of an appeal of the Planning Director's decision and affirmed the Planning Director's decision, are adopted, ratified, and affirmed by the Board of County Commissioners as the County's final decision. Furthermore, to the extent that the Hearings Official interpreted Lane Code 16.211(5) and (8), that the Board expressly agrees with and adopts those interpretations.

ADOPTED this 5th day of February, 2019



Pete Sorenson, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 1-24-19

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-PA18-05289.
2. Notice of the November 27, 2018 Hearings Official's decision was mailed to the applicant and parties of record on November 28, 2018.
3. On December 10, 2018, Dianne Bielefeld and William Dunham, 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 14.080(4)(d)(ii) and (vi).
4. On December 13, 2018, the Hearings Official reviewed the appeal and affirmed his decision without further consideration pursuant to LC 14.080(4)(a) and (b).
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 decision within 150 days after the application was deemed complete was September 28, 2018. 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 14.080(4)(d)(iii) 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; or*
 - *The Planning Director or Hearings Official recommends review.*

Issues raised in the appeal statement are largely specific to the application and to the slopes and site plan of the subject property. The siting standards that are in question with this appeal are in question because of the specific site attributes for the subject property.

The main focus of the appeal by the appellant asserts that fire safety standards are not being met on the site plan, in the application, or the review by the Planning Director. The fire safety standards the appellant is mainly concerned with are fuel breaks in relation to the slopes and access for emergency vehicles in relation to the slopes of the property. The Planning Director believes that there is not a need for policy guidance on this issue because fire safety is something that has been consistently applied by staff, and much of these issues are site specific because of slopes.

Forest Template Dwelling applications are a common land use application made to the County, but the Planning Director has consistently determined that fire safety design standards are adequately addressed as conditioned in template dwelling applications.

Appellants concerns over Lane Code Chapter 14 have been addressed by both staff and Lane Code Chapter 14 is currently being addressed by LUBA. Since this appeal was submitted staff have updated appeal forms to alleviate some of the confusion that may have resulted from the previous versions of the forms. The Planning Director believes that there is not a need for policy guidance on this issue as Lane Code Chapter 14 is currently on appeal to LUBA.

Issues raised in the appeal concerning OAR 660-006-0027(1)(f) and other applicable State law are matters of State law interpretation on which the County would not have deference on appeal to LUBA.

As described in the Hearings Official's decision, the applicant has demonstrated that the proposed dwelling meets siting criteria and that access to the proposed dwelling is feasible as conditioned.

The Hearings Official has reviewed the appeal and found that the allegations of error have been adequately addressed in his decision and do not warrant reconsideration, as explained in his December 13, 2018 letter affirming his November 27, 2018 decision.

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. To the extent that the issues will occur with frequency, the Hearings Official's decision or any forthcoming LUBA opinion would provide guidance.

7. The issues raised in this appeal do not relate to, or involve a Goal 5 inventoried environmental resource. Issues raised in this appeal relate to provisions of OAR 660 and Lane Code 16.211(5) and (8).

The appellant has raised the issue that approval of the dwelling fails to meet Big Game Range habitat density standards and Goal 5 policies of the Rural Comprehensive Plan. The Hearings Official's decision details that the intended use of the density standards was to establish the Lane County zoning ordinance and is to be considered in rezoning applications. The Planning Director has held that Goal 5 Big Game policies apply to post-acknowledgement plan amendments (PAPA), and that a PAPA does not require an entirely new Goal 5 analysis. Therefore, an application for a template dwelling does not require a Goal 5 analysis.

8. The Planning Director recommends that the Board elect *not* to conduct an on-the-record hearing for the appeal and adopt, affirm, and ratify the Lane County Hearings Official decision as the County's final decision, and expressly agree with and adopt any interpretations of Lane Code 16.211(5) and (8) made by the Hearings Official. The November 27, 2018 Hearings Official's decision and his December 13, 2018 letter affirming his decision does not include a recommendation that the Board of Commissioners conduct an on-the-record hearing for the appeal.
9. To meet the requirements of Lane Code 14.080(4)(d)(ii), 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 February 5, 2019, finds that the appeal does not comply with the criteria of Lane Code Chapter 14.080(4)(d)(iii), declines to further review the application, and elects not to hold an on the record hearing for the appeal.
10. The Board therefore elects not to conduct an on-the-record hearing for the appeal and to adopt, affirm, and ratify the Lane County Hearings Official decision as the County's final decision. Furthermore, to the extent that the Hearings Official has interpreted Lane Code 16.211(5) and (8), the Board expressly agrees with and adopts those interpretations.



