BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 15-04-14-07

IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL'S RECONSIDERED DECISION APPROVING A 27-LOT PRELIMINARY SUBDIVISION IN THE RURAL RESIDENTIAL ZONE (RR-2) AND THE FLOODPLAIN COMBINING ZONE (FP); MAP T17-R15-S17-30, TAX LOT 600 (FILE NO. 509-PA13-05697/OMLID).

WHEREAS, the Lane County Hearings Official has made a decision approving a 27-lot preliminary subdivision application in Department File No. 509-PA13-05697; and

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

WHEREAS, the Lane County Hearings Official has affirmed his decision on the application after reviewing the appeal in File No. 509-PA13-05697; and

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

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

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

1. That the appeal does not comply with the criteria of Lane Code 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 reconsidered decision dated March 3, 2015, and the letter affirming the decision dated May 23, 2015, attached as Exhibit "B," and those portions of the Hearings Official decision dated December 24, 2014, that found relevant approval criteria are met, and the letter reconsidering the decision dated January 12, 2015, attached as Exhibit "C," are affirmed and adopted by the Board of County Commissioners as the County's final decision. The Board of County Commissioners has reviewed the appeal and the Hearings Official decision and expressly agrees with and adopts the interpretations of Lane Code 13.050(9) made by the Hearings Official in the decision.

ADOPTED this 14th day of April, 2015.

[Signature]
Jay Bozievich, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM
Date 4/2/15
Lane County
OFFICE OF LEGAL COUNSEL
FINDINGS IN SUPPORT OF THE ORDER

1. The property subject to the subdivision in question is identified as tax lot 600, assessor's map 17-15-17-30. It is approximately 58 acres in size and is located 8.6 miles east of Springfield. The property is currently the site of the McKenzie River Golf Course, including a 9-hole course, a small club house, restrooms, equipment shed, food cart, driving range, and parking. All of these facilities would be removed if the subdivision were approved and developed.

2. The base zone of the subject property is RR-2/RCP, Rural Residential (Lane Code 16.290) with a 2-acre minimum lot size. The subject property is bordered by RR-1 zoned lots on the south (the Second and Third addition to Deerhorn Ranch Acres), and the McKenzie River on the north. There are also 8 tax lots zoned RR-1 situated between the subject property and the McKenzie River near the Holden Creek Lane bridge, as well as an extended sliver of land between the river and the subject property owned by the McKenzie River Trust.

3. The subject property is bordered by the McKenzie River along much of its northern boundary, while Haugen Creek runs along much of the southern boundary. Both are classified as Class I streams and subject to the riparian regulations of Lane Code 16.253. Except for small areas, the subject property is covered by the regulated 100-year flood hazard area, with the regulatory flood way found as a narrow band next to the McKenzie River; the remainder of the upland area is within an "AE" flood hazard area where the base flood elevation has been determined. This information is derived by FIRM Map Number 41039C1205F (effective 6-2-99).

4. On December 19, 2013, the Applicants, Rod & Sara Omlid, submitted the preliminary subdivision application contained in Department File 509-P-13-05697. The applicant proposes to subdivide the subject property into 27 lots of a minimum 2.0 acres each. Each lot would be served by an individual well and an individual subsurface sewage disposal system.

5. On January 19, 2014, staff deemed the application incomplete. The application was subsequently deemed complete on January 27, 2014, after the applicant submitted additional information. On October 8, 2014, the Director issued a decision denying the preliminary subdivision. On October 20, 2014, the applicant, represented by Bill Kloos, filed a timely appeal.

6. On November 13, 2014, the Lane County Hearings Official conducted a public hearing. The record was held open until December 16, 2014. On December 24, 2014, the Lane County Hearings Official issued a decision denying the application.

7. On January 5, 2015, the applicant filed a timely appeal and requested that the Hearings Official reconsider his decision. On January 12, 2015, the Hearings Official agreed to reconsider his decision per Lane Code 15.535(2)(b) and to open the record for additional evidence. The record closed on January 26, 2015. On March 3, 2015, the Lane County Hearings Official issued a reconsidered decision approving the application.

8. On March 16, 2015, Sean T. Malone, representing appellant Nena Lovinger, filed an appeal of the Hearings Official's reconsidered decision pursuant to Lane Code 14.515(3)(f)(ii), requesting that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County. The Hearings Official reviewed the appeal and on March 23, 2015, affirmed his decision of March 3, 2015.

9. 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.

10. The subject property is unusual in that it is a large, residentially-zoned property capable of being subdivided into 27 lots, it is almost entirely located within a designated flood hazard area, and it is bounded by the McKenzie River and Haagen Creek, both of which are identified as essential salmonid habitat. There are a limited number of dividable properties that are similarly located entirely or predominantly within designated flood hazard areas that could potentially serve to provide refugia to threatened salmonid species during flood events. Because of the limited number of properties with similar characteristics, and because the Hearings Official’s decision presents a reasonable interpretation of Lane Code 13.050(9) with regard to the issues raised in this appeal, the Board finds that the implications of the decision are not of countywide significance.

11. There are a limited number of dividable properties located entirely or predominantly within designated flood hazard areas that could potentially serve to provide refugia to threatened salmonid species during flood events. The subject property is likely the largest such property in the county. In the event that a comparable proposal and fact pattern comes before the Land Management Division, the Hearings Official’s decision presents a reasonable interpretation of Lane Code 13.050(9). If these issues arise in the future, the Hearings Official’s decision provides guidance. Therefore, The Board finds that the issues involved in this appeal will not reoccur with frequency and that there is not a need for further policy guidance.

12. The Board finds that the subject property does not constitute a unique environmental resource. The existing riparian habitat on the property is not considered unique, and based on the evidence in the record, it is not considered to be excellent or exceptional due in part to the fact that the property has been impacted through the development of a golf course.

13. The Planning Director does not recommend review of the appeals for the reasons cited above.

14. 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.

15. The Board has reviewed this matter at its meeting of April 14, 2015, finds that the appeal does not comply with the criteria of Lane Code Chapter 14.600(3), declines further review, and elects not to hold an on the record hearing for the appeal.

16. The Board affirms and adopts the Hearings Official decision of March 3, 2015, as the County's final decision in this matter, has reviewed that decision, and expressly agrees with and adopts the interpretations of Lane Code 13.050(9) made by the Hearings Official in the decision.
March 23, 2015

Mr. Matt Laird, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: Appeal of Hearings Official decision in the Omlid request (PA 13-05697) for preliminary subdivision plan approval for tax lot 600, assessor’s map 17-15-17-30.

Dear Mr. Laird:

On March 3, 2015, I issued a reconsidered decision approving the Omlid request (PA 13-05697) for preliminary subdivision plan approval for tax lot 600, assessor’s map 17-15-17-30. On March 16, 2015, Nina Lovinger appealed my reconsidered decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in my decision and that a reconsideration of that decision is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my March 3, 2015 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Rafael Sebba (file)
Application Summary

The Applicants in this matter are Rod & Sara Omlid, 827 Jannette Court, Springfield, OR 97477. On December 19, 2013, the Applicants submitted Preliminary Subdivision application PA13-05697 and on January 19, 2014, staff deemed the application incomplete. The application was subsequently deemed complete on January 27, 2014, after the applicant submitted additional information. On October 8, 2014, the Director issued a decision denying the preliminary subdivision and on October 20, 2014, the appellant filed a timely appeal. Subsequently, the Hearings Official held a hearing on the appeal on November 13, 2014 and issued a decision affirming the Planning Director's denial on December 24, 2014. On January 12, 2015, the Hearings Official agreed to reconsider his decision per Lane Code 14.535(2)(b) and to open the record for additional evidence. The record closed on January 26, 2015.

