BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of the Applications by Steve Matiaco, Carole Matiaco, and John Jungwirth for 3 Conditional Use Permits to Place 3 Single Family Dwellings in the Primary Forest (PF-76) Zone	))))))	ORDER NO. 94-2002 FINDINGS AND CONCLUSIONS

WHEREAS, on September 17, 2001, Steve Matiaco, Carole Matiaco, John Jungwirth and Karen Jungwirth filed five applications for Conditional Use Permits (CU 02-10, CU 02-11, CU 02-12, CU 02-13, and CU 02-14); and

WHEREAS, on appeal from the Columbia County Planning Commission, the Board of County Commissioners approved two such applications (CU 02-12 and 02-14) and denied three such applications (CU 02-10, CU 02-11, and CU 02-13); and

WHEREAS, the Board's decision to deny the three applications was subsequently appealed to the Land Use Board of Appeals (LUBA); and

WHEREAS, LUBA remanded the Board's decision for a determination of the number of dwelling units in Section 19; and

WHEREAS, the Board gave notice of the proceedings on remand and opened the record for additional evidence related to the number of dwelling units in the Section; and

WHEREAS, the record was re-opened for additional written evidence and testimony until October 23, 2002, and for rebuttal evidence and testimony until October 30, 2002. Deliberation based on such additional evidence and testimony was scheduled for November 6, 2002; and

WHEREAS, the following additional evidence and testimony was offered for the record of the decision on remand:

Exhibit 1- County Counsel's File, including the following:
- (A) Notice of Deliberation on Remand (Publication);
- (B) Affidavit of Publication;
- (C) Notice of Deliberation on Remand (Property Owner Notice);
- (D) Affidavit of Mailing;

Exhibit 2- Board Communication and staff report from Todd Dugdale dated October 23, 2002, with the following attachments:

(A) LUBA Final Opinion and Order No. 2002-029;
(B) Address Map of Section 19;
(C) Appellants' Memorandum to the Board of Commissioners with attachments, dated February 6, 2002;
(D) Table of Dwelling Inventory;
(E) Dwelling Unit Documentation;
(F) Building Inspection Report for TL 1700;

Exhibit 3- Appellants' Memorandum to the Board received October 23, 2002, with the following attachments:

(A) Table of Dwelling Inventory with attached map;
(B) Photo of Tax Lot 100;
(C) Photos and Documents related to Tax Lot 200;
(D) Photos and Documents related to Tax Lot 300;
(E) Photos and Documents related to Tax Lot 400;
(F) Photos and Documents related to Tax Lot 500;
(G) Photos and Documents related to Tax Lot 601;
(H) Photos and Documents related to Tax Lot 602;
(I) Photos and Documents related to Tax Lot 603;
(J) Photos and Documents related to Tax Lot 604;
(K) Photos and Documents related to Tax Lot 700;
(L) Photos and Documents related to Tax Lot 801;
(M) Photos and Documents related to Tax Lot 900;
(N) Photo of Tax Lot 1000;
(O) Photo of Tax Lot 1100;
(P) Photos and Documents of Tax Lot 1200;
(Q) Photos and Documents of Tax Lot 1300;
(R) Photos and Document of Tax Lot 1400;
(S) Photos of Tax Lot 1500;
(T) Photos of Tax Lot 1600;
(U) Photos and Documents related to Tax Lot 1700;
(V) Photo of Tax Lot 1800;

Exhibit 4- Letter to the Board from CCCOG and Jennifer Kirkpatrick received October 23, 2002, with the following attachments:

(A) Table of dwelling units;
(B) 15 photographs;
(C) Assessor's Records;
(D) Letter from David Cascadden;
(E) Letter from George Johnson;
(F) Land Development Services Records;

Exhibit 5- Rebuttal Memorandum to the Board from Todd Dugdale dated October 29, 2002, with the following attachments:

(A) Letter to David Cascadden;
(B) Building Permit Documents (George Johnson- Tax Lot 900);

Exhibit 6- Rebuttal Memorandum to the Board from CCCOG and Jennifer Kirkpatrick dated October 30, 2002, with the following attachments:

(A) 4 Photos;
(B) Letter from Lillian Gore;
(C) Documents related to Temporary Use Permit on Tax Lot 600;
(D) Building Permit Documents for Tax Lot 603;
(E) Land Use Permit Documents for Tax Lot 603;
(F) Building Permit Application Documents and Assessor's Record for Tax Lot 900;

Exhibit 7- Final Argument from Vial Fotheringham received November 5, 2002; and

WHEREAS, on November 6, 2002, the Board of County Commissioners continued the deliberations in the matter to November 13, 2002, at or after 10:00 a.m.; and

