BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 16-03-01-06 IN THE MATTER OF ELECTING WHETHER OR NOT TO HEAR AN APPEAL OF A HEARINGS OFFICIAL’S RECONSIDERED DECISION REGARDING A LAND USE COMPATIBILITY STATEMENT (LUCS) DETERMINATION THAT AN ACCESSORY STRUCTURE IN THE IMPACTED FOREST LANDS ZONE (F-2) COMPLIES WITH LANE CODE 16.211(2) AND THE SITING STANDARDS OF LANE CODE 16.211(8); MAP 18-04-27, TAX LOT 402 (FILE NO. 509-PA15-05054/KAPLOWITZ).

WHEREAS, the Lane County Hearings Official has made a determination that an accessory structure in the Impacted Forest Lands Zone (F-2) complies with Lane Code 16.211(2) and the siting standards of Lane Code 16.211(8), in Department File No. 509-PA15-05054; and

WHEREAS, the Lane County Planning Director has received an appeal of the Hearings Official’s reconsidered decision to the Board of County Commissioners pursuant to LC 14.515(3)(f)(ii) and LC 14.515(3)(f)(ii); and

WHEREAS, the Lane County Hearings Official has affirmed his reconsidered decision on the application after reviewing the appeal in File No. 509-PA15-05054; and

WHEREAS, Lane Code 14.600 provides the procedure and criteria that 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, the Board of County Commissioners of Lane County 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 December 30, 2015, and the letter affirming the decision dated January 22, 2016, attached as Exhibit "B," and those portions of the Hearings Official decision dated August 17, 2015, that found relevant approval criteria are met, and the letter reconsidering the decision dated September 2, 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 16.211 made by the Hearings Official in the decision.

ADOPTED this 1st day of March, 2016.

Faye Stewart, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 7-23-16
Lane County
OFFICE OF LEGAL COUNSEL
ORDER EXHIBIT “A”

FINDINGS IN SUPPORT OF THE ORDER

1. The subject property is located on tax lot 402, assessor’s map 18-04-27, and has a site address of 85344 Forest Hill Lane, Eugene, Oregon. The subject property is zoned F-2 Impacted Forest Lands and is about 9.7 acres in size. The Applicants also own tax lot 409 (Assessor’s Map 18-04-28) adjacent to the west. The subject property lies within the Lane County Fire District #1 and is served by a private well that produces 8 gallons per minute.

2. There is a lawful dwelling on the subject property authorized under Special Use Permit 509-PA91-02274 and constructed under Building Permit 509-BP92-03268. This structure is 3,600 square feet in size and contains three bedrooms and three bathrooms. Lane Code allows a structure that is accessory to a lawful residential use. Such accessory structures could include garages, storerooms and utility spaces, sheds, playhouses, greenhouses, hobby shop, animal or pet shelters, or an accessory residential structure (a structure that contains an area for residential use or occupancy that could include a toilet or bathroom, but not a kitchen).

3. The subject property is occupied by two additional structures. One structure was built as a barn and was permitted in 1995 pursuant to Building Permit #1990-95. The other structure, which is the subject of this appeal, was originally constructed as a horse barn/arena. This structure was constructed in August of 2000 without the benefit of land use or building approval and is located approximately 285 feet from the dwelling. It is 95 feet long and 60 feet wide (5,700 square feet) and is located outside of the “same site” area as defined in both LC 16.211(2)(o) and the previous version of LC 16.211(4)(a)(iii).

4. On January 28, 2015, the Applicants, Larry Kaplowitz and Karin Marcus, represented by Thom Lanfear, submitted a Land Use Compatibility Statement requesting a determination that an accessory structure meets the siting standards of Lane Code 16.211(8). On February 27, 2015, the application was deemed complete. On May 12, 2015, the Director issued a decision approving the Land Use Compatibility Statement, determining that the structure met the applicable siting standards of Lane Code 16.211(8).

5. On June 1, 2015, a timely appeal was submitted by Charles Wiper III, represented by Aaron Noteboom. On July 2, 2015, the Lane County Hearings Official conducted a public hearing. The record was held open until August 6, 2015. On August 17, 2015, the Lane County Hearings Official issued a decision affirming in part, and reversing in part, the Director’s approval.

6. On August 27, 2015, both the applicant and the appellant submitted timely appeals. The applicant requested that the Hearings Official reconsider his decision pursuant to Lane Code 14.515(3)(d)(vi). The appellant appealed 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 agreed to reconsider his decision per Lane Code 15.535(2)(b) and to open the record for additional evidence. The record closed on December 8, 2015. On December 30, 2015, the Lane County Hearings Official issued a reconsidered decision approving the application.

7. On January 15, 2016, Aaron Noteboom, representing appellant Charles Wiper III, filed a timely appeal of the Hearings Official’s reconsidered decision pursuant to Lane Code 14.515(3)(f)(ii), again requesting that the Board not conduct a hearing on the appeal and deem the Hearings Official decision the final decision of the County. On January 22, 2016, the Hearings Official reviewed the appeal and affirmed his reconsidered decision of December 30, 2015. On January 22, 2016, William Sherlock, representing the applicants, submitted a motion and request to dismiss the January 15, 2016 appeal filed by Aaron Noteboom. The Planning Director accepted the appeal, and did not reject the appeal pursuant to Lane Code 14.520. The Board finds that Lane Code 14.520 gives the Director discretion in accepting or rejecting appeals. The Board elects not to dismiss the appeal as requested by the applicant.
8. 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.

9. The Board finds that the issues raised in this appeal are not of countywide significance. The issues in this appeal are limited to the site-specific circumstances of the subject property, the specific location and characteristics of the accessory structure in question, and the proposed use of the structure by the current property owner.

