

W. S. A.

**AGENDA COVER MEMO**

**DATE:** March 11, 2011 (Date of Memo)  
April 6, 2011 (Date of Meeting)

**TO:** Lane County Board of Commissioners

**DEPARTMENT:** Public Works Department/Land Management Division

**PRESENTED BY:** Sarah Wilkinson, Planner

**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 Reversing the Planning Director's Denial of a Riparian Modification (Dept. File PA 10-5248)

**I. MOTION**

Motions for the Board of Commissioners:

Option 1. Move to approve the attached order, electing to not hear arguments on the appeal, affirm and adopt the Lane County Hearings Official decision dated February 16, 2011, as the County's final decision, and expressly agree with and adopt the interpretations of the Lane County Rural Comprehensive Plan policies, implementing ordinances, and State Law made by the Hearings Official in the decision.

Option 2. Move to approve the attached order, electing to not hear arguments on the appeal and to remain silent on the Hearings Official's decision and interpretations; or

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 has been filed, contesting a Hearings Official's decision modifying, in part, and reversing, in part, a Planning Director's denial of an application for a riparian modification to allow two existing storage sheds and attached decks within the Riparian Setback Area pursuant to Lane Code 16.253(3). The appellant filed the appeal pursuant to Lane Code 14.515(3)(f)(ii) and requested the Board not to conduct a hearing on the appeal and to deem the Hearings Official's decision as the final decision of the County. Pursuant to Lane Code 14.600, the Board must decide whether or not to hear the appeal by applying the criteria set forth in Lane Code 14.600(3).

### **III. DISCUSSION**

#### **A. Background**

1. The subject property 0.6 acres in size and is identified as Tax Lot No. 603 on Lane County Tax Assessor's Map 16-07-18-41. The property is designated Residential (R) in the Lane County Rural Comprehensive Plan, is zoned Rural Residential (RR-2, RCP) and is within the Floodplain Combining Zone (/FP, RCP).
2. On March 29, 2010, the applicant submitted to Lane County Land Management an application to request Planning Director approval of a riparian modification to allow two existing storage sheds and attached decks within the Riparian Setback Area pursuant to Lane Code 16.253(3).
3. On October 21, 2010, the Planning Director denied the application.
4. On November 2, 2010, the applicant submitted a timely appeal of the Planning Director's decision. The Director reviewed and accepted the appeal, affirmed his original decision and scheduled the appeal for a de novo hearing before the Hearings Official.
5. On December 9, 2010, a de novo hearing was held before the Hearings Official. The record was held open until February 11, 2011, to allow for additional submittals into the record.
6. On February 16, 2011, the Hearings Official issued a decision modifying, in part, and reversing, in part, the Planning Director's denial of the application.
7. On February 28, 2011, the applicant submitted a timely appeal of the Hearings Official's decision.
8. On March 3, 2011, the Hearings Official reviewed the appeal and affirmed his decision of February 16, 2011.

#### **B. Character of Appeal**

The subject property is developed with two storage sheds and attached decks located entirely within the Riparian Setback Area, the area between a line 50 feet above and parallel to the ordinary high water of Triangle Lake, a Class I stream. The storage sheds and decks were constructed without permits and are the subject of Compliance Action No. 07-0261. The applicant applied for a riparian modification, pursuant to Lane Code 16.253(3), to allow the two existing storage sheds and attached decks within the Riparian Setback Area. The Planning Director denied the request for a riparian modification on the basis that the legal lot status of the subject property had not been proven. The applicant appealed the Planning Director's decision to the Hearings Official.

The Hearings Official modified, in part, and reversed, in part, the Planning Director's denial of the request for a riparian modification. In the first part of his decision, the Hearings Official modified the Planning Director's decision. The sole reason for the denial was the determination that the legal lot status of the subject property had not been proven. On appeal, additional evidence was submitted to the Hearings Official that resolved the legal lot issue in favor of the applicant. In the second part of his decision, the Hearings Official reversed the Planning Director's denial and granted approval of a riparian modification to those portions of the existing structures that are determined to have nonconforming use

status. The Hearings Official required, as a condition of approval, the applicant to obtain a Verification of Nonconforming Use special use permit, pursuant to Lane Code 16.251.

The applicant appealed the Hearings Official's decision. The applicant's representative claims the Hearings Official exceeded his jurisdiction and misinterpreted the Lane Code, State Law and other applicable criteria. More specifically, the Hearings Official erred by improperly conditioning the approval by requiring a Verification of a Nonconforming Use special use permit; making a decision that does not address the applicant's issues; and improperly interpreting and applying Lane Code 16.253(2) and (3).

Lane Code (LC) 14.515(3)(f) provides for two appeal options. The Applicant 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 applicant chose the second option (LC 14.515(3)(f)(ii)), and paid the associated fee of \$250. The appellant requests the Board not hear the appeal, thus enabling the applicant to subsequently appeal to the Land Use Board of Appeals (LUBA). The appellant's representative states that requesting a full appeal to the Board would cost \$3,812 in an appeal fee. The applicant would incur additional costs in the form of attorney fees to proceed through the appeal process. The appellant's representative states that it is more efficient and cost effective to instead apply the applicant's resources to an appeal to LUBA. The appellant's representative believes LUBA will strike the condition requiring a Verification of a Nonconforming Use special use permit.

### **C. Elective Board Review Procedure**

The Elective Board Review Procedure in Lane Code (LC) 14.600(2)(c) and (d) provides the Board with three options:

- To hear the appeal on-the-record,
- To not hear arguments on the appeal and to remain silent on the Hearings Official's decision, or
- To not hear arguments on the appeal, affirm the Hearings Official's decision and expressly agree with any interpretations of the Lane County Rural Comprehensive Plan policies, implementing ordinances, or State Law made by the Hearings Official in the decision being appealed.

The applicable subsections of LC 14.600(2) are:

***LC14.600(2)(c) The Board shall specify whether or not the decision of the Board is to have a hearing on the record for the appeal and shall include findings addressing the decision criteria in LC 14.600(3) below. If the Board's decision is to have a hearing on the record for the appeal, the Board order shall also specify the tentative date for the hearing on the record for the appeal and shall specify the parties who qualify to participate in the hearing on the record for the appeal.***

***LC14.600(2)(d) If the decision of the Board is to not have a hearing, the Board order shall specify whether or not the Board expressly agrees with or is silent regarding any interpretations of the***

*comprehensive plan policies or implementing ordinances made by the Hearings Official in the decision being appealed. The Board order shall affirm the Hearings Official decision.*

In order for the Board to hear the appeal, the Decision Criteria of LC 14.600(3) requires that one or more of the four criteria cited below, be satisfied:

*(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.*

#### Analysis of Elect-to-Hear Criteria

In regard to the "time constraints" referred to in LC 14.600(3), ORS 215.427(1) requires that a decision be reached within 150 days of the application being deemed complete. On March 29, 2010, the applicant submitted PA 10-5248. On September 23, 2010, at the applicant's request, staff deemed the application complete. No timeline waivers were received. Thus, 195 days have passed from September 23, 2010 to April 6, 2011. Per LC 14.600(3), the Board is advised that it cannot reach a final decision on PA 10-5248 within the time constraints of ORS 215.427(1).

Each provision of Lane Code 14.600(3)(a)-(d) is presented below with the Director's analysis:

- a. *The issue is of Countywide significance.*

The appeal involves a set of circumstances and a fact pattern particular to the subject property. While the appeal raises issues concerning interpretation of Lane Code 16.253(2) and (3), the issues raised in the appeal are adequately dealt with in the Hearings Official's decision of February 16, 2011, which was affirmed by the Hearings Official letter dated March 3, 2011.

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

The appeal involves a set of circumstances and a fact pattern particular to the subject property. The requested riparian modification is to allow two existing storage sheds and attached decks within the Riparian Setback Area. The storage sheds and decks were constructed without permits and are the subject of Compliance Action No. 07-0261. The issues raised in this appeal do not occur with frequency and there is no need for policy guidance.

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

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

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

The Planning Director and Hearings Official do not recommend review of the appeal.

#### **D. Options**

Option 1. Move to approve the attached order, electing to not hear arguments on the appeal, affirm and adopt the Lane County Hearings Official decision dated February 16, 2011, as the County's final decision, and expressly agree with and adopt the interpretations of the Lane County Rural Comprehensive Plan policies, implementing ordinances, and State Law made by the Hearings Official in the decision.

Option 2. Move to approve the attached order, electing to not hear arguments on the appeal and to remain silent on the Hearings Official's decision and interpretations; or

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 LC 14.400.

#### **E. Recommendation**

Option 1 is recommended by the Planning Director.

