



*Protecting Our Natural Heritage  
From the Coast to the Cascades*

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November 16, 2015

Lane County Land Management Division  
Public Works Department  
3050 N Delta Highway  
Eugene, OR 97408

RE: 509- PA1405807- Request to amend the RCP to redesignate land from "Forest Land" to "Marginal Land" and Rezone land from "Impacted Forest Land (F-2)" to "Marginal Land with Site Review (ML/SR)" pursuant LC 16.211(4)(b) and 16.211(8).

These comments are submitted on behalf of:

LandWatch Lane County  
PO Box 5347  
Eugene OR 97405  
and

Robert Emmons  
40093 Little Fall Creek Rd.  
Fall Creek OR

Commissioners:

Landwatch regrets we are unable to attend today's hearing regarding the Kerby request for a rezone/plan amendment to convert approximately 60 acres from F2 to ML.

The area where the subject property is located is designated as Big Game, with the specific designation being Peripheral Big Game. We are concerned about the proliferation of approvals for ML designation on the ability of peripheral big game habitat to continue to provide for the needs of species who have been intruded upon through rural development patterns.

## Discussion Points

### Legal Lot Status

Subject taxlot # 100 is not a legal lot. The applicant's reliance on PA 91-02600 is misplaced for several reasons.

- That planning action was never noticed, so is not a final decision.
- PA91-02600 was a request for a LLV on tl# 103, not tl#100; additionally, that nonbinding decision was in error because it relied only on the 'lack of ' adopted County land division regulations to approve essentially a 4 parcel partition created in violation of state laws; land division laws were in effect statewide by at least the late 1960's; the fact that the County did not adopt code regulations consistent with state law until March 26, 1975, has no bearing because the fact is that state law applied directly in lieu of consistent local code regulations.
- The Findings for PA91-02600 stated:

"At the time of the creation of the subject parcel, there were no applicable land division regulations governing its creation. Lane County did not adopt regulations requiring an approved and recorded partition for the division of two or three parcels until March 26, 1975. -This transaction occurred one month prior to the regulation and is a legal lot."

- In addition, there was an unreviewed PLA between tl#100 and tl#103 in 1991

Subject taxlot #4901 appears to be nothing more than an Easement; both the current deed card description, and the deed card description included in the 1991 planning action (PA91-02600) read exactly the same, and the Easement deed (signed March 19, 1975) notes: "Legal easement from the end of Reynolds Drive to taxlot 4901".

### ESEE Analysis

The subject property, in its entirety, is noted as Peripheral Big Game Range,

- OAR 660-023-0040 establishes the ESEE decision process

#### **660-023-0040**

##### **ESEE Decision Process**

(1) Local governments shall develop a program to achieve Goal 5 for all significant resource sites based on an analysis of the economic, social, environmental, and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use.

This rule describes four steps to be followed in conducting an ESEE analysis, as set out in detail in sections (2) through (5) of this rule.

Local governments are not required to follow these steps sequentially, and some steps anticipate a return to a previous step. However, findings shall demonstrate that requirements under each of the steps have been met, regardless of the sequence followed by the local government. The ESEE

analysis need not be lengthy or complex, but should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected. The steps in the standard ESEE process are as follows:

(2) **Identify conflicting uses.** Local governments shall identify conflicting uses that exist, or could occur, with regard to significant Goal 5 resource sites. To identify these uses, local governments shall examine land uses allowed outright or conditionally within the zones applied to the resource site and in its impact area. Local governments are not required to consider allowed uses that would be unlikely to occur in the impact area because existing permanent uses occupy the site. The following shall also apply in the identification of conflicting uses:

(a) If no uses conflict with a significant resource site, acknowledged policies and land use regulations may be considered sufficient to protect the resource site. The determination that there are no conflicting uses must be based on the applicable zoning rather than ownership of the site. (Therefore, public ownership of a site does not by itself support a conclusion that there are no conflicting uses.)

(b) A local government may determine that one or more significant Goal 5 resource sites are conflicting uses with another significant resource site. The local government shall determine the level of protection for each significant site using the ESEE process and/or the requirements in OAR 660-023-0090 through 660-023-0230 (see OAR 660-023-0020(1)).

