

**MEMORANDUM**

DATE: April 5, 2024

TO: Board of County Commissioners

FROM: Public Works / Land Management Division

Shawna Adams, Senior Planner

RE: Distribution Memo #1 with revised motion options for the April 16, 2024, on-the-record hearing review of the Hearings Official's decisions for three forest template dwellings (509-PA23-05321; 509-PA23-05322; 509-PA23-05323; King)

On January 30, 2024, the Board considered whether to review the Hearing Official's decisions for three forest template dwelling proposals submitted on behalf of Edward J. King and E.J.K. Investments. Via Board Order 24-01-30-04, the Board opted to review the Hearing Official's decisions in an on-the-record hearing set for the March 19, 2024. On that date, the Board passed a motion to postpone the on-the-record hearing to April 16, 2024, 1:30 PM time certain.

The staff Agenda Cover Memorandum (ACM) and attachments for the March 19, 2024, Board meeting provide three (3) motion options for the Board's consideration. **Option 1** is for Board adoption of the Board Orders in Attachment 1 of the ACM. These Board Orders affirm the Hearings Official's decisions to deny the applications with the Board expressly remaining silent on the interpretations made by the Hearings Official. The Orders and associated findings reference March 19, 2024, as the date of the on-the-record hearing and final Board action and will need to be updated before final adoption by the Board.

Below, the three (3) motion options have been revised to include the necessary updates:

Option 1. Move to adopt the attached Orders - with updates to the date of the on-the-record hearing and Board action -affirming the Lane County Hearings Official's decisions to deny the three (3) applications, and expressly remaining silent on the interpretations made by the Hearings Official. Direct staff to return with the Orders for final adoption on the consent calendar.

Option 2. Move to modify the attached Orders, by [CHOOSE ONE: affirming the Hearings Official's decisions and expressly agreeing with any interpretations made by the Hearings Official - OR - affirming the Hearings Official's decisions and modifying any interpretations made by the Hearings Official as directed by the Board], and direct staff to return with revised Orders and findings of fact affirming and adopting the Hearings Official's denials that reflect the Boards decision.

Option 3. Move to direct staff to return with revised Orders reversing the Hearings Official's decisions to deny the three applications and conditionally approving the applications with findings of fact that include the Board's interpretation of Policy 11.



MEMORANDUM

DATE: April 15, 2024

TO: Board of County Commissioners

FROM: Public Works / Land Management Division
Shawna Adams, Senior Planner

RE: Distribution Memo #2 for the April 16, 2024, on-the-record hearing review of the Hearings Official's decisions for three forest template dwellings (509-PA23-05321; 509-PA23-05322; 509-PA23-05323; King)

Attached is a hearing letter to the Board of Commissioners from Bill Kloos concerning the April 16, 2024, on-the-record hearing for the Board's review of the Hearings Official's decisions for the King template dwellings. The letter relates to procedural matters, which Mr. Kloos will have an opportunity to address as a hearing participant identified in the Board's Order electing to conduct the on-the-record hearing (Board Order No. 24-01-30-04).

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April 9, 2024

Lane County Board
c/o Shawna Adams, Planner
Lane County Land Management Division
3050 North Delta Highway
Eugene, OR 97408

Re: PA23-05321, PA23-05322, PA23-05323.
Applicant's Request on Hearing Procedures

Dear County Board Members:

This letter raises a procedural issue which I attempted to state at the March 19 meeting but was referred to the County Attorney to resolve. We could not reach agreement; hence, I am bringing this issue back to the Board. (I have copied the attorney for LandWatch with this letter.)

The code, the Board's Order, and the hearing Notice all limit the argument at the hearing to the staff and the applicant. Others who appeared at the Hearing Official, including LandWatch, are "parties" as defined by the code, but they are not allowed to argue in this hearing. This is a big mistake.

I understand this has been the practice under the current and former versions of Chapter 14. However, other parties will question whether this is fair and in compliance with state law. The Board's decision on the merits of this matter is sure to be appealed. It would be most efficient if that appeal were limited to the merits and did not also include a challenge to the Board's procedure. It would be wasteful if the Board's decision were to be remanded by LUBA for failure to provide a fair hearing to all parties.

