



Lane County

LAND MANAGEMENT DIVISION
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W. Y. G.

AGENDA COVER MEMO

DATE OF MEMO: June 1, 2005

DATE OF WORK SESSION: June 8, 2005

TO: LANE COUNTY BOARD OF COMMISSIONERS

DEPT.: Public Works Department/Land Management Division

PRESENTED BY: Steve Hopkins, AICP

AGENDA ITEM TITLE: ORDER NO. 05-_____ IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR ARGUMENTS ON AN APPEAL OF A HEARINGS OFFICIAL'S DECISION TO APPROVE A TEMPLATE DWELLING AND RIPARIAN MODIFICATION IN THE F2 (IMPACTED FOREST) ZONE. (PA 04-5746 & PA 04-5747/LEGAULT)

I. MOTIONS

If the Board does not elect to hear the appeal: MOVE TO ADOPT THE ORDER ATTACHED AS EXHIBIT "A".

If the Board elects to hear the appeal: MOVE TO AMEND THE ORDER TO ALLOW THE BOARD TO HEAR ARGUMENTS CONCERNING THE APPEAL OF PA04-5746 AND PA04-5747 ON JUNE 29, 2005.

II. ISSUE OR PROBLEM

The appellants allege the Hearings Official erred in affirming the Planning Director's approval of PA 04-5746 and PA 04-5747.

III. DISCUSSION

a. Site Characteristics & Background

On December 3, 2004, the Planning Director approved PA04-5746 (riparian modification) and PA04-5747 (template dwelling). These applications allowed the land owner, Michael LeGault, to construct a dwelling 30 feet from the high water mark of Fall Creek. The approved riparian modification allowed the dwelling to be placed within the 100 foot riparian setback.

The appellants, Robert Emmons and Nena Lovinger, appealed the Director's decision to the Hearings Official. On May 9, 2005, the Hearings Official affirmed the Director's

decision. On May 12, the Hearings Official revised his decision concerning the riparian modification. This appeal followed.

b. Analysis

In accordance with LC 14.600(3), in order to hear the appeal, the Board must find the issues raised in this appeal were raised in the appeal to the hearings official. In addition, the Board must find the appeal complies with one or more of the following:

- (1) The issue is of countywide significance.
- (2) The issue will reoccur with frequency and there is a need for policy guidance.
- (3) The issue involves a unique environmental resource.
- (4) The Planning Director or Hearings Official recommends review.

The Board must determine if either appeal complies with findings #1, #2 or #3. Regarding finding #4, neither the Planning Director nor the Hearings Official recommends review. The order attached as Exhibit "A" includes findings that show the appeal does not meet these criteria. Specifically, the Board has stated, on April 20, 2005, that it supports the current interpretation of when roads divide legal lots. On that date, the Board also decided that if a unique situation arises concerning the creation of a legal lot, it will address that issue in an appeal of the legal lot verification, rather than amending the Lane Code. The Director approval of the template dwelling and the riparian modification is consistent with the applicable statutes and the past practices of the Land Management Division. These appeals do not raise any issues that are unique to the property, and the property does not contain any unique environmental resources.

The issues identified in both appeals are identical. The appellants allege the following:

- The Hearings Official erred in issuing ~~two~~ separate decisions.
- The Hearings Official misconstrued applicable law, made inadequate findings, and made findings not supported by evidence in the record.
- The Hearings Official violated applicable law by approving the template dwelling.

c. Alternatives/Options

The Board must decide, based on the criteria outlined in the "Analysis" section of this report, whether or not to hear the appeal.

If the Board does not elect to hear the appeal, then move to adopt the order attached as Exhibit "A".

If the Board elects to hear the appeal, move to direct staff to amend the order and set a hearing date for June 29. The order will need to be amended to address the required findings outlined in the "Analysis" section, and specify the parties who qualify to participate in the hearing. In accordance with LC 14.600(3), the parties who qualify are the applicant (Michael LeGault) and the applicant's representative, the Planning

Director, the appellant (Nena Lovinger and Robert Emmons) and the appellant's representative (Jim Just).

d. Recommendations

The Director does not recommend the Board hear the appeal.

e. Timing

If the Board does not elect to hear the appeal, the order can be adopted immediately. If the Board elects to hear the appeal, the order will need to be amended first, then it can be adopted on June 15. The hearing can be scheduled for June 29.

IV. IMPLEMENTATION/FOLLOW-UP

If the Board elects not to hear the appeal, the appellants are allowed to take their appeal to the Land Use Board of Appeals. If the Board elects to hear the appeal, a hearing will be scheduled for two weeks after the adoption of the order allowing the Board to hear the appeal (June 29).

V. ATTACHMENTS

- a. Exhibit "A": Order not to hear the appeal.
- b. Exhibit "B": materials submitted for appeal of PA04-5746.
- c. Exhibit "C": materials submitted for appeal of PA04-5747.
- d. Exhibit "D": Hearings Official's letter dated May 26, 2005.
- e. Exhibit "E": Hearings Official's revised decision dated May 12, 2005
- f. Exhibit "F": Hearings Official's decision dated May 9, 2005

Exhibit "A"

Order not to hear the appeal

IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

Order No. 05-_____ (In the Matter of Electing Whether or Not to Hear
(Arguments on an Appeal of a Hearings Official's
(Decision to approval a Template Dwelling and a
(Riparian Modification within the F2 (Impacted Forest)
(zone. (PA 04-5746 & PA 04-747/LeGault)

WHEREAS, the Lane County Hearings Official has made a decision on applications files PA 04-5746 & PA 04-5747; and

WHEREAS, the Lane County Planning Director has accepted an appeal of the Hearings Official's Decision to the Board of County Commissioners pursuant to LC 14.515; and

WHEREAS, the Lane County Hearings Official has affirmed his decision on applications PA 04-5746 & PA 04-5747; and

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

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

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

1. That the appeal does not comply with the criteria of Lane Code Chapter 14.600(3) and arguments on the appeal should therefore not be considered. Findings in support of this decision are attached as Exhibit "A".
2. That the Lane County Hearings Official decisions dated May 9, 2005 and May 12, 2005, interpreting applicable provisions of Lane Code 16.211(5) and 16.253(3), is affirmed and adopted by the Board of County Commissioners as its own interpretation in reaching a final decision on this application.

DATED this _____ day of _____, 2005.

Chairman, Lane County Board of Commissioners

FINDINGS IN SUPPORT OF THE ORDER

1. Property involved in this action is identified as tax lot 200, map 18-01-35, located at 40203 Little Fall Creek Rd, and zoned F2 (Impacted Forest), within the jurisdiction of the Lane County Rural Comprehensive Plan and Lane Code Chapter 16.
2. In the form of applications PA 04-5746 & PA 04-5747, the property owner on June 28, 2004, requested Planning Director approval of a template dwelling and a Riparian Modification within the F2 (Impacted Forest) zone, pursuant to Lane Code (LC) 16.211(5) and LC 16.253(3).
3. On December 15, 2004, the Planning Director approved the applications.
4. On December 27, 2004, the Planning Director's decision was appealed to the Hearings Official. A hearing before the Lane County Hearings Official was held on February 3, 2005. The record was held open until March 2, 2005.
5. On May 9, 2005, the Hearings Official issued a decision denying the applications. On May 12, 2005, the Hearings Official issued a revised decision concerning the riparian modification.
6. A timely appeal of the Hearings Official decision was filed by the applicant on May 20, 2005. On May 26, 2005, the Hearings Official affirmed his decision.
7. The appeal states that the Hearings Official erred by:
 - a. Issuing two separate decisions.
 - b. Misconstruing applicable law, making inadequate findings, and making findings not supported by evidence in the record.
 - c. Approving the template dwelling in violation of applicable law.
8. In order for the Board to hear arguments on the appeal, LC 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeal:
 - a. The issue is of countywide significance.
 - b. The issue will reoccur with frequency and there is a need for policy guidance.
 - c. The issue involves a unique environmental resource.
 - d. The Planning Director or Hearings Official recommends review.
9. The Board of Commissioners finds that the appeal involves a set of circumstances and a fact pattern particular to the property. The Board further finds no issues of countywide significance raised in the appeal.

10. The Board of Commissioners finds that the policy issues raised will not occur with frequency due the consistent interpretation and implementation of LC 16.211(5) and LC 16.253(3). In addition, on April 20, 2005, the Board of Commissioners endorsed the current interpretation of the legal lot criteria. The Board of Commissioners will not change the current interpretation of when a road divides a legal lot, which is based on statute and the past practices of the Land Management Division. Tax lot 200, map 18-01-35, is comprised of two legal lots because it is bisected by Little Fall Creek Road.
11. The Board of Commissioners finds that tax lot 200 is a 7.5 acre parcel which is not a unique environmental resource.
12. Neither the Planning Director nor the Hearings Official recommends review.
13. To meet the requirements of LC 14.600(2)(b), the Board is required to adopt a written decision and order that elects to have a hearing on the record for the appeal, or declines further review of the appeal.
14. The Board has reviewed this matter at its meeting of June 8, 2005, and finds that the appeal does not comply with the criteria of LC 14.600(3) and elects to not hold an on-the-record hearing.

EXHIBIT "B"

Submittals for appeal of PA 04-5746

Riparian Modification

APPLICATION FOR AN APPEAL OF A
DECISION BY THE HEARINGS OFFICIAL
(Thoroughly Complete by Typing or Printing)

1. Name of Appellant Robert Emmons & Nena Lovinger Phone 741-3625
Mailing Address 40093 Little fall Cr. Rd. fall Creek OR 97438
(Street) (State) (Zip)
Appellant's Representative Jim Just
Mailing Address 39625 Almen Dr. Lebanon OR 97355
(Street) (State) (Zip)

2. Attach a copy of the decision being appeal. DEPARTMENT FILE NO: PA 24-5746*
3. Attach one check for \$3,240.00 covering the appeal fees, payable to LANE COUNTY. (See reverse side for important fee information).
4. The deadline date by which this appeal must be submitted to and received by the Lane County Land Management Division is: May 23 2005 (This deadline date stated in Hearings Official decision).
5. Check one of the boxes below to identify your party status with the right to appeal the Hearings Official decision:

- () a. I am the owner or contract purchaser of the subject property;
() b. I am the applicant for the subject application;
 c. I made an 'appearance' in the proceeding by submitting oral or written testimony into the record. (An appearance does not include a name or address on the petition).

6. Attach to this form a written explanation that addresses each of the following, three standards:
1. An explanation of the reasons why you believe the decision of the Hearings Official was in error or why you believe the Hearings Official should reconsider the decision;
2. An identification of one or more of the following general reasons for the appeal or request for reconsideration:
a. the Hearings Official exceeded his or her jurisdiction;
 b. the Hearings Official failed to follow the procedure applicable to the matter;
c. the Hearings Official rendered a decision that is unconstitutional;
 d. the Hearings Official misinterpreted the Lane Code or Manual, State Law or other applicable criteria; or
e. the Hearings Official should reconsider the decision in order to allow the submittal of additional evidence not available in the record and addressing compliance with the applicable standards or criteria; and
3. Detailed information in support of your explanations.

Your appeal shall be rejected by the Director if it does not include all required fees and above mentioned information.

Signature of Appellant or Appellant's Representative

Date

May 23, 2005

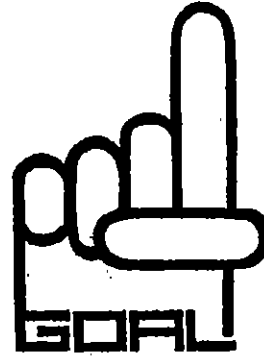
Rev 02/05

* Appellants note that an appeal of PA-5746 & PA-5747 was filed on May 19, 2005. This appeal is precautionary.

05-23-05P12:27 RCVD

GOAL ONE COALITION

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Lane County Land Management Division
Lane County Courthouse
125 East 8th Avenue
Eugene, OR 97401

May 23, 2005

RE: Appeal of Hearings Official decision, PA04-5746 (riparian modification request).

Mr. Just is submitting this letter as the representative of Nena Lovinger and Robert Emmons. The purpose of this letter is to set forth the reasons why the Hearings Official's decision in the above-referenced matter was in error.

Appellants note that the Hearings Official has already reconsidered his initial decision in this matter. The Hearings Official reconsidered his decision in violation of Lane Code provisions authorizing reconsideration. No appeal was submitted to or accepted by the Department, as required by LC 14.520; no notice was provided as required by LC 14.525(3), and the Hearings Official's reconsideration failed to follow the procedures or fulfill the substantive requirements of LC 14.530. Any further reconsideration by the Hearings Official is not authorized or allowed. Appellants do not seek to submit additional evidence not available at the hearing, which is the reason for reconsideration authorized by LC 14.515(3)(d)(vi). Appellants request that the appeal be forwarded to the Board of Commissioners for disposition.

The Hearings Official issued a decision in the above-referenced matter on May 9, 2005. The Hearings Official then issued a reconsidered decision, replacing the May 9 decision, on May 12, 2005. The Notice of Decision states that the issuance of the new decision on reconsideration restarts the appeals clock for both applications and that the appeal deadline for both applications is May 23, 2005.

Appellants note that an appeal of PA-5747 was filed on May 19, 2005. It is appellants' position that PA-5646 and PA-5747 were approved in a single decision, and that the May 19, 2005 appeal of PA-5747 served to appeal PA-5746 as well. This appeal is being filed to preserve appellants' appeal of PA-5746 should appellants' position not prevail.

GOAL ONE COALITION

I. First Assignment of Error: the Hearings Official erred in issuing two separate decisions.

The applicant on June 28, 2004 submitted one request for approval of a template dwelling and a riparian setback modification. Lane County on August 4, 2004 sent out a Referral Notice identifying the nature of the pending development application and offering opportunity to comment.

ORS 215.416(2) requires local governments to establish a consolidated procedure for applicants:

“The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 215.427. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.”

The applicant in this case elected and Lane County has provided a consolidated procedure.

The Hearings Official’s decision in PA04-5746 and PA04-5747 was in fact one decision in a consolidated procedure approving the development proposal. Finding of Fact 1 in the Riparian Modification decision states that “[t]he applicant now wishes to receive template dwelling approval for the remainder of tax lot 200 that is located south of Little Fall Creek Road and to construct a dwelling.” The riparian modification is an integral and inseparable element of the template dwelling request. The fact that the Hearing Official’s issuance of a reconsidered decision in PA04-5746 restarted the appeal clock for both PA04-5746 and PA-5747 reinforces that the decision was in fact one decision.

Lane County erroneously required two separate appeal fees for the appeal to an initial public hearing of the Planning Director decision. The second of those appeal fees must be refunded. Similarly, it appears that two separate appeals and appeal fees are being required for this appeal of the decision of the Hearing Official. Appellants request that the second appeal fee be waived or refunded.

II. Second Assignment of Error: the Hearing Official in approving PA04-5746 (riparian modification request) misconstrued applicable law, made inadequate findings, and made findings not supported by evidence in the record.

In approving the requested Riparian Modification the Hearings Official misinterpreted the Lane Code and other applicable criteria and made a decision not supported by evidence in the record.

