

W. L. C.

AGENDA COVER MEMO

DATE: December 15, 2004

TO: LANE COUNTY BOARD OF COMMISSIONERS

DEPT.: Public Works Department/Land Management Division

PRESENTED BY: Jerry Kendall^{JK}/Land Management Division

AGENDA ITEM TITLE: Order _____/In the Matter of Denying a request to amend the Rural Comprehensive Plan to redesignate and rezone 73.76 acres of land from "Agricultural Land/E-40 Exclusive Farm Use" to "Marginal Land/ML Marginal Lands" (file PA 02-5838; Ogle-Childs)

I. MOTION

MOVE ADOPTION OF THE ORDER WITH EXHIBIT "A" (Findings)

II. ISSUE OR PROBLEM

An Ordinance to amend the Rural Comprehensive Plan and rezone property was tentatively denied by the Board on November 3rd. This Order sets the matter before the Board for final action.

III. DISCUSSION

A. Background

Beginning on July 14, and during subsequent readings on August 25, September 22, and November 3, the Board held a public hearing and deliberation on Ordinance PA 1210, proposing to amend the Rural Comprehensive Plan from "Agricultural Land" to "Marginal Land", and rezone the subject property from E-40 to ML. Applicants were Brad and Julie Ogle, and Mark and Cindi Childs. Land Management Division file number was PA 02-5838. Following the hearing, the Board evaluated the proposal and decided that it should not approve the request. Staff was directed to coordinate with the prevailing party (Goal 1 Coalition, Jim Just) and prepare the attached Order and Findings.

B. Analysis

After the Board's deliberation on November 3, Michael Farthing, attorney for the applicants, filed an objection concerning the Board's deliberation discussion. Mr. Farthing contends that new evidence was raised after the close of the record, in prejudice to his clients. Mr. Just, party in opposition, submitted a response, maintaining that Mr. Farthing's claim is without merit. These two missives are attached, and should be discussed by the Board prior to taking final action.

Otherwise, the attached Order effectuates denial of Ordinance PA 1210 and sets forth Findings and Conclusions in support of the action (Exhibit "A" to the Order).

C. Alternatives/Options

1. Adopt the Order as presented.
2. Do not adopt the Order.

D. Recommendations

Staff recommends alternative 1 above.

E. Timing

No special timing concerns

IV. IMPLEMENTATION/FOLLOW-UP

Notice of action will be provided to DLCD and the applicant.

V. ATTACHMENT

1. Order with Exhibit "A" (Findings)—3pp.
2. Letter of Objection, M. Farthing—2pp.
3. Letter in response (to the above), J. Just—2pp.

IN THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON

ORDER No. _____

-) IN THE MATTER OF DENYING A REQUEST
-) TO AMEND THE RURAL COMPREHENSIVE PLAN
-) TO REDESIGNATE AND REZONE 73.76 ACRES OF
-) LAND FROM "AGRICULTURAL LAND/E-40
-) EXCLUSIVE FARM USE" TO
-) "MARGINAL LAND/ML MARGINAL LANDS"
-) (FILE PA 02-5838; OGLE-CHILDS)

WHEREAS, the Board of County Commissioners of Lane County, through enactment of Ordinance PA 884, has adopted Land Use Designations and Zoning for lands within the planning jurisdiction of the Lane County Rural Comprehensive Plan; and

WHEREAS, Lane Code 16.400 sets forth procedures for amendment of the Rural Comprehensive Plan and Lane Code 16.252 sets forth procedures for rezoning lands within the jurisdiction of the Rural Comprehensive Plan; and

WHEREAS, a request, in the form of Ordinance No. PA 1210 (application file number PA 02-5838) to adopt an amendment to the Lane County Rural Comprehensive Plan by redesignating and rezoning the affected property from "Agricultural/E-40 Exclusive Farm Use" to "Marginal Land/Marginal Lands", has come before the Board for action; and

WHEREAS, upon review of the testimony and evidence placed in the record of this matter and following a public hearing and deliberation, the Board elects to not adopt the proposed RCP amendment and rezoning as contained in Ordinance No. PA 1210; and

NOW THEREFORE, IT IS HEREBY ORDERED that Ordinance PA 1210 shall not be adopted and the application shall be denied based upon the findings and conclusions in support of this action, as set forth in the attached Exhibit "A", adopted and made a part of this Order by this reference.

