

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

Regarding an Application for a Conditional Use	)	<b>Case File No.</b>
Permit for Commercial Forest Activities	)	<b>Z0491-15-C</b>
In Conjunction with a Forest Use.	)	<b>(Mr. Tree)</b>

**A. SUMMARY**

1. The owner and applicant is Wilbur Akins & Mr. Tree Incorporated.
2. The subject property is located at 8540 SE 172<sup>nd</sup> Avenue, Happy Valley, OR 97086. The legal description is T1S R3E, Section 30A, Tax Lots 1200 and 1401 W.M. The subject property is 2.64 acres and is zoned FF-10 – Farm Forest – 10 Acre Minimum.
4. On March 17, 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 March 17, 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 Sandy Ingalls discussed the staff report and recommended approval of the application.
3. The applicant and his representatives testified in support of the application.
4. No one testified in opposition to the application.
5. At the conclusion of the public hearing the Hearings Officer closed the record.

### C. DISCUSSION

The subject property is a 2.64-acre parcel zoned FF-10. The property is located at 8540 SE 172<sup>nd</sup> Avenue, Happy Valley, OR 97086. The subject property is part of a narrow strip of land in unincorporated Clackamas County between Multnomah County to the north and the City of Happy Valley to the south. The applicant also owns land to the south in the City of Happy Valley which is used in the business. The business has been operating on the property for some time. Complaints from the City of Happy Valley led to code enforcements proceedings which resulted in the present conditional use permit (CUP) application for commercial uses in conjunction with forest operations. The business conducts small and large forest harvest operations, does land clearing work, removes trees, clears stumps, and processes non-merchantable timber into firewood. The subject property currently contains the applicant's home and his mother's home, garage, shed, equipment storage building, repair building, and shop building. The application proposes to remove one of the buildings and construct a new office building. The business has access from an easement on the north. There is a large graveled area in the middle of the site where larger trucks enter and exit the property.

The March 10, 2016 staff report thoroughly analyzes the applicable approval criteria and explain why most of the conditional use approval criteria are satisfied. As there was no opposition to the application, it would be a waste of the County's money and resources to review and repeat all of the findings in the staff report. I therefore adopt and incorporate the findings in the staff report in this decision, except as follows.

The staff report recommended denial until the requirements for the septic system could be met pursuant to Clackamas County Zoning Ordinance (ZDO) 1006.07. The staff report explains that the application proposes to use portions of the applicant's property south of the subject property as the drain field for the septic system from the two residences on the subject property. At the time of the staff report, the applicant had not executed an easement to allow use of the southern property for a septic system drain field. Prior to the public hearing, the applicant executed and recorded an easement grating use of the southern property for the drain field. The County septic expert testified that the

easement resolved all County issues with the septic system. Therefore, all of the applicable approval criteria for a CUP have been satisfied.

The only remaining issues are arguments regarding proposed conditions of approval. The staff report has a number of proposed conditions of approval that the applicant seeks clarification of. Initially, the applicant had concerns about proposed condition of approval IV. (4) regarding sight distances, but after discussions with County staff those concerns were satisfied. The applicant would like to amend proposed condition of approval IV. (5), which would require that proposed building J and the required parking spaces be setback at least 60 feet from the SE 172<sup>nd</sup> Avenue right of way. Although the required setback is only 30 feet, the County requested a sixty foot setback to accommodate future plans to realign SE 172<sup>nd</sup> Avenue. The applicant explained that a 60-foot setback would eliminate the necessary room for trucks to maneuver on the rest of the property. The County and the applicant agreed to the following amendment:

“Proposed building ‘J’ and required new parking spaces shall be setback a minimum of 60 feet from the SE 172<sup>nd</sup> right-of-way to the extent reasonably practicable while maintaining all of the existing and approved uses.”

