

W.S.C.

## AGENDA COVER MEMO

**DATE:** August 13, 2007 (Date of Memo)  
August 29, 2007 (Date of Meeting)

**TO:** Lane County Board of Commissioners

**DEPT.:** Public Works Department

**PRESENTED BY:** Jerry Kendall, Land Management Division *JK*

**AGENDA ITEM TITLE:** Order No. \_\_\_\_\_ / In the Matter of Electing Whether or Not to Hear an Appeal of a Hearings Official's Decision Approving an Application for Rezoning Property from F-1 to F-2 (file PA 06-6170/Lininger)

### I. MOTION

MOVE TO ADOPT THE ORDER ESTABLISHING THE BOARD'S ELECTION TO NOT HEAR ARGUMENTS IN AN APPEAL OF THE HEARINGS OFFICIAL'S DECISION AND TO AFFIRM THE HEARINGS OFFICIAL'S INTERPRETATION OF ORDINANCE NO PA 1236, LANE CODE, AND STATE LAW, ON THE RECORD.

### II. ISSUE OR PROBLEM

An appeal to the Board, contesting a Hearings Official approval of a rezone request from F-1/Nonimpacted Forest Lands to F-2/Impacted Forest Lands, has been received by the Director. Pursuant to Lane Code 14.600, the Board must now decide whether or not to hear the appeal by applying criteria set forth in the Code.

### III. DISCUSSION

#### A. Background

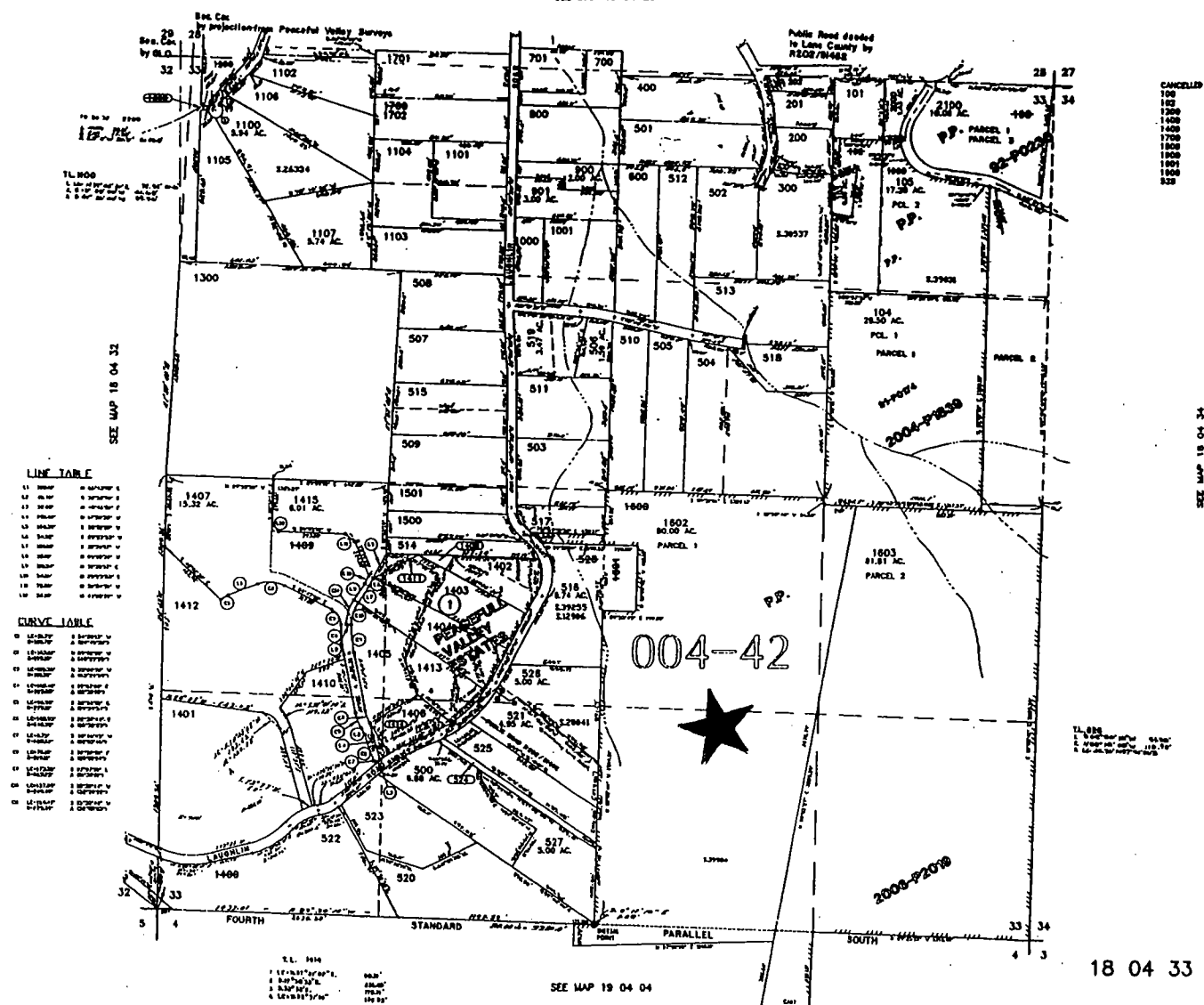
1. Property involved in this action is 80 acres of land identified as tax lot 1602, map 18-04-33, located on the east side of Laughlin Road, and approximately ½ mile north of Fox Hollow Road. The property is designated F-1/Nonimpacted Forest Lands by the Rural Comprehensive Plan, Zone Plot Map #299.
2. In the form of application PA 06-6170, the property owner in June 2006 requested Lane County Hearings Official approval of a rezone request, from F-1/Nonimpacted Forest Lands to F-2/Impacted Forest Lands, per LC 16.252.
3. A hearing before the Lane County Hearings Official was held on January 18, 2007.
4. On May 30, 2007, the Hearings Official issued a decision approving the rezone request.
5. A timely appeal of the Hearings Official decision was filed on June 11, 2007; the appeal was accepted by the Director and forwarded to the Hearings Official.

SECTION 33 T.18S. R.4W. W.M.  
LANE COUNTY

SCALE 1" = 400'

**SIE MAP 18 04 28**

18 04 33  
NAD 83/91

[illegible]

6. On June 15, 2007, the Applicant requested that the Order and Findings approving the rezone be revised by the Hearings Official to better reflect evidence already in the record. The Hearings Official subsequently issued a revised Order and Findings on June 18, 2007, and affirmed his decision.
7. On July 2, 2007, the Applicant requested that they be allowed to submit recalculations of statistics challenged by the Appellant on June 28. The revised calculations were minor and did not affect the previous Findings. On July 16, 2007, the Hearings Official issued a second revision of the Order and Findings. The Appellant was provided the opportunity to modify their appeal, but declined.

#### **B. Elective Board Review Procedure**

The Elective Board Review Procedure in Lane Code 14.600(2)(c) and (d) provides the Board with three options:

- To hear the appeal on-the-record,
- To not hear the appeal and to remain silent on the Hearings Official's decision, or
- To not hear argument in the appeal but to expressly agree with any interpretations of the comprehensive plan policies or implementing ordinances made by the Hearings Official in the decision being appealed and affirm the Hearings Official's decision.

The applicable subsections are:

*(c) The Board shall specify whether or not the decision of the Board is to have a hearing on the record for the appeal and shall include findings addressing the decision criteria in LC 14.600(3) below. If the Board's decision is to have a hearing on the record for the appeal, the Board order shall also specify the tentative date for the hearing on the record for the appeal and shall specify the parties who qualify to participate in the hearing on the record for the appeal.*

*(d) If the decision of the Board is to not have a hearing, the Board order shall specify whether or not the Board expressly agrees with or is silent regarding any interpretations of the comprehensive plan policies or implementing ordinances made by the Hearings Official in the decision being appealed. The Board order shall affirm the Hearings Official decision.*

If the Board's decision is to hear arguments on the appeal, then the Board must adopt an Order and findings specifying the tentative date for a hearing and the parties who qualify to participate in a hearing on the record for the appeal. Such an Order is not attached here and will need to be produced if the Board elects to hear.

In order for the Board to hear the appeal, the Decision Criteria of LC 14.600(3) requires that one or more of the four criteria cited below, be satisfied:

*(3) Decision Criteria. A decision by the Board to hear the appeal on the record must conclude the issue raised in the appeal to the Board could have been and was raised before the close of the record at or following the final evidentiary hearing and must comply with one or more of the following criteria:*

- a) The issue is of Countywide significance.*
- b) The issue will reoccur with frequency and there is a need for policy guidance.*
- c) The issue involves a unique environmental resource.*
- d) The Planning Director or Hearings Official recommends review.*

## C. Analysis

### Character of the Appeal.

The appeal contains a general admonition that the Board hear the appeal, and gives details on three issues.

The admonition advises that the issues raised in this case are of countywide significance and that they will reoccur with frequency, warranting an appeal hearing before the Board. The appeal states that the interpretation of Rural Comprehensive Plan Goal 4, policy 15 (a key policy in this application which describes the characteristics of F-1 versus F-2 land) "... has been the subject of much debate in the recent past and has already reoccurred several times since the county's decision in the Symbiotics case..."<sup>1</sup>. The Appellant goes on to cite three LUBA cases that are claimed to bolster this assertion. However, all three of the cited LUBA cases were heard by LUBA *before* the Board issued Ordinance No PA 1236 on August 20, 2006. Ordinance No PA 1236 has not been challenged before LUBA. It is noted that the Applicant had revised their proposal in response to Ordinance No PA 1236, as it took effect two months after the original application was submitted.

The appeal continues to describe three assignments of error.

The first assignment states that the Hearings Official exceeded his jurisdiction and misinterpreted the Lane Code and state law in reference to RCP Goal 4, policy 15. The policy is recited on page 1 and 2 of the appeal, Attachment #2 to this memo.

The Appellant contends that the county should evaluate the proposal as it stood prior to partitioning in 2006, at 242 acres<sup>2</sup>. However, the prior actions by the Applicant were properly noticed and were not appealed, and are not subject to collateral attack. The 242 acre parent property was declared a preliminary legal lot per PA 04-6236. That determination was previously "noticed" per LC 13.020 via file PA 05-5498 on May 10, 2005, wherein parties were offered the opportunity to appeal. No appeal was filed.

Likewise, the parent parcel was granted preliminary partition approval via application PA 05-6791 on March 9, 2006. No appeal was filed, and the decision became final on March 21, 2006. Again, that decision is not subject to collateral attack through this rezone proposal. The Applicant followed legal procedure in arriving at the three parcels under family ownership that exist today. The Hearings Official properly evaluated the rezone request only for the 80 acre parcel, as requested by the Applicant. Ordinance No. PA 1236 was properly utilized in that decision.

The appeal mentions a recent rezone from F-1 to F-2 which was denied (Dockum, PA 06-6054, an attachment within the appeal). The Appellant appears to reason that since Dockum was a split-zoned proposal and was denied, the present proposal should also have been denied. In Dockum, the subject property was a 38 acre portion of an 80 acre parcel. In the present case, the subject property<sup>3</sup> is zoned F-1, and the same 80 acres is proposed to be rezoned to F-2.

The second assignment of error concerns the legal lot status, and alleges that the opponents argued that an illegal lot line adjustment was performed, in part, to orchestrate the creation of the subject parcel, "... to divide up the previous 160-acre property previously owned and managed by Roseboro Timber in order to fall within the Goal 4, Policy 15 characteristics". However, as mentioned above, the Applicant followed

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<sup>1</sup> The Symbiotics case, Ordinance No. PA 1236, is included in the file record for this rezone. It can also be viewed at [http://www.lanecounty.org/BCC\\_Info/Meeting\\_Info/2006/Order%20Text/8-30/Passed/1236.pdf](http://www.lanecounty.org/BCC_Info/Meeting_Info/2006/Order%20Text/8-30/Passed/1236.pdf).

<sup>2</sup> Prior to its partitioning in 2006, the property consisted of 242 acres, 160 acres of which was zoned F-1. Via partition Plat No. 2006-P2019, that block of land was divided into three parcels, now under separate legal ownership but within the Applicant's family.

<sup>3</sup> It is noted that the access panhandle of the subject parcel, the former tax lot 528, is zoned Rural Residential. However it is not part of the rezone proposal, and was properly addressed on page 10 of the Hearing Official's decision.

legal procedure in previously partitioning the property, which included notice and the opportunity to appeal. Since no appeal was filed, the legal lot status cannot be collaterally attacked.

The third and final assignment of error mentions a recent LUBA case, *Anderson v. Coos County*, 51 Or LUBA 454 (2006). The Appellant argues that the *Anderson* case applies here, apparently maintaining that the Applicant and Hearings Official erroneously use the issue of no pesticide use as rationale for the rezone. The present case differs from *Anderson* in at least two significant ways. First, the *Anderson* case involved a Plan Amendment and rezone from Forest land to Residential through a “developed and committed argument”, a more stringent application with a higher level of evidence required. In the present case, the proposal is a rezone only from one forest zone to another. No argument is being made that the subject property is not to be used for resource use, unlike in *Anderson*. Secondly, the “pesticide issue” is not the determinant factor in the Hearing Official’s ruling. In his decision, the Hearings Official relies on the Applicant’s labor intensive forestry methods (mulch mats, hand pruning, etc.), as justification for RCP policy compliance, and does not relay on a finding as to whether or not pesticides will be used.

The Applicant has also addressed reasons why the Board should not hear this appeal in materials dated June 18, 2007, Attachment #3 to this memo.

If, pursuant to Lane Code 14.600(2)(d), the Board agrees with the Hearings Official’s decision and affirmation of his decision, it is then appropriate not to hear arguments on the appeal and to adopt the attached Order affirming and adopting the Hearings Official’s justification for the decision, findings of fact, and conclusions of law as written in his decision of July 16, 2007.

If on the other hand the Board concludes that further interpretation of issues raised in the appeal is necessary, then it is appropriate to schedule an on the record hearing as authorized by Lane Code 14.600(2)(c) and conducted pursuant to Lane Code 14.600. A new Order with Findings will be needed in lieu of the attached Order.

#### Analysis of Election to Hear Criteria.

Each Lane Code 14.600(3)(a)-(d) election-to-hear criterion is presented below with the Director’s analysis.

*1. The issue is of Countywide significance.*

The Board of Commissioners previously issued an interpretation on how RCP Goal 4 policy 15 is to be evaluated via Ordinance No. PA 1236. The Hearings Official properly applied that ordinance in evaluating the proposal. No unresolved issues of countywide significance remain.

