BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON

Regarding an Appeal of an Approval of an Agricultural Lot of Record Dwelling.	)))	**Case File No. Z0260-15-ALR (Appeal) (Popenuk)**

A. SUMMARY

1. The owner is the John Popenuk Trust and the applicant is John Popenuk.
2. The appellant is Roye Alsup.
3. The subject property is located adjacent and east of 25918 NE Butteville Road, Aurora, OR 97002. The legal description is T3S, R1W, Section 27, Tax Lots 400 & 401 W.M. The subject property is approximately 2.2 acres and is zoned EFU – Exclusive Farm Use – 80 Acres.
4. On January 21, 2016, 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 January 21, 2016. 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 Gary Hewitt discussed the planning director's decision and recommended approval of the lot of record dwelling.
3. The applicant testified in favor of the application.
4. The appellant, Roye Alsup, testified in opposition to the application.

5. At the conclusion of the public hearing, the Hearings Officer closed the record.

C. FACTS

The subject property is an approximately 2.2-acre parcel zoned EFU. The property is located adjacent and east of 25918 NE Butteville Road, Aurora, OR 97002. The subject property is located south of NE Butteville Road. To the north of NE Butteville Road there are similarly sized lots which border the Willamette River. The subject property is generally flat, but tends to slope away from NE Butteville Road. The appellant, Roye Alsup (Alsup) lives immediately to the west of the subject property. The applicant is seeking a lot of record dwelling on class III & IV high value farmland, which is subject to a type II procedure, whereby the decision is made by the Planning Director. The planning director approved the application for a lot of record dwelling.[1] This appeal followed.

D. DISCUSSION

Clackamas County Zoning and Development Ordinance (ZDO) Table 401-1 provides that the approval criteria for a lot of record dwelling on class III & IV high value farmland are ZDO 401.05(A)(2, 3, & 4) and ZDO 401.05(C)(3). The Planning Director's decision found that all of the approval criteria were satisfied. The Planning Director's decision does a thorough job of explaining why the approval criteria are satisfied. Alsup does not challenge most of the findings in the Planning Director's decision. Therefore, it would be a waste of the County's money and resources to review all of the undisputed approval criteria in the Planning Director's decision. I have reviewed all of the findings in the Planning Director's decision and agree with the Planning Director that all of the undisputed approval criteria are satisfied. I therefore adopt and incorporate the findings in the Planning Director's decision in this decision, except as further discussed.

Alsup's appeal form lists four reasons for appealing the Planning Director's decision. Those reasons are not explained in the appeal form, and Alsup did not submit any evidence or argument in writing at the public hearing. Alsup did discuss his reasons at the public hearing.

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[1] Under 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]."

1. Soil Classification

The first reason for appealing the decision cited by Alsup is "Misrepresentation of Soil Classes." ZDO 401.05(A)(2) provides:

> "The Natural Resources Conservation Service (NRCS) Internet Soils Survey for Clackamas County shall be used to determine the soil classification and soil rating for a specific lot of record, except for purposes of approving a Lot of Record Dwelling application, the applicant may submit a report from a professional soils classifier * * *."

The Planning Director's decision states that the "NRCS Internet Soils Survey for Clackamas County was used to determine the soil classification for the subject tract." Planning Director's Decision 8. Alsup apparently believes some misrepresentation occurred regarding the soils on the subject property, but he does not explain what that misrepresentation was. Alsup does not argue that the NRCS Internet Soils Survey does not show the subject property to be made up of class III & IV soils. The NRCS Internet Soils Survey is what determines the soils for the application, and that survey shows the subject property contains class III & IV soils. ZDO 401.05(A)(2) is satisfied.

2. Elevation

Alsup lists "elevation" as a reason for appealing the Planning Director's decision. According to Alsup, the elevation of the subject property and nearby properties cause water to drain onto his property. Apparently the development of the property to the west of Alsup resulted in discharge of water onto Alsup's property. While I can understand Alsup's frustration regarding adverse impacts from the development to the west of his property, any effects from that development are not relevant to the present application. Proposed condition of approval three requires the applicant to submit an elevation certificate to show that the proposed dwelling does not require a Floodplain Development Permit (FDP) under ZDO chapter 703. Even if a FDP were required, that does not affect the approval criteria for a lot of record dwelling. Alsup's arguments provide no basis to deny the application.