Allowing all parties to take part in the argument will ensure a level playing field and keep the procedural objection out of the appeal to LUBA. At this point allowing all parties to argue would require re-noticing the hearing to another day. However, it is worth the delay if that would avoid a procedural challenge on appeal.

I provided County Counsel with a Lane County case that is very close to the procedural posture of this one. *Families for a Quarry Free Neighborhood v. Lane County*, 64 Or LUBA 297 (2011). That involved a quarry site review. The evidentiary hearing was at the Director level. The on-the-record appeal was to the Hearing Official. The applicant filed the appeal to the Hearing Official, and the neighbor opponents were excluded from the appeal proceeding, as stated in the code. That is the posture of this present matter at the County Board.

The Hearing Official enforced the code and kept other parties out of the argument in the appeal hearing, just as the county notice is proposing to do here with respect to LandWatch and other parties below.

On appeal, LUBA found a procedural error that prejudiced the rights of the excluded parties. After examining the former code provisions similar to these in the context of state law that applies to hearings, LUBA concluded.

“Given the above code and statutory context, although it is a reasonably close question, we conclude that LC 14.400 and 14.600 are not correctly interpreted to bar nonapplicant parties in the evidentiary phase of a proceeding from participating in an on-the-record appeal filed by the applicant.” *Families* at 305.

That is just what the County is proposing to do here – bar parties in the evidentiary hearing from participating in the on-the-record appeal.

In summary, the procedural posture of this is now teed up for an appeal by LandWatch to LUBA saying its right to argue to the Board as a party has been prejudiced by keeping the door closed to them.

If the applicant here prevails on the merits of the Big Game issue, it wants to avoid a successful appeal to LUBA due to procedural error. Here are the possible outcomes depending on what the Board does and how LandWatch responds:

1. The Board could reschedule this argument with notice to all parties that they may argue to the Board. This is the approach most certain to avoid an appeal alleging procedural error. The rationale for doing this is the holding in the *Families* decision.¹
2. LandWatch could submit for the record a waiver of any objection to the procedure currently proposed by the Board. With a waiver, LandWatch should not be able to allege procedural error in an appeal to LUBA. With a waiver in the record, I will argue the merits of the Big Game issue at the April 16 hearing.
3. LandWatch could raise a procedural objection before or during the hearing March 16 hearing, and, based on that, the Board could reschedule the hearing with notice that all parties may argue the merits. In that event I will defer arguing the merits until the rescheduled hearing.
4. LandWatch could remain silent about the proposed procedure through the April 16 hearing, even though they are aware of the issue. In that event I will not argue the merits on April 16,

¹ Having already lost once on this same procedural issue in *Families*, the County should consider whether making the same mistake again, and unsuccessfully defending that at LUBA again, might expose the County to having to pay LandWatch’s attorneys fees as a result of the second loss on the same issue.

Lane County Board

April 9, 2024

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as that would raise a serious risk of an allegation of procedural error by LandWatch on appeal to LUBA. I will limit my remarks at the hearing to issues of procedure, stressing the points in this letter.

This is an important issue for the Board to consider. The safest course is for the Board to follow LUBA's advice in *Families*, interpret its code consistent with state law, and allow all parties to argue the merits on appeal. That should come after delaying the hearing and giving notice of the right to argue.

Thank you for your consideration.