Parties of Record

See Exhibit “A”

Reconsideration History

Reconsidered Decision Date: March 3, 2014

Appeal Deadline

An appeal must be filed within 12 days of the issuance this decision and final order, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane Code 13.050
Lane Code 16.290(6)

Findings of Fact

1. The findings of fact contained in the Lane County Hearings Official's December 24, 2014 decisions in PA 13-05697 are incorporated by reference into these findings except where explicitly modified or rejected.
By way of background, the property subject to the subdivision in question, hereinafter referred to as "the subject property," can be identified as tax lot 600, assessor's map 17-15-17-30. It is 58+ acres in size and is located approximately 8.6 miles east of Springfield. It is currently the site of the McKenzie River Golf Course, including a 9-hole course, a small club house, restrooms, equipment shed, food cart, driving range, and parking. All of these facilities would be removed if the subdivision were approved and developed.

The base zone of the subject property is RR–2/RCP, Rural Residential (LC 16.290) with a 2-acre minimum lot size. The subject property is bordered by RR–1 zoned lots on the south (the Second and Third addition to Deerhorn Ranch Acres), and the McKenzie River on the north. There are also 8 tax lots zoned RR–1 situated between the subject property and the McKenzie River near the Holden Creek Lane bridge, as well as an extended sliver of land (tax lot 1700 of map 17–15–18) owned by the McKenzie River Trust, found between the river and the subject property, although most of it appears to be below ordinary high water of the river.

Two salmonid species that are listed as threatened and are seasonally found in the McKenzie River along the subject property are the Upper Willamette Spring Chinook Salmon and Bull Trout.

2. The applicant has retained the services of a professional biologist to examine the subject property to determine what part of the floodplain is currently in its "natural state" and to evaluate which portions of the "natural state" serve to provide refugia to salmonid species. Evidence relevant to this inquiry is as follows:

(1) The natural state before disturbance by man was scoured gravels and silt deposits with stands of riparian vegetation along the southern edge (Haagen Creek). There was about 11 acres of riparian habitat in 1944 (forested riparian and McKenzie River water/gravel bar). This is "good" quality habitat.

(2) The current situation shows that the area of "good" habitat above was reduced to about 7 acres with the development of the golf course. This "good" habitat consists of forested riparian areas, Haagen Creek, and the McKenzie River water/gravel bar.

(3) The forested riparian areas provide refugia for listed species during flood events; the vegetation slows the flood flows and offers the first potential egress after a 100-year flood event.

(4) Impacts to the forested wetlands should be limited, and the development proposal shows this, with the dwellings and septic fields being located outside the forested riparian and disturbed riparian areas, due to proposed building setbacks on the river and the creek.
(5) The golf course habitat and disturbed riparian habitat poses risks for fish, including faster water in flood time, stranding of fish in golf course depressions, and washout of golf course chemicals. In 2014, the golf course utilized 1,000 pounds of fungicide, 10 gallons of insecticide, 3,200 pounds of fertilizer, and 2,100 pounds of fertilizer/herbicide mixture. Over 2,000 pounds of granular insecticide was used in 2013.

(6) The 3.5 acres of disturbed riparian habitat in the golf course is “poor” habitat, due to the lack of riparian vegetation. "Poor" habitat or refugia quality provides no benefit and potential harm to listed salmonid species.

(7) The development proposal shows minimal impact to the disturbed riparian areas, which have the potential for restoration to a forested riparian, or natural state.

(8) Aside from the reduction of chemical use that would come from ending the golf course use, the following things could be affirmatively done in conjunction with development to actually “benefit listed species.” These include: maintain 100-foot setbacks for buildings and setback on the river and 50 feet on the creek; move the road about 50 feet to the north so the site drains naturally to the north and south; preserve all forested riparian habitat; remove golf course features that trap fish and prevent new ones; prevent native vegetation removal in the setback areas; remove non-native vegetation in the 50-foot setback area; preserve golf course trees, except noxious or invasive; restore native vegetation in the 50-foot setback from ordinary high water line; discontinue weir boards in Haagen Creek when the golf course no longer needs water rights.

Decision

THE OMLID REQUEST (PA 13–05697) FOR THE APPROVAL OF A PRELIMINARY SUBDIVISION PLAN FOR AS TAX LOT 600, ASSESSOR’S MAP 17–15–17–30 IS APPROVED, subject to the following conditions:

1. The subdivision road shall be relocated approximately 50 feet to the north in the widest part of the site to better follow the natural break between drainage to the north and drainage to the south; thus facilitating fish egress during flood events.

2. Approval of 509–PA13–05697 is valid for two years from the final date of approval. The Conditions of Tentative Approval must be satisfied within a two-year period from the final date of approval or the Tentative Approval becomes null and void. A single extension may be applied for per LC 13.200. Review of a subsequent Land Division Final Plat Application shall be an administrative action without further notice and opportunity for appeal.
3. Obtain separate site evaluations for Lots 1 through 27 from the Lane County Subsurface Sanitation Program. Submit proof of ability of each lot to accommodate an individual sewage disposal system and replacement area. The location of the test holes and the site evaluation numbers for each lot must be shown on a copy of the final plat.

4. Submit proof of potable water quality. Proof shall be in the form of chemical/biological tests, conducted by a certified water testing lab, for nitrates, total coliform, fecal coliform, arsenic, and E.Coli.

5. Private access and/or utility easements shall be clearly labeled for their intended purpose on the final plat. A copy of the all easement documents shall be included in the application packet submitted for final plat approval. Original easement documents shall be recorded prior to, or at the time of final plat recording by the Lane County Surveyor’s Office.

6. In accordance with Lane Code 15.135, the private access easement shall meet the applicable requirements of Lane Code 15.055:
   a. A Private Access Easement that is part of or serves a land division shall comply with the following:
      (a) the land division requirements in Lane Code 13.050; and
      (b) road dedication and improvement requirements in Lane Code 15.105; and
      (c) the provisions in Lane Code 15.055(3) through (8).
   b. The minimum width for private access easement shall be of a width determined by the County suitable for the intended use, but in no case less than 30 feet. Notwithstanding this requirement, a pre-existing easement of at least 20 feet in width and serving a lot or parcel created in its present configuration prior to April 28, 2004 is allowable provided it complies with other requirements of this chapter.
   c. All approved documents creating a private access easement shall provide for the installation, construction and maintenance thereof of all utilities and facilities which are now or may in the future be needed for the area abutting the road and the surrounding area.
   d. Any easement approved as a private access easement shall be an affirmative, perpetual easement appurtenant to the property that will be served by the easement, and contain at a minimum the names of grantor and grantee, the description of the land covered by the easement, a description of the lot(s) or parcel(s) to be served by the easement, a description of the intent or purpose of the easement and a statement of maintenance responsibility. All approved easements shall be recorded.
   e. The private access easement shall be named and a road sign shall be posted at the entrance to the private access easement at private expense stating the name of the private road and the words "Private Road, Not Dedicated for Public Use or Maintained by Lane County."
In accordance with Lane Code 15.105(1), the private access easement shall comply with the applicable standards of Lane Code 15.706. In regard to Lane Code 15.706(2)(d), the private access easement shall meet the applicable standards of Lane Code 15.705:

a. The minimum right-of-way width shall be 50 feet. In addition to meeting minimum width requirement, the right-of-way shall include space for the travel way, rock slopes, utilities, and adequate drainage ditches, including accepted safety standards for ditch foreslopes and backslopes.