WHEREAS, on November 13, 2002, the Board opened the hearing and accepted the written evidence and testimony as listed above into the record, except that the following evidence and testimony was specifically rejected:

1. Paragraphs II(C)(1)-(5) of Exhibit 3 -Appellants' Memorandum, was rejected and not received into the record because they are not relevant to the issue of the number of dwelling units in the Section, but rather are related to what the applicants refer to as the applicants' duty to reasonably investigate;
2. Exhibit A to Exhibit 7- Final Argument from Vial Fotheringham, was rejected and not received into the record because it was new evidence presented during final argument. The final argument shall not include any new evidence; and

WHEREAS, having considered the evidence and testimony in the record, the Board of County Commissioners deliberated on the matter and voted to approve applications CU 02-10, CU 02-11 and CU 02-13, subject to conditions of approval as set forth in the Staff Report to the Board of County Commissioners, dated October 23, 2002;

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 October 23, 2002, which

is attached hereto as Attachment A, and is incorporated herein by this reference.

2. The Board of County Commissioners adopts Supplemental Findings set forth in Attachment B, which is attached hereto and is incorporated herein by this reference.

3. Applications CU 02-10, CU 02-11, and CU 02-13, are APPROVED subject to the following conditions of approval for each application:

   I. Each Conditional Use Permit shall become void 2 years from the date of the final decision if development has not begun on the property. An extension of time may be granted by the Planning Director if requested in writing prior to the expiration date and, if the applicant/owner was not responsible for the failure to develop within the prescribed time.

   II. Prior to the issuance of a building permit, the applicant/owner of each parcel shall do the following:

      A. Sign a Waiver of Remonstrance regarding current and accepted forest and farm management practices on adjacent properties devoted to timber production;

      B. Submit to the County Land Development Services Department, documentation from the Scappoose Rural Fire Protection District approving the shared private road and private driveways to the proposed residences and stating that the driveways and road have been constructed to meet fire district standards;

      C. Obtain an official name for the private road. The required process to obtain a formal name includes submitting a road name application and having it approved by the Board of County Commissioners;

      D. Enter into a maintenance agreement with abutting property owners which shall specify the responsibility of each property owner to maintain the shared private driveway and section of Chapman Grange Road used for access. The Maintenance Agreement shall run with the land and be binding on all successors in interest in the property. The Maintenance Agreement shall be recorded in the deed records of Columbia County;

      E. Build an emergency apparatus turnaround at the end of the driveway;

      F. Build the driveways according to the Columbia County Driveway Standards which prohibits driveway grade in excess of 12% unless special improvements are approved by the County Road Department;

G. Obtain an Access Permit from the Columbia County Road Department and submit such Permit to the Land Development Services Department;

H. Submit a well constructor's report indicating that sufficient domestic water is available to serve each dwelling;

I. Submit documentation that the County Sanitarian has performed as septic lot evaluation and that each parcel is approved for a septic system;

J. Clearly mark the address of the three residences with signs in two locations for each parcel. One such sign shall be at the beginning of the private road near the intersection of Chapman Grange Road, and the second shall be where the shared private road enters each parcel and becomes a driveway;

K. Follow the requirements of OAR 660-06-029 to 040, as they are interpreted by the Oregon Department of Forestry in its "Land Use Planning Notes: Recommended Fire Siting Standards for Dwellings and Structure and Fire Safety Design Standards for Roads," dated March, 1991, in construction of the access driveways and all structures on the site. The dwellings shall, among other requirements, have fire retardant roofs, spark arresters on all chimneys, and shall not be sited on slopes greater than 40%;

L. Follow the firebreak requirements of OAR 660-06-029 to 660-06-040 as interpreted by the Oregon Department of Forestry in its "Land Use Planning Notes: Recommended Fire Siting Standards for Dwellings and Structures and fire Safety Design Standards for Roads," dated March, 1991;

M. Meet the provisions of the Oregon Forest Practices Act with may require either a timber stocking survey or a reforestation plan.

III. Prior to Obtaining an Access Permit, the Applicants/Owners of each parcel shall do the following:

1. Widen Chapman Grange Road to a 20' wide graveled travel surface, and if deemed necessary by the County Road Department, build drainage ditches and culverts as instructed by the County Road Department. These road improvements shall start at the intersections of Melling Drive and Melonie Drive with Chapman Grange Road and shall continue to the location of the access of the new private driveway;

2. Coordinate the removal of second growth fir trees located in the right of way which must be removed for road widening purposes;

3. Dedicate five additional feet of road right of way on Chapman Grange Road for the length of each applicant/owner's property where such property abuts Chapman Grange Road; and

4. Construct the private driveway to County Standards, i.e. 12' wide, with turnouts, using grade stakes to mark the easement location and showing the cut/fill requirements. The grade stakes shall be in place prior to site inspection by the County Road Department.

