

IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

Order No. 97- 9-24-2

(In the Matter of Electing Whether or Not to Hear Arguments
 (on an Appeal of a Hearings Official's Remand Decision
 (Approving an Application for Rezoning Property from RR-5
 (to RR-2. (File No. PA 1268-95/Stapleton)

WHEREAS, the Lane County Hearings Official has made a decision on rezoning application PA 1268-95 as instructed by the Board of County Commissioners' remand by means of Order No. 97-2-26-2 following the Oregon Land Use Board of Appeals' (LUBA) remand of an earlier decision; and

WHEREAS, the Lane County Planning Director has accepted an appeal of the Hearings Official's May 2, 1997 remand decision to the Board of County Commissioners; and

WHEREAS, the Lane County Hearings Official has affirmed and declined reconsideration of the remand decision on application PA 1268-95; and

WHEREAS, the remand decisions and Lane Code do not specify the procedure for review of remanded decisions but LC 14.600 provides reasonable procedures and criteria for the Board to follow in deciding whether or not to conduct an on the record hearing for this appeal of a decision by the Hearings Official; and

WHEREAS, the Board has reviewed the appeal and record in this matter at a public meeting.

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

1. That the appeal does not comply with the criteria of LC 14.600(3) and additional arguments on the appeal should therefore not be heard. Review of the record will adequately inform the Board on the issues raised and allow final disposition of the appeal. Findings in support of this decision are attached as Exhibit "A".
2. As described in Exhibit "A", the Lane County Hearings Official decisions dated May 2 and 14, 1997 interpreting applicable provisions of Lane Code 16.003, 16.004, 16.212, 16.231 and 16.252 and further interpreting applicable policy provisions of the Lane County Rural Comprehensive Plan including Agricultural Lands (goal 3) policy #8 and Land Use Planning (goal 2) policy 11, attached as Exhibit "B", are affirmed and adopted by the Board of County Commissioners as its own interpretations in reaching a final decision denying the appeal and approving the application.

DATED this 24th day of September, 1997.

FILED

SEP 30 1997

Cindy Weeldreyer COUNTY CLERK
 BY *M. B. ...*
 Chairperson Lane County Board of Commissioners

APPROVED TO FORM
 Date 9-16-97 Lane County
Stephen J. ...
 OFFICE OF LEGAL COUNSEL

FINDINGS IN SUPPORT OF ORDER NO. 97-9-24-2

1. Property involved in this action is identified as tax lot 1205, map 16-03-32, located at 32393 Coburg Bottom Loop Road, and zoned RR-5/RCP (Rural Residential - 5) within the jurisdiction of the Lane County Rural Comprehensive Plan and Lane Code Chapter 16.
2. In the form of application PA 1268-95, the property owner in March 1995 requested Lane County Hearings Official approval of zone change from RR-5 to RR-2, pursuant to Lane Code 16.252.
3. A hearing before the Lane County Hearings Official was held on June 15, 1995. The record was held open until June 27 at request of parties.
4. On July 10, 1995, the Hearings Official issued a decision approving with conditions the rezoning application.
5. A timely appeal of the Hearings Official decision was filed by a party on July 20, 1995. On July 25, the Hearings Official affirmed his decision.
6. The Hearings Official decision was upheld by the Board on August 23, 1995, by means of Board Order 95-8-23-4.
7. Following Board action, the decision was appealed to the Oregon Land Use Board of Appeals (LUBA No. 95-192), which on March 14, 1996 affirmed the decision of the Hearings Official.
8. The LUBA decision was further appealed to the Court of Appeals (CA A92492), which on May 29, 1996 reversed and remanded the LUBA decision.
9. This Court of Appeals decision was further appealed to the Supreme Court, which on July 30, 1996 denied review of the Court of Appeals' decision, thus sustaining the remand action.
10. On February 26 of this year, the Board adopted Order 97-2-26-2 remanding the rezoning back to the Hearings Official for evaluation of issues raised at the appellate level and "findings consistent with the Court of Appeals' opinion in Gutoski v. Lane County, 141 Or App 265, 917 P2d 1048 (1996)".
12. The Hearings Official on March 4 reopened the record for written arguments on the issues. Material was received from applicant's agent and opponent's agent. The record was closed April 7, and an affirmative decision was made by the Hearings Official on May 2.
11. On May 12, the new decision was again timely appealed. The appeal was accepted by the Director and forwarded to the Hearings Official, who on May 14 reaffirmed the decision.
13. The appeal states that the Approval Authority exceeded his authority and jurisdiction, failed to follow applicable procedure and rendered a decision which misinterpreted Lane Code.
14. The remands and Lane Code provisions do not specify the procedure for review on remand. Although not mandatory in remand proceedings, the Board finds that the criteria and the procedures in LC 14.600 provide reasonable guidance for review of the remanded decision. In addition, the

Board disagrees with the Court of Appeals and interprets LC 14.500 and 14.600 to authorize review and final action by the Board on the record without hearing further arguments. Unless expressly stated otherwise, Board review and final action on an appeal without hearing arguments affirms the reviewed decision. In order for the Board to hold a hearing to hear further arguments on the appeal, LC 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.*