DATED this _____ day of _____, 2004

Chair, Lane County Board of County Commissioners

APPROVED AS TO FORM

Date 12-7-2004 Lane County


OFFICE OF LEGAL COUNSEL

Exhibit "A" to Order No. _____

**Findings and Conclusions in Support of the Board's Action
To Decline Adoption of Ordinance No. PA 1210 and Deny Application PA 02-5838**

1. The matter before the Board, in the form of Ordinance No. PA 1210, is a request to amend the Lane County Rural Comprehensive Plan designation of property identified as tax lots 303 and 304, map 18-04-11 (73 acres out of 113.7 acres total) from "Agricultural" to "Marginal Land", with concurrent rezoning of the property from "E-40/Exclusive Farm Use" to "ML/Marginal Land".
2. Applicants requesting the action are Brad and Julie Ogle, and Mark and Cindy Childs. County application file number is PA 02-5838. The subject property consists of 73.76 acres within a 113.7 acre tract of land. The tract is composed of two parcels, which are under separate ownership. In 1992, via PA 0221-92, the northernmost 40 acres of the tract were successfully changed from E-40 to ML. The present application seeks to rezone the remainder of the tract to ML. Approval of the proposal would allow for an application seeking approval of subsequent division of the tract into a mix of 10 or 20-acre parcels, with a maximum of 9 parcels. If divided, a dwelling could be allowed on each parcel.
3. The request was set for public hearing before the Lane County Planning Commission on January 6, 2004. At its March 2, 2004 meeting the Planning Commission voted unanimously to approve the request. The request was then placed into Ordinance No. PA 1210 for consideration by the Board of County Commissioners.
4. Ordinance No. PA 1210 was set before the Lane County Board of County Commissioners for first reading and setting of the second reading and public hearing on June 23, 2004. The Board of Commissioners held the public hearing on July 14, 2004, then closed the hearing and left the record open until July 28 for any party to comment on any aspect; until August 11 for any party to comment on materials received during the first comment period; and until August 18 for applicant's final rebuttal.

Following allegations of procedural error, the Board on August 25, 2004 chose to re-open the record for a limited time, in order to allow for the submittal of written evidence and/or written argument in response to materials submitted during the second comment period (which ended on August 11) and the third period, which was for final rebuttal (and which closed on August 18). September 8, 2004 was set as the deadline for such submittals, followed by a one week period to September 15 for the applicant's final argument only rebuttal. A fourth reading and deliberations were set for September 22, 2004.

At the fourth reading, in order to resolve procedural objections, the Board reopened the record until October 8 for submittal of new written evidence, arguments or testimony in response to new evidence submitted during the previous reopened record period (August 25 through September 15, 2004); and until October 22 for submittal of final written argument rebuttal by applicant. A fifth reading was scheduled for November 3, 2004.

The Board moved to deliberate on November 3, 2004. Following review of the record by the Board, consideration of testimony and evidence presented at the public hearing and further deliberation after the record was closed; the Board tentatively elected to not adopt the proposed Ordinance and directed preparation of a final order of denial.

5. The Board finds that the proposal does not satisfy the requirements of Lane Code 16.400(6)(h)(iii)(aa) and 16.252 in that it does not meet "all applicable requirements of local and state law, including Statewide Planning Goals and Oregon Administrative Rules" including requirements of the 1991 version of ORS 197.247 and is "contrary to public interest." The Board's conclusions are as follows:
 - a. ORS 197.247(1)(a), the "income test", looks at the entire forest operation. In 1983 the proposed marginal lands were part of the parent 113-acre parcel, under one ownership. Evidence in the record establishes that the property was and is forested, that harvesting of timber took place during the 1990s, and that the parent parcel was therefore managed as part of a forest operation during the relevant 1978-82 period. There is credible evidence in the record that the property is capable of producing Douglas-fir, ponderosa pine, and other merchantable timber. There is credible evidence in the record showing that, employing reasonable

management practices and applying reasonable economic assumptions, the forest operation could produce average annual income over a growth cycle sufficient to meet or exceed the \$10,000 threshold. This evidence is sufficient to establish that the applicants have not met their burden of proof to demonstrate that the forest operation was not capable of producing an average, over the growth cycle, of \$10,000 in annual gross income.

- b. ORS 197.247(1)(b)(C), the “productivity test”, requires that the proposed marginal land not be capable of producing 85 cubic feet per acre per year of merchantable timber. There is credible evidence in the record in the form of NRCS, Oregon Department of Forestry, and other published data demonstrating that the portions of both TL 303 and TL 304 proposed to be redesignated marginal land are capable of producing in excess of 85 cf/ac/yr of Douglas-fir, ponderosa pine, and other merchantable timber. This evidence in the record is sufficient to establish that the applicants have not met their burden to demonstrate that the proposed marginal lands are not capable of producing 85 cf/ac/yr of merchantable timber.
- c. The applicant failed to establish compliance with the criteria for rezoning by the failure to meet the marginal land requirements of ORS 197.247 (1991) and as a result of that failure, approval of the request is contrary to the public interest and should not occur.

