

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding an Application for a Conditional Use) **Case File No.**
Permit to Establish a Temple.) **Z0059-15-C**

A. SUMMARY

1. The applicant is the Buddhi Dharma Hui Lin Foundation. The application is for a conditional use permit to operate a temple in an existing building.
2. The subject property is located at 21391 South Grapevine Road, West Linn, OR 97068. The legal description is T2S, R1E Section 27A, Tax Lot 200. The subject property is approximately 6 acres and is zoned RRFF-5 – Rural Residential Farm Forest – 5 acre minimum.
3. On May 21, 2015, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing about this application on May 21, 2015. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the staff report, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. At the hearing, county planner Linda Preisz discussed various components of the staff report.
3. The applicant’s representatives testified in support of the application.
4. Numerous opponents testified in opposition to the application.
5. At the conclusion of the public hearing, the Hearings Officer closed the record.

C. DISCUSSION

1. Facts

The subject property is located at 21391 South Grapevine Road, West Linn, OR 97068. The subject property is approximately 6 acres and is zoned RRFF-5. The subject property contains an existing house and two accessory structures. Over twenty people apparently live in the house. One of the accessory structures is approximately 5000 square feet and has been in use as a temple. Apparently the temple ceased operating after complaints were raised, which precipitated this conditional use permit application. Surrounding

properties are also zoned RRFF-5, contain single-family residences, and range in size from less than an acre to ten acres.

The application states that Phase 1 of the temple will have one to five visitors during the week and 15 to 20 worshippers on weekends. Phase II, anticipated in 10 to 20 years would expand services to eighty worshippers on weekends. The existing temple is already built to the size for the expanded use contemplated in Phase II. As discussed later, the scope of the proposed use is contested.

2. Conditional Use Approval Criteria

Clackamas County Zoning and Development Ordinance (ZDO) 1203.01 provides the approval criteria for a conditional use:

- “A. The use is listed as a conditional use in the zoning district in which the subject property is located.
- “B. The characteristics of the subject property are suitable for the proposed use considering size, shape, location, topography, existence of improvements, and natural features.
- “C. The proposed use is consistent with Subsection 1007.09, and safety of the transportation system is adequate to serve the proposed use.
- “D. The proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs or precludes the use of surrounding properties for the primary uses allowed in the zoning district(s) in which surrounding properties are located.
- “E. The proposal satisfies the goals and policies of the Comprehensive Plan that apply to the proposed use.
- “F. The proposed use complies with any applicable requirements of the zoning district and overlay zoning district(s) in which the subject property is located, Section 800, and Section 1000.”

ZDO 1203.01(A) requires that the proposed use be listed as a conditional use in the underlying zoning district. The underlying zoning district is RRFF-5. Section 309 of the ZDO controls the land uses in the RRFF-5 zone. ZDO 309.04(A)(1) provides that churches are a conditional use in the RRFF-5 zone. Temples are equivalent to churches. Therefore, ZDO 1203.01(A) is satisfied.

ZDO 1203.01(B) requires that the characteristics of the site are suitable for the proposed use. The size, shape, location, topography, existing improvements, and natural features are suitable for the proposed use as the temple had been operating for some time before this application. Although there are slopes on the property, the structures are sited in a way that leaves most of the property undeveloped. Although opponents argue that the existing offsite improvements are not suitable for the proposed use, those arguments regarding traffic and roads are more applicable under other sections of the ZDO. The existing on site improvements are suitable for the proposed use. ZDO 1203.01(B)(2) is satisfied.

ZDO 1203.01(C) requires that the proposed development is consistent with ZDO 1007.09, which ensures that transportation infrastructure is provided concurrently with new development or within a reasonable period of time following approval of new development. ZDO 1203(1) also requires that the “safety of the transportation system is adequate to serve

the proposed development.”

