

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

Regarding an Appeal of an Approval of a)	Case File Nos.
Driveway in the Floodplain and Principal)	Z0416-15-F & Z0421-15-R
River Conservation Area.)	(Blackwood)

A. SUMMARY

1. The owner and the applicant is Timothy Blackwood.
2. The appellant is James Martenson.
3. The subject property is located at 67058 East Jerrys Lane, Brightwood, Oregon 97011. The legal description is T2S R7E, Section 32CA, Tax Lot 100 W.M. The total area involved is approximately 5000 square feet, and the property is zoned RR – Recreational Residential.
4. On January 28, 2016, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. The record was left open one week for the submission of new evidence, one additional week for responses to the new evidence, and one final 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 January 28, 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 Steve Hanschka discussed the planning director's decision and recommended approval of the floodplain development permit and the principal river conservation area permit.
3. The applicant testified in favor of the application.
4. The appellant, James Martenson, his attorney, and other opponents testified in opposition to the application.
5. At the conclusion of the public hearing, the Hearings Officer left the record open one week for the submission of new evidence, an additional week for responses to the new evidence, and a final week for the applicant's legal argument.

C. FACTS

The subject property is zoned RR – Recreational Residential and has a dwelling that was recently completed. The subject property is located just south of the Sandy River. Oregon Street runs north to south one lot to the west of the subject property, and ends just south of the Sandy River. East Jerrys Lane (Jerrys Lane) runs east from the terminus of Oregon Street along the north side of the appellant's property and then east along the north side of the subject property, where Jerrys Lane ends. The applicant's existing driveway runs north from the residence to the northern property line that borders Jerrys Lane. The applicant proposes to make some improvements to Jerry Lane to connect the existing driveway to Jerrys Lane in order to provide the only access to the dwelling. As discussed later, the area proposed for the improvements is located within the Special Flood Hazard Area (SFHA) and the Principal River Conservation Area (PRCA). Therefore, the applicant needs to obtain a floodplain development permit (FDP) and a PRCA permit. The area proposed for the improvements is not located in the mapped floodway, which generally prohibits development. The appellant, however, argues that the area should be included in the floodway. The application is subject to a type II procedure, whereby the decision is made by the Planning Director. The planning director approved the application for an FDP and PRCA permit.¹ This appeal followed.

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]."

D. DISCUSSION

1. **Are the Proposed Improvements Located in the Floodway?**

A threshold issue in this appeal is whether the area proposed for the improvements to Jerrys Lane (subject area) should be considered in the floodway even though it is not currently in the County's identified floodway. A brief discussion of the regulatory background 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."

According to the FIS and FIRMs, it is undisputed that the subject area is located in the SFHA but not located in the floodway. 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.'" 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 shown on Flood Insurance Rate Maps and on the flood profiles included in the Flood Insurance Study."² The appellant argues that although the subject area is presently

² 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

identified as outside of the floodway, the subject area should be located in the floodway, and therefore the application should be denied.

In a recent case, the issue of whether properties identified as being within the floodway could be removed from the floodway without changing the FIRMs that determine such boundaries arose. In *Lifestyle Ventures v. Clackamas County* (Z0289-15-F - LUBA appeal pending), the County argued that the FIRMs were determinative of whether a property was in the floodway and only a letter of map amendment (LOMA) from the Federal Emergency Management Agency (FEMA) could remove a property from the floodway. The applicant argued that under the ZDO it was possible to remove a property from the floodway. The applicant relied 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.”

I agreed with the applicant that under ZDO 703.04(B) the Planning Director could remove properties from the floodway based upon conflicts between the mapped boundary and actual field conditions, topography, and/or elevations. In that case, I ultimately agreed with the County that the property was properly mapped as in the floodway.

