

PASSED

IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

Order No. 06- 9-27-2 ) In the Matter of Electing Whether or Not to Hear Arguments  
) on Appeals of the Hearings Official Affirming the Planning  
) Director's Decision and Approving, with modification, an  
) Application for a Special Use Permit for a Dwelling in the  
) Prime Wildlife Shorelands Combining Zone (file PA 05-  
) 6026/Peters).

WHEREAS, the Lane County Hearings Official has made a decision affirming, with modifications, a Planning Director approval of Special Use Permit for a dwelling in the Prime Wildlife Shorelands Combining Zone, application PA 05-6026; and

WHEREAS, the Lane County Planning Director has accepted 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 application PA 05-6026; and

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

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


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

1. That the appeal does not comply with the criteria of Lane Code Chapter 14.600(3) and arguments on the 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 July 24, 2006 interpreting applicable provisions of Lane Code 16.238, the Lane County Comprehensive, including Goal 5 policies and their relation to federal law, attached as Exhibit "B", is affirmed and adopted by the Board of County Commissioners as its own interpretation in reaching a final decision on this application.

DATED this 27th day of September, 2006.

  
Chairperson, Lane County Board of Commissioners

APPROVED AS TO FORM

Date 9-20-2006 Lane county  
  
OFFICE OF LEGAL COUNSEL

**FINDINGS IN SUPPORT OF THE ORDER**

1. Property involved in this action is identified as tax lot 301, map 15-12-27.4, a 1.6 acre parcel located north of Ten Mile Creek and south of Yachats. The property is designated Rural Land by the Rural Comprehensive Plan and is zoned RR-2. The parcel is also within the Prime Wildlife Shorelands Combining Zone.
2. In the form of application PA 05-6026, the property owner in July 2005 requested Planning Director approval of a Special Use Permit for a dwelling and ancillary structures within the Prime Wildlife Shorelands Combining Zone, pursuant to Lane Code 16.38(4)(a) and the criteria found in LC 16.238(6) & (7).
3. The Planning Director conditionally approved the request on March 24, 2006.
4. A timely appeal of the Planning Director decision was filed by adjacent landowners (Keseys) on April 5, 2006.
5. A de-novo hearing before the Lane County Hearings Official was held on May 18, 2006, with the record closing on June 21, 2006.
6. On July 24, 2006, the Hearings Official issued a decision affirming the Planning Director, with modifications. One of the conditions relocated the proposed dwelling slightly eastward.
7. Timely appeals of the Hearings Official decision were filed by both the Applicants (Peters) and original Appellants (Keseys) on August 3, 2006; the appeals were accepted by the Director and forwarded to the Hearings Official.
8. On August 8, 2006, the Hearings Official affirmed his decision.
9. The appeals state that the Approval Authority exceeded his authority and jurisdiction, failed to follow applicable procedure and rendered a decision which misinterpreted Lane Code, state and federal law.
10. 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.*
11. The Board of Commissioners finds that the issues raised in this appeal pertain to a narrow band of beachfront properties in the approximate northern half of the county, and to land adjacent to one or two streams extending a few miles inland, where *Oregon Silverspot Butterfly* habitat is found.

The geographic area to which the issues raised pertain is limited, and the interpretation of law by the Hearings Official can be affirmed by the Board as an appropriate response to them, and could be used in other similar situations.

