IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO:
12-05-23-14

IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR APPEALS OF A HEARINGS OFFICIAL'S DECISION APPROVING A RIPARIAN MODIFICATION APPLICATION AND A FLOODPLAIN DEVELOPMENT PERMIT FOR A BRIDGE IN THE IMPACTED FOREST LANDS ZONE (F-2), MAP AND TAX LOT T19-R01-S20 TL 3400 (FILE NO. PA 11-5472 AND PA 11-5435/ATR LAND LLC, LEELYN INC., AND WILEY MT. INC.).

WHEREAS, the Lane County Hearings Official has made a decision approving a Riparian Modification application in File No. PA 11-5472 and a Floodplain Development Permit in File No. PA 11-5435 for a bridge over Lost Creek in the F-2 Impacted Forest Lands Zone; and

WHEREAS, the Lane County Planning Director has accepted two appeals of the Hearings Official's Decision to the Board of County Commissioners pursuant to LC 14.515; and

WHEREAS, the Lane County Hearings Official has affirmed his decision on the applications and appeals in File No. PA 11-5472 and File No. PA 11-5435; and

WHEREAS, Lane Code 14.600 provides the procedure and criteria which the Board follows in deciding whether or not to conduct an on the record hearing for an appeal of a decision by the Hearings Official; and

WHEREAS, the Board of County Commissioners has reviewed this matter at a public meeting of the Board.

NOW, THEREFORE, BE IT ORDERED the Board of County Commissioners of Lane County finds and orders as follows:

1. That the appeals do not comply with the criteria of Lane Code 14.600(3) and arguments on the appeals should therefore not be considered. Findings in support of this decision are attached as Exhibit "A."

2. That the Lane County Hearings Official decision dated January 23, 2012, attached as Exhibit "B," is affirmed and adopted by the Board of County Commissioners as the County's final decision. The Board of County Commissioners is silent regarding the interpretations of the Lane County Rural Comprehensive Plan policies, implementing ordinances, or State Law made by the Hearings Official in the decision.

DATED this 23rd day of May, 2012.

Sid Leiken, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 5-14-2012 Lane County

OFFICE OF LEGAL COUNSEL

Order Exhibit "A"

FINDINGS IN SUPPORT OF THE ORDER

1. The subject property can be identified as tax lot 3400, assessor's map 19-01-20. The subject property is 63.5 acres in size and is located southeast of the unincorporated community of Dexter, at the northwest of the intersection of Rattlesnake Road and Parvin Road. The eastern portion of the subject property, upon which the proposed bridge over Lost Creek is to be located, is zoned F–2 Impacted Forest Lands. The western portion of the subject property is zoned QM Quarry and Mine Operations Zone. Parvin Butte is located on the QM zoned portion of the property. The property is within the jurisdiction of the Lane County Rural Comprehensive Plan and Lane Code Chapter 16. Access is currently taken from Rattlesnake Road via an existing road located along the eastern boundaries of tax lots 2100 and 1501, and continuing through the subject property to its northern boundary.

2. On July 26, 2011, the applicant submitted an application for a Floodplain Development Permit (PA 11-5435) for a bridge over Lost Creek, pursuant to LC 16.244. On August 2, 2011, staff requested additional information. Between August 22, 2011, and August 28, 2011, the applicant submitted information and revisions to the application.

3. On August 15, 2011, the applicant submitted a Riparian Modification (PA 11-5472) for the same bridge over Lost Creek, pursuant to LC 16.253(3). On September 15, 2012, the Director deemed the application complete. On September 22, 2012, the Director mailed notice of referral and opportunity to comment for both the Riparian Modification and the Floodplain Development Permit.

4. Because of the number of letters received opposing the proposal and requesting a public hearing, the Planning Director elected to have an evidentiary hearing with the Hearings Official to review the application, as provided by LC 14.110. On November 10, 2011, the Hearings Official conducted an evidentiary hearing. On January 23, 2012, the Hearings Official issued a decision approving both applications.

5. On February 6, 2012, the applicant, Land Planning Consultants, and the Dexter-Lost Valley Community Association, filed timely appeals.

6. On February 8, 2012, the Hearings Official issued a decision affirming his January 23, 2012, approval.

7. In order for the Board to hear arguments on either 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 fact pattern and circumstances in these appeals are relatively narrow in scope and are not of Countywide significance. Though the appeals raise issues concerning the implementation of Lane Code 16.253(2), the Hearings Official's decision of January 23, 2012, affirmed on February 8, 2012, addresses these issues, supports Land Management Division's established practices, and does not find error in how LC 16.253(2) has been implemented by the Land Management Division.

10. The issues raised in these appeals do not occur with frequency. Though the appeals raise issues concerning the implementation of Lane Code 16.253(2), the Hearings Official's decision of

January 23, 2012, affirmed on February 8, 2012, addresses these issues, supports Land Management Division's established practices, and does not find error in how LC 16.253(2) has been implemented by the Land Management Division.

11. No unique environmental resources are pertinent to these appeals. There are numerous Class I streams subject to the stream riparian regulations of LC 16.253 in Lane County. Lost Creek, in terms of its designation as a Class I stream and the applicability of LC 16.253, is not a unique resource in Lane County.

12. The Planning Director does not recommend review of these appeals for the reasons cited above. The Hearings Official recommends the Board affirm the Hearings Official's interpretations of Lane Code 16.253(2)(d)(i), as it applies to the Oregon Forest Practices Act, and Lane Code 16.253(2), as it relates to the calculation of total linear shoreline footage.

13. 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 either appeal or declining to further review the appeal.

14. The Board has reviewed this matter at its meeting of May 23, 2012, and finds that the appeals do not comply with the criteria of Lane Code Chapter 14.600(3), declines further review and elects not to hold an on the record hearing on either appeal.

15. The Board affirms and adopts the Hearings Official's decision of January 23, 2012, as the County's final decision in this matter, and remains silent regarding the interpretations of the Lane County Rural Comprehensive Plan policies, implementing ordinances, or State Law made by the Hearings Official in the decision.