Adoption of the attached Order will establish the Board’s affirmation and adoption of the Hearings Officials reading of RCP Goal 4, policy 15 and Ordinance No PA 1236. If not, the Board can go on and further interpret RCP Goal 4, policy 15 and Ordinance No PA 1236 following an on the record hearing.

*2. The issue will reoccur with frequency and there is a need for policy guidance.*

Requests for F-1 to F-2 rezones do not occur with frequency. There have been only six other such applications since 1984.

There is no need for policy guidance if the Board agrees with the interpretation of Ordinance No PA 1236 by the Hearings Official.

*3. The issue involves a unique environmental resource.*

No unique or rare environmental resources on the property have been identified in the record.

*4. The Planning Director or Hearings Official recommends review.*

Neither the Planning Director or the Hearings Official recommends review of this appeal.

**D. Options**

1. To hear the appeal on the record;
2. To not hear arguments on the appeal, affirm the Hearings Official's decision, and to expressly agree with his interpretation of Lane County RCP Goal 4, policy 15 in light of Ordinance No PA 1236, Lane Code, and state law in the decision being appealed; or
3. To not hear arguments on the appeal and to remain silent on the Hearings Official's decision and interpretations.

**E. Recommendation**

Option 2 is recommended.

**F. Timing**

If the Board elects to hear the appeal, a date for an on-the-record hearing will need to be established following adoption of an Order electing to hear.

**IV. IMPLEMENTATION/FOLLOW-UP**

Notify the parties of the Board decision to adopt the attached Order; or

If the Board elects to hear the appeal, a new Order and Findings will need to be prepared and adopted, and notice of a hearing given, as soon as possible.

**ATTACHMENTS**

1. Board Order electing to not hear the appeal, with Exhibits "A" (findings) and "B" (Hearings Official Decision and Final Order dated July 16, 2007—21pp.
2. Appeal of H. Hermanson, June 11, 2007, with attachments--57pp.
3. Applicant's materials to the Board dated June 18, 2007, addressing the appeal—37pp.

More background information can be supplied if needed. If an on-the-record appeal hearing is scheduled, a complete copy of the record with all evidence will be made available to the Board.

IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO.

) IN THE MATTER OF ELECTING WHETHER OR NOT  
) TO HEAR AN APPEAL OF A HEARINGS  
) OFFICIAL'S DECISION APPROVING  
) AN APPLICATION FOR REZONING PROPERTY FROM  
) F-1 TO F-2 (File PA 06-6170/Lininger)

WHEREAS, the Lane County Hearings Official has made a decision approving a rezone request from F-1/Nonimpacted Forest Lands to F-2/Impacted Forest Lands, PA 06-6170; 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 PA 06-6170; 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, the Board of County Commissioners has reviewed this matter at a public meeting of the Board; NOW

THEREFORE, BE IT ORDERED 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".
2. That the Lane County Hearings Official decision dated July 16, 2007, interpreting applicable provisions of Lane Code, Lane County RCP Goal 4 policy 15, Ordinance No. PA 1236, and state law, attached as Exhibit "B", is affirmed and adopted by the Board of County Commissioners as its own interpretation in reaching a final decision on this application.

DATED this \_\_\_\_\_ day of August, 2007.

\_\_\_\_\_  
Chair, Lane County Board of Commissioners

APPROVED AS TO FORM

Date 8-21-2007 Lane County

  
OFFICE OF LEGAL COUNSEL

**FINDINGS IN SUPPORT OF THE ORDER**

1. Property involved in this action is 80 acres of land identified as tax lot 1602, map 18-04-33, located on the east side of Laughlin Road, and approximately ½ mile north of Fox Hollow Road. The property is designated F-1/Nonimpacted Forest Lands by the Rural Comprehensive Plan, Zone Plot Map #299.
2. In the form of application PA 06-6170, the property owner in June 2006 requested Lane County Hearings Official approval of a rezone request, from F-1/Nonimpacted Forest Lands to F-2/Impacted Forest Lands, per LC 16.252.
3. A hearing before the Lane County Hearings Official was held on January 18, 2007.
4. On May 30, 2007, the Hearings Official issued a decision approving the rezone request.
5. A timely appeal of the Hearings Official decision was filed on June 11, 2007; the appeal was accepted by the Director and forwarded to the Hearings Official.
6. On June 15, 2007, the Applicant requested that the Order and Findings approving the rezone be revised by the Hearings Official to better reflect evidence already in the record. The Hearings Official subsequently issued a revised Order and Findings on June 18, 2007, and affirmed his decision.
7. On July 2, 2007, the Applicant requested that they be allowed to submit recalculations of statistics challenged by the Appellant on June 28. The revised calculations were minor and did not affect the previous Findings. On July 16, 2007, the Hearings Official issued a second revision of the Order and Findings. The Appellant was provided the opportunity to modify their appeal, but declined.
8. The appeal states that the Hearings Official rendered a decision which exceeded his jurisdiction, misinterpreted Lane Code, Ordinance No. PA 1236, and state law.
9. 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.*
10. The Board of Commissioners finds that the issues raised in the appeal concerning the Lane County RCP Goal 4, policy 15, Ordinance No. PA 1236, Lane Code and state law are adequately dealt with in the Hearings Official's decision of July 16, which was affirmed by the Hearings Official previously on June 18. The Board finds that the Hearings Official's treatment of this law is appropriate and thus the Board finds that further evaluation is not necessary. The Board further finds no issues of Countywide significance remain.
11. The Board of Commissioners finds that the issues associated with this appeal do not occur within the County "with frequency" during consideration of rezones from F-1 to F-2. Only six such applications have been filed since 1984, and the Board agrees with the Hearings Officials interpretation and application of Ordinance No PA 1236 and RCP Goal 4, policy 15. Additional policy guidance from the Board is not necessary, and the Board adopts and affirms the same in this Order.



12. The Board of Commissioners finds that tax lot 1602 is an 80 acre parcel which is not a unique environmental resource.
13. Neither the Planning Director nor the Hearings Official recommends review of this appeal.
14. 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.
15. The Board has reviewed this matter at its meeting of August 29, 2007, 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.
16. The Board expressly agrees with the July 16, 2007 decision of the Lane County Hearings Official interpreting Lane County RCP Goal 4, policy 15, Lane Code, Ordinance No. PA 1236, and state law, attached here as Exhibit "B". The Hearings Official's decision and interpretations are affirmed and adopted by the Board of County Commissioners as its own interpretation and decision.

**BEFORE THE HEARINGS OFFICIAL OF LANE COUNTY, OREGON**

**Final Order in PA 06-6170  
Approving a Rezoning From F-1 to F-2**

The Lane County Hearings Official finds as follows:

1. The following application for a change of zone was accepted by the Lane County Land Management Division on June 30, 2006:

Tom Lininger & Merle Weiner (PA 06-6170)  
Portion of Parcel 3 of P 2006-2019, assessor's map 18-04-33 **Plot 299**  
Approval of a change in zoning from F-1 to F-2

2. The application was initiated and submitted in accordance with Lane Code 14.050. Timely and sufficient notice of the zone change hearings under Chapter 14 of the Lane Code has been provided.
3. On January 18, 2007, a public hearing on the zone change request was held. The planning department staff notes and recommendation together with the testimony and submittals of persons testifying at the hearing have been considered and are part of the record of this proceeding.
4. Further consideration has been given to and administrative notice taken of the provisions of the Lane County Rural Comprehensive Plan and all applicable special purpose/functional plans, planning related policies and refinement plans.
5. On the basis of this record, the requested zone change was found to be consistent with the applicable criteria set forth in the Lane County Rural Comprehensive Plan and Section 16.252 of the Lane Code. This general finding is supported by the specific findings of fact and the conclusions of law set out in Exhibit A, adopted May 30, 2007, revised June 18, 2007 and July 16, 2007, to this order. Exhibit B to this order depicts the property subject to this rezoning approval.

NOW, THEREFORE, based upon the above findings and the record in this proceeding, IT IS HEREBY ORDERED THAT:

The application for rezoning is APPROVED.

Approval dated this 16th day of July, 2007.

This action will become final and effective on the 10th day following the approval date above.

  
Gary L. Darnielle  
Lane County Hearings Official

# EXHIBIT A

## LANE COUNTY HEARINGS OFFICIAL

### REQUEST FOR THE REZONING OF A PORTION OF PARCEL #1 OF PARTITION 2006-P2019 FROM NONIMPACTED FOREST LAND (F-1) TO IMPACTED FOREST LAND (F-2)

#### Application Summary

Tom Lininger/Merle Weiner, 930 E. 37<sup>th</sup>, Eugene, Or. 97405. Tax lot 1602 (portion of), Assessor's Map 18-04-33. Request to change the zoning of 80 acres of land from Non-Impacted Forest Lands (F-1/RCP) to Impacted Forest Lands (F-2/RCP).

#### Parties of Record

See Attachment "A".

#### Application History

Hearing Date: January 18, 2007  
(Record Held Open Until March 15, 2007)

Decision Date: May 30, 2007 (Revised June 18, 2007; Revised July 16, 2007)

#### Appeal Deadline

An appeal must be filed within 10 days of the issuance of a final order on this rezoning request, 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

LC 16.210  
LC 16.211  
LC 16.252  
Rural Comprehensive Plan (RCP)

#### Procedural Issues

Mr. Neal Miller, in a January 22, 2007 electronic message to myself, requested that I recuse myself because of bias. Examples of bias given were the time limitations placed upon speakers testifying in opposition during the January 18, 2007 hearing when none were placed on the applicant, modification of decisions after behind-the-scenes discussion with planning staff, and allegedly previous pro-development zone change decisions. First, Mr. Miller is correct in his allegation that the applicant is treated differently at the public hearing. Because the applicant carries the burden of proof, no time constraints are usually placed their testimony although this is not offered *carte*

*blanche* and exceptions are made in cases of excessively redundant and irrelevant testimony. Most applicants wish to explain why they have submitted their application and the applicant in this case was no different. However, subsequent speakers were encouraged to direct their testimony towards the approval criteria and to avoid allegations going to the motives or character of the applicant. At the January 22 hearing a previous speaker was essentially warned to wind up his testimony as it was becoming redundant and not directed to the approval criteria. This speaker had already spoken for over five minutes. Mr. Miller took umbrage in this action. Mr. Miller mistakes bias for crowd control. The audience was informed that they had the opportunity to request that the record be held open and, in fact, it was held open until March 15, 2007.

Second, I did pull back my May 9, 2005 decision in PA 04-5746 regarding a request for a modification to a riparian setback. The re-issuance, issued on May 12, 2005, was based upon the recognition by myself that the section of the May 9 decision regarding compliance with Lane Code 16.253(3)(b) was erroneous. There was no private meeting regarding the determination to rework this part of the decision and the modification did not change the decision to affirm the Planning Director's decision as I had already found that the application complied with Lane Code 16.253(3)(c). A determination of compliance with (3)(b) was not necessary.

Finally, if Mr. Miller had taken the time to do a little research he would have discovered that there is a published record of all my decisions that is available on request. Had he done his homework Mr. Miller would have discovered that I have heard five requests regarding the rezoning of Nonimpacted Forest Land to Impacted Forest Land. I have approved three applications, including this one, and have denied two.

In conclusion, I deny any bias concerning this or other rezoning hearing that I have participated in. I strive to apply the approval criteria both impartially and consistently and believe that I have done so in this case. Had I not I am sure this decision would have taken far fewer pages to write.

### **Findings of Fact**

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lot 1602, assessor's map 18-04-33. The subject property lies southwest of Eugene in a neighborhood known as Peaceful Valley and is owned by Merle Weiner, one of the applicants. Prior to Ms. Weiner's ownership, the subject property was part of a 242-acre parcel owned by Roseboro Timber Company. In 2006, after being clear-cut in part, the parcel was partitioned<sup>1</sup> into three parcels: the subject property, Parcel 1, which is 80.6 acres in size; Parcel 2, which is 81.2 acres in size; and Parcel 3, which is 80 acres in size. The ownership of the three parcels is held by different family members and therefore they do not constitute a tract. All but 0.6 acres of Parcel 1 is zoned F-1.

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<sup>1</sup> #2006-P2019.

The 0.6 acres is represented by tax lot 528, which is zoned RR-10 and provides access to the subject property from Laughlin Road.

2. The subject property is not developed by a residence or nonforest use. Preliminary legal lot status for tax lot 1600, assessor's map 18-04-33 and tax lot 401, assessor's map 19-04-04 was verified through PA 05-5498 and PA 04-6236 by the Lane County Planning Director on April 26, 2005. Notice of this decision was mailed to property owners that were entitled to notice and no appeals were filed during the appeal period that ended May 10, 2005.
3. An examination of the assessor's maps of the area surrounding the subject property indicates that there are between 50 and 60 parcels roughly within 2,000 feet of the subject property. Of these properties, 18 parcels share a common boundary with the subject property. Of these 18 properties, eleven are occupied with residences. These eleven parcels constitute 55 percent of the subject property's perimeter. The following is a description of the 18 contiguous parcels, arranged according to orientation to the subject property:

Western boundary (37.7% of total) – all tracts smaller than 80 acres

*Tax lot 400:* The total size of the tract is 40.4 acres, and it is occupied with a residence. The frontage along the subject property is 108.7 feet (1.3% of the subject property's total perimeter) and it is zoned F-2.

*Tax lot 520:* The total size of the tract is 8.94 acres, and it is occupied with a residence. The frontage along the subject property is 115.88 feet (1.3% of the subject property's total perimeter) and it is zoned RR-10.

*Tax lots 524, 525 & 527 (commonly owned):* The total size of the tract is slightly over 10 acres, and tax lot 525 is occupied with a residence that is less than 100 feet from the subject property. The frontage along the subject property is 688.26 feet (8% of the subject property's total perimeter) and all of these tax lots are zoned RR-10.

*Tax lot 521:* The total size of the tract is 4.95 acres and it is occupied with a residence. The frontage along the subject property is 277.26 feet (3.2% of the Subject property's total perimeter) and it is zoned RR-10.

*Tax lot 526:* The total size of the tract is 5 acres, and it is occupied with a residence that is about 150 feet and downhill from the subject property. The frontage along the subject property is 591.17 feet (6.8% of the subject property's total perimeter) and it is zoned RR-10.

