W.9.C.

AGENDA COVER MEMO

LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

DATE: March 18, 2009 (Date of Memo)
April 1, 2009 (Date of Meeting)

TO: **Lane County Board of Commissioners**

DEPT.: Public Works Department, Land Management Division

PRESENTED BY: Rafael Sebba, Land Management Division

AGENDA ITEM TITLE: **ON THE RECORD HEARING / In the Matter of Hearing Arguments on an Appeal of a Hearings Official's Reconsidered Decision Approving in part, and Denying in part, an Application for a recreational vehicle, boat, and self–storage facility in the Rural Residential Zone (RR-5), Map and Tax Lot T18-R03-S24 TL 4600 (File No. PA 07-6721/McCabe).**

I. BACKGROUND

1. The subject property is 5.0 acres in size and is identified as Tax Lot 4600, Assessor's Map 18-03-24. The property is located about one mile east of the rural community of Goshen on the south of State Hwy 58 and has a site address of 34570 Highway 58. It is zoned RR–5/RCP, lies within "developed and committed" Exception Area 426-2, and is not located within an unincorporated community. The subject property lies several miles from both the Eugene–Springfield Urban Growth Boundary and the community of Pleasant Hill. The property is currently developed with a dwelling, garage, septic system, and well.

2. The Applicant submitted an application for a special use permit on November 8, 2007. The applicant requested Director Approval to build seven (7) commercial buildings to store recreational vehicles, boats, and segmented self–storage units. The proposal includes 115 RV/boat units and 384 self–storage units, totaling over 79,000 square feet in floor area. One of the buildings will also include a 900 square foot office/caretaker residence.

3. The Planning Director denied the application on April 16, 2008.

4. A timely appeal of the Planning Director decision was filed on April 28, 2008, by the applicants, Don and Cheryl McCabe, who are represented by James Spickerman. 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 July 10, 2008.

6. On September 2, 2008, the Hearings Official issued a decision affirming the Planning Director's denial of the proposal.

7. A timely appeal of the Hearings Official's decision was filed by the Applicants on September 12, 2008.

8. The Hearings Official held a reconsideration hearing on November 6, 2008.

9. On January 5, 2009, the Hearings Official issued a reconsidered decision affirming, in part, and reversing, in part, the previous decision. The Hearings Official approved the RV/boat storage component of the proposal, and denied the self-storage component.

10. A timely appeal of the Hearings Official's reconsidered decision was filed on January 15, 2009, by Cecil Saxon Jr., who is represented by Michael Farthing. On January 23, 2009, the Hearings Official affirmed his reconsidered decision.

11. The appeal was taken before the Board of Commissioners on February 18, 2009, and the Board approved Order No. 09-2-18-10 to hear the appeal, with findings that it complied with the criteria of Lane Code 14.600(3), and elected to conduct an on-the-record hearing on April 1, 2009, at 1:30 PM.

II. PROCEDURAL MATTERS

A. Rules of Conduct

The Board Chair must announce the rules of conduct for the on-the-record hearing which are stated below as contained in Order of Procedure of Lane Code 14.400(9) and in Lane Manual 3.915.

These Lane Code and Manual provisions are summarized as follows:

1. Announce the nature and purpose of the hearing and explain the rules of conduct.
2. Announce the hearing is on the record established by the Hearings Official, and that argument is limited to the persons identified in Board Order No. 09-2-18-10.
3. Disclose any ex parte contacts.
4. Call for abstentions due to conflicts of interest, ex parte contacts, and biases.
5. Call for the Director's report and identify the record before the Board for this application.
6. Allow the appellant to be heard.
7. Allow the applicant to be heard.
8. Allow the appellant to rebut any arguments previously presented to the Board.
9. Conclude the hearing.
10. The Board shall make a tentative decision or continue the matter for deliberation. If a tentative decision is made, the Board may direct the prevailing party or staff to prepare an order and findings.

B. Ex Parte Contacts

The Board should declare any ex parte contacts and provide an opportunity for response as necessary. A communication between County staff and the Board shall not be considered an ex parte contact.

C. Participation Status

As directed by Board Order 09-2-18-10, the hearing is limited to the parties to the Hearings Official decision as identified on Exhibit "A" attached to the order.

D. Record

Lane Code 14.400(1) requires that the Board hearing be confined to the record of the proceeding before the Hearings Official. Staff recommends that the Board recognize the record to be those items #1-51, as listed on Attachment 17, "PA 08-07-6721 File Record Index". To the best of staff's record keeping ability, items #1-45 as listed constitute the evidentiary record of the proceedings before the Hearings Official. The remaining items, #46-51, are matters that have come in subsequent to the Hearings Official decisions as appeal items and procedural items. A copy of the complete records are available for review in the Board Secretary's office. The Board will be informed of any additions to the record submitted after March 18 via a supplementary memo.

E. Scope of the Hearing

This appeal is limited to argument based on the record before the Hearings Official.

III. MOTIONS

A. I MOVE TO TENTATIVELY AFFIRM THE HEARINGS OFFICIAL'S INITIAL DECISION AFFIRMING THE PLANNING DIRECTOR'S DECISION AND DENYING THE APPLICATION IN FILE PA 07-6721, AND DIRECT EITHER STAFF OR THE APPELLANT TO PREPARE AN ORDER WITH APPROPRIATE FINDINGS FOR FINAL ACTION, INCLUDING CLARIFICATION REGARDING THE BOARD'S INTERPRETATION OF LANE CODE 16.290(4)(r) AND OTHER APPLICABLE LAW.

OR

B. I MOVE TO TENTATIVELY AFFIRM THE HEARINGS OFFICIAL'S RECONSIDERED DECISION DENYING IN PART AND APPROVING IN PART THE APPLICATION IN FILE PA 07-6721, AND DIRECT EITHER STAFF OR THE APPLICANT TO PREPARE AN ORDER WITH APPROPRIATE FINDINGS FOR FINAL ACTION, INCLUDING CLARIFICATION REGARDING THE BOARD'S INTERPRETATION OF LANE CODE 16.290(4)(r) AND OTHER APPLICABLE LAW.

IV. DISCUSSION

A. Applicable Criteria

This on-the-record hearing is limited to arguments primarily concerning the Hearings Official decisions dated January 5, 2009 and September 2, 2008. The application for the storage facility, including both recreational vehicle and boat storage units and self–storage units, was made under two separate provisions of the Rural Residential Zone in Lane Code (LC):

1) the recreational vehicle and boat storage provision in LC 16.290(4)(r)
2) the similar uses and development provision in LC 16.290(4)(s)

LC 16.290(4) Uses and Development Subject to Approval by the Director. The uses and developments in LC 16.290(4)(a) through (s) below are allowed subject to: submittal of a land use application pursuant to LC 14.050; compliance with the applicable requirements of LC 16.290(5) below and elsewhere in LC Chapter 16; and review and approval of the land use application pursuant to LC 14.100 with the options for the Director to conduct a hearing or to provide written notice of the decision and the opportunity for appeal.

(r) Storage facilities for boats and recreational vehicles.

(s) Uses and development similar to uses and development allowed by LC16.290(2) or (4) above if found by the Planning Director to be clearly similar to the uses and development allowed by LC 16.290(2) through (4) above. Such a finding shall be made by the Director and shall comply with the following criteria:

- *(i) The proposed use and development shall be consistent with the purpose in LC 16.290(1).*
- *(ii) When compared with the uses and development permitted by LC 16.290(2) or (4) above, the proposed use and development is similar to one or more of these uses and development. A comparison shall include an analysis of the:*
  - *(aa) Goods or services traded from the site;*
  - *(bb) Bulk, size, and operating characteristics of the proposed use;*
  - *(cc) Parking demand, customer types and traffic generation; and*
  - *(dd) Intensity of land use of the site.*
- *(iii) The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site's ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available.*
- *(iv) The proposed use and development shall not result in public health hazards or adverse environmental impacts that violate state or federal water quality regulations.*
- *(v) It shall be the applicant's responsibility to provide sufficient information to allow the Director to make the above determination.*

LC 16.290(5) Approval Criteria. Uses and development in LC 16.290(4)(a) through (s) above, except for telecommunication facilities allowed in LC 16.290(4)(d) above, shall comply with the requirements in LC 16.290(5) below. Telecommunications facilities allowed by LC 16.290(4)(d) above shall comply with the requirements in LC 16.264.

(a) *Shall not create significant adverse impacts on existing uses on adjacent and nearby lands or on uses permitted by the zoning of adjacent or nearby undeveloped lands;*
(b) *Where necessary, measures are taken to minimize potential negative impacts on adjacent and nearby lands;*
(c) *The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site's ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available; and*
(d) *The proposed use and development shall not result in public health hazards or adverse environmental impacts that violate state or federal water quality regulations.*

Also relevant to this case is the purpose statement of the Rural Residential zone included in LC 16.290(1).

LC 16.290(1) Purpose. The purposes of the Rural Residential Zone (RR) are:
(a) *To implement the policies of the Lane County Rural Comprehensive Plan (RCP) pertaining to developed and committed lands. LC 16.290 does not apply to lands designated by the RCP as non-resource lands;*
(b) *To promote a compatible and safe rural residential living environment by limiting allowed uses and development to primary and accessory rural residential uses and to other rural uses compatible with rural residential uses and the uses of nearby lands;*
(c) *To provide protective measures for riparian vegetation along Class I streams designated as significant in the RCP; and*
(d) *To provide that LC 16.290 shall not be retroactive and that the Director shall not have authority to initiate compliance with LC 16.290 for uses and development lawfully existing (per LC Chapter 16) on the effective date that LC 16.290 was applied to the subject property.*

B. Issues and Analysis

Applicant's Position and Hearings Official's Reconsidered Decision

The applicant's central argument is that the language of Lane Code 16.290(4)(r) is clear that storage facilities for boats and recreational vehicles may be allowed subject only to the approval criteria of Lane Code 16.290(5), and are not subject to size limitation. The applicant maintains there is no ambiguity in the provision to explain and, as such, the Statewide Goal 14 issue of what is or is not urban is not applicable.

In the Hearings Official's reconsidered decision, the Hearings Official agreed with the applicant and found neither the plain language of Lane Code 16.290(4)(r) nor its context within Lane Code 16.290(4) support a conclusion that there are any external approval standards, other than those found in Lane Code 16.290(5), that apply to the storage of boats and recreational vehicles within the Rural Residential zone. The Hearings Official essentially found that, because there is no explicit reference to the purpose statement of the Rural Residential zone in the language of either 16.290(4)(r) or 16.290(5), consistency with the purpose of the zone is not a requirement for RV and boat storage facilities. The Hearings Official thus approved the RV and boat storage component of the facility.

In his reconsidered decision, the Hearings Official affirmed his initial denial of the self-storage component of the proposed facility. The applicant applied for the self-storage component under LC 16.290(4)(s), which allows uses and development similar to other uses permitted in the Rural Residential Zone, subject to Director approval and compliance with specific approval criteria. Of these approval criteria, LC 16.290(4)(s)(i) requires the proposed use be consistent with LC 16.290(1), which is the purpose in statement of the Rural Residential Zone. The Hearings Official found that the self-storage component is urban in nature and, for this reason, does not comply with the purpose of the Rural Residential Zone. In the reconsidered decision, the Hearings Official includes a discussion of factors relied upon in determining what constitutes a rural versus an urban use. This discussion raises the issue of Statewide Planning Goal 14 and the size limitations for commercial and industrial uses found in OAR 660-022-0030(10) and (11). In addition to size limitations, the discussion also considers the location of the facility's anticipated clientele as a factor.

The applicant has not appealed the denial of the self-storage component of the facility.

Appellant's Position and Hearings Official's Initial Decision

The appellant takes issue with the reconsidered decision and maintains that the Hearings Official's initial decision denying the entire facility is correct. The appellant contends that the reconsidered decision violates the purpose and intent of the Rural Residential Zone and the basic premise of Statewide Planning Goal 14, as was described in the initial decision. The appellant also points out that, if allowed to stand, there would be no size limit on recreational vehicle and boat storage facilities in the Rural Residential Zone, which could have implications for properties near major bodies of water and along recreational corridors.

The basic argument advanced by the appellant, supported by the Hearings Official's initial decision, and originally presented by the Planning Director, is that besides the criteria specifically incorporated by Lane Code 16.290(4)(s) and Lane Code 16.290(5), a consistency analysis with Statewide Planning Goal 14 should be applied because of the proposed facility's size.

Both the Hearings Official's first decision and the initial Planning Director's denial concluded uses listed in the zone must be consistent with the stated purpose of the zone. Additionally, these decisions concluded that the proposed storage facility constitutes an urban use and, as such, may not be permitted in the Rural Residential District. The argument is based upon *1000 Friends of Oregon v. Curry County*, 301 Or 447 (1986), and how the Land Conservation and Development Commission (LCDC) amended Goal 14 to address intensity of uses outside of urban growth boundaries. Because OAR 660–022–0030(10) & (11), which implements Goal 14, limits the size of industrial structures to 40,000 square feet and the size of commercial structures to 4,000 square feet, respectively, in non–urban unincorporated communities, it can be presumed that development outside of rural communities must be less intense. Lane Code elaborates on these size restrictions for areas outside of unincorporated communities. Uses in the Rural Commercial Zone, including a recreational vehicle and boat storage facility, would be limited to 3,500 square feet in size. In the Rural Industrial Zone, uses are limited to 35,000 square feet in size.

In addition to finding that the proposed facility was urban rather than rural, the Hearings Official initially found the proposal was commercial in nature because the storage facility serves individual members of the community rather than an industry. Based on this

determination, the Hearings Official concluded that the facility's size could not exceed the size limitations placed on commercial uses allowed within the Rural Commercial Zone (3,500 square feet outside of an unincorporated community).

Interpretation of Lane Code 16.290(4)(r)

The ambiguity brought to light by this case is whether Lane Code 16.290(4)(r) allows for unlimited sized RV and boat storage facilities. If no size requirements are included in the evaluation of a proposal, does it mean that a facility can exceed the established limitations of the other rural zones?

The purpose statement of LC 16.290(1) is essentially a backstop that establishes the Rural Residential zone is for rural uses. In 2002, as part of its Rural Comprehensive Plan (RCP) Periodic Review Program, Lane County consolidated the various zones that it applies to developed and committed exception areas into five rural zoning districts: Rural Residential (LC 16.290), Rural Commercial (LC 16.291), Rural Industrial (LC 16.292), Rural Public Facilities (LC 16.294), and Rural Park and Recreation (LC 16.295). The purpose of this effort and consolidation was specifically described to get Lane County into compliance with Statewide Goal 14 as implemented by OAR 660-004 and 660–022.

The appellant, the Planning Director, and the Hearings Official, at least initially, did not think the Rural Residential zone, the least intense of the rural zones, ought to allow a non-residential use of a size and scale that would not be permitted in any other rural zone. In his initial decision, the Hearings Official invoked ORS 197.829(1)(d), which allows LUBA to overrule a local government's interpretation of an acknowledged land use regulation if the interpretation is contrary to state statute, land use goal or rule that the provision implements. The Hearings Official explained that it is not suggested that Lane Code 16.290(4)(r) and (s) do not comply with Goal 14, but that an interpretation of these provisions that would allow a storage facility as large as the proposed use would violate that goal. Using this rationale, the Hearings Official justified a consistency analysis with Statewide Planning Goal 14. The appellant has reiterated this approach in the appeal, and elaborated on the applicability of ORS 197.829(1) to this proposal and decision.