15. The Board of Commissioners finds that the appeal involves a set of circumstances and a fact pattern particular to the property. While the appeal raises issues concerning interpretation of a Rural Comprehensive Plan policy (Policy 8 of Goal 3 policies), the issues raised in the appeal are adequately dealt with in the Hearings Official's decision of May 2, which is affirmed by the Hearings Official letter of May 14. While the policy interpretation may have some County significance in that it could apply to other similar rezonings in the future, the Board finds that the Hearings Official's treatment is appropriate and thus the Board finds that further arguments and evaluation of the issues for this reason is not necessary. The Board further finds no other issues of Countywide significance raised in those elements of the appeal which address procedural matters, including the request for a subsequent hearing or a different allocation of the burden of proof.
16. The Board of Commissioners finds that the issues associated with this appeal may reoccur within the County on occasion during consideration of zone changes in exception areas which border resource lands, but that there is no certainty that they will reoccur "with frequency." The issues were adequately briefed before the Hearings Official and further argument before the Board is not necessary. Furthermore, additional policy guidance from the Board is not necessary in that the Board is satisfied with the reasoning and findings of the Hearings Official and the Board adopts and affirms the same in this Order. No further policy guidance from the Board is necessary at this time.
17. The Board of Commissioners finds that tax lot 1205 is a 4-acre developed residential parcel which is not a unique environmental resource.
18. Neither the Planning Director nor the Hearings Official recommend hearing further arguments provided the Board affirms and adopts the Hearings Official interpretation of applicable policy and Lane Code elements.
19. The Board has reviewed the record in this matter at its regular public meeting, finds that the appeal does not comply with the criteria of LC 14.600(3) elects to not hear further arguments or hold an on the record hearing and finds that review of the appeal on the record provides adequate information for final disposition.
20. The Board expressly agrees with the May 2 and 14, 1997 decisions of the Lane County Hearings Official interpreting Lane Code 16.003, 16.004, 16.212, 16.231 and 16.252 and applicable policies of the Rural Comprehensive Plan including Policy 8 of goal 3 and Policy 11(a) of goal 2, attached here as Exhibit "B". The appeal is denied. The Hearings Official's decisions and interpretations are affirmed and adopted by the Board of County Commissioners as its own interpretation.



BOOK 159 PAGE 1356

Lane Council of Governments

125 East Eighth Avenue Eugene, Oregon 97401 (541) 682-4283 Fax: (541) 682-4099 TDD: (541) 682-4567

May 2, 1997

Mr. Kent Howe
Lane County Land Management Division
Public Service Building
125 East Eighth Avenue
Eugene, Or

Re: PA 1268-95 (Egge)

Dear Mr. Howe:

Enclosed is the Lane County Hearings Official decision on the requested rezoning of Tax Lot 1205, Assessor's Map 16-03-32. This request was initially approved in 1995, but the approval was appealed. After a decision by the Court of Appeals and a remand back down to the Hearings Official, the request has again been approved, taking into account the decision by the Court of Appeals. The property in question has been sold and is now owned by a Mr. Don Stapleton. Mr. Stapleton and his attorney have been added as participants in the decision.

Please contact me if you have any questions.

Sincerely,

Milo Mecham
Lane County Hearings Official

BEFORE THE HEARINGS OFFICIAL OF LANE COUNTY, OREGON

Final Order in PA 1268-95

The Lane County Hearings Official finds as follows:

1. The following application for a change of zone was accepted by the Lane County Land Management Division on April 26, 1995:

Vernon Egge (PA 1268-95)
Tax lot 1205, Assessor's map 16-03-32
Request for a change in zoning from RR-5 to RR-2
2. The application was initiated and submitted in accordance with Lane Code 14.050. Timely and sufficient notice of the zone change hearings under Chapter 14 of the Lane Code has been provided.
3. On June 15, 1995, a public hearing on the zone change request was held, with the record remaining open until June 27, 1995. The planning department staff report and recommendation, together with the submission of persons testifying at the hearing, the subsequent consideration, including a decision by the Court of Appeals and materials submitted upon remand have been considered and are a part of the record of this proceeding.
4. Further consideration has been given to, and administrative notice taken of, the provisions of the Lane County Rural Comprehensive Plan and all applicable special purpose/functional plans, planning related policies and refinement plans.
5. On the basis of this record, the requested zone change is consistent with applicable criteria set forth in the Lane County Rural Comprehensive Plan and sections 16.231 and 16.252 of the Lane Code. This general finding is supported by the specific findings of fact and conclusions of law set out in Exhibit A to this order, adopted May 2, 1997.

NOW, THEREFORE, based on the above findings and the record in this proceeding, IT IS HEREBY ORDERED THAT:

The application for rezoning is APPROVED.

Approval dated this 2nd day of May, 1997.

This action will become final and effective on the 10th day following the approval date above.

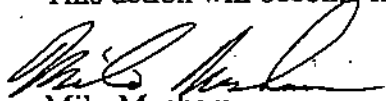

Milo Mecham
Lane County Hearings Official

EXHIBIT A

**LANE COUNTY HEARINGS OFFICIAL
REQUEST FOR THE REZONING OF TAX LOT 1200,
ASSESSOR'S MAP 17-15-01.3, FROM RR-5 TO RR-2**

(CONTESTED)

Application Summary

Vernon Egge, 90520 Coburg Road, Eugene, Oregon 97401. Tax Lot 1205, Assessor's Map 16-03-32. Request to rezone the property from Rural Residential 5 to Rural Residential 2. Following initial approval an appeal was filed, which led to a reversal of the initial approval by the Court of Appeals. Purchase of the property by Don Stapleton during the consideration of the application.

Parties of Record

Vernon Egge
Bill Kloos
Karen Weker
David Jewett

Land Planning Consultants
Peter Gutoski
Mike Evans
Don Stapleton

Application History

Hearing Date: June 15, 1995 (Record to remain open until June 27, 1995)

Remand from Board: February 26, 1997 (Record to remain open until April 7, 1997)