*Tax lots 516 & 1601 (commonly owned):* The total size of the tract is 8.74 acres and tax lot 516 is occupied with a residence. The frontage along the subject

property is 1150.83 feet (13.3% of the subject property's total perimeter). Tax lot 516 is zoned RR-10 and tax lot 1601 is zoned F-1. Tax lot 1601 is a 400-foot by 200-foot rectangular-shaped parcel that is 1.84 acres in size. It is appurtenant to the 6.9-acre parcel of RR-10 zoned land on which Marie Matsen and Karla Rice own and reside. Ms. Matsen and Ms. Rice acquired the 1.84-acre piece in exchange for granting driveway access through their property to a prior owner of the subject property. Tax lot 1601 acquired its F-1 zoning due to its origins in tax lot 1600, not due to any commercial forestry activities conducted by Ms. Matsen and Ms. Rice. They acquired tax lot 1601 for the purpose of insulating their residence from the subject property. Ms. Rice and Ms. Matsen "use tax lot 1601 solely as a buffer, not for commercial forestry" and do not intend to harvest any trees on tax lot 1601 for commercial purposes.<sup>2</sup>

*Tax lot 528:* This 0.6-acre driveway is owned by Applicant Merle Weiner and is zoned RR-10. It does not have a residence. The frontage along the subject property is 60.6 feet (0.7% of the subject property's total perimeter).

*Tax lots 503 & 517 (commonly owned):* The total size of the tract is 7.31 acres and tax lot 517 is occupied with a residence. The frontage along the subject property is 269.52 feet (3.1% of the subject property's total perimeter) and the two tax lots are zoned RR-10.

Northern boundary (17.4 % of total) – all tracts smaller than 80 acres

*Tax lot 510:* The total size of the tract is 5.06 acres, it is occupied with a residence, and is zoned RR-10. The frontage along the subject property is 218.19 feet (2.5% of the subject property's total perimeter).

*Tax lot 505:* The total size of the tract is 5.12 acres, it occupied with a residence, and it is zoned RR-10. The frontage along the subject property is 231.89 feet (2.7% of the subject property's total perimeter).

*Tax lot 504:* The total size of the tract is 13.91 acres, it is occupied with a residence, and it is zoned F-2. The frontage along the subject property is 860.25 feet (9.9% of the subject property's total perimeter). The owners of tax lot 504 are Larry and Joan Banfield. Ms. Banfield's affidavit (Appendix "U" to the applicants rezoning application) explains the noncommercial use of this parcel. Ms. Banfield and her husband primarily use the property "for residential purposes."<sup>3</sup> Throughout the 30 years in which they have owned tax lot 504, Mr. and Ms. Banfield "have never sold any trees" nor have they held themselves out to the public as a forestry business. They have never incorporated nor filed business tax returns for a forestry operation and they have never tried to write off the

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<sup>2</sup> See September 23, 2005 affidavit of Karla Rice (Appendix "A" to applicants' submission.)

<sup>3</sup> See January 29, 2007 affidavit of Joan Banfield (Appendix "U" to applicants' submission.)

purchase of forestry-related equipment as a business expense on their tax returns. According to Ms. Banfield, the function of the trees on tax lot 504 is to provide a buffer between the Banfields' residence and the Subject Property to the south. Tax lot 504 is not in forest tax deferral.

*Tax lot 104:* The total size of the tract is 28.5 acres, it is occupied with a residence and it is zoned F-2. The frontage along the subject property is 200 feet (2.3% of the subject property's total perimeter).

Southern boundary (14% of total) – one tract exactly 80 acres in size

*Newly partitioned Parcel 3:* Parcel 3 is 80 acres in size, does not have a residence and is zoned F-2 and has been designated as a State-certified habitat conservation zone where commercial forestry is not allowed. The frontage along the subject property is 1210.12 feet (14% of the subject property's total perimeter).

Eastern boundary (30.9% of total) – one tract exceeding 80 acres in size

*Newly partitioned Parcel 2:* Parcel 2 is 81.2 acres in size, is not occupied with a residence, and is zoned F-1. The frontage along the subject property is 2672.79 feet (30.9% of the subject property's total perimeter).

4. The subject property receives police protection from the Lane County Sheriff and Oregon State Police. Electricity is available from the Lane Electric Coop and telephone service is provided by Qwest. The subject property is located within the boundary of the Eugene School District #4J. An on-site well and septic tank are proposed. Solid waste collection is provided to the area by Countryside Disposal and Ecosystems Transfer and Recycling.

Access to the subject property is via tax lot 528 to Laughlin Road, functionally classified as a rural local road by the Lane County Transportation System Plan (TSP).<sup>4</sup> Lane Code 15.010(18)(e) states that local roads are "intended solely for the purpose of providing access to adjacent properties." An examination of the Lane County Official Zoning Map (Plot #299) indicates that 42 parcels have frontage on Laughlin Road. Three of these 42 parcels are zoned F-2 and the remainder are zoned RR-10. Laughlin Road is 1.26 miles in length and appears to serve about 40 residences.

The subject property receives fire protection from Lane County Fire District #1. The District's Prevention Coordinator inspected the subject property in 2004 and found that the grade of the driveway was within the specifications of Lane Code

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<sup>4</sup> I have taken official notice of Appendix B: County Roads Inventory of the Lane County Transportation System Plan, adopted via Ordinance 1202 on May 5, 2004.

16.211(8)(e)(iv) (grade). The driveway also was found to meet Code standards for width and turn-around requirements.<sup>5</sup>

5. Assessor's Map 18-04-33 is listed in the Lane Manual 13.010(2)(b)(i) as being water quantity limited for "built upon or committed" lands subject to R-1 zoning. The area surrounding the subject property is underlain by the Fisher Formation, which is known for its restricted well yields. The poor permeability of the strata means that water must be removed slowly but also indicates that the aquifer is protected from overdraft. In areas with this type of geology, wells on parcels of five acres in size or larger have little chance of significantly impacting a well on adjacent property or depleting the aquifer.<sup>6</sup>
6. Ms. Wiener has recorded a declaration pledging that she will not pursue commercial forestry on the subject property<sup>7</sup> and the Lane County Department of Assessment and Taxation has agreed to eliminate the subject property's forest tax exemption.<sup>8</sup> Currently, the applicants are growing diverse species of trees, including hardwoods, on the subject property.
7. A large number of residents in the area surrounding the subject property have voiced their concerns regarding the aerial spraying of herbicides on the subject property during its tenure under ownership of Rosboro Lumber. (Appendix "G" to the Applicants' rezoning application.)
8. Parcel #3 abuts the southern border of the subject property and is owned by the applicant Tom Lininger. It is subject to a recorded declaration forbidding commercial forestry use, has been converted to a state-certified Wildlife Habitat Conservation and Management Zone, and has been assessed under this zone beginning in the 2006-2007 tax year. The applicants are planting new trees on Parcel #3 and are managing its existing vegetation in consultation with a wildlife biologist. They are also working to conserve a seasonal creek on this southern parcel.
9. Applicants are the largest-scale private users of mulch mats in Lane County and have extended this practice to all three of the parcels that comprise Partition 2006-P2019. Mulch mats are essentially swatches of mulch manually placed around tree seedlings to protect the seedling from competing grasses and weeds.
10. The subject property and Parcels #2 and #3 have experienced hunting-related incidents of trespass in the past. Signs have not been effective in diminishing this activity and there has been at least one incident of confrontation between the

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<sup>5</sup> See Appendix "n" of the applicants' submission.

<sup>6</sup> See January 30, 2007 letter from Ralph Christensen to Merle Weiner. (Appendix "X" to applicants' submission.)

<sup>7</sup> Appendix "D" to the Applicants' rezoning application.

<sup>8</sup> See Appendices "E" and "F" of the applicants' application for rezoning.



applicants and a hunter. The presence of hunters represents a safety danger that may deter forest crews from commercial forest operations on Parcel #2 as well as non-commercial forest operations the subject property and Parcel #3 during hunting season.

11. About 80 percent of the soil on the subject property is Bellpine Silty Clay Loam, which has a Douglas Fir site index of 115 and a cubic foot/acre/year rating of 163. Lesser amounts of Witzel Very Cobbly Loam and Dixonville–Philomath–Hazelair Complex are also present.

### **Decision**

THE LININGER/WEINER REQUEST (PA 06–6170) FOR THE REZONING OF A PORTION OF PARCEL NO. #1 OF PARTITION 2006–P2019 IS APPROVED.

### **Justification for the Decision (Conclusion)**

**Lane Code 16.252(2)** This section of the Code establishes the basic requirements for the proposed rezoning. Section 16.252(2) requires that rezoning be consistent with the general purposes of Chapter 16, not be contrary to the public interest, and be consistent with the purposes of the proposed zoning classifications and the Lane County Rural Comprehensive Plan elements.

#### **A. Consistency with the general purposes of Chapter 16 of the Lane Code.**

Lane Code 16.003 sets out 14 purposes of Chapter 16. Arguably, the only relevant purpose statements found in Lane Code 16.003(4) are as follows:

- (1) *Insure that the development of property within the County is commensurate with the character and physical limitations of the land and, in general, to promote and protect the public health, safety, convenience and welfare.*

The applicants' proposal is premised upon the limitations placed on the subject property by its adjacency to dense residential development. The close proximity of neighbors has dictated that forest management on the subject property and Parcels #2 and Parcel #3 be conducted through labor-intensive techniques utilizing non-chemical methods. This strategy requires on-site management due to the substantial amount of work required to maintain a sustainable forestry strategy and to protect the public health and safety from such traditional industrial forestry management techniques as aerial herbicide spraying.

- (4) *Conserve farm and forest lands for the production of crops, livestock and timber products.*

The record is clear that traditional industrial methods of timber management on the remaining portions of the Partition 2006–P2019, such as the aerial spraying of herbicides, are impractical because of the proximity of residential use. The applicants have adopted a management strategy on Parcel #2 (as well as on the subject property and Parcel #3 for non-commercial forest management) that emphasizes non-chemical control of competing vegetation and have spent hundreds of hours implementing this strategy. This type of forest management involves labor-intensive techniques such as the use of mulch mats and manual removal of scotch broom and blackberries. The application of low-impact forestry methods also serves as a controlled laboratory experiment for the large-scale use of mulch mats.

The applicants have pointed to examples of trespass by hunters and others that could discourage work crews for safety reasons and that increase fire danger. It is expected that the presence of a dwelling would decrease the threat of trespass and increase access for emergency vehicles through the upgrade to existing logging roads.

- (7) *Provide for the orderly and efficient transition from rural to urban land use.*

There are a number of residences within 100 to 150 feet of the subject property. The Lane Code contemplates a buffer between F–1 land and residences of at least 500 feet. The applicants’ rezoning proposal would create a buffer of F–2 land between the residential neighbors to the west and the applicants’ F–1 land to the east. In this manner the applicants’ proposal would allow for “an orderly and efficient transition” from residential land to forestland.

- (13) *Conserve open space and protect historic, cultural, natural and scenic resources.*

Applicant Lininger owns Parcel #3 that abuts the southern border of the subject property and have converted this parcel to a state-certified Wildlife Habitat Conservation and Management Zone. On this parcel, the applicants are planting new trees and managing existing vegetation in consultation with a wildlife biologist. The applicants are also working to conserve a seasonal creek on this southern parcel. The applicants’ residence on the subject property will further their conservation efforts on the southern parcel.

Despite the posting of “no hunting” signs throughout the applicants’ property, trespassers continue to hunt on the subject property and on the

adjacent Wildlife Habitat Conservation and Management Zone. Living on the subject property will place the applicants in the best position to protect the wildlife on the property from hunters.

The proposed rezoning is consistent with applicable purposes of Chapter 16 of the Lane Code.

**B. Not be contrary to the public interest.**

The public interest is best expressed by a showing of consistency with the Rural Comprehensive Plan (RCP). The overall intent of the Forest Land policies of the RCP is to encourage the preservation of forest land, to properly characterize F-1 lands and to protect those lands through accurate zoning and through the consolidation of ownerships. The best determinate of the public interest is therefore a showing of consistency with Forest Lands Policy #15 of the Rural Comprehensive Plan, addressed below in "D."

**C. Consistent with Sections 16.210 and 16.211 of the Lane Code.**

The joint purpose of the F-2 and F-1 Districts is to implement the forest land policies of the Lane County Rural Comprehensive Plan and to conserve forest land for forest uses consistent with Statewide Planning Goal #4, OAR 660-006 and ORS 215.700 through .755. Consistency with the Lane County Rural Comprehensive Plan is addressed in "D," below.

OAR 660-006-0000(1) states that the purpose of the Forest Lands Goal is to conserve forest lands and to carry out the legislative policy of ORS 215.700. ORS 215.700 states a policy to provide certain owners of less productive land an opportunity to build a dwelling on their land and to limit the future division of and the siting of dwellings upon the state's more productive resource land.

While the soil characteristics of the subject property appear to be homogeneous to those of Parcels #2 and #3, the purpose of the rezoning is to allow the more intensive commercial forestry management of Parcel #2 and for the non-commercial (wildlife habitat conservation) forestry management of Parcel #3. Oregon Administrative Rule 660-006-0025(1) provides that "[U]ses related to and in support of forest operations" and "[U]ses to conserve soil, air and water quality and to provide for fish and wildlife resources" are general types of uses allowed in a forest environment and, under subsections (2) and (3), are allowed outright on forest land.

For the above-described reasons, the proposed rezoning is consistent with Sections 16.210 and 16.211 of the Lane Code.

**D. Conformity with the Rural Comprehensive Plan.**

The subject property is designated "Forest Lands" by the Rural Comprehensive Plan. Goal #4 Policies #15(b) and (c) describe the characteristics of F-1 and F-2 properties, respectively. Policy #15(a) implies that the zoning should reflect a conclusion that the characteristics of the land correspond more closely to the characteristics of the proposed zoning (F-2) than the characteristics of the other forest zone (F-2).

The Lane County Rural Comprehensive Plan contains several policies in the Goal Four element that apply to the proposed rezoning.

**Policy 1 Conserve forest land by maintaining the forest land base and protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.**

This policy appears to be advisory in nature and not directly applicable to the rezoning at hand.

**Policy 2 Forest lands will be segregated into two categories, Non-Impacted and Impacted and these categories shall be defined and mapped by the general characteristics specified in the Non-Impacted and Impacted Forest Land Zones General Characteristics.**

This policy refers to the policies set forth in Policy 15.

**Policy 15 Lands designated within the Rural Comprehensive Plan as forest land shall be zoned Non-Impacted (F-1/RCP) or Impacted Forest Land (F-2/RCP). A decision to apply one of the above zones or both in a split zone fashion shall be based upon:**

- a. **A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsections b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.**

The opponents argue that tax lot 528, the 0.6-acre driveway owned by Ms. Weiner, should be combined with the subject property in this rezoning because it was created through an illegal lot line adjustment and because the two parcels are under the same ownership.