The applicant would like to amend proposed condition of approval IV. (6), which among other things requires “[a]ll parking and maneuvering areas shall be paved.” The proposed condition of approval was proposed pursuant to ZDO 1015.03(B), which provides that “\* \* \* parking, loading and maneuvering areas shall be hard surfaced, unless a permeable surface is required to reduce surface runoff, as determined by the Department of Transportation and Development.” There are some areas, particularly in the middle of the property, that are currently graveled that the applicant would prefer not to pave. Initially, the applicant argues that the term “hard surfaced” in ZDO 1015.04(B) does not necessarily mean “paved.” According to the applicant, hard surfaced could also be satisfied by compacted gravel. ZDO 1015.03(B) applies to areas inside the Metro urban growth boundary (UGB). ZDO 1015.03(C) applies to areas outside the Metro UGB and provides such areas “\* \* \* shall be surfaced with screened gravel or better, and shall provide for suitable drainage.” While the applicant’s argument is not unreasonable, I believe ZDO 1015.03(C) illustrates that the ZDO drafters knew how to differentiate

between situations when gravel is acceptable and when it is not. ZDO 1015.03(B) also gives the Department of Transportation (DTD) significant discretion to allow non-hard surfaces when necessary for drainage. I also agree with the applicant that the non-CUP activities on the subject property need not comply with the paving requirements. Therefore, the first sentence of the proposed condition of approval is amended as follows:

“All commercial parking, loading, and maneuvering areas shall be hard surfaced unless the Department of Transportation and Development determines they may be graveled for drainage purposes.”

The applicant initially had concerns with proposed condition of approval III. (2), but after discussion with County staff those concerns were satisfied. The applicant also has concerns with proposed conditions of approval IV. (1) & (9)(c). Those proposed conditions of approval address any frontage improvements in the County right of way. The applicant explains that no frontage improvements are proposed by the application or required by the County, so the conditions are unnecessary. County staff explained that proposed condition of approval IV. (1) is merely boilerplate language that provides that if there are any improvements in County right of ways that they must meet County roadway standards. If there are no improvements then there are no standards that need to be met. County staff also agreed that the word “street” should be removed from proposed condition of approval IV. (9)(c).

As discussed later, the City of Happy Valley has submitted proposed conditions of approval in addition to those proposed by County staff. The County proposed condition of approval IV. (3), which provides: “Approval from the City of Happy Valley shall be provided for aspects of the business that occur within city jurisdiction.” I do not see that any aspect of the proposed CUP for the County property is dependent upon any City of Happy Valley approvals. Therefore, I agree with the applicant that the issues with the City of Happy Valley should be decided by the City of Happy Valley and are not pertinent to this application. Proposed condition of approval IV. (3) is amended as follows:

“This approval does not approve any uses within the City of Happy Valley. The applicant should consult the City of Happy Valley regarding its requirements for any uses the applicant makes of its property located within the City of Happy Valley.”

Proposed condition of approval II. (4) is similar in that it provides: “The applicant

is required to obtain all permits required by the City of Happy Valley.” For the same reasons as proposed condition of approval IV. (3), proposed condition of approval II. (4) is amended to the same language as IV. (3).<sup>1</sup>

There is apparently some enmity between the applicant and the City of Happy Valley. As mentioned earlier, it was the City of Happy Valley that instigated the code enforcement proceedings against the applicant. Apparently, there is also a dispute between the applicant and the City as to what type of permit is necessary to continue the operations ongoing within the City. The City of Happy Valley proposed six additional conditions of approval that it believes the County should impose. The City’s first argument is that there should be a reciprocal maintenance and access agreement between the County and City sites. While this would make sense if they properties were in different ownership, it is not necessary when all of the properties are in the same ownership. The first City proposed condition of approval is rejected.

The City’s second argument is that the applicant should dedicate right of way along SE 172<sup>nd</sup> Avenue. ZDO 1007.04(G) provides that new developments “may” be required to dedicate land for right of way purposes if “deemed necessary” by the DTD. As DTD explains, such dedications are necessary if needed to safely accommodate traffic expected by development. DTD further explains that there is no need for additional right of way dedications to handle the traffic on SE 172<sup>nd</sup> Avenue. The second City proposed condition of approval is rejected.

The City’s third argument is that the access onto SE 172<sup>nd</sup> Avenue must meet intersection spacing and sight distance requirements. As County staff explains, the intersection spacing requirements are already met and sight distance requirements are already addressed by proposed condition of approval IV. (4). The third City proposed condition of approval is rejected.

