

BEFORE THE BOARD OF COUNTY COMMISSIONERS

KLAMATH COUNTY, OREGON

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

)
) ORDER ON REMAND
) NO 88-247
)

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. On October 21, 1988, the Board of County Commissioners entered its Order No 88-153 approving the subdivision request. That Order was appealed to LUBA and on February 25, 1988, in LUBA No. 87-099, the matter was remanded "for further proceedings not inconsistent with this opinion." The Board of County Commissioners met on June 14, 1988, to consider the remand and determined that additional evidence was not necessary.

ORDER -- PAGE 1

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.

III. LEGAL DESCRIPTION

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 NE1/4 SW1.4 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, together with the Remand Order from LUBA.

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 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

1 size from 1.5 to 20 acres in size. Of the lots in the
2 subdivision which surrounds the property, Cedar Trails
3 Subdivision, there are 24 which have houses on them. The
4 majority of the smaller lots in Cedar Trails are near or
5 adjacent to this property.

6 The property lies, at its western most point, approximately
7 one-quarter mile from the nearest boundary of the Bear Valley
8 Eagle Refuge and between one and one-quarter miles and one and
9 one-half miles from the nearest identified roosting area. The
10 land between this property and the roosting area is heavily
11 wooded with juniper and mature Ponderosa Pine. There is a ridge
12 laying between the identified roost area and this property,
13 which is approximately 400 feet higher than the applicant's
14 property and the valley floor in which the roost areas lay.

15 Access will be off an existing road in Cedar Trails
16 Subdivision. This road, named Overland Drive, is cindered.
17 Cedar Trails Subdivision and this land are within a road
18 district. Overland Drive is maintained by the road district.

19 The public facilities and service are:

- 20 A. Schools: Keno-Henly School District
21 B. Recreation: NA
22 C. Sewer: Individual septic
23 D. Water: Individual well
24 E. Utility Districts: Pacific Power and Light and
25 Pacific Northwest Bell
26 F. Fire Distircts: Keno Rural Fire Protection District

V. RELEVANT APPROVAL CRITERIA

The following are the relevant policies contained in the land use plan:

- (1) The County shall provide for continuances and involvement opportunities.
- (2) The provisions of plan policies 11, 12, 13, 14, and 16 of the Goal 5 policies.
- (3) The provision of Goal 6, policy 4.
- (4) The provision of Goal 7, policy 1.
- (5) The provision of Goal 6, policy 1.
- (6) The provision of Goal 10, policy 4.

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

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

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

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

C. The future streets plan for the proposed subdivision will permit its development in accordance with this Code;

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

E. The site of the proposed subdivision is physically suitable for the type and density of the proposed development;

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

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

Section 69.004 - REVIEW AND APPROVAL

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

Also relevant consideration is Code Section 83.004c(2); which provides as follows:

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

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

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

C. The proposed development would not result in the loss of a rear, irretrievable, or irreplaceable natural feature or scientific opportunity, or the 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 development in the area must be consistent with the maintenance of long term big game habitat values.

Michael L. Spencer
Attorney at Law
325 Main St., Suite 206
Klamath Falls, OR 97601
(503) 884-2894

VI. FINDINGS

1. Notification has been sent to the agencies concerned, to owners within 250 feet of the site, published in the Herald News, and posted in public places. Significant citizen input has been presented in testimony at the hearings.

2. The County has advised the applicant of the need to coordinate with Oregon State agencies, being the Oregon Department of Fish & Wildlife and Forestry. The applicant has been unable to reach an agreement with the Oregon Department of Fish Wildlife as to lot size. The Land Development Code provisions of 83.004 C(2) provide a process for resolving Goal 5 disputes, including lot size issues where the parties are unable to reach an agreement. Those criteria are reviewed hereinafter. The Department of Forestry has raised concerns relative to fire danger, as to which additional findings are made hereinafter.

3. The Bald Eagle refuge at Bear Valley has been established. The Goal 5 conflict is addressed and resolved as hereinafter discussed.

4. As above noted, this proposal results in a previously identified Goal 5 conflict which is resolved through the land development code procedures set forth in Section 83.004 C(2) which are hereinafter discussed.

///

1 5. The property is within a secondary buffer zone of
2 the Bear Valley Bald Eagle winter roost site; however, as
3 noted elsewhere herein, that secondary buffer zone appears
4 to be larger than is required and through the process of the
5 conflict resolution of Section 83.004 C(2), the damage to
6 the applicant outweighs the potential benefit of overlaying
7 that buffer zone on this property.

8 6. Since this property is within an existing partially
9 developed subdivision and in view of the testimony on the
10 lack of negative effects on deer winter range from the
11 densities applied for in this matter, the detriments to the
12 applicant outweigh the potential benefits of applying more
13 stringent density criteria.