Decision Date: May 2, 1997

Appeal Deadline: May 12, 1997; Lane County Board of Commissioners

Statement of Criteria

OAR 660-04-018(2)
Lane County Rural Comprehensive Plan
Lane Code 13.050(13)
Lane Code 16.003
Lane Code 16.004
Lane Code 16.231(1)
Lane Code 16.252(2)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," has a street address of 32393 Coburg Bottom Loop Road, located approximately one half mile southwest of the City of Coburg. The subject property can also be referred to as tax lot 1205, Assessor's Map 16-03-32. It is L shaped, with the L being inverted when viewed from the south. It is four acres in size and contains one dwelling and an accessory structure. The subject property is served by an on-site well and a septic system located on-site.
2. The subject property is designated Rural Residential in the Lane County Rural Comprehensive Plan and is currently zoned RR-5 (Rural Residential, 5 acre minimum parcel size) consistent with that designation. It is located within a "developed and committed" exception area (Plot 363, Exception #1). This exception area is divided into two parts because of intervening parcels zoned E-30. The two parts of the exception area contain a total of 12 residential zoned parcels comprising 25.21 acres, with an average parcel size of 2.1 acres. The 12 parcels contain 13 dwellings. At the time of acknowledgment, the exception area contained 14 parcels, including two parcels, now zoned E-30, which were later removed. If the two parcels are excluded from consideration, the exception area remains the same as when initially acknowledged.
3. The subject property is bordered on the west by three parcels, one of which only touches the subject parcel on the corner. These three parcels are all zoned RR-5. To the north and to the east of the subject property are two parcels, zoned E-30. These parcels are under common ownership and are used as a part of a large filbert growing operation. Immediately to the south of the subject property is Coburg Bottom Loop Road. Across the road is a large parcel zoned E-30.
4. The subject property receives fire protection from the Coburg Rural Fire District and police protection from the Lane County Sheriff's Department and the Oregon State Police. Electricity is available from Emerald People's Utility District and telephone service is provided by U.S. West. The subject property is within Eugene School District #4J. Solid waste disposal service is available at several Lane County facilities, including the collection facility in Glenwood between Eugene and Springfield. No increase in public service levels is anticipated to become necessary because of the proposed rezoning.
5. The subject property has an existing subsurface sewage disposal system which was inspected and found to be operating satisfactorily in 1991. The soil type - Newberg Fine Sandy Loam and Newberg Loam -- provides an adequate disposal media, so that the subject property could support an additional on-site sewage system. Further development would use an on-site sewer system and draw water from a well on the subject property. The subject property now contains a well which provides more than six gallons of water per minute. A recent summary of well logs indicates that wells in the area, defined as the section designated as 16-03-32, have an average production of 176 gpm. The subject

property is not located within an area identified in the Lane County Manual as a quantity or quality limited groundwater area.

6. The subject property has frontage on and access to Coburg Bottom Loop Road, which is a County maintained road.
7. No historic, cultural, natural, or scenic resources have been identified on the subject property. A referral for Flood Management and Wetlands review indicated that the National Wetlands Inventory of the United States Fish and Wildlife Service does not identify any wetlands on the subject property. It appears from the wetlands inventory map in the record that the subject property was incorrectly located as a part of this review. Correct positioning of the subject property on this map supports the conclusion that there are no NWI wetlands on the subject property. The subject property is located within an "impacted" big game range. No identified sensitive wildlife habitat areas have been identified on or near the subject property. There are no significant slopes on the subject property. A portion of the property is within the 100 year flood plain. No class I streams are located on the subject property.
8. The applicant desires to change the allowed density for development on the subject parcel through this rezoning to create the potential for one additional parcel subject property, increasing the buildout potential to a total of two residences.
9. The farm property to the north and east is used as a filbert orchard. The farm operation depends on spraying as a part of its normal operations, and this spray occasionally drifts off the farm property onto adjacent properties. The farm operation also occasionally operates at night, causing loud noises and using lights for operation during nighttime operation. The area under and around the filbert trees is cleaned by the use of a flail and a mowing machine. This activity raises clouds of dust and causes objects on the ground to be thrown away from the machines at high rates of speed. These thrown objects may be propelled beyond the boundaries of the farm property. The operators of the filbert farm have received complaints from at least one resident of the exception area. No evidence was introduced concerning the farming activities on the property across Coburg Bottom Loop Road from the subject property.

Decision

THE REQUEST (PA 0941-95) FOR THE REZONING OF TAX LOT 1200, ASSESSOR'S MAP 17-15-01.3, FROM RR-5 TO RR-2 IS ALLOWED, SUBJECT TO THE FOLLOWING CONDITIONS:

1. Prior to any application for construction on the subject property, or partition of the subject property, applicant shall have constructed a solid six-foot metal fence along the north and east lines of the subject property.

2. Prior to any application for construction on the subject property, or prior to any application for partition of the subject property, whichever shall occur first, applicant shall file proof of the recordation of a farm or forest management easement for the subject property and any subsequent parcels created from the subject parcel.
3. No request for a permit to construct any new dwelling on the property or on parcels created from the subject property may be made or granted unless the plans submitted with the permit request show that the proposed dwelling will be set back at least 100 feet from the north and east perimeters of the subject property as it currently exists.
4. Any deed transferring ownership of any portion of the subject property and any rental agreement or lease allowing temporary occupancy of all or any portion of the subject property shall contain the following notice, printed in at least 8-point type: THIS PROPERTY IS LOCATED NEXT TO AN OPERATIONAL AGRICULTURAL ACTIVITY. NORMAL OPERATION OF THE AGRICULTURAL USE MAY RESULT IN INTRUSIONS ON OCCUPANTS QUIET ENJOYMENT OF THIS PROPERTY IN THE FORM OF DUST, LIGHTS, NOISE, MIST AND PHYSICAL OBJECTS. CURRENT LAW AND AN EASEMENT BINDING ON THE OWNER AND OCCUPANT OF THIS PROPERTY LIMITS ANY OCCUPANT'S ABILITY TO COMPLAIN OR TAKE LEGAL ACTION CONCERNING THE INTRUSIONS.

Justification for the Decision (Conclusion)

I. STATEWIDE PLANNING GOALS

In implementing Part II of statewide planning Goal 2, Oregon Administrative Rule 660-04-018(2)(c) establishes requirements for zone changes in developed and committed exception areas:

"Changes to plan or zone designations are allowed consistently with subsections (a) or (b) of this section, or where the uses or zones are identified and authorized by specific related policies contained in the acknowledged plan."

Subsection (a) of OAR 660-04-018(2), the relevant requirement for this application, allows zone changes for

"(a) Uses which are the same as the existing types of land use on the exception site . . ."

The zone change requested by this application involves the same type of use as the existing land use on the exception site, namely rural residential. The only change involved is in the intensity of the use, and intensity of use is addressed in the relevant criteria of the Lane County Rural Comprehensive Plan. Accordingly, the application is consistent with the statewide planning goals.

II. PLAN CONFORMITY

BOOK 159 PAGE 1362

The subject property is located in a "developed and committed" rural residential area of Lane County. It is designated Rural Residential by the Lane County Rural Comprehensive Plan and is zoned RR-5. The policies of the Rural Comprehensive Plan applicable to this request are as follows:

- A. **Agricultural Lands (Goal 3) Policy #8.** "Provide maximum protection to agricultural activities by minimizing activities, particularly residential, that conflict with such use. Whenever possible planning goals, policies and regulations should be interpreted in favor of agricultural activities."