The City’s fourth argument is that the applicant should maintain an at least six-foot tall solid vegetative screen along the SE 172<sup>nd</sup> Avenue frontage. ZDO 1009.05(A) requires screening to reduce visual impacts for “certain areas,” and ZDO 1009.05(C) requires screening around “the material or equipment.” Appropriate screening for these

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<sup>1</sup> At the public hearing, County staff testified that a ZDO section was inadvertently included in proposed condition of approval II. (6). The reference to ZDO section 1009.08 has been removed.

areas is provided in the site plan. Furthermore, such a vegetative screen could easily interfere with the required site distances for the access to SE 172<sup>nd</sup> Avenue. The fourth City proposed condition of approval is rejected.

The City's fifth argument is that all driveways, vehicular parking, and circulation areas within the site should be paved. That issue was addressed earlier with an amended proposed condition of approval. The fifth City proposed condition of approval is rejected.

The City's sixth argument is that the applicant should be required to obtain approval of a conditional use permit from the City of Happy Valley before commencing any activities on the subject property. The applicant disputes whether a conditional use permit is even necessary from the City. While I take no position on whether a CUP is necessary to continue operations in the City, it would not make sense to require the applicant to obtain a permit it might not need. The City provides no authority for this proposed condition of approval, and I am not aware of any. As discussed earlier, the applicant will need to resolve its issues with the City regarding its property within the City. The sixth City proposed condition of approval is rejected.

#### **D. 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 Z0491-15-C, with the following conditions of approval.

#### **E. CONDITIONS OF APPROVAL**

##### **I. General Conditions:**

- 1) Approval of this land use permit is based on the submitted written narrative and plan(s) originally submitted November 25, 2015. Additional materials were submitted through January 25, 2016 and deemed complete January 25, 2016. 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 this document(s) and the limitation of approval described herein.
- 2) The applicant is advised to take part in a Post Land Use Transition meeting. County staff would like to offer you an opportunity to meet and discuss this decision and the conditions of approval necessary to finalize the project. The purpose of the meeting is to ensure you understand all the conditions and to identify other permits necessary to complete the project. If you like to take

advantage of this meeting please contact Deana Mulder, Clackamas County Engineering at (503) 742-4710 or at [deanam@clackamas.us](mailto:deanam@clackamas.us)

- 3) **Prior to the issuance of building permits**, the applicant shall submit a Statement of Use to Lori Phillips. She can be contacted at (503) 742-4433 or [loriphi@clackamas.us](mailto:loriphi@clackamas.us). The statement of use is used to calculate the Transportation System Development charge. A Transportation System Development Charge (TSDC) is included in the final calculation of the building permit fees for new instructional projects; this includes additions and tenant improvements that increase the number of daily trips to the site.
- 4) If approved, the conditional use 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. "Implemented" means all major development permits shall be obtained and maintained for the approved conditional use, or if no major development permits are required to complete the development contemplated by the approved conditional use, "implemented" means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained. A "major development permit" is:
  - a. A building permit for a new primary structure that was part of the conditional use approval; or
  - b. A permit issued by the County Engineering Division for parking lot or road improvements required by the conditional use approval.
- 5) This Conditional Use approval is granted subject to the above and below stated conditions. Failure to comply with any of the conditions of approval constitutes a violation of this permit and may be cause for revocation of this approval.
- 6) 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 responsibility 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. Planning and Zoning Conditions:** Sandy Ingalls, (503) 742-4532, [sandying@clackamas.us](mailto:sandying@clackamas.us)