10. 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. Lane Code contains provisions allowing accessory structures in conjunction with residential uses and includes siting standards for such structures in the Impacted Forest Lands Zone. The Hearings Official's decision presents reasonable interpretations of Lane Code 16.211 as it applies to the fact pattern and issues raised in this appeal, and those interpretations comport with the Planning Director's understanding of Lane Code.

11. The Board finds that the subject property does not constitute a unique environmental resource. The property does not contain any unique or notable environmental resources, nor does it contain any regulated water bodies, rivers, creeks, or wetlands.

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

13. 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.

14. The Board has reviewed this matter at its meeting of March 1, 2016, 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.

15. The Board affirms and adopts the Lane County Hearings Official reconsidered decision dated December 30, 2015, and those portions of the Hearings Official decision dated August 17, 2015, that found relevant approval criteria are met, as the County's final decision in this matter, and expressly agrees with and adopts the interpretations of Lane Code 16.211 made by the Hearings Official in the decision.
EXHIBIT "B"

LANE COUNTY HEARINGS OFFICIAL
RECONSIDERATION OF THE HEARINGS OFFICIAL'S LUCS
DETERMINATION REGARDING A HORSE BARN/ARENA WITHIN AN F-2
DISTRICT

Application Summary

The Applicants, Larry Kaplowitz and Karin Marcus, submitted a request for a Land Use Compatibility Statement (LUCS) determination that a horse barn/arena structure constructed without the benefit of applicable planning and building permits complies with Lane Code 16.211(2) and the siting standards of Lane Code 16.211(8). On May 19, 2015, the Director issued a determination that the subject structure complied with the applicable siting standards of Lane Code 16.211(8). On June 1, 2015, a timely appeal was submitted by Charles Wiper III.

On August 17, 2015 the Hearings Official affirmed the Planning Director's determination that the Applicant's horse barn/arena structure is an accessory use but reversed the Planning Director's determination that the applicant's access road met the standards of Lane Code 16.211(8)(e). The applicant appealed this decision and requested a reconsideration. Pursuant to Lane Code 14.535(2)(b) the Hearings Official granted a reconsideration with the introduction of new evidence.

Parties of Record

Larry Kaplowitz  Karin Marcus  Charles Wiper III
Aaron Noteboom  Thom Lanfear  William Sherlock
Charles Thomason  Jen Cavanaugh  David & Jill Rink

Application History

Record Closure Date:  December 8, 2015

Reconsidered Decision Date:  January 4, 2016

Appeal Deadline

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

Lane Code 16.211(2)&(8)
ORS 215.760
ORS 455.315

Findings of Fact

1. The property subject to this application, hereinafter referred to as the “subject property,” is located on tax lot 402, assessor’s map 18–04–27, and has a site address of 85344 Forest Hill Lane, Eugene, Oregon. The subject property is zoned F–2 Impacted Forest Lands and is about 9.7 acres in size. The Applicants also own tax lot 409 (Assessor’s Map 18–04–28) adjacent to the west. The subject property lies within the Lane County Fire District #1 and is served by a private well that produces 8 gallons per minute.

2. The findings of fact contained in the August 17, 2015 Hearings Official decision in this matter are adopted by reference except where explicitly modified or replaced. In this regard: The horse barn/arena accessory structure is 92 feet long and 56 feet wide for a square footage of 5,200. It was improved by the Applicants in 2012 after purchasing the property in 2009.

3. A site view of the subject property was taken by the Hearings Official on November 3, 2015. During this site view, the interior and exterior of the horse barn/arena structure was observed and the access road was walked up to where it was adjacent to tax lot 401.

4. The Lane Fire Authority provides fire and emergency services to the subject property. Its Spencer Creek station (Station 109), the nearest fire station to the subject property, has a Type 1 fire engine with a 1,000–gallon water tank and a Type 1 Tender with 3,000 gallons of water. Its Fox Hollow station (Station 107) has a Type 1 fire engine with a 1,000–gallon water tank. Finally, its Veneta station (Station 101) has a Type 1 fire engine with a 750–gallon tank and a Type 1 Tender with a 3,000–gallon water tank.

The Lane Fire Authority has reviewed the proposed turnaround near the horse barn/arena structure and has found it to be adequate for its equipment.¹ The Authority’s fire inspector has inspected the driveway for adequacy of its firefighting equipment and has determined that it meets the Authority’s standards.

¹ See September 21, 2015 site plan signed off by Dean Chappell, Lane Fire Authority Fire Inspector.
Decision

THE PLANNING DIRECTOR'S DETERMINATION THAT THE HORSE BARN/ARENA ON THE SUBJECT PROPERTY IS AN ACCESSORY STRUCTURE TO THE PRIMARY RESIDENCE AND THAT THE ACCESS ROAD TO THE HORSE BARN/ARENA COMPLIES WITH LANE CODE 16.211(8)(e) IS AFFIRMED, with the following conditions of approval:

1. The conditions of approval in the Planning Director's May 19, 2015 determination are adopted by reference except as modified by this decision and its conditions of approval.

2. The accessway to the subject property shall be increased to road standards (two feet clearance on either side and a 16-foot wide travel surface) from Chezum Road to the northwest corner of tax lot 401. The turnout shall be constructed as detailed on the Applicants' site plan. In addition, the hammerhead/turnaround proposed by the Applicants that is adjacent to their barn must have at least six inches of gravel or with paving having a crushed base equivalent to six inches of gravel and must be accessible to emergency vehicles at all times (i.e., not used for parking during events at the accessory structure).

3. The accessory residential structure (horse barn/arena) shall conform to the fire-fuel setback standards of LC 16.211(8)(c)(i)(aa).

4. The use of the accessory residential structure shall be confined to family, friends of family, and family guests for all events and shall not be offered to the general public nor used for commercial purposes.