b. The minimum pavement width shall be 20 feet.

c. The surface type shall be pavement.

d. The pavement structure design shall meet the requirements specified in Lane Code 15.707. In accordance with Lane Code 15.707(5) and (6), the private access easement shall have a road surface depth of two inches of asphalt concrete and base thickness of 12 inches.

e. Roadway and Ditch Side-Slopes:
   (a) In general, ditch rock slopes and foreslopes no steeper than 4H:1V are required.
   (b) When existing terrain precludes use of 4H:1V side-slopes, steeper slopes may be constructed if approved by the County Engineer or designee.
   (c) When slopes steeper than 3H:1V must be used, consideration will be given to the use of a roadside barrier. The standards from the Oregon Highway Design Manual publication cited in Lane Manual 15.450 shall be used when it is necessary to review the efficacy of a barrier.
   (d) The slope rate for cut slopes shall be determined by geotechnical analysis and/or clear zone considerations.
   (e) Side-slopes should be designed to ensure the stability of the roadway and to provide a reasonable opportunity for recovery of an out-of-control vehicle.

f. Ditch depth shall be a minimum of one foot below the elevation of the roadway subgrade, as measured at the edge of the paved surface.

g. A minimum 10 feet wide clear zone is required from the edge of the travel lane. The clear zone should be cleared of all unyielding objects such as trees, sign supports, utility poles, light poles, and any other fixed objects that might severely damage an out-of-control vehicle. The County Engineer or designee may waive this requirement where there is guardrail protection.

h. Sidewalks or walkways are permissible. Walkways may be provided behind the ditch in the road right-of-way, but only at private expense. Any proposed pedestrian facilities are subject to approval by the County Engineer or designee.

i. Maximum Grade:
   (a) Maximum grade shall be 16%. A maximum grade of 20% is allowable for spans of up to 100 feet on a straight tangent when
topographic conditions make lesser grades impractical.

(b) Grades that exceed 16% shall be paved.
(c) Road grades in excess of 8% require the following:
   (i) Submit a center line profile prepared for the proposed road by an Oregon-certified civil engineer or Oregon licensed surveyor.
   (ii) The roadway shall be designed by an Oregon-certified civil engineer.
   (iii) Submit objective evidence demonstrating that road grades in excess of 8% are adequate for firefighting equipment of the agency providing fire protection to access the use and water supply.

8. In accordance with Lane Code 15.708, private access easements shall terminate in a turnaround. The Preliminary Subdivision Plans shows a cul-de-sac. The cul-de-sac shall meet the requirements of Lane Code 15.708(1)(a).

9. Prior to Final Plat approval, an Oregon certified engineer shall provide stamped documentation that demonstrates the private access easement has been established and constructed in accordance with the applicable standards of Lane Code 15.055, 15.705, and 15.708.

10. In accordance with Lane Code 15.137(3), there shall only be one approaches to Bridge Street from the proposed subdivision. The Preliminary Subdivision Plan shows an existing driveway approach to Bridge Street that serves the McKenzie River Golf Course. The proposed subdivision will be served from a new private access easement approach to Bridge Street. Accordingly, the existing driveway approach shall be eliminated.

11. In accordance with Lane Code 15.138(3), new approaches to Madrone Street shall be located at least 100 feet from existing and proposed approaches. In accordance with Lane Code 15.138(1), new approaches to Bridge Street shall be located at least 150 feet from existing and proposed approaches. As shown on the Preliminary Subdivision Plan, the centerline of the new private access easement approach is located within 150 feet of the existing approach to Deerhorn Park located opposite the subject property. The new private access easement approach shall be relocated to comply with Lane Code 15.138(1). Spacing standards shall be measured from center-line to center-line of a road or driveway approach at the intersection of the approach with the County Road Right-of-Way as defined in Lane Code 15.010(34)(a) [Lane Code 15.138(5)].

12. In accordance with Lane Code 15.205(1), a Facility Permit shall be required for placement of facilities and development within the right-of-way of Bridge Street and Madrone Street. Facilities and development include, but are not limited to, road improvements, sidewalks, new or reconstructed driveway or road approach intersections, utility placements, excavation, clearing, grading, culvert placement
or replacement, storm water facilities, or any other facility, thing, or appurtenance. A Facility Permit is required for the elimination of the existing driveway approach and construction of the new private access easement approach to Bridge Street, and the construction of two new driveway approaches to Madrone Street in order to verify that the portion of the approaches within the County road right-of-way meet current County standards (LC 15.205(3)).

13. In accordance with Lane Manual 15.515, storm water runoff from private property shall not be directed to the Lane County road right-of-way, or into any Lane County drainage facility, including roadside ditches. Ditches adjacent to County roads are designed solely to accommodate roadway storm water runoff.

14. In accordance with Lane Code 16.244(8)(d) Table 1: Roads, AE Flood Zone (1), adequate provisions shall be made for accessibility during a 100-year flood, so as to ensure ingress and egress for ordinary and emergency vehicles and services during potential future flooding.

15. In accordance with Lane Code 16.244(8)(d) Table 1: Roads, AE Flood Zone (2), no road surface of any new street, road or access road shall be at an elevation less than one foot below the base flood height. Compliance with this condition shall be certified by a registered professional engineer or surveyor.

16. In accordance with Lane Code 16.244(8)(d) Table 1: Subdivisions and Partitions, AE Flood Zone (3), 100-year flood elevation data shall be provided and shown on final partition maps and subdivision plats. Applicant must show the boundaries of the 100-year flood and floodway on the final subdivision plat.

17. In accordance with Lane Code 16.244(8)(d) Table 1: Subdivisions and Partitions, AE Flood Zone (4), a permanent monument shall be established and maintained on land partitioned or subdivided showing the elevation in feet above mean sea level. The location of such monument shall be shown on the final partition map or subdivision plat.

18. All or a portion of the subject property is identified as a jurisdictional wetland on National Wetlands Inventory Map, Leaburg SW 2. The boundaries of any jurisdictional wetland(s) shall be shown on a copy of the final plat.

19. All development in/and or near wetlands must comply with Oregon Department of State Lands (DSL) and/or the Army Corps of Engineers (ACOE) wetland regulations. Pursuant to the February 12, 2014 referral comments from DSL, a permit is required. The applicant shall coordinate with the DSL and/or ACOE to satisfy permitting requirements. It is the applicant's responsibility to comply with DSL and ACOE regulations.
20. Pursuant to the February 25, 2014 referral comments from DEQ, a 1200-C permit is required. The applicant shall coordinate with the DEQ to satisfy permitting requirements. It is the applicant's responsibility to comply with DEQ regulations.

21. Existing or proposed easements must be shown on the final plat along with the necessary recording information. Any easements created on the Plat must be declared in the Owner’s Declaration.

22. The proposed lots must be surveyed and monumented as required pursuant to ORS Chapter 92.

23. A paper copy of the final plat for review to the Lane County Surveyor’s Office along with other submittal requirements as noted in the “Lane County Surveyor’s Office Policies for Subdivision & Partition Plats”. The final plat must be prepared by a land surveyor registered in the State of Oregon and conform to ORS Chapters 92 and 209.250, as well as Lane Code Chapter 13.

24. A proposed road name for the private access easement shall be submitted to the Lane County Surveyor’s Office for review by the Regional Roadnames Group.

