BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES,
Petitioner,

and

OREGON DEPARTMENT OF
FISH AND WILDLIFE,
Intervenor-Petitioner,

vs.

JOSEPHINE COUNTY,
Respondent,

and

BRIMSTONE NATURAL RESOURCE CO.,
Intervenor-Respondent.

LUBA Nos. 2017-065/092

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Andrew Mulkey, Eugene, filed a petition for review and argued on behalf of petitioner.

Erin L. Donald, Assistant Attorney General, Oregon Department of Justice, Portland, filed a petition for review and argued on behalf of intervenor-petitioner.

No appearance by Josephine County.

James R. Dole, Grants Pass, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Watkins Laird Rubenstein PC.

RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

BASSHAM, Board Member, concurring.

REMANDED 08/03/2018

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the board of county commissioners dismissing an appeal of a planning director decision, which approved an application for site plan review in conjunction with proposed placer mining in a riparian area.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. There is no opposition to the reply brief and it is allowed.

FACTS

In 2014, intervenor-respondent Brimstone Natural Resource Company (Brimstone) removed trees and vegetation from the portion of Forest-Commercial (FC)-zoned property that is located in the 50-foot riparian corridor of Brimstone Gulch, in order to facilitate proposed placer mining. Brimstone Gulch flows into Graves Creek, a tributary of the Rogue River. In November 2016, Brimstone submitted an application for Riparian Corridor Site Plan Review in conjunction with its proposed placer mining operation on its property, which Brimstone stated would take place above the high-water mark of Brimstone Gulch and within the 50-foot riparian area. Record 98, 143-50.

In March 2017, the county planning department approved Brimstone's application and imposed 21 conditions of approval. On March 10, 2017,

Brimstone filed an appeal of the planning department's decision on the county's appeal application form. Record 164-66. On May 5, 2017, the planning department issued a staff report to the board of county commissioners. On May 12, 2017, Brimstone submitted a document entitled a "letter in support of [its] appeal" that listed its challenges to various conditions of approval. Record 181-85.

Three days later, on May 15, 2017, the board of county commissioners held a hearing on the appeal. The hearing was conducted as a *de novo* hearing, and petitioner, intervenor-petitioner Oregon Department of Fish and Wildlife (ODFW), Brimstone, and others were allowed to present evidence and testimony on any issue. At the conclusion of the hearing, the board of county commissioners continued the hearing until June 2, 2017. On May 30, 2017, the board of county commissioners met in executive session to discuss the appeal. Record 53-54.

On June 2, 2017, the board of county commissioners opened the continued public hearing. However, no additional testimony or evidence was accepted. Rather, one of the county commissioners read a statement on behalf of the board of county commissioners that took the position that the county lacked jurisdiction to approve or disapprove Brimstone's proposed mining activity in the riparian corridor, and that therefore the appeal was dismissed.[1]

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[1] In LUBA No. 2017-065, petitioner appeals the minutes of that June 2, 2017 meeting that were approved on June 14, 2017. We previously

At its regular meetings on August 23, 2017 and August 29, 2017, the board of county commissioners discussed the appeal and on September 6, 2017, the board of county commissioners voted to adopt findings of fact and conclusions of law in support of its previous June 2, 2017 verbal decision to dismiss the appeal.[2]

The board of county commissioners concluded that Brimstone's placer mining activities were uses that are allowed outright on FC-zoned property pursuant to Josephine County Rural Land Development Code (RLDC) 65.020(A)(3). The board of county commissioners also concluded that RLDC 72.040(B), which regulates development within riparian corridors, does not apply to Brimstone's proposed activities in the riparian zone.[3]

This appeal followed.

FOURTH ASSIGNMENT OF ERROR (PETITIONER)

In its fourth assignment of error, petitioner argues that the board of county commissioners "exceeded its jurisdiction" in considering Brimstone's appeal of the planning director's decision and deciding that Brimstone's proposed mining was a use permitted outright in the FC zone. ORS

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consolidated LUBA Nos. 2017-065 and -092 because they appeal "closely related" decisions and arguably, "the same" decision. OAR 661-010-0055.

[2] Petitioner and ODFW appeal those findings of fact and conclusions of law in LUBA No. 2017-092.

[3] RLDC 72.040(B), which was adopted by the board of county commissioners in Ordinance 2006-001 as amendment to the RLDC, is set out in its entirety at Appendix A.

197.835(9)(a)(A). Prior to and during the hearing before the board of county commissioners, petitioner argued that Brimstone's appeal of the planning director's decision did not satisfy the requirements of RLDC 33.040(A), and that pursuant to RLDC 33.040(E), the board of county commissioners was required to dismiss the appeal. Record 186-87.

