

W. 10.a.

## AGENDA COVER MEMO

**DATE:** May 1, 2011 (Date of Memo)  
May 18, 2011 (Date of Meeting)

**TO:** Lane County Board of Commissioners

**DEPT.:** Public Works Department/Land Management

**PRESENTED BY:** Jerry Kendall, Associate Planner *JK*

**AGENDA ITEM TITLE:** Order No. \_\_\_\_\_ / In the Matter of Electing Whether or Not to Hear Arguments on an Appeal of a Hearings Official's Decision upon remand, limited to approving the septic system capability, for a Group Care Home (file PA 09-5314/Teen Challenge)

### I. MOTION

Motions for the Board of Commissioners:

Option 1. Move to approve the attached Order, electing not to hear the appeal, expressly agreeing with the Hearings Official's interpretation of applicable ordinances, and deeming the Hearings Official decision of April 11, 2011 as the final decision of the County.

Option 2. Move to modify the attached Order, electing not to hear the appeal, remaining silent as to the Hearings Official's interpretation of applicable ordinances, and affirming the decision of April 11, 2011 as the final decision of the County,

Option 3. Move to not approve the attached order, electing to hear the appeal on the record and direct staff to return with an order electing to hear the appeal pursuant to Lane Code 14.400.

### II. AGENDA ITEM SUMMARY

An appeal to the Board, contesting a Hearings Official approval of septic system capability for a group care home upon remand, has been received by the Director. The Appellant has filed the appeal per the option in LC 14.515(3)(f)(ii), requesting that the Board not conduct a hearing on the appeal and to deem the Hearings Official decision the final decision of the County. Pursuant to Lane Code 14.600, the Board must now decide whether or not to hear the appeal by applying criteria set forth in the Code.

### **III. BACKGROUND**

#### **A. History**

1. Property involved in this action is identified as tax lot 224, map 18-04-21, located at 85989 and 85987 Bailey Hill Road, Eugene, and zoned RR-5 (Rural Residential -5) within the jurisdiction of the Lane County Rural Comprehensive Plan and Lane Code Chapter 16.
2. In the form of application PA 09-5314, the property owner and applicant, Teen Challenge International Pacific NW Centers, in May 2009, requested the Planning Director's approval of a group care home, pursuant to Lane Code 16.290(4)(b) and LC 16.290(5).
3. On October 20, 2009, the Planning Director denied the application, finding that the applicant failed to carry the burden of proof in regards to describing the scope, frequency, nature, and duration of the proposal, and the activities associated with it.
4. A timely appeal of the Planning Director's decision was filed by the Applicant on November 2, 2009. The Director affirmed his decision, and a de-novo appeal hearing was scheduled.
5. The appeal hearing was held on December 4, 2009. The record was subsequently left open until December 24, 2009, for further submittals into the record.
6. On January 26, 2010, the Hearings Official issued his decision, reversing the Planning Director and approving the group care home.
7. On February 8, 2010, a timely appeal of the Hearings Official's decision was filed.
8. On February 16, 2010, and after reviewing the appeal, the Hearings Official affirmed his decision of January 26.
9. On March 17, 2010, the Board adopted Order No. 10-3-17-14 electing not to conduct a hearing on the appeal.
10. Opponents of the proposal, Pat Phillips, Al Phillips, Robbin Freedman, and Matt Freedman, subsequently appealed the decision of January 26, 2010 to the Oregon Land Use Board of Appeals (LUBA No. 2010-025). They cited five assignments of error.
11. On September 20, 2010, LUBA issued its decision, dismissing four of the five assignments of error. The second portion of the fifth assignment of error, specific to the issue of whether the subject property had the ability to accommodate the increase in septic effluent from the proposed use should the primary septic tank drain field fail, was sustained and remanded back to the County for further action.
12. On December 15, 2010, via Order No. 10-12-15-10, the Lane County Board of Commissioners remanded the matter back to the Lane County Hearings Official for further proceedings and action consistent with the remand.

13. On January 20, 2011, the Hearings Official conducted a limited evidentiary hearing upon the remand. The record closed on March 14, 2011, and the decision was approved on April 7, 2011.
14. On April 19, 2011, a timely appeal of the April 7 decision was filed by the opponents, Pat Phillips, Al Phillips, Robbin Freedman, and Matt Freedman.
15. The Planning Director accepted the appeal, and forwarded it to the Hearings Official for his review. On April 25, 2011, the Hearings Official affirmed his decision of April 7.

B. Appeal Analysis

Lane Code 14.515(3)(f) provides for two appeal options. The Appellant can:

- (i) Request that the Board conduct a hearing on the appeal, or*
- (ii) Request that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County. An appellant's election under this section shall constitute exhaustion of administrative remedies for purposes of further appeal of the County's final decision. The fee under this option shall not exceed the amount specified in ORS 215.416(11)(b).*

The opponents of the remand of the group care home chose the 2<sup>nd</sup> option (LC 14.515(3)(f)(ii)), and paid the associated fee of \$250. The text of the appeal consists of one page, simply stating that they request that the Board not hear the appeal, believing "...that LUBA is the most appropriate body to hear this case at this time".

The LUBA remand was based solely on the following standard found in the Rural Residential zone, LC 16.290(5)(c):

- (c) The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site's ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available;*

The above standard requires the applicant to demonstrate that the subject property had the ability to accommodate the increase in septic effluent from the proposed use should the primary septic tank drain field fail. LUBA found that the record was insufficient in this regard.

As witnessed by a reading of the Hearings Official's decision (found within Attachment #1), extensive documentation was submitted into the remand record by "dueling experts" in the field of environmental health/sanitation systems.

The current appeal basically states that the Hearings Official "improperly determined" that the soils of the subject property can accommodate the amount of wastewater generated by the group care home and therefore fails to meet the LC 16.290(5)(c) standard. It references, but did not provide, two submittals from the opponents and in the file record (dated 2-14-11 and 3-7-11). These two documents total 110 pages, and are available for the Board's review, along with the entire file record, at the Land Management Division.

The appeal maintains that the Hearings Official mischaracterized critical facts, misinterpreted Lane Code and state law, and made a decision which is not based on substantial evidence in the record.

### C. Policy Issues

Lane Code 14.600(3) dictates the procedure for this elect to hear meeting:

*(3) Decision Criteria. A decision by the Board to hear the appeal on the record must conclude that a final decision by the Board can be made within the time constraints established by ORS 215.427(1) and that the issue raised in the appeal to the Board could have been and was raised before the close of the record at or following the final evidentiary hearing. The Board's decision to hear the appeal must comply with one or more of the following criteria:*

- (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.*

#### Election to Hear Criteria

Regarding the "time constraints" mentioned in subsection (3) above, ORS 215.427(1) does not apply to this remand item.

Each Lane Code 14.600(3)(a)-(d) election-to-hear criterion is presented below with the Director's analysis.

a. *The issue is of Countywide significance.*

The issue upon remand is specifically limited to the subject property's ability to accommodate a septic system and replacement area that will adequately service the proposed group care home. These sanitation issues are driven largely by soil types and topographic features which are specific to the subject property, and therefore are site specific and not of Countywide significance.

b. *The issue will reoccur with frequency and there is a need for policy guidance.*

The issue of septic system capability for a group care home on a specific parcel of land with localized soil types and topographic conditions is not likely to occur with frequency, and there is no need for policy guidance if the Board affirms the Hearings Official's decision.

c. *The issue involves a unique environmental resource.*

No unique or rare environmental resources on the property have been identified in the record.

d. *The Planning Director or Hearings Official recommends review.*

Neither the Planning Director nor the Hearings Official recommends Board review of this appeal.

#### D. Board Goals

The Board adopted the Strategic Plan in 2001.

An applicable goal from the plan includes:

- *Contribute to appropriate community development in the areas of transportation and telecommunications infrastructure, housing, growth management and land development.*

The Hearings Officials decision, in approving the sanitation system capability for the group care home, aids community development by providing housing for handicapped parties. The decision contributes to growth management and land development in that such use is allowed in residential zones, provided the standards for approval are met. Such was found to be the case in the current decision.

#### E. Financial and/or Resource Considerations

The Appellant has chosen the 2<sup>nd</sup> appeal option as found in LC 14.515(3)(f)(ii), requesting that the Board not hear this appeal and to deem the Hearings Official decision of April 7, 2011 the final decision of the County. Per Lane Manual, the appeal fee was \$250. If the Board elects to not hear the appeal, the Appellant can proceed directly to the Land Use Board of Appeals (LUBA).