25. New parcel lines shall be no less than 10 feet from any existing structure or septic system.

26. The following notes shall be placed on the final plat:
   a. “The property is located in an area where arsenic is known to occur at significant levels.”
   b. “All or a portion of the subject property is identified as a jurisdictional wetland on National Wetlands Inventory Map, Leaburg SW 2. The locations of the mapped wetlands are shown on a copy of the final plat contained in the Final Plat Application for 509-PAl3-05697. All development shall comply with Oregon Department of State Lands (DSL) and/or the Army Corps of Engineers (ACOE) wetland regulations. The applicant shall coordinate with the DSL and/or ACOE to satisfy any permit requirements. It is the applicant's responsibility to comply with DSL and ACOE regulations.”
   c. “The property is located in a flood hazard zone. All development shall comply with Lane County floodplain regulations in Lane Code 16.244. The flood hazard information shown on this plat is taken from the Flood Insurance Rate Map Panel 41039C1205F, effective June 2, 1999.”
   d. “All development shall comply with the Lane County Class I Stream Riparian regulations in Lane Code 16.253.”

27. Conditions, covenants and restrictions (CC&R), if desired, shall be approved by Lane County and recorded with the final plat. Language shall be included for the maintenance responsibilities of the access easement. The following covenants shall be included within the CC&R's:
a. Building and septic setbacks of 50 feet and 100 feet shall be maintained from Haagen Creek and the McKenzie River, respectively.
b. At the time of Building Permit approval, initial residential building plans for any platted lot shall include leveling any features created by the golf course that pose a risk of isolating fish during a flood event.
c. Owners of residential lots shall create no features that pose a risk of isolating fish during a flood event.
d. With the exception of hazard trees, no native vegetation shall be removed within the 50–foot and 100–foot setbacks on Haagan Creek and the McKenzie River.
e. In conjunction with initial residential development on any lot, non-native vegetation within the 50–foot Haagen Creek setback shall be removed. Within this setback area trees shall be preserved unless they are state listed as noxious or invasive.
f. In conjunction with initial residential development on any lot, a planting plan, prepared by a professional, shall be implemented in the 50–foot setback area from ordinary high water line of the river and the creek. The planting plan is intended to mimic a nearly riparian plant community with herbaceous tree and shrub species. Building permit approval shall be contingent upon the implementation of this plan.
g. At such time as residential development begins, and irrigation water from Haagan Creek is no longer needed for golf course irrigation, then Declarant or its successor shall be responsible to remove the boards from the culvert slot weir in Haagan Creek, so as to allow unimpeded flow for fish passage and natural flow. This obligation is subject to compliance with regulations of the Water Resources Department, Oregon Department of Fish and Wildlife, and the Division of State Lands, and other water rights of record, if any.

28. A "Request Form for Plat Tax Payment Process" shall be completed and submitted to the Department of Assessment and Taxation. Certification from Lane County Assessment and Taxation, verifying that all taxes have been paid, shall be submitted.

29. A final plat shall be prepared and submitted. The plat shall incorporate the requirements of the Lane County Surveyor's Office. The final plat must be prepared by a land surveyor registered in the State of Oregon and must conform to ORS Chapters 92 and 209.250, and Lane Code Chapter 13.

30. An updated subdivision guarantee report shall be prepared by a Title Company no sooner than 30 days prior to the submission of the "Land Division Final Plat Application." A copy of the report shall be attached to the "Land Division Final Plat Application."
31. Once all of the above conditions have been satisfactorily met:
   a. Complete the attached “Land Division Final Plat Application” (Attachment 12); and
   b. Attach a copy of the above required conditions; and
   c. Attach all documents required for verification of the above required conditions; and
   d. Submit the “Land Division Final Plat Application” and required attachments as a complete packet, with the required application fee. The Land Division Final Plat Application will be reviewed. If all of the above required conditions are satisfied, the final plat will be approved and recorded.

Justification for the Decision (Conclusion)

In the December 24, 2014 decision, I found that the applicant had not satisfied Lane Code 13.050(9), which reads:

(9) Dangerous Areas. Any area determined by the Director to be dangerous for road or building development by reasons of geological conditions, unstable subsurface conditions, groundwater or seepage conditions, floodplain, inundation or erosion or any other dangerous condition shall not be divided or used for development except under special consideration and restriction. Special consideration and restriction shall consist of a detailed report by a professional engineer stating the nature and extent of the hazard and recommending means of protecting life and property from the potential hazard and/or the County shall impose limitations designed to minimize the known danger on development commensurate with the degree of hazard. Areas of erosion or potential erosion shall be protected from loss of soil and vegetative cover by appropriate means which are compatible with the environmental character, such as restricting grading or building or constructing erosion control devices. Areas of flood plain, water areas and wetlands shall be retained in their natural state to the extent practicable to preserve water quality and protect water retention, overflow and natural functions. Structures will be required to maintain flood elevation consistent with LC 11.500 (Flood Hazard Area) and LC 16.244. Areas of unstable surface or subsurface conditions shall be protected from movement by appropriate means which are compatible with environmental character, such as restricting grading or building or constructing suitable structures. Areas which are located within the designated floodway, unless a permit pursuant to LC 11.525 and LC 16.244 has been granted, shall be restricted from any building development or the installation of any permanent structure. The County may require that special development recommendations and/or restrictions as to location of building or other development be made a matter of public record when it is deemed necessary to ensure proper disposition of the dangerous area. If the restrictions are considered permanent, they shall be shown on the plat, and if temporary in
nature, shall be recorded by separate document by the partitioner or subdivider prior to the recording of the plat.

Specifically, I opined that the portion of subsection 9 that had not been satisfied was the language that commanded that: "Areas of flood plain, water areas and wetlands shall be retained in their natural state to the extent practicable to preserve water quality and protect water retention, overflow and natural functions."

I concluded that in order to satisfy Lane Code 13.050(9), the Applicants must: (1) inventory the subject property for areas that should be retained in their natural state to preserve natural functions, particularly as they relate to flood event refuge and, if applicable, (2) explain why, in certain situations involving the proposed subdivision plan, it is not practicable to do so.

As described in Finding-of-Fact #2, above, an inventory of the natural state of the subject property that could provide refugia for listed salmonid species has been completed. The results of this inventory support a conclusion that most of the natural state of the subject property was lost with the construction of the golf course. Good refugia that still exists is confined to the forested riparian areas, Haagen Creek, and the McKenzie River water/gravel bar and occupies about 7 acres of the 59-acre subject property.

Based upon the mapped inventory of the "good refugia" existing on the subject property, it appears that the development, as proposed (which includes suggested conditions of approval), will leave untouched the portions of the subject property that are still in their "natural state" and may affirmatively provide refugia to listed salmonid species.

The Hearings Official notes that the golf course does not represent the "natural state" of the subject property and agrees with the applicant's expert on the reasons why the golf course does not provide "good refugia" for listed salmonid species. These reasons include the fact that there is little vegetation in the fairways that would slow the velocity of floodwaters and that sand traps represent potential death traps for fish rather than serving as refugia. Further, I would argue that returning the subject property to its pre-golf course condition is not an option that is practicable.

While not directly relevant to the question at hand, the Hearings Official must also agree with the biologist that the amount of pollutants from the proposed residential development will likely be far less than the quantity of chemicals applied by the golf course in past years.

Conclusion

The December 24, 2014 decision in this matter found that Lane Code 13.050(9) had not been satisfied as no inventory of the floodplain, in its natural state on the subject property, had been done and therefore it was impossible to access how the proposed subdivision would affect these areas. The inventory has been done and conditions of approval have been crafted to ensure that these areas, which serve as refugia for listed
salmonid species, will be preserved. Further, the recommendations by the applicants' biologist, which include enhancement of habitat for listed salmonid species on portions of the subject property, have been embraced by the applicants. Therefore, I find that the applicants' supplemental materials on reconsideration, in concert with the findings made in the December 24, 2014 decision, have satisfied the applicable approval criteria, including Lane Code 13.050(9).

