

53674

BEFORE THE BOARD OF COMMISSIONERS  
KLAMATH COUNTY, OREGON

IN THE MATTER OF APPEAL OF ISSUANCE OF  
BUILDING PERMIT FOR A NON-FOREST DWELLING  
UNDER ENFORCEMENT ORDER 89-EO-491

ORDER

1. NATURE OF THE HEARING:

On November 19, 1991, the Board of Commissioners of Klamath County heard an appeal of the Planning Director's decision to approve a building permit issued for property identified as R-2508-00500-01000-000, a five acre parcel located in Tract 1214, in Klamath County. The order affirming the Planning Director's decision was signed December 19, 1991. Said decision was appealed by the Department of Land Conservation Development (DLCD) to the Land Use Board of Appeals of the State of Oregon (LUBA). LUBA reversed and remanded the Board's decision in an Order dated May 18, 1992. The hearing before the Board on the LUBA remand was originally scheduled for August 12, 1992, but was postponed until October 13, 1992. The hearing was held October 13, 1992.

2. NAMES OF THOSE WHO PARTICIPATED:

Commissioners Edwin D. Kentner and Wesley E. Sine were present. No one was present on behalf of the Department of Land Conservation and Development. John Schoonover was present and was represented by Jerry Molatore, attorney. Carl Shuck, Klamath County Planning Director, was present on behalf of the Klamath County Planning Department. Rod Davis, Klamath County Counsel, was present. Hal Pierce, former director of Walker Range Fire Patrol District, testified on behalf of applicant. The recording secretary was Karen Burg.



3. LEGAL DESCRIPTION:

The subject property is identified as R-2508-00500-01000-000, a five acre parcel located in Tract 1214, northern Klamath County. The approved Tract contains sixteen, 5-acre parcels zoned Forestry. The property is located north of Highway 58 and is transected by the Little Deschutes River.

4. RELEVANT FACTS:

The subject property is zoned Forestry. It is five acres in size and is one of sixteen parcels in Tract 1214. Conditional Use Permit #39-88-09 was approved on November 30, 1988, allowing construction of a nonforest residence on the subject parcel. On February 27, 1989, the Department of Land Conservation and Development adopted Enforcement Order #89-EO-491 which set forth in Paragraph III, six criteria to be addressed in an application for a building permit for the subject property.

5. EXHIBITS:

The following exhibits were offered by the applicant and received at the hearing:

- A. Map of the subject property and surrounding area;
- B. Letter to Carl Shuck from John M. Schoonover, dated October 12, 1992;
- C. Letter to Klamath County Board of Commissioners from John Schoonover, dated October 13, 1992;
- D. Copy of Article 83 of Klamath County Land Development Code (Significant Resource Area);
- E. Article 57 of Klamath County Land Development Code, Significant Resource Overlay (SRO);



F. Article 55 of Klamath County Land Development Code, Forestry (F);

G. Letter to J. M. Schoonover from John A. Rounds, Consulting Forester, dated October 11, 1992.

All matters in the record of the hearing before LUBA (LUBA #92-003) remain in the record.

6. NOTICE:

On September 23, 1992, the Board approved reopening of the hearing on this matter to allow additional testimony. On September 23, 1992, written notice to DLCD, of the reopening of the hearing, was provided by the Klamath County Planning Department, pursuant to Article III, Paragraph 2, of Enforcement Order #89-EO-491.

7. FINDINGS:

The Board makes the following findings, in relation to the six criteria set forth in Enforcement Order #89-EO-491:

A. COMPATIBILITY. The following forest uses exist on the subject property and the surrounding property: employment of land for production of trees, open space, buffers from noise, visual separation of conflicting uses, watershed protection, wildlife and fishery habitat, soil protection from wind and water, maintenance of clean air and water, and outdoor recreational activities. The following forest uses do not occur on the subject property or surrounding property: processing of forest products, related support services for outdoor recreational activities, wilderness values, and grazing land for livestock.



There is no processing of forest products occurring on the property or in surrounding areas. There are no related support services of outdoor recreational activities occurring on the property or in surrounding areas. There is no wilderness area close to the property or the surrounding property, and because of the density of development, there are no wilderness values. There is no grazing on the subject property or on surrounding properties.