If on the other hand, the Board deems that the appeal has merit per the decision criteria of LC 14.600(3), an on the record Board hearing will be scheduled per LC 14.400. Such action will require further planning staff time in preparing a more detailed analysis of the appeal, required coordination with Legal Counsel, Board administrative staff, and the Board itself. With no further appeal fees forthcoming, the Land Management Division will bear the cost of these additional county resources.

#### IV. TIMING/IMPLEMENTATION

If the Board adopts the order as presented, the decision by the Hearings Official becomes the final decision of the County upon signing of the order.

If the Board elects to hear the appeal, a date for an on-the-record hearing will need to be established following adoption of an Order electing to hear.

In either event, the involved parties will be notified of the Board outcome.

## **V. ACTION**

### **A. Options:**

Option 1. Move to approve the attached Order, electing not to hear the appeal, expressly agreeing with the Hearings Official's interpretation of applicable ordinances, and deeming the Hearings Official decision of April 11, 2011 as the final decision of the County.

Option 2. Move to modify the attached Order, electing not to hear the appeal, remaining silent as to the Hearings Official's interpretation of applicable ordinances, and affirming the decision of April 11, 2011 as the final decision of the County,

Option 3. Move to not approve the attached order, electing to hear the appeal on the record and direct staff to return with an order electing to hear the appeal pursuant to Lane Code 14.400.

### **B. Staff Recommendation:**

Select option 1.

## **VI. ATTACHMENTS**

1. Board Order electing to not hear the appeal, with Exhibits "A" (findings) and "B" (Hearings Official Decision, April 7, 2011 with Affirmation of decision, April 25, 2011)--22pp.
2. Opponents appeal of the Hearings Official decision, filed on April 19, 2011—4 pp.

The entire remand file record for PA 09-5314 is available for review at the Land Management Division.



IN THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

Order No. \_\_\_\_\_

) In the Matter of Electing Whether or Not to Hear  
) Arguments on an Appeal of a Hearings Official's Decision  
) upon remand, limited to approving the septic system  
) capability, for a Group Care Home (file PA 09-5314/Teen  
) Challenge)

**WHEREAS**, the Lane County Hearings Official has made a decision, approving upon remand, the septic system capability for a Group Care Home, application PA 09-5314 ; 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 remand application PA 9-5314; 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**, Lane Code 14.515(3)(f)(ii) provides the option that the appellant can request the Board not conduct a hearing on the appeal; and

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

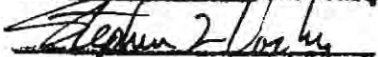
**THEREFORE, BE IT ORDERED** the Board of County Commissioners of Lane County finds and orders as follows:

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 decision dated April 7, 2011, attached as Exhibit "B", is affirmed and adopted by the Board of County Commissioners as the County's final decision. The Board of County Commissioners expressly agrees with and adopts the interpretations of the implementing ordinances, including Lane Code Chapter 16.290(5)(c), made by the Hearings Official in the decision.

**DATED** this 18<sup>th</sup> day of May, 2011

APPROVED AS TO FORM

Date: 5-18-2011 Lane County

  
OFFICE OF LEGAL COUNSEL

\_\_\_\_\_  
Chairperson, Lane County Board of Commissioners

### **FINDINGS IN SUPPORT OF THE ORDER**

1. Property involved in this action is identified as tax lot 224, map 18-04-21, located at 85989 and 85987 Bailey Hill Road, Eugene, and zoned RR-5 (Rural Residential -5) within the jurisdiction of the Lane County Rural Comprehensive Plan and Lane Code Chapter 16.
2. In the form of application PA 09-5314, the property owner and applicant, Teen Challenge International Pacific NW Centers, in May 2009, requested the Planning Director's approval of a group care home, pursuant to Lane Code 16.290(4)(b) and LC 16.290(5).
3. On October 20, 2009, the Planning Director denied the application, finding that the applicant failed to carry the burden of proof in regards to describing the scope, frequency, nature, and duration of the proposal, and the activities associated with it.
4. A timely appeal of the Planning Director's decision was filed by the Applicant on November 2, 2009. The Director affirmed his decision, and a de-novo appeal hearing was scheduled.
5. The appeal hearing was held on December 4, 2009. The record was subsequently left open until December 24, 2009, for further submittals into the record.
6. On January 26, 2010, the Hearings Official issued his decision, reversing the Planning Director and approving the group care home.
7. On February 8, 2010, a timely appeal of the Hearings Official's decision was filed.
8. On February 16, 2010, and after reviewing the appeal, the Hearings Official affirmed his decision of January 26.
9. On March 17, 2010, the Board adopted Order No. 10-3-17-14 electing not to conduct a hearing on the appeal.
10. Opponents of the proposal, Pat Phillips, Al Phillips, Robbin Freedman, and Matt Freedman, subsequently appealed the decision of January 26, 2010 to the Oregon Land Use Board of Appeals (LUBA No. 2010-025). They cited five assignments of error.
11. On September 20, 2010, LUBA issued its decision, dismissing four of the five assignments of error. The second portion of the fifth assignment of error, specific to the issue of whether the subject property had the ability to accommodate the increase in septic effluent from the proposed use should the primary septic tank drain field fail, was sustained and remanded back to the County for further action.



12. On December 15, 2010, via Order No. 10-12-15-10, the Lane County Board of Commissioners remanded the matter back to the Lane County Hearings Official for further proceedings and action consistent with the remand.
13. On January 20, 2011, the Hearings Official conducted a limited evidentiary hearing upon the remand. The record closed on March 14, 2011, and the decision was approved on April 7, 2011.
14. On April 19, 2011, a timely appeal of the April 7 decision was filed by the opponents, Pat Phillips, Al Phillips, Robbin Freedman, and Matt Freedman.
15. The Planning Director accepted the appeal, and forwarded it to the Hearings Official for his review. On April 25, 2011, the Hearings Official affirmed his decision of April 7.
16. The appeal states that the Approval Authority mischaracterized critical facts, misinterpreted Lane Code and state law, and made a decision which is not based on substantial evidence in the record.
17. In order for the Board to hear arguments on the appeal, Lane Code 14.600(3) requires one or more of the following criteria to be found by the Board to apply to the appeal:
  - *The issue is of Countywide significance.*
  - *The issue will reoccur with frequency and there is a need for policy guidance.*
  - *The issue involves a unique environmental resource.*
  - *The Planning Director or Hearings Official recommends review.*
18. The Board of Commissioners finds that the issue upon remand is specifically limited to the subject property's ability to accommodate a septic system and replacement area that will adequately service the proposed group care home. These sanitation issues are driven largely by soil types and topographic features which are specific to the subject property, and therefore are site specific and not of Countywide significance.
19. The Board of Commissioners finds that the issue of septic system capability for a group care home on a specific parcel of land with localized soil types and topographic conditions is not likely to occur with frequency, and there is no need for policy guidance if the Board affirms the Hearings Official's decision.
20. The Board of Commissioners finds that tax lot 224 is a 5.4-acre developed residential parcel which is not a unique environmental resource.
21. Neither the Planning Director nor the Hearings Official recommends review of the appeal.
22. To meet the requirements of Lane Code 14.600(2)(b), the Board is required to adopt a written decision and order electing to have a hearing on the record for the appeal or declining to further review the appeal.

23. The Board has reviewed this matter at its meeting of May 18, 2011, and finds that the appeal does not comply with the criteria of Lane Code Chapter 16.600(3), and elects to not hold an on the record hearing.
24. The Board expressly agrees with the Hearings Official's interpretation of implementing ordinance, LC 16.290(5)(c), and adopts the Hearings Official's decision of April 7, 2011, as the County's final decision in this matter.

**LANE COUNTY HEARINGS OFFICIAL  
DECISION ON THE REMAND OF THE APPROVAL OF A REQUEST FOR A  
SPECIAL USE PERMIT TO ALLOW A GROUP CARE HOME WITHIN A RURAL  
RESIDENTIAL DISTRICT**

**Application Summary**

Teen Challenge International Pacific Northwest Centers (Teen Challenge) requested a special use permit to allow a group care home for "disabled" women and their children within the Rural Residential Zone (RR-5/RCP) on March 19, 2009. The application was deemed complete on April 19, 2009, and denied by the Lane County Planning Director on October 19, 2009. A timely appeal to the Lane County Hearings Official was filed on by the applicant.