ZDO 1007.09(C) provides that “[a]pproval of a development shall be granted only if the capacity of transportation facilities is adequate or will be made adequate in a timely manner. * * *.” A major contention between the parties is the scope of the proposed use. Although the application and the staff report discuss Phase I and Phase II, conditional use applications do not provide for phases. In order to expand the scope of a conditional use, such as Phase II, a separate conditional use permit application would have to be filed. Thus, there is no Phase I or Phase II to consider, only the proposed use for this conditional use application. The applicant argues that the proposed use is the reduced use of one to 5 visitors a day during the week and 15 to 20 worshippers on weekends. Opponents argue that the full potential use of the property, which has occurred in the past, should be the scope of the use for purposes of the application.

This presents an interesting question. I tend to agree with opponents that in most contexts the scope of a proposed use is based upon the potential use or building under consideration. Zone changes generally require worst case scenarios for traffic considerations. Traffic engineers generally consider the full size of a building and its use in determining anticipated daily trips. Other provisions in the ZDO require specific measures to ensure that only a portion of a building is used in order to restrict its use. For instance, under the home occupation provisions, when a building is used for a home occupation a wall must be erected to separate the home occupation from the rest of the building. It is not enough to just say that the applicant will not use the rest of the building for the home occupation. *See* ZDO 822.05(D).

The existing temple is almost 5000 square feet. The temple is clearly designed and anticipated to regularly hold up to at least eighty people. Opponents have provided testimony and pictures demonstrating that the temple has been previously used for large services of around one hundred worshipers and regularly more than the suggested one to five visitors during the week and 15 to 20 worshipers on weekends.

The applicant merely states that the number of visitors will be well below capacity. There is no evidence other than vague assurances that the use will be restricted to that described in the application. While the county states that the restricted use could be made a condition of approval and opponents could seek a code enforcement action if the applicant exceeds the proposed use, I think that would be a very difficult condition of approval to monitor and/or enforce.

Given that the property was used as a temple for a significant period of time in violation of known zoning regulations, the conditional use application was only filed after code enforcement proceedings were initiated, the property is anticipated to be used for a more intensive use, the property was regularly used in excess of the proposed reduced use, the building is already large enough for the more intensive use, and the difficulty in enforcing the reduced use, I find it more likely than not that the use of the property would far exceed the proposed use of one to five visitors during the day and 15 to 20 visitors on weekends. While I do not agree with opponents that in all conditional use situations that the full potential use or worst case scenario must be used, in the present case I agree that the actual use would exceed that described in the application.

Returning to ZDO 1007.09(C), the capacity of the transportation facilities must be adequate or be made adequate in a timely manner. ZDO 1007.09(D) provides:

“As used in Subsection 1007.09(C), ‘adequate’ means a maximum volume-to-capacity (v/c), or a minimum level of service (LOS), as established by Comprehensive Plan Tables 5-2a * * *.”

The subject property is located on South Grapevine Road which is the southern part of a meandering curved loop that surrounds the property. South Clematis Road is to the north, South Sweetbriar Road is to the west, and South Wisteria Road is to the east. The loop contains many sharp curves and corners. All four roads are classified as Very Low Volume Local Roads with average daily traffic (ADT) limits of 400 vehicle trips per day. Under the applicant’s proposed reduced use, there does not seem to be any dispute that the vehicle trips generated would remain below the 400 (ADT) limit for the four roads. Opponents’ traffic engineer, however, submitted a report demonstrating that with full use of the temple the ADT on South Wisteria Road would exceed 400. There is no rebuttal to opponents’ traffic engineer from the applicant other than that the temple would not be fully used. As explained earlier, I agree with opponents that it is more likely that the temple would be used more intensively than proposed in the application. Therefore, the capacity of the transportation system is not adequate for the proposed development, and ZDO 1007.09 is not satisfied.

ZDO 1203.01(B) also requires that the “safety of the transportation system is adequate to serve the proposed development.” ZDO 1007.04(D) provides, “[d]evelopments shall comply with the intersection sight distance and roadside clear zone standards of the Clackamas County Roadway Standards.” Opponents argue that in addition to the capacity issues discussed above, the transportation system is not safe due to inadequate sight distances at nearby intersections. The applicant’s traffic engineer prepared a report explaining why the sight distances for the driveway to the subject property are adequate for the proposed development. Opponents argue that sight distances at nearby intersections are inadequate based on their traffic engineer’s report. The application and the staff report only address sight distances for the driveway for the subject property, not nearby intersections. According to opponents, ZDO 1007.05(A)(5) already requires that access driveways meet sight distance requirements. Opponents argue that because ZDO 1007.05(A)(5) already requires driveways to meet sight distance requirements, ZDO 1007.04(D) must include more than just the subject property.

