AGENDA COVER MEMO

Memorandum Date: January 12, 2024
Order Date: January 30, 2024

TO: Board of County Commissioners

DEPTARTMENT: Public Works Department, Land Management Division (LMD)

PRESENTED BY: Shawna Adams, Senior Planner

AGENDA ITEM TITLE: ORDER NO. _____/ In the Matter of Electing to Conduct an On-the-Record Hearing to Review the Hearings Official's Denial of Three Forest Template Dwelling Proposals in the Impacted Forest Lands Zone (F-2): Assessor's Map 21-25-12, Tax Lot 843, File No. 509-PA23-05321 (E.J.K. Investments); Assessor's Map 21-35-07, Tax Lot 2900, File No. 509-PA23-05322 (E.J.K. Investments); Assessor's Map 21-35-07, Tax Lot 2800, File No. 509-PA23-05323 (Edward J King)

I. MOTION

Motion Alternatives for the Board of County Commissioners:

1. Move to adopt the Order electing to conduct an on-the-record hearing on March 19, 2024; or

2. Move to direct staff to modify the Order electing to conduct an on-the-record hearing in accordance with the procedures set forth in in LC 14.080(5)(b) [state modifications]; or

3. Move to not adopt the Order and direct staff to return with an Order ratifying and affirming the Hearings Official decisions [state whether the Board expressly agrees with or remains silent on any interpretations made by the Hearings Official].

II. AGENDA ITEM SUMMARY

On June 13, 2023, the Board directed LMD staff to elevate the next relevant Hearings Official decision involving Rural Comprehensive Plan (RCP) Goal 5, Flora & Fauna Policy 11 (Policy 11) for the Board to consider whether to adopt a local interpretation of the policy. On November 2, 2023, the Lane County Hearings Official denied three applications seeking forest template dwelling approvals on separate parcels adjacent to the Oakridge Airport. For

all three applications, Policy 11 conformance was the sole basis for denial. In accordance with the Board's directive, the Planning Director requests Board review of the Hearings Official decisions pursuant to Lane Code (LC) 14.080(1)(e) and 14.080(5)(a). LC 14.080(5)(b) provides that the Board must now decide whether to adopt a written decision and Order electing to affirm the Hearings Official decisions or to conduct a hearing on-the-record.

III. BACKGROUND/IMPLICATIONS OF ACTION

A. Board Action and Other History

1. On May 8, 2023, the Law Office of Bill Kloos filed three applications with LMD on behalf of Edward J. King and E.J. K. Investments, each seeking Director Approval for a dwelling in the Impacted Forest Lands (F-2) Zone pursuant to the 'Template Dwelling' provisions of LC 16.211(2)-2.4, House Bill 2225, and RCP Goal 5 Flora and Fauna Policy 11, as applicable.

    a. File No. 509-PA23-05321; Assessor's Map 21-25-12, Tax Lot 843; Owner/Applicant E.J.K. Investments
    b. File No. 509-PA23-05322; Assessor's Map 21-35-07, Tax Lot 2900; Owner/Applicant E.J.K. Investments
    c. File No. 509-PA23-05323; Assessor's Map 21-35-07, Tax Lot 2800; Owner/Applicant Edward J King

2. Each of the three applications seeks approval for dwellings on a parcel of less than 14 acres that directly abuts the Oakridge Airport and that is located within the Airport Safety Combining Zone (/AS) area. Apart from a small corner of Tax Lot 843 of Assessor's Map 21-25-12, the subject parcels are entirely zoned Impacted Forest Lands (F-2) and are located within designated Goal 5 Major Big Game Habitat.

3. On June 7, 2023, LMD staff deemed the applications complete. The Lane County Planning Director elected to elevate the applications for Hearings Official review through a Type III procedure pursuant to LC 14.030(1)(b)(ii)(cc). Accordingly, on August 16, 2023, Lane County staff sent notice of a public hearing before the Lane County Hearings Official to occur on September 7, 2023.

4. The initial public hearings for the applications were held on September 7, 2023. The Hearings Official granted an extended record period for written testimony allowing for all parties of record to the Hearings proceeding to submit additional evidence and argument with an opportunity for response, and final rebuttal by the applicant prior to October 12, 2023.

5. During the hearing proceedings, the applicant's agent provided full timeline waivers to the applicable statutory 150-day statutory timeline requirements for final local set forth in ORS 215.427. The waivers were provided for all three applications.

6. On November 2, 2023, the Hearings Official issued decisions denying all three applications. Required notice of the Hearings Official's decision was mailed to parties of record on November 6, 2024.

7. On November 9, 2023, LMD staff mailed notice informing parties of record of the Planning Director's request and recommendation for Board review pursuant to LC 14.080(1)(e) and LC 14.080(5)(a)(iv).

B. Policy Issues

LC 14.080(5) establishes the procedure and requirements for Director requests for Board review of Hearings Official decisions. LC 14.080(5)(a) is addressed below in Section III.F, Analysis.

C. Board Goals

The Board's decision to affirm the Hearings Official decisions or to conduct an on-the-record hearing does not directly relate to any of the Board's strategic planning goals. Approval or denial of land use applications is determined by compliance with specific approval criteria dictated by the Lane Code and state law, and consistency with relevant RCP policies adopted by the Board and acknowledged by the Land Conservation and Development Commission (LCDC). See Section III.F, Analysis.

D. Financial and/or Resource Considerations

The Board Review process presents the potential for financial and staffing impacts as it is not fee supported. The procedures and requirements of Lane Code 14.080(5) allow for Board Review if specific criteria are met.

E. Health Implications

There are no direct health implications related to the Board's decision whether to affirm or to conduct an on-the-record hearing for review of the Hearings Official decisions.

F. Analysis

LC 14.080(5) sets forth the requirements and procedures governing Director requests for Board review of Hearings Official decisions. See **Attachment 5** for LC Chapter 14 website link. The decisions that the Board is asked to review are provided in **Attachment 2 through 4**. The same approval criteria apply for the review of all three applications. The Hearings Official denied the applications solely based on Policy 11 and found that all other criteria could be satisfied.

Policy 11 states:

> *Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of Big Game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in*

accordance with OAR 660-16-000. The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program.

In 2021, the Oregon Land Use Board of Appeals (LUBA) held that Policy 11 must be applied directly as an approval criterion for new dwelling proposals on parcels within designated Major and Peripheral Big Game Habitat areas. (*Nimpkish LLC* LUBA No. 2020-030 and *King/EJK Investments* LUBA No. 2021-047). LUBA's decision in *King* was affirmed by the Court of Appeals in 2022. The specific land use applications denied under *King* involved prior template dwelling proposals for two of the three parcels involved in the current matter before the Board.

The result of these appeal rulings generally has been understood to be that new forest zone residences proposed within designated Major Big Game Habitat cannot be approved on parcels of less than 80 acres in size or on tracts of land with an average parcel size of 80 acres or less. The Hearings Official decisions address new evidence not previously considered by LUBA concerning the Oregon Department of Fish and Wildlife *(*ODFW) residential density recommendations referenced in Policy 11. In consideration of this evidence, the Hearings Official decisions recognize that the Policy 11 residential density standard in Major Big Game Habitat allows up to one dwelling per 40 acres where clustering of dwellings is required in addition to allowing one dwelling per 80 acres where clustering of dwellings is not required.

Because the three of the template dwelling applications for this matter involve parcels of less than 14 acres in Major Big Game habitat, the additional dwellings proposed on these parcels would exceed the maximum density allowance regardless of whether the 40-acre density standard with clustering requirements or the 80-acre standard recognized by LUBA in *Nimpkish* and *King* were to apply. Accordingly, the question of whether the less restrictive density standard might apply under the circumstances was left unresolved in the Hearings Official decisions.

The applicants' agent acknowledged that the Hearings Official is bound by LUBA's holdings in *Nimpkish* and *King* and was obligated to deny the proposals. He also proposed an alternative interpretation of Policy 11 intended for consideration and adoption by the Board, reasoning that the Board is entitled to more deference and not bound by the holdings in *Nimpkish* and *King*. Interpreted as proposed, Policy 11 would not constitute an approval criterion for template dwelling applications and would provide no basis for denial of the applications.

The Hearings Official decisions offer analysis responding to the applicant's proposal that was placed before the Hearings Official.

Requirements for Director Requests for Board Review. LC 14.080(5)(a) provides that the Director may request that the Board affirm the Hearings Official decision or conduct an on-the record hearing if the decision involves any of the following circumstances:

(i) Interpretation of County policies or issues of countywide significance;

(ii) Issues that will reoccur with frequency or for which there is a need for policy guidance;

(iii) Issues involving impacts to an inventoried Goal 5 resource; or

(iv) The Director or Hearings Official recommends review.

The Director's request for Board review is justified under subsections (i), (iii), and (iv). Since the basis for Hearings Official denial and the Director's request for Board review is the same for all three decisions, the Director has requested that the Board review all three decisions jointly. During the Hearings Official proceedings, many parties of record submitted testimony indicating that Policy 11 residential density standards could not be satisfied and would be a determinative issue for the approval of a forest template dwelling application on their property. Opponents emphasized that Policy 11 density standards would be determinative only in the absence of applying the required Goal 5 process for resolving the conflict with Major Big Game habitat.

Related to this, the need for local interpretation by the Board has been raised in a variety of contexts, including public comments in Board meetings and the testimony presented to the Hearings Official for the subject applications. At their June 13, 2023 meeting, the Board directed LMD staff elevate the next relevant land use application involving the interpretation of the policy for Board review and consideration. The applicants' proposal for the Board to interpret Policy 11 to not apply as an approval criterion for forest template dwelling applications, together with the new information concerning the specific density recommendations referenced in Policy 11 presented in the record before the Hearings Official, present a timely opportunity for the Board to review and to consider further interpretation of Policy 11.

The Hearings Official decision to deny the applications based on Policy 11 directly pertains to impacts and acknowledged protections for inventoried Goal 5 Big Game habitat resources.

In the Director's view, the circumstances warrant policy interpretation and resolution by the Board. Accordingly, the Planning Director recommends that the Board conduct an on-the-record hearing to review the Hearings Official decisions.

Procedure for Director Requests for Board Review. Lane Code 14.080(5)(b) compels the Board to adopt a written decision and Order electing to affirm the Hearings Official decision or to conduct a hearing on-the-record in a prescribed manner. If requested by the Director, or if an Order to affirm the decision is not adopted and the Board so elects, the procedures provide that the Board will conduct an on-the-record hearing.

The procedures limit participation in the on-the-record hearing to the Director or staff representative and the applicant and the applicant's representative and confine the Board's review to the record for the Hearings Official proceedings. The procedures provide certain exceptions that allow for the other parties to the Hearings Official proceeding to participate and to provide limited additional testimony with demonstration that the information could not have been presented before close of the record. The applicant and other parties may be afforded an opportunity to provide new evidence as

well, if certain criteria of LC 14.080(5)() are met. These procedures outline several other factors for the Board to considered before additional limited testimony may be allowed. As well, the Board Order electing to conduct an on-the-record hearing must specify the participants that qualify to participate and whether limited additional testimony is warranted and will be permitted.

In this instance, the Hearings Official allowed for extended record periods following the hearing providing all parties to the proceeding the opportunity to submit additional evidence and testimony and to respond to the additional testimony and evidence submitted during the record period. Accordingly, the Board Order provided in **Attachment 1** limits participation to the applicant and Director without allowing for additional limited testimony, in accordance with the applicable procedures.

G. Alternatives/Options

1. Approve the Order electing to conduct an on-the-record hearing on March 19, 2024.

2. Direct staff to modify the Order electing to review the Hearings Official decisions and to conduct an on-the-record hearing on March 19, 2024. Any modifications must be in accordance with the procedural requirements set forth in LC 14.080(5)(b).

3. Do not approve the Order electing to conduct an on-the-record hearing. Direct staff to return with an Order ratifying and affirming the Hearings Official decisions. The Order must specify whether the Board expressly agrees with or remains silent on any interpretations made by the Hearings Official.

IV. RECOMMENDATION

The Planning Director recommends **Option 1** above.

V. TIMING/IMPLEMENTATION/FOLLOW-UP

If the Board adopts the Order to conduct on-the-record hearing under **Option 1**, the hearing will be scheduled on March 19, 2024, and staff will return to the Board on the date. (**Attachment 1**)

If the Board chooses **Option 2** and directs staff to modify the Order to conduct an on-the-record hearing, staff will return to the Board with the modified Order for Board approval on the consent calendar prior to the on-the record hearing. The Order will specify March 19, 2024 as the date for the on-the-record hearing unless the Board directs staff to schedule the hearing a different date.

If the Board chooses **Option 3** and elects to affirm the Hearings Official decisions without conducting an on-the-record hearing, the Board will be asked to specify whether the Board expressly agrees with any interpretations made by the Hearing Official or chooses to remain silent. Staff will return with an Order reflecting the Board's decision for adoption on the consent calendar.

Under **Option 1** or **Option 2**, required notice will be mailed to all parties of record at least 10 days in advance of the on the on-the-record hearing and staff will prepare an agenda cover memo with a summary of the record of the proceeding before the Hearings Official and alternatives for Board action. After conducting an on-the-record hearing, the Board will decide whether to affirm, reverse, or modify the Decisions.

In any event, the involved parties to the Hearings Official proceeding will be notified of the Board outcome.

