

SUPPLEMENTAL MATERIAL

W. S. a.

SUPPLEMENTAL MEMORANDUM



LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

March 18, 2008

TO: Board of Commissioners

FROM: Deanna Harris, Planner
Land Management Division

RE: In the Matter of Electing Whether or Not to Hear an Appeal of a Hearings Official's Decision Denying an Application for a Replacement Dwelling in the Exclusive Farm Use Zone (E-40), Map and Tax Lot T18-R05-S08 TL 608 (File No. PA 07-5572/ Bottem/CBM Family LLC).

On March 19 the Board is meeting on the above mentioned matter. Lane Code 14.600 establishes the procedure and criteria for which the Board decides whether or not to conduct an on-the-record hearing for an appeal of a Hearings Official's decision. During this meeting the Board may affirm the Hearings Official decision or agree to hear the appeal in a subsequent on-the-record hearing.

An adjacent property owner submitted information addressing the election to hear criteria that is not part of the record. The information is attached for your review.

Lane County Board of Commissioners
Attn: Steve Vorhes
Office of Legal Counsel
Lane County Courthouse
125 E 8th Ave.
Eugene, OR 97401



**RE: Appeal of Hearing Official Decision, PA 07-5572/ Dennis Bottem/CBM/Ross Murry
(placement of a rental mobile home on F-F 20 land without land use approval or
permits)**

Dear Board of Commissioners

This letter responds to the matter before the Board of County Commissioners to determine whether or not to hear an appeal of the Hearings Official's decision on PA 07-5572.

As the appellants' subject property has an easement across our property and the renters in the mobile home located on appellants' property travel across our property, we have been adversely affected by the applicants' ongoing failure to comply with Lane County and State permit, land use, and zoning regulations. The illegal placement of the mobile home on F-F 20 land, now EFU, without land use approval or permits clearly violated Lane County and State regulations. The Hearings Official's decision corrected this problem by faithfully interpreting the plainly stated standards in the Lane County Code. For the reasons stated below, his decision should stand as the county's final decision.

Lane County Code 14.600(3) requires the applicant to comply with one or more of the following criteria to justify a Board hearing:

- (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.

This appeal does not meet any of the above criteria for the following reasons:

With regard to LC 14.600(3)(a) - the issue is not of countywide significance:

This appeal involves a set of circumstances and a fact pattern particular to the subject property and does not have countywide significance. The issues raised in this appeal are adequately dealt with in the Hearings Official's decision of January 14, 2008, and affirmed by the Hearings Official's reconsideration of January 29, 2008. (Attached as Exhibit A)

As the Hearings Official notes: *"The decision is not as broad as alleged by the appellant. The code provisions being applied are focused upon the lawful establishment of a structure not of real property. Under the code provisions applied in this case, a structure constructed without applicable building code approval was not lawfully established."*

The applicant insists that the language under the purpose statement of LC 10.015 controls because it refers to promotion of "health, safety, and welfare" as well as implementation of the comprehensive plan. This reliance is misplaced because purpose statements in the code are not

mandatory criteria. Instead, the applicant is trying to obscure what is really a very straightforward application of the law by the Hearings Official.

With regard to LC 14.600(3)(b) - the issue does not reoccur frequently and the Hearings Official has correctly interpreted the Board's policy as articulated in the Code:

The applicant has not offered any evidence that this issue arises with sufficient frequency to justify expenditure of Board resources on this appeal. The fact that applicant can only point to one other application that raises similar issues and speculates that the county may have to address this again sometime in the future does not suffice. The interpretation provided by the Hearings Official leaves very little room for rational disagreement regarding an infrequent and relatively narrowly framed factual issue. Likewise, the Hearings Official has made no indication of the need for policy guidance.

With regard to LC 14.600(3)(c) - It is undisputed that this matter does not involve a unique environmental resource


This criterion is inapplicable, as the subject property is EFU property with no unique environmental resource at issue.

