

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

Regarding an appeal by Ian Walsh of a planning director ) **FINAL ORDER**  
decision denying a proposed six lot subdivision of a 21- )  
acre parcel located at 20230, 20242, and 20248 SE Veneer ) **Z0064-23-SS**  
Lane in unincorporated Clackamas County, Oregon ) **(Firwood Subdivision)**

**A. SUMMARY**

1. On February 7 2023, Ian Walsh (the “applicant”), filed an application for approval of a subdivision to divide a 23 acre parcel into six lots.

a. The property proposed for subdivision is located at 20230, 20242, and 20248 SE Veneer Lane; also known as tax lots 03400, 03500, and 03600, Section 20, Township 2 South, Range 5 East, of Willamette Meridian, Clackamas County; also known as Lots 3, 4, and 5 of the Firwood Industrial Park Subdivision Plat No. 4614 (the “site”). The site is zoned RI (Rural Industrial). Abutting properties to the west, north, and east are zoned TBR (Timber). Properties to the south, across Highway 26, are zoned RFFF-5 (Rural Residential Farm Forest, 5-acre minimum lot size) and TBR.

b. The site currently consists of three platted subdivision lots, each of which is developed with an onsite wastewater treatment system (“septic system”) serving multiple buildings on the same lot. The applicant proposes to divide each of the three existing lots in two, resulting in a six-lot replat, with each of the three existing septic system serving two lots.

2. On June 15, 2023, the planning director (the “director”) issued a written decision concluding that the proposed subdivision will create three new “sewer systems” as defined by Oregon Administrative Rule (OAR) 660-011-0060(1)(f).<sup>1</sup> Footnote 4 of Table 604-1 of the Clackamas County Zoning and Development Ordinance (the “ZDO”), Policy 7.A.9.1 of the Clackamas County Comprehensive Plan, and OAR 660-011-0060(2)(a) prohibit the establishment of new sewer systems outside urban growth boundaries or unincorporated communities. Therefore, the director denied the application. (Exhibit 1).

3. On June 22, 2023, attorney Wendie Kellington filed a written appeal of the director’s decision on behalf of the applicant. (Exhibit 10).

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<sup>1</sup> OAR 660-011-0060(1)(f) provides, in relevant part:

Sewer system" means a system that serves more than one lot or parcel...and includes pipelines or conduits, pump stations, force mains, and all other structures, devices, appurtenances and facilities used for treating or disposing of sewage...

4. Clackamas County Hearings Officer Joe Turner (the “hearings officer”) held a public hearing to receive testimony and evidence regarding the appeal. County staff testified in support of the director’s decision. Representatives of the applicant testified in support of the appeal. No one else testified orally or in writing, other than written comments from service providers. The only contested issue in this case is whether the subdivision will result in the establishment of new sewer systems outside urban growth or unincorporated community boundaries.

5. The hearings officer concludes the applicant sustained the burden of proof that the proposed subdivision will not “establish new sewer systems outside urban growth boundaries or unincorporated community boundaries” in violation of footnote 4 of ZDO Table 604-1, Clackamas County Comprehensive Plan Policy 7.A.9, and OAR 660-011-0060(2), and the application otherwise complies or can comply with the applicable approval criteria of the ZDO subject to conditions of approval that ensure such compliance occurs in fact. Therefore the hearings officer grants the appeal, reverses the planning director’s decision, and approves the proposed subdivision based on the findings and conclusions adopted or incorporated herein and subject to the conditions of approval at the end of this final order.

## **B. HEARING AND RECORD**

1. The hearings officer received testimony at the public hearing about the appeal on July 20, 2023. All exhibits and records of testimony have been filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the statement required by ORS 197.763 and disclaimed any *ex parte* contacts, bias, or conflicts of interest. The following is a summary by the hearings officer of selected testimony offered at the public hearing.

2. County planner Lizbeth Dance summarized the director’s decision and the applicable approval criteria. She noted that the applicant proposes to divide a 21-acre parcel consisting of three platted lots into six new lots. The site is located in the rural area and zoned RI. The director denied the application because approval of the proposed subdivision would create three new “sewer systems” as defined by OAR 660-011-0060(1)(f).