This matter was remanded by the Court of Appeals because the Court disagreed with the Hearings Official's original interpretation of Goal 3, Policy 8 as not applying to a request to rezone property in a Rural Residential zone. The Court of Appeals held that Policy 8 "does not state or imply that the zone where the conflicting uses are conducted is germane to whether the agricultural activities with which they conflict are to be protected." Following the Court of Appeals decision, it is no longer possible to read Goal 3, policy 8 as being inapplicable.

The opponents of the proposed rezoning argue that the language of Goal 3, policy 8, requiring that agricultural activities receive maximum protection, applies here to preclude the proposed residential use because there will inevitably be something that can be characterized as a conflict. This interpretation is not mandated or endorsed by the Court of Appeals' decision. Such an interpretation would mean an end to almost any residential use adjacent to an agricultural activity. Since this is not what the remainder of the Rural Comprehensive Plan or Lane Code Chapter 16 calls for, such a severe interpretation must be wrong.

The easiest way to judge how this plan provision should be applied is to look at the standards that the County set when it applied the Rural Comprehensive Plan policy in other circumstances. Lane Code 16.212(3)(c)(i) allows dwellings not provided in conjunction with farm uses on land zoned for farm use, provided that the dwelling will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands devoted to farm use. This provision, which was written to implement the agricultural goals and policies of the Rural Comprehensive Plan, indicates that the standard for determining when a conflict exists is not the inevitable friction that might occur between any two uses. The conflict about which Goal 3, policy 8 is concerned is a clash of uses that will result in a significant change in or a significant increase in the cost of accepted farming practices.

Applicant's successor argues that Goal 2, policy 11, discussed below, implements the provisions of Goal 3, policy 8, and policy 11's provisions for limiting problems from a negative evaluation of the criteria is the method for providing the protection called for in policy 8. This argument is consistent with the Court of Appeals ruling that both policies are to be read with reference to each other, so long as policy 11 is applied in a manner that meets the requirements of maximum protection to agricultural activities in the event of a conflict. This means that where it is shown that a proposed rezoning will significantly change or significantly increase the cost of agricultural

activities, the rezoning must be conditioned to eliminate the possibility of a significant change in or significant increase in the cost of accepted agricultural practices. With that fixed as the criteria, the standards of Goal 3, policy 8 can be applied in this matter as a part of the application of Goal 2, policy 11.

B. Land Use Planning (Goal 2) Policy #11. "Land use designations and densities appropriate for developed and committed areas shall be determined through compliance with other plan policies and the following criteria:

- a. A Rural Residential designation shall be applied to lands which are devoted to rural housing uses as evaluated by the following criteria:
 - i. existing development pattern and density;
 - ii. on-site sewage disposal suitability, or community sewerage;
 - iii. domestic water supply availability;
 - iv. access;
 - v. public services;
 - vi. lack of natural hazards;
 - vii. effect on resource lands.

Densities of 1, 2, 5 or 10 acres shall be applied to represent existing development patterns and to limit problems resulting from a negative evaluation of any of the above criteria."

The Lane County Board of Commissioners issued Board Order 88-2-10-14 clarifying some components of this policy. In three "Policy Interpretations" the Board explained how the existing development pattern should be calculated and how these calculations should then be applied to the six other factors of Goal 2, policy 11.

1. **Existing Development Pattern and Density:** When originally created, the exception area that includes the subject parcel was composed of 14 parcels. At that time the exception area had an area of 32 acres, and an average parcel size of 2.3 acres. The owners of two parcels, who happen to be opponents to the proposed rezoning, petitioned Lane County to have their property within the exception area removed from the exception area. This reduced the number of parcels in the exception area to 12, reduced the area of the exception area to 25.21 acres, and made the average parcel size 2.1 acres.¹ This had the effect of increasing the density of the exception area, and increasing the number of built upon parcels in the exception area. The exception area has not changed since. The existing pattern of development is consistent with the proposed change in zoning. Since its creation the exception area has increased in density. The average parcel size of the exception area is closer to the proposed rezoning than it is to the current RR-5 zoning.

¹ It appears that the application and the staff report calculated the average parcel size using the original area of the exception area, but the reduced number of parcels existing after the exception area was divided. This had the effect of incorrectly increasing the average parcels size.

2. **On-Site Sewage Disposal Suitability or Community Sewerage:** Community sewerage is not available to the subject property. The subject property currently has one functioning on-site sewage disposal system for the existing dwelling, and no problems have been noted with this system. The soil types on the subject property present no unusual problems for sewage disposal at the density proposed by the requested rezoning. At the proposed density and with the existing soil type, the potential for adequate on-site sewage disposal is sufficient to allow the rezoning requested by the applicant. This criteria does not preclude a higher density.

3. **Domestic Water Supply Availability:** The subject property is not within a water quality or quantity limited area. The applicant submitted well logs for the area, and a pump test on the subject property, done September 5, 1991. This evidence indicates that the subject property has sufficient water available to support the proposed increase in density.

4. **Access:** The subject property has frontage along Coburg Bottom Loop Road. This is a County Road which is adequate to handle the increased use that might result from the proposed increase in density. When the question of the impact of the proposed rezoning was referred to Lane County Transportation, no adverse response was received. It is possible that a dedication of right of way will be required by Lane County if the property is partitioned. This does not indicate that the present road is inadequate to handle either existing traffic or the possible increase that might come from the increase in density. The lack of an expression of concern by the referral agency indicates that the proposed density change is compatible with this criteria.

5. **Public Services:** The subject property has a complete range of rural services appropriate for a rural residential area. The exception area has not changed in a manner that would place an increased demand on public services, and no evidence was introduced showing a change in service availability in the area. No evidence was introduced to suggest a deterioration of services would result from the proposed change in density. The initial determination of adequate services made at the time of adoption of the Rural Comprehensive Plan remains effective to show that the required level of public services is available. The proposal meets this criteria.