December 13, 2018

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

Re: *Appeal of the Hearings Official decision affirming the Planning Director's approval of the Casey Jones, Jr. request for a forest template dwelling on tax lot 2403, assessor's map 17-06-10.*

Dear Ms. Kaye:

On November 27, 2018, I issued a decision affirming the Planning Director's approval of the request (PA 18-05289) by Casey Jones, Jr. for a forest template dwelling on tax lot 2403, assessor's map 17-06-10. On December 10, 2018 this decision was appealed by Dianne Bielefeld and William Dunham. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in the decision and that a further consideration is not warranted.

Accordingly, on the authority of Lane Code 14.080(4)(b), I shall affirm my November 27, 2018 decision without further consideration. Please advise interested parties of this decision.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

cc: Aaron Staniak (file)

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL OF A TEMPLATE
DWELLING WITHIN AN F-2 DISTRICT**

Application Summary

On April 3, 2018, a request to establish a dwelling in the Impacted Forest Lands (F-2) zone was submitted to Lane County Land Management Division by Casey Jones Jr. The application was deemed complete on May 2, 2018. On September 7, 2018, the Director issued a determination that the subject property complied with the applicable standards and criteria for a Forest Template Dwelling pursuant to LC 16.211(5) and (8). Notice of the determination was mailed to surrounding property owners and interested parties. On September 19, 2018, a timely appeal was submitted by LandWatch Lane County.

Parties of Record¹

Casey Jones, Jr.	LandWatch Lane County*	Andrew Mulkey*
Lauri Segal *	J&K Timber & Land LLC	Kim O'Dea
Dianne Bielefeld*	William Dunham*	Pam Bielefeld
Thom Lanfear		

Application History

Hearing Date: October 18, 2018
 (Record Held Open Until November 15, 2018)

Decision Date: November 27, 2018

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(5) & (8)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the “subject property,” is located on tax lot 2403, assessor’s map 17-06-10, about 3.7 miles northwest of the City of Veneta. The subject property is vacant, is about 10.14

¹ The party status of individuals or organizations with an asterisk after their names has been challenged.

acres in size, and is zoned F-2 Impacted Forest Lands. It is owned by Casey Jones, Jr. and J & K Timber and Land, LLC. The entire property is located within an area designated as Peripheral Big Game.

The subject property, was created on November 13, 1964 in a Warranty Deed from Sweet to Hickey. This deed was recorded on Reel 464, Instrument 91380 Land County Deeds & Records. Tax lot 2402, owned by the Applicant, was created on February 19, 1963 in a Warranty Deed from Sweet to Hickey. This deed was recorded on Reel 212, Instrument 1045 Land County Deeds & Records.

The subject property was recently logged (2015) and has generally contains slopes that fall away from a central north/south ridge that cuts across the middle of the property. County LiDAR² records show that the eastern and western portions of the property have slopes in excess of 25 percent but typically not more than 40 percent. The subject property is bordered on the north, west and east by properties zoned F-2 and on the south by a property zoned RR-5. Additional properties zoned RR-5 are located to the west beyond the lone F-2 property. Adjacent property tax lot 2402, which has an approved replacement dwelling permit and is currently occupied by a garage, is owned by J&K timber and Land, LLC. The Applicant's site plan identifies a 140' by 200' area (28,000 square feet) within which the proposed dwelling and subsurface sewage system is to be located.