Upon reconsideration, however, the applicant persuaded the Hearings Official that LC 16.290(4)(r) does in fact allow the proposed development without running afoul of Goal 14. The applicant's argument is based on the premise that the language of LC 16.290(4)(r) is clear, explicitly allowing RV and boat storage facilities of any size, provided they comply with the approval criteria of LC 16.290(5). The applicant argues that there is no ambiguity and therefore a Goal 14 consistency analysis per ORS 197.829(1) is not appropriate.

Regarding an interpretation of LC 16.290(4)(r), if the Board determines an interpretation is necessary, the meaning and/or intent of the provision should be articulated and clarified, whether that be based on the arguments presented by the appellant, those of the applicant, or analysis of staff. Part of that analysis could include the introductory statements of LC 16.290(4); the context of the use provisions being presented in the Rural Residential zone with a stated purpose, and the role the Board plays as the authority enacting LC Chapter 16.

Rural Versus Urban Use

If a Goal 14 consistency analysis is warranted, the ultimate question is whether or not the proposed facility constitutes an urban or rural use that would be permissible in the Rural Residential zone. Three main factors were considered in the Hearings Official's initial decision and the Hearings Official's discussion of the self-storage component of the proposal in his reconsidered decision.

As discussed above, one of these factors is the size limitation established by OAR 660–022–0030(10) & (11) for commercial and industrial uses in rural areas. Similar size limitations in the Rural Commercial and Rural Industrial zones are also a consideration. Clearly, the proposed facility exceeds all of these size limitations.

The second factor is whether the facility is commercial or industrial in nature. Initially, the Hearings Official considered OAR 660-022–0010(1), which defines "commercial use" as "the use of land primarily for the retail sale of products or services, including offices." Subsection (4) of this provision defines "industrial use" as "the use of land primarily for the manufacture, processing, storage, or wholesale distribution of products, goods, or materials." The Hearings Official also considered *Friends of Yamhill County v. Yamhill County*, 49 Or LUBA, 541, *aff'd w/o opinion* 201 Or App 528 (2005), which involved comprehensive plan and zoning amendments that would have allowed RV storage on property adjacent to the McMinville UGB.

The Hearings Official found the proposed use would be most accurately described as a commercial use as it involves the retail sale of a service; the storage of boats, recreational vehicles and household goods. This is consistent with early claims made by the applicant that the use is not industrial, though the applicant seemed to be arguing that the facility was neither industrial nor commercial. The Hearings Official reversed this position upon reconsideration, and leaned more towards a finding that mini–storage is traditionally considered to be an industrial use, commenting that the fact that mini-storage facilities cater to the general public is apparently outweighed by the size requirements of these uses and the low amount of traffic that is normally generated.

The issue of whether the use is commercial or industrial in nature partially informs the size threshold for determining what would be considered an urban versus a rural use. This may be an issue worth reflecting on, should the Board decide that an interpretation of LC 16.290(4)(r) is necessary.

The third factor concerns the identity of the population that is served by the use. In addition to the *Friends of Yamhill County v. Yamhill County* case mentioned above, the Hearings Official's analysis referenced *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989), and *Conarow v. Coos County*, 2 Or LUBA 190, 193 (1981). In his reconsidered decision, the Hearings Official explained that if it were shown that 100 percent of the clientele of a mini–storage facility lived in rural Lane County, outside of urban growth boundaries and rural communities, then arguably it would be appropriate to allow the size of that facility to approach the size of industrial structures allowed in the Rural Industrial District. On the other hand, if only a small percentage of the clientele lived in rural Lane County then the use should not be characterized as being "rural" at all.

In both decisions, the Hearings Official found that the record does not include any evidence supporting a conclusion that the proposed storage facility will primarily serve a rural population. He found that the location of the use suggests that a significant percentage of the clientele may be generated by the nearby major urban growth boundary and two rural communities. If necessary, the Board may explore those findings and the role they might play in a decision on this appeal.

C. Alternatives/Options

A. Tentatively affirm the Hearings Official's *initial* decision affirming the Planning Director's denial of the application in file PA 07-6721, declare findings and clarification regarding the Board's interpretation of lane code 16.290(4)(r) and other applicable law, and direct either staff or the appellant to prepare a Board Order with findings for final action.

OR

B. Tentatively affirm the Hearings Official's *reconsidered* decision denying in part and approving in part the application in file PA 07-6721, declare findings and clarification regarding the Board's interpretation of lane code 16.290(4)(r) and other applicable law, and direct either staff or the applicant to prepare a Board Order with findings for final action.

D. Recommendation

If the Board determines that the Hearings Official improperly evaluated the evidence in the record in his reconsidered decision, and that his first decision is correct, then Option A is recommended.

If the Board determines that the Hearings Official properly evaluated the evidence in the record in his reconsidered decision, then Option B is recommended.

In either case, if the Board determines a particular interpretation of LC 16.290(4)(r) is warranted, the meaning and/or intent of the provision should be articulated and clarified, as should a determination of whether RV and boat storage is more accurately described as a commercial or industrial use, and as a rural or urban use.

The Board may direct either staff or the prevailing party to prepare the order and findings, including any interpretation made.

E. Timing

The Board's tentative decision would become final upon adoption of findings and the entering of the final order.

IV. IMPLEMENTATION/FOLLOW-UP

As noted in the above options, either staff or the prevailing party will prepare an Order and Findings in support of the Board's tentative decision for return to the Board.

Notice of the Board's final decision will be mailed to all parties.

V. ATTACHMENTS

1. Board Order of Febraury 18, 2009, electing to hear the appeal, with Exhibit "A" (findings)
2. Appeal of Hearings Official January 5, 2009 Reconsidered Decision, received on January 15, 2009 (Appeal Statement only)
3. Hearing's Official Reconsidered Decision dated January 5, 2009
4. Spickerman Letter to Hearings Official dated December 18, 2008
5. Farthing Letter to Hearings Official dated December 12, 2008
6. Spickerman Letter to Hearings Official dated November 6, 2008
7. Staff Memo to Hearings Official dated November 5, 2008
8. Farthing Letter to Hearings Official dated November 5, 2008
9. Spickerman Letter to Hearings Official dated September 12, 2008
10. Hearing's Official Initial Decision dated September 2, 2009
11. Spickerman Letter to Hearings Official dated July 24, 2008
12. Farthing Letter to Hearings Official dated July 15, 2008
13. Appellant's Statement on Appeal (Spickerman)
14. Director Decision
15. Map illustrating location of property
16. Site Plan
17. File Record Index

IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO:
09-2-18-10

IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL'S RECONSIDERED DECISION APPROVING IN PART, AND DENYING IN PART, AN APPLICATION FOR A RECREATIONAL VEHICLE, BOAT, AND SELF–STORAGE FACILITY IN THE RURAL RESIDENTIAL ZONE (RR5), MAP AND TAX LOT T18-R03-S24 TL 4600 (FILE NO. PA 07-6721/MCCABE).

WHEREAS, the Lane County Hearings Official has made a decision affirming in part, and reversing in part, the Planning Director's and Hearings Official's previous denial of a recreational vehicle, boat, and self–storage facility application in File No. PA 07-6721; 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 reconsidered decision on the application and appeal in File No. PA 07-6721; 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 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 arguments in an appeal on-the-record pursuant to Lane Code 14.200, 14.400 and Lane Manual 3.915 on April 1, 2009, at 1:30 p.m.

2. Pursuant to LC 14.600(4) the participants are the appellant, applicant, and the Planning Director.

DATED this 18th day of February, 2009.

Pete Sorenson, Chairperson
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 2-9-2009 Lane County

OFFICE OF LEGAL COUNSEL

Order Exhibit "A"

FINDINGS IN SUPPORT OF THE ORDER

1. The subject property is 5.0 acres in size and is identified as Tax Lot 4600, Assessor's Map 18-03-24. The property is located about one mile east of the rural community of Goshen on the south of State Hwy 58 and has a site address of 34570 Highway 58. It is zoned RR-5/RCP, and lies within "developed and committed" Exception Area 426-2. The subject property lies several miles from both the Eugene-Springfield Urban Growth Boundary and the Community of Pleasant Hill.

2. The Applicant submitted an application for a special use permit on November 8, 2007. The applicant requested Director Approval to build seven (7) commercial buildings to store recreational vehicles, boats, and segmented self-storage units. The proposal includes 115 RV/boat units and 384 self-storage units, totaling over 79,000 square feet in floor area. One of the buildings will also include a 900 square foot office/caretaker residence.

3. The Planning Director denied the application on April 16, 2008.

4. A timely appeal of the Planning Director decision was filed on April 28, 2008, by the applicants, Don and Cheryl McCabe, who are represented by James Spickerman. 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 July 10, 2008.

6. On September 2, 2008, the Hearings Official issued a decision affirming the Planning Director's denial of the proposal.

7. A timely appeal of the Hearings Official's decision was filed by the Applicants on September 12, 2008.

8. The Hearings Official held a reconsideration hearing on November 6, 2008.

9. On January 5, 2009, the Hearings Official issued a reconsidered decision affirming, in part, and reversing, in part, the previous decision. The Hearings Official approved the RV/boat storage component of the proposal, and denied the self-storage component.

10. A timely appeal of the Hearings Official's reconsidered decision was filed on January 15, 2009, by Cecil Saxon Jr., who is represented by Michael Farthing.

11. On January 23, 2009, the Hearings Official affirmed his reconsidered decision.

12. 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 Rural Residential Zone exists throughout the County. The implications of the reconsidered decision could apply to any Rural Residential zoned property in the County.

10. The issue has come up with some frequency recently. In all likelihood, similar facilities will be proposed in the future. Policy guidance is needed now in order to proactively address future

proposals. The fact that the Hearings Official has been able to effectively argue at least two sides of the issue also illustrates a need for policy guidance. 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 February 18, 2009, and finds that the appeal does comply with the criteria of Lane Code Chapter 14.600(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.

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January 15, 2009

HAND DELIVERED

Lane County Board of Commissioners
c/o Kent Howe, Planning Director
Public Service Building
125 E. 8th Avenue
Eugene, OR 97401

Re: Appeal of Hearing Official Decision
Special Use Permitfor RV/Boat Storage/Mini-Storage Facility
PA 07-6721 (McCabe, Applicant)

Chair Sorenson and Commissioners:

On behalf of Cecil Saxon, Jr., I am filing an appeal of the Hearings Official's reconsidered decision of the above-referenced application. The permit would allow a 79,000 square foot recreational vehicle, boat and mini-storage facility to be constructed on a 5-acre parcel located on the south side of Highway 58 and less than a mile east of the highway's intersection with I-5 and the unincorporated community of Goshen. The Subject Property is zoned RR, Rural Residential. Copies of the reconsidered decision, dated January 5, 2009, and the Hearings Official's initial decision, dated September 2, 2008, are attached as Exhibits "A" and "B" respectively. The earlier decision is included because the reconsidered decision incorporated the earlier decision's findings of fact and also because we believe the September 2 decision and analysis should be adopted by the Board in overturning the January 5 reconsidered decision.

INTRODUCTION

The application that is the subject of this appeal requests a special use permit to construct seven (7) commercial buildings (A-G) that would contain 30,980 square feet for 115 RV and boat storage units (Buildings A, B, and G) and 47,600 square feet for 384 self-storage units. There would also be a 900 square feet office/caretaker residence. The total building development, not counting roads and parking areas, would total over 79,000 square feet. The storage units would be available to the general public on an individual basis. Attached as Exhibit "C" is copy of the most recent site plan which shows that the property is essentially filled with building and driveways.

The Director denied the application on several grounds including his determination that the proposed use did not comply with one of the purposes of the RR zone which requires that uses allowed in the RR zone be limited to rural residential uses and "other rural uses" that are compatible with rural residential uses. LC 16.290(1)(b). The Director also found that the size of the proposed storage facility far exceeded the maximum size limits in both the RC Rural Commercial zone (3500 square feet) and the Rural Industrial zone (35,000 square feet) for such facilities and therefore did not qualify as either a rural residential use or "other rural uses" that are compatible with rural residential uses.

The applicant appealed the Director's denial to the Hearings Official and on September 2, 2008, the Hearings Official issued a final decision that affirmed the Director's denial of the special use application. See Exhibit "B". The Hearings Official's analysis was thorough and well-reasoned. He found that the proposed use was, on whole, commercial in nature because it was available to the general public on a client-by-client basis. He also found that because the proposed use far exceeded the size of the same use that would be allowed in a Rural Commercial zone and because its location would serve the Metro Area's population, that it was an urban use. He concluded that such storage facilities could only be approved if they met the size limitations allowed in the County's Rural Commercial (RC) zone which is 3500 square feet.

The applicant appealed that decision and requested the Hearings Official reconsider his decision. Subsequently, the Hearings Official issued his reconsidered decision on January 5, 2009, in which he reversed both his September 2 decision (Exhibit "B") and the Director's initial decision as far as the boat and RV storage facility. He sustained the Director's denial of the self storage facility because it was not consistent with one of the purpose statements of the RR zone which limits allowed uses to rural residential uses and "other rural uses" that are compatible with rural residential uses. As explained below, we believe his rationale is flawed and violates the purpose and intent of the Rural Residential zone as well as the basic premise of Goal 14 which is to direct urban uses inside urban growth boundaries and not allow them to be located on rural land.

The following section addresses the three standards set forth in the County's printed appeal form (Section 5).

APPEAL STANDARDS

a. The reasons why the decision of the Hearings Official was made in error or why the Hearings Official should reconsider the decision.

The Hearings Official's reconsidered decision was made in error because he did not apply

a basic tenet of Oregon land use law which is that Goal 14 prohibits urban uses on rural land. This was the basis for his initial decision (September 2) and also the Director's decision. In his reconsidered decision, the Hearings Official resorts to a highly technical and strained analysis of Lane Code 16.290(4)(r) and (s) in which he seems to conclude that he has no choice but to approve any RV/boat storage facility so long as it meets the criteria in Lane Code 16.290(5) and the property development standards in subsection (7).

In doing so, he ignored the purpose statement in LC 16.290(1)(b) which states:

> (b) To promote a compatible and safe rural residential living environment by limiting allowed uses and development to primary and accessory rural residential uses and to other rural uses compatible with rural residential uses and uses of nearby lands.

Without saying so explicitly, the Hearings Official found that the above-quoted purpose statement is not an "external approval standard". We agree that for RV/boat storage facilities, it is not a separate criterion. However, it is the expression of how Goal 14 is to be applied to uses that are allowed in the rural residential zone.

The Hearings Official's interpretation of what is allowed in the RR zone is in error because he failed to consider the fact that the proposed use is a commercial, urban use. He made this finding in the September 2 decision but then ignored it in his January 5 reconsidered decision.