Justification for the Reconsidered Decision (Conclusion)

The Planning Director required the Applicants to submit a request for a Land Use Compatibility Statement (LUCS) to allow the determination of whether the converted horse barn/arena complied with Lane Code 16.211(2) and the siting standards of Lane Code 16.211(8). The August 17, 2015 decision raised two general issues regarding the application: compliance with the siting requirements of LC 16.211(8)(e) and whether the proposed use of the horse barn/arena structure was consistent with residential use of an accessory structure.

Compliance with LC 16.211(8)

Three appeal issues have been addressed regarding compliance with LC 16.211(8). First, the Fire Safety and Design Standards for Driveways and Roads within the Impacted Forest Lands District, as found in Lane Code 16.211(8)(e), requires evidence of compliance with the standards specified in LC 16.211(8)(e) that must include:

"... objective information about the fire fighting equipment, the physical nature of the access route, the nature of any proposed improvements to the access route, and it may
also include a written verification of compliance from the agency providing fire protection, or a written certification of compliance from an Oregon Registered Professional Engineer."

Upon reconsideration, the Applicants supplemented the record with specific information regarding the fire fighting equipment used by the local fire protection provider, the Lane Fire Authority. Evidence was also supplied showing that the Authority’s fire inspector had inspected the Applicants’ driveway and proposed turnaround and found them to be adequate. Further, the site view of the driveway demonstrated that it was feasible, given the width and topography of the easement, to provide necessary 2-foot clearance and necessary pullouts to meet the standards of LC 16.211(8)(e).

Second, in the appeal of Charles Wiper III the issue was raised regarding whether the access easement utilized by the Applicant was consistent with LC 16.211(8)(e). The language in question reads: "As used herein, "road" means a way of access used for more than one use and accessory uses dwelling or manufactured dwelling. As used herein, "driveway" means a way of access used for only one dwelling or manufactured dwelling." In this regard, it is argued that the minimum roadway width standard of LC 15.706(4) of 12 feet is not applicable as the access road qualifies as a road not a driveway since it serves both the Applicant’s property and the Thompson’s property (tax lot 401).

The language of LC 16.211(8)(e)(i) supports this allegation as it makes it clear that a road is defined as an accessway that serves more than a single residence with its accessory uses. While the Thompsons have not used the easement in the past, they do have a legal right to use the access easement and have a gate along its border. Therefore, the access road will have to be improved to a travel surface of 16 feet in width to the end of the Thompson property.

Third, during the site view it was pointed out that there were several trees and brush near the accessory structure in violation of the 30-foot primary fuel-break standard of LC 16.211(8)(c)(i)(aa). Satisfaction with this criterion has been made a condition of approval.

With the aforementioned conditions of approval, the Applicant has satisfied LC 16.211(8)(e).

Normal Residential Use of the Accessory Structure

Besides daily family use, the applicants have proposed that the accessory structure will be used, at a maximum, by small groups of friends and family (5 to 15 people) one a week for dancing, music, yoga or meditation practice. They also anticipate using the structure up to eight times a year for parties of fewer than 40 persons. As noted in my August 17, 2015 decision, this intensity of use falls within a normal residential use, albeit at the higher end of that scale.
Finally, the applicants anticipate holding parties of between 40 and 80 persons three to four times a year and an occasional wedding or bar mitzvah celebration/reception once a year. Whether this intensity of use is "normal" for a rural residential use is questionable and the Applicants have not provided the Hearings Official with any evidence of other residential uses in Lane County that have a similar level of use. The comparison with what was proposed with the Applicants' home occupation application is too "apples and oranges" although it can be conceded that the intensity of certain home occupations may exceed that of what the Applicants propose.

Perhaps the best indication of residential use is not in regard to whether the intensity of usage is "normal" for a rural residential lifestyle but rather whether it is truly residential in nature and whether it causes significant harm to adjacent and nearby uses. In regard to the former, one aspect of a residential use is that it does not involve commercial remuneration. The Applicants have not proposed that they will be charging for the use of the accessory structure and this decision relies upon that assumption. A second aspect of a residential use is that it involves family, friends of the family, business associates, etc.; not the general public. Approval granted by this decision is based upon an understanding, clarified in the conditions of approval, that the larger events (except for the wedding-type celebration/reception activities) are not open to the general public but are constrained to individuals invited by the Applicants.

In terms of "harm" to adjacent and nearby uses, the primary issue has been adequacy of access to the subject property for emergency vehicles. The applicable fire authority has conducted a site inspection of the road and turnaround location and found them to be adequate for the emergency equipment that it uses. The increase of a portion of the accessway to road standards address the Appellant's concerns about the adequacy of the accessway during emergency circumstances. The condition regarding compliance with the primary fuel-break standards also addresses concerns about fire hazard.

In summary, the Applicants have shown by a preponderance of the evidence that their proposed use of the horse barn/arena, including the three to four gatherings of 40 to 80 persons, can be considered a residential use of the structure.

**Conclusion**

It must be remembered that this decision originated as a request for a Land Use Compatibility Statement (LUCS) regarding whether the horse barn/arena structure should be characterized as a residential accessory structure or an illegal structure. While this question was the primary focus of the Appellant, other issues regarding compliance with LC 16.211(8) and the scope of the use of the accessory structure were raised. This
decision, and associated conditions of approval, clarifies the basis upon which the horse barn/arena has been recognized as a residential accessory structure.

Respectfully Submitted,

Gary Darnielle
Lane County Hearings Official
January 22, 2016

Ms. Lydia McKinney, Manager
Land Management Division
3050 N. Delta Highway
Eugene, OR 97408

Re: Appeal of Reconsidered Decision in the Kaplowitz/Marcus request (PA 15-05054) for a Land Use Compatibility Statement (LUCS) determination that a horse barn/arena structure constructed without the benefit of applicable planning and building permits complies with Lane Code 16.211(2) and the siting standards of Lane Code 16.211(8).