We set out the relevant provisions of RLDC 33.040 here:

> "A. A statement of appeal shall be on a form supplied by the Planning Director and shall contain the following information:
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> > "1. How the comprehensive plan, this code, or other applicable federal, state or local law or rule, or evidence, was incorrectly interpreted or applied in the decision;
> >
> > "2. What information in the record of decision was pertinent to the decision, but was not considered by the review body. This may include the comprehensive plan, this code, applicable state law, or other evidence;
> >
> > "3. Each ground or reason for appeal must be separately numbered and explained, and the appeal hearing will be strictly limited to the items specified in the statement of appeal[.]
>
> "* * * * *
>
> "E. Failure to submit a statement of appeal in conformance with the requirements of this Section shall be considered a jurisdictional defect, and the appeal shall be dismissed."

According to petitioner, the appeal application that Brimstone filed on March 10, 2017 did not conform to the requirements in RLDC 33.040(A)(1)-(3).

Record 164-66. Accordingly, petitioner argues, RLDC 33.040(E) required the board of county commissioners to dismiss the appeal. Thus, petitioner requests that LUBA reverse the board of county commissioners' decision.

Brimstone first responds that remand, rather than reversal, is the appropriate remedy in the event that LUBA sustains this assignment of error, because the board of county commissioners did not address petitioner's argument during the proceedings below or adopt any findings addressing the issue. Brimstone also responds that it filed its appeal on the form provided by the county, and paid the filing fee, and that nothing on the appeal form provided to it by the county refers to the requirements found in RLDC 33.040(A), or even includes space to insert the information required by RLDC 33.040(A). Brimstone argues that the county has no prescribed form for the "Statement of Appeal" that is required by RLDC 33.040. Finally, Brimstone points out that the appeal hearing that is conducted after an appeal of a director's decision is a *de novo* hearing, and argues that therefore, the requirement to provide the information specified in RLDC 33.040(A) would "serve no purpose whatsoever." Response Brief 14.

Although it does not cite it, presumably Brimstone's last response is a reference to ORS 215.416(11)(a)(E), which provides:

> "The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

"(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;

"(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and

"(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing."

ORS 215.416(11)(a)(E) was adopted as an amendment to ORS 215.416(11)(a) by the legislature in 2001 in order to overturn the Court of Appeals' holding in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997). Or Laws 2001, ch 397, §1. *Johns* concerned a permit decision that had been rendered initially without a hearing under ORS 227.175(10)(a) (the city counterpart to ORS 215.416(11)(a)), then appealed to the planning commission for a hearing and ultimately to the city council. Lincoln City Code provisions required that persons attempting to appeal such a permit decision specify "the basis for the appeal." 146 Or App at 596. Based on that code requirement, the Court of Appeals held that the issues the local appellant raised before the local appellate body were limited to the issues specified in appellant's notice of local appeal. 146 Or App at 602–03. ORS 215.416(11)(a)(E) has the effect of legislatively overruling the Court of Appeals' holding in *Johns*, that the issues the local appellant raised on appeal were limited to the issues specified in the notice of appeal. Pursuant to ORS 215.416(11)(a)(E), the issues that may be raised at the hearing are unlimited. Accordingly, we agree with Brimstone that, as far as its argument goes, ORS

215.416(11)(a)(E) prohibits the board of county commissioners from limiting the appeal hearing to only issues that are presented in Brimstone's appeal statement, and the board is required to conduct the appeal hearing as a *de novo* hearing.[4]

However, the question presented by petitioner's fourth assignment of error is whether RLDC 33.040(E), which makes the failure to submit a statement of appeal that includes the information in RLDC 33.040(A)(1)–(3) a jurisdictional defect, required the board of county commissioners to dismiss the appeal. That threshold jurisdictional question is not answered by the fact that the hearing was a *de novo* hearing at which Brimstone (and any other party) could raise any issue. As Brimstone points out, the board of county commissioners did not address petitioner's argument and did not adopt any findings regarding the issue. Accordingly, we do not know whether the board

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[4] RLDC 33.070, which as far as we can tell has been in effect since at least 1994, provides:

> "Appeals from decisions made by the Planning Director without a hearing shall be heard by the Board as a *de novo* hearing (a fully, open evidentiary hearing). Within 14 days from the filing of the statement of appeal, the Planning Director shall prepare a report of the action under appeal, and mail notice to the parties indicating the report is available for inspection and/or copying. The report shall consist of all materials, documents, and exhibits considered by the Planning Director in taking the action, including the final action under appeal, if one exists. The Planning Director is authorized to charge a reasonable fee for the preparation and copying of the report."

of county commissioners considered the provisions of RLDC 33.040(A) to be satisfied and the appeal to be valid and if so, under what evidentiary or legal theory, or whether the board of county commissioners considered RLDC 33.040(E) to be inapplicable, and if so, under what legal theory.