Respectfully Submitted,

[Signature]

Gary Durnieele
Lane County Hearings Official
January 12, 2015

Mr. Matt Laird, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: Request for Reconsideration of Hearings Official Decision in the Omlid request (PA 13–05697) for preliminary subdivision plan approval.

Dear Mr. Laird:

Rod and Sara Omlid have appealed my December 24, 2014 decision in PA 13–05697 denying their request for preliminary subdivision plan approval on tax lot 600, assessor’s map 17–15–17–30 and have asked that I reconsider my decision. The denial of this application was based upon a conclusion that insufficient evidence was available to find that Lane Code 13050(9) had been satisfied.

I have read the applicants’ appeal statement and believe that their proposed scope of work is adequate to identify natural state habitat areas that may serve as salmonid refuge areas during flood events. This inventory will allow the applicants to address Lane Code 13.050(9) and, hopefully, reassure concerns regarding the possibility that the development will create a “take” of endangered species protected by the Endangered Species Act.

Accordingly, under the authority of Lane Code 14.535(2)(b), I will reconsider my December 24, 2014 decision by reopening the record to receive new evidence of compliance with Lane Code 13.050(9); including, but not necessarily limited to, identification of salmonid refuge areas on the subject property and how those areas impact the proposed preliminary subdivision plan.

The applicants will have until 4:00 p.m. on January 26, 2015 to submit additional evidence into the record. Thereafter, other parties, including the County, will have until 4:00 p.m. on February 2, 2015 to review and respond to this submission. Finally, the applicants will have until 4:00 p.m. on February 9, 2015 to submit a written rebuttal.

Sincerely,

Gary L. Danielle
Lane County Hearings Official

Cc: Rafael Sebba (File)
LANE COUNTY HEARINGS OFFICIAL
APPEAL OF THE LANE COUNTY PLANNING DIRECTOR'S DENIAL
OF A PRELIMINARY SUBDIVISION PLAN FOR TAX LOT 600,
ASSSESSOR'S MAP 17–15–17–30

Application Summary

The Applicants in this matter are Rod & Sara Omlid, 827 Jannette Court, Springfield, OR 97477. On December 19, 2013, the Applicants submitted Preliminary Subdivision application PA14–05697 and on January 19, 2014, staff deemed the application incomplete. The application was subsequently deemed complete on January 27, 2014, after the applicant submitted additional information. On October 8, 2014, the Director issued a decision denying the preliminary subdivision and on October 20, 2014, the appellant filed a timely appeal.

Parties of Record

See Exhibit “A”

Application History

Hearing Date: November 13, 2014
(Record Closed on December 16, 2014)

Decision Date: December 24, 2014

Appeal Deadline

An appeal must be filed within 12 days of the issuance this decision and final order, using the form provided by the Lane County Land Management Division. The appeal will be considered by the Lane County Board of Commissioners.

Statement of Criteria

Lane Code 13.050
Lane Code 16.290(6)

Findings of Fact

1. The findings of fact contained in the Lane County Planning Director’s October 8, 2014 decisions in PA 13–05697 are incorporated by reference into these findings except where explicitly modified or rejected.
2. The property subject to the subdivision in question, hereinafter referred to as “the subject property,” can be identified as tax lot 600, assessor’s map 17–15–17–30. It is 58+ acres in size and is located approximately 8.6 miles east of Springfield.

The property is currently the site of the McKenzie River Golf Course, including a 9-hole course, a small club house, restrooms, equipment shed, food cart, driving range, and parking. All of these facilities would be removed if the subdivision were approved and developed.

The base zone of the subject property is RR–2/RCP, Rural Residential (LC 16.290) with a 2-acre minimum lot size. The subject property is bordered by RR–1 zoned lots on the south (the Second and Third addition to Deerhorn Ranch Acres), and the McKenzie River on the north. There are also 8 tax lots zoned RR–1 situated between the subject property and the McKenzie River near the Holden Creek Lane bridge, as well as an extended sliver of land (tax lot 1700 of map 17–15–18) owned by the McKenzie River Trust, found between the river and the subject property, although most of it appears to be below ordinary high water of the river.

3. The subject property is largely bordered by the McKenzie River along much of its northern boundary, while Haugen Creek, runs along much of the southern boundary. Both are classified as Class 1 streams and subject to the riparian regulations of LC 16.253.

Except for small areas, the subject property is covered by the FEMA regulated 100-year flood hazard area, with the regulatory floodway found as a narrow band next to the McKenzie River; the remainder of the upland area is within an “AE” flood hazard area where the base flood elevation has been determined. This information is derived by FIRM Map Number 41039C1205F (effective 6–2–’99). No development is planned within the floodway or within 50 feet of ordinary high water. The Applicants have proposed bio swales, “rain gardens”, and other retention devices to collect storm water and allow it to percolate underground, eventually flowing back into the river. Regardless, the Oregon Department of Environmental Quality requires a 1200–C Construction Stormwater Permit for development on property larger than one acre.

4. The applicant proposes to subdivide the subject property into 27 lots of a minimum 2.0 acres each. Each lot will be served by an individual well and an individual subsurface sewage disposal system. The subject property is not located within an area designated as a water quantity limited area by Lane Manual 13.010(2)(b)(i) although it is located within a water quality limited area by Lane Manual 13.010(1) for the presence of arsenic. A soil survey was conducted on the subject property in October of 2014. The soil conditions at ten locations were tested and the results support a conclusion that there is a reasonable chance that all of the proposed lots will be able to accommodate either a standard on-site sewage disposal system or a sand filter system.
The 27 proposed lots will be served by a proposed 70' wide private access easement extending from Bridge Street westward and terminating in a cul-de-sac at lots 13 and 14. Lots 1–20 and 23–27 will front this easement for a minimum of 30'. Likewise lots 21 and 22 front Madrone Street for a minimum of 30'. The 27 lots are anticipated to generate a peak hour flow of 27 vehicles.

5. The Federal Emergency Management Agency (FEMA) must comply with other federal laws, including the Endangered Species Act (ESA), and must “consult” (a formal process) with the National Marine Fisheries Service (NMFS). NMFS is the agency responsible for the protection of listed species of ocean fish. Two salmonid species that are listed as threatened and are seasonally found in the McKenzie River along the subject property are the Upper Willamette Spring Chinook Salmon and Bull Trout.

In regard to potential impacts that development of the proposed subdivision may have on the two threatened fish species, the Applicant does not propose to remove any riparian vegetation or conduct any fill within 50 feet of the McKenzie River. One area of salmonid habitat identified by FEMA is the upland flood plain that can serve as a refuge during high velocity flooding events. It is unknown how much of the subject property has historically served in this capacity or would likely do so in the future. Theoretically, the placement of homes and accessory structures such as fences and garages, and the development of a road system may serve to negatively impact the high water flood refuge habitat used by the salmonid population.

Decision

THE PLANNING DIRECTOR’S DECISION TO DENY THE OLMID REQUEST (PA 13–05697 IS AFFIRMED, IN PART, AND REVERSED, IN PART.

THE DECISION TO DENY THE APPLICATION ON THE BASIS OF FAILURE TO COMPLY WITH LANE CODE 13.050(9) IS AFFIRMED, BUT FOR REASONS EXPLAINED IN THIS DECISION.

