

W.S.A.

**AGENDA COVER MEMO**

**DATE:** March 4, 2008 (Date of Memo)  
March 19, 2008 (Date of Meeting)

**TO:** Lane County Board of Commissioners

**DEPT.:** Public Works Department, Land Management Division

**PRESENTED BY:** Deanna Harris, Planner, Land Management Division

**AGENDA ITEM TITLE:** Order No. 08-\_\_\_\_\_ In the Matter of Electing Whether or Not to Hear an Appeal of a Hearings Official's Decision Denying an Application for a Replacement Dwelling in the Exclusive Farm Use Zone (E-40), Map and Tax Lot T18-R05-S08 TL 608 (File No. PA 07-5572/ Bottem/CBM Family LLC).

**I. MOTION**

MOTION TO ADOPT THE ORDER ESTABLISHING THE BOARD'S ELECTION TO HEAR ARGUMENTS IN AN APPEAL OF THE HEARINGS OFFICIAL'S DECISION AND CONDUCT AN ON-THE-RECORD HEARING.

**II. ISSUE OR PROBLEM**

An appeal to the Board, contesting a Hearings Official decision reversing the Planning Director approval of an Application for a Replacement Dwelling within the Exclusive Farm Use (E-40) Zone, 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 provisions of LC 14.600(3).

**III. DISCUSSION**

**A. Background**

1. The subject property involved is a 127 acre parcel identified as Map 18-05-08, tax lot 608, located approximately 2 miles southeast of Veneta, west of Central Road, zoned Exclusive Farm Use (E-40).
2. The Applicant submitted a Replacement Dwelling application on April 23, 2007.

3. The Planning Director approved the application on September 4, 2007.
4. A timely appeal of the Planning Director decision was filed on September 17, 2007 by adjacent property owners Ron and Katy Lenn and the Goal One Coalition. The Planning Director affirmed the decision and scheduled the appeal for a de novo review by the Hearings Official.
5. A hearing before the Lane County Hearings Official was held on November 19, 2007.
6. On January 14, 2008, the Hearings Official issued a decision reversing the Planning Director's approval of the proposal.
7. A timely appeal of the Hearings Official's decision was filed by the Applicant on January 24, 2008, and the Hearings Official affirmed his decision.

## **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 and implementing ordinances made by the Hearings Official in the decision being appealed and affirm the Hearings Official's decision.

The applicable subsections are:

***LC14.600(2)(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.***

***LC14.600(2)(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. Under LC 14.600(4) participants include the appellant, the applicant, and the Planning Director. In this case, the appellant is the applicant. If the Board elects to hear, staff suggests a hearing date be set for April 16, 2008 at 1:30 p.m.

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 Planning Director's approval was reversed because the Hearings Official concluded that the mobile home to be replaced was not lawfully placed on the subject property, because it does not comply with LC 16.212 (5)(b)(i) and certain provisions of LC Chapter 10. In part, LC 16.212(5)(b) (as does LC 16.211(4)(b)) provides for the replacement of a lawfully established dwelling upon compliance with the following requirement (the issue of the appeal):

- (i) *There is objective evidence demonstrating that the existing dwelling was lawfully placed on the subject property. The burden of proof is upon the applicant to provide this evidence to the Director;***

The major issue is whether or not the mobile home was lawfully established on the property under the criteria of LC 16.212(5)(b). When the 1979 Mobile Home was placed in 1980 without County approval, the subject property was zoned FF-20. The Planning Director's decision stated that the mobile home was lawfully established on the property because it was an outright permitted use in the FF-20 zone at that time. The approval basis was, since the dwelling placement was a permitted use in the FF-20 zone, it met the applicable land use regulations when it was located on the subject property.

The Hearings Official's Denial reasons that the mobile home was not lawfully placed because the then acting code general provisions included mention of the requirement of obtaining a building permit to finalize the mobile home placement. Thus, the Hearings Official concluded that to obtain "lawfully established" status, the mobile home placement in 1980 would have had to comply with both land use and building code requirements because of the way the then acting Lane Code Chapter 10 was written.