Dated this 4th day of December, 2002.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

Tony Hyde, Chair

Joe Corsiglia, Commissioner

Rita M. Bernhard

Rita Bernhard, Commissioner

Approved as to form

By: Sarah Tyson
Assistant County Counsel

ATTACHMENT A

COLUMBIA COUNTY BOARD OF COMMISSIONERS
STAFF REPORT
10/23/02

ON REMAND FROM THE LAND USE BOARD OF APPEALS

FILE NUMBERS: CU 02-10; CU 02-11, CU 02-13

APPLICANT/OWNER:

CU 02-10	CU 02-11	CU 02-13
Steve Matiaco	John Jungwirth	Carole Matiaco
PO Box 367	6696 McLeod Ln.	3343 Valley Crst Way
Forest Grove, Or.	Salem, Or.	Forest Grove, Or.

PROPERTY LOCATION: Approximately ½ mile Southwest of Scappoose Vernonia Hwy; Northwest of Chapman Grange Road.

TAX ACCOUNT NUMBER: 4219-000-00800 (Lots 4, 18, and 11 of Kohler Acres).

ZONING & SIZE: Primary Forest (PF-76); 9.66, 9.48 and 8.48, respectively.

REQUEST: To place a single-family dwelling on each of the three parcels in the PF-76 zone.

APPEALED DECISION: By Final Order No. 10-2002, the Board of Commissioners denied three applications for forest dwellings (CU 02-10, CU 02-11, and CU 02-13), on the grounds that the addition of these homes would exceed the major big game density standards for Big Game Habitat in the Primary Forest Zone. The decision was appealed to the Land Use Board of Appeals (LUBA). LUBA remanded the decision on the issue of the number of dwellings in Section 19 of Township 4N, Range 2W, used to determine whether the applications were within allowable dwelling unit density limits for Major Big Game Habitat contained in Section 1193 of the Columbia County Zoning Ordinance.[1]

APPELLANTS: Steve Matiaco, John Jungwirth, and Carole Matiaco.

BASIS FOR REMAND: LUBA remanded the decision based on the failure of the County to provide substantial evidence in the record that there are 14 dwellings

[1] In Final Order No. 10-2002, the Board also approved two applications for forest dwellings in the Primary forest Zone, which met the density standards.

in Section 19 of Township 4N, Range 2 W, used to calculate the existing dwelling unit density. Reference to the County Address Map was not adequate because the address map was not included in the record and there was no explanation of how information is placed on the map, how or when that information is updated, and how addresses on the map correlate to actual dwellings. In addition, the County had not refuted evidence presented that tended to prove that there were less than 14 dwellings in the Section. (See Attachment 1).[2]

CRITERIA:

Section 1193 of the Columbia County zoning Ordinance reads in pertinent part,

Development Standards: In the Big Game Range zone the following standards shall apply:

.1 Big Game habitat density standards:

A. Major habitat- 1 dwelling unit per 38 acres with clustering.

Finding 1: The Columbia County Rural Address Map is the basis for counting dwelling units in each Section in order to calculate the above dwelling density. The County's Rural Address Map is maintained by the Land Development Services Department consistent with Ordinance 81-6 which establishes a Countywide Addressing System adopted onAugust 4, 1982. Pursuant to Section 6.06 of the Ordinance, Land Development Services assigns a new address when a building permit is issued for a new structure and notifies appropriate agencies of the new address. The new address is then added to the Rural Address map. If a demolition permit is issued for a structure and it is demolished and not replaced, the assigned address will be removed from the County Address Map. The Map is not updated if an existing permitted dwelling becomes uninhabitable under provisions of the State Building Codes if no further permits to demolish or remodel the structure are filed.

Finding 2: Addresses that are shown on the Rural Address Map do not all correlate with dwellings to be counted under in the Big Game Habitat density. Addresses assigned and placed on the map using the procedure as explained in Finding 1, are not necessarily distinguished as to use. While many of the addresses assigned in the PF-76 zone correlate to dwellings, addresses are also assigned to other structures, such as churches. Therefore, a count of the addresses in the section may not accurately portray the actual number of dwellings in the section. It is also necessary to cross-check the County Address Map against Building Permits, Conditional Use Permits and Tax Assessor records which give information about the type of structure on the property or type of structure which is authorized to be built. Having done such a cross-check, a list of dwelling units can be generated. Because addresses are assigned when a building permit is issued, the Address Map, when cross-checked, will show dwellings which have been authorized but not yet built. Temporary Hardship Dwellings may be placed on a parcel in conjunction with an existing dwelling, if approved under the

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[2]LUBA sustained the County's decision to consider all dwellings in the Section.

applicable zoning regulations, but such dwellings are not assigned separate addresses and they do not appear on the Address Map.