The Hearings Official reversed the Planning Director on January 26, 2010. The neighbors appealed this decision to the Oregon Land Use Board of Appeals (LUBA). On September 20, 2010, LUBA remanded the case to Lane County. The remand was limited to the issue of whether the subject property had the ability to accommodate the increase in septic effluent from the proposed use should the primary septic tank drain field fail. Specifically, the remand found that the record contained insufficient factual data to support a conclusion that the mandate of LC 16.290(5)(c), that the proposal "...not exceed the carrying capacity of the soil."

**Motions**

At the close of the January 13, 2011 hearing on the remand of the January 26, 2010 Hearings Official decision, the record was left open until February 1, 2011 for the applicant to respond to expert testimony presented by the opponents at the hearing; until February 14, 2011 for the opponents to respond to evidence introduced into the record by the applicant; and then until February 21, 2011 for final written rebuttal by the applicant.

On February 17, 2011, the applicant requested that the Hearings Official reopen the record to allow it to respond to evidence presented by the opponents that it felt was not directly responsive to its January 31 evidentiary submission. On February 22, I reopened the record to allow the applicant until February 28 to respond to the "extra evidence" and the opponents to review and comment on the applicant's submission until March 7. The applicant was given until March 14, 2011 for final written rebuttal.

The opponents have asked the Hearings Official to strike the applicant's February 28, 2011 response. I must respectfully decline. The issues raised and the testimony offered by both parties have been numerous and complex, often raising more questions than they have answered. Evidence presented by dueling experts, each with impeccable credentials, complicated matters, especially where an analytical contribution by an impartial County expert was conspicuously absent. I would rather commit procedural error, provided that it could be done without prejudicing either party, if it resulted in a more informed decision. I believe that the post-hearing closure submissions by both parties have greatly assisted in attaining that goal.

## **Application History**

Remand Hearing Date: January 13, 2011  
(Record Held Open Until March 14, 2011)

Remand Decision Date: April 7, 2011

## **Appeal Deadline**

An appeal must be filed within 12 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 Code 16.290(5)(c)

## **Findings of Fact**

1. As an aid in the framing of the issues to be addressed by this remand, the following is a summary of pertinent information regarding the proposed group care home that is subject to the applicant's special use permit application:

The applicant is Teen Challenge International Pacific Northwest Centers (Teen Challenge) that operates residential facilities for recovery from drug and alcohol addiction. The property subject to this special use permit application, hereinafter referred to as the "subject property," is located at 85989 & 85987 Bailey Hill Road, southwest of Eugene. The subject property is 5.38 acres in size and can be identified as tax lot 224, assessor's map 18-04-21. The findings of fact from the January 26, 2010 decision in this matter are incorporated by reference except where explicitly modified by this decision.

The group care home is called Hanna House and is intended to serve as a recovery facility/environment for recovering female drug and alcohol abusers. The requested permit would allow up to 20 individuals (women and dependent children), plus seven full-time workers, three of which would remain on-site overnight. Twenty beds have been allocated for the women and their children and three for staff.<sup>1</sup> The previous Hearings Official decision was based upon an assumption that at least one of the three staff members on-site at night would be awake and on duty. The group care home will provide meals for the women and their children when they are on site (e.g., not at school or at work).

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<sup>1</sup> November 18, 2010 letter from Michael Reeder to George Ehlers.

The subject property is burdened by a 50-foot wide easement that was created as a part of Land Partition Plat No. 2001-P1519. This easement, shown on the plat map, underlies the driveway that serves the subject property (Blue Barn Tract), and serves and burdens Parcel 1 (Tax Lot 228), and serves and terminates at Parcel 2 (Tax Lot 229).

2. Oregon Department of Environmental Quality (DEQ) rule 340-71-220 (Table 2) assigns a design flow of 150 gallons per day (gpd) to each bedroom for boarding houses and 80 gallons per day to each person for rooming houses. The DEQ rules do not define either "boarding house" or "rooming house." Lane Code 16.090 provides that Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1981, Principal Copyright 1961, shall be considered as providing ordinary accepted meanings. In this respect, Webster defines "boardinghouse" as "...a house that provides board and sometimes rooms" and notes that the term "board" means to have meals.<sup>2</sup> Webster defines "rooming house" as "...a house where rooms are provided and let."<sup>3</sup> Lane County's Environmental Health Specialist (Subsurface Sanitation Program) has assumed that the proposed use most closely resembles a boarding house for purposes of septic tank system design flow.<sup>4</sup>
3. The subject property's existing on-site wastewater treatment system (septic tank system) is 17 years old and consists of two septic tanks; a 1,500 gallon tank, followed by the 1,000 gallon tank, that collect sewage from the residence on the subject property. Scum and grease rise to the top of the tank(s), sludge forms at the bottom, and the liquid effluent in the center is treated through anaerobic processes. The treated effluent then flows to a diverter valve, where the effluent is manually diverted into one of two distribution or drop boxes that serve separate 750 lineal feet of drain fields. The effluent loading rate or capacity for this system is 150 gallons of effluent per 150 lineal feet of absorption line. Upon receiving the effluent from the diverter valve, the drop boxes distribute it concurrently into two or more header pipes that lead to the absorption field (drain field).

The drain fields are composed of absorption trenches with vertical sides and a flat bottom that are installed into the soil. Distribution pipes, open-jointed or perforated pipe used in the dispersion of septic tank effluent, are placed in the absorption trenches. Over time, a biomat is formed along the trench bottom and slowly along the sides. As the liquid level rises in the trench due to slower infiltration, it backs up into the box and eventually reaches the invert of the downstream outlet of the box, allowing the effluent to flow down to the next drop box.

An on-site wastewater treatment system can fail for several reasons. It can fail at its septic tank component when the tank is not pumped frequently enough and scum or sludge blocks the intake pipe, or where harmful chemicals or materials kill the

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<sup>2</sup> Webster's Third New International Dictionary, pg. 244.

<sup>3</sup> Ibid, pg. 1972.

<sup>4</sup> October 14, 2009 email from Jay Mathison to Jerry Kendal regarding "Teen Challenge 18-04-21 #224."



microorganisms that treat the effluent. Lines from the house may be clogged and the system can also fail due to problems in its distribution system. For instance, the drop boxes may become clogged or the absorption trench surfaces become totally covered with biomat and can no longer absorb and treat the effluent. In this latter case, the effluent may spill over the top of the trenches or water will back up into the septic tank and into the home. Also, lines leading from the septic tank or the distribution pipes may be crushed by heavy vehicles, resulting in the same symptom.

The previous owner of the property has testified that she was instructed to switch the diversion valve every four years and that there was only 750 feet of drain field available at any one time.<sup>5</sup> The system was installed 1994 and the Lane County Land Management Division Authorization Form (Permit 2106-94) indicates that the construction did not entail the alteration or extension of an existing system but rather the relocation (total replacement) of the existing system. Both the septic tanks and the current 1,500 feet of drain field were constructed under this permit. There is no evidence that any of the prior system is being used. The existing septic tanks are partially located inside the 50-foot wide easement but well back and one-foot higher than the travelled gravel surface of the easement.

4. DEQ rules provide that a Certificate of Satisfactory Completion (CSC) be issued upon inspection of a new on-site wastewater treatment system. An authorized agent (Lane County Sanitarian) may issue an "Authorization Notice" that establishes that an existing onsite wastewater treatment system appears adequate for its intended use. Lane County's analogue to this permit is an Authorization Form issued by its Land Management Division. In regard to the current onsite wastewater treatment system on the subject property, this form was assigned permit number 2106-94. The form indicated that the request was for the relocation of a sewage system, and it noted the applicant and the address of the property to be served by the system, the use to be served by the system and information regarding zoning, including setbacks, and the characteristics and dimensions of the proposed sewage system. No site evaluation report for the existing system was found in the County sanitation records.

Permit 2106-94 shows that the proposed system was to consist of a 1,000 gallon septic tank, a 1,500 gallon septic tank, and 1485 lineal feet of drain field. No replacement drain field is noted. Attached to the Authorization Form is a site plan of the proposed system. The site plan of the proposed system shows the two septic tanks and the drain field in relation to the structures on the property. The 1,500-gallon septic tank was to serve an activity building and the 1,000-gallon septic tank was to serve the single-family residence. Both tanks were to feed into the two-cell drain field. The site plan does not identify the parcel size (nor does the Authorization Form), the slope of the drain field, a replacement drain field, water table levels, cuts and fills, or encumbrances.