The appellant (which is also the applicant) states that the Hearings Official incorrectly concluded the replacement dwelling required both land use and building permit approval of the existing dwelling in order to be considered "lawfully established." Further, the appellant argues that the general provision of the then acting code did not state that a building permit must have been obtained in order to be "lawfully established" under the applicable zoning regulations.

The question raised in the appeal is, do the terms "lawfully established" and "lawfully placed" in LC 16.212(5)(b) require proof of both Land Use Approval, and Building Permit Approval, or can those terms be interpreted to allow replacement if the dwelling was permitted outright under the zone applicable at the time the dwelling was placed on the property?

If the Board agrees with the Hearings Official's decision and finds the appeal does not meet any of the election-to-hear criteria, it is then appropriate not to hear arguments on the appeal. A new Order with findings addressing Lane Code 14.600(2)(d) and (3) will be needed in lieu of the attached Order.

If on the other hand the Board concludes that further interpretation of the 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. An Order implementing this option is attached.

#### **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.

a. *The issue is of Countywide significance.*

The issue of replacement of dwellings in resource zones occurs countywide, reflecting the wide distribution of those zones, and many of those applications may require interpretation of the relevant LC provisions involved in this appeal.

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

The issue will occur with frequency and there is a need for policy guidance. Requests for replacement dwellings in resource zones do occur with frequency and many may involve interpretation and application of LC 16.212(5)(b) and the provisions of LC Chapter 10 relied upon by the Hearings Official to reverse the Planning Director decision. Thus, there is a need for policy guidance on the proper interpretation of the applicable LC provisions by the Board.

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

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

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

The Planning Director recommends review of the appeal.

**D. Options**

1. To hear the appeal on the record;
2. To not hear arguments on the appeal and to remain silent on the Hearings Official's decision and interpretations; or
3. To not hear arguments on the appeal, affirm the Hearings Official's decision, and to expressly agree with any interpretations of the comprehensive plan policies, or implementing ordinances or state law made by the Hearings Official in the decision being appealed.

**E. Recommendation**

Option 1 is recommended by the Planning Director.

**F. Timing**

If the Board elects to hear the appeal, staff suggests a hearing date be set for April 16, 2008 at 1:30 P.M.

**IV. IMPLEMENTATION/FOLLOW-UP**

Notify the parties of the Board decision to adopt the attached Order and conduct an on the record appeal hearing, or

If the Board elects not to hear the appeal, a new Order and Findings will need to be prepared and adopted, as soon as possible.

## **V. ATTACHMENTS**

1. Board Order electing to hear the appeal, with Exhibit "A" (findings).
2. Hearing's Official Decision dated January 14, 2008 with Affirmation of decision dated, January 29, 2008.
3. Appeal of Hearings Official January 24, 2008 decision, received on January 24, 2008, with arguments.
4. Map illustrating location of property.

The entire file record is available for review at the LMD. 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 as part of the staff generated agenda packet.

**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 Denying an Application for a Replacement Dwelling in the Exclusive Farm Use Zone (E-40), Map and Tax Lot T18-R05-S08 TL 608 (File No. PA 07-5572/ Bottem/CBM Family LLC).**

**WHEREAS**, the Lane County Hearings Official has made a decision reversing the Planning Director's approval of a replacement dwelling in File No. PA 07-5572; 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 the application and appeal in File No. PA 07-5572; 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. The appeal does comply with the criterion of Lane Code Chapter 14.600(3)(a), (b) and (d) as described in the findings attached as Exhibit "A" and incorporated here by this reference, and the Board will hear the arguments in the appeal on-the-record pursuant to Lane Code Chapter 14.200 and 14.400 on April 16, 2008 at 1:30 p.m.
2. Pursuant to LC 14.600(4) the participants are the appellant/applicant and the Planning Director.

