

IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

94-9-28-2

- ) In the Matter of Board Adoption of an
- ) Interpretation of Policy Regarding
- ) Lane Code 16.212(3)(b) and Conflicts
- ) Between ORS 215.213(2)(b) and OAR 660
- ) Division 33.


WHEREAS, pursuant to Order 94-9-13-22 the Board has elected to accept a request from the Hearings Official for an interpretation or application of policy; and

WHEREAS, the Board of County Commissioners has reviewed this matter at a public meeting of the Board on September 28, 1994; NOW

THEREFORE, BE IT ORDERED as follows:

1. The Board interprets policy regarding LC 16.212(3)(b) and the conflicts between ORS 215.213(2)(b) and OAR 660 Division 33 to exclude consideration of OAR 660 Division 33. In other words, the effect of this interpretation is to not apply OAR 660 Division 33 where property may apply for dwellings authorized by LC 16.212.(3)(b) and which are consistent with ORS 215.213(2)(b).
2. The Board adopts Exhibits "A" and "B" in support of this interpretation of policy.

ORDERED this 28th day of September, 1994.

  
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 Chair, Lane County Board of Commissioners

APPROVED AS TO FORM

Date 9-26-94 Lane County

  
 OFFICE OF LEGAL COUNSEL

FILED

SEP 29 1994

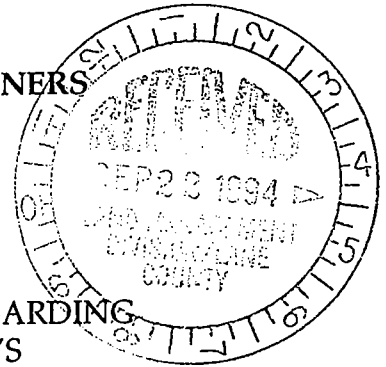
COUNTY CLERK

BY 

BOOK 155 PAGE 0173

BEFORE THE LANE COUNTY BOARD OF COMMISSIONERS

STATE OF OREGON



In The Matter of	)	MEMORANDUM REGARDING
	)	HEARINGS OFFICIAL'S
WILLIAM and BONNIE THIELMAN,	)	REQUEST FOR APPLICATION
	)	OR INTERPRETATION OF
Applicant.	)	POLICY
	)	
	)	PA 2109-94

BACKGROUND

Applicant William and Bonnie Thielman (the "Thielmans") are the owners of a 41 acre tree farm on Territorial Road, northwest of Fern Ridge Reservoir. Mrs. Thielman, the daughter of Clarence and Alice Rutherford, was raised on a portion of the property.<sup>1</sup> Three of Mrs. Thielman's brothers and sisters have built on neighboring parcels. The Thielmans are currently residing with Mrs. Thielman's parents (who also live on an adjoining parcel), awaiting the outcome of this proceeding.

The Thielmans have applied for a permit to establish a farm dwelling on their tree farm pursuant to LC 16.212(3)(b)(ii). LC 16.212 (3)(b)(ii) allows for the placement of a farm dwelling in an exclusive farm use (EFU) zone on a wood lot capable of producing an average over the growth cycle of \$10,000 in gross annual income. This provision is based upon ORS 215.213(2) (1991 Ed.) and has been acknowledged by LCDC as being in compliance with applicable statutes, goals and guidelines. (Note: ORS 215.213(2) was amended by Section 29a of HB 3661 which increased the income standard from \$10,000 to \$20,000 in annual gross income over the growth cycle.)

<sup>1</sup> Title to the property remains in Mrs. Thielman's name for estate planning reasons.

The Thielmans' application was denied on the basis that the applicant did not meet the requirements of OAR 660-33-135(6). OAR 660-33-135(6), which was filed by LCDC with the Secretary of State on March 9, 1994, purports to prohibit the siting of farm dwellings on high-value farm land under these circumstances, even though the siting of the farm dwelling meets the requirements of ORS 215.213(2). OAR 660-33-135(6) is inconsistent with ORS 215.213(2). OAR 660-33-135(6) attempts to prohibit what the statute expressly permits.

### ISSUE FOR INTERPRETATION

#### 1. Factual Summary.

The issue for interpretation presented by this appeal is whether Lane County will give legal effect to the 1994 Administrative Rules to the extent that they are inconsistent with HB 3661, as codified at ORS Ch. 215.

The Legislature has unambiguously listed in ORS 215.213 those uses that are allowed in EFU zones in marginal lands counties. The 1994 Administrative Rules prohibit many of these uses on EFU zoned lands, even though they are expressly allowed by statute.

For purposes of this appeal, the inconsistency between the statute and the 1994 Administrative Rules is best illustrated by focusing on the EFU farm dwelling woodlot provisions. ORS 215.213(2) permits a farm dwelling on a parcel that is managed as a woodlot if the lot or parcel is capable of producing an average over the growth cycle of \$20,000 in gross annual income. In contrast, OAR 660-33-135(6) prohibits the siting of the home if the EFU zoned land is identified as high value, unless the property has produced at least \$80,000 in gross annual income in the last two years, or three out of the last five years.<sup>2</sup>

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<sup>2</sup> This is an almost impossible standard to achieve for a small tree farmer.

## 2. LCDC Has Exceeded Its Statutory Authority.

The power of an administrative agency to promulgate rules is limited and defined by the power conferred upon it by the legislature.

“It is fundamental law that the legislature can delegate to an administrative agency the power to make rules and regulations to implement a statute. Thus, the origin of the rule-making capacity is in a delegation from the legislature, not a constitutional grant of power to the executive; and all rule-making authority delegated to administrative agencies is limited and defined by the statute conferring the power.” [Emphasis added] 2 Am Jur 2d, *Admin. Law* §152, (1994).

The general standard described above is the standard adopted by the courts in Oregon. In Fish & Wildlife Dept. v. LCDC, 288 Or 203, 210, 603 P2d 1391 (1979), it was stated that an agency has only those powers conferred upon it by statute. In Morse v. Div. of State Lands, 34 Or App 853, 856, 587 P2d 520, *aff'd* 285 Or 197 (1978), the court held that an agency, being a creature of statute, can act only within its legislative mandate.

“A statute which creates an administrative agency and invests it with its powers restricts it to the powers granted. The agency has no powers except those mentioned in the statute. It is the statute, not the agency, which directs what shall be done. The statute is not a mere outline of policy which the agency is at liberty to disregard or put into effect according to its own ideas of the public welfare.” U of O Co-Oper. v. Dept. of Rev., 273 Or 539, 550, 542 P2d 900 (1975), quoting Gouge v. David, 185 Or 437, 459, 202 P2d 489 (1949).

Even though LCDC has broad powers (*see* ORS 197.040 (1) (b)) to promulgate rules to carry out its statutory mandate (as do many other agencies in Oregon), it is subject to the fundamental rule that its powers are limited and defined by the legislature. In 1000 Friends v. LCDC, 292 Or 735, 642 P2d 1158 (1982), LCDC promulgated a rule requiring cities to make all land within city limits available for urban development, even if that land otherwise met the definition of agricultural land under Goal 3. The court invalidated the rule, noting that ORS 197.230 (1) evidenced an intent by the

legislature that agricultural lands not be made available for urban development solely because they were within city boundaries. The court stated:

“This review of the statutory setting of LCDC’s authority to adopt and amend rules leads to the conclusion that LCDC’s goal amendment is not authorized by legislative delegation.” 292 Or. at 750.

In Fish & Wildlife Dept. v LCDC, *supra*, prior to the creation of LUBA by the 1979 legislature, LCDC, ruling on an appeal by the Fish & Wildlife Dept. of the approval of a plat by the Deschutes County Planning Commission, dismissed the appeal on the ground that the Fish & Wildlife Dept. had not exhausted its administrative remedies at the local level. The court overturned LCDC, holding that the applicable statute (ORS 197.300) allowed review “without procedural precondition.” 288 Or at 210. The court noted that an agency only has those powers “conferred upon it by statute.” *Id.*

The question of whether LCDC has the power to prohibit uses allowed by the legislature in ORS Ch. 215 was discussed by legislators in the debate over the passage of HB 3661 during the 1993 legislative session. These discussions were in response to concerns regarding the effect HB 3661 would have on LCDC’s “small scale” or “secondary lands” rules which had been adopted in 1992 (the “1992 Admin. Rules”).