Not all RV/boat storage facilities are allowed in the RR zone. Only those that are "rural" in character should be permitted. The size of this proposed facility, 30,980 square feet, is what makes it urban. The fact that it is open to the general public, as opposed to being accessory or related to a single-use entity, is what makes it commercial. In his September 2 decision, the Hearings Official concluded:

> ". . . In the present case, I believe that because the storage facility serves individual members of the community rather than an industry, it should be characterized as being commercial in nature. Given that characterization, I do not believe that its size can exceed the size limitations placed on commercial uses allowed within, the Rural Commercial District."

P. 7, Ex B. The size limitation in the Rural Commercial District is 3,500 square feet.

Earlier in his September 2 decision, the Hearings Official provided the rationale for why the

proposed facility was urban, and not rural. He concluded:

> "The most important litmus test of whether a use is urban or rural concerns the identity of population that is served by the use. In the present case, the applicant has warranted that the proposed storage facility will primarily serve a rural population but the record does not include any evidence supporting this conclusion. The location of the use, however, suggests that a significant percentage of the clientele may be generated by the nearby major urban growth boundary and two rural communities. One purpose of Goal 14 is to focus growth and intensive uses within more urban areas. The placement of these types of uses near urban growth boundaries and rural communities can have the effect of undercutting the effectiveness of those geographically-based, land use borders. Also, the scale of the proposed use does not seem appropriate to rural residential zoning. If the proposed facility existed at the time the Rural Comprehensive Plan was acknowledged, I suspect that it would have been zoned either Rural Commercial or Rural Industrial to better reflect the type of use and its size."

P.7 Ex B. This holding is consistent with the Code language and other provisions of the Code, specifically the size limitation found in the Rural Commercial and Rural Industrial zones.

Not all storage facilities are alike. Urban facilities should be restricted to urban areas and not allowed on rural lands.

b. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:

- **The Hearings Official exceeded his/her authority**
- **The Hearings Official failed to follow the procedure applicable to this 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.**

In this case, the Hearings Official misinterpreted Lane Code, as described previously, and also State Law as expressed in LUBA and Court decisions and Oregon Revised Statutes. The

September 2 decision reflects a proper interpretation and application of the Lane Code to this proposed storage use. It is also consistent with State Law and appellate decisions.

As explained in the previous section, the Hearings Official erred by failing to recognize that uses that are allowed in the RR zone must be "rural". Urban uses, like the 30,000 square foot storage facility that is proposed, cannot and should not be permitted in the RR zone. The Hearings Official acknowledges this fact in his September 2 decision and notes that case law supports this conclusion:

> "The application of Goal 14 to uses outside an urban growth boundary that are not inherently urban or rural must be done on a case-by-case basis. [8] The question is whether the proposed use, as warranted by the applicant, represents an urban use that is no allowed outside of an urban growth boundary or within a rural community without an exception to Goal 14. One relevant factor is whether the use is typically located in urban or rural areas [9]. Also, if the use is commercial in nature, then it is appropriate to ask whose needs are being served by the use. That is, is the use appropriate for and limited to the needs and requirements of the rural area to be served? In a case involving a grocery store that was allowed conditionally in a rural residential district, LUBA pondered whether that use would act as a magnate to shoppers from outside the rural area where it was located.[10]
>
> A case closely parallel to this one involved comprehensive plan and zoning amendments that would have allowed RV storage on property adjacent to the McMinnville UGB.[11] In that case, a similar comparison was made regarding the size of the proposed facility and the square footage constraints found in OAR 660-022-0010. LUBA found that factors concerning location, proximity to an urban growth boundary, and operational characteristics. ". . . particularly the population it is likely to serve . . . . " were more a relevant indicator than floor space in a determination of whether a use was "urban." Further, LUBA noted that because the facility did not appear to be associated with any industry it was probably more accurately characterized as a commercial rather than an industrial use. [12] "

p. 5, Ex B (footnotes omitted). This is a correct interpretation of the law as applied to these kinds of uses that can be both rural and urban in character. The Hearings Official's September 2

decision is the proper interpretation and is consistent with the purpose and intent of the RR zone and also Goal 14. His January 5 reconsidered decision ignores these cases and the reasoning and analysis that he used in applying them to the proposed storage use.

There is another provision of State Law that the Hearings Official ignored in his reconsidered decision. This is ORS 197.829(1) which states: "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the legal government's interpretation:

(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
(b) Is inconsistent with the purpose for the comprehensive plan or land use regulations;
(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. . . . "

(emphasis supplied) When this matter is appealed to LUBA, that appellate body has the authority and direction to review the County's decision as to whether its "interpretation" is inconsistent with the "purpose" of the land use regulation (RR zone in this case) or the land use goal (Goal 14) that is being implemented.

In this case, the Hearings Official first "interpreted" the Lane Code to not allow urban uses in the RR zone. His January 5 reconsidered decision changes that interpretation by finding that all RV/boat storage facilities, whether urban or rural, must be permitted in the RR zone.

There are now two diametrically opposed "interpretations" before you in this appeal. One, the September 2 decision, is consistent with the "purpose" of the RR zone as stated in LC 16.290(1)(b) and quoted previously. It is also consistent with Goal 14 which requires urban uses to be located within urban growth boundaries. The January 5 reconsidered decision is inconsistent with both these provisions. ORS 197.829(1) directs LUBA to overturn the County's interpretation if there is such an inconsistency.

Based on this analysis, it makes no sense for the County to approve this use when it most assuredly will be reversed by LUBA. The September 2 decision should be adopted by the Board as its "interpretation" of the Code and Goal 14 as applied to this proposed storage use.

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.

Additional evidence is not needed in this case. The Hearings Official should reconsider his decision and apply this analysis, findings and conclusion set forth in his September 2 decision..

LC 14.600(3) ELECTIVE BOARD REVIEW CRITERIA

Lane Code 14.600 describes the process for appealing land use decisions of the Hearings Official to the Board of Commissioners. Review by the Board is discretionary and dependent upon a finding by the Board addressing criteria set forth in subsection (3). Those criteria state:

"(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."

With the exception of subsection (c), each of the criteria has relevance to and is satisfied by this appeal.

Most importantly, I have discussed this matter with Mr. Howe, the County's Planning Director, and he has indicated he will recommend that the Board review this matter. This fact, alone, satisfies subsection (d) of the elective Board review criteria.

While I am sure Mr. Howe will elaborate in his staff report to the Board as to the reasons for his recommendation, I believe they are based on the precedent that this decision will establish. As explained later, this is one of three applications for RV/boat storage facilities that have been considered by the Director within the last year, all of which would be located on RR-zoned land. The Hearings Official's decision opens the flood gates to similar proposals for RR-zoned lands throughout the County but especially for properties located near major water bodies, e.g. Fern Ridge Lake and the reservoirs east of Cottage Grove, as well as recreational corridors like Highways 58 and 126. If allowed to stand, there would be no size limit on such facilities.

Beyond the Director's recommendation that the Board review this appeal, subsections (a) and (b) are applicable to this appeal. As noted above, this decision by the Hearings Official opens all RR-zoned land throughout the County to this type of application. Already, within the last year, there have been two applications for properties abutting Highway 58. In addition to this application, a similar request was denied by the same Hearings Official for the same reasons that were articulated in his September 2 decision in this matter. Brink, PA 07-6355.

On the same day the reconsidered decision was issued, January 5, 2009, the Hearings

Official approved an RV/boat storage facility for property located along the Willamette River and east of Junction City. Banton, PA 08-5496. The total area of this facility is nearly 20,000 square feet. Mr. Saxon did not appeal this approval because of the cost and the location does not directly impact his home and properties in the Goshen area. The Banton decision illustrates our point which is that all RR-zoned land is open to these storage facilities and size is not an issue if the Hearings Official's decision is left in place.

This type of application will likely reoccur as word gets out about the Hearings Official's approval. Board review is essential to provide policy guidance to your staff and particularly the Hearings Official. Also, the public needs to know that RR-zoned properties will not be available for this type of urban commercial development.

Why would anyone place this type of facility inside an urban growth boundary when they could find an RR-zoned parcel near a river, lake or the ocean and develop an RV/boat storage facility. Better yet, if there is a house on the site, a person would pay the going rate for an RR-zoned parcel with the caretaker's house already in place and them establish a commercial storage facility at a price that is considerably less than commercial properties located in a city.

It is important to recognize the significance of the Hearings Official's decision. The same facility, if proposed for property zoned Rural Commercial, would be limited to 3,500 square feet. The facility proposed by this application exceeds 30,000 square feet of building alone. Look at the site plan (Ex C) and see how much area was proposed for development. At least the Hearings Official sustained the Director's decision which denied the self-storage units. However, allowing the RV/boat storage facility still creates bad precedent that is contrary to and inconsistent with Goal 14 and the purpose of the RR zone.

HEARINGS OFFICIAL RECONSIDERATION

As noted at the outset of this appeal statement, the Hearings Official seems to believe that the current wording of the Code and specifically LC 16.290(4)(r) which allows RV/boat storage as a specially permitted use in the RR zone, does not allow consideration of the zone's purpose statement and Goal 14. We request the Hearings Official to reconsider this position.

The September 2 decision (Ex B) is legally defensible and, in my opinion, would be sustained at LUBA. All of the case law cited and rationale used in that decision and which supported the Director's denial was ignored and replaced with a hyper-technical interpretation of the Code provision that allows any size of RV/boat storage as a specially permitted use. What is ignored is the simple fact that only rural storage facilities are allowed in the RR zone. It is not all storage facilities that can be placed in the RR zone. This requires interpretation and common sense.

The Hearings Official's January 5 decision even states that his earlier decision was an "interpretation". P.3, Ex A. If the first decision was an "interpretation", then certainly the January 5 reconsidered decision was a "reinterpretation" of the same cases, Code provisions and State law, including Goal 14. The point is this: these facilities should be rural in character. The Hearings Official has already made a finding that the proposed facility is "urban" and "commercial". The cases cited in the September 2 decision allow requests like this one to be evaluated on a case-by-case basis. Washington County Farm Bureau v. Washington County, 17 Or LUBA 861,.875 (1989). A determination has been made that the proposed facility is "urban" and that means it should not be allowed in the RR zone.

We urge the Hearings Official to reverse his reconsidered decision and reinstate his September 2 decision.

Sincerely,

Michael E. Farthing

Enclosure

cc: Cecil Saxon, JR.
Jim Spickerman
All Commissioners

LANE COUNTY HEARINGS OFFICIAL
RECONSIDERATION OF A HEARINGS OFFICIAL DENIAL OF A REQUEST FOR A SPECIAL USE PERMIT TO ALLOW FOR AN RV, BOAT AND SEGMENTED SELF-STORAGE FACILITY WITHIN A RURAL RESIDENTIAL DISTRICT

Application Summary

Don & Cheryl McCabe, 362 North 42nd Street, Springfield, Oregon 97478. The applicants requested a special use permit to allow a recreational vehicle, boat, and segmented self-storage facility in the Rural Residential (RR5) Zone, pursuant to Lane Code 16.290(4)(r) & (s). The Lane County Planning Director denied the request on April 15, 2008 and a timely appeal was filed by the applicants.

A hearing before the Lane County Hearings Official was held on July 10, 2008 and a decision affirming the Planning Director was issued on September 2, 2008. A timely appeal was filed and the Hearings Official agreed to reconsider the September decision.

Parties of Record

Don & Cheryl McCabe
Thomas & Bonnie Woolley

Mike Farthing

Jim Spickerman

Application History

Reconsideration Hearing Date: November 6, 2008
(Record Held Open Until December 18, 2008)

Reconsidered Decision Date: January 5, 2008

Appeal Deadline

An appeal must be filed within 10 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane Code 16.290(4)(r) & (s)
Lane Code 16.290(5)

Findings of Fact

1. The applicants propose a facility to store recreational vehicles (RVs), boats and household goods. It will be open Monday through Saturday, 10:00 a.m. to 6:00 p.m. and is closed Sunday. A manager will be present 24 hours–a–day, seven days a week. The facility will be entirely enclosed with a six–foot tall chain link fence.

2. The findings of fact of the September 2, 2008 Hearings Official decision in PA 07–6721 are incorporated by reference except where explicitly modified by this decision.

3. The State Fire Marshal has revised previous comments and now finds that the applicant's site plan adequately provides for the access and circulation of fire apparatus to the proposed use.

4. The site plan (updated 12/26/07) shows the north side of Building A to be 50 feet from the right–of–way of Highway 58. Interpretation of available flood plain maps indicates that the area between the highway right–of–way and Building A is located outside of the flood hazard area.

5. The application consists of 7 storage buildings; A–G.[1] Buildings A, B and G contain 115 units within 30,980 square feet for the storage of boats and recreational vehicles. Buildings C through F contain 47,600 square feet devoted to mini-storage.

Decision

THE SEPTEMBER 2, 2008 DECISION REGARDING THE MCCABE REQUEST (PA 07–6721) FOR A SPECIAL USE PERMIT TO CONSTRUCT AN RV, BOAT AND SELF–STORAGE FACILITY IS AFFIRMED, IN PART, AND REVERSED, IN PART.

THE RV AND BOAT STORAGE COMPONENT OF THE REQUEST IS APPROVED, subject to the following conditions:

1. Outdoor lighting shall be as warranted by the applicant with no spill–over light from the proposed facility.
2. The applicant shall submit a revised site plan showing the location of the buildings housing the recreational vehicles and boats, the office/caretaker residence and the required parking spaces.
3. The applicant shall procure all necessary building and sanitation permits prior to expanding the current operation. In this regard, the applicant shall maintain fire code standards as they pertain to vehicle storage.
4. The applicant shall procure a Floodplain Special Use Permit prior to the construction of the structures.
5. The proposed recreational vehicle and boat storage facility shall be operated as warranted by the applicant.

[1] See Site Plan dated 12/26/07.

6. Signage of the proposed use must be consistent with Lane Code 16.290(7)(g).
7. The proposed use shall be equipped with a storm drainage system designed with a capacity to treat storm runoff from new impermeable surfaces on the subject property for up to 5-year storm events.

THE MINI-STORAGE COMPONENT OF THE REQUEST IS DENIED.

Justification for Decision (Conclusion)

This application is evaluated pursuant to the uses subject to Hearings Official approval and applicable criteria found in Lane Code 16.290(4)(r) & (s) and Lane Code 16.290(5). Lane Code 16.290(4)(r) and (s) allow storage facilities for boats and recreational vehicles and similar uses, respectively, subject to compliance with Lane Code 16.290(5).

