

STAFF REPORT

JOSEPHINE COUNTY COMMUNITY DEVELOPMENT – PLANNING DIVISION

TO: Josephine County Board of County Commissioners

AGENDA ITEM: LUBA Remand Hearing – Continuance

PREPARED BY: Planning Staff

DATE: October 19, 2018

APPEAL INFORMATION

Appellants / Owners: John W. West
Clifford E. Phillips III
Ellison Revocable Living Trust, Hazel J Ellison, TTEE

Appellant’s Representative: Grace Zilverberg, Z Land Use Consulting

LUBA Order 95-032: Remanding to Josephine County its decision to approve a change to the Comprehensive Plan designation from Forest (F) to Residential (R) and to change the zoning map from Forest Commercial (FC) to Rural Residential (RR2.5), on the basis that the County, as opposed to LUBA, is the appropriate body to interpret a local enactment, in this case, the County’s Comprehensive Plan, with respect to the rating of unrated soils using the Internal Rate of Return system.

Statement of Action: Continuance hearing to allow the Board of County Commissioners to interpret the County’s Comprehensive Plan as it is related to unrated soils, to determine whether the subject tax lots are or are not resource lands.

Legal Description: T35S, R6W, Section 16.B0, Tax Lots 100, 200 and 700

Location: 1174 Pleasant Valley Road, Russell Road, Wildflower Drive

Existing Zoning: Forest Commercial (FC) and Rural Residential (RR1)

Parcel Size: 107.31 acres

Comprehensive Plan: Forest

Application History:

BCC DECISION – BCC “Findings and Ordinance 95-4” dated January 25, 1995 approving the County’s comprehensive plan and zoning designation.

APPEAL TO LUBA – LUBA case number 1995-032, challenging that the County improperly relied upon a soil type to amend the County’s comprehensive plan, and that the County incorrectly determined that the subject properties are non-resource land.

REMAND FROM LUBA – Final Opinion and Order dated August 31, 1995 remanding decision to Josephine County to determine whether the property’s soil characteristics were “resource” in nature.

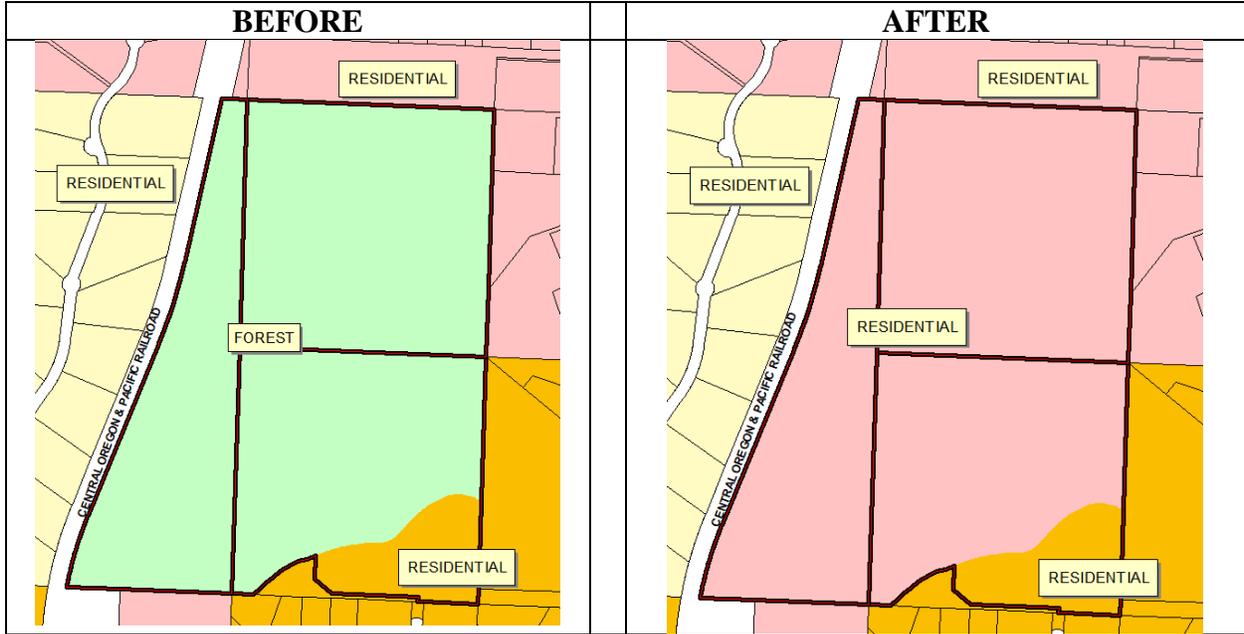
REMAND HEARING AND CONTINUANCES – The first remand hearing was held May 27, 1996, with numerous continuances, until the matter was indefinitely tabled by the BCC on September 4, 2002.

