

94-24343

REVIEWED
BWW
LEGAL COUNSEL

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

94 JUN 16 PM 3:20

An Ordinance Amending Title 18.90, *
Sensitive Bird And Mammal Habitat *
Combining Zone And Declaring An *
Emergency. *

MARY SUE PENHOLLOW
COUNTY CLERK

ORDINANCE NO. 94-005 **0135-2256**

WHEREAS, the Land Conservation and Development Commission issued Remand Order 93-RA-883 requiring Deschutes County to amend Title 18.90 of the Deschutes County Code, Sensitive Bird and Mammal Habitat Combining Zone, to implement site specific economic, social, environmental and energy analyses (ESEE's) of conflicting uses for sensitive bird and mammal sites in Deschutes County; and

WHEREAS, Ordinance 94-004 amended "Fish and Wildlife Inventories Conflict ESEE Analyses" of the Resource Element of the Deschutes County Year 2000 Comprehensive Plan to adopt site specific ESEE analyses for each inventoried sensitive bird and mammal sensitive habitat area on non-federal land; and

WHEREAS, the ESEE decisions adopted by Ordinance 94-004 require amendments to the Deschutes County Code Chapter 18.90, Sensitive Bird and Mammal Habitat Combining Zone; and

WHEREAS, public hearings have been held in conformance with state law before the Deschutes County Planning Commission and Board of County Commissioners for Deschutes County; and

WHEREAS, the Board of County Commissioners has considered the recommendations of the Planning Commission and the public; now therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS AS FOLLOWS:

Section 1. That Deschutes County Code Chapter 18.90, Sensitive Bird and Mammal Habitat Combining Zone, of Title 18 of the Deschutes County Code is amended to read as described in Exhibit "1," attached hereto and by this reference incorporated herein.

Section 2. FINDINGS. The Board of County Commissioners adopts as its findings and conclusions in support of this ordinance the findings attached as Exhibit "2" by this reference incorporated herein.

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Section 3. SEVERABILITY. The provisions of this ordinance are severable. If any section, sentence, clause, or phrase of this ordinance or any exhibit thereto is adjudged to be invalid by a court or competent jurisdiction that decision shall not affect the validity of the remaining portions of this ordinance or exhibit thereto.

Section 4. CODIFICATION. County Legal Counsel shall have the authority to format the provisions contained herein in a manner that will integrate them into the County Code consistent with the the County Legal Counsel form and style for ordinance codification. Such codification shall include the authority to make format changes, to make changes in numbering systems and to make such numbering changes consistent with interrelated code sections. In addition, as part of codification of these ordinances, County Legal Counsel may insert appropriate legislative history reference. Any legislative history references included herein are not adopted as part of the substance of this ordinance, but are included for administrative convenience and as a reference. They may be changed to correct errors and to conform to proper style without action of the Board of County Commissioners.

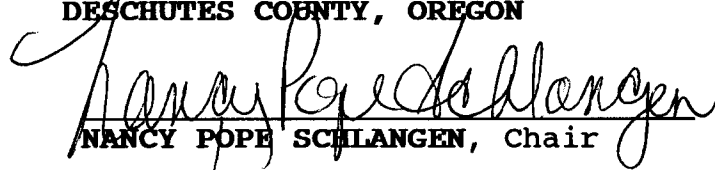
Section 5. REPEAL OF ORDINANCES AS AFFECTING EXISTING LIABILITIES. The repeal, express or implied, of any ordinance, ordinance provision, code section, or any map or any line on a map incorporated therein by reference, by this amending ordinance shall not release or extinguish any duty, condition, penalty, forfeiture, or liability previously incurred or that may hereafter be incurred under such ordinance, unless a provision of this amending ordinance shall so expressly provide, and such ordinance repealed shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such duty, condition, penalty, forfeiture, or liability, and for the purpose of authorizing the prosecution, conviction and punishment of the person or persons who previously violated the repealed ordinance.

Section 6. EMERGENCY. This ordinance being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Ordinance takes effect on its passage.

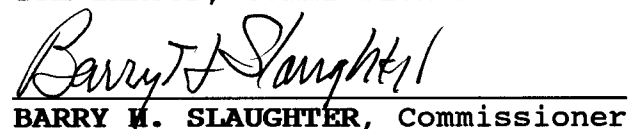
DATED this 15 day of June, 1994.