The September 2, 2008 decision in this matter affirmed the Planning Director's denial of this application on the basis of its inconsistency with Statewide Planning Goal14. I now believe that this decision, as it applied to the storage of boats and recreational vehicles, was not a correct interpretation of the code and this reasoning has been applied to an intervening decision.[2]

Boat and Recreational Vehicle Storage

The applicant proposes 115 storage units, consisting of about 30,980 square feet for the storage of boats and recreational vehicles. The applicant has argued that the language of Lane Code 16.290(4)(r) is clear that storage facilities for boats and recreational vehicles may be allowed subject only to the approval criteria of Lane Code 16.290(5), and that there is no ambiguity to explain. However, the ambiguity of a provision may not appear on its face but may become apparent only when placed in its statutory context or framework. The opponents argue that this is the case in the present situation and point to the purpose statement of the Rural Residential District as part of the statutory context that must be considered. In specific, they cite Lane Code 16.290(1)(b), which provides:

(b) To promote a compatible and safe rural residential living environment by limiting allowed uses and development to primary and accessory rural residential uses and to other rural uses compatible with rural residential uses and the uses of nearby lands;

Whether the language of Lane Code 16.290(1) can be considered as creating an approval standard is a question of statutory construction. One of the fundamental principles of statutory construction, and one memorialized in ORS 174.010, is that a court should not insert what has been omitted nor omit what has been inserted from a statute. In this regard, the language of Lane Code 16.290(4)(s) is instructive. Subsection (4)(s) concerns "uses and development similar to uses and development allowed by Lane Code 16.290(2) & (4)" and requires, in part, that such uses be consistent with the purpose of LC 16.290(1). By its explicit reference to subsection (1), the Board of Commissioners have made a conscious decision to not require the same level of

[2] *Application of Steve and Denise Banton*, Lane County Hearings Official Decision in PA 08-5496 (January 5, 2009)

scrutiny to other uses listed under LC 16.290(4). By the same token, several uses in LC 16.290(4), such as animal hospitals, lodges and grange halls, have square footage requirements. Again, no such restrictions apply to LC 16.290(4)(r).

In summary, neither the plain language of Lane Code 16.290(4)(r) nor its context within Lane Code 16.290(4) support a conclusion that there are any external approval standards, other than those found in Lane Code 16.290(5), that apply to the storage of boats and recreational vehicles within the rural residential district.

(5) Approval Criteria. Uses and development in LC 16.290(4)(a) through (s) above, except for telecommunication facilities allowed in LC 16.290(4)(d) above, shall comply with the requirements in LC 16.290(5) below. Telecommunications facilities allowed by LC 16.290(4)(d) above shall comply with the requirements in LC 16.264.

(a) Shall not create significant adverse impacts on existing uses on adjacent and nearby lands or on uses permitted by the zoning of adjacent or nearby undeveloped lands;

The proposed use is passive in that there is no sale of goods and the only traffic is that of clients visiting the site to store boats or RVs or to move one of those vehicles. It will be located on that portion of the subject property adjacent to Highway 58.

Parcels to the east and south are actively farmed with alfalfa and hay as their principle crops. The owners of these properties do not believe that the proposed use is incompatible with their agricultural pursuits.

The parcel adjacent to the west is zoned rural residential and apparently is occupied by a nonconforming or illegal business that involves the open storage of vehicles and the indoor manufacture of RV axles. Properties further to the west include small residences on rural residentially–zoned land and the Highway 58 Market, which has RC zoning.

Properties across Highway 58 are occupied by two active businesses, Lanze Electric, an electrical contractor, Franklin Contracting, and Highway 58 Garage. These uses are active and include offices, storage yards and warehousing.

The applicants' Traffic Impact Analysis for the RV, boat and mini–storage uses shows an estimated ten vehicles entering and leaving the subject property during peak hours. The proposed use is expected to generate 16 to 30 traffic movements per day with an average of about 16 per day. Trip generation mini–warehouses is expected to be less than that of boat and recreational vehicle storage units.

The proposed use is largely passive in nature with the only major impacts on surrounding properties coming from very light traffic generation and the aesthetic impact of the proposed storage buildings. The latter impact does not have a

significant impact since industrial development is located across Highway 58 and a business of some kind operates adjacent to the west.

Trespass does not appear to be a legitimate concern as the proposed facility will be entirely fenced and a manager is constantly present. Fire safety is also not a major concern as the Deputy State Fire Marshal has found the circulation pattern of the site adequate and the property lies within the Goshen Rural Fire Protection District. Additionally, as a condition of approval, the construction and layout of buildings must conform to fire code standards as they pertain to storage buildings of the size proposed.

The proposed use, as conditioned by this decision, meets this criterion.

(b) **Where necessary, measures are taken to minimize potential negative impacts on adjacent and nearby lands;**

Conditions of approval are attached to this decision. In specific, storm water generated by the proposed use must be treated on–site.

(c) **The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site's ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available; and**

A new septic tank system is proposed and will be constructed outside of the regulated flood hazard area. This system must conform to DEQ regulations for subsurface sewage disposal and will be located down gradient and 100 feet away from the existing well.

The subject property is occupied by an existing well that has supplied domestic water for the last 12 years. The water has been tested for quality and is below maximum allowable contaminant levels for arsenic and nitrates and is free of coliform bacteria and E.Coli. An inventory of 97 well logs in Sections 19 and 24 indicate an adequate supply of groundwater with the average well depth being 114 feet and the average yield being 26 gallons per minute. The only use of water on the property will be by the resident caretaker/manager.

The proposed use, as approved, meets this criterion.

(d) **The proposed use and development shall not result in public health hazards or adverse environmental impacts that violate state or federal water quality regulations.**

The subject property is located partially within the Floodway and partially within the "AE" Floodplain zone. The Applicant has warranted that no structures will be constructed within Floodway and that all structures within the "AE" Floodplain zone will be constructed with a reinforced concrete slab foundation one foot above the Base Flood Elevation (BFE). An on-site drainage plan will be engineered at the same time the buildings are engineered.

The proposed use, as approved, meets this criterion.

(7) **Property Development Standards. All uses or development permitted by LC 16.290(2) through (4) above, except as may be provided therein, shall comply with the following development standards:**

(a) **Property Line Setbacks. Structures other than a fence or sign shall be located:**

(i) **At least 20 feet from the right-of-way of a State road, County road or a local access public road specified in LC Chapter 15;**

(ii) **At least 10 feet from all other property lines; and**

(ii) **Notwithstanding LC 16.290(7)(a)(ii) above, a structure that contains less than 120 square feet of floor area and that is located more than 10 feet from other structures may be located in the 10 foot setback otherwise required by LC 16.290(7)(a)(ii) above provided it complies with LC 16.290(7)(d) below.**

All proposed structures are at least 10 feet from interior property lines and at least 30 feet from the edge of the public right of way.

(g) **Signs.**

(i) **Signs shall not extend over a public right-of-way or project beyond the property line.**

(ii) **Signs shall not be illuminated or capable of movement**

(iii) **Signs shall be limited to 200 square feet in area.**

While there are no proposed signs at this time, signage of the proposed use must be consistent with Lane Code 16.290(7)(g).

(h) **Parking. Off street parking shall be provided in accordance with LC 16.250.**

Lane Code 16.250 PARKING SPACE, HEIGHT, AREA, GENERAL BUILDING AND GENERAL LOT AREA AND WIDTH SETBACK REQUIREMENTS

(2) Nonresidential Private Parking.

(a) Automobile parking space allowing 300 square feet per automobile (parking, plus driving space) shall be provided and maintained for any new or enlarged building as listed below:

(i) **For business or commercial buildings or structures, at least one permanently maintained parking space for every 300 square feet or fraction thereof of floor space within the building, exclusive of automobile parking space.**

The site plan did not show any proposed parking spaces. The applicant is required to provide, at a minimum, 1 space per 300 square feet of office/residence.

Self–Storage

The applicants propose that 47,600 square feet, located within four buildings, be devoted to mini–storage. As discussed above, Lane Code 16.290(4)(s) explicitly incorporates the purpose statement of Lane Code 16.290(1) as an approval criterion. Lane Code 16.290(1)(b) limits allowed uses and development in the Rural Residential District to "... rural residential uses and to other rural uses [*emphasis mine*] compatible with rural residential uses and the uses of nearby lands."

Normally, the language of a purpose statement in a zoning ordinance is not considered to be traditional approval criterion. However, a purpose statement in a land use regulation may be both an explicit statement of the purpose of the regulation and the context for interpreting the provisions of that regulation. In some cases the language may impose an "additional affirmative duty" that must be fulfilled prior to final approval. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620, 628 (2006) In the *Concerned Homeowners* case, LUBA found that the purpose statement of one of the city's sub–zoning districts required that the city had to ensure that "traditional residential" uses were not approved unless it was shown that such uses were "necessary to support the primary recreationally–oriented uses." Similarly, the language of Lane Code 16.290(1)(b) suggests that the county not approve uses in the Rural Residential District that are not, in fact, rural.

The purpose statement requires uses allowed by Lane Code 16.290(4)(s) not just be compatible with rural residential uses and other nearby uses but also requires them to be rural in character. The question of whether the 47,000+ square feet of self–storage component of the proposed use is urban or rural is determined by a number of factors, including but not limited to, whether it is commercial or industrial in nature, its size, and the location of its clientele.

Information submitted in support of the application is persuasive in arguing that mini–storage has been traditionally considered to be an industrial use. The fact that mini-storage facilities cater to the general public is apparently outweighed by the size requirements of these uses and the low amount of traffic that is normally generated.

As discussed in the September 2, 2008 Hearings Official decision, the Land Conservation and Development Commission (LCDC) amended Goal 14 to address the intensity of uses outside of urban growth boundaries. The Goal 14 amendments resulted in the adoption of OAR 660–022–0030(10) & (11), that limit the size of industrial structures to 40,000 square feet and the size of

commercial structures to 4,000 square feet, respectively, in non–urban unincorporated communities. Lane County, in turn, has limited the size of industrial structures in rural industrial zones to 35,000 square feet and the size of commercial structures in rural commercial zones to 3,500 square feet.[3] The proposed use exceeds the maximum size of an industrial use that can be sited in an arguably more appropriately zoned industrial district by over 12,000 square feet.

The appropriate size of a "rural" use permitted under Lane Code 16.290(4)(s) is determined, at least in part, by the location of its clientele. Thus, if it were shown that 100 percent of the clientele of a mini–storage facility lived in rural Lane County, outside of urban growth boundaries and rural communities, then arguably it would be appropriate to allow the size of that facility to approach the size of industrial structures allowed in the Rural Industrial District. On the other hand, if only a small percentage of the clientele lived in rural Lane County then the use should not be characterized as being "rural" at all.

In the present case the subject property is located between the rural communities of Goshen and Pleasant Hill and only a few miles from the Eugene–Springfield Urban Growth Boundary. No credible evidence has been presented to suggest that more than a small minority of its clients would be from the surrounding rural area and outside a rural community. The argument that the storage of boats and recreational vehicles should be in rural areas near recreational areas does not appear to be relevant to mini-storage.

The mini–storage component of the proposed use, as put forth, is urban in nature and does not comply with Lane Code 16.290(4)(s)((i).

Conclusion

The previous decision on this matter is affirmed, in part, and reversed, in part.

Respectfully Submitted,

Gary Darnielle
Lane County Hearing Official

[3] See Lane Code sections 16.292(3)(b)(iii) and 16.291(4)(a), respectively.

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Re: Reconsideration of Hearings Official Decision
(PA 07-6721) McCabe
Applicant/Appellant Final Argument

Dear Mr. Darnielle:

The applicants' appeal of the Hearings Official decision, dated September 12, 2008 raised a total of four issues. In his September 16, 2008 letter, the Hearings Official allowed reconsideration of his September 2, 2008 decision and to admit additional testimony and evidence on the issues raised by the applicant/appellant in the appeal. The applicant/appellant submits the following final argument addressing those issues.

A. Relationship of ORS 197.829(1)(d) to *PGE v. BOLI*

The essence of the primary holding of the Hearings Official appealed by the applicant/appellant is as follows:

> "Traditionally, it has been thought that ORS 197.175(2)(d) shielded land use decisions applying acknowledged land use or comprehensive plan provisions from goal or administrative rule compliance scrutiny.[4] The adoption of ORS 197.829(1)(d) in 1995, however, has muddied the water. This provision allows LUBA to overrule a local government's interpretation of an acknowledged land use regulation if the interpretation is contrary to state statute, land use goal or rule that the provision implements. I believe the law in this area is generally as follows:

- Compliance of an acknowledged land use or plan provision with the Statewide Planning Goals or LCDC administrative rules cannot be directly challenged but a local government's interpretation of those provisions may be as long as the challenge is not based or dependent upon the proposition that the acknowledged provision itself does not comply with a goal or rule.[5]

- If a use is allowed by statute in a rural area then it cannot be challenged under Goal 14 because it is a statutorily recognized exception to that rule.[6]

In the present case, the proposed use is allowed in the Rural Residential District, a land use regulation that has been acknowledged by LCDC.[7] The Planning Director has not suggested that Lane Code 16.290(4)(r) and (s) does not comply with Goal 14 but has essentially opined that an interpretation of these provisions that would allow the a [sic] storage facility as large as the proposed use would violate that goal." Hearings Official decision, 9/2/08, pp. 4-5 (footnotes omitted).

The Hearings Official upheld the ruling and opinion of the Planning Director that an interpretation of the Code that would permit a storage facility of the size proposed would violate Goal 14. The error in this application of ORS 197.829(1)(d) is that it completely ignores the analytical approach required by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993) when reviewing the interpretation of a land use plan or ordinance by a local governing body.

In addition to the case of *Friends of Neabeack Hill v. City of Philomath,* 139 Or App 39 (1996), discussed in my November 6, 2008 letter to the Hearings Official, three other recent Court of Appeals decisions make clear that a local government interpretation is subject to the *PGE v. BOLI* analysis and, to defer a local interpretation, the interpretation must be plausible in light of the *PGE* analysis. These cases are discussed in the attached March 2008 article from the Oregon State Bar Oregon Real Estate and Land Use Digest.

One of the cases cited in the article, *Church v. Grant County,* 187 Or App 518 (2003), contains language particularly appropriate to the Planning Director interpretation adopted by the Hearings Official in the present case.

In referencing previous cases discussing the standard of review mandated by *Clark v. Jackson County,* 313 Or 508 (1992), the Court, in *Church,* states:

> "To the extent our summary description of the standard of review under *Clark* suggests that LUBA must sustain all but the most unreasonable interpretations of local land use controls, that description is inaccurate. The legitimacy of an interpretation of a local plan and ordinance provision depends on its consistency with the terms of the provision, the context of the provision, and the purpose of policy behind the provisions. Conversely, the validity of the interpretation is not determined solely by the reasonableness of an argument created to support it. The *Clark* decision and ORS 197.850(9), which was enacted after *Clark*, are more correctly characterized as consistent with the rules of construction announced in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 869 P.2d 1143 (1993)." 187 Or App at 524.

The Court goes on to hold that "LUBA did not err in its conclusion that the county's interpretation of its ordinance was legally impermissible and, therefore, not entitled to deference." 187 Or App at 525. The Court concluded that the County's interpretation of its Code was inconsistent with the text of the provision, its context and the apparent purpose of the ordinance. Particularly applicable is the Court's statement:

> "We agree with LUBA that it is impermissible to read into an unambiguous and directly relevant definition of a term in an ordinance a requirement that the ordinance simply does not contain." 187 Or App at 526.

This is the case with the Planning Director reading into LC 16.290(4)(r) and (s) a size limitation on the facilities allowed there when the Code contains no such restriction.