LANE COUNTY HEARINGS OFFICIAL
REQUEST FOR A MODIFICATION TO THE 100–FOOT RIPARIAN SETBACK IN AN F–2 IMPACTED FOREST LANDS DISTRICT AND A FLOODPLAIN DEVELOPMENT PERMIT (CONTESTED)

Application Summary

Land Planning Consultants, 475 Oakdale Avenue, Springfield, OR 97477 requested a modification to the 100–foot riparian setback (PA 11–5472) and a floodplain development permit (PA 11–5435) for the construction of a bridge on tax lot 3400, assessor's map 19–01–20.

Parties of Record

See Attachment "A"

Application History

Hearing Date: November 10, 2011
(Record Held Open Until December 21, 2011)

Decision Date: January 23, 2012

Appeal Deadline

An appeal must be filed within 12 days of the issuance this decision and final order, 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 County Rural Comprehensive Plan
Lane Code 16.211
Lane Code 16.244
Lane Code 16.253

Findings of Fact

1. The property subject to this application, hereinafter referred to as "the subject property," can be identified as tax lot 3400, assessor's map 19-01-20. The subject property is 63.5 acres in size and is located southeast of the unincorporated community of Dexter, at the northwest of the intersection of Rattlesnake Road and Parvin Road. Lost Creek crosses the eastern-most portion of the property. The eastern portion of the subject property, upon which the proposed bridge is to be located, is zoned F–2 Impacted Forest Lands. The F–2 zoning only extends 57–78 feet before it becomes RR–5. The western portion of the subject property is zoned QM Quarry and Mine Operations Zone. The subject property is vacant except for a lean–to that is attached to a garage located on tax lot 803. The lean–to is located within the riparian setback area of the subject property.

Parvin Butte is located on the western portion of the property, and rises approximately 500 feet from Lost Creek, to an elevation of 1,193 feet above sea level. The eastern face of the butte is the site of a rock quarry that was actively mined during construction of the adjacent railroad. The property does not contain any structures or buildings except for a small lean–to/garage. Access is currently taken from Rattlesnake Road via an existing road located along the eastern boundaries of tax lots 2100 and 1501, and continuing through the subject property to its northern boundary.

Legal Lot Verification PA 10–5317 approved the status of nine legal lots contained in the subject property, four of which are located in the F–2 zoned portion of the property with frontage along Lost Creek, a Class I stream. The proposed bridge is located on the legal lot identified as Parcel 9 of PA 10–5317. This legal lot appears to have less than 400 feet of frontage along Lost Creek.

2. The applicant proposes the construction of a 20–foot wide, 81–foot long (89.75 as depicted on the Proposed Bridge Site Plan) concrete bridge crossing over Lost Creek. Additionally, the proposal includes abutments, riprap, and approximately 2000 cubic yards of rock for the realignment of the existing gravel driveway and dirt road. The bridge abutments and related fill, including the wing walls and rip rap required to protect the abutments, will be located outside of the area bounded by the ordinary high water of Lost Creek. No Fill and Removal permit from the Oregon Department of State Lands (DSL) will be required because of this fact. There will be adequate room for small mammals to travel under the bridge and clear the proposed fill and other bridge–related structures.

   The existing road/driveway crosses through the creek to access both sides of the property. The existing road/driveway and proposed development is located 60–80 feet south of a Southern Pacific Railroad trestle. The length of project is approximately 466 feet long and includes a portion (approximately 125 feet) of the adjacent property (tax lot 803, assessor's map 19–01–21). The majority of the development is located on the owners' property that is zoned Impacted Forest. (F-2). The remaining portion is on lands zoned RR–5 Rural Residential.

   About 4,740 square feet of riparian vegetation removal will occur on the west bank of Lost Creek. The revised site plan indicates that the linear measurement of the disturbed area along the west bank is 75 feet. The revised site plan indicates that 3,586 square feet of riparian vegetation removal will occur on the east bank of Lost Creek. There will be about 80 feet of linear disturbance, excluding the garage encroachment, on the east side of the creek. The riparian setback area (within the legal lot upon which the bridge is to be placed) is roughly 35,000 square feet on the west side of the creek and roughly 26,600 square feet on the east side of the creek.

3. The proposed bridge is in an area designated as a special flood hazard area and is mapped and zoned "A" by the Federal Emergency Management Administration's (FEMA) Flood Insurance Rate Map (FIRM) community number 415591, panel 1690, suffix F, map number 41039C1690 F, Effective June 2, 1999. The water conveyance or flow for Lost Creek was determined by FEMA in 1992 by the U.S. Army Corps of Engineers.

   The proposed bridge is located on lands designated as a special flood hazard area and therefore the floodplain combining zone (/FP-RCP) applies to this proposal. The construction of a bridge

is defined as "development" pursuant LC 16.244(6), which defines it in LC 16.090 as including "... dredging, paving, and drilling operations and the storage of equipment and materials."

The "A" zone is a mapped 100-year flood area without a base flood elevation (BFE). There are various methods Lane County can use to determine a base flood elevation that include techniques ranging from simple to complex hydraulic analysis. Assessment and Taxation Map 19–01–21 delineates an area called "Lost Creek Flood Area," what appears to be a flood easement and presumably part of a settlement with landowners in the area (See U.S. Government Flowage Easement, Document Reel and Reception No. R164/18006, Lane County Deeds and Records). A design flood elevation of 686.2 feet NGVD 1929 (National Geodetic Vertical Datum of 1929) has been computed based on the most current Flood Insurance Study information and flows from a studied area south of the project on the same FIRM. This elevation is based on the applicant's engineer's hydraulic design of the proposed bridge that used the 100–year flow of 8,225 cubic feet per second (cfs) from the 1992 Corps of Army Engineers study.

The elevations shown on the design drawing indicate that the bottom of the proposed bridge is approximately 0.8 feet (9.6 inches) above the design base flood elevation. If a flood-proof certification is required, Section 8(d), table 1, subsection labeled "Elevation: Nonresidential" will apply along with a completed FEMA form 81-31, Mar 09 (Elevation Certificate). The flood-proofing and other flood related documents are kept on file with the Planning Department. The abutments are the foundation of the proposed bridge and are susceptible to more than 18 inches of flooding. The lowest adjacent grade at the west abutment is approximately 680.8 feet, which is 5.4 feet below the design base flood elevation. The finished grade of the proposed bridge is an elevation of 689.5, which equates to being 3.3 above the design base flood elevation. The area below the finished grade is not considered an enclosed area, so the flood–proofing requirement is not applicable.