The proposed nonforest dwelling is compatible with the employment of land for production of trees because the dwelling site will take only a fraction of one acre of the five acre parcel, and because an owner of a small parcel of forest property is more inclined and motivated to improve the forest resource.

A nonforest dwelling is compatible with open space because the open space of the parcel is contained in the flood plain located on the parcel, and because the flood plain contains few trees, and because the deed restrictions on the property will prevent construction of improvements on the flood plain.

A nonforest dwelling is compatible with buffers from noise and with visual separation of conflicting uses because only a fraction of one acre of the parcel will be cleared in order to erect the nonforest dwelling, and the buffers from noise and visual separation of conflicting uses (trees) will be maintained.

A nonforest dwelling is compatible with watershed protection and wildlife and fishery habitat because the watershed and fishery and wildlife habitat existing on the property is contained in the flood plain and there will be no improvements allowed in the flood plain.



A nonforest dwelling will not interfere with soil protection from wind because of the minimal removal of trees and vegetation, which provide the protection from wind.

A nonforest dwelling will not interfere with soil protection from water because no dwellings will be located on the flood plain.

A nonforest dwelling will not interfere with maintenance of clean air and water because the dwelling will not be located on the flood plain, and will have no adverse effects on clean air.

The proposed nonforest dwelling is compatible with outdoor recreational activities because it will provide for increased outdoor recreational activities by providing a seasonal cabin or a dwelling which may be used for outdoor recreational activities.

The nonforest dwelling is compatible with the existing forest uses because the size and shape of the lots will minimize the effect on surrounding forest land because an owner of said property is more apt to manage and improve the forest conditions, and because there have been a minimum of forestry activities on the property.

B. INTERFERENCE. The adjacent lands devoted to forest use are as follows: The property located to the east of the subject property is owned by Crown Pacific Limited and is composed of 80 acres. The logging practices which have occurred on this parcel are salvage logging.

The property to the north is zoned R-5. The logging practices which have occurred on this property in the past is logging.



Property to the west is owned by Crown Pacific Limited and is composed of 321.84 acres, and has been logged in past years. It has not been salvage logged to remove dead and dying material. The parcel to the south is part of the Deschutes National Forest and is composed of 80 acres. The property has been logged and is heavily stocked with young stand of lodgepole pine.

There is no forest practice occurring on the subject property.

Interference with accepted forestry practices on adjacent lands results from five sources. Those sources are access, timber management, fire danger, insects and disease, and topography. There will be no interference from the proposed dwelling in any of the above areas for the reasons as follows: There will be no interference because of access because there is public access on existing roads to the subject property. There will be no interference because of timber management because the setback requirements will avoid any danger from trees felled on neighboring parcels to the subject property. There is no interference from fire danger because the dwellings will provide water which can be used to suppress fires and because dwelling owners can be expected to reduce the fire hazards on their property and because the risk of fire danger will be lessened after development of Tract 1214. There will be no interference from insects and disease because the property owners will eliminate the threat of insects to their own trees by removing dead and dying trees. There will be no interference based upon topography because the subject property and surrounding area is flat or gently rolling.



There can be no significant increase in the cost of forest operations on adjacent property if there is no serious interference with accepted forestry practices and if the proposed use is compatible with forest use.

C. STABILITY. The overall land use pattern of the area surrounding the subject property is that of small recreational lot subdivisions interspersed with larger land holdings, with most of the smaller parcels already having been improved by the placement of dwellings. Addition of one, or of sixteen, additional dwellings does not materially alter the stability of the overall land use pattern for the following reasons: Exhibit "A" indicates that within one mile of the southeast corner of the subject property there are 48 existing dwellings, and there are 48 existing lots of  $2\frac{1}{2}$  to 5 acres and 11 existing lots of 10 acres. The existing dwellings are established nonresource, recreational or residential use. The allowance of the building permit for the subject property will increase the number of dwellings in the circle by 2.09%, and will not increase the number of vacant parcels. Construction of sixteen dwellings on Tract 1214 will increase the number of dwellings within one square mile of the southeast corner of the property by 33.33%.