6. **Lack of Natural Hazards:** About half the subject property is located within a regulated flood hazard area. Development within this area is allowed subject to the requirements of Lane Code 16.244. The portion of the property that might be used in the event of further development lies largely within the flood hazard area. Compliance with the restrictions of the Lane Code will assure that the increased density will not have a negative impact or be negatively impacted by this natural hazard. None of the other natural hazards listed for consideration exist on the subject property.

7. **Effect on Resource Lands:** The subject property abuts resource lands to the east and north and is separated by Coburg Bottom Loop Road from resource land to the south. The Gutoskis, opponents to the proposed rezoning, were most concerned about the possible impact of the proposed rezoning on the abutting resource land owned by the Gutoskis, which is operated as a filbert farm.

As a part of the regular operation of the filbert farm, the filbert trees are sprayed. Drifts of spray occasionally cross the property line of the farm operation. The operation also generates noise at various times, including at night, and uses lights for its operation at what might be considered inconvenient times for residents. Operation of the filbert orchard also produces dust. It is not uncommon for the dust produced to rise in the sky above the orchard and drift across property lines. The Gutoskis fear that an additional residence on the subject property will encourage suits complaining that the operations of the filbert farm interfere with the complainant's residential life style. The greatest potential source of complaints, the Gutoskis fear, may derive from the flailing operations, which are used to remove unwelcome vegetation and other items from the vicinity of the filbert trees. Flailing involves the use of cutting equipment which may fling objects, including, occasionally, parts of the cutting equipment, from the vicinity of the flailing operation some distance away. When the objects have considerable mass, such as when portions of the cutting machine break loose, the flung objects may travel for some distance and impact other objects with significant and penetrating force. Even without the possibility of throwing hard object, flailing produces dust that is likely to drift downwind onto the subject property.

The increased density proposed may have a negative impact on the use of the adjacent natural resource lands, opponents fear, because the location of another dwelling close to the farm land may lead the occupants to complain or take legal action against the farm operation. The Gutoskis introduced evidence of the nature of their concerns in the form of a previously successful suit, which they claimed, penalized them for the same farm operations that they must engage in to continue their operation.

While there is no dispute that the proposed increase in density would have some impact, the evidence shows that the degree of impact is likely to be much less than feared by the opponents. First, the suit that the Gutoskis hold up as evidence of the degree of threat is distinguishable. The suit alleged several acts that do not correspond with the activities that the opponents described as their regular farming practices. Furthermore, since the suit the legislature has passed several laws, ORS 30.930² to 30.947, that offer considerable protection to the farming operation, including the possibility of recovering attorney fees and costs in the event they are wrongfully sued.³

Second, limitations that the Gutoskis have already placed on their farming practices because of the proximity of other residences in the area do not count in the calculation of impacts because of the proposed zone density change. The exception area already contains 12 dwellings, several

² ORS 30.936 provides: "(1) No farming or forest practice on lands zoned for farm or forest use occurring outside an urban growth boundary shall give rise to any private right or action or claim for relief based on nuisance or trespass."

ORS 30.932 provides: "As used in ORS 30.930 to 30.947, 'nuisance' or 'trespass' includes but is not limited to actions or claims based on noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides and use of crop production substances."

³ ORS 30.938 provides: "In any action or claim for relief alleging nuisance or trespass and arising from a practice that is alleged by either party to be a farming or forest practice, the prevailing party shall be entitled to judgment for reasonable attorney fees and costs incurred at trial and on appeal."

of which are close to the natural resource land, and at least one of which is as close as any dwelling that would result from the proposed increase in density on the subject property. The only concern that is relevant to this decision is impacts that might affect the Gutoskis' farming practices as a result of the proposed zone density change and possible addition of a dwelling.

The Gutoskis claim that because the proposed rezoning might lead to another dwelling near the agricultural land, the zone change should be denied. This is an incorrect reading of the Comprehensive Plan requirements. Goal 2, policy 11 does not prohibit increased density in the event of a conflict. The policy states: "[d]ensities of 1, 2, 5, or 10 acres shall be applied to represent existing development patterns and to limit problems resulting from a negative evaluation of any of the above criteria." The Board's Order 88-2-10-14, interpreting the policy makes it clear that the process should include an analysis of how the conflict can be accommodated: "It should be noted that, even though a compatibility problem might be identified during step one of the compatibility analysis, compliance with this policy can still be established if mitigation measures or conditions can be established to reasonably limit any of the identified compatibility problems." In the event that these are problems with adjacent agricultural land that will force a significant change in or significantly increase the cost of accepted farming practices on the nearby farm land, then the proposed change must be limited or conditioned to meet the demands of Goal 3, policy 8 to make certain that agricultural activities are given maximum protection.

Having found a potential compatibility problem between the proposed increase in density and the adjacent farm land (resource land) the question is whether there are measures that can be taken to mitigate the problem. The answer is yes. A metal fence constructed along the boundary of the subject property will deal with most, if not all, of the objects thrown from the flailing operations. Even objects that might penetrate the fence will lose much of their force as they do so. Requiring any dwelling located on the subject property to be set back from the boundary of the farm will also deal with some of the problems. Requiring the owner to sign a farm operations easement should eliminate the possibility of trespass and nuisance claims not only from the flailing operations, but from all of the other operations that create dust or may otherwise be annoying, such as spraying, running at night and so forth. All farming operations in the area will also benefit from application of this easement to the existing dwelling on the subject property.

The Gutoskis did not produce substantial evidence of any actual negative effect that the proposed rezoning would have. These concerns were all speculative, based at most on what some other property owner did under different circumstances. The Gutoskis did not show that this proposed rezoning would force any significant change in their operations. The only hint of a significant increase in the cost of operations was speculation that they might have to pay damages or pay the cost of defending themselves from a nuisance suit. The proposed rezoning is the focus of a generalized concern, but there is no evidence to justify focusing these concerns on the subject parcel. The conditions imposed, in the form of a fence, setbacks, an easement, and notice in any subsequent property transaction make certain that even if any future residents on the subject property feel put upon, they will also be very aware that they chose to move to the nuisance and thus have no grounds to complain after they arrive.