4. Lost Creek provides important spawning and rearing habitat for populations of cutthroat trout and Willamette spring Chinook salmon. Willamette spring Chinook salmon are classified as Threatened on the Federal Endangered Species list and is currently one of the key species in the proposed Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead. The habitat that could be damaged by the proposed bridge is important as it is limited and difficult to replace. The level of protection afforded this habitat considered to be "essential habitat" for the salmon and therefore is classified as "Habitat Category 2" under OAR 635–415–0025.

5. Goal 5, Flora and Fauna Policy 1 of the Lane County Rural Comprehensive Plan states that: "Implement construction, development and other land use activities which significantly alter natural systems only after evaluation of effects on wildlife habitats and natural areas."

6. Timber was harvested from the property in 2011 and removed from the property, presumably to be sold on the timber market. The machinery and trucks used to remove the logs utilized the existing access road to Rattlesnake Road, to the south. Slash burning occurred in 2011 and in March of 2011, a 200–foot perimeter inside the QM–zoned portion of the property was reseeded with Douglas fir. Forest management occurs to be ongoing as seedlings have been ordered for the restocking of the remainder of the property in the Spring of 2012.

7. The subject property is served by a 30–foot wide easement to Rattlesnake Road that also serves tax lots 1501, 2100, assessor's map 19–01–20; and tax lots 1400, 1500 and 1601, assessor's map 19–01–21. Of these parcels, tax lots 2100 and 1601 take direct access onto Rattlesnake Road. The access easement was created in 1942 along with the development of the Oregon Properties, Inc.'s Schafler Tract, an unrecorded subdivision. Subsequent to the filing of themap, the deeds were conveyed. Later, portions of the land were condemned by the United States and sold to the Central Pacific Railroad. The existing railroad right–of–way was sold in 2009, reconfiguring the parcels in their present form, although the Schafler Tract map shows tax lot 2100 (Lot 6), Assessor's Map 19–01–20 and tax lots 1400 (Lot 8A), 1500 (Lot 6A) and 1601 (Lot 7), Assessor's Map 19–01–21 are in the same configuration as they exist today.

   The driving surface of this easement is asphaltic concrete that varies in width from 12 to 14 feet. The gravel shoulders are generally between one and two feet wide. Bringing the easement up to Code requirements of an 18 foot travel surface, with shoulders and ditches, would be difficult expensive as there is insufficient right–of–way to install normal cuts and fills, inadequate right–of–way for cuts and fills necessary to support needed retaining walls, difficulty in fitting existing driveways because of elevation differences, and because of high cut and fill banks required for steeper portions of the roadway. The Applicant's statement that property owners along the easement will not dedicate additional right–of–way has not been rebutted.

8. High water events on Lost Creek have been exacerbated by the construction of a large fill for a railway trestle located just downstream of the site of the proposed bridge. Four concrete culverts were constructed through the fill to carry the creek flow and while they were adequate for that task they have been blocked by wood debris from severe floods. The most severe flooding in recent memory occurred in 1964 when the culverts were blocked with debris. An 80–foot wide trash rack was installed at the trestle to keep water flowing through the culverts. The floods of 1996 were much less severe than those of 1964. If a more than 100–year rain event occurs it is expected that the culverts will not be able to handle the flow and the water will backup. This situation will vastly decrease the water velocity at the site of the proposed bridge, which will have no impact upon this event because the rack will present a much more effective obstruction to the flow than the bridge.

Decision

THE REQUEST (PA 11–5472) TO CONSTRUCT A BRIDGE WITHIN THE lO0–FOOT RIPARIAN SETBACK IS APPROVED subject to the following conditions:

1 The bridge and approach road shall be designed and constructed as warranted.

2 The lean–to/garage located on the east site of Lost Creek on the subject property shall be removed and the area replanted with indigenous vegetation.

THE REQUEST (PA 11–5435) TO CONSTRUCT A BRIDGE WITHIN AN AREA DESIGNATED AS A SPECIAL FLOOD HAZARD AREA AND IS MAPPED AND ZONED "A" BY THE

FEDERAL EMERGENCY MANAGEMENT ADMINISTRATION'S (FEMA) FLOOD INSURANCE RATE MAP IS APPROVED subject to the following conditions:

1. The Applicant shall supply the Lane County Building Inspector and the Planning Director with "as–built" drawings of the bridge in order to provide both horizontal and vertical alignment documentation that the structure was accurately constructed according to this permit.

2. The Applicant's engineer shall certify that the standards of Section (5) of Table 1 of Lane Code 16.244(8) have been met at or prior to the time of building permit approval.

3. The construction of the proposed bridge shall conform to the Forest Zone Fire Siting requirements of LC 16.244 and Lane Code 16.211(8)(e)(iii).

4. The finished scale of the proposed bridge shall be verified through an approved FEMA elevation certificate, certified and stamped by a licensed surveyor.

5. Road grades shall be verified through the submission of an "as–built" drawing stamped and certified by a licensed surveyor.

6. Warning and Disclaimer of Liability. The degree of flood protection required by this decision is considered reasonable for regulatory purposes. Larger floods can and will occur on rare occasions. Flood heights may be increased by human-made or natural causes. Neither the Lane Code nor this decision imply that land outside the areas of special flood hazards or uses permitted within such areas will be free from flooding or flood damages. This section shall not create liability on the part of Lane County, any officer or employee thereof, for any flood damages that result from reliance on this section or any administrative decision lawfully made hereunder.

Justification for the Decision (Conclusion)

The first question to be addressed is whether a riparian modification permit or a floodplain development permit is required for the construction of the proposed bridge. The applicant has argued that the bridge will be accessory to forest use of the subject property and therefore the Oregon Forest Practices Act (OFPA) preempts local land use regulation.