Finding 3: As indicated above, the purpose of the County Address map is to record all assigned rural addresses according to the County addressing system established in Ordinance No. 81-6. Because an address assignments occur in conjunction with the issuance of building permits, the map is an appropriate starting point for counting dwellings, needing only to be cross-checked with other County records. County planning staff has cross-checked the addresses shown on the Address Map for Section19. Based on that cross-check, and as explained below, Planning Staff has determined that there are 13 dwellings units in Section 19. (See Attachment 4).

A "dwelling unit" as defined in CCZO Section 100.17, means, "a single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation." From review of County records, Staff finds that there are existing dwellings which meet the definition of "dwelling unit" on tax lots 200, 300, 400, 602, 700, 900, 1200, 1300, 1400, 500, and 801. (See Attached Assessors records, Building Records, and Photographs).

In addition to these 11 dwelling units, 3 parcels are approved to be built as dwelling units meeting the definition. These are on tax lots 604, and 800 (lots 9, 10, and 19- 2 dwellings). These proposed dwellings must meet the current state building codes which require that each must also meet the definition of a "dwelling unit." Dwellings that were authorized prior to or concurrent with a new proposal must be counted even though the dwelling may not currently be physically built. If such dwellings were not counted in the density calculation for a newly proposed dwelling, the maximum Big Game Habitat density may be exceeded unwittingly. The County, therefore, will have failed to mitigate the impacts from residential uses on its big game.

The two dwellings proposed on Tax lot 800 are the dwellings approved by Final Order No. 10-2002. The building permit for the dwelling proposed on Tax Lot 604 was issued in May of 2002, after the date the 5 applications were filed; September 17, 2001. Because the criteria in effect at the time the applications were filed still applies on remand, Staff will not count dwelling units in the Section which were not approved when the applications were filed, unless one or more such application is filed concurrently with the subject applications. Therefore, the dwelling on tax lot 604 has not been counted for purposes of the Big Game Habitat density calculation, and the two dwellings approved on Tax Lot 800 have been counted.

In addition to the dwelling units mentioned above, there is one temporary hardship dwelling on tax lot 600. Staff has not counted this temporary hardship dwelling in the count of dwellings because it is not permanently sited on the tax lot. A temporary hardship dwelling may be sited in conjunction with a permanent dwelling if it meets the criteria in the County Zoning Ordinance. Such a permit is only valid for one year unless renewed. Because of the temporary nature of such a dwelling, its impact on Big Game is not as great as with a permanent dwelling. Although there will be some impact from such a dwelling due to the additional residential uses of the parcel, such an impact is not significant enough to prohibit an additional dwelling on a different parcel to be sited because the hardship dwelling must be removed as soon as the hardship has ended. While a hardship may last for years, the Big Game Habitat rules are concerned with the permanency of impact to big game from siting of permanent residences. Therefore, the short-term impacts of the temporary dwelling should not be considered.

The other structures in the section include a church on Tax Lot 500, a grange hall on Tax Lot 603 and a "shack" on Tax lot 1700. There is no question that the church and Grange Hall do not meet the definition of dwelling unit, having no independent living facilities. The "shack" does not meet the definition of dwelling unit either, having no permanent sanitation facilities. (See Finding 4, below). Therefore, the dwelling unit count for purposes of the Big Game Habitat Density is currently 13 (11 existing built dwellings plus 2 authorized but not built dwellings).

Finding 4. The Applicants raised several claims on appeal to LUBA that the County had not considered their evidence which showed that there were less than 14 dwelling units in the Section. Specifically, the Applicants provided evidence in the record that there is only one dwelling on tax lot 801 (the County had counted two), that the structure on tax lot 601 is a church with no facilities meeting the definition of a "dwelling unit" (the County had counted it as a dwelling unit), and that the "shack" on tax lot 1700 should not be counted because it is not habitable.
Having cross-checked the records and doing a site visit, Staff now agrees that there is only one dwelling on Tax Lot 801, and that the structure on Tax Lot 601 is a church with no independent living facilities. Therefore, Staff has not counted such structures in the dwelling unit count.