The Court of Appeals made a similar finding in *Foland v. Jackson County,* 215 Or App 157 (2007). The Court states:

> "As we have noted, ORS 197.829(1)(a) provides that LUBA must defer to a local government's interpretation of its own ordinances unless, among other things, that interpretation is 'inconsistent' with the language of the ordinance. Whether a local government's interpretation of its ordinance is 'inconsistent' with the language of the ordinance depends on whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE*. We have previously considered, and rejected, suggestions such as the Provosts' in this case that the principles of interpretation articulated

> in *PGE* do not apply to our examination of the plausibility of a local government's interpretation of its own ordinances. *See, e.g., Wal-Mart Stores, Inc. v. City of Oregon City,* 204 Ore. App. 359, 364-65, 129 P.3d 702, *rev den*, 341 Ore. 80 (2006)...." 215 Or App at 163-4.

The *Foland* Court rejected a claim of ambiguity in the land use regulation, stating:

> "An 'ambiguity,' however, is a term of art when it is applied to the interpretation of statutes and ordinances; it refers to the existence of more than one reasonable construction of the language that was actually enacted or adopted. *See, e.g., City of Keizer v. Lake Labish Water Control Dist.,* 185 Ore. App. 425, 431, 60 P.3d 557 (2002) ('[W]e are constrained by the wording actually enacted and may not insert wording that the legislature has omitted.')." 215 Or App at 164.

Where an ordinance is misinterpreted, as here, due to an attempt to interpret it in a manner consistent with what is perceived to be the direction of the Statewide Goals, it fares no better. In *Friends of Neabeack Hill v. City of Philomath,* 139 Or App 39 (1996), that was the case. As discussed in my November 6, 2008 letter, in that case, the plan policy at issue was not ambiguous (but arguably more so than the one at issue in the present case). The Court held that it could not be construed to contain constrictions the petitioners found would be required by Goal 5.

In *Neabeack Hill,* the Court states with respect to the attempt to apply goals directly as part of interpretation pursuant to ORS 197.829(1)(d):

> "In a very real sense, the question comes down to whether ORS 197.829(1)(d) allows a challenge that cannot be made directly to be made by indirection: to assert that a correct interpretation of an acknowledged plan provision violates the goals is exactly the same exercise as urging that the provision itself violates them." 139 Or App at 48.

In the present case, the application of the *PGE v. BOLI* analytical approach to statutory construction yields clear results. LC 16.290(4) simply allows, subject to approval by the Planning Director, "storage facilities for boats and recreational vehicles" without any size limitation of the facility. LC 16.290(4)(s) allows:

> "Uses and development similar to uses and development allowed by LC 16.290(2) or (4) above if found by the Planning Director to be

> clearly similar to the uses and development allowed by LC 16.290(2) through (4) above."

There has been no suggestion that the segmented storage is not clearly similar to storage of boats and RVs.

As to the "context" step of the *PGE v. BOLI* analysis, other rural uses listed in LC 16.290(4), animal hospitals outside communities (j) and grange halls outside communities (o), are limited to 3,000 square feet. There is no such restriction as to the size of the other rural uses, including boat and RV storage in LC 16.290(4).

In the broader context of the Code, the Code amply demonstrates that where the legislative judgment was to impose size limitations on commercial or industrial uses, those size limitations were imposed. Lane Code's Rural Industrial Zone (LC 16.292) and Lane Code's Commercial Zone (LC 16.291) contain limitations of size of industrial and commercial uses, respectively, within unincorporated communities.

If legislative judgment was to limit the size of what is listed in the ordinance as rural residential uses, the ordinance would contain such a limitation. Instead, the apparent legislative judgment was to, unlike the Rural Commercial and Rural Industrial zones, impose the criteria of LC 16.290(5) to require that rural residential uses:

> "(a) Shall not create significant adverse impacts on existing uses on adjacent or nearby lands or on uses permitted by the zoning of adjacent or nearby undeveloped lands."

The rural commercial and rural industrial uses, while subject to size limitations, are not subject to this discretionary requirement.

The situation is similar to that in *Church v. Grant County, supra,* where there was an attempt to read a time restriction into the applicability of an exception to certain requirements. The Court stated:

> "It is apparent from that provision [another provision containing a time limit] that the county knows how to include time restrictions on the availability of exceptions to minimum area requirements. Had the county intended to restrict the exception for 'authorized lots' in subsection (A) to lots created after 1997 (which would be the effect of its reading of this code provision), it could have easily done so by including a limiting date in LDC 13.010(A)." 187 Or App 526.

As explained in an earlier briefing, virtually all language cited in support of an application of a Goal 14 standard to uses unambiguously permitted by Lane Code is lifted from cases involving plan adoptions or amendments. As such, the cases and their language are inapposite to this permit decision. As the above cited cases demonstrate, the plan language of the ordinance cannot be "interpreted" where there is no ambiguity as to its meaning. The Statewide Goals cannot be applied under the guise of interpretation where there is no question as to the meaning of the acknowledged land use regulation.

Storage of boats and recreational vehicles and similar uses are included in the RR zone as "other rural uses compatible with rural residential uses" [RR 16.290(1)(b), purposes of the Rural Residential zone]. The Code requires that they be compatible but does not limit the size of such uses. If this is a "loophole," as suggested by Mr. Farthing, it is up to the Board of Commissioners to address it. It cannot be done by means of interpretation of the land use regulation.

B. Other Issues

As stated in the appeal, the application was denied by the Hearings Official based upon the above discussed legal issue. In his opinion, the Hearings Official questioned the evidence on three different issues. Those are addressed here, comments that include some of those found in the appeal statement itself.

1. Fire Apparatus Access.

The file now reflects that the Fire Marshall finds that the site plan adequately provides for fire apparatus access.

2. Sewage Disposal System/Floodplain

The Hearings Official's decision noted that the applicant had warranted that the sewage disposal system would be moved to an area outside both the floodplain and the floodway but, because the computer-generated floodplain map was perceived to indicate only a narrow strip of land parallel to Highway 58 would be available, found that there was insufficient evidence to indicate this land was large enough to show that location of such a system was feasible.

This finding pertained to LC 16.290(4)(s)(iii). It is important to note that subsection pertains only to the requirements to show similarity of a proposed unlisted use (segmented storage) to those uses specifically listed in LC 16.290(4). The applicant has made the case that segmented storage is similar in all respects to RV and boat storage. Specifically, with respect to septic requirements, here

the only septic requirements are those for the office use, whether it be only for RV and boat storage, a use not subject to this requirement, or for segmented storage in addition to the RV and boat storage use.

To the extent relevant, there is sufficient area available for the siting of a septic system. Attached to the staff report of November 2008 is an 8x11 copy of the updated site plan. Although this reduced version is difficult to read, the 11x17 original (in the Planning Department file, dated by hand 12/26/07) clearly shows the north side of Building A as 50 feet from the right-of-way. Building A is 30 feet in width, north to south, and the northerly line of the floodplain is nearly commensurate with the south side of Building A. The engineer's depiction of the line between the floodplain and zone X is consistent with the computer-generated floodplain map. The applicant would have available not only the 50-foot area but Building A could be altered or eliminated to provide additional area if necessary to meet sanitation requirements, particularly to only serve an office.

The applicant cannot obtain a septic permit delineating an acceptable septic system for the proposed use based on soils and the approved use until granted a special use permit. Appropriately, the Planning Director's decision herein addressed the issue of the sewage disposal system as such an issue is usually addressed:

> "If this application would have been approved, the Applicant would be required to meet all sanitation requirements."

The applicant anticipates such a condition will be imposed here as a condition of approval.

3. Issue of Significant Adverse Impacts on Uses Permitted by Zoning on Adjacent Lands

The Hearings Official states that while the issue of impacts on existing uses on adjacent lands is discussed, there is no discussion of permitted uses that could be allowed in adjacent zoning districts.

The criterion at issue is Lane Code 16.290(5)(a):

> "Shall not create significant adverse impacts on existing uses on adjacent and nearby lands or on uses permitted by the zoning of adjacent or nearby undeveloped lands."

First, such a discussion would involve operating characteristics of the proposed use and whether they would create significant adverse impacts on any of these

adjacent or nearby permitted uses. While there are discussions elsewhere, there is a particular discussion of the operating characteristics of the use in the portion of the application that responds to planner Thom Lanfear's letter dated December 10, 2007. (The Written Statement portion of the application is attached to the appeal of the Planning Director's decision.) The limited operating hours are 10:00 a.m. to 6:00 p.m., Monday through Saturday, closed Sunday, lighting is discussed and described as internally located and low intensity with no spillover light from the facility.

As stated there, the facility will be completely fenced and have a manager on duty at all times. Traffic is expected to be from 6 to 30 movements per day with an average of 16 per day overall. Of course, the facility will have direct access to Highway 58. The actual business operations for the site will be forwarded to the head office elsewhere.

There was no suggestion in the record that this use will have any significant adverse impacts on adjacent or nearby property. The only evidence was that it would not have such impact. As stated in the appeal statement, given the state of the evidence in the record, it would be difficult to discuss significant adverse impacts on surrounding properties.

It is noted that the Planning Department submitted new evidence on the issue of trip generation and suggests that clients coming in from other areas will impact the area of the proposed development. The Hearings Official found that there would be "little impact on the neighborhood from traffic generated by the proposed use." (Hearings Official opinion, 9/2/08, p. 6.) The impact of traffic was not raised as an issue by the appeal and consideration is limited to those issues raised by the appeal.

The application does contain a discussion of the compatibility of this use with the uses on surrounding properties. A portion of this is contained under the subsection (5)(a) heading. The discussion is also found under LC 16.290(1)(b) addressing the purposes of the Rural Residential zone, particularly that of assuring compatible uses.

This criterion calls for a review of uses permitted on "undeveloped" land. The Hearings Official findings describe the developed nature of the properties to the north and west of the site. The EFU land to the east and south is developed in pasture and does contain home sites. (The land to the east is presently being developed into a retail plant nursery.) If, nonetheless, it is considered undeveloped land, if one looks to the list of permitted uses in the EFU district, given the lack of any indication of significant impacts that would be created by

the proposed use, none of the permitted uses would suffer significant impact from the proposed use.

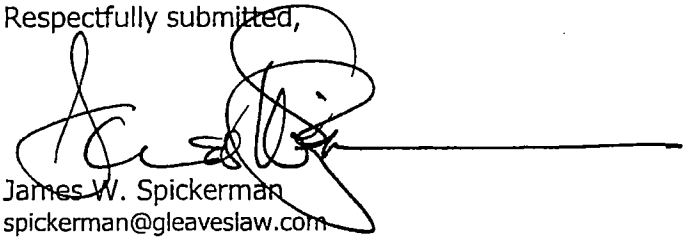
4. Applicability of Site Review

Mr. Farthing urged that, if approved, the proposed use should require development to be subject to site review. Site review is not required when a "special use permit is required for the proposed uses...." See LC 16.257(3)(b).

C. Conclusion

Whether one finds a lack of size limitation for uses in the Rural Residential zone an anomaly relative to size limitations in other rural zones, the Code is clear in not placing a limitation on the size of those uses, requiring instead that it not have a significant impact on surrounding properties and uses. That has been demonstrated.

Respectfully submitted,



James W. Spickerman
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jca
Attachment: OSB Article

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Oregon State Bar

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August 7-9, 2008

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Appellate Cases – Land Use

■ THERE'S AN EXCEPTION TO EVERY GOAL

VinCEP v. Yamhill County, 215 Or App 414, 171 P3d 368 (2007), involves the interpretation and interplay of two Land Conservation and Development Commission (LCDC) administrative rules setting criteria for taking exceptions to Oregon's statewide planning goals.

The applicant requested, and the county approved, a comprehensive plan amendment and zone change from exclusive farm use to recreational commercial to allow a "luxury wine country hotel" on 12 acres of a 65-acre rural parcel. The plan amendment and rezoning required that the county take a "reasons exception" to Goals 3 and 14. Opponents of the project appealed the county's decision to the Land Use Board of Appeals (LUBA). The primary issue on appeal was which LCDC administrative rule, or rules, had to be satisfied to approve the exceptions.

Oregon Administrative Rule (OAR) 660-014-0040 sets out the requirements for a county to take a "reasons exception" to Goal 14. Among other criteria, the urban use (in this case, the planned hotel) must be "necessary to support an economic activity that is dependent upon an adjacent or nearby natural resource." OAR 660-004-0022 sets out the generic standards for a "reasons exception" which apply to most of the Goals, including Goal 3. These are more onerous than the criteria for a Goal 14 exception, including a showing that the use must be located at this particular site. At LUBA, the applicants argued that when a proposed use requires exceptions to both Goals 3 and 14, the Goal 14 administrative rule (OAR 660-014-0040) is applied to judge both. LUBA agreed, relying on rule language which, in its view, made it "reasonably clear" that LCDC intended to require application of only the Goal 14 exception rule in this situation. It remanded the decision, however, for additional justification under the Goal 14 rule.

On review, the Court of Appeals agreed with the opponents, reversing LUBA's interpretation of the administrative rules. Under the court's reading of the text and context, while only OAR 660-014-0040 applies to the exception to Goal 14, OAR 660-004-0022 is the standard for the exception to Goal 3. In this case, therefore, both rules applied, and LUBA erred in holding that compliance with OAR 660-004-0022 "is somehow excused because a Goal 14 exception is taken." Because the county had made alternative findings under OAR 660-004-0022, which LUBA had not analyzed because of its conclusion that they were unnecessary, the court remanded to LUBA for that review.

Michael E. Judd

VinCEP v. Yamhill County, 215 Or App 414, 171 P3d 368 (2007).

Editor's Note: On remand from the Court of Appeals, LUBA again remanded the county's decision, ruling the county failed to address why the proposed hotel requires a location on resource land under OAR 660-004-0020(2) and failed to explain why there is a demonstrated need for the hotel under Goal 9's requirement to provide adequate opportunities for a variety of economic activities. *VinCEP v. Yamhill County*, ____ Or LUBA ____, LUBA No. 2006-157 (12/21/2007).

■ PGE, "PLAUSIBILITY," AND DEFERENCE TO LOCAL GOVERNMENT INTERPRETATIONS OF LAND USE REGULATIONS

In *Foland v. Jackson County*, 215 Or App 157, 168 P3d 1238 (2007), the Oregon Court of Appeals took another step away from the "*Clark* jurisprudence" that limited appellate review of local governing bodies' interpretation of their own land use ordinances. As stated in a number of opinions based on *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and ORS 197.829(1), which was adopted in 1993, the court of appeals has held that *Clark* "establishes a principle of review under which LUBA and the courts may not construe local land use legislation independently but, with limited exceptions, are bound by the interpretations that the local government offers in applying the legislation to particular land use decisions." *Cope v. Cannon Beach*, 115 Or App 11, 836 P2d 775 (1992). The court rephrased its interpretation of *Clark* in different but similar ways in many subsequent opinions, such as

Huntzicker v. Washington County, 141 Or App 257, 917 P2d 1051, *rev den* 324 Or 322, 927 P2d 598 (1996) and *Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999).