2. The Director's report does not identify the soils that occupy the subject property but the Applicant has elected to apply under LC 16.211(5)(c)(iii) and stipulates applicability of the most rigorous soils standard of 85 cubic feet per acre per year of wood fiber.
3. As the subject property's soils are stipulated to produce more than 85 cubic feet per acre per year of wood fiber per NRCS data, the 11-parcel template test required by Lane Code 16.211(5)(c)(iii)(aa) is applicable to this application. In addition, Lane Code 16.211(5)(c)(iii)(bb) requires that at least three dwellings existed on January 1, 1993, and continue to exist on lots located within a 160 acre square centered on the subject property. The following table documents the 14 parcels relied upon by the Applicant to satisfy Lane Code 16.211(5)(c)(iii):

Count	Assessor's Map	Tax Lot	Date of Creation	Documentation / Deed / LLV / Partition
1	17-06-10	204 & 205	1979	Parcel 3, M455-79
2	17-06-10	2401	1962	Reel 105/Instrument 54495
3	17-06-10	2402	1964	Reel 212/Instrument 1045

² Lidar is a surveying method that measures distance to a target by illuminating the target with pulsed laser light and measuring the reflected pulses with a sensor. LiDAR derives its name from "light" and "radar."

4	17-06-10	2404	1968	Reel 338/Instrument 77927
5	17-06-10	2409	1970	Reel 481/Instrument 6826
6	17-06-11	900	1972	Reel 563, Instrument 77765
7	17-06-11	2500	1980	Parcel 1, M277-80
8	17-06-11	2502	1980	Parcel 2, M277-80
9	17-06-10	2507	1977	Parcel 1, M62-77
10	17-06-10	2506	1977	Parcel 2, M62-77
11	17-06-10	2505	1977	Parcel 3, M62-77

4. Lane Code 16.211(5)(c)(iii)(bb) requires that at least three dwellings existed on January 1, 1993, and continue to exist on lots located within a 160 acre square centered on the subject property. The Applicant has relied upon the following dwellings/tax lots:

Count	Assessor's Map	Tax Lot	Year	Date of Dwelling on Property
1	17-06-10	2401	1962	1940
2	17-06-10	2507	1977	1977
3	17-06-10	2505	1977	1946

5. Lane County's land division regulations affected the subject property and surrounding properties on April 2, 1962.
6. The subject property is served by the Lane Fire Authority. The record contains information regarding the service district of the Authority, its personnel, number of stations and available fire-fighting and emergency equipment. The record also contains a February 9, 2018 letter³ and a November 8, 2018 letter from Dean Chappell, Fire Inspector with the Lane Fire Authority, that states that the access road will meet its emergency vehicle requirements if certain conditions are met. The record contains an information sheet about the Lane Fire Authority. This sheet contains information about the Authority's equipment, personnel and fire stations.
7. On October 24, 2018, the Hearings Official took a site view of the subject property. A description of this site view can be found in an October 25, 2018 memorandum to File PA 18-05289. At the time of the site view, the driveway to the proposed dwelling site was completed and graveled. The driveway was constructed by CJ Development Company using a 308 CAT E3 series excavator. This vehicle measures grade while in operation and allows the operator to precisely know the finished grade during and after construction. The Applicant, the operator of the excavator, testified that the finished grade met the standards of

³ February 9, 2018 letter from Dean Chappell to the Lane County Land Management Division regarding 18-06-10-00, tax lot 2403.

the rural fire district and this was confirmed by the Lane Fire Authority’s inspector, who had inspected the driveway on two occasions.

Decision

THE PLANNING DIRECTOR DECISION ACCEPTING THE APPEAL OF HER SEPTEMBER 7, 2018 DECISION IS REVERSED ON THE BASIS OF LACK OF JURISDICTION.

SHOULD THE DISMISSAL OF THE APPEAL BE OVERTURNED ON APPEAL, THE PLANNING DIRECTOR DECISION APPROVING THE REQUEST (PA 18–05289) BY CASEY JONES, JR. FOR A TEMPLATE FOREST DWELLING ON TAX LOT 2403, ASSESSOR’S MAP 17–06–10 IS AFFIRMED ON ITS MERITS, with the following modification to Condition of Approval #12:

12. In the building or placement permit application submittal, the applicant must submit a Site Development Plan drawn to a standard engineer’s scale demonstrating that the parcel configuration, proposed dwelling, driveway, and septic system are located *substantially* consistent with the approved Site Plan, unless modified by the Planning Director. It must include any other information required by the building department. At the discretion of the Planning Director, any *substantial* deviation from the approved Site Plan may require an application for the Modification of Conditions.

Motion to Dismiss the Appeal

The Applicant has moved that the appeal be dismissed for failure to adhere to the required contents of the notice of appeal required by LC 14.080(1)(c). In specific, the Applicant contends that the requirements of LC 14.080(1)(c)(v) and (vii) were not satisfied.