**DATED** this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

\_\_\_\_\_  
**Faye Stewart, Chairperson**  
**Lane County Board of Commissioners**

APPROVED AS TO FORM

Date 3-11-2008 Lane County

  
\_\_\_\_\_  
OFFICE OF LEGAL COUNSEL

Order Exhibit "A"

**FINDINGS IN SUPPORT OF THE ORDER**

1. The subject property involved is a 127 acre parcel identified as Map 18-05-08, tax lot 608, located approximately 2 miles southeast of Veneta, west of Central Road, zoned Exclusive Farm Use (E-40).
2. The Applicant submitted a Replacement Dwelling application on April 23, 2007.
3. The Planning Director approved the application on September 4, 2007.
4. A timely appeal of the Planning Director decision was filed on September 17, 2007 by adjacent property owners Ron and Katy Lenn and the Goal One Coalition. The Planning Director affirmed the decision and scheduled the appeal for a de novo review by the Hearings Official.
5. A hearing before the Lane County Hearings Official was held on November 19, 2007.
6. On January 14, 2008, the Hearings Official issued a decision reversing the Planning Director's approval of the proposal.
7. A timely appeal of the Hearings Official's decision was filed by the Applicant on January 24, 2008, and the Hearings Official affirmed his decision.
8. 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.*
9. The Board of Commissioners finds that the appeal issue is of Countywide significance. The issue of replacement of dwellings in resource zones occurs countywide, reflecting the wide distribution of those zones, and many of those applications may require interpretation of the relevant LC provisions involved in this appeal.
10. The issue will occur with frequency and there is a need for policy guidance. Requests for replacement dwellings in resource zones do occur with frequency and many may involve interpretation and application of LC 16.212(5)(b) (or LC 16.211(4)(b)) and the provisions of LC Chapter 10 relied upon by the Hearing's Official to reverse the Planning Director decision. Thus, there is a need for policy guidance on the proper interpretation of the applicable LC provisions by the Board.
11. The Planning Director recommends review of the appeal.
12. 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.
13. The Board has reviewed this matter at its meeting of March 19, 2008 and finds that the appeal does comply with the criteria of Lane Code Chapter 16.600(3), and elects to hold an on the record hearing.
14. Under LC 14.600(4) the participants in the on the record hearing include the applicant, the appellant, and the Planning Director.



**LANE COUNTY HEARINGS OFFICIAL  
REQUEST FOR REPLACEMENT DWELLING APPROVAL WITHIN AN E-40  
DISTRICT**

**Application Summary**

Dennis Bottem, 86730 Central Road, Eugene, Or. 97402 applied to the Lane County Planning Director on April 23, 2007 for approval of a replacement dwelling on E-40-zoned land (tax lot 608, assessor's map 18-05-08). Planning Director approval of the request was mailed on September 4, 2007 and a timely appeal was filed on September 17, 2007 by Ron and Katy Lenn and the Goal One Coalition.

**Parties of Record**

Dennis Bottem  
CBM Family, LLC

Ron & Katy Lenn  
Goal One Coalition

James Mann

**Application History**

Hearing Date: November 19, 2007  
(Record Held Open Until December 20, 2007)

Decision Date: January 14, 2008

**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**

Lane Code 10.025-35 /10.105-10(5) (1980)  
Lane Code 16.212(5)(b)  
ORS 215.213(1)(t)

**Findings of Fact**

1. The property subject to this request, hereinafter referred to as the "subject property," has a location of 86730 Central Road, Eugene, Oregon. It can further be described as tax lot 608, assessor's map 18-05-08.
2. The subject property was occupied with a single-family dwelling in the early 1970s. In 1973, temporary permit MH 487-73 authorized the placement of mobile home on the property. This mobile home was removed in 1974.

On August 4, 1976, the subject property was zoned (FF-20) Farm-Forestry District, 20-acre minimum lot size.<sup>1</sup> In 1980, a 1979 Oakbrook mobile home was placed on this property without the benefit of a building permit. At this time, Lane Code 10-105(5) allowed outright one single-family dwelling or mobile home on property zoned FF-20. On February 29, 1984, the property was zoned E-40 Exclusive Farm Use through Ordinance PA 884.

2. The 1979 Oakbrook mobile home currently occupies the subject property. The mobile home has walls, a rook, a kitchen and bathing facilities, plumbing, lighting, electricity and a heating system.

### **Decision**

THE PLANNING DIRECTOR'S APPROVAL OF THE BOTTEM REQUEST (PA 07-5572) FOR A REPLACEMENT DWELLING ON TAX LOT 608, ASSESSOR'S MAP 18-05-08 IS REVERSED.