These cases and their holdings are summarized in *Schwerdt*:

> [i]f the question confronting us were what the local provisions mean, both arguments would be quite tenable. But that is not the question. Rather, it is whether the local interpretation is reversible under the deferential standard of review required by *Clark*. To be reversible under that standard, the local interpretation must be 'clearly wrong.' *Goose Hollow Foothills League v. City of Portland*. In *Huntzicker v. Washington County*, we explained that 'clearly wrong' means that the reviewing tribunal must be able to 'say that no person could reasonably interpret the provision in the manner that the local body did.' We have also described 'clearly wrong' as meaning 'so wrong as to be beyond colorable defense.' *deBardelaben v. Tillamook County*. Further, we have emphasized repeatedly that LUBA's task and ours in reviewing a local interpretation under the *Clark* standard is not to resolve the question of 'what the local legislation in fact means,' nor is it 'to provide an independent interpretation of local land use legislation that might appear preferable to the local government's.' *Zippel v. Josephine County*, *Langford v. City of Eugene*. Rather, the issue is whether the local government's interpretation, taken on its own terms, passes the 'clearly wrong' test. (Citations omitted.)

In *Huntzicker*, the court expressly rejected using the analytical approach taken by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), when reviewing the interpretation of a land use plan or ordinance by a local governing body:

> [t]he rules of statutory construction, as explained in *PGE*, are designed to arrive at a 'right' understanding of the meaning of an enactment. Although it might be abstractly correct that if an interpretation is right, it cannot be clearly wrong, the converse is by no means true: LUBA's and our post-*Clark* cases amply illustrate that there are many points on the continuum between 'right' and 'clearly wrong.' 141 Or App at 261.

After *Schwerdt* the court began to turn away from its "*Clark* jurisprudence." It decided in *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), that while it "continue[d] to believe that [a limited] standard of review is mandated by *Clark*," the "shorthand summary" of the standard of review in certain earlier cases "is not precisely consistent with *Clark*." 187 Or App at 524. The court then stated, "[t]he *Clark* decision and ORS 197.850(9) [ORS 197.829(1)?], which was enacted after *Clark*, are more correctly characterized as consistent with the rules of construction announced in [*PGE*]." *Id.*

The three recent land use cases, including *Church*, that apply the *PGE* analytical approach do not justify a rigid embrace of that approach. None of the cases has been a close call when the principles of statutory construction are applied. In *Church*, the interpretive issue involved an application to construct a dwelling on a substandard lot, which was nevertheless "authorized" by a previous land use approval. The county code specifically provided that the county's minimum area or width requirements did not apply to an "authorized" lot. To avoid the express language of the ordinance, the county argued that the title of the code section ("Non-Conforming Lots or Parcels") implicitly amended the meaning of "authorized lot." The court observed that a statute's caption is of no legal significance and rejected the county's argument, which would have "read into an unambiguous and directly relevant definition of a term in an ordinance a requirement that the ordinance simply does not contain." 187 Or App at 526.

In *Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or App 359, 365, 129 P3d 702 (2006), the court emphasized the importance of deference on review to the local governing body's interpretation of its own ordinances. The court reversed LUBA's holding, based on *Church*, that a city governing body's interpretation of its own code strayed too far from the underlying policy supporting a prohibition on a new application for a similar "proposal" within one year from denial of the initial application. The court gave more deference to the local government's interpretation of "proposal" than LUBA had, stating, "[w]e see no inconsistency in following the steps of statutory interpretation articulated in *PGE* while also giving a local legislative body's interpretation and application of its own enactments some deference as discussed in *Clark* and *Church*." 204 Or App at 365.

In *Foland*, language in the county code established a three-step process for destination resort approval. The code required completion of the third step within three years of the completion of the second step. As explained by LUBA, because of the delays caused by appeals and other matters, the third step was not completed within three years. The question presented was whether the code could be read to allow the three-year period to start after all appeals and the county's action on remand with respect to the second step had been completed. LUBA concluded that this would require rewriting the language rather than interpreting it.

The petitioners argued that because LUBA had not identified any language in the applicable development ordinances with which the county's decision was "inconsistent," LUBA's conclusion was wrong. The court focused on the language of ORS 197.829(1):

> [w]hether a local government's interpretation of its ordinance is 'inconsistent' with the language depends on whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE*. We have previously considered, and rejected, suggestions . . . that the principles of interpretation articulated in *PGE* do not apply to our examination of the plausibility of a local government's interpretation of its own ordinances. *See, e.g., Wal-Mart Stores, Inc. v. City of Oregon City*, 204 Or App 359, 364-65, 129 P3d 702, *rev den*, 341 Or 80 (2006).

Thus, the standard on review now appears to be whether the local government interpretation is 'plausible' in light of a *PGE* analysis. *Clark* and ORS 197.829(1) still require "some deference" to the interpretation of the local governing body. *Gage v. City of Portland*, 319 Or 308, 316 17, 877 P2d 1187 (1994). Given the reappearance in *Church*, *Wal-Mart Stores* and *Foland* of the analytical principles of *PGE*, it appears the court has now adopted the analytical approach it scorned in *Huntzicker*: interpret the ordinance using the *PGE* approach and then compare the local governing body's interpretation to determine if it is plausible or if it has strayed beyond the limits allowed by "some deference."

Peter Livingston

Foland v. Jackson County, 215 Or App 157, 168 P3d 1238 (2007).

ATTACHMENT 5

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December 12, 2008

HAND DELIVERED

Gary Darnielle
c/o Lindsey Eichner
Lane County Land Management Division
125 E. 8th Avenue
Eugene, OR 97401

Re: Appeal of Director Denial of Application for RV, boat and self-storage facility
PA 07-6721 (McCabe, Applicant)

Dear Mr. Darnielle:

We reaffirm our support for your September 2 decision and its analysis of how Goal 14 should be considered within the context of the Lane Code criteria. This letter responds to Mr. Spickerman's letter of November 6, 2008.

In particular, your recognition that ORS 197.829 does indeed supplement the local government's criteria for a particular use is consistent with the relevant case law on this point. As the County's primary arbiter of land use applications, you should strive to make decisions that are consistent with relevant Lane Code criteria and also are defensible upon appeal to LUBA. ORS 197.829 requires LUBA to affirm a local government's interpretation of its land use regulations or comprehensive plan unless that interpretation fits within one of the four standards listed in subsections (a) to (d).

In this case, the Applicant is proposing a use that is urban in character and inconsistent with one of the primary purposes of the Rural Residential (RR) zone, i.e. limiting allowed uses to residential uses and "other rural uses" that are compatible with those rural residential uses. LC 16.290(1)(b). The Code and the Goals require allowed uses in the RR zone be limited to those that are "rural" in character. We believe, and you so found, that a 79,000 square foot multi-purpose storage facility is "urban" in character. It dwarfs what would be allowed in a rural commercial or industrial zone. As you noted in your decision, LUBA has determined that Goal 14 can be applied to proposed uses outside a UGB when those uses are not inherently rural or urban. This is done on a case-by-case basis. Washington County Farm Bureau v. Washington County, 17 Or LUBA 861,875 (1989).

The Applicant argues that any size storage facility can be permitted in the RR zone as

opposed to Rural Industrial (RI) and Rural Commercial (RC) zones which have defined limitations on size. This argument ignores the urban character of the proposed use. This would allow the owner of a 20-acre parcel that is zoned RR to establish a 400,000 square foot or larger storage facility because there are no prescribed limitations. This not a proper interpretation of the RR zone and the specific limitation on allowed uses in the purpose section which requires all allowed uses to be rural in character. If this use is allowed, it would create a gigantic loophole by which these types of applications would proliferate throughout the County. Already we have seen this begin to occur with the Brink (PA 07-6355) and Banton (PA 08-5496A) applications. This makes sense because why would any one propose to put such a facility in an RI or RC zone which has strict limitations on size. Storage facilities of urban proportions would litter RR zones on the perimeter of the Metro area if this type of facility is permitted.

The Applicant's attorney cites to Friends of Neabeck Hill v. City of Philomath, 139 Or Applicant 39 (1996) and argues that your decision and our arguments in support of it constitute a challenge to the acknowledged land use regulation which, in this case, is the allowance of storage facilities in the RR zone. That is not what we are arguing nor is it what you based your decision. Our concern is with the urban size of the proposed use. The provision in the RR zone that allows RV/boat storage facilities does not allow and should not be interpreted to allow urban-sized storage facilities.

The petitioners in Neabeck Hill were clearly challenging LCDC's acknowledgment of the low density residential zone being in conflict with the acknowledged Goal 5 designation for the same property. We are not arguing there is a conflict with Goal 14 but rather that it "limits" the size of such facilities by requiring them to be rural in character. Storage facilities for Rvs and boats are an allowed and acknowledged use in the RR zone. They just have to be rural in character. This proposed facility does not come close to being rural in any respect.

We strongly urge you to affirm your September 2 decision.

Sincerely,

Michael E. Farthing

Enclosure

cc: Cecil Saxon, Jr.
Gary Darnielle (at L-COG)
Jim Spickerman

RECEIVED AT HEARING
P.A. NO. 07-6721 A
DATE: 11/6/08 EXHIBIT NO.

ATTACHMENT 6

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HAND DELIVERED

November 6, 2008

Gary Darnielle
Lane County Hearings Official
C/O LCOG
99 E Broadway Ste 400
Eugene, OR 97401

Re: Reconsideration of Hearings Official Decision in McCabe (PA 07-6721)

Dear Mr. Darnielle:

As pointed in Applicant's Appeal Statement, the effect of ORS 197.829 on application of acknowledged local regulations was not raised as an argument prior to the close of the record herein, therefore, should not have been considered. This should be dispositive but the following comments are offered on the merits of application of this statute to this permit decision.

The applicants' appeal statement discusses the inapplicability of Statewide Goal 14 to this permit decision. As pointed out there, of all the cases cited, only one does not involve the adoption or amendment of a comprehensive plan. Jackson County Citizens' League v. Jackson County, 171 Or App 149 (2000) is there indicated as the only case involving a permit decision. That case is discussed in some detail, pointing out that ORS 197.829(1) only plays a role in involving a Statewide Goal because the ordinance at issue contained, as a criterion, a local policy adopted to carry out a Statewide Goal. The petitioner's contention there was that the County's decision had applied the comprehensive plan urbanization policies in a manner contrary to Goal 14, therefore, the interpretation was reversible under ORS 197.829(1)(d). In fact, there is another case involving a permit decision which is more similar to the present case in that, like the present case, the local regulation to which ORS 197.829(1)(d) is sought to be applied is not ambiguous and does not require interpretation.

A copy of Friends of Neabeack v. City of Philomath, 139 Or App 39 (1996) is attached. In this case, the City had given the site in question a "2A designation" for purposes of Goal 5, due to the existence of an oak forest visible to the City of

Philomath. Of course, with this categorization, there was a finding that there were no conflicting uses for these resources. To implement the designation, the City included Policy 6 in its plan, which provided:

> "The natural vegetation located on Neabeack Hill shall be preserved to the maximum extent possible by limiting clearing to what is necessary for housing, roads and utilities."

At issue in Neabeack was the City's approval of the subdivision that utilized this policy and which effectively allowed 75 percent of the trees and nearly the entire understory to be removed to accommodate 100 homes, associated roads, utilities and accessories.

The Court quotes the assertion of the petitioners at 139 Or App 39, 43:

> "LUBA affirmed an interpretation of Policy 6 which allows development to the full extent zoning permits, without regard to vegetation. That is, under LUBA's and the city's interpretation, all of the trees can be removed from Neabeack Hill if it is 'necessary for housing, roads and utilities' as long as the development is allowed by the zoning. In other words, 'preserved to the maximum extent possible' in Policy 6 can mean 'not at all.' LUBA erred in affirming that interpretation."

The Court recognized the apparent conflict between the acknowledged Policy 6 and Goal 5 and OAR 660-16-005, noting that issue itself was not before the Court.

The Court observed that LUBA concluded that the City's interpretation was consistent with the language of the acknowledged comprehensive plan provision and that the petitioners' argument amounted to a collateral attack on the acknowledgment of the provision in the guise of a challenge to the City's interpretation of it. The petitioners' response at the Court of Appeals was similar to the reasoning in the decision under reconsideration here. The Court summarizes the petitioners' response to the collateral attack allegation:

> "According to petitioners, however, their argument was no such thing, but was an assertion that the interpretation was contrary to the goal and rule, and that ORS 197.829(1)(d) makes an *interpretation* reversible on that basis notwithstanding the fact that the *provision* that the city interpreted had been acknowledged as complying with the goal and rule." 39 Or App 39, 45

The Court then discusses the history of the Clark line of cases and the adoption of ORS 197.829(1). It points out that when ORS 197.829 was adopted, the legislation did not alter ORS 197.175(2)(c) and (d), which state that land use decisions made under acknowledged plans and regulations are only subject to compliance with the acknowledged local legislation. The Court emphasizes that, while the other statutes pertain to land use *decisions*, ORS 197.829(1)(d) is concerned only with review of *interpretations*.

The Court continues, stating that the City's interpretation of Policy 6 is not even arguably an incorrect statement of what Policy 6 means and that it is this plan policy, not the City's interpretation, which was the problem that concerned the petitioners. The Court states:

> "In a very real sense, the question comes down to whether ORS 197.829(1)(d) allows a challenge that cannot be made directly to be made by indirection: to assert that a correct interpretation of an acknowledged plan provision violates the goals is exactly the same exercise as urging the provision itself violates them." 39 Or App 39, 48.

The Court conducts the PGE v. BOLI analysis of ORS 197.829(1)(d). The Court concludes:

> "Applying that principle here, we conclude that a goal or rule compliance challenge cannot be advanced under ORS 197.829(1)(d) when, however phrased, the argument necessarily depends on the thesis that the acknowledged local land use legislation itself does not comply with a goal or rule, and when a direct contention that the acknowledged legislation is contrary to the goal or rule could not be entertained under ORS 197.835."

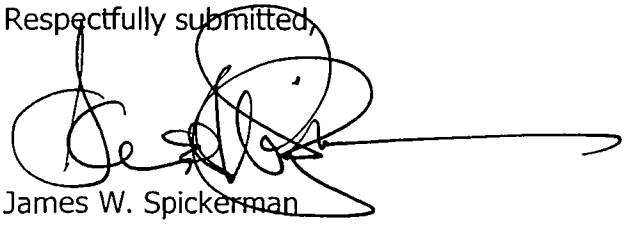
In Opus Development Corp. v. City of Eugene, 141 Or App 249 (1996), decided shortly after Neabeack, the Court summarized the holding in that case:

> "The initial question is whether respondents' ORS 197.829(1)(d) argument is reviewable. We held in *Friends of Neabeack Hill v. City of Philomath,* 139 Ore. App. 39, 911 P.2d 350, *rev den* 323 Ore. 136, 916 P2d 311 (1997), that, in the review of a local land use decision to which an acknowledged comprehensive plan or regulatory provision is applicable, ORS 197.829(1)(d) does not enable LUBA or us to consider a *goal* consistency challenge to a local interpretation of the provision if: (1) the local government's interpretation is a correct statement of the meaning of the provision; (2) the challenge depends in substance on a showing

> that the acknowledged provision itself, as distinct from the interpretation of it, is contrary to a goal; and (3) a direct assertion that the acknowledged provision is inconsistent with the goal would not be cognizable under ORS 197.835." 141 Or App at 225-256.

As in Neabeack, here there is no contention that there is any ambiguity in the local land use legislation being applied. A local interpretation of the acknowledged ordinance is not being challenged. The ordinance clearly states the uses are allowed subject to certain criteria and not subject to a size limitation. In order for the Statewide Goal issue of what is or is not urban use to come into play, there must be an issue of interpretation. There is not.

