

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of the Remand of Board Final)
Order Approving Two Resource Dwellings)
for Kevin Bender, dba Western States) FINAL ORDER NO. 17-2008
Development, in the Primary Forest Zone)

WHEREAS, on August 3, 2006, Kevin Bender, dba Western States Development (hereinafter referred to as the "Applicant"), submitted two Applications, FMP 06-03 and FMP 06-04, for Resource dwellings and associated Forest Management Plans to build a dwelling on each of two lots approximately 65 and 96 acres in size and zoned Primary Forest (PF-76); and

WHEREAS, the Columbia County Planning Commission held a hearing on the matter and voted to deny the Applications on September 11, 2006, and Final Orders 06-03 and 06-04 were signed on September 22, 2006; and

WHEREAS, on September 29, 2006, the Applicant filed an appeal with the Columbia County Board of Commissioners of the Planning Commission's FMP 06-03 decision and FMP 06-04 decision; and

Whereas, on December 13, 2006, the Board of County Commissioners held a de novo hearing on the Applications, received evidence into the record and, while leaving the record open, carried over the matter to January 10, 2007 for deliberations; and

WHEREAS, on January 10, 2007, the Board of County Commissioners deliberated on the Applications and voted to approve FMP 06-03 and FMP 06-04; and

WHEREAS, on January 24, 2007, the Board of County Commissioners adopted Final Order No. 9-2007, approving FMP 06-03 and FMP 06-04; and

WHEREAS, Notice of Intent to Appeal Final Order 9-2007 was filed with the Oregon Land Use Board of Appeals (heinafter referred to as "LUBA") on February 14, 2007; and

WHEREAS, on July 27, 2007, after arguments had been presented, LUBA issued a Final Opinion and Order on LUBA Nos. 2007-043 and 2007-044 remanding the Board of Commissioner's Final Order No. 9-2007 on one point, Petitioners' Sixth Assignment of Error regarding the application of Columbia County Zoning Ordinance Section 502.3; and

WHEREAS, on August 14, 2007, the Applicant appealed LUBA's decision to the Oregon Court of Appeals and, after arguments were presented, the Court of Appeals issued an decision affirming LUBA's decision on October 31, 2007, and entered its Judgment on December 14, 2007; and

WHEREAS, consistent with the Court of Appeals Judgment LUBA issued a Notice of Appellate Judgment on December 18, 2007; and

WHEREAS, the Board of County Commissioners undertook the remand ordered by LUBA by receiving written testimony regarding the application of Columbia County Zoning Ordinance Section 502.3 to FMP 06-03 and FMP 06-04 and set a date for deliberations on the remanded portion of Final Order No. 9-2007; and

Whereas, on March 5, 2008, the Board of County Commissioners accepted all written evidence submitted into the record, a list of which is attached hereto as Attachment 1 and incorporated herein by this reference, deliberated on the remanded portion of Final Order No. 9-2007 and voted to deny FMP 06-03 and FMP 06-04;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Board of County Commissioners adopts the Findings of Fact and Conclusions of Law in the Staff Report to the Board of County Commissioners, dated July 30, 2008, which is attached hereto as Attachment 2 and is incorporated herein by this reference.
2. The Board of County Commissioners adopts the Additional Findings of Fact and Conclusions of Law which are attached hereto as Attachment 3 and are incorporated herein by this reference.
3. Based on the foregoing and the whole record in this matter, as well as the adopted Findings of Fact and Conclusions of Law included in Staff Report to the Board of County Commissioners dated July 30, 2008, and Additional Findings of Fact and Conclusions of Law adopted by this Final Order, the Applications for Resource Dwellings with Forest Management Plans, FMP 06-03 and FMP 06-04 are hereby DENIED for failure to demonstrate compliance with Columbia County Zoning Ordinance Section 502.3.

Dated this 12th day of March, 2008.