It is clear that the subject property, which is not located within any urban growth boundary, has been managed for commercial forestry purposes recently. Timber was harvested from the property in 2011 and removed from the property via the existing access road, and presumably to be sold on the timber market. Slash burning occurred in 2011 and in March of 2011 a 200–foot perimeter inside the QM–zoned portion of the property was reseeded with Douglas fir. Forest management occurs to be ongoing as seedlings have been ordered for the restocking of the remainder of the property in the Spring of 2012.

The OFPA defines a "forest practice" to include harvesting of tree species, reforestation of forestland, road construction and maintenance, and the disposal of slash. It is clear from this definition that the

above–described activities on the subject property constitute "forest practice."[1] With certain exceptions, the Act prohibits local governments from regulating forest practices on forestlands located outside of an acknowledged urban growth boundary. ORS 527.722(1) "Forestland" is broadly defined by the Act to include any land used for the growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied.[2]

Exceptions to the coverage of the Act are enumerated in ORS 527.722(2). Applicable here is the provision of Subsection (2)(c) that excepts the following activity:

> *"The establishment or alteration of structures other than temporary on-site structures which are auxiliary to and used during the term of a particular forest operation;"*

The Applicant has argued that a bridge is part of a road not a structure and therefore its establishment cannot be regulated by Lane County. In support of this position, the Applicant points to the definition of "forest practices" that includes "road construction and maintenance" and that the Department of Forestry's administrative rules that treat bridges as components of roads. Oregon Administrative Rule 629–625–0200(4) requires operators to "minimize the number of stream crossings" in road design and OAR 629–625–0320(1) provides certain guidelines for the design and construction of stream crossing structures.

The term "structure" is not defined by the OFPA or by the Department of Forestry's administrative rules, however, the Lane Code 16.090 definition for "building," which is synonymous with "structure," includes bridges. Further, OAR 629–625–0320(1) explicitly identifies bridges as "structures" that cross streams. On its face, ORS 527.722(2)© exempts from the OFPA all permanent structures and temporary structures that are not auxiliary to a forest operation. The Applicant has never claimed that the proposed bridge is "temporary" and therefore it must be considered to be a permanent structure that is subject to the local government regulation.

Riparian Modification (PA 11–5472)

Lane Code 16.211(8)(c) provides that within the F–2 District, the riparian setback shall be 100 feet from Class I streams. Lost Creek is a Class I stream. The proposed bridge is located within the setback area of both sides of the creek. The applicable standards of Lane Code 16.253 are as follows:

Lane Code 16.253(2)

The Applicant has argued that Lane Code 16.253(2)(d)(i) exempts commercial forest practices regulated by the OFPA from the riparian setback regulations of Lane Code 16.253. This decision has already read ORS 527.722(2)© as exempting the bridge from coverage of the Act.

The Applicant has also argued that a bridge is not the type of structure that is intended to be governed by LC 16.253 because it can never be "set back" from the body of water that it crosses. First, I would suggest that this is not a correct assumption. While it is a truism that a bridges span bodies of water, the

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[1] ORS 527.620(5)
[2] ORS 527.620(7)

intent of Lane Code 16.253 is to protect riparian land areas on the shoreline of those bodies of water not the air space above. Depending upon the size of the zoning district involved and the width of the stream, a bridge may very well span the riparian setback area of a small creek. I would also agree with Mr. Tyler's testimony that a bridge can be oversized to accomplish this goal if enough resources are applied to its construction. Second, accepting the conclusion that a bridge can never be setback from a body of water is not the same as accepting the conclusion that a bridge will never comply with the riparian setback regulations. It must be remembered that the riparian setback regulations are an attempt to minimize the disturbance of riparian areas not to prohibit outright the removal of riparian vegetation or the placement of structures within the setback area. This application is a good example of this latter position as the evidence in the record supports a conclusion that the Applicant's proposed bridge complies with Lane County's riparian setback regulations. The suggestion that it is somehow incongruous to subject bridges to the jurisdiction of the county's riparian setback regulations is without merit.

Lane Code 16.253(2) sets out standards for the removal of vegetation within a riparian setback area. Lane Code 16.253(2)(a) provides that a minimum of seventy-five percent (75%) of the total area within the riparian setback area of any legal lot shall remain in an unaltered, indigenous state and Lane Code 16.253(2)(b) provides formulas for the removal of vegetation within the riparian setback area based upon shoreline linear frontage and square footage limitations.

The Applicant makes a reasonable argument, based upon the introductory language of Lane Code 16.253(2), that the standards of this section only apply to indigenous vegetation within the riparian setback area. However, this interpretation is inconsistent with the plain language of Lane Code 16.253(2)(b), which refers to "existing vegetation" and Lane Code 16.253(1), which explains that the purpose of the Riparian Regulations are, in part, to implement the Goal 5 Flora and Fauna policies and the Goal 6 Water Resources policies of the Lane County Rural Comprehensive Plan. In this respect, Goal 5 Flora and Fauna Policy #6 provides that "[R]iparian vegetation along all Class I streams in the County is recognized as being of high value for many purposes, notably wildlife habitat and stream bank stabilization." Neither of these functions require that the vegetation be "indigenous, only that it be located close enough to a Class I stream to be considered as "riparian."

The Planning Director and the Applicant propose different interpretations of Lane Code 16.253(2)(b) regarding the restrictions upon removal of existing vegetation "along the shoreline." The Applicant urges a literal view where only that vegetation located where the body of water contacts the land is subject to this aspect of the regulation. The Planning Director believes that "along the shoreline" should be measured by the linear distance of vegetation removal along parallel to the shoreline from the furthest points of disturbance within the riparian setback area.[3] It seems that the term "along" implies a less restrictive view of the standard that that proposed by the Applicant. Under the Applicant's interpretation, for instance, where there was one foot of grass between a creek and a stand of Cottenwood Trees, the trees could be removed without affecting the linear shoreline removal standard. On the other hand, the Planning Director's methodology seems to come dangerously close to comingling the overall removal standard with the shoreline standard. However, because I have found that the Applicant meets the standard of Lane Code 16.253(2)(b)(ii) under either analysis the point is moot.