0135-2258

BOARD OF COUNTY COMMISSIONERS OF
DESCHUTES COUNTY, OREGON


NANCY POPE SCHLANGEN, Chair


TOM THROOP, Commissioner


BARRY W. SLAUGHTER, Commissioner

ATTEST:


Anita Mutchie
Recording Secretary

EXHIBIT "2" for ORDINANCE NO. 94-005FINDINGS OF BOARD OF COUNTY COMMISSIONERS
SUPPORTING ADOPTION OF AMENDMENTS TO CHAPTER 18.90
OF THE DESCHUTES COUNTY CODE

Ordinance 92-042 adopted Title 18.90, the Sensitive Bird and Mammal Habitat Combining Zone. The ordinance was adopted as part of periodic review in order to comply with OAR 660-16, the Goal 5 administrative rule.

Oregonians in Action, a state land use organization, objected to the County's final periodic review order. The objections pertained to the Goal 5 ESEE analysis for sensitive bird and mammal species. The Land Conservation and Development Commission upheld the objections of Oregonians in Action and issued a periodic review remand order (93-RA-883). The remand order required the county to:

1. Identify specific conflicting uses and evaluate the ESEE consequences of those conflicting uses for the inventoried sensitive bird habitat sites.
2. Revise the Sensitive Bird and Mammal Habitat Combining Zone to: (1) require that any special condition resulting from the site-specific ESEE analysis (e.g., setbacks timing of activities, etc,) be applied as a condition of approval to the development approval; (2) clarify how a proposed action in the identified "sensitive" area triggers a review; and (3) delete the repetitive step in the review process (Section 18.90.050 (A))

The Department of Land Conservation and Development approved a Periodic Review Work Plan (Order #00055) for Deschutes County. Work Task #3 of the approved work plan includes a requirement to amend the SBM zone as required by the Remand Order. The deadline for completion of work task #3 is June 15, 1994.

The Deschutes County Planning Commission conducted public hearings on File TA-94-3 and Ordinance 94-005, proposed amendments to Title 18.90, on March 30 and April 14, 1994. Staff revised the draft amendments to Title 18.90 based on testimony received and recommendations from the planning commission. The planning commission forwarded the revised draft amendments to the Board of County Commissioners with a recommendation for adoption. The Board of County Commissioners conducted a public hearing on the proposed amendment to Title 18.90 on May 23, 1994.

0135-2260

The Board finds that with the adoption of Ordinance No 94-005 the county complies with the Periodic Review Remand Order requirement for amendment to Title 18.90, the Sensitive Bird and Mammal Habitat Combining Zone, for the following reasons:

1. Section 18.90.050(D) and Section 18.90.060(A)(7) requires conformance with the ESEE analysis for each sensitive bird or mammal site.
2. Section 19.90.040 defines how a proposed action in the sensitive habitat area triggers review under the Sensitive Bird and Mammal Habitat Combining Zone.
3. Section 18.90.050(A) has been deleted.

The Board finds that with adoption of Ordinances 94-005, 94-004 and 94-021 the County has completed Periodic Review Work Task 3 as required by the Department of Land Conservation and Development.

AMENDMENTS TO CHAPTER 18.90, SENSITIVE BIRD AND MAMMAL
HABITAT COMBINING ZONE, OF THE DESCHUTES COUNTY CODE

NOTE: Additions are shown in **BOLD** and deletions are shown with brackets [].

Chapter 18.90.00

Sensitive Bird & Mammal Habitat Combining Zone - SBMH

Section 18.90.010 Purpose

A[1]. The purpose of the Sensitive Bird and Mammal Combining Zone is to insure that sensitive habitat areas identified in the County's Goal 5 sensitive bird and mammal inventory as critical for the survival of the northern bald eagle, great blue heron, golden eagle, prairie falcon, osprey, great grey owl, sage grouse, and the Townsend's big-eared bat are protected from the effects of conflicting uses or activities which are not subject to the Forest Practices Act. [This objective shall be achieved through the establishment of site specific management plans that are developed to insure that proposed uses and activities will neither destroy or result in the abandonment of sensitive bird or mammal habitat areas.] **This objective shall be achieved by implementation of the decision resulting from the economic, social, environmental and energy analysis (ESEE) for each inventoried sensitive habitat area.**

Section 18.90.020 Definition of Sensitive Habitat [Sites] Area

A[1]. The sensitive habitat area is the area identified in the Deschutes County Comprehensive Plan Resource Element inventory and site specific ESEE for each sensitive bird or mammal site. The sensitive habitat [site] area to be protected by the provisions of this chapter is defined as the area:

1. Within a radius of 1320 feet of a golden eagle, bald eagle, prairie falcon nest, [osprey nest,] sage grouse lek, or a Townsend's big-eared bat hibernating or nursery site.
2. Within a radius of 300 feet of a great blue heron rookery **or osprey nest.**
3. Within a radius of 900 feet of a great grey owl nest site.