VI. ATTACHMENTS

1. Board Order electing to conduct an on-the-record hearing
   a. Exhibit A: Findings in Support of the Order
2. Hearings Official decision dated November 2, 2023, File No. 509-PA23-05321
3. Hearings Official decision dated November 2, 2023, File No. 509-PA23-05322
4. Hearings Official decision dated November 2, 2023, File No. 509-PA23-05323
5. LC Chapter 14 Application Review and Appeal Procedures can be accessed via the following website link: LC14.docx (civiclive.com)

**The entire file record is available for review at the Land Management Division. If an on-the-record appeal hearing is scheduled, a complete copy of the record with all evidence will be made available to the Board as part of the staff agenda cover memo packet or via website links noted therein.*

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 24-01-30-04	ORDER / In the Matter of Electing to Conduct an On-the-Record Hearing to Review the Hearings Official's Denial of Three Forest Template Dwelling Proposals in the Impacted Forest Lands Zone (F-2): Assessor's Map 21-25-12, Tax Lot 843, File No. 509-PA23-05321 (E.J.K. Investments); Assessor's Map 21-35-07, Tax Lot 2900, File No. 509-PA23-05322 (E.J.K. Investments); Assessor's Map 21-35-07, Tax Lot 2800, File No. 509-PA23-05323 (Edward J King)

WHEREAS, the Lane County Hearings Official (the Hearings Official) has made the decision to deny three Type II Forest Template Dwelling applications elevated by the Lane County Planning Director (the Director) for Hearings Official review through a Type III procedure under Department File Nos. 509-PA23-05321, 509-PA23-05322, and 509-PA23-05323 (the Decisions); and

WHEREAS, pursuant to Lane Code (LC) 14.080(5)(a), the Director now requests review of the Hearings Official's Decisions by the Lane County Board of County Commissioners (the Board) in an on-the-record hearing; and

WHEREAS, LC 14.080(5) provides the procedures which the Director's request for Board review must follow; and

WHEREAS, LC 14.080(5)(b) specifies that the Board must adopt a written decision and order electing to conduct a hearing on-the-record; and

WHEREAS, LC 14.080(5)(b)(ii) provides that a Board order to conduct an on-the-record hearing must specify the date for the on-the-record hearing, the parties who qualify to participate in the on-the-record hearing, and whether the Board finds that an opportunity for limited additional testimony is warranted and will be provided; and

WHEREAS, in a duly noticed public meeting, the Board has considered materials presented by County staff including an agenda cover memorandum which recommends that the Board adopt the following Order and review the Hearings Official decision in an on-the-record hearing; and

NOW, THEREFORE, the Board of County Commissioners of Lane County **ORDERS** as follows:

1. The foregoing recitals are adopted herein by reference and in support of this Order.

2. The Decisions qualify for Board review pursuant to LC 14.080(5)(a)(i)-(iv). Specifically, the Decisions involve the circumstances described under subsections (i), (iii), and (iv) of LC 14.080(5)(a), as supported by the findings of fact attached hereto as Exhibit A and incorporated herein by reference. Therefore, and consistent with the Director's request, the Board elects to conduct an on-the-record hearing pursuant to the procedures in LC 14.080(5)(c).

3. After conducting an on-the-record hearing, the Board will decide whether to affirm, reverse, or modify the Decisions.

4. The tentative date for the hearing on-the-record is March 19, 2024. The hearing will be conducted in accordance with the procedures in LC 14.080(5)(c). LC 14.080(5)(c)(i). Pursuant to LC 14.080(5)(c)(i), the evidence considered by the Board in an on-the-record hearing proceeding must be confined to the record of the proceeding before the Hearings Official, with the exception of limited additional testimony as described in LC 14.080(5)(c)(i) and specified in the Board Order electing to conduct the hearing on-the-record.

5. The opportunity for limited additional testimony described in LC 14.080(5)(c)(ii) is not warranted and will not be provided. The Board may only admit additional testimony from parties of record based on LC 14.080(5)(c)(ii) if the Board is satisfied that limited additional testimony or other evidence could not have been presented before the close of record on the Hearings Official proceedings. In those proceedings, the Hearings Official accommodated requests to extend the evidentiary Hearing record to allow all parties the opportunity to present additional evidence and to respond to the new information submitted.

6. The parties that qualify to participate in the hearing on-the-record pursuant to LC 14.080(5)(c)(vii) are the Director, the applicants, and the applicants' representative.

ADOPTED this 30th day of January, 2024.

_____

Laurie Trieger, Chair
Lane County Board of Commissioners

ORDER EXHIBIT A

FINDINGS IN SUPPORT OF THE ORDER

1. On May 8, 2023, the Law Office of Bill Kloos filed three applications with the Land Management Division (LMD) on behalf of Edward J. King and E.J. K. Investments, each seeking Director Approval for a dwelling in the Impacted Forest Lands (F-2) Zone pursuant to the 'Template Dwelling' provisions of LC 16.211(2)-2.4, House Bill 2225, and RCP Goal 5 Flora and Fauna Policy 11 (Policy 11), as applicable.
   a. File No. 509-PA23-05321; Assessor's Map 21-25-12, Tax Lot 843; Owner/Applicant E.J.K. Investments
   b. File No. 509-PA23-05322; Assessor's Map 21-35-07, Tax Lot 2900; Owner/Applicant E.J.K. Investments
   c. File No. 509-PA23-05323; Assessor's Map 21-35-07, Tax Lot 2800; Owner/Applicant Edward J King

2. Each of the three applications seeks approval for dwellings on a parcel of less than 14 acres that directly abuts the Oakridge Airport and is located within the Airport Safety Combining Zone (/AS) area. Apart from a small corner of Tax Lot 843 of Assessor's Map 21-25-12, the subject parcels are entirely zoned Impacted Forest Lands (F-2) and are located within designated Goal 5 Major Big Game Habitat.

3. On June 7, 2023, LMD staff deemed the applications complete. The Lane County Planning Director elected to elevate the applications for Hearings Official review through a Type III procedure pursuant to LC 14.030(1)(b)(ii)(cc). Accordingly, on August 16, 2023, Lane County staff sent notice of a public hearing before the Lane County Hearings Official to occur on September 7, 2023.

4. The initial public hearings for the applications were held on September 7, 2023. The Hearings Official granted an extended record period for written testimony allowing for parties of record to the Hearings proceeding to submit additional evidence and argument with an opportunity for response and final rebuttal by the applicant by October 12, 2023.

5. During the hearing proceedings, the applicant's agent provided full timeline waivers to the applicable statutory 150-day statutory timeline requirements for final local set forth in ORS 215.427. The waivers were provided for all three applications.

6. On November 2, 2023, the Hearings Official issued decisions denying all three applications. Required notice of the Hearings Official's decision was mailed to parties of record on November 6, 2024.

7. On November 9, 2023, the LMD staff mailed notice informing parties of record of the Planning Director's request and recommendation for Board review pursuant to LC 14.080(1)(e) and LC 14.080(5)(a)(iv).

8. LC 14.080(5)(a) provides that the Director may request that the Board affirm the Hearings Official decision or conduct an on-the record hearing if the decision involves any of the following circumstances:
   (i) Interpretation of County policies or issues of countywide significance;
   (ii) Issues that will reoccur with frequency or for which there is a need for policy guidance;
   (iii) Issues involving impacts to an inventoried Goal 5 resource; or
   (iv) The Director or Hearings Official recommends review.

9. Interpretation of County policies or issues of countywide significance. Conformance with Rural Comprehensive Plan (RCP) Goal 5 Flora & Fauna Policy 11 (Policy 11) is the sole basis for the Hearing Official denial of the applications. The Oregon Land Use Board of Appeals (LUBA) and Oregon Court of Appeals held that Goal 5, Flora & Fauna Policy 11 must be applied directly as an approval criterion for new dwelling proposals on parcels within designated Major and Peripheral Big Game Habitat areas. (Nimpkish LLC (LUBA No. 2020-030 and King/EJK Investments LUBA No. 2021-047). The question of when and how Policy 11 applies directly to land use applications has been contested and these appeal rulings were made without benefit of clarification and interpretation by the Board, which would be entitled to greater degree of deference that was afforded to the Hearings Official decisions reviewed under those ruling. The need for Board policy interpretation of Policy 11 has been raised in a variety of contexts and has been requested of the Board in public comments. On June 13, 2023 meeting, the Board directed LMD staff elevate the next relevant land use application involving the interpretation of the policy for Board review and consideration of the Policy, either by affirming the Hearings Official or making its own interpretation of the Policy.

10. Issues involving impacts to an inventoried Goal 5 resource. The Hearings Official decision to deny the applications based on Policy 11 directly pertains to impacts and acknowledged protections measure for inventoried Goal 5 Big Game habitat resources.

11. The Director or Hearings Official recommends review. The Director requested Board joint Board review of the three applications based on LC 14.080(5)(a) (i), (iii), and (iv) and recommended that the Board conduct a hearing on-the-record hearing for the purpose of resolving uncertainty regarding Policy 11. The Director has indicated that new information and testimony related to the adoption and acknowledgment of Policy 11 not previously considered was placed in the record before the Hearings Official.

12. The Board agrees that the Director request for Board Review pursuant to LC 14.080(5)(a) based on LC 14.080(5)(a) (i), (iii), and (iv) is warranted.

NOV 0 6 2023

BEFORE THE LANE COUNTY HEARINGS OFFICIAL

REVIEW OF AN APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING WITHIN AN F–2 DISTRICT

Application Summary

On May 8 2023, the applicant, Edward J. King/E.J.K. Investments, filed an application seeking to establish a dwelling in the Impacted Forest Lands (F-2) zone on tax lot 843, assessors map 21-25-12. PA 23-05321. The application was deemed complete on June 7, 2023. County staff elected to hear this application through a Type III initial Hearings Official review, pursuant to Lane Code 14.030(1)(b)(ii)(cc). Accordingly, on August 16, 2023, Lane County staff sent notice of a public hearing to occur on September 7, 2023 before the Lane County Hearings Official. The initial public hearing was held on September 7, 2023.

Parties of Record

Edward J. King/E.J.K. Investments (Bill Kloos)
Michael Farthing — Jim McLaughlin
Nicholas Milosevich — Amy Pincus
LandWatch Lane County (LandWatch) (Lauri Segel; Sean Malone)
1000 Friends of Oregon (Andrew Mulkey)
Richard and Amy Shearer — Sharon Carroll — Jim Babson
Ellen and Herbert Jaeger — Carlette Larson — Tony Drago
Land Planning Consultants; Mike Evans — Deborah Noble
McKenzie Land and Timber, LLC; Casey Jones (Kim O'Dea)
Chris and Meagan Leturno — Lynda McCord (Kim O'Dea)
Jeremy and Celeste Keepers (Kim O'Dea) — Kay King
Greg Demers; ATR Services (Kim O'Dea)
Fern Hollow Farms (Kim O'Dea) — PM Land and Timber (Kim O'Dea)
Melvin McDougal; McDougal Bros. Inv., McDougal Bros. Inc., Leelynn Inc. (Kim O'Dea)
Mike Miller (Kim O'Dea) — Weston Hallstead (Kim O'Dea)
Robert Gill (Kim O'Dea)
Oregon Department of Fish and Wildlife (ODFW) (Joe Stack)

Application History

Hearing Date: September 7, 2023
(Record Held Open Until October 12, 2023)

Decision Date: November 2, 2023

Appeal Deadline

A party may request reconsideration of this decision by the Hearings Official, pursuant to Lane Code 14.080(1)(a)(iii) and (1)(b), by filing a notice of appeal within 12 days after the date the notice of decision was mailed. If a party seeking further review chooses not to seek reconsideration, they must file an appeal directly with LUBA within the timelines set forth in state law. See LUBA's website for more information on appeal deadlines.

Statement of Criteria

Lane Code (LC) 16.211(2)-2.4; LC 16.211(3)(c), (3)(p), (3)(q), (5), and (6)
House Bill 2225
Rural Comprehensive Plan (RCP) Goal 5 Flora and Fauna Policy 11

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 843, assessor's map 21–25–12, which is immediately west of the Oakridge Airport and situated between the Westfir and Oakridge Urban Growth Boundaries. The property is approximately 13.34 acres and is vacant.

   The subject property is zoned Impacted Forest Land (F–2) except for a small portion of the property's eastern corner, which is zoned Rural Residential (RR-5). The property also falls within the Airport Safety Combining Zone (/AS). The F-2 portion of the property is located entirely within designated Major Big Game Habitat recognized as a significant Goal 5 resource under the RCP.

2. The subject application is one of three template dwelling applications submitted on the same date. The other two applications are PA 23-05322 and PA 23-05323. The other two applications are requests for forest template dwelling approvals that were previously denied by the Hearings Official (PA 20-05064 and PA 20-05066) and subsequently appealed to LUBA.

Decision

THE EDWARD J. KING/E.J.K. INVESTMENTS APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING (PA- 05321) ON TAX LOT 843, ASSESSOR'S MAP 21–25–12 IS DENIED.

Motion to Strike

At the hearing in this matter, the Hearings Official announced the following open record period:

September 21, 2023: First open record period
October 5, 2023: Responses to materials submitted during first open record period

October 12, 2023: Final rebuttal by applicant

During the time period for submitting responses (*i.e.*, from September 21 through October 5), Carlette Larson submitted written materials. The submittal included tax lot maps with writing on them; a list of tax lots and tax payers and owners; Assessment and Taxation records; and individual property account information. Ms. Larson does not explain how the documents are in response to issues raised in the open record period.

LandWatch moves to strike the submittal of Ms. Larson because the documents are not relevant to the issues before the Hearings Official, and LandWatch does not believe the documents are responsive to issues raised in the initial open record period. The Hearings Official agrees that the materials do not appear to be responsive to materials that were submitted during the first open record period. Accordingly, the motion to strike is granted.

Justification for the Decision

I. Goal 5, Policy 11

The main dispute in this case involves an interpretation of RCP Goal 5 Flora and Fauna Policy 11 (referred to herein as Policy 11). Policy 11 is a policy that is intended to implement the requirements of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) aimed at preserving habitat for Big Game.[1] Policy 11 provides:

> "*Oregon Department of Fish and Wildlife [ODFW] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program.*" Lane County Rural Comprehensive Plan (RCP) Goal 5, Flora and Fauna Policy 11.

The history of the adoption of RCP Goal 5 Flora and Fauna Policy 11 goes all the way back to the 1980s, when the RCP was acknowledged by the Land Conservation and Development Commission (LCDC). This history is important to the Hearings Official's and the Board's mission in this case, which is to discern what the County Board at that time intended regarding the meaning and applicability of Policy 11.