Dear Ms. McKinney:

On December 30, 2015, I issued a reconsidered decision regarding Kaplowitz/Marcus request (PA 15-05054) for a Land Use Compatibility Statement (LUCS) determination that a horse barn/arena structure constructed without the benefit of applicable planning and building permits complies with Lane Code 16.211(2) and the siting standards of Lane Code 16.211(8). On January 20, 2016 the Appellant appealed my reconsidered decision. Upon a review of this appeal, I find that the allegations of error have been adequately addressed in that decision and that further reconsideration is not warranted.

Accordingly, on the authority of Lane Code 14.535(1), I shall affirm my December 30, 2015 decision without further consideration. Please advise interested parties of this decision.

Sincerely,

Gary L. Darnielle
Lane County Hearings Official

cc: Rafael Sebba (file)
LANE COUNTY HEARINGS OFFICIAL
APPEAL OF A PLANNING DIRECTOR LUCS DETERMINATION REGARDING
A HORSE BARN/ARENA WITHIN AN F-2 DISTRICT

Application Summary

The Applicants, Larry Kaplowitz and Karin Marcus, submitted a request for a Land Use Compatibility Statement (LUCS) determination that a horse barn/arena structure constructed without the benefit of applicable planning and building permits complies with Lane Code 16.211(2) and the siting standards of Lane Code 16.211(8). On May 19, 2015, the Director issued a determination that the subject structure complied with the applicable siting standards of Lane Code 16.211(8). On June 1, 2015, a timely appeal was submitted by Charles Wiper III.

Parties of Record

Larry Kaplowitz  Karin Marcus  Charles Wiper III
Aaron Noteboom  Thom Lanfear  William Sherlock
Charles Thomason  Jen Cavanaugh  David & Jill Rink

Application History

Hearing Date: July 2, 2015
(Record Held Open Until August 6, 2015)
Decision Date: August 17, 2015

Appeal Deadline

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

Statement of Criteria

Lane Code 16.211(2)&(8)
ORS 215.760
ORS 455.315

Findings of Fact

1. The property subject to this application, hereinafter referred to as the “subject property,” is located on tax lot 402, assessor’s map 18–04–27, and has a site
address of 85344 Forest Hill Lane, Eugene, Oregon. The subject property is zoned F-2 Impacted Forest Lands and is about 9.7 acres in size. The Applicants also own tax lot 409 (Assessor’s Map 18-04-28) adjacent to the west. The subject property lies within the Lane County Fire District #1 and is served by a private well that produces 8 gallons per minute.

There is a lawful dwelling on the subject property authorized under Special Use Permit 509-PA91-02274 and constructed under Building Permit 509-BP92-03268. This structure is 3,600 square feet in size and contains three bedrooms and three bathrooms. Lane Code allows a structure that is accessory to a lawful residential use. Such accessory structures could include garages, storerooms and utility spaces, sheds, playhouses, greenhouses, hobby shop, animal or pet shelters, or an accessory residential structure (a structure that contains an area for residential use or occupancy that could include a toilet or bathroom, but not a kitchen).

2. The subject property is occupied by two additional structures. One structure was built as a barn and was permitted in 1995 pursuant to Building Permit #1990-95. The other structure, which is the subject of this appeal, was originally constructed as a horse barn/arena. This structure was constructed in August of 2000 without the benefit of land use or building approval and is located approximately 285 feet from the dwelling. It is 95 feet long and 60 feet wide (5,700 square feet) and is located outside of the “same site” area as defined in both LC 16.211(2)(o) and the previous version of LC 16.211(4)(a)(iii).

In 1991, after purchasing the subject property, the Applicants converted a portion (2,800 square feet) of the horse barn/barn/arena into a "sanctuary," commonly referred to as the "Mandala Sanctuary." The Applicants replaced the dirt floor with a wooden floor and built the following improvements to the structure: a studio, for yoga, music and dance; a guest room; a recording studio; two storage rooms; two bathrooms with composting toilets; and a mudroom/entry foyer. The structure has a metal roof and its chimney has a spark arrester.

3. After converting a portion of the horse barn/arena into a "sanctuary," the Applicants used the structure to conduct a business known as Solsara. Solsara consisted of workshops, residential retreats, etc., that featured instruction in yoga, meditation, kirtan\(^1\), ecstatic dance, concerts and community gatherings. A complaint was filed with the Lane County Compliance Officer\(^2\) regarding the operation of the business without a proper land use permit and the Applicants submitted an application for a home occupation to conduct yoga classes, dance workshops, personal wellness workshops and small indoor musical events.

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\(^1\) A meditation chant exercise originating from Kundalini Yoga.

\(^2\) CA 13-00128
Under the terms of the home occupation application, the yoga classes were to consist of two, three-hour sessions per week for five to 25 persons. The personal wellness workshops were to consist of three, three-hour sessions per week for 12 to 40 persons. One workshop per month would occur for a three-day period on a weekend during the hours of 9 am to 9 pm. Dance workshops were to consist of one, three-hour session a week for a group of 25 to 60 persons. The class would normally be held in the evening. Music events were to occur no more than once a week in the evening and would consist of three hours of amplified acoustic music with attendance of 40 to 80 persons. These events would be held from 7 pm to 10 pm in the evening. During the pendency of the permit application, the Applicants continued to operate their business out of the horse barn/arena until they withdrew their application in early December of 2014.

4. The subject property is accessed by a private easement (along the northern perimeter of tax lots 401 and 404) that is connected to Forest Hill Lane that, in turn, connects to Chezem Road. The shared access is limited to the eastern 240 feet of Forest Hill Lane. The easement is 30 feet wide and is slightly over 1,000 feet in length. It has one turnout located more than 400 feet from the subject property. The nearest residence to the access road, located on tax lot 401, is 40 feet from the access road. It is buffered by trees located between it and the road.