The 1992 Admin. Rules, similar to the 1994 Rules (which are the subject of this interpretation), attempted to prohibit certain uses on lands zoned EFU. *See* OAR 660-33-120 (1992). During the floor debate in the Senate, Senator Jim Bunn (one of the carriers of HB 3661 on the Senate floor) was asked the following question by Senator Stan Bunn, and gave the following answer:

“Q. What is the effect of House Bill 3661-B on LCDC’s new administrative rules adopted last year [The 1992 Rules]?”

“A. There are four parts to this answer. \* \* \* LCDC will now be required to amend its rules relating to high-value and important farmland to make them consistent with the legislation. \* \* \* [I]t eliminates any rules that take away uses that the legislature authorizes on farm-

land.” [Emphasis added.] Tape Recording, Senate Floor Debate (HB 3661), August 2, 1993, Tape 201, Side B.

In the House of Representatives, Representative Ray Baum, sponsor and carrier of HB 3661 on the floor of the House, provided a similar answer when asked the same question by Representative Marilyn Dell. See Tape Recording, House of Representatives Floor Debate (HB 3661), August 3, 1993, Tape 229, Side A. Representative Baum also spoke to this issue on the House floor during the debate over final passage of HB 3661 during his reading of a letter written by the Governor's Office. Representative Baum stated:

“As an interpretation of this, I would say that in no case are we going to be authorizing LCDC to repeal any uses that are authorized under existing statutory law in both forest and farm zones.” [Emphasis added.] *Id.*, Tape 229, Side A.

It is clear from a literal reading of the statute and the applicable legislative history that the legislature has decided what uses may be established on lands zoned EFU. “[A]n administrative agency may not, under the guise of regulations substitute its judgment for that of the legislature.” 2 Am Jur 2d, *supra* at §152. As this court stated in Oregon Fire/Police Retire. v. PERB, 62 Or App 777, 779, 662 P2d 729 (1983) “[r]egulations may be adopted only to carry out provisions of a statute and not to change them.”

An administrative agency does not have the right or authority to adopt a rule that contravenes or is inconsistent with a legislative enactment. Gilliam County v. Dept. of Environmental Quality, *supra*, 316 Or at 106; Planned Parenthood Ass’n. v. Dept. of Human Res., *supra*, 297 Or at 565. In Equitable Savings & Loan v. Dept. of Rev., 5 OTR 661 (1974), the tax court stated:

“Plaintiff initially alleges that a regulation contrary to the statute under which it is subservient may not stand. As a legal maxim, this is indeed a correct statement. United States v. Cartwright, 411 US 546, 93 S. Ct. 1713,

36 L Ed2d 528 (1973); General Motors Corp. v. Dist. of Columbia, 380 US 553, 85 S Ct. 1156, 14 L Ed2d 68 (1965); and Bronson v. Dept. of Rev., 5 OTR 86 (1972)." 5 OTR at 668

In Oregon Bankers Ass'n v. Bureau of Labor & Ind., 102 Or App 539, 543, 796 P2d 366 (1990), it was stated that "[t]o the extent that an administrative rule is contrary to statutory policy, it is invalid because it 'exceeds the statutory authority of the agency' within the meaning of those words." [citation omitted]. In Van Riper v. OLCC, 228 Or 581, 591, 365 P2d 109 (1961), the court pointed out that OLCC could write rules and enforce them, but could not "undertake anything contrary to the statute itself." Likewise, in Morse v. Division of State Lands, *supra*, 34 Or App at 587, the court held that "administrative actions which, as a matter of law, are inconsistent with the statutory purpose are outside the power of the agency and will not be upheld. [citation omitted]."

The 1994 Rules directly contravene ORS 215.213. ORS 215.213 provides that certain uses may be established on EFU zoned lands. The 1994 Rules provide that some of these same uses may not be established on certain EFU lands.

An administrative agency has no more authority to adopt a rule that is inconsistent with a statute than it does to adopt a rule that alters or limits the terms of a statute. LCDC, by limiting the applicability of ORS 215.21 to those EFU zoned lands it deems not to be of high-value, has unlawfully attempted to "alter" those statutes by "limiting" their applicability. In U of O Co-Oper. v. Dept. of Rev. *supra*, the court stated:

"This court has consistently held that an administrative agency may not, by its rules, amend, alter, enlarge or limit the terms of a legislative enactment." 273 Or at 550.

3. LCDC Has Violated the Intent and Express Language of HB 3661 As It Pertains To Marginal Lands Counties.

One of the key issues negotiated between the House and the Senate during the writing of HB 3661 was its effect on the 1992 Administrative Rules. During the final days of the 1993 legislative session a special meeting was held among House negotiators and DLCD officials concerning this issue. In a letter submitted into the record during LCDC's deliberations over the 1994 Rule amendments, one of the House negotiators summarized the negotiations as follows:

"[O]ne of the key issues negotiated between the House and Senate concerning HB 3661 was its effect on the farm and forest rules adopted by [LCDC] in December of 1992. During negotiations over HB 3661 the House of Representatives refused to accept HB 3661 as amended by the Senate Agriculture & Natural Resources Committee unless express language was inserted into the bill clarifying its effect on the Goal 3 and 4 rules. In a meeting of the working group (which included members of the House and its negotiators (Kent Howe, Mike Evans and [Dale Riddle]), the Senate, the Governor's office, DLCD, ODOF and ODOA) held on the morning of July 29, 1993, Ann Squier of the Governor's office objected to inserting this type of language into the bill, arguing that it would be impossible to codify the effect of HB 3661 on all Goal 3 and 4 administrative rules in the time left before the legislature adjourned *sine die*. In order to break the impasse, the working group directed Dick Benner [Director, DLCD] and [Dale Riddle] to meet and review the Goal 3 and 4 rules and determine if [they] could not come to an agreement as to the effect of HB 3661 on these rules. The meeting took place later in the day on July 29, and included, in addition to Dick Benner and [Dale Riddle], Greg Wolf from the Department [DLCD]; Kent Howe, from Lane County; and Mike Evans, of Land Planning Consultants.

"At the meeting described above, [they] discussed the issue of whether LCDC had the power under the high-value rules to limit uses on EFU lands if they were otherwise authorized by the legislature. The parties did not come to an agreement as to all of LCDC's powers. They did agree, however, that the high-value rules would not apply to the marginal lands counties, and that LCDC could not eliminate uses authorized by the legislature on EFU lands in marginal lands counties. In exchange, the marginal lands counties would not be allowed to take advantage of the farm lot of record provisions contained in HB 3661. In addition, it was agreed that the income requirements for farm dwellings on EFU lands in marginal lands counties would increase from \$10,000 to \$20,000 annual gross farm

income. Finally, it was agreed that these agreements would be codified in HB 3661." [Emphasis in original].

Reference to the negotiating meeting described above is made at several points in discussions before the Senate Committee on Agriculture & Natural Resources. See Tape Recording, Senate Hearing, Agriculture & Natural Resources Committee (HB 3661), July 29, 1993, Tape 271, Side A and Tape 272, Side B; *Id.*, July 30, 1993, Tape 276, Side B.

The agreement negotiated between House negotiators (Howe, Evans and Riddle) and DLCDC (Benner and Wolf) that the high-value rules would not apply to the marginal lands counties is evidenced by the following discussion that took place between Senator Ron Cease, Chairman of the committee, Mike Evans and Dick Benner in a work session of the Senate Committee on Agriculture & Natural Resources that took place late in the afternoon of July 29, 1993:

"Evans: One other fairly important issue that was raised was the issue of marginal lands and how the rules impact the marginal lands. We're waiting for language now from Sue [legislative counsel] that clarifies what I believe is the committee's intent that the marginal lands counties would not be affected by the rules to the extent that it would modify sections of ORS that relate to marginal lands.