The other structure, the "shack" was once a hunting lodge where people would periodically live, but which does not currently have sanitation facilities. Because the shack does not have sanitation facilities, it cannot be counted as a "dwelling unit" under CCZO 100.17. However, Staff specifically disagrees with the Applicants' claim that the dwelling cannot be counted if it is not habitable. While the issue does not make a difference to the outcome of the Applicants' requests, Staff does not read the definition of "dwelling unit" as requiring a "habitable" structure, if such structure otherwise has all of the indications of being a dwelling unit according to the definition.

Finding 5. Based on the foregoing, Staff calculates the big game density for the proposed dwellings as follows: The existing Big Game Habitat density is one dwelling unit per 49.23 (640 acres/13 dwelling units). With the addition of one proposed dwelling, the Big Game Habitat density would be one dwelling unit per 45.71 acres (640 acres/14 dwelling units). With the addition of two additional proposed dwellings, the big game habitat density would be one dwelling unit per 42.66 acres (640 acres/15 dwelling units). With the addition of all three additional proposed dwellings in the section, the Big Game Habitat density would be one dwelling unit per 40 acres (640 acres/16 dwelling units). Therefore, the 3 proposed dwellings are within the maximum density standard for major Big Game Habitat of one dwelling per 38 acres. Staff finds that the 3 applications comply with CCZO § 1193.1.

Recommendation: Based on the above findings, Staff recommends **Approval** of CU 02-10, CU 02-11 and CU 02-13 to site single family dwellings on three parcels located on Lots 4,11, and 18 of the Koehler Acres Subdivision in the Primary Forest Zone, subject to the following conditions:

1. The conditional use permit shall become void 2 years from the date of the final decision if development has not begun on the property. Extensions of time may be granted by the Planning Director if requested in writing before the expiration date

and if the applicant/owner was not responsible for the failure to develop within the prescribed time.

2. Prior to the issuance of a building permit, the applicant/owner of each parcel shall do the following:

   A. Sign a Waiver of Remonstrance regarding current and accepted forest and farm management practices on adjacent properties devoted to timber production;

   B. Submit to the County Land Development Services Department, documentation from the Scappoose Rural Fire Protection District approving the shared private road and private driveways to the proposed residences and stating that the driveways and road have been constructed to meet fire district standards;

   C. Obtain an official name for the private road. The required process to obtain a formal name includes submitting a road name application and having it approved by the Board of County Commissioners.

   D. Enter into a maintenance agreement with abutting property owners which shall specify the responsibility of each property owner to maintain the shared private driveway and section of Chapman Grange Road used for access. The Maintenance Agreement shall run with the land and be binding on all successors in interest in the property. The Maintenance Agreement shall be recorded in the deed records of Columbia County;

   E. Build an emergency apparatus turnaround at the end of the driveway;

   F. Build the driveways according to the Columbia County Driveway Standards which prohibits driveway grade in excess of 12% unless special improvements are approved by the County Road Department;

   G. Obtain an Access Permit from the Columbia County Road Department and submit such Permit to the Land Development Services Department;

   H. Submit a well constructor's report indicating that sufficient domestic water is available to serve each dwelling;

   I. Submit documentation that the County Sanitarian has performed as septic lot evaluation and that each parcel is approved for a septic system;

   J. Clearly mark the address of the three residences in two locations for each parcel. One such sign shall be at the beginning of the private road near the intersection of Chapman Grange Road, and the second shall be where the shared private road enters each parcel and becomes a driveway;

K. Follow the requirements of OAR 660-06-029 to 040, as they are interpreted by the Oregon Department of Forestry in its "Land Use Planning Notes: Recommended Fire Siting Standards for Dwellings and Structure and Fire Safety Design Standards for Roads," dated March, 1991, in construction of the access driveways and all structures on the site. The dwellings shall, among other requirements, have fire retardant roofs, spark arresters on all chimneys, and shall not be sited on slopes greater than 40%;

I. Follow the firebreak requirements of OAR 660-06-029 to 660-06-040 as interpreted by the Oregon Department of Forestry in its "Land Use Planning Notes: Recommended Fire Siting Standards for Dwellings and Structures and fire Safety Design Standards for Roads," dated March, 1991.

J. Meet the provisions of the Oregon Forest Practices Act with may require either a timber stocking survey or a reforestation plan.