First, I do not agree with the opponents that *Maxwell v. Lane County*<sup>9</sup> is dispositive in this case. Central to the satisfaction of the rezoning approval standards in *Maxwell* was the counting of qualifying parcels within applicable exception areas. The Court of Appeals, reasoning that the term “parcel” had a legal definition under the Lane Code, then determined that the legality of the creation of those parcels was a relevant consideration in the rezoning process. In the present case, the rezoning criteria of RCP Goal 2, Policy 11 and its implementing Order 88–2–10–14 are not applicable. Second, I do not believe that the criteria of RCP Goal 4, Policy 15 require the consideration of legal lot status. Rather, the primary inquiry is into ownership patterns.

The tract sold to the applicants in 2005 had been previously reconfigured through a property line adjustment. This adjustment did not reduce the parent parcel below 80 acres and it (the adjustment) was subject to a final legal lot determination that was properly noticed per Lane Code 13.020. In addition, the applicants’ 2006 partition of that tract into its current three–parcel configuration was properly noticed. Both of these actions have achieved final land use decision status and there are no approval criteria that allow them to be collaterally attacked in this proceeding.

Second, RCP Goal 4, Policy 15 concerns lands currently designated as forest land by the RCP. It does not concern nor does it include criteria for the conversion of residentially zoned land to forest land. Tax lot 528 is zoned RR–10 and cannot be considered in the analysis of the proposed rezoning of Parcel 1 to F–2 Non–impacted Forest Land.

**b. Non-impacted Forest Land Zone characteristics:**

**(1) Predominantly ownerships not developed by residences or nonforest uses.**

In the application of RCP Goal 4 Policy 15 in Ordinance No. PA 1236, the Board of County Commissioners interpreted the use the term “ownerships” to apply only to the property subject to the rezoning. In the present case, the subject property is the only parcel owned by Ms. Weiner that is zoned F–1. The applicants’ concede that the subject property is not developed with a residence or other non–forest use. The application is consistent with this characteristic of non-impacted forest lands.

**(2) Predominantly contiguous, ownerships of 80 acres or larger in size.**

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<sup>9</sup> *Maxwell v. Lane County*, 178 Or. App. 210 (2001), modified on other grounds, 179 O. App. 409 (2002).

The subject property is 80 acres in size. As discussed above, RCP Forest Lands Policy 15 only applies to property designated as forest lands by the comprehensive plan and therefore even though tax lot 528 is under the same ownership as the subject property it cannot be merged with the subject property for purposes of this criterion.

Whether because of sloppy draftsmanship or careless intent, Policy 15.b.(2) and 15.c.(2) create an incongruity in that a parcel exactly 80 acres in size meets both criterion. The applicants have offered what they term as a “split-zone alternative” where only 79 acres of the subject property would be subject to the rezoning request. For the reasons that I articulated in the *Dockum* case<sup>10</sup> I do not favor this approach nor do I believe this strategy is necessary.

The application is consistent with this characteristic of non-impacted forest lands.

**(3) Predominantly ownerships contiguous to other land utilized for commercial forest or commercial farm uses.**

Some opponents have argued that the growing of a commercial tree species is, *per se*, a commercial forest use. This statement is inconsistent with Statewide Planning Goal 4 and OAR 660-006-0025(1), which specifically recognizes that forest lands include lands that are used to “conserve soil, water fish and wildlife resources, agricultural and recreational opportunities appropriate in a forest environment...” in addition to commercial forest operations. The presence or absence of a commercial tree species is but one component in determining the presence of a commercial forest use. The definition of “commercial” connotes an aspect of profit. Thus, an operation where a landowner plants and nurtures a tree species to create a forest environment but only occasionally sells trees as an incidental aspect of that operation (i.e. after thinning for safety purposes or after the removal of trees subject to windfall or disease) should not be considered as a commercial forest operation. There must be a primary intent to harvest and sell trees and that intent must be divined from the actions of the landowner as well as the characteristics of the forest land.

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<sup>10</sup> Lane County Hearings Official, *Application of Floyd & Connie Dockum* (PA 06-6054) March 29, 2007, pg. 8.

The subject property is bordered by 18 parcels, at least 15 of which are not utilized for commercial forest or commercial farm use. These 15 parcels represent over 60 percent of the perimeter of the subject property.

The subject property does not meet this characteristic of Non-Impacted Forest Lands.

**(4) Accessed by arterial roads or roads intended primarily for forest management.**

The subject property is accessed by Laughlin Road, a public county road. An examination of the county's official zoning map for the area surrounding the subject property shows that about 42 parcels have frontage on Laughlin Road. All but three of these parcels are zoned for residential use (RR-10).

While the record contains no direct evidence regarding a specific "intent" regarding the use of Laughlin Road, Lane Code 15.010(18)(e) makes it clear that local roads are intended to provide access to adjacent properties. The primary intent is therefore is to provide access to whatever uses occur on adjacent properties. In the present case, the overwhelmingly primary use of Laughlin Road is to provide access to residentially-zoned properties.

The property does not meet this characteristic of Non-Impacted Forest Lands.

**(5) Primarily under commercial forest management.**

The subject property has been logged in the recent past and its soils are suitable for the commercial management of trees. However, in past years many adjacent and nearby property owners have raised serious concerns about the proposed application of industrial forest management practices (i.e. aerial herbicide spraying) to the subject property. I believe both the applicants and their neighbors would agree that traditional commercial forest management is impractical on the subject property.

The applicants have taken affirmative steps to manage the subject property for conservation and non-commercial forestry purposes. To this end, non-commercially-viable tree species have been planted and labor-intensive, herbicide-free methods of noxious vegetation control have been employed. In addition, the subject

property is subject to a deed restriction that prohibits commercial forestry and the Lane County Department of Assessment and Taxation has agreed to remove the property from its special assessment program for forest land.

The applicants have gone beyond the utterance of platitudes regarding their intent to remove the subject property from commercial forest management practices. I believe that these affirmative steps demonstrate that the subject property no longer can be considered as being primarily under commercial forest management.

In summary, the subject property only exhibits two of the five characteristics of property that characterize land that should properly be zoned non-impacted forest land.

**c. Impacted Forest Land Zone (F-2, RCP) Characteristics**

**(1) Predominantly ownerships developed by residences or nonforest uses.**

The applicants' concede that the subject property is not developed with a residence or other non-forest use. The application is therefore inconsistent with this characteristic of non-impacted forest lands.

**(2) Predominantly ownerships 80 acres or less in size.**

As explained above, the size of the subject property is consistent with this characteristic as well as Policy 15.b.(2), above.

**(3) Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.**

The subject property abuts 13 tracts, 11 of which are under 80 acres in size. These tracts are comprised of 18 parcels, 11 of which are zoned RR-10. Rural residential zoning is applied to exception areas (nonresource land) that are devoted to rural housing.<sup>11</sup> In addition, there are between 50 and 60 parcels within 2,000 feet of the subject property. An "eyeball" assessment of the official zoning map of this area indicates that the vast majority of these

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<sup>11</sup> Lane County Rural Comprehensive Plan, Land Use Policy 11.



parcels are less than 80 acres in size. In addition, a large number of these parcels are zoned RR-10, including Peacefull Valley Estates, a residential subdivision located about 400 feet to the west.

The subject property meets this characteristic of Impacted Forest Lands.

**(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences.**

One opponent has argued that the term “provided” should be interpreted to mean that the subject property actually has those facilities and services in place rather than merely having access to them. While not disputing that this criterion could have been written more clearly, I do not believe that it should be read so narrowly.

The Policy #6 of the RCP’s Goal Eleven: Public Facilities and Services chapter describes minimum service levels for various land designations. Inexplicably, no description is provided for Impacted Forest Land but a reading of descriptions for other designations reveals that the phrase “public facilities and services” includes schools, electrical service, telephone service, a rural level of fire and police protection, and reasonable access to a solid waste facility.

The subject property lies within a rural fire protection district, a school district and the service area of the Lane County Sheriff’s Department. Under the interpretation suggested, the subject property would not qualify as being provided with fire, police or school service unless the fire district was currently providing emergency services to the property, a child living on the property was enrolled in a School District 4J school and a representative of the Sheriff’s Department was on the property. This is an oversimplification, of course, but it illustrates the difficulty in applying such a conservative interpretation to this criterion.

A better interpretation is that “provided” means reasonably accessible and I believe that this is consistent with the Board of Commissioners interpretation of RCP Goal Four Policy 15.c.(4).<sup>12</sup> Electrical and telephone utilities, for instance, are normally made available via the local road system. Properties that have direct

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<sup>12</sup> Lane County Board Ordinance PA 1236 (Oct. 26, 2006), Findings of Fact at page 16.

access to the local road system therefore have direct access to those services and thus those services can be considered to be provided to the property. As a corollary, if a property does not have access to the local road system then the fire district, for example, cannot provide emergency service and that service cannot be considered to be "provided" to the property. In the present case, the subject property has direct access<sup>13</sup> to Laughlin Road via tax lot 528, which is a part of the same legal lot that comprises the subject property. There is no practical or legal impediment to the provision of the full range of rural public facilities and services provided along Laughlin Road to the subject property.

It has also been suggested that this criterion requires that the applicants show the intent behind the construction of Laughlin Road. I must agree with the applicants' interpretation of legislative construction that the placement of the comma after the word "roads" indicates the phrase "intended primarily for direct services to rural residences" modifies "public facilities and services" as well as roads.

The question then is whether the public services and the road are intended primarily for direct services to rural residences. In regard to Laughlin Road, it is only 1.26 miles in length and is classified as a rural local road. Lane Code 15.010(18)(e) states that local roads are solely intended to provide access to adjacent properties. In this respect, ninety-two percent of the 42 parcels adjacent to (having frontage on) Laughlin Road are zoned RR-10. Most of these parcels are developed with residences. As stated above, Parcel 1, which includes the subject property, has frontage on Laughlin Road.

The subject property, as well as the other properties in the area that have access to Laughlin Road, has access to a full range of services normally available to a rural residence, including police and fire coverage, school, electricity, telephone, and solid waste disposal. To a large degree, the public facilities and services available in the area and Laughlin Road are utilized by rural residences. For this reason, I believe that the subject property meets this characteristic of Impacted Forest Lands.

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<sup>13</sup> Under LC 15.135(2)(a), the subject property is considered to have legal access to a County Road because it was the creature of an approved land division.

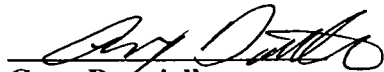
The subject property has three of the four characteristics that the RCP has ascribed to Impacted Forest Lands.

Policy 15 requires a conclusion that the characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. In the present case, the subject property exhibits two of the five characteristics of Non-Impacted Forest Land and three of the four characteristics that would denote Impacted Forest Land. On this basis of this analysis, the rezoning of the subject property to F-2 Impacted Forest Land is consistent with RCP Forest Land Policy 15.

**Conclusion**

The proposed rezoning is consistent with applicable criteria of the Lane Code and the Rural Comprehensive Plan.

**Respectfully Submitted,**



**Gary Darnielle**  
**Lane County Hearings Official**

LAND MANAGEMENT DIVISION



# APPEAL OF A HEARINGS OFFICIAL DECISION

PUBLIC WORKS DEPARTMENT 125 E 8<sup>th</sup> AVENUE, EUGENE OR 97401  
Planning: 682-3807 Building: 682-3823 Sanitation: 682-3754

For Office Use Only: FILE # PA066170A CODE: BCAPPEAL FEE: \$3,490

Appellant: HAL B. HERMANSON JK  
Mailing address: 84912 LAUGHLIN ROAD, EUGENE, OR 97405  
Phone: 359-6485 Email: hbh@efn.org  
Signature: Hal B. Hermanson

Appellant's Representative: Anne C. Davies 06-11-07P02  
Mailing address: 433 W. 10<sup>th</sup> Ave  
Phone: 541-953-2119 Email: acdavies@gwest.net  
Signature: Anne C. Davies

**Required submittals.** Your appeal application will be rejected if it does not contain all the required information.

1. A copy of the decision being appealed, with the department file number. File # PA 06-6170
2. The \$3,490 appeal fee, payable to Lane County. (See the reverse side for important fee information)
3. Indicate the deadline to submit the appeal. (Found in the Hearing Official's Decision) JUNE 11, 2007
4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:
  - ☐ I am the owner or contract purchaser of the subject property;
  - ☐ I am the applicant for the subject application;
  - ☒ Prior to the decision by the Hearings Official, I submitted written testimony into the record
  - ☐ I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision for the reasons explained in my letter.
5. A letter that addresses each of the following three standards:
  - a. The reason(s) why the decision of the Hearings Official was made in error or why the Hearings Official should reconsider the decision;
  - b. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:
    - The Hearings Official exceeded his or her authority;
    - The Hearings Official failed to follow the procedure applicable to the matter;
    - The Hearings Official rendered a decision that is unconstitutional;
    - The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.
  - c. The Hearings Official should reconsider the decision to allow the submittal for additional evidence not in the record that addresses compliance with the applicable standards or criteria.
6. Any additional information in support of your appeal.

BCC ATTACH. #2 - 57 pp.

# Anne C. Davies

Attorney at Law

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June 11, 2007

Lane County Board of Commissioners  
125 E. 8<sup>th</sup> Avenue  
Eugene, OR 97401

Re: Appeal of Decision by the Lane County Hearings Officer  
PA 06-6170

Dear Members of the Board:

I represent Hal Hermanson, a neighbor who is opposed to the proposed zone change and who submitted written testimony into the record at the hearing before the hearings officer in this matter. I submit this letter on his behalf, appealing the May 30, 2007 hearings officer approval of an application to rezone the subject property from F-1 to F-2.

LC 14.600 (3) – Decision Criteria

The issues raised in this appeal statement were raised during the proceedings before the hearings officer. See LandWatch Lane County letters dated January 16, 2007, February 7, 2007, and March 6, 2007 (those letters are hereby incorporated as part of this appeal statement). Further, the issues raised are of countywide significance and will reoccur with frequency. LC 14.600(3)(a), (b). The interpretation of Goal Four, Policy 15 of the comprehensive plan has been the subject of much debate in the recent past and has already reoccurred several times since the county's decision in the Symbiotics case. See *Just v. Lane County*, 50 Or LUBA 399 (2005), *Brown v. Lane County*, (LUBA No. 2005-104, May 5, 2006); *Brown v. Lane County*, (LUBA No. 2006-237, May 18, 2007); Ordinance 1236, *Symbiotics*.