ZDO 1007.05(A)(5) provides:

“The intersection of private roads or access drives with a public or county road and intersections of two private roads or access drives shall comply with the sight distance and clear zone standards pursuant to [ZDO] 1007.04(D).”

Opponents’ theory might be persuasive if “access drives” and driveways were the same thing. “Access drives,” however, are defined by ZDO 202 as “[a] private way, with a travel surface generally no more than 12 feet in width, created by deed or easement to provide vehicular ingress to, or egress from not more than two lots or parcels.” Thus, “access drives” are different than driveways. Therefore, I agree with the applicant and staff that sight distance requirements on nearby intersections are not applicable to whether ZDO 1007.04(D) is satisfied.

Staff concluded that the sight distances for the driveway could meet the requirements for the reduced proposed use with minimal conditions of approval. Staff indicated that the anticipated Phase II would require additional conditions of approval. Given that I agree with

opponents that a more intensive use of the temple would occur, those greater conditions of approval would be required to satisfy ZDO 1004.04(D), but with conditions the approval criterion could be satisfied. Although ZDO 1004.04(D) can be satisfied, the application still fails to satisfy 1007.09 and therefore fails to satisfy ZDO 1203.01(C).¹

ZDO 1203.01(D) requires that the “proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs or precludes the use of surrounding properties for the primary uses allowed in the underlying zoning district.” The surrounding properties are also zoned RRF-5 and are primarily used for rural residential use. The primary argument from opponents concerns the additional traffic that will be generated by the temple combined with the existing nature of the roads in the area. Opponents argue that the roads in the area (the four roads that loop around the subject property) are narrow and winding roads without sidewalks or bicycle lanes. Opponents testified that they regularly walk and bicycle on the roads (they even move llamas along the roads) and that it is already dangerous in the area. According to opponents, adding additional traffic, even the limited traffic from the applicant’s proposed reduced use, would make an already dangerous situation even more dangerous.

ZDO 1203.01(D) does not prohibit adverse impacts, it prohibits uses that substantially limit, impair or preclude the use of surrounding properties for the primary uses allowed in the underlying zone. Surrounding properties are used for rural residential uses, and that includes driving, bicycling, and walking to and from their properties. In addition to the believable testimony from the neighbors, opponents also submitted a traffic engineering report from their expert explaining in great detail how the stopping sight distances are inadequate in numerous areas. According to their traffic expert, there are four locations on South Grapevine Road, five locations on South Clematis Road, and three locations on South Wisteria Road where stopping sight distances are inadequate in both directions of travel. The report also demonstrates that intersection sight distances are inadequate at the intersections of South Grapevine Road and South Wisteria Road, South Grapevine Road and South Sweetbriar Street, South Sweetbriar Street and South Clematis Road, and South Wisteria Road and South Clematis Road.

The only evidence in support of the applicant’s position that the area roads are safe is vague assurances from the applicant and conclusory statements from staff.² The overwhelming weight of evidence demonstrates that the even the proposed reduced use, let alone the likely more intense use of the temple demonstrates that the increased traffic on narrow roads without sidewalks or bicycle lanes, and without adequate stopping and intersection distances, would substantially limit, impair or preclude the neighbors’ rural residential use of surrounding properties. Generally, it is opponents who lose because they have merely anecdotal testimony facing the reports prepared by professional experts. In the present case, the opponents are the ones who benefit from un rebutted expert testimony. Even with the proposed reduced use, ZDO 1203.01(D) is not satisfied. Given that I agree with opponents that a more intense use of the temple would occur, it is not even a close question

¹ Because I find that ZDO 1203.01 is not satisfied for other reasons, I need not list all of the improvements that would be necessary as conditions of approval to meet the required sight distances for the more intensive use of the temple.