With regard to LC 14.600(3)(d) - The hearings official does not recommend review:

The foregoing points are amplified by the fact the Hearings Official has reconsidered and affirmed his decision and does not recommend board review. It seems likely that if the Hearings Official's decision had involved issues of countywide significance that, in turn, required in depth Board analysis and interpretation, the Hearings Official would have, per Lane Code 14.300(6), recommended Board review. In light of the fact that neither criterion (a) nor (b) apply in this case, it is not surprising that he has withheld a recommendation as provided under criterion (c).

Given the evidence, the thorough review and reconsideration of this application by the Hearings Official, and the Hearings Official's lack of recommendations for further review, the Board should affirm and expressly agree with the Hearings Official's January 14, 2008 decision and January 29, 2008 review of this case.

Sincerely,



Kathleen Lenn

Ron & Kathleen Lenn
86730 Central Road
Eugene, Oregon 97402

**LANE COUNTY HEARINGS OFFICIAL
REQUEST FOR REPLACEMENT DWELLING APPROVAL WITHIN AN E-40
DISTRICT**

Application Summary

Dennis Bottem, 86730 Central Road, Eugene, Or. 97402 applied to the Lane County Planning Director on April 23, 2007 for approval of a replacement dwelling on E-40-zoned land (tax lot 608, assessor's map 18-05-08). Planning Director approval of the request was mailed on September 4, 2007 and a timely appeal was filed on September 17, 2007 by Ron and Katy Lenn and the Goal One Coalition.

Parties of Record

Dennis Bottem
CBM Family, LLC

Ron & Katy Lenn
Goal One Coalition

James Mann



Application History

Hearing Date: November 19, 2007
(Record Held Open Until December 20, 2007)

Decision Date: January 14, 2008

Appeal Deadline

An appeal must be filed within 10 days of the issuance of a final order on this rezoning request, 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 Code 10.025-35 /10.105-10(5) (1980)
Lane Code 16.212(5)(b)
ORS 215.213(1)(t)

Findings of Fact

1. The property subject to this request, hereinafter referred to as the "subject property," has a location of 86730 Central Road, Eugene, Oregon. It can further be described as tax lot 608, assessor's map 18-05-08.
2. The subject property was occupied with a single-family dwelling in the early 1970s. In 1973, temporary permit MH 487-73 authorized the placement of mobile home on the property. This mobile home was removed in 1974.

10.025, which they believe incorporate the building code and other standards. Lane Code 10.025-35 reads:

“Conformance and Permits Required. No building or structure shall be erected, reconstructed, structurally altered, enlarged, moved or maintained, nor shall any building, structure or land be used or designed to be used for any use other than is permitted in the zone in which such building, structure or land is located, and there only after proper application for and securing of all permits and licenses required by all applicable State and local laws.”

The applicant responds by noting that LC 16.212(5)(b), by definition, is an approval process that doesn't require satisfaction of LC 16.212(5)(a)(i), which requires a showing of building permit or land use application records to prove the dwelling was “lawfully constructed.” That argument is not determinative as LC 16.212(5)(a)(i) focuses upon the availability of *records* that demonstrate building permit or land use approval. The choice of option “(b)” does not mean that building permit approval was not required but rather provides an evidentiary alternative to producing records of building permit or land use approval. Lane Code 16.212(5)(b) assumes that the records of lawful establishment, for whatever reason, are not available and allows for the introduction of other “objective evidence” that the structure to be replaced was lawfully established. Thus, testimony of a retired building inspector who remembers issuing a placement permit for the mobile home to be replaced would be “objective evidence” relevant in a situation where the original permit was lost or destroyed.

This chain of reasoning brings us back to the question of whether building permit approval, in addition to conformity with zoning regulations, was necessary to lawfully establish a use. While I agree with the Planning Director's reliance on LUBA's reasoning in the *Coonse* nonconforming use case, it should be pointed out that in that case the issue concerned the violation of specific fire code and building code requirements, not the more fundamental issue of whether a building permit application was filed and subsequent occupancy permit was granted. The question then is whether LC 10.105-10(5) and LC 10.025-35, read together, require conformity with building and land use regulations in order to lawfully establish a use in 1980.