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<sup>5</sup> Letter dated February 10, 2011 from Marcia Stachowiak to "Whom It May Concern."

The file containing the Authorization Form also includes a plot plan of the system as constructed; which consists of the "Detail System Plot Plan as Constructed" and a very cursory site plan authored by the system installer, Percol Starrs Co. The "Detail System Plot Plan as Constructed" is very cursory and merely shows a 1,500 lineal foot drain field, a diverter valve, the two septic tanks in a series, and the single-family dwelling that was to be served by the sewage system. Of primary concern to the opponents is that the "Detail System Plot Plan as Constructed" form identifies the system capacity as 450 gallons per day. No explanation is provided as to why the system capacity is so low when the permit was issued for a system designed to serve a 24-child day care center.

5. In 2009, sewage flowed out of a riser in one of the septic tanks due to failure to pump the tank in a timely manner. The county was notified but did not inspect the system although a licensed septic tank pumper pumped the tank and cleaned the spill. No subsequent problems have since surfaced (*no pun intended*) and there has been no documented failure of the existing drain field.
6. For its replacement (backup) sewage disposal system, the applicant proposes an alternative onsite wastewater treatment system approved by DEQ for use in lieu of the standard subsurface system. It is a pressurized sand filtration treatment system manufactured by Orenco Systems. This system is designed to treat 2,500 gpd of residential strength effluent and would reduce the lineal footage to loading requirement to 50 lineal feet for every 150 gallons of effluent. Site plans show two possible replacement drain fields (Areas D1 and D2) that would provide a combined 909 lineal feet of treatment, and a third possible drain field, located in Area D3, that might provide an additional 661 lineal feet of absorption trench.

In addition to the replacement onsite wastewater treatment system, the applicant intends to add an additional 205 lineal feet of absorption trench to the primary or existing system. An additional 129 and 76 lineal feet, respectively, would be taken from the two nearest replacement absorption trenches located in Area D1, reducing the size of this replacement drain field to 376 lineal feet.

7. In January of 2011, ten test holes were dug on the subject property to determine soil characteristics, depth and evidence of depth of the water table. Four of these test holes were dug in an area south of the access easement, both north and southeast of the existing drain field. The soils in these test pits are reddish brown silty clay loam grading to silty clay soil overlying very highly weathered parent material (saprolite) varying in depth from 27 inches to 37 inches from the surface. These areas have been identified as Areas D1 and D2. Test holes #5 through #7 were dug in Area D3, an area north of the access easement. The three test holes dug in Area D3, located on the eastern portion of the property, were filled some years ago with up to 5,000 cubic yards of road construction debris and contained either no water or water at 47 inches from the surface. The soils have regained structure although there is evidence of some large concrete and asphalt remnants from a widening project on the Lorane Highway. The third area investigated was located farther to the east and was eliminated from further consideration due to wetness and a high water table.

The fill that was in evidence in Area D3 was placed in a historic gully located in the northwest corner of the subject property, north of the access road in this area. This feature, which faintly shows up on a 1994 aerial photograph of the subject property, is evidenced by the vegetation pattern.<sup>6</sup> The gully had steeper walls near Baily Hill Road and flattened out as it moved eastward. Replacement absorption field area D3 lies in the easternmost half of this drainage area. Water drains towards Baily Hill Road in this area.

8. OAR 340-071-0100(126) "Residential Strength Wastewater" means septic tank effluent that does not typically exceed five-day biochemical oxygen demand (BOD5) of 300 mg/L; total suspended solids (TSS) of 150 mg/L; total Kjeldahl nitrogen (TKN) of 150 mg/L; oil & grease of 25 mg/L; or concentrations or quantities of other contaminants normally found in residential sewage.

### Decision

THE HEARING OFFICIAL'S APPROVAL OF THE TEEN CHALLENGE REQUEST (PA 09-5314) FOR A SPECIAL USE PERMIT TO OPERATE A GROUP CARE FACILITY ON PROPERTY ZONED RURAL RESIDENTIAL IS AFFIRMED, SUBJECT TO THE FOLLOWING ADDITIONAL CONDITIONS OF APPROVAL:

1. The proposed use shall be limited to a maximum of 20 clients and seven staff. A maximum of one resident staff is allowed and, depending upon whether an additional bedroom is provided for that individual, the existing and replacement onsite wastewater treatment systems shall be sized according to the larger loading flow estimated by Table 2, OAR 340-071-0220.
2. Utilizing Areas D1 and D2, the subject property can support a primary and secondary system (as proposed by the applicant) that can treat 1,770 gpd of wastewater. The applicant shall add the appropriate amount of additional lineal feet of absorption trench capacity to the existing onsite wastewater treatment system and employ a two-way splitter valve that will allow simultaneous use of both drain field cells. The applicant shall utilize the Orenco Systems pressurized sand filtration treatment system for the replacement wastewater treatment system and provide sufficient feet of absorption trenches in Areas D1 and D2 to address the projected wastewater loading flows. (See Condition of Approval #1, above, and the discussion on page 13 of this decision.) The replacement system and the addition to the existing system's drain field shall be inspected and approved by the Lane County Sanitarian according to applicable DEQ administrative rules.
3. The applicant shall have the septic tanks of its onsite wastewater treatment system inspected annually by a professional licensed to do so and the tanks shall be pumped upon the recommendation of that individual.

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<sup>6</sup> Exhibit K, Opponents' February 14, 2011 Closing Statement.

4. The applicant shall provide a minimum of one portable toilet for special events where the daily sewage loading would exceed the capacity of the onsite wastewater treatment system's drain fields. (See the discussion in the third paragraph on page 9 of this decision.)
5. Existing and replacement drain fields shall be marked and permanent barriers erected to prevent vehicles from traveling or parking on their absorption trenches.
6. The location of the septic tanks located partially within the access easement shall be clearly marked and the adjacent driveway surface shall be enlarged to the east to allow the passage of two large vehicles.
7. The white PVC hose bib and water line shall be removed and its connection to its water source capped.

#### **Justification for Decision (Conclusion)**

In its September 20, 2010 remand, LUBA found that the findings of fact in the January 26, 2010 Lane County Hearings Official decision (PA 09-5314) did not adequately support a conclusion that the application, in regard to the onsite wastewater treatment system, was consistent with Lane Code 16.290(5)(c). In particular, LUBA found that there was insufficient evidence that the proposed use would not exceed the carrying capacity of the soil or the site's ability to provide on-site sewage disposal. The full standard of Lane Code 16.290(5)(c) is as follows:

*The proposed use and development shall not exceed the carrying capacity of the soil or of the existing water supply resources and sewer service. To address this requirement, factual information shall be provided about any existing or proposed sewer or water systems for the site and the site's ability to provide on-site sewage disposal and water supply if a community water or sewer system is not available;*

In regard to the adequacy of the sewage treatment, I believe that there are three primary issues to address. These issues are: what is the actual capacity of the existing system; what is the actual sewage loading of the proposed use; and is there sufficient area with suitable soils on the property for a replacement drainage system.

#### Actual Capacity of the Existing System

Opponents of the special use permit have raised questions regarding the treatment capacity of the existing on-site wastewater treatment system. The first issue raised has to do with an apparent internal inconsistency in Lane County's permit for the current system. The County issues an Authorization Form that includes a site plan of the proposed system. After the system is constructed, a "Detail System Plot Plan as Constructed" is submitted to the County that shows how the actual system as installed. The latter materials indicate that the system is composed of two septic tanks, a diverter valve and 1,500 feet of drain field. The place on the form where the system capacity is to be entered has an entry of 450 gallons per day.



While the actual capacity of the proposed use is contested, it is clear that based upon its components it would normally be expected to have a capacity far in excess of 450 gallons per day. The question then becomes whether the 450-gpd entry is an error on the part of the sanitarian who filed out the form or whether it reflects some aspect of the system that limits its capacity to that amount. The greater weight of the evidence in the record supports the first alternative.

The loading rate of the drain field is 150 gallons per 150 lineal feet and the as-built drain field is composed of two 750 lineal foot absorption field cells. This latter conclusion is supported by the dimensions of the absorption trenches provided by the "Detail System Plot Plan as Constructed," by the attached site plan attached to this form, and by an on-the-ground inspection of the system where the size and configuration of the absorption fields were measured and verified by probes.