Almost all of the portion of TL 200 south of Little Fall Creek Rd. falls within the identified riparian setback area, established by LC 16.211(8)(a)(iv):

“The riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water line of a Class I stream designated for riparian vegetation

GOAL ONE COALITION

protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) are met[.]”

Little Fall Creek runs along the southern boundary of the subject property, varying from about 35 to 45 feet in width. The northern bank along the creek has a modest slope to the water; the opposite side of the creek has a more vertical cut bank. Total creek frontage is found to be 540 feet. The entire dwelling would be located within the riparian setback area. Existing vegetation is found to be “several large cottonwood trees, ash and other smaller deciduous trees, as well as blackberry bushes, ivy and ferns.

LC 16.253 establishes regulations governing riparian areas. LC 16.253(2) sets forth removal standards. LC 16.253(2)(a) requires that a minimum of 75% of the total area within the riparian setback area of any legal lot remain in an unaltered, indigenous state, except as allowed under LC 16.253(2)(b), which establishes maximum allowable removal standards along shorelines and within the riparian setback zone depending on stream frontage. LC 16.253(3) allows for modification to the applicable riparian setback standard for a structure, subject to ODFW comment and compliance with the criteria of LC 16.253(3):

- “(a) The location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2) above. For purposes of LC 16.253, altered means to eliminate, significantly reduce or interrupt the natural growth cycle of indigenous vegetation by removal or destruction of the vegetation caused by a person; and
- “(b) The riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. This determination shall include consideration of any evidence of riparian vegetation existing prior to any removal of indigenous vegetation before or during the application review period; or
- “(c) It can be demonstrated that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area.”

Thus a structure can be sited within the riparian setback area if: 1) LC 16.253(2) standards are met; *and* 2) if the riparian vegetation does not actually exist at the proposed building site, *or* if compliance would place an “unduly restrictive burden” on the property owner.

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- 1. First sub-assignment of error: the Hearing Official's findings of compliance with LC 16.253(2) and LC 16.253(3)(a) misconstrue applicable law and are not supported by evidence in the record.**

The Hearings Official found that the subject property contains 35,900 square feet of riparian vegetation; that the building footprint is 1,120 sq. ft.; that the primary safety zone required by LC 16.211(8) is 30 feet in all directions; that no secondary fuel break is required within a riparian setback area; that the dwelling and primary fuel break would require an area of 4,060 square feet and 100 feet of linear shoreline removal; and that an additional 4,740 sq. ft. would be removed for a driveway, sand filter and drainfield. The Hearings Official concluded that the total area of vegetation to be removed would thus be 8,800 sq. ft., which is less than 25% of the total area of riparian vegetation; and that the requirements of LC 16.253(2) are met.

The Hearing Official's decision fails to include findings that siting the septic system within the required setback area is feasible. There is no evidence in the record to support the required findings.

The Hearing Official's determination that no secondary fuel break is required within the riparian setback area violates applicable law. LC 16.211(8)(c) establishes fire safety measures, to include a 30-ft primary safety zone in all directions from any dwelling and a secondary fuel break extending a minimum of 100 ft. in all directions. Only green lawns and low shrubs (under 24") are allowed within the primary safety zone. Within the secondary fuel break, small trees and brush must be removed. The Hearings Official's decision fails to cite to Lane Code for support of his assertion that no secondary fuel break is required within the riparian setback area. No such exemption is to be found in Lane Code.

Furthermore, LC 16.253(2) implements administrative rule. OAR 660-006-0035 establishes siting standards for dwellings and structures in forest zones and provides, in relevant part:

“(3) The owners of the dwellings and structures shall maintain a primary fuel-free break area surrounding all structures and clear and maintain a secondary fuel-free break area on land surrounding the dwelling that is owned or controlled by the owner in accordance with the provisions in ‘Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads’ dated March 1, 1991 and published by the Oregon Department of Forestry.”

OAR 660-006-0035 does not provide any exception to the requirement for a secondary fuel break area for dwellings located in riparian areas, nor does it recognize Class I streams as secondary fuel breaks. Neither does “Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads” recommend or establish any such exception to fuel break requirements, or recognize streams or riparian areas as providing secondary fuel breaks.

LC 16.253(2) must be interpreted and applied in a manner consistent with OAR 660-006-0035. In addition, OAR 660-006-0035 applies directly to this application. The Hearings Official erred in failing to interpret LC 16.253(2) in a manner consistent with OAR 660-006-0035 and in failing to make findings of compliance with OAR 660-006-0035. Evidence in the

GOAL ONE COALITION

record establishes that the requirements of LC 16.253(2) and LC 16.253(3)(a) cannot be met while providing the required secondary fuel break.

2. Second sub-assignment of error: the Hearing Official's findings of compliance with LC 16.253(3)(c) misconstrue applicable law.

The Hearing Official's finding that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area is based on the assumption that the subject property is a legal lot that can be developed with a dwelling. The decision is based upon erroneous interpretations and application of the Lane Code's definition of "contiguity" and of ORS 92.010(7). The Hearings Official's decision is erroneously based on the assumption that the existence of a road crossing a unit of land is sufficient in and of itself to create two separate, legal and developable units of land.

Furthermore, LC 16.244(7)(c)(iv) prohibits partitioning of land for residential purposes if the land is located entirely within the Floodway.

In addition, the enforcement of regulations, the result of which is to not allow an applicant to construct a second dwelling so as to realize financial gain, simply does not place an undue burden on a property owner. *Walker v. Josephine County*, __ Or LUBA __ (LUBA No. 2003-204, 5/13/2004).

3. Third sub-assignment of error: the Hearing Official's findings of compliance with LC 16.253(2) and LC 16.253(3)(a) applied the wrong legal standard and are not supported by evidence in the record.

LC 16.211(8)(a)(iv) defines the riparian setback area as that area between the ordinary high water line and a line 100 feet above and parallel to the ordinary high water line. The Hearings Official found that the subject property contained 35,900 sq. ft. of riparian setback area. This determination is dependent upon the location of the ordinary high water line. Approval of the request requires findings that at least 75% of the riparian setback area will remain undisturbed.

The Hearings Official made contradictory findings regarding the identification of the ordinary high water line. The Hearings Official found that "it is impossible to say conclusively that the debris line identified by the Planning Director demonstrates an ordinary high water line * * *. This is especially true based upon the lack of precise data regarding flooding of the creek over the past few years. * * * It is impossible to say that [the Planning Director's] determination is clearly wrong."

LC 16.090 requires, in the absence of satisfactorily identifying physical characteristics, that ordinary high water be determined using Step backwater analysis upon a two-year frequency flood as determined by the US Army Corps of Engineers. Because the Hearings Official found that evidence regarding the high water line was "inconclusive," his findings of compliance with LC 16.253(2) and LC 16.253(3)(a), in the absence of a Step backwater analysis, are not supported by evidence in the record.

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It was the Hearing Official's duty to make a finding that the applicant has met his burden of proof that the approval criteria were met, based upon substantial evidence in the record. The Hearings Official erred in failing to require that the applicant bear the burden of proof.

4. Fourth sub-assignment of error: the Hearing Official failed to make findings of compliance with LC 16.244

LC 16.244 establishes standards and criteria pertaining to the Floodplain Combining Zone (/FP-RCP) for the purpose of minimizing public and private losses due to flood conditions in all areas of flood hazard within Lane County.

LC 16.244(6)(a) provides that the action proposed in PA 04-5746 is a development application that cannot be approved unless it is determined that the requirements of LC 16.244 have been satisfied. LC 16.244(6) requires that base flood elevation data be provided, that the actual elevation of the structure be determined, and that the flood-carrying capacity of the watercourse not be diminished.

The Hearings Official's findings indicate that the proposed building site is within the floodway, as defined by LC 16.090:

"Floodway, Regulatory. The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the waters of a base flood without cumulatively increasing the water surface elevation."

LC 16.090 defines "base flood":

"Base Flood. A flood that has a one percent chance of being equaled or exceeded in any given year."

and equates it to 100 Year Flood:

"100 Year Flood. See Base Flood.

LC 16.090 defines "flood elevation determination" as the product of an approved flood hazard study:

"Flood Elevation Determination. A determination by the Administrator of the water surface elevations of the base flood from the approved flood hazard studies."

No "flood elevation determination" is found in the record. The Hearings Official's findings of May 12, 2005 at p. 7 concede that there is a "lack of precise data regarding flooding of the creek over the past few years."

LC 16.244(7)(a)(viii) requires adequate provision for accessibility during a 100-year flood, so as to ensure ingress and egress for ordinary and emergency vehicles and services during potential future flooding. The Hearings Official made no findings nor imposed any conditions regarding accessibility.

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If the proposed development is in the floodway, it must be found that the requirements of LC 16.244(7)(c) are met. LC 16.244(7)(c)(i) prohibits encroachments, including fill and new construction, unless certification by a professional engineer demonstrates that encroachments shall not increase the water surface elevation of the base flood by more than one foot at any point. LC 16.244(7)(c)(ii) similarly limits elevation of base flood from cumulative impacts.

LC 16.244(7)(c)(iv) prohibits partitioning of land for residential purposes if the land is located entirely within the Floodway.

The provisions of Lane Code listed above were identified as applicable approval criteria in the proceedings before the Hearings Official. The Hearings Official erred in failing to make findings addressing issues raised pertaining to these identified provisions.

CONCLUSION

For the above reasons, the decision of the Hearings Official was in error. As the Hearings Official has already issued a reconsidered decision. Appellants do not seek reconsideration in order to submit additional evidence not available at the hearing, as provided for in LC 14.515(3)(d)(vi). Further reconsideration is not warranted or allowed.

Should this appeal prove redundant, appellants request refund of the accompanying appeal fee.

Respectfully submitted,

Jim Just
Executive Director

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL
OF A REQUEST FOR A RIPARIAN SETBACK MODIFICATION**

Application Summary

Michael E. Legault, 40203 Little Fall Creek Road, Fall Creek, Oregon 97438, requested Planning Director approval for a riparian setback modification to allow the construction of a dwelling 30 feet from the ordinary high water mark of Little Fall Creek on Tax Lot 200, Assessor's Map 18-01-35. The application was approved by the Lane County Planning Director, subject to conditions, on December 3, 2003. This approval was appealed in a timely manner by Robert Emmons & Nena Lovinger to the Lane County Hearings Official.

Parties of Record

Michael Legault
Jim Just

Robert Emmons
Jim Reed

Nena Lovinger
Alan Evans

Application History

Hearing Date: February 3, 2005
(Record Held Open Until March 2, 2005)

Decision Date: May 12, 2005

Appeal Deadline

An appeal must be filed within 10 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane County Rural Comprehensive Plan
Lane Code 16.253(3)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as Tax Lot 200, Assessor's Map 18-01-35. Tax lot 200 originally comprised the subject property and tax lot 203, which is located adjacent, to the north of Little Fall Creek Road, and was owned by the applicant. The applicant has since received template dwelling approval for tax lot 203 and has sold this parcel. The applicant now wishes to receive template dwelling approval for the remainder of tax lot 200 that is located south of Little Fall Creek Road and to construct a dwelling. The dwelling is

proposed to be 28 feet wide by 40 feet long. The entire dwelling is located within the riparian setback area of the creek. The total creek frontage of the subject property is 540 feet. The subject property varies from 35 feet to 130 feet in width and contains about 35,900 square feet (0.82 acres) of riparian setback area.

2. Lane Code 16.211(8)(a)(iv) states:

"The riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water line of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from the ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) are met."

Little Fall Creek is a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. Ordinary High Water is defined by Lane Code 16.090 as"

"...that high level of a river which is attained during mean annual flood. It does not include levels attained during exceptional or catastrophic floods. It is often identifiable by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in character in the soil, destruction or absence of vegetation not adapted for life in saturated soils or the presence of flotsam and debris. In the absence of identifying physical characteristics, ordinary high water may be determined by Step backwater analysis upon a two-year frequency flood as determined by the US Army Corps of Engineers."

The Oregon Department of State Lands (DSL) has exclusive jurisdiction over all ungranted tidal submerged lands owned by this state. ORS 274.710(1). The definition of "ordinary high water line" used by DSL is found in OAR 141-085-0010(150):

"Ordinary High Water Line" (OHWL) means the line on the bank or shore to which the high water ordinarily rises annually in season (ORS 274.005). The OHWL excludes exceptionally high water levels caused by large flood events (e.g. 100 year events). OHWL is indicated in the field by the following physical characteristics:

- (a) *Clear, natural line impressed on the shore;*
- (b) *Change in vegetation (riparian (e.g. willows) to upland (e.g. oak, fir) dominated);*
- (c) *Textural change of depositional sediment or changes in the character of the soil (e.g. from sand, sand and cobble, cobble and gravel to upland soils);*
- (d) *Elevation below which no fine debris (needles, leaves, cones, seeds) occurs;*
- (e) *Presence of litter and debris, water-stained leaves, water lines on tree trunks;*
and/or

(f) *Other appropriate means that consider the characteristics of the surrounding areas."*

3. A riparian setback examination was performed on August 26, 2004 to locate the ordinary high water mark of Little Fall Creek on the subject property. Based upon this analysis, the proposed dwelling was estimated to be sited 60 feet from the centerline of Little Fall Creek Road and, according to the riparian setback determination of the Planning Director, 30 feet from the ordinary high water line.

On February 9, 2005, a site view was conducted by the Hearings Official, Mr. Don Nickell, the applicant, Mr. Jim Reed, Nena Lovinger and Robert Emmons. The primary purpose of this site view was to determine whether the Planning Director's assessment of the ordinary high water line was accurate. The three areas identified by Don Nickell in his February 15, 2004 electronic communication to the Hearings Official will be relied upon to describe the banks of Little Fall Creek in relation to the subject property in this analysis. A summary of the facts relied upon from this site view and testimony regarding the site view are presented in Finding of Fact 4, below.

4. The parcel is vegetated with several large cottonwood trees, ash and other smaller deciduous trees, as well as blackberry bushes, ivy and ferns. Little Fall Creek, as it runs along the southern boundary of the subject property, varies from about 35 to 45 feet in width, and flows to the west. The creek, which last experienced a major flood event in 1996, loses elevation as it flows past the subject property. The area has experienced lower than average rain flows during the past two years. The northern bank along the creek and parallel to the location of the proposed dwelling, has a modest slope to the water. The opposite site of the creek can be characterized by a more vertical cut bank.

Area east of the proposed dwelling. The northern bank along the creek in this area has a modest slope to the water. The opposite site of the creek can be characterized by a more vertical cut bank. One measurement was taken from bank near the east line of the proposed dwelling (as staked) of a log located between 100 and 130 upstream (on the south side of the bank). This measurement was then compared to the level where vegetation (ferns) first appear on the nearly vertical cut bank directly across the river from this stake. Using a construction-grade laser level the level of the log and the ferns were found to be one to two feet higher than the elevation of the ordinary high water line marked by Mr. Nickell. It was noted, however, that because of the creek's flow direction and higher elevation, the south shore of the creek in this location receives higher water energy than the north shore.

Also located in this area is a downed tree that goes across the creek adjacent to the upstream log. This tree fell about one year ago and the debris on the upriver side of the tree appears to be of similar height as the debris on the bank of the north side of the creek.