The conditions will apply to renters as well as future owners. The standard form of the Farm and Forest easement specifies that it applies to all successors of the grantors, including assignees. Renters will be bound by the easement, and the applicant and successors should inform any renters of the existence of the easement as a part of renting the property. The condition requiring notice in any rental agreement as well as in any deed will make certain that renters know of the risk and the limits before they take up residence.

The conditions imposed as a part of the approval of the request for rezoning assure that any compatibility problems will be mitigated and the agricultural activities on the adjacent property will be protected. These conditions allow the proposal to achieve compliance with the requirements of the Lane County Rural Comprehensive Plan.

B. Water Resources Policies #3 and #5: These policies state that the adequacy of groundwater supply is a major issue in planning actions before the Hearings Official and that land use designations shall be commensurate with groundwater aquifer capacities. As discussed under Domestic Water Supply Availability above, the area provides adequate water for all users, and the subject property has a supply adequate for present use and the contemplated future use. The proposed zone change is consistent with this criteria.

C. Public Facilities and Services Policy #6.f: The appropriate public service levels established by this policy are enumerated in Public Facilities and Services Policy #6.f: schools, on-site sewage disposal, individual water supply system, electrical service, telephone service, a rural level of fire and police protection, and reasonable access to a solid waste disposal facility. All of these services are available, and no evidence was introduced to suggest that the level of services will be affected by the proposed change in density. The proposed density change is consistent with service provisions at or above the minimum level required by the Lane Rural Comprehensive Plan.

D. Land Use Planning Goal #14: This policy, to encourage residential development to locate within existing incorporated cities or rural communities, requires growth outside of urban growth boundaries to satisfy certain criteria. The applicable criterion here is that growth be restricted to committed or developed areas. As described in Finding of Fact #2 above, the subject property is located within an acknowledged developed or committed exception area.

III. ZONE CONFORMITY

A. Lane Code 16.252(2) This section of the Code establishes the basic requirements for the proposed rezoning. Section 16.252(2) requires that rezoning be consistent with the general purposes of Chapter 16, not be contrary to the public interest, and be consistent with the purposes of the proposed zoning classifications and the Lane County Rural Comprehensive Plan elements. Conformity with the Rural Comprehensive Plan has already been discussed. Rezoning in an exception area to a level that more closely matches the existing pattern of development in the exception area is consistent with the public interest. The conformity of the proposed rezoning with the purpose of Lane Code Chapter 16, as that purpose is set forth in section 16.003 is discussed below.

B. Lane Code 16.003 Lane Code 16.003 describes 14 purposes for Chapter 16. The purposes that are arguably applicable to this application, and that have not been touched upon already, are as follows:

(1) Ensure that development of property within the County is commensurate with the character and physical limitation of the land and, in general, to promote and protect the public health, safety, convenience, and welfare.

The proposed change in the development of the subject property is consistent with the character and the physical limitations of the property. Insofar as any individual development promotes the general public health, safety, convenience and welfare, this proposed development can be said to do so, in that it provides further opportunity for persons to live in rural Lane County without disturbing the predominant natural resource use of the County. The potential conflict with adjacent properties has been mitigated through the imposition of conditions on the proposed development, so that the proposed development will not unduly restrict the contributions made by that property. The proposed density change meets this criteria.

(2) Protect and diversify the economy of the County.

The proposed change, limited by the conditions imposed on it, will protect the economy of the County, but will not diversify the economy in any way. Allowing the proposed increase in density is consistent with this purpose of the Lane Code.

(4) Conserve farm and forest lands for the production of crops, livestock and timber products.

Location of an additional residence within the exception area will preserve resource land by reducing pressure for residential development on the resource land. Lane County has, in Goal 2, policy 11 and the accompanying Board Order, recognized the existence of pressure for greater residential development on the rural parts of Lane County. Allowing increases in density in the exception areas works to preserve resource land.

(5) Encourage the provision of affordable housing in quantities sufficient to allow all citizens some reasonable choice in the selection of a place to live.

The proposed increase in density, and the increase in housing units that may follow will offer increased housing choices and therefore furthers this policy purpose of the Lane Code.

(7) Provide for the orderly and efficient transition from rural to urban land use.

The proposed change in an exception area focuses development in already developed areas and therefore furthers the goal of an orderly transition from rural to urban land uses.

C. **Lane Code 16.004(4)** Lane Code 16.004(4) requires, among other things, that an application to rezone land which creates the potential for additional parcelization or water demands demonstrate the adequacy of a long-term water supply, as described in Lane Code 13.050(13)(a)-(d). The well logs presented by the applicant indicate that the long-term water supply of the subject property is adequate for any additional parcelization which may occur as a result of the proposed rezoning.

D. **Lane Code 16.231(1)** This section states that the purpose of the RR District, which includes the proposed RR-2 zoning, is to provide opportunities for people to live in a rural area, to allow primary and secondary residential uses, to implement the policies of the Rural Comprehensive Plan, particularly in regard to residential development, and to provide protective measures for riparian vegetation along Class I streams. The proposed zoning does promote residential use within a rural area committed to nonresource use. Conformity with the Rural Comprehensive Plan has been discussed above. The subject property is not close enough to any riparian area to require consideration of the riparian vegetation protection standards. The proposed rezoning is consistent with the purposes of Lane Code section 16.231(1).

Conclusion

The application is consistent with all relevant criteria of the Rural comprehensive Plan and the Lane Code. Conditions have been imposed to assure compatibility with nearby resource lands. While these resource lands may feel threatened by the proposed increase in density, the applicable requirements are designed to accommodate the competing public interests of agricultural needs and residential needs by limiting residential development to appropriate areas and making sure that it accommodates itself to agricultural practices by allowing increases in residential density only when it can be conditioned to preserve the more important agricultural activities from substantial harm. This rezoning is consistent with that scheme and meets all the requirements of the Lane Code, the Comprehensive Plan and state law.

