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Before the Board of Commissioners

Klamath County, Oregon

IN THE MATTER OF A REQUEST TO)
SUBDIVIDE LAND KNOWN AS TRACT)
1234, DEER KNOLL, FOR)
EDWARD J. SHIPSEY)

ORDER #88-153

I. NATURE OF APPLICATION

This is a request for a subdivision in a rural (R-1) zone and was considered pursuant to Article 46 of the Land Development Code.

Public hearings were held on the matter on August 25, 1987, pursuant to notice given in conformity with ordinance numbers 44 and 45, and on a continuation of that hearing to September 10, 1987, by the Klamath County Planning Commission. The matter came before the Board of Commissioners pursuant to appeal of Edward J. Shipsey and heard by the Klamath County Board of Commissioners on September 30, 1987, pursuant to notice given in conformity with ordinance numbers 44 and 45.

II. NAMES OF THOSE INVOLVED

The applicant, Edward J. Shipsey, together with his attorney Steven A. Zamsky, were present to present argument before this Board. The Planning Department was present, represented by Senior Planner, Kim Lundahl. Administrative Secretary, Karen Burg, was the recording secretary. Michael Spencer, Legal Counsel, was also present. Richard Bergstrom presented argument opposing the application and appeal.

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III. LEGAL DESCRIPTION

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The property is located approximately one-half mile southwest of the Keno-Worden Road and approximately 3.5 miles south of Keno. The legal description: located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, Township 40S, Range 8 EWM, Tax Lot 7400.

IV. RELEVANT FACTS

Before the Board of Commissioners was the record of the testimony presented at the hearing on August 25, 1987, in the form of a transcript, and Exhibits A through GG.

The property has a Rural plan designation with an implementing zone of R-1 (Rural-one acre minimum).

The property is 20 acres in size and rectangular. The topography is generally flat. The vegetation is sagebrush, scattered juniper, pine and native grass. The area is not being used for agricultural purposes. The SCS Soil Class is V. The timber site productivity rating is VI. The surrounding lands in the immediate area are subdivided into lots ranging in size from 1.5 to 20 acres in size. Of the lots in the subdivision which surrounds the property, Cedar Trails Subdivision, there are 24 which have houses on them. The majority of the smaller lots in Cedar Trails are near or adjacent to this property.

The property lies, at its western most point, approximately one-quarter mile from the nearest boundary of the Bear Valley Eagle Refuge and between one and one-quarter miles and one and one-half miles from the nearest identified roosting area. The land between this property and the roosting area is heavily wooded with juniper and mature Ponderosa Pine. There is a ridge laying between the identified roost area and this property, which is

1 approximately 400 feet higher than the applicant's property and
2 the valley floor in which the roost areas lay.

3 Access will be off an existing road in Cedar Trails
4 Subdivision. This road, named Overland Drive, is cindered. Cedar
5 Trails Subdivision and this land are within a road district.
6 Overland Drive is maintained by the road district.

7 The public facilities and services are:

8 A. Schools: Keno-Henley School District

9 B. Recreation: NA

10 C. Sewer: Individual septic

11 D. Water: Individual well

12 E. Utility Districts: Pacific Power and Light and Pacific
13 Northwest Bell

14 F. Fire Districts: Keno Rural Fire Protection District.

15 **V. RELEVANT APPROVAL CRITERIA**

16 Subdivision review criteria are set forth in the Land
17 Development Code under Article 46, subsection 003 and are as
18 follows:

19 The preliminary plat of a proposed subdivision may
20 be approved only if the reviewing authority finds that
21 it satisfies the following criteria:

22 A. The preliminary plat of the proposed
23 subdivision is in conformance with the Klamath County
24 Comprehensive Plan;

25 B. The preliminary plat of the proposed
26 subdivision is in conformance with all applicable
27 provisions of this Code, other county codes and
28 ordinances and State Law;

29 C. The future street plan for the proposed
30 subdivision will permit its development in accordance
31 with this Code;

32 D. The future street plan for the proposed
33 subdivision will permit the development of adjoining
34 land or is provided access that will allow its
35 development in accordance with this Code;

36 E. The site of the proposed subdivision is

1 physically suitable for the type and density of the
2 proposed development;

3 F. The existing sewer and water facilities and
4 existing fire protection services are adequate to serve
5 the proposed development.

6 Also relevant is Code Section 69.004, which provides as follows:

7 Section 69.004 - REVIEW AND APPROVAL

8 In approving applications for development in fire hazard
9 areas as defined in Section 69.002, the review authority
10 shall incorporate the suggested fire protection measures
11 as conditions of approval.