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

The subject property is currently zoned E-40 Exclusive Farm Use, 40-acre minimum. Lane Code 16.212(5)(b) provides that the replacement of a lawfully established dwelling on EFU-zoned land that is high value farmland or land that is not high value may be approved upon compliance with the following requirements:

- (i) *There is objective evidence demonstrating that the existing dwelling was lawfully placed on the subject property. The burden of proof is upon the applicant to provide this evidence to the Director;*

The major issue in this case is whether the Oakbrook mobile home can be considered to be lawfully placed on the subject property. At the time the mobile home was sited, the subject property was subject to Farm-Forestry 20 District regulations found in Chapter 10.105 of the Lane Code (LC). Specifically, LC 10.105-10(5) permitted "One single-family dwelling per lot or one mobile home per lot." According to the introductory paragraph of this provision, the buildings and uses were permitted "...*subject to the general provisions and exceptions set forth...*" in the Chapter (LC Chapter 10).

The Planning Director opined that the mobile home was lawfully placed on the property because it was an outright permitted use at that time. In his decision, he relied upon *Coonse v. Crook County*, 22 Or LUBA 138 (1991), for the proposition that unless a land use ordinance specifically or implicitly incorporates other permit processes, a determination of "lawful" is limited to an inquiry into conformity to applicable land use and zoning regulations. In rebuttal, the appellants argue that LC 10.105-10(5) integrates the provisions of LC 10.025-35, found among the General Provisions of Lane Code

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<sup>1</sup> Lane County Ordinance No. 592.

10.025, which they believe incorporate the building code and other standards. Lane Code 10.025–35 reads:

*“Conformance and Permits Required. No building or structure shall be erected, reconstructed, structurally altered, enlarged, moved or maintained, nor shall any building, structure or land be used or designed to be used for any use other than is permitted in the zone in which such building, structure or land is located, and there only after proper application for and securing of all permits and licenses required by all applicable State and local laws.”*

The applicant responds by noting that LC 16.212(5)(b), by definition, is an approval process that doesn’t require satisfaction of LC 16.212(5)(a)(i), which requires a showing of building permit or land use application records to prove the dwelling was “lawfully constructed.” That argument is not determinative as LC 16.212(5)(a)(i) focuses upon the availability of *records* that demonstrate building permit or land use approval. The choice of option “(b)” does not mean that building permit approval was not required but rather provides an evidentiary alternative to producing records of building permit or land use approval. Lane Code 16.212(5)(b) assumes that the records of lawful establishment, for whatever reason, are not available and allows for the introduction of other “objective evidence” that the structure to be replaced was lawfully established. Thus, testimony of a retired building inspector who remembers issuing a placement permit for the mobile home to be replaced would be “objective evidence” relevant in a situation where the original permit was lost or destroyed.

This chain of reasoning brings us back to the question of whether building permit approval, in addition to conformity with zoning regulations, was necessary to lawfully establish a use. While I agree with the Planning Director’s reliance on LUBA’s reasoning in the *Coonse* nonconforming use case, it should be pointed out that in that case the issue concerned the violation of specific fire code and building code requirements, not the more fundamental issue of whether a building permit application was filed and subsequent occupancy permit was granted. The question then is whether LC 10.105–10(5) and LC 10.025–35, read together, require conformity with building and land use regulations in order to lawfully establish a use in 1980.

By way of example, the appellants cite Multnomah County’s code definition of the term “Lawfully established dwelling”:

*“A dwelling that was constructed in compliance with the laws in effect at the time of establishment. The laws in effect shall include, zoning, land division and building code requirements.”*

While not nearly as explicit as the Multnomah County Code, I believe that LC 10.025–35 does require building approval. I have arrived at this conclusion because of the way that this provision is written. It clearly differentiates between the physical treatment of structures and buildings and the use thereof. Thus, the first clause of Lane Code 10.025–35 concerns the erection, reconstruction, structural alteration, enlargement, movement or

maintenance of buildings or structures. While land use approval may sometimes be necessary for these activities, building approval almost always is. The second clause of Lane Code 10.025–35 focuses on the use of buildings, structures and land.

