BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON

Regarding an Appeal of a Planning	)	**Case File No.**
Director Decision Denying an Application	)	**Z0289-15-F**
For Development in the Floodplain.	)	**(Lifestyle Ventures)**

A. SUMMARY

1. The applicant and owner is Lifestyle Ventures.
2. The subject property is located at 64285 East Relton Lane, Rhododendron, OR 97049. The legal description is T2S, R7E, Section 30BB, Tax Lot 4200. The subject property is approximately 8500 square feet and is zoned RR – Recreational Residential.
4. On September 24, 2015, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. The record was left open for one week for the submission of new evidence, one additional week for responses to the new evidence, and one additional week for the applicant's final legal argument.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing about this application on September 24, 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 Planning Director Mike McCallister and planner Rebecca Ceniga discussed the Planning Director's decision and recommended denial of the application

3. The applicant's representative, Kip O'Connor, and the applicant's attorney Mark Griffin, testified in support of the application.

4. At the conclusion of the public hearing, the Hearings Officer left the record open one week for the submission of new evidence, one additional week for responses to the new evidence, and one additional week for the applicant's final legal argument. After new evidence and argument was submitted the record was closed.

C. FACTS

The subject property is an 8500 square foot parcel zoned RR. The property is located at 64285 East Relton Lane, Rhododendron, OR 97049 adjacent to the east side of the Sandy River and the west side East Relton Lane. The applicant wants to build a dwelling on the property. The property has a depth from the river to the road of approximately 144 to 146 feet. Due to erosion from the river, however, the above water lot depth is only approximately 65 feet. Generally, there is a 100-foot setback requirement for dwellings from the river. The applicant obtained a Principal River Conservation Area (PRCA) permit for the property which granted exceptions to river setback requirements. The applicant believed the PRCA permit was the only permit necessary before applying for a building permit for the dwelling. The County subsequently put a note in the PRCA file stating that the applicant still needed to obtain a floodplain development permit (FDP) before a dwelling could be approved. The County also believed that a FDP could not be obtained. Although the applicant does not believe a FDP is necessary, because the property is incorrectly included in the floodplain management district, the applicant filed the present application for a FDP because the County stated it was the only way to obtain approval for a dwelling. FDP approval is subject to a type II procedure, whereby the decision is made by the Planning Director.[1] The Planning Director denied the FDP. This appeal followed.

D. DISCUSSION

This is an unusual decision. The County essentially required the applicant to apply for a permit that the applicant claims it does not need and the County says the

[1] Under Clackamas County Zoning and Development Ordinance (ZDO) 1307.03(B), the Planning Director includes "any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]."

applicant cannot obtain. There is apparently a long and contentious history between the applicant and the County, and as discussed later, the Court of Appeals recently issued a decision regarding two mandamus actions filed by the applicant against the County regarding development of a nearby property with similar issues to the present case. A brief discussion of the regulatory background for the property may be helpful.

Clackamas County Zoning and Development Ordinance (ZDO) section 703 regulates the Floodplain Management District (FMD). The floodplain is defined by ZDO 703.05(S) as: "Land area that is adjacent to rivers and streams and is subject to periodic and recurring inundation by floodwaters." ZDO 703.04 provides that, "[t]he FMD is applied to the special flood hazard area (SFHA) identified by the Federal Insurance Administration in a scientific and engineering report entitled, 'The Flood Insurance Study for Clackamas County, Oregon & Incorporated Areas,' (FIS) dated June 17, 2008, with accompanying Flood Insurance Rate Maps (FIRMs)." The SFHA is defined by ZDO 703.05(LL) as: "The land area covered by the floodwaters of the base flood on National Flood Insurance Program (NFIP) maps and, thus, the area determined by detailed or approximate studies to be in a 100-year floodplain. The SFHA is subject to the NFIP's floodplain management regulations and the mandatory purchase of flood insurance. The SFHA includes the floodway, flood fringe, flood hazard, flood prone, and shallow flooding areas." The property is located in the floodway, and therefore the SFHA, on the FIS FIRMs. The floodway is defined by ZDO 703.05(U) as: "The channel of the river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot, often referred to as the 'regulatory floodway.'" There is no dispute that the property is in the area designated as the floodway on the FIS FIRMs.[2] ZDO 703.07 provides that "[d]evelopment in the floodway is prohibited * * *" other than exceptions not applicable in the present case. In other words, new dwellings are not permitted in the floodway. The boundaries of the floodway, floodplain, and SFHA are largely determined by base flood elevation (BFE), which is defined by ZDO 703.05(B) as: "The computed elevation to which floodwater is anticipated to rise during the base flood. Base flood elevations are