"Cease: Yes. Do you want to add to that, Dick?

"Benner: Mr. Chairman, yes, just to maybe expand on that a bit, the commission has a set of rules which is applicable soon [the 1992 Rules], and those rules, to the extent that they are inconsistent with what the legislature has said about uses authorized in a marginal lands county [the uses] would not be affected.

"Cease: Great. Sue, I understand, has got the rules, she's got the amendment, but we don't yet have it in hand. But we'll have it shortly. Okay? Thank you very much.

"Benner: The commission would retain authority to—well—any use that's authorized on marginal lands and there are, say, conditions that are applied in the statute to those uses such as, let's say it's a golf course and the statute says you can have a golf course if it isn't going to interfere. The commission continues to

have rule-making authority to describe how that would be applied; but it [the commission] cannot change that criteria, and it can't add to it, it can't take it away.

- "Cease: All right. Anyone have any questions on this—yes, go ahead.
- "Evans: For the record, the concern of the marginal lands counties, the two marginal lands counties, is that the current rules [the 1992 Rules], we believe, go beyond what was just described by Mr. Benner, and we wanted clarification that the provisions in 215.213 allowed by statute were retained, yes; they can be regulated to the extent described, but they can't be eliminated."  
Tape Recording, Senate Hearing, Agriculture & Natural Resources Committee (HB 3661), July 29, 1993, Tape 272, Side A. [Emphasis added.]

The above colloquy between Messrs. Cease, Benner and Evans unambiguously indicates that the 1992 Rules would have to be modified such that uses allowed by the legislature in ORS 215.213 could not be "taken away" or "eliminated" by LCDC on EFU-zoned lands. The specific example of the "golf course" used by Director Benner to describe the application of the language to be inserted into the bill confirms the unambiguous agreement of the parties. ORS 215.213 (2)(f, subject to certain stringent standards, allows for the siting of golf courses on EFU-zoned lands. In contrast, OAR 660-33-120 of the 1994 Rule amendments prohibits siting golf courses on high-value lands zoned EFU. Director Benner admits that the language to be inserted into HB 3661 would not allow LCDC to "change," "add to," or "take away" this language, *i.e.*, criteria, in ORS Ch. 215 that allows for the siting of golf courses. Yet that is what LCDC attempted to do when it adopted the 1994 Rules.

The agreement of the House, Senate and Governor's negotiators was also discussed in the debates over passage of HB 3661 on the floors of the Senate and the House of Representatives. In response to a question posed to Senator Jim Bunn (one of the carriers of HB 3661 on the Senate floor) by Senator Stan Bunn concerning the effect of HB 3661 on the LCDC farm and forest rules, Senator Jim Bunn answered that "it elimi-

nates any rules that take away uses that the legislature authorizes on farmland." Tape Recording, Senate Floor Debate (HB 3661), August 2, 1993, Tape 201, Side B.

In the House of Representatives, Representative Ray Baum (chief sponsor and carrier of HB 3661 in the House) provided a similar answer when asked the same question by Representative Marilyn Dell. See Tape Recording, House Floor Debate (HB 3661), August 3, 1993, Tape 229, Side A.

The agreement between the House, Senate and Governor's negotiators concerning marginal lands counties was codified at Sections 28, 29 and 29 (a) of HB 3661. See portions of HB 3661 attached hereto as App. 1.

Section 29 (1) of HB 3661, codified at ORS 215.316 (1) provides:

"Unless a county applies the provisions of ORS 215.705 to 215.730 [lot of record] to land zoned for exclusive farm use, a county that adopted marginal lands provisions under ORS 197.247 (1991 Edition), 215.213, 215.214 (1991 Edition), 215.288 (1991 Edition), 215.317, 215.327 and 215.337 (1991 Edition) may continue to apply those provisions." [Emphasis added.]

ORS 215.288 (2) (1991 Edition), as referenced in Section 29(1) of HB 366 provides:

"If a county amends its comprehensive plan or land use regulations to allow for the designation of marginal lands under ORS 197.247 or to allow the establishment of dwellings under ORS 215.213 (4) to (8), the county shall apply ORS 215.213 (1) to (3) to land zoned for exclusive farm use under ORS 215.203." [Emphasis added.]

As stated in the Hearings Official's request for interpretation and the staff report, ORS 215.213 expressly allows for the siting of a farm dwelling on the Thielmans' property. ORS 215.288(2) (1991 Ed.) mandates that the county shall apply the provisions of ORS 215.213. Lane County, as a marginal lands county, therefore has no discretion but to allow for the siting of the Thielmans' farm dwelling.

As indicated above, the leadership of the House was reluctant to allow for passage of HB 3661 unless it was clearly stated that its provisions took precedence over any administrative rule promulgated by LCDC. For this reason, Section 28(3) (codified at ORS 215.304(3)) was also added to the Bill. It provides that:

“Any portion of a rule inconsistent with the provisions of ORS 197.247 (1991 Edition), 215.213, 215.214 (1991 Edition), 215.288 (1991 Edition), 215.317, 215.327 and 215.337 (1991 Edition) or 215.705 to 215.780 on March 1, 1994:

- “(a) Shall not be implemented or enforced; and
- “(b) Has no legal effect.”

Therefore, to the extent that the 1994 Administrative Rules are inconsistent with HB 3661 and ORS 215.213, they should “not be implemented” nor should they be given “legal effect.”

ORS 215.213(2)(b) which unambiguously allows for the siting of the Thielmans' home, and OAR 660-33-135(6), which prohibits the siting of the home are patently inconsistent. Lane County should follow the clear and unambiguous provisions of the statute.

## POLICY

For many of the same reasons state above, Lane County filed suit against LCDC in an original proceeding before the Court of Appeals asking the court to declare the 1994 Administrative Rules invalid. It would be inconsistent for Lane County to now take the position that the Rules are valid and should be enforced.

There is no logical way to require citizens to comply with Lane Code, the Statute, and the Administrative Rule. There is no logical way to reconcile the differences. Section 28(3) of HB 3661 mandates that the Administrative Rule should not be given effect if it is inconsistent with the statute. Therefore, if Lane County requires

compliance with the Administrative Rule, it is necessarily violating Section 28(3) of HB 3661, which states that the rule should not be given legal effect.

Lane County, as it understands it, should make the "right" decision in this case. It may have been entirely appropriate for the Board of Commissioners to direct staff not to ignore LCDC in handling applications at the staff level. However, once the matter is elevated to the policy-making stage, as it is in this case, there should be no doubt that Lane County should come down on the side which enforces the legislative mandate of the elected representatives of this state. This is especially true in light of LCDC's flagrant disregard for the will of the Legislature as expressed in Section 28(3) of HB 3661, which really does nothing more than restate our common law and constitutional understanding that the legislative power has been delegated from the people to elected officials through democratic elections, and that any form of legislation to the contrary is void and of no legal effect. Any form of government action which violates this fundamental principle necessarily violates Article IV, Section 1 of the Oregon Constitution, which provides that, except for the powers of initiative and referendum, all legislative power of the state "is vested in a Legislative Assembly, consisting of a Senate and House of Representatives." As Justice Goodwin stated in Ore. Newspaper Pub. v. Peterson, 244 Or 116, 415 P2d 21 (1966):

"The reason behind this rule is that the people, by adopting the state constitution, conferred upon the Legislative Assembly the power to legislate. Therefore this power is not by implication to be delegated to nonelective officers. The tendency of administrators to expand the scope of their operations is perhaps as natural as nature's well-known abhorrence of a vacuum. But no matter how highly motivated it may be, the tendency to make law without a clear direction to do so must be curbed by the overriding constitutional requirement that substantial changes in the law be made solely by the Legislative Assembly, or by the people." Oregon Constitution, Art. IV, §1." 244 Or at 123-24 [Emphasis added.]