#### **IV. IMPLEMENTATION/FOLLOW-UP**

Notify the parties to the appeal of the Board's decision to adopt the attached Order, electing not to conduct an on the record appeal hearing, or

If the Board elects to hear the appeal, direct staff to return with an order electing to hear the appeal pursuant to LC 14.400.

#### **V. ATTACHMENTS**

1. Board Order Electing Not to Hear the Appeal
2. Hearing's Official Decision (d. February 16, 2011); Affirmation of Decision (d. March 3, 2011)
3. Appeal of Hearings Official Decision (d. February 16, 2011)
4. Vicinity Map of Subject Property
5. Site Plan of Subject Property.

The entire file record is available for review at the LMD. If an on-the-record appeal hearing is scheduled, a complete copy of the record with all evidence will be made available to the Board as part of the staff generated agenda packet.

BEFORE 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  
 ) Reversing the Planning Director's Denial of a Riparian  
 ) Modification (Dept. File PA 10-5248)

WHEREAS, the Lane County Hearings Official has made a decision, reversing the Planning Director and approving a riparian modification, application PA 10-5248; 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 Lane Code 14.515 and 14.520; and

WHEREAS, the Lane County Hearings Official has affirmed his decision on application PA 10-5248 pursuant to Lane Code 14.535; 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 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 February 16, 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 Lane County Rural Comprehensive Plan policies, implementing ordinances, or State Law made by the Hearings Official in the decision.

ADOPTED this \_\_\_\_\_ day of April, 2011

3-21-11  
[Signature]

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

### FINDINGS IN SUPPORT OF THE ORDER

1. The subject property 0.6 acres in size and is identified as Tax Lot No. 603 on Lane County Tax Assessor's Map 16-07-18-41. The property is designated Residential (R) in the Lane County Rural Comprehensive Plan, is zoned Rural Residential (RR-2, RCP) and is within the Floodplain Combining Zone (/FP, RCP).
2. On March 29, 2010, the applicant submitted to Lane County Land Management an application to request Planning Director approval of a riparian modification to allow two existing storage sheds and attached decks within the Riparian Setback Area pursuant to Lane Code 16.253(3).
3. On October 21, 2010, the Planning Director denied the application.
4. On November 2, 2010, the applicant submitted a timely appeal of the Planning Director's decision. The Director reviewed and accepted the appeal, affirmed his original decision and scheduled the appeal for a de novo hearing before the Hearings Official.
5. On December 9, 2010, a de novo hearing was held before the Hearings Official. The record was held open until February 11, 2011, to allow for additional submittals into the record.
6. On February 16, 2011, the Hearings Official issued a decision modifying, in part, and reversing, in part, the Planning Director's denial of the application.
7. On February 28, 2011, the applicant submitted a timely appeal of the Hearings Official's decision.
8. On March 3, 2011, the Hearings Official reviewed the appeal and affirmed his decision of February 16, 2011.
9. The appeal states that the Hearings Official exceeded his authority, and misinterpreted and misapplied the Lane Code, State Law and other applicable criteria.
10. 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.
11. The Board cannot reach a final decision within the time constraints of ORS 215.427(1).
12. The appeal involves a set of circumstances and a fact pattern particular to the subject property. While the appeal raises issues concerning interpretation of Lane Code 16.253(2) and (3), the

issues raised in the appeal are adequately dealt with in the Hearings Official's decision of February 16, 2011, which was affirmed by the Hearings Official letter dated March 3, 2011.

13. The appeal involves a set of circumstances and a fact pattern particular to the subject property. The requested riparian modification is to allow two existing storage sheds and attached decks within the Riparian Setback Area. The storage sheds and decks were constructed without permits and are the subject of Compliance Action No. 07-0261. The issues raised in this appeal do not occur with frequency and there is no need for policy guidance.
14. The Board of Commissioners finds that the subject property is a 0.6-acre developed residential parcel that is not a unique environmental resource.
15. The Planning Director and Hearings Official do not recommend review of the appeal.
16. 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.
17. The Board has reviewed this matter at its meeting of April 6, 2011, and finds that the appeal does not comply with the criteria of Lane Code Chapter 14.600(3), and elects to not hold an on-the-record hearing.
18. The Board affirms and adopts the Hearings Officials decision of February 16, 2011, as the County's final decision in this matter, and expressly agrees with and adopts the interpretations of the Lane County Rural Comprehensive Plan policies, implementing ordinances, or State Law made by the Hearings Official in the decision.



**LANE COUNTY HEARINGS OFFICIAL  
APPEAL OF A PLANNING DIRECTOR DENIAL OF A REQUEST FOR A RIPARIAN  
MODIFICATION TO ALLOW TWO EXISTING STORAGE SHEDS AND ATTACHED  
DECKS WITHIN THE RIPARIAN SETBACK AREA OF THE RURAL RESIDENTIAL  
DISTRICT**

**Application Summary**

Helen Hickerson, Hwy 36, Blachly, OR. The applicant requests a riparian modification, pursuant to LC 16.253(3), to allow two existing storage sheds and attached decks within the Riparian Setback Area within the Rural Residential Zone (RR-2/RCP).

**Parties of Record**

Helen Hickerson

Kim O'Dea

**Application History**

Hearing Dates:       December 9, 2010  
                              (Record Held Open Until February 11, 2011)

Decision Date:       February 16, 2011

**Appeal Deadline**

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

**Statement of Criteria**

LC 16.253(3)  
LC 16.290(7)(d) &(e)

**Findings of Fact**

1. The property subject to this application, hereinafter referred to as the "subject property," is located on Hwy 36, near Blachly, Oregon. The subject property is 0.6 acres in size (2,613.6 square feet) and can be identified as tax lot 603, assessor's map 16-07-18-41. It zoned RR-2/RCP and is occupied by a two storage sheds and attached decks. Storage

shed #2 is 12'x16' and storage shed #3 is '12x14'. Total area of sheds and decks is about 875 square feet (37'x25'). Tax lot 604, adjacent to the west, is occupied by a 250 square foot cabin and two tent platforms (12' x 14' and 10' x 12'). The total space occupied by structures on tax lot 604 is 538 square feet.

The cabin (w/ deck) and shed (w/ deck) on tax lot 604 have 24 feet and 15 feet, respectively, of lineal frontage within the riparian setback area. The two sheds (w/ decks) have a combined 25 feet of lineal frontage. Total structure frontage within the tract is 64 feet.

The structures on the subject property are located entirely within the Riparian Setback Area, the area between a line 50 feet above and parallel to the ordinary high water of Triangle Lake, a Class I stream. The storage sheds and decks were constructed without building permits and are the subject of Compliance Action No. 07-0261. The subject property (tax lot 603) is located adjacent to tax lot 604, a parcel owned by the applicant and which has legal lot status.

The North Shore Park Subdivision was created in 1971. On June 5, 1972 W. and V. Marshall conveyed Lot 3 of North Shore Park Subdivision to Wallace and Helen Hickerson. On March 30, 1973, W. and V. Marshall conveyed the western ½ of Lot 2 (tax lot 603) of the North Shore Park Subdivision to Wallace and Helen Hickerson. On the same day, W. and V. Marshall conveyed the eastern ½ of Lot 2 (tax lot 615) to Daniel and Judith Walker. Tax lot 615 is about 0.07 acres in size. At the time of the March 30, 1973 conveyance, W. and V. Marshall also owned adjacent Lot 1 in the North Shore Park Subdivision.

2. On September 27, 2010, a Referral Notice and Opportunity to Comment was sent to Oregon Department of Fish and Wildlife. As of October 18, 2010, no response was received.
3. The subject property has 2,350 square feet of riparian setback area and has frontage of about 47 feet along Triangle Lake, a Class 1 stream. Tax lot 604 has 100 feet of frontage along Triangle Lake and 5,000 square feet of riparian setback area. The subject property is a part of a tract (tax lot 604 and 603) that has a frontage of 147 feet on Triangle Lake. The tract is occupied by 1413 square feet of structures.
4. The subject property is not located between the Eugene-Springfield Metropolitan Area General Plan Boundary or the Eugene and Springfield Urban Growth Boundaries.
5. The Hearings Official has taken official notice of Lane County Ordinance No. 4-63, adopted April 2, 1962. Section III.G.4.b. of this ordinance allowed either property line adjustments ("an exchange of land between owners of abutting property") and the division of one lot within a recorded subdivision provided that the resulting tract was not less than 6,000 square feet in size and met other dimensional standards. As it turns out, this ordinance was not germane as it had been modified several times subsequent to its enactment. At the time of the March 30, 1973 division of Lot 2 of the North Shore Park

Subdivision, Lane County's land division regulations had been codified into Chapter 13 of the Lane Code (LC). (Ordinance No. 14-72, adopted August 11, 1972)

Lane County Ordinance No. 14-72, as it existed in 1972, also excepted from the definition of "subdivision" property line adjustments ("an exchange of land between owners of abutting property") or where there was the division of one lot in a recorded plat that added land to one or more adjacent lots in the plat. Under the latter category of exception, the resulting tract had to conform to the dimensional requirements of LC 13.080(1)(a). The maximum minimum lot size allowed under LC 13.080(1)(a) was 6,000 square feet and that was only when a site was served by a public sewer.