We agree with Brimstone that remand, rather than reversal, is the appropriate remedy because the board of county commissioners did not adopt findings in response to the argument below or otherwise explain why Brimstone's appeal was valid. In these circumstances, we do not believe it would be appropriate to interpret the relevant RLDC provisions in the first instance.

On remand, the board of county commissioners should address petitioner's argument that Brimstone did not initially provide a statement of appeal with the information required by RLDC 33.040(A), and petitioner's argument that, as a consequence, the board of county commissioners lacked jurisdiction over the appeal of the planning director's decision, pursuant to RLDC 33.040(E).

Petitioner's fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR (PETITIONER)

Petitioner's fifth assignment of error challenges the planning director's initial decision approving the riparian corridor site plan. That decision is not before us. Accordingly, the arguments in petitioner's fifth assignment of error provide no basis for reversal or remand.

Petitioner's fifth assignment of error is denied.

REMAINING ASSIGNMENTS OF ERROR (PETITIONER AND ODFW)

Petitioner's first, second, and third assignments of error, and ODFW's single assignment of error, challenge the board of county commissioners' conclusion that Brimstone's activities in the riparian corridor are not subject to review under RLDC Article 72, and that Brimstone's placer mining activity is a use permitted outright in the FC zone pursuant to RLDC 65.020(A)(3) as a mining activity that is "auxiliary" to a forest practice. Because we remand for the board of county commissioners to address petitioner's argument that RLDC 33.040(E) required the board of county commissioners to dismiss the appeal, it would be premature to address petitioner's and ODFW's remaining assignments of error. If the board of county commissioners determines that RLDC 33.040(A) did not apply or was satisfied, or that RLDC 33.040(E) did not require the county to dismiss the appeal, then petitioner or other parties may challenge that conclusion and any other conclusions in the findings of fact and conclusions of law that may be adopted by the board of county commissioners in that new decision.

We do not reach petitioner's first, second, or third assignment of error, or ODFW's single assignment of error.

The county's decision is remanded.

Bassham, Board Member, concurring.

I concur with the majority that it is appropriate in the present circumstance to remand the decision to the board of county commissioners to resolve, in the first instance, the merits of petitioner's argument under RLDC 33.040(E) that Brimstone's initial failure to provide the information, including specification of issues, had the effect of depriving the commissioners of jurisdiction over Brimstone's appeal. The issue is ultimately an interpretative one. ORS 197.829(2) authorizes LUBA to interpret RLDC 33.040 in the first instance, where the local government fails to adopt findings or where the local government's interpretation is inadequate for review.[5] However, because the interpretative dispute in the present case relates to what the code labels a "jurisdictional" issue, I agree that it is appropriate to remand to allow the county to articulate, in the first instance, the basis for its jurisdiction over Brimstone's local appeal.

I write separately only to highlight several points that may be salient on remand. The first point is that the board of county commissioners has considerable discretion in the interpretation of its land use regulations under ORS 197.829(1), and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776

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[5] ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

(2010). RLDC 33.040(E) states that "[f]ailure to submit a statement of appeal in conformance with the requirements of this Section shall be considered a jurisdictional defect, and the appeal shall be dismissed." Petitioner apparently reads RLDC 33.040(E) to provide that initial nonconformance with the requirements of RLDC 33.040(A) automatically deprives the county of jurisdiction over the appeal, and that any initial nonconformance cannot be cured. But RLDC 33.040(E) does not clearly state either proposition, and the code need not be so interpreted. The county's apparent practice, as evidenced in the present case, is to note in the staff report that the statement of appeal does not include a specification of issues, but allow the appellant an opportunity to correct that nonconformity. The commissioners' final decision does not address petitioners' jurisdictional argument, other than to find that Brimstone's local appeal was *timely* filed. Record 2. Nonetheless, the board of county commissioners apparently acquiesced to the staff practice of allowing an appellant to cure an initial failure to specify issues in the initial appeal document. If the board of county commissioners believed otherwise, it is difficult to see why the commissioners went on to hold a *de novo* evidentiary hearing and issue its ultimate decision, rather than summarily dismiss the appeal due to the initial nonconformance with RLDC 33.040(A). It seems likely, then, on remand that the commissioners will interpret RLDC 33.040(A) in some manner that allows initial nonconformance with the informational

requirements of that code provision to be cured, and that the commissioners will ultimately conclude that they retain jurisdiction over Brimstone's appeal.