Discussing the same principal as applied to the federal level, Kenneth Culp Davis writes:

"Under the Constitution the power to legislate is in Congress, and no agency has power to legislate unless Congress has delegated legislative power to it. \* \* \* The principle is nothing less than the principle that distinguishes democratic government from dictatorship." 2 Davis, *Administrative Law Treatise* §7.11 (1979 2nd Edition).

Finally, although maybe not the most important policy reason, the Board of Commissioners should follow the statute to avoid potential liability on behalf of Lane County. If Lane County bases its denial of applications upon the 1994 Administrative Rules, and the Administrative Rules are invalid, Lane County itself will have acted arbitrarily and without authority. Governmental acts taken without authority violate the due process clause (substantive due process) of the United States Constitution. In White v. Heceta Water District, Civil No. 91-816 (D. Or. 1992), Heceta Water District denied plaintiffs' permit to hook up to the District's water lines based upon a regulation that was invalid. Judge Coffin ruled:

"B) Denial of Substantive Due Process.

\* \* \*

"Heceta argues that the denial was rationally related to its goals of abating water pollution and avoiding expensive public works projects (e.g., the construction of sewage water treatment facilities). *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461 (1955). Had Heceta the authority to unilaterally enact regulations to abate pollution and deny water permits based on those regulations, I would agree that such actions were rationally related to the stated goals. However, lacking the authority to unilaterally regulate in this area, as set forth above, it follows that Heceta's actions must be viewed as arbitrary as applied to the Whites. In this case, Heceta made a decision based upon a regulation (or standards which were set forth in the regulation) which was invalid. As a consequence, the board acted arbitrarily, for it had no discretion to deny the application. *See: Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988)." [Emphasis added] Id at pp. 15-16.

**CONCLUSION****To summarize:**

1. The 1994 Administrative Rules are inconsistent with HB 3661.
2. It is well established law that the rule making function of an administrative agent is subservient to the will of the legislature as expressed through statute. LCDC may not, under the guise of regulation, contravene statutory law, or substitute its judgment for that of the legislature. It may not promulgate a rule that adds a requirement that does not exist under applicable statutes, or amend, alter, enlarge or limit the terms of a legislative enactment.
3. Sections 28, 29 and 29(a) of HB 3661, read together and codified at ORS 215.304, 215.316 and 215.213(1), (2) and (3), unambiguously provide that: (a) marginal lands counties which do not implement the "lot of record" provisions of HB 3661 may continue to designate marginal lands and shall allow those uses described in ORS 215.213(1) to (3) on EFU-zoned lands; and (b) any rule, or portion thereof, that is inconsistent with the counties' rights or obligations under the marginal lands statute may not be implemented and has no legal effect. The 1994 Administrative Rules prohibit the siting of uses expressly mandated and authorized by the Legislature on EFU-zoned lands as codified in ORS 215.213. The 1994 Administrative Rules disregard the express mandate of the legislature that any rules in contravention of the rights of the marginal lands counties have no legal effect.

**In conclusion:**

The 1994 Administrative Rules, to the extent that they are inconsistent with HB 3661, are invalid and without legal effect. The Board of Commissioners should declare, as a matter of policy, that Lane County will follow Section 28(3) of HB 3661 and not

implement any portion of the 1994 Administrative Rules that are inconsistent with HB 3661. The Board should direct the Hearings Official to grant the Thielmans' application for a farm dwelling permit if the Hearings Official finds that the application complies with Lane Code, as revised by HB 3661.

Dated this 22nd day of September, 1994.

Respectfully submitted,

GLEAVES SWEARINGEN LARSEN  
POTTER SCOTT & SMITH

By:   
Dale A. Riddle, OSB No. 81352

1 provided in conjunction with farm use.

2 (2) The governing body or its designate shall not grant final approval of an application made  
3 under ORS 215.213 (3) or 215.283 (3), (4), (5) or (6) for the establishment of a dwelling on a lot or  
4 parcel in an exclusive farm use zone that is, or has been, receiving special assessment without evi-  
5 dence that the lot or parcel upon which the dwelling is proposed has been disqualified for special  
6 assessment at value for farm use under ORS 308.370 or other special assessment under ORS 308.765,  
7 321.352, 321.730 or 321.815 and any additional tax imposed as the result of disqualification has been  
8 paid.

9 (3) The governing body or its designate may grant tentative approval of an application made  
10 under ORS 215.213 (3) or 215.283 (3), (4), (5) or (6) for the establishment of a dwelling on a lot or  
11 parcel in an exclusive farm use zone that is specially assessed at value for farm use under ORS  
12 308.370 upon making the findings required by ORS 215.213 (3) or 215.283 (3), (4), (5) or (6). An ap-  
13 plication for the establishment of a dwelling that has been tentatively approved shall be given final  
14 approval by the governing body or its designate upon receipt of evidence that the lot or parcel upon  
15 which establishment of the dwelling is proposed has been disqualified for special assessment at value  
16 for farm use under ORS 308.370 and any additional tax imposed as the result of disqualification has  
17 been paid.

18 (4) The owner of a lot or parcel upon which the establishment of a dwelling has been tentatively  
19 approved as provided by subsection (3) of this section shall, before final approval, simultaneously:

- 20 (a) Notify the county assessor that the lot or parcel is no longer being used as farmland;  
21 (b) Request that the county assessor disqualify the lot or parcel for special assessment under  
22 ORS 308.370, 308.765, 321.352, 321.730 or 321.815; and  
23 (c) Pay any additional tax imposed upon disqualification from special assessment.

24 (5) A lot or parcel that has been disqualified pursuant to subsection (4) of this section shall not  
25 requalify for special assessment unless, when combined with another contiguous lot or parcel, it  
26 constitutes a qualifying parcel.

27 (6) When the owner of a lot or parcel upon which the establishment of a dwelling has been  
28 tentatively approved notifies the county assessor that the lot or parcel is no longer being used as  
29 farmland and requests disqualification of the lot or parcel for special assessment at value for farm  
30 use, the county assessor shall:

- 31 (a) Disqualify the lot or parcel for special assessment at value for farm use under ORS 308.370  
32 or other special assessment by removing the special assessment;  
33 (b) Provide the owner of the lot or parcel with written notice of the disqualification; and  
34 (c) Impose the additional tax, if any, provided by statute upon disqualification.

35 (7) The Building Codes Agency, a building official, as defined in ORS 456.715 (1), or any other  
36 agency or official responsible for the administration and enforcement of the state building code, as  
37 defined in ORS 455.010, shall not issue a building permit for the construction of a dwelling on a lot  
38 or parcel in an exclusive farm use zone without evidence that the owner of the lot or parcel upon  
39 which the dwelling is proposed to be constructed has paid the additional tax, if any, imposed by the  
40 county assessor under subsection (6)(c) of this section.

41 **SECTION 28.** (1) **The Land Conservation and Development Commission shall not adopt**  
42 **or implement any rule to identify or designate small-scale farmland or secondary land.**

43 (2) **Amendments required to conform rules to the provisions of subsection (1) of this**  
44 **section and sections 2 to 7 of this Act shall be adopted by March 1, 1994.**

45 (3) **Any portion of a rule inconsistent with the provisions of ORS 197.247 (1991 Edition),**

1 215.213, 215.214 (1991 Edition), 215.288 (1991 Edition), 215.317, 215.327 and 215.337 (1991 Edition)  
2 or sections 2 to 7 of this Act on March 1, 1994:

3 (a) Shall not be implemented or enforced; and

4 (b) Has no legal effect.

5 **SECTION 29.** (1) Unless a county applies the provisions of sections 2 to 5 of this Act to  
6 land zoned for exclusive farm use, a county that adopted marginal lands provisions under  
7 ORS 197.247 (1991 Edition), 215.213, 215.214 (1991 Edition), 215.288 (1991 Edition), 215.317,  
8 215.327 and 215.337 (1991 Edition) may continue to apply those provisions. After January 1,  
9 1993, no county may adopt marginal lands provisions.