12. The Board of Commissioners finds that while requests for development proposals along this area of the coast are not infrequent, there is no need for policy guidance because the Board agrees with the manner in which the Hearings Official implemented the Lane Code 16.238, the Comprehensive Plan, Goal 5 policies, and their relation to federal law.
13. The Board of Commissioners finds that the property does contain habitat for a species listed as Threatened under the Endangered Species Act. However, the nectar plant, *Viola adunca*, food source for the *Oregon Silverspot Butterfly*, is not unique. The decision by the Hearings Official prioritized preservation of that habitat, increasing the probability that the habitat will be preserved.
14. Neither the Planning Director nor the Hearings Official recommend review.
15. 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.
16. The Board has reviewed this matter at its meeting of September 27, 2006, and finds that the appeals do not comply with the criteria of Lane Code Chapter 16.600(3), and elects to not hold an on the record hearing.
17. The Board expressly agrees with the July 24, 2006 decision of the Lane County Hearings Official interpreting Lane Code 16.238, the Comprehensive Plan, Goal 5 policies, and their relation to federal law, attached here as Exhibit "B". The Hearings Official's decision and interpretations are affirmed and adopted by the Board of County Commissioners as its own interpretation.

**LANE COUNTY HEARINGS OFFICIAL  
APPEAL OF A PLANNING DIRECTOR DECISION APPROVING A SPECIAL  
USE PERMIT FOR THE PLACEMENT OF A SINGLE-FAMILY DWELLING  
WITHIN A RURAL RESIDENTIAL/PRIME WILDLIFE SHORELANDS COMBINING  
DISTRICT (R-2/PW/RCP)**

**Application Summary**

Mervin and Brenda Peters received Planning Director approval, subject to conditions, to place a dwelling and accessory structure on tax lot 301, assessor's map 15-12-27-40 on March 24, 2006. Joe and Sue Kesey filed a timely appeal of this decision on April 5, 2006.

**Application History**

Hearing Dates:           May 18, 2006  
                                  (Record Closed June 21, 2006)

Decision Date:           July 24, 2006

**Appeal Deadline**

An appeal must be filed within ten days 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 County Rural Comprehensive Plan  
Lane Code 16.290(2)(a)  
Lane Code 16.238(6) and (7)

**Findings of Fact**

1.     The Findings of Fact of the March 24, 2006 Planning Director decision in this matter are incorporated into this decision by reference except where explicitly modified. Also incorporated by reference are the observations contained in the June 6, 2006 site review report.
  
2.     Mervin and Brenda Peters wish to construct a dwelling on tax lot 301, assessor's map 15-12-27-40. This property, hereinafter referred to as the "subject property," is owned by Phyllis Williams. The subject property is 1.57 acres in size, is a legal lot<sup>1</sup> and is zoned

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<sup>1</sup> Per PA 05-5279 legal lot verification.

Rural Residential 2-acre minimum (RR-2), Prime Wildlife Shorelands Combining Zone (PW). The subject property is currently vacant.

The subject property is narrow (100 feet) and about 690 feet in length and is located on a marine terrace. The western edge of the subject property varies between 31 and 62 feet from the terrace bluff that drops to a beach about 15 feet below. The subject property is occupied by vegetation that is typical of near-shore areas along the central Oregon coast. It is covered with thickets of salal, evergreen huckleberry and black twinberry. There are open areas that support a mixture of grasses and other herbaceous plants. A wetland area, located just west of the mid-point of the subject property, is occupied by slough sedge and reed canary grass.

Some areas of the subject property have been cleared in the past and have lighter herbaceous vegetation cover and scattered shrubs. These more open areas can serve as habitat for early blue violet plants (*Viola adunca*) that serve as a necessary component for the survival of the Oregon Silverspon, a butterfly that is federally listed as Threatened. The plant is the primary food source for the butterfly and its larvae. A survey of the subject property by Lorena Wilson, an environmental consultant with a Master's degree in botany, disclosed seven populations of early blue violet on the subject property representing a total of 34 plants.<sup>2</sup> These populations were located within four of the six 100' x 100' grid cells that Ms. Wilson had overlayed on an aerial photograph of the subject property. The majority of these populations were located in the easternmost 35 percent of the subject property although one population of six plants was located at the westernmost edge of the property. An additional three populations (30 plants) of early blue violet were located on the terrace edge west of the property boundary.

One of the early blue violet populations was located in Grid Cell #F, the grid cell located closest to Highway 101 and the grid cell within which the applicant has received preliminary septic tank approval for two test pits. This early blue violet population is represented by two blooming plants.