In the present case, the appellant does not argue that a certain property is inaccurately mapped. Instead, the appellant argues that the floodway itself is inaccurately mapped. According to the appellant, the subject area regularly floods and furthermore the Sandy River is subject to channel migration which could easily submerge the entire area. Even assuming that the appellant is correct that the County could determine that the floodway is inaccurately mapped independent of the FIRMs, the appellant has not demonstrated that the floodway is inaccurately mapped. Although the subject area is not

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.”

in the floodway, it is in the SFHA. Therefore, it is not surprising that it is periodically flooded. The appellant relies on a study entitled “Flood Erosion Hazard Mitigation Evaluation Upper Sandy River.” Although that study does discuss channel migration, and it is certainly possible that the Sandy River could at some point inundate the subject area, as the County and applicant explain, channel migration is not a factor that is taken into account by the ZDO. The study submitted by the appellant does not demonstrate that the floodway is inaccurately mapped. Furthermore, as the County explains, there is a draft study of the Sandy River underway, and under that draft the subject area is still located outside of the floodway. The evidence relied on by the County and the applicant is more persuasive than that provided by the appellant. I agree with the County and the applicant that the subject area is properly mapped as being outside of the floodway.

2. Floodplain Development Permit

The Planning Director’s decision reviews the applicable approval criteria for development within the floodplain and explains why those criteria are satisfied. A number of those findings are not challenged by the appellant and opponents. It would be waste of the County’s money to review and repeat all of the unchallenged findings in the Planning Director’s decision. Therefore, I adopt and incorporate the Planning Directors’ findings in this decision, except as further explained.

ZDO 703.09 concerns floodplain development permits (FDP). Because the subject area is in the SFHA, an FDP is required. ZDO 703.09(A) provides the submittal requirements for an FDP:

“Submittal Requirements: In addition to the submittal requirements identified in Subsection 1307.07(C), an application for an FDP shall include:

- “1. A site plan drawn to scale, showing elevations of the site; pertinent structure, fill, or storage elevations; size, location, and spatial arrangement of all proposed and existing structures on the site; and location and elevations of streets, water supply, sanitary facilities, and soil types; and other applicable information;
- “2. Specifications for building construction and materials, loads and forces, and effect on soil bearing pressures, erosion control, floodproofing, filling, dredging, grading, channel improvement, storage of materials, water supply, and sanitary facilities;

- “3. A description of the extent to which any watercourse will be altered or relocated as a result of proposed development; and
- “4. Either an elevation certificate or a Federal Emergency Management Agency National Flood Insurance Program Floodproofing Certificate for Non-Residential Structures.
 - “a. In either case, the currently effective form shall be used, and it shall be completed in accordance with the accompanying instructions, and based on construction drawings and proposed site locations of development.
 - “b. The determination regarding which certificate is required shall be made based on the nature of the proposed development consistent with National Flood Insurance Program regulations.”

The Planning Director’s decision merely states that the “applicant has provided the necessary submittal materials for the proposed development.” Planning Director’s Decision 11. The appellant argues that a number of the submittal requirements were not provided. Initially, submittal requirements are not the same thing as approval criteria.³ If an approval criterion is not satisfied then an application cannot be approved. The failure to provide all of the submittal requirements, in and of itself, is not a basis to deny an application. The submittal requirements are intended to provide the decision maker with the necessary information to decide whether the approval criteria have been satisfied. Unless the failure to provide a submittal requirement results in insufficient evidence to satisfy an applicable approval criterion, the mere failure to provide the submittal information will not result in a denial of the application.

The appellant argues that the applicant did not submit a site plan as required by ZDO 703.09(A)(1). According to the appellant, the site plan submitted by the applicant is not drawn to scale as required by ZDO 703.09(A)(1). The applicant responds that the site plan, while approximate, is drawn to scale. I do not see that the scale of the site plan provides any reason to deny the application.