The opponents suggest that the drain fields may be compromised in some respect and this may be the reason that the capacity of the on-site wastewater treatment system was limited to 450 gallons. They point out that there was no site evaluation done to show that the entry was an error. Implicit is the proposition that because the existing on-site wastewater treatment system was a replacement system, and did not utilize an existing system, the County applied the wrong permitting process. The opponents correctly note that the Authorization Notice employed by Lane County is only appropriate for existing onsite systems that are subject to a change in use, an increase in sewage flow, repair or reconnection. The Authorization Notice process does not require a site evaluation. A construction permit, however, which is required for the installation of a new system, must have a site evaluation report as well as a land use compatibility statement. A site evaluation report must contain observations about slope, soil profiles, useable areas for initial and replacement absorption areas, encumbrances, etc. The opponents argue that if a site evaluation were done it would be possible to determine whether the 450 gallons per day capacity was based upon specific limitations of the subject property or was a scrivener's error.

I must agree with the Opponents that the existence of a site evaluation report would be extremely helpful in unraveling the mystery of the contradictory evidence in the "Detail System Plot Plan as Constructed" form. Whether a site evaluation, consistent with OAR 340-071-0150(3), was never conducted because the permit was treated as an alteration of an existing system or it was and the paperwork has been lost is unclear. The County Sanitarian believes that the former is true and the system was approved as a major alteration of an existing system although the previous owner of the subject property remembers the digging of three test holes, which is a usual precursor to the development of a site evaluation report. The record demonstrates that these rule requirements were in place at the time the existing system was constructed. Despite the lack of a site evaluation report, however, the existing system has been subject to onsite inspections by a septic tank pumping company in January of 2004, by a County sanitarian in November of 2010, and by the applicant's civil engineer in January of 2011. This latter inspection determined that the drop boxes showed no signs of sludge or high water conditions and that there was no evidence of odors of effluent along the absorption field laterals. Collectively, these inspections support a conclusion that the drain fields are in excellent condition and that their capacity has not been compromised.



The conclusion that can be drawn from the results of these inspections is that there is no evidence that would suggest that the loading rate of the applicant's on-site wastewater treatment system was less than 150 gallons per 150 lineal feet of drain field. The only hindrance appears to be the diversion valve that limits the actual capacity of the system to one of the two drain field cells at any one time. The applicant's engineer posits that the diverter valve can be replaced by a two-way splitter valve that will allow simultaneous use of both drain field cells. While the opponents' engineer argues that there is insufficient slope to allow this type of valve to function properly it is common knowledge that, if necessary, pumps can be employed to push effluent or water in directions that it would not naturally flow.

The opponents also point out that had the County processed the construction of the on-site wastewater treatment system as a new system instead of an alteration of an existing system, the County would have had to generate a Land Use Compatibility Statement (LUCS). A LUCS is essentially a statement from the county to the state that the proposed land use (a day care center at the time) was compatible with the Lane County acknowledged Rural Comprehensive Plan. (OAR 340-071-0160(2)(b)) Even if a LUCS was required, its absence seems like harmless error as the day care center/private school received discretionary land use approval from the County in November of 1994.<sup>7</sup>

The opponents point to a 2009 incident where there was a surfacing of sewage in the area of the septic tanks to demonstrate that the applicant's onsite wastewater treatment system is not adequate to handle the anticipated loads. They point specifically to special events held on the subject property where between 40 and 100 people are alleged to have attended. Septic tanks need to be pumped at a frequency that is determined by the amount and type of loading they receive. Apparently, the septic tanks had not been previously pumped. A licensed sewage pumper investigated the problem, determined that the septic tanks needed to be pumped, and did so. The County Sanitation Department was notified but chose not to investigate. There were no indications that any other aspect of the system was experiencing problems and no problems of this nature have occurred since. Nevertheless, the opponents do identify two important issues. First, they raise the issue of how often should a septic tank be pumped given the average daily loading that it experiences. Second, they correctly point out that consideration should be paid to special events when excessive loading of the system may occur. In regard to the first issue, I believe it is prudent to have the tanks investigated annually by a professional licensed to do so and pumped as recommended by that individual. Regarding the second issue, for special events where the number of people on the property are anticipated to generate wastewater flows that exceed the capacity of the onsite wastewater treatment system, system overloading can be addressed by providing portable toilets.<sup>8</sup> The amount of loading can be determined by the number clients and resident staff, at 80 gallons of wastewater per person; the number of nonresident staff during a 24-hour period, at 15 gallons of wastewater per staff person; and the number of visitors, at 5 gallons of wastewater per visitor.<sup>9</sup>

<sup>7</sup> *Application of Marcia Stachowiak (PA 2969-94)*, Lane County Hearings Official (Nov. 4, 1994)

<sup>8</sup> Public Health Division rules [333-039-0025(3)(a)] require one toilet or privy for each 800 persons or fraction thereof, at mass gatherings.

<sup>9</sup> Mr. Smits suggests that visitors be considered to have a similar wastewater loading profile as church attendees under Table 2 of OAR 340-071-0220.

Another issue raised by the opponents has to do with exposure of the existing onsite wastewater treatment system and replacement absorption trenches to damage by vehicles. In specific, the opponents have identified instances where it appears that vehicles have been parked in areas of the existing drain field. I believe that this circumstance can be prevented by the placement of signs and barriers at locations where the access easement and parking areas are relatively close to the primary and replacement absorption trenches.

The opponents also correctly note that the septic tanks are partially located within the 50-foot wide access easement and that there is no information in the record that indicates that the septic tanks are of a type designed to support vehicles. Granted, the tanks are located a foot or so above and out of the driveway surface but nevertheless appear to be inconsistent with the intent of OAR 340-071-0130(8), which requires new systems to be free of encumbrances that could prevent the installation or operation of the system from conforming with Division 71 of DEQ's administrative rules. It appears that the easement was created with a 2001 partitioning, and therefore was not in existence when the county approved the existing onsite wastewater management treatment system. Currently, there is no indication that the septic tanks have been damaged due to their location. The most cost-effective solution to this problem would be to clearly mark the location of the tanks and to widen the driveway's travel surface to the east in that area to provide adequate room for two large vehicles to share the travel lane. The site plans and aerial photographs in the record indicate that adequate room exists to accomplish this task.

Finally, the applicant has warranted that the primary (existing) drain field can be expanded by adding an additional 205 lineal feet of absorption trench in the area between the shed and the septic tanks (Area D1). This would bring the wastewater treatment capacity of the existing drain field system up to 1,705 gallons per day. It should be noted that OAR 340-071-0205(5) allows the agent issuing an Authorization Notice to allow an increase in projected daily sewage flow of up to 300 gallons above the design capacity of the onsite wastewater treatment system. I do not believe that this decision should rely upon this exception as it is discretionary with the authorized sanitation agent and therefore its approval would be speculation.

### System Loading

Of significant concern is the actual amount of effluent loading that will be contributed to the onsite wastewater treatment system. As discussed under Finding of Fact #2, above, DEQ treats rooming houses and boarding houses differently in terms of sewage flow. In the former, DEQ assumes that each person will contribute 80 gallons of wastewater per day, in the latter, 150 gallons per bedroom.<sup>10</sup> The terms "rooming house" and "boarding house" are not defined by DEQ but Webster's Dictionary distinguishes the two on the basis of meals; the former not providing them while the latter does. Meals will be provided at the applicant's group care home and therefore Hanna House most closely approximates a boarding house for purposes of estimating the amount of effluent that it might generate.

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<sup>10</sup> Table 2, OAR 340-071-0220

The existing single-family dwelling has four bedrooms and is 1,914 square feet in size. Some of the bedrooms are occupied by multiple bunk beds. The plan is to enlarge the facility to include 10 bedrooms for clients. This would equate to 1,500 gallons of wastewater per day. However, the group care home also has seven staff, three of which are onsite at night. The applicant states that one staff member will be awake at all times during the night. This suggests there will be at least two additional beds and possibly three. Additional beds do not necessarily result in different system loading unless additional bedrooms are added or if the beds are being used by resident staff. I believe that each resident staff should count as a rooming house resident for purposes of measuring sewage system loading and each additional bedroom should be considered to contribute 150 gpd of wastewater. Thus, the primary drain field capacity would have to be expanded by an additional 80 lineal feet for each permanent resident staff and 150 lineal feet for each bedroom. The proposed replacement drain field would have to be enlarged about 25 lineal feet for each permanent resident staff and about 50 feet for each additional bedroom.