Area parallel to the proposed dwelling. A branch lying on the south side of the creek was observed as being at an elevation similar to that of the debris line on the north side of the creek that served to delineate the ordinary high water line by the Planning Director.

Area west of the proposed dwelling. The banks on both sides of the river in this area have similar vegetation (i.e, grass and blackberries) growing all the way up to their tops. The debris line from the area parallel to the proposed dwelling appears to extend into this area.

The County's determination of the ordinary high water line of Little Fall Creek was based upon an examination of debris such as sticks, limbs and leaves and the absence of such debris in other areas. This debris line was visible during the site view of the subject property and represented evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line.

Decision

THE DECISION OF THE PLANNING DIRECTOR APPROVING THE LEGAULT REQUEST (PA 04-5746) FOR A RIPARIAN SETBACK MODIFICATION IS AFFIRMED subject to the following condition:

1. The sand filter and other components of the subsurface disposal system shall be placed within the 100 foot linear footprint of the proposed dwelling and primary fuel break.

Justification for the Decision

The appellants have identified two assignments of error in their appeal to the Planning Director's decision in PA 04-5747.

Assignment of Error #1: *"The Planning Director's decision approving the requested riparian modification was in error."*

The appellants' argument is threefold. First, they argue that the applicant's proposal requires the removal of indigenous vegetation in excess of that allowed by Lane Code 16.253(2). Second, they argue that the Planning Director's determination of the ordinary high water line is too liberal and is closer to the location of the proposed dwelling. Third, they argue that the applicant has not demonstrated that an undue burden would be placed on him if he was not allow to locate the proposed dwelling within the riparian setback area.

To satisfy Lane Code 16.253(3), the applicant must either comply with Lane Code 16.253(3)(a) & (b) or, in the alternative, comply with Lane Code 16.253(3)(a) & (c).

Compliance with Lane Code 16.253(3)(a)

Lane Code 16.253(3)(a) states the location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2). Lane Code 16.253(2)(a) requires that 75 percent of the total area of the total area within the riparian setback area shall remain in an unaltered, indigenous state. Lane Code 16.253(2)(b)(iii) provides that the maximum allowable removal for any legal lot having frontage 400 feet or greater in length along a Class I stream shall not exceed 100 linear feet along the shoreline of the Class I stream and an area not greater than 10,000 square feet within the riparian setback area of a Resource Zone.

The subject property is zoned Impacted Forest Land, a Resource Zone, and contains 35,900 square feet of riparian vegetation. The applicant's proposed dwelling is 28' x 40' and thus will displace 1,120 square feet. The primary safety zone required by Lane Code 16.211(8) is 30 feet in all directions around the dwelling. (No secondary fuel break is required within a riparian setback area.) This would require an area of 4,060 square feet to be removed for the dwelling and primary setback and 100 feet of linear shoreline. An additional 4,740 square feet of riparian vegetation is anticipated to be removed with the construction of a driveway, 360 square foot sand filter and drainfield. The total area of riparian setback vegetation to be removed, 8,800 square feet, is less than 25 percent of the total riparian setback area of the subject property.

The proposal is consistent with the requirement of Lane Code 16.253(2)(a), in that it retains 75+ percent of the total area of the total area within the riparian setback area to remain in an unaltered, indigenous state, consistent with Lane Code 16.253(2)(a) and because it results in less than 10,000 square feet of riparian area being removed, consistent with part of Lane Code 16.253(2)(b)(iii). However, the applicant's site plan shows that the length of the proposed dwelling (40 feet), the primary fuel break (60 feet total); and sand filter (10-15 feet?) would result in the removal of more than 100 linear feet of riparian setback area, inconsistent with a portion of Lane Code 16.253(2)(b)(iii). However, as a condition of approval, the sand filter and other components of the subsurface disposal system can be placed within the primary setback area thus bringing the proposal into conformance with Lane Code 16.253(3)(a).

The application complies with Lane Code 16.253(3)(a).

Compliance with Lane Code 16.253(3)(b)

In conjunction with satisfying Lane Code 16.253(3)(a), Lane Code 16.253(3)(b) requires that the applicant demonstrate that the riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. Clearly, the site of the proposed dwelling lies within the 100-foot riparian setback on the subject property. The application therefore does not comply with Lane Code 16.253(3)(b).

Compliance with Lane Code 16.253(3)(c)

This provision requires that the applicant demonstrate that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area.

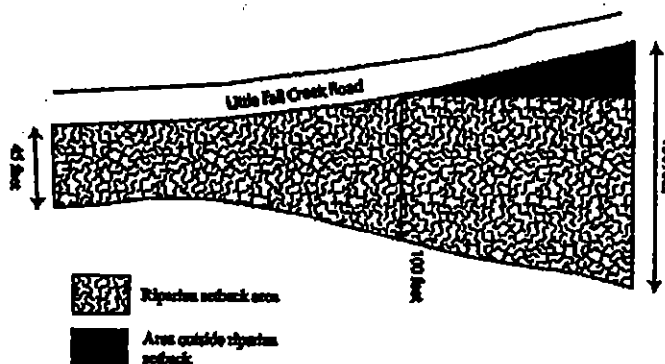
The appellants argue that the applicant cannot satisfy Lane Code 16.253(3)(c) because tax lot 200 is not two legal lots and the construction of a second dwelling for purposes of financial gain is not an undue burden. This is the appellant's first assignment of error in the Planning Director's approval of the applicant's request (PA 04-5747) for approval of a template forest dwelling on the subject property. In this appeal, the Hearings Official determined that it was reasonable for the County to apply its definition of "contiguity" to properties that were bisected by roads prior to the 1989 and 1991 amendments to ORS 92.010(7) that provide that "...any property divided by the sale or grant of property for state highway, county road, city street or other right of way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned."¹ In essence, the Hearings Official agreed with the Planning Director's assessment that there is no evidence that the amendments to ORS 92.010(7) were intended to be retroactive and there is some evidence of legislative intent that that was not the case.

Since this decision assumes that the subject property is a legal lot, the question remains whether the applicant would suffer an unduly restrictive burden if the proposed dwelling was not allowed to be located within the riparian setback area. An examination of the applicant's plot plan reveals that the subject property is wedge-shaped, being 130 feet wide at its eastern end and tapering to 45 to 35 feet in width at its western end. Applying a rough scale, it appears that the eastern portion of the subject property tapers to 100 feet in width, measuring between the right-of-way of Little Fall Creek Road to the bank of Little Fall Creek, about 90 feet from its eastern perimeter. Thus, there appears to be a small triangle of land, 90 feet long with a 30-foot wide base that represents the portion of the subject property that does not lie within the 100-foot riparian setback area. Assuming this figure is approximately a "right triangle" its area would be somewhere around 1350 square feet.² (See Figure 1, below.) As seen above, the applicant's "modest" house is 1,120 square feet in size without accounting for the subsurface disposal system, a driveway, or the primary fuel break. Locating a dwelling in this area would put the proposed structure within the County's right-of-way for Little Fall Creek, which extends 50 feet on either side of its centerline. This location would violate Lane Code 15.083 and Lane Code 16.211(8)(a)(v)(aa). Finally, if the dwelling was sited 30 feet from all other property lines consistent with Lane Code 16.211(8)(a)(v)(bb) this situation would be further aggravated.

¹ Lane County Hearings Official, *Application of Michael Legault* (PA 04-5747), May 9, 2005.

² Area = $\frac{1}{2} ab$ where "a" is 90' and "b" is 30'.

FIGURE 1



The dimensions of the subject property preclude any practicable way that the applicant could site a dwelling with a primary fuel break without severely encroaching on the 100-foot setback from Little Fall Creek. The plot plan appears to be a reasonable compromise given the slope constraints of the subject property, the required setbacks from Little Fall Creek Road, and the distance from the ordinary high water line of Little Fall Creek.

The location of an ordinary high water line is not always a clear process and it certainly wasn't in regard to the subject property. The Planning Director's determination was based upon the location of a debris line located on the subject property's bank along Little Fall Creek. While the line was relatively distinct, logs located on other portions of the bank and at elevations higher than the debris line gave rise to reasonable speculation that the mean annual flood might be higher. Adding to this confusion was the low precipitation conditions of the last two years and the presence of dense blackberries that might obscure a higher debris line.

The debris line was the factor that most clearly defined the Planning Director's determination. In the area where it was apparent, there was evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line. It would seem that if the mean annual flood was higher, there would be more evidence of older debris and scour lines at higher elevations. Also, the location of large logs seem to argue as heavily for their being deposited through an exceptional flood event as through the occurrence of annual flooding.

In the final analysis, it is impossible to say conclusively that the debris line identified by the Planning Director demonstrates an ordinary high water line representative of Little Fall Creek. This is especially true based upon the lack of precise data regarding flooding of the creek over

the past few years. It is possible to conclude, however, that the Planning Director has reasonably applied the descriptive factors of the Lane Code 16.090 definition of ordinary high water to the subject property. Based upon the site view and the arguments of the parties it is not possible to say that this determination is clearly wrong. Therefore, I must conclude that the Planning Director's determination of the ordinary high water line should prevail.

The Planning Director's conclusion that the application, as represented by the applicant's proposed plot plan, complies with Lane Code 16.253(3)(c).

Assignment of Error #2: *"The appeal fee charged by Lane County exceeds that allowed by state law.*

The Planning Director appealed here was an administrative decision issued without the benefit of an evidentiary hearing. Parties were notified of their right to request an evidentiary, de novo appeal hearing before the Lane County Hearings Official. The appellants filed their appeal in a timely manner and were charged \$310 at the time of filing.

Lane County's base fee for an evidentiary hearing is \$250. Pursuant to Lane Manual 60.850(6), (8) and (9), Lane County adds a \$10 technology fee, a five percent long range planning surcharge and a \$15 percent administrative fee to the base fee for a total of, in this case, \$310. The appellants argue that this fee violates ORS 215.416(11).

ORS 215.416(11)(b) reads:

"If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or \$250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site."

The statute is very clear that the maximum amount that may be charged for the first evidentiary hearing is \$250 even if that amount does not cover the cost to the County. Specifically, the County may not charge a \$10 technology fee, a five percent long range planning surcharge or a \$15 percent administrative fee to the base fee for the initial evidentiary hearing. The County must reimburse the appellants \$60 of their appeal costs.

Respectfully submitted,



**Gary Darnielle
Lane County Hearings Official**

EXHIBIT "C"

Submittals for appeal of PA 04-5747

Template Dwelling

APPLICATION FOR AN APPEAL OF A
DECISION BY THE HEARINGS OFFICIAL
(Thoroughly Complete by Typing or Printing)

1. Name of Appellant Robert Emmons & Wena Lovinger Phone 741-3625
Mailing Address 40093 Little Fall Creek Rd, Fall Creek, OR 97438
(Street) (State) (Zip)
Appellant's Representative Jim Just
Mailing Address 39621 Almen Drive, Lebanon, OR 97355
(Street) (State) (Zip)

2. Attach a copy of the decision being appeal. DEPARTMENT FILE NO: PA 04 5747*
3. Attach one check for \$3,240.00 covering the appeal fees, payable to LANE COUNTY. (See reverse side for important fee information).
4. The deadline date by which this appeal must be submitted to and received by the Lane County Land Management Division is: 5/23/05. (This deadline date stated in Hearings Official decision).
5. Check one of the boxes below to identify your party status with the right to appeal the Hearings Official decision:
- a. I am the owner or contract purchaser of the subject property;
 - b. I am the applicant for the subject application;
 - c. I made an 'appearance' in the proceeding by submitting oral or written testimony into the record. (An appearance does not include a name or address on the petition).

6. Attach to this form a written explanation that addresses each of the following, three standards:
1. An explanation of the reasons why you believe the decision of the Hearings Official was in error or why you believe the Hearings Official should reconsider the decision;
 2. An identification of one or more of the following general reasons for the appeal or request for reconsideration:
 - a. the Hearings Official exceeded his or her jurisdiction;
 - ~~b.~~ the Hearings Official failed to follow the procedure applicable to the matter;
 - c. the Hearings Official rendered a decision that is unconstitutional;
 - ~~d.~~ the Hearings Official misinterpreted the Lane Code or Manual, State Law or other applicable criteria; or
 - e. the Hearings Official should reconsider the decision in order to allow the submittal of additional evidence not available in the record and addressing compliance with the applicable standards or criteria; and
 3. Detailed information in support of your explanations.

Your appeal shall be rejected by the Director if it does not include all required fees and above mentioned information.

Wena Lovinger Robert Emmons 5/19/2005
Signature of Appellant or Appellant's Representative Date

Rev 02/05

* We preserve our right to appeal PA 04 5746 in this appeal as well.

Robert Emmons
Nena Lovinger
40093 Little Fall Creek Road
Fall Creek, OR 97438

Lane County Land Management Division
Lane County Courthouse
125 East 8th Avenue
Eugene, OR 97401

May 19, 2005

RE: Appeal of Hearings Official decision, PA04-5746 (riparian modification request) and PA04-5747 (forest template dwelling).

The purpose of this letter is to set forth the reasons why the Hearings Official's decision in the above-referenced matter was in error.

Appellants note that the Hearings Official has already reconsidered his initial decision in this matter. The Hearings Official reconsidered his decision in violation of Lane Code provisions authorizing reconsideration: no appeal was submitted to or accepted by the Department, as required by LC 14.520; no notice was provided as required by LC 14.525(3), and the Hearings Official's reconsideration failed to follow the procedures or fulfill the substantive requirements of LC 14.530. Any additional reconsideration by the Hearings Official is not allowable. Appellants do not seek to submit additional evidence not available at the hearing, which is the reason for consideration authorized by LC 14.515(3)(d)(vi). Appellants request that the appeal be forwarded to the Board of Commissioners for disposition.

The Hearings Official issued a decision in the above-referenced matter on May 9, 2005. The Hearings Official then issued a reconsidered decision, replacing the May 9 decision, on May 12, 2005. The Notice of Decision states that the issuance of the new decision on reconsideration restarts the appeals clock for both applications and that the appeal deadline for both applications is May 23, 2005.

I. First Assignment of Error: the Hearings Official erred in issuing two separate decisions.

The applicant on June 28, 2004 submitted one request for approval of a template dwelling and a riparian setback modification. Lane County on August 4, 2004 sent out a Referral Notice identifying the nature of the pending development application and offering opportunity to comment.

ORS 215.416(2) requires local governments to establish a consolidated procedure for applicants:

“The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a

development project. The consolidated procedure shall be subject to the time limitations set out in ORS 215.427. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.”

The applicant in this case elected and Lane County has provided a consolidated procedure.

The Hearings Official’s decision in PA04-5746 and PA04-5747 was in fact one decision in a consolidated procedure approving the development proposal. Finding of Fact 1 in the Riparian Modification decision states that “[t]he applicant now wishes to receive template dwelling approval for the remainder of tax lot 200 that is located south of Little Fall Creek Road and to construct a dwelling.” The riparian modification is an integral and inseparable element of the template dwelling request. The fact that the Hearing Official’s issuance of a reconsidered decision in PA04-5746 restarted the appeal clock for both PA04-5746 and PA-5747 reinforces that the decision was in fact one decision.