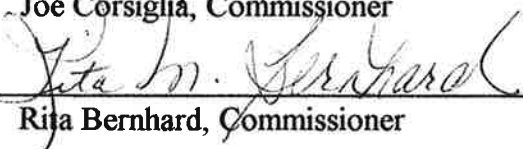
BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: 
Anthony Hyde, Chair

By: Not present
Joe Corsiglia, Commissioner

Approved as to form

By: 
Office of County Counsel

By: 
Rita Bernhard, Commissioner

ATTACHMENT 1

Legal Counsel's Remand File - EXHIBIT 1

- (1) Notice of Remand Proceedings (Publication)
- (2) Notice of Remand Proceedings (Property Owner Notice)
- (3) Affidavit of Mailing
- (4) Affidavit of Publication
- (5) Letter from Oregon Department of Fish and Wildlife dated January 28, 2008
- (6) Board Communication from Land Development Services dated January 30, 2008
- (7) Letter from Petitioners' attorney dated January 30, 2008
- (8) Letter from Petitioners' attorney dated January 30, 2008
- (9) Memorandum from Applicants' attorney dated January 30, 2008 with attached letter to Applicants' attorney from AKS Engineering dated January 30, 2008
- (10) Letter from Petitioners' attorney dated February 6, 2008
- (11) Letter from Applicants' attorney dated February 6, 2008
- (12) Letter from Applicants' attorney dated February 13, 2008

COLUMBIA COUNTY

JAN 30 2008

COUNTY COUNSEL

BOARD COMMUNICATIONFROM THE LAND DEVELOPMENT SERVICES DEPARTMENT
MEETING DATE: Date To Be Set

TO: BOARD OF COUNTY COMMISSIONERS

FROM: Todd Dugdale, Director of Land Development Services ^{TD}

SUBJECT: Bender LUBA Remand on Forest dwellings (FMP 06-03 & FMP 06-04)

DATE: January 30, 2008

SUMMARY:

On January 24 2007 the Board approved Forest Related Dwellings for two parcels in the PF-76 zone. The parcels are 96 acres and 65 acres respectively. The Board's decision was appealed to LUBA. LUBA issued a Final Opinion and Order on July 27, 2007 sustaining the sixth assignment of error that there was not adequate evidence in the County's record to make a finding pursuant to CCZO Section 502.3 that the dwellings on the subject parcels were "necessary" to the primary forest use. LUBA's decision was appealed to the Oregon Court of Appeals. The Court of Appeals upheld the decision of LUBA to remand the County's decision with respect to the subject parcels on December 14, 2007. The Board has been requested to conduct remand proceedings only on the one point of contention, that is, whether or not the applicant submitted substantial evidence that a dwelling is "necessary for" forest management, CCZO Section 502.3.

Instead of holding a "hearing" per se, the County will receive written testimony limited to only that portion of the decision remanded by LUBA until January 30, 2008 (this staff report included). Then written responses to the written testimony will be received until February 6, 2008. Written rebuttal by the applicant to the testimony received will accepted until February 13, 2008. The Board will then consider all testimony received and deliberate towards a decision.

ATTACHMENTS:

1. Remand Staff Report for FMP 06-03 & FMP 06-04 dated January 30, 2008.
2. One comment received from Oregon Dept of Fish and Wildlife

RECOMMENDATION:

Based on the attached Staff report, Staff recommends that the Board of Commissioners deny the applications for forest management dwellings. The applicant has not shown that the dwellings are necessary for nor required for commercial forest management.

COLUMBIA COUNTY BOARD OF COMMISSIONERS
STAFF REPORT
January 30, 2008
LUBA REMAND Proceedings

LDS FILE NUMBERS: FMP 06-03 and FMP 06-04

APPLICANT: Kevin Bender, Fred Bender and Western States Development Corporation
20285 Amberwood Drive
Hillsboro, Oregon 97124

OWNER: Same as above

PROP. LOCATION: Approx. 4 miles northwest of Scappoose on Walker Road

TAX MAP NUMBERS : 4221-040-00301 / 421-040-00200 / 4221-000-00301
4221-000-00300 / 4221-040-00300

ZONING: Primary Forest-76 (PF-76)

SIZE: 96.0 +/- Acres
65.0 +/- Acres

REQUEST: To site single-family dwellings; one on a 96.0 acre parcel and one on a 65.0 acre parcel in a PF-76 zone.