5. The subject property is located within the Spencer Creek watershed. Properties to the west and southeast are zoned Rural Residential and properties to the northeast and south are zoned Impacted Forest Lands (F-2). Property to the north is zoned E-40.

More specifically, tax lots 400 and 406 are located north of the subject property. They are both owned by the Appellant, are zoned E-40, and 27 of their 78 acres are in hay production. The one dwelling on this ownership is located about 900 feet to the northwest of the horse barn/arena and takes its access off of Chezem Road, to the east. Tax lots 401 and 405 are located east of the subject property. The former is split zoned F-2/RR-5 and the latter is zoned RR-5. The dwellings on tax lot 401 and 405 are located, respectively, about 600 feet and 475 feet from the horse barn/arena.

Tax lot 500 borders the subject property on the south. It is zoned F-2 and is used for residential purposes, limited grazing and small-scale timber management. Two residences, which take access off of Florence Road, occupy this tax lot. The closest residence is 650 feet from the horse barn/arena. Tax lot 410, zoned RR-5, lies adjacent to and to the southwest of the subject property. This tax lot takes its access off of Jessie Lane to the west, and is used for residential purposes. Its residence is about 1,000 feet from the horse barn/arena.
Tax lot 409, owned by the Applicants, lies adjacent to the subject property on the west. It is undeveloped and zoned RR-5. Tax lot 417 is located adjacent and to the northwest of the subject property. This property is used for residential purposes, limited grazing and small-scale timber management. It is zoned RR-5 and takes its access from Jessie Lane, to the west.

The horse barn/arena is about 160 feet from tax lot 406 to the north, which is zoned E-40, and 190 feet from tax lot 401 on the east, which is zoned F-2. It is at least 130-feet from all property lines. There are no F-1 properties adjacent to the subject property. The neighborhood to the west of the subject property is often referred to as “Peaceful Valley.”

6. ORS 215.760(1) states:

"An agricultural building, as defined in ORS 455.315, customarily provided in conjunction with farm use or forest use is an authorized use on land zoned for forest use or for mixed farm and forest use."

ORS 215.760(2) states:

"A person may not convert an agricultural building authorized by this section to another use."

ORS 455.315(1) states that:

"The provisions of this chapter do not authorize the application of a state structural specialty code to any agricultural building, agricultural grading or equine facility."

ORS 455.315(2)(a) and (b), respectively, define what an "agricultural building" is and is not. ORS 455.315(2)(d) and (e), respectively, define what an "equine facility" is and is not.

Decision

THE PLANNING DIRECTOR’S DETERMINATION THAT THE HORSE BARN/ARENA ON THE SUBJECT PROPERTY IS AN ACCESSORY STRUCTURE TO THE PRIMARY RESIDENCE IS AFFIRMED.

THE PLANNING DIRECTOR’S DETERMINATION THAT THE ACCESS ROAD TO THE HORSE BARN/ARENA COMPLIES WITH LANE CODE 16.211(8)(e) IS REVERSED.
Justification for the Decision (Conclusion)

The Planning Director required the Applicants to submit a request for a Land Use Compatibility Statement (LUCS) to allow the determination of whether the converted horse barn/arena complied with Lane Code 16.211(2) and the siting standards of Lane Code 16.211(8).

The Planning Director has determined that because the structure was not constructed under a permit for an agricultural building, it is not subject to the constraints of 16.211(2)(n) even though the applicant has referenced the structure as being an existing agricultural structure. The Planning Director has considered the structure as an “accessory structure” to the residence because that term has been construed very broadly in the past and has included garages, storerooms, sheds, playhouses, greenhouses, hobby shops, animal shelters, and accessory residential structures (with no kitchen).

After the Planning Director considered the structure as an accessory structure, he applied the criteria of Lane Code 16.211(2)(o) to determine which siting standards were applicable.

(o) Uses and development accessory to existing uses and development, subject to the following
   (i) ‘Same Site’ development area is defined as the area within 250 feet from the perimeter of the primary structure to which the proposed use or development is accessory.
   (ii) If the proposed accessory development is located partially or entirely within the ‘same site’ development area, the accessory development is subject to the following clear and objective siting standards: LC 16.211(8)(a)(iv) & (v), (c)(i)(aa), and (c)(iii); or
   (iii) If the proposed accessory development is located outside of the ‘same site’ development area, the accessory development is subject to the following discretionary siting standards: LC 16.211(8)(a), (b), (c)(i)(aa), (c)(iii), and (e). Notice is required pursuant to LC 14.100(3) and (4) with the opportunity for appeal pursuant to LC 14.500.

Because the structure was located more than 250 feet from the perimeter of the residence, the Planning Director believed that the criterion of Lane Code 16.211(2)(o)(iii) were applicable. However, because the legality of Lane Code 16.211(2)(o) is currently in question, the Planning Director applied all of the siting criteria of Lane Code 16.211(8) in his approval of the LUCS. In summary, the Planning Director determined that the use of the horse barn/arena complied with applicable land use standards. A timely appeal was filed by the Appellant.
The following are the assignment of errors enumerated by the Appellant:

1. **The horse barn/arena cannot be considered as an "accessory structure" under Lane Code 16.211(2) as Lane Code 16.211(2)(n) prohibits the conversion of an agricultural building to another use.**

   Lane Code 16.211(2)(n)\(^3\) states:

   "An agricultural building, as defined by LC 16.090, customarily provided in conjunction with farm use or forest use. A person may not convert an agricultural building authorized by this section to another use."