Lane County erroneously required two separate appeal fees for the appeal to an initial public hearing of the Planning Director decision. The second of those appeal fees must be refunded. Similarly, it appears that two separate appeals and appeal fees are being required for this appeal of the decision of the Hearing Official. Appellants request that the second appeal fee be waived or refunded.

II. Second Assignment of Error: the Hearing Official in approving PA04-5746 (riparian modification request) misconstrued applicable law, made inadequate findings, and made findings not supported by evidence in the record.

In approving the requested Riparian Modification the Hearings Official misinterpreted the Lane Code and other applicable criteria and made a decision not supported by evidence in the record.

Almost all of the portion of TL 200 south of Little Fall Creek Rd. falls within the identified riparian setback area, established by LC 16.211(8)(a)(iv):

“The riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water line of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) are met[.]”

Little Fall Creek runs along the southern boundary of the subject property, varying from about 35 to 45 feet in width. The northern bank along the creek has a modest slope to the water; the opposite side of the creek has a more vertical cut bank. Total creek frontage is found to be 540 feet. The entire dwelling would be located within the riparian setback area. Existing vegetation is found to be “several large cottonwood trees, ash and other smaller deciduous trees, as well as blackberry bushes, ivy and ferns.”

LC 16.253 establishes regulations governing riparian areas. LC 16.253(2) sets forth removal standards. LC 16.253(2)(a) requires that a minimum of 75% of the total area within the riparian setback area of any legal lot remain in an unaltered, indigenous state, except as allowed under LC 16.253(2)(b), which establishes maximum allowable removal standards along shorelines and within the riparian setback zone depending on stream frontage. LC 16.253(3) allows for modification to the applicable riparian setback standard for a structure, subject to ODFW comment and compliance with the criteria of LC 16.253(3):

- “(a) The location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2) above. For purposes of LC 16.253, altered means to eliminate, significantly reduce or interrupt the natural growth cycle of indigenous vegetation by removal or destruction of the vegetation caused by a person; and
- “(b) The riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. This determination shall include consideration of any evidence of riparian vegetation existing prior to any removal of indigenous vegetation before or during the application review period; or
- “(c) It can be demonstrated that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area.”

Thus a structure can be sited within the riparian setback area if: 1) LC 16.253(2) standards are met; *and* 2) if the riparian vegetation does not actually exist at the proposed building site, *or* if compliance would place an “unduly restrictive burden” on the property owner.

- 1. First sub-assignment of error: the Hearing Official’s findings of compliance with LC 16.253(2) and LC 16.253(3)(a) misconstrue applicable law and are not supported by evidence in the record.**

The Hearings Official found that the subject property contains 35,900 square feet of riparian vegetation; that the building footprint is 1,120 sq. ft.; that the primary safety zone required by LC 16.211(8) is 30 feet in all directions; that no secondary fuel break is required within a riparian setback area; that the dwelling and primary fuel break would require an area of 4,060 square feet and 100 feet of linear shoreline removal; and that an additional 4,740 sq. ft. would be removed for a driveway, sand filter and drainfield. The Hearings Official concluded that the total area of vegetation to be removed would thus be 8,800 sq. ft., which is less than 25% of the total area of riparian vegetation; and that the requirements of LC 16.253(2) are met.

The Hearing Official’s decision fails to include findings that siting the septic system within the required area is feasible. There is no evidence in the record to support the required findings.

The Hearing Official’s determination that no secondary fuel break is required within the riparian setback area violates applicable law. LC 16.211(8)(c) establishes fire safety measures, to include a 30-ft primary safety zone in all directions from any dwelling and a

secondary fuel break extending a minimum of 100 ft. in all directions. Only green lawns and low shrubs (under 24") are allowed within the primary safety zone. Within the secondary fuel break, small trees and brush must be removed. The Hearings Official's decision fails to cite to Lane Code for support of his assertion that no secondary fuel break is required within the riparian setback area. No such exemption is to be found in Lane Code.

Furthermore, LC 16.253(2) implements administrative rule. OAR 660-006-0035 establishes siting standards for dwellings and structures in forest zones and provides, in relevant part:

"(3) The owners of the dwellings and structures shall maintain a primary fuel-free break area surrounding all structures and clear and maintain a secondary fuel-free break area on land surrounding the dwelling that is owned or controlled by the owner in accordance with the provisions in 'Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads' dated March 1, 1991 and published by the Oregon Department of Forestry."

OAR 660-006-0035 does not provide any exception to the requirement for a secondary fuel break area for dwellings located in riparian areas, nor does it recognize Class I streams as secondary fuel breaks. Neither does "Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads" recommend or establish any such exception to fuel break requirements, or recognize streams or riparian areas as providing secondary fuel breaks.

LC 16.253(2) must be interpreted and applied in a manner consistent with OAR 660-006-0035. In addition, OAR 660-006-0035 applies directly to this application. The Hearings Official erred in failing to interpret LC 16.253(2) in a manner consistent with OAR 660-006-0035 and in failing to make findings of compliance with OAR 660-006-0035. Evidence in the record establishes that the requirements of LC 16.253(2) and LC 16.253(3)(a) cannot be met while providing the required secondary fuel break.

2. Second sub-assignment of error: the Hearing Official's findings of compliance with LC 16.253(3)(c) misconstrue applicable law.

The Hearing Official's finding that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area is based on the assumption that the subject property is a legal lot that can be developed with a dwelling. The decision is based upon erroneous interpretations and application of the Lane Code's definition of "contiguity" and of ORS 92.010(7). The Hearings Official's decision is erroneously based on the assumption that the existence of a road crossing a unit of land is sufficient in and of itself to create two separate, legal and developable units of land.

LC 16.244(7)(c)(iv) prohibits partitioning of land for residential purposes if the land is located entirely within the Floodway.

In addition, the enforcement of regulations, the result of which is to not allow an applicant to construct a second dwelling so as to realize financial gain, simply does not place an undue burden on a property owner. *Walker v. Josephine County*, ___ Or LUBA ___ (LUBA No. 2003-204, 5/13/2004).

3. Third sub-assignment of error: the Hearing Official's findings of compliance with LC 16.253(2) and LC 16.253(3)(a) applied the wrong legal standard and are not supported by evidence in the record.

LC 16.211(8)(a)(iv) defines the riparian setback area as that area between the ordinary high water line and a line 100 feet above and parallel to the ordinary high water line. The Hearings Official found that the subject property contained 35,900 sq. ft. of riparian setback area. This determination is dependent upon the location of the ordinary high water line. Approval of the request requires findings that at least 75% of the riparian setback area will remain undisturbed.

The Hearings Official made contradictory findings regarding the identification of the ordinary high water line. The Hearings Official found that "it is impossible to say conclusively that the debris line identified by the Planning Director demonstrates and ordinary high water line * * *. This is especially true based upon the lack of precise data regarding flooding of the creek over the past few years. * * * It is impossible to say that [the Planning Director's] determination is clearly wrong."

LC 16.090 requires, in the absence of satisfactory identifying physical characteristics, that ordinary high water be determined using Step backwater analysis upon a two-year frequency flood as determined by the US Army Corps of Engineers. Because the Hearings Official found that evidence regarding the high water line was "inconclusive," his findings of compliance with LC 16.253(2) and LC 16.253(3)(a), in the absence of a Step backwater analysis, are not supported by evidence in the record.

It was the Hearing Official's duty to make a finding that the applicant has met his burden of proof that the approval criteria were met, based upon substantial evidence in the record. The Hearings Official erred in failing to require that the applicant bear the burden of proof.

4. Fourth sub-assignment of error: the Hearing Official failed to make findings of compliance with LC 16.244

LC 16.244 establishes standards and criteria pertaining to the Floodplain Combining Zone (FP-RCP) for the purpose of minimizing public and private losses due to flood conditions in all areas of flood hazard within Lane County.

PA 04-5746 is a development application that cannot be approved unless it is determined that the requirements of LC 16.244 have been satisfied. LC 16.244(6)(a). LC 16.244(6) requires that base flood elevation data be provided, that the actual elevation of the structure be determined, and that the flood-carrying capacity of the watercourse not be diminished.

The Hearings Official's findings indicate that the proposed building site is within the floodway, as defined by LC 16.090:

"Floodway, Regulatory. The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the waters of a base flood without cumulatively increasing the water surface elevation."

LC 16.090 defines "base flood":

“Base Flood. A flood that has a one percent chance of being equaled or exceeded in any given year.”

and equates it to 100 Year Flood:

“100 Year Flood. See Base Flood.

LC 16.090 defines “flood elevation determination” as the product of an approved flood hazard study:

“Flood Elevation Determination. A determination by the Administrator of the water surface elevations of the base flood from the approved flood hazard studies.”

No “flood elevation determination” is found in the record. The Hearings Official’s findings of May 12, 2005 at p. 7 concede that there is a “lack of precise data regarding flooding of the creek over the past few years.”

LC 16.244(7)(a)(viii) requires adequate provision for accessibility during a 100-year flood, so as to ensure ingress and egress for ordinary and emergency vehicles and services during potential future flooding.

If the proposed development is in the floodway, it must be found that the requirements of LC 16.244(7)(c) are met. LC 16.244(7)(c)(i) prohibits encroachments, including fill and new construction, unless certification by a professional engineer demonstrates that encroachments shall not increase the water surface elevation of the base flood by more than one foot at any point. LC 16.244(7)(c)(ii) similarly limits elevation of base flood from cumulative impacts.

LC 16.244(7)(c)(iv) prohibits partitioning of land for residential purposes if the land is located entirely within the Floodway.

The provisions of Lane Code listed above were identified as applicable approval criteria in the proceedings before the Hearings Official. The Hearings Official erred in failing to make findings addressing issues raised pertaining to these identified provisions.

III. Third Assignment of Error: The Hearing Official’s decision approving the requested template dwelling violates applicable law.

1. First sub-assignment of error: the Hearings Official erred in finding that the subject property is not part of a tract already containing a dwelling.

OAR 660-006-0027(1)(i) provides:

“A proposed dwelling provided for by subsection (1)(f) and (1)(g) is not allowed if the tract on which the dwelling will be sited includes a dwelling.”

ORS 215.010 defines tract:

“(2) ‘Tract’ means one or more contiguous lots or parcels under the same ownership.”

OAR 660-006-0027(5) also defines “tract”:

“(a) ‘Tract’ means one or more contiguous lots or parcels in the same ownership. A tract shall not be considered to consist of less than the required acreage because it is crossed by a public road or waterway.”

Thus a tract crossed by a public road remains one tract. *See also* OAR 660-004-0028(6)(c)(B).

OAR 660-006-0027(4) provides, in relevant part:

“A proposed dwelling under this rule is not allowed:

“* * *

“(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under section (6) of this rule for the other lots or parcels that make up the tract are met.”

The portion of TL 200 south of Little Fall Creek Rd. is contiguous to that portion of TL 200 north of Little Fall Creek Rd., was in the same ownership, and was thus part of a tract in 2003 when the northern portion of TL 200 received a dwelling approval as a result of PA 03-5878. The Hearings Official’s decision violated applicable law in allowing a second dwelling on a lot which was part of the tract consisting of those portions of TL 200 north and south of Little Fall Creek Rd. when the first dwelling approval was obtained.

In addition, the portion of TL 200 south of Little Fall Creek Rd. is contiguous with TL 300, which also lies south of Little Fall Creek Rd. TL 300 is in the same ownership as the southern portion of TL 200. The southern portion of TL 200 and TL 300 thus constitute a tract. TL 300 contains a pre- 1/1/93 dwelling. The Hearings Official’s decision violated applicable law in approving a “template” dwelling on a tract that already contains a dwelling.

Lane Code at LC 16.090 contains a definition of “contiguous” adopted in 1984 stating that tracts of land under the same ownership and which are intervened by a street shall not be considered contiguous. The code definition of “contiguous” referred to the county’s definition of “partition land,” and “tract,” both of which contained that term. However, in 1986 the definitions of “partition land” and “tract” were amended to conform to statutory changes by eliminating the term “contiguous.” Regardless of the possible relevance of the Lane Code definition of “contiguous”, no county definition of “contiguous” can govern the interpretation and application of statute or administrative rule. The Hearings Official erred in finding that the existence of a road was sufficient to interrupt contiguity for purposes of determining the extent of any “tract.”

- 2. Second sub-assignment of error: the proposed template dwelling cannot be approved because TL 200 is one legal parcel that already has an approval for a template dwelling.**

Included in this application is PA 03-5356, a preliminary legal lot determination for 18-01-35 TL 200 dated July 15, 2003. The report states”

“The decision that this property constitutes a legal lot will be made at the time of the first permit or application action where a legal lot is required.”

LC 16.214(7) allows for the approval of a dwelling provided:

“(e) The parcel on which the dwelling would be located was lawfully created prior to January 25, 1990[.]”

Approval of the proposed dwelling requires a legal lot, and a decision that the subject property constitutes a legal lot in conjunction and concurrent with any dwelling approval. The Hearings Official erred in approving the requested template dwelling because the portion of TL 200 south of Little Fall Creek Rd. does not constitute a legal lot or parcel.

ORS 92.017 provides that “[a] lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law.”

Assuming that the creation of a road has the legal effect of dividing a parcel into separate legal parcels is inconsistent with ORS 92.010(7) and common law requirements predating the statute. *Maxwell v. Lane County*, 39 Or LUBA 556, *rev'd on other grounds*, 178 Or App 210 (2001).

The 1959 public road dedication was, in itself, insufficient to partition TL 200 into two separate legal parcels. The northern and southern portions of TL 200 are not separately described or identified as separate units of land on the 1944 deed or on the June 9, 2000 deed found in the record. TL 200 has never been partitioned. TL 200 was acquired by the present owners as a single unit of land, described and conveyed as a single unit on a single deed. TL 200 remains a single unit of land. The Hearings Official erred in his interpretation of ORS 92.010(7) and in finding that the creation of Little Fall Creek Road partitioned TL 200 so as to create a legal lot on its southern portion upon which the requested template dwelling could be sited.

In addition, LC 16.244(7)(c)(iv) prohibits partitioning of land for residential purposes if the land is located entirely within the floodway. LC 16.244(7)(c)(iv) thus prohibits the partitioning of TL 200 for purposes of siting a dwelling. The Hearings Official failed to make findings addressing this issue.

3. Third sub-assignment of error: the Hearing Official failed to make findings of compliance with LC 16.244

LC 16.244 establishes standards and criteria pertaining to the Floodplain Combining Zone (FP-RCP) for the purpose of minimizing public and private losses due to flood conditions in all areas of flood hazard within Lane County.

PA 04-5747 is a development application that cannot be approved unless it is determined that the requirements of LC 16.244 have been satisfied. LC 16.244(6)(a). LC 16.244(6) requires

that base flood elevation data be provided, that the actual elevation of the structure be determined, and that the flood-carrying capacity of the watercourse not be diminished.

The Hearings Official's findings indicate that the proposed building site is within the floodway, as defined by LC 16.090:

"Floodway, Regulatory. The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the waters of a base flood without cumulatively increasing the water surface elevation."

LC 16.090 defines "base flood":

"Base Flood. A flood that has a one percent chance of being equaled or exceeded in any given year."

and equates it to 100 Year Flood:

"100 Year Flood. See Base Flood.