BOARD APPROVED APPLICATIONS: 1/24/07

REMAND :

	7/27/07	LUBA Final Opinion and Order
10/31/07	12/14/07	Court of Appeals Opinion
	12/14/07	Court of Appeals Judgment
	12/18/07	LUBA Notice of Appellate Judgment

APPLICABLE REVIEW CRITERIA (from LUBA Decision Addressing Sixth Assignment of Error):

Columbia County Zoning Ordinance Section 502.3 Primary Forest - Permitted Uses

Section 500 Primary Forest (PF-76)

502 Permitted Uses:

- .1 Commercial forest management consistent with the intent and purposes of the Oregon Forest Practices Act.
- .2 Fish and wildlife management.
- .3 *Structures and facilities necessary for and accessory to commercial forest management and fish and wildlife management. The uses served by such structures and facilities may include,*

but are not limited to: administration, equipment storage and maintenance, communications, fire protection, fish rearing, and residences for property owners, employers or full-time employees directly accessory to and required for commercial forest management or fish and wildlife management. A management plan approved by the Planning Director is required before a building permit is issued to assure that structures and facilities are consistent with the requirement of this ordinance. The management plan shall contain the information required by Section 402.3 of this ordinance, and it shall be reviewed under the procedures set forth in Section 1601 of this ordinance.

BACKGROUND:

This decision was appealed to the Oregon Land Use Board of Appeals (LUBA) on several grounds. LUBA sustained only the sixth assignment of error. In that assignment of error, the Petitioners argued that the County erred in finding that there was substantial evidence in the record to satisfy the requirements of CCZO Section 502.3 for establishing dwellings on the 65 and 96 acre parcels.

In its decision, the Board adopted supplemental findings interpreting and applying CCZO Section 502.3 consistent with past decisions:

“The Board’s interpretation in the Andreotti decision is that in order to be necessary, the dwelling must be on the same property which is proposed to be forested, and the dwelling must make forest management more efficient and convenient for the owner/operator of the forest land. . . . The Board finds that there is substantial evidence in the record that the proposed dwelling is accessory and necessary to the proposed forest use using the Andreotti standard of ‘convenience and efficiency.’”

The Board approved the applications, in part, in an effort to be consistent with previous County forest management dwelling decisions. As evidenced from the quoted language above, the Board had previously interpreted the “necessary for and accessory to” standard to mean that the dwelling must make forest management more “efficient and convenient” for the owner/operator of the forest land. However, LUBA ruled that the terms “convenient” and “efficient” are contrary to the ordinary meaning of the word “necessary” and therefore contrary to the express language of CCZO Section 502.3.

LUBA found that the County’s “interpretation of the phrase ‘necessary for and accessory to . . . commercial forest management’ to mean ‘convenient and efficient’ to forest management is contrary to the ordinary meaning of the word ‘necessary’ and thus, contrary to the express language of CCZO 502.3” (LUBA Opinion, p. 18). LUBA also noted that CCZO Section 502.3 further requires that a dwelling must be “required for commercial forest management.” As LUBA explained, “To construe [the] CCZO to allow a residence that is merely convenient or efficient for forest management ignores the use of the phrase ‘required for,’ which connotes something more than mere convenience or efficiency and is closer in meaning to ‘necessary.’” LUBA remanded the Board’s decision for reconsideration of CCZO Section 502.3.

REVIEW FINDINGS:

Columbia County Zoning Ordinance (CCZO) Section 502.3 uses three qualifying terms for a forest management dwelling: the dwelling must be necessary for, accessory to and required for commercial forest management.

Definitions:

The following definitions come from the American College Dictionary: Random House, 1962:

- Necessary: cannot be dispensed with; indispensable; requisite; essential.
- Accessory: a subordinate part; contributing to a general effect, subsidiary; denoting presence of something in relatively small amounts.
- Required: to have a need of, need; to impose need or occasion for; to place under an obligation or a (requisite) necessity; required by the nature of things or by circumstances, indispensable.

Finding 1:

Regarding the CCZO Section 502.3 requirement that the proposed dwellings be “accessory to” commercial forest management, Staff adopts the definition of “accessory” provided above: a subordinate part; contributing to a general effect, subsidiary; denoting presence of something in relatively small amounts. The house and supporting facilities would take 3 to 4 acres out of timber production. The proportional dwelling facility use, 6% or less, is relatively small and subsidiary compared to the main forest use of the property. As well, the applicant argues that the dwelling would contribute to a general effect of better commercial forest management by allowing the owner to contribute time to implement forest management techniques. Staff finds there is substantial evidence that the dwellings would in fact be a subordinate part, contribute to the general effect, are subsidiary to commercial forest management and would take up a relatively small amount of the overall property. Accordingly, Staff finds the proposed dwellings would be accessory to the main forest use of the entire properties.