3. The southwest corner of the applicant's proposed dwelling, as approved by the Planning Director, is about 65 feet from the top of the terrace bluff. The northwest corner of the structure appears to be within 10 feet of a population of early blue violet. The structure is proposed to have a footprint of 1248 square feet (24' x 52') with an 8' x 52' porch. The dwelling will be built with natural cedar shingle siding, cedar trim and a chimney constructed of local rock. The roofing material will be a natural-looking, raised profile architectural composition by Elk-Barkwood and will be dark in color.<sup>3</sup>
4. The subject property is bordered on the north by tax lot 315, which is owned by the appellants and developed with a single-family residence. A dwelling is currently being constructed on tax lot 308, adjacent to the north of tax lot 315. Tax lot 312, a 2.2 acre parcel occupied with a residential structure, borders the subject property on the south.

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<sup>2</sup> Exhibit E-3 of Applicant's May 18, 2006 submission, page 2.

<sup>3</sup> Exhibit G of Applicant's May 18, 2006 submission.

The proposed dwelling, as sited by the Planning Director's decision, would interfere with the northerly ocean view of the dwelling on tax lot 312 and the southerly ocean view of the dwelling on tax lot 315. The subject property is bordered on the east by Highway 101 and by the Pacific Ocean on the west.

5. An erosion study was prepared by EGR & Associates (6/1/2005) that documents an annual shoreline erosion rate of .36'. Per Lane Code 16.238(7)(b), a 50' setback would theoretically safeguard the dwelling for 69 years. The actual selected setback is 70' and is reflected in the approved plot plan (dwelling foundation is 80' from the nearest edge of top of the bluff, with a 2<sup>nd</sup> story porch protruding 10' westward, with posts).
6. The Coastal Resources Management Plan is a single-purpose plan under the Lane County Rural Comprehensive Plan (RCC)<sup>4</sup> and the Goal Seventeen: Coastal Shorelands policies of the RCC are excerpted from the Coastal Resources Management Plan. The subject property is mapped in Prime Wildlife Habitat Unit No. 38 of the Coastal Resources Management Plan.
7. The applicant's proposal has been reviewed by a representative of the U.S. Fish and Wildlife Service. This review identified four concerns that, if affirmatively addressed by the Planning Director, would make it unlikely that an Endangered Species Act of 1973 "take" would occur.<sup>5</sup> These concerns addressed the rerouting of the driveway, the creation of new early blue violet habitat, the creation of a small buffer zone around blue violet plants closest to the dwelling, the use of construction fencing and/or flagging to mark the location of the sensitive plant areas and permission of U.S. Fish and Wildlife Service employees to verify the implementation of protective measures during construction. These concerns, including the rerouting of the driveway, were integrated into the conditions of approval of the Planning Director's March 24, 2006 decision.

### Decision

THE MARCH 24, 2006 DECISION OF THE LANE COUNTY PLANNING DIRECTOR IN THE MATTER OF PA 05-6026 IS AFFIRMED, WITH THE FOLLOWING ADDITIONS TO THE PLANNING DIRECTOR'S CONDITIONS OF APPROVAL:

1. The site of the proposed dwelling shall be moved eastward so that it will not unreasonably intrude upon the ocean view of the existing dwellings on tax lots 312 and 315. For purposes of this condition, this location can be represented by a line drawn from the southwest corner of the deck on tax lot 315 to the northwest corner of main structure on tax lot 312.

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<sup>4</sup> See Chart One of the RCC.

<sup>5</sup> See letter from Kemper M. McMaster, U.S. Fish and Wildlife Service to Mr. James W. Spickerman, received on December 5, 2005.

2. No early violet populations shall be destroyed in the construction of the proposed dwelling, driveway, beach access path, septic tank system or other facilities or accessory structures associated with the development of the subject property.