However, even if the board of county commissioners ultimately concludes that RLDC 33.040(E) requires specification of issues at the time the appeal is filed, and that the nonconformity cannot be cured, and therefore the commissioners lacked jurisdiction over the appeal, I think there is a strong argument that such an interpretation as applied to a permit decision made without a hearing would be inconsistent with ORS 215.416(11), which sets out the minimum requirements for processing permit decisions without a hearing.[6]

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[6] ORS 215.416(11)(a) provides, in relevant part:

> "(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.
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> "(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.
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> "(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the

The majority opinion presumes that Brimstone's application is one for a "permit" as defined at ORS 215.402(4) and therefore subject to the

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date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

"(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

"(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

"(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;

"(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and

"(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing."

requirements of ORS 215.416.[7] I agree with that presumption. For the reasons set out below, it is clear to me that Brimstone's application proposes the development of land under discretionary criteria, and is therefore a "permit" decision as defined at ORS 215.402(4).

The county's primary conclusion in the challenged decision is that placer mining for gold in a riparian zone in the FC zone is a type of use allowed outright in that zone, without any county land use regulation. The county's conclusion is almost certainly incorrect. First, the FC zone is a forest zone that implements Statewide Planning Goal 4 (Forest Lands). RLDC 65.010. OAR 660-006-0025(4)(g) provides that local governments may allow "mining" on forest lands, subject to discretionary approval standards at OAR 660-006-0025(5).[8] The FC zone at RLDC 65.030(U) implements OAR 660-006-

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[7] ORS 215.402(4) defines "[p]ermit" in relevant part to mean "discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto."

[8] OAR 660-006-0025(4) provides in relevant part:

> "(4) The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:
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> " * * * * *
>
> "(g) Mining and processing of oil, gas, or other subsurface resources, as defined in ORS chapter 520, and not otherwise permitted under subsection (3)(m) of this rule (e.g., compressors, separators and storage serving multiple wells), and mining and processing of

0025(4)(g) by providing that mining is a conditional use in the FC zone.[9] Neither the county's decision nor Brimstone take the position that the proposed placer mining does not constitute "mining" for purposes of the rule and RLDC. Instead, the county's apparent theory for why the proposed placer mining is a use permitted outright in the FC zone is based on RLDC 65.020(A)(3), which implements OAR 660-006-0025(2)(c), in providing that mining that is auxiliary to a forest operation is an outright permitted use on forest lands. The county apparently believes that cutting down trees in order to facilitate mining for gold somehow renders the mining operation "auxiliary" to the "forest operation" of

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> aggregate and mineral resources as defined in ORS chapter 517[.]"

[9] RLDC 65.030 provides:

> "The following uses, with accessory uses, shall be authorized using Quasi-Judicial Review Procedures (Article 22), subject to the requirements for Conditional Uses (Article 45) and Site Plan Review (Article 42). All uses shall also meet the applicable development standards listed in Section 65.095 of this Article. A Development Permit (Article 41) shall be required as the final permit approval.
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> " * * * * *
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> "(U) Mining and processing of oil, gas, or other subsurface resources, as defined in ORS Chapter 520, and not otherwise permitted under subsection (3)(m) of this rule (e.g., compressors, separators and storage serving multiple wells), and mining and processing of aggregate and mineral resources as defined in ORS Chapter 517."

cutting down trees. That is patently absurd. The act of cutting down trees for commercial sale may constitute a "forest operation" for purposes of the Forest Practices Act, but the tail is wagging the dog pretty hard if a gold mining operation can be viewed as "auxiliary" to a forest operation, based on the fact that to reach the gold buried under the ground, the trees growing on top of it must be cut down, and the mining operator then chooses to sell the downed trees. In my view, the auxiliary mining operations authorized as a permitted use under OAR 660-006-0025(2)(c) refer to auxiliary operations such as mining for locally available gravel in order to construct forest roads to support logging operations. *See* OAR 660-06-0025(2)(d) (defining "auxiliary" to mean "[f]or the purposes of section (2) of this rule 'auxiliary' means a use or alteration of a structure or land that provides help or is directly associated with the conduct of a particular forest practice. An auxiliary structure is located on site, temporary in nature, and is not designed to remain for the forest's entire growth cycle from planting to harvesting. An auxiliary use is removed when a particular forest practice has concluded.") For this reason alone, if we reached the assignments of error challenging the county's conclusion that placer mining is an outright permitted use in the FC zone, I would likely sustain those assignments of error.