Sincerely,

Bill Kloos

Bill Kloos

Cc: Rebekah Dohrman, Lane County Legal Counsel
Sean Malone, Attorney for LandWatch
Clients



Lane County Board of Commissioners On-the-Record Hearing Staff Report

509-PA23-05321

509-PA23-05322

509-PA23-05323

(King Template Dwellings)

April 16, 2024

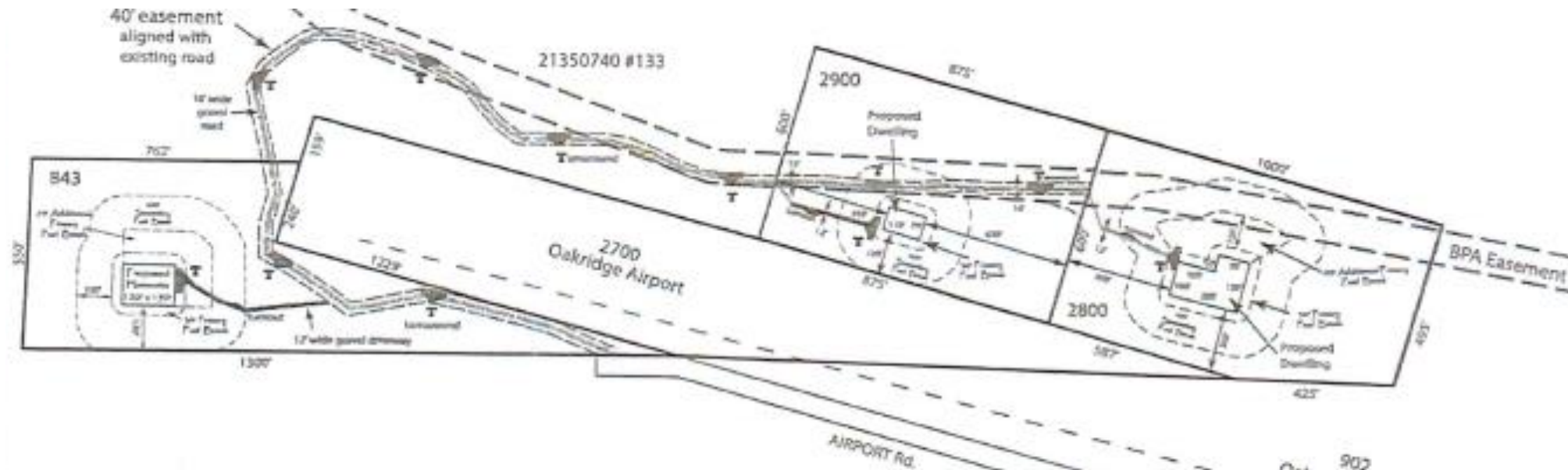
Shawna Adams, Staff Planner

Proposals



Three (3) requests for a Type II Planning Director Approval of a forest template dwelling in the Impacted Forest Lands (F-2) Zone

- < 14 Acre parcels adjacent to Oakridge Airport
- Major Big Game Habitat
- Elevated to the Hearings Official



Overview



- ❖ **Staff Agenda Cover Memorandum - Analysis**
 - Evidentiary record
 - New evidence
 - Parties of record/ testimony
 - Policy 11 history/ background
 - Applicants' "Needed Housing" challenge to Policy 11
 - Policy 11 interpretations raised in HO proceedings
 - Objections by ODFW/ LWLC/1000 Friends
 - HO decision & suggested Board interpretation

- ❖ **Staff Agenda Cover Memorandum – Board Options/ Recommendation**



RCP Goal 5: Open Spaces, Scenic and Historic Areas and Natural Resources Flora & Fauna - Policy 11

“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.”

Applicants' Policy 11 Interpretation

Policy Text: Relates to future planning/ regional work that hasn't occurred.

Working Paper/Addendum: County abandoned 80/40 acre overall density standards for stronger siting standards.

DLCD Reports: DLCD accepted County intended to protect BG habitat solely via siting standards.

F-2 Zone: Siting standards deemed to satisfy residential density standard w/o need for dwelling lot size minimum.

Conclusion: Text, context, legislative history all support interpretation.



LUBA's Response

Plain language does not limit density standard to future regional work. Such interpretation is contrary to Goal 5.

“Nothing in text purports to completely abandon ODFW density standard” or suggests siting standards alone satisfy Goal 5. To the contrary, the documents outline a process to meet Goal 5 when measures fail.

History “clearly illustrates” DLCD expectation that density standards have role for dwelling proposals. “Nothing in the acknowledgment process eliminated or vitiated the applicability of those density standards.”