Respectfully submitted,



James W. Spickerman
spickerman@gleaveslaw.com

jca
cc: Don and Cheryl McCabe
Michael E. Farthing
Lindsey Eichner

Attachment: *Friends of Neabeack Hill v. City of Philomath*

maintained separate full-time employment, kept separate bank accounts and did not hold any of the business assets jointly. *See Bowers and Bowers*, 136 Or App 112, 900 P2d 1085 (1995) (no intent to rescind found where wife maintained separate employment and had limited involvement with husband's corporation). While wife worked for the State of Oregon, she provided a steady source of income that was used to pay monthly family expenses, whereas the income earned from the sale of condominiums in husband's complex was used to keep the golf course financially solvent. When wife left her outside employment after filing a stress claim, she immediately began working full-time at the golf course with husband, contributing considerable time and effort in what she described as an attempt to preserve the parties' future. As the parties' financial prospects dimmed, wife took the significant step of cashing in her retirement account, one of her remaining sources of financial independence from husband, to pay a pro shop debt, and cosigned promissory notes necessary to complete the purchase of the golf course. Husband did not discourage wife's efforts, even when she went back to school to take marketing classes so that she could more effectively promote special events at the golf course. For almost half of their marriage, the parties worked together to turn the golf course into a profitable venture. We believe, as did the trial court, that the parties' conduct demonstrated mutual intent to rescind the antenuptial agreement and, on *de novo* review, conclude that the trial court's property distribution was just and proper under the circumstances. ORS 107.105(1)(f).

6. Husband's two remaining assignments of error challenge the trial court's award of attorney fees and costs, including expert witness fees, to wife.[4] We have reviewed husband's arguments and conclude that the award was proper.

Affirmed. Costs to wife.

[4] Husband withdrew his second assignment of error, which asserted that the trial court erred in ordering the sale of the golf course.

Argued and submitted December 20, 1995, affirmed February 7, petition for review denied April 9, 1996 (323 Or 136)

FRIENDS OF NEABEACK HILL and John P. Bolte, *Petitioners,* *v.* CITY OF PHILOMATH and Schneider Homes, Inc., *Respondents.*

(95-027; CA A90489)

911 P2d 350

Environmental association sought judicial review of decision by Land Use Board of Appeals (LUBA) which sustained city's interpretation of comprehensive plan as allowing disturbance and partial removal of wooded site in subdivision. The Court of Appeals, De Muniz, P. J., held that an appeal from city's interpretation of acknowledged comprehensive plan did not provide proper occasion for reevaluating consistency of plan with statewide land use goal.

Affirmed.

1. Zoning and planning—Administration in general—Procedure

Local land use decisions by jurisdictions with acknowledged plans and regulations are not reviewable for compliance with statewide goals and rules, but are reviewable for compliance with applicable state statutes. ORS 197.175(2)(c, d), 197.835(8).

2. Zoning and planning—Administration in general—Procedure

Statute which permits Land Use Board of Appeals (LUBA) to reverse local government's interpretation of comprehensive plan if interpretation is contrary to statute, land use goal, or rule that plan implements relates to whether local interpretation of local legislation complies with land use goals; statute does not deal with applicability and reviewability of goals in connection with local land use decisions. ORS 197.829(1).

3. Statutes—Construction and operation—Statute as a whole, and intrinsic aids to construction—Conflicting provisions

Courts are required to harmonize apparent conflicts within statute if possible to do so.

4. Zoning and planning—Administration in general—Procedure

Claim that local decision does not comply with statewide land use goal or rule may not be advanced under statute which permits Land Use Board of Appeals (LUBA) to reverse local government's interpretation of comprehensive plan if interpretation is contrary to statute, land use goal, or rule that plan implements where claim depends on thesis that acknowledged local land use legislation does not comply with goal or rule and where direct contention that acknowledged legislation is contrary to goal or rule could not be entertained. ORS 197.829(1)(d), 197.835.

5. Zoning and planning—Administration in general—Procedure

Environmental association's appeal from city's interpretation of acknowledged comprehensive plan did not provide proper occasion for reevaluating consistency of plan with statewide land use goal where association's position was that city's interpretation violated goal because plan itself violated goal; association could not

assert indirectly that which could not be asserted directly. ORS 197.829(1)(d), 197.835.

CJS, Zoning and Land Planning § 187.

Judicial Review from Land Use Board of Appeals.

Hilary E. Berkman argued the cause and filed the brief for petitioners.

Scott A. Fewel argued the cause for respondent City of Philomath. George B. Heilig argued the cause for respondent Schneider Homes, Inc. On the brief were James K. Brewer and Eickelberg & Fewel, and George B. Heilig and Cable, Huston, Benedict & Haagensen.

Before De Muniz, Presiding Judge, and Haselton and Armstrong, Judges.

De MUNIZ, P. J.

Affirmed.

De MUNIZ, P. J.

Petitioners seek review of LUBA's remand of respondent City of Philomath's approval of respondent Schneider Homes, Inc.'s application to develop a subdivision in the Neabeack Hill area. Petitioners oppose the application, and they assign error to a number of LUBA's rulings in which it rejected their contentions. We write to address only their argument that LUBA erred in sustaining the city's interpretation of Resources and Hazards Policy 6 of its comprehensive plan as allowing the disturbance and partial removal of a wooded Goal 5 resource site in the vicinity of the development. We affirm.

Before considering the specifics of the city's decision approving the application, LUBA's decision and the parties' arguments here, an understanding of the relevant aspects of the city's Goal 5 planning history is necessary. The city's comprehensive plan and land use regulations are acknowledged and have successfully undergone periodic review. As part of its planning program, the city gave the site in question a so-called "2A designation" for purposes of Goal 5. The city concluded that there were no uses that conflicted with the resource, and the designation was therefore dictated by Goal 5 itself ("[w]here no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character"), and by a provision of LCDC's Goal 5 implementing rule, OAR 660-16-005(1) (if no conflicting uses are identified, the local government shall "insure preservation of the resource site").

The city explained its 2A designation under the goal and rule:

> "This area is covered in primarily oak forest, and is visible from most of Philomath. It is one of the few oak covered hillsides visible from Philomath. The current Comprehensive Plan Designation is Low Density Residential, the County zoning is Urban Residential - 5 acre minimum; City zoning upon annexation will be Low Density Residential (R-1). Due to the low density plan and zone designations, the site can be developed in a way that will preserve the existing vegetation. Based on this information, the site is designated '2-A.' "

To implement the designation, the city included Policy 6 in its plan. The policy provides:

> "The natural vegetation located on Neabeack Hill shall be preserved to the maximum extent possible by limiting clearing to that which is necessary for housing, roads, and utilities."

As we will discuss in some detail below, petitioners' appeal from the particular land use decision in question does not provide a proper occasion for re-evaluating the consistency of the acknowledged plan in general, or Policy 6 in particular, with Goal 5 or the LCDC rule. Nevertheless, some observations that appear to raise questions along those lines are necessary to an understanding of the issues that are now presented and of our disposition. Arguably, the city's Goal 5 process and its promulgation of Policy 6 were at odds with the goal and OAR 660-16-005(1), in three connected respects, *as of the time that its plan was found to comply with the goals in the periodic review process*: first, the residential use allowed by the zoning is *ipso facto* one that conflicts with the resource, and that required further analysis pursuant to the goal and the implementing rules rather than the automatic designation of the site as 2A; second, and correspondingly, the "preservation of the resource" approach embodied in the 2A designation made residential use in the resource area impermissible; and third, the city could not properly, as Policy 6 provides, allow residential and related development that conflicts with the preservation of the resource in the area that is designated as a preservation site *because* no conflicts were identified.[1]

In acting on the present application, the city governing body interpreted Policy 6 as permitting disturbance and some removal of the wooded resource as proposed by the application, subject to conditions imposed by the city. Petitioners contended to LUBA that that was a reversible misinterpretation of the plan policy. Their contention was based on a number of grounds, including that the interpretation was

[1] We emphasize that, here and elsewhere in the text, our comments that suggest inconsistencies between the plan and the goal and the rule are designed only to state propositions that underlie petitioners' arguments. The question of whether those propositions are correct is not before us, and we do not decide it.

contrary to Goal 5 and OAR 660-16-005(1) and, consequently, should be reversed under ORS 197.829(1)(d) (*formerly* ORS 197.829(4) (1993)). ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) *Is contrary to a statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.*"[2] (Emphasis supplied.)

Petitioners assert:

"LUBA affirmed an interpretation of Policy 6 which allows development to the full extent zoning permits, without regard to vegetation. That is, under LUBA's and the city's interpretation, all of the trees can be removed from Neabeack Hill if it is 'necessary for housing, roads and utilities' as long as the development is allowed by the zoning. In other words, 'preserved to the maximum extent possible' in Policy 6 can mean 'not at all.' LUBA erred in affirming that interpretation.

"* * * * *

"The city's Comprehensive Plan Resources and Hazards Policy #6 implements Goal 5 and OAR 660-16-005. Where, as here, no conflicting uses have been identified, the city's Goal 5 Inventory and Analysis Comprehensive Plan Amendment requires that a 2A resource be managed 'so as to preserve its original character.' OAR 660-16-005 requires that policies and ordinances 'insure preservation of the resource site.' LUBA cannot affirm the city's interpretation of Policy 6 if it is 'contrary to a land use goal or rule it implements.' ORS 197.829(4).

[2] Respondents question whether petitioners raised any issue under ORS 197.829(1)(d) before LUBA. We conclude that the statute was adequately raised. There is no dispute that Policy 6 "implements" Goal 5 and the LCDC implementing rule, within the meaning of the statute.

"Here, the most generous reading of the city's interpretation would allow removal of at least 75 percent of the trees and nearly the entire understory from the proposed development site, while adding 100 homes, associated roads, utilities and accessories. That interpretation is contrary to the Goal and Rule that the policy implements. It is impossible to retain the character of the oak forest on Neabeack Hill while removing nearly all of its vegetation and building 100 homes. Because the interpretation that LUBA affirmed is contrary to Goal 5 and OAR 660-16-005, LUBA erred in affirming it, and its order is unlawful in substance. Because the issue of whether the city's interpretation is contrary to the goal it implements is a question of law, LUBA's order should be reversed." (Footnotes and citation to record omitted.)

Like respondents', LUBA's reasoning concerning the city's interpretation of Policy 6 did not rely on ORS 197.829(1)(d) to any cognizable extent. Rather, LUBA said:

"Petitioners misconstrue the requirements of Policy 6. As with the 2A designation, Policy 6 recognizes the site's R-1 residential zoning. It does not require that the city reduce the permitted density to preserve more natural vegetation than necessary for development consistent with the R-1 zone. So long as the proposed development provides for an average lot size of no less than 7,000 square feet, Policy 6 requires only that disturbances of natural vegetation be limited to that which is necessary for housing, roads, and utilities.

"* * * * *

"Policy 6 does not, by its terms, limit the amount of clearing necessary for housing, roads and utilities. Nonetheless, the city's application of Policy 6 to this subdivision does reflect an interpretation that Policy 6 also requires a demonstration that the proposed development is designed in a manner that will preserve the site's natural vegetation and thereby limit the amount of clearing necessary for housing, roads and utilities. The city's interpretation actually ensures more preservation than the express language of the policy requires.

"Petitioners do not contest the evidence upon which the city's findings are based. Rather, their substantial evidence argument is based upon either their disagreement with the density allowed by the R-1 zone, or upon an interpretation that Policy 6 imposes additional restrictions on the density allowed in the R-1 zone.

"Petitioners have not established that the city's interpretation of Policy 6 is clearly wrong. We affirm the city's interpretation. *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992); ORS 197.829."

Relatedly, LUBA rejected petitioners' contention that the city's action was inconsistent with the area's 2A designation, and explained that petitioner's argument

"is, in effect, a challenge to the city's decision to zone the site for residential development, rather than open space. That decision is not subject to review during this process, and petitioners cannot collaterally attack that decision by arguing that residential development is inconsistent with the [acknowledged] 2A decision. * * * Nor must the city address Goal 5 compliance through this [subdivision] approval proceeding." (Citations omitted.)

In sum, LUBA concluded that the city's interpretation was consistent with the language of the acknowledged comprehensive plan provision that was the subject of the interpretation, and that petitioners' argument amounted to a collateral attack on the acknowledgment of the provision in the guise of a challenge to the city's interpretation of it. According to petitioners, however, their argument was no such thing, but was an assertion that the interpretation was contrary to the goal and rule, and that ORS 197.829(1)(d) makes an *interpretation* reversible on that basis notwithstanding the fact that the *provision* that the city interpreted had been acknowledged as complying with the goal and rule.

Although a case could be made that petitioners' argument and LUBA's response are ships passing in the night, the more descriptive metaphor may be that they are two ships traveling in a legislatively created Bermuda Triangle. ORS 197.829 was enacted by the 1993 legislature in response to *Clark v. Jackson County*, where the Supreme Court devised a deferential scope of LUBA and judicial review of local interpretations of local land use legislation. The 1993 statute had the purpose of "codifying [*Clark*] in part and reversing it in part." Minutes, Senate Agricultural and Natural Resources Committee, July 20, 1993, p 4. The

first three paragraphs of ORS 197.829(1) implement *Clark*; the fourth modifies it by providing that local interpretations are not entitled to deference if they deal with local provisions that implement and are challenged as contravening a state statute, planning goal or rule that explicates a goal. *See Cope v. City of Cannon Beach*, 115 Or App 11, 16-18, 836 P2d 775 (1992), *aff'd on unrelated grounds* 317 Or 339, 855 P2d 1083 (1993) (describing problems with *Clark* that ORS 197.829(1)(d) was apparently aimed at remedying).

1. However, under other statutes that the 1993 legislature did not alter, local land use decisions by jurisdictions with acknowledged plans and regulations are not reviewable for compliance with the statewide goals and rules.[3] ORS 197.175(2)(c) and (d) provide, respectively, that local governments whose plans and regulations are not acknowledged must make land use decisions that comply with the goals but, after acknowledgment, land use decisions made under acknowledged plans and regulations need only comply with the acknowledged local legislation. Correspondingly, ORS 197.835(8) confines LUBA's review of local decisions made solely under local plans and regulations to the question of whether the decision complies with the local legislation. *See, e.g., Foland v. Jackson County*, 311 Or 167, 807 P2d 801 (1991); *Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983) (interpreting statutes in the manner indicated).

We have also held specifically, in cases decided before the enactment of ORS 197.829, that LUBA and we may not entertain arguments concerning the compliance of acknowledged local land use legislation with the statewide goals in the context of reviewing particular land use decisions to which the local legislation is applicable. Rather, we have concluded, any errors in the acknowledgment process can only be rectified through the Land Conservation and Development Commission's periodic review procedures. *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986).

[3] However, they are reviewable for compliance with applicable state statutes. *Forster v. Polk County*, 115 Or App 475, 839 P2d 241 (1992). Nothing in this opinion bears on the application of ORS 197.829(1)(d) in cases where the state provision that a local interpretation assertedly violates is statutory.