The application for this template dwelling was submitted on April 3, 2018 and the current provisions of Chapter 14 of the Lane Code were adopted July 23, 2018. The Appellant’s Notice of Appeal was filed September 19, 2018. The Appellants argue that ORS 215.427(3) prevents the County from applying the new appeal procedures because the procedures were adopted and made effective after the application was submitted. I believe that the Appellants misunderstand the purpose of the statute. ORS 215.427(3) prevents the imposition of new criteria or standards to an application after that application was filed. The provisions of Chapter 14 of the Lane Code are procedural not substantive standards. As such, they can be applied after an application has been filed. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).⁴

⁴ But arguably not retroactively. That is, if the new appeal provisions were adopted after the Appellant’s filed their appeal then I do not believe the provisions would be applicable.

Chapter 14's new appeal provisions make it clear that the Notice of Appeal requirements are "jurisdictional." LC 14.080(1) Where an ordinance includes "clear and distinct identification of specific grounds" for appeal and compliance with that requirement with that requirement is jurisdictional, the local government can insist on strict compliance with those provisions. *Lang v. City of Ashland*, 64 Or LUBA 250 (2011). The requirement that a notice of appeal include information that establishes how appellants have standing is a provision that has been upheld as being "jurisdictional" in Coos County. *Tipton v. Coos County*, 29 Or LUBA 474 (1995)

The Appellants argue that because the Planning Director accepted the appeal it must be valid. Because the requirements of LC 14.080(1)(a) through (c) are jurisdictional, the question of whether the Planning Director erred in accepting the appeal can be separated from the appeal on the merits. That is, the question of jurisdiction goes to the authority of the Planning Director to accept the appeal. The Applicant is arguing that the Planning Director cannot accept an appeal that is not consistent with LC 14.080(1) as those requirements are jurisdictional. The Appellants argue that a dismissal of the appeal because of the failure to strictly conform to the requirements of LC 14.080(1) is overly harsh and implies that they should be able to cure the deficiencies during the review by the Hearings Official. However, it should be noted that Lane Code 14.080(2)(b)(iii) provides a remedy to cure a defective appeal, but only within the 12-day appeal period. In the present case, this was a moot option as the appeal form was turned into the County on the last day of the appeal period and there was no opportunity for the Director to notify the Appellants by mail of the deficiencies of the appeal.

The Applicant's motion will be addressed according to the following issues raised therein:

Party Status

Lane Code 14.080(1)(a) addresses who may appeal a land use decision. Subsection (a)(i) addresses appeals of Type II decision. Under the current provisions of Chapter 14, a Type II decision is one that "involves the Director's interpretation and exercise of discretion when evaluating approval standards and criteria." LC 14.030(1)(b). This is the same language in the previous version of Chapter 14 that applied at the time the application was filed and processed. The application for a forest template dwelling was processed as a Type II procedure.

Those who have party status to appeal a Type II decision are (i)(aa) persons who are entitled to written notice under LC 14.060 or (i)(bb) any person who is adversely affected or aggrieved by the application. The appeal statement of the Appellants contains the names of Dianne Bielefeld, William Dunham, and the initials "LWLC" (LandWatch Lane County). The form was signed by Ms. Laurie Segal on behalf of LandWatch Lane County. Attached to the appeal form was a memorandum dated September 19, 2018 that alleged numerous errors by the Planning Director in her decision in PA 18-05289. Neither the appeal form nor the attached memorandum state how the Appellants qualify for party status under LC 14.080(1)(a)(i).

Establishing party status is essential and is the first step in establishing the Planning Director's authority (jurisdiction) to accept an appeal. The addition of the term "jurisdictional" in LC 14.080(1) was an explicit action by the Board of Commissioners to tighten the requirements for appealing a Planning Director decision. To not to implement this provision would be to a failure to implement this clear policy mandate. *On this basis alone I believe that the appeal should be dismissed.*

Specified Assignments of Error

Lane Code 14.080(1)(c)(vii) reads:

"Provide an explanation with detailed support specifying one or more of the following as assignments of error or reasons for reconsideration."

This code provision lists four categories of error and provides an option to explain why a reconsideration is necessary to address evidence that was not available in the record at the hearing. Section 4.d of the appeal form sets out LC 14.080(c)(vii) verbatim.