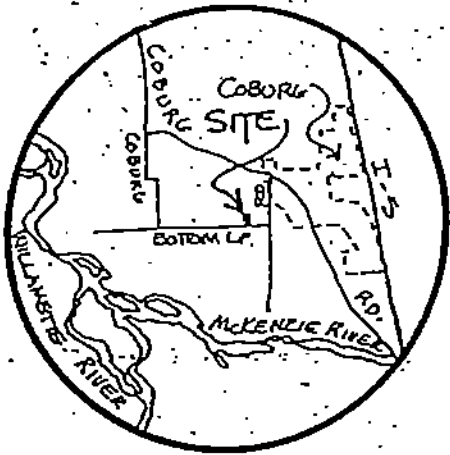
Respectfully Submitted,



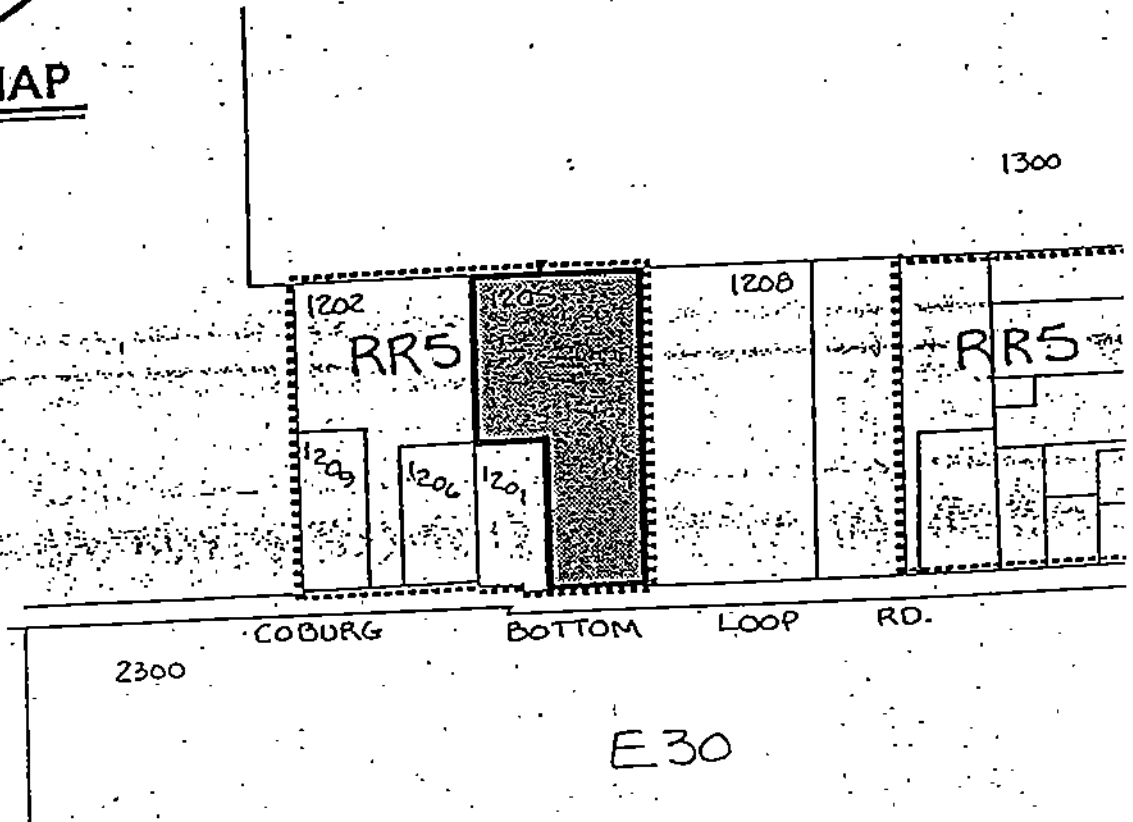
Milo Mecham
Lane County Hearings Official

BOOK 159 PAGE 1370
Exhibit B

Map of subject property and vicinity (PA 1268-95)

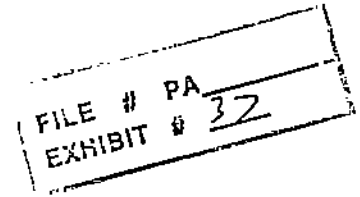


VICINITY MAP





May 14, 1997



John Cole, Director
Lane County Land Management Division
125 E. 8th Ave.
Eugene, Or

Re: Affirming the Hearings Official decision in PA 1268-95

Dear John:

On May 13, 1997, I received a copy of an appeal of the Hearings Official's decision approving an application for a zoning density change after a remand from the Board of Commissioners. As provided in LC 14.535, an appeal of a Hearings Official's decision is to be reviewed by the Hearings Official to determine whether the initial decision should be affirmed, modified or reconsidered. Having reviewed the issues raised in the appeal, I have determined to affirm the Hearings Official's May 2, 1997, decision. The issues raised in the appeal raise important questions concerning the meaning of policies in the Lane County Rural Comprehensive Plan. For that reason I recommend that the Board either accept review or expressly state their agreement with the interpretation offered by the Hearings Official, so that the Board's interpretation can be used in the future.

In the appeal the appellant asserts three general reasons for reconsideration and appeal, and discusses three specific areas of claimed error. The three general reasons: the hearings official exceeded his authority and jurisdiction, failed to follow the applicable procedure, and misinterpreted the provisions of the Lane Code, may be seen to apply in some degree to each of the three specific areas of claimed error. I would like to respond to the request for reconsideration by discussing each of the three specific alleged errors.

1. Interpretation without a subsequent hearing

The appellant claims that the hearings official erred "to the prejudice of the parties' substantial rights, in announcing a new interpretation of Goal 3, policy 8 after the close of the record. The parties have a right to submit evidence and argument after the interpretation is made." (Appeal, page 2) The case law indicates that the right that appellant alleges to have been abridged by the procedures in this case does not exist. In Heceta Water District v. Lane County, 24 Or LUBA 402, 419-20 (1993) LUBA faced a similar complaint and rejected the notion that the state land use laws or Lane County procedures required a new evidentiary hearing after an interpretation of a policy was

announced. In this matter, as in the Heceta Head case, the policy at issue in the appeal was in question throughout the consideration of the application, which means that the appellant has had ample opportunity to introduce all relevant evidence on the matter. Not allowing additional evidence at this time does not harm the appellant's substantial rights.