[For purposes of triggering the review process set forth in this Chapter, where the precise location of the nest, hibernation or nursery site or rookery can be located only to the nearest quarter section, the nest, lek, hibernation or nursery site or rookery shall be deemed to take up the entire quarter section.]

- B[2]. **Inventoried [S]sensitive bird or mammal [Habitat] sites** located on federal land are not subject to the provisions of this chapter unless the **sensitive habitat area** identified in Section 18.90.020 (1) extends onto non-federal land.

Section 18.90.030 **Limitations** [Development] and Uses Permitted

- A[1]. Uses permitted in the underlying zone(s) are permitted or conditionally permitted in the Sensitive Bird and Mammal Combining Zone subject to the additional procedure and requirements of Section 18.90.040 and the **provisions of the ESEE decision**. The Sensitive Bird and Mammal Habitat Combining Zone does not regulate or prohibit forest practices subject to ORS 527.610 to 527.770 and the rules adopted pursuant thereto; [the Forest Practices Act] or to farm practices as defined by ORS 30.947(2).

- B. **When there is a conflict between the site specific ESEE analysis and the provisions of this title, the site-specific ESEE analysis shall control.**

Section 18.90.040 **Applicability**

- A. Review under this Chapter shall be triggered by the following proposals occurring within a [wildlife] **sensitive habitat [site] area**, as defined in Section 18.90.020 of this Chapter:

1. An application for a building permit for a new structure or addition to an existing structure;
2. Land divisions creating new lots or parcels within the sensitive habitat area;
3. An application for a conditional use permit; or
4. An application for site plan approval.

- [B. **Site-specific determination of applicability:**

1. In instances where the precise location of the habitat site has not been identified in the County's Goal 5 inventory of sensitive birds and mammals, the County shall prior to acceptance of an application seek a determination from ODFW

pursuant to a determination of whether any part of applicant's lot or parcel falls within the habitat site.

2. If ODFW finds that applicant's lot or parcel or a portion thereof does lie within the habitat site, applicant shall be required to proceed in accordance with Section 18.090.060. If ODFW finds the applicant's lot or parcel does not fall within the habitat site, applicant's proposal shall not be governed by this Chapter.
3. If ODFW fails to respond with the 20-day time period, it shall be presumed that applicant's property does not lie within the habitat site.]

[Section 18.90.050 Preapplication Consultation with ODFW

- A. Prior to acceptance of an application involving a lot or parcel lying in whole or in part within a habitat site as defined in Section 18.90.020, applicant shall submit sufficient information to the County about its proposal so that the County, in consultation with ODFW, can determine whether applicant's property falls within the habitat site and if so what impacts the proposal may have on the habitat site.
- B. Upon notification, ODFW shall have 20 days to respond to the County, identifying the precise location of the sensitive bird or mammal site, determining whether the wildlife site is active or abandoned, and determining whether the proposal will destroy a nesting, hibernating, nursery, lek or rookery site or to a reasonable certainty cause the site to be abandoned.]

Section 18.90.0[6]50 Site [Management] Plan Review Requirement

- A. For those proposals identified in Section 18.90.040 to be sited [on a lot or parcel located] within an inventoried sensitive habitat area [site], as defined under Section 18.90.020 [and verified by ODFW under Section 18.90.040], a site [management] plan shall be prepared in accordance with the requirements of this section [prior to acceptance of an application subject to this Chapter]. The site plan shall be approved prior to issuance of a building permit, land division, conditional use permit or site plan identified in Section 18.90.040.