The final clause in Lane Code 10.025–35, modifies the first two clauses with the requirement that all applicable permits and licenses be secured. I believe that if Lane Code 10.025–35 was only applicable to land use and zoning–related permits and licenses then its first clause would be largely redundant.

I have found the discussion regarding ORS 215.185(1) interesting, if not pertinent. The language of this provision is very similar to the language of Lane Code 10.025–35 and implies that buildings or structures constructed in violation of an ordinance or regulation designed to implement a comprehensive plan are unlawful. Lane Code 10.015, the Purpose section of Lane County’s 1980 Zoning Ordinance, provides that the purpose of the Chapter is to *...promote the implementation of the Comprehensive Plan for Lane County.*”

The present case is not a situation where building permit records are not available. The applicant concedes that the Oakbrook mobile home was placed on the subject property without benefit of a required building permit. Absent any evidence of contrary legislative intent, a fair reading of LC 10.105–10(5) and LC 10.025–35 is that in 1980, the lawful establishment of a dwelling required conformity with applicable land use and building code regulations. It is upon this basis that I am reversing the Planning Director’s decision.

- (ii) *The dwelling has:*
  - (aa) *intact exterior walls and roof structure;*
  - (bb) *indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;*
  - (cc) *interior wiring for interior lights; and*
  - (dd) *a heating system;*

It is uncontested that the dwelling to be replaced exhibits these features and testimony and photographs document this fact.

- (iii) *The dwelling to be replaced shall be removed, demolished, or converted to an allowable use within three months of the completion of the replacement dwelling. A replacement dwelling may be sited on any part of the same lot or parcel. A dwelling established under this section shall comply with all applicable siting standards in LC Chapter 16. However, the siting standards shall not be applied in a manner that prohibits the siting of the dwelling. If the dwelling to be replaced is located on a portion of a lot or parcel not zoned Exclusive Farm Use, the applicant, as a condition of approval, shall execute and record in the Lane County deed records a deed restriction prohibiting the siting of a dwelling on that portion of the lot or parcel. The restriction imposed shall be irrevocable unless a statement of release is placed by the Director in the Lane County deed records. The release shall be signed by the Director and state that the provisions of this subsection regarding replacement dwellings have changed to allow the siting of another*

*dwelling. The Director shall maintain a record of the lots or parcels that do not qualify for the siting of a dwelling under the provisions of this subsection, including a copy of the deed restrictions and release statements filed under this section;*

The Planning Director required the existing mobile home to be removed or demolished within 90 days of when the replacement home is finalized. (Director's Condition of Approval #5)

- (iv) *An accessory farm dwelling authorized pursuant to LC 16.212(6)(b) or (7)(e) below may only be replaced by a manufactured dwelling;*

This criterion is not applicable.

- (v) *LC 16.212(10)(h) below; and*

- (vi) *Land use approval of a permit described in LC 16.212(2)(b) above shall be valid for four years from the date of the approval. Notwithstanding the requirements in LC 14.700(2)(d)(ii) and (iii), an application for a two year extension of the timelines for the permit approval described in LC 16.212(5)(b)(vi) above may be made and approved pursuant to LC 14.700(2).*

This criterion can be implemented through a condition of approval.

### **Conclusion**

As the mobile home to be replaced was not lawfully placed upon the subject property, it does not comply with Lane Code 16.212(5)(b)(i) and therefore cannot be replaced.

**Respectfully Submitted,**



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

# LCOG

LANE COUNCIL OF GOVERNMENTS

January 29, 2008

Mr. Kent Howe, Director of Planning  
Lane County Land Management Division  
125 E. 8Th Ave.  
Eugene, OR 97401

Re: *Request for Reconsideration of Hearings Official Decision in Bottem (PA 07-5572)*

Dear Mr. Howe:

The applicant has appealed my January 14, 2008 decision in PA 07-5572 regarding the denial of a replacement dwelling on tax lot 608, assessor's map 18-05-08. Upon my review of this appeal, I find that the allegations of error are not persuasive. I believe that the language of Lane Code 16.212(5), LC 10.105-10(5) and LC 10.025-35, not the *Drake* decision cited by the appellant, are controlling. Further, the decision is not as broad as alleged by the appellant. The code provisions being applied are focused upon the lawful establishment of a structure not of real property. Under the code provisions applied in this case, a structure constructed without applicable building code approval was not lawfully established.