Furthermore, here, as in the Heceta Head case, the appellant has not explained what aspect of the alleged new interpretation necessitates the submittal of additional evidence. In the absence of this important step, there can be no showing of an error harming substantive rights, even if there were such a right.

The cases appellant cites in the appeal letter do not apply as appellant wants. Morrison v. City of Portland 70 Or App 437 (1984) and Friends of the Metolius v. Jefferson County, 28 Or LUBA 591 (1995) concerned situations where the jurisdiction had originally given no notice concerning the potential application of a provision of law. In both cases after remand the jurisdiction applied the provision in question without giving any party an opportunity to discuss how the provision might be interpreted or applied. In both cases the reviewing court held that the jurisdiction should have given the parties an opportunity to submit arguments (but not additional evidence) on how the policy in question should be applied before a decision was made.

In those cases what the jurisdiction did was an error, but it does not describe what happened in the present matter. Here the appellant has claimed all along that Goal 3, policy 8 applied, and introduced evidence and arguments concerning the claimed consequences of applying the policy. After the Hearings Official's decision was remanded by the Court of Appeals, appellant was given another opportunity to submit argument and evidence on how the policy should be interpreted and applied. Following that, the Hearings Official issued a decision applying Goal 3, policy 8. Lane Code 14.515 gives the appellant an opportunity to make additional arguments concerning the application of the policy, and the appellant has taken advantage of that opportunity in filing an appeal and explaining the perceived errors. Appellant has received the opportunities to be heard that are allowed or required in the decision making process.

2. Interpretation of Goal 3, policy 8

The Hearings Official's decision after remand did apply Goal 3, policy 8 in a manner contrary to the manner proposed by the appellant. The Hearings Official does not accept the applicant's suggestion that this was an error, or that it was contrary to the express language of the policy.

Appellant sought to have Goal 3, policy 8 applied with regard to a specific issue in a specific way. Appellant argued that when Goal 3, policy 8 is applied to residential rezoning applications subject to Goal 2, policy 11, if there would be any conceivable amount of potential harm to the agricultural activity, the only answer is to deny the

proposed rezoning. The Hearings Official rejected this suggestion because it would create an apparent inconsistency in the interpretation and application of Goal 3, policy 8.

Goal 3, policy 8 is a part of the Rural Comprehensive Plan and should have been applied consistently throughout the Rural Comprehensive Plan and the Lane Code. While Goal 3, policy 8 may appear to the appellant to be unambiguous and require only one interpretation, there are other parts of the Rural Comprehensive Plan and especially the Lane Code where Goal 3, policy 8 was apparently applied in a manner different than the appellant advocated. The most obvious place where this is true is with regard to the provisions allowing a non-farm residence on property zoned for agricultural use. In this circumstance the Board of Commissioners chose to prohibit residential uses if they will have the effect of causing a significant change in farm practices, or significantly increase the cost of farming on adjacent agricultural land. These provisions could only be consistent with Goal 3, policy 8 if the level of conflict that Goal 3, policy 8 focuses on is conflict that will force a significant change in or significantly increase the cost of accepted farm practices.

Appellant incorrectly argues that the Hearings Official's decision only allows consideration of certain conflicts. Under the application of Goal 3, policy 8 used by the Hearings Official, the word conflict in Goal 3, policy 8 means a negative impact that will force a significant change in or a significant increase in the cost of accepted farming practices. There are not two types of conflict; impacts that fall below the threshold of a significant impact are not conflicts within the meaning of Goal 3, policy 8.

The Hearings Official's decision was designed to follow the Court of Appeal's mandate to apply Goal 3, policy 8 to this decision. Implicit in the Court of Appeals decision, as it is in all of land use planning, is the mandate to apply the policy in this matter in a way that is consistent with other applications of the policy. The Hearings Official was not trying to develop a new interpretation of Goal 3, policy 8 such as the appellant offered. Instead the Hearings Official sought to apply Goal 3, policy 8 in this matter in the same way that it had been applied in other circumstances.

3. Burden of proof

Appellant asserts that the Hearings Official's decision reversed the burden of proof and required the appellant to prove that there would be a significant change in or significant increase in the cost of the farming practices. Appellant finds proof of this in the fact that the hearings official considered and rejected the evidence that the appellant offered about the impact that the proposed rezoning might have.

This was not a shifting of the burden of proof. It was instead an attempt to consider all the evidence, positive and negative that might apply to the question of whether the proposed rezoning would have an impact. The applicants had asserted that

the proposed rezoning would not have a negative effect, and had cited evidence from the existing residences in the area, reasoning that adding one more residence in the area would not have a significant independent negative effect. The appellant offered contrary evidence. In discussing the appellant's evidence and explaining why the hearings official did not give it the same credence that the appellant wanted, the hearings official was complying with the requirements for what are adequate findings.

"[F]indings must (1) identify the relevant approval standards, (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion that the request satisfies the approval standards. In addition, when a party raises issues regarding compliance with any particular approval criteria, it is incumbent upon the local government to address those issues. When evidence is conflicting, the local government may choose which evidence to accept, but it must state the facts it relies on and explain why those facts lead to the conclusion that the applicable standard is satisfied." LeRoux v. Malheur County, 30 Or LUBA 268, 271 (1996) (citations omitted).

A decision does not need to respond to each and every fact or argument proposed, but if it is going to reject some evidence in the record, the requirements of relying on the substantial evidence in the record suggest that some explanation of why some evidence is rejected is prudent. See, Mission Bottom Association, Inc. v. Marion County, 32 Or LUBA ___ (LUBA 96-057) (Sept. 26, 1996) Discussing the evidence offered by the appellant and explaining why it was not found to have the conclusive effect that the appellant wanted it to have is not placing the burden of proof on the appellant.

4. Conclusion

For the reasons set forth here, I conclude that the hearings official's decision does not need to be reconsidered. However, because the issue the appellant raises concerning the meaning of Goal 3, policy 8 are important for Lane County, I do suggest that the Board take steps to give expression to their interpretation of the policy. Under the current Lane Code, the Board can do this either by accepting the appeal or affirmatively adopting the Hearings Official's decision.

Respectfully submitted,



Milo Mecham
Lane County Hearings Official

cc: Bill Kloos (for appellant)