Finding 2:

Concerning CCZO Section 502.3, the requirement that the proposed dwellings be “necessary for” commercial forest management is a more burdensome standard to meet. Staff adopts the definition of “necessary” provided above: cannot be dispensed with; indispensable; requisite; essential. A contribution to timber management is beneficial but alone does not rise to the level of “necessary.” By the above dictionary definition, in order to be necessary, the dwelling cannot be dispensed with, or must be required for, essential for or indispensable to forest management. Therefore, the question is to what extent is the contribution of the owner, given the ability to live on the forest unit property, required and needed for proper timber management.

In the late 1980s and early 1990s there was considerable debate involving the term “necessary for” while the requirement still existed in state law. An important legal decision cited by LUBA in its remand is Champion International v. Douglas County, 16 Or. LUBA 132 (1987). In Douglas County LUBA interpreted “necessary for” to require that “the property cannot reasonably be put to forest use without a dwelling on the site” and that forest management “require[s] a continuous presence.”

Staff agrees with LUBA’s interpretation of “necessary for” commercial forest management to require that the property cannot reasonably be put to forest use without a dwelling on the site, and that a continued presence by the owner/operator be required. An approval by the County without the necessity of this high degree of on-site presence and timber management by the owner/operator would be inconsistent with the interpretations of the courts and LUBA, including LUBA’s remand in this case (which was affirmed by the Oregon Court of Appeals). While it may be somewhat beneficial for the owner to live on site to perform management tasks and assure workers are performing management techniques on a daily basis, Staff finds that there is nothing in the record to establish that

it is necessary or cannot be done while residing off-site. Therefore, Staff finds the requirement that the dwelling to be necessary for commercial forest management is not met.

Finding 3:

In its decision remanding the Board's decision, LUBA noted that, in addition to the "necessary and accessory" language discussed above, CCZO Section 502.3 requires that an applicant must show that the dwelling is "required for" commercial forest management ("The last part of CCZO 502.3, emphasized above, states that the dwelling must be 'required for commercial forest management.' To construe [the] CCZO to allow a residence that is merely convenient or efficient for forest management ignores the use of the phrase 'required for,' which connotes something more than mere convenience or efficiency and is closer in meaning to 'necessary.'" LUBA Opinion at p. 19, citing Douglas County, 16 Or. LUBA at 138-39).

Staff adopts the definition of "required" provided above: to have a need of, need; to impose need or occasion for; to place under an obligation or a (requisite) necessity; required by the nature of things or by circumstances, indispensable. Further, consistent with LUBA's discussion in its decision, as well as the definitional overlap for "required" and "necessary" above, Staff finds that there is no distinguishable difference between the "required for" commercial forest management and "necessary for" commercial forest management standards. Therefore, for the reasons outlined under the "necessary for" commercial forest management finding above, Staff finds that the proposed dwellings are not required for commercial forest management.

COMMENTS:

1.

No other comments have been received from notified nearby property owners or government agencies as of the date of this staff report (January 30, 2008).

STAFF CONCLUSIONS & RECOMMENDATION:

Columbia County has determined that it very important to the vitality of the county's economy to plan for and provide opportunities for land owners to maximize timber production on parcels in the Forest Zones. To accomplish this forest management plans for a single family dwelling application on the larger, high value timber parcel is required to demonstrate that a dwelling is necessary for and accessory to forest management. Obviously, very large tracts, typically owned by commercial timber companies, do not need on-site permanent structures or dwellings to produce and harvest timber. Given economies of scale, the smaller isolated forest tracts in the 25 to 35 acre size, do not provide sufficient long term return on management investments.

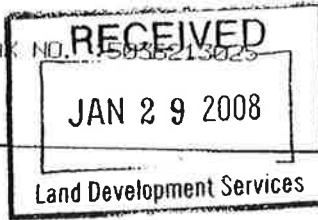
Based upon research about the property, LUBA's remand and the findings of the above supplemental staff report (FMP 06-03 and FMP 06-04), Staff finds that the proposal does not comply with all the criteria for siting a dwelling in the resource zone, specifically CCZO Section 502.3. While the record contains substantial evidence that on-site dwellings may provides efficiency and convenience to enhance forest management, and that such dwellings may be accessory to commercial forest management, there is not substantial evidence in the record to support findings that such dwellings are necessary for or required for commercial forest management under the requirements of CCZO Section 502.3. Therefore, Staff **Recommends Denial** of this request to place single family dwellings on acre and 65 acre parcels in a Primary Forest (PF-76) zone.