[2] Although the SFHA includes areas in addition to the floodway, no party argues that the property might be outside of the floodway but still within the SFHA.

shown on Flood Insurance Rate Maps and on the flood profiles included in the Flood Insurance Study."[3]

The applicant submitted an elevation certificate from a registered professional land surveyor stating that the BFE on the property is below the elevation of the proposed homesite.[4] The applicant argues that the property (at least where the dwelling is proposed) should not be included in the floodway or SFHA. According to the applicant, if the property is not in the floodway then it is not in the SFHA and the FMD is not applicable. Under the applicant's argument, because the elevation of the proposed homesite is above BFE, the property is not in the floodplain and a FDP is not necessary. The County responds initially that even if the applicant is correct that the elevation of the proposed homesite is above the BFE that the property is still identified on the FIS FIRM, and until the property is removed from the FIS FIRM no development is allowed. According to the County, the applicant must obtain a Letter of Map Amendment (LOMA) from FEMA to remove the property from the SFHA.[5] The County further responds that even if the applicant is correct that a demonstration that the elevation of the proposed homesite would remove the property from the floodway and SFHA that the elevation certificate is in error and that the elevation of the proposed homesite is below BFE.[6]

1. **Effect of PRCA Approval**

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[3] ZDO 703.05(A) defines base flood as: "The flood having a one percent chance of being equaled or exceeded in any given year. Also known as the 'regulatory flood,' or the '100-year flood,' the base flood is the national standard used by the National Flood Insurance Program and all federal agencies for the purposes of requiring the purchase of flood insurance and regulating new development."

[4] ZDO 703.05 defines an Elevation Certificate as: "A form produced by the Federal Emergency Management Agency (FEMA) that is completed by a professional engineer, licensed architect, or licensed surveyor, usually through field survey work, that reports elevation information about grades, structures, and other facilities. An elevation certificate is used to determine the relationship of grades, structures, and other facilities to the base flood elevation. It is also used to certify building elevations to ensure compliance with community floodplain regulations; determine proper insurance rates; and support a Letter of Map Amendment or Letter of Map Revision Based on Fill. Communities that participate in the Community Rating System are required to use an elevation certificate for all official reporting and recordkeeping of elevations."

[5] ZDO 703.05 defines a LOMA as: "An official amendment, by letter from the Federal Emergency Management Agency, to an effective National Flood Insurance Program map. A LOMA established a property's location in relation to the special flood hazard area. LOMAs usually are issued because a property has been inadvertently mapped as being in the flood plain, but is actually on natural high ground above the base flood elevation."

[6] I can certainly understand the applicant's frustration. The applicant has been put in the Catch-22 situation of only being able to remove the property from the SFHA by obtaining a LOMA, but in order to obtain a LOMA the County must sign off on the application, and the County will not sign off on the LOMA application.

The applicant's initial argument is that approval of the proposed dwelling was approved by the PRCA permit. The applicant argues that the PRCA application showed the proposed homesite, included the elevation certificate, and was approved by the County. According to the applicant, the PRCA permit approved the proposed homesite, and the County cannot require additional permits for a use that was already approved. The County responds that the PRCA permit only approved the dwelling under the PRCA requirements, not any other requirements that might be applicable. According to the County, the PRCA did not approve the development itself.