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

#### **Approval Criteria**

The subject property is zoned Rural Residential, two-acre minimum lot size (RR-2). It is subject to Lane Code 16.292(2)(a), which allows the placement of a single-family dwelling or manufactured dwelling on a lot or parcel outright. However, the subject property is also subject to the County's Prime Wildlife Shorelands Combining District (/PW) (Lane Code 16.238).

The Prime Wildlife Shorelands Combining District provides an additional layer of land use regulation to the subject property. Lane Code 16.238(4)(a)(i) allows single-family dwelling units and mobile homes subject to compliance with consistency with Lane Code 16.238(6), (7) and (8).

#### **Allegations of Error**

1. **LC 16.238(6)(a). No more of a parcel's existing vegetation shall be cleared than is necessary for the permitted use, accessory buildings, necessary access, septic requirements and fire safety requirements.**

Literally read, the scope of this provision addresses the wasteful and unnecessary destruction of vegetation when siting a dwelling. The appellants argue that this is too narrow a construction and that LC 16.238(6)(a) is also concerned with the siting determination itself, and the natural consequences that follow regarding vegetation removal. I must agree with the appellants. The /PW zone is specifically concerned with the protection of riparian vegetation and the habitat of species of concern. I believe that it is fair to assume that the broader reading of this provision is consistent with the goals of the /PW zone. Also, a narrow reading of this provision would seem to make it redundant with Lane Code 16.238(6)(c).

Despite a broad interpretation of LC 16.238(6)(a), it must be understood that it is not preeminent among the provisions of Lane Code 16.238(6). That is, the siting of the permitted use, in this case a dwelling, must also be determined by considering areas with the least vegetative cover,<sup>6</sup> aesthetic concerns,<sup>7</sup> and, of course, the protection of sensitive species habitat.

The primary "on the ground" impact of the more broad interpretation of LC 16.238(6)(a) is that the length of the driveway must be a consideration. Thus, if the dwelling was

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<sup>6</sup> Lane Code 16.238(6)(b).

<sup>7</sup> Lane Code 16.238(6)(j).

located near the Highway, the amount of vegetation removal would be minimized since the driveway would be shorter.

The best way to illustrate an analysis regarding compliance with LC 16.238(6)(a) is to use Ms. Loverna Wilson's survey grid of the subject property.<sup>8</sup> Ms. Wilson grid divides the subject property up into six 100' x 100' sections, numbered A to F from west to east. While the grid appears to be overlain on a less than current aerial photograph, it does precisely locate early blue violet. Grid Cell #E, the cell with the greatest number of early blue violet populations, is clearly a no-build zone despite it having the least vegetative cover. By the same token, Grid Cell #C, the site of a wetland, should also be considered a no-build zone. Ms. Wilson points out that on the subject property, the highest value habitat is the open herbaceous meadows with early spring violet communities and not the dense, woody vegetation areas.<sup>9</sup>

Of the remaining four grid cells, cells A, D, and F each have one colony of early blue violet. Each of these grid cells, however, is located adjacent to grids or areas with significant populations of early blue violet. Further, Grid Cells F and D have less vegetative areas in which habitat improvement could occur. The only grid cell that is located a significant distance from an identified early blue violet population is Grid Cell #B.

Because of driveway length, the plot plan approved by the Planning Director represents the design that results in the most permanent clearing of vegetation. In my analysis of consistency with LC 16.238(6)(j), below, the approved site of the dwelling is moved eastward about 31 feet. This location reduces the length of the driveway and moves the dwelling as far from existing early blue violet populations as possible.