10 (2) If a county that had adopted marginal lands provisions before January 1, 1993, sub-  
11 sequently sites a dwelling under sections 2 to 5 of this Act on land zoned for exclusive farm  
12 use, the county shall not later apply marginal lands provisions, including those set forth in  
13 ORS 215.213, to lots or parcels other than those to which the county applied the marginal  
14 lands provisions before the county sited a dwelling under sections 2 to 5 of this 1993 Act.

15 **SECTION 29a.** ORS 215.213 is amended to read:

16 215.213. (1) In counties that have adopted marginal lands provisions under ORS 197.247  
17 (1991 Edition), the following uses may be established in any area zoned for exclusive farm use:

18 (a) Public or private schools, including all buildings essential to the operation of a school.

19 (b) Churches and cemeteries in conjunction with churches.

20 (c) The propagation or harvesting of a forest product.

21 (d) Utility facilities necessary for public service, except commercial facilities for the purpose of  
22 generating power for public use by sale and transmission towers over 200 feet in height.

23 (e) A dwelling on real property used for farm use if the dwelling is:

24 (A) Located on the same lot or parcel as the dwelling of the farm operator; and

25 (B) Occupied by a relative, which means grandparent, grandchild, parent, child, brother or sister  
26 of the farm operator or the farm operator's spouse, whose assistance in the management of the farm  
27 use is or will be required by the farm operator.

28 (f) Nonresidential buildings customarily provided in conjunction with farm use.

29 (g) A dwelling customarily provided in conjunction with farm use if the dwelling is on a lot or  
30 parcel that is managed as part of a farm operation not smaller than the minimum lot size in a farm  
31 zone with a minimum lot size acknowledged under ORS 197.251.

32 (h) Operations for the exploration for and production of geothermal resources as defined by ORS  
33 522.005 and oil and gas as defined by ORS 520.005, including the placement and operation of  
34 compressors, separators and other customary production equipment for an individual well adjacent  
35 to the wellhead. Any activities or construction relating to such operations shall not be a basis for  
36 an exception under ORS 197.732 (1)(a) or (b).

37 (i) Operations for the exploration for minerals as defined by ORS 517.750. Any activities or  
38 construction relating to such operations shall not be a basis for an exception under ORS 197.732  
39 (1)(a) or (b).

40 (j) A site for the disposal of solid waste that has been ordered to be established by the Envi-  
41 ronmental Quality Commission under ORS 459.049, together with equipment, facilities or buildings  
42 necessary for its operation.

43 (k) One manufactured dwelling in conjunction with an existing dwelling as a temporary use for  
44 the term of a hardship suffered by the existing resident or a relative of the resident.

45 (L) The breeding, kenneling and training of greyhounds for racing in any county over 200,000

1 in population in which there is located a greyhound racing track or in a county of over 200,000 in  
2 population contiguous to such a county.

3 (m) Climbing and passing lanes within the right of way existing as of July 1, 1987.

4 (n) Reconstruction or modification of public roads and highways, not including the addition of  
5 travel lanes, where no removal or displacement of buildings would occur, or no new land parcels  
6 result.

7 (o) Temporary public road and highway detours that will be abandoned and restored to original  
8 condition or use at such time as no longer needed.

9 (p) Minor betterment of existing public [roads] road and highway related facilities, such as  
10 maintenance yards, weigh stations and rest areas, within right of way existing as of July 1, 1987,  
11 and contiguous public-owned property utilized to support the operation and maintenance of public  
12 roads and highways.

13 (q) A replacement dwelling to be used in conjunction with farm use if the existing dwelling has  
14 been listed in a county inventory as historic property as defined in ORS 358.480.

15 (r) Seasonal farm-worker housing as defined in ORS 197.675.

16 (s) Creation of, restoration of or enhancement of wetlands.

17 (t) A winery, as described in ORS 215.452.

18 (u) **Alteration, restoration or replacement of a lawfully established dwelling that:**

19 (A) **Has intact exterior walls and roof structure;**

20 (B) **Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities con-**  
21 **nected to a sanitary waste disposal system;**

22 (C) **Has interior wiring for interior lights;**

23 (D) **Has a heating system; and**

24 (E) **In the case of replacement, is removed, demolished or converted to an allowable**  
25 **nonresidential use within three months of the completion of the replacement dwelling.**

26 (2) **In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edi-**  
27 **tion), the following uses may be established in any area zoned for exclusive farm use subject to ORS**  
28 **215.296:**

29 (a) A dwelling in conjunction with farm use or the propagation or harvesting of a forest product  
30 on a lot or parcel that is managed as part of a farm operation or woodlot if the farm operation or  
31 woodlot:

32 (A) Consists of 20 or more acres; and

33 (B) Is not smaller than the average farm or woodlot in the county producing at least \$2,500 in  
34 annual gross income from the crops, livestock or forest products to be raised on the farm operation  
35 or woodlot.

36 (b) A dwelling in conjunction with farm use or the propagation or harvesting of a forest product  
37 on a lot or parcel that is managed as part of a farm operation or woodlot smaller than required  
38 under paragraph (a) of this subsection, if the lot or parcel:

39 (A) Has produced at least [\$10,000] \$20,000 in annual gross farm income in two consecutive  
40 calendar years out of the three calendar years before the year in which the application for the  
41 dwelling was made or is planted in perennials capable of producing upon harvest an average of at  
42 least [\$10,000] \$20,000 in annual gross farm income; or

43 (B) Is a woodlot capable of producing an average over the growth cycle of [\$10,000] \$20,000 in  
44 gross annual income.

45 (c) Commercial activities that are in conjunction with farm use.

- 1 (d) Operations conducted for:
- 2 (A) Mining and processing of geothermal resources as defined by ORS 522.005 and oil and gas
- 3 as defined by ORS 520.005, not otherwise permitted under subsection (1)(h) of this section;
- 4 (B) Mining, **crushing or stockpiling** of aggregate and other mineral and other subsurface re-
- 5 sources subject to ORS 215.298;
- 6 (C) Processing, as defined by ORS 517.750, of aggregate into asphalt or portland cement; and
- 7 (D) Processing of other mineral resources and other subsurface resources.
- 8 (e) Community centers owned and operated by a governmental agency or a nonprofit community
- 9 organization, hunting and fishing preserves, parks, playgrounds and campgrounds.
- 10 (f) Golf courses.
- 11 (g) Commercial utility facilities for the purpose of generating power for public use by sale.
- 12 (h) Personal-use airports for airplanes and helicopter pads, including associated hangar, main-
- 13 tenance and service facilities. A personal-use airport as used in this section means an airstrip re-
- 14 stricted, except for aircraft emergencies, to use by the owner, and, on an infrequent and occasional
- 15 basis, by invited guests, and by commercial aviation activities in connection with agricultural op-
- 16 erations. No aircraft may be based on a personal-use airport other than those owned or controlled
- 17 by the owner of the airstrip. Exceptions to the activities permitted under this definition may be
- 18 granted through waiver action by the Aeronautics Division in specific instances. A personal-use
- 19 airport lawfully existing as of September 13, 1975, shall continue to be permitted subject to any
- 20 applicable rules of the Aeronautics Division.
- 21 (i) A facility for the primary processing of forest products, provided that such facility is found
- 22 to not seriously interfere with accepted farming practices and is compatible with farm uses de-
- 23 scribed in ORS 215.203 (2). Such a facility may be approved for a one-year period which is
- 24 renewable. These facilities are intended to be only portable or temporary in nature. The primary
- 25 processing of a forest product, as used in this section, means the use of a portable chipper or stud
- 26 mill or other similar methods of initial treatment of a forest product in order to enable its shipment
- 27 to market. Forest products, as used in this section, means timber grown upon a parcel of land or
- 28 contiguous land where the primary processing facility is located.
- 29 (j) The boarding of horses for profit.
- 30 (k) A site for the disposal of solid waste approved by the governing body of a city or county or
- 31 both and for which a permit has been granted under ORS 459.245 by the Department of Environ-
- 32 mental Quality together with equipment, facilities or buildings necessary for its operation.
- 33 (L) Dog kennels not described in subsection (1)(L) of this section.
- 34 (m) Residential homes as defined in ORS 197.660, in existing dwellings.
- 35 (n) The propagation, cultivation, maintenance and harvesting of aquatic species.
- 36 (o) Home occupations as provided in ORS 215.448.
- 37 (p) Transmission towers over 200 feet in height.
- 38 (q) Construction of additional passing and travel lanes requiring the acquisition of right of way
- 39 but not resulting in the creation of new land parcels.
- 40 (r) Reconstruction or modification of public roads and highways involving the removal or dis-
- 41 placement of buildings but not resulting in the creation of new land parcels.
- 42 (s) Improvement of public [roads] road and highway related facilities such as maintenance yards,
- 43 weigh stations and rest areas, where additional property or right of way is required but not result-
- 44 ing in the creation of new land parcels.
- 45 (t) A destination resort which is approved consistent with the requirements of any statewide