² This is not meant as a criticism of staff. The evidence in opposition was introduced at the public hearing. The applicant, however, chose not to request that the record be left open to respond to the large amounts of new evidence submitted at the public hearing in opposition to the application.

that ZDO 1203.01(D) is not satisfied.

ZDO 1203.01(E) requires that the proposed use satisfies any applicable goals and policies of the comprehensive plan. The applicant briefly addressed a few comprehensive plan policies and goals and the staff report addresses a few other policies and goals. Opponents argue that application fails satisfies numerous other policies and goals. Opponents' arguments are not particularly well developed, but the applicant has no response at all to those arguments. If this criterion were the crux of the case then I would need to undertake a lengthy analysis of the dozens of policies and goals raised by opponents with hardly any analysis from staff, the applicant, or opponents. As I have already decided that other approval criteria are not satisfied, I believe it would be a waste of time and money to independently analyze the dozens of policies and goals raised by opponents. I agree with opponents that at least some of the policies and goals are applicable, such as the rural goals and transportation goals, and others are arguably applicable. Given that there is no response to those arguments, I agree with opponents that ZDO 1203.01(E) is not satisfied.

ZDO 1203.01(F) requires that the proposed use comply with any applicable requirements of the zoning district or overlay zoning district, including ZDO Sections 800 and 1000. Opponents argue that the application fails to satisfy this approval criterion. Opponents' arguments are based on the arguments advanced under the previous approval criteria. For the same reason that the application fails to satisfy ZDO 1007.09 and 1203.01(C), it also fails to satisfy ZDO 1203.01(F).

3. Other Approval Criteria

Opponents raise numerous arguments under this approval criterion. Opponents argue the application fails to satisfy ZDO 1005.03(F) which concerns site design standards which require internal walkways in certain circumstances. Even assuming ZDO 1005.03(F) applies, it could be satisfied with conditions of approval. Opponents also argue that ZDO 1005.05(A)(1) regarding lighting requirements is not satisfied. Again, that provision could easily be satisfied with conditions of approval. Opponents argue the applicant must establish that the subject property is a legal lot of record. Again, even if that were a requirement it could easily be made a condition of approval. Opponents argue that the application fails to comply with ZDO 1010.06(B) signage requirements. Again, this could easily be made a condition of approval. Opponents argue that the proposed change in use would trigger a requirement for seismic upgrades under the Oregon Structural Specialty Code. Even if that is true, I do not see that that is an approval criterion under the conditional use criteria. Opponents argue that the septic system is not sized to accommodate the full use of the temple. Opponents may be correct that the septic system is not adequate to serve full use of the temple. Additional conditions of approval would likely be necessary to approve the application if it satisfied all the other applicable approval criteria. Opponents' arguments under other approval criteria would not be enough to deny the application, but rather would require additional conditions of approval.

The applicant has not satisfied the approval criteria of ZDO 1203.01.³

D. CONCLUSION

³ There is no dispute that the application satisfies the dimensional standards and setback requirements of ZDO 309.06 and 804.

This was a difficult decision. The decision was difficult because many of the approval criteria were not satisfied because of a lack of evidence not because they were fundamentally incapable of being satisfied. Even if I agreed that a reduced use of the temple could be proved and enforced, the application would still have to be denied because of a lack of evidence responding to the safety concerns demonstrated by opponents' traffic engineer. Unfortunately for the applicant, I can only weigh the evidence and arguments before me, I cannot make arguments and provide evidence to support an application. Given the overwhelming and mostly unrebutted evidence from opponents, I have no choice but to deny the application. Therefore, based on the above findings and discussion, the Hearings Officer hereby concludes that the application should be denied.

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **DENIES** application Z0059-15-C.

DATED this 7th day of July, 2015.


Fred Wilson
Clackamas County Hearings Officer

Clackamas County Hearings Officer

ENDANGERED SPECIES ACT NOTICE

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

APPEAL RIGHTS

ZDO 1304.01 provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(8) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." ZDO 1304.02 provides that this decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).