The map submitted as Exhibit "A" accurately describes and indicates the existing land use pattern of the area.

The development pattern and ownership pattern of the area is a mixture of larger land holdings and small (5 acre) lots, some of which are developed and some not. The only change to the development pattern or ownership pattern as a result of the issuance of a building permit will be the addition of one



additional dwelling, and in the event all sixteen lots of Tract 1214 are developed, the addition of sixteen dwellings.

D. UNSUITABILITY. The subject parcel contains approximately one acre in the flood plain of the Little Deschutes River. Most of the flood plain is devoid of tree cover. Any merchantable trees along the banks of the river have no commercial value and cannot be harvested. The parcel is flat or gently rolling and is transected by the Little Deschutes River. Any forestry activity within the flood plain will be severely limited. Livestock grazing is not a viable use for the parcel. There is no livestock grazing at this time on the subject property. The subject parcel is low productivity forest land.

The land is unsuitable for a production of livestock because the land is not suitable for the growing of grasses necessary to produce livestock.

It is not economically feasible to manage the property for forest growth, because the growth potential is only 13.4 cubic feet per acre per year in a wild state, or 22 cubic feet per acre per year in a managed state.

E. ARTICLE 83. Article 83 of the Land Development Code, as indicated in Exhibit "D", is the appropriate Article to which the applicant must comply pursuant to paragraph III(1)(e) of Enforcement Order #89-EO-491. The copy of Article 83 admitted as Exhibit "D", is the Article which was in effect as of the effective date of Enforcement Order #89-EO-491. There are significant differences between the current Article 57 of the Klamath County Land Development Code and Article 83 existing as of the effective date of Enforcement Order #89-EO-491. Residential development



within Tract 1214 is a Goal 5 conflicting use under Article 83 and the review procedures and criteria under Section 83.004(c)(limit conflicting uses decision)(3c) must be satisfied. Section 83.004(c) requires that an applicant shall be encouraged to meet with an agency having responsibility for particular resources. The agency having responsibility for protection of fish and wildlife habitats is the Oregon Department of Fish and Wildlife. Applicant met with the Department of Fish and Wildlife. Section 83.004(c)(2) contemplates a management plan. Applicant and the Oregon Department of Fish and Wildlife agreed upon a management plan. Applicant has performed his obligations under the management plan by the recording of the deed restriction in Volume M87, Page 1637 of the Deed Records of Klamath County, Oregon (Page 77 of the Record of November 19, 1991 hearing).

F. FORESTRY ZONE. Applicant's Exhibit "F" is Article 55 of the Klamath County Land Development Ordinance in existence at the time of the adoption of Enforcement Order #89-EO-491, and sets forth the requirements of the forestry zone which must be satisfied by paragraph III(1)(f) of the Enforcement Order. Residential uses are allowed subject to a conditional use permit which has been obtained by applicant. Existing facilities and services include telephone and electric service, access via a U.S. Forest Service road, and fire protection from Walker Range Fire Patrol District. The telephone and electric facilities have been installed in order to serve the subdivision and issuance of a building permit will not have an adverse effect on those facilities. The forest service road is adequate to carry anticipated traffic for the dwelling and there will be no adverse effect on existing roads. The risk of



fire from development of the subject property will be lower after development of the property.

Issuance of the building permit meets the requirements of the forestry zone because the conditional use permit has been obtained.

The proposed dwelling is appropriate for the forestry zone because it meets the intended purpose of the zone as follows: the dwelling will continue to preserve and protect lands for a continued timber production because the development of small lots by the homeowner will probably increase timber production, harvesting and related uses. The watershed of the Little Deschutes River will be protected and conserved because of the greater attention paid to the property by an interested owner and because there will be no improvements placed on the flood plain. Wildlife habitat will be maintained because of the agreement with the Oregon Department of Fish and Game that no development will occur on the flood plain. There will be orderly development of private recreational uses, because there will be more recreational opportunities available because of the existence of a dwelling. Those recreational uses will not be in conflict with the primary intent of the zone because the uses will not seriously interfere with forest operations, practices, or uses as defined by the Klamath County Land Development Ordinance.