- 1) Development of the subject property is subject to the provisions of ZDO Sec.1203 and those other relevant codes and ordinances adopted by the Board of County Commissioners pursuant to subsec. 1001.03 of the ZDO, including, but not limited to, the County Roadway Standards, County Excavation and Grading Ordinance, and Oregon Structural Specialty Code, etc.
- 2) A conditional use permit for existing commercial forest activities in conjunction with forest use including: small and large forest harvest operations, land clearing, tree removal, stump clearing and processes non-merchantable timber into firewood and installs hardwood floors. It also includes the storage of equipment used in the business. On average 17 of the 45 people employed are reporting on-site, they then leave for the job sites, while the rest report on site to work in the office or shop, etc. Buildings on site (tax lots 1200 and 1401, County) include two homes, garage, equipment storage building, shed, repair building, shop building, proposed shop and proposed office trailer. One of the dwellings is occupied by the business owner (tax lot 1200), the other by the applicant's elderly mother (tax lot 1401). Hours of operation are from 6am to 3pm. The site takes access off SE 172<sup>nd</sup> Ave.
- 3) Any outdoor lighting [ZDO 1005.05(A) and (B)] shall be located and designed so that it does not shine onto adjacent properties or right-of-ways. If lighting will be installed, the applicant will submit an outdoor lighting system design plan prior to installation of the outdoor lighting system for review and approval by Planning and Zoning Division.
- 4) This approval does not approve any uses within the City of Happy Valley. The applicant should consult the City of Happy Valley regarding its requirements for any uses the applicant makes of its property located within the City of Happy Valley.
- 5) **Prior to final occupancy:** All signs shall comply with Section 1010 of the ZDO, state regulations; and signs shall be maintained.
- 6) **Prior to building permit approval:** the applicant shall submit a landscape plan to the County's Planning and Zoning Arborist, Sandy Ingalls for review and approval prior to planting, illustrating the location of the vegetation and a legend, per ZDO Section 1009, including subsections 1009.02, 1009.03, 1009.04, 1009.05, and Table 1009-1 requirements, to be planted within and around the proposed structure and parking lot. A minimum of 25% of the site shall be landscaped with a minimum of 75% of the required landscape from Table 1009-1, being planted with a mix of 50% conifer and 50% deciduous native and/or drought-tolerant plants and trees. The site shall be landscaped prior to final Certificate of Occupancy. The applicant will also submit a one year vegetation guarantee to the County, prior to final Certificate of Occupancy.

- 7) **Trash & Recycling: Prior to final occupancy permit issuance:** the applicant shall illustrate to Linda Preisz of the Planning Division that a trash and recycling enclosure does exist on site, or submit plans for their refuse and recycling enclosure to be reviewed pursuant to Section 1021. Contact Linda Preisz, Planning & Zoning Division, 503-742-4528, [lindap@clackamas.us](mailto:lindap@clackamas.us). She can provide the necessary information about size of service trucks and appropriate containers. She also must sign off on behalf of the service provider(s). Detailed information, including ZDO 1021, is available on the county web site [www.co.clackamas.or.us](http://www.co.clackamas.or.us) under “Garbage & Recycling.”
- 8) **Prior to final occupancy** Install one bicycle parking space on site per Table 1015-4 and ZDO Section 1015.05 requirements.

**III. Building Code Division Conditions:** Richard Carlson, (503) 742-4769, [richardcar@co.clackamas.or.us](mailto:richardcar@co.clackamas.or.us)

- 1) All construction activities, and all changes of use (occupancy type), shall comply with applicable Oregon Specialty Codes and local ordinances. All such codes and ordinances apply to all such activities, even when permits and inspections are not required.
- 2) Compliance with the following conditions is required prior to the commencement of any new use or occupancy:
  - a. All necessary development permits (septic, building, electrical, grading, driveways, Manufactured home or RV placement, etc.) for the property, facility, and associated buildings shall be obtained.
  - b. The plans must meet the minimum structural integrity and life safety requirements of the applicable Oregon Specialty Codes.
  - c. Any additional information required by the Building Codes Division, such as engineering, details, and specifications, must be provided to the Plans Examiner reviewing the project.
  - d. All necessary permits and approved plans must be issued and maintained onsite as required.
  - e. All required inspections, corrections, and final approval must be obtained.

**IV. Engineering Division Conditions:** Ken Kent, (503) 742-4673, [KenKen@co.clackamas.or.us](mailto:KenKen@co.clackamas.or.us)

*Traffic Engineering and Development Review staff have visited the site and reviewed the application.*

The following items are project requirements from the Department of Transportation and Development’s Development Engineering Division. These conditions of

approval are not intended to include every engineering requirement necessary for the successful completion of this project, but are provided to illustrate to the applicant specific details regarding the required improvements that may prove helpful in determining the cost and scope of the project. These conditions are based upon the requirements detailed in the County's Comprehensive Plan (Comp Plan), the County's Zoning and Development Ordinance (ZDO) and the County's Site Development and Roadway Construction Standards (Roadway Standards). Additional requirements beyond those stated in the conditions of approval may be required. The applicant may discuss the requirements of the project with staff at any time.