The appellant argues that the applicant did not submit an elevation certificate as required by ZDO 703.09(A)(4). While 703.09(A)(4) does appear to require that an

³ As explained later, the FDP provisions also contain considerations as well as approval criteria. For purposes of the considering submittal requirements, the necessity of the submittal requirements for satisfying approval criteria also includes satisfying the considerations.

elevation certificate be submitted, the question is whether the failure to submit an elevation certificate affects an applicable approval criterion. The subject area is located outside of the floodway on the FIRMs, so there is no need for an elevation certificate to determine where the subject area is located in the SFHA. The applicant explains that ZDO provisions that explicitly require elevation certificates involve proposed structures. According to the applicant, there is nothing in the ZDO approval criteria that requires an elevation certificate for a proposed gravel driveway. The appellant generally argues that it is necessary to know what the elevation of the subject area is in order to determine what will happen in flood events. While that is a reasonable argument, the subject area is in the SFHA so some flooding is to be expected regardless of the actual elevations. Furthermore, as the Planning Director's decision explains, the BFE in the area of the project site is approximately 1258 feet. Because the subject area is out of the floodway, the elevation is therefore above 1258 feet. I do not see that any of the applicable approval criteria require an actual elevation certificate.⁴ Any deficiencies in the applicant's submittal requirements do not provide a basis to deny the application.

ZDO 703.09(B) provides factors of consideration in reviewing an FDP application:

“Factors of Consideration: In reviewing an application for an FDP, the following factors shall be considered:

- “1. The danger to life and property due to increased flood heights or velocities caused by encroachments;
- “2. The danger that materials may be swept on to other lands or downstream to the injury of others;
- “3. The proposed water supply and sanitation systems and the ability of those systems to prevent disease, contamination, and unsanitary conditions;
- “4. The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
- “5. The importance to the community of the service provided by the

⁴ The appellant also argues that the applicant did not satisfy ZDO 703.09(A)(3) because the alteration of a watercourse was not adequately described. The issue of whether an existing ditch is a watercourse is discussed later.

proposed facility;

- “6. The requirements of the facility for a waterfront location;
- “7. The availability of alternative locations not subject to flooding for the proposed use;
- “8. The compatibility of the proposed use with existing development and development anticipated in the foreseeable future;
- “9. The relationship of the proposed use to the Comprehensive Plan and floodplain management program for the area;
- “10. The safety of access to property in times of flood for ordinary and emergency vehicles;
- “11. The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters expected at the site; and
- “12. Other factors that are relevant to the purpose of this section.”

As discussed later, ZDO 703.09(C) provides the approval criteria for an FDP. The approval criteria obviously must be satisfied. ZDO 703.09(B) provides factors to consider. Although the ZDO does not explain the relationship between the factors for consideration and the approval criteria, I understand the ZDO to allow an FDP application to be denied, even if the approval criteria are satisfied, if the factors for consideration weigh in favor of denial. I do not understand each of the factors for consideration must weigh in favor of approval, but rather all of the factors should be considered in a balancing test to determine whether the FDP should be approved (assuming all of the approval criteria are satisfied).

The appellant argues that five of the factors for consideration weigh in favor of denying the FDP permit: ZDO 703.09(B)(1), (2), (4), (7), and (10). ZDO 703.09(B)(1) involves danger to life and property due to increased flood heights or velocities caused by encroachments. ZDO 703.05(J) defines “encroachments” as “[a]ctivities or construction within the *floodway*, including fill, new construction, substantial improvements, and other development.” (Emphasis added.) As discussed earlier, the subject area is not in the floodway. Therefore, the subject area is not an encroachment, and the driveway cannot be an encroachment that causes danger to life or property. ZDO 703.09(B)(1) weighs in favor of approving the FDP.

ZDO 703.09(2) involves the “danger that material may be swept downstream to

the injury of others.” The only potential danger would be that gravel would be swept downstream and cause erosion from scouring downstream areas. The danger of gravel from the proposed driveway causing much damage seems minimal. In the event of major flooding, a small amount of extra gravel would seem a minor concern. Furthermore, there is already gravel in the area that would presumably cause the same problem. I do not see that the proposed driveway would be much if any of danger to downstream owners. At the least, ZDO 703.09(B)(2) does not weigh against approving the FDP.