The County's recent decision making on the issue began in November, 2019 with the Hearings Official's decision in *Green.* PA 18-05913 (November 25, 2019). A different Lane County Hearings Official issued a decision in *Nimpkish* a few months later, in February, 2020. PA 19-

[1] The County mapped areas of big game as Major Big Game (the most highly protected), Peripheral Big Game (the next highest level of protection), and Impacted Big Game (least protected).

05298 (February 4, 2020). Prior to *Green* and *Nimpkish*, the County did not require an application for a forest template dwelling to assess the impacts of such dwelling on Big Game Habitat. Both *Green* and *Nimpkish* involved applications for forest template dwellings on property located in the F-2 zone and within the County's areas designated for Major Big Game Habitat. In both cases, LandWatch argued that it was not sufficient for an applicant seeking approval of a forest template dwelling on property located within mapped Big Game Habitat areas, to demonstrate compliance with the applicable approval criteria found in the Lane Code. LandWatch argued that Policy 11 provided an approval criterion that applied directly to an application for a forest template dwelling where the property fell within a protected Major Big Game area.

The parties in *Green* and *Nimpkish* provided research regarding the initial RCP acknowledgment process in an attempt to shed light on the County's intent in adopting Policy 11. Ultimately, the Hearings Officials in both *Green* and *Nimpkish* held that Policy 11 did not apply directly to applications for forest template dwellings in this circumstance. The Hearings Official's decision in *Nimpkish* was appealed to LUBA.

LUBA disagreed with the Hearings Official's determination in *Nimpkish* and determined, based on a rather extensive review of the acknowledgment materials from the early 1980s, that Policy 11 applied directly as an approval criterion to applications for forest template dwellings on lands shown as protected big game habitat on the County's Goal 5 maps for big game habitat. *LandWatch Lane County v. Lane County (Nimpkish)*, ___ Or LUBA ___ (LUBA No. 2020-030, January 23, 2021).

In two subsequent appeals, the Lane County Hearings Official denied requests for forest template dwellings, based on LUBA's ruling in *Nimpkish*. PA 20-05064 and PA 20-05066 (*King*). These decisions were also appealed to LUBA, which affirmed the Hearings Official decisions denying the applications based on the applicant's failure to demonstrate compliance with Policy 11. *King v. Lane County (King* or *King 2021)*, ___ Or LUBA ___ (LUBA Nos. 2021-047/052, October 15, 2021).[2] On appeal to the Oregon Court of Appeals, the Court affirmed without opinion. *King v. Lane County*, 317 Or App 136, 501 P3d 1058 (2022).

LUBA's determinations in both *Nimpkish* and *King* involved a review of final local decisions rendered by the Lane County Hearings Official. When LUBA reviews a decision of a local hearings official, it is not required to "defer" to that decision. When LUBA reviews a decision of a local governing body (in this case, the Board of Commissioners), however, LUBA is required to defer to that body's interpretation of its own local legislation. The applicant in this case asserts that the Lane County Board of Commissioners can provide its own interpretation of Policy 11, and it argues that LUBA will be required to defer to that interpretation. That added deference, according to the applicant, could result in a different decision by LUBA.

[2] LUBA's decisions in the *King 2021* appeals went further than LUBA's decision in *Nimpkish* and examined how the "overall dwelling density" was to be determined—i.e., what unit of land was to be used for the denominator in the density calculation. That issue is not relevant to this appeal and will not be discussed further.

For the most part, the Hearings Official agrees with the applicant regarding this assertion. The Hearings Official does not agree with LandWatch that the County Board is bound by LUBA's previous rulings, because the scope of deference is different in this case.[3] The Hearings Official does note, however, that any interpretation that the Board adopts must also be consistent with state law, as Policy 11 is intended to implement the requirements of Statewide Planning Goal 5 as it relates to protection for Big Game Habitat. LUBA's discussions in both *Nimpkish* and *King* were based largely on the extent to which an interpretation of Policy 11 complied with state law, *i.e.*, the dictates of Statewide Planning Goal 5.[4] It seems likely that, on review of this decision, if appealed, LUBA will be concerned about an interpretation of Policy 11 that it feels lacks the necessary protections to fully implement the dictates of Goal 5.

The Hearings Official understands that the Board will likely review this Hearings Official decision so that it can provide a Board interpretation of Policy 11 that LUBA, on appeal, will be required to defer to. With that goal in mind, the Hearings Official provides the following interpretation as a guide to the Board's decision.

RCP Acknowledgment

At the time of acknowledgment of RCP Policy 11, it was well accepted that residential development was the main potential conflict with protection of Big Game Habitat. Accordingly, DLCD and ODFW staff's primary concern regarding Big Game Habitat was the allowed density of dwellings in areas mapped for Big Game Habitat protections. In that vein, DLCD aimed to help counties draft comprehensive plan policies and code language that would minimize the density of residences where such density could impact Big Game Habitat.

There is relevant analysis in both LUBA decisions in *Nimpkish* and *King* and in staff's memorandum to the Hearings Official in this case. However, this decision will attempt to narrow the discussion to the key issue in this case. That issue is to what extent the County and DLCD viewed the Lane Code provisions as adequate to protect the resource; *i.e.*, Big Game Habitat. That is, did the Code fully implement Policy 11, such that only the Code provisions applied? Or did Policy 11 contain protections that remained applicable to discrete land use applications such as requests for forest template dwellings on land protected for Big Game Habitat?

The first sentence of Policy 11 provides: *Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County.*

In the prior cases, it was assumed that the ODFW "recommendations for overall residential density for protection of big game" was no more than one dwelling per 80 acres in the Major Big Game Habitat areas and no more than one dwelling per 40 acres in the Peripheral Big Game

[3] The applicant is correct that LUBA would be required to affirm an interpretation so long as it is "plausible."
[4] LUBA stated: "Moreover, the county must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential development through density standards, in a manner that is not inconsistent with Goal 5. ORS 197.829(1)(d)." *Nimpkish*, slip op. 14.

Habitat. This assumption or assertion was not correct or complete. The record in this case makes clear that the ODFW overall residential density recommendations included an alternative for circumstances where clustering was required. In the Major Big Game Habitat, one dwelling per 40 acres (rather than one dwelling per 80 acres) is acceptable with cluster development. In Peripheral Big Game Habitat, one dwelling per 20 acres (rather than one dwelling per 40 acres) is acceptable with cluster development. *See* attachment to March 30, 1983 letter from Neal Coenen, ODFW Program Leader, to Aldie Howard, Benton County Planning Director.[5] The recommendation articulates clearly that it relates to "overall residential density" and not "minimum lot sizes." A minimum lot size only regulates how big or small a property must be when the property is being created. It does not address how big a property must be in order to site a dwelling on it. That said, the County relied, at least in part, on minimum lot sizes in the F-1 and F-2 zones to assist with compliance with Goal 5 Big Game Habitat protections.

Lane County's first attempt at acknowledgment of its Goal 5 program related to protection of Big Game Habitat was rejected by DLCD. It had proposed a minimum lot size in the F-2 zone of 20 acres and a minimum lot size in the F-1 zone of 40 acres. ODFW and 1000 Friends objected to that proposal, in part because it was not consistent with the ODFW density recommendations. As a result of the negative comments, Lane County ended up adopting much larger minimum lots sizes of 80 acres for the F-1 zone and 40 acres for the F-2 zone. It also adopted provisions that required clustering.

However, as DLCD and ODFW made clear, the recommended residential density related to overall residential density, not minimum lot size. That is, the County's choice to adopt a minimum lot size for the forest zone (and presumably for areas designated for protected Big Game Habitat), did not fully address ODFW's recommended residential densities. There was nothing in the adopted Code that addressed actual overall residential densities when a dwelling was proposed to be added. Specifically, the Code did not include a required minimum lot size for approval of a dwelling in the F-2 zone. Accordingly, the Code provisions did not fully address the overall residential density recommendations. For example, if there was a cluster of small, nonconforming (*i.e.*, smaller than the minimum lot size for the zone) properties zoned F-2, as long as the owners could satisfy the approval criteria in the Code, they could potentially build out the properties far in excess of ODFW's recommended residential density.

That all being said, the Hearings Official is aware that the question here is not whether Policy 11 and the Lane Code fully protect Big Game resources. Rather, the question is what the County and DLCD intended at the time the RCP was acknowledged in 1984. As discussed below, the Hearings Official believes that the intent of Policy 11 was to fill the hole with regard to Goal 5 protections that was left because the County Code did not have a minimum lot size requirement for placement of a dwelling.

The applicant's proposed interpretation of Policy 11 is found in the Home Builders Association of Lane County's letter of interpretation that was provided to the Board by Pete Barrell on May

[5] The ODFW policy recommendation for overall residential densities found attached to the March 30, 1983 letter was in relation to Benton County's acknowledgment. But the one-page attachment is entitled "Big Game Ranges—Northwest Oregon" and appears to contain the recommendations for Lane County as well.

8, 2022. That letter asserts that Lane Code 16.211, the chapter of the Code applicable to the F-2 zone, is intended as an exhaustive list of applicable approval criteria and standards. It relies on the Purpose statement in LC 16.211(1) and the introduction to the Table of Permitted Uses (Table 16.211-1) found at LC 16.211(2). The Table includes "Template Dwellings" as an allowed use in the F-2 zone and makes no mention of Policy 11 as an applicable approval standard. In general, the applicant is correct that comprehensive plan policies do not usually apply directly to discrete land use applications where there are land use regulations that fully implement that particular policy. However, as explained below, Policy 11 was not fully implemented by the Lane Code in this case. The legislative history of Policy 11 (*i.e.,* the acknowledgment materials) make clear that in certain circumstances, a full Goal 5 analysis would be required when a forest template dwelling was sought on lands protected as Big Game Habitat.

The applicant also argues, through the Home Builders' proposed interpretation, that the Flora and Fauna Working Paper "moved away from setting minimum lot sizes for dwelling applications on F-2 land and toward applying siting and clustering standards." The Hearings Official does not believe this argument, even if true, provides a basis for concluding that Policy 11 does not apply directly to certain applications for forest template dwellings.

The applicant relies, at least in part, on Directive 2.d of DLCD staff's July 19, 1984 staff report, which provides: "Amend the F-2 and EFU zones to carry out the intent of the Flora and Fauna Policy 11. Specifically, the zones must either require larger minimum lot sizes in the Big Game Habitat portions of those zones or contain clustering requirements in those areas." Taken out of context, this statement could be read as an either/or directive: increase minimum lot sizes OR adopt clustering requirements. Read in context, however, it is clear that the County chose to address this directive by increasing the minimum lot size proposed in the F-2 zone (from 20 acres to 40 acres), AND by adopting clustering requirements for dwellings in an attempt to comply with the ODFW recommended density standards, which were one dwelling per 40 acres in the Major Big Game Habitat where clustering is required.

The Hearings Official believes that language found in the August 17, 1984 DLCD acknowledgment staff report to LCDC is determinative as to the intended meaning of Policy 11. In response to objections made to the version of Policy 11 that was ultimately adopted, DLCD found:

> "[Response 2]. [The proposed, and ultimately adopted, language of Policy 11 is cited here].
>
> Objectors are not correct that this policy [Policy 11] violates Goal 5. Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.* This would require a plan amendment and could only take place if justified based on the Goal 5 analysis. However, as noted previously, the County still needs to adopt measures in its F-2, [Marginal Lands] and EFU zones which ensure ODFW's density standards will be achieved.

> The second part of the policy requires the County to work with ODFW in preventing conflicts from occurring through land use regulations in resource areas and such things as siting requirement[s]. *ODFW is correct that its recommended density standards (if adopted in the ordinance) would constitute an approach to resolve and/or prevent conflicts between dwellings and big game habitat. However as discussed below, the county has not adopted such standards in its zoning ordinance."* August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).
>
> [Response 3]. ODFW is correct that the County's F-1 and F-2 zones do not incorporate ODFW's development density recommendations, nor do they set forth siting or clustering requirements. Without siting and clustering requirements, the minimum lot sizes in the F-1, F-2 and E zones are half that recommended by ODFW (i.e., the minimum lot sizes would have to be doubled to be acceptable). This is a problem in the F-2 and EFU zones in particular, but not in the F-1 zone, since in general, dwellings are not permitted in that zone." August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).

The County ultimately adopted a minimum lot size in the F-2 zone of 40 acres, with clustering standards. However, as was made clear in the comment quoted above, this action only demonstrated compliance with the ODFW overall residential density standards where a property on which a dwelling would be sited satisfied the 40-acre minimum lot size requirement and where the siting of the dwelling satisfied the clustering siting standards. Consistent with the language in Policy 11, as explained in the July, 1984 staff report, "Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.*" The County could have adopted minimum lot sizes for siting of dwellings that satisfied the ODFW recommended density standards. However, it chose not to do so. It chose, rather, to leave the Goal 5 analysis of the conflict created between a proposed dwelling and big game habitat to the time at which "such proposals are made"—that is, at the time the County processes an application for a forest template dwelling that, if approved, would create an overall residential density greater than the ODFW recommended residential density standards.

The Hearings Official believes that LUBA has already succinctly answered the applicant's arguments as follows:

> "the County's failure to take the step of identifying regions and basing zoning by region on either overall residential densities or ODFW minimum parcel size recommendations does not mean that the county is absolved from protecting land included on the Big Game Habitat Inventory as Major Big Game Range through the residential density recommendations referred to in RCP Goal 5, Flora and Fauna Policy 11, or that the density recommendations simply do not apply. * * * the County must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential

development through density standards, in a manner that is not inconsistent with Goal 5." *Nimpkish*, slip op. at 14.

The Hearings Official hereby incorporates the analysis in staff's August 31, 2023 Staff Report,[6] addressing the appeal issues, as well as staff's analysis addressing the remainder of the approval criteria. *See* Attachment 1 to Staff Report (Lane County Hearings Official Staff Analysis).

