

BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON

Regarding a request by Randy and Christina Pousson)
for Conditional Use approval and a Minor Variance)
to construct a single family dwelling not related to)
forest management on a 17.8 acre site in the)
Commercial Forest Use zoning district located at)
21574 N.W. Gilkison Road in unincorporated)
Multnomah County, Oregon.)

FINAL ORDER
CU 10-94/HV 28-95
(Pousson)

I. FINDINGS

The Hearings Officer adopts and incorporates by reference affirmative findings and conclusions as set forth in the original staff report (Exhibit 7) and the addendum to the staff report (Exhibit 30), except to the extent expressly modified or supplemented below.

II. HEARING AND RECORD

A public hearing concerning this matter was held on September 20, 1995 and was continued until November 1, 1995. The hearing was continued again until January 10, 1996 in order to take testimony and evidence on a Minor Variance application submitted by the applicant, related to the side yard setback for proposed conditional use, and to take further testimony on the conditional use request itself. The written record was left open until February 14, 1996.

A list of all exhibits received in this matter is attached and incorporated by reference herein.

III. DISCUSSION

A. Lot of Record Status

MCC 11.15.2052(A) provides that:

"A dwelling not related to forest management may be allowed subject to the following: (1) the lot shall meet the lot of record standards of MCC .2062(A) and (B) and have been lawfully created prior to January 25, 1990."

The staff report adequately discusses the law and facts relative to MCC .2062(A)(2)(a) - (c). Each of these criteria are clearly met. The problem here is determining whether .2062(A)(2)(d) has been met. MCC .2062(A)(2)(d) requires substantial evidence in the record indicating that the subject parcel (Tax Lot 37) is ". . . not contiguous to another substandard parcel or parcels under the same ownership. . . ." The record indicates that on October 28, 1994 (the date on which the application was deemed complete for purposes of ORS 215.428(3)), Western International owned a small triangular tract of land (the triangle), approximately .62 acres in size. On that date, Western International also owned the subject parcel (Tax Lot 37). Western International was the original applicant for this conditional use request.

Paul Wright and Marquette Mitchell have asserted that under MCC .2062(A)(2)(d) the fact that the original applicant, Western International, owned two contiguous properties both of which were substandard in size under the County's zoning ordinance, means that Tax Lot 37 does meet the requirements of MCC 11.15.2062 as a lot of record.

In order to determine whether requirements of .2062(A)(2)(d) have been met, an additional set of facts must be considered. First, it is clear from the record that the "triangle" was improperly sold-off from its parent parcel, Tax Lot 41. The "triangle" was not created from Tax Lot 37. Second, since the triangle was created without obtaining partition approval, it does not constitute a "parcel" for purposes of MCC .2062(A)(2)(d). As the applicant points out, even though MCC 11.15 does not define the term "parcel", MCC 11.45.010(P) does. That section defines the term "parcel", as a "unit of land that is created by a partitioning of land." Therefore, for purposes of MCC 11.15 and 11.45, the triangle is not a "parcel", because it was not created by a partitioning of land.

Returning to .2062(A)(2)(d), the Hearings Officer finds that the triangle is contiguous to another substandard unit of land (Tax Lot 37) which was at the time the application was submitted, under the same ownership. However, the triangle does not meet the Multnomah County Code definition of a "parcel", because it was not partitioned from Lot 41. Therefore, even though Lot 37 is contiguous to the triangle, and was under the same ownership as the triangle at the time this application was submitted, because the triangle is not a "parcel", it does not disqualify Tax Lot 37 from meeting the test under .2062(A)(2)(d). In short, Tax Lot 37 is not contiguous to another substandard parcel under the same ownership.

Having untangled this knot with regard to Tax Lot 37 and its status as a legal lot of record, the Hearings Officer acknowledges that the existence of the triangle is troubling. However, the problems associated with the triangle are not the subject of this application. The triangle is only relevant to the extent it may or may not affect Lot 37's lot of record status. Nonetheless, the Hearings Officer notes, without deciding, that since the triangle appears to have been improperly separated and sold apart from Tax Lot 41, the County may

want to scrutinize the issuance of further permits for Tax Lot 41, as its status may have been affected by the transfer of the triangle. The point being that the problem with the triangle is related to Tax Lot 41, not Tax Lot 37, and that action should be pursued relative to the lot that the triangle was created from, not the neighboring lot.

B. Road Access

The applicant has shown two alternative road accesses to the proposed dwelling site. The first access is via a "north-south" road which begins in the northwest corner of Lot 37 at Gilkison Road and follows a non-exclusive easement to the point where it intersects the "east-west" road, following that road to the proposed dwelling location. The applicant has agreed to improve the north-south road's westerly intersection with the east-west road so that the connection is restored.

The alternative access to the dwelling is entirely along the east-west road from its beginning in the "triangle" at Gilkison Road to its terminus at the dwelling site.