3. Prior to Obtaining an Access Permit, the Applicants/Owners of each parcel shall do the following:

A. Widen Chapman Grange Road to a 20' wide graveled travel surface, and if deemed necessary by the County Road Department, build drainage ditches and culverts as instructed by the County Road Department. These road improvements shall start at the intersections of Melling Drive and Melonie Drive with Chapman Grange Road and shall continue to the location of the access of the new private driveway;

B. Coordinate the removal of second growth fir trees located in the right of way which must be removed for road widening purposes;

C. Dedicate five additional feet of road right of way on Chapman Grange Road for the length of each applicant/owner's property where such property abuts Chapman Grange Road;

D. Construct the private driveway to County Standards, i.e. 12' wide, with turnouts, using grade stakes to mark the easement location and showing the cut/fill requirements. The grade stakes shall be in place prior to site inspection by the County Road Department;

ATTACHMENTS:

1. LUBA Decision
2. County Address Map for Section 19
3. Appellants Memorandum
4. Table w/Results of Dwelling Unit Count
5. Dwelling Unit Documentation including photos, assessors records and building records;
6. Building Inspector's report on structure located on T.L. 1700

ATTACHMENT B

SUPPLEMENTAL FINDINGS

1. CCCOG and Jennifer Kirkpatrick (hereinafter referred to as "the opponents"), argued on remand that all five applications dealt with in Final Order No. 10-2002 are subject to approval or denial during the remand proceedings. The Board of County Commissioners finds that in Final Order No. 10-2002, the Board denied three applications (CU 02-10, CU 02-13, and CU 02-14), and approved two applications (CU 02-12 and CU 02-14). Steve Matiaco, Carole Matiaco and John Jungwirth appealed the Board's decision to deny the three applications to LUBA. The two applications approved by Final Order No.10- 2002, were not appealed to LUBA. The Board finds that on remand the Board is restricted to a decision on CU 02-10, CU 02-13, and CU 02-14, which were appealed to LUBA. The Board finds that the approval of CU 02-12 and 02-14 was final 21 days after the final decision was approved and notice of the decision was sent to the parties. However, the Board finds that even if all five applications were subject to approval or denial on remand, all five would be approved because of the number of dwelling units in the Section.

2. The opponents argued on remand that the Board should count dwelling units that became dwelling units after the original decision was made. The Board finds that the subject applications were filed on September 17, 2001. Final Order No. 10-2002 was signed on February 22, 2002, and was thereafter appealed to LUBA. CCCOG and Jennifer Kirkpatrick argue that any dwelling that became a "dwelling unit" under CCZO 100.17 between the time that the application was deemed complete and the time the decision is ultimately made, should be counted despite intervening appeals. The Board disagrees. The Board finds that the decision was remanded for a determination of the number of dwelling units in Section 19 at the time that the decision was made. While the Board was instructed by LUBA to provide a considered response to petitioner's evidence and argument regarding the number of dwellings in the Section, the Board was not instructed to make a decision based on evidence that could not have been considered at the time of the initial decision.[1] Without instructions to the alternative, the Board finds that the remand proceeding is a continuation of the original decision, and the Board, therefore, will not consider evidence that it could not have considered in the first proceeding. While the Board does not necessarily agree with Staff that the dwelling count should be limited to dwellings in existence at the time the applications are filed. However, the Board finds that the decision must be limited to evidence available at the time the initial decision was made. Opponents' evidence related to new dwelling units built or permitted after the initial decision was made, is such evidence. According to the opponents, they could appeal a decision, presumably drawing it out for years, and thereby effectively guarantee that additional dwellings will be added in the Section

[1]The Board counted the 2 dwelling units approved in Final Order No. 10-2002 during the initial decision, and will continue to count them as dwelling units on remand.

in the intervening years,[2] and reducing land available for dwellings in the Big Game Habitat Overlay because of the maximum density standards. Such a result is not called for either in LUBA's remand or otherwise.

3. The opponents further argue on remand that a structure need not be legally sited to be considered a "dwelling unit" for purposes of the Big Game Habitat Density Standard. The Board disagrees. In their rebuttal memorandum, opponents state that there is no definition in county ordinances of the term "legal" when applied to dwellings. To the extent that the opponents argue that because the definition of a dwelling unit in CCZO § 110.17 does not expressly say that a dwelling unit must be legal, the Board agrees. However, the Board interprets the definition as applied to the Big Game Habitat Density Standard to require that a dwelling unit must actually be legally sited in order to be counted for density purposes. The Board looks to the definition which requires that the structure have "permanent provisions for living, sleeping, eating, cooking, and sanitation." The Board finds that if a structure is not legally sited, its provisions for living, sleeping, etc. are not permanent. Such structures are subject to an enforcement action which would require that such dwelling unit features be removed. For example, a structure that has been illegally converted to a structure which otherwise meets the definition of a dwelling unit by the addition of a kitchen is illegally converted and the owner of the property will be required to either remove the kitchen or otherwise attempt to legalize the dwelling. The existence of such an illegal dwelling should not preclude a land owner from siting a dwelling that, but for the illegal dwelling, would be approved. Rather, the property owner who has illegally converted a structure should be required to go through a permit process, just as the applicants have done in this case. If the illegal structure is also in the Big Game Habitat Overlay, then the illegal structure should also be subject to density standards under CCZO § 1193 which may or may not permit the conversion.