II. Needed Housing

The applicant raises another theory upon which he bases the assertion that Policy 11 does not apply directly to an application for a forest template dwelling. The applicant contends that Policy 11 is not clear and objective and therefore cannot be applied to needed housing, pursuant to ORS 197.307(4), the needed housing statute. The Hearings Official understands the applicant to have withdrawn this argument, based on the recent LUBA decision in *LandWatch Lane County v. Lane County (Helsel)*, ___ Or LUBA ___ (LUBA No. 2023-037, August 28, 2023). *Helsel* held that the clear and objective requirement found in ORS 197.307(4) does not apply to housing on EFU land outside the urban growth boundary. To the extent the applicant did not technically withdraw the "needed housing" argument, the Hearings Official determines that, based on the analysis in *Helsel*, the clear and objective requirement does not apply to applications for forest template dwellings on rural resource lands zoned F-2.

III. Access and Other Findings

During the open record period, the applicant submitted four revised site plans relevant to access to the subject property: one showing the proposed access for all three dwellings sought on tax lot 2800 (PA 23-05323), tax lot 2900 (PA 23-05422), and tax lot 843 (subject application); one showing access for tax lot 2800 only; one showing access for tax lot 2900 only; and one showing access for tax lot 843 only. *See* applicant's Open Record submittal letter dated September 21, 2023, with attached revised site plans (all dated September 20, 2023). The revised site plans are attached hereto as Exhibit A.

The Hearings Official understands the Planning Director to propose adopting the Planning Director analysis and proposed conditions of approval regarding the driveway (based on the revised site plans), as well as the rest of the findings addressing the remainder of the approval criteria.[7] That is, if the Board opts to adopt an interpretation of Policy 11 that would allow approval of the proposed dwelling, the remainder of the applicable approval criteria are satisfied, as set forth in the Lane County Hearings Official Staff Analysis (Staff Analysis), attached as Attachment 1 to the Lane County Hearings Official Staff Report, dated August 31, 2023, with the proposed conditions of approval, attached as Exhibit C to Staff Analysis.

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[6] Caveat: The Hearings Official agrees with the opponents that the language in reference to Cerro Gordo is not particularly applicable to determining compliance with the Big Game aspects of Goal 5 as a whole.

[7] The Hearings Official's reliance on the revised site plans dated September 20, 2023 is based on the understanding that the accessway shown on the revised site plans accurately depicts the location of the existing roadway. That is, the evidentiary foundation for the determination that the approval criteria are satisfied assumes that a new roadway will not be created.

Conclusion

The Hearings Official agrees with the applicant that, in a review by LUBA of the Board's decision in this case, LUBA will be required to defer to the Board's interpretation of its own policy (Policy 11). However, that statement is tempered by the fact that any interpretation must also be consistent with the requirements imposed by Statewide Planning Goal 5 as it relates to protection of Big Game Habitat. Given the language of LUBA's opinions, quoted above, in *Nimpkish* and *King*, the Hearings Official believes that the Board has an uphill battle if it wishes to adopt an interpretation that does not fully implement ODFW's recommended residential densities, which is required by Policy 11.

With regard to any hope on the part of the County to "remove barriers" for approvals for dwellings in the F-2 zone due to the current emergency for needed housing, the Hearings Official does not believe that the answer to the housing crisis should include ignoring the protections of Goal 5 for Big Game Habitat to facilitate housing in a rural resource zone. There are better places for such needed housing where the necessary facilities are available and where precious resources will not be impacted.

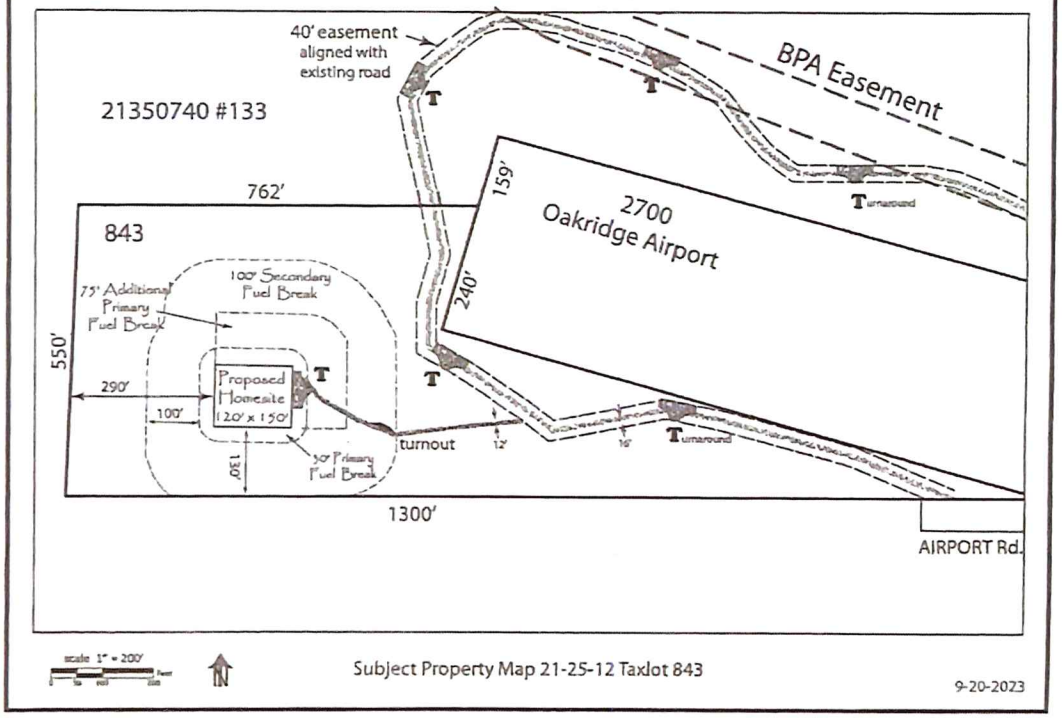
Respectfully Submitted,

Anne C. Davies
Lane County Hearings Official

SITE PLAN SUBMITTAL FORM

OWNER NAME: E.J.K Investments **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405	**Map and Taxlot #:** 21-25-12 Tax Lot 843 **Scale:** 1 inch = 200 feet	**APPLICANT NAME:** Edward J. King **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405

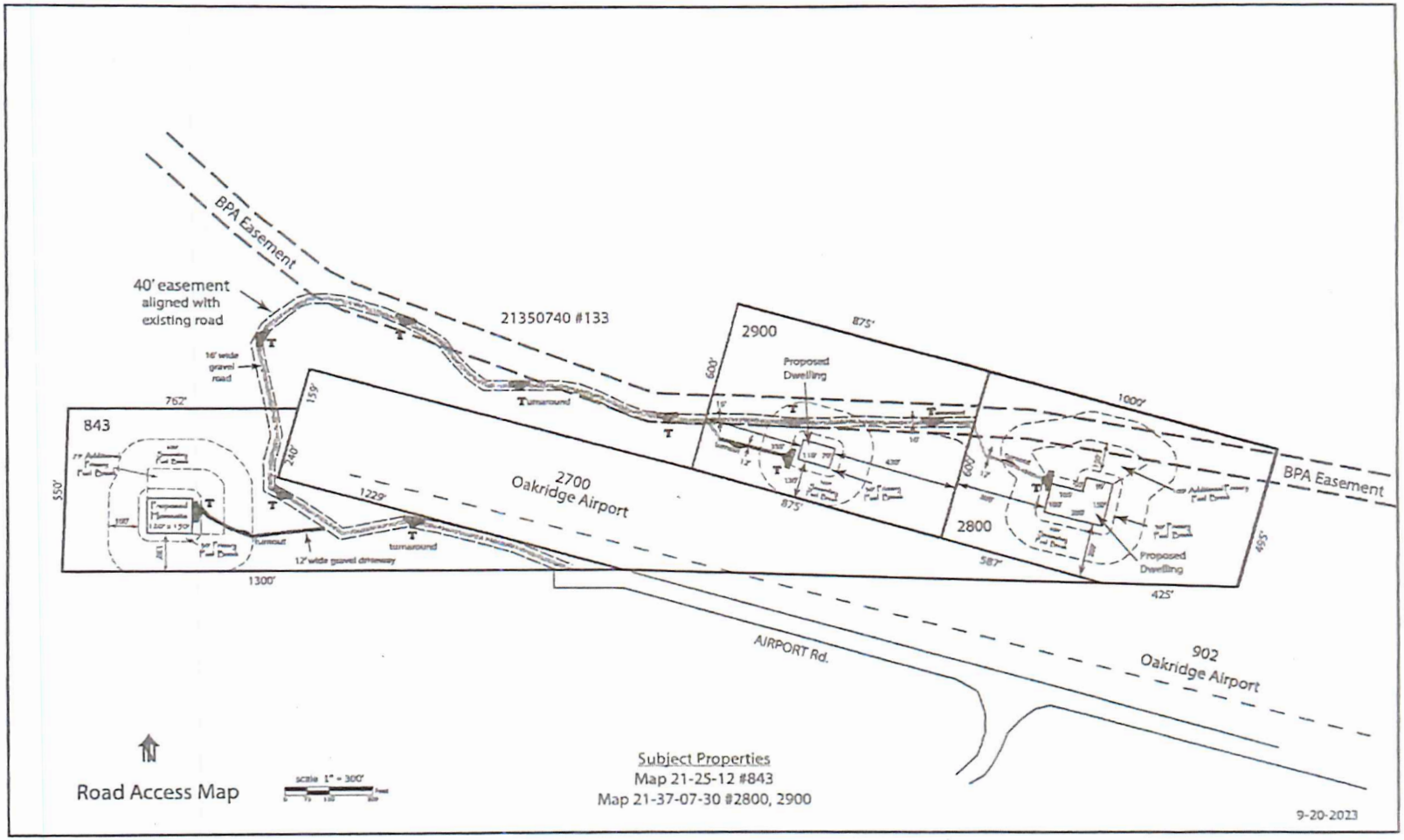
Site Plan



Subject Property Map 21-25-12 Taxlot 843

9-20-2023

EXHIBIT A


BPA Easement
40' easement aligned with existing road
16' wide gravel road
21350740 #133
2900
875'
600'
Proposed Dwelling
1000'
762'
843
159'
240'
2700
Oakridge Airport
1229'
550'
turnout
12' wide gravel driveway
turnaround
1300'
2800
587'
425'
495'
BPA Easement
AIRPORT Rd.
902
Oakridge Airport
Road Access Map
scale 1" = 300'
Subject Properties
Map 21-25-12 #843
Map 21-37-07-30 #2800, 2900
9-20-2023

NOV 0 6 2023

BEFORE THE LANE COUNTY HEARINGS OFFICIAL

REVIEW OF AN APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING WITHIN AN F–2 DISTRICT

Application Summary

On May 8, 2023, the applicant, Edward J. King/E.J.K Investments, filed an application seeking to establish a dwelling in the Impacted Forest Lands (F-2) zone on tax lot 2900, assessor's map 21-35-07-30. PA 23-05322. The application was deemed complete on June 7, 2023. County staff elected to hear this application through a Type III initial Hearings Official review, pursuant to Lane Code 14.030(1)(b)(ii)(cc). Accordingly, on August 16, 2023, Lane County staff sent notice of a public hearing to occur on September 7, 2023 before the Lane County Hearings Official. The initial public hearing was held on September 7, 2023.

Parties of Record

Edward J. King (Bill Kloos)
Michael Farthing — Jim McLaughlin
Nicholas Milosevich — Amy Pincus
LandWatch Lane County (LandWatch) (Lauri Segel; Sean Malone)
1000 Friends of Oregon (Andrew Mulkey)
Richard and Amy Shearer — Sharon Carroll — Jim Babson
Ellen and Herbert Jaeger — Carlette Larson — Tony Drago
Land Planning Consultants; Mike Evans — Deborah Noble
McKenzie Land and Timber, LLC; Casey Jones (Kim O'Dea)
Chris and Meagan Leturno — Lynda McCord (Kim O'Dea)
Jeremy and Celeste Keepers (Kim O'Dea) — Kay King
Greg Demers; ATR Services (Kim O'Dea)
Fern Hollow Farms (Kim O'Dea) — PM Land and Timber (Kim O'Dea)
Melvin McDougal; McDougal Bros. Inv., McDougal Bros. Inc., Leelynn Inc. (Kim O'Dea)
Mike Miller (Kim O'Dea) — Weston Hallstead (Kim O'Dea)
Robert Gill (Kim O'Dea)
Oregon Department of Fish and Wildlife (ODFW) (Joe Stack)

Application History

Hearing Date: September 7, 2023
(Record Held Open Until October 12, 2023)

Decision Date: November 2, 2023

Appeal Deadline

A party may request reconsideration of this decision by the Hearings Official, pursuant to Lane Code 14.080(1)(a)(iii) and (1)(b), by filing a notice of appeal within 12 days after the date the notice of decision was mailed. If a party seeking further review chooses not to seek reconsideration, they must file an appeal directly with LUBA within the timelines set forth in state law. See LUBA's website for more information on appeal deadlines.

Statement of Criteria

Lane Code (LC) 16.211(2)-2.4; LC 16.211(3)(c), (3)(p), (3)(q), (5), and (6)
House Bill 2225
Rural Comprehensive Plan (RCP) Goal 5 Flora and Fauna Policy 11

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 2900, assessor's map 21–35–07–30, which is immediately north of the Oakridge Airport and situated between the Westfir and Oakridge Urban Growth Boundaries. The property is approximately 12.05 acres and is vacant except for an existing roadway and powerlines largely within an east-west Bonneville Power Administration easement that transects the property.

   The subject property is designated Forest in the Lane County Rural Comprehensive Plan and is zoned Impacted Forest Land (F–2, RCP), consistent with that plan designation. The subject property is located entirely within designated Major Big Game Habitat recognized as a significant Goal 5 resource under the RCP.