12 Also relevant consideration is Code Section 83.004C(2), which
13 provides as follows:

14 If the responsible agency and the applicant cannot agree
15 on a management plan which would allow for both resource
16 preservation and development, the following findings of
17 fact, if applicable to the disagreement must be made:

18 A. The resource or site must be disturbed to
19 provide for reasonable use of the site, and if not
20 disturbed, the applicant would be substantially damaged;

21 B. The use proposed will directly benefit the
22 community and satisfies a substantial public need or
23 provides for a public good which clearly outweighs
24 retention of the resource;

25 C. The proposed development would not result in
26 the loss of a rare, irretrievable, or irreplaceable
27 natural feature or scientific opportunity, or the
28 disturbance of a substantially unaltered natural feature
or area in or adjacent to the proposed site, unless the
benefit to the public from the proposed use clearly
outweighs the public good from retaining the feature or
area;

D. The public benefit due to the development of
the particular site would be maximized when compared to
development of similar properties in the area not
possessing a unique site or resource;

E. The identified site or resource cannot be
physically developed for an energy source or has a low
potential for an energy development based upon an
evaluation of environmental, social and economic
factors;

F. The proposed development will disturb or
destroy only an area or areas of low preservation value,
and will not significantly alter or disturb other
portions of the resource area on or adjacent to the
site;

G. In big game winter ranges, the cumulative
effect of the proposed land use change and other

1 development in the area must be consistent with the
2 maintenance of long term big game habitat values.

3 VI. FINDINGS

4 1. The preliminary plat of the proposed subdivision is of
5 lots slightly more than one acre, which is in conformance with the
6 Comprehensive Plan Designation after resolution of the Goal 5
7 issues as set forth in Code Section 83.004C(2) and the fire issue
8 as hereinafter discussed.

9 2. Upon resolution of the two above noted issues and
10 approval of the variance requested, the preliminary plat of the
11 proposed subdivision will be in conformity with the applicable
12 provisions of this Code, other county codes and ordinances, and
13 State law.

14 3. The street plan (consisting of a single cul-de-sac) will
15 permit the development of this property in accordance with the
16 Code, provided that the variance for cul-de-sac length is
17 approved.

18 4. The adjoining land of this property is already developed
19 and has its own access.

20 5. The site of the proposed subdivision is relatively flat
21 and thus suitable for one acre lots, as proposed in the
22 development.

23 6. Based upon the hydrology study presented, as required by
24 the Comprehensive Plan, adequate water appears to be available.
25 It also appears that the area, generally, is suitable for septic
26 tanks. Applicable DEQ procedure requirements will be applied in
27 the development and installation of septic tanks and, in addition,

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1 a statement will be provided to the purchaser of any lot, from the
2 developer, that no sewage disposal facility will be provided.

3 7. The property is within the Keno Rural Fire Protection
4 District. The State Department of Forestry has expressed concern
5 about the cul-de-sac insofar as fire protection is concerned. The
6 Keno Rural Fire Protection District does not share that concern,
7 but it is concerned about the adequacy of water. The issue with
8 relation to the cul-de-sac will be determined under the variance
9 request. It also appears that the fire protection district and
10 applicant are in discussions concerning adequacy of water, but had
11 not reached a conclusion. Therefore, a condition to the plat
12 shall be that it be subject to resolution of the water supply
13 issue between the applicant and the fire protection district,
14 before a final plat is accepted.

15 8. Concerns raised by the adequacy of the access road are
16 not supported by substantial evidence particularly in view of the
17 fact that a road was built to county standards, is maintained by a
18 road district of which this property is a part, and the Klamath
19 County engineer believes them to be adequate.

20 9. The conditions above set forth as to the agreement of the
21 applicant and Keno Rural Fire Protection District satisfies
22 Section 69.004.

23 10. The Oregon Department of Fish and Wildlife has objected
24 to the one acre lots as proposed since the property is situate
25 within a secondary buffer zone for the Bear Valley Bald Eagle
26 Refuge and the Pearson Butte low/medium deer winter range, but has
27 indicated it would accept a reduction to 5 acre lots from the
28 20-80 acre minimum lot size provided by the respective zone

1 overlays. The applicant and the Department were unable to agree
2 on a mutually acceptable plan. Therefore, the provisions of Code
3 Section 83.004C(2) come into play.

4 11. No opponents or agencies presented evidence insofar as
5 the deer winter range is concerned, other than Mr. Opp in his
6 letter. During Mr. Opp's testimony, it was apparent that his
7 concern revolved not around deer, but around eagles. Proponents
8 submitted significant testimony through the applicant, Ted
9 Paddock, and Barney Oldfield that in their experience and personal
10 observation of the area, over many years, that if anything the
11 deer herd in the area are on the increase, even in view of the
12 significant development that has occurred in the Keno area
13 generally during that time. Significant development surrounds
14 this property.