The actual shoreline footage of the legal lot along the west bank is more than 300 feet, but less than 400 feet, and more than 320 feet, but less than 400 feet, along the east bank. Therefore, Lane Code

[3] See "Issue 3" discussed in the December 7, 2011 staff memorandum.

16.253(2)(b)(ii) is applicable as the legal lot upon which the proposed bridge will be placed has more than 200 feet but less than 400 feet of frontage along Lost Creek. The standard of this provision is that vegetative removal not exceed 25 percent of the total linear footage along the shoreline and an area not greater than 25 percent of the total square footage of the entire area within the riparian setback area.

Those opposed to the construction of the bridge have argued that Lane Code 16.253(2) should be interpreted to require that the total linear footage of shoreline should be calculated by combining the respective footage on both sides of the creek. This has not been the practice of the County for the reason that it would require a different standard depending upon whether the body of water bifurcated a single legal lot or two different legal lots. Applying the opposition's theory to the present case, the applicant would have to satisfy Lane Code 16.253(2)(b)(iii). However, if the current legal lot upon which the bridge was to be located was actually two legal lots (under the same ownership) divided by the creek, then Lane Code 16.253(2)(b)(ii) would apply. It seems reasonable and most fair to treat all ownership alternatives similarly and therefore the standards of Lane Code 16.253(2)(b) should be applied independently to the shoreline of each side of the creek.

About 4,740 square feet of vegetation removal will occur on the west bank of Lost Creek or 13.5 percent of the total square footage of the riparian setback area. Using the Planning Director's interpretation of "along the shoreline," the revised site plan indicates that the linear measurement of the disturbed area along the west bank is 75 feet, or 25 percent of the total linear feet of setback area. The revised site plan indicates that 3,586 square feet of vegetation removal will occur on the east bank of Lost Creek or about 13.5 percent of the total square footage of the riparian setback area. There will be about 80 feet of linear disturbance, excluding the garage encroachment, on the east side of the creek. This disturbance is 25 percent of the total linear footage along the shoreline of the east side of the creek.

Lane Code 16.253(3)

Lane Code 16.253(3) sets out standards for the modification to the applicable riparian setback standard for a structure. The first requirement is that the Oregon Department of Fish & Wildlife (ODF&W) be consulted at least 10 working days prior to the hearing. In the present case, "Notice and Opportunity to Comment" materials were sent to ODF&W on September 22, 2011. On October 3, 2011 electronic copies of submitted materials were sent to ODF&W staff and on October 18, 2011, notice of the November 10, 2011 hearing was sent to ODF&W staff. This requirement has been satisfied.

Lane Code 16.253(3) also imposes two other criteria on the placement of a structure within a riparian setback area. The first criteria, found in Lane Code 16.253(3)(a), is that the structure may not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2). As seen above, this standard has been met. The applicant then has a choice of meeting either Lane Code 16.253(3)(b) or (c).[4]

Lane Code 16.253(3)(b) requires that the riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. It is uncontested that over 8,000 square feet of riparian vegetation located within the setback area will be disturbed by the proposed bridge.

[4] The applicant has argued that Lane Code 16.253(3) should be read to require compliance with either (3)(a) & (b) or (3)(c). While the Hearings Official does not agree with this interpretation, the argument is moot as (3)(a) has been found to be satisfied and the Applicant must show compliance with either (3)(b) or (c).

The second option for the applicant, found in Lane Code 16.253(3)(c), is if it can be shown that an unduly restrictive burden would be placed on the property owner if the bridge was not allowed to be placed within the riparian setback area. The Lane County Board of County Commissioners have addressed this issue in Order 87–6–10–14 where they opined that "unduly restrictive burden" should be interpreted to mean that "practical difficulties" exist. This standard exists upon a continuum between a demonstration of mere inconvenience and where it would be impossible to develop property without a variance.

The opposition has pointed out that the existing access road has successfully been used to manage the forest practices that have occurred on the subject property. I concur. The applicant has clear cut most of the subject property, hauled off the logs, and has done some reseeding. I cannot imagine more intensive forest practices happening upon the subject property than those that have already occurred. However, despite the Applicant's attempts to cloak the bridge in the protection of the OFPA, the bridge must be stand on its own merits in regard to compliance with Lane Code 16.253 and 16.244. That is, the necessity of using the bridge as access for forest practices is just one argument that may be applicable. Other relevant arguments about whether a denial of the bridge would constitute an "unduly restrictive burden" (practical difficulty) must also be examined.

The applicant has argued that the existing access is not adequate to meet the County's regulations regarding access easements. Lane Code 15.706(3)(a) requires that a minimum road right–of–way or easement be 40 feet in width if it serves more than three lots. In the present case, the existing easement that connects the subject property to Rattlesnake Road to the south is 30 feet in width and serves the subject property in addition to four lots that are occupied with dwellings.[5] However, Lane Code 15.706(3)(c) states that "[N]otwithstanding LC 15.706(3)(a), a pre-existing easement of at least 20 feet in width and serving a lot or parcel created in its present configuration prior to April 28, 2004, is allowable provided it complies with other requirements of this chapter."

At first blush, it appears that the exception of Lane Code 15.706(3)(c) is not available to the Applicant. Pages 70 and 71 of Legal Lot Verification file PA 10–5317, titled "1950 – 2009" and "2009 –Present," respectively, shows the configuration of the subject property prior and after the October 2009 transfer of the Union Pacific Railroad's interest in the subject property to the Applicants. This transfer resulted in a reduction in the size in Parcels 1, 2 and 9 of the Schafler Tract. Therefore, at the very least the exception of LC 15.706(3)(a) is not applicable to the legal lot upon which the proposed bridge will be located or a portion of Parvin Butte that is zoned QM. Arguably, the exception is not available to any of the subject property as it was a tract of common ownership prior to the transfer and a reconfigured tract of common ownership after the transfer.