### **Decision**

THE PLANNING DIRECTOR'S DENIAL OF THE HICKERSON REQUEST (PA 10-5248) FOR A RIPARIAN MODIFICATION IS MODIFIED, IN PART, AND REVERSED, IN PART.

The Planning Director's decision is modified because the sole reason for denial was the determination that the legal lot status of tax lot 603 had not been proven. On appeal, additional evidence was submitted to the Hearings Official that resolved this issue in favor of the applicant. Tax lot 603 has legal lot status by virtue of being part of a tract that is composed of tax lots 603 and 604 and which obtained this status in 1973.

The broader question is whether the standards for a riparian setback modification have been met. The record supports a conclusion that the precursors to the sheds, the tent platforms, had at one time nonconforming use status as they pre-existed zoning regulations and, more particularly, the riparian setback regulations. It is unclear whether the change, increase or alteration of those structures to add walls, roofing and decking has the same status. The second part of this decision is to reverse the Planning Director's denial and to grant riparian setback modification approval to those portions of the two sheds that are determined to have nonconforming use status after having undergone a verification process provided by LC 16.251. The process must not only verify the nonconforming use status of the tent platforms but also determine whether there has been a change or increase of the use or an impermissible alteration of that use. This conditional approval shall be valid for two years following the date that this decision becomes final.

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

The subject property is zoned R-2 Rural Residential and, pursuant to LC 16.253(2), is subject to the riparian regulations of LC 16.290(7)(d), that provide:

- (d) ***Riparian Setback Area.*** Except for property located between the Eugene-Springfield Metropolitan Area General Plan Boundary and the Eugene and Springfield Urban Growth Boundaries, where setbacks are provided for in LC 16.253(6), the riparian setback area shall be the area between a line 50 feet above and parallel to the ordinary high water of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 50 feet from the ordinary high water of a Class I stream designated for riparian

*vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) or LC 16.253(6), as applicable, are met.*

All development on tax lot 603 and tax lot 604 is located entirely within the riparian setback area. Therefore, a modification to the setback standards is required

LC 16.253(2) provides:

- (2) ***Removal of Vegetation Within the Riparian Setback Area.** The following standards shall apply to the maintenance, removal, destruction and replacement of indigenous vegetation within the riparian setback area along Class I streams designated for riparian vegetation protection by the Rural Comprehensive Plan. For purposes of LC 16.253(2)(b)(i) and (iii) below, Resource Zones shall be: LC 16.210 (F-1); LC 16.211 (F-2); LC 16.212 (EFU); LC 16.213 (NR); LC 16.214 (ML); LC 16.215 (PR); LC 16.216 (QM); LC 16.227 (IWC); and LC 16.232 (DR). For purposes of LC 16.253(2)(b)(i) and (iii) below, Nonresource Zones shall be: LC 16.219 (PF); LC 16.220 (C-1); LC 16.221 (C-2); LC 16.222 (C-3); LC 16.223 (C-R); LC 16.224 (M-1); LC 16.225 (M-2); LC 16.226 (M-3); LC 16.229 (RA); LC 16.230 (RG); LC 16.231 (RR); LC 16.290 (RR); LC 16.291 (RC); LC 16.292 (RI); LC 16.294 (RPF); and LC 16.295 (RPR).*
- (a) *A minimum of seventy-five percent (75%) of the total area within the riparian setback area of any legal lot shall remain in an unaltered, indigenous state except as provided in LC 16.253(2)(b)(i) and LC 16.253(5)(b) below; and*

The applicant argues that LC 16.253(2) is poorly drafted and its reference to legal lots implies that the application of this provision must be limited to legal lots. While I agree that it is imprecisely drafted, there is nothing in LC 16.253(2) to suggest that illegal lots are given a pass on legislation designed to implement Goal 5 Flora and Fauna policies and the Goal 6 Water Resources policies of the Lane County Rural Comprehensive Plan.<sup>1</sup> LC 16.253(2)(d), for instance, lists exceptions to the setback removal standards of LC 16.253(2) &(3). One would imagine that if there were a legislative intent to exempt illegal lots from the riparian setback standards that provision would be placed in this list. It is not. Further, such a policy would seem to be inconsistent with LC 16.005(1) that states “A Development May Be Used Only For a Lawful Use. A lawful use is a use that is not prohibited by law or which is nonconforming pursuant to LC 16.251 below of this chapter.” I believe it more reasonable to interpret LC 16.253(2) to mean that one cannot apply for a modification to the riparian setback removal standards for an illegal lot.

The issue raised by the applicant does not appear to be relevant, however, since I have determined that the subject property is a legal lot by virtue of its being part

<sup>1</sup> LC 16.253(1) lists conformance with these standards as the purpose of the Riparian Regulations.

of a tract that includes tax lot 604, a parcel that has legal lot status. The relevant Lane County regulation is Ordinance No. 14-72. Under this ordinance, the division of one lot in a recorded plat that added land to one or more adjacent lots in the plat was legal without County approval so long as there was no resulting tract that did not meet the dimensional requirements of LC 13.080(1)(a). The most liberal standard of LC 13.080(1)(a) was 6,000 square feet. While the addition of the transferred property did not result in the receiving tracts exceeding 6,000 square feet, it was the practice of the County to allow this type of conveyance where the end result was that the receiving tracts were less nonconforming than prior to the transfer and where a substandard lot was made more substandard. The subject property therefore has legal lot status by virtue of being part of a tract that includes tax lot 604 and this application is thus subject to a review under LC 16.253(2).

In regard to the merits of the application vis à vis this approval criterion, the two storage sheds on the subject property, which are 12' x 16' and 12' x 14', respectively, have a total area (including decks) of about 875 square feet. Tax lot 604 is occupied by three structures that collectively cover 538 square feet. Tax lots 603 and 604, combined, are subject to 7,350 square feet of the riparian setback area and therefore the 1413 square feet of structures represent a little more than 19 percent of the tax lot's area.

The record contains uncontroverted testimony that the portion of the riparian area that is unoccupied by structures has not been modified subsequent to the effective date of LC 16.253.<sup>2</sup> Therefore, the application meets the standard of LC 16.253(2)(a) as 81 percent of the total area within the riparian setback area remains in the unaltered, indigenous state that existed on November 12, 1992, when LC 16.253 (Ordinance 10-92) became effective.

**(b) *Removal of existing vegetation from within the riparian setback area of any legal lot shall not exceed the shoreline linear frontage and square footage limitations calculated as follows:***

- (i) *The maximum allowable removal for any legal lot having frontage of 200 feet or less in length along a Class I stream shall not exceed 50 linear feet along the shoreline and an area not greater than 2,500 square feet within the riparian setback area of a Nonresource Zone, or 5,000 square feet within the riparian setback area of a Resource Zone.***

As noted above, the subject property is part of a legal lot (tract) that is comprised of tax lots 604 and 603 and is located within a nonresource zone. Combined, these two tax lots have less than 200 feet of frontage on Triangle Lake and therefore LC 16.253(2)(b)(i) is applicable.

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<sup>2</sup> LC 16.253 was adopted through Lane County Ordinance No. 10-92, enacted October 13, 1992 and effective November 12, 1992.

The structures located on the tract have a combined frontage of 64 lineal feet and an area of 1,413 square feet within the riparian setback area. The existing structures on the tract do not meet the lineal footage standard of LC 16.253(2)(b)(i).

The applicant has argued that the construction of the structures preceded the effective date of LC 16.253. This would be a persuasive argument if the nonconforming use status of all of the structures has been verified. This is not the case, however, as only the cabin and shed located on tax lot 604 have been accorded this status.

While it is possible that the platforms that form the base of the two sheds on tax lot 603 are nonconforming, given the zoning that may have existed when they were created, it remains to be seen whether the same conclusion can be made regarding the walls and decking surrounding them. The shed platforms were either legal nonconforming uses or illegal uses/structures. If the latter, they cannot be granted a riparian modification. If the shed platforms are verified as being nonconforming, then the question is whether the subsequent addition of walls and decking were permissible alterations of that status.

Assuming, for arguments sake, that the structures on tax lot 603, or portions thereof, are nonconforming then a modification to the riparian setback standards may be possible.