## Issues

The hearings officer exceeded his jurisdiction and misinterpreted the Lane Code and state law in the following ways.

Goal 4, Policy 15

Goal 4, Policy 15 of the Rural Comprehensive Plan provides:

"Lands designated within the Rural Comprehensive Plan as forest land shall be zoned Non-Impacted Forest Lands (F-1, RCP) or Impacted Forest Lands (F-2, RCP). A decision to apply one of the above zones or both of the above zones in a split zone fashion shall be based upon:

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a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsections b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.

b. Non-impacted Forest Land Zone (F-1,RCP) Characteristics:

- (1) Predominantly ownerships not developed by residences or non-forest uses.
- (2) Predominantly contiguous, ownerships of 80 acres or larger in size.
- (3) Predominantly ownerships contiguous, to other lands utilized for commercial forest or commercial farm uses.
- (4) Accessed by arterial roads or roads intended primarily for forest management.
- (5) Primarily under commercial forest management.

c. Impacted Forest Land Zone (F-2, RCP) Characteristics

- (1) Predominantly ownerships developed by residences or non-forest uses.
- (2) Predominantly ownerships 80 acres or less in size.
- (3) Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.
- (4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences."

The county's previous interpretation of the Goal Four, Policy 15 of the Rural Comprehensive Plan explained the context of the policy language. Ordinance PA 1236. That is that the criteria for determining whether property should be zoned F-1 or F-2 were intended to be used for the initial zoning determination of the county in 1984 when it was first zoning property. Those characteristics, as the Board conceded in its interpretation, do not really make sense in the context of an application for a rezone in 2006. Having said that, Ordinance 1236 attempted to provide an interpretation of the meaning of the policy and several terms in that policy, including the definition of the term "ownerships." However, the hearings officer misinterprets that ordinance.

The Board of Commissioners, in that interpretation, conceded that "generally" the term ownerships refers to the area proposed for rezoning. It acknowledged that that interpretation might not always make sense. In this case, the subject property was part of a 242-acre parcel until 2006, 160 of which was zoned F-1. It was owned by Roseboro Timber Company, and was actively managed commercially, being clear cut in 2004. The applicants

purchased the property and promptly partitioned the 242-acre property into three separate parcels. They then transferred ownerships of those parcels to separate individuals so that the confines of the policy's definition of "ownerships" could be overcome. Because of the recent ownership and land use actions on the subject property, set explained above, in this case, it makes sense to consider the entire 242-acre property when considering the characteristics set forth in policy 15. This is not a case in which it makes sense to define the term "ownerships" to mean only the area proposed for rezoning.

With regard to the term "generally contiguous" in Policy 15(c)(3), the Board acknowledged that it would be called upon, in each specific case, to determine how broadly it could look to see whether the ownerships are "generally contiguous" to tracts containing less than 80 acres.<sup>1</sup> In this case, the board should determine that it must look beyond merely the properties directly contiguous to the subject property, pursuant to LC 16.090.<sup>2</sup> That is because the property was recently a very large tract of land of 242 acres, 160 of which was and still is zoned F-1. The applicant obtained a partition and then transferred the resulting parcels into separate ownerships in order to circumvent the provisions of the code that are designed to preserve large tracts of forest land for forest management.<sup>3</sup> The hearings official only considered the 18 parcels that had common boundary lines with the subject 80-acre property. He should have looked further to the east, beyond Parcel 2, where the parcels are much larger. See attached zoning map showing the parcelization to the east as well as to the west.

To the extent Goal Four, Policy 15 is already acknowledged to be consistent with Statewide Planning Goal 4, any interpretation of the county's policy must be consistent with Goal 4. While the interpretation that the Board previously provided in Ordinance 1236 may have been consistent with Goal 4 in the context of the Symbiotics case, the current interpretation is completely inconsistent with Goal 4. It would allow rezoning of many large F-1 zoned lands in the county. By definition, F-1 lands are large parcels, larger than 80 acres, and sometimes many times larger than 80 acres. Those large parcels are often surrounded by F-2 zoned land. Under the county's current interpretation, those large tracts of F-1 zoned land could be rezoned F-2 at the drop of a hat, merely because they are surrounded by F-2 zoned land.

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<sup>1</sup> The ordinance provides:

"It also makes clear that 'generally contiguous' as used in Policy 15.c.(3) is different and broader in meaning and application when assessing the F-2 characteristics. It will remain for the Board of Commissioners to exercise discretion on a case-by-case basis, in making a final determination how wide and how far that assessment pursuant to Policy 15.c.(3) would need to reach to provide a factual basis in arriving at a decision to approve or deny a request for rezoning." The Board therefore anticipated involvement in future cases in determining, given the facts of each case, how broad the review of "generally contiguous" properties would be.

<sup>2</sup> LC 16.090 defines "contiguous" as follows:

"Having at least one common boundary line greater than eight feet in length. Tracts of land under the same ownership and which are intervened by a street (local access, public, County, State or Federal street) shall not be considered contiguous."

<sup>3</sup> Opponents question the tactic of taking property that had been in intensive forest management out of commercial forest management as a basis for declaring that the property is not being commercially managed.

The hearings official's reference to an intention by the county code to provide buffers of F-2 land between F-1 zoned land and residential land fails to hold water. The subject property was zoned F-1, with the exception area of residential lands directly adjacent, for some time. Roseboro Timber clearcut the property in 2004. A decision to rezone the subject 80 acres to F-2 would leave absolutely no justification for leaving the parcel to the east as a lone 80-acre F-1 parcel. The domino effect would then be complete. The property was originally zoned F-1 for a reason, despite its proximity to nearby residential uses and other F-2 land. A rezone of this land and the interpretations necessary to reach that result are completely contrary to Goal 4.

In the alternative, if the Board determines that the challenged decision is consistent with its previous interpretation, then it should review that previous interpretation, because it should now be clear that the implementation of that previous interpretation is inadequate to protect the important forest lands of Lane County. Accordingly, the Board should revisit its prior interpretation.

The hearings official recently denied a request for a rezone based on the Board's interpretation in Ordinance 1236. Dockum, attached hereto. In that case, the hearings official warned against the proposal in that case to split zone the subject property, some for F-1 and some for F-2. He stated:

"The concept of split-zoning, as applied by the applicant and sanctioned by staff, has the dangerous potential of allowing Non-Impacted Forest Land to be carved up through rezoning based upon geographical vagaries that do not take into account the commercial viability of the property as a whole." Dockum, page 6.

The hearings official cited Dockum in the challenged decision as a basis for denying a split zone here. However, he failed to realize that risks associated with approving the desired action in Dockum is not so different than what is being approved here. In fact, Dockum warned against this very type of action—allowing F-1 zoned land to be carved up through rezoning. The previous actions by the applicant, indeed, have nearly identical effects as those of the proposal in Dockum. Except that in this case, there was no split zone necessary because the applicant had already partitioned the property.

#### Legal lot status

Before the hearings officer, opponents argued that the subject property was an illegal lot, and that the previous partition, lot line adjustment had been in violation of the code. The hearings officer dismissed these arguments, contending that the previous actions had been noticed, and any attack on their validity is a collateral attack. The legal lot status of the property may not be an approval criterion, but the issue in this case is not that the application must be reversed because the subject property does not consist of a legal lot. The issue is that the previous division, whether illegal or not, was an orchestrated act to divide up the previous 160-acre property previously owned and managed by Roseboro Timber in order to fall within the Goal 4, Policy 15 characteristics. The fact that those resulting lots were



illegally created merely exacerbates the machinations that were clearly done to set up this rezone request.

#### Pesticide Use

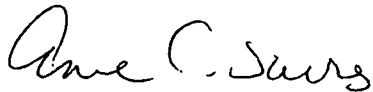
Applicants justify their proposed use by claiming that aerial spraying of pesticides is inconsistent with the neighboring residential uses. However, in a recent case, LUBA set a very high standard for applications that attempt to justify residential uses on forest lands based on the fear of pesticide contamination. *See Anderson v. Coos County*, 51 Or LUBA 454 (2006) (A county's findings that chemicals are required in the future in order to make forest practices on a property practicable are not supported by substantial evidence where the record does not indicate whether chemicals were already applied to the property or that whatever applications might be necessary have not already occurred.).

#### Conclusion

My client completely realizes the temptations of the county to approve this rezone request because of the beneficial actions that the applicant asserts will occur on the property. However, the temptation to approve this rezone based, even in part, on the stated acts described by the applicant should be avoided. The approval would set a dangerous precedent for future applications and applicants who may or may not have the best interests of the land and the surrounding community in mind.

We respectfully request, based on the foregoing, that the Board accept review of this decision.

Sincerely,



Anne C. Davies

LC 16290

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6.11.2007

**A Note from Peaceful Valley and Fox Hollow Neighbors Against Rezoning**

We are heartened that there are over 50 neighbors against the rezoning of the former Rosboro property by Tom Lininger and Merle Weiner. We are also heartened that many other people in the Eugene Springfield area are also against this rezoning. We are confident that when the facts of the case become known to the greater public there will be more people against this type of clever navigation of the Lane Code for rezoning purposes.

Hal Hermanson, Neal Miller, and Chris Berner representing  
Peaceful Valley and Fox Hollow Neighbors Against rezoning

6.11.2007

Rezoning Appeal: Prevent the further erosion of prime forest lands.

Introduction:

Mr. Lininger stated at the Hearing for this proposed rezoning that he and his wife were lawyers. As lawyers they thought in the long term. He stated that in 50 years the urban growth boundary may extend beyond the Peaceful Valley area. This was the reason he stated for increasing the access to his property to 10 residences (when the current owners of the property granting access are no longer living there). He asked rhetorically to those listening at the hearing, "Is there currently any F-2 zoned property within the Eugene-Springfield Urban Growth boundary?" He answered saying "no". This is not the long term vision we have for the Peaceful Valley and Fox Hollow Communities. We want a neighbor who would not want to subdivide their property further if the UGB was extended. We want a neighbor who would preserve their land rather than subdivide.

The rezoning of the former Rosboro Property is being appealed for the following reasons:

1. Tom Lininger and Merle Weiner used environmental group insider information for their own private gain. They used information about Rosboro's proposed aerial spraying (in 2004) and the community's distress and reaction against the aerial spraying as an opportunity to shrewdly negotiate a private land sale (land was bought for just over \$2,000/acre). This was information first gleaned from environmental group meetings.
2. Rezoning further erodes the prime forest land. The county should be protecting our scarce resource base rather than eroding it.
3. Rezoning would give Tom Lininger and Merle Weiner two 80 acre parcels zoned F-2. An additional 80 acre parcel rezoned F-2 is worth considerably (estimated increased value is greater than \$50,000) more on the open market than F-1 zoned land. This windfall in property value appears to be another reason for their pursuit of this rezoning. The applicant's have stated to neighbors that they will do nothing to decrease the value of their property. All of the steps in this rezoning process also show that they will aggressively pursue ways to increase the value of their property. What is to stop them from rezoning further? Also, why do they have access for three residences? Where is the third property zoned for this access for a third residence?
4. The applicants hired attorney Bill <sup>K1065</sup>Close, a land use attorney for developers.
5. The Rosboro property did not go up for public sale. The property was sold from Rosboro to Real Ex, LLC. Then it was sold one month later to Lininger/Weiner in May of 2005. It appears that Real Ex, LLC is a legal shield.
6. The property had over 80 acres of F-2 land (and roughly 160 acres of F-1 land) when they bought it in May 2005.

7. The rezoning applicants knew this prior to their purchase but were not satisfied with what they had. The primary reason for the rezoning process appears to be because they were not satisfied with where they could build. Rather, they wanted to build on the ridgeline, where it is zoned F-1 and has a better view.

8. Thus they obtained access for 3 residences (with access going to 10 when the current residents of the access property were no longer living there), resurveyed the property, partitioned the 242 acres into three 80-acre parcels (June 29, 2006), and then finally in October 2006 applied to have property rezoned. All of these actions were premeditated for the express purpose of rezoning their property. In fact, it appears that the applicants prepared this plan prior to buying the property.

9. Many of the sites on this existing F-2 land are private and secluded, two of the key characteristics Mr. Lininger stated they wanted in their home site.

10. The proposed home site is neither private nor secluded.

11. The property has been prime forest land since George Zellner bought it in 1944.

12. The applicants have proceeded on a course of misinformation to the community in this rezoning process. They have consistently overstated the reasons for the rezoning and brushed off the reasons against it.

13. There is no restriction on pesticide use, only a "last use philosophy".

14. The proposed rezoned parcel is in the direct watershed for the Peaceful Valley. Building there could affect water quantity and quality adversely.

15. The applicants have hounded neighbors opposed to the rezoning to such a degree that it borders on harassment. We will not be bullied or harassed by outsiders.

16. The private interest of the applicants is driving this rezoning, not what is in the best interest of the community, county, or state.

17. Some neighbors will receive property if the rezoning goes through. We are against such kick backs. Such transactions, after the fact, are highly divisive in nature. Such deals undermine the credibility of support of such neighbors and those they have convinced that it is a good idea for the community.

18. The proposed rezoning on the subject property would reduce the amount of land zoned F-1 by almost 50% and expose the remaining property zoned F-1 to the likelihood of an adjacent non-forest dwelling, the stated intent of the applicant. Commercial forest management of the 80-acre remainder would become more difficult, especially because

access to that portion of the subject property would have to be through the rezoned portion. The applicant has not shown how the proposed rezoning is consistent with this general purpose statement of chapter 16 of the Lane Code.

19. It is contrary to the public interest. The public interest is best expressed by the Rural Comprehensive Plan. The overall intent of the Forest Land policies is to encourage the preservation of forest land and to protect those lands through consolidation of ownerships not allowing the partitioning of such F-1 lands.

In short, the rezoning is being appealed because it is simply not the right action for the community. It also sets a precedent for others to pursue loopholes in the Lane County Code as well as around the state for rezoning. The process through which the applicants have gone, exploiting loopholes in the code for their private ends, is not in the best interests of the county or the state. There are over 50 neighbors against this proposed rezoning. We do not think it is in the best interests of the community, county, or state to allow this rezoning to occur. We are taking donations for the legal defense fund to stop this rezoning action. All donations will be used solely for the appeal fees and attorney's fees in this appeal process. Contact Hal Hermanson, treasurer of the fund, at 359-6485 to make a contribution. All donations from additional neighbors and citizens of the state of Oregon who are against this rezoning will be accepted. If the amount is greater than expenses incurred then a portion will be returned on a contribution percentage basis.