2. The subject application is one of three template dwelling applications submitted on the same date. The other two applications are PA 23-05321 and PA 23-05323. This application and PA 23-05323 are requests for forest template dwelling approvals that were previously denied by the Hearings Official and subsequently appealed to LUBA—PA 20-05064 (Tax Lot 2900) and PA 20-05066 (Tax Lot 2800).

Decision

THE EDWARD J. KING/E.J.K. INVESTMENTS APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING (PA- 22-05322) ON TAX LOT 2900, ASSESSOR'S MAP 21–35–07–30 IS DENIED.

Motion to Strike

At the hearing in this matter, the Hearings Official announced the following open record period:

September 21, 2023: First open record period

October 5, 2023: Responses to materials submitted during first open record period
October 12, 2023: Final rebuttal by applicant

During the time period for submitting responses (*i.e.*, from September 21 through October 5), Carlette Larson submitted written materials. The submittal included tax lot maps with writing on them; a list of tax lots and tax payers and owners; Assessment and Taxation records; and individual property account information. Ms. Larson does not explain how the documents are in response to issues raised in the open record period.

LandWatch moves to strike the submittal of Ms. Larson because the documents are not relevant to the issues before the Hearings Official, and LandWatch does not believe the documents are responsive to issues raised in the initial open record period. The Hearings Official agrees that the materials do not appear to be responsive to materials that were submitted during the first open record period. Accordingly, the motion to strike is granted.

Justification for the Decision

I. Goal 5, Policy 11

The main dispute in this case involves an interpretation of RCP Goal 5 Flora and Fauna Policy 11 (referred to herein as Policy 11). Policy 11 is a policy that is intended to implement the requirements of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) aimed at preserving habitat for Big Game.[1] Policy 11 provides:

> "*Oregon Department of Fish and Wildlife [ODFW] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program.*" Lane County Rural Comprehensive Plan (RCP) Goal 5, Flora and Fauna Policy 11.

The history of the adoption of RCP Goal 5 Flora and Fauna Policy 11 goes all the way back to the 1980s, when the RCP was acknowledged by the Land Conservation and Development Commission (LCDC). This history is important to the Hearings Official's and the Board's mission in this case, which is to discern what the County Board at that time intended regarding the meaning and applicability of Policy 11.

The County's recent decision making on the issue began in November, 2019 with the Hearings Official's decision in *Green.* PA 18-05913 (November 25, 2019). A different Lane County

[1] The County mapped areas of big game as Major Big Game (the most highly protected), Peripheral Big Game (the next highest level of protection), and Impacted Big Game (least protected).

Hearings Official issued a decision in *Nimpkish* a few months later, in February, 2020. PA 19-05298 (February 4, 2020). Prior to *Green* and *Nimpkish*, the County did not require an application for a forest template dwelling to assess the impacts of such dwelling on Big Game Habitat. Both *Green* and *Nimpkish* involved applications for forest template dwellings on property located in the F-2 zone and within the County's areas designated for Major Big Game Habitat. In both cases, LandWatch argued that it was not sufficient for an applicant seeking approval of a forest template dwelling on property located within mapped Big Game Habitat areas, to demonstrate compliance with the applicable approval criteria found in the Lane Code. LandWatch argued that Policy 11 provided an approval criterion that applied directly to an application for a forest template dwelling where the property fell within a protected Major Big Game area.

The parties in *Green* and *Nimpkish* provided research regarding the initial RCP acknowledgment process in an attempt to shed light on the County's intent in adopting Policy 11. Ultimately, the Hearings Officials in both *Green* and *Nimpkish* held that Policy 11 did not apply directly to applications for forest template dwellings in this circumstance. The Hearings Official's decision in *Nimpkish* was appealed to LUBA.

LUBA disagreed with the Hearings Official's determination in *Nimpkish* and determined, based on a rather extensive review of the acknowledgment materials from the early 1980s, that Policy 11 applied directly as an approval criterion to applications for forest template dwellings on lands shown as protected big game habitat on the County's Goal 5 maps for big game habitat. *LandWatch Lane County v. Lane County (Nimpkish)*, ___ Or LUBA ___ (LUBA No. 2020-030, January 23, 2021).

In two subsequent appeals, the Lane County Hearings Official denied requests for forest template dwellings, based on LUBA's ruling in *Nimpkish*. PA 20-05064 and PA 20-05066 (*King*). These decisions were also appealed to LUBA, which affirmed the Hearings Official decisions denying the applications based on the applicant's failure to demonstrate compliance with Policy 11. *King v. Lane County (King* or *King 2021)*, ___ Or LUBA ___ (LUBA Nos. 2021-047/052, October 15, 2021).[2] On appeal to the Oregon Court of Appeals, the Court affirmed without opinion. *King v. Lane County*, 317 Or App 136, 501 P3d 1058 (2022).

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[2] LUBA's decisions in the *King 2021* appeals went further than LUBA's decision in *Nimpkish* and examined how the "overall dwelling density" was to be determined—i.e., what unit of land was to be used for the denominator in the density calculation. That issue is not relevant to this appeal and will not be discussed further.

For the most part, the Hearings Official agrees with the applicant regarding this assertion. The Hearings Official does not agree with LandWatch that the County Board is bound by LUBA's previous rulings, because the scope of deference is different in this case.[3] The Hearings Official does note, however, that any interpretation that the Board adopts must also be consistent with state law, as Policy 11 is intended to implement the requirements of Statewide Planning Goal 5 as it relates to protection for Big Game Habitat. LUBA's discussions in both *Nimpkish* and *King* were based largely on the extent to which an interpretation of Policy 11 complied with state law, *i.e.*, the dictates of Statewide Planning Goal 5.[4] It seems likely that, on review of this decision, if appealed, LUBA will be concerned about an interpretation of Policy 11 that it feels lacks the necessary protections to fully implement the dictates of Goal 5.

The Hearings Official understands that the Board will likely review this Hearings Official decision so that it can provide a Board interpretation of Policy 11 that LUBA, on appeal, will be required to defer to. With that goal in mind, the Hearings Official provides the following interpretation as a guide to the Board's decision.

RCP Acknowledgment

At the time of acknowledgment of RCP Policy 11, it was well accepted that residential development was the main potential conflict with protection of Big Game Habitat. Accordingly, DLCD and ODFW staff's primary concern regarding Big Game Habitat was the allowed density of dwellings in areas mapped for Big Game Habitat protections. In that vein, DLCD aimed to help counties draft comprehensive plan policies and code language that would minimize the density of residences where such density could impact Big Game Habitat.

There is relevant analysis in both LUBA decisions in *Nimpkish* and *King* and in staff's memorandum to the Hearings Official in this case. However, this decision will attempt to narrow the discussion to the key issue in this case. That issue is to what extent the County and DLCD viewed the Lane Code provisions as adequate to protect the resource; *i.e.*, Big Game Habitat. That is, did the Code fully implement Policy 11, such that only the Code provisions applied? Or did Policy 11 contain protections that remained applicable to discrete land use applications such as requests for forest template dwellings on land protected for Big Game Habitat?

The first sentence of Policy 11 provides: *Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County.*

In the prior cases, it was assumed that the ODFW "recommendations for overall residential density for protection of big game" was no more than one dwelling per 80 acres in the Major Big Game Habitat areas and no more than one dwelling per 40 acres in the Peripheral Big Game

[3] The applicant is correct that LUBA would be required to affirm an interpretation so long as it is "plausible."
[4] LUBA stated: "Moreover, the county must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential development through density standards, in a manner that is not inconsistent with Goal 5. ORS 197.829(1)(d)." *Nimpkish*, slip op. 14.

Habitat. This assumption or assertion was not correct or complete. The record in this case makes clear that the ODFW overall residential density recommendations included an alternative for circumstances where clustering was required. In the Major Big Game Habitat, one dwelling per 40 acres (rather than one dwelling per 80 acres) is acceptable with cluster development. In Peripheral Big Game Habitat, one dwelling per 20 acres (rather than one dwelling per 40 acres) is acceptable with cluster development. *See* attachment to March 30, 1983 letter from Neal Coenen, ODFW Program Leader, to Aldie Howard, Benton County Planning Director.[5] The recommendation articulates clearly that it relates to "overall residential density" and not "minimum lot sizes." A minimum lot size only regulates how big or small a property must be when the property is being created. It does not address how big a property must be in order to site a dwelling on it. That said, the County relied, at least in part, on minimum lot sizes in the F-1 and F-2 zones to assist with compliance with Goal 5 Big Game Habitat protections.

Lane County's first attempt at acknowledgment of its Goal 5 program related to protection of Big Game Habitat was rejected by DLCD. It had proposed a minimum lot size in the F-2 zone of 20 acres and a minimum lot size in the F-1 zone of 40 acres. ODFW and 1000 Friends objected to that proposal, in part because it was not consistent with the ODFW density recommendations. As a result of the negative comments, Lane County ended up adopting much larger minimum lots sizes of 80 acres for the F-1 zone and 40 acres for the F-2 zone. It also adopted provisions that required clustering.

However, as DLCD and ODFW made clear, the recommended residential density related to overall residential density, not minimum lot size. That is, the County's choice to adopt a minimum lot size for the forest zone (and presumably for areas designated for protected Big Game Habitat), did not fully address ODFW's recommended residential densities. There was nothing in the adopted Code that addressed actual overall residential densities when a dwelling was proposed to be added. Specifically, the Code did not include a required minimum lot size for approval of a dwelling in the F-2 zone. Accordingly, the Code provisions did not fully address the overall residential density recommendations. For example, if there was a cluster of small, nonconforming (*i.e.*, smaller than the minimum lot size for the zone) properties zoned F-2, as long as the owners could satisfy the approval criteria in the Code, they could potentially build out the properties far in excess of ODFW's recommended residential density.

That all being said, the Hearings Official is aware that the question here is not whether Policy 11 and the Lane Code fully protect Big Game resources. Rather, the question is what the County and DLCD intended at the time the RCP was acknowledged in 1984. As discussed below, the Hearings Official believes that the intent of Policy 11 was to fill the hole with regard to Goal 5 protections that was left because the County Code did not have a minimum lot size requirement for placement of a dwelling.

The applicant's proposed interpretation of Policy 11 is found in the Home Builders Association of Lane County's letter of interpretation that was provided to the Board by Pete Barrell on May

[5] The ODFW policy recommendation for overall residential densities found attached to the March 30, 1983 letter was in relation to Benton County's acknowledgment. But the one-page attachment is entitled "Big Game Ranges—Northwest Oregon" and appears to contain the recommendations for Lane County as well.

8, 2022. That letter asserts that Lane Code 16.211, the chapter of the Code applicable to the F-2 zone, is intended as an exhaustive list of applicable approval criteria and standards. It relies on the Purpose statement in LC 16.211(1) and the introduction to the Table of Permitted Uses (Table 16.211-1) found at LC 16.211(2). The Table includes "Template Dwellings" as an allowed use in the F-2 zone and makes no mention of Policy 11 as an applicable approval standard. In general, the applicant is correct that comprehensive plan policies do not usually apply directly to discrete land use applications where there are land use regulations that fully implement that particular policy. However, as explained below, Policy 11 was not fully implemented by the Lane Code in this case. The legislative history of Policy 11 (*i.e.*, the acknowledgment materials) make clear that in certain circumstances, a full Goal 5 analysis would be required when a forest template dwelling was sought on lands protected as Big Game Habitat.

The applicant also argues, through the Home Builders' proposed interpretation, that the Flora and Fauna Working Paper "moved away from setting minimum lot sizes for dwelling applications on F-2 land and toward applying siting and clustering standards." The Hearings Official does not believe this argument, even if true, provides a basis for concluding that Policy 11 does not apply directly to certain applications for forest template dwellings.

The applicant relies, at least in part, on Directive 2.d of DLCD staff's July 19, 1984 staff report, which provides: "Amend the F-2 and EFU zones to carry out the intent of the Flora and Fauna Policy 11. Specifically, the zones must either require larger minimum lot sizes in the Big Game Habitat portions of those zones or contain clustering requirements in those areas." Taken out of context, this statement could be read as an either/or directive: increase minimum lot sizes OR adopt clustering requirements. Read in context, however, it is clear that the County chose to address this directive by increasing the minimum lot size proposed in the F-2 zone (from 20 acres to 40 acres), AND by adopting clustering requirements for dwellings in an attempt to comply with the ODFW recommended density standards, which were one dwelling per 40 acres in the Major Big Game Habitat where clustering is required.

The Hearings Official believes that language found in the August 17, 1984 DLCD acknowledgment staff report to LCDC is determinative as to the intended meaning of Policy 11. In response to objections made to the version of Policy 11 that was ultimately adopted, DLCD found:

> "[Response 2]. [The proposed, and ultimately adopted, language of Policy 11 is cited here].
>
> Objectors are not correct that this policy [Policy 11] violates Goal 5. Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.* This would require a plan amendment and could only take place if justified based on the Goal 5 analysis. However, as noted previously, the County still needs to adopt measures in its F-2, [Marginal Lands] and EFU zones which ensure ODFW's density standards will be achieved.

> The second part of the policy requires the County to work with ODFW in preventing conflicts from occurring through land use regulations in resource areas and such things as siting requirement[s]. *ODFW is correct that its recommended density standards (if adopted in the ordinance) would constitute an approach to resolve and/or prevent conflicts between dwellings and big game habitat. However as discussed below, the county has not adopted such standards in its zoning ordinance."* August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).
>
> [Response 3]. ODFW is correct that the County's F-1 and F-2 zones do not incorporate ODFW's development density recommendations, nor do they set forth siting or clustering requirements. Without siting and clustering requirements, the minimum lot sizes in the F-1, F-2 and E zones are half that recommended by ODFW (i.e., the minimum lot sizes would have to be doubled to be acceptable). This is a problem in the F-2 and EFU zones in particular, but not in the F-1 zone, since in general, dwellings are not permitted in that zone." August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).