LC 16.253(3) provides:

***Modifications. A modification to the applicable riparian setback standard for a structure may be allowed provided the Oregon Department of Fish and Wildlife (hereafter ODF&W) is consulted by the Planning Director at least 10 working days prior to the initial permit decision and an application for a modification to the setback standard has been submitted pursuant to LC 14.050 and approved by the Planning Director pursuant to the requirements of LC 14.100 with findings of compliance addressing the following criteria:***

The first part of this criterion has been met as the ODFW was notified through a referral notice mailed September 27, 2010.

- (a) The location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2) above. For purposes of LC 16.253, altered means to eliminate, significantly reduce or interrupt the natural growth cycle of indigenous vegetation by removal or destruction of the vegetation caused by a person; and***
- (b) The riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. This determination shall include***

*consideration of any evidence of riparian vegetation existing prior to any removal of indigenous vegetation before or during the application review period; or*

The applicant argues that LC 16.253(2) & (3) are contradictory in the sense that if you can't meet the standards of LC 16.253(2) then you request a modification under LC 16.253(3) but (3)(a), in turn, requires you to meet the standards of LC 16.253(2).

While the language of LC 16.253(3) could be much clearer, I believe that the applicant chooses to ascribe the most confusing interpretation to its text. Accordingly, I believe that the riparian setback standards should be viewed in this manner:

- The RR-2 zoning district (LC 16.290(7)(d)) requires a setback of 50 feet between structures and Class I streams. Triangle Lake is classified as Class I stream.
- LC 16.290(7)(e) directs one to LC 16.253(2) for removal of vegetation within the RR-2 zoning districts riparian setback area.
- LC 16.253(2) places restrictions upon the removal of vegetation within a riparian setback area. This section does not distinguish between the different reasons for which one might want to remove vegetation from a setback area.
- LC 16.253(3) specifically deals with situations where one wishes to place a structure within the riparian setback area. For a modification to be approved, LC 16.253(3) requires (a) the location of the structure not remove vegetation in excess of that allowed by LC 16.253(2) and (b) that the riparian vegetation does not actually extend all the way into the setback area to the location of the proposed structure. I agree that it makes little sense to conjunctively combine these two provisions but, if so combined, it can be read to mean that the more rigorous second provision subsumes the first and that the applicant must demonstrate that there was no riparian vegetation in the location of the proposed structure prior to that structure's placement. If read in this manner, both provisions will be satisfied where there has been no removal in excess of LC 16.253(2) because the riparian vegetation did not exist.

Given evidence in the record, I believe that this standard can be met for the structures that have verified nonconforming use status. The scope and breadth of this approval can therefore be conditioned upon that circumstance.

- (c) *It can be demonstrated that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area.*

LC 16.253(3)(c) offers an alternative criterion to obtain a modification and that is to show that the imposition of the riparian setback standards would place an unduly restrictive burden on the property owner if not allowed to place the structure within the riparian setback area. The "unduly restrictive" burden may turn on the question of

whether, at the time of construction, the applicable zoning regulations (if any) limited the number of accessory structures associated with a residence. If one assumes that there were no limitations then it is clear that the regulation would place an unduly restrictive burden on the property owner to place legal structures on the property as the riparian setback area covers over 75 percent of the property and there isn't room, because of the driveway, to site a structure of similar size within the remaining property. In addition, much if not all of the area outside of the riparian setback lies within the setback from the adjacent road.


In summary, the operative proviso is that the two structures on tax lot 603 have not yet been verified as having nonconforming use status. I do not believe that the provisions of LC 16.253(3)(a) & (b) or (c) are available to illegal uses. Therefore, as a precursor to qualifying for a modification of the riparian setback standards, the applicant must first demonstrate that the structures are either outright permitted or are nonconforming.

The bottom line is that this decision is not the proper venue to address the nonconforming use status of the two sheds. Neither the notice of the Director's decision nor the notice of this appeal address the verification standards of LC 16.251(1) and it is therefore inappropriate to address those standards now. Suffice it to say that whichever structures, or portions thereof, on tax lot 603 that are granted nonconforming use status also, by virtue of this decision, have a modification of the riparian setback standards applicable to the Rural Residential District.

### **Conclusion**

I am somewhat mystified as to why an application for a riparian modification was chosen as the vehicle to address the status of the two structures on tax lot 603. The applicant claims that planning staff so directed her and the planning staff denies that assertion. Regardless, the specter of the nonconforming use status of the two sheds on tax lot 603 has permeated this appeal. The irony is twofold. First, no final, complete riparian modification can be issued until the nonconforming use issue is determined. Second, and more important, a nonconforming use determination would seem address all related issues, such as the legality of the structures as well as their right to be placed within the riparian setback area. For these reasons, this decision must be conditional in nature until the status of the two structures can be determined.

**Respectfully Submitted,**

  
\_\_\_\_\_  
**Gary Danielle**  
**Lane County Hearing Official**



**LANE COUNTY HEARINGS OFFICIAL  
APPEAL OF A PLANNING DIRECTOR DENIAL OF A REQUEST FOR A RIPARIAN  
MODIFICATION TO ALLOW TWO EXISTING STORAGE SHEDS AND ATTACHED  
DECKS WITHIN THE RIPARIAN SETBACK AREA OF THE RURAL RESIDENTIAL  
DISTRICT**

**Application Summary**

Helen Hickerson, Hwy 36, Blachly, OR. The applicant requests a riparian modification, pursuant to LC 16.253(3), to allow two existing storage sheds and attached decks within the Riparian Setback Area within the Rural Residential Zone (RR-2/RCP).

**Parties of Record**

Helen Hickerson

Kim O'Dea

**Application History**

Hearing Dates:           December 9, 2010  
                                  (Record Held Open Until February 11, 2011)

Decision Date:           February 16, 2011

**Appeal Deadline**

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

**Statement of Criteria**

LC 16.253(3)  
LC 16.290(7)(d) &(e)

**Findings of Fact**

1. The property subject to this application, hereinafter referred to as the "subject property," is located on Hwy 36, near Blachly, Oregon. The subject property is 0.6 acres in size (2,613.6 square feet) and can be identified as tax lot 603, assessor's map 16-07-18-41. It zoned RR-2/RCP and is occupied by a two storage sheds and attached decks. Storage

shed #2 is 12'x16' and storage shed #3 is '12x14'. Total area of sheds and decks is about 875 square feet (37'x25'). Tax lot 604, adjacent to the west, is occupied by a 250 square foot cabin and two tent platforms (12' x 14' and 10' x 12'). The total space occupied by structures on tax lot 604 is 538 square feet.

The cabin (w/ deck) and shed (w/ deck) on tax lot 604 have 24 feet and 15 feet, respectively, of lineal frontage within the riparian setback area. The two sheds (w/ decks) have a combined 25 feet of lineal frontage. Total structure frontage within the tract is 64 feet.

The structures on the subject property are located entirely within the Riparian Setback Area, the area between a line 50 feet above and parallel to the ordinary high water of Triangle Lake, a Class I stream. The storage sheds and decks were constructed without building permits and are the subject of Compliance Action No. 07-0261. The subject property (tax lot 603) is located adjacent to tax lot 604, a parcel owned by the applicant and which has legal lot status.

The North Shore Park Subdivision was created in 1971. On June 5, 1972 W. and V. Marshall conveyed Lot 3 of North Shore Park Subdivision to Wallace and Helen Hickerson. On March 30, 1973, W. and V. Marshall conveyed the western ½ of Lot 2 (tax lot 603) of the North Shore Park Subdivision to Wallace and Helen Hickerson. On the same day, W. and V. Marshall conveyed the eastern ½ of Lot 2 (tax lot 615) to Daniel and Judith Walker. Tax lot 615 is about 0.07 acres in size. At the time of the March 30, 1973 conveyance, W. and V. Marshall also owned adjacent Lot 1 in the North Shore Park Subdivision.

2. On September 27, 2010, a Referral Notice and Opportunity to Comment was sent to Oregon Department of Fish and Wildlife. As of October 18, 2010, no response was received.
3. The subject property has 2,350 square feet of riparian setback area and has frontage of about 47 feet along Triangle Lake, a Class 1 stream. Tax lot 604 has 100 feet of frontage along Triangle Lake and 5,000 square feet of riparian setback area. The subject property is a part of a tract (tax lot 604 and 603) that has a frontage of 147 feet on Triangle Lake. The tract is occupied by 1413 square feet of structures.
4. The subject property is not located between the Eugene-Springfield Metropolitan Area General Plan Boundary or the Eugene and Springfield Urban Growth Boundaries.
5. The Hearings Official has taken official notice of Lane County Ordinance No. 4-63, adopted April 2, 1962. Section III.G.4.b. of this ordinance allowed either property line adjustments ("an exchange of land between owners of abutting property") and the division of one lot within a recorded subdivision provided that the resulting tract was not less than 6,000 square feet in size and met other dimensional standards. As it turns out, this ordinance was not germane as it had been modified several times subsequent to its enactment. At the time of the March 30, 1973 division of Lot 2 of the North Shore Park

Subdivision, Lane County's land division regulations had been codified into Chapter 13 of the Lane Code (LC). (Ordinance No. 14-72, adopted August 11, 1972)

Lane County Ordinance No. 14-72, as it existed in 1972, also excepted from the definition of "subdivision" property line adjustments ("an exchange of land between owners of abutting property") or where there was the division of one lot in a recorded plat that added land to one or more adjacent lots in the plat. Under the latter category of exception, the resulting tract had to conform to the dimensional requirements of LC 13.080(1)(a). The maximum minimum lot size allowed under LC 13.080(1)(a) was 6,000 square feet and that was only when a site was served by a public sewer.