THE DECISION TO DENY THE APPLICATION ON THE BASIS OF FAILURE TO COMPLY WITH LANE CODE 13.050(7)(a) AND (12)(b) IS REVERSED.

Justification for the Decision (Conclusion)

The Planning Director denied the Applicants' request for preliminary subdivision plan approval on the basis that it was not consistent with Lane Code 13.050(7)(a), (9) and (12)(b). The Applicants' December 2, 2014 submission of a revised preliminary subdivision plan that identifies an access and utility easement addresses the Director's concerns regarding Lane Code 13.050(7)(a). The Applicants' December submission also supplemented the record to show that all of the soil types occupying the subject property
can support either a standard subsurface sewage disposal system or a standard subsurface disposal system augmented by a sand filter. In his December 9, 2014 memo, the Planning Director has suggested that this evidentiary offering is sufficient to show consistency with Lane Code 13.050(7)(a) and (12)(b) and I agree.

As mentioned above, the Planning Director also concluded that the application failed to meet the standard of Lane Code 13.050(9). In particular, he points to the following language of this section:

"Areas of flood plain, water areas and wetlands shall be retained in their natural state to the extent practicable to preserve water quality and protect water retention, overflow and natural functions."

After noting that over 90 percent of the subject property lies within the 100-year flood hazard area, the Director points to lawsuits charging FEMA with violation of the Endangered Species Act (ESA) by failure to protect endangered salmonid species through the application of their administrative rules concerning development in flood hazard areas. The result of these lawsuits has been a court decision and a settlement agreement requiring FEMA to consider whether proposed development within a flood hazard area will create a "take" of a protected species.

At this juncture, a short summary of the ESA is appropriate. Section 7(a)(1) of the ESA directs all federal agencies to work to conserve endangered and threatened species and to use their authority to further the purposes of the Act. Federal agencies must consult with the "listing agency" on existing programs or proposed actions that may affect a listed species or its critical habitat. In terms of salmonid species, the listing agency is the National Marine Fisheries Service (NMFS).

The consulting process begins with the federal agency that proposes an action submitting a biological assessment of the action as well as mitigating steps. The listing agency then issues a "biological opinion" (BiOp) regarding whether the proposed action is expected to diminish a species' numbers, reproduction, or distribution so that the likelihood of survival and recovery in the wild is appreciably reduced. If a "jeopardy opinion" is issued then reasonable and prudent alternatives must be applied before the proposed action is implemented. At present, no BiOp has been completed for the Upper Willamette River or its tributaries (i.e., the McKenzie River).

Section 9 of the ESA prohibits the "take" of any endangered species and this prohibition extends to states, local governments, and private individuals. The term "take" has a long definition that includes the term "harm." The term "harm" includes actions that include significant habitat modification or degradation that actually kills or injures fish or wildlife or significantly impairs essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

The first question that springs to mind is "what standard is being applied to this application?" The Director has relied upon LC 13.050(9) to deny the Applicants'
preliminary subdivision plan. The standard embodied by this code section is that the flood hazard area must be retained in its natural state to protect its natural functions only if it is *practicable* to do so. While it is permissible for a local government to interpret its code to find that a federal standard may supply the relevant test for the satisfaction of a local standard, it is clear that this was not done in the present situation.

Rather than apply the standard set forth in LC 13.050(9), the Director concluded that "the proposal presents the *potential* of a "take" of a listed species in that areas of refuge during high water events will be degraded or eliminated altogether by the subdivision." This is the standard of Section 9 of the ESA as interpreted by FEMA. FEMA’s standard, in turn, differs from the standard applied by the NMFS, which is whether an action is "likely to take or harm" a protected species. [Emphasis mine.] The Ninth Circuit Court of Appeals seems to agree with the latter interpretation. In an opinion regarding a proposed school in designated critical habitat of an endangered pygmy owl, the Court found that while a school district’s action might adversely affect the habitat of an endangered species, it was not a “take” or a likely “take.”

A local government may violate Section 9 by its actions but it is questionable as to how far this vicarious liability may extend. For instance, the Tenth Amendment protects local governments from being compelled to implement federal rules directly. The few relevant court cases in the applicability of the ESA at the local level suggest that the local government must have a significant degree of control over a situation to be found liable for violating the Act. For example, the US District Court for the District of Massachusetts enjoined the town of Plymouth from allowing private, off-road vehicles to drive on a municipal beach unless precautions were taken to protect endangered piping plovers. Similarly, if a state or local government is enforcing its own regulations that may violate the ESA the courts may issue an injunction to stop a likely “take.” An example can be found in the *Strahan* case where the First Circuit Court of Appeals enjoined the state of Massachusetts from licensing gillnet and lobster pot fishing that caused injury to endangered northern right whales. A contrary result was reached in what is known as the Loggerhead Turtle cases. In the first *Loggerhead Turtle case*, the Eleventh Circuit Court of Appeals held that for purposes of establishing standing, a county regulation concerning artificial beach lighting was assumed to have harmed the loggerhead sea turtle and the green sea turtle. In considering the merits of the allegations on remand, however, the district court found that the county was not liable under the ESA. In specific, the district court found that the county “cannot be made to assume liability for the act of its private citizens merely because it has chosen to adopt regulations to ameliorate sea turtle takings.”

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1 *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999).
4 *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997).
5 *Loggerhead Turtle v. Volusia County*, 148 F.3d 1231 (11th Cir. 1998).
The first problem with applying the ESA to this subdivision application is that it is premature. It is premature because FEMA has not completed its BiOp for the McKenzie River nor has the NMFS determined whether a “jeopardy opinion” is warranted. To say that FEMA’s amendment of its regulations to address the ESA is several years away is probably very charitable.

The Director is applying the ESA because the subject property lies in the floodplain and because of recent lawsuits concerning the impact of FEMA regulations on the ESA. The application of the ESA to the present application is also premature because the Applicants are not applying for actual development within the floodplain. The preliminary subdivision map is only the framework for future development and, in the present case, does not identify where the houses will be built on the proposed two-acre lots nor does it determine the size or orientation of those houses. If there is to be an inquiry into whether development within the floodplain will likely create a "take," then that inquiry should occur when the actual development is proposed. Thus, at some point in the future, either the developer or a property owner must request a flood plain development permit to construct houses and streets. Also at that time, a DEQ 1200–C Construction Stormwater Permit, that will address issues regarding the potential for pollution of salmonid species habitat from development, will be required.

The second problem is that if the Director is applying the ESA through the authority of Lane Code 13.050(9), the language of the latter does not support the stricter standard of Section 9 of the ESA. If, on the other hand, the Director is applying the ESA directly, I do not believe that he has the authority to do so. While the flood hazard regulations of Lane Code 16.244(7)(b) does authorize the Director to consider compliance with Federal and State permits, there is no similar authorization in Lane Code 13.050. When a floodplain development permit is requested for construction within the proposed subdivision then, arguably, the Director can examine the proposal(s) for compliance with the ESA.

The third problem is one of notice. That is, the approval standard applied by the Director is much stricter than even the most liberal reading of Lane Code 13.050(9) would imply. Under the notice standard of ORS 197.763(3)(b), a reasonable person would not be able to conclude that a showing of compliance with Section 9 of the ESA is required to satisfy Lane Code 13.050(9).