Peaceful Valley and Fox Hollow Neighbors against Rezoning.

**BEFORE THE HEARINGS OFFICIAL OF LANE COUNTY, OREGON**

**Final Order in PA 06-6170  
Approving a Rezoning From F-1 to F-2**

The Lane County Hearings Official finds as follows:

1. The following application for a change of zone was accepted by the Lane County Land Management Division on June 30, 2006:

Tom Lininger & Merle Weiner (PA 06-6170)  
Portion of Parcel 31 of P 2006-2019, assessor's map 18-04-33 **Plot 299**  
Approval of a change in zoning from F-1 to F-2

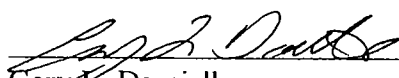
2. The application was initiated and submitted in accordance with Lane Code 14.050. Timely and sufficient notice of the zone change hearings under Chapter 14 of the Lane Code has been provided.
3. On January 18, 2007, a public hearing on the zone change request was held. The planning department staff notes and recommendation together with the testimony and submittals of persons testifying at the hearing have been considered and are part of the record of this proceeding.
4. Further consideration has been given to and administrative notice taken of the provisions of the Lane County Rural Comprehensive Plan and all applicable special purpose/functional plans, planning related policies and refinement plans.
5. On the basis of this record, the requested zone change was found to be consistent with the applicable criteria set forth in the Lane County Rural Comprehensive Plan and Section 16.252 of the Lane Code. This general finding is supported by the specific findings of fact and the conclusions of law set out in Exhibit A, adopted May 30, 2007, to this order. Exhibit B to this order depicts the property subject to this rezoning approval.

NOW, THEREFORE, based upon the above findings and the record in this proceeding, IT IS HEREBY ORDERED THAT:

The application for rezoning is APPROVED.

Approval dated this 30th day of May, 2006.

This action will become final and effective on the 10th day following the approval date above.

  
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Gary L. Darnielle  
Lane County Hearings Official

Lane County Hearings Official



## **LANE COUNTY HEARINGS OFFICIAL**

### **REQUEST FOR THE REZONING OF A PORTION OF PARCEL #1 OF PARTITION 2006-P2019 FROM NONIMPACTED FOREST LAND (F-1) TO IMPACTED FOREST LAND (F-2)**

#### **Application Summary**

Tom Lininger/Merle Weiner, 930 E. 37<sup>th</sup>, Eugene, Or. 97405. Tax lot 1602 (portion of), Assessor's Map 18-04-33. Request to change the zoning of 80 acres of land from Non-Impacted Forest Lands (F-1/RCP) to Impacted Forest Lands (F-2/RCP).

#### **Parties of Record**

See Attachment "A".

#### **Application History**

Hearing Date: January 18, 2007  
(Record Held Open Until March 15, 2007)

Decision Date: May 30, 2007

#### **Appeal Deadline**

An appeal must be filed within 10 days of the issuance of a final order on this rezoning request, 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**

LC 16.210  
LC 16.211  
LC 16.252  
Rural Comprehensive Plan (RCP)

#### **Procedural Issues**

Mr. Neal Miller, in a January 22, 2007 electronic message to myself, requested that I recuse myself because of bias. Examples of bias given were the time limitations placed upon speakers testifying in opposition during the January 18, 2007 hearing when none were placed on the applicant, modification of decisions after behind-the-scenes discussion with planning staff, and allegedly previous pro-development zone change decisions. First, Mr. Miller is correct in his allegation that the applicant is treated differently at the public hearing. Because the applicant carries the burden of proof, no time constraints are usually placed their testimony although this is not offered *carte*

*blanche* and exceptions are made in cases of excessively redundant and irrelevant testimony. Most applicants wish to explain why they have submitted their application and the applicant in this case was no different. However, subsequent speakers were encouraged to direct their testimony towards the approval criteria and to avoid allegations going to the motives or character of the applicant. At the January 22 hearing a previous speaker was essentially warned to wind up his testimony as it was becoming redundant and not directed to the approval criteria. This speaker had already spoken for over five minutes. Mr. Miller took umbrage in this action. Mr. Miller mistakes bias for crowd control. The audience was informed that they had the opportunity to request that the record be held open and, in fact, it was held open until March 15, 2007.

Second, I did pull back my May 9, 2005 decision in PA 04-5746 regarding a request for a modification to a riparian setback. The re-issuance, issued on May 12, 2005, was based upon the recognition by myself that the section of the May 9 decision regarding compliance with Lane Code 16.253(3)(b) was erroneous. There was no private meeting regarding the determination to rework this part of the decision and the modification did not change the decision to affirm the Planning Director's decision as I had already found that the application complied with Lane Code 16.253(3)(c). A determination of compliance with (3)(b) was not necessary.

Finally, if Mr. Miller had taken the time to do a little research he would have discovered that there is a published record of all my decisions that is available on request. Had he done his homework Mr. Miller would have discovered that I have heard five requests regarding the rezoning of Nonimpacted Forest Land to Impacted Forest Land. I have approved three applications, including this one, and have denied two.

In conclusion, I deny any bias concerning this or other rezoning hearing that I have participated in. I strive to apply the approval criteria both impartially and consistently and believe that I have done so in this case. Had I not I am sure this decision would have taken far fewer pages to write.

### **Findings of Fact**

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lot 1602, assessor's map 18-04-33. The subject property lies southwest of Eugene in a neighborhood known as Peaceful Valley and is owned by Merle Weiner, one of the applicants. Prior to Ms. Weiner's ownership, the subject property was part of a 242-acre parcel owned by Roseboro Timber Company. In 2006, after being stripped of its timber, the parcel was partitioned<sup>1</sup> into three parcels: the subject property, Parcel 1, which is 80.6 acres in size; Parcel 2, which is 81.2 acres in size; and Parcel 3, which is 80 acres in size. The ownership of the three parcels is held by different family members and therefore they do not constitute a tract. All but 0.6 acres of Parcel 1 is zoned F-1.

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<sup>1</sup> #2006-P2019.

The 0.6 acres is represented by tax lot 528, which is zoned RR-10 and provides access to the subject property from Laughlin Road.

2. The subject property is not developed by a residence or nonforest use. Preliminary legal lot status for tax lot 1600, assessor's map 18-04-33 and tax lot 401, assessor's map 19-04-04 was verified through PA 05-5498 and PA 04-6236 by the Lane County Planning Director on April 26, 2005. Notice of this decision was mailed to property owners that were entitled to notice and no appeals were filed during the appeal period that ended May 10, 2005.
3. An examination of the assessor's maps of the area surrounding the subject property indicates that there are between 50 and 60 parcels roughly within 2,000 feet of the subject property. Of these properties, 18 parcels share a common boundary with the subject property. Of these 18 properties, eleven or 85 percent are occupied with residences. These eleven parcels constitute 55 percent of the subject property's perimeter. The following is a description of the 18 contiguous parcels, arranged according to orientation to the subject property:

Western boundary (38.7% of total) – all tracts smaller than 80 acres

*Tax lot 400:* The total size of the tract is 40.4 acres, and it is occupied with a residence. The frontage along the subject property is 108.7 feet (1.3% of the subject property's total perimeter) and it is zoned F-2.

*Tax lot 520:* The total size of the tract is 8.94 acres, and it is occupied with a residence. The frontage along the subject property is 115.88 feet (1.3% of the subject property's total perimeter) and it is zoned RR-10.

*Tax lots 524, 525 & 527 (commonly owned):* The total size of the tract is slightly over 10 acres, and tax lot 525 is occupied with a residence that is less than 100 feet from the subject property. The frontage along the subject property is 688.26 feet (5.6% of the subject property's total perimeter) and all of these tax lots are zoned RR-10.

*Tax lot 521:* The total size of the tract is 4.95 acres and it is occupied with a residence. The frontage along the subject property is 277.26 feet (3.2% of the Subject property's total perimeter) and it is zoned RR-10.

*Tax lot 526:* The total size of the tract is 5 acres, and it is occupied with a residence that is about 150 feet and downhill from the subject property. The frontage along the subject property is 591.17 feet (6.8% of the subject property's total perimeter) and it is zoned RR-10.

*Tax lots 516 & 1601 (commonly owned):* The total size of the tract is 8.74 acres and tax lot 516 is occupied with a residence. The frontage along the subject

property is 1150.83 feet (13.3% of the subject property's total perimeter). Tax lot 516 is zoned RR-10 and tax lot 1601 is zoned F-1. Tax lot 1601 is a 400-foot by 200-foot rectangular-shaped parcel that is 1.84 acres in size. It is appurtenant to the 6.9-acre parcel of RR-10 zoned land on which Marie Matsen and Karla Rice own and reside. Ms. Matsen and Ms. Rice acquired the 1.84-acre piece in exchange for granting driveway access through their property to a prior owner of the subject property. Tax lot 1601 acquired its F-1 zoning due to its origins in tax lot 1600, not due to any commercial forestry activities conducted by Ms. Matsen and Ms. Rice. They acquired tax lot 1601 for the purpose of insulating their residence from the subject property. Ms. Rice and Ms. Matsen "use tax lot 1601 solely as a buffer, not for commercial forestry" and do not intend to harvest any trees on tax lot 1601 for commercial purposes.<sup>2</sup>

*Tax lot 528:* This 0.6-acre driveway is owned by Applicant Merle Weiner and is zoned RR-10. It does not have a residence. The frontage along the subject property is 60.6 feet (0.7% of the subject property's total perimeter).

*Tax lots 503 & 517 (commonly owned):* The total size of the tract is 7.31 acres and tax lot 517 is occupied with a residence. The frontage along the subject property is 269.52 feet (3.2% of the subject property's total perimeter) and the two tax lots are zoned RR-10.

Northern boundary (17.4 % of total) – all tracts smaller than 80 acres

*Tax lot 510:* The total size of the tract is 5.06 acres, it is occupied with a residence, and is zoned RR-10. The frontage along the subject property is 218.19 feet (2.5% of the subject property's total perimeter).

*Tax lot 505:* The total size of the tract is 5.12 acres, it occupied with a residence, and it is zoned RR-10. The frontage along the subject property is 231.89 feet (2.7% of the subject property's total perimeter).

*Tax lot 504:* The total size of the tract is 13.91 acres, it is occupied with a residence, and it is zoned F-2. The frontage along the subject property is 860.25 feet (9.9% of the subject property's total perimeter). The owners of tax lot 504 are Larry and Joan Banfield. Ms. Banfield's affidavit (Appendix "U" to the applicants rezoning application) explains the noncommercial use of this parcel. Ms. Banfield and her husband primarily use the property "for residential purposes."<sup>3</sup> Throughout the 30 years in which they have owned tax lot 504, Mr. and Ms. Banfield "have never sold any trees" nor have they held themselves out to the public as a forestry business. They have never incorporated nor filed business tax returns for a forestry operation and they have never tried to write off the

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<sup>2</sup> See September 23, 2005 affidavit of Karla Rice (Appendix "A" to applicants' submission.)

<sup>3</sup> See January 29, 2007 affidavit of Joan Banfield (Appendix "U" to applicants' submission.)

purchase of forestry-related equipment as a business expense on their tax returns. According to Ms. Banfield, the function of the trees on tax lot 504 is to provide a buffer between the Banfields' residence and the Subject Property to the south. Tax lot 504 is not in forest tax deferral.

*Tax lot 104:* The total size of the tract is 28.5 acres, it is occupied with a residence and it is zoned F-2. The frontage along the subject property is 200 feet (2.3% of the subject property's total perimeter).

Southern boundary (14% of total) – one tract exactly 80 acres in size

*Newly partitioned Parcel 3:* Parcel 3 is 80 acres in size, does not have a residence and is zoned F-2 and has been designated as a State-certified habitat conservation zone where commercial forestry is not allowed. The frontage along the subject property is 1210.12 feet (14% of the subject property's total perimeter).

Eastern boundary (30.9% of total) – one tract exceeding 80 acres in size

*Newly partitioned Parcel 2:* Parcel 2 is 81.2 acres in size, is not occupied with a residence, and is zoned F-1. The frontage along the subject property is 2672.79 feet (30.9% of the subject property's total perimeter).

4. The subject property receives police protection from the Lane County Sheriff and Oregon State Police. Electricity is available from the Lane Electric Coop and telephone service is provided by Qwest. The subject property is located within the boundary of the Eugene School District #4J. An on-site well and septic tank are proposed. Solid waste collection is provided to the area by Countryside Disposal and Ecosystems Transfer and Recycling.

Access to the subject property is via tax lot 528 to Laughlin Road, functionally classified as a rural local road by the Lane County Transportation System Plan (TSP).<sup>4</sup> Lane Code 15.010(18(e) states that local roads are "intended solely for the purpose of providing access to adjacent properties." An examination of the Lane County Official Zoning Map (Plot #299) indicates that 42 parcels have frontage on Laughlin Road. Three of these 42 parcels are zoned F-2 and the remainder are zoned RR-10. Laughlin Road is 1.26 miles in length and appears to serve about 40 residences.

The subject property receives fire protection from Lane County Fire District #1. The District's Prevention Coordinator inspected the subject property in 2004 and found that the grade of the driveway was within the specifications of Lane Code

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<sup>4</sup> I have taken official notice of Appendix B: County Roads Inventory of the Lane County Transportation System Plan, adopted via Ordinance 1202 on May 5, 2004.

16.211(8)(e)(iv) (grade). The driveway also was found to meet Code standards for width and turn-around requirements.<sup>5</sup>

5. Assessor's Map 18-04-33 is listed in the Lane Manual 13.010(2)(b)(i) as being water quantity limited for "built upon or committed" lands subject to R-1 zoning. The area surrounding the subject property is underlain by the Fisher Formation, which is known for its restricted well yields. The poor permeability of the strata means that water must be removed slowly but also indicates that the aquifer is protected from overdraft. In areas with this type of geology, wells on parcels of five acres in size or larger have little chance of significantly impacting a well on adjacent property or depleting the aquifer.<sup>6</sup>
6. Ms. Wiener has recorded a declaration pledging that she will not pursue commercial forestry on the subject property<sup>7</sup> and the Lane County Department of Assessment and Taxation has agreed to eliminate the subject property's forest tax exemption.<sup>8</sup> Currently, the applicants are growing diverse species of trees, including hardwoods, on the subject property.
7. A large number of residents in the area surrounding the subject property have voiced their concerns regarding the aerial spraying of herbicides on the subject property during its tenure under ownership of Rosboro Lumber. (Appendix "G" to the Applicants' rezoning application.)
8. Parcel #3 abuts the southern border of the subject property and is owned by the applicant Tom Lininger. It is subject to a recorded declaration forbidding commercial forestry use, has been converted to a state-certified Wildlife Habitat Conservation and Management Zone, and has been assessed under this zone beginning in the 2006-2007 tax year. The applicants are planting new trees on Parcel #3 and are managing its existing vegetation in consultation with a wildlife biologist. They are also working to conserve a seasonal creek on this southern parcel.
9. Applicants are the largest-scale private users of mulch mats in Lane County and have extended this practice throughout the majority of the three parcels that comprise Partition 2006-P2019. Mulch mats are essentially swatches of mulch manually placed around tree seedlings to protect the seedling from competing grasses and weeds.
10. The subject property and Parcels #2 and #3 have experienced hunting-related incidents of trespass in the past. Signs have not been effective in diminishing this

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<sup>5</sup> See Appendix "n" of the applicants' submission.