15 12. Mr. Opp has presented his Department's concern insofar
16 as the potential impacts on the eagle roost area. He is unable to
17 give specific reasons why the development might disturb the
18 eagles, other than vague statements that dogs and people might
19 enter the area. Applicant presented testimony that the people
20 living in the area have seen few eagles over-flying this area,
21 which is consistent with Mr. Opp's statements that the main flyway
22 is to the southeast of the roost area, several miles distant from
23 this proposed development. Additionally, the applicant submitted
24 11 articles and abstracts of articles and papers dealing with the
25 buffered areas around eagle roosts from experts in the field.
26 These articles dealt with other areas, but many are similar,
27 especially that concerning the Three Sisters area. The consensus
28 of those articles would indicate that those experts believe a

1 buffering zone, where there is visual separation, would be
2 sufficient if there were one-quarter to one-half of a mile
3 surrounding the buffered area. There is almost a mile of
4 separation from the roost area to the boundaries of the refuge.

5 Based on the foregoing, we conclude that the importance of
6 the secondary buffer area and deer winter range is slight.

7 13. Applicant produced evidence that there is a need for
8 affordable housing in the Keno area generally, and that he intends
9 to build that type of house which would sell for approximately
10 \$50,000. There is no evidence to the contrary.

11 14. Applicant presented testimony from Barney Oldfield, Ted
12 Paddock, and himself that in order to build that type of housing,
13 it is necessary that the building operation be done efficiently,
14 and that can only be accomplished when the lots are next to each
15 other and relatively inexpensive. He also testified that he was
16 not aware (which testimony was supported by both Mr. Paddock, Mr.
17 Oldfield, and by letter from Mr. Hank Holman) of other property in
18 the Keno area with the R-1 zone, with lots next to each other, and
19 with appropriate prices, which was available for development.
20 Opponents produced evidence of the amount of property zone R-1,
21 but no specific evidence of buildable land, which was
22 appropriately zoned, nor any evidence of whether or not such land
23 was available.

24 15. The applicant claims that he would suffer an economic
25 loss of \$150,000 if a 5 acre minimum were imposed on him. No
26 determination that the applicant would suffer such a loss is made.
27 It should also be noted that the total increase in tax base to the
28 County by the development proposed by applicant would be increased

1 by approximately \$1 million in the event one acre minimums were
2 provided, and by only approximately \$150,000 if 5 acre minimums
3 were provided. Additionally, applicant presented evidence of the
4 cost to fence the refuge boundary, which would be \$20,000 as
5 compared to the loss occasioned by him and the county by reducing
6 the number of lots to be developed.

7 16. In view of the foregoing, we conclude that applicant
8 would be substantially damaged if the lot size were greater than
9 one acre.

10 17. We also conclude that the proposed development would
11 provide a direct benefit to the community and satisfy a
12 substantial public need by increasing the County tax base, and
13 providing affordable housing to members of the public. As opposed
14 to that, there is little support for retaining the large lot
15 limitations imposed by the buffer zone and winter range zone in
16 view of the facts above recited and also taking into account the
17 degree of development surrounding this property.

18 18. There is no irreplaceable natural feature or scenic
19 opportunity nor an unaltered natural feature.

20 19. The property is not involved in any energy source.

21 20. Public benefit will be maximized by the development of
22 this particular site, since other sites are not available which
23 would allow the construction of affordable housing in the Keno
24 area. There simply are not other similar properties in the area.

25 21. The deer winter range and buffer zones overlaying the
26 proposed development have only a low preservation value, and this
27 development, for the reasons described above, will not
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1 significantly alter other portions of the resource area on or
2 adjacent to the site from their present condition.

3 22. There is no evidence that the cumulative effect of the
4 proposed land use change would be damaging to big game habitat
5 values. There is significant evidence from the proponent, that,
6 if anything, the deer population will be enhanced.

7 VII. CONCLUSIONS

8 Applicant has, with the conditions to be imposed as above set
9 forth, satisfied the provisions of Code Section 46.003.

10 The applicant has, with the condition imposed below, complied
11 with Code Section 69.004.

12 In considering the factors set forth in Code Section
13 83.004C(2), we find that considerations involved support
14 developing 18 lots as proposed, rather than a lesser number.

15 VIII. ORDER

16 Therefore, it is hereby ordered that the request for
17 subdivision Tract 1234, Deer Knoll, be approved, subject to the
18 following conditions:

19 1. That the applicant obtain approval of the variance
20 submitted by him.

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2. That the applicant and the Keno Rural Fire Protection District reach agreement on the adequacy of water supply measures.

Dated this 21st day of October, 1987.

KLAMATH COUNTY BOARD OF COMMISSIONERS

[Signatures of Board Members]

APPROVED AS TO FORM AND CONTENT:

[Signature of Legal Counsel]
LEGAL COUNSEL

STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of Klamath County Planning Department the 23rd day of October A.D., 19 87 at 3:12 o'clock P M., and duly recorded in Vol. M87 of Deeds on Page 19309.

Evelyn Biehn, County Clerk
By *[Signature]*

FEE NONE

Return: Commissioners' Journal