There was no indication on Section 4.d. of the appeal form as to which assignments of error were relevant to the appeal. Further, while the memorandum in support of the appeal contain nine bullet-points of error, none of these bullet points reference a category of error.

The appeal is also dismissed for failure to comply 14.080(c)(vii).

Signature of Appellants

The Applicant notes that Appellant's Bielefeld and Dunham did not sign the appeal form and there is no written document indicating that Ms. Segal was authorized to place their names on the appeal form. The appeal form explicitly contains lines for the name of an appellant's representative, their pertinent information, and their signature. These lines were left blank.

While the appeal form does have a line for appellants' signatures, the code does not specifically require that an appellant sign the appeal form. While such a prerequisite is a very good idea, it is not a code requirement. *This portion of the motion is dismissed.*

Authorization to Represent A Party

The Applicant alleges that the County requires all representatives to provide an "authorization form" to prove that they have the authority to represent other individuals or organizations. There is no evidence in the record that this is the practice of the County. While LC 14.015(4) requires someone representing an applicant to demonstrate, in writing, their authorization to do so, there is nothing in Chapter 14 of the Lane Code that

requires authorization of one to represent an appellant. *This portion of the motion is dismissed.*

Lack of a Filing Fee

The Applicant presumes that the written authorization of Ms. Segel to represent LandWatch Lane County was required and since it wasn't, the appeal fee that she submitted on behalf of LandWatch must be returned. I have indicated above that written authorization to represent an appellant is not a code requirement and therefore the fee cannot be returned on that basis. *This portion of the motion is dismissed.*

Conclusion

For the reasons stated above, the Applicant's motion is sustained and the appeal must be dismissed. However, because this area of the law is not entirely clear, I will address the Appellant's allegations of error on their merits.

Justification for the Decision (Conclusion)

The subject property is zoned F-2 Impacted Forest Land. The Applicant is requesting approval to construct a single-family dwelling as provided by Lane Code 16.211(5)(c). Dwellings authorized by this provision are known as "forest template" dwellings because some of the applicable approval criteria of Lane Code 16.211(5) must be analyzed through the placement of a 160-acre square template centered on the center of the subject property (tract). Additionally, the placement of a dwelling on non-impacted forest land must meet the siting standards provided by Lane Code 16.211(8).

Under the template dwelling regulations, the standards differ depending upon the soil productivity of the property upon which the dwelling is to be placed. In the present case, the Applicant has conceded that a majority of the soils on the subject property are capable of producing more than 85 cubic feet per acre per year of wood fiber. Therefore, Lane Code 16.211(5)(c)(iii) is applicable. Under Subsection (aa) of this standard an applicant must demonstrate that there were eleven lots or parcels that existed on January 1, 1993 with a 160-acre square template that is centered on the subject property. In addition, under Subsection (bb) of this standard, an applicant must demonstrate that there were three dwellings that existed on January 1, 1993 and continue to exist that are located within the 160-acre square template that is centered on the subject property.

The allegations of error raised by the Appellant in its appeal are as follows:

1. The Applicant's site development plan is inadequate.

The Appellant argues that the site development plan does not provide any information concerning the configuration or size of the proposed dwelling, the actual driveway configuration with turnouts, the septic system or drain field, primary and secondary fuel breaks.

The Applicant's site development plan (Exhibit C to the Planning Director's September 7, 2018 report) shows the length of the subject property's borders, the 140' x 200' development area, and the distance of the development area from each property line. It also shows the general location of the access driveway, tax lot 2402 and Sheffler Road. The site plan does not show a location for the proposed dwelling, the well, the subsurface sewage system, or the primary and secondary fuel breaks. Another site plan, dated October 26, 1917, is in the record. This site plan lays out a 75' x 75' area where the house may be situated, as well as the location of the septic tank drainfield and the proposed well site.

The instructions that the Planning Director may have regarding required information on site plans has been placed into the record by the Appellants. This material consists of a document titled "Application Standards for Land Use Applications" and a "Site Plan Checklist." While I agree with the Appellants that a site plan that fully conforms to the Planning Director's instructions would be helpful, unfortunately there are no code requirements that specify the contents of a site plan. If the site plan does not show the location of the proposed dwelling, the well, the subsurface sewage system, or the primary and secondary fuel breaks, then the decision-maker must rely upon other information in the record to determine whether applicable code standards have been met.