The County ultimately adopted a minimum lot size in the F-2 zone of 40 acres, with clustering standards. However, as was made clear in the comment quoted above, this action only demonstrated compliance with the ODFW overall residential density standards where a property on which a dwelling would be sited satisfied the 40-acre minimum lot size requirement and where the siting of the dwelling satisfied the clustering siting standards. Consistent with the language in Policy 11, as explained in the July, 1984 staff report, "Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.*" The County could have adopted minimum lot sizes for siting of dwellings that satisfied the ODFW recommended density standards. However, it chose not to do so. It chose, rather, to leave the Goal 5 analysis of the conflict created between a proposed dwelling and big game habitat to the time at which "such proposals are made"—that is, at the time the County processes an application for a forest template dwelling that, if approved, would create an overall residential density greater than the ODFW recommended residential density standards.

The Hearings Official believes that LUBA has already succinctly answered the applicant's arguments as follows:

> "the County's failure to take the step of identifying regions and basing zoning by region on either overall residential densities or ODFW minimum parcel size recommendations does not mean that the county is absolved from protecting land included on the Big Game Habitat Inventory as Major Big Game Range through the residential density recommendations referred to in RCP Goal 5, Flora and Fauna Policy 11, or that the density recommendations simply do not apply. * * * the County must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential

development through density standards, in a manner that is not inconsistent with Goal 5." *Nimpkish*, slip op. at 14.

The Hearings Official hereby incorporates the analysis in staff's August 31, 2023 memorandum,[6] addressing the appeal issues.

II. Needed Housing

The applicant raises another theory upon which he bases the assertion that Policy 11 does not apply directly to an application for a forest template dwelling. The applicant contends that Policy 11 is not clear and objective and therefore cannot be applied to needed housing, pursuant to ORS 197.307(4), the needed housing statute. The Hearings Official understands the applicant to have withdrawn this argument, based on the recent LUBA decision in *LandWatch Lane County v. Lane County (Helsel)*, ___ Or LUBA ___ (LUBA No. 2023-037, August 28, 2023). *Helsel* held that the clear and objective requirement found in ORS 197.307(4) does not apply to housing on EFU land outside the urban growth boundary. To the extent the applicant did not technically withdraw the "needed housing" argument, the Hearings Official determines that, based on the analysis in *Helsel*, the clear and objective requirement does not apply to applications for forest template dwellings on rural resource lands zoned F-2.

III. Access and Other Findings

During the open record period, the applicant submitted four revised site plans relevant to access to the subject property: one showing the proposed access for all three dwellings sought on tax lot 2800 (PA 23-05323), tax lot 2900 (subject application), and tax lot 843 (PA 23-05321); one showing access for tax lot 2800 only; one showing access for tax lot 843 only; and one showing access for tax lot 2900 only. *See* applicant's Open Record submittal letter dated September 21, 2023, with attached revised site plans (all dated September 20, 2023). The revised site plans are attached hereto as Exhibit A.

The Planning Director had originally approved PA 20-05064 because it was issued before the Planning Director became aware of LUBA's ruling in *Nimpkish*. LUBA's decision in *Nimpkish* was issued Thursday, January 21, 2021, and the Planning Director's decision in PA 20-05064 was issued Wednesday, January 27, 2021. The Hearings Official understands the Planning Director to propose adopting the Planning Director analysis and proposed conditions of approval in PA 20-05064 regarding the driveway (with revised site plans), as well as the rest of the findings addressing the remainder of the approval criteria.[7] That is, if the Board opts to adopt an interpretation of Policy 11 that would allow approval of the proposed dwelling, the remainder of the applicable approval criteria are satisfied, as set forth in the Planning Director's decision in PA 20-05064, with the proposed conditions of approval.

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[6] Caveat: The Hearings Official agrees with the opponents that the language in reference to Cerro Gordo is not particularly applicable to determining compliance with the Big Game aspects of Goal 5 as a whole.

[7] The Hearings Official's reliance on the revised site plans dated September 20, 2023 is based on the understanding that the accessway shown on the revised site plans accurately depicts the location of the existing roadway. That is, the evidentiary foundation for the determination that the approval criteria are satisfied assumes that a new roadway will not be created.

Conclusion

The Hearings Official agrees with the applicant that, in a review by LUBA of the Board's decision in this case, LUBA will be required to defer to the Board's interpretation of its own policy (Policy 11). However, that statement is tempered by the fact that any interpretation must also be consistent with the requirements imposed by Statewide Planning Goal 5 as it relates to protection of Big Game Habitat. Given the language of LUBA's opinions quoted above, in *Nimpkish* and *King*, the Hearings Official believes that the Board has an uphill battle if it wishes to adopt an interpretation that does not fully implement ODFW's recommended residential densities, which is required by Policy 11.

With regard to any hope on the part of the County to "remove barriers" for approvals for dwellings in the F-2 zone due to the current emergency for needed housing, the Hearings Official does not believe that the answer to the housing crisis should include ignoring the protections of Goal 5 for Big Game Habitat to facilitate housing in a rural resource zone. There are better places for such needed housing where the necessary facilities are available and where precious resources will not be impacted.

Respectfully Submitted,

Anne C. Davies
Lane County Hearings Official

SITE PLAN SUBMITTAL FORM

OWNER NAME: E.J.K. Investments **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405	**Map and Taxlot #:** 21-35-07-30 Tax Lot 2900 **Scale:** 1 inch = 200 feet	**APPLICANT NAME:** Edward J. King **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405

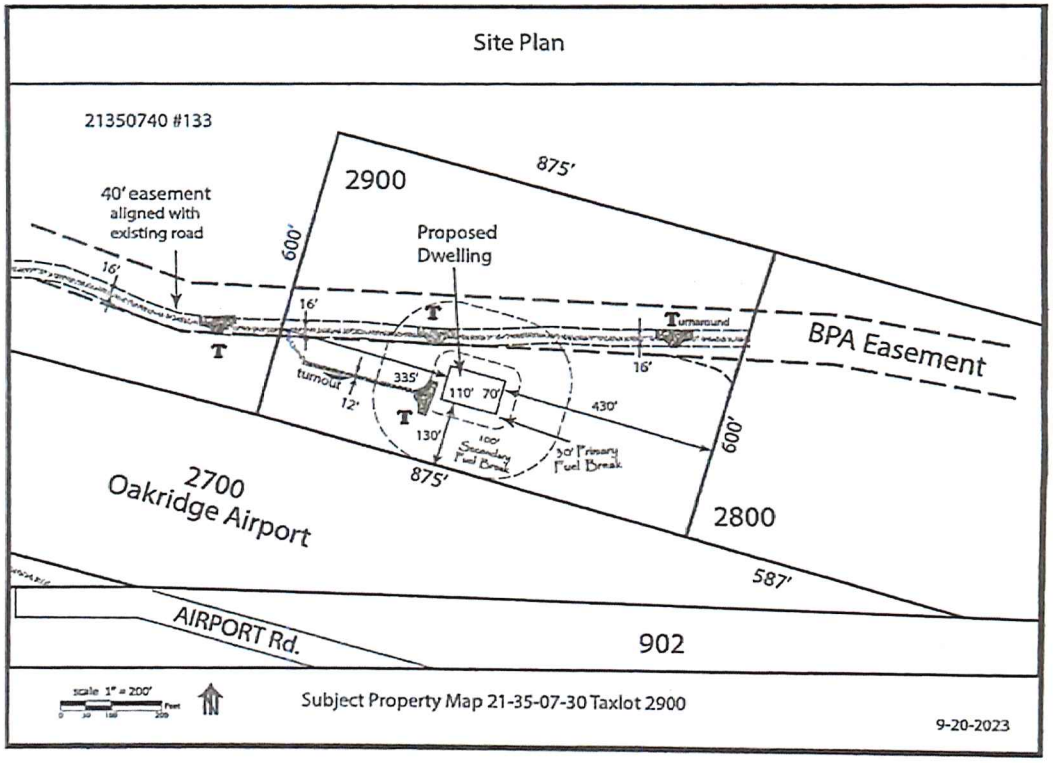
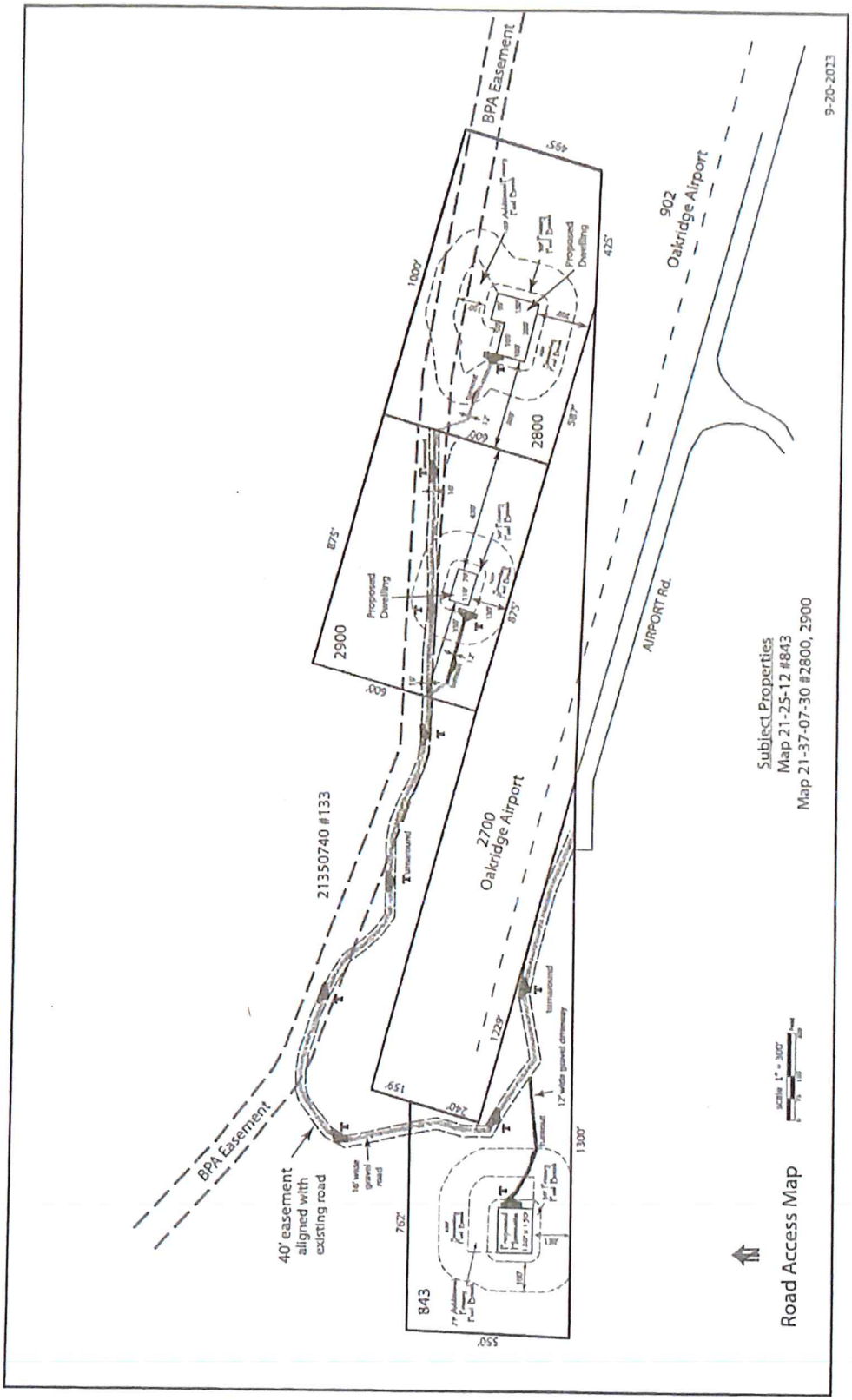


EXHIBIT A



BPA Easement
902
Oakridge Airport
2800
2900
2700
Oakridge Airport
21350740 #133
843
AIRPORT Rd.
Proposed Dwelling
Proposed Dwelling
40' easement aligned with existing road
16' wide gravel road
12' wide gravel driveway
Subject Properties
Map 21-25-12 #843
Map 21-37-07-30 #2800, 2900
Road Access Map
9-20-2023

NOV 0 6 2023

BEFORE THE LANE COUNTY HEARINGS OFFICIAL

REVIEW OF AN APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING WITHIN AN F–2 DISTRICT

Application Summary

On May 8, 2023, the applicant, Edward J. King, filed an application seeking to establish a dwelling in the Impacted Forest Lands (F-2) zone on tax lot 2800, assessor's map 21-35-07-30. PA 23-05323. The application was deemed complete on June 7, 2023. County staff elected to hear this application through a Type III initial Hearings Official review, pursuant to Lane Code 14.030(1)(b)(ii)(cc). Accordingly, on August 16, 2023, Lane County staff sent notice of a public hearing to occur on September 7, 2023 before the Lane County Hearings Official. The initial public hearing was held on September 7, 2023.

Parties of Record

Edward J. King (Bill Kloos)
Michael Farthing — Jim McLaughlin
Nicholas Milosevich — Amy Pincus
LandWatch Lane County (LandWatch) (Lauri Segel; Sean Malone)
1000 Friends of Oregon (Andrew Mulkey)
Richard and Amy Shearer — Sharon Carroll — Jim Babson
Ellen and Herbert Jaeger — Carlette Larson — Tony Drago
Land Planning Consultants; Mike Evans — Deborah Noble
McKenzie Land and Timber, LLC; Casey Jones (Kim O'Dea)
Chris and Meagan Leturno — Lynda McCord (Kim O'Dea)
Jeremy and Celeste Keepers (Kim O'Dea) — Kay King
Greg Demers; ATR Services (Kim O'Dea)
Fern Hollow Farms (Kim O'Dea) — PM Land and Timber (Kim O'Dea)
Melvin McDougal; McDougal Bros. Inv., McDougal Bros. Inc., Leelynn Inc. (Kim O'Dea)
Mike Miller (Kim O'Dea) — Weston Hallstead (Kim O'Dea)
Robert Gill (Kim O'Dea)
Oregon Department of Fish and Wildlife (ODFW) (Joe Stack)

Application History

Hearing Date: September 7, 2023
(Record Held Open Until October 12, 2023)

Decision Date: November 2, 2023

Appeal Deadline

A party may request reconsideration of this decision by the Hearings Official, pursuant to Lane Code 14.080(1)(a)(iii) and (1)(b), by filing a notice of appeal within 12 days after the date the notice of decision was mailed. If a party seeking further review chooses not to seek reconsideration, they must file an appeal directly with LUBA within the timelines set forth in state law. See LUBA's website for more information on appeal deadlines.