LC 16.090 defines "flood elevation determination" as the product of an approved flood hazard study:

"Flood Elevation Determination. A determination by the Administrator of the water surface elevations of the base flood from the approved flood hazard studies."

No "flood elevation determination" is found in the record. The Hearings Official's findings regarding PA-04-5746 of May 9, 2005 at p. 7 concede that there is a "lack of precise data regarding flooding of the creek over the past few years."

LC 16.244(7)(a)(viii) requires adequate provision for accessibility during a 100-year flood, so as to ensure ingress and egress for ordinary and emergency vehicles and services during potential future flooding.

If the proposed development is in the floodway, it must be found that the requirements of LC 16.244(7)(c) are met. LC 16.244(7)(c)(i) prohibits encroachments, including fill and new construction, unless certification by a professional engineer demonstrates that encroachments shall not increase the water surface elevation of the base flood by more than one foot at any point. LC 16.244(7)(c)(ii) similarly limits elevation of base flood from cumulative impacts.

LC 16.244(7)(c)(iv) prohibits partitioning of land for residential purposes if the land is located entirely within the Floodway.

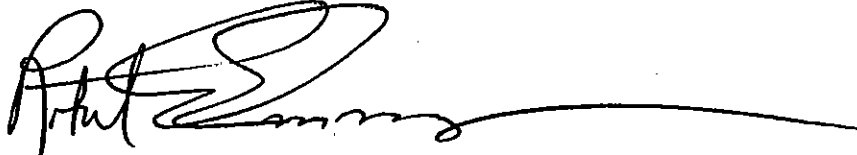
The provisions of Lane Code listed above were identified as applicable approval criteria in the proceedings before the Hearings Official. The Hearings Official erred in failing to make findings addressing issues raised pertaining to these identified provisions.

CONCLUSION

For the above reasons, the decision of the Hearings Official was in error. The Hearings Official has already issued a reconsidered decision. Appellants do not seek reconsideration in

order to submit additional evidence not available at the hearing, as provided for in LC 14.515(3)(d)(vi). Further consideration is not warranted or allowed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Emmons", with a long horizontal flourish extending to the right.

Robert Emmons

A handwritten signature in black ink, appearing to read "Nena Lovinger", with a long horizontal flourish extending to the right.

Nena Lovinger

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL
OF A REQUEST FOR A SPECIAL USE PERMIT
TO ALLOW A DWELLING RELATED TO FOREST MANAGEMENT
WITHIN AN IMPACTED FOREST LANDS ZONE**

Application Summary

Michael E. Legault, 40203 Little Fall Creek Road, Fall Creek, Oregon 97438, requested Planning Director approval for a special use permit to allow a dwelling related to forest management within an Impacted Forest Lands (F-2) zone on Tax Lot 200, Assessor's Map 18-01-35. The application was approved by the Lane County Planning Director, subject to conditions, on December 3, 2003. This approval was appealed in a timely manner by Robert Emmons & Nena Lovinger to the Lane County Hearings Official.

Parties of Record

Michael Legault
Jim Just

Robert Emmons
Jim Reed

Nena Lovinger
Alan Evans

Application History

Hearing Date: February 3, 2005
(Record Held Open Until March 2, 2005)

Decision Date: May 9, 2005

Appeal Deadline

An appeal must be filed within 10 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

ORS 215.720 – .730

ORS 215.750

OAR 660-06-025(1)(d)

OAR 660-06

Lane County Rural Comprehensive Plan

Lane Code 16.211(6)&(8)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as Tax Lot 200, Assessor's Map 18-01-35. Tax lot 200 originally comprised the subject property and tax lot 203, which is located adjacent, to the north of Little Fall Creek Road, and was owned by the applicant. The applicant has since received template dwelling approval for tax lot 203 and has sold this parcel. The applicant now wishes to receive template dwelling approval for the remainder of tax lot 200 that is located south of Little Fall Creek Road.
2. The template dwelling approval that was issued for tax lot 203 (PA 03-5878) was, in part, based upon a legal lot determination that determined that the portions of that tax lot located north and south of Little Fall Creek Road, respectively, were separate legal lots due to the intervention of that road. This approval was noticed to surrounding neighbors but was not appealed.

Decision

THE DECISION OF THE PLANNING DIRECTOR APPROVING THE LEGAULT REQUEST (PA 04-5747) FOR A TEMPLATE FOREST DWELLING IS AFFIRMED.

Justification for the Decision

The appellants have identified two assignments of error in their appeal to the Planning Director's decision in PA 04-5747.

Assignment of Error #1: *"The Planning Director may not approve the requested template dwelling on forest land because tax lot 200 is one legal parcel that already is occupied with a dwelling."*

The applicant has applied for what is termed as a "template dwelling" under Lane Code 16.211(5). A template dwelling is a dwelling or manufactured dwelling that is allowed on forest land subject to meeting certain requirements. Lane Code 16.211(5)(a) provides that one of those requirements is that the tract upon which the dwelling will be located has no other dwellings or manufactured dwellings on it. Subsection (5)(a) further defines "tract" to mean one or more contiguous lots or parcels in the same ownership.

The appellants' argument is as follows: Tax lots 200 and 203 constitute a single tract as they are currently under the ownership of the applicant and are contiguous to one another. Tax lot 200 is occupied with a dwelling and therefore cannot meet the first requirement for the placement of a template forest dwelling.

The County counters with the argument that Little Fall Creek Road, which bisects the two tax lots, negates the contiguity between those parcels and, in effect, creates two legal lots. Specifically; the County relies upon two theories.

The County's first theory is that the legal lot status of the two parcels was determined through Planning Action (PA) 03-5878. This was an administrative decision where the County approved a template dwelling for tax lot 203 based upon a legal lot determination that affected both the northern and southern portions of tax lot 200. Notice of this template dwelling approval was given to adjacent property owners and no appeal was made. The flaw with this theory is that the legal lot determination associated with this planning action only provided notice as to the template dwelling approval for tax lot 203. It did not provide legally sufficient notice of a legal lot determination for the remainder parcel (the subject property) nor arguably did it provide standing for anyone to challenge the applicability of that legal lot determination in regard to the remainder parcel. For these reasons, Planning Action 03-5878 did not serve as a final decision in regard to the legal lot status of the subject property.

The County's second theory is that the intervention of Little Fall Creek Road acted to divide tax lot 203 into two legal lots. First, it points to the definition of "contiguous" found in Lane Code 16.090: "*Having at least one common boundary line greater than eight feet in length. Tracts of land under the same ownership and which are intervened by a street (local access, public, County, State or Federal street) shall not be considered contiguous.*" Under this definition, the two tax lots are not contiguous. The County further points out that the Little Fall Creek Road right-of-way, as it is adjacent to the two lots, was created by a Warranty Deed that transferred fee ownership to the County. Thus, there is not merely an intervening easement but an intervening ownership between the two lots.

The County has held that the bisection of property by a road acts to legally divide that road since 1975. In September of 1983, through the adoption of Ordinance 16-83, the County amended its definition of "contiguous" in its land division regulations to provide that tracts of land that are intervened by a street or road were not to be considered to be contiguous. This definition was reaffirmed in February of 1984 with the adoption of Ordinance 1-84, which established Lane Code Chapter 16, the zoning provisions that apply outside urban growth boundaries. The definition was again preserved in 1986 changes to Chapters 13 and 16 of the Lane Code.

In 1989 and again in 1991, the Oregon Legislature revised the definition of 'partition land' in ORS 92.010(7)(d) to exclude from the definition of 'partition' "*a sale or grant by a person to a public agency or public body for state highway, county road, city street or other right of way purposes...*" It has been the County's position that the statute does not have retroactive effect and therefore land divisions caused by the intersection of roads that occurred prior to 1989 serve as valid land divisions.

The Hearings Official has previously addressed the issue of contiguity in a 1993 decision involving a request for a special use permit for a dwelling not in conjunction with a forest use.¹ In this case, the issue was whether the property subject to the special use request was lawfully created prior to January 25, 1990. The Hearings Official opined that since the property had been previously conveyed in reliance of the County's interpretation that a road could lawfully divide a tract of land, the legality of the transfer was not subsequently subject to collateral attack.

In the present case, while the bisection of the applicant's property by Hills Creek Road preceded the application of land division law to that property, the transfer of the property to the applicant did not occur until after that date (1975). The County's policy, embedded in code language defining "contiguous," has been consistent since that date. That is, this was the interpretation that was provided to potential land purchasers and developers and that was administered through approvals granted by the Land Management Division.

I must agree with the Planning Director's assessment that there is no evidence that the amendments to ORS 92.010(7) were intended to be retroactive and there is some evidence of legislative intent that that was not the case. While the County's interpretation of ORS 92.010(7) will not be given deference during judicial review, it is a reasonable interpretation that must stand until reversed by an appellate body.

The Planning Director's determination that the subject property is a legal lot is affirmed.

Assignment of Error #2: *"The appeal fee charged by Lane County exceeds that allowed by state law.*

The Planning Director's decision appealed here was an administrative decision issued without the benefit of an evidentiary hearing. Parties were notified of their right to request an evidentiary, de novo appeal hearing before the Lane County Hearings Official and the appellants filed their appeal in a timely manner and were charged \$310 at the time of filing.

Lane County's base fee for an evidentiary hearing is \$250. Pursuant to Lane Manual 60.850(6), (8) and (9), Lane County adds a \$10 technology fee, a five percent long range planning surcharge and a \$15 percent administrative fee to the base fee for a total of, in this case, \$310. The appellants argue that this fee violates ORS 215.416(11).

ORS 215.416(11)(b) reads:

"If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of

¹ Lane County Hearings Official, *Application of Hugh McMahan* (PA 1689-92), January 14, 1993.

preparing for and conducting the appeal, or \$250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site."

The statute is very clear that the maximum amount that may be charged for the first evidentiary hearing is \$250 even if that amount does not cover the cost to the County. Specifically, the County may not charge a \$10 technology fee, a five percent long range planning surcharge or a \$15 percent administrative fee to the base fee for the initial evidentiary hearing. The County must reimburse the appellants \$60 of their appeal costs.

Respectfully submitted,



Gary Darnielle
Lane County Hearings Official

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL
OF A REQUEST FOR A RIPARIAN SETBACK MODIFICATION**

Application Summary

Michael E. Legault, 40203 Little Fall Creek Road, Fall Creek, Oregon 97438, requested Planning Director approval for a riparian setback modification to allow the construction of a dwelling 30 feet from the ordinary high water mark of Little Fall Creek on Tax Lot 200, Assessor's Map 18-01-35. The application was approved by the Lane County Planning Director, subject to conditions, on December 3, 2003. This approval was appealed in a timely manner by Robert Emmons & Nena Lovinger to the Lane County Hearings Official.

Parties of Record

Michael Legault
Jim Just

Robert Emmons
Jim Reed

Nena Lovinger
Alan Evans

Application History

Hearing Date: February 3, 2005
(Record Held Open Until March 2, 2005)

Decision Date: May 12, 2005

Appeal Deadline

An appeal must be filed within 10 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane County Rural Comprehensive Plan
Lane Code 16.253(3)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as Tax Lot 200, Assessor's Map 18-01-35. Tax lot 200 originally comprised the subject property and tax lot 203, which is located adjacent, to the north of Little Fall Creek Road, and was owned by the applicant. The applicant has since received template dwelling approval for tax lot 203 and has sold this parcel. The applicant now wishes to receive template dwelling approval for the remainder of tax lot 200 that is located south of Little Fall Creek Road and to construct a dwelling. The dwelling is

proposed to be 28 feet wide by 40 feet long. The entire dwelling is located within the riparian setback area of the creek. The total creek frontage of the subject property is 540 feet. The subject property varies from 35 feet to 130 feet in width and contains about 35,900 square feet (0.82 acres) of riparian setback area.

2. Lane Code 16.211(8)(a)(iv) states:

"The riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water line of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from the ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) are met."

Little Fall Creek is a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. Ordinary High Water is defined by Lane Code 16.090 as"

"...that high level of a river which is attained during mean annual flood. It does not include levels attained during exceptional or catastrophic floods. It is often identifiable by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in character in the soil, destruction or absence of vegetation not adapted for life in saturated soils or the presence of flotsam and debris. In the absence of identifying physical characteristics, ordinary high water may be determined by Step backwater analysis upon a two-year frequency flood as determined by the US Army Corps of Engineers."

The Oregon Department of State Lands (DSL) has exclusive jurisdiction over all ungranted tidal submerged lands owned by this state. ORS 274.710(1). The definition of "ordinary high water line" used by DSL is found in OAR 141-085-0010(150):

"Ordinary High Water Line" (OHWL) means the line on the bank or shore to which the high water ordinarily rises annually in season (ORS 274.005). The OHWL excludes exceptionally high water levels caused by large flood events (e.g. 100 year events). OHWL is indicated in the field by the following physical characteristics:

- (a) Clear, natural line impressed on the shore;*
- (b) Change in vegetation (riparian (e.g. willows) to upland (e.g. oak, fir) dominated);*
- (c) Textural change of depositional sediment or changes in the character of the soil (e.g. from sand, sand and cobble, cobble and gravel to upland soils);*
- (d) Elevation below which no fine debris (needles, leaves, cones, seeds) occurs;*
- (e) Presence of litter and debris, water-stained leaves, water lines on tree trunks; and/or*

(f) *Other appropriate means that consider the characteristics of the surrounding areas."*

3. A riparian setback examination was performed on August 26, 2004 to locate the ordinary high water mark of Little Fall Creek on the subject property. Based upon this analysis, the proposed dwelling was estimated to be sited 60 feet from the centerline of Little Fall Creek Road and, according to the riparian setback determination of the Planning Director, 30 feet from the ordinary high water line.

On February 9, 2005, a site view was conducted by the Hearings Official, Mr. Don Nickell, the applicant, Mr. Jim Reed, Nena Lovinger and Robert Emmons. The primary purpose of this site view was to determine whether the Planning Director's assessment of the ordinary high water line was accurate. The three areas identified by Don Nickell in his February 15, 2004 electronic communication to the Hearings Official will be relied upon to describe the banks of Little Fall Creek in relation to the subject property in this analysis. A summary of the facts relied upon from this site view and testimony regarding the site view are presented in Finding of Fact 4, below.

4. The parcel is vegetated with several large cottonwood trees, ash and other smaller deciduous trees, as well as blackberry bushes, ivy and ferns. Little Fall Creek, as it runs along the southern boundary of the subject property, varies from about 35 to 45 feet in width, and flows to the west. The creek, which last experienced a major flood event in 1996, loses elevation as it flows past the subject property. The area has experienced lower than average rain flows during the past two years. The northern bank along the creek and parallel to the location of the proposed dwelling, has a modest slope to the water. The opposite site of the creek can be characterized by a more vertical cut bank.

Area east of the proposed dwelling. The northern bank along the creek in this area has a modest slope to the water. The opposite site of the creek can be characterized by a more vertical cut bank. One measurement was taken from bank near the east line of the proposed dwelling (as staked) of a log located between 100 and 130 upstream (on the south side of the bank). This measurement was then compared to the level where vegetation (ferns) first appear on the nearly vertical cut bank directly across the river from this stake. Using a construction-grade laser level the level of the log and the ferns were found to be one to two feet higher than the elevation of the ordinary high water line marked by Mr. Nickell. It was noted, however, that because of the creek's flow direction and higher elevation, the south shore of the creek in this location receives higher water energy than the north shore.