**2. LC 16.238(6)(b). To the maximum degree possible, building sites shall be located on portions of the site which exhibit the least vegetative cover.**

The blue violet populations best propagate in open, disturbed soil and without the "maximum degree possible" clause, this provision would directly conflict with the protection of that resource. The provision would also conflict with wetland regulations. The vegetation on the remainder of the subject property is relatively uniform in coverage although my site view observations were that a slightly thicker and taller canopy existed on the western portion in Grid Cells A and B. The vegetation of the subject property is not uniform, however, as Grid Cells A and B are composed primarily of salal and false lily-of-the-valley while the more easternmost grid cells are more diverse, being composed of a mixture of black twinberry, salal, evergreen huckleberry and a more varied collection of associated species.<sup>10</sup>

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<sup>8</sup> Exhibit E-1 of Applicant's May 18, 2006 submission, page 3.

<sup>9</sup> Ibid at page 2.

<sup>10</sup> Appendix A of Exhibit E-3 of Applicant's May 18, 2006 submission.

3. **LC 16.238(6)(c). Construction activities occur in such a manner so as to avoid unnecessary excavation and/or removal of existing vegetation beyond that area required for the facilities indicated in LC 16.238(6)(a) above. Where vegetation removal beyond that allowed in LC 16.238(6)(a) above cannot be avoided, the site shall be replanted during the next replanting season to avoid sedimentation of coastal waters. The vegetation shall be of indigenous species in order to maintain the natural character of the area.**

This criterion addresses the issue of ensuring that excess vegetation is not removed during construction after the facilities permitted by LC 16.238(6)(a) are sited. The Planning Director's decision outlines a number of conditions that implement this standard, including requiring a 10' buffer zone around the early blue violet plants closest to the building site, the use of construction fencing and flagging to mark sensitive areas, notice of construction to U.S. Fish & Wildlife and Oregon Fish & Wildlife offices and permission to allow these agencies to monitor construction activities.

4. **LC 16.238(6)(f). The shoreward half of the setback area specified by LC 16.238(7) below must be left in indigenous vegetation, except where unsurfaced trails are provided.**

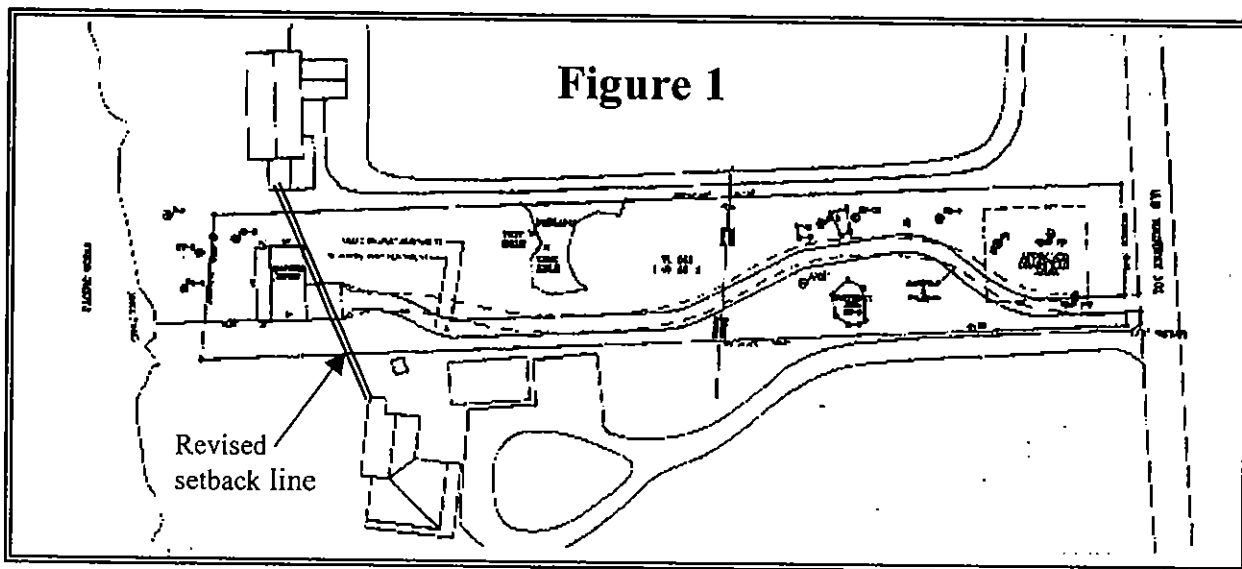
The applicant's site plan does not currently contemplate a path but such a route is allowed by this approval criterion and the Planning Director's decision. It is likely that a small 3-foot wide path will be necessary because this decision requires that the proposed dwelling be moved to the east. As a condition of approval, the path must avoid existing early blue violet populations.