The fire district has granted preliminary approval for both access.

The Hearings Officer finds that the north-south road, which is located within land owned by the applicant, is the preferable access. The alternative east-west road involves the triangle property and therefore needlessly complicates the access issue. The final design of the road will be subject to review under MCC 11.15.2074(D) (see Condition 6).

C. Building Site Geologic Stability

When the applicant requested approval of a Minor Variance to reduce the side yard setback from 200 to 150 feet, in order to move the proposed location of the building site closer to the western boundary, it was unclear whether the new location for the house was geologically stable for purposes of Plan Policy 14.

The evidence submitted by the applicant's geotechnical engineer, Mr. Craig C. LaVille, indicate that the new site has experienced some landslide activity in the past and advises that the new site could be stabilized with certain design and construction techniques. He further indicates that the risk of any public harm or associated public cost could be minimized.

The Hearings Officer accepts the professional opinion of the applicant's engineer and will require, as a condition of approval, that prior to any on-site construction within the area identified for the new homesite, that all plans be reviewed and approved by a geotechnical engineer to insure that proper construction techniques are used to mitigate any public harm or

associated public cost and to eliminate any adverse effects on surrounding persons or property. (See Condition 5)

D. Protection of Joy Creek

Laurie and Jeff Mapes have asserted that the applicant has not demonstrated that the proposed development will not harm the water quality of the north fork of Joy Creek, which runs through the subject site.

It should be noted that there is some disagreement between the applicant and staff on one hand and the Mapes on the other, as to whether or not the north fork of Joy Creek, located on the site, is subject to SEC overlay protections. The Hearings Officer finds that the SEC overlay district was not applied to this property until November 26, 1994, which was after the date the application was submitted. Therefore, pursuant to ORS 215.428(3), the SEC overlay district is not relevant to this application, since the overlay district was not applied to this site until after the date the application was submitted.

Nonetheless, other policies in the comprehensive plan independently require consideration of various environmental impacts to adjacent streams from the proposed development. The relevant plan policies and related findings are set forth below.

1. Plan Policy 37 (G).

Plan Policy 37 (G) provides as follows:

"G. The runoff from the site will not adversely affect the water quality in adjacent streams, ponds, lakes, or alter the drainage on adjoining lands."

Plan Policy 37 (G) requires a findings that runoff from the site will not adversely affect the water quality in adjacent streams. The Mapes testimony suggests that this portion of Joy Creek begins at a spring on the southwest corner of the property and that the water quality of the spring is extremely high. The evidence also indicates that until recently, the spring was used as a domestic water source. The Mapes and others have expressed their desire to keep the water quality from this resource as unaffected as possible. In particular, the Mapes are concerned that the proposed septic system and its proximity to the creek will be a threat to the water quality of Joy Creek and that the evidence does not demonstrate that adverse impacts will not occur.

The applicant has submitted a four page report by Mr. LaVille, a geotechnical engineer, who discussed the effects of the proposed development on water quality based on stormwater impacts. However, none of Mr. LaVille's analysis focused on the possible

effects on Joy Creek from the proposed septic system. In fact, the location of the septic system has not yet been specifically identified in the record.

However, the future impacts from proposed septic system on water quality should be handled the same way in this case they have been in other cases. Namely, the applicant is required to submit a site evaluation report indicating that the requirements of OAR 340-71-290 will be met. These standards require the system to be located not less than 50 feet from a water source. This preliminary report was submitted and accepted by the relevant agencies and constitutes some evidence that the water quality in Joy Creek will be protected.

The Hearings Officer finds that in this case, prior to issuance of final permits for the septic system, the applicant should be required to satisfy all applicable DEQ regulations concerning the proposed subsurface sanitary sewage disposal system. The Hearings Officer is not in a position to independently develop and apply other water quality standards on a case by case basis. So long as the applicant meets applicable DEQ water quality regulations prior to operating the septic system, this policy will be satisfied. (See Condition 10)

2. Plan Policy 16 (G).

Plan Policy 16 (G) provides:

"It is the County's policy to protect and, where appropriate, designate as areas of significant environmental concern, those water areas, streams, wetlands, water sheds, and groundwater resources having special public value in terms of the following: (a) economic value; (b) recreation value; (c) educational research value (ecologically and scientifically significant lands); (d) public safety (municipal water supply, water sheds, water quality, flood water, storage areas, vegetation necessary to stabilize river banks and slopes); (e) natural area value (areas valued for their fragile character as habitats for plant, animal or aquatic life, or having endangered plant or animal species)."

The Hearings Officer finds that Policy 16 (G) and the implementation strategies that follow it, by its terms, are not applicable approval criteria because its language serves as a guide for future legislative action by the County. In fact, the subsequent application of the SEC overlay district along portions of Joy Creek on the site is evidence of this fact. Therefore, this policy is not relevant to this quasi-judicial application.