- [A. Notwithstanding the remainder of this section, if the habitat site covers only a portion of applicant's lot or parcel and applicant proposes to locate the proposed use outside of the habitat site, the management plan shall consist of a plot plan detailing the location of

the proposed use in relation to the habitat site as it falls on the lot or parcel. Said plot plan shall be approved as a management plan under this section if it shows the subject use to be located outside the habitat site. Approval of the use shall be conditioned upon location the use in accordance with the approved plot plan.]

- [B. A management plan shall consider the biology of the identified sensitive species, nesting trees, critical nesting periods, roosting sites and buffer areas. Where appropriate, the plan shall specify timeframes for implementation. The plan may dictate placement of the proposed use within the habitat site and place restrictions upon the manner and time period of operations.]
- B. The site plan application shall provide the following information:
1. A plot plan showing the location of all development including existing and proposed roads, driveways and structures.
 2. Description of operating characteristics of the proposed use including times when activity within the sensitive habitat area would generate noise, dust, vibration, lights, traffic or be visible from the nest, lek, rookery or hibernation site.
 3. Timing of construction activities included grading or filling land, hauling materials and building.
 4. Description of existing vegetation and vegetation to be removed for the proposed development.
- C. The County shall submit a copy of the site [management] plan to the Oregon Department of Fish and Wildlife [ODFW] for comment. ODFW shall have 20 days from the date of the site [management] plan is mailed to submit written comments to the County.
- D. Based upon the record, and evaluation of the proposal based on the criteria in Section 18.90.060, and conformance with the ESEE analysis for the site contained in the Resource Element of the Comprehensive Plan, the County shall approve or reject the site [management] plan. [based upon whether the protection proposed in the plan would avoid destruction of the subject nesting site, lek, hibernation or nursery site or rookery and or would to a reasonable certainty avoid causing such a site to be abandoned.] In lieu of rejection of the site [management] plan, the County may allow the applicant to revise the site [management]

plan if the applicant has not met the standards for approval. Applicant shall waive the 120-day time limit if it chooses to revise the site [management] plan.

- [E. In lieu of a management plan, if applicant believes that its proposal would not destroy a nesting site, lek, hibernation or nursery site or rookery or would not with a reasonable certainty cause such a site to be abandoned, applicant shall provide justification for such an exception and County shall after consultation with ODFW either approve or deny the exception request.]
- E[F]. Approval of a [management] site plan under this section shall be conditioned upon applicant's implementation of the plan.

Section 18.90.060 Site Plan Review Criteria

A. Approval of site plan shall be based on the following criteria:

1. The site plan shall consider the biology of the identified sensitive species, nesting trees, critical nesting periods, roosting sites and buffer areas. Based on the biology of the species and the characteristics of the site, the site plan shall provide protection that will prevent destruction of the subject nesting site, lek, hibernation site or rookery and will, to a reasonable certainty, avoid causing the site to be abandoned.
2. Development activities, including grading and fill, mining, construction, or activities generating noise or dust within the sensitive habitat area shall be prohibited during the nesting, strutting or hibernation season identified in the site specific ESEE analysis and decision for each habitat site. An exception to this standard may be made if the Oregon Department of Fish and Wildlife determines in writing that the nest, lek or rookery is not active and will not become active during the proposed construction period or if the sensitive birds have fledged. Construction activities within an enclosed structure may be conducted during the nesting, strutting or hibernation season. Construction activities necessary to repair an existing septic system or to replace or repair a structure destroyed or damaged by fire or other natural causes may be conducted during the nesting, strutting or hibernation season.
3. New roads, driveways or public trails shall be

located at the greatest distance possible from the nest, lek, rookery or hibernation site unless topographic or vegetation or structural features will provide greater visual and/or noise buffer from the nest, lek, rookery or hibernation site.

4. Existing vegetation or other landscape features which are located on the subject property and which obscure the view of the nest, rookery, lek or hibernation site from the proposed development, shall be preserved and maintained. A restrictive covenant to preserve and maintain vegetation shall be required when specified in the ESEE for the site.
5. No partitions or subdivisions shall be permitted which would force location of a dwelling or other structure, not otherwise permitted by the site specific ESEE, within the designated sensitive habitat area.
6. All exterior lighting, including security lighting shall be sited and shielded so that the light is directed downward and does not shine on the subject nest, rookery, lek or hibernation site.
7. The site plan shall conform with the requirements of the ESEE decision for the subject sensitive bird or mammal site contained in the Resource Element of the Deschutes County Comprehensive plan.