Also located in this area is a downed tree that goes across the creek adjacent to the upstream log. This tree fell about one year ago and the debris on the upriver side of the tree appears to be of similar height as the debris on the bank of the north side of the creek.

Area parallel to the proposed dwelling. A branch lying on the south side of the creek was observed as being at an elevation similar to that of the debris line on the north side of the creek that served to delineate the ordinary high water line by the Planning Director.

Area west of the proposed dwelling. The banks on both sides of the river in this area have similar vegetation (i.e, grass and blackberries) growing all the way up to their tops. The debris line from the area parallel to the proposed dwelling appears to extend into this area.

The County's determination of the ordinary high water line of Little Fall Creek was based upon an examination of debris such as sticks, limbs and leaves and the absence of such debris in other areas. This debris line was visible during the site view of the subject property and represented evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line.

Decision

THE DECISION OF THE PLANNING DIRECTOR APPROVING THE LEGAULT REQUEST (PA 04-5746) FOR A RIPARIAN SETBACK MODIFICATION IS AFFIRMED subject to the following condition:

1. The sand filter and other components of the subsurface disposal system shall be placed within the 100 foot linear footprint of the proposed dwelling and primary fuel break.

Justification for the Decision

The appellants have identified two assignments of error in their appeal to the Planning Director's decision in PA 04-5747.

Assignment of Error #1: *"The Planning Director's decision approving the requested riparian modification was in error."*

The appellants' argument is threefold. First, they argue that the applicant's proposal requires the removal of indigenous vegetation in excess of that allowed by Lane Code 16.253(2). Second, they argue that the Planning Director's determination of the ordinary high water line is too liberal and is closer to the location of the proposed dwelling. Third, they argue that the applicant has not demonstrated that an unduly burden would be placed on him if he was not allow to locate the proposed dwelling within the riparian setback area.

To satisfy Lane Code 16.253(3), the applicant must either comply with Lane Code 16.253(3)(a) & (b) or, in the alternative, comply with Lane Code 16.253(3)(a) & (c).

Compliance with Lane Code 16.253(3)(a)

Lane Code 16.253(3)(a) states the location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2). Lane Code 16.253(2)(a) requires that 75 percent of the total area of the total area within the riparian setback area shall remain in an unaltered, indigenous state. Lane Code 16.253(2)(b)(iii) provides that the maximum allowable removal for any legal lot having frontage 400 feet or greater in length along a Class I stream shall not exceed 100 linear feet along the shoreline of the Class I stream and an area not greater than 10,000 square feet within the riparian setback area of a Resource Zone.

The subject property is zoned Impacted Forest Land, a Resource Zone, and contains 35,900 square feet of riparian vegetation. The applicant's proposed dwelling is 28' x 40' and thus will displace 1,120 square feet. The primary safety zone required by Lane Code 16.211(8) is 30 feet in all directions around the dwelling. (No secondary fuel break is required within a riparian setback area.) This would require an area of 4,060 square feet to be removed for the dwelling and primary setback and 100 feet of linear shoreline. An additional 4,740 square feet of riparian vegetation is anticipated to be removed with the construction of a driveway, 360 square foot sand filter and drainfield. The total area of riparian setback vegetation to be removed, 8,800 square feet, is less than 25 percent of the total riparian setback area of the subject property.

The proposal is consistent with the requirement of Lane Code 16.253(2)(a), in that it retains 75+ percent of the total area of the total area within the riparian setback area to remain in an unaltered, indigenous state, consistent with Lane Code 16.253(2)(a) and because it results in less than 10,000 square feet of riparian area being removed, consistent with part of Lane Code 16.253(2)(b)(iii). However, the applicant's site plan shows that the length of the proposed dwelling (40 feet), the primary fuel break (60 feet total); and sand filter (10-15 feet?) would result in the removal of more than 100 linear feet of riparian setback area, inconsistent with a portion of Lane Code 16.253(2)(b)(iii). However, as a condition of approval, the sand filter and other components of the subsurface disposal system can be placed within the primary setback area thus bringing the proposal into conformance with Lane Code 16.253(3)(a).

The application complies with Lane Code 16.253(3)(a).

Compliance with Lane Code 16.253(3)(b)

In conjunction with satisfying Lane Code 16.253(3)(a), Lane Code 16.253(3)(b) requires that the applicant demonstrate that the riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. Clearly, the site of the proposed dwelling lies within the 100-foot riparian setback on the subject property. The application therefore does not comply with Lane Code 16.253(3)(b).

Compliance with Lane Code 16.253(3)(c)

This provision requires that the applicant demonstrate that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area.

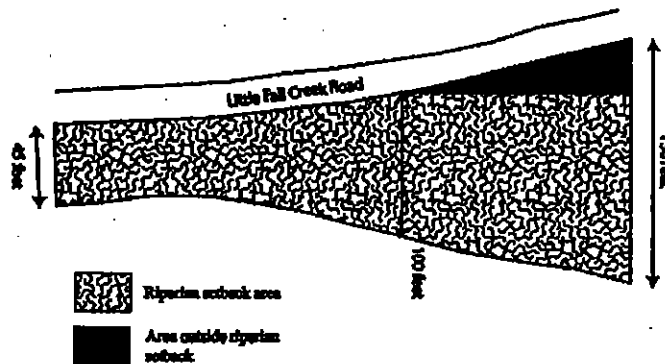
The appellants argue that the applicant cannot satisfy Lane Code 16.253(3)(c) because tax lot 200 is not two legal lots and the construction of a second dwelling for purposes of financial gain is not an undue burden. This is the appellant's first assignment of error in the Planning Director's approval of the applicant's request (PA 04-5747) for approval of a template forest dwelling on the subject property. In this appeal, the Hearings Official determined that it was reasonable for the County to apply its definition of "contiguity" to properties that were bisected by roads prior to the 1989 and 1991 amendments to ORS 92.010(7) that provide that "...any property divided by the sale or grant of property for state highway, county road, city street or other right of way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned."¹ In essence, the Hearings Official agreed with the Planning Director's assessment that there is no evidence that the amendments to ORS 92.010(7) were intended to be retroactive and there is some evidence of legislative intent that that was not the case.

Since this decision assumes that the subject property is a legal lot, the question remains whether the applicant would suffer an unduly restrictive burden if the proposed dwelling was not allowed to be located within the riparian setback area. An examination of the applicant's plot plan reveals that the subject property is wedge-shaped, being 130 feet wide at its eastern end and tapering to 45 to 35 feet in width at its western end. Applying a rough scale, it appears that the eastern portion of the subject property tapers to 100 feet in width, measuring between the right-of-way of Little Fall Creek Road to the bank of Little Fall Creek, about 90 feet from its eastern perimeter. Thus, there appears to be a small triangle of land, 90 feet long with a 30-foot wide base that represents the portion of the subject property that does not lie within the 100-foot riparian setback area. Assuming this figure is approximately a "right triangle" its area would be somewhere around 1350 square feet.² (See Figure 1, below.) As seen above, the applicant's "modest" house is 1,120 square feet in size without accounting for the subsurface disposal system, a driveway, or the primary fuel break. Locating a dwelling in this area would put the proposed structure within the County's right-of-way for Little Fall Creek, which extends 50 feet on either side of its centerline. This location would violate Lane Code 15.083 and Lane Code 16.211(8)(a)(v)(aa). Finally, if the dwelling was sited 30 feet from all other property lines consistent with Lane Code 16.211(8)(a)(v)(bb) this situation would be further aggravated.

¹ Lane County Hearings Official, *Application of Michael Legault* (PA 04-5747), May 9, 2005.

² Area = $\frac{1}{2} ab$ where "a" is 90' and "b" is 30'.

FIGURE 1



The dimensions of the subject property preclude any practicable way that the applicant could site a dwelling with a primary fuel break without severely encroaching on the 100-foot setback from Little Fall Creek. The plot plan appears to be a reasonable compromise given the slope constraints of the subject property, the required setbacks from Little Fall Creek Road, and the distance from the ordinary high water line of Little Fall Creek.

The location of an ordinary high water line is not always a clear process and it certainly wasn't in regard to the subject property. The Planning Director's determination was based upon the location of a debris line located on the subject property's bank along Little Fall Creek. While the line was relatively distinct, logs located on other portions of the bank and at elevations higher than the debris line gave rise to reasonable speculation that the mean annual flood might be higher. Adding to this confusion was the low precipitation conditions of the last two years and the presence of dense blackberries that might obscure a higher debris line.

The debris line was the factor that most clearly defined the Planning Director's determination. In the area where it was apparent, there was evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line. It would seem that if the mean annual flood was higher, there would be more evidence of older debris and scour lines at higher elevations. Also, the location of large logs seem to argue as heavily for their being deposited through an exceptional flood event as through the occurrence of annual flooding.

In the final analysis, it is impossible to say conclusively that the debris line identified by the Planning Director demonstrates an ordinary high water line representative of Little Fall Creek. This is especially true based upon the lack of precise data regarding flooding of the creek over

the past few years. It is possible to conclude, however, that the Planning Director has reasonably applied the descriptive factors of the Lane Code 16.090 definition of ordinary high water to the subject property. Based upon the site view and the arguments of the parties it is not possible to say that this determination is clearly wrong. Therefore, I must conclude that the Planning Director's determination of the ordinary high water line should prevail.

The Planning Director's conclusion that the application, as represented by the applicant's proposed plot plan, complies with Lane Code 16.253(3)(c).

Assignment of Error #2: *"The appeal fee charged by Lane County exceeds that allowed by state law.*

The Planning Director appealed here was an administrative decision issued without the benefit of an evidentiary hearing. Parties were notified of their right to request an evidentiary, de novo appeal hearing before the Lane County Hearings Official. The appellants filed their appeal in a timely manner and were charged \$310 at the time of filing.

Lane County's base fee for an evidentiary hearing is \$250. Pursuant to lane Manual 60.850(6), (8) and (9), Lane County adds a \$10 technology fee, a five percent long range planning surcharge and a \$15 percent administrative fee to the base fee for a total of, in this case, \$310. The appellants argue that this fee violates ORS 215.416(11).

ORS 215.416(11)(b) reads:

"If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or \$250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site."

The statute is very clear that the maximum amount that may be charged for the first evidentiary hearing is \$250 even if that amount does not cover the cost to the County. Specifically, the County may not charge a \$10 technology fee, a five percent long range planning surcharge or a \$15 percent administrative fee to the base fee for the initial evidentiary hearing. The County must reimburse the appellants \$60 of their appeal costs.

Respectfully submitted,



Gary Barnielle
Lane County Hearings Official

EXHIBIT "D"

Hearings Official's letter dated May 26, 2005



Lane Council of Governments

99 East Broadway, Suite 400, Eugene, Oregon 97401-3111 (541) 682-4283 Fax: (541) 682-4099 TTY: (541) 682-4567

May 26, 2005

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

Re: *Appeal of Hearings Official decisions in Legault (PA 04-5746 and PA 04-5747)*

Dear Mr. Howe:

On May 23, 2005, Robert Emmons and Nena Lovinger appealed my May 9, 2005 decisions in PA 04-5746 concerning a riparian setback modification and PA 04-5747 concerning a forest template dwelling. Upon my review of this appeal, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

In specific, the Appellants' First Assignment of Error alleged a procedural error in failing to order one of the appellants appeal fees to be returned because the applicant elected to consolidate the template dwelling application and the modification to the riparian setback application. While the two applications may have been consolidated for processing purposes, two distinct sets of approval criteria are involved, two land use decisions were issued by the Director and two land use decisions were appealed by the appellants. The consolidation of the two applications is a procedural matter while the decisions are substantive determinations. Further, the decisions are not necessarily dependent upon one another and, for instance, the applicant might be able to build on the subject property even if the request for a modification of a riparian setback was denied.

Second, the Hearings Official does not agree with the appellants' interpretation argued under the First sub-assignment of error in their Second Assignment of Error. OAR 660-006-0035(3) requires a secondary fuel break area only on "...land surrounding the dwelling that is owned or controlled by the owner..." [*emphasis mine*].

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my May 9, 2005 decision without further consideration. Please advise interested parties of this decision.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

Exhibit "E"

Hearings Official's revised decision dated May 12, 2005

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

May 12, 2005

Mr. Kent Howe, Director
Lane County Land Management Division
Public Service Building
125 E. 8th Ave.
Eugene, OR 97401

Dear Mr. Howe:

Please find the revised Hearings Official decision affirming the Planning Director's approval of the Legault request for a riparian modification setback (PA 04-5746) on tax lot 200, Assessor's Map 18-01-35. Please re-notice the parties regarding this revised opinion and change the appeal period for both decisions accordingly.

Please notice that

Sincerely,



Gary L. Barnielle
Lane County Hearings Official

CC: Frederique Chateau-Gruener (file)

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL
OF A REQUEST FOR A RIPARIAN SETBACK MODIFICATION**

Application Summary

Michael E. Legault, 40203 Little Fall Creek Road, Fall Creek, Oregon 97438, requested Planning Director approval for a riparian setback modification to allow the construction of a dwelling 30 feet from the ordinary high water mark of Little Fall Creek on Tax Lot 200, Assessor's Map 18-01-35. The application was approved by the Lane County Planning Director, subject to conditions, on December 3, 2003. This approval was appealed in a timely manner by Robert Emmons & Nena Lovinger to the Lane County Hearings Official.

Parties of Record

Michael Legault
Jim Just

Robert Emmons
Jim Reed

Nena Lovinger
Alan Evans

Application History

Hearing Date: February 3, 2005
(Record Held Open Until March 2, 2005)

Decision Date: May 12, 2005

Appeal Deadline

An appeal must be filed within 10 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane County Rural Comprehensive Plan
Lane Code 16.253(3)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as Tax Lot 200, Assessor's Map 18-01-35. Tax lot 200 originally comprised the subject property and tax lot 203, which is located adjacent, to the north of Little Fall Creek Road, and was owned by the applicant. The applicant has since received template dwelling approval for tax lot 203 and has sold this parcel. The applicant now wishes to receive template dwelling approval for the remainder of tax lot 200 that is located south of Little Fall Creek Road and to construct a dwelling. The dwelling is

proposed to be 28 feet wide by 40 feet long. The entire dwelling is located within the riparian setback area of the creek. The total creek frontage of the subject property is 540 feet. The subject property varies from 35 feet to 130 feet in width and contains about 35,900 square feet (0.82 acres) of riparian setback area.

2. Lane Code 16.211(8)(a)(iv) states:

"The riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water line of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from the ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) are met."

Little Fall Creek is a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. Ordinary High Water is defined by Lane Code 16.090 as"

"...that high level of a river which is attained during mean annual flood. It does not include levels attained during exceptional or catastrophic floods. It is often identifiable by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in character in the soil, destruction or absence of vegetation not adapted for life in saturated soils or the presence of flotsam and debris. In the absence of identifying physical characteristics, ordinary high water may be determined by Step backwater analysis upon a two-year frequency flood as determined by the US Army Corps of Engineers."