5. **LC 16.238(6)(j). Structures shall be sited and/or screened with natural vegetation so as not to impair the aesthetic quality of the site.**

To a large degree, the aesthetic quality of the site is already predetermined by the location of existing development in the area. Adjacent to the north of the subject property, tax lots 315 and 310 are currently developed with residences and a dwelling on tax lot 308 is currently under construction. Each of the dwellings on these lots are located at the western end of the property and parallel to Ten Mile Creek and the ocean. To the south, adjacent tax lot 312 is developed with a residence on its western end. Further south, tax lot 313 is developed although the dwelling on this lot is much closer to Highway 101 because there are two properties owned by the State of Oregon that are located between it and Ten Mile Creek. As viewed from either the highway or the beach, the land use pattern around the subject property is one where dwellings are placed near the westernmost portion of the property upon which they are located. Placement of a dwelling in the middle or at the easternmost edge of the subject property would not be harmonious with this pattern.

The placement of a dwelling can also negatively impact the aesthetic quality of adjacent homes in terms of disruption of site view. Currently, the structure on tax lot 312, south of the subject property, has a largely unobstructed view of the beach to the north as it is set

back further than the dwelling on tax lot 315. In turn, this structure does not obstruct the southerly beach view of the dwelling situated on tax lot 315. The applicants' propose to site their dwelling porch about 70 feet back from the terrace bench but still in a position to infringe upon the beach view of the dwelling on tax lot 312, looking north, and the dwelling on tax lot 315, looking south. To preserve the existing aesthetic beach viewshed of adjacent properties, the applicant must move their proposed dwelling to the east about 31 feet. The revised setback can be established by drawing a line from southwest corner of the deck on tax lot 315 to the northwest corner of main structure on tax lot 312. Figure 1 is a modified graphic of the applicants' plot plan that illustrates the revised setback line. The new location will be farther from the established early blue violet populations at the west end of the subject property but still remain in Grid Cells #A and #B. Additionally, the driveway length will be shortened accordingly.



6. **LC 16.238(6)(k). The exterior building materials shall blend in color, hue and texture to the maximum amount feasible with the surrounding vegetation and landscape.**

The surrounding vegetation and landscape can be characterized as a mixture of subdued green, brown and rust tints. The applicants propose that the exterior of the proposed dwelling will consist of natural cedar shingle siding, cedar trim and a chimney constructed from local rock. Roofing material will similarly be selected for natural-appearing qualities. I believe that the design of the proposed dwelling is consistent with this criterion.

7. **Failure to Apply Rural Comprehensive Plan Policies.**

The appellants have argued that the application does not meet several Flora and Fauna policies of the Lane County Rural Comprehensive Plan (RCC). Whether or not the language is sufficiently directive and relevant is determined by the language of the

policy. The appellants cite four policies against which they believe the application must be measured:

**Flora & Fauna Policy #1: Implement construction, development and other land use activities which significantly alter natural systems only after evaluation of effects on wildlife habitats and natural areas.**

This policy does not provide any individual criteria for the evaluation of a land use application and is implemented through the Prime Wildlife Shorelands Combining Zone. Lane Code 16.238(1) notes that the /PW zone is specifically applied to areas of "...habitats of rare or endangered species..." and that the purpose of the zone is, in part, to "...protect wildlife habitat.