Accordingly, on the authority of Lane Code 14.535(a), I shall affirm my January 14, 2008 reconsidered decision.

Sincerely,



Gary L. Darnielle  
Lane County Hearings Official

Cc: Jerry Kendall  
Michael Reeder

ARNOLD GALLAGHER SAYDACK  
PERCELL ROBERTS & POTTER

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MICHEAL M. REEDER

January 24, 2008

Kent Howe, Planning Director  
Department of Public Works  
Land Management Division  
125 E. 8<sup>th</sup> Avenue  
Eugene, Oregon 97401Re: Appeal of Hearings Officer Decision, PA 07-5572 - Bottem  
Please Refer to Our File No. 15312-8

Dear Kent:

Our office represents Dennis Bottem and CBM Family, LLC, the applicant in PA 07-5572. Please accept this letter as our notice of intent to appeal the Hearings Official's decision (the "Decision") reversing the Planning Director's approval of PA 07-5572 for a Replacement Dwelling on Assessor's Map 18-05-08, Tax Lot 608. Mr. Bottem is the applicant and therefore has standing to appeal the Hearings Official's Decision. Should the Decision be affirmed, Mr. Bottem will be adversely affected.

We respectfully request that the Hearing Official reconsider the Decision. Additionally, we respectfully request that the Hearings Official also reopen the record to allow additional evidence relevant to the Decision and to allow briefing on the issues to more fully develop the assignment of errors below. Should the Hearings Official decline to reconsider the Decision, we respectfully request that the Board of Commissioners (the "Board") hear the appeal and reverse the Decision and affirm the Planning Director's decision to approve the application. Should the Decision be reconsidered by the Hearings Official and the Hearings Official affirms the Decision, or should the Hearings Official decline to reconsider the Decision, the Board should review the Decision pursuant to LC 14.600. Lane Code 16.600(3) provides the following criteria for when the Board elects to hear an appeal from a Hearings Official decision:

- (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.**

We feel strongly that this issue meets, at the very least, criterion (a) and criterion (b), and from my conversations with County staff, hopefully criterion (d). As discussed in Assignment of Error #3, the Decision may have profound consequences for Lane County code compliance. Furthermore, at least one other application for replacement dwellings with similar facts is filed with the County. It is likely that this is not the first time this issue has been dealt with by the County, and will most likely not be the last time. Therefore, should the Decision not be reversed by the Hearings Official, policy guidance from the Board is necessary. Furthermore, we understand that Lane County staff is analyzing the Decision and looking ahead at possible ramifications of the Decision should it be affirmed. We respectfully request that staff recommend review of this Decision to either the Hearing Official and/or the Board. The Director's decision to approve PA 07-5572 reflects Lane County's current and historical approach to code compliance that separates compliance with the zoning code from compliance with the building code. This approach has allowed property owners to bring long-standing dwellings that complied with the zoning requirements when the building was constructed or placed into compliance with the building code, but not have to also comply with the more restrictive current land use regulations. The Decision will certainly have the effect of extremely punitive actions that could force the removal of dwellings. This flies in the face of caselaw that interprets ORS 215.213(1)(t) that was intended to rectify punitive actions of local governments.

The Hearings Official's Decision misinterpreted Lane Code ("LC") 16.212(5) and ORS 215.213(1)(t) and should therefore either be reconsidered by the Hearings Official or reviewed on the record by the Board. Below are the specific reasons the Decision was made in error and are the basis for either reconsideration by the Hearings Official or hearing by the Board:

**Assignment of Error #1: The Hearings Official incorrectly concluded that LC 16.212(5)(a) and (b) [and by implication ORS 215.213(1)(t)] requires the replacement dwelling to have received a building permit in order to be "lawfully established."**