The use of a development area allows an applicant some flexibility to situate necessary facilities during construction without having to get a modification to an approved permit. It also means that approval standards are applied to a larger area than necessary to meet code requirements. For example, the primary fuel break must be measured from the borders of the development area rather than from the location of the dwelling. Also, the Applicant's site plan must show that the development area meets the setbacks required by Lane Code 16.211(8)(a)(iii). Of course, if the development area meets the required setback and fuel break standards then it is known that it is feasible for a dwelling within that area to also meet those standards.

While a detailed site plan makes the decision-maker's job easier, the amount of detail is not specified in the code. I do not believe that the site plan has to do more than identify the borders of the property, the location of a development area, and the distance of the borders of the development area to the perimeter of the property. Other required information may be provided elsewhere in the record.
This allegation of error is dismissed.

2. *There is no evidence in the record supporting the Applicant's statements about the location of the new dwelling with respect to the distance from dwellings on adjacent properties.*

The site plan shows a development area of 28,000 square feet. The nearest property to the development area, owned by the Appellants Bielefeld and

Dunham, is 130 feet (actual measurement) from the southern end of the development area. Finding #11 in the Planning Director's report notes the distance from the development area to the proposed dwelling on tax lot 2402 to the west (435 feet), to the existing dwelling to the south (400 feet), and to the existing dwelling on tax lot 2502 to the east (1,000 feet). Since the proposed dwelling will be located within the development area it will be at least these distances from the dwellings identified in Finding #11. *This allegation of error is dismissed.*

3. *The Applicant does not provide the required distance from the proposed dwelling to the County right-of-way.*

I am not sure the relevance of this information although a scaled map included in the Applicant's October 17, 2018 submission shows that the road right-of-way is 465 feet from the southwest corner of the development area. Lane Code 16.211(8)(a)(ii) requires that the dwelling have minimal intrusion into forest areas undeveloped by non-forest uses. The access driveway is over an existing logging road and the development area is located on the only relatively flat area on the subject property large enough for a dwelling. Placement elsewhere would result in larger primary and secondary fuel breaks and requisite negative impact on the restocked timber as it matures. Given the topography of the subject property, it appears that the siting of the proposed dwelling on the subject property would have the least impact if located in the development area. *This allegation of error is dismissed.*

4. *There is no evidence in the record to support the Applicant's claim that the proposed dwelling will be situated on slopes of less than 10 percent within 30 feet of the dwelling.*

The Applicant has submitted a colored slope map that shows a ridge with slopes between 0 and 8 percent that runs through the center of the development area. The development area was marked for the site view and observations made during the site view confirmed a large area in that location that is relatively flat. The site of the well, test holes for the drainfield, and probable location of the dwelling were within the development area and were all located on relatively level ground.

The development area is large enough to place the well, drainfield, and dwelling within the development area and ensure that the dwelling can be sited so that there are no slopes in excess of 10 percent within 30 feet of it. The secondary safety zone would therefore be 100 feet around the primary safety zone. *This allegation of error is dismissed.*

5. *The primary and secondary fuel breaks must be shown on the site plan. Further, the Applicant's site plan shows that the development area cannot meet the primary and secondary fuel break on the northern property line.*

As noted above, the code does not require that this information be shown on the site plan. It is the Applicant's responsibility, however, to somehow demonstrate that the necessary fire safety setbacks can be met around the perimeter of the development area based upon the existing slope pattern. Nevertheless, the Applicant submitted an additional map of the development area, detailing the primary and secondary fuel breaks, in his October 17, 2018 submission.

The Appellant claims that the distance between the northern property line and the development area cannot accommodate a primary and secondary fuel break. However, it should be pointed out that the secondary fuel break is only required to be 100 feet in length or to the property line, whichever is shorter. Lane Code 16.211(8)(c)(i). The reliance of the north boundary of the development area is necessary to fully utilize the existing roadway. A reduction in the development area in this location will require additional tree cutting and slope modification to accommodate a slight relocation of the driveway.