The Oregon Department of State Lands (DSL) has exclusive jurisdiction over all ungranted tidal submerged lands owned by this state. ORS 274.710(1). The definition of "ordinary high water line" used by DSL is found in OAR 141-085-0010(150):

"Ordinary High Water Line" (OHWL) means the line on the bank or shore to which the high water ordinarily rises annually in season (ORS 274.005). The OHWL excludes exceptionally high water levels caused by large flood events (e.g. 100 year events). OHWL is indicated in the field by the following physical characteristics:

- (a) Clear, natural line impressed on the shore;*
- (b) Change in vegetation (riparian (e.g. willows) to upland (e.g. oak, fir) dominated);*
- (c) Textural change of depositional sediment or changes in the character of the soil (e.g. from sand, sand and cobble, cobble and gravel to upland soils);*
- (d) Elevation below which no fine debris (needles, leaves, cones, seeds) occurs;*
- (e) Presence of litter and debris, water-stained leaves, water lines on tree trunks;*
and/or

(f) Other appropriate means that consider the characteristics of the surrounding areas."

3. A riparian setback examination was performed on August 26, 2004 to locate the ordinary high water mark of Little Fall Creek on the subject property. Based upon this analysis, the proposed dwelling was estimated to be sited 60 feet from the centerline of Little Fall Creek Road and, according to the riparian setback determination of the Planning Director, 30 feet from the ordinary high water line.

On February 9, 2005, a site view was conducted by the Hearings Official, Mr. Don Nickell, the applicant, Mr. Jim Reed, Nena Lovinger and Robert Emmons. The primary purpose of this site view was to determine whether the Planning Director's assessment of the ordinary high water line was accurate. The three areas identified by Don Nickell in his February 15, 2004 electronic communication to the Hearings Official will be relied upon to describe the banks of Little Fall Creek in relation to the subject property in this analysis. A summary of the facts relied upon from this site view and testimony regarding the site view are presented in Finding of Fact 4, below.

4. The parcel is vegetated with several large cottonwood trees, ash and other smaller deciduous trees, as well as blackberry bushes, ivy and ferns. Little Fall Creek, as it runs along the southern boundary of the subject property, varies from about 35 to 45 feet in width, and flows to the west. The creek, which last experienced a major flood event in 1996, loses elevation as it flows past the subject property. The area has experienced lower than average rain flows during the past two years. The northern bank along the creek and parallel to the location of the proposed dwelling, has a modest slope to the water. The opposite site of the creek can be characterized by a more vertical cut bank.

Area east of the proposed dwelling. The northern bank along the creek in this area has a modest slope to the water. The opposite site of the creek can be characterized by a more vertical cut bank. One measurement was taken from bank near the east line of the proposed dwelling (as staked) of a log located between 100 and 130 upstream (on the south side of the bank). This measurement was then compared to the level where vegetation (ferns) first appear on the nearly vertical cut bank directly across the river from this stake. Using a construction-grade laser level the level of the log and the ferns were found to be one to two feet higher than the elevation of the ordinary high water line marked by Mr. Nickell. It was noted, however, that because of the creek's flow direction and higher elevation, the south shore of the creek in this location receives higher water energy than the north shore.

Also located in this area is a downed tree that goes across the creek adjacent to the upstream log. This tree fell about one year ago and the debris on the upriver side of the tree appears to be of similar height as the debris on the bank of the north side of the creek.

Area parallel to the proposed dwelling. A branch lying on the south side of the creek was observed as being at an elevation similar to that of the debris line on the north side of the creek that served to delineate the ordinary high water line by the Planning Director.

Area west of the proposed dwelling. The banks on both sides of the river in this area have similar vegetation (i.e, grass and blackberries) growing all the way up to their tops. The debris line from the area parallel to the proposed dwelling appears to extend into this area.

The County's determination of the ordinary high water line of Little Fall Creek was based upon an examination of debris such as sticks, limbs and leaves and the absence of such debris in other areas. This debris line was visible during the site view of the subject property and represented evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line.

Decision

THE DECISION OF THE PLANNING DIRECTOR APPROVING THE LEGAULT REQUEST (PA 04-5746) FOR A RIPARIAN SETBACK MODIFICATION IS AFFIRMED subject to the following condition:

1. The sand filter and other components of the subsurface disposal system shall be placed within the 100 foot linear footprint of the proposed dwelling and primary fuel break.

Justification for the Decision

The appellants have identified two assignments of error in their appeal to the Planning Director's decision in PA 04-5747.

Assignment of Error #1: *"The Planning Director's decision approving the requested riparian modification was in error."*

The appellants' argument is threefold. First, they argue that the applicant's proposal requires the removal of indigenous vegetation in excess of that allowed by Lane Code 16.253(2). Second, they argue that the Planning Director's determination of the ordinary high water line is too liberal and is closer to the location of the proposed dwelling. Third, they argue that the applicant has not demonstrated that an unduly burden would be placed on him if he was not allow to locate the proposed dwelling within the riparian setback area.

To satisfy Lane Code 16.253(3), the applicant must either comply with Lane Code 16.253(3)(a) & (b) or, in the alternative, comply with Lane Code 16.253(3)(a) & (c).

Compliance with Lane Code 16.253(3)(a)

Lane Code 16.253(3)(a) states the location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2). Lane Code 16.253(2)(a) requires that 75 percent of the total area of the total area within the riparian setback area shall remain in an unaltered, indigenous state. Lane Code 16.253(2)(b)(iii) provides that the maximum allowable removal for any legal lot having frontage 400 feet or greater in length along a Class I stream shall not exceed 100 linear feet along the shoreline of the Class I stream and an area not greater than 10,000 square feet within the riparian setback area of a Resource Zone.

The subject property is zoned Impacted Forest Land, a Resource Zone, and contains 35,900 square feet of riparian vegetation. The applicant's proposed dwelling is 28' x 40' and thus will displace 1,120 square feet. The primary safety zone required by Lane Code 16.211(8) is 30 feet in all directions around the dwelling. (No secondary fuel break is required within a riparian setback area.) This would require an area of 4,060 square feet to be removed for the dwelling and primary setback and 100 feet of linear shoreline. An additional 4,740 square feet of riparian vegetation is anticipated to be removed with the construction of a driveway, 360 square foot sand filter and drainfield. The total area of riparian setback vegetation to be removed, 8,800 square feet, is less than 25 percent of the total riparian setback area of the subject property.

The proposal is consistent with the requirement of Lane Code 16.253(2)(a), in that it retains 75+ percent of the total area of the total area within the riparian setback area to remain in an unaltered, indigenous state, consistent with Lane Code 16.253(2)(a) and because it results in less than 10,000 square feet of riparian area being removed, consistent with part of Lane Code 16.253(2)(b)(iii). However, the applicant's site plan shows that the length of the proposed dwelling (40 feet), the primary fuel break (60 feet total); and sand filter (10-15 feet?) would result in the removal of more than 100 linear feet of riparian setback area, inconsistent with a portion of Lane Code 16.253(2)(b)(iii). However, as a condition of approval, the sand filter and other components of the subsurface disposal system can be placed within the primary setback area thus bringing the proposal into conformance with Lane Code 16.253(3)(a).

The application complies with Lane Code 16.253(3)(a).

Compliance with Lane Code 16.253(3)(b)

In conjunction with satisfying Lane Code 16.253(3)(a), Lane Code 16.253(3)(b) requires that the applicant demonstrate that the riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. Clearly, the site of the proposed dwelling lies within the 100-foot riparian setback on the subject property. The application therefore does not comply with Lane Code 16.253(3)(b).

Compliance with Lane Code 16.253(3)(c)

This provision requires that the applicant demonstrate that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area.

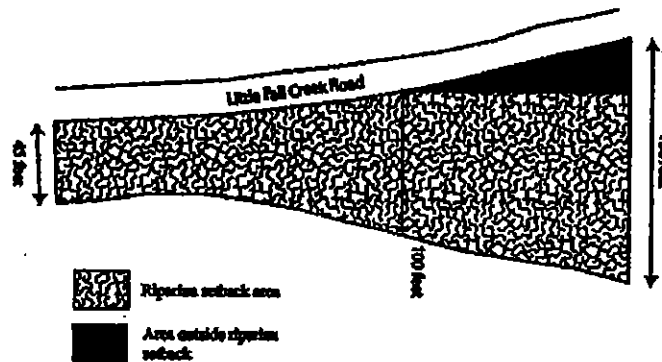
The appellants argue that the applicant cannot satisfy Lane Code 16.253(3)(c) because tax lot 200 is not two legal lots and the construction of a second dwelling for purposes of financial gain is not an undue burden. This is the appellant's first assignment of error in the Planning Director's approval of the applicant's request (PA 04-5747) for approval of a template forest dwelling on the subject property. In this appeal, the Hearings Official determined that it was reasonable for the County to apply its definition of "contiguity" to properties that were bisected by roads prior to the 1989 and 1991 amendments to ORS 92.010(7) that provide that "...any property divided by the sale or grant of property for state highway, county road, city street or other right of way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned." ¹ In essence, the Hearings Official agreed with the Planning Director's assessment that there is no evidence that the amendments to ORS 92.010(7) were intended to be retroactive and there is some evidence of legislative intent that that was not the case.

Since this decision assumes that the subject property is a legal lot, the question remains whether the applicant would suffer an unduly restrictive burden if the proposed dwelling was not allowed to be located within the riparian setback area. An examination of the applicant's plot plan reveals that the subject property is wedge-shaped, being 130 feet wide at its eastern end and tapering to 45 to 35 feet in width at its western end. Applying a rough scale, it appears that the eastern portion of the subject property tapers to 100 feet in width, measuring between the right-of-way of Little Fall Creek Road to the bank of Little Fall Creek, about 90 feet from its eastern perimeter. Thus, there appears to be a small triangle of land, 90 feet long with a 30-foot wide base that represents the portion of the subject property that does not lie within the 100-foot riparian setback area. Assuming this figure is approximately a "right triangle" its area would be somewhere around 1350 square feet.² (See Figure 1, below.) As seen above, the applicant's "modest" house is 1,120 square feet in size without accounting for the subsurface disposal system, a driveway, or the primary fuel break. Locating a dwelling in this area would put the proposed structure within the County's right-of-way for Little Fall Creek, which extends 50 feet on either side of its centerline. This location would violate Lane Code 15.083 and Lane Code 16.211(8)(a)(v)(aa). Finally, if the dwelling was sited 30 feet from all other property lines consistent with Lane Code 16.211(8)(a)(v)(bb) this situation would be further aggravated.

¹ Lane County Hearings Official, *Application of Michael Legault* (PA 04-5747), May 9, 2005.

² Area = $\frac{1}{2} ab$ where "a" is 90' and "b" is 30'.

FIGURE 1



The dimensions of the subject property preclude any practicable way that the applicant could site a dwelling with a primary fuel break without severely encroaching on the 100-foot setback from Little Fall Creek. The plot plan appears to be a reasonable compromise given the slope constraints of the subject property, the required setbacks from Little Fall Creek Road, and the distance from the ordinary high water line of Little Fall Creek.

The location of an ordinary high water line is not always a clear process and it certainly wasn't in regard to the subject property. The Planning Director's determination was based upon the location of a debris line located on the subject property's bank along Little Fall Creek. While the line was relatively distinct, logs located on other portions of the bank and at elevations higher than the debris line gave rise to reasonable speculation that the mean annual flood might be higher. Adding to this confusion was the low precipitation conditions of the last two years and the presence of dense blackberries that might obscure a higher debris line.

The debris line was the factor that most clearly defined the Planning Director's determination. In the area where it was apparent, there was evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line. It would seem that if the mean annual flood was higher, there would be more evidence of older debris and scour lines at higher elevations. Also, the location of large logs seem to argue as heavily for their being deposited through an exceptional flood event as through the occurrence of annual flooding.

In the final analysis, it is impossible to say conclusively that the debris line identified by the Planning Director demonstrates an ordinary high water line representative of Little Fall Creek. This is especially true based upon the lack of precise data regarding flooding of the creek over

the past few years. It is possible to conclude, however, that the Planning Director has reasonably applied the descriptive factors of the Lane Code 16.090 definition of ordinary high water to the subject property. Based upon the site view and the arguments of the parties it is not possible to say that this determination is clearly wrong. Therefore, I must conclude that the Planning Director's determination of the ordinary high water line should prevail.

The Planning Director's conclusion that the application, as represented by the applicant's proposed plot plan, complies with Lane Code 16.253(3)(c).

Assignment of Error #2: *"The appeal fee charged by Lane County exceeds that allowed by state law.*

The Planning Director appealed here was an administrative decision issued without the benefit of an evidentiary hearing. Parties were notified of their right to request an evidentiary, de novo appeal hearing before the Lane County Hearings Official. The appellants filed their appeal in a timely manner and were charged \$310 at the time of filing.

Lane County's base fee for an evidentiary hearing is \$250. Pursuant to lane Manual 60.850(6), (8) and (9), Lane County adds a \$10 technology fee, a five percent long range planning surcharge and a \$15 percent administrative fee to the base fee for a total of, in this case, \$310. The appellants argue that this fee violates ORS 215.416(11).

ORS 215.416(11)(b) reads:

"If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or \$250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site."

The statute is very clear that the maximum amount that may be charged for the first evidentiary hearing is \$250 even if that amount does not cover the cost to the County. Specifically, the County may not charge a \$10 technology fee, a five percent long range planning surcharge or a \$15 percent administrative fee to the base fee for the initial evidentiary hearing. The County must reimburse the appellants \$60 of their appeal costs.

Respectfully submitted,



**Gary Darnielle
Lane County Hearings Official**

Exhibit "F"

Hearings Official's decision dated May 9, 2005

ICOGS Lane Council of Governments

99 East Broadway, Suite 400, Eugene, Oregon 97401-3111 (541) 682-4283 Fax: (541) 682-4099 TTY: (541) 682-4567

May 9, 2005

Mr. Kent Howe, Director
Lane County Land Management Division
Public Service Building
125 E. 8th Ave.
Eugene, OR 97401

Dear Mr. Howe:

Please find the attached Hearings Official decisions affirming the Planning Director's approval of the Legault requests for a riparian modification setback (PA 04-5746) and a special use permit for a template forest dwelling (PA 04-5747) on tax lot 200, Assessor's Map 18-01-35.

Sincerely,


Gary L. Darnielle
Lane County Hearings Official

CC: Frederique Chateau-Gruener (file)

**LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR APPROVAL
OF A REQUEST FOR A RIPARIAN SETBACK MODIFICATION**

Application Summary

Michael E. Legault, 40203 Little Fall Creek Road, Fall Creek, Oregon 97438, requested Planning Director approval for a riparian setback modification to allow the construction of a dwelling 30 feet from the ordinary high water mark of Little Fall Creek on Tax Lot 200, Assessor's Map 18-01-35. The application was approved by the Lane County Planning Director, subject to conditions, on December 3, 2003. This approval was appealed in a timely manner by Robert Emmons & Nena Lovinger to the Lane County Hearings Official.