The impact of the Decision seems to be that in order to comply with LC 16.212(5)(a) and (b), and by implication ORS 215.213(1)(t), an applicant must show that a dwelling was "lawfully established" by showing that at the time the dwelling was constructed or placed, it received a building permit. However, under subsection (a), evidence of the dwelling being lawfully established may be shown by providing a building permit *or* "land use application records" showing that the existing dwelling "was lawfully constructed or placed on the subject property." Therefore, by its express language, LC 16.212(5)(a) does not *require* evidence of a building permit at the time of construction or placement, but rather evidence that the dwelling was "lawfully placed." A building permit is not the only objective evidence that a dwelling met the "lawfully established" requirement; land use approval records may also satisfy this criterion. Generally, land use permit approval is granted prior to obtaining a building permit. Therefore, it is entirely possible (although, unlikely) that, under certain scenarios, an individual could receive land use permit approval but not follow through and apply for and receive a building permit. Therefore, the Decision explicitly interprets the Lane Code erroneously and therefore should be reconsidered and reversed. Furthermore, LC 16.212(5)(b) does not require a building permit.



The Hearings Official poses a (more likely) scenario that a building permit record is unavailable (through lost records or fire, etc.) but that objective evidence may show that a building permit was received. However, the objective evidence requirement is not that one provide evidence that a building permit was received, but that the “existing dwelling was lawfully placed on the subject property.” A building permit is objective evidence of a “lawfully established” dwelling (i.e. meets zoning/land use requirements) because zoning/land use review and approval is generally required in order to receive a building permit. In short, LC 16.212(5)(a) is not an evidentiary alternative to producing records of a building permit, but rather an evidentiary method of showing that the dwelling was “lawfully established.”

**Assignment of Error #2: The Hearings Official incorrectly concluded that LC 10.1005-10(5) and LC 10.025-35 (1980) require conformity with building code regulations.**

The Decision states that LC 10.025-35 requires building approval in order to have a “lawfully established” dwelling. The Hearings Official’s rationale for this conclusion is that if building approval is not required, then “its first clause would be largely redundant.” *Decision*, Page 4 of 5. This is in error. The Hearings Official quotes only a portion of LC 10.015, the purpose statement of the 1980 Lane Code Chapter 10 as follows: “...to promote the implementation of the Comprehensive Plan for Lane County.” *Id.* However, the purpose statement of LC 10, as articulated in LC 10.015, is broader than just “promot[ing] the implementation of the Comprehensive Plan for Lane County,” but also to “...promote the health, safety, and welfare **and** promote the implementation of the Comprehensive Plan for Lane County.” (Emphasis added). The health, safety and welfare is promoted by including advisory language that building approval must be obtained. It does not magically make the building code a land use regulation. In other words, there are multiple purposes of Lane Code Chapter 10 (1980)—not just the implementation of the comprehensive plan. However, even if the building code requirements of LC 10 (1980) are somehow considered land use requirements, not all land use regulations are considered in the determination whether the dwelling was “lawfully established” under ORS 215.213(1)(t). *See Drake v. Polk County*, 30 Or LUBA 199 (1995). Notice in *Drake* that the “legal access requirement” of the Polk County Zoning Ordinance (“PCZO”) 110.800 was “not relevant to the determination of whether a dwelling is lawfully established under ORS 215.213(1)(t).” Although *Drake* held that a “previous land use approval...and [building permit]...are **sufficient** to support the conclusion that the original dwelling was lawfully established,” it did not articulate that a building permit must have been received in order to be “lawfully established.” (Emphasis added.) *Id.* Again, the “legal access” requirement may or may not have been a land use regulation. If it was not, then *Drake* cuts against the Decision. However, if the “legal access” requirement was a land use regulation, it was not one in which the comprehensive plan was implemented. Either way, *Drake* is controlling and supports the applicant’s arguments.

Kent Howe, Planning Director  
January 24, 2008  
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**Assignment of Error #3: The Decision interprets LC 10 (1980) in such a way as to make conformity with LC 10 practically impossible.**

If the Decision is taken to its logical conclusion, and compliance with the building code is required for compliance with the land use regulations (in 1980, Lane Code Chapter 10), then it would be impossible to obtain land use approval because a building permit must have been obtained first. This presents us with a “chicken and the egg dilemma” making it practically impossible to meet the requirements of LC 10.