The Board also looks to the purpose of the Big Game Habitat Overlay which, according to CCZO § 1190, is to "limit uses that conflict with maintenance of the areas." The Board finds that the uses that may conflict with maintenance of the Big Game Habitat areas are permanent, legal uses. A use which is not legal must be discontinued and will therefore, not conflict with maintenance of the areas. Property owners who have established such an illegal use should stop such illegal use, rather than attempt to prohibit the legal siting of a dwelling elsewhere.

4. Opponents argued on remand that there are currently 15 dwelling units in Section 19. The applicants and the County each counted 13 dwelling units in the Section (including 11 existing dwellings and the 2 approved in Final Order No. 10-2002). The structures which are the subject of debate are found on tax lots 600, 603, 604, and 900. As discussed below, the Board finds that there are no dwelling units on any of these tax lots which may be counted for purposes of the Big Game Habitat Density Standard.

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[2] Dwellings in the Rural Residential Zone are not subject to the Big Game Habitat Density Standards when built, but will increase the dwelling density for forest dwellings.

The Temporary Hardship Dwelling. The Board finds that there is a temporary hardship mobile home on tax lot 600. The mobile home has been occupied for the last 9 years by elderly relatives of the property owners of Tax Lot 500. Opponents argue that "there is no reason to exclude this home, since it clearly is occupied and impacts the Big Game Habitat." The opponents base their argument on the fact that the structure has all the permanent provisions listed in the definition of dwelling unit, and that the residents have indicated that when the necessity for the hardship dwelling ends, they "plan to convert the status to an ordinary residence." The Board disagrees with the opponent's conclusions. At the outset, the Board notes that the definition of "dwelling unit" does not refer to whether the structure is occupied or empty. Therefore, the fact that the mobile home is occupied is not itself evidence that it meets the definition. The Board finds that there is substantial evidence in the record that a temporary hardship dwelling may or may not be approved from year to year. Each year the resident of such dwelling must obtain medical evidence that there is an ongoing need for special attention and must receive approval from the Land Development Services Department for the continued use. Therefore, the siting of a such a dwelling is not permanent. Furthermore, such a dwelling must be sited in the same area as the primary residence, and must be connected to the primary residence's subsurface septic system under CCZO 1505.3. The Board finds that the fact that the temporary dwelling must necessarily be clustered with the primary dwelling in order to share a subsurface septic system, there is little, if any, additional conflict with Big Game due to its existence. The Board further finds that because the hardship mobile must be hooked up to an existing septic system, it does not have independent permanent provisions for sanitation. Finally, the Board finds that the lot line adjustment and the resident's intent to convert the hardship dwelling into an ordinary residence has no bearing on whether the dwelling is currently a "dwelling unit" for purposes of Big Game Density. Once the hardship ends, the temporary dwelling must be removed. Whether or not the property owner decides at that time to attempt to legally site the dwelling is purely speculative. Such a prospective dwelling may or may not be approved, and should not be counted now to prohibit an otherwise qualifying dwelling or dwellings from siting.

The Grange. The Board finds that there is a grange building on Tax Lot 603. The opponents argue that the grange has been converted into a dwelling unit by David Cascadden, the current owner of the structure and by previous owners, and therefore, should be counted as a dwelling unit for purposes of the Big Game Density Standard. The opponents make this argument based on the fact that Mr. Cascadden purchased the property, converted the grange hall into a residence and has occupied it has a residence for over a year. Furthermore, the opponents rely on the fact that at the time Mr. Cascadden moved in the building was fully functional with electricity/plumbing and a new furnace that was installed a year before he moved in. The opponents further rely on the fact that Mr. Cascadden applied for a septic permit which was inspected and approved in June of 2002, an electrical permit in April of 2002, for which Mr. Cascadden never paid, and he also filed a "Land Use Proposal" in December of 2001, which showed that the owner was living in the building at that time. Opponents also argue that the structure need not be legal to qualify as a dwelling unit. The