**Flora & Fauna Policy #2: Recognize existing federal and state programs protecting threatened or endangered fish and wildlife species.**

Comments received in December of 2005 from the U.S. Fish and Wildlife Service<sup>11</sup> suggested four steps to minimize the potential of harm to the Oregon silverspot butterfly from loss of nectar sources. These steps included rerouting the proposed driveway to avoid blue violet seedlings, the clearing of some brush near to wetland to provide more plant habitat, the use of a 10-foot buffer zone around blue violet plants located closest to the house and the fencing or flagging of sensitive plant areas prior to construction. The applicant has rerouted the driveway to avoid identified blue violet populations and the Planning Director has implemented the other three "steps" in Condition of Approval #5 of his March 24, 2006 decision. In addition, Condition of Approval #5 requires the applicant to provide the U.S. Fish and Wildlife Service office with at least one week's notice prior to initial building construction to allow the monitoring of the construction activity by a representative of that agency. The Planning Director has not just "recognized" the federal Endangered Species Act of 1973, he has affirmatively adopted the recommendations of the federal agency that is charged with the implementation of that law. This policy has been met through this land use permit process.

**Flora & Fauna Policy #3: Through the use of County regulations including zoning, seek to minimize the adverse impacts of land use changes on sensitive species (those susceptible to significant population declines resulting from habitat modification).**

This policy provides general policy direction regarding how adverse impacts on sensitive species from land use changes can be minimized. The policy provides that zoning is one tool in that minimization process. The zoning of the subject property as Prime Shorelands Wildlife Combining Zone and the application of applicable criteria of that zoning district to the present application are consistent with Policy 3.

**Flora & Fauna Policy #13: In its program of protecting "1C" resources, the County shall make maximum practical use of existing land use regulations (e.g., Willamette**

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<sup>11</sup> McMaster letter.

**Greenway Permit, Coastal Resources Zoning overlays, rural forest and agricultural resource zones) to achieve such protection. Duplication of existing standards shall be avoided wherever practicable, provided County-determined Goal 5 and OAR 660-16-000/025 objectives are met.**

In the present case, the County has applied the applicable criteria of the Prime Shorelands Wildlife Combining Zone, a Coastal Resources Zoning Overlay, to the present application. This zoning district has received acknowledgment of compliance and Goal 5 is no longer directly relevant to land use permit processing.

The Planning Director's decision is consistent with all policies of the Rural Comprehensive Plan that have been identified as being relevant to the present application

**8. Failure to Apply Coastal Resources Management Plan Policies.**

The policies of the Lane County Coastal Resources Management Plan (CRMP) that apply to significant natural areas and prime wildlife areas have been replicated verbatim in the RCC.<sup>12</sup> Policy 1 of the Prime Wildlife Area Management Unit of the CRMP states that "No use shall be permitted within the Prime Wildlife Shorelands Management Unit unless that use is determined to be consistent with the protection of natural values identified in the Coastal Resources Management Plan's description of the Management Unit." The subject property is located in Prime Wildlife Management Unit #38 which is described on page 66 of the CRMP. The rationale for the creation of Prime Wildlife Management Unit #38 is the "endangered silverspot butterfly habitat" but inexplicitly the discussion focuses on the "grassy fields" in a state park. Nevertheless, the discussion makes it clear that residential development should be designed to incur the least feasible impact to the butterfly habitat.

Lane Code 16.238(4) addresses special uses approved by the Planning Director in the Prime Wildlife Shorelands Management Zone. As noted above, single-family homes are allowed by LC 16.238(4)(a) and subsection (4)(a)(ii) requires compliance with the requirements of LC 16.238(6), (7) and (8). However, the introductory language of LC 16.238(4) specifies that the approval by the Planning Director must be based not only upon satisfaction of the applicable criteria but also through a "determination that the use is consistent with protection of natural values specified in the Coastal Resources Management Plan."