   The Appellant argues that a horse barn/arena is an equine facility and that an "equine facility" is included within the Lane Code 16.090 definition of "agricultural building." He notes that this differs from ORS 215.760 but argues that it is permissible for Lane County to be more rigorous than the regulations adopted by the state.

   The Appellant is correct that counties may, in some cases, adopt land use regulations that are more rigorous than their state counterparts. They may not, however, adopt regulations that are inconsistent. The language of Lane Code 16.211(2)(n) is derived from ORS 215.760, which specifically points to ORS 455.315 for the definition of "agricultural building." It is clear from ORS 455.315(1) that "agricultural building" and "equine facility" are two different uses and the specific provisions of ORS 455.315(2) make this clear.

   The confusion arises from the fact that the drafters of Lane Code 16.090 chose to lump the terms "agricultural building" and "equine facility" under the single heading of "Agricultural Building." Section (1) of this definition, however, clarifies the matter by addressing each use separately when it states: "Nothing in this Chapter is intended to authorize the application of a state structural specialty code to any agricultural building or equine facility." Section (1)(a) then specifically provides a definition of "agricultural building" that is different from the definition of "equine facility" used in Section (1)(c). Taken together, these code sections make it clear that Lane County's intent was to follow the statutory scheme of treating an equine facility differently than an agricultural building. The Appellant chooses to read the Lane Code as being inconsistent with statute when he is not required to do so.

   Second, even if an equine facility can be considered to be an agricultural building, Lane Code 16.211(2)(n) implies that a structure cannot become an agricultural building unless so authorized. Section (1) of the definition of "Agricultural Building" state that neither an agricultural building nor an equine facility are

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\(^3\) Lane Code 16.211(2)(n) implements ORS 215.760.
subject to the state structural specialty (building) code. The horse barn/arena was never approved under a building permit.

However, in Lane County, agricultural buildings and equine facilities are subject to land use approval. To obtain approval for an agricultural building or equine facility, Lane County requires, among other things, an application to certify the structure as being an agricultural building or an equine facility, a site plan, a legal description of the property, a notarized "Agricultural Building/Equine Facility Use Covenant" that promises that the structure will remain as an agricultural building or equine facility, and an application fee. The horse barn/arena was never received land use certification that it was either an agricultural building or an equine facility.

Without either building permit approval or land use certification, the horse barn/arena has no official status. It therefore seems appropriate that its status shall be that use which the current owner intends. The current owners want the structure to be considered as being accessory to the primary residence on the subject property. For this, the Applicants need only obtain a building permit and this was a condition of the Planning Director's determination.

This allegation of error is dismissed.

2. **The accessory use is not permitted on F–2 zoned property.**

The appellant initially argued that Lane Code 16.211(2)(o)(iii) has not yet been acknowledged by the Land Conservation and Development Commission (LCDC) and therefore, Goal 4 must be applied directly to the Planning Director's LUCS determination. This allegation was withdrawn by the Appellant when it was shown that the code provision in question has been acknowledged.

3. **The converted horse barn/arena ("sanctuary") is not an "accessory" residential use.**

Essentially the Appellant is arguing that the proposed use of the horse barn/arena, as converted, is not subordinate or in proper scale with the residential use of the property. By way of example, the *McCormick* case\(^4\) is used to demonstrate a situation where the scale and operating characteristics of an alleged accessory use is clearly out of proportion to the residential use of a property and therefore is not accessory to that use. The Applicants counter by citing *Fleming v. Coos County*\(^5\), for the proposition that size [of the accessory structure] does not matter.

While this decision is not an infractions judgment, the LUCS inquiry is, by its very nature, quite broad and includes a determination of the appropriate use of the


\(^5\) 34 Or LUBA 328 (1998)
horse barn/arena. I maintain that the size of the structure has limited evidentiary value compared to the scope of the use proposed and its impact on the neighborhood.

While the horse barn/arena structure is 58 percent larger than the primary residence on the subject property this, in itself, is not determinate of whether the structure is reasonably accessory to the residence. It is common knowledge that many homes in the rural area have large accessory structures that serve as storage for car collections, a large recreational vehicle, or even an indoor bicycle/skateboard facility for teenage boys.

Much of the Appellant's concerns, and that of other neighbors, are based upon past uses of the horse barn/arena by the Applicants as well as the potential usage outlined in their application for a home occupation. The appropriate consideration, however, is whether the structure, as intended to be used in the future by the Applicants, qualifies as a building and use that is truly accessory to the residential use of the subject property.

The pertinent issue is whether the accessory structure is subordinate to the residence or visa versa. Two factors are relevant to this inquiry. First, the intensity of the use of the accessory structure should be weighed against the intensity of the use of the residence. Second, the impact on the neighborhood from the use of the accessory structure and the residence should be compared. If in the McCormicks case the Grangers, the owners of the property, had only a couple of tennis courts and restricted usage to a few friends of the family then LUBA's decision probably would have turned out differently. Five tennis tournaments utilizing four tennis courts with surrounding retaining walls, a cabana with showers and a bathroom, lighting and a parking lot, is a whole other matter.

In a supplemental evidentiary submission, the Applicants have clarified how they intend to use the accessory structure. The structure will be used on a daily basis by the Applicants and their housemates for personal use such as yoga, dance, meditation and hobbies. Small groups of friends and family (5 to 15 individuals) will use the structure for dancing, music, yoga or meditation practice once a week, on the average. The Applicants intend to hold parties of 40 or more people once a month or so. There will be an occasional accommodation of overnight guests.

Intensity of the primary residence in regard to the intensity of the accessory use.