3. Spiteful Location of the Building

Alsup argues that the proposed location of the lot of record dwelling is spiteful in that it will be located very close to the west property line and very close to Alsup's

residence. Alsup's arguments are based upon a not to scale site plan that show the proposed dwelling relatively close to Alsup's house. The applicant explains that the site plan is not exactly accurate and that the dwelling and garage will likely be farther towards the front of the lot and not directly across from Alsup's residence. In any event, the only restrictions on where a dwelling may be placed are found in the setback requirements of the EFU zone, which require 10 foot setbacks. Proposed condition of approval five requires that the applicable EFU setback requirements be met. Alsup's arguments regarding a spiteful location of the proposed dwelling do not provide a basis to deny the application.

4. Conflict of Interest

Alsup argues the County has a conflict of interest because of the applicant's son's work. According to Alsup, John Popenuk Jr. works for the County. As the applicant explains, his son works for a private consulting company. While his son's company provides services to clients who sometimes appear before the County, his son does not work for Clackamas County. There is no conflict of interest regarding the applicant's son.

5. Other Arguments

At the public hearing, Alsup argued that his constitutional right to life, liberty, and the pursuit of happiness would be violated by approval of the proposed application. Alsup's arguments are not sufficiently developed to understand or address, and they are 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 **APPROVES** application Z0260-15-ALR, with the following conditions of approval.

F. CONDITIONS OF APPROVAL

1. Prior to Planning Approval of a building or septic permit, the applicant shall sign, notarize, and record in the deed records for the County a document binding the landowner, and the landowner's successors in interest, prohibiting them from pursuing a claim for relief or cause of action alleging injury from farming and forest practices for which no action or claim is allowed under ORS 30.936 or 30.937. A copy of the aforementioned deed shall be submitted to this planning file. (Sample was enclosed with the applicant's decision).

2. Prior to Planning Approval of a building or septic permit, the owner shall provide substantial evidence that parcel 400 and 401 have been consolidated.

3. Prior to Planning Approval of a building or septic permit, the owner shall provide an elevation certificate from an Oregon Licensed Surveyor that shows the proposed dwelling does not require a Floodplain Development Permit as provided in Section 703 of the Zoning and Development Ordinance.

4. Prior to Planning Approval of a building or septic permit, the owner shall provide substantial evidence that shows the proposed dwelling does not require a Habitat Conservation Area (HCA) review permit as provided in Section 706 of the Zoning and Development Ordinance.

5. Placement of the dwelling shall meet the setback requirements of the EFU zoning district.

6. Development permits (septic, building, electrical, driveway, etc.) shall be obtained prior to any construction. The dwelling and any accessory buildings shall comply with the setback requirements of the EFU zoning district.

7. Placement and use of a mobile home shall require a mobile home set up permit and is subject to Section 824 of the Zoning and Development Ordinance.

8. This land use approval may be transferred to another individual after the final effective date of the decision.

9. The approval of the application granted by this decision concerns only the applicable criteria for this decision. The decision does not include any conclusions by the County concerning whether the activities allowed will or will not come in conflict with the provisions of the federal Endangered Species Act (ESA). This decision should not be construed to or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination if necessary with the federal agencies responsible for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated, and maintained in a manner that complies with the ESA.

10. Approval is subject to the above stated conditions. Failure to comply with all conditions of approval shall be cause for revocation of this permit.

11. Approval Period: Approval of an administrative action under Section 401 is valid for four years from the date of the written decision. If the County's final written decision is appealed, the approval period shall commence on the date of the final

appellate decision. During this four year period, the approval shall be implemented. “Implemented” means:

“For administrative actions, a building or manufactured dwelling placement for a new primary structure that was the subject of the administrative action shall be obtained and maintained. If no building or manufactured dwelling placement permit is required, all other necessary County development permits shall be obtained and maintained.”

12. Prior to Planning Approval of a building or septic permit, the owner’s development plan shall comply with all the Fire, Life, and Safety Standards and requirements of the Aurora Fire District. Documentation from the Aurora Fire District indicating compliance is met shall be submitted by the applicant to this Planning File. It shall be the responsibility of the applicant to contact the Aurora Fire District to determine the applicable requirements.

13. The address to the subject property shall be addressed by the County Planning & Zoning Division. The address shall be plainly legible and visible from the road fronting the property and the same shall be on the dwelling plainly legible and visible when approaching. These numbers shall contrast with their background. Address numbers shall be Arabic numerals at least 4 inches high with a minimum stroke width of .5 inch for easy identification by emergency service providers.

14. Fire safety designs standards for public roads and driveways shall comply with the current adopted Clackamas County Roadway Standards.

DATED this 11th day of February, 2016.

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 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).