Parties of Record

Michael Legault
Jim Just

Robert Emmons
Jim Reed

Nena Lovinger
Alan Evans

Application History

Hearing Date: February 3, 2005
(Record Held Open Until March 2, 2005)

Decision Date: May 9, 2005

Appeal Deadline

An appeal must be filed within 10 days of the issuance of this decision, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane County Rural Comprehensive Plan
Lane Code 16.253(3)

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as Tax Lot 200, Assessor's Map 18-01-35. Tax lot 200 originally comprised the subject property and tax lot 203, which is located adjacent, to the north of Little Fall Creek Road, and was owned by the applicant. The applicant has since received template dwelling approval for tax lot 203 and has sold this parcel. The applicant now wishes to receive template dwelling approval for the remainder of tax lot 200 that is

located south of Little Fall Creek Road and to construct a dwelling. The dwelling is proposed to be 28 feet wide by 40 feet long. The entire dwelling is located within the riparian setback area of the creek. The total creek frontage of the subject property is 540 feet. The subject property varies from 35 feet to 130 feet in width and contains about 35,900 square feet (0.82 acres) of riparian setback area.

2. Lane Code 16.211(8)(a)(iv) states:

"The riparian setback area shall be the area between a line 100 feet above and parallel to the ordinary high water line of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 100 feet from the ordinary high water of a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) are met."

Little Fall Creek is a Class I stream designated for riparian vegetation protection by the Rural Comprehensive Plan. Ordinary High Water is defined by Lane Code 16.090 as"

"...that high level of a river which is attained during mean annual flood. It does not include levels attained during exceptional or catastrophic floods. It is often identifiable by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in character in the soil, destruction or absence of vegetation not adapted for life in saturated soils or the presence of flotsam and debris. In the absence of identifying physical characteristics, ordinary high water may be determined by Step backwater analysis upon a two-year frequency flood as determined by the US Army Corps of Engineers."

The Oregon Department of State Lands (DSL) has exclusive jurisdiction over all ungranted tidal submerged lands owned by this state. ORS 274.710(1). The definition of "ordinary high water line" used by DSL is found in OAR 141-085-0010(150):

"Ordinary High Water Line" (OHWL) means the line on the bank or shore to which the high water ordinarily rises annually in season (ORS 274.005). The OHWL excludes exceptionally high water levels caused by large flood events (e.g. 100 year events). OHWL is indicated in the field by the following physical characteristics:

- (a) *Clear, natural line impressed on the shore;*
- (b) *Change in vegetation (riparian (e.g. willows) to upland (e.g. oak, fir) dominated);*
- (c) *Textural change of depositional sediment or changes in the character of the soil (e.g. from sand, sand and cobble, cobble and gravel to upland soils);*
- (d) *Elevation below which no fine debris (needles, leaves, cones, seeds) occurs;*

- (e) *Presence of litter and debris, water-stained leaves, water lines on tree trunks; and/or*
- (f) *Other appropriate means that consider the characteristics of the surrounding areas."*

3. A riparian setback examination was performed on August 26, 2004 to locate the ordinary high water mark of Little Fall Creek on the subject property. Based upon this analysis, the proposed dwelling was estimated to be sited 60 feet from the centerline of Little Fall Creek Road and, according to the riparian setback determination of the Planning Director, 30 feet from the ordinary high water line.

On February 9, 2005, a site view was conducted by the Hearings Official, Mr. Don Nickell, Lane County Engineering Associate, the applicant, Mr. Jim Reed, Nena Lovinger and Robert Emmons. The primary purpose of this site view was to determine whether the Planning Director's assessment of the ordinary high water line was accurate. The three areas identified by Don Nickell in his February 15, 2004 electronic communication to the Hearings Official will be relied upon to describe the banks of Little Fall Creek in relation to the subject property in this analysis. A summary of the facts relied upon from this site view and testimony regarding the site view are presented in Finding of Fact 4, below.

4. The parcel is vegetated with several large cottonwood trees, ash and other smaller deciduous trees, as well as blackberry bushes, ivy and ferns. Little Fall Creek, as it runs along the southern boundary of the subject property, varies from about 35 to 45 feet in width, and flows to the west. The creek, which last experienced a major flood event in 1996, loses elevation as it flows past the subject property. The area has experienced lower than average rain flows during the past two years. The northern bank along the creek and parallel to the location of the proposed dwelling has a modest slope to the water. The opposite site of the creek can be characterized by a more vertical cut bank.

Area east of the proposed dwelling. The northern bank along the creek in this area has a modest slope own to the water while the opposite site of the creek can be characterized as having a more vertical cut bank. One measurement was taken from bank near the east line of the proposed dwelling (as staked) of a log located between 100 and 130 upstream (on the south side of the bank). This measurement was then compared to the level where vegetation (ferns) first appear on the nearly vertical cut bank directly across the river from this stake. Using a construction-grade laser level the level of the log and the ferns were found to be one to two feet higher than the elevation of the ordinary high water line marked by Mr. Nickell. It was noted, however, that because of the creek's flow direction and higher elevation, the south shore of the creek in this location receives higher water energy than the north shore.

Also located in this area is a downed tree that goes across the creek adjacent to the upstream log. This tree fell about one year ago and the debris on the upriver side of the tree appears to be of similar height as the debris on the bank of the north side of the creek.

Area parallel to the proposed dwelling. A branch lying on the south side of the creek was observed as being at an elevation similar to that of the debris line on the north side of the creek that served to delineate the ordinary high water line by the Planning Director.

Area west of the proposed dwelling. The banks on both sides of the river in this area have similar vegetation (i.e, grass and blackberries) growing all the way up to their tops. The debris line from the area parallel to the proposed dwelling appears to extend into this area.

The County's determination of the ordinary high water line of Little Fall Creek was based upon an examination of debris such as sticks, limbs and leaves and the absence of such debris in other areas. This debris line was visible during the site view of the subject property and represented evidence of vegetation alteration, textural changes in the soil and little evidence of patterns of loose debris above or below the line.

Decision

THE DECISION OF THE PLANNING DIRECTOR APPROVING THE LEGAULT REQUEST (PA 04-5746) FOR A RIPARIAN SETBACK MODIFICATION IS AFFIRMED.

Justification for the Decision

The appellants have identified two assignments of error in their appeal to the Planning Director's decision in PA 04-5747.

Assignment of Error #1: *"The Planning Director's decision approving the requested riparian modification was in error."*

The appellants present three arguments. First, they argue that the applicant's proposal requires the removal of indigenous vegetation in excess of that allowed by Lane Code 16.253(2). Second, they argue that the Planning Director's determination of the ordinary high water line is too liberal and is closer to the location of the proposed dwelling. Third, they argue that the applicant has not demonstrated that an unduly burden would be placed on him if he was not allow to locate the proposed dwelling within the riparian setback area.

To satisfy Lane Code 16.253(3), the applicant must either comply with Lane Code 16.253(3)(a) and (b) or, in the alternative, comply with Lane Code 16.253(3)(c).

Compliance with Lane Code 16.253(3)(b)

Lane Code 16.253(3)(a) states the location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2). Lane Code 16.253(2)(a) requires that 75 percent of the total area of the total area within the riparian setback area shall remain in an unaltered, indigenous state. Lane Code 16.253(2)(b)(iii) provides that the maximum allowable removal for any legal lot having frontage 400 feet or greater in length along a Class I stream shall not exceed 100 linear feet along the shoreline of the Class I stream and an area not greater than 10,000 square feet within the riparian setback area of a Resource Zone.

The subject property is zoned Impacted Forest Land, a Resource Zone, and contains 35,900 square feet of riparian vegetation. The applicant's proposed dwelling is 28' x 40' and thus will displace 1,120 square feet. The primary safety zone required by Lane Code 16.211(8) is 30 feet in all directions around the dwelling. (No secondary fuel break is required within a riparian setback area.) This would require an area of 4,060 square feet to be removed for the dwelling and primary setback and 100 feet of linear shoreline. An additional 4,740 square feet of riparian vegetation is anticipated to be removed with the construction of a driveway, 360 square foot sand filter and drainfield. The total area of riparian setback vegetation to be removed, 8,800 square feet, is less than 25 percent of the total riparian setback area of the subject property.

The proposal is consistent with the requirement of Lane Code 16.253(2)(a), in that it retains 75+ percent of the total area of the total area within the riparian setback area to remain in an unaltered, indigenous state, consistent with Lane Code 16.253(2)(a) and because it results in less than 10,000 square feet of riparian area being removed, consistent with part of Lane Code 16.253(2)(b)(iii). However, the dwelling, primary fuel break and subsurface drainage system result in the removal of more than 100 linear feet of riparian setback area, inconsistent with a portion of Lane Code 16.253(2)(b)(iii).

The application does not comply with Lane Code 16.253(a).

Compliance with Lane Code 16.253(3)(b)

In conjunction with satisfying Lane Code 16.253(a), Lane Code 16.253(b) requires that the applicant demonstrate that the riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. Clearly, the site of the proposed dwelling lies within the 100-foot riparian setback on the subject property. The application therefore does not comply with Lane Code 16.253(b).

Compliance with Lane Code 16.253(3)(c)

This provision requires that the applicant demonstrate that an unduly restrictive burden would be placed on the property owner if the structure is not allowed to be located within the riparian setback area.

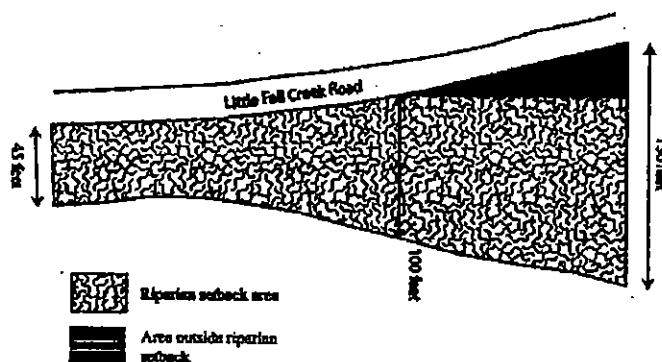
The appellants argue that the applicant cannot satisfy Lane Code 16.253(3)(c) because tax lot 200 is not two legal lots and the construction of a second dwelling for purposes of financial gain is not an undue burden. This is the appellant's first assignment of error in the Planning Director's approval of the applicant's request (PA 04-5747) for approval of a template forest dwelling on the subject property. In this appeal, the Hearings Official determined that it was reasonable for the County to apply its definition of "contiguity" to properties that were bisected by roads prior to the 1989 and 1991 amendments to ORS 92.010(7) that provide that "...any property divided by the sale or grant of property for state highway, county road, city street or other right of way purposes shall continue to be considered a single unit of land until such time as the property is further subdivided or partitioned." ¹ In essence, the Hearings Official agreed with the Planning Director's assessment that there is no evidence that the amendments to ORS 92.010(7) were intended to be retroactive and there is some evidence of legislative intent that that was not the case.

Since this decision assumes that the subject property is a legal lot, the question remains whether the applicant would suffer an unduly restrictive burden if the proposed dwelling is not allowed to be located within the riparian setback area. An examination of the applicant's plot plan reveals that the subject property is wedge-shaped, being 130 feet wide at its eastern end and tapering to 45 to 35 feet in width at its western end. Applying a rough scale, it appears that the eastern portion of the subject property tapers to 100 feet in width, measuring between the right-of-way of Little Fall Creek Road to the bank of Little Fall Creek, about 90 feet from its eastern perimeter. Thus, there appears to be a small triangle of land, 90 feet long with a 30-foot wide base that represents the portion of the subject property that does not lie within the 100-foot riparian setback area. Assuming this figure is approximately a "right triangle" its area would be somewhere around 1350 square feet.² (See Figure 1, below.) As seen above, the applicant's "modest" house is 1,120 square feet in size without accounting for the subsurface disposal system, a driveway, or the primary fuel break. Locating a dwelling in this area would put the proposed structure within the County's right-of-way for Little Fall Creek, which extends 50 feet on either side of its centerline. This location would violate Lane Code 15.083 and Lane Code 16.211(8)(a)(v)(aa). Finally, if the dwelling was sited within 30 feet from the eastern property line, inconsistent with Lane Code 16.211(8)(a)(v)(bb), Lane Code setback requirements would be further compromised.

¹ Lane County Hearings Official, *Application of Michael Legault* (PA 04-5747), May 9, 2005.

² Area = $\frac{1}{2} ab$ where "a" is 90' and "b" is 30'.

FIGURE 1



The dimensions of the subject property preclude any practicable way that the applicant could site a dwelling with a primary fuel break without severely encroaching on the 100-foot setback from Little Fall Creek. The plot plan appears to be a reasonable compromise given the slope constraints of the subject property, the required setbacks from Little Fall Creek Road, and the distance from the ordinary high water line of Little Fall Creek.

The location of an ordinary high water line is not always a clear process and it certainly wasn't in regard to the subject property. The Planning Director's determination was based upon the location of a debris line located on the subject property's bank along Little Fall Creek. While the line was relatively distinct, logs located on other portions of the bank and at elevations higher than the debris line gave rise to reasonable speculation that the mean annual flood might be higher. Adding to this confusion was the low precipitation conditions of the last two years and the presence of dense blackberries that might obscure a higher debris line.

The debris line was the factor that most clearly defined the Planning Director's determination. In the area where it was apparent, there was evidence of vegetation alteration and textural changes in the soil but little evidence of patterns of loose debris above or below the line. It would seem that if the mean annual flood is higher, there would be more evidence of older debris and scour lines at higher elevations. Also, the location of large logs seem to argue as heavily for being deposited through an exceptional flood event as through the occurrence of annual flooding.

In the final analysis, it is impossible to say conclusively that the debris line identified by the Planning Director demonstrates an ordinary high water line representative of Little Fall Creek. This is especially true based upon the lack of precise data regarding flooding of the creek over

the past few years. It is possible to conclude, however, that the Planning Director has reasonably applied the descriptive factors of the Lane Code 16.090 definition of ordinary high water to the subject property. Based upon the site view and the arguments of the parties it is not possible to say that this determination is clearly wrong. Therefore, I must conclude that the Planning Director's determination of the ordinary high water line should prevail.

The Planning Director's conclusion that the application, as represented by the applicant's proposed plot plan, complies with Lane Code 16.253(3)(c).

Assignment of Error #2: *"The appeal fee charged by Lane County exceeds that allowed by state law.*

The Planning Director's decision appealed here was an administrative decision issued without the benefit of an evidentiary hearing. Parties were notified of their right to request an evidentiary, de novo appeal hearing before the Lane County Hearings Official. The appellants filed their appeal in a timely manner and were charged \$310 at the time of filing.

Lane County's base fee for an evidentiary hearing is \$250. Pursuant to Lane Manual 60.850(6), (8) and (9), Lane County adds a \$10 technology fee, a five percent long range planning surcharge and a \$15 percent administrative fee to the base fee for a total of, in this case, \$310. The appellants argue that this fee violates ORS 215.416(11).

ORS 215.416(11)(b) reads:

"If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or \$250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site."

The statute is very clear that the maximum amount that may be charged for the first evidentiary hearing is \$250 even if that amount does not cover the cost to the County. Specifically, the County may not charge a \$10 technology fee, a five percent long range planning surcharge or a

\$15 percent administrative fee to the base fee for the initial evidentiary hearing. The County must reimburse the appellants \$60 of their appeal costs.

Respectfully submitted,



Gary Darnielle
Lane County Hearings Official