The applicant cites ORS 215.427(3)(a) (the goal post rule), which provides in part that "approval or denial of an application shall be based upon the standards and criteria that were applicable at the time of the application," for the proposition that the County cannot now deny approval of the dwelling approved in the PRCA. According to the applicant, the County moved the goal posts by requiring it to obtain a FDP and by placing a note in the PRCA file stating that no development could occur until a FDP was obtained. I do not agree with the applicant that the goal post rule requires that the proposed dwelling be approved. The County did not change any applicable standards or criteria. The standards and criteria for a PRCA permit remained the same throughout the process. The standards and criteria for a FDP remained the same throughout the process. The note placed in the PRCA file did not change the PRCA permit or revoke the PRCA approval. The note merely made clear the County's position to any planners that might deal with the file that a FDP was also necessary to construct a dwelling. The County did not move the goal posts – the County just disagrees with the applicant about which goal posts apply.

The applicant's better argument is that the PRCA itself approves a dwelling, and therefore a FDP is not required. The applicant argues that if a dwelling were not permissible for some reason outside of the PRCA approval criteria, such as the FMD provisions, then the County should not have approved the PRCA. The PRCA decision specifically states that the proposal is "[t]o construct a single family residence within the 100-foot wide protected buffer of the Sandy River Conservation Area." The PRCA application includes the elevation certificate stating the proposed dwelling would be sited above BFE and includes a site plan showing the BFEs. The PRCA decision does not

dispute any of the applicant's BFE calculations. The applicant has also provided evidence that County planners generally do not approve PRCA permits if the proposed dwelling would be below BFE. This is a reasonable argument.

Without more context, I might be inclined to agree with the applicant, but as the County explains, this is not a standard case. The County testified that the applicant and the County were at odds about the development potential of the property before any applications were filed. Consistent with the parties' arguments here, the applicant believed it did not need a FDP because the property is wrongfully included in the floodway and SFHA. The County believed the applicant could not obtain approval for a dwelling because the property is in the floodway and SFHA. The County told the applicant it could apply for the PRCA but that would not be enough to build a dwelling. The County also offered the applicant the opportunity to apply for a FDP with the PRCA, but the applicant declined because it did not believe it needed a FDP.[7] While there is not documentation of this background in the record, I believe the County's testimony.

While the PRCA permit does grant approval to setback requirements for a dwelling, the decision makes no mention of FMD provisions. Those provisions clearly apply unless and until the property is removed from the floodway and SFHA. The County clearly did not believe the property should be removed from the floodway and SFHA. The PRCA does not find compliance with or waive the FMD provisions. While it would have been much clearer if the PRCA decision had stated that the decision did not waive compliance with the FMD provisions, the PRCA decision does not render the FMD provisions inapplicable. While it is a reasonably close call, I agree with the County that the PRCA approval does not waive the requirement of complying the FMD provisions.

2. Whether the County Can Remove Property from the SFHA

As discussed earlier, there is no dispute that the subject property is located in the floodway and SFHA as designated on the FIS FIRMs. ZDO 703.07 provides that development such as dwellings are prohibited in the floodway. The County argues that because the property is in the floodway and development is prohibited in the floodway,

[7] The applicant's argument that the County violated ORS 215.416(2), which requires the County to provide a consolidated procedure for an applicant to apply for all necessary permits, fails because the County did offer the applicant the opportunity to apply for a FDP at the time of the PRCA application. The County cannot be blamed because the applicant did not avail itself of this opportunity.

the FDP must be denied. According to the County, that is the end of the analysis. The County cites the earlier referenced Court of Appeals decision regarding the applicant's similar arguments on a nearby parcel.

In *State ex rel O'Connor v. Helm/Clackamas County*, 273 Or App 717 (2015), the present applicant brought two mandamus actions against the County. The applicant sought approval for previously constructed revetment repairs to the riverbank and for approval of a FDP to construct a dwelling on a parcel close to the property at issue in the present case. The two consolidated mandamus actions included one case against another County hearings officer regarding approval of the revetment. That case is not particularly relevant to the present case. The other case involved a mandamus action seeking to require the County to approve a dwelling on property located in the mapped floodway. The situation was nearly identical to the present case in that the property was located in the floodway as designated on the FIS FIRMs and the applicant had an elevation certificate from a licensed land surveyor asserting that the proposed homesite was above BFE. The circuit court dismissed the petition on numerous grounds, including that approval of the FDP would violate the County's land use regulations. The circuit court acknowledged that the applicant had provided "a wealth of factual evidence that the property should not be classified as within the regulatory floodway," but because the applicant had "conceded at oral argument that a LOMA permit signed by the County was the proper method to determine this issue," that it was irrelevant whether the property was misidentified on the FIS FIRMs. The Court of Appeals affirmed the circuit court's decision:

> "As the circuit court understood the case, the question framed by the parties below was not whether there was a factual dispute about whether the subject property *should be* designated as part of the regulatory floodway; the question was whether it *has been*, in light of the fact the relevant parts of the county's code, when viewed in the context of federal regulations, make clear that the regulatory floodway is determined in the first instance by the flood profiles included in the FIS and the accompanying FIRMs. [The applicant] does not dispute that the subject property * * * is within the regulatory floodway as shown on FEMA's existing maps. Nor does he dispute that, as of the date of the mandamus action, no LOMA has been processed by FEMA to change that designation; in fact, one of [the applicant's] complaints is that the county planning director incorrectly refused to sign off on

> the LOMA, thereby precluding him from obtaining the LOMA, to which he would be otherwise entitled. On this record, and in light of the parties' agreements, the trial court correctly ruled that there is no genuine issue of material fact as to whether [the property] is within the designated regulatory floodway, thereby precluding the construction of a new residence on that lot under the restriction in [ZDO] 703.07 in the absence of a change of designation." *Id*. at 733-34.

While the Court of Appeals decision addressed the same situation at issue in the present case, for whatever reason the applicant conceded that a LOMA was necessary in order to remove the property from the floodway and SFHA. The applicant does not make that concession in the present case. As the Court of Appeals stated in a footnote:

> "We note that there are other parts of the county code, such as [ZDO] 703.08(B) and section 703.11(A), which suggest that the county's planning director can, in some circumstances, make determinations about what is in the flood fringe or floodway based on 'federal, state or other authoritative source." * * * However, [the applicant] does not cite those provisions, let alone develop any argument as to their significance in this case. The circuit court understood [the applicant] to 'concede' during the summary judgment hearing that a LOMA was the proper method to resolve whether the property is within the regulatory floodway, and he does not address that aspect of the court's ruling on appeal. Accordingly, we assume, as did the circuit court, that a LOMA is the proper way to resolve whether [the property] is within the regulatory floodway for purposes of satisfying the criteria of the county code." *Id*. at 734 n 7.

In the present case, the applicant makes precisely the argument that was waived in the earlier case and noted by the Court of Appeals as a potential argument. Therefore, the Court of Appeals decision is of little assistance in resolving the issue in the present case.

The County's position is that development of a dwelling is prohibited in the floodway, the parameters of the floodway are determined by the FIS FIRMs, and the only way to remove property that is designated under the FIS FIRMs as in the floodway is through a LOMA. The applicant argues that whether the property should be located in the floodway is a proper consideration. The applicant relies on ZDO 703.04(B), which provides:

> "The Planning Director shall make interpretations where needed, as to the exact location of the boundaries of the SFHA (for example, where there appears to be a conflict between a mapped boundary and actual

> field conditions, topography and/or elevations). In areas where base flood elevation data have been provided, the Planning Director may require the applicant to submit an elevation certificate to determine whether the proposed development is located in the SFHA. To most precisely determine the base flood elevation of the subject area, the elevations provided by the FIS flood profiles in combination with the cross section lines on the FIRM shall supersede the base flood elevation lines and values identified on the FIRM."

ZDO 703.04(B) directs the Planning Director to make interpretations as to the exact location of the SFHA boundary if needed. According to the applicant, the present case is just such a situation where there appears to be a conflict between the mapped boundary and the actual boundary. The applicant also cites the NFIP Floodplain Handbook, which states:

> "The BFE in relation to the actual ground elevation sets the floodplain limits for regulatory purposes. When ground surveys show that a development site is above the BFE, you can record the data and issue the permit. Then, if the developer or owner wants the property removed from the Special Flood Hazard Area designation, he or she can request a Letter of Map Amendment."