(3) Determine the impact area. Local governments shall determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource. The impact area defines the geographic limits within which to conduct an ESEE analysis for the identified significant resource site.

(4) **Analyze the ESEE consequences.** Local governments shall analyze the ESEE consequences that could result from decisions to allow, limit, or prohibit a conflicting use. The analysis may address each of the identified conflicting uses, or it may address a group of similar conflicting uses. A local government may conduct a single analysis for two or more resource sites that are within the same area or that are similarly situated and subject to the same zoning. The local government may establish a matrix of commonly occurring conflicting uses and apply the matrix to particular resource sites in order to facilitate the analysis. A local government may conduct a single analysis for a site containing more than one significant Goal 5 resource. The ESEE analysis must consider any applicable statewide goal or acknowledged plan requirements, including the requirements of Goal 5. The analyses of the ESEE consequences shall be adopted either as part of the plan or as a land use regulation.

(5) **Develop a program** to achieve Goal 5. Local governments shall determine whether to allow, limit, or prohibit identified conflicting uses for significant resource sites. This decision shall be based upon and supported by the ESEE analysis. A decision to prohibit or limit conflicting uses protects a resource site. A decision to allow some or all conflicting uses for a particular site may also be consistent with Goal 5, provided it is supported by the ESEE analysis. **One of the following determinations shall be reached with regard to conflicting uses for a significant resource site:**

(a) A local government may decide that a significant resource site is of such importance compared to the conflicting uses, and the ESEE consequences of allowing the conflicting uses are so detrimental to the resource, that the conflicting uses should be prohibited.

(b) A local government may decide that both the resource site and the conflicting uses are important compared to each other, and, **based on the ESEE analysis, the conflicting uses should be allowed in a limited way that protects the resource site to a desired extent.**

(c) A local government may decide that the conflicting use should be allowed fully, notwithstanding the possible impacts on the resource site. The ESEE analysis must demonstrate that the conflicting use is of sufficient importance relative to the resource site, and must indicate why measures to protect the resource to some extent should not be provided, as per subsection (b) of this section.

It appears to be the case that the Lane County RCP does not comply with Goal 5, as Lane County has not adopted a "program" to achieve Goal 5 compliance for Big Game Habitat. Rather, Lane County allows applicants to write their own ESEE report to justify plan amendments and zone changes that will have the effect of increasing residential densities on resource zoned lands and in resource zoned areas of the County.

However, the RCP has a policy provision that establishes:

"Oregon Department of Fish and Wildlife recommendations on overall residential density for protection of big game **shall (emphasis added)** be used to determine the allowable number of residential units within regions of the County. Any density above that limit **shall** be considered to conflict with Goal 5 and will be allowed only after resolution in accordance with OAR 660-16-000 "Requirements and Application Procedures for Complying with Statewide Goal 5"

The record reflects that ODF&W recommendations for residential density in Peripheral Big Game Habitat areas are no more than one dwelling per 40 acres.

The applicant states "There is ample habitat for big game animals throughout Lane County. Industrial forest land is a large amount of the land base in Lane County."

Whether or not this statement is true, it provides no substantive justification for further intruding into big game habitat as the applicant proposes. Nor is there evidence in the applicant's exhibits that establishes what ample habitat means and what size parcels in what ownerships reflect the remaining "industrial forest land" base in the county.

The applicant goes on to state that "in 1979, the total number of black-tailed deer statewide was estimated at 500,000 animals. Presently, the population estimate is 320,000 animals. **This is likely the result of changing forest management practices rather than as a result of development of the type proposed in this application.** Despite this general population decline there are a large number of deer in the south hills area of Eugene and surrounding environments.

That the population of cougar is stable and/or growing even at a time when human population is larger than ever **suggests that a primary limiting factor in cougar population numbers is human tolerance for cougar.**"

The statement that the reduction in the black-tailed deer population "is likely the result of changing forest management practices rather than as a result of development of the type proposed in this application" is only an assumption, as is the suggestion that "a primary limiting factor in cougar population numbers is human tolerance" Neither of these statements is supported by evidence in the record.