6. *The application states that there is no water use permit for the existing well on the subject property.*

Lane Code 16.211(8)(d) requires evidence that the domestic water supply be from a source authorized in accordance with the Water Resources Department's administrative rules for ground or surface water appropriation. A well exists on the subject property and will be the source of the domestic water supply for the proposed dwelling. A water supply well report was submitted as Exhibit 15 in the Applicant's October 17, 2018 submission.

Condition #8 of the Planning Director's decision requires that the Applicant provide evidence that the domestic water supply is from a source authorized by the Water Resources Department's administrative rules or the appropriate of ground or surface water and Condition of Approval #9 requires verification of this through the provision of a well constructor's report or a water use permit from the Water Resources Department.

This allegation of error is dismissed.

- 7. *There is no evidence in the record to prove that the road is not over 200 feet long. The existing logging road is a dead-end road.***
- 8. *There is no evidence in the record supporting the Applicant's statement that the driveway will be developed on grades between 8 and 16 percent, that it is 12 feet wide and is over 200 feet long.***

Lane Code 16.211(8)(e) establishes the fire safety design standards for roads and driveways. The Applicant's access route is classified as a driveway as it provides access to only one dwelling. The replacement dwelling on tax lot 2402 has its own driveway and only shares a common access point off of Sheffler Road. The Applicant's driveway dead-ends at the site of the proposed dwelling. Lane Code

16.211(8)(e) requires that driveways be constructed to widths of at least 12 feet; have a base equivalent to six inches of gravel; have vertical clearance of 13 feet, six inches; have turnarounds every 400 feet for a dead end road, and have a grade not to exceed 16 percent except for distances of 100 feet or less.

The Applicant has testified as to how the existing driveway meets the fire districts slope maximum (12 percent) as well as width and number of required turnout locations. The mechanism for determining the slope of the driveway was also explained. These facts were verified by the Fire Inspector. During the site view it was apparent that the driveway had a base of crushed rock, had several turnarounds, and that it was longer than 200 feet.⁵ The width of the driveway was not measured during the site view nor was the distance from the road to the turnout.

The procedure followed by the Planning Director is to ascertain whether a driveway or road is or could be made to comply with Lane County and fire district access standards. Compliance with these standards are then made a condition of approval and the County verifies compliance prior to issuing a building permit. Testimony establishes that the driveway currently meets applicable standards or that it is easily feasible to do so and Condition #10 of the Planning Director's decision requires a verification that the driveway has met applicable standards. *These allegations of error are dismissed.*

9. *The subject property has been clear-cut and it does not appear that a single seed tree has been left for reproduction.*

On the October 24, 2018 site view, it was clear that the subject property had been restocked with Douglas fir trees. Lane Code 16.211(5)(d)(i) requires the property owner to restock the tract to reasonably meet the Department of Forestry stocking requirements. OAR 629-610-0020 provides that the actual number of trees restocked per acre depends upon the cubic site class of a property's soils. It was evident on the site view that the subject property had been restocked but because it is only known that the subject property has a productivity of greater than 85 cubic feet per acre of wood fiber, it is not known whether the standard of OAR 629-610-0020(4), at least 120 cubic feet per acre, or the standard of OAR 629-610-0020(5), between 50 and 119 cubic feet per acre, applies. Nor was the Hearings Official able to ascertain the actual restocking level. Nevertheless, the Planning Director's Condition of Approval #14 requires that the Applicant comply with applicable Department of Forestry stocking requirements. Condition of Approval #8 requires the verification of a forest stocking survey and evidence of receipt from the County Assessor.

⁵ The Applicant has warranted in an October 16, 2018 letter to the Hearings Official that the road is 700 feet long and has a turn-out located about 350 feet from the road. A turn-around at the home site was also warranted by the Applicant.

- 10. *The subject property cannot meet Lane Code 16.211(5)(a) and ORS 215.750(4), which requires that the tract upon which the template dwelling will be located not be occupied by another dwelling.***

The Appellant has argued that the County has already approved a replacement manufactured home for the subject property and has approved a site plan and building permit (BP 17-03472) for that structure.