<sup>6</sup> See January 30, 2007 letter from Ralph Christensen to Merle Weiner. (Appendix "X" to applicants' submission.)

<sup>7</sup> Appendix "D" to the Applicants' rezoning application.

<sup>8</sup> See Appendices "E" and "F" of the applicants' application for rezoning.

activity and there has been at least one incident of confrontation between the applicants and a hunter. The presence of hunters represents a safety danger that may deter forest crews from commercial forest operations on Parcel #2 as well as non-commercial forest operations the subject property and Parcel #3 during hunting season.

11. About 80 percent of the soil on the subject property is Bellpine Silty Clay Loam, which has a Douglas Fir site index of 115 and a cubic foot/acre/year rating of 163. Lesser amounts of Witzel Very Cobbly Loam and Dixonville-Philomath-Hazelair Complex are also present.

### **Decision**

THE LININGER/WEINER REQUEST (PA 06-6170) FOR THE REZONING OF A PORTION OF PARCEL NO. #1 OF PARTITION 2006-P2019 IS APPROVED.

### **Justification for the Decision (Conclusion)**

**Lane Code 16.252(2)** This section of the Code establishes the basic requirements for the proposed rezoning. Section 16.252(2) requires that rezoning be consistent with the general purposes of Chapter 16, not be contrary to the public interest, and be consistent with the purposes of the proposed zoning classifications and the Lane County Rural Comprehensive Plan elements.

#### **A. Consistency with the general purposes of Chapter 16 of the Lane Code.**

Lane Code 16.003 sets out 14 purposes of Chapter 16. Arguably, the only relevant purpose statements found in Lane Code 16.003(4) are as follows:

- (1) *Insure that the development of property within the County is commensurate with the character and physical limitations of the land and, in general, to promote and protect the public health, safety, convenience and welfare.*

The applicants' proposal is premised upon the limitations placed on the subject property by its adjacency to dense residential development. The close proximity of neighbors has dictated that forest management on the subject property and Parcels #2 and Parcel #3 be conducted through labor-intensive techniques utilizing non-chemical methods. This strategy requires on-site management due to the substantial amount of work required to maintain a sustainable forestry strategy and to protect the public health and safety from such traditional industrial forestry management techniques as aerial herbicide spraying.

- (4) *Conserve farm and forest lands for the production of crops, livestock and timber products.*

The record is clear that traditional industrial methods of timber management on the remaining portions of the Partition 2006-P2019, such as the aerial spraying of herbicides, are impractical because of the proximity of residential use. The applicants have adopted a management strategy on Parcel #2 (as well as on the subject property and Parcel #3 for non-commercial forest management) that emphasizes non-chemical control of competing vegetation and have spent hundreds of hours implementing this strategy. This type of forest management involves labor-intensive techniques such as the use of mulch mats and manual removal of scotch broom and blackberries. The application of low-impact forestry methods also serves as a controlled laboratory experiment for the large-scale use of mulch mats.

The applicants have pointed to examples of trespass by hunters and others that could discourage work crews for safety reasons and that increase fire danger. It is expected that the presence of a dwelling would decrease the threat of trespass and increase access for emergency vehicles through the upgrade to existing logging roads.

- (7) *Provide for the orderly and efficient transition from rural to urban land use.*

There are a number of residences within 100 to 150 feet of the subject property. The Lane Code contemplates a buffer between F-1 land and residences of at least 500 feet. The applicants' rezoning proposal would create a buffer of F-2 land between the residential neighbors to the west and the applicants' F-1 land to the east. In this manner the applicants' proposal would allow for "an orderly and efficient transition" from residential land to forestland.

- (13) *Conserve open space and protect historic, cultural, natural and scenic resources.*

The applicants own Parcel #3 that abuts the southern border of the subject property and have converted this parcel to a state-certified Wildlife Habitat Conservation and Management Zone. On this parcel, the applicants are planting new trees and managing existing vegetation in consultation with a wildlife biologist. The applicants are also working to conserve a seasonal creek on this southern parcel. The applicants' residence on the subject property will further their conservation efforts on the southern parcel.



Despite the posting of "no hunting" signs throughout the applicants' property, trespassers continue to hunt on the subject property and on the adjacent Wildlife Habitat Conservation and Management Zone. Living on the subject property will place the applicants in the best position to protect the wildlife on the property from hunters.

The proposed rezoning is consistent with applicable purposes of Chapter 16 of the Lane Code.

**B. Not be contrary to the public interest.**

The public interest is best expressed by a showing of consistency with the Rural Comprehensive Plan (RCP). The overall intent of the Forest Land policies of the RCP is to encourage the preservation of forest land, to properly characterize F-1 lands and to protect those lands through accurate zoning and through the consolidation of ownerships. The best determinate of the public interest is therefore a showing of consistency with Forest Lands Policy #15 of the Rural Comprehensive Plan, addressed below in "D."

**C. Consistent with Sections 16.210 and 16.211 of the Lane Code.**

The joint purpose of the F-2 and F-1 Districts is to implement the forest land policies of the Lane County Rural Comprehensive Plan and to conserve forest land for forest uses consistent with Statewide Planning Goal #4, OAR 660-006 and ORS 215.700 through .755. Consistency with the Lane County Rural Comprehensive Plan is addressed in "D," below.

OAR 660-006-0000(1) states that the purpose of the Forest Lands Goal is to conserve forest lands and to carry out the legislative policy of ORS 215.700. ORS 215.700 states a policy to provide certain owners of less productive land an opportunity to build a dwelling on their land and to limit the future division of and the siting of dwellings upon the state's more productive resource land.

While the soil characteristics of the subject property appear to be homogeneous to those of Parcels #2 and #3, the purpose of the rezoning is to allow the more intensive commercial forestry management of Parcel #2 and for the non-commercial (wildlife habitat conservation) forestry management of Parcel #3. Oregon Administrative Rule 660-006-0025(1) provides that "[U]ses related to and in support of forest operations" and "[U]ses to conserve soil, air and water quality and to provide for fish and wildlife resources" are general types of uses allowed in a forest environment and, under subsections (2) and (3), are allowed outright on forest land.

For the above-described reasons, the proposed rezoning is consistent with Sections 16.210 and 16.211 of the Lane Code.

**D. Conformity with the Rural Comprehensive Plan.**

The subject property is designated "Forest Lands" by the Rural Comprehensive Plan. Goal #4 Policies #15(b) and (c) describe the characteristics of F-1 and F-2 properties, respectively. Policy #15(a) implies that the zoning should reflect a conclusion that the characteristics of the land correspond more closely to the characteristics of the proposed zoning (F-2) than the characteristics of the other forest zone (F-2).

The Lane County Rural Comprehensive Plan contains several policies in the Goal Four element that apply to the proposed rezoning.

**Policy 1** Conserve forest land by maintaining the forest land base and protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

This policy appears to be advisory in nature and not directly applicable to the rezoning at hand.

**Policy 2** Forest lands will be segregated into two categories, Non-Impacted and Impacted and these categories shall be defined and mapped by the general characteristics specified in the Non-Impacted and Impacted Forest Land Zones General Characteristics.

This policy refers to the policies set forth in Policy 15.

**Policy 15** Lands designated within the Rural Comprehensive Plan as forest land shall be zoned Non-Impacted (F-1/RCP) or Impacted Forest Land (F-2/RCP). A decision to apply one of the above zones or both in a split zone fashion shall be based upon:

- a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsections b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.

The opponents argue that tax lot 528, the 0.6-acre driveway owned by Ms. Weiner, should be combined with the subject process in this rezoning

because it was created through an illegal lot line adjustment and because the two parcels are under the same ownership.

First, I do not agree with the opponents that *Maxwell v. Lane County*<sup>9</sup> is dispositive in this case. Central to the satisfaction of the rezoning approval standards in *Maxwell* was the counting of qualifying parcels within applicable exception areas. The Court of Appeals, reasoning that the term "parcel" had a legal definition under the Lane Code, then determined that the legality of the creation of those parcels was a relevant consideration in the rezoning process. In the present case, the rezoning criteria of RCP Goal 2, Policy 11 and its implementing Order 88-2-10-14 are not applicable. Second, I do not believe that the criteria of RCP Goal 4, Policy 15 require the consideration of legal lot status. Rather, the primary inquiry is into ownership patterns.

The tract sold to the applicants in 2005 had been previously reconfigured through a property line adjustment. This adjustment did not reduce the parent parcel below 80 acres and it (the adjustment) was subject to a final legal lot determination that was properly noticed per Lane Code 13.020. In addition, the applicants' 2006 partition of that tract into its current three-parcel configuration was properly noticed. Both of these actions have achieved final land use decision status and there are no approval criteria that allow them to be collaterally attacked in this proceeding.

Second, RCP Goal 4, Policy 15 concerns lands currently designated as forest land by the RCP. It does not concern nor does it include criteria for the conversion of residentially zoned land to forest land. Tax lot 528 is zoned RR-10 and cannot be considered in the analysis of the proposed rezoning of Parcel 1 to F-2 Non-impacted Forest Land.

**b. Non-impacted Forest Land Zone characteristics:**

**(1) Predominantly ownerships not developed by residences or nonforest uses.**

In the application of RCP Goal 4 Policy 15 in Ordinance No. PA 1236, the Board of County Commissioners interpreted the use the term "ownerships" to apply only to the property subject to the rezoning. In the present case, the subject property is the only parcel owned by Ms. Weiner that is zoned F-1. The applicants' concede that the subject property is not developed with a residence or other non-forest use. The application is consistent with this characteristic of non-impacted forest lands.

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<sup>9</sup> *Maxwell v. Lane County*, 178 Or. App. 210 (2001), modified on other grounds, 179 O. App. 409 (2002).

(2) **Predominantly contiguous, ownerships of 80 acres or larger in size.**

The subject property is 80 acres in size. As discussed above, RCP Forest Lands Policy 15 only applies to property designated as forest lands by the comprehensive plan and therefore even though tax lot 528 is under the same ownership as the subject property it cannot be merged with the subject property for purposes of this criterion.

Whether because of sloppy draftsmanship or careless intent, Policy 15.b.(2) and 15.c.(2) create an incongruity in that a parcel exactly 80 acres in size meets both criterion. The applicants have offered what they term as a "split-zone alternative" where only 79 acres of the subject property would be subject to the rezoning request. For the reasons that I articulated in the *Dockum* case<sup>10</sup> I do not favor this approach nor do I believe this strategy is necessary.

The application is consistent with this characteristic of non-impacted forest lands.

(3) **Predominantly ownerships contiguous to other land utilized for commercial forest or commercial farm uses.**

Some opponents have argued that the growing of a commercial tree species is, *per se*, a commercial forest use. This statement is inconsistent with Statewide Planning Goal 4 and OAR 660-006-0025(1), which specifically recognizes that forest lands include lands that are used to "conserve soil, water fish and wildlife resources, agricultural and recreational opportunities appropriate in a forest environment..." in addition to commercial forest operations. The presence or absence of a commercial tree species is but one component in determining the presence of a commercial forest use. The definition of "commercial" connotes an aspect of profit. Thus, an operation where a landowner plants and nurtures a tree species to create a forest environment but only occasionally sells trees as an incidental aspect of that operation (i.e. after thinning for safety purposes or after the removal of trees subject to windfall or disease) should not be considered as a commercial forest operation. There must be a primary intent to harvest and sell

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<sup>10</sup> Lane County Hearings Official, *Application of Floyd & Connie Dockum* (PA 06-6054) March 29, 2007, pg. 8.

trees and that intent must be divined from the actions of the landowner as well as the characteristics of the forest land.

The subject property is bordered by 18 parcels, at least 14 of which are not utilized for commercial forest or commercial farm use. These 14 parcels represent about 56 percent of the perimeter of the subject property.

The subject property does not meet this characteristic of Non-Impacted Forest Lands.

**(4) Accessed by arterial roads or roads intended primarily for forest management.**

The subject property is accessed by Laughlin Road, a public county road. An examination of the county's official zoning map for the area surrounding the subject property shows that about 42 parcels have frontage on Laughlin Road. All but three of these parcels are zoned for residential use (RR-10).

While the record contains no direct evidence regarding a specific "intent" regarding the use of Laughlin Road, Lane Code 15.010(18)(e) makes it clear that local roads are intended to provide access to adjacent properties. The primary intent is therefore is to provide access to whatever uses occur on adjacent properties. In the present case, the overwhelmingly primary use of Laughlin Road is to provide access to residentially-zoned properties.

The property does not meet this characteristic of Non-Impacted Forest Lands.

**(5) Primarily under commercial forest management.**

The subject property has been logged in the recent past and its soils are suitable for the commercial management of trees. However, in past years many adjacent and nearby property owners have raised serious concerns about the proposed application of industrial forest management practices (i.e. aerial herbicide spraying) to the subject property. I believe both the applicants and their neighbors would agree that traditional commercial forest management is impractical on the subject property.

The applicants have taken affirmative steps to manage the subject property for conservation and non-commercial forestry purposes.

To this end, non-commercially-viable tree species have been planted and labor-intensive, herbicide-free methods of noxious vegetation control have been employed. In addition, the subject property is subject to a deed restriction that prohibits commercial forestry and the Lane County Department of Assessment and Taxation has agreed to remove the property from its special assessment program for forest land.

The applicants have gone beyond the utterance of platitudes regarding their intent to remove the subject property from commercial forest management practices. I believe that these affirmative steps demonstrate that the subject property no longer can be considered as being primarily under commercial forest management.

In summary, the subject property only exhibits two of the five characteristics of property that characterize land that should properly be zoned non-impacted forest land.