The requirements specifically required by the Comp Plan and the ZDO cannot be modified by the Development Engineering Division. However, the requirements detailed in these conditions of approval, derived from the Roadway Standards, are based upon nationally accepted standards and engineering judgment and may be modified pursuant to Section 170 of the Roadway Standards. The applicant is required to provide sufficient justification to staff in the request. Staff shall determine if a modification is warranted.

**Development Engineering recommended conditions of approval:**

- 1) All frontage improvements in, or adjacent to Clackamas County right-of-way, or on site, shall be in compliance with *Clackamas County Roadway Standards*.
- 2) The applicant shall obtain a Development Permit from Clackamas County Department of Transportation and Development prior to the initiation of any construction activities associated with the project.
- 3) This approval does not approve any uses within the City of Happy Valley. The applicant should consult the City of Happy Valley regarding its requirements for any uses the applicant makes of its property located within the City of Happy Valley.
- 4) The applicant shall provide adequate sight distance at the driveway approach on to SE 172<sup>nd</sup> Avenue, per Section 240 of the Clackamas County Roadway Standards. Sight distance shall be no less than 555 feet to the north and 500 feet to the south. A sight line easement shall be provided across Tax Lot 13E30A 01400 to the south for the portion of sight line that extends outside the public right-of-way.
- 5) Proposed building "J" and required new parking spaces shall be setback a minimum of 60 feet from the SE 172<sup>nd</sup> right-of-way to the extent reasonably practicable while maintaining all of the existing and approved uses.
- 6) All commercial parking, loading, and maneuvering areas shall be hard surfaced unless the Department of Transportation and Development determines they may be graveled for drainage purposes. The applicant shall provide adequate on site

circulation for the parking and maneuvering of all vehicles anticipated to use the site, including a minimum of 24 feet of back up maneuvering room for all 90-degree parking spaces. The applicant shall show the paths traced by the extremities of anticipated large vehicles (delivery trucks, fire apparatus, garbage and recycling trucks), including off-tracking, on the site plan to insure adequate turning radii are provided for the anticipated large vehicles maneuvering on the site.

- 7) Parking spaces shall meet minimum and maximum *ZDO* section 1015 requirements, both in number and dimensions. The site plan shall include dimension for the parking stalls and back up areas. The applicant shall stripe each parking space in accordance with *ZDO* subsection 1015. The plans shall list the number of parking spaces required and the number of parking spaces provided. The minimum number of parking spaces is 12. The applicant shall label all compact, carpool, disabled (minimum of one required), and loading berth spaces on the plans. Parking layout geometry shall be in accordance with *ZDO* Table 1015-1 and *ZDO* Figure 1015-1.
- 8) Prior to certificate of occupancy, the applicant shall provide an Engineer's cost estimate to Clackamas County Engineering for any unfinished improvements required by conditions of approval. The estimate shall be submitted for review and approval of quantities of asphalt concrete, aggregates, and any other required improvements and associated construction costs.
- 9) Prior to the issuance of a building permit, the applicant shall submit to Clackamas County Engineering Office:
  - a) Written approval from the local Fire District for the planned access, circulation, fire lanes and water source supply. The approval shall be in the form of site and utility plans stamped and signed by the Fire Marshal.
  - b) Written approval from the Department of Transportation and Development for surface water management facilities and erosion control measures.
  - c) A set of site improvement construction plans, including a striping and signing plan, for review, in conformance with *Clackamas County Roadway Standards* Section 140, to Deana Mulder in Clackamas County's Engineering Office and obtain written approval, in the form of a Development Permit.
    - i) The permit will be for driveway, drainage, parking and maneuvering areas, and other site improvements.
    - ii) The minimum fee is required for eight or fewer, new or reconstructed parking spaces. For projects with more than eight parking spaces, the fee will be calculated at a per parking space rate according to the current fee

structure for commercial/industrial/multi-family development at the time of the Development Permit application.

- iii) The applicant shall have an Engineer, registered in the state of Oregon, design and stamp construction plans for all required improvements, or provide alternative plans acceptable to the Engineering Division.

DATED this 22<sup>ND</sup> 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).