## SOCIAL CONSEQUENCES

The applicants' ESEE analysis claims:

Allowing the residential use would mean that the site would be developed with uses similar in residential density to the Marginal land area to the south and lesser than the developed and committed areas to the north and in the area surrounding the subject property. The proposed density would be consistent with existing densities in the vicinity of the subject property.

*Residential use is already allowed with the current F2 zoning, even with the subject parcel being smaller than the minimum parcel size for the F2 zone. Residential density is higher to the north because that is the location of the Metro Plan boundary, where residential density is expected to be higher than on resource zoned, or even RR zoned lands. The area between the Eugene UGB and the Metro Plan boundary is expected to urbanize.*

*The areas south and east (and to some extent west) of the subject property do not reflect urban densities, and it is not true, as stated by the applicant' ESEE analysis, that "the proposed density would be consistent with existing densities in the vicinity of the subject property."*

### ECONOMIC CONSEQUENCES

The applicants ESSE analysis maintains:

"Allowing the subject property to be developed with residential uses at 20 acres or greater will have short term positive economic consequences in terms of construction activity. **In the longer term, development of the site with up to three residences will increase the property value of the subject property with attendant impacts on tax revenue.**

*This is an unsupported statement. Nothing prohibits ML zoned properties from remaining in forest or farm deferral; in fact, the 4 properties rezoned to marginal that are located south of the subject property, all partitioned into 20 acre parcels (tl#'s: 213, 214, 216, 217) are all receiving forest deferrals, even with dwellings.*

*In addition, what is a "positive economic consequence" as stated by the applicant's ESSE analysis? The statement appears to be a way to get to a benefits analysis, which is not what the ESEE is expected to be.*

Another possible economic consequence is that property owners undertake economic activities in accordance with the purpose statement of the Marginal Lands zone which is intended to allow persons to conduct intensive or part time farm or forest operations on marginally productive lands. **The beneficial impacts are any of those economic activities (farm or forest operations) considered more likely to occur as a result of a marginal lands zoning designation**

*There is no evidence in the record to support the statement that somehow marginal lands zoning contributes more to farm/forest management than does a forest or farm zoning designation.*

Economic impacts as a result of conflict that arises from the proposed zoning to big game range are likely to be nominal, if any. **There is no indication that the proposal would be harmful to local big game animals to the extent that the economic activities supported by these populations, hunting, wildlife viewing, etc. will be impacted in any way.**

*The analysis provides no evidence or justification for the statement that parcelization and residential development will have no negative economic consequences on recreational activities such as hunting and wildlife viewing. There is no analysis of the impact of fencing, traffic, etc.*

Economic losses attributed to conflict with big game animals should be minimal and most likely limited to human economic loss due to browsing activities undertaken by ungulates. These conflicts are readily resolved with minimal economic investments. Other conflicts that could result include losses attributable to predation on domestic livestock by cougar or economic loss due to predation by black bear or loss attributable to bear foraging activities that strip trees of their bark.

The subject property is adjacent to areas to the north that are developed with rural residential uses. To the south there are additional exception areas as well as Marginal Lands. Much of the surrounding area is in resource use. Please see attached Exhibit 2, Zoning Map which shows zoning in the broader area. There is no indication that the approval of up to three additional residences on the subject property will have any deleterious economic impact on surrounding resource extraction/ utilization activities.

*To assert that 'people and their activities' will be the victims of economic loss because the habitat they are intruding into will result in big game populations having to forage on domestic crops and livestock, but that with "minimal economic investment" (meaning possibly use of herbicides, fences, structures for livestock, etc.) peoples investments will be protected, is not what the ESEE economic analysis expects. If people move into another species habitat, it's at their own risk; to say an economic consequence of this proposal is that humans will have to protect their assets is irrelevant for purposes of the economic consequences analysis.*

**Prohibiting the use will have an adverse economic impact on the property owner, David Kerby.** Mr. Kerby is an area resident who owns a dry walling company. This property is an important portion of his assets that have been acquired over a lifetime. The subject property otherwise meets the statutory requirements for a Marginal Lands application (Poor agricultural soils, poor timber productivity, not managed as part of a farm or forest operation). Denial of this application based on a Peripheral big game classification will adversely and impact Mr. Kerby, his dependents, heirs and assigns by diminishing the value of his assets.