UNTABLING – Board Order 2018-058 was issued to untable the application and proceed with the remand process upon the applicant gathering the requisite evidence and requesting a remand hearing.

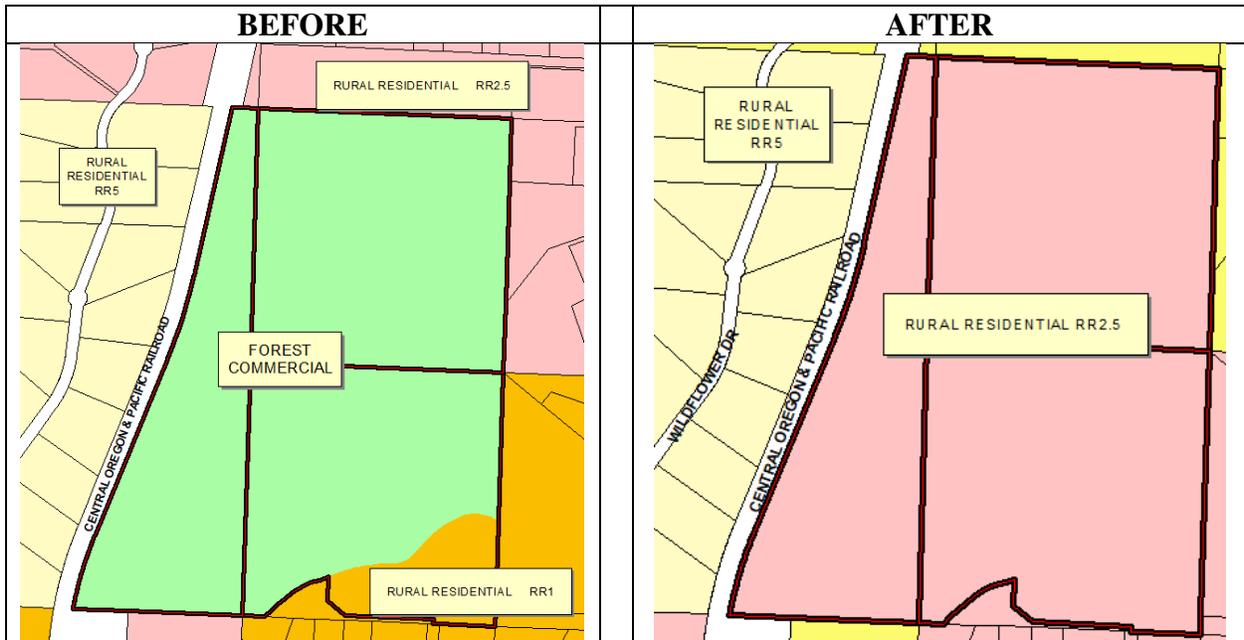
APPLICATION SUBMITTED – Applicants submitted the required application, fee and evidence to the Planning office on September 13, 2018.