Statement of Criteria

Lane Code (LC) 16.211(2)-2.4; LC 16.211(3)(c), (3)(p), (3)(q), (5), and (6)
House Bill 2225
Rural Comprehensive Plan (RCP) Goal 5 Flora and Fauna Policy 11

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," is located on tax lot 2800, assessor's map 21–35–07–30, which is immediately north of the Oakridge Airport and situated between the Westfir and Oakridge Urban Growth Boundaries. The property is approximately 13.28 acres and is vacant except for an existing roadway and powerlines largely within an east-west Bonneville Power Administration easement that transects the property.

   The subject property is designated Forest in the Lane County Rural Comprehensive Plan and is zoned Impacted Forest Land (F–2, RCP), consistent with that plan designation. The entire property is designated Major Big Game by the Oregon Department of Fish and Wildlife (ODFW) Habitat Maps.

2. The subject application is one of three template dwelling applications submitted on the same date. The other two applications are PA 23-05321 and PA 23-05322. This application and PA 23-05322 are requests for forest template dwelling approvals that were previously denied by the Hearings Official and subsequently appealed to LUBA--PA 20-05064 (Tax Lot 2900) and PA 20-05066 (Tax Lot 2800).

Decision

THE EDWARD J. KING APPLICATION FOR APPROVAL OF A FOREST TEMPLATE DWELLING (PA-23-05323) ON TAX LOT 2800, ASSESSOR'S MAP 21–35–07–30 IS DENIED.

Motion to Strike

At the hearing in this matter, the Hearings Official announced the following open record period:

September 21, 2023: First open record period

October 5, 2023: Responses to materials submitted during first open record period
October 12, 2023: Final rebuttal by applicant

During the time period for submitting responses (*i.e.*, from September 21 through October 5), Carlette Larson submitted written materials. The submittal included tax lot maps with writing on them; a list of tax lots and tax payers and owners; Assessment and Taxation records; and individual property account information. Ms. Larson does not explain how the documents are in response to issues raised in the open record period.

LandWatch moves to strike the submittal of Ms. Larson because the documents are not relevant to the issues before the Hearings Official, and LandWatch does not believe the documents are responsive to issues raised in the initial open record period. The Hearings Official agrees that the materials do not appear to be responsive to materials that were submitted during the first open record period. Accordingly, the motion to strike is granted.

Justification for the Decision

I. Goal 5, Policy 11

The main dispute in this case involves an interpretation of RCP Goal 5 Flora and Fauna Policy 11 (referred to herein as Policy 11). Policy 11 is a policy that is intended to implement the requirements of Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) aimed at preserving habitat for Big Game.[1] Policy 11 provides:

> "*Oregon Department of Fish and Wildlife [ODFW] recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County. Any density above that limit shall be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000. The County shall work with Oregon Department of Fish and Wildlife officials to prevent conflicts between development and Big Game Range through land use regulation in resource areas, siting requirements and similar activities which are already a part of the County's rural resources zoning program.*" Lane County Rural Comprehensive Plan (RCP) Goal 5, Flora and Fauna Policy 11.

The history of the adoption of RCP Goal 5 Flora and Fauna Policy 11 goes all the way back to the 1980s, when the RCP was acknowledged by the Land Conservation and Development Commission (LCDC). This history is important to the Hearings Official's and the Board's mission in this case, which is to discern what the County Board at that time intended regarding the meaning and applicability of Policy 11.

The County's recent decision making on the issue began in November, 2019 with the Hearings Official's decision in *Green.* PA 18-05913 (November 25, 2019). A different Lane County

[1] The County mapped areas of big game as Major Big Game (the most highly protected), Peripheral Big Game (the next highest level of protection), and Impacted Big Game (least protected).

Hearings Official issued a decision in *Nimpkish* a few months later, in February, 2020. PA 19-05298 (February 4, 2020). Prior to *Green* and *Nimpkish*, the County did not require an application for a forest template dwelling to assess the impacts of such dwelling on Big Game Habitat. Both *Green* and *Nimpkish* involved applications for forest template dwellings on property located in the F-2 zone and within the County's areas designated for Major Big Game Habitat. In both cases, LandWatch argued that it was not sufficient for an applicant seeking approval of a forest template dwelling on property located within mapped Big Game Habitat areas, to demonstrate compliance with the applicable approval criteria found in the Lane Code. LandWatch argued that Policy 11 provided an approval criterion that applied directly to an application for a forest template dwelling where the property fell within a protected Major Big Game area.

The parties in *Green* and *Nimpkish* provided research regarding the initial RCP acknowledgment process in an attempt to shed light on the County's intent in adopting Policy 11. Ultimately, the Hearings Officials in both *Green* and *Nimpkish* held that Policy 11 did not apply directly to applications for forest template dwellings in this circumstance. The Hearings Official's decision in *Nimpkish* was appealed to LUBA.

LUBA disagreed with the Hearings Official's determination in *Nimpkish* and determined, based on a rather extensive review of the acknowledgment materials from the early 1980s, that Policy 11 applied directly as an approval criterion to applications for forest template dwellings on lands shown as protected big game habitat on the County's Goal 5 maps for big game habitat. *LandWatch Lane County v. Lane County (Nimpkish)*, ___ Or LUBA ___ (LUBA No. 2020-030, January 23, 2021).

In two subsequent appeals, the Lane County Hearings Official denied requests for forest template dwellings, based on LUBA's ruling in *Nimpkish*. PA 20-05064 and PA 20-05066 (*King*). These decisions were also appealed to LUBA, which affirmed the Hearings Official decisions denying the applications based on the applicant's failure to demonstrate compliance with Policy 11. *King v. Lane County (King* or *King 2021)*, ___ Or LUBA ___ (LUBA Nos. 2021-047/052, October 15, 2021).[2] On appeal to the Oregon Court of Appeals, the Court affirmed without opinion. *King v. Lane County*, 317 Or App 136, 501 P3d 1058 (2022).

LUBA's determinations in both *Nimpkish* and *King* involved a review of final local decisions rendered by the Lane County Hearings Official. When LUBA reviews a decision of a local hearings official, it is not required to "defer" to that decision. When LUBA reviews a decision of a local governing body (in this case, the Board of Commissioners), however, LUBA is required to defer to that body's interpretation of its own local legislation. The applicant in this case asserts that the Lane County Board of Commissioners can provide its own interpretation of Policy 11, and it argues that LUBA will be required to defer to that interpretation. That added deference, according to the applicant, could result in a different decision by LUBA.

[2] LUBA's decisions in the *King 2021* appeals went further than LUBA's decision in *Nimpkish* and examined how the "overall dwelling density" was to be determined—i.e., what unit of land was to be used for the denominator in the density calculation. That issue is not relevant to this appeal and will not be discussed further.

For the most part, the Hearings Official agrees with the applicant regarding this assertion. The Hearings Official does not agree with LandWatch that the County Board is bound by LUBA's previous rulings, because the scope of deference is different in this case.[3] The Hearings Official does note, however, that any interpretation that the Board adopts must also be consistent with state law, as Policy 11 is intended to implement the requirements of Statewide Planning Goal 5 as it relates to protection for Big Game Habitat. LUBA's discussions in both *Nimpkish* and *King* were based largely on the extent to which an interpretation of Policy 11 complied with state law, *i.e.*, the dictates of Statewide Planning Goal 5.[4] It seems likely that, on review of this decision, if appealed, LUBA will be concerned about an interpretation of Policy 11 that it feels lacks the necessary protections to fully implement the dictates of Goal 5.

The Hearings Official understands that the Board will likely review this Hearings Official decision so that it can provide a Board interpretation of Policy 11 that LUBA, on appeal, will be required to defer to. With that goal in mind, the Hearings Official provides the following interpretation as a guide to the Board's decision.

RCP Acknowledgment

At the time of acknowledgment of RCP Policy 11, it was well accepted that residential development was the main potential conflict with protection of Big Game Habitat. Accordingly, DLCD and ODFW staff's primary concern regarding Big Game Habitat was the allowed density of dwellings in areas mapped for Big Game Habitat protections. In that vein, DLCD aimed to help counties draft comprehensive plan policies and code language that would minimize the density of residences where such density could impact Big Game Habitat.

There is relevant analysis in both LUBA decisions in *Nimpkish* and *King* and in staff's memorandum to the Hearings Official in this case. However, this decision will attempt to narrow the discussion to the key issue in this case. That issue is to what extent the County and DLCD viewed the Lane Code provisions as adequate to protect the resource; *i.e.*, Big Game Habitat. That is, did the Code fully implement Policy 11, such that only the Code provisions applied? Or did Policy 11 contain protections that remained applicable to discrete land use applications such as requests for forest template dwellings on land protected for Big Game Habitat?

The first sentence of Policy 11 provides: *Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of big game shall be used to determine the allowable number of residential units within regions of the County.*

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[4] LUBA stated: "Moreover, the county must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential development through density standards, in a manner that is not inconsistent with Goal 5. ORS 197.829(1)(d)." *Nimpkish*, slip op. 14.

Habitat. This assumption or assertion was not correct or complete. The record in this case makes clear that the ODFW overall residential density recommendations included an alternative for circumstances where clustering was required. In the Major Big Game Habitat, one dwelling per 40 acres (rather than one dwelling per 80 acres) is acceptable with cluster development. In Peripheral Big Game Habitat, one dwelling per 20 acres (rather than one dwelling per 40 acres) is acceptable with cluster development. *See* attachment to March 30, 1983 letter from Neal Coenen, ODFW Program Leader, to Aldie Howard, Benton County Planning Director.[5] The recommendation articulates clearly that it relates to "overall residential density" and not "minimum lot sizes." A minimum lot size only regulates how big or small a property must be when the property is being created. It does not address how big a property must be in order to site a dwelling on it. That said, the County relied, at least in part, on minimum lot sizes in the F-1 and F-2 zones to assist with compliance with Goal 5 Big Game Habitat protections.

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However, as DLCD and ODFW made clear, the recommended residential density related to overall residential density, not minimum lot size. That is, the County's choice to adopt a minimum lot size for the forest zone (and presumably for areas designated for protected Big Game Habitat), did not fully address ODFW's recommended residential densities. There was nothing in the adopted Code that addressed actual overall residential densities when a dwelling was proposed to be added. Specifically, the Code did not include a required minimum lot size for approval of a dwelling in the F-2 zone. Accordingly, the Code provisions did not fully address the overall residential density recommendations. For example, if there was a cluster of small, nonconforming (*i.e.*, smaller than the minimum lot size for the zone) properties zoned F-2, as long as the owners could satisfy the approval criteria in the Code, they could potentially build out the properties far in excess of ODFW's recommended residential density.

That all being said, the Hearings Official is aware that the question here is not whether Policy 11 and the Lane Code fully protect Big Game resources. Rather, the question is what the County and DLCD intended at the time the RCP was acknowledged in 1984. As discussed below, the Hearings Official believes that the intent of Policy 11 was to fill the hole with regard to Goal 5 protections that was left because the County Code did not have a minimum lot size requirement for placement of a dwelling.

The applicant's proposed interpretation of Policy 11 is found in the Home Builders Association of Lane County's letter of interpretation that was provided to the Board by Pete Barrell on May

[5] The ODFW policy recommendation for overall residential densities found attached to the March 30, 1983 letter was in relation to Benton County's acknowledgment. But the one-page attachment is entitled "Big Game Ranges—Northwest Oregon" and appears to contain the recommendations for Lane County as well.

8, 2022. That letter asserts that Lane Code 16.211, the chapter of the Code applicable to the F-2 zone, is intended as an exhaustive list of applicable approval criteria and standards. It relies on the Purpose statement in LC 16.211(1) and the introduction to the Table of Permitted Uses (Table 16.211-1) found at LC 16.211(2). The Table includes "Template Dwellings" as an allowed use in the F-2 zone and makes no mention of Policy 11 as an applicable approval standard. In general, the applicant is correct that comprehensive plan policies do not usually apply directly to discrete land use applications where there are land use regulations that fully implement that particular policy. However, as explained below, Policy 11 was not fully implemented by the Lane Code in this case. The legislative history of Policy 11 (*i.e.,* the acknowledgment materials) make clear that in certain circumstances, a full Goal 5 analysis would be required when a forest template dwelling was sought on lands protected as Big Game Habitat.

The applicant also argues, through the Home Builders' proposed interpretation, that the Flora and Fauna Working Paper "moved away from setting minimum lot sizes for dwelling applications on F-2 land and toward applying siting and clustering standards." The Hearings Official does not believe this argument, even if true, provides a basis for concluding that Policy 11 does not apply directly to certain applications for forest template dwellings.

The applicant relies, at least in part, on Directive 2.d of DLCD staff's July 19, 1984 staff report, which provides: "Amend the F-2 and EFU zones to carry out the intent of the Flora and Fauna Policy 11. Specifically, the zones must either require larger minimum lot sizes in the Big Game Habitat portions of those zones or contain clustering requirements in those areas." Taken out of context, this statement could be read as an either/or directive: increase minimum lot sizes OR adopt clustering requirements. Read in context, however, it is clear that the County chose to address this directive by increasing the minimum lot size proposed in the F-2 zone (from 20 acres to 40 acres), AND by adopting clustering requirements for dwellings in an attempt to comply with the ODFW recommended density standards, which were one dwelling per 40 acres in the Major Big Game Habitat where clustering is required.