3. West Hills Reconciliation Report.

The staff report adequately discusses the applicable provisions of the West Hills Reconciliation Report. The Hearings Officer notes that the report expressly states that the implementation of protections for habitat in and around Joy Creek are accomplished through

the use of the SEC overlay. This overlay did not apply at the time this application was submitted.

E. Big Game Habitat

MCC 11.15.2052(5) requires the proposed dwelling to be located outside of big game winter habitat areas defined by the Oregon Department of Fish & Wildlife, or the agency must certify that the impacts of the additional dwelling, considered cumulatively with the approval of other dwellings in the area since 1980, will be acceptable. Based upon the testimony and evidence in the record, the Hearings Officer finds that the proposed dwelling site is located outside of big game winter habitat area. Furthermore, the October 17, 1995 letter from ODF&W provides the necessary certification. Therefore, this criteria is met.

IV. CONCLUSION

Based upon all the evidence and testimony in the record, the Hearings Officer concludes that CU 10-95 and HV 28-95 (Pousson) should be approved because it does or can comply with all applicable approval criteria.

V. DECISION

CU 10-95 and HV 28-95 (Pousson) are hereby approved, subject to the following conditions:

1. Approval of this Conditional Use shall expire two years from the date of the Board Order unless substantial construction has taken place in accordance with MCC 11.15.7110(C).
2. The dwelling location shall be as proposed on the revised site plan (Exhibit 23).
3. Prior to approval of building permits, provide evidence that a stocking survey report has been submitted in accordance with OAR 660-06-029(5)(c).
4. Prior to the issuance of a building permit, the property owner shall provide to the Division of Planning and Development a copy of the recorded restrictions acknowledging the rights of nearby properties to conduct farm and forest practices. A prepared form is available at the Planning Offices.
5. Prior to the issuance of a building permit for the dwelling, apply for and obtain approval of a Hillside Development Permit or Grading and Erosion Control Permit as

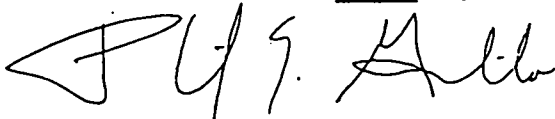
applicable, unless it can be demonstrated that construction would be carried out in a manner and scale as to be exempt from this requirement as provided in MCC .6715. Plans submitted for the permit will incorporate as required the standards of MCC 11.15.2074(D), [see 6 below]. Furthermore, prior to any on-site construction within the area identified as the new homesite, all construction plans should be reviewed by a geotechnical engineer to insure that proper construction techniques are used to mitigate any public harm or associated public cost and to eliminate any adverse effects on surrounding persons or property.

6. Prior to the issuance of a building permit, submit confirmation that the "driveway" from Gilkison Road to the building site has been constructed to the standards of MCC 11.15.2074(D), (the "driveway" includes the existing easement road to reach Gilkison Road from the home).
7. Prior to the issuance of a building permit and as long as the property is under forest resource zoning, maintain primary and secondary fire safety zones around all structures, in accordance with MCC 11.15.2074(A)(5).
8. The dwelling shall have a fire retardant roof and all chimneys shall be equipped with spark arrestors.
9. The following Wildlife Habitat Mitigation measures outlined in the submitted Wildlife Conservation Plan for the property shall be carried out and maintained:
 - A. Use only native vegetation for landscaping;
 - B. Maintain as many existing trees and shrubs as possible while still meeting fire protection zone requirements;
 - C. Limit exterior lighting to prevent disturbance and place all necessary lighting as close to the ground as possible to limit the affected area by lighting while still meeting the needs of safety and security;
 - D. No fencing should be placed along Gilkison Road or outside of the Secondary Fire Protection Zone perimeter; and
 - E. Move trees and downed logs that must be removed for the fire protection zone into the existing stands or into the downslope harvested area to provide coarse woody debris habitat for small mammals, reptiles and amphibians.
10. Prior to issuance of building permits for the residence or septic system the applicant shall demonstrate that all applicable local and state standards have been met for the

septic system, to ensure that water quality in Joy Creek will not be adversely affected by this septic system.

11. Prior to the issuance of a building permit, the applicant shall provide evidence that the domestic water supply is from a source authorized in accordance with the Department of Water Resources Oregon Administrative Rules for the appropriation of ground water (OAR 690, Division 10) or surface water (OAR 690, Division 20) and not from a Class II stream as defined in the Forest Practices Rules. If the water supply is unavailable from public sources, or sources located entirely on the property, the applicant shall provide evidence that a legal easement has been obtained permitting domestic water lines to cross the properties of affected owners.
12. The parcel owner shall request disqualification from farm deferral prior to issuance of a building permit.

It is so ordered this 19th day of March, 1996.



Phillip E. Grillo
Hearings Officer
Multnomah County