If Hanna House were to be treated as a boarding house, for purposes of establishing sewage effluent loading, then the ten bedrooms would contribute 1,500 gpd of effluent per day. If an additional bedroom was created for the 3 night staff then 1,650 gpd of effluent would be the estimated wastewater contribution. Table 2, OAR 340-071-0220 suggests that workers on shifts (at schools or offices) contribute 15 gallons of effluent per day and therefore the seven Hanna House staff could reasonably be expected to contribute an additional 105 gallons of effluent per day for a total of 1,705 gallons of effluent when Hanna House is at capacity. If an additional bedroom was provided for staff then Table 2 would assume the total effluent loading would be 1,710 gpd.<sup>11</sup>

A more conservative approach would be to treat Hanna House as a rooming house and under this characterization the maximum loading would be 1,705 gallons of sewage effluent per day if there were no resident staff.<sup>12</sup> One resident staff would increase wastewater loading to 1,770 gpd.<sup>13</sup> I believe that the more conservative approach is warranted as the assumptions that caused DEQ to treat sewage effluent flows differently for rooming houses and boarding houses are not known and cannot be used for comparison purposes with Hanna House.

Mr. Smits suggests that "DEQ Table 2 should be used for the purpose of sizing systems to include a minimum safety factor of two." I have found no support for this statement in Division 71 of Chapter 340 of Oregon Administrative Rules<sup>14</sup> nor is there any evidence that it is an industry custom or standard to design onsite wastewater treatment systems at double the anticipated wastewater loading. Indeed, this does not even appear to be the standard employed by Mr. Smits, as he testified that he designed the Shedd onsite wastewater treatment system with two 3,000-gallon septic tanks, a 3,000 gallon dosing tank, and two 1,900 lineal foot absorption trenches.<sup>15</sup> Using DEQ Table 2's estimate of 80 gallons per day per person for a rooming house, the 60-client Shedd facility would require 4,800 lineal feet of drain field (assuming 150 lineal

<sup>11</sup> (150 gpd x 11) + (15 gpd x 4 staff)

<sup>12</sup> (80 gpd x 20 persons) + (15 gpd x 7 staff)

<sup>13</sup> (80 gpd x 21 persons) + (15 gpd x 6 staff)

<sup>14</sup> OAR 340-071-0130(6)

<sup>15</sup> Mr. Smitt's answer to Question 10, Exhibit A to the February 12, 2011 "Neighbors' Response to Teen Challenge Remand Submittals," (Pg. 4)



feet for every 150 gallons of wastewater) without even counting wastewater loading from staff. Not only is this not a doubling of system capacity to meet the DEQ "minimum" wastewater loading estimate but it does not even represent a system capacity necessary to meet DEQ's minimum wastewater loading estimates. It should be noted that under OAR 340-071-0130(19)(b), DEQ may allow variations to its criteria, standards, and technologies based on adequate documentation of successful operation of a proposed technology or design for onsite systems subject to WPCF onsite permits. My point is that without more information, the Shedd facility is not a useful reference point for determining the necessary capacity or wastewater strength of the applicant's onsite wastewater treatment system. Indeed, as the applicant's engineer has pointed out, even wastewater systems that are considered as "commercial" by DEQ, such as a motel or a high school, do not always have to have a WPCF permit.

The opponents argue that the wastes generated by Hanna House will exceed DEQ standards for residential strength wastewater as defined in OAR 340-071-0100(126). This argument has two implications. First, if an onsite wastewater treatment system's septic tank produces more than 2,500 gallons of wastewater per day or a greater than residential strength wastewater it must be constructed and operated under a renewable WPCF permit.<sup>16</sup> The implications to the existing system are that it would be a nonconforming system as Lane County does not have authorization to approve such a permit and therefore it may not operate until such a permit is issued by DEQ. Second, the charge has relevance to the proposed secondary treatment system that is integral to justifying the size of the replacement drain field. The secondary treatment system utilizes an Advantex Textile Treatment System manufactured by Orenco Systems, Inc. This system, which reduces absorption field sizing from 150 lineal feet per 150 gallons to 50 lineal feet per 150 gallons, requires residential strength wastewater to properly operate.

The opponents' speculation about the strength of the wastewater from the group home is again made by analogy to the group care facility for men in Shedd, Oregon.<sup>17</sup> They point out that this facility has 18 beds and 7 staff, similar in size to the Hanna House capacity and is served by a significantly more advanced septic system that is subject to a WPCF permit. Missing is a detailed analysis of comparables between the applicant's facility in Shedd and the group care home on the subject property. What is clear, however, is that an onsite wastewater management treatment system must have a design capacity appropriate to the maximum size of the use that it will be serving. The Shedd facility currently serves 18 clients but Mr. Smits' testimony that the Shedd group home is of similar size is misleading as the ultimate capacity to be served by the Shedd facility is for 60 men plus staff, almost three times that of Hanna House. Sixty clients plus staff will clearly generate an excess of 2,400 gallons of wastewater per day, the loading threshold for requiring a WPCF permit.<sup>18</sup> Further, the Shedd facility is a training center and the record is silent about the type of training that it offers and whether its training practices might contribute a greater than residential strength wastewater to its onsite wastewater treatment system. For these reasons, I cannot conclude that there is sufficient evidence in the record to suspect that the applicant's group care home will produce a greater than residential strength effluent.

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<sup>16</sup> OAR 340-071-0130(15)(b)(A)&(B)

<sup>17</sup> Willamette Valley Training Center

<sup>18</sup> OAR 340-071-0130(15)(b)(A)

### Replacement Absorption Field

The applicant's engineer has provided several site plans (Exhibits A through C) depicting the existing drain field and possible alternative locations for the replacement drain fields. Specifically, these site plans identify Area D1, located between the existing drain fields and the existing septic tanks; Area D2, located to the north of the existing drain fields and south of the access easement; and Area D3, located north of the access easement and northwest of the barn. Area D1 can provide 581 lineal feet of absorption trench and Area D2 can provide 328 lineal feet of absorption trench for a total of 909 lineal feet of replacement drain field. Using the assumption that wastewater loading would be created by 20 residents and 7 staff then the existing drain field would have to be increased by 205 lineal feet. The applicant proposes to appropriate this footage from Area D1, reducing the capacity of that drain field from 581 lineal feet to 376 lineal feet and the combined capacity of Areas D1 and D2 to 704 lineal feet.

Assuming a loading of 1,705 gpd of wastewater, the pressurized sand filtration treatment system proposed to serve the replacement wastewater treatment system would reduce the lineal footage requirements for the replacement drain field to about 570 lineal feet. Areas D1 and D2 would provide more than adequate space to serve the expected wastewater loading from 20 individuals and seven staff occupying Hanna House. My calculations also indicate that Areas D1 and D2 are large enough to support a scenario where Hanna House had one resident staff member. This scenario would anticipate a wastewater loading of 1,770 gpd and the use of an additional 859 lineal feet of absorption trench; 270 lineal feet to be added to the existing drain field and 589 lineal feet for the replacement drain field.

The opponents have alleged that the methodology used to determine the replacement drain field is faulty and does not incorporate or take account of various topographic features. In regard to the first allegation, this does not appear to be the case. In preparation to locating the replacement absorption field(s), the applicant's engineer obtained available surveys and partition maps of the subject property and created a computer model of the boundaries of the subject property, using found and set pins from the most recent partition plat (No. 2001-P1519) to determine the bearings, distance and curve data from that plat. Found monuments along Bailey Hill Road or along the access easement were not used as they were often buried or covered with vegetation and because the method used to create the site plan incorporates their locations. This data was imported into AutoCad, computer-aided design and drafting software. In a similar manner, the centerline of the access easement was determined, using coordinate geometry and AutoCad, starting from Bailey Hill Road and ending at the boundary of Parcel 1 of Partition No. 2001-P1519. Two previous partition plats were reviewed to verify that the latest recorded information was being used.

Next, an aerial photograph showing the property's tax lot lines was imported from Lane County's ARC GIS website. The aerial photograph was scaled to accurately match the calculated property lines and the location of existing structures and the access easement. The existing onsite wastewater treatment system and the boundaries of the new replacement absorption field(s) were located by measuring radially from two or three fixed points (buildings) to accurately establish a common location. As previously noted, the boundaries of the existing absorption trenches were



also manually verified through the insertion of probes. I believe that the methodology followed by the applicant's engineer is solid and its accuracy has been verified by on-site measurements.