Michael E. Farthing
Attorney at Law

Smeede Hotel Building
767 Willamette Street, Suite 203
Eugene, Oregon 97401
Office (541) 485-1141 -- Fax (541) 485-1174
email - mefarthing@yahoo.com

November 8, 2004

HAND DELIVERED

Lane County Board of Commissioners
c/o Jerry Kendall
Land Management Division
Lane County Courthouse/PSB
125 East 8th Avenue
Eugene, OR 97401

Re: Applicants' Objections
Plan Amendment/Zone Change Applications
Agriculture (E-40) to Marginal Lands (ML)
Ogle-Child (PA 02-5838)

Chair Green and Commissioners:

On behalf of the Applicants for the above-referenced Marginal Lands application, I object to the procedures utilized by the Board in its deliberation at last Wednesday's meeting. The Board's consideration of new evidence and testimony was prejudicial and resulted in a tentative denial (3-2 vote) of the application. To cure, I request that you provide all parties with an opportunity to respond to new information that was introduced during the Board's deliberation yesterday. Until I transcribe the meeting tape, I am not sure how much new information was submitted but, as a minimum, it included the following

(1) Commissioner Dwyer made comments about the property tax deferral status for the subject property. He suggested that the deferral status for the property prevented approval of the application. His comments could easily have influenced and been persuasive to other Commissioners who tentatively voted to deny the application. The Applicants, as well as anyone else, should have the opportunity to address and clarify the status of any tax deferral that presently applies to the Subject Property and how that deferral status relates to the applicable criteria.

(2) There was also discussion by some of the Commissioners about the written easements for the BPA and EWEB powerlines and whether merchantable trees could be grown within those utility corridors. The new information that was provided (e.g. utility easements allow 18-foot trees) was never part of the record and, on first glance, appears to be inconsistent with the terms and conditions of the easements themselves.

BCC # 2 - 2 pp.

Lane County Board of Commissioners
November 8, 2004
Page 2

The Applicants would like to provide a written response to these comments. Again, more new information may have been submitted but I will not know until the transcript is prepared.

For now, we believe the Board, especially in these circumstances, should reopen the hearing to allow comment and evidence addressing the new evidence.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Farthing", with a long, sweeping horizontal line extending to the right.

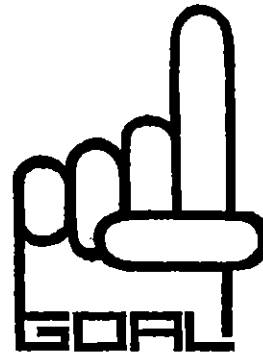
Michael E. Farthing

MEF/kt

cc: Brad Ogle
Steve Vorhes
Commissioners

GOAL ONE COALITION

39625 Almen Drive
Lebanon, Oregon 97355
Phone: 541-258-6074
Fax: 541-258-6810
goal1@pacifier.com



November 8, 2004, 2004

Lane County Board of Commissioners
c/o Jerry Kendall
Land Management Division
125 E. 8th Avenue
Eugene, OR 97401

RE: Applicant's objections of November 8, 2004; Ogle-Child (PA 02-5838)

Dear Chair Green and Commissioners:

Mr. Farthing has filed an objection to comments made by commissioners during deliberations on the above-referenced matter, and asked that the record be re-opened to provide an opportunity to respond to these comments. Mr. Farthing's objection is without merit and should be rejected.

Mr. Farthing has offered no authority for the proposition that comments by a decision maker during deliberations constitute evidence to which a party is entitled the opportunity to respond. There is no such authority. Indeed, existing law provides otherwise.

ORS 197.763(6)(c), which provides for the opportunity, upon written request, to respond to new evidence submitted during an open record period, applies only to the initial evidentiary hearing. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292, 300, *rev'd and rem'd on other grounds*, 148 Or App 217, 939 P2d 625, *rev den* 326 Or 59 (1997). Here, this was not the initial evidentiary hearing and there was no open record period.

ORS 197.763(7) provides as follows:

"When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence or testimony, any person may raise new issues which relate to the new evidence, testimony or criteria for decision-making which apply to the matter at issue."

In this case, the record was not reopened, and no new evidence or testimony was provided.

Staff communications with local decision makers are not considered ex parte contacts that require disclosure and an opportunity for rebuttal. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541 (1996). By the same reasoning, a staff recommendation regarding

Championing citizen participation in realizing sustainable communities, economies and environments

BCC #3 - 2/28 -

appropriate conditions of approval is not new "evidence" that might, if submitted by one of the parties, trigger an obligation to reopen the record for rebuttal. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

Comments made by a decision maker during deliberations simply do not constitute evidence. The city's decision must be accompanied by findings supported by substantial evidence in the record. If the county's findings reflect or incorporate comments made during deliberation, and if those findings are not adequate to address the approval criteria or are not supported by substantial evidence in the record, Mr. Farthing will have the opportunity to appeal the county's decision to the Land Use Board of Appeals.

Respectfully submitted,

Jim Just
Executive Director