1 planning goal relating to the siting of a destination resort.

2 (u) Room and board arrangements for a maximum of five unrelated persons in existing resi-  
3 dences.

4 (v)(A) A living history museum related to resource based activities owned and operated by a  
5 governmental agency or a local historical society, together with limited commercial activities and  
6 facilities that are directly related to the use and enjoyment of the museum and located within au-  
7 thentic buildings of the depicted historic period or the museum administration building, if areas  
8 other than an exclusive farm use zone cannot accommodate the museum and related activities or if  
9 the museum[,] administration buildings and parking lot are located within one quarter mile of the  
10 metropolitan urban growth boundary.

11 (B) As used in this paragraph:

12 (i) "Living history museum" means a facility designed to depict and interpret everyday life and  
13 culture of some specific historic period using authentic buildings, tools, equipment and people to  
14 simulate past activities and events; and

15 (ii) "Local historical society" means the local historical society, recognized as such by the  
16 county governing body and organized under ORS chapter 65.

17 (3) **In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edi-**  
18 **tion)**, a single-family residential dwelling not provided in conjunction with farm use may be estab-  
19 lished on a lot or parcel with soils predominantly in capability classes IV through VIII as  
20 determined by the Agricultural Capability Classification System in use by the United States De-  
21 partment of Agriculture Soil Conservation Service on October 15, 1983. A proposed dwelling is  
22 subject to approval of the governing body or its designate in any area zoned for exclusive farm use  
23 upon written findings showing all of the following:

24 (a) The dwelling or activities associated with the dwelling will not force a significant change in  
25 or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use.

26 (b) The dwelling is situated upon generally unsuitable land for the production of farm crops and  
27 livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, location  
28 and size of the tract. A lot or parcel shall not be considered unsuitable solely because of its size  
29 or location if it can reasonably be put to farm use in conjunction with other land.

30 (c) Complies with such other conditions as the governing body or its designate considers nec-  
31 essary.

32 (4) **In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edi-**  
33 **tion)**, one single-family dwelling, not provided in conjunction with farm use, may be established in  
34 any area zoned for exclusive farm use on a lot or parcel described in subsection (7) of this section  
35 that is not larger than three acres upon written findings showing:

36 (a) The dwelling or activities associated with the dwelling will not force a significant change in  
37 or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use;

38 (b) If the lot or parcel is located within the Willamette Greenway, a floodplain or a geological  
39 hazard area, the dwelling complies with conditions imposed by local ordinances relating specifically  
40 to the Willamette Greenway, floodplains or geological hazard areas, whichever is applicable; and

41 (c) The dwelling complies with other conditions considered necessary by the governing body or  
42 its designate.

43 (5) Upon receipt of an application for a permit under subsection (4) of this section, the governing  
44 body shall notify:

45 (a) Owners of land that is within 250 feet of the lot or parcel on which the dwelling will be es-

1 established; and

2 (b) Persons who have requested notice of such applications and who have paid a reasonable fee  
3 imposed by the county to cover the cost of such notice.

4 (6) The notice required in subsection (5) of this section shall specify that persons have 15 days  
5 following the date of postmark of the notice to file a written objection on the grounds only that the  
6 dwelling or activities associated with it would force a significant change in or significantly increase  
7 the cost of accepted farming practices on nearby lands devoted to farm use. If no objection is re-  
8 ceived, the governing body or its designate shall approve or disapprove the application. If an ob-  
9 jection is received, the governing body shall set the matter for hearing in the manner prescribed in  
10 ORS 215.402 to 215.438. The governing body may charge the reasonable costs of the notice required  
11 by subsection (5)(a) of this section to the applicant for the permit requested under subsection (4) of  
12 this section.

13 (7) Subsection (4) of this section applies to a lot or parcel lawfully created between January 1,  
14 1948, and July 1, 1983. For the purposes of this section:

15 (a) Only one lot or parcel exists if:

16 (A) A lot or parcel described in this section is contiguous to one or more lots or parcels de-  
17 scribed in this section; and

18 (B) On July 1, 1983, greater than possessory interests are held in those contiguous lots, parcels  
19 or lots and parcels by the same person, spouses or a single partnership or business entity, separately  
20 or in tenancy in common.

21 (b) "Contiguous" means lots, parcels or lots and parcels that have a common boundary, including  
22 but not limited to, lots, parcels or lots and parcels separated only by a public road.

23 (8) A person who sells or otherwise transfers real property in an exclusive farm use zone may  
24 retain a life estate in a dwelling on that property and in a tract of land under and around the  
25 dwelling.

26 (9) No final approval of a nonfarm use under this section shall be given unless any additional  
27 taxes imposed upon the change in use have been paid.

28 (10) **Roads, highways and other transportation facilities and improvements not allowed**  
29 **under subsections (1) and (2) of this section may be established, subject to the approval of**  
30 **the governing body or its designate, in areas zoned for exclusive farm use subject to:**

31 (a) **Adoption of an exception to the goal related to agricultural lands and to any other**  
32 **applicable goal with which the facility or improvement does not comply; or**

33 (b) **ORS 215.296 for those uses identified by rule of the Land Conservation and Develop-**  
34 **ment Commission as provided in section 3, chapter \_\_\_\_\_, Oregon Laws 1993 (Enrolled**  
35 **Senate Bill 1057).**

36 **SECTION 30. Sections 31, 32a, 33 to 36, 38 and 41 of this Act are added to and made a part**  
37 **of ORS 30.930 to 30.947.**

38 **SECTION 31. (1) The Legislative Assembly finds that:**

39 (a) **Farming and forest practices are critical to the economic welfare of this state.**

40 (b) **The expansion of residential and urban uses on and near lands zoned or used for ag-**  
41 **riculture or production of forest products may give rise to conflicts between resource and**  
42 **nonresource activities.**

43 (c) **In the interest of the continued welfare of the state, farming and forest practices**  
44 **must be protected from legal actions that may be intended to limit, or have the effect of**  
45 **limiting, farming and forest practices.**

BEFORE THE LANE COUNTY BOARD OF COMMISSIONERS

STATE OF OREGON

In The Matter of	)	SUPPLEMENTAL MEMORANDUM
	)	REGARDING HEARINGS
WILLIAM and BONNIE THIELMAN,	)	OFFICIAL'S REQUEST FOR
	)	APPLICATION OR INTERPRE-
Applicant.	)	TATION OF POLICY
	)	
	)	PA 2109-94

In the letter submittal filed by 1000 Friends of Oregon in this matter, staff attorney Blair Batson argues that the legislature recognized that the high-value farm land rules were not "inconsistent" with HB 3661. Ms. Batson cites as support for her argument a letter signed by Anne W. Squier, Sr. Policy Advisor, Natural Resources for Governor Roberts, and Richard P. Benner, Director, DLCD, which Ms. Batson attaches to her letter as attachment "B". See App. 1 attached hereto. Ms. Batson states that this letter reflects the intent of the House and Senate, citing the House floor debate that took place on August 3, 1993. This is not accurate.