The opponents next argue that the property survey is flawed because it does not identify or take into account several factors. First, they state that it does not identify a cut bank in the southwest corner of the property and point out that DEQ regulations require a 50-foot setback from cut banks. In fact, the cut bank runs north 125 feet from the southwest monument along Bailey Hill Road. This feature is completely adjacent to the existing drain field and while the distance between the cut bank and the drain field is slightly less than 50 feet, there is no evidence of surfacing effluent or bank sloughing that would indicate that it has adversely affected the existing absorption trenches in this area. It is also important to point out that it does not affect the design of portion of the replacement drain field in Area D2.

Second, it has been pointed out by the opponents that there is a small shed located up-slope from the existing drain field and within replacement drain field Area D1. It is suggested that the shed housed a wellhead or spigot. An inspection of the shed has determined that this structure was once a chicken coop and there is no evidence of the current or past presence of a wellhead. The structure can therefore be removed without reducing the area available for the replacement absorption trenches in this area.

Another feature not shown on the applicant's site diagrams is a white, PVC hose bib and water line in the field near the west end of the existing drain field that sticks up three feet. The water supply pipe runs across the operating absorption trenches. DEQ requires a separation of 10 feet between absorption trenches and water lines. The opponents express a concern that unless the water source of the spigot is located, there will be a possibility that that source could be contaminated by effluent in the absorption trenches. While the applicant responds that this pipe is no longer in service and can be cut and capped or removed entirely, it is not clear whether this answer adequately responds to the concern of the opponents. An adequate response is that the water line to the spigot be traced back to its source and capped and/or cut at that location. It should be noted that the applicant's site plans do not show the location of the existing well because the well is located well to the east of the portion of the property considered for the replacement drain fields. It is, however, shown on Exhibit S of the opponent's February 14, 2011 submission.

Next, the opponents note that the applicant's site designs do not portray a large tree located in Area D2, located between test pits No. 2 and 3. Their expert opined that "most arborists will advise that the drain field trenches should be placed no closer than the drip line." While this statement may be true, it is unclear whether the arborists are expressing concern over the health of the tree or making a statement about the relationship of the location of a tree's root system in regard to the operation of adjacent absorption trenches. As far as I can determine, DEQ rules are silent about the proximity of trees and absorption trenches. That is, I do not see why two proposed trenches would have to be removed from the design. Even if a tree and its stump would have to be removed and the excavated hole filled, the distribution line carrying the effluent could be constructed so as not to release effluent within the excavated area (no holes in distribution line) but the line could continue through the area to release effluent further on. The loss of lineal feet of treatment area of the absorption trench would be minimal. Indeed, this design may be

wholly unnecessary as DEQ rules allow the use of substitute material for drain media. Also, while the site plan may not depict all of the trees on the western half of the subject property, the applicant's engineer laid out the location of the absorption trenches on the ground to ensure that a practical design was possible. This process considered existing trees and respected the coverage of the canopies of those trees when locating the trenches. Finally, relying upon what appears to be the most recent aerial photograph of the subject property in the record (Opponent's Exhibit S), there does not appear to be a tree located in the area identified by the opponent's expert. The photograph shows one tree within the access easement, to the northeast of the chicken coop; one small tree somewhere in the vicinity of test pit No. 4; and one tree in the middle of the existing drain field.

The opponents have raised a number of issues regarding the potential harm from the treatment of wastewater on the subject property to local water supplies. They have expressed concern that drainage from Area D3 would receive inadequate treatment as it moves through the gully area, through the large pit at the northwest corner of the property, and thereafter through a culvert under Bailey Hill road and into surface waters. While it appears that there is no need to use Area D3 for a replacement absorption field, in the event that it is utilized, there are several conditions of approval that would address the concerns of the opponents. First, the use of this area can be conditioned upon the sanitarian inspecting the absorption trenches in this area prior to their being covered with soil. This would allow the sanitarian to determine whether there were sufficient soils that had regained structure to adequately treat the effluent to DEQ standards or whether DEQ-approved substitute material for drain media could be employed. Second, the applicant's engineer has suggested that a disinfection component could be added in conjunction with any replacement area to kill all harmful bacteria. This option could also be added as a condition of approval.

The opponents also question whether the soils in the replacement absorption field are adequate to treat the amount of wastewater generated by Hanna House. Specifically, they argue that the soils survey done by Mr. Ewing do not represent best practices and that the section of the replacement absorption field located northwest of the barn and north of the access easement will not be able to adequately treat wastewater because it is located within a culvert filled with construction debris.

In regard to Mr. Ewing's soil survey, I am not aware that DEQ rules require "best practices" in soil science be applied when determining the class of soil to be used for an absorption field. Indeed, DEQ classifies soils into three general groups according to texture. Table 4 of OAR 340-071-0220 measures the different soil groups against effective soil depth to determine the minimum length of absorption trench required per 150 gallons of projected daily wastewater. The soils on the subject property that will be occupied by absorption trenches fall within Soil Group C, which may be comprised of silty clay loam, sandy clay, silty clay and clay. Thus, for purposes of establishing the minimum length of an absorption trench under DEQ rules, one need only identify the soil group and its depth. Mr. Ewing's report noted that the soils in the first four test pits were "characterized by reddish brown silty clay loam grading to silty clay soil overlying very highly weathered parent material (saprolite) varying in depth from 27 inches to 37 inches from the surface." As noted above, these soils were classified as Soil Group C, the soil group requiring the largest minimum length of absorption trench required for each 150 gallons of

projected wastewater. Added detail in this report would not have required a different conclusion nor made the report any less accurate.

I share the opponents' concern regarding Mr. Ewing's report concerning the northern replacement absorption field. First, the report describes the soils as consisting of "fairly clean" fill and that the soils has "regained structure." This description does not provide a clue as to the grouping within which the soils would fall although one assumes from his conclusion that it is Soil Group C. It also seems to minimize the importance of the large pieces of asphalt and concrete blocks clearly shown in the photographs of the test pits located in Area D3. Second, Mr. Ewing's conclusion that the area could be used for [a] disposal field "after treatment" is rather enigmatic. I cannot tell whether he is referring to treatment of the soil (removal of large debris?) or to the treatment of the effluent by the alternative treatment technology system.

The applicant's engineer notes that OAR 340-071-0205(5)(a) - (d) allows a change in use of an onsite wastewater treatment system without the consideration of soil or groundwater conditions. However, that disregards the fact that LC 16.290(5)(c) requires affirmative evidence that the subject property has the ability to provide on-site sewage treatment. We know from testimony of the previous owner of the subject property and one of the opponents that a gully that encompasses Area D3 was the recipient of up to 5,000 cubic yards of construction debris from the 1998 widening of Lorane Highway. Some of the fill included very huge rocks as well as large pieces of concrete and asphalt. Photographs of the spoil piles from the test pits in Area D3 show concrete construction debris several feet in diameter.

Test pits are used to generally determine soil texture, depth and relationship to the groundwater table. The locations of the test pits are spread out so that a person can determine if the soils are homogeneous and therefore suitable for the design of absorption trenches, which require a significant commitment of land surface area. I don't believe that they are as useful in predicting how much large construction debris will have to be removed to actually construct a drain field. If a substantial amount of material must be removed to construct a drain field then replacement soils must be provided.

The depth and the amount of large, impermeable construction debris in Area D3 cannot be known until there is an actual attempt to construct the replacement absorption trenches in this area. Under OAR 340-071-0135(1)(b)(C), DEQ may approve alternative drain field products as long as they meet certain performance standards and design criteria. However, there is not enough information in the record to clearly say whether it is feasible to use alternative drain field media in area D3.

In summary, it appears that there is adequate room in Areas D1 and D2 to create a replacement drain field system that will accommodate the anticipated loading from Hanna House.

### **Conclusion**

It is my judgment that the record contains sufficient factual information regarding the wastewater effluent loading from the proposed use (at maximum approved capacity); the capacity of the existing onsite wastewater treatment system, and the ability of the subject property to support an

adequate replacement drain field to conclude that the proposed use will not exceed the carrying capacity of the soils of the subject property and thereby find that the application satisfies the provisions of Lane Code 16.290(5)(c).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Gary Darnielle", is written over a horizontal line.