MAPS

Proposed Comprehensive Plan Map Designation Amendment



Proposed Zoning Map Designation Amendment



RED OUTLINE = Subject Properties

STANDARDS & CRITERIA

The sole focus of this remand hearing is for the Board of County Commissioners to determine whether the parcels do or do not consist of farm or forest lands. The portions of the RLDC related to this matter are as follows:

Section 33.130 – Remand Hearings

- E. The remand hearing shall not consider any issue(s) other than those specified for remand in the remanding decision, and no other evidence, testimony or arguments shall be allowed regarding other issues within the scope of the Board’s original action.

Section 46.050 – Non-Resource Land Criteria

Authorized lots or parcels (but not portions thereof) which have been zoned Woodlot Resource or Farm Resource may be designated as non-resource when the application demonstrates compliance with the following criteria and rules:

- A. The land within the lot or parcel is non-farm land because:
1. The predominant (greater than 50%) soil or soils are rated Class V or above in the Soil Survey of Josephine County, as adopted or amended in the plan data base (soils having both an irrigated and non-irrigated class ratings will be rated based on whether irrigation rights are or are not perfected at the time the application is filed).
- B. The land within the lot or parcel is non-forest land because:
1. It is not included within the following definition of forest land:

A lot or parcel is considered forest land when the predominant (more than 50%) soil or soils on the parcel have an internal rate of return of 3.50 or higher (if a single forest-rated soil is present), or composite internal rate of return of 3.50 or higher (if multiple forest-rated soils are present).

For the purpose of this criterion, any evaluation of the internal rates of return for forest soils shall be made pursuant to the document entitled, *Using the Internal Rate of Return to Rate Forest Soils for Applications in Land Use Planning (1985)*, by Lawrence F. Brown, as amended.

ANALYSIS

The LUBA remand occurred in 1995. The version of the county's Rural Land Development Code in effect at that time was dated August 18, 1994; the portions of the code applicable to this hearing are virtually unchanged from that version of the code to the code now in effect (dated May 2005).

Planning staff reviewed the submittal. Page 4 of binder "Part 1 – New Evidence" states that the soils reports were approved by the Department of Land Conservation and Development (DLCD). As noted in the DLCD emails in Appendix E, the DLCD is not approving the soils reports, they are only acknowledging receipt and confirming that the submittals related to agricultural soils capability are complete and consistent with reporting requirements; no analysis was conducted. Also noted in Appendix E is a statement by DLCD that the agency has not assessed, and will not assess, whether the parcels qualify as forest land as ORS 215.211 limits the DLCD review to a review of soil assessments regarding agricultural land. Staff notes, however, that Mr. Gallagher is among the DLCD-approved soil scientists.

Staff acknowledges that amendments have occurred at the state level with respect to the methodology for determining whether specific land should be classified as forest land, but maintains that as these amendments occurred after the original LUBA remand date of 1995, they are not pertinent to this application. For reference purposes only, an outline of these amendments follow.

In 2008, the Land Conservation and Development Commission LCDC amended Oregon Administrative Rules (OAR) chapter 660, division 6 (Forest Lands) to require that cubic foot productivity data or equivalent alternative sources of data authorized by rule be used in inventorying or determining the productivity of forest land (OAR 660-006-0005 and 0010). Where the specified sources of productivity are not available or are inaccurate, other alternative methodologies may be used, as explained in the referenced Oregon Department of Forestry (ODF) technical bulletin, *Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010*. In January 2011, minor housekeeping amendments were made to OAR 660, division 6 to reference the updated ODF publication and to provide additional clarity to the process.

Both the 1998 and 2010 versions of *Land Use Planning Notes* state that where alternative methodologies are used to determine forest productivity, direct tree measurements must be taken. Site-specific soils testing may only be relied upon where an inadequate number of dominant trees exist on-site or on adjacent, similarly-situated properties.