*The subject property does not require a rezone in order to site a dwelling, and a property owners economic situation as a result of having one rather than three dwellings is not relevant for purposes of the economic consequences analysis. Mr. Kerby inherited F2 zoned property that was located in a Peripheral Big Game Habitat area, so there should have been no expectation that more than one dwelling could be approved for that property. The rezone proposal is more of an opportunistic approach, and there is no evidence that Kerby ever tried to get approval for a forest template dwelling.*

One final potential economic effect of prohibiting the proposed use is the **potentially chilling effect that denial of this application based on impacts to Big Game Range may have on future Marginal Lands applications.** The economic benefits of approval this application clearly outweigh any **immeasurable economic consequences that could result from approval.** The economic portion of this ESEE analysis supports approval of the use.

*Lane County is the only county, statewide, that even allows rezoning to ML; the reason may be that ML zoning is a loophole that allows productive farm and forest land to retain their farm/forest property tax deferral status even with parcelization and development of dwellings. There is no beneficial reason provided, with evidence, of why ML zoning is so important to Lane County.*

## ENVIRONMENTAL CONSEQUENCES

*There is no evidence in the record to support the applicants assumptions regarding lack of environmental consequences as a result of approval for 3 dwellings in this resource zoned area of the County:*

Deer likely utilize the subject property browsing on vegetation and retreating into the forest canopy when feeling threatened. Development at the proposed density will not likely much alter this pattern.

*The applicant asserts, without eviidence, that because black tailed deer are abundant in and around the urban fringe, more development of the type found around the urban fringe (albeit rural development outside the UGB) will have no effect.*

The evidence also suggests that deer often utilize forage resources that are supported by human irrigation activities in residential areas both suburban and rural and that these activities may increase the amount of forage available for deer.

*To assert that human populations and their related activities provide support for deer is backwards thinking; human populations and their activities force big game to compensate for the intrusions into their natural habitat and food/water sources, and the subsequent reduction/losses of these resources; compensating means learning to rely on what humans provide, rather than what nature provides.*

. . . our relatively primitive analysis (Wisdom Analysis) indicated that there is adequate cover and forage in the vicinity of the subject property for Elk **if one disregards existing limiting factors such housing development and the extensive transportation infrastructure.**

*Lacking an analysis which does NOT disregard the relevant limiting factors*

Almost all of the open area in the analysis areas is within 100 yards of cover which is the forage area most utilized by Elk. Cover quality and availability and forage also appear adequate based on our analysis; please note though that these are the variables that we are unable to effectively analyze.

*What are now open areas are likely to be developed not only with dwellings, but with other structures, often referred to as accessory structures; it also possible that human uses such as illegal commercial events, extensive clearing, addition of impervious surfaces, etc. will have a negative domino effect on the availability of open areas in the future if this proposal is approved.*

The assumption that this habitat is not critically important was in view generally confirmed by the applicant's discussions with local ODFW biologist Brian Woofer who stated via verbal communication that there is a herd of Elk in the Crow area and that this herd is primarily observed in the Crow Rd area in the edges of agricultural field near forested areas.

*What does generally confirmed mean? And verbal communications are not evidence. And the fact that there could be a herd of Elk in the Crow area, and that it is primarily observed in the Crow Rd area, does not provide support for the applicant's position that Elk habitat does not necessarily need protection from development.*

Population density is not the primary limiting factor for Elk in Oregon. The environmental consequences of this proposal on Elk are absolutely minimal and should have no serious or detrimental effect on regional elk populations.

*Population density is not the only issue - the related human activities and developments and uses associated with parcelization and proliferation of development activities has not been addressed in the context of the environmental consequences of a potential partition of 3 parcels on big game habitat.*

As this proposal is not expected to have any appreciable impact on big game populations it will not have any impact on cougar populations.

*This statement is not supported by evidence in the record, but rather is a summary statement based on the applicants assumptions and assertions in support of their proposal.*

### Conclusion

For the reasons noted above, it has not been demonstrated that the applicant's ESEE analysis supports the plan amendment/rezone request.

It is also relevant that subject property tl# 100 was not lawfully created.

Respectfully submitted,

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

Robert Emmons, President