Gary Darnielle  
Lane County Hearing Official

# LCOG

LANE COUNCIL OF GOVERNMENTS

April 25, 2011

Mr. Kent Howe, Director of Planning  
Lane County Land Management Division  
125 E. 8<sup>th</sup> Ave  
Eugene, OR 97401

Re: *Appeal of Hearings Official decision in the remand of the Teen Challenge (PA 09-5314) request for special use permit to allow a group care home within a rural residential district.*

Dear Mr. Howe:

On April 7, 2011, I issued a decision affirming, on remand, the Teen Challenge's request (PA 09-5314) for a special use permit to allow a group care home within a rural residential district. This decision was appealed by the opponents on April 19, 2011. My review of the appeal does not lead me to believe that a reconsideration is appropriate. Accordingly, on the authority of Lane Code 14.535(1), I affirm my April 7, 2011 decision without further consideration. Please advise the interested parties of this decision.

Sincerely,



Gary Darnielle  
Lane County Hearings Official

cc: Jerry Kendall



LAND MANAGEMENT DIVISION



# APPEAL OF A HEARING'S OFFICIAL DECISION

PUBLIC WORKS DEPARTMENT 125 E 8<sup>th</sup> AVENUE, EUGENE OR 97401

Planning: 682-3807 Building: 682-3823 Sanitation: 682-3754

For Office Use Only: FILE #

CODE:

FEE: \$250

2K

Appellants: Matt and Robbin Freedman and Al and Pat Phillips

Mailing address: 85985 Bailey Hill Road, Eugene, OR 97405 & 85995 Bailey Hill Road, Eugene, OR 97405

Phone: Email: [rfreedman@hotmail.com](mailto:rfreedman@hotmail.com) & [palphillips64@dishmail.net](mailto:palphillips64@dishmail.net)

Signature:

*Robbin Freedman*

Date:

*April 19<sup>th</sup>, 2011*

Appellant's Representative : Michael J. Gelardi

Mailing address: 1300 SW Fifth Ave., Suite 2300, Portland, OR 97201

Phone: 503-241-2300 Email: [michaelgelardi@dwmt.com](mailto:michaelgelardi@dwmt.com)

Signature:

*Michael J. Gelardi*

Date:

*4/19/11*



LOCATION (subject property)

18-04-21

224

Township - Range - Section - Taxlot

Subdivision/partition

lot/parcel

You have one of two appeal options. Your appeal application will be rejected if it does not contain all the required submittals.

## Required Option 1 submittals:

Option 1 (The appellant requests Hearing's Official Reconsideration OR Board of Commissioner Review in a Hearing.)

1. Fee is \$3,812 appeal fee, payable to Lane County. (See the reverse side for important fee information)

2. A copy of the decision being appealed, with the Department file number. File # ~~18-09-5316~~ 2K

3. Indicate the deadline to submit the appeal. (Found in the Hearing Official's Decision) \_\_\_\_\_

4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:

☐ I am the owner or contract purchaser of the subject property;

☐ I am the applicant for the subject application;

☐ Prior to the decision by the Hearings Official, I submitted written testimony into the record

☐ I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision for the reasons explained in my letter.

5. A letter that addresses each of the following three standards:

a. The reason(s) why the decision of the Hearings Official was made in error or why the Hearings Official should reconsider the decision;

BCC ATTACH #2-4p.

- b. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:
- The Hearings Official exceeded his or her authority;
  - The Hearings Official failed to follow the procedure applicable to the matter;
  - The Hearings Official rendered a decision that is unconstitutional;
  - The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.
- c. The Hearings Official should reconsider the decision to allow the submittal for additional evidence not in the record that addresses compliance with the applicable standards or criteria.
6. Any additional information in support of your appeal.

### EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 1

There are 3 steps involved in an appeal of a Hearings Official decision. Each requires a fee for services.

#### Step 1

When the appeal is submitted, the Hearings Official has the option to reconsider the decision (Refer to LC 14.535). If the Hearings Official reconsiders the decision, the fee is \$1,242.

#### Step 2

If the Hearings Official elects not to reconsider the decision, the appeal is forwarded to the Board of County Commissioners. The fee is \$1,584.80. The Board then decides whether or not to hear the appeal (Refer to LC 14.600)

#### Step 3

If the Commissioners elect to hear the appeal, the fee for the Board hearing is \$2,227.20. If the Board does not elect to hear the appeal, the parties of record may appeal the decision to the Land Use Board of Appeals (LUBA). If the Commissioners do not hear the appeal, \$150 of the \$1,534.80 fee (Step 2 above) will be refunded, in addition to the \$2,227.20, for a total refund of \$2,377.20.

#### Explanation of the Appeal Fee Under Option 1

The total due when submitting the appeal is \$3,812. You will get a refund if the Hearings Official reconsiders the decision, or the County Commissioners elect not to hear the appeal.

If the Hearings Official reconsiders the decision, the refund is \$2,570.

If the County Commissioners elect not to hear the appeal, the refund is \$2,377.20.

If the Board elects to hear the appeal, there is no refund.

### Required Option 2 submittals: APPELLANT CHOOSES THIS OPTION

**Option 2;** The appellant requests that the Board not conduct a hearing on the appeal and deem the Hearing's Official decision the final decision of the County. (Note, the Board may still choose to review the appeal pursuant to Lane Code 14.500(2) or the Hearing's Official may still reconsider the decision pursuant to LC 14.535).

1. Fee is a non-refundable \$250 appeal fee, payable to Lane County.
2. A copy of the decision being appealed, with the department file number. File #PA 09-5314.
3. Indicate the deadline to submit the appeal. (*Found in the Hearing Official's Decision*) 4/7/2011
4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:

\_\_\_ I am the owner or contract purchaser of the subject property;

☐ I am the applicant for the subject application;

☒ Prior to the decision by the Hearings Official, I submitted written testimony into the record

☐ I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision.

5. Any additional information in support of your appeal. Please see attached letter.

#### EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 2

LMD Staff will prepare a memorandum (with an Order) for the Board to review the appeal during their regular public meetings as an item under the Public Works section. The parties of record will be notified of the tentative meeting date on which the Board will review the appeal.

There may be no separate discussion of this item. If Board discussion is desired, that item will be considered separately in an Elect to Hear appeal hearing pursuant to Lane Code 14.600.

If the Board approves an Order and elects to not conduct a hearing, the final County land use decision may be appealed to Land Use Board of Appeals.



Suite 2300  
1300 SW Fifth Avenue  
Portland, OR 97201-5630

Michael J. Gelardi  
503.778.5337 tel  
503.778.5299 fax

michaelgelardi@dwt.com

April 19, 2011

Lane County Board of Commissioners  
125 East 8<sup>th</sup> Avenue  
Eugene, OR 97401

Re: Appeal of Hearings Official's Decision in Teen Challenge Remand Application 09-5314

Dear Board of Commissioners:

This firm represents the Freedman and Phillips families (the "Neighbors") in the above-referenced matter. The Neighbors wish to appeal the Hearings Official's decision in this case to the Oregon Land Use Board of Appeals ("LUBA") and request that the Board not conduct a hearing on this appeal. The Neighbors have standing to appeal this case because they appeared both orally and in writing before the Hearings Official and are adversely affected and aggrieved by the Hearings Official's decision.

Simply put, the Neighbors believe that LUBA is the most appropriate body to hear this case at this time. The Hearings Official improperly determined that the soils on the Teen Challenge property can physically accommodate the type and amount of wastewater that would be generated by the proposed group home. This decision creates a hazard to human health and local water quality in violation of LC 16.290(5)(c) and state law. The Hearings Official mischaracterized critical facts, misinterpreted the Lane County Code and state law and made a decision that is not supported by substantial evidence in the record. Moreover, the Hearings Official exceeded his jurisdiction because he effectively approved a septic system that by law can only be approved by the Oregon Department of Environmental Quality. The Neighbors wish to avail themselves of LUBA's particular expertise to establish the legal significance of these errors and to fashion an effective remedy.

All of the issues that the Neighbors intend to raise before LUBA were extensively detailed in the Neighbors' written submissions to the Hearings Official, specifically the Neighbors' Closing Statement of February 14, 2011 and Neighbors' Rebuttal of March 7, 2011.

Thank you for your consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'M. J. Gelardi'.

Michael J. Gelardi  
MJG:bas