### **Decision**

THE PLANNING DIRECTOR'S DENIAL OF THE HICKERSON REQUEST (PA 10-5248) FOR A RIPARIAN MODIFICATION IS MODIFIED, IN PART, AND REVERSED, IN PART.

The Planning Director's decision is modified because the sole reason for denial was the determination that the legal lot status of tax lot 603 had not been proven. On appeal, additional evidence was submitted to the Hearings Official that resolved this issue in favor of the applicant. Tax lot 603 has legal lot status by virtue of being part of a tract that is composed of tax lots 603 and 604 and which obtained this status in 1973.

The broader question is whether the standards for a riparian setback modification have been met. The record supports a conclusion that the precursors to the sheds, the tent platforms, had at one time nonconforming use status as they pre-existed zoning regulations and, more particularly, the riparian setback regulations. It is unclear whether the change, increase or alteration of those structures to add walls, roofing and decking has the same status. The second part of this decision is to reverse the Planning Director's denial and to grant riparian setback modification approval to those portions of the two sheds that are determined to have nonconforming use status after having undergone a verification process provided by LC 16.251. The process must not only verify the nonconforming use status of the tent platforms but also determine whether there has been a change or increase of the use or an impermissible alteration of that use. This conditional approval shall be valid for two years following the date that this decision becomes final.

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

The subject property is zoned R-2 Rural Residential and, pursuant to LC 16.253(2), is subject to the riparian regulations of LC 16.290(7)(d), that provide:

- (d) ***Riparian Setback Area.*** Except for property located between the Eugene-Springfield Metropolitan Area General Plan Boundary and the Eugene and Springfield Urban Growth Boundaries, where setbacks are provided for in LC 16.253(6), the riparian setback area shall be the area between a line 50 feet above and parallel to the ordinary high water of a Class I stream designated for riparian vegetation protection in the Rural Comprehensive Plan. No structure other than a fence shall be located closer than 50 feet from the ordinary high water of a Class I stream designated for riparian

*vegetation protection by the Rural Comprehensive Plan. A modification to the riparian setback standard for a structure may be allowed provided the requirements of LC 16.253(3) or LC 16.253(6), as applicable, are met.*

All development on tax lot 603 and tax lot 604 is located entirely within the riparian setback area. Therefore, a modification to the setback standards is required

LC 16.253(2) provides:

(2) ***Removal of Vegetation Within the Riparian Setback Area.*** *The following standards shall apply to the maintenance, removal, destruction and replacement of indigenous vegetation within the riparian setback area along Class I streams designated for riparian vegetation protection by the Rural Comprehensive Plan. For purposes of LC 16.253(2)(b)(i) and (iii) below, Resource Zones shall be: LC 16.210 (F-1); LC 16.211 (F-2); LC 16.212 (EFU); LC 16.213 (NR); LC 16.214 (ML); LC 16.215 (PR); LC 16.216 (QM); LC 16.227 (IWC); and LC 16.232 (DR). For purposes of LC 16.253(2)(b)(i) and (iii) below, Nonresource Zones shall be: LC 16.219 (PF); LC 16.220 (C-1); LC 16.221 (C-2); LC 16.222 (C-3); LC 16.223 (C-R); LC 16.224 (M-1); LC 16.225 (M-2); LC 16.226 (M-3); LC 16.229 (RA); LC 16.230 (RG); LC 16.231 (RR); LC 16.290 (RR); LC 16.291 (RC); LC 16.292 (RJ); LC 16.294 (RPF); and LC 16.295 (RPR).*

(a) *A minimum of seventy-five percent (75%) of the total area within the riparian setback area of any legal lot shall remain in an unaltered, indigenous state except as provided in LC 16.253(2)(b)(i) and LC 16.253(5)(b) below; and*

The applicant argues that LC 16.253(2) is poorly drafted and its reference to legal lots implies that the application of this provision must be limited to legal lots. While I agree that it is imprecisely drafted, there is nothing in LC 16.253(2) to suggest that illegal lots are given a pass on legislation designed to implement Goal 5 Flora and Fauna policies and the Goal 6 Water Resources policies of the Lane County Rural Comprehensive Plan.<sup>1</sup> LC 16.253(2)(d), for instance, lists exceptions to the setback removal standards of LC 16.253(2) &(3). One would imagine that if there were a legislative intent to exempt illegal lots from the riparian setback standards that provision would be placed in this list. It is not. Further, such a policy would seem to be inconsistent with LC 16.005(1) that states "A Development May Be Used Only For a Lawful Use. A lawful use is a use that is not prohibited by law or which is nonconforming pursuant to LC 16.251 below of this chapter." I believe it more reasonable to interpret LC 16.253(2) to mean that one cannot apply for a modification to the riparian setback removal standards for an illegal lot.

The issue raised by the applicant does not appear to be relevant, however, since I have determined that the subject property is a legal lot by virtue of its being part

<sup>1</sup> LC 16.253(1) lists conformance with these standards as the purpose of the Riparian Regulations.

of a tract that includes tax lot 604, a parcel that has legal lot status. The relevant Lane County regulation is Ordinance No. 14-72. Under this ordinance, the division of one lot in a recorded plat that added land to one or more adjacent lots in the plat was legal without County approval so long as there was no resulting tract that did not meet the dimensional requirements of LC 13.080(1)(a). The most liberal standard of LC 13.080(1)(a) was 6,000 square feet. While the addition of the transferred property did not result in the receiving tracts exceeding 6,000 square feet, it was the practice of the County to allow this type of conveyance where the end result was that the receiving tracts were less nonconforming than prior to the transfer and where a substandard lot was made more substandard. The subject property therefore has legal lot status by virtue of being part of a tract that includes tax lot 604 and this application is thus subject to a review under LC 16.253(2).

In regard to the merits of the application vis à vis this approval criterion, the two storage sheds on the subject property, which are 12' x 16' and 12' x 14', respectively, have a total area (including decks) of about 875 square feet. Tax lot 604 is occupied by three structures that collectively cover 538 square feet. Tax lots 603 and 604, combined, are subject to 7,350 square feet of the riparian setback area and therefore the 1413 square feet of structures represent a little more than 19 percent of the tax lot's area.

The record contains uncontroverted testimony that the portion of the riparian area that is unoccupied by structures has not been modified subsequent to the effective date of LC 16.253.<sup>2</sup> Therefore, the application meets the standard of LC 16.253(2)(a) as 81 percent of the total area within the riparian setback area remains in the unaltered, indigenous state that existed on November 12, 1992, when LC 16.253 (Ordinance 10-92) became effective.

**(b) *Removal of existing vegetation from within the riparian setback area of any legal lot shall not exceed the shoreline linear frontage and square footage limitations calculated as follows:***

- (i) *The maximum allowable removal for any legal lot having frontage of 200 feet or less in length along a Class I stream shall not exceed 50 linear feet along the shoreline and an area not greater than 2,500 square feet within the riparian setback area of a Nonresource Zone, or 5,000 square feet within the riparian setback area of a Resource Zone.***

As noted above, the subject property is part of a legal lot (tract) that is comprised of tax lots 604 and 603 and is located within a nonresource zone. Combined, these two tax lots have less than 200 feet of frontage on Triangle Lake and therefore LC 16.253(2)(b)(i) is applicable.

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<sup>2</sup> LC 16.253 was adopted through Lane County Ordinance No. 10-92, enacted October 13, 1992 and effective November 12, 1992.

The structures located on the tract have a combined frontage of 64 lineal feet and an area of 1,413 square feet within the riparian setback area. The existing structures on the tract do not meet the lineal footage standard of LC 16.253(2)(b)(i).

The applicant has argued that the construction of the structures preceded the effective date of LC 16.253. This would be a persuasive argument if the nonconforming use status of all of the structures has been verified. This is not the case, however, as only the cabin and shed located on tax lot 604 have been accorded this status.