8. FURTHER FINDINGS:

Applicant's Exhibit "A" is a map showing Tract 1214 and the surrounding area. The map contains a circle with a radius of one mile, with the center point of the circle being the southeast



corner of Tract 1214. Each black dot on the map represents an existing dwelling. There are 48 existing dwellings within the one mile circle. The map which has been prepared is a composite of the maps which were included in the record of the November 19, 1991 hearing before the Board of County Commissioners at Pages 83 through 87. The map fairly represents the area around Tract 1214. Each tax lot shown on the map prepared is a separate parcel. Located within the one mile circle are 11 existing parcels of approximately ten acres each, on which there are 12 dwellings. There are located 46 parcels of approximately five acres, on which there are 31 dwellings. There are also two parcels of approximately 2½ acres on which there are 5 dwellings.

Tract 1214 is served by two means of access: Forest Service Road 3093 and access to the northeast corner of Tract 1214 by means of a public easement. Fire protection for Tract 1214 will be provided by Walker Range Fire Patrol District. During 1992, two building permits have been issued for nonforest dwellings, to be erected within one mile of the southeast corner of Tract 1214. The building permits were issued to Troxell and Rauch. The Rauch property and the Troxell property are zoned forestry, and each property is not distinguishable from the lots contained in Tract 1214.

Fire danger to the subject property and surrounding property will be decreased with the development of the parcels in Tract 1214, because of the clearing of brush surrounding residences, and because each residence will provide a source of water, and because the presence of residents will allow for greater notification of the existence of a fire.



Tract 1214 was filed in 1981, and was approved by the Board of County Commissioners in 1987. The final subdivision map for Tract 1214 was recorded in 1987. All lots in Tract 1214 were created prior to November 15, 1990.

Access along Forest Service Road 3093 has not been denied to the public by the forest service since 1965.

9. CONCLUSIONS:

A. The proposed dwelling is a nonforest use and is compatible with forest use.

B. The proposed dwelling will not interfere seriously with accepted forestry practices on adjacent land devoted for forest use and will not significantly increase the cost of forestry operations on those lands.

C. The proposed dwelling will not materially alter the stability of the overall land use pattern of the area.

D. The proposed dwelling is situated on a parcel of land generally unsuitable for the production of forest crops and livestock.

E. The proposed dwelling is consistent with the provisions of Article 83 of the Code regarding the protection of fish and wildlife habitats along the Little Deschutes River. The review procedures and criteria under Section 83.004(c) of the Klamath County Land Development Code have been satisfied.

F. The proposed dwelling is appropriate for and limited to requirements of forestry zone (Section 55) and will not have an adverse effect on existing facilities and services.


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10. ORDER:

In review of the evidence presented and the testimony heard, the Klamath County Board of Commissioners upholds the decision to issue building permit per LCDC Enforcement Order #89-EO-491 for a single family residence on a parcel of land located in Tract 1214 and furthermore finds the applicant has submitted substantial evidence in the record satisfying the criteria as set forth in the Enforcement Order #89-EO-491.

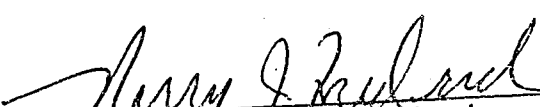
DATED: November 5, 1992

  
EDWIN D. KENTNER, Commissioner

DATED: November 5, 1992


  
WESLEY E. SINE, Commissioner

DATED: November 5, 1992

  
HARRY FREDRICKS, Commissioner

APPROVED AS TO FORM AND CONTENT:

DATED: 11-3, 1992

  
ROD DAVIS  
Klamath County Counsel

## NOTICE OF APPEAL RIGHTS

You are hereby notified that this decision may be appealed to the Land Use Board of Appeals within 21 days following the date of the mailing. Contact the Klamath County Planning Department for more information regarding this procedure. Failure to appeal within the time provided will result in the loss of your right to appeal this decision.

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STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of Klamath County the 10th day  
of Nov. A.D., 19 92 at 10:18 o'clock AM., and duly recorded in Vol. M92  
of Deeds on Page 26549  
By Evelyn Biehn County Clerk  
Rod Davis

FEE none

Return: Commissioners Journal