For arguments sake, I will assume that the exception of Lane Code 15.706(3)(c) is available to the Applicant. In this regard, Lane Code 15.706(4) requires a minimum travel width of 18 feet for roads or easements that serve four or more parcels; Lane Code 15.706(7) specifies required surface depth and structure; Lane Code 15.706(11) requires a minimum two-foot wide clear zone from the edge of the travel lane, and Lane Code 15.706(13) specifies maximum road grade. As noted in Finding of Fact #7,

[5] The access easement serves tax lots 1501, 2100, and 3400 (the subject property) of Assessor's Map 19–01–20–00 and tax lots 1400, 1500 and 1601, Assessor's Map 19–01–21–00. (Tax lots 2100 and 1601 have direct access onto Rattlesnake Road.)

the driving surface of this easement is asphaltic concrete that varies in width from 12 to 14 feet. The gravel shoulders are generally between one and two feet wide. Bringing the easement up to Code requirements of an 18 foot travel surface, with four feet of clear zone (shoulders) would be difficult and expensive as there is insufficient right–of–way to install normal cuts and fills and those necessary to support needed retaining walls. In addition, elevation differences create a difficulty in fitting existing driveways to an expanded travel surface and the steeper portions of the roadway will require high cut and fill banks. Finally, the Applicant's statement that property owners along the easement will not dedicate additional right–of–way has not been rebutted.

The Applicant also points to the existence of nine legal lots on the subject property; providing the Hearings Official with the opportunity to speculate on the potential for additional development. And "speculation" would be the operative word as the nine legal lots, are zoned F–2, are under the same ownership, and therefore would considered a "tract" for purposes of establishing a "template" dwelling under Lane Code 16.211(5). The approval of a "template" dwelling is determined by the soil characteristics of the tract as well as the number of lots and dwellings that existed on January 1, of 1993 that are located within a 160–acre square centered on the tract. Given the development pattern in the area surrounding the subject property the Applicant could probably satisfy the applicable template test but the evidence to substantiate this conclusion is not in the record.

Finally, the Applicant has also noted that the proposed bridge is necessary for aggregate removal from the quarry operation on the subject property. The Planning Director has maintained that the quarry operation, including the use of the access route to that operation, requires a site review permit. The interface between the use of heavy, large aggregate trucks and residential areas is always problematical because of noise, traffic and dust. The aerial photograph of the subject property indicates that the bridge access road, which would connect to Parvin Road, would have fewer adjacent residences that are located farther from the access road than that which exists with the existing access easement.

In summary, it appears that the existing easement does not meet Code width requirements to serve to any new use of the subject property. Also, it would be difficult and expensive for the applicant to upgrade the existing access road to meet the applicable road standards of Lane Code 15.706 even if this course of action was available. For these reasons, I must conclude that the denial of the riparian modification permit application would cause serious practical difficulties to the Applicant and would therefore constitute an "unduly restrictive burden."

Floodplain Development Permit (PA 11–5435)

Pursuant to Lane Code 16.244, the Applicant has applied for a Floodplain Development Permit for a bridge over Lost Creek. Applicable code language for Lane Code 16.244 is in boldface type:

(3) Lands to Which This Section Applies. This section shall apply to all areas of flood hazard within Lane County, and overlay the regulations of the underlying zone.

(a) Areas of flood hazard for Lane County under the jurisdiction of the Rural Comprehensive Plan are identified by the Federal Insurance Administration in a scientific and engineering report entitled "THE FLOOD INSURANCE STUDY FOR LANE COUNTY, OREGON UNINCORPORATED AREAS", with accompanying Flood Insurance Rate Maps.

(b) **Areas of flood hazard shall also include any land area designated by the Director as susceptible to inundation of water from any source where the above-referenced maps have not identified any special flood areas.**

(c) **Flood hazard areas shall be adopted by Board Order, made a part of Lane Manual (LM 11.020) and filed in the office of the Department. Such studies shall form the basis for the administration and implementation of this section.**

The proposed 20–foot wide bridge over Lost Creek is in an area designated as a special flood hazard area and is mapped and zoned "A" by the Federal Emergency Management Administration's (FEMA) Flood Insurance Rate Map (FIRM) community number 415591, panel 1690, suffix F, map number 41039C1690 F, Effective June 2, 1999. Pursuant to (3)(a) above, the proposed bridge is on lands designated as a special flood hazard area and therefore the floodplain combining zone (/FP–RCP) applies to this proposal.

(4) **Warning and Disclaimer of Liability. The degree of flood protection required by this section is considered reasonable for regulatory purposes. Larger floods can and will occur on rare occasions. Flood heights may be increased by human-made or natural causes. This section does not imply that land outside the areas of special flood hazards or uses permitted within such areas will be free from flooding or flood damages. This section shall not create liability on the part of Lane County, any officer or employee thereof, for any flood damages that result from reliance on this section or any administrative decision lawfully made hereunder.**

This warning and disclaimer statement shall be a condition of approval.

(5) **Development Subject to Director Approval. Approval shall be obtained before construction or development begins within any area of special flood hazard. Approval shall be required for all structures, manufactured homes, and "development" as this term is defined in LC 16.244(6). Application for approval shall be filed with the Department pursuant to LC 14.050.**

The construction of a bridge is defined as "development" pursuant to Lane Code 16.090, which defines it to include dredging, paving, and drilling operations and the storage of equipment and materials. The owners of the subject property have applied for a floodplain development permit for the construction of the bridge over Lost Creek and in the special flood hazard area as mentioned above.

(7) **Designation of Administrator. The Director shall:**

(a) **Review all development applications to determine that the permit requirements of this section have been satisfied.**

The Applicant has argued that a flood plain development permit is not necessary as the bridge is part of a forest operation and therefore exempt from local regulation (except for building permit regulation). This decision has found, however, that pursuant to ORS

527.722(2)(c), the bridge is a permanent structure that is subject to local government regulation.

(b) **Review all development applications to determine that all necessary permits have been obtained from those Federal, State or Local governmental agencies from which prior approval is required.**

Besides building permit approval a permit from DOGAMI and a riparian modification permit from Lane County are required. No other permits are known to be required.

(c) **Review all development applications to determine if the proposed development is located in the floodway. If located in the floodway, assure that the encroachment provisions of LC 16.244(8)(d) are met.**

According to the above referenced FIRM, this project is not located within a floodway.