While it is possible that the platforms that form the base of the two sheds on tax lot 603 are nonconforming, given the zoning that may have existed when they were created, it remains to be seen whether the same conclusion can be made regarding the walls and decking surrounding them. The shed platforms were either legal nonconforming uses or illegal uses/structures. If the latter, they cannot be granted a riparian modification. If the shed platforms are verified as being nonconforming, then the question is whether the subsequent addition of walls and decking were permissible alterations of that status.

Assuming, for arguments sake, that the structures on tax lot 603, or portions thereof, are nonconforming then a modification to the riparian setback standards may be possible.

LC 16.253(3) provides:

***Modifications.*** *A modification to the applicable riparian setback standard for a structure may be allowed provided the Oregon Department of Fish and Wildlife (hereafter ODF&W) is consulted by the Planning Director at least 10 working days prior to the initial permit decision and an application for a modification to the setback standard has been submitted pursuant to LC 14.050 and approved by the Planning Director pursuant to the requirements of LC 14.100 with findings of compliance addressing the following criteria:*

The first part of this criterion has been met as the ODFW was notified through a referral notice mailed September 27, 2010.

- (a)*** *The location of a structure within the riparian setback area shall not result in the removal or the alteration of vegetation within the riparian setback area in excess of the standards of LC 16.253(2) above. For purposes of LC 16.253, altered means to eliminate, significantly reduce or interrupt the natural growth cycle of indigenous vegetation by removal or destruction of the vegetation caused by a person; and*
- (b)*** *The riparian vegetation does not actually extend all the way into the riparian setback area to the location of the proposed structure. This determination shall include*

***consideration of any evidence of riparian vegetation existing prior to any removal of indigenous vegetation before or during the application review period; or***

The applicant argues that LC 16.253(2) & (3) are contradictory in the sense that if you can't meet the standards of LC 16.253(2) then you request a modification under LC 16.253(3) but (3)(a), in turn, requires you to meet the standards of LC 16.253(2).

While the language of LC 16.253(3) could be much clearer, I believe that the applicant chooses to ascribe the most confusing interpretation to its text. Accordingly, I believe that the riparian setback standards should be viewed in this manner:

- The RR-2 zoning district (LC 16.290(7)(d)) requires a setback of 50 feet between structures and Class I streams. Triangle Lake is classified as Class I stream.
- LC 16.290(7)(e) directs one to LC 16.253(2) for removal of vegetation within the RR-2 zoning districts riparian setback area.
- LC 16.253(2) places restrictions upon the removal of vegetation within a riparian setback area. This section does not distinguish between the different reasons for which one might want to remove vegetation from a setback area.
- LC 16.253(3) specifically deals with situations where one wishes to place a structure within the riparian setback area. For a modification to be approved, LC 16.253(3) requires (a) the location of the structure not remove vegetation in excess of that allowed by LC 16.253(2) and (b) that the riparian vegetation does not actually extend all the way into the setback area to the location of the proposed structure. I agree that it makes little sense to conjunctively combine these two provisions but, if so combined, it can be read to mean that the more rigorous second provision subsumes the first and that the applicant must demonstrate that there was no riparian vegetation in the location of the proposed structure prior to that structure's placement. If read in this manner, both provisions will be satisfied where there has been no removal in excess of LC 16.253(2) because the riparian vegetation did not exist.

Given evidence in the record, I believe that this standard can be met for the structures that have verified nonconforming use status. The scope and breadth of this approval can therefore be conditioned upon that circumstance.

- (c) ***It can be demonstrated that an unduly restrictive burden would be placed on the property owner if the structure was not allowed to be located within the riparian setback area.***

LC 16.253(3)(c) offers an alternative criterion to obtain a modification and that is to show that the imposition of the riparian setback standards would place an unduly restrictive burden on the property owner if not allowed to place the structure within the riparian setback area. The "unduly restrictive" burden may turn on the question of

whether, at the time of construction, the applicable zoning regulations (if any) limited the number of accessory structures associated with a residence. If one assumes that there were no limitations then it is clear that the regulation would place an unduly restrictive burden on the property owner to place legal structures on the property as the riparian setback area covers over 75 percent of the property and there isn't room, because of the driveway, to site a structure of similar size within the remaining property. In addition, much if not all of the area outside of the riparian setback lies within the setback from the adjacent road.

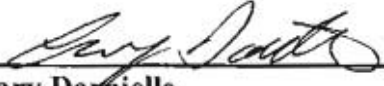
In summary, the operative proviso is that the two structures on tax lot 603 have not yet been verified as having nonconforming use status. I do not believe that the provisions of LC 16.253(3)(a) & (b) or (c) are available to illegal uses. Therefore, as a precursor to qualifying for a modification of the riparian setback standards, the applicant must first demonstrate that the structures are either outright permitted or are nonconforming.

The bottom line is that this decision is not the proper venue to address the nonconforming use status of the two sheds. Neither the notice of the Director's decision nor the notice of this appeal address the verification standards of LC 16.251(1) and it is therefore inappropriate to address those standards now. Suffice it to say that whichever structures, or portions thereof, on tax lot 603 that are granted nonconforming use status also, by virtue of this decision, have a modification of the riparian setback standards applicable to the Rural Residential District.

### **Conclusion**

I am somewhat mystified as to why an application for a riparian modification was chosen as the vehicle to address the status of the two structures on tax lot 603. The applicant claims that planning staff so directed her and the planning staff denies that assertion. Regardless, the specter of the nonconforming use status of the two sheds on tax lot 603 has permeated this appeal. The irony is twofold. First, no final, complete riparian modification can be issued until the nonconforming use issue is determined. Second, and more important, a nonconforming use determination would seem address all related issues, such as the legality of the structures as well as their right to be placed within the riparian setback area. For these reasons, this decision must be conditional in nature until the status of the two structures can be determined.

**Respectfully Submitted,**

  
\_\_\_\_\_  
**Gary Darnielle**  
**Lane County Hearing Official**



# LCOG

LANE COUNCIL OF GOVERNMENTS

March 3, 2011

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

Re: *Appeal of Hearings Official decision in Hickerson (PA 10-5248)*

Dear Mr. Howe:

On February 16, 2011 I issued a decision reversing the Planning Director's denial of the Hickerson request for a riparian modification for two sheds on tax lot 603, assessor's map 16-07-18-41. On March 2, 2011 the applicant appealed my decision. Upon a review of these appeals, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

The approval was conditional because it is clear from the record, and admitted by the applicant, that the structures on tax lot 603 have not been verified as having nonconforming use status. The applicant, through the riparian modification application, wishes to circumvent the nonconforming use verification process by obtaining a ruling that the structures, in total, comply with the riparian modification application regardless of the legal status of those structures. These structures are not just the tent platforms that have existed for some length of time but also the walls and decks surrounding those platforms. The decks, for instance, encroach much more significantly than the platforms themselves into the riparian setback area. There is no data in the record to suggest that they were completed prior to the adoption of the riparian setback regulations.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my February 16, 2011 decision without further consideration. Please advise interested parties of this decision.

Sincerely,



Gary V. Darnielle  
Lane County Hearings Official

cc: Sarah Wilkinson (file)



LAND MANAGEMENT DIVISION



APPEAL OF A HEARING'S OFFICIAL DECISION

PUBLIC WORKS DEPARTMENT 125 E 8th AVENUE, EUGENE OR 97401

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

For Office Use Only: FILE # PA10-5248B CODE: BCNOREV FEE: ~~541.812~~ 250 LE

Appellant: Helan Hickerson LE
Mailing address: 7208A NE Hazel Dell Ave Vancouver Wa 98665

Phone: 541 954-0917 Email: MA

Signature: [Signature] Date: 2/28/10

Appellant's Representative: Kim O'Dea Law Office of Bill Klaus, PC

Mailing address: 375 W 4th Ste 204 Eugene 97401

Phone: 541 954-0925 Email: Kimodea@landuse.org

Signature: [Signature] Date: 2/28/10

LOCATION (subject property) 16 07 18 91 603
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. OPTION 2

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.
2. A copy of the decision being appealed, with the Department file number.
3. Indicate the deadline to submit the appeal.
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;

- 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.

#### 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.

**LAW OFFICE OF BILL KLOOS, PC**

OREGON LAND USE LAW

375 W. 4<sup>th</sup>, SUITE 204  
EUGENE, OR 97401  
TEL (541) 933-3920  
FAX (541) 343-8702  
E-MAIL KIMODEA@LANDUSEOREGON.COM

February 28, 2011

Land County Board of Commissioners  
c/o Kent Howe, Planning Director  
Lane County Courthouse/PSB  
125 E. 8th Ave  
Eugene, OR 97401

Re: Appeal and request for Hearings Official reconsideration of an approval of a Riparian Modification for Tax Map 16-07-18-41, tax lot 603 (PA 10-5248). Helen Hickerson/Kathy Eskandani

Dear Commissioners and Mr. Darnielle:

Please accept this letter as a statement in support of the "Option 2" appeal of PA 10-5248, attached. 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. However, the applicant hopes that the Hearings Official will opt to reconsider the second part of his February 16, 2011 decision relating to the Condition of Approval requiring a nonconforming use verification, as allowed under Option 2 and LC 14.535.