**c. Impacted Forest Land Zone (F-2, RCP) Characteristics**

- (1) Predominantly ownerships developed by residences or nonforest uses.**

The applicants' concede that the subject property is not developed with a residence or other non-forest use. The application is therefore inconsistent with this characteristic of non-impacted forest lands.

- (2) Predominantly ownerships 80 acres or less in size.**

As explained above, the size of the subject property is consistent with this characteristic as well as Policy 15.b.(2), above.

- (3) Ownerships generally contiguous to tracts containing less than 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.**

The subject property abuts 13 tracts, 11 of which are under 80 acres in size. These tracts are comprised of 18 parcels, 11 of which are zoned RR-10. Rural residential zoning is applied to exception areas (nonresource land) that are devoted to rural housing.<sup>11</sup> In

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<sup>11</sup> Lane County Rural Comprehensive Plan, Land Use Policy 11.

addition, there are between 50 and 60 parcels within 2,000 feet of the subject property. An "eyeball" assessment of the official zoning map of this area indicates that the vast majority of these parcels are less than 80 acres in size. In addition, a large number of these parcels are zoned RR-10, including Peacefull Valley Estates, a residential subdivision located about 400 feet to the west.

The subject property meets this characteristic of Impacted Forest Lands.

**(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences.**

One opponent has argued that the term "provided" should be interpreted to mean that the subject property actually has those facilities and services in place rather than merely having access to them. While not disputing that this criterion could have been written more clearly, I do not believe that it should be read so narrowly.

The Policy #6 of the RCP's Goal Eleven: Public Facilities and Services chapter describes minimum service levels for various land designations. Inexplicably, no description is provided for Impacted Forest Land but a reading of descriptions for other designations reveals that the phrase "public facilities and services" includes schools, electrical service, telephone service, a rural level of fire and police protection, and reasonable access to a solid waste facility.

The subject property lies within a rural fire protection district, a school district and the service area of the Lane County Sheriff's Department. Under the interpretation suggested, the subject property would not qualify as being provided with fire, police or school service unless the fire district was currently providing emergency services to the property, a child living on the property was enrolled in a School District 4J school and a representative of the Sheriff's Department was on the property. This is an oversimplification, of course, but it illustrates the difficulty in applying such a conservative interpretation to this criterion.

A better interpretation is that "provided" means reasonably accessible and I believe that this is consistent with the Board of

Commissioners interpretation of RCP Goal Four Policy 15.c.(4).<sup>12</sup> Electrical and telephone utilities, for instance, are normally made available via the local road system. Properties that have direct access to the local road system therefore have direct access to those services and thus those services can be considered to be provided to the property. As a corollary, if a property does not have access to the local road system then the fire district, for example, cannot provide emergency service and that service cannot be considered to be "provided" to the property. In the present case, the subject property has direct access<sup>13</sup> to Laughlin Road via tax lot 538, which is a part of the same legal lot that comprises the subject property. There is no practical or legal impediment to the provision of the full range of rural public facilities and services provided along Laughlin Road to the subject property.

It has also been suggested that this criterion requires that the applicants show the intent behind the construction of Laughlin Road. I must agree with the applicants' interpretation of legislative construction that the placement of the comma after the word "roads" indicates the phrase "intended primarily for direct services to rural residences" modifies "public facilities and services" as well as roads.

The question then is whether the public services and the road are intended primarily for direct services to rural residences. In regard to Laughlin Road, it is only 1.26 miles in length and is classified as a rural local road. Lane Code 15.010(18)(e) states that local roads are solely intended to provide access to adjacent properties. In this respect, ninety-two percent of the 42 parcels adjacent to (having frontage on) Laughlin Road are zoned RR-10. Most of these parcels are developed with residences. As stated above, Parcel 1, which includes the subject property, has frontage on Laughlin Road.

The subject property, as well as the other properties in the area that have access to Laughlin Road, has access to a full range of services normally available to a rural residence, including police and fire coverage, school, electricity, telephone, and solid waste disposal. To a large degree, the public facilities and services available in the area and Laughlin Road are utilized by rural residences. For this

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<sup>12</sup> Lane County Board Ordinance PA 1236 (Oct. 26, 2006), Findings of Fact at page 16.

<sup>13</sup> Under LC 15.135(2)(a), the subject property is considered to have legal access to a County Road because it was the creature of an approved land division.



reason, I believe that the subject property meets this characteristic of Impacted Forest Lands.

The subject property has three of the four characteristics that the RCP has ascribed to Impacted Forest Lands.

Policy 15 requires a conclusion that the characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. In the present case, the subject property exhibits three of the five characteristics of Non-Impacted Forest Land and three of the four characteristics that would denote Impacted Forest Land. On this basis of this analysis, the rezoning of the subject property to F-2 Impacted Forest Land is consistent with RCP Forest Land Policy 15.

**Conclusion**

The proposed rezoning is consistent with applicable criteria of the Lane Code and the Rural Comprehensive Plan.

**Respectfully Submitted,**



**Gary Darnielle**  
**Lane County Hearings Official**

**ATTACHMENT A**  
**Parties of Record – PA 06-6170**

Tom Lininger  
Merle Weiner  
Robert Emmons, LandWatch  
Hal & Lynn Hermanson  
Lisa Arkin  
Robin Winfree-Andrew  
Nancy Miller  
Matt Ginsberg  
Mr. & Mrs. Glen Bjurling  
Charles & Reida Kimmel  
Jared Hanley  
Anne Todd  
Sheri Taylor  
Marilyn Cohen  
Barbara Skolnick  
Fara Roberts & Paul Williams  
Karen Perkins & David Simone

Richard Hazzard  
Don Olson  
Debra McGee  
Marie Matsu  
Dale van Metre  
Chris Berner  
Mary Milo  
Pamela Kinion  
June & Larry Wise  
Jim & Kathy Leppard  
Joan Banfield  
Bernita Mather  
Thomas Hahn  
Larry & Gale Deedon  
Lynn Bowers  
Harold Hadden  
Tom Worell

Dale Olson  
Andrea Taylor  
Neal Lundeen  
Rebekah Hanley  
Neal Miller  
Karla Rice  
Claudia Gray  
Linda Bovard  
F. Warren Colvin  
J.R. & Susan Frost  
Stuart Perlmeter  
Larry Orticke  
Peter Moulton  
Patty Hine  
Kaye Bauman  
Marsh Wingard

BEFORE THE HEARINGS OFFICIAL OF LANE COUNTY, OREGON

Final Order in PA 06-6054  
Approving a Rezoning From F-1 to F-2

The Lane County Hearings Official finds as follows:

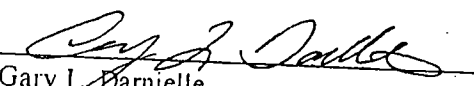
1. The following application for a change of zone was accepted by the Lane County Land Management Division on June 9, 2006:  
  
Floyd & Connie Dockum (PA 06-6054)  
Portion of tax lot 3800, assessor's map 16-06-00  
Approval of a change in zoning from F-1 to F-2
2. The application was initiated and submitted in accordance with Lane Code 14.050. Timely and sufficient notice of the zone change hearings under Chapter 14 of the Lane Code has been provided.
3. On November 16, 2006, a public hearing on the zone change request was held. The planning department staff notes and recommendation together with the testimony and submittals of persons testifying at the hearing have been considered and are part of the record of this proceeding.
4. Further consideration has been given to and administrative notice taken of the provisions of the Lane County Rural Comprehensive Plan and all applicable special purpose/functional plans, planning related policies and refinement plans.
5. On the basis of this record, the requested zone change, as modified, was found to be inconsistent with the applicable criteria set forth in Forest Lands Policy #15 of the Lane County Rural Comprehensive Plan and 16.252 of the Lane Code. This general finding is supported by the specific findings of fact and the conclusions of law set out in Exhibit A, adopted March 29, 2007, to this order.

NOW, THEREFORE, based upon the above findings and the record in this proceeding, IT IS HEREBY ORDERED THAT:

The application for rezoning is **denied**.

Denial dated this 29th day of March, 2007.

This action will become final and effective on the 10th day following the denial date above.

  
Gary L. Darnielle  
Lane County Hearings Official

# EXHIBIT A

## LANE COUNTY HEARINGS OFFICIAL REQUEST FOR THE REZONING OF TAX LOT 104, ASSESSOR'S MAP 16-03-35

### Application Summary

Floyd & Connie Dockum, P.O. Box 5176, Helena, MT 59601. Tax lot 3800, Assessor's Map 16-06-00. Request to change the zoning of 38 acres of a 118-acre parcel from Non-Impacted Forest Lands (F-1/RCP) to Impacted Forest Lands (F-2/RCP).

### Parties of Record

Floyd & Connie Dockum  
Eban Fodor  
Lauri Segel, LandWatch Lane County  
Tom and Diana Larsen  
Gary Hewitt  
Mona Linstromberg  
Tom Largsen

Becki Kammerling  
Jan Wilson, Goal One Coalition  
Nena Lovinger  
Myriam Iribarren  
Bob Gresham  
Frank Blair

### Application History

Hearing Date: November 16, 2006  
(Record Held Open Until December 11, 2006)

Decision Date: March 29, 2007

### Appeal Deadline

An appeal must be filed within 10 days of the issuance of a final order on this rezoning request, 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

LC 16.210  
LC 16.211  
LC 16.252  
RCP Policies, Goal 4 (Forest Land)

### Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as tax lot 3800, Assessor's Map 16-06-00. The applicant proposes that the southern 38 acres of the subject property be rezoned to F-2 and that the residual 80 acres remain F-1. The subject property has a

perimeter of about 1670 feet, 626 feet of which is contiguous to a parcel of 80 acres in size or larger.

The subject property is comprised of sloping topography ranging from 4% to 20%. All timber was clear-cut harvested from tax lot 3800 in the spring of 1998 although it is not clear whether it was ever replanted. Eighty-one percent of this tax lot is occupied by soils with a forest capability range of 162-184 cu. Ft./ac./yr. and the soils of portion of tax lot 3800 to be rezoned to F-2 have a mean site site index for Douglas fir of between 155 and 165.<sup>1</sup> The property to the west, north and east are heavily forested.<sup>2</sup>

2. The subject property is not developed by a residence or nonforest use. Dusky Creek traverses the property in a northwest to southeast direction but is not classified as a Class I Stream within the Rural Comprehensive Plan. No wetlands or flood hazard areas are identified on the subject property by the National Wetlands Inventory and the Flood Insurance Rate Map (FIRM) respectively. The property is designated as Major Big Game Range (Deer and Elk Winter Range Habitat). Legal Lot status for the entirety of tax lot 3800 has been verified under PA 99-5790.
3. Properties contiguous to the subject property are as follows: To the north is tax lot 3700, a 159-acre parcel zoned F-1 owned by Paul and Norma Templeton. This property is under forest tax deferral. Contiguous to the subject property on the east and southeast, respectively, are tax lot 900, assessor's map 16-06-28, a 78-acre parcel occupied with a residence, zoned E-40 and owned by Paul V. Templeton, and tax lots 3900 and 3901. Tax lot 3900 is zoned F-1, is 29.5 acres in size, and is under a small tract forestland tax deferral. It is owned by an archery club (Cascadian Bowmen). This company also owns tax lot 1100, assessor's map 16-06-28, a 17.5 acre parcel adjacent to tax lot 3900 on the east. Tax lot 3901 is owned by Donald Meyer, is zoned F-1 and is 8.4 acres in size. It is occupied with a residence.

On the south, across Poodle Creek Road, are properties zoned Rural Residential RR-10 and RR-5. Tax lots 3601 and 3600, adjacent to the west of the subject property, are zoned Impacted Forest Lands (F-2) and are 30 and 60 acres in size, respectively, and are owned by the Evans Family Trust. These tax lots are under forest tax deferral.

Lane Code 16.090 defines "contiguous" as "having at least one common boundary line greater than eight feet in length." By this definition, there are five parcels contiguous to the subject property as Poodle Creek Road makes the parcels to the south non-contiguous. Of the 13 tracts that are generally

<sup>1</sup> See attachment "B" (NRCS Soils Map for Property) of applicant's submission.

<sup>2</sup> See aerial photograph of subject property taken 6/20/02. Attachment "A" of applicant's submission.

contiguous<sup>3</sup> to tax lot 3800, eleven are less than 80 acres in size and ten have a residence. These ten tracts occupied with a dwelling can be identified as tax lots 302, 101, 102, 103, 105, 100, assessor's map 16-06-32; tax lot 3901, assessor's map 16-06-00; and tax lots 1100, 900, and 500, assessor's map 16-06-28.

4. The subject property receives fire protection from Lane Rural Fire/Rescue District and police protection is by the Lane County Sheriff and Oregon State Police. Electricity is available from the Blachly Lane Cooperative and telephone service is provided by Qwest. The subject property is located within the boundary of the Junction City School District #69. An on-site well and septic tank are proposed.

Access to the subject property is from Poodle Creek Road, a Rural Major Collector. Lane County Roads Inventory<sup>4</sup> (Pg B-53) lists Poodle Creek Road as having a paved surface of 26 feet and as being 6.77 miles in length. Lane Code 15.703(3)(a) lists the minimum right-of-way widths for rural arterial and collector roads shall be 80 feet in two-lane sections. At the minimum right-of-way, Poodle Creek Road is about 66 acres in area. The actual right-of-way width of Poodle Creek Road is not in the record.

5. Assessor's Map 16-06-00 is not listed in the Lane Manual 13.010(2)(a)(ii) as being water quantity limited.

### **Decision**

THE DOCKUM REQUEST (PA 06-6054) FOR THE REZONING OF A PORTION OF TAX LOT 3800, ASSESSOR'S MAP 16-06-00, IS DENIED.

### **Justification for the Decision (Conclusion)**

**Lane Code 16.252(2)** This section of the Code establishes the basic requirements for the proposed rezoning. Section 16.252(2) requires that rezoning be consistent with the general purposes of Chapter 16, not be contrary to the public interest, and be consistent with the purposes of the proposed zoning classifications and the Lane County Rural Comprehensive Plan elements.

#### **A. Consistency with the general purposes of Chapter 16 of the Lane Code.**

Lane Code 16.003 sets out 14 purposes of Chapter 16. Arguably, the only relevant purpose statement is found in Lane Code 16.003(4) that states:

- (4) *Conserve farm and forest lands for the production of crops, livestock and timber products.*

<sup>3</sup> "Generally contiguous" is defined as properties that share a common boundary, touch the subject property at a corner point, or are separated from the subject property by a road.

<sup>4</sup> Appendix B of the Lane County Transportation System Plan