(d) **When base flood elevation data has not been provided in the Flood Insurance Study for Lane County, Oregon unincorporated areas, the Director shall obtain, review and reasonably utilize any base flood elevation and floodway data available from a Federal, State or other source in order to administer this section.**

The "A" zone is a mapped 100-year flood area without a base flood elevation (BFE). There are various methods Lane County can use to determine a base flood elevation that include techniques ranging from simple to complex hydraulic analysis. The Applicant's engineer has computed a design flood elevation of 686.2 feet NGVD 1929 based upon the most current Flood Insurance Study information and flows from a studied area south of the project within the same FIRM. This elevation is based on the engineer's hydraulic design of the proposed bridge, which has not been challenged.

The opponents have thoroughly documented the flooding that has occurred within the area around the subject property. While this anecdotal evidence is not questioned, it is not possible to translate this information into an accurate picture of whether the FIRM map is flawed and, if so, by how much. The evidence also is not sufficient to quantify how much of the flooding can be attributed to blockage of the creek by the blocked culverts and trash rack located at the railroad trestle located downstream from the proposed bridge.

The best information available to the Hearings Official is the FIRM map and the hydraulic analysis done by the Applicant's engineer. Based upon this information the proposed bridge is designed to meet the standards of Lane Code 16.244 in regard to structures.

(e) **Where base flood elevation data is provided through the Flood Insurance Study or required as in LC 16.244(7)(d), obtain and record the actual elevation (in relation to mean sea level) of the lowest floor (including basement) of all new or substantially improved structures, and whether or not the structure contains a basement.**

This proposal is located in Zone "A" with a design base flood elevation of 686.2 feet. The road leading to and from the bridge slopes down from station 2-08.5 to 0-14.23 and from 0+75.52 to the end of the project at station 2+57.47. Obtaining and recording of actual elevations are made a condition of approval and are submitted on an elevation certificate (FEMA form 81-31, Mar 09). Additionally, an "as-built" drawing is required to provide both horizontal and vertical alignment documentation that the structure was accurately constructed according to the permit.

(f) **For all new or substantially improved flood-proofed structures:**

(i) **Verify and record the actual elevation (in relation to mean sea level) to which the structure was flood proofed; and**

(ii) **Maintain the flood-proofing certifications required for elevation of nonresidential construction in zones A1-10, AH and AE.**

The proposed bridge meets the definition of a structure, but does not have an enclosed area or attendant utility and sanitary facilities. The elevations shown on the design drawing indicate that the bottom of the proposed bridge is approximately 0.8' above the design base flood elevation. If a flood-proof certification is required, Section 8(d), Table 1, subsection labeled "Elevation: Nonresidential" will apply along with a completed FEMA form 81-31, Mar 09 (Elevation Certificate).

(g) **Maintain for public inspection all records pertaining to the Provisions of this section.**

The flood-proofing and other flood related documents are kept on file with the Planning Department for public inspection.

(h) **Notify adjacent communities and the Department of Land Conservation and Development prior to any alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Insurance Administration.**

There is no indication that the proposal alters or relocates Lost Creek. The roadside ditch is realigned and a culvert installed to match the proposed new road alignment. The Department of Land Conservation and Development was notified during the referral period and no comments were received.

(i) **Require that a program of periodic inspection and maintenance be provided with the altered or relocated portion of said watercourse so that the flood carrying capacity of the watercourse is not diminished.**

The watercourse is not altered. Therefore a periodic inspection and maintenance is not required.

(j) **Make interpretation, where needed, as to exact location of the boundaries of areas of special flood hazards (for example, where there appears to be a conflict between a**

mapped boundary and actual field conditions). A person contesting the location of the boundary may appeal the interpretation to the Hearings Official as provided in LC 14.500.

As noted above, the subject property is located in the "A" Zone which, by definition, does not have an elevation tied to it. The Applicant's engineer did a hydraulic analysis, using available data, including a FEMA hydraulic study done near the area, and proposed an elevation. This elevation and the vertical and horizontal boundaries associated with this elevation were not challenged.

(8) **Provisions for Flood Hazard Reduction. In all areas of flood hazard, the following standards are required:**

(a) **Provisions applicable to Unnumbered A, A1-10, AH and AE zones:**

(i) **All new construction and substantial improvements shall be constructed with approved materials and utility equipment resistant to flood damage.**

(ii) **All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.**

(iii) **Electrical, heating, ventilation, plumbing and air-conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.**

The materials used to construct the proposed bridge and road are governed by the Forest Zone Fire Siting requirements of LC16.244. Lane Code 16.211(8)(e)(iii) states:

"Bridges and culverts shall be constructed to sustain a minimum gross vehicle weight of 50,000 lbs. and to maintain a minimum 16-foot road width surface or a minimum 12-foot driveway surface. The Planning Director may allow a single-span bridge utilizing a converted railroad flatcar as an alternative to the road and driveway surface width requirements, subject to verification from a engineer licensed in the State of Oregon that the structure will comply with the minimum gross weight standard of 50,000 lbs."

The proposed bridge is designed by a licensed engineer as a concrete structure. This material is allowed per Lane Code 16.244(8)(e)(iii). The Lane County Building Program governs the methods and practices used to construct the bridge. The design standards are deferred to the Building Program through the building permit process.

(b) **Review of Building Permits. Where elevation data is not available either through the Flood Insurance Study or from another authoritative source, applications for building and manufactured home placement permits shall be reviewed to assure that proposed construction will be reasonably safe from flooding. The test of reasonableness shall include the use of historical data, high water marks, photographs of past flooding, etc., where available.**

A hydraulic study was conducted to enable the proposed bridge and road to be designed to be reasonably safe from flooding. The design elevation is calculated to be 686.2 feet, which is approximately 0.8 feet below the bottom of the proposed bridge.