A garage is located on adjacent tax lot 2402, the same tax lot upon which the aforementioned building permit applies. The site plan for the building permit for the replacement dwelling on tax lot 2402 (BP 17-03472) shows the site of the proposed dwelling to be 32 feet from the border of the subject property. The record also contains a survey (CS File No. 43255) for tax lots 2402 and 2403 that precisely marks the boundaries of each tax lot. I believe that the Appellants' reliance on an ArcGIS Web Map is misplaced when the boundaries of tax lot 2402 and 2403 are precisely mapped with a survey that has been certified by a licensed surveyor and filed with the Lane County Surveyors Office. The building permit site plan, which places the replacement dwelling over 30 feet from the property line of the subject property, must rely upon that survey for the placement of the dwelling. *This allegation of error is dismissed.*

- 11. *Goal 5, Policies #9 and #11, of the Rural Comprehensive Plan are applicable and, in the present situation, requires a Statewide Planning Goal #5 ESEE analysis.***

The subject property lies within a Peripheral Big Game Range. The Appellants point to ORS 215.750(4)(a) and OAR 660-006-0027(6)(a) which require dwellings on forest land to comply with the requirements of acknowledged comprehensive plans and land use regulations. Also cited is Goal 4, Policy #6 of the Rural Comprehensive Plan that requires that dwellings shall be allowed on Impacted Forest Lands as provided by OAR 660-006 and Goal 4, Policy #7 of the Rural Comprehensive Plan that establishes the minimum parcel size in the Impacted Forest Lands District as 80 acres.

The Appellants next addresses Goal 5 policies of the Rural Comprehensive Plan and their protection of Big Game areas. They note that the 1983 Flora and Fauna Working Paper states that the allowable residential density in a Peripheral Big Game area is one dwelling unit per 40 acres. Then the Appellants note that the area located between Sheffler Road, on the east, and Baker Road, on the east, contains about 179 acres and 11 dwelling units, for an average of about one dwelling unit per 16 acres. The Appellants posit that this is an apparent conflict with a Goal 5 resource that must be resolved through an ESEE analysis.

Lane County's Rural Comprehensive Plan and Chapter 16 of the Lane Code were acknowledged by LCDC in 1984. Big Game Habitat was recognized as a 1C

significant Goal 5 resource⁶ and the County incorporated some of the protections recommended in the Flora and Fauna Working Paper into the zoning ordinance. Residential development was limited in the Major Big Game Habitat areas but further restrictions were found not necessary to comply with Statewide Planning Goal 5.

Flora and Fauna Policy 11, of Goal 5 of the Rural Comprehensive Plan requires that Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of big game were to be used to determine the allowable number of residential units within regions of the County. This policy stated that any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000.

The Big Game Range section of the 1982 Flora & Fauna Working Paper⁷ notes that the County was to be divided into regions convenient for planning purposes; probably between 10 to 20 regions. Within the regions, excluding the Impacted Big Game Ranges, a residential carrying capacity was to be determined. The ODFW apparently recommended a density of one dwelling unit per 40 acres for peripheral big game range areas. The record does not reflect whether Lane County ever divided the County into geographic Big Game Range regions and the Appellant has not alleged that its analysis encompasses one of those regions. Therefore, it is not known whether the subject property lies within a specific geographic Big Game region and, if so, what the current dwelling unit density is in that region.

Ultimately, the acknowledged zoning ordinance did not apply the Big Game limitations except in certain circumstances, such as in the Exclusive Farm Use Zone.⁸ And in that case only properties lying within a Major Big Game area were affected. No specific siting regulations for forest template dwellings located within a peripheral big game range were adopted by the acknowledged Chapter 16 zoning code.

This allegation of error is dismissed.

Summary

This is a test case for whether conformance with the County's Notice of Appeal contents are to be strictly enforced. Because the requirements of 14.080 are jurisdictional, I have determined that failure to comply with them must result in a dismissal of the appeal. In the eventuality that it is found, on appeal, that the appeal of the Planning Director's

⁶ *Save TV Butte v. Lane County*, LUBA No. 2017-031, Slip Op at 26 (1/18/2018)

⁷ It should be noted that the working papers that support the Rural Comprehensive Plan were not "elements" of the plan and did not carry any authority in and by themselves. Not all of their recommendations were implemented by plan policies although they generally provided information and analysis that supported adopted policies.

⁸ See, for instance, Lane Code 16.212(10)(a)(i).

decision should not be dismissed, this decision also addresses the application on its merits.

Respectfully Submitted,



Gary Darnielle
Lane County Hearings Official