ZDO 703.09(4) involves the susceptibility of the proposal to flood damage and the effect of the damage to the owner. The gravel driveway would be susceptible to washing out during floods, but the only damage would be to repair the driveway. Given that the alternative is very expensive access or no access to the property, the prospect of potentially replacing the driveway is not an overwhelming factor. The applicant would seem to be in the best position to consider this factor as any damage and resulting cost would fall on him. The applicant’s decision to risk potential damage to the driveway in order to obtain access seems entirely reasonable. At the least, ZDO 703.09(B)(4) does not weigh against approving the FDP.

ZDO 703.09(7) involves the “availability of alternative locations not subject to flooding for the proposed use.” The applicant owns lots to the south of the subject property. It would be possible to access the subject property with an easement over one of the lots to the south. The appellant argues that because there is an alternative access available, the proposed driveway should be denied. The Planning Director’s decision states that “there is no County floodplain management standard that requires an applicant to purchase separate, upland property to acquire an alternative location for access that is not subject to flooding.” Planning Director Decision 13. Technically that is true – there is nothing that *requires* an applicant to purchase additional lots to provide access to a property that only has access through the SFHA. When an applicant already owns adjacent lots that could provide alternative access, however, I believe that is a fair consideration under ZDO 703.09(B)(7).

The applicant explains that the adjacent lots are densely vegetated, contain wetlands, and have challenging topography. According to the applicant, it would cost \$25,000 to construct a driveway on an easement through an adjacent lot and would

devalue the servient lot by \$40,000. The applicant also argues that requiring a driveway to be constructed through an adjacent lot could render the adjacent lot unbuildable. If there were an existing access on the south of the subject property I would likely agree with the appellant that that alone would weigh in favor of denying the FDP. In the present case, however, when the potential alternative access is speculative, would involve many potential constraints, and would be prohibitively expensive, the potential for an alternative access is not dispositive. ZDO 703.09(B)(7) weighs slightly against approving the FDP.

ZDO 703.09(B)(10) involves the safety of emergency vehicle access during floods. The appellant argues that emergency vehicles will not be able to access the property during floods because Jerry Lane would be washed out or submerged. There does not seem to be any dispute that during large flood events the subject property would not be accessible by emergency vehicles by Jerry Lane. Hoodland Fire District No. 74 (District) submitted a letter explaining that the District has plans for such situations, where it closes some roads and either has people evacuate by foot or shelter in place. While that would be fine for people who could walk or stay put, it does not explain how people in need of emergency vehicle access such as an ambulance would evacuate. ZDO 703.09(B)(10) weighs in favor of denying the FDP.

The Planning Director's decision went through the factors of consideration but did not conduct a balancing test or reach any conclusion regarding the factors. Most of the factors weigh in favor of approving the FDP, a couple of the factors are neither in favor or against the FDP, the potential for alternative access weighs slightly against the FDP, and the problem of emergency vehicle access during floods firmly weighs against the FDP. While it is a reasonably close call, I believe on balance the factors of consideration weigh in favor of approving the FDP. While the number of factors for and against are not determinative by themselves, there are many more factors weighing in favor of the FDP. As explained earlier, the potential for alternative access would weigh more heavily against the application if the alternative access were more feasible and less expensive. Although the emergency vehicle access problem is concerning, if the drafters of the ZDO had considered such access absolutely necessary, presumably they would have included it in the approval criteria rather than merely a factor for consideration. On

balance, the factors for consideration weigh in favor of approving the FDP.

ZDO 703.09(C) provides the approval criteria for FDPs:

“Approval Criteria: An FDP shall be subject to the following standards and criteria:

- “1. All necessary permits have been obtained from those federal, state, or local governmental agencies from which prior approval is required.
- “2. If the proposed development is in the floodway, the standards of Subsection 703.07 have been met.
- “3. If the proposed development includes alteration of a watercourse, maintenance will be provided within the altered or relocated portion of said watercourse so that the flood carrying capacity is not diminished.
- “4. The proposed development will comply with the applicable provisions of Subsections 703.10 and 703.11.”

ZDO 703.09(C)(1) requires that all necessary permits have been obtained. No federal or state permits are required. The only permit required is a development permit from the County Engineering Division which is included as a proposed condition of approval. ZDO 703.09(C)(1) is satisfied.