Based upon the Applicants' statements, it appears that the business aspects of their activities, such as workshops and such, have been transferred to Spencer Creek Grange. The use of the accessory structure on a daily basis by the Applicants and housemates is, by definition, a reasonable and normal residential use, the scope of which is determined by the number of residents in the primary residence. The weekly meeting of a small group of friends also does not appear to exceed normal residential use as measured against households that host weekly
bridge parties, poker games or book clubs. The monthly “parties”, however, appear to approach the threshold of what might be considered a normal residential use; especially if the “or more” substantially exceeds 40 individuals on a regular basis. For instance, in their home occupation application, the Applicants intended to hold music events for as many as 80 people. A one–time wedding of attendees of this size or larger could be considered as a normal residential use but a one–a–month party of this magnitude would not. The burden lies with the Applicants to show that regular, monthly parties of 40 or more people is a normal occurrence in rural Lane County.

Intensity of the accessory use in regard to the neighborhood.

The issue is whether the impact on the neighborhood from the Applicant’s accessory use is greater than what reasonable person would expect from the residential use of an accessory structure. Using testimony submitted regarding the Applicant’s home occupation application, it appears that concerns include increased fire danger, overuse of the access easement, water supply, noise, capacity of septic tank systems, and light pollution from use of easement.

Fire hazard – As a condition of approval, the Applicant was required to obtain a building permit for the horse barn/arena. Since the structure will be associated with a residential use, it must meet fire code standards as if it were a dwelling, with a firewall required to separate the portion of the structure that will be utilized for storage from the portion that will be occupied.

In addition, primary fuel breaks have been established around the accessory structure and the record suggests that the Applicants have demonstrated compliance with most of the fire safety standards of Lane Code 16.211(8). The use of the horse barn/arena by the Applicants appear to largely consist of activities that will be conducted inside of the structure. There appears to be sufficient space to construct a hammerhead turnaround near the accessory structure once there is confirmation regarding the specific needs of the equipment used by the fire district.

Easement usage – The Applicant’s use of the easement is subject to a maintenance agreement that requires them to pay for maintenance and repairs in proportion to their usage of the easement. Arguably, the cost of repairing excessive wear and tear of the surface of the easement will be covered by the Applicants.

Water supply – None of the proposed uses of the accessory structure identified by the Applicants would seem to put a strain on the well that serves the residence; especially in comparison to using it to support agricultural crops on the subject property.
Noise — As warranted by the Applicants, the activities proposed to be associated with the horse barn/arena will occur within that structure. Proper modulation of amplified music and the closing of doors can control sound generated by any activity. Complaints regarding failure to adequately control sound associated with residential use of property is not an infrequent issue with the County and these situations are referred to the Infractions Compliance Official.

Septic tank capacity — I don’t believe the record reflects the capacity of the current subsurface disposal system or the composting toilets. If, on remand, the Planning Director approves the LUCS and the Applicants continue to desire to host ‘occasional’ parties then I believe that they should obtain feedback from the Lane County Sanitarian regarding the capacity of their waste disposal systems.

Light and noise pollution from use of the easement — The residence on tax lot 401, to the east, is located about 40 feet from the access easement. Depending upon the time of day the easement is used, headlight-shine and tire noise on the gravel surface may unreasonably disturb the residents of this dwelling regardless of the intervening trees. Normal daily and weekly use of the accessory structure, as proposed by the Applicants, would not constitute an unusual residential use of the easement.

The monthly “parties,” even if not constrained to about 40 people, may represent an abnormal residential use. Assuming arguendo that the Lane County Transportation Planning staff estimate that vehicle occupancy for the proposed home occupation was correct (2.4 persons per vehicle), then a party of 40 people would generate 17 vehicles and a party of 80 would generate 33–34 vehicles. As noted above, a reasonable person would probably consider an occasional event of 40 people as normal for a rural residence. A monthly event of this magnitude or greater would not, on its face, appear to be a normal residential use of the subject property.

This allegation of error is dismissed except as it relates to the proposed monthly parties proposed by the Applicants. Absent a strong evidentiary showing by the Applicants on this issue I cannot conclude that this intensity of use can be considered as subordinate to the primary residential use of the subject property.

4. **The Applicants failed to demonstrate that the access to the horse barn/arena meets the siting requirements of LC 16.211(8)(e).**

The Fire Safety and Design Standards for Driveways and Roads within the Impacted Forest Lands District, as found in Lane Code 16.211(8)(e), requires evidence of compliance with the standards specified in LC 16.211(8)(e) that must include:
“... objective information about the fire fighting equipment, the physical nature of the access route, the nature of any proposed improvements to the access route, and it may also include a written verification of compliance from the agency providing fire protection, or a written certification of compliance from an Oregon Registered Professional Engineer."

The Planning Director's approval contains no findings regarding available fire fighting equipment. It is not clear what portion of the Applicants' home occupation file is in this record but there is no information regarding the specifics of any recent inspection of the access road by the fire district. The lack of this information is documented by the Planning Director's condition of approval requiring the Applicants to obtain a letter from Lane County Fire District #1 as to the adequacy of access to the existing barn structure. Unfortunately, this condition represents an improper delegation of the Director's authority to determine that the proposed use satisfies the fire safety design standards applicable to the road serving the barn structure. There is no evidence in the record regarding the nature of fire fighting equipment or evidence as to what improvements, other than a turnaround at the barn, are necessary to accommodate the fire fighting equipment. Indeed, the information relied upon by the Applicant and the Planning Director appears to be the information relied upon in the 1992 approval of the primary dwelling.

Lane Code 16211(8)(e) makes it clear that written verification of compliance from the applicable fire district or a certification from a licensed engineer is not mandatory but if supplied must be treated as evidence relevant to compliance with fire safety design standards. It is evidence that must be available for public review prior to the Director's decision and it is evidence that must be considered by the Director in his determination as to whether or not the approval criteria have been met.