Josephine County's approach to the re-designation of Woodlot Resource land as non-forest land as described in the Comprehensive Plan at Goal 11, Policy 3.B[1] and [2] and as implemented in section 46.050.B of the Rural Land Development Code have not been updated to comply with

OAR 660-006-005 and 0010. Because the County has not amended its comprehensive plan and land use regulations in this respect, the 2008 and 2011 division 6 amendments apply directly to the County's decisions per ORS 197.646.

Staff adds that if these rules were to be applied, the applicant would be required to submit cubic foot productivity data or equivalent alternative as authorized by said rule to determine the forest productivity of the property.

HEARING FORMAT

The appeal is subject to the rules and procedures found in Article 33 of the Josephine County *Rural Land Development Code (RLDC)*, as follows:

33.130 – REMAND HEARINGS

Hearings to consider remanded land use decisions shall be governed by the applicable rules for applications, hearings and appeals as set forth in this code, except as follows:

- A. A remand proceeding shall be initiated by an appeal application on forms prescribed by the Planning Director, together with the fee for remand hearings. The application must be filed within 45 days from the date of the final opinion and order remanding the county's decision. Except as provided in subsection B below, only the applicant as defined in Section 11.030 of this code may file a remand application.
- B. All remand proceedings shall be conducted exclusively by the Board unless the Board delegates jurisdiction to another review body by resolution. This grant of jurisdiction is intended to supersede any other grant of jurisdiction in this code. In addition, the Board reserves the right to initiate a remand proceeding pursuant to Section 31.030 of this code.
- C. The applicant in a remand proceeding shall specify in the application whether the remand hearing will be confined to the record of the earlier proceeding or whether the remand hearing will involve the introduction of new evidence. In the event the remand hearing is confined to the earlier record, the applicant shall submit amended findings with the remand application. The remand hearing shall be confined to the earlier record unless the review body opens the record for new evidence pursuant to Sections 33.080.E or 33.090.F.
- D. Participation in the remand hearing shall be strictly limited to those persons or organizations who were legal parties in the higher appeal. Procedures shall therefore be limited in the following respects:

1. Written notice shall be given only to the persons or entities who were parties to the higher appeal.
 2. Only parties to the higher appeal may present arguments (in the case of a hearing on the record), or present evidence, witnesses, testimony and arguments (in the event new evidence is allowed) in the remand hearing.
 3. Josephine County shall always be considered a party in the remand proceeding even if it did not submit briefs or make arguments in the higher appeal(s).
- E. The remand hearing shall not consider any issue or issues other than those specified for remand in the remanding decision, and no other evidence, testimony or arguments shall be allowed regarding other issues within the scope of the Board's original action.
- F. The following special time limits shall apply to remand applications:
1. The review body shall take final action on a remand application within 90 days of the effective date of the final remand order; and
 2. The effective date of the final order is the last day for filing a petition for judicial review of a final order of LUBA, or if judicial review of LUBA's order is sought by the Oregon Court of Appeals or the Supreme Court, the 90-day period shall not begin until final resolution of the judicial review; and
 3. In any case, the 90 day period shall not begin until the applicant requests in writing that the county proceed with the application on remand; and
 4. The 90 day period may be extended for a reasonable period of time at the request of the applicant; and
 5. The 90 day period applies only to decisions wholly within the authority and control of the county; and
 6. The 90 day period does not apply to a remand proceeding concerning an amendment to an acknowledged comprehensive plan or land use regulation or the adoption of a new land use regulation that was forwarded to the Director of Land Conservation and Development under ORS 197.610.
- G. The prevailing party shall prepare the findings of fact for the decision on remand unless the Board designates someone else to prepare them.

RECOMMENDATION BY STAFF

If the Board finds that the applicant has submitted sufficient evidence to substantiate that the subject properties are neither farm or forest lands, staff recommends a decision of approval of the application.

ATTACHMENTS

Exhibit A.....Application – Remand Hearing Continuance (Part I – New Evidence)

Exhibit B.....Application – Remand Hearing Continuance (Part II – History)