In conditioning the above approval for a modification, the Hearings Official exceeded his authority, and misinterpreted and misapplied the Lane Code, State Law and other applicable criteria. More specifically, the Hearings Official erred by: improperly conditioning the approval, making a decision that does not address the applicant's issues; and improperly interpreting and applying LC 16.253(2) and (3).

The Hearings Official's decision contains two parts: (1) a determination that Tax Lots 603 and 604 are a legal lot; and (2) a determination that the standards for a riparian setback modification have been met subject to a condition of approval that the applicant apply for a nonconforming use verification on the structures, and subject to a limitation that the riparian modification is only valid for the portions of the structures that are verified.

The first part of the decision is accurate and is not appealed. Tax lots 603 and 604 are a legal lot.

The appeal is based on the following facts and argument:

LC 16.253 regulates "*the maintenance, removal, destruction and replacement of indigenous vegetation with the riparian setback area.*" Note that this language does not contain the term "disturb." LC 16.253(2). If no indigenous riparian vegetation is removed (et.al), LC 16.253 is not triggered. Riparian vegetation, as regulated by LC 16.253, did not exist on the site until November 12, 1992, when Ordinance 10-92 became effective and created LC 16.253. The tent

platforms on TL 603, the footprint of which has not changed, predated November 12, 1992. The Hearings Official acknowledged these facts when he found, *"the portion of the riparian area that is unoccupied by structures has not been modified subsequent to the effective date of LC 16.253."* Decision, page 5. Therefore, it is uncontroverted that the existing structures have not "removed" any riparian vegetation. Furthermore, the Hearings Official found that *"the record supports a conclusion that the precursors to the sheds, the tent platforms, \*\*\* pre-existed zoning regulations and, more particularly, the riparian setback regulations."* Decision, page 3.

Review should have ended there. Once the Hearings Official determined that no vegetation had been removed, the decision should have reflected that LC 16.253 was not applicable and that a modification to LC 16.253 was not required.

The Hearings Official erred in blending nonconforming use law with riparian regulation requirements. Each is an independent analysis. As recognized by the Hearings Official, review of a nonconforming use is different in request and scope. The Hearings Official's findings began to veer off track when he determined that subsequent maintenance of the platforms (new boards) and construction on top of (or even if in the footprint of) the platforms (sheds) might violate NCU law, despite already acknowledging that the footprint of the tent platforms had not changed and riparian vegetation had not been removed since 1992, when LC 16.253 went into effect. The conclusion that the NCU "maintenance and improvement" issue was relevant to the subject application is the error of the decision.

In short, based on the hearing official's findings, no riparian vegetation has been removed or disturbed by the structures. LC 16.253 is not applicable. As such, no modification is needed.

Specific concerns about the decision:

It is unclear how the Hearings Official reached his conclusion under LC 16.253(2)(b), given his earlier and latter findings that no riparian vegetation has been removed by the structures. Subsection (2)(b) only applies to removal of existing vegetation, per the text. There has been no removal of vegetation for any of the structures. The Hearings Official has already determined that to be so. This is especially true for the structures on TL 604, which have NCU status dating back to the late 1960's. As such, the Hearings Official's findings on page 6 are not supported. While his square foot and lineal foot figures may be accurate to the site plan, they do not reflect "removed vegetation," which is the focus of the standard.

In addition, the findings under LC 16.253(3)(b) appear to support the applicant's position, once the riparian modification findings are teased out of the NCU knot. All parties agree that the footprint of the structures predate Ordinance 10-92. That position is supported by the record. As such, no riparian vegetation has been removed.

And finally, in his conclusion the Hearings Official is "mystified" as to why an application for a riparian modification was chosen. *"The applicant claims that planning staff so directed her and the planning staff denies that assertion."* Attached is a letter from staff directing the applicant to file a modification. The applicant spent many hours with staff trying to explain why the

Letter to Board - Hickerson  
February 28, 2011  
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interpretation and application of the code was incorrect. In the end, the applicant just applied for what she was instructed to.

Sincerely,

  
Bill Kloos

Attachments:

E-mail from staff dated May 21, 2010;  
Copy of decision

## Kimberly J.R. O'Dea

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**From:** WILKINSON Sarah W [Sarah.WILKINSON@co.lane.or.us]  
**Sent:** Friday, May 21, 2010 4:32 PM  
**To:** Kimberly J.R. O'Dea  
**Cc:** KENDALL Jerry; HOWE Kent  
**Subject:** RE: PA 10-5248 Hickerson

Kim,

I hope you have/had a great weekend.

This email is to follow up in regard to our conversation on Monday, May 17.

Based on conversation with County Counsel, the County will count toward LC 16.253(2)(b) the total linear length of all four structures. As you know, the four structures exceed the 50-foot linear length allowed. The County has identified two possible remedies:

1. Obtain a legal lot verification that recognizes Tax Lot No. 603 as a separate parcel. To address the problem of having accessory structures on a parcel without a dwelling, you would need to obtain a non-conforming use verification for each of the two sheds.
2. Obtain a legal lot verification that recognizes Tax Lot No. 603 and 604 as one parcel. To address the problem of exceeding the maximum linear length allowed, you would need to obtain a variance to LC 16.253(2)(b).

If you have any questions, please give me a call or send me an email.

Best,

Sarah

Sarah W. Wilkinson  
Planner  
Lane County Land Use Management  
125 E 8th Avenue  
Eugene, Oregon 97401  
(P) 541.682.4054  
(F) 541.682.3947

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**From:** Kimberly J.R. O'Dea [mailto:kimodea@landuseoregon.com]  
**Sent:** Wednesday, May 12, 2010 12:15 PM  
**To:** WILKINSON Sarah W  
**Subject:** RE: PA 10-5248 Hickerson

Sarah:

Let's do 2:00P on Monday.

Thanks,  
Kim

**LAW OFFICE OF BILL KLOOS, PC**

OREGON LAND USE LAW

REC'D MAR 07 2011

375 W. 4<sup>th</sup>, SUITE 204  
EUGENE, OR 97401  
TEL (541) 933-3920  
FAX (541) 343-8702  
E-MAIL KIMODEA@LANDUSEOREGON.COM

March 2, 2011

Land County Board of Commissioners  
c/o Kent Howe, Planning Director  
Lane County Courthouse/PSB  
125 E. 8th Ave  
Eugene, OR 97401

**RECEIVED**

**MAR 04 2011**

**LANE COUNTY  
BOARD OF COMMISSIONERS**

Re: Appeal and request for Hearings Official reconsideration of an approval of a Riparian Modification for Tax Map 16-07-18-41, tax lot 603 (PA 10-5248). Helen Hickerson/Kathy Eskandani

Dear Commissioners:

I would like to add a summary gloss to this appeal, which is in an odd posture. We are avoiding an expensive appeal to the Board, so that we can get LUBA to direct the county to make the decision we applied for but did not get. Due to the fee structure at the county, it is more efficient for us to ask LUBA for relief than to live with the Hearing Official Decision or to ask the County Board for relief.

County staff told our client to get a riparian modification approved, for a wooden platform (that long predated the adoption of the riparian regulations), or staff would start an enforcement proceeding. Facing the prospect of an expensive enforcement proceeding, we applied for a riparian vegetation modification. We also asked for a determination that no riparian modification is needed. (As explained by the Court of Appeals, an applicant for a land use approval is entitled to a decision as to whether the land use approval is needed in the first place.)

The decision of the Hearing Official neither simply approved the application for a riparian modification nor determined whether one was needed. Instead, the Hearing Official approved the modification subject to a condition that within two years the owner apply for a nonconforming use determination with respect to a shed subsequently built on top of the wooden platform.

If the Hearing Official had answered our request for a determination that no riparian modification is necessary, the matter would be over. We did not get an answer to that question. LUBA will direct that the question be answered.

By granting the riparian modification subject to the requirement that we apply for a nonconforming use determination, the Hearing Official sentenced our client to a new proceeding at the county. The filing fee will be \$2660. From our experience with other uses on this property, we expect a nonconforming use proceeding contested by county staff will exceed \$10,000 in attorneys fees. We believe that LUBA will strike the condition requiring the nonconforming use determination. The riparian modification is justified based on the wooden platform, which the Hearing Official concedes predated the riparian regulations. Whether the




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March 2, 2011  
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shed later build on top of the wooden platform is a lawful nonconforming use is not relevant to the riparian issue.