The applicant argues that the NFIP Handbook further establishes that if an applicant demonstrates that a property is above BFE then the local government can issue permits without a LOMA. According to the applicant, the LOMA only concerns whether a property is identified on FIRMs for purposes of insurance. While it would make sense for an owner to remove his or her property from the floodway to reduce insurance costs by obtaining a LOMA, it is not necessary to do so to build a dwelling. Finally, the applicant argues that this is exactly the way the County has approved dwellings in the past.[8]

The first sentence of ZDO 703.08(B), in mandatory language, directs the Planning Director to make interpretations as to the exact location of the SFHA. The non-exclusive list of examples of when such interpretations shall be made includes where there are conflicts between the mapped boundary and actual field conditions, topography, and/or

[8] The applicant provides examples of situations where the County did not require a FDP when an applicant demonstrated through an elevation certificate that the property was above BFE. The County responds that those cases are from many years ago, but the County does not explain how any pertinent ZDO provisions have changed. At the least, the previous cases, are evidence that the County at some point agreed with the applicant's contention that the Planning Director may remove properties from the SFHA.

elevations. That appears to be precisely the situation in the present case. ZDO 703.04(B) further states that in areas where base flood elevation data have been provided, the Planning Director may require an applicant to submit an elevation certificate. The subject property is in an area where base flood elevation data have been provided and the applicant did submit an elevation certificate. Finally, ZDO 703.04(B) provides the method for determining the base flood elevation of the subject area.

The Planning Director's decision goes through the process of determining the BFE for the subject property in the findings under ZDO 703.04(B). The decision explains why the County disagrees with the elevation certificate submitted by the applicant, and concludes that the entire site is located in the floodway. According to the County's calculations, the proposed homesite would be approximately .4 feet below BFE. The decision concludes by stating that only FEMA can remove a site from the floodway through a letter of map revision.

ZDO 703.04 specifically concerns the area of application for the FMD and states that the FMD is applied to the SFHA. ZDO 703.04(B) seems to require the Planning Director to make interpretations as to the exact boundary of the SFHA in situations like the present case. If a property is determined during that interpretation to be not be in the SFHA then the FMD would presumably not apply and a FDP would not be required. The decision does not explain why the Planning Director is not required to make such an interpretation. The decision just states that a LOMA is required to remove a property from the SFHA.[9]

After the public hearing, the County submitted a letter to the Department of Land Conservation and Development (DLCD) regarding issues that arose at the hearing. Specifically, the County asked DLCD for its opinion on three questions:

- It is the applicant's contention that an Elevation Certificate can be presented to the jurisdiction and if that certificate shows the location to be above BFE, the jurisdiction then cannot require any SFHA review because the Elevation Certification *in and of itself* removes the area from the

[9] The decision states that a LOMR-FW (Letter of Map Revision – Floodway) is required rather than a LOMA but a LOMA, which is less involved, would also be adequate.

SFHA, both floodplain and/or floodway, making the SFHA ordinance of the jurisdiction not applicable. (Emphasis in original.)

- The stamp of a licensed land surveyor on an Elevation Certificate makes the BFE determination irrefutable, that is, it cannot and should not be reviewed or corrected by the jurisdiction.
- What is the community's responsibility for ensuring the Elevation Certificate is accurately completed?

The closest the DLCD representative comes to responding to this issue is the following:

> "The Elevation Certificate in and of itself does not remove an area from the SFHA. The following NFIP regulations apply:
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> "44 CFR 60.2 – Minimum compliance with flood plain management criteria. Paragraph (h): The community shall adopt and enforce flood plain management regulations based on data provided by the Federal Insurance Administrator. Without prior approval of the Federal Insurance Administrator, the community shall not adopt and enforce flood plain management regulations based upon modified data reflecting natural or man-made physical changes.
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> "44 CFR Part 60.3 Flood plain management criteria for flood-prone areas. The Administrator will provide the data upon which flood plain management regulations shall be based. If the Administrator has not provided sufficient data to furnish a basis for these regulations in a particular community, the community shall obtain, review and reasonably utilize data available from other Federal, state, or other sources pending receipt of data from the Administrator. However, when special flood hazard area designations and water surface elevations have been furnished by the Administrator, they shall apply.
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> "In this case FEMA (aka the Administrator) has furnished the County with flood hazard designations (aka Special Flood Hazard Area of SFHA) and water surface elevations (aka Base Flood Elevations of BFEs) on a set of Flood Insurance Rate Maps with an accompanying Flood Insurance Study. These SFHAs and BFEs must be used by the County for all floodplain review unless and until FEMA amends or revises them. An Elevation Certificate alone does not amend or revise Flood Insurance Rate Maps, BFEs or SFHAs and cannot in and of itself remove a building or an area from the SFHA, even when the Elevation Certificate shows that all or a portion of the parcel is above the BFE. Until the BFE of SFHA boundary is officially amended or revised by FEMA, the County must continue to treat the disputed area as if it is in

the regulated floodplain."

While this may explain how DLCD thinks floodplain development ordinances should work, it does nothing to explain why the plain language of ZDO 703.04(B) specifically allows the Planning Director to make interpretation as to the exact boundaries of the SFHA.[10] The question posed to DLCD was not whether ZDO 703.04(B) allows the Planning Director the ability to interpret whether certain properties are correctly within the SFHA, the question was whether an elevation certificate – in and of itself – can remove a property from the SFHA. As the quotation from the NFIP Handbook illustrates, there are at least certain situations where permits can be obtained without a LOMA. DLCD states that the Handbook is not a regulation, but the Handbook certainly is meant to explain how the regulations operate. I agree with DLCD and the County, however, that an elevation certificate in and of itself does not remove a property from the SFHA. As ZDO 703.04(B) explains: "To most precisely determine the base flood elevation of the subject area, the elevations provided by the FIS flood profiles in combination with the cross section lines in the FIRM shall supersede the base flood elevation lines and values identified on the FIRM." In other words, although an elevation certificate cannot in and of itself remove a property from the SFHA, a property can be removed from the SFHA in conjunction with an interpretation from the Planning Director based on "elevations provided from FIS flood profiles in combination with the cross section lines in the FIRM." Therefore, I agree with applicant that ZDO 703.04(B) provides a method for the Planning Director to determine that the SFHA, and thereby the FMD, does not apply to a certain property or portion of a property.[11]

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[10] Although the letter from DLCD references federal regulations in response to the question of whether an elevation certificate is in and of itself sufficient to remove a property from the SFHA, the County does not argue that any federal regulations supersede or overrule ZDO 703.04(B).

[11] Although the applicant does not cite the 703.08(B) or ZDO 703.11(A), the Court of Appeals noted that they were potentially applicable. ZDO 703.08(B) provides:

> "Within the [SFHA], when more detailed base flood elevation or floodway data is available outside of the adopted [FIS] from a federal, state or other authoritative source – such as a preliminary or draft information from a new study that will revise the FIS – the Planning Director may obtain, review, and reasonably utilize such data. * * *"

ZDO 703.11(A) provides:

> "Flood Fringe and Floodway Areas: In flood fringe and floodway areas, as indicated

3. Whether the Property is in the SFHA

In order to determine whether the property is in the SFHA, ZDO 703.04(B) provides that: "To most precisely determine the base flood elevation of the subject area, the elevations provided by the FIS flood profiles in combination with the cross section lines in the FIRM shall supersede the base flood elevation lines and values identified on the FIRM." The Planning Director's decision explains how he determined that the subject property is in the SFHA:

> "According to FEMA FIRM Map Number 41005C0382D, effective June 17, 2008, the entire site is located within the floodplain and Floodway of the Sandy River. Therefore, Section 703 applies. This is an area where base flood elevation data have been provided. The applicant has submitted an elevation certificate that is based on the no longer effective August 4, 1987 FIRM for the subject area, which was superseded on June 17, 2008 by the FIRM listed above. The elevation certificate states that Base Flood Elevation (BFE) at the homesite is 1,116 feet in the National Geodetic Vertical Datum of 1929 (NVGD 29). The certificate also states that the Lowest Adjacent Grade (LAG) at the building site is 1,116.52 feet (NGVD 29), although no site plan was submitted to indicate the location of LAG relative to a homesite.
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> "To most precisely determine BFE of the subject area, Staff has utilized the flood profiles from the currently effective June 17, 2008 Flood Insurance Study (FIS) for Clackamas County, Oregon and Incorporated Areas, in combination with the cross section lines on the currently effective FIRM (Map Number 41005C0382D, effective June 17, 2008). Because no site plan was submitted to indicate the location of the homesite, Staff instead determined BFE at the center of the site. The center of the site, measuring along the Sandy River stream profile, is located 70 feet upstream of Cross Section 'BN,' where according to the Flood Profiles of the Sandy River (Sheet 119P of the FIS) BFE is 1,120.3 feet North American Vertical Datum of 1988 (NAVD 1988). Then, to compare BFE on the currently effective FIRM to the

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> on the [FIRMs] or determined pursuant to Subsection 703.08(B), development shall comply with the following criteria: [standards for residential construction, nonresidential construction, flood hazard areas, flood prone areas, and shallow flooding areas]."

Although 703.08(B) is not particularly clear, it at least provides further evidence that the Planning Director may use additional information to make changes to the SFHA. ZDO 703.11(A) appears to apply to additional areas previously outside the SFHA that may have been included based on additional information rather than areas that are not in the SFHA. As the applicant points out, it would make little sense to apply floodway building standards such as anchoring and flood proofing for areas that are not within the floodway.

> information provided on the outdated elevation certificate, Staff converted the NAVD 29 elevations on the elevation certificate to the NAVD 88 elevations to which the currently effective FIRM is referenced. According to Table 4 (Clackamas County Vertical Datum Conversion [In Feet Above NGVD 29 datum] on Page 31 of the current FIS, the conversion factor on the Sandy River from NGVD 29 to NAVD 88 is +3.4 feet. This conversion factor also changes the Box C2.f) LAG of the elevation certificate from 1,116.52 feet (NGDV 29) to 1,119.92 feet (NAVD 88), which locates the LAG almost 4 tenths of a foot below BFE."

The first problem the County identifies with the applicant's elevation certificate is that it was submitted using the wrong FIRM. The elevation certificate uses the 1987 FIRM based upon the National Geodetic Vertical Datum of 1929 or NGVD 29. The current FIRM is from 2008 and is based upon the North American Vertical Datum of 1988 or NAVD 88. I do not see that in itself this is a problem. The elevation certificates have boxes to check to show whether the surveyor is using NGVD 29 or NAVD 88. Furthermore, as the County explains, there is a conversion table to convert NGVD 29 to NAV 88. In the present case, 3.4 feet is added to NGVD 29 to convert to NAVD 88 elevations. Thus, instead of a BFE of 1,116 for the proposed homesite, the BFE is converted to 1,119.4. Similarly, the LAG for the proposed homesite is converted from 1,116.52 to 1,119.92. The important fact is that whether the NGVD 29 elevations or NAVD 88 elevations are used, the applicant's surveyor determined that the proposed homesite is approximately a half-foot above BFE. When the County evaluated the applicant's elevation certificate, the County added 3.4 feet to the proposed LAG to find an elevation of 1,116.92. When the County converted the BFE, instead of adding the 3.4 feet conversion amount, the County determined the BFE was 1,120.3. The question is which elevation for BFE is correct.