The natural value of Prime Wildlife Management Unit #38 is the habitat for the Silverspot butterfly and the goal is to incur the least feasible impact. In this respect, the driveway location of the original site plan has been modified to better avoid early blue violet locations and the site plan, as modified by this decision, moves the proposed dwelling farther away from existing early blue violet populations located on in Grid Cell #A and the marine terrace area to its west. The modified location is occupied by the thickest vegetation on the subject property albeit vegetation that is less diverse than on

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<sup>12</sup> Lane County Coastal Resources Management Plan (1991), pages 32-37.

other portions of the subject property and vegetation that is too dense to support early blue violet populations. Further, the conditions of approval by the Planning Director not only protect existing early blue violet populations through buffering, flagging, fencing and construction supervision by U.S. Fish and Wildlife personnel, but also require the creation of one-eighth of an acre of new habitat near the wetland area. The Planning Director's decision, as modified by this appeal, makes the proposed residential use of the subject property consistent with the protection of the natural values specified in the Coastal Resources Management Plan.

#### **9. Failure to Apply the Endangered Species Act.**

The United States Department of the Interior, through the Fish and Wildlife Service, is responsible for the administration of the Endangered Species Act 1973 (ESA), as amended. Under the Act, the County's responsibility is not to commit a "take" through its land use actions.

The Fish and Wildlife Service has exercised its responsibility in administering the ESA by reviewing the applicant's proposed development. The lead reviewer by the Fish and Wildlife Service proposed four conditions that, if implemented, would make it unlikely that there would be a potential of a "take" of the butterfly habitat.<sup>13</sup> These conditions are integrated into the Planning Director's decision and, by reference, into this decision.

The appellants' have pointed out that two approved septic tank test holes are located in Grid Cell #F, a grid cell with a population of early blue violet. They speculate that the placement of a septic tank system (including drainfield) will likely constitute a "take" of the habitat. I do not believe this is a reasonable conclusion. Each grid cell represents 1,000 square feet, an area larger than normally required for a septic tank system except in extremely poor soil conditions. The use of pumping systems and alternative system components such as sand filters allow the size and location of drainfield lines, respectively, to be minimized and strategically arranged. With this flexibility in mind, the approval of the proposed dwelling will be conditioned upon the preservation of all early blue violet populations identified by Ms. Wilson knowing that a septic tank system that complies with sanitation regulations can be constructed without damage to the butterfly habitat.

If the conditions proposed by the Fish and Wildlife Service and this decision are implemented, I believe that it is unlikely that the proposed development will cause a "take" of habitat that support and endangered species.

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<sup>13</sup> See letter received December 5, 2005 from Kempter M. McMaster, State Supervisor of the Oregon Fish and Wildlife Office, to James W. Spickerman (Exhibit F of the applicant's May 18, 2006 submission).

**Conclusion**

The application, as approved by the Planning Director and modified by this decision, is consistent with applicable approval criteria.

**Respectfully Submitted,**

  
**Gary L. Darnielle**  
**Lane County Hearings Official**

**ICOG** Lane Council of Governments  
99 East Broadway, Suite 400, Eugene, Oregon 97401-3111 (541) 682-4283 Fax: (541) 682-4099 TTY: (541) 682-4567

August 8, 2006

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

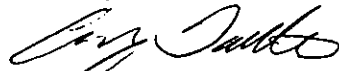
Re: *Appeal of Hearings Official decisions in Peters (PA 05-6026)*

Dear Mr. Howe:

On July 24, 2006 I issued a decision affirming the Planning Directors decision, with modifications, to approve the Mervin and Brenda Peters request (PA 05-6026) for a dwelling in an RR-2/PW District. On August 3, 2005, Mervin and Brenda Peters, the applicants in PA 05-6026, and Joe and Susan Kesey, appealed my decision. Upon a review of these appeals, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my July 24, 2006 decision without further consideration. Please advise interested parties of this decision.

Sincerely,



Gary L. Danielle  
Lane County Hearings Official

cc: Jerry Kendall (file)