Thank you for your consideration in this matter.

Very truly yours,

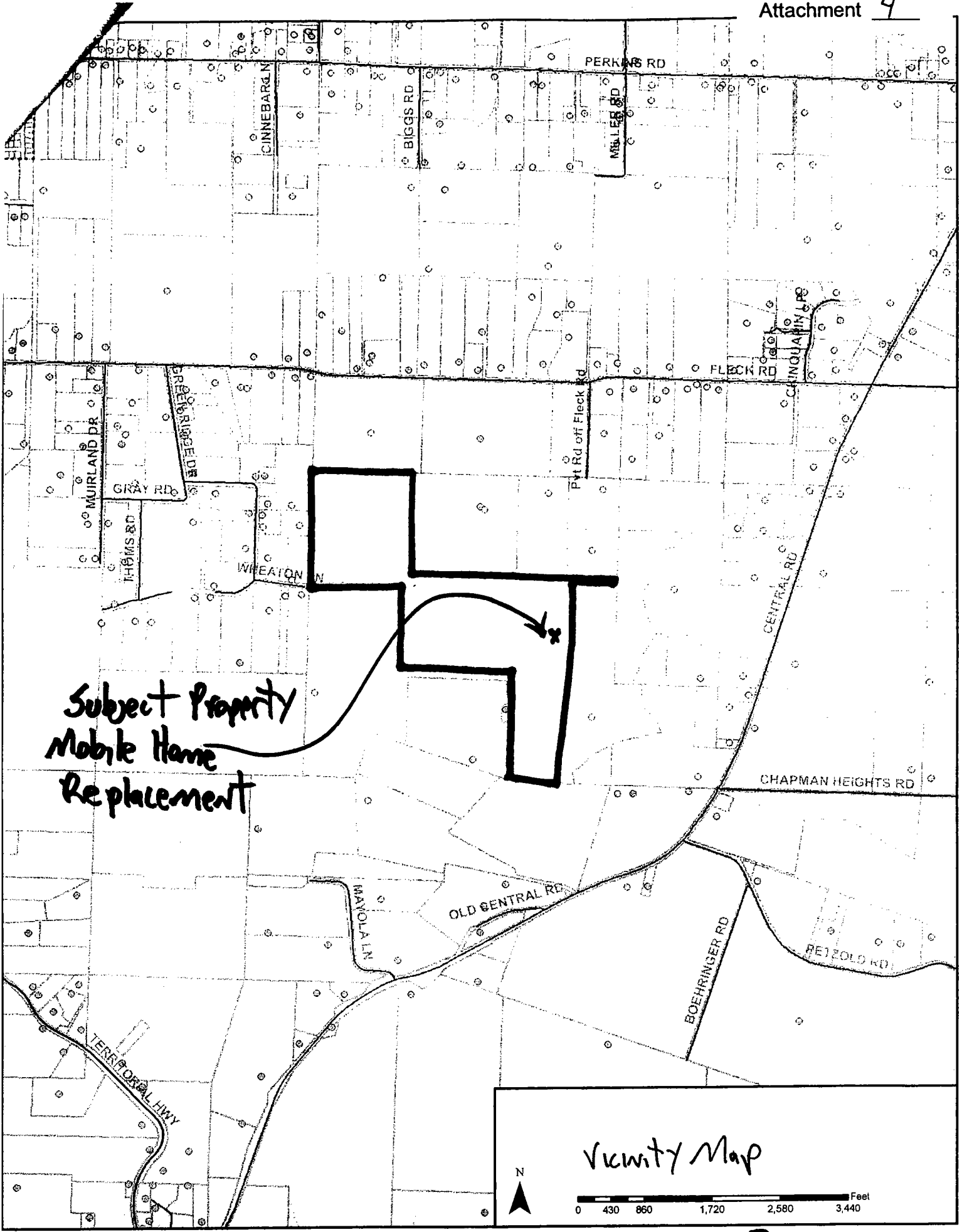


Micheal M. Reeder

MMR:jgh

cc: Client

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Subject Property  
 Mobile Home  
 Replacement

Vicinity Map