(c) **Floodways. Located within areas of special flood hazard established in LC 16.244(3) are areas designated as floodways. Since the floodway is an extremely hazardous area due to the velocity of flood waters which carry debris, potential projectiles and erosion potential, the following provisions apply:**

(i) **Prohibit encroachments, including fill, new construction, substantial improvements and other development unless certification by a registered professional engineer is provided demonstrating that encroachments shall not result in any increase in flood levels during the occurrence of the base flood discharge. This evidence shall utilize hydrologic and hydraulic analyses performed in accordance with standard engineering practices.**

(ii) **Where base flood elevations have been provided but floodways have not, the cumulative effect of any proposed development, when combined with all other existing and anticipated development, shall not increase the water surface elevation of the base flood more than one foot at any point.**

(iii) **If LC 16.244(8)©(i) is satisfied, all new construction and substantial improvements shall comply with all applicable flood hazard reduction provisions for development in zones A1-30, AH and AE.**

(iv) **Subdivision and partitioning of land for residential purposes is prohibited if land is located entirely within the Floodway.**

The proposed development is not located within a floodway.

(d) **Development in areas of special flood hazard shall also comply with the provisions in Table 1: Provisions for Flood Hazard Reduction.**

The development is in the designated flood zone "A" with a design base flood elevation provided by the owners' engineer. Table 1 provides development standards for each flood zone designation, but doesn't make accommodations for areas where the Director uses a base flood elevation from another source. It seems reasonable to apply the Provisions for Flood Hazard Reduction, Table 1 that refer to the "A1-30," "AH" and "AE" zones. This decision uses the provisions for those zones that have determined base flood elevations instead of the "A" zone provisions.

Table 1: Provisions for Flood Hazard Reduction

The submitted plans show the bridge and abutments on either side of Lost Creek. The anchoring requirement is addressed in the building permit process and has traditionally been made a condition of approval.

Foundations and Anchoring, A1-30, AH and AE

(1) **All new construction and substantial improvements subject to less than 18 inches of flood water during a 100-year flood shall be anchored to prevent flotation, collapse and lateral movement.**

The abutments are the foundation of the proposed bridge and are susceptible to more than 18 inches of flooding. The lowest adjacent grade at the west abutment is approximately 680.8 feet, which is 5.4 feet below the design base flood elevation. This section does not apply. (See Section 5 below for flooding more than 18").

(2) **All manufactured homes subject to less than 18 inches of flood water during a 100-year flood shall be anchored and/or supported to prevent flotation, collapse and lateral movement, in accordance with the State of Oregon, Manufactured Dwelling Standard.**

This section does not apply as the proposal is for a bridge.

(3) **All new construction, substantial improvements and manufactured homes not in an existing manufactured home park or existing manufactured home subdivision subject to 18 inches or more of flood water during a 100-year flood, shall be anchored to prevent flotation, collapse, and lateral movement which may reasonably occur independently or combined. Designs for meeting this requirement shall be certified by an Oregon registered engineer or architect.**

This section does not apply as the proposal is for a bridge.

(4) **All manufactured homes in existing manufactured home parks and existing manufactured home subdivisions shall be anchored to prevent flotation, collapse, and lateral movement, in accordance with the State of Oregon, Manufactured Dwelling Standard.**

This section does not apply as the proposal is for a bridge.

(5) **Foundations for all new construction, substantial improvements, and manufactured homes that are not in an existing manufactured home park or existing manufactured home subdivision subject to 18 inches or more of flood water during a 100-year flood or located within a designated floodway, shall be certified by an Oregon registered professional engineer or architect to meet the following minimum foundation requirements:**

(a) **concrete footings sized for 1000 psf soil pressure unless data to substantiate the use of higher values are submitted.**
(b) **footings extending below the frost line.**
(c) **reinforced concrete, reinforced masonry, or other suitably designed supporting systems to resist all vertical and lateral loads which may reasonably occur independently or combined.**

The abutments are the foundation of the proposed bridge and are susceptible to more than 18 inches of flooding. The lowest adjacent grade at the west abutment is approximately 680.8 feet,

which is 5.4 feet below the design base flood elevation. Therefore, the abutments must meet the minimum requirements of this section. The owners' have not provided a certification from the engineer however, the standards of Section (5) of Table 1 of Lane Code 16.244(8) have been made a condition of approval that can be reviewed at the time of building permit review.

Elevation: Nonresidential, A1-30, AH and AE

New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall either have the lowest floor, including basement, elevated to a level at least one foot above the base flood elevation; or, together with attendant utility and sanitary facilities shall:

(a) be flood-proofed to one foot above the base flood level, so the structure is watertight with walls substantially impermeable to the passage of water;

(b) have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy;

(c) be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications and plans. Such certification shall be provided to the official as set forth in LC 16.244(7)(f)(ii). Nonresidential structures that are elevated, not flood-proofed, must meet the same standards as residential construction of fully enclosed areas below the lowest floor in zones A1-30, AH and AE.

(d) Applicants flood-proofing nonresidential buildings shall be notified that flood insurance premiums will be based on rates that are one foot below the flood-proofed level (e.g., a building constructed to the base flood level will be rated as one foot below that level).

The finished grade of the proposed bridge is an elevation of 689.5, which equates to being 3.3 above the design base flood elevation. The area below the finished grade is not considered an enclosed area, so the flood proofing requirement is not applicable. This requirement is met when the bridge is complete and the elevation verified. This is made a condition of approval and is verified by an approved FEMA elevation certificate, certified and stamped by a licensed surveyor.

Roads, A1-30, AH and AE

(1) Adequate provisions shall be made for accessibility during a 100-year flood, so as to ensure ingress and egress for ordinary and emergency vehicles and services during potential future flooding.

(2) No road surface of any new street, road or access road shall be at an elevation less than one foot below the base flood height.

The existing road grade is below the design base flood elevation from approximate station 0-79 to station 2+57.47. The proposed development will increase the elevation of the road at a slope of 5.495% from station 2+57.47 to station 1+58.33. At approximate station 1+60, the elevation of the road is 1 foot below the design flood elevation. From station 1+60 west, the road grade is above the design base flood elevation. Road grades shall be verified by an "as-built" drawing

stamped and certified by a licensed surveyor. Once the project is complete, a final "As-Built" drawing shall be submitted to the Planning Director.

Summary

The proposed bridge was found to be within Lane County's land use planning jurisdiction. The Applicant's request for a riparian modification was found to conform to the applicable criteria of Lane Code 16.253 and the Applicant's request for a floodplain development permit was found to conform to the applicable criteria of Lane Code 16.244.

Respectfully Submitted,

Gary Darnielle
Lane County Hearings Official