As discussed earlier, the mere fact that the applicant's surveyor submitted an elevation certificate does not establish the BFE. As ZDO 703.04(B) provides, there is a required method for determining BFE – using the FIS flood profiles and the cross section lines from the FIRM. As the County explained, the middle of the property is 70 feet upstream from cross section "BN." The decision then states that the BFE 70 feet upstream from cross section BN is 1,120.3. The decision does not explain how the elevation of 1,120.3 was determined. While that might seem like a simple exercise, in this

case it is not. The cross sections are depicted as squiggly lines. The BN cross section runs through the northern part of the subject property, and the stated elevation for BN is 1,119 feet. Exhibit 8, Page 4. Exhibit 8, Page 5 shows the BN cross section and another more detailed cross section north of the property that has an elevation of 1,119.3. Exhibit 8, page 6 is the FEMA flood profile graph which plots a number of potential floods, including the 100-year flood that BFE is based upon, with elevations in relation to cross sections. On this profile, 70 feet upstream from cross section BN, the BFE is 1,120.3.[12]

Apparently there was some confusion regarding the BN cross section because the elevation of 1,119 at that point is lower than the 1,119.3 elevation downstream from the property. The applicant quotes an explanation from the DLCD representative regarding the BN cross section:

> "The squiggly line is clearly misplaced because it is upstream of a cross section labeled 1119.3. And remember, the squiggly lines are rounded whole foot elevations and are not equal to 1119.0 but to + or - .05 feet. Still, I think the squiggly line is misplaced or mislabeled when compared to the flood profile.
>
> "What I haven't been able to locate are the FEMA mapping guidelines that were in effect at the time the 2008 FIRMs were compiled. As I recall, FEMA's standards on placement of squiggly lines were different than they are now."

I am not sure that the DLCD representative's statement clears up the confusion, but it does seem unlikely that the BFE upstream of a cross section with a BFE 1,119.3 would be at a lower elevation of 1,119. As the applicant likes to argue, water does not run uphill.

In any event, the applicant has presented evidence of the elevation certificate and pictures from the 2010 flood (that was a 100-year flood) showing at least part of the property out of the flooded river. The County relies on the FIS profile and BN cross section and flood profile. While it certainly not crystal clear, the County used the method required by ZDO 703.04(B) to determine BFE for the property, and even though the BN cross section is confusing, the flood profile at Exhibit 8, Page 6 appears to show the

[12] Exhibit 6, Page 6 at least appears to show an elevation close to 1,120.3. The chart is relatively small in scale so it is difficult to determine exact numbers. It does appear, however, that 70 feet upstream of cross section BN is above the 1,120 foot BFE.

property with a BFE of above 1,120, which would place the property in the SFHA. The flood profiles are the best evidence available to determine what the BFE for the property is. While it is a close call, I agree with the County that using the methodology required by ZDO 703.04(B), the Planning Director's interpretation of BFE for the property is correct. Therefore, because the property is in the SFHA and dwellings are prohibited in the SFHA, the Planning Director correctly denied the FDP.[13]

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 Z0289-15-F.

DATED this 3rd day of December, 2015.

Fred Wilson
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

[13] While I agree with the County's conclusion, it is certainly a close call. It is clear that with the antipathy between the applicant and the County that the County does not trust the applicant's elevation certificates, and the applicant does not trust the County to make a fair decision. While as a hearings officer I am required to review the Planning Director's decision, I hardly seem like the most qualified person to be making this determination. The logical solution would to somehow have FEMA review the issue, but apparently a LOMA application requires the County to agree with the applicant that the property is out of the SFHA, which allows the County to block a LOMA application. In any event, it is outside the scope of my review to send the matter to FEMA.

the federal agencies responsible for administration and enforcement of the ESA for the affected species.

APPEAL RIGHTS

ZDO 1307.10(F) 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(9) 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." 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).

CERTIFICATE OF MAILING

I certify that on the date set forth below I mailed a copy of the above HEARINGS OFFICER FINAL ORDER by first class mail to the following participants at the address shown:

Kip O'Connor / Lifestyle Ventures
PO BOX 219
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Mark Griffin
1631 NE Broadway, #721
Portland, OR 97232

The Villages at the Mountain
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Welches, OR 97067

Hoodland Fire District #74
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Paul Spaniol
6925 N Albina St
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Christine Shirley - DLCD
635 Capitol Street NE, Suite150
Salem, OR 97301

Scott Van Hoff – FEMA
130 228th Street SW
Bothell, WA 98021

The original of this decision has been filed with the Planning Division, Clackamas County Department of Transportation and Development.

DATED this 3rd day of December, 2015

Linda J May

Linda J. May, Permits Specialist