The Applicants’ proposal does not call for development within the floodway or for development, infill, or removal of vegetation within the 50-foot riparian setback area. The record does, however, document that one "natural" function of a flood plain is to serve as a refuge for salmonid species during times of high velocity or volume of water and that the adjacent McKenzie River hosts those endangered species. Since most of the subject property is located within a flood hazard area, it is natural to conclude that at least a portion of the subject property may serve in this capacity. The record is silent about which portions, if any, of the subject property that may have traditionally served this function. It follows then that in order to demonstrate that the proposed subdivision layout represents, to the extent practicable, the retention of the floodplain in its natural state to
protect natural functions, the Applicant must first identify the portion of the subject property that has or is likely to serve as a refuge for salmonid species during times of high velocity or volume of water. The final plat map can thereafter be annotated to prohibit development, or types of development, that may occur in areas so identified.

Conclusion

The Applicants have alleged that the Director has essentially applied a new interpretation of Lane Code 13.050(9) to this application that has not been applied to previous similar applications. While this allegation appears to be correct, it must be remembered that there is no requirement that a local government decision be consistent with past decisions, only that they be correct when made. In recent history, it has been determined that the lands lying within a floodplain serve as a refuge for certain endangered fish species during flood events.

In the present case, the Hearings Official believes that a more complete reading of Lane Code 13.050(9) is warranted but not one as far removed from the language of the Code as that applied by the Planning Director. At the very least, to satisfy Lane Code 13.050(9), the Applicants must: (1) inventory the subject property for areas that should be retained in their natural state to preserve natural functions, particularly as they relate to flood event refuge and, if applicable, (2) explain why, in certain situations involving the proposed subdivision plan, it is not practicable to do so.

Respectfully Submitted,

Gary Darnielle
Lane County Hearings Official

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7 Okeson v. Union Co., 10 Or LUBA 1, 5 (1983)
LAND MANAGEMENT DIVISION

APPEAL OF A
HEARING'S OFFICIAL DECISION

PUBLIC WORKS DEPARTMENT 3050 NORTH DELTA HIGHWAY, EUGENE OR 97408
PLANNING: 541-682-3577 BUILDING: 541-682-4651 SANITATION: 541-682-3754

For Office Use Only: FILE # PA13-05147 CODE: FEE: 250.00

Appellant: Nancy Lozano
Mailing address: 40093 Little Fall Creek Rd., Fall Creek, OR 97438
Phone: __________________________ Email: __________________________
Signature: __________________________ Date: __________________________

Appellant's Representative: Sean T. Malone, Attorney at Law
Mailing address: 259 E. 5th Ave., Ste 200-B, Eugene OR 97401
Phone: 503-950-0403 Email: seanmalone8@hotmail.com
Signature: __________________________ Date: 3/16/15

LOCATION (subject property)
7-15-17 - 30 TaxLot 1000

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

Required Option 1 submittals:

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

1. Fee is $3,735.20 appeal fee, payable to Lane County. (See the reverse side for important fee information)
2. A copy of the decision being appealed, with the Department file number. File #
3. Indicate the deadline to submit the appeal. (Found in the Hearing Official's Decision)
4. Check one of the items below to identify your party status with the right to appeal the Hearings Official's decision:
   ___ I am the owner or contract purchaser of the subject property;
   ___ I am the applicant for the subject application;
   ___ Prior to the decision by the Hearings Official, I submitted written testimony into the record
   ___ I am not one of the persons mentioned above, but wish to appeal the Hearings Official's decision for the reasons explained in my letter.
5. A letter that addresses each of the following three standards:
   a. The reason(s) why the decision of the Hearings Official was made in error or why the Hearings Official should reconsider the decision;

Revised on 7/2014
b. An identification of one or more of the following general reasons for the appeal, or request for reconsideration:
   - The Hearings Official exceeded his or her authority;
   - The Hearings Official failed to follow the procedure applicable to the matter;
   - The Hearings Official rendered a decision that is unconstitutional;
   - The Hearings Official misinterpreted the Lane Code, Lane Manual, State Law, or other applicable criteria.

c. The Hearings Official should reconsider the decision to allow the submittal for additional evidence not in the record that addresses compliance with the applicable standards or criteria.

6. Any additional information in support of your appeal.

EXPLANATION OF THE APPEAL PROCESS UNDER OPTION 1

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

Step 1
When the appeal is submitted, the Hearings Official has the option to reconsider the decision (Refer to LC 14.535). If the Hearings Official reconiders the decision, the fee is $1,170.00.

Step 2
If the Hearings Official elects not to reconsider the decision, the appeal is forwarded to the Board of County Commissioners. The fee is $1,508.00. The Board then decides whether or not to hear the appeal (Refer to LC 14.600).

Step 3
If the Commissioners elect to hear the appeal, the fee for the Board hearing is $2,227.20. If the Board does not elect to hear the appeal, the parties of record may appeal the decision to the Land Use Board of Appeals (LUBA). If the Commissioners do not hear the appeal, $150 of the $1,508.00 fee (Step 2 above) will be refunded, in addition to the $2,227.20, for a total refund of $2,377.20.

Explanation of the Appeal Fee Under Option 1

The total due when submitting the appeal is $3,735.20. You will get a refund if the Hearings Official reconsider the decision, or the County Commissioners elect not to hear the appeal.

If the Hearings Official reconsider the decision, the refund is $2,565.20.

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

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

Required Option 2 submittals:

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

1. Fee is a non-refundable $250 appeal fee, payable to Lane County.

2. A copy of the decision being appealed, with the department file number. File #

3. Indicate the deadline to submit the appeal. (Found in the Hearing Official’s Decision) 3/16/15

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

   __ I am the owner or contract purchaser of the subject property;
I am the applicant for the subject application;

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

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

5. Any additional information in support of your appeal.

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.
Via Hand Delivery

March 16, 2015

Public Works Department
3050 North Delta Highway
Eugene OR 97408
(541) 682-3577

Re: Appeal Addendum for Appeal of a Hearing’s Officer’s Decision re 509-PA-13-05697, Approval of a Preliminary Subdivision Plan for AS Tax Lot 600, Assessor’s Map 17-15-17-30

Appellant Name and Mailing Address

Nena Lovinger
40093 Little Fall Creek Rd.
Fall Creek OR 97438

Authorized Representative for Appellants:

Sean T. Malone
Attorney at Law
259 E. 5th Ave, Ste 200-G
Eugene OR 97401
Ph. (303) 859-0403
Fax (650) 471-7366
Seanmalone8@hotmail.com

Identification of the Decision Sought to Be Reviewed

Appellant hereby appeals the Hearing Officer’s March 3, 2015, decision approving the Applicant’s (Rod and Sarah Omlid) request for a preliminary subdivision along the McKenzie River at tax lot 600, assessor’s map 17-15-17-30, located approximately 8.6 miles east of Springfield, on what is currently the site of the McKenzie River Golf Course (509-PA-13-05697).
Appeal Option

Appellant requests Option 2 as set forth in the County’s appeal form. 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 pursuant to LCC 14.515(3)(f)(ii).

Standing

Appellant has standing to appeal because appellants appeared before the Hearings Officer in writing.