The letter attached to Ms. Batson's submittal as attachment "B" is not the identical letter that was read on the House floor during the floor debate over passage of HB 3661. The original letter which was read on the floor was not signed by Richard P. Benner, nor was it supposed to be. As set out in the Affidavit of Dale A. Riddle, attached hereto as App. 2, the original letter was supposed to be signed by Mr. Riddle on behalf of the House leadership, reflecting the consensus of the negotiators. Mr. Riddle, however, declined to sign the letter for the reasons stated in his Affidavit. Mr. Benner's signature, and the signature line for Mr. Benner's signature, did not surface on the letter until several months later during LCDC's final hearings on the 1994

**FILE COPY**

Administrative Rules.<sup>1</sup> Since the letter is written on the governor's stationery, it is presumed that the governor's office changed the letter some time after the legislative session ended, but before the final hearings on the 1994 Administrative Rules.

More importantly, because of an ambiguity in the letter, the House leadership refused to read the letter into the record during the House floor debate without clarification. This clarification was provided by Rep. Ray Baum, who read the letter on the floor of the House. During the reading of the letter, Rep. Baum departed from the letter, stating:


"As an interpretation of this, I would say that in no case are we going to be authorizing LCDC to repeal any uses that are authorized under existing statutory law in both forest and farm zones." Tape Recording, House of Representatives Floor Debate (HB 3661), Aug. 3, 1993, Tape 229, Side A.

It is clear from a literal reading of HB 3661 that the legislature never intended for LCDC to promulgate rules that prohibit the siting of uses authorized by the legislature in ORS 215.213. The legislative history confirms this.

Dated this 22nd day of September, 1994.

Respectfully submitted,

GLEAVES SWEARINGEN LARSEN  
POTTER SCOTT & SMITH

By:   
Dale A. Riddle, OSB No. 81352

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<sup>1</sup> For comparative purposes, the original letter, without Mr. Benner's signature, is attached to Mr. Riddle's Affidavit as Exhibit 1.

BOOK 155 PAGE 0196

Attachment B

BARBARA ROBERTS  
GOVERNOR



OFFICE OF THE GOVERNOR  
STATE CAPITOL  
SALEM, OREGON 97310-0370  
TELEPHONE: (503) 378-3111

July 30, 1993

The Honorable Ron Cease  
Senator, District 10  
Room 216  
State Capitol  
Salem, Oregon 97310

Dear Senator Cease:

The undersigned persons involved in the drafting of amendments to HB 3661 agree that its passage would have the following effects upon LCDC's rules relating to farm and forest land.

HB 3661 would provide opportunities that do not exist in current statutes or LCDC rules to establish dwellings on land zoned for farm and forest use. As a consequence, LCDC would have to amend its Agricultural Lands and Forest Lands Goals and rules to reflect the new opportunities.

HB 3661 intends to replace LCDC's rules on small-scale resource land with new opportunities for dwellings on certain lots of record and on certain lots and parcels eligible for nonfarm dwellings and dwellings in forest zones. If HB 3661 passes into law, LCDC will have to repeal its rules relating to small-scale resource land and revise other rule provisions relating to dwellings so as not to conflict with HB 3661.

LCDC's rules on farmland and forest land contain provisions which conflict with HB 3661. If HB 3661 becomes law, LCDC will be required to review those rule provisions.

LCDC's rules also contain provisions which address matters that are not directly addressed by HB 3661. HB 3661 does not affect these provisions and would not require LCDC to repeal or revise these provisions, although the Commission remains free to do so.


BOOK 155 PAGE 0197


The Honorable Ron Cease  
July 30, 1993  
Page 2

LCDC's rules on farmland and forest land contain provisions which address matters that are not directly addressed by HB 3661, but are not inconsistent with it. For example, LCDC's rules allow the creation of parcels smaller than minimum lot and parcels sizes specified in the rules if for the purpose of establishing certain nonfarm and nonforest uses, such as utility facilities. The signatories agree that these rule provisions are not inconsistent with section 7(3) of HB 3661. At the time the Commission repeals or revises other provisions of its rules, the Commission may choose to retain these rule provisions. The signatories expect that LCDC will, at this time, assess the continuing need for these and other rules not inconsistent with HB 3661 and will strive to bring them as close to clear and objective as possible.

HB 3661 would preclude LCDC from defining "high-value farmland" in a manner different from HB 3661 if the definition would have the effect of limiting the opportunities for dwellings on lots of record provided by HB 3661. HB 3661 does not preclude LCDC from defining "high-value farmland" differently from HB 3661 in rules addressing uses other than dwellings allowed under section 2 of HB 3661. In fact, the signatories recognize that the HB 3661 definition, being "tract-based," would need adjustment if it is to serve as a basis for planning and zoning. It is the expectation of the signatories, however, that LCDC will review the definition of "high-value farmland" in its current rules to bring it as close to the definition in HB 3661 as possible given the purpose of the rules in order to make its definition optimally clear and objective.

Because passage of HB 3661 will cause LCDC to revise its rules relating to "high-value farmland", the signatories expect that the revised rules will be made applicable to counties on a schedule different from that specified in current rules; but which will allow counties adequate time to make changes.

  
\_\_\_\_\_  
Anne W. Squier  
Senior Policy Advisor  
Natural Resources

  
\_\_\_\_\_  
Richard P. Benner, Director  
Department of Land  
Conservation and Development

BEFORE THE LANE COUNTY BOARD OF COMMISSIONERS  
STATE OF OREGON

In The Matter of )  
 )  
WILLIAM and BONNIE THIELMAN, )  
 ) AFFIDAVIT OF DALE A. RIDDLE  
Applicant. )  
 )  
 ) PA 2109-94  
 )

STATE OF OREGON )  
 ) ss.  
County of Lane )

I, Dale A. Riddle, first being sworn, say:

1. I make this Affidavit in support of Applicant's Supplemental Memorandum Regarding Hearings Official's Request for Application or Interpretation of Policy.

2. This Affidavit is made upon first-hand knowledge and I am competent to testify as to the matters stated herein.

3. I served as chief negotiator on behalf of the House of Representatives during the legislative deliberations over the passage of House Bill 3661 during the 1993 Legislative Session. In this regard, I took part in a meeting which took place early on the morning of August 29, 1993. In attendance at this meeting were the House negotiators, including House leaders; Kent Howe, Lane County Planner, and Mike Evans, of Land Planning Consultants, Senate leaders, members of the governor's staff, DLCD, ODOF and ODOA. I informed those present at the meeting that the House would not accept the Senate's version of HB 3661 unless a section was included in the bill clarifying the bill's effect on the recently-adopted secondary lands rules (the "1992 Administrative Rules"), and specifically that HB 3661 overturned many of the provisions of the

1992 Administrative Rules (which also included high-value provisions prohibiting certain uses allowed by ORS 215.213).

Anne Squier of the governor's office objected to inserting this type of language into the bill, arguing that it would be impossible to codify the effect of HB 3661 on the 1992 Administrative Rules in the time left before the legislature adjourned *sine die*. In order to break the impasse, the working group directed Dick Benner and myself to meet and review the 1992 rules to determine if we could not come to an agreement as to the effect of HB 3661 on these rules. The meeting took place later in the morning and during the early afternoon of the same day. In attendance, in addition to Dick Benner and myself, were Greg Wolf from DLCD, Kent Howe from Lane County, and Mike Evans from Land Planning Consultants.