Siting standards do not quantify a residential density standard. F-2 zone provides no indication Policy 11 density standards do not apply to dwelling proposals.

Conclusion: “Nothing in text, context, or legislative history of Policy 11 suggests that its applicability is so limited.” Interpretation is contrary to Goal 5.

LUBA Policy 11 Interpretation

Policy Text: Plain language does not limit density standard to future regional work.

Working Paper/Addendum: “Nothing in text purports to completely abandon ODFW density standard” or suggest siting standards alone satisfy Goal 5.

DLCD Reports: History “clearly illustrates” DLCD expectation that density standards have role for dwelling proposals. “Nothing in the acknowledgment process eliminated or vitiated the applicability of those density standards.”

F-2 Zone: Siting standards do not quantify a residential density standard. F-2 zone provides no indication Policy 11 density standards do not apply to dwelling proposals.

Staff “20/40” Alternative Interpretation



Also, text does not indicate that only 1 particular ODFW recommendation is the density standard.



Instead, text support conclusion that siting standards in combo with a less restrictive density standard could satisfy ODFW density recommendations and Goal 5.



Also, history clearly illustrates that DLCD, and County understood ODFW recommendations to include density standard of 1 dwelling/40 or/20 acres when clustering is required. F-2 siting standards were acknowledged to meet the clustering requirement.



Siting standards qualify dwelling proposals for a less restrictive density threshold under Policy 11.

Conclusion: Template dwellings meeting F-2 siting standards on 40 acres in Major BG or 20 acres in Peripheral BG satisfy Policy 11 density standard.

Staff “20/40” Policy 11 Interpretation

Policy Text: Plain language does not limit density standard to future regional work or indicate a particular ODFW density standard.

Working Paper/Addendum: Supports conclusion that siting standards in combo with less restrictive density standard could satisfy ODFW density standards and Goal 5

DLCD Reports: History indicates DLCD & County recognized ODFW recommendations to include a 1 dwelling per 40/20-acre density standard when clustering is required. F-2 siting standards acknowledged to meet clustering requirement.

F-2 Zone: Siting standards – if satisfied – qualify dwelling proposals for a less restrictive density threshold under Policy 11.

Objectors



Text reference to the ODFW density standard is properly understood to be the 80/40-acre threshold in the Working Paper/Addendum.



Identifies ODFW’s 80/40-acre density as the threshold for Policy 11. Staff misreads text to support 40/20-acre standard w/o required justification under Goal 5 rule.



Staff misinterprets the history to indicate F-2 siting standards were adopted and recognized to satisfy the clustering requirement or to justify a lesser density standard for dwelling proposals.



F-2 siting standards are not relevant to whether and how Policy 11 applies to dwelling proposals .

Hearing Official's Decisions & Suggested Interpretation



- ❖ HO obligated to apply Policy 11 and deny proposals under LUBA's holding in King
- ❖ HO addresses Policy 11 interpretations - accounting for new evidence & deference
 - HO agrees that Board is not bound by LUBA's holding
 - HO agrees Board interpretation owed more deference/less scrutiny by LUBA
 - HO raises concern that LUBA would not affirm a Board that does not fully implement ODFW's recommended residential densities as required by Policy 11
- ❖ HO provides interpretation based on the HO's analysis to assist Board's review
 - HO agrees with LUBA's interpretation that Policy 11 applies – Fills gap
 - HO endorses staff's alternative "20/40" Policy 11 interpretation

BOARD MOTIONS/ OPTIONS



Option 1. Move to adopt the attached Orders - with updates to the date of the on-the-record hearing and Board action -affirming the Lane County Hearings Official's decisions to deny the three (3) applications, and expressly remaining silent on the interpretations made by the Hearings Official. Direct staff to return with the Orders for final adoption on the consent calendar.

Option 2. Move to modify the attached Orders, by [CHOOSE ONE: affirming the Hearings Official's decisions and expressly agreeing with any interpretations made by the Hearings Official - OR – affirming the Hearings Official's decisions and modifying any interpretations made by the Hearings Official as directed by the Board], and direct staff to return with revised Orders and findings of fact affirming and adopting the Hearings Official's denials that reflect the Boards decision.