ZDO 703.09(C)(2) requires that if the proposed development is in the floodway that certain standards be met. As explained earlier, the subject area is not in the floodway. ZDO 703.09(C)(2) is satisfied.

ZDO 703.09(C)(3) requires that “[i]f the proposed development includes alteration of a watercourse, maintenance will be provided within the altered or relocated portion of said watercourse so that flood carrying capacity is not diminished.” The appellant argues that a ditch in the subject area is a watercourse that is being altered by the applicant. There is an apparently manmade ditch that varies from two feet deep at its east end to essentially ground level at its west end that directs water during flood events. In order to make the improvements for the driveway, the ditch would be rerouted. The appellant argues that the ditch is being redirected 180 degrees. This is clearly not the case as that would turn the ditch completely around and run upstream. As the applicant explains, the ditch would gradually turn approximately 30 degrees and then turn back 30 degrees the other way to connect to the existing ditch on both ends.

The Planning Director's decision merely states that the proposed development does not alter a watercourse. At the public hearing, the appellant argued that the ditch was a watercourse while the applicant argued it was not a watercourse. No party cites, and I am not aware of, any County definition of "watercourse." The applicant and the County rely on a FEMA definition submitted at the public hearing to argue that the ditch is not a watercourse. The FEMA definition provided by the applicant and the County defines "watercourse" as:

"A watercourse means only the channel and banks of an identifiable watercourse, and not the adjoining floodplain areas. The flood carrying capacity of a watercourse refers to the flood carrying capacity of the channel (except in the case of alluvial fans, where a channel is not typically defined)."

This definition is not particularly helpful because by defining "watercourse" the definition refers to the channel and banks of an "identifiable watercourse." This hardly helps define what an identifiable watercourse is to begin with. I tend to agree with the applicant and the County that watercourse means something more substantial than the ditch at issue. The fact that the definition refers to channel and banks also suggest something more substantial than the ditch, although the appellant argues that there are banks to the ditch. Additionally, the definition refers adjoining floodplains being separate from the watercourse. Because the ditch is in the floodplain, that favors the argument that it is not a watercourse. While it is not entirely clear, I agree with the applicant and County that the ditch is not a watercourse. In the event I am wrong about that definition, and because it would help alleviate potential factors of consideration regarding downstream damage, I also include the following condition of approval:

"The portion of the rerouted ditch on the subject property will be maintained so that the flood carrying capacity is not diminished."

Because I find that the ditch is not a watercourse, ZDO 703.09(C)(3) is satisfied. Even if the ditch is a watercourse, the condition of approval would nonetheless satisfy ZDO 703.09(C)(3).

ZDO 703.09(C)(4) requires that the "proposed development will comply with the applicable provision on ZDO 703.10 and 703.11." ZDO 703.10 and 703.11 provide the general and specific standards for development within the SFHA. The appellant argues

that although the proposed conditions of approval require the applicant to comply with these standards that there is not enough information to determine whether the applicant can actually comply with the standards. According to the appellant, the applicant cannot meet ZDO 703.10(F)(4)(a) which requires that “[e]xcavation below the level of the seasonal groundwater table shall not be used in balancing fill volumes against excavation volumes.” The proposed conditions of approval explicitly require this standard be met. As the applicant explains, water is only present in the ditch during flood events. Since excavation of the new portions of the ditch would be at the same level as the existing ditch no excavation would occur below the level of the seasonal groundwater table. I agree with the applicant that it is at least certainly feasible that the condition of approval can be complied with and satisfy ZDO 703.10(F)(4)(a).

The appellant also argues that ZDO 703.10(F)(4)(b) is not satisfied, which requires that the “mean annual groundwater level shall be determined by soil morphology, or other available data on groundwater conditions.” Again, there is a proposed condition of approval that requires that this standard be met. The applicant also explains that hand excavations were conducted which determined the mean annual groundwater level is more than two feet below the base of the ditch. According to the applicant, this means groundwater will not affect the proposed development, and the proposed development will not affect the groundwater table. I agree with the applicant that the groundwater table has been determined. Even if the mean annual groundwater table has not been determined, the proposed condition of approval requires such a determination and such a determination is feasible. With the proposed condition of approval, ZDO 703.10(F)(4)(b) is satisfied.