Grounds for Appeal

For an option 2 appeal, appellant notes that the form does not require the appellant to set forth grounds for appeal. However, to the extent required, the grounds on which appellant bases its appeal include but are not limited to the following:

- The Hearings Officer misconstrued applicable law and criteria, as outlined below:
  - Lane County Code and all applicable approval criteria, including the requirement in LC 13.050(9) to retain areas of the flood plain, water areas, and wetlands in their natural state to preserve water quality and protect water retention, overflow and natural functions;
- The Hearings Officer made findings not supported by substantial evidence, as outlined below:
  - Re why refugia for sensitive fish species that may be of lesser quality is not better than no refugia at all;
  - Re how the “unnatural” function of the current golf course obviates the property’s function as refugia during high velocity water events;
  - Re how existing vegetation on the golf course is not forested riparian;
  - Re endangered and threatened species;
  - Re why the proposed subdivision (and the development that inevitably will result) would be more “natural” than the current forested state;
  - Re limitations on golf course features relating to water storage and delay, and the ability to function as refugia;
  - Re the current use’s alleged failure to function as refugia and how the proposed subdivision will retain such refugia;
  - Re introduction of fungicides, herbicides, insecticides, and fertilizers that will occur regardless of the change of use from golf course to residential subdivision;
  - Re occurrence of additional pollutants and impermeable surfaces resulting from development;
  - Re development with homes on the property allowing the area to transition to a more “natural state;”
  - Re recommendation to fill or grade areas of the golf course so as to not trap fish concedes that the area will be used as refugia;
o Re the presence of significant trees and other vegetation that provide refugia on the property
o Re the forested areas on the golf course providing the same potential refugia as the forested riparian areas.

• The Hearings Officer made inadequate findings, as outlined below:
  o Re why refugia for threatened fish species (Chinook Salmon and Bull Trout) that may be of lesser quality is not better than no refugia at all;
  o Re how the “unnatural” function of the current golf course obviates the property’s function as refugia during high velocity water events;
  o Re how existing vegetation on the golf course is not forested riparian;
  o Re endangered and threatened species;
  o Re why the proposed subdivision (and the development that inevitably will result) would be more “natural” than the current forested state;
  o Re limitations on golf course features relating to water storage and delay, and the ability to function as refugia;
  o Re the current use’s alleged failure to function as refugia and how the proposed subdivision will retain such refugia;
  o Re introduction of fungicides, herbicides, insecticides, and fertilizers that will occur regardless of the change of use from golf course to residential subdivision;
  o Re occurrence of additional pollutants and impermeable surfaces resulting from development;
  o Re development with homes on the property allowing the area to transition to a more “natural state;”
  o Re recommendation to fill or grade areas of the golf course so as to not trap fish concedes that the area will be used as refugia;
  o Re the presence of significant trees and other vegetation that provide refugia on the property
  o Re the forested areas on the golf course providing the same potential refugia as the forested riparian areas.

• All arguments (both written and oral) submitted on behalf of appellant throughout the open record period are incorporated by reference into this section of the appeal addendum, including all comments and emails, including the comments dated February 2, 2015 (attached).

Appeal Fee

Please find attached a check in the amount of $250.00 for the appeal fee.

Copy of the Decision

A copy of the decision being appealed is attached hereto.

Position of Appellants

Appellant submitted all information containing all applicable arguments before the close of the record, and appellants request that the application be denied.
Sincerely,

Sean T. Malone
Attorney for Appellant

cc: appellant
For the record of PA13-05697, Omlid

2 February 2015

To hearings official Gary Darnielle from Nena Lovinger. Please confirm that these comments get entered into the record.

The applicant does not articulate why refugia that may be of lesser quality is not better than no refugia at all (i.e., development with houses, impermeable surfaces, and so forth). The applicant concedes that there are degrees to the refugia, but fails to account for the fact that with the development, the opportunity for refugia would be foreclosed.

The applicant states that disturbed riparian habitat types are historical riparian habitats which have been altered (typically vegetation removal) to accommodate development, but fails to explain why the existing vegetation on the golf course is not forested riparian. The applicant does not explain why this area could not be reclassified as riparian habitat, and similarly does not explain why the proposed development would be more “natural” than the current forested state.

The applicant argues that “[t]he golf course features on the property have some specific limitations relating to water storage and delay, and their ability to function as refugia.” This suggests that it does not absolutely preclude its function as refugia, and fails to explain how the proposed development would retain such existing refugia.

Introduction of fungicides, herbicides, insecticides, and fertilizers occurs regardless, and that is not a reason to develop the property, which will preclude refugia. Additional pollutants and impermeable surfaces will occur as a result of the development, which is far less “natural” than the existing condition.

Simply because the property has been converted to an unnatural function does nothing to obviate the property’s function as refugia during high velocity water events. Regardless of the quality of refugia, it is still refugia. The area is surrounded by forested areas, which will slow the floods in the interior of the forested area. The area will fare no better, and even worse, if developed. Poor refugia is better than no refugia whatsoever. It is simply incredible to argue that development with homes will allow the area to transition to a “natural state.” To the contrary, it will become less natural.

While pollutants could be eliminated if there is no golf course, this begs the question of what new pollutants and development will occur to create even greater unnatural areas. This issue is ignored by the applicant.

Recommendation to fill or grade areas of the golf course so as not to trap fish concedes that the area will be used as refugia.

“Portions of the proposed subdivision will already be sufficiently established with native vegetation as described.” Any forested or vegetated area must be off-limits to development.
Simply because some development occurred in the past, which may be unnatural, that does not preclude the use of the area for otherwise natural purposes. The applicant has misconstrued the use of the term "natural."

There are significant trees and other vegetation that provide refugia on the property. Figure 1 misrepresents that these areas of significant vegetation are only grass. There is no difference between the forested areas on the golf course and the forested riparian areas.
MCKENZIE DEERHORN LANDING
PRELIMINARY SUBDIVISION
ASSESSOR'S MAP No. 17-15-17-3, TAX LOTS 600 & 601
EUGENE, LANE COUNTY, OREGON
DECEMBER 12, 2013

APPLICANT:
ROD & SARA OMID
837 JANETTE COURT
SPRINGFIELD, OR 97477
(503) 277-6833

GENERAL NOTES:
1. THE SUBJECT PROPERTY IS ZONED RR2.
2. THE TOTAL AREA OF THE SUBJECT PROPERTY IS 58.75 ACRES.
3. ACCESS FOR LOTS 1-20 AND 23-27 WILL BE TAKEN VIA THE PROPOSED 70-FOOT WIDE ACCESS EASEMENT. THE ACCESS EASEMENT PROVIDES ACCESS TO BRIDGE STREET, A PUBLIC ROAD. LOTS 21-23 WILL TAKE ACCESS VIA MADRONE STREET, A PUBLIC COUNTY ROAD.
4. SURFACE WATER FROM THE PROPOSED 20-FOOT WIDE PAVED AREA OF THE ACCESS EASEMENT WILL DRAIN TO SWALES LOCATED ALONG EACH SIDE OF THE PAVING AND WILL THEN INFILTRATE INTO THE EXISTING SOIL. STORMWATER FROM IMPERVIOUS SURFACES (IE ROOFS, DRIVEWAYS, ETC.) LOCATED ON PROPOSED LOTS WILL DRAIN TO SOAKAGE TRENCHES OR OTHER SURFACE INFILTRATION FACILITIES. NO PUBLIC STORMWATER FACILITIES ARE PROPOSED.
5. NO PUBLIC OR COMMUNITY SEWAGE DISPOSAL SYSTEM IS BEING PROPOSED. EACH INDIVIDUAL LOT WILL USE A SUBSURFACE GRAINFIELD TO DISPOSE OF THEIR SEWAGE EFFLUENT. BASED ON EXISTING ON SITE SOIL TESTING, THE PROPOSED LOTS CAN ACCOMMODATE AN INDIVIDUAL SEWAGE DISPOSAL SYSTEM. EACH INDIVIDUAL LOT WILL HAVE ITS OWN WELL TO SUPPLY POTABLE WATER FOR EACH FUTURE HOME. EACH WELL WILL BE LOCATED A MINIMUM OF 100 FEET FROM ANY GRAINFIELD.
6. ALL BUILDINGS, AS SHOWN, WILL BE REMOVED.