Board disagrees with the opponents, and finds that the grange hall has been illegally occupied by Mr. Cascadden. The County has initiated enforcement action (Case No. COD 2003-00060) to correct the occupancy violation and the County has determined that the structure is not a legal "dwelling unit". The fact that there may have been independent living facilities installed before Mr. Cascadden illegally moved into the hall, does not make the structure a legal dwelling unit.[3] In addition, there are no current permits to legally convert the building and there is no indication in the record that Mr. Cascadden even intends to legalize the structure at this point[4]. In any event, whether Mr. Cascadden intends to legalize the structure as a dwelling in the future is not very important to this decision. Such a prospective dwelling may or may not be approved, and should not be counted now to prohibit an otherwise qualifying dwelling or dwellings from siting. Opponents also appear to argue that because this structure is located in the RR-5 zone, and therefore, not subject to the same Big Game Habitat density standards as property in the forest zone, the structure should be counted. The Board disagrees with that conclusion. The Board relies on whether a structure, at the time of the original decision, was a "dwelling unit". The fact that a potential structure, if it is ever converted to a dwelling unit, is not subject to the Big Game Habitat Overlay provisions has no bearing on whether or not it was a dwelling unit at the time of the original decision.

New Construction. The Board finds that there is new construction of a dwelling unit on Tax Lot 604. The record shows that Ken and Sheri Jillson received a building permit to build a single family residence on the tax lot in the RR-5 zone. The permit was issued on May 22, 2002. For the reasons stated above, the Board has already concluded that it will only count dwelling units for purposes of the Big Game Habitat Standard that met the definition at the time of the original decision. Opponents argue that presumably, the applicants would agree with the opponents if a structure which was a dwelling unit during the original decision, was later converted into some other structure in the intervening appeal period. The Board does not speculate as to whether the applicants would make such an argument, and will not rely on that speculation in order to justify counting a dwelling unit which was clearly not a dwelling unit at the time of the original decision.

Garage Apartment. The Board finds that there is one "dwelling unit" on tax lot 900, and one illegally converted garage apartment on the tax lot. The opponents argue that the garage apartment should be counted as a "dwelling unit." They argue that the lack of an address on the rural address map was a clerical error because the apartment was legally built and should therefore be counted. The opponents also point out that the Assessor's records show two dwellings on the tax lot. The Board agrees that the Assessor's records show that

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[3] It is not surprising to the Board that a grange hall would be improved with plumbing or other facilities.

[4] While Mr. Cascadden's letter in the record (Attachment 4-603 to the Opponents Memorandum) states that he intends to remodel, it does not indicate he intends to obtain a building permit to legally change the occupancy of the grange hall.

there are two residences. However, the Board disagrees with the opponents that such evidence necessarily means that the apartment is a "dwelling unit". The Board finds it interesting that the opponents argue that the apartment was built legally with respect to this structure, when they previously argued that a structure need not be legal to be a "dwelling unit". Nevertheless, the Board disagrees with the opponents assertion that the apartment was legally converted. The Board finds that there is substantial evidence in the record that in 1970, George Johnson received a building permit to build a single family dwelling on tax lot 900. (See Attachment 2, LDS Rebuttal Memorandum). The Board further finds that in 1979, a garage was permitted and built (See Attachment 2, LDS Rebuttal Memorandum). Then, the property was zoned RR-5 in 1984. Thereafter, only one-single family dwelling was legally permitted on the property. The Board finds that while the garage was permitted prior to zoning, the addition of an apartment above it was not. Therefore, the later conversion of the apartment into a "dwelling unit" was illegal. In addition, the Board finds that the kitchen facilities have only recently been added. A letter from George Johnson, submitted by the opponents into the record indicates that Mr. Johnson only recently completed a kitchen in the "apartment" which indicates to the Board that there was no kitchen prior to zoning in 1984. (See attachment 4-900 to Opponent's Memorandum). The Board finds that the illegal addition of the kitchen illegally converted the space into an apartment. This illegal residence should not be counted as a dwelling unit for purposes of the Big Game Habitat Density Standard.

5. Opponents suggest that OAR 660-06-025(3)(p) is a standard against the Board should determine whether a structure is a dwelling. The rule places conditions upon the restoration, alteration or replacement of a dwelling in a forest zone, requiring that the dwelling has intact exterior walls and roof structures, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system, interior wiring for interior lights, and has a heating system. The Board disagrees and finds that the rule is inapplicable to this decision. OAR 660-06-025 (3)(p) applies only in the specific context of the entire rule. The subsection only governs the circumstances under which an existing forest dwelling may be restored, replaced or altered. There is no indication from the text of the rule that DLCD intended that the standard for lawfully established dwellings under the forest practices rules should apply to the County's interpretation of its local code definition of dwelling unit. The Board, therefore, declines to apply the standard to this decision.[5]

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[5]The Board notes that if the rule requires that a dwelling must be "lawfully established" to qualify for replacement, alteration or restoration. If the Board were to use this standard, it could not count illegally established dwellings for purposes of the Big Game Habitat Density Standard.