Finally, the appellant argues that the applicant has not satisfied ZDO 703.10(F)(4)(e), which requires that a “professional engineer or licensed architect shall certify that the amount of material removed balances the amount of fill material.” According to the appellant, the engineer failed to describe the method by which the engineer made such a determination. I agree with the applicant that there is nothing in ZDO 703.10(F)(4)(e) which requires a specific description of the method used to make the determination, only the certification. ZDO 703.10(F)(4)(e) is satisfied.

The applicant has satisfied all the requirements for a FDP.⁵

3. Principal River Conservation Area Permit

The appellant does not make any independent challenges to the PRCA permit findings. Therefore I adopt and incorporate the Planning Director's findings in this decision. The PRCA permit approval criteria are satisfied.

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** applications Z0416-15-F and Z0421-15-R, with the following conditions of approval.

F. CONDITIONS OF APPROVAL

Floodplain Management Conditions of Approval

I. General Conditions

- A. Approval of this land use permit is based on the submitted written narrative and plan(s) dated October 2, 2015. No work shall occur under this permit other than which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with the document(s) and the limitation of approval described herein.
- B. Approval Period: The approval of this Floodplain Development Permit is valid for four years from the date of the final 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, or the approval will become void.
 - a. "Implemented" means at least one major development permit shall be obtained and maintained, or if a major development permit is not required to complete the development contemplated by the approved FDP, "implemented" means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained.

⁵ The appellant does not make any independent challenges to the PRCA permit findings. The Planning Director's findings, which I adopt and incorporate, explain how the approval criteria for the PRCA permit are satisfied.

- i. A “major development permit” is:
 1. A building or manufactured dwelling placement permit for a new primary structure that was part of the FDP approval; or
 2. A permit issued by the County Engineering Division for parking lot or road improvements that were part of the FDP approval.
 - C. Time Extension: If the approval of this Floodplain Development Permit is not implemented within the initial approval period established by Subsection 703.09(F), a two-year extension may be approved pursuant to Section 1310.
 - D. 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.
- II. County Permitting Requirements:
- A. The applicant shall obtain all other necessary permits from those federal, state, or local governmental agencies from which prior approval is required.
 - B. A Development Permit is required by the County Transportation Engineering Division for the construction of the proposed new roadway/improvements to the East Jerrys Lane right-of-way. The construction of the new roadway must meet County Transportation Engineering standards and permitting requirements, along with applicable FEMA NFIP standards.

- a. Survey data identifying the location of the right of way, the existing road and the existing ditch and the proposed driveway. Trees would need to be shown.
 - b. Plan view of the proposed construction.
 - c. Existing and proposed contours.
 - d. Depth to groundwater table.
 - e. Elevations of the proposed road and the existing road including the ditch as are needed to compare to the 100 year flood event elevations.
 - f. Profile of the proposed road including the existing ground line.
 - g. A profile of the proposed realignment of the ditch. It should show a portion of the upstream and downstream ditch along with the existing slopes.
 - h. Hydraulic analysis of the ditch. Compare the capacity and velocity of the existing and proposed ditches. It may be more instructive to determine what storm occurs at top of bank and if the proposed top of bank for the new ditch will be at the same elevation. Show the low point in the top of bank where the flood breaches.
 - i. Cut and fill analysis.
 - j. Revised Planting Plan requiring County approval that shall:
 1. Seek to preserve at least one (1) of the larger trees that are currently identified for removal.
 2. Augment the Planting Plan with additional vegetation that will best mitigate erosion.
- C. Pursuant to FEMA, NFIP, and County Transportation Engineering regulations, the Development Permit to construct the proposed new roadway, along with any other County development permits, must be finalized in accordance with the permitting requirements of the County Transportation Engineering Department and any other applicable County agencies.