By way of example, the appellants cite Multnomah County's code definition of the term “Lawfully established dwelling”:

“A dwelling that was constructed in compliance with the laws in effect at the time of establishment. The laws in effect shall include, zoning, land division and building code requirements.”

While not nearly as explicit as the Multnomah County Code, I believe that LC 10.025-35 does require building approval. I have arrived at this conclusion because of the way that this provision is written. It clearly differentiates between the physical treatment of structures and buildings and the use thereof. Thus, the first clause of Lane Code 10.025-35 concerns the erection, reconstruction, structural alteration, enlargement, movement or

dwelling. The Director shall maintain a record of the lots or parcels that do not qualify for the siting of a dwelling under the provisions of this subsection, including a copy of the deed restrictions and release statements filed under this section;

The Planning Director required the existing mobile home to be removed or demolished within 90 days of when the replacement home is finalized. (Director's Condition of Approval #5)

- (iv) *An accessory farm dwelling authorized pursuant to LC 16.212(6)(b) or (7)(e) below may only be replaced by a manufactured dwelling;*

This criterion is not applicable.

- (v) *LC 16.212(10)(h) below; and*

- (vi) *Land use approval of a permit described in LC 16.212(2)(b) above shall be valid for four years from the date of the approval. Notwithstanding the requirements in LC 14.700(2)(d)(ii) and (iii), an application for a two year extension of the timelines for the permit approval described in LC 16.212(5)(b)(vi) above may be made and approved pursuant to LC 14.700(2).*

This criterion can be implemented through a condition of approval.

Conclusion

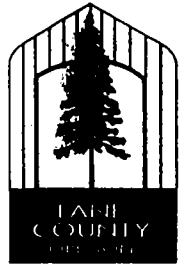
As the mobile home to be replaced was not lawfully placed upon the subject property, it does not comply with Lane Code 16.212(5)(b)(i) and therefore cannot be replaced.

Respectfully Submitted,



**Gary Darnielie
Lane County Hearings Official**

EXHIBIT 71



LAND MANAGEMENT DIVISION
http://www.LaneCounty.org/PW_LMD/

February 1, 2008

Re: Appeal of PA 07-5572B

Dear Interested Individuals,

The following is a courtesy letter in the above referenced file. The Hearings Official affirmed his January 14, 2008 decision in the above referenced file (see attachment). A tentative date of March 19, 2008 has been selected for the Board of County Commissioners to elect whether or not they wish to hear the appeal, and pursuant to LC 14.600(2)(c). Please refer to **LC 14.600 Elective Board Review Procedure**, and **LC 14.400 On the Record Hearing Procedure** for procedure, notice, and criteria establishment.

Deanna Harris, Planner
e-mail: Deanna.Harris@co.lane.or.us
(541) 682-4082



LCOG

LANE COUNCIL OF GOVERNMENTS

January 29, 2008

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

Re: *Request for Reconsideration of Hearings Official Decision in Bottem (PA 07-5572)*

Dear Mr. Howe:

The applicant has appealed my January 14, 2008 decision in PA 07-5572 regarding the denial of a replacement dwelling on tax lot 608, assessor's map 18-05-08. Upon my review of this appeal, I find that the allegations of error are not persuasive. I believe that the language of Lane Code 16.212(5), LC 10.105-10(5) and LC 10.025-35, not the *Drake* decision cited by the appellant, are controlling. Further, the decision is not as broad as alleged by the appellant. The code provisions being applied are focused upon the lawful establishment of a structure not of real property. Under the code provisions applied in this case, a structure constructed without applicable building code approval was not lawfully established.

Accordingly, on the authority of Lane Code 14.535(a), I shall affirm my January 14, 2008 reconsidered decision.

Sincerely,



Gary L. Darnielle
Lane County Hearings Official

Cc: Jerry Kendall
Michael Reeder