The Hearings Official believes that language found in the August 17, 1984 DLCD acknowledgment staff report to LCDC is determinative as to the intended meaning of Policy 11. In response to objections made to the version of Policy 11 that was ultimately adopted, DLCD found:

> "[Response 2]. [The proposed, and ultimately adopted, language of Policy 11 is cited here].
>
> Objectors are not correct that this policy [Policy 11] violates Goal 5. Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.* This would require a plan amendment and could only take place if justified based on the Goal 5 analysis. However, as noted previously, the County still needs to adopt measures in its F-2, [Marginal Lands] and EFU zones which ensure ODFW's density standards will be achieved.

> The second part of the policy requires the County to work with ODFW in preventing conflicts from occurring through land use regulations in resource areas and such things as siting requirement[s]. *ODFW is correct that its recommended density standards (if adopted in the ordinance) would constitute an approach to resolve and/or prevent conflicts between dwellings and big game habitat. However as discussed below, the county has not adopted such standards in its zoning ordinance."* August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).
>
> [Response 3]. ODFW is correct that the County's F-1 and F-2 zones do not incorporate ODFW's development density recommendations, nor do they set forth siting or clustering requirements. Without siting and clustering requirements, the minimum lot sizes in the F-1, F-2 and E zones are half that recommended by ODFW (i.e., the minimum lot sizes would have to be doubled to be acceptable). This is a problem in the F-2 and EFU zones in particular, but not in the F-1 zone, since in general, dwellings are not permitted in that zone." August 17, 1984 DLCD acknowledgment staff report to LCDC at page 39 (emphasis added).

The County ultimately adopted a minimum lot size in the F-2 zone of 40 acres, with clustering standards. However, as was made clear in the comment quoted above, this action only demonstrated compliance with the ODFW overall residential density standards where a property on which a dwelling would be sited satisfied the 40-acre minimum lot size requirement and where the siting of the dwelling satisfied the clustering siting standards. Consistent with the language in Policy 11, as explained in the July, 1984 staff report, "Densities above those recommended by ODFW would certainly constitute a conflict with big game habitat. *The County has, through this policy, however, simply indicated that it intends to resolve them by applying the entire Goal 5 process when such proposals are made.*" The County could have adopted minimum lot sizes for siting of dwellings that satisfied the ODFW recommended density standards. However, it chose not to do so. It chose, rather, to leave the Goal 5 analysis of the conflict created between a proposed dwelling and big game habitat to the time at which "such proposals are made"—that is, at the time the County processes an application for a forest template dwelling that, if approved, would create an overall residential density greater than the ODFW recommended residential density standards.

The Hearings Official believes that LUBA has already succinctly answered the applicant's arguments as follows:

> "the County's failure to take the step of identifying regions and basing zoning by region on either overall residential densities or ODFW minimum parcel size recommendations does not mean that the county is absolved from protecting land included on the Big Game Habitat Inventory as Major Big Game Range through the residential density recommendations referred to in RCP Goal 5, Flora and Fauna Policy 11, or that the density recommendations simply do not apply. * * * the County must interpret a provision of the RCP that was adopted to implement its Goal 5 program, which protects Big Game Range from conflicting residential

development through density standards, in a manner that is not inconsistent with Goal 5." *Nimpkish*, slip op. at 14.

The Hearings Official hereby incorporates the analysis in staff's August 31, 2023 memorandum,[6] addressing the appeal issues.

II. Needed Housing

The applicant raises another theory upon which he bases the assertion that Policy 11 does not apply directly to an application for a forest template dwelling. The applicant contends that Policy 11 is not clear and objective and therefore cannot be applied to needed housing, pursuant to ORS 197.307(4), the needed housing statute. The Hearings Official understands the applicant to have withdrawn this argument, based on the recent LUBA decision in *LandWatch Lane County v. Lane County (Helsel)*, ___ Or LUBA ___ (LUBA No. 2023-037, August 28, 2023). *Helsel* held that the clear and objective requirement found in ORS 197.307(4) does not apply to housing on EFU land outside the urban growth boundary. To the extent the applicant did not technically withdraw the "needed housing" argument, the Hearings Official determines that, based on the analysis in *Helsel*, the clear and objective requirement does not apply to applications for forest template dwellings on rural resource lands zoned F-2.

III. Access and Other Findings

During the open record period, the applicant submitted four revised site plans relevant to access to the subject property: one showing the proposed access for all three dwellings sought on tax lot 2800 (subject application), tax lot 2900 (PA 23-05322), and tax lot 843 (PA 23-05321); one showing access for tax lot 2900 only; one showing access for tax lot 843 only; and one showing access for tax lot 2800 only. *See* applicant's Open Record submittal letter dated September 21, 2023, with attached revised site plans (all dated September 20, 2023). The revised site plans are attached hereto as Exhibit A.

The Planning Director had originally approved PA 20-05066 because it was issued before the Planning Director became aware of LUBA's ruling in *Nimpkish*. LUBA's decision in *Nimpkish* was issued Thursday, January 21, 2021, and the Planning Director's decision in PA 20-05066 was issued Wednesday, January 27, 2021. The Hearings Official understands the Planning Director to propose adopting the Planning Director analysis and proposed conditions of approval in PA 20-05066 regarding the driveway (with revised site plans), as well as the rest of the findings addressing the remainder of the approval criteria.[7] That is, if the Board opts to adopt an interpretation of Policy 11 that would allow approval of the proposed dwelling, the remainder of the applicable approval criteria are satisfied, as set forth in the Planning Director's decision in PA 20-05066, with the proposed conditions of approval.

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[6] Caveat: The Hearings Official agrees with the opponents that the language in reference to Cerro Gordo is not particularly applicable to determining compliance with the Big Game aspects of Goal 5 as a whole.

[7] The Hearings Official's reliance on the revised site plans dated September 20, 2023 is based on the understanding that the accessway shown on the revised site plans accurately depicts the location of the existing roadway. That is, the evidentiary foundation for the determination that the approval criteria are satisfied assumes that a new roadway will not be created.

Conclusion

The Hearings Official agrees with the applicant that, in a review by LUBA of the Board's decision in this case, LUBA will be required to defer to the Board's interpretation of its own policy (Policy 11). However, that statement is tempered by the fact that any interpretation must also be consistent with the requirements imposed by Statewide Planning Goal 5 as it relates to protection of Big Game Habitat. Given the language of LUBA's opinions, quoted above, in *Nimpkish* and *King*, the Hearings Official believes that the Board has an uphill battle if it wishes to adopt an interpretation that does not fully implement ODFW's recommended residential densities, which is required by Policy 11.

With regard to any hope on the part of the County to "remove barriers" for approvals for dwellings in the F-2 zone due to the current emergency for needed housing, the Hearings Official does not believe that the answer to the housing crisis should include ignoring the protections of Goal 5 for Big Game Habitat to facilitate housing in a rural resource zone. There are better places for such needed housing where the necessary facilities are available and where precious resources will not be impacted.

Respectfully Submitted,

Anne C. Davies
Lane County Hearings Official

SITE PLAN SUBMITTAL FORM

OWNER NAME: Edward J. King **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405	**Map and Taxlot #:** 21-35-07-30 Tax Lot 2800 **Scale:** 1 inch = 200 feet	**APPLICANT NAME:** Edward J. King **PHONE #** **ADDRESS:** 30414 Lebleu Road Eugene, OR 97405

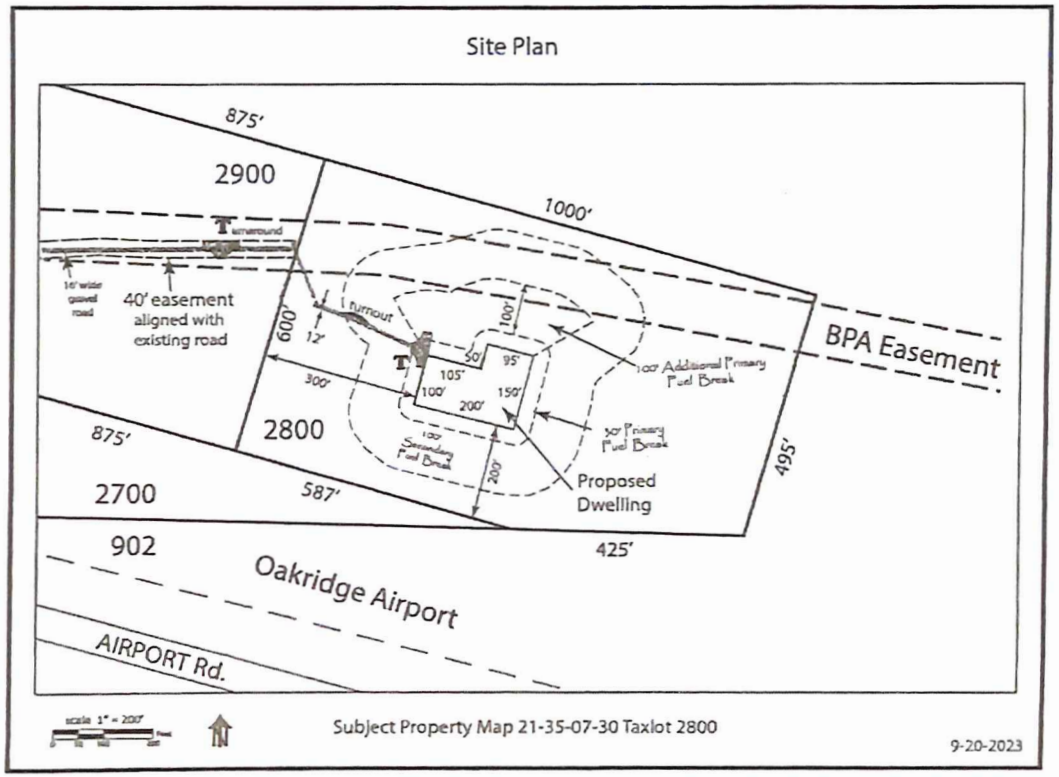
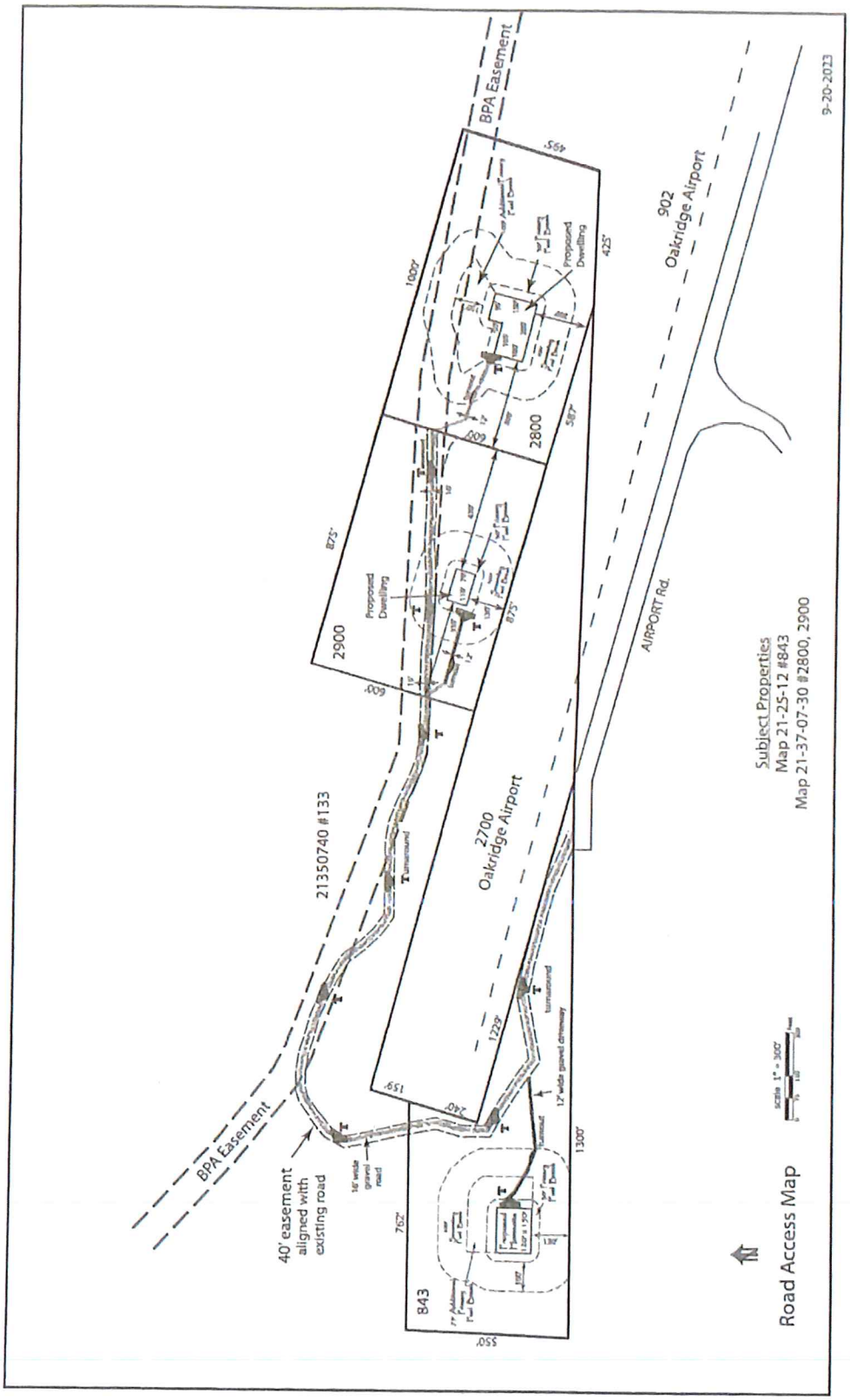


EXHIBIT A



BCC STAFF ACM 1-30-24
ATTACHMENT 4.12