- D. Failure to finalize any County development permits will be cause for revocation of this Floodplain Development Permit, and will result in County Code violations that, if unresolved, will lead to fines, penalties, and other enforcement action, as necessary.
- E. The portion of the rerouted ditch on the subject property will be maintained so that the flood carrying capacity is not diminished.

III. Standards for Fill:

A. Balanced Cut & Fill Standards:

- a. The proposed roadway project shall be conducted as outlined in the submitted Figure 2, Grading Plan, and Figure 4, Cross Sections.
- b. The fill shall be balanced with at least an equal amount of material removal from on-site.
- c. Excavation below the level of the seasonal groundwater table shall not be used in balancing fill volumes against excavation volumes.
- d. The mean annual groundwater level shall be determined by soil morphology, or other available data on groundwater conditions.
- e. Balancing of fill shall occur at the same time as the fill is placed on the development site.

B. The following uses or activities are not subject to the provisions of Subsection 703.10(F)(4):

- a. Removal and/or fill necessary to plant new trees or vegetation;
- b. Removal and/or fill required for the construction of storm-water runoff detention facilities and/or structures; and
- c. Removal and/or fill required for the construction of other facilities such as levees designed specifically to reduce or mitigate flood impacts.

Principal River Conservation Area Conditions of Approval

I. General Conditions:

- A. Approval of this land use permit is based on the submitted written narrative and plan(s) dated October 2, 2015. No work shall occur under this permit other than which is specified within these documents. It shall

be the responsibility of the property owner(s) to comply with the document(s) and the limitation of approval described herein.

- B. The approval of this Sandy River PRCA permit is valid for four years from the date of the final 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, or the approval will become void.
- a. "Implemented" means all major development permits shall be obtained and maintained, or if a major development permit is not required to complete the development contemplated by the approved PRCA permit, "implemented" means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained.
 - i. A "major development permit" is:
 - 1. A building or manufactured dwelling placement permit for a new primary structure that was part of the PRCA permit approval; or
 - 2. A permit issued by the County Engineering Division for parking lot or road improvements that were part of the PRCA permit approval.
 - b. If approval of this PRCA permit is not implemented within the initial approval period established by Subsection 704.09(F), a two-year extension may be approved pursuant to Section 1310.
- C. 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.

II. Standards for Buffers/Setbacks from Rivers & Streams

A. Exceptions to Buffers/Setbacks:

- a. Pre-Existing Development: Pursuant to Subsection 704.05(A)(2), the proposed improvements to the existing East Jerrys Lane right-of-way, which is located about 55 feet from the mean high water line of the Sandy River, shall not encroach any closer to the mean high water line of the Sandy River than the existing East Jerrys Lane right-of-way.

III. Vegetation Preservation & Restoration Standards for River & Stream Buffers/Setbacks:

- A. Native Vegetation Preservation: Pursuant to Subsection 704.07(A), a minimum of 75 percent of the buffer/setback area, which is 100 feet from the mean high water line of the Sandy River, shall be preserved with native vegetation.

- B. Tree Cutting & Grading: Pursuant to Subsection 704.07(B), tree cutting and grading shall be prohibited within the buffer/setback, except as follows:

- a. Tree cutting and grading is permitted in conjunction with the proposed gravel roadway/right-of-way improvements that are being permitted through Subsections 704.05(2), to the extent necessary to accommodate the proposed gravel driveway.

- b. Disturbed areas that are outside the footprint of structures and other improvements shall be restored with native vegetation, as illustrated generally by the submitted Figure 5, "Planting Plan."

- i. Prior to Approval of the Transportation Engineering Development Permit: The applicant will develop a revised Planting Plan requiring County approval that will:

1. Seek to preserve at least one (1) of the larger trees that are currently identified for removal.
2. Augment the Planting Plan with additional vegetation that will best mitigate erosion.

- c. The required vegetation shall be planted as soon as it is reasonably feasible within the parameters of on-site construction activities and seasonal requirements for plantings.

IV. Other Agency Standards:

- A. A Development Permit is required by the County Transportation Engineering Division for the construction of the proposed new roadway/improvements to the East Jerrys Lane right-of-way.

DATED this 15th day of March, 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).