Requesting a full appeal to the County Board in this matter would cost \$3812 in an appeal fee, plus more for actually getting through the hearing. For that amount we can fund the LUBA appeal and have a clearer shot at the relief to which our client is entitled.

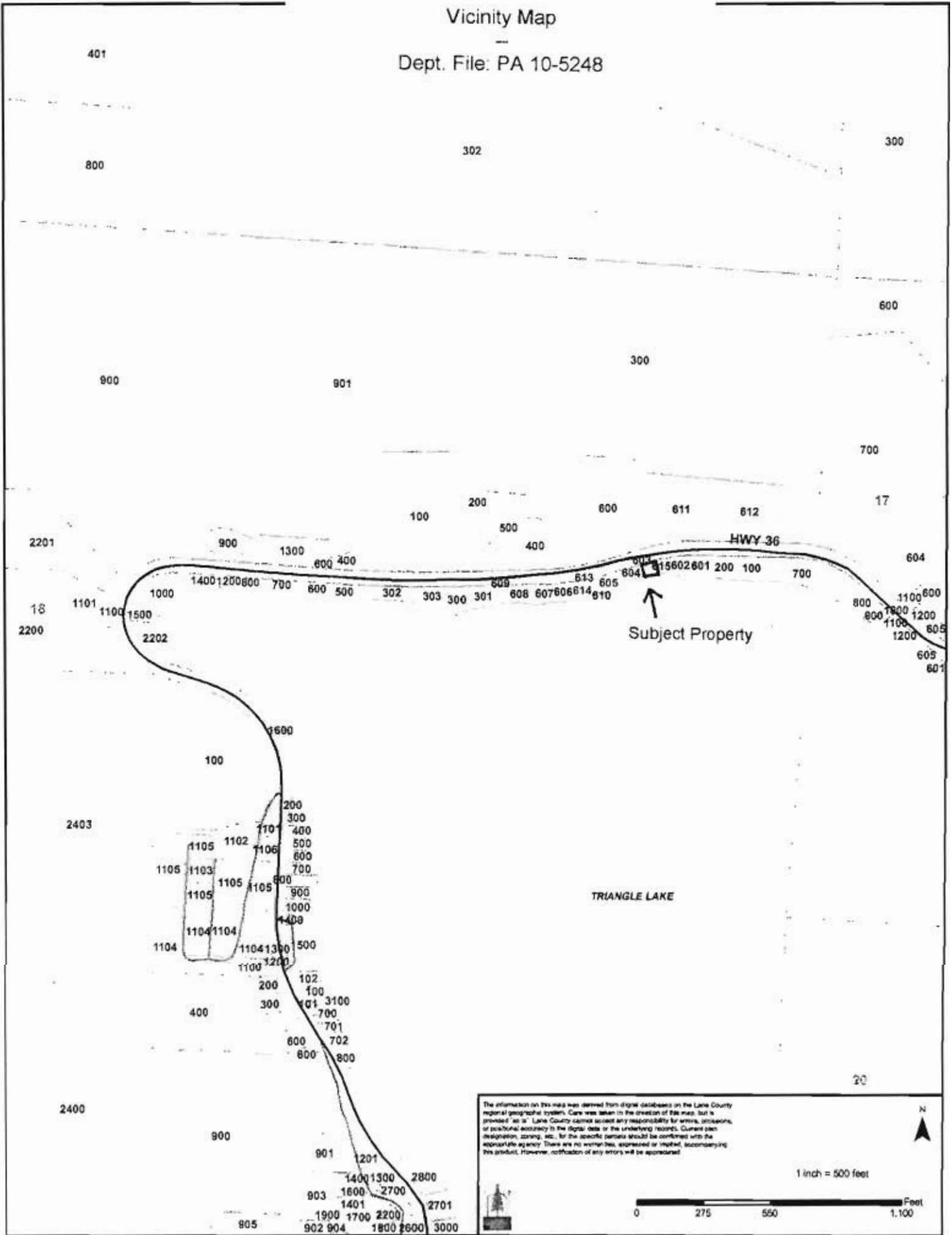
It is a bit odd that it is more efficient to go to LUBA than to the County Board. But that is the nature of the local appeal fee structure. I hope this is a helpful explanation of our strategy here.

Sincerely,



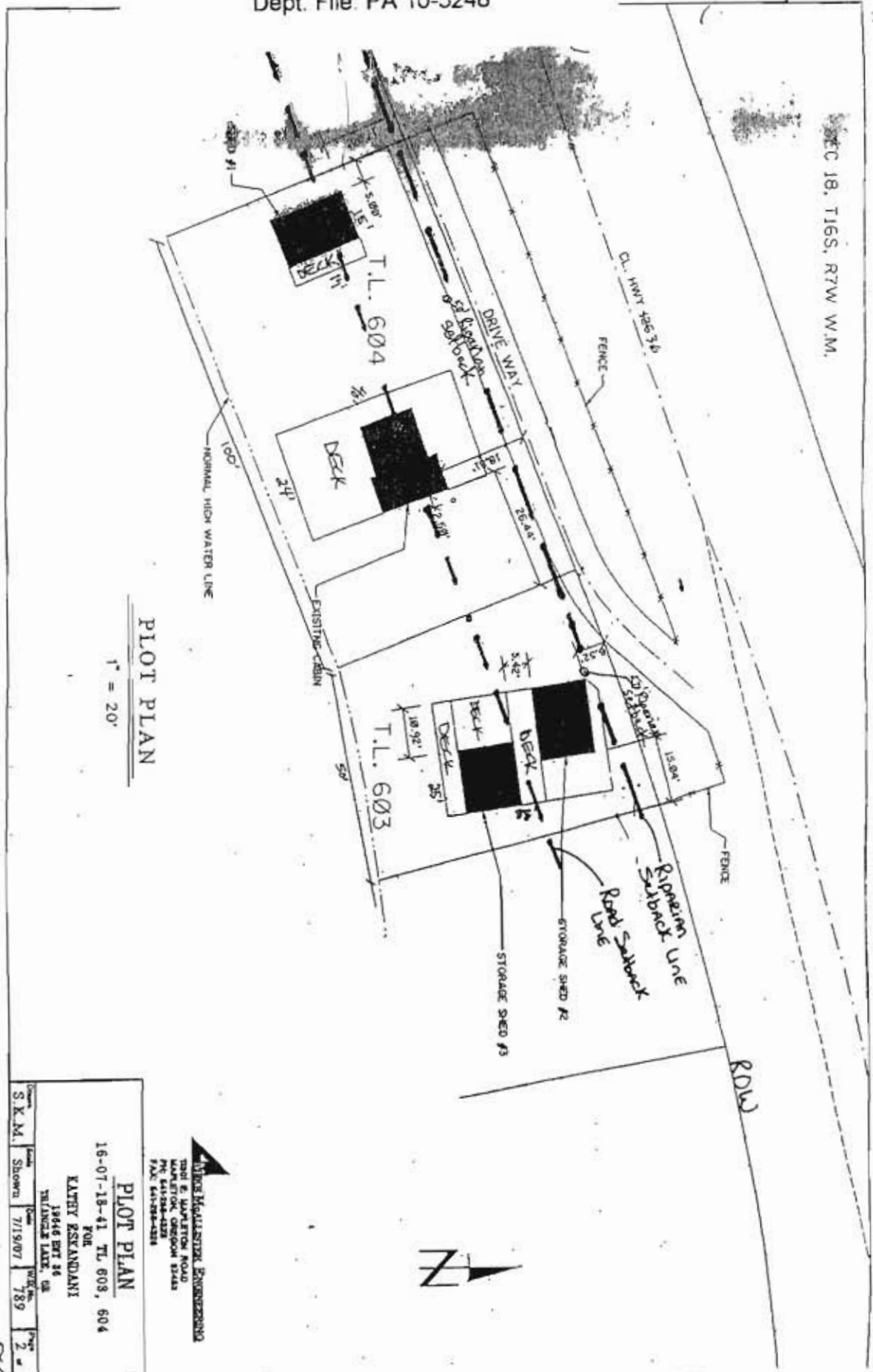
Bill Kloos

Vicinity Map  
Dept. File: PA 10-5248



Site Plan (Not to Scale)

Dept. File: PA 10-5248



PLOT PLAN

1" = 20'

Client	16-07-18-41 TL 603, 604
For	KATRYE EKANDANI
Project No.	19646 ERT 36
Date	7/19/07
Scale	7/89
Sheet No.	2
Total Sheets	2

**ALICE KULLISTON ENGINEERING**  
 701 E. JUPITER ROAD  
 WASHINGTON, OREGON 97143  
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