Moreover, even if the proposed placer mining were in fact a permitted use in the FC zone, I also agree with ODFW that the proposed placer mining in the riparian corridor is subject to RLDC 72.040(B), which generally prohibits

development within the riparian setback area except for the 10 activities listed in RLDC 72.040(B)(2)(a)-(j), or unless an exception is granted pursuant to RLDC 72.040(B)(3). *See* Appendix A. The proposed placer mining falls squarely within the definition of "development" at RLDC 11.030, as the "alteration of * * * unimproved real estate, including but not limited to * * * mining, dredging, filling * * * [or] excavation * * *." The fact that most of the removed overburden is proposed to be replaced within a short time period after it is removed does not mean that removal of that overburden from the riparian corridor is not an "alteration" of the land as that term is defined in RLDC 11.030.[10]

For these reasons, Brimstone's application is clearly one that must be processed as a permit decision as defined by ORS 214.402(4), and the county's application of its procedures governing permit decisions, including local appeal procedures, must therefore be consistent with ORS 215.416(11). Some provisions of RLCD 33.040 (*e.g.*, the last clause of RLDC 33.040(A)(3), which limits issues to those raised in the statement of appeal) are clearly inconsistent with one or more of the requirements of ORS 215.416(11), and other provisions might well be, depending on how they are interpreted and applied. However, in the present posture of this appeal, it would be premature to

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[10] According to *Webster's Third New Int'l Dictionary* 1606 (unabridged ed 2002), "overburden" is "**2a** :[A] consolidated or unconsolidated material overlying a deposit of useful geological materials (as a coal seam or an ore body) esp. where mined by open cuts[.]"

However, in the present posture of this appeal, it would be premature to evaluate whether and how the provisions of RLDC 33.040, as applied to a permit decision, might be interpreted and applied inconsistently with the requirements of ORS 215.416(11).

72.040 - SPECIAL SETBACK REQUIREMENTS

Special use and structure siting restrictions shall apply to development within the following protected areas:

* * * * *

B. Riparian Corridor Setback Area. Development within riparian corridors shall be limited as follows:

1. SETBACK DISTANCES. The riparian corridor setback area shall be 50' wide for Class 1 Streams and 25' wide for Class 2 Streams (based upon stream classifications established and maintained by the Oregon Department of Fish and Wildlife).

2. RIPARIAN CORRIDOR DEVELOPMENT. Development within a riparian corridor setback area by fill or excavation, by placement of structures, by construction of impervious surfaces, or by removal of vegetation (with or without other development) is generally prohibited, except as listed in subsections 2.a through 2.j below. Approval of the following activities shall require a pre-application review pursuant to Article 42.030 (Initiation of Site Plan Review), and must be authorized by a development permit pursuant to Article 41.020 (Development Permits), prior to development. A riparian area mitigation plan may be required.

   a. Streets, roads, and paths;

   b. Drainage facilities, utilities, and irrigation pumps;

   c. Water-related and water-dependent uses, such as boat ramps, landings, docks, platforms for irrigation equipment, push up dams;

d. Replacement of existing structures with structures in the same location that do not disturb additional riparian surface area;

e. Reclamation activities intended to enhance riparian habitat;

f. Improvements to fish habitat or fish passage;

g. Aggregate mining between the banks of the stream;

h. Forest practices in the farm or forest resource zones where the forest practice is authorized by a permit issued under the Oregon Forest Practices Act;

i. On-going trimming and/or maintenance programs for the improvement of riparian and non-riparian vegetation; and

j. Removal of non-native vegetation when replaced with native plant species.

3. EXCEPTIONS. Exceptions may be granted to the general prohibition of uses specified in subsection 2 above. Requests for development shall require preapplication review procedures for site plan review as set forth in Article 42.030, but shall be judged using the following standards only:

a. The development will result in equal or better protection for the riparian area because the riparian area will be restored, buffered, or enhanced through other special measures; and

b. The exception will not authorize alterations to occupy more than 50 percent of the width of the riparian area measured from the upland edge of the corridor; or

c. An existing lot or parcel proposed for development is rendered not buildable by application of the riparian setback.

d. A riparian area mitigation plan shall be required for all circumstances covered by subsections a, b and c above. The requirement for a mitigation plan may be waived if both the county and the Oregon Department of Fish and Wildlife agree a mitigation plan is unnecessary.

e. Notice of all proposed exceptions, to include copies of proposed mitigation plans, if not waived, shall be given to the Oregon Department of Fish and Wildlife, the Division of State Lands, and the Department of Environmental Quality consistent with the notice requirements contained in Section 32.030 (Mailed Notice).