Option 3. Move to direct staff to return with revised Orders reversing the Hearings Official's decisions to deny the three applications and conditionally approving the applications with findings of fact that include the Board's interpretation of Policy 11.

Questions?



LIMITED ADDITIONAL TESTIMONY



LC 14.080(5)(a)(i) Review on the Record. Evidence considered by the Board must be confined to the record of the proceeding before the previous approval authority except as provided in subsection (ii) and (iii) below.

(ii) Limited Additional Testimony. The Board may admit additional testimony and other evidence without holding a de novo hearing, if the approval authority is satisfied that the testimony or other evidence could not have been presented before close of the record on prior hearing proceedings. In deciding whether to admit additional testimony or evidence, the approval authority will consider:

- (aa) Prejudice to parties;
- (bb) Convenience or availability of evidence at the time of the prior hearing proceedings;
- (cc) Impact to opposing parties;
- (dd) When notice was given to other parties of the intended attempt to admit the new evidence prior to the close of the record;
- (ee) The competency, relevancy, and materiality of the proposed testimony or other evidence; and
- (ff) Whether the matter should be remanded to the approval authority for a de novo hearing under subsection (iii) below.

De Novo Hearing/Remand



LC 14.080(5)(a)(iii) De Novo Hearing/Remand. The Board may elect to hold a de novo hearing or remand the appeal for a supplemental de novo hearing before the approval authority that held the previous hearing if it decides that the volume of new information offered by a party proceeding under subsection (ii) above would:

- (aa)** Interfere with the approval authority's agenda;
- (bb)** Prejudice parties; or
- (cc)** If the approval authority determines that the wrong legal criteria were applied by the previous approval authority.

July 19, 1984

DLCD Letter

Flora & Fauna -

Policy 11

Lane County

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July 19, 1984

process. Depending upon this analysis, the policies may have to be modified, and implementing measures will have to be adopted. The concern that Policy 3 is unclear as to which species or habitat areas are covered by the policy is valid.

2. 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 resource zoning program.

Objectors are not correct that this policy 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, ML, and EFU Zones which ensure that 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. 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.

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.

RCP Goal 5: Open Spaces, Scenic and Historic Areas and Natural Resources

Flora & Fauna Working Paper Addendum 1983

- J. DELETE text beginning with the last paragraph on page 24 of the Working Paper through the remainder of text on page 25, and ADD the following in its place:

Although this is a useful index, officials of the ODFW stress the fact that a mere "numbers game" is not the optimum manner to deal with conflicts to the Big Game Range resource. While overall densities are important indicators of conflict, the manner in which these densities occur can either create worse conflict or reduce that which already exists.

A prime example is that of "clustering" dwelling units in Peripheral or Major Range areas -- siting dwellings on large tracts of timber or agricultural land near lot lines, near roads, and near one another. This leaves the balance of the land unimpacted.

The means to prevent conflict is appropriate zoning and siting regulations. As a general rule, the County's 80-acre forest land zone will satisfy the requirements of Major Range, and the 40-acre zone will satisfy the requirements of Peripheral Range. Since commercial timber zoning is very restrictive of dwelling unit placement, it is unlikely that conflicts will occur.

Within Developed and Committed areas, ODFW officials are examining the utility of continuing to designate some of these lands as either Peripheral or Major Range. Developed and Committed areas should be considered as Impacted, and conflicting uses permitted.

The County should continue to work with the ODFW to resolve the issue of Big Game Range designation and protection in a mutually acceptable manner -- including the involvement of that agency in land use regulation development. If the zoning procedure described above does not succeed in pre-empting conflicts with the resource, it will be necessary for the County to go through the ESEE process and determine new ways of dealing with conflicts. The process should follow the Goal 5 Rule format, and center on weighing the relative benefits of dwelling unit construction against those of Big Game Range maintenance.

Policies concerning this issue are proposed in the concluding section of this Working Paper.