4. At the meeting described above, we discussed the issue of whether LCDC had the power under the high-value rules to limit uses on EFU lands if those uses were authorized by the legislature. We did not come to an agreement as to whether LCDC had this power on a state-wide basis. We agreed to disagree and left it for the courts to decide. We did, however, agree that LCDC could not limit uses allowed by the legislature on EFU lands in marginal lands counties. We agreed that the high-value rules would not apply to the marginal lands counties. In exchange, we agreed that the marginal lands counties would not be allowed to take advantage of the farm lot-of-record provisions contained in HB 3661. In addition, we agreed that the annual income requirements for farm dwellings on EFU lands in marginal lands counties would increase from \$10,000 to \$20,000. We also agreed that, to the extent possible, these agreements would be codified in HB 3661 and that a "memorandum of understanding" would be drafted which would be signed by the House negotiators and the governor's office to be submitted into the record to reflect legislative intent.


5. The codification of the agreements reached at the meeting described above are set out at Sections 28, 29 and 29a of HB 3661.

6. The "memorandum of understanding" that was to be submitted into the record to evidence legislative intent was drafted by the governor's office. I felt that the letter was ambiguous and did not fully reflect the oral agreements at the meeting. Therefore, I did not sign the letter and it was submitted into the record without my signature. A copy of the original letter without my signature, and without Mr. Benner's signature (which inexplicably appeared some time after the legislative session had concluded) is attached to this Affidavit as Exhibit 1 and incorporated herein by this reference.

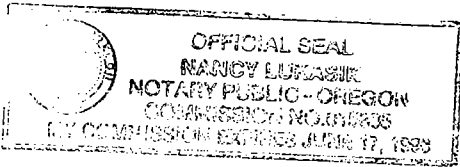
7. Because the House leadership did not feel that the letter from the governor's office adequately represented the agreements reached during our negotiating meeting, the House negotiating team, along with Rep. Ray Baum, sponsor and carrier of HB 3661 in the House, drafted a set of questions and answers which were read on the floor of the House and Senate during floor debate over passage of HB 3661. One of these questions asked: "What is the effect of HB 3661-B on LCDC's new [1992] administrative rules adopted last year?" The answer given was: "It eliminates any rules that take away uses that the legislature authorizes on farm land." The House leadership also decided that Anne Squier's letter should not be read during the floor debate without clarification that the high-value rules could not prohibit uses allowed by the legislature. Therefore, during his reading of Anne Squier's letter on the House floor, Baum interrupted his reading of the letter, stating:


"As an interpretation of this, I would say that in no case are we going to be authorizing LCDC to repeal any uses that are authorized under existing statutory law in both forest and farm zones." Tape Recording, House of Representatives Floor Debate (HB 3661), Aug. 3, 1993, Tape 229, Side A.

A copy of relevant portions of Rep. Baum's speech is attached hereto as Exhibit 2 and incorporated herein by this reference.

  
\_\_\_\_\_  
Dale A. Riddle

SUBSCRIBED AND SWORN to before me this 22nd day of September, 1993.



  
\_\_\_\_\_

BARBARA ROBERTS  
GOVERNOR



BOOK 155 PAGE 0202

OFFICE OF THE GOVERNOR  
STATE CAPITOL  
SALEM, OREGON 97310-0370  
TELEPHONE: (503) 378-3111

July 30, 1993

The Honorable Ron Cease  
Senator, District 10  
Room 216  
State Capitol  
Salem, Oregon 97310

Dear Senator Cease:

The undersigned persons involved in the drafting of amendments to HB 3661 agree that its passage would have the following effects upon LCDC's rules relating to farm and forest land.

HB 3661 would provide opportunities that do not exist in current statutes or LCDC rules to establish dwellings on land zoned for farm and forest use. As a consequence, LCDC would have to amend its Agricultural Lands and Forest Lands Goals and rules to reflect the new opportunities.

HB 3661 intends to replace LCDC's rules on small-scale resource land with new opportunities for dwellings on certain lots of record and on certain lots and parcels eligible for nonfarm dwellings and dwellings in forest zones. If HB 3661 passes into law, LCDC will have to repeal its rules relating to small-scale resource land and revise other rule provisions relating to dwellings so as not to conflict with HB 3661.

LCDC's rules on farmland and forest land contain provisions which conflict with HB 3661. If HB 3661 becomes law, LCDC will be required to review those rule provisions.

LCDC's rules also contain provisions which address matters that are <sup>not</sup> directly addressed by HB 3661. HB 3661 does not affect these provisions and would not require LCDC to repeal or revise these provisions, although the Commission remains free to do so.

The Honorable Ron Cease  
July 30, 1993  
Page 2

BOOK 155 PAGE 0203

LCDC's rules on farmland and forest land contain provisions which address matters that are not directly addressed by HB 3661, but are not inconsistent with it. For example, LCDC's rules allow the creation of parcels smaller than minimum lot and parcels sizes specified in the rules if for the purpose of establishing certain nonfarm and nonforest uses, such as utility facilities. The signatories agree that these rule provisions are not inconsistent with section 7(3) of HB 3661. At the time the Commission repeals or revises other provisions of its rules, the Commission may choose to retain these rule provisions. The signatories expect that LCDC will, at this time, assess the continuing need for these and other rules not inconsistent with HB 3661 and will strive to bring them as close to clear and objective as possible.

HB 3661 would preclude LCDC from defining "high-value farmland" in a manner different from HB 3661 if the definition would have the effect of limiting the opportunities for dwellings on lots of record provided by HB 3661. HB 3661 does not preclude LCDC from defining "high-value farmland" differently from HB 3661 in rules addressing uses other than dwellings allowed under subsection 2 of HB 3661. In fact, the signatories recognize that the HB 3661 definition, being "tract-based," would need adjustment if it is to serve as a basis for planning and zoning. It is the expectation of the signatories, however, that LCDC will review the definition of "high-value farmland" in its current rules to bring it as close to the definition in HB 3661 as possible given the purpose of the rules in order to make its definition optimally clear and objective.

Because passage of HB 3661 will cause LCDC to revise its rules relating to "high-value farmland", the signatories expect that the revised rules will be made applicable to counties on a schedule different from that specified in current rules, but which will allow counties adequate time to make changes.

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Anne W. Squier  
Senior Policy Advisor  
Natural Resources

OREGON HOUSE OF REPRESENTATIVES

DEBATE ON HB 3661 (8/31/93)

Tape 229, Side A

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BOOK 155 PAGE 0204

Rep. Baum: "I want to take a moment now and read into the record as relates to the administrative rules that were adopted last fall by LCDC, [the 1992 Rules] a memorandum of agreement that was read into the House—excuse me, that was read on the Senate floor, and the Senate Committee, that reflects the agreement reached between the Senate, the House and the Governor's office on how this HB 3661 impacts existing secondary land rules. It reads as follows:

'The undersigned persons'—it's dated June 30, 1993, it's addressed to Honorable Ron Cease—'The undersigned persons involved in the drafting of amendments to HB 3661 agree that its passage will have the following effect upon LCDC's rules relating to farm and forest land:

'HB 3661 would provide opportunities that do not exist in current statutes or LCDC rules to establish dwellings on lands zoned for farm and forest use. As a consequence, LCDC would have to amend its agricultural lands and forest lands goals and rules to reflect the new opportunities.

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'HB 3661 would preclude LCDC from defining high-value farm land in a manner different from HB 3661, if the definition would have the effect of limiting the opportunities for dwellings on lots of record provided by HB 3661. HB 3661 does not preclude LCDC from defining high-value farmland differently from HB 3661 in rules addressing uses other than dwellings allowed under subsection (2) of HB 3661. In fact, the signatories recognize that the HB 3661 definition being 'tract-based,' would need adjustment if it is to serve as a basis for planning and zoning.'

"As an interpretation of this, I would say that in no case are we going to be authorizing LCDC to repeal any uses that are authorized under existing statutory law in both forest and farm zones."

'It is the expectation of the signatories of this agreement, however, that LCDC will review the definition of high-value farmland in its current rules to bring it as close to the definition in HB 3661 as possible given the purpose of these rules in order to make its definition optimally clear and objective.'

"That was agreed to by the Governor's office, by the Senate, and the House negotiators."