The Appellant has also suggested that the road access has an insufficient number of turnouts and cites the 500-foot minimum standard of Lane Code 16.211(8)(e)(ii). A vehicle passage turnout exists at the bend in the driveway, about midway between Forest Hill Lane and the border of the subject property and the Applicant has warranted that a second turnout will be placed near the horse barn/arena. Several problems exist with this solution. First, the proposed new access point is more than 500 feet from the existing access point. Second, the need for turnarounds isn't just for emergency vehicles but also for people who are traveling over the access road and this was a concern of the residents of tax lot 401 regarding the proposed home occupation. Thus, turnouts are necessary to serve people entering or leaving the subject property as well as tax lot 401. To meet the requirements of Lane Code 16.211(8)(e)(vi), there should be a

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6 See Margulis v. City of Portland, 4 Or LUBA 89, 98 (1981), where the decision-maker improperly delegated the determination of the adequacy of off-site parking to the city's Bureau of Traffic Management.
turnaround at a point near the border of the subject property and tax lot 401 and, arguably, another access near where the access easement turns south towards the primary residence. While it is true that Lane Code 16.211(8) states that the standards in LC 16.211(8)(a) – through (b) shall be weighed together with the requirements in LC 16.211(8)(c) and (e), I believe that this balancing should be employed only where one or more of the various siting standards cannot be met. In the present case, the record indicates no reason why the turnaround spacing requirements of Lane Code 16.211(8)(e)(ii) cannot be met.

This allegation of error is affirmed and the Planning Director’s LUCS determination that the accessory structure meets the siting standards of Lane Code 16.211(8) is reversed. It should be pointed out that it is likely that this discrepancy can be corrected through additional information and cured upon reconsideration.

5. The siting of the accessory structure outside of the “same site” as the primary residence must be justified through the application of the standards of LC 16.211(8).

Lane Code 16.211(8) mandates that its subordinate provisions, except for subsection (d) that addresses water availability, be weighed together to identify a building site. When applied to the siting of a primary residence, these provisions are intended to make the use compatible with farm and forest uses, to minimize wildfire hazards, and to generally conserve forest land values. The Appellant argues that when applied to an accessory structure proposed to be located outside of the “same site,” the provisions require an applicant to demonstrate why the accessory structure cannot be located within the “same site.” In support of this interpretation, the Appellant points to a January 26, 2010 memo from Kent Howe, Planning Director, to planning staff.

The Applicant argues that the January 2010 memo was only intended to apply to residential accessory uses (i.e., guest houses). While that memo may have been triggered by the proposed placement of a guest house, the language of the memo must be understood to apply to all accessory structures in the F-2 District as that zone lists neither "residential accessory uses" or "guest house" as standalone, allowable uses. The reasoning behind this conclusion is based upon the language of Lane Code 16.211(2)(o), which talks about uses and development that are accessory to "existing uses and development." There are a great many types of use and development allowed in the F-2 District that are not residential in nature and which could conceivably be supported by or require an accessory structure. Indeed, the definition of "same site" found in Lane Code 16.211(2)(o)(i) refers to a "primary structure," not a residential structure, to which a use or development is accessory.

The Applicant makes a good point in recognizing that the 2010 memo from the Planning Director, which does not have the gravis of a formal administrative
interpretation, was superseded by the December 17, 2014 formal Director Interpretation that an accessory structure located outside of a “same site” development area must be justified through a LUCS determination.

I further believe that the interpretation the Appellant gleaned from the February 2010 memo is not supported by the language of Lane Code 16.211(2)(o). Subsection (ii) requires that certain provisions of Lane Code 16.211(8) be applied when a proposed accessory structure is within or partially within the "same site" as the primary structure and subsection (iii) requires the application of a slightly modified list of provisions when the accessory structure is not. If the legislative intent were to require that the provisions cited by Lane Code 16.211(2)(o)(iii) demonstrate why the accessory structure cannot be placed within the "same site" then requiring compliance with some of the same standards when an accessory structure lies within the "same site" would be superfluous.

The introductory paragraph of Lane Code 16.211(8) makes it clear that the siting standards are intended to ensure compatibility with farm and forest operations, minimize wildfire hazard risk, and conserve forest land values. None of the standards that apply to accessory structures located outside of the "same site" area require a clustering of structures on the subject property although Lane Code 16.211(8)(a)(i) implies that clustering with dwellings and structures located on adjacent parcels is advisable. Further, the overriding warrant of Lane Code 16.211(8) is that the building site is to be determined by weighing the various standards of this section of the code. And these standards can often be contradictory as 16.211(8)(a)(i) supports clustering with structures on adjacent properties while 16.211(8)(a)(iii) supports keeping the accessory use away from adjacent properties zoned F-1, F-2 and EFU even though those properties may have dwellings or other structures.

This allegation of error is dismissed.

**Conclusion**

I conclude that the horse barn/arena is a structure that has never been certified as being either an agricultural building or an equine facility and its proposed usage, except for monthly parties, is subordinate to the primary residential use of the subject property. I further conclude that the applicable siting standards of Lane Code 16.211(8) are not to be narrowly interpreted to require justification of the location of the accessory structure in regard to placement within the “same area” standard of Lane Code 16.211(2)(o).

I further conclude that the Planning Director erred in conditioning his approval upon certification by the fire district or an Oregon Registered Professional Engineer that the horse barn/arena complies with Lane Code 16.211(8)(e). This inquiry should also determine proper number of turnouts that are required. The necessary information may have been available in the supporting information for the Applicants’ home occupation
application but apparently it did not make its way into this record. As stated above, these problems can likely be cured upon reconsideration.

I am also suggesting that if the Applicants wish to host occasional parties of 40 or more people that they obtain information from the County Sanitarian regarding the capacity of their waste disposal systems. This information will help the Planning Director and other county officials determine whether these systems have the capacity to handle this many individuals.

Respectfully Submitted,

Gary Darnielle
Lane County Hearings Official