2. The principal difference between ORS 197.829(1)(d) and the other statutes we have discussed is that the latter deal with the applicability and reviewability of the goals in connection with local land use *decisions*, while the former relates to whether a local *interpretation* of local legislation complies with the goals. However, that might not be much of a distinction in most instances. We observed in *Cope* that "[t]he interpretation of local legislation plays a major role in virtually every land use decision." 115 Or App at 18.

Nevertheless, ORS 197.829(1) *is* concerned only with the review of interpretations. In *McKenzie v. Multnomah County*, 131 Or App 177, 884 P2d 868 (1994), we suggested that the proper sequence of analysis under the statute is to determine whether the interpretation is an affirmable statement of the meaning of the local legislation before considering whether the interpretation is contrary to state law. We said:

> "If the county's interpretation is contrary to the express language of its ordinance, the interpretation is reversible under ORS 197.829(1)[(a)], and it is immaterial and unnecessary to decide whether the interpretation violates a state statute and is therefore also reversible under ORS 197.829[(1)(d)]." 131 Or App at 181 (footnote omitted).

This case differs from *McKenzie* in that, here, the city's interpretation is not even arguably an incorrect statement of what Policy 6 means. LUBA rightly noted that petitioners' arguments lose sight of the fact that the provision very expressly makes the preservation of the resource subject to the residential needs for which the area is zoned. Although petitioners protest otherwise, the real target of their argument is Policy 6 itself, and the thrust of the argument is that the policy and the planning process that produced it are contrary to Goal 5 and OAR 660-16-005(1), notwithstanding their acknowledged status. It is the plan policy, not the city's interpretation, in which the problem that concerns petitioners originates: by its express terms, Policy 6 makes the preservation of the supposedly protected resource dependent on the necessities of conflicting uses that were not identified as such by the city in its planning process.

Petitioners' point may be abstractly correct. There is no question, however, that, if petitioners' argument took the form of a direct challenge to the consistency of Policy 6 with

the goal and the rule, it would fail. The statutes and case authority discussed above make clear that the goal compliance of acknowledged local legislation cannot be challenged or revisited in the review of particular land use decisions to which the legislation is applicable. In a very real sense, the question comes down to whether ORS 197.829(1)(d) allows a challenge that cannot be made directly to be made by indirection: to assert that a correct interpretation of an acknowledged plan provision violates the goals is exactly the same exercise as urging that the provision itself violates them.[4]

To answer the question, we turn to the methodology for statutory interpretation set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1132 (1993). The text of ORS 197.829(1)(d), standing alone, militates for a "yes" answer. It is unambiguous, and it provides that an interpretation that is contrary to a state goal or rule is reversible. Under *PGE*, however, the context of the statute is as important to its interpretation as the text is. Here, the context includes the statutes we have discussed relating to the inapplicability of the goals to post-acknowledgment land use decisions and their review.

In more usual situations, it might be that the distinction between decisions and interpretations would allow the contextual statutes and ORS 197.829(1)(d) to operate literally and consistently in their respective spheres. We have noted, however, that that distinction is thin in all circumstances, and it is nonexistent in this setting and ones like it. There is no difference here between the goal compatibility of the interpretation and that of the acknowledged plan provision. To hold that the interpretation can be reviewed for inconsistency with the goal and rule in situations such as this one would be wholly at odds with ORS 197.175(2)(c) and (d) and ORS 197.835(8).

It could be argued that ORS 197.829(1)(d) is so inconsistent with the other cited statutes that the former impliedly repeals the latter. However, as we understand

[4] We recognize that there are interpretations that are not reversible under ORS 197.829(1)(a)-(c), but that are not "correct" in the literal sense. In cases where that divergence exists, the analysis *might* differ from our reasoning here. This is not such a case.

PGE, if the text and context of a statute point in opposite directions — as they do here — the conundrum should not be lightly resolved by concluding without further inquiry that the text impliedly repeals the context.[5]

3. Instead, the next step is to consider the legislative history. We have done so here, and it is of no assistance. That brings us to the last step in the *PGE* methodology — resort to "general maxims of statutory construction." 317 Or at 612. Generally, in the cases where resort to that last step has become necessary, little explanation has been offered by the Supreme Court or us regarding *which* maxim has been chosen to be accorded what amounts to decisive significance. In this case, however, the reason for our selection is fairly self-evident. We resort to the maxim stated in *State ex rel Appling v. Chase*, 224 Or 112, 117, 355 P2d 631 (1960): the courts "are required to harmonize apparent conflicts within a statute if it is possible to do so."[6]

4. Applying that principle here, we conclude that a goal or rule compliance challenge cannot be advanced under ORS 197.829(1)(d) when, however phrased, the argument necessarily depends on the thesis that the acknowledged local land use legislation itself does not comply with a goal or rule, and when a direct contention that the acknowledged legislation is contrary to the goal or rule could not be entertained under ORS 197.835. Situations undoubtedly will arise where that rule will prove difficult to apply. The line between an interpretation and the provision it interprets will not always be sharp.

5. This is not such a situation. This case presents an extreme example of an argument that cannot be considered under ORS 197.829(1)(d) as we have construed it: as we have discussed, petitioners' position can only be characterized as being that the city's interpretation violates the goal and rule

[5] For reasons that will become clearer as we progress, we do not consider this to be a situation where an implied repeal has occurred. The statutes "can function together," *Harris v. Craig*, 299 Or 12, 16 n 1, 697 P2d 189 (1985), unless they are construed in a way that prevents them from doing so. However, such a construction would not be an implied repeal by the legislature, but a judicial repeal.

[6] ORS 197.829(1)(d) and ORS 197.835(8) are both provisions that govern LUBA's review methodology and are part of the same statutory scheme. ORS 197.175(2)(c) and (d) are *in pari materia* with ORS 197.835(8).

solely because the plan provision that the city interpreted violates those state provisions.[7]

We conclude that LUBA did not err by rejecting petitioners' argument under ORS 197.829(1)(d) *sub silentio*. We have considered petitioners' other arguments and assignments and reject them without discussion.

Affirmed.

[7] At the other extreme, of course, are situations where the acknowledged legislation is capable of an application that is fully consistent with the goals and rules, but the local interpretation is not. A hypothetical example may be of some use. County X's acknowledged land use regulations provide for three alternative minimum lot sizes in exclusive farm use zones. In response to a particular application, the governing body interprets the lot size provisions as allowing the smallest of the three to be used for the most unintensive of farm uses, with the effect that a "hobby farm" can be created. In an appeal from the land use decision granting that application, a tenable Goal 3 challenge to the interpretation of the lot size provisions could clearly be made without any concomitant challenge to the provisions themselves, even though the interpretation may not be in direct conflict with the language of the provisions or otherwise reversible under ORS 197.829(1)(a)-(c).

We also note that our holding does not foreclose the application of ORS 197.829(1)(d) in situations where the interpretation is challenged as violating a goal or rule for reasons that are independent of arguable bases on which the goal or rule consistency of the interpreted provision itself might be questioned.

Argued and submitted September 19, 1995, affirmed February 7, petition for review denied July 23, 1996 (323 Or 691)

STATE FARM FIRE AND CASUALTY COMPANY, an Illinois corporation, *Respondent,*

v.

Aaron GREEN and Jerome Blake, a minor, by and through his guardian, Robert Jester, *Appellants.*

(9307-04401; CA A84962)

911 P2d 357

Homeowners' insurer brought suit seeking declaration that it was not obligated to indemnify its insured for his liability for shooting property owner. Following jury trial before the Circuit Court, Multnomah County, Anna J. Brown, J., judgment was entered on jury verdict in favor of insurer. Insured appealed. The Court of Appeals, De Muniz, J., held that: (1) issue of whether insured had subjective intent to injure when he aimed his gun into crowd of party goers and fired three shots was issue for jury, and (2) insurer was required to show insured's subjective intent to injure, but not intent to injure directed against specific victim.

Affirmed.

1. Insurance—Risks and causes of loss—Liability or indemnity insurance in general—Accident

For exclusion for intentional acts to apply, acts must have been committed for purpose of inflicting injury and harm; intent must be to cause harm, not just intent to act.

2. Insurance—Risks and causes of loss—Questions for jury

Whether insured subjectively intends to cause harm or injury, so as to preclude coverage for his acts under exclusion for intentional acts, is question of fact.

3. Insurance—Risks and causes of loss—Questions for jury

Court may infer subjective intent to harm on part of insured as matter of law only when such subjective intent is only reasonable inference that could be drawn from insured's conduct.

4. Insurance—Risks and causes of loss—Evidence—Presumptions and burden of proof

In determining whether insured's conduct falls within exclusion for intentional acts, evidence of intent need not be direct but may be inferred from nature and circumstances of insured's actions.

5. Appeal and error—Review—Taking case from jury—Direction of verdict

On review of denial of motion for directed verdict, Court of Appeals may not set aside jury verdict unless there is no evidence from which jury could have found facts necessary to establish elements of plaintiff's cause of action.

6. Insurance—Risks and causes of loss—Questions for jury

Whether defendant had subjective intent to harm when he aimed his loaded gun into crowd of people and fired three times was question for jury in action

ATTACHMENT 7

LANE COUNTY OREGON

LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

MEMORANDUM

DATE: November 5, 2008

TO: Gary Darnielle, Lane County Hearings Official

FROM: Lindsey Eichner, Planner

RE: McCabe Reconsideration of a Hearings Official Decision, PA 07-6721B

ISSUES:

Applicability of Goal 14:

Lane Code Chapter 16.290 was acknowledged as being consistent with the Statewide Planning Goals by DLCD and that process included consideration of Goal 14 and the Goal 2 Exceptions requirements. In planning and zoning for exceptions areas, including this and other rural residential area, the rural uses, densities, public facilities and services must maintain those lands as "Rural Land." OAR 660-004-0018(2). Uses, densities, public facilities and services not meeting those requirements may only be approved through a reasons exception, which was not done for this or the other rural zones. Those considerations are expressed generally in the purpose section of the RR5 zone by indication that the focus is on provision for rural, not urban uses. Any interpretation of the uses allowed in LC 16.290 must be consistent with the Goal 2 Exceptions and Goal 14 limitations on uses allowed in rural planning and zoning designations designed to implement those Statewide Goals.

The Planning Director interpretation in this case, that the size of the proposed facility fails to establish a rural use and violates Goal 14, focused on the scope and intensity of the facility and did not conclude that the use of any RV and Boat storage facility does not comply with LC 16.290 and the Goals. The nearly 80,000 sq ft RV, boat, and self-storage facility is larger than the largest industrial use permitted in a non-urban, rural community (40,000 sq ft) and the largest commercial use permitted in a non-urban rural community (4,000 sq ft). Interpreting LC 16.290(4)(r) as allowing the scale and intensity of the proposed use would not be consistent with the applicable Goals and rules this provision implements and would not be sustainable under ORS 197.829. Cases discussed by applicant do not change this result.

The scale of the proposed facility is not rural and consists of a use that is urban in nature and violates Goals 2 and 14. Factors that support the reasoning of the Planning Director and Hearings Official include the following:

- The scale of the proposed use, measured by the square footage of the buildings, is nearly 20,000 sq ft larger than the largest industrial use permitted in an urban unincorporated community, 60,000 sq ft. The subject property is located outside of an unincorporated community, which in the rural industrial zone means the use would be limited to 35,000 sq ft and in the rural commercial zone means the use would be limited to 3,500 sq ft. See LC 16.291(4) and 16.292(3).
- The subject property lies approximately 3.3 miles southeast of the Eugene-Springfield Urban Growth Boundary, 0.38 mile south of the Metro Plan Boundary, 1 mile east of the rural unincorporated community of Goshen, and 1.8 miles west of the rural unincorporated community of Pleasant Hill. Placement of the proposed facility with its described scope and intensity in this proximity may undercut the efficacy of the planning and zoning adopted for those other areas.
- Based on the size of the facility having approximately 344 self storage units and 115 RV and boat storage units, there is not substantial evidence in the record that the proposed facility will serve rural needs. It seems logical that with that amount of units, clients will come from the nearby rural unincorporated communities and from within the Eugene-Springfield Urban Growth Boundary, further impacting those areas.
- Lane Code Chapter 10.170-10(9), which applied to property within urban growth boundaries allows for storage buildings for household or consumer goods (the Limited Industrial District). This is not a specifically listed use in the Rural Industrial Zone of LC 16.292(3), so staff concludes that those types of use should be limited to urban areas.
- The character of the neighborhood is that of traditional residential uses of single-family dwellings and manufactured dwellings, along with small-scale industrial and commercial uses. The industrial and commercial uses nearby have buildings that do not exceed the size limitations allowed in their respective zones. The table below lists data collected from Assessment and Taxation on all Rural Industrial (RI) and Rural Commercial (RC) Zoned properties within ½ mile of the subject property:

TRS	Taxlot	Zoning	Building Square Footage	Yr Built
18-03-24	103	RI	2 gas pumps & underground tanks	
18-03-24	104	RI	3,840 sq ft (7,680 sq ft = 2 stories)	1974
18-03-24	105	RI	See TL 104	
18-03-24	106	RI	4,000 sq ft	1966
18-03-24	107	RI	3,500 sq ft	1965
18-03-24	108	RI	4,440 sq ft	1965
18-03-24	3100	RC	3,236 sq ft Store & Apt	1948
18-02-19-23	5700	RC	SFD & 2760 Sq /ft GPB*	unknown
18-02-19-23	6300	RC	vacant	

* GPB = General Purpose Building

Staff agrees with the Hearing Official's analysis of the appropriate interpretation of LC 16.290 and the limitations on the scope and intensity of the proposed use as being consistent with Goals 2 and 14 and the categorization of the proposed use as a commercial use, in which the size of the facility is limited to 3,500 sq ft or less to be considered rural.

Fire Apparatus Access:

In the second Appeal statement the Applicant's Agent has stated that the site plan provides a 30-foot inside radius and a 50-foot outside radius for fire truck turning.

Staff notes that the State Fire Marshal's office, Kristina Deschaine, commented on the original proposal and stated that the fire department did not find the access adequate. Her comments are attached as Exhibit A

Adverse Impacts:

- Regarding adverse impacts, the appeal letter discusses the anticipated traffic generation. It is unclear where those numbers come from. The Institute of Transportation Engineering Trip Generation Manual, 6th Edition, has trips calculations for mini-warehouse/self-storage facilities. The following calculations were found:

Days	Average Daily Trips per Unit (344 Self-Storage Units)	Average Daily Trips per 1,000 sq ft of Building (47,600 sq ft Self-Storage Units)
Weekdays	96	119
Saturdays	86	111
Sundays	62	84

*Please note that roughly 50% of the trips are entering and 50% are exiting

The information in the above table only applies to the proposed 47,600 sq ft of self-storage buildings and does not include the trips generated by the 30,980 sq ft of RV and Boat storage. The trips generated by the RV and Boat storage units would be in addition to those listed above.

- The appeal statement included a copy of the Floodplain Verification, staff notes that the site plan that was attached to that application has since been modified and the most recent site plan is attached as Exhibit B.

Recommendation:

Staff recommends that the Hearing Official affirm his denial of the proposed facility.

EXHIBITS:
Exhibit A. Comments from the Office of State Fire Marshal, March 25, 2008
Exhibit B. Updated Site Plan