JAN 29 2008



Oregon

Theodore R. Kulungoski, Governor

**Department of Fish and Wildlife**Sauvie Island Wildlife Area
North Willamette Wildlife District
18330 NW Sauvie Island Road
Portland, OR 97231
503-621-3488
FAX 503-621-3025

January 28, 2008

Todd Dugdale
Land Development Services
230 Strand Street
St. Helens, OR 97051

Mr. Dugdale,

The Oregon Department of Fish and Wildlife (ODFW) has reviewed the proposal submitted by Kevin Bender. Mr. Bender proposes to build two resource dwellings on 96 and 65 acre parcels, respectively. After review of the proposal, ODFW would like to add the following comments and recommendations:

Based on the proposal, ODFW does not have enough information to assess potential impacts to fish and wildlife and associated habitats at this time. ODFW is requesting the following additional information: the types of habitats on the property (wetlands, streams, coniferous forests, etc.), the size of the footprint of the new buildings, number of trees proposed for removal and other impacts, such as roads, septic, sewer, power lines, etc.

The Oregon Department of Fish and Wildlife would like to thank Columbia County for the opportunity to provide comments. If you have any questions or would like to discuss my comments further, please feel free to contact me.

Sincerely,

Mischa Connine
Habitat Biologist
18330 NW Sauvie Island Road
Portland, OR 97231
(503) 621-3488 ext 28
mischa.a.connine@state.or.us

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of the Remand of Board Final)
Order Approving Two Resource Dwellings) Additional Findings of Fact and
for Kevin Bender, dba Western States) Conclusions of Law
Development, in the Primary Forest Zone)

The Columbia County Board of Commissioners makes the following additional Findings of Fact and Conclusions of Law:

1. CCZO §502.03, a mandatory approval standard for uses in the County’s PF-76 zone, allows the following specifically described uses:

Structures and facilities necessary for and accessory to commercial forest management and fish and wildlife management. The uses served by such structures and facilities may include, but are not limited to: administration, equipment storage and maintenance, communications, fire protection, fish rearing, and residences for property owners, employers or full-time employees directly accessory to and required for commercial forest management or fish and wildlife management (emphasis added).

2. The Board applies a dictionary definition to the operative terms in this code requirement and interprets “necessary” to mean “that cannot be done without; that must be done or had; absolutely required.” *Webster’s Third New International Dictionary* (Unabridged) (1981). This is a strict standard, and if there is evidence that the land can or will be managed for forest production without the dwelling, then the “necessary and accessory” standard is not met. In light of LUBA’s Remand Order, the Board rejects an interpretation of this operative phrase that would allow a dwelling that merely lends convenience or efficiency to the forest management of the property.

3. To meet this standard, the Board looks for evidence that the on-site presence of the person who lives in the dwelling is actually needed (necessary for) the commercial management of the forest land, and the person who will live in the dwelling is primarily and actively engaged in commercial forest management of the land. If the evidence does not show this close relationship, then, in our view, the dwelling is not necessary for commercial forest management. This code requirement exists to prevent the proliferation of non-forest dwellings on forest land in Columbia County, which could undermine the County’s timber and forest management base.

4. The record of these two resource dwellings (FMP 06-03 and FMP 06-04) shows that neither parcel (at 65 and 96 acres respectively) has ever had a dwelling, yet both nonetheless have been managed for and committed to commercial forestry for many years. Most recently, both parcels were logged in 2000, were replanted pursuant to an approved forest management plan, and are still under commercial forest management without benefit of any on-site resident forest manager.

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5. The Board does not view as credible the applicants' statements, or its forestry reports, to the effect that a resident owner is or might be required to manage these parcels for commercial forestry. The record contrary and more substantial evidence that these parcels, at 65 and 96 acres respectively, and near-by parcels that are much larger, have never had, and do not now require, on-site residents for forest management.

6. From this the Board concludes that a dwelling on neither parcel is necessary for forest management. Likewise, the evidence in the record convinces us that a dwelling would not be required for the commercial forest management of either parcel.