14 7. The applicant and Keno Rural Fire Protection
15 District are attempting to reach an agreement as to the
16 water supply provisions, and this order is made subject to
17 reaching that agreement. The other concerns relative to
18 fire apply to the cul-de-sac length, which variance has been
19 previously granted, and not appealed.

20 8. The preliminary plat of the proposed subdivision is of
21 lots slightly more than one acre, which is in conformance with
22 the Comprehensive Plan Designation after resolution of the Goal
23 5 issues as set forth in Code Section 83.004c(2) and the fire
24 issue as hereinafter discussed.

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

6 10. The street plan (consisting of a single cul-de-sac)
7 will permit the development of this property in accordance with
8 the Code, provided that the variance for cul-de-sac length is
9 approved.

10 11. The adjoining land of this property is already
11 developed and has its own access.

12 12. The site of the proposed subdivision is relatively
13 flat and thus suitable for one acre lots, as proposed in the
14 development.

15 13. Based upon the hydrology study presented, as required
16 by the Comprehensive Plan, adequate water appears to be
17 available. It also appears that the area, generally, is
18 suitable for septic tanks. Applicable DEQ procedure
19 requirements will be applied in the development and installation
20 of septic tanks and, in addition, a statement will be provided
21 to the purchaser of any lot, from the developer, that no sewage
22 disposal facility will be provided.

23 14. The property is within the Keno Rural Fire Protection
24 District. The State Department of Forestry has expressed
25 concern about the cul-de-sac insofar as fire protection is

26 ORDER - PAGE 8
27

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

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

16 16. The conditions above set forth as to the agreement of
17 the applicant and Keno Rural Fire Protection District satisfies
18 Section 69.004.

19 17. The Oregon Department of Fish and Wildlife has
20 objected to the one acre lots as proposed since the property is
21 situated within a secondary buffer zone for the Bear Valley Bald
22 Eagle Refuge and the Pearson Butte low/medium deer winter range,
23 but has indicated it would accept a reduction to 5 acre lots
24 from the 20-80 acre minimum lot size provided by the respective
25 zone overlays. The applicant and the Department were unable to
26
27 ORDER - PAGE 9

1 agree on the mutually acceptable plan. Therefore, the provision
2 of Code Section 83.004 C(2) come into play.

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

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

ORDER - PAGE 10

1 but many are similar, especially that concerning the Three
2 Sisters area. The consensus of those articles would indicate
3 that those experts believe a buffering zone, where there is
4 visual separation, would be sufficient if there were one-quarter
5 to one-half of a mile surrounding the buffered area. There is
6 almost a mile of separation from the roost area to the
7 boundaries of the refuge.

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

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

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

1 of whether or not such land was available.

2 15. The Board has further reviewed the evidence
3 submitted with relation to the economic impact and loss to
4 the applicant if a five acre minimum were imposed upon him
5 as compared to the density he is requesting. There is no
6 evidence to the contrary, and we believe that the
7 applicant's evidence to be credible and conclude that the
8 loss of lots by the applicant because of the imposition of
9 the five acre minimum would result in an economic loss to
10 him in an amount which could be reasonably expected to be
11 the sum of \$150,000.00. This far outweighs other
12 mitigation measures and outweighs, as discussed elsewhere,
13 the potential benefits which could be realized by imposing a
14 five acre or greater lot size minimum.

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

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

26 ORDER - PAGE 12
27

1 18. There are no irreplaceable natural feature or scenic
2 opportunity nor an unaltered natural feature.

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

4 20. Public benefit will be maximized by the development of
5 this particular site, since other sites are not available which
6 would allow the construction of affordable housing in the Keno
7 area. There simply are not other similar properties in the
8 area.

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

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

18 VII. CONCLUSIONS

19 Applicant has complied with all comprehensive plan criteria
20 which are applicable to this request.

21 Applicant has, with the conditions to be imposed as above
22 set forth, satisfied the provision of Code Section 46.003.

23 The applicant has with the condition imposed below,
24 complied with Code Section 69.004.

25 In considering the factors set forth in Code Section
26

83.004c(2), we find that consideration involved support developing 18 lots as proposed, rather than a lesser number.

VIII. ORDER

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

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

DATED this 29th day of June, 1988.

BOARD OF COUNTY COMMISSIONERS

Roger Hamilton, Chairman

Ted Lindow, Commissioner

Jim Rogers, Commissioner

APPROVED AS TO FORM

County Counsel

STATE OF OREGON,
County of Klamath ss.

Filed for record at request of:

on this 6th day of July A.D., 19 88
at 8:47 o'clock A. M. and duly recorded
in Vol. M88 of Deeds Page 10494

Evelyn Biehn, County Clerk

By Laurel Muller

Fee, none

Deputy.

ORDER - PAGE 14