3. County planning director Jennifer Hughes noted that the only issue in this case is whether the proposed subdivision will create new “sewer systems” as defined by OAR 660-011-0060(1)(f). The ZDO does not define the term “sewer system.” Therefore, the County relies on the definition of that term in OAR 660-011-0060(1)(f).

a. The three lots that make up the site are currently served by three separate lawfully established septic systems, one on each parcel, that serve multiple buildings on the same parcel. The proposed subdivision would further divide each of the three existing lots, creating six new lots. As a result, the three existing septic systems would each serve buildings on two lots. The existing septic systems would therefore

constitute “sewer systems” as defined by OAR 660-011-0060(1)(f), as they would serve more than one lot or parcel, even though the subdivision will not cause or require any physical change to the existing septic systems on the site.

b. ZDO 604 regulates uses in the RI zone. ZDO Table 604-1 lists the uses permitted in the RI zone, including:

i. “Sewer System Components that Serve Lands Inside an Urban Growth Boundary, subject to ORS 660-011-0060(3).”<sup>2</sup> This use is subject to footnote 4, which provides “Components of a sewer system that serve land outside urban growth boundaries or unincorporated community boundaries are prohibited;” and

ii. “Sewer Systems and Extensions of Sewer Systems to Serve Land Outside an Urban Growth Boundary and Unincorporated Community, subject to ORS 660-011-0060(4)” which allows sewer systems that are necessary to mitigate a public health hazard. This use is subject to footnote 5, which provides “The use is limited to sewer systems that: are designed and constructed so that their capacity does not exceed the minimum necessary to serve the area within the boundaries described under ORS 660-011-0060(4)(b)(B), except for urban reserve areas as provided under OAR 660-021-0040(6); and do not serve any uses other than those existing or allowed in the identified service area on the date the sewer system is approved.”

c. Uses that are not included in the table are prohibited. The sewer systems that would be created by approval of this subdivision application are neither of the types of sewer systems listed in ZDO Table 604-1. Therefore, the sewer systems that would be created by approval of this subdivision application are prohibited in the RI zone.

d. The comprehensive plan and OAR both prohibit the creation of new sewer systems serving lands in the rural area, except as necessary to alleviate a public health hazard. The zoning code implements the comprehensive plan, which implements the OARs.

e. The applicant argues that the proposed subdivision will not “create” anything. However, approval of the subdivision will “create” three new lots that are served by septic systems located on separate lots, which is a “sewer system” as defined by OAR 660-011-0060(1)(f). This is consistent with *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010), where LUBA concluded that a proposed septic system serving two separate lots was not allowed, but the same system could be approved if the two lots were consolidated into a single lot.

f. She argued that LCDC amended Goal 11 in 1998 in response to the *Lincoln Co.* decision cited by Ms. Kellington.

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<sup>2</sup> ZDO Table 604-1 contains a scrivener error, erroneously referring to “ORS 660-011-0060.” This should refer to OAR 660-011-0060.

4. Attorney Wendie Kellington and engineer Dan Symons appeared on behalf of the applicant, Ian Walsh.

a. Mr. Symons noted that the site was the subject of several prior land use approvals, including County approval of the existing septic systems and other development on the site. The site is fully developed; there is no room for additional development that would utilize the existing septic systems.

b. Ms. Kellington summarized the appeal and her PowerPoint presentation (Exhibit 16).

i. She noted that the applicant is proposing to replat Lots 3, 4, and 5 of the previously approved Firwood Industrial Subdivision to create six new lots. The site is currently developed with 20 industrial buildings and three septic systems, one on each of the three existing lots. No changes are proposed to the existing septic systems or buildings and no new “development” is proposed. There is no room for any additional buildings on the site. The proposed plat will merely draw three “artificial lines” through the site to create the new lots

ii. She argued that staff are misreading Goal 11 (OAR 660-011)

(A) OAR 660-011-0060(2)(a) prohibits the “establishment” of new sewer systems outside the UGB. OAR 660-011-0060(1)(f) defines “sewer system.” OAR 660-011-0060(1)(f) defines “Establishment of a sewer system.” However, definitions are not prohibitions and staff are impermissibly conflating the definition of “sewer system” with the regulatory requirement not to allow the “establishment of a new” sewer system. Staff are ignoring the words “creation” and “new.” The *Linn County Farm Bureau* case cited by the County is inapplicable. In that case, the County was proposing to establish an entirely new septic system. In this case there are three existing systems that will not be altered in any way by the proposed subdivision. No new systems will be created.

(B) The Court of Appeals addressed the establishment and extension of water systems subject to OAR 660-011-0065 in *DLCD v. Lincoln Co.*, 144 Or App 9 (1996). The Court held that “establishment” refers to the creation of a new system in an area where none was present before while the term “extension” refers to the expansion of an existing system into a previously unserved area.

(C) Goal 11 differentiates between the presence, extension, and establishment of sewer and water systems, prohibiting local governments from relying on the “presence, establishment, or extension of a water or sewer system to allow residential development of land outside a UGB.” In this case, the proposed subdivision may result in the “presence” of a sewer system, but it will not “establish” a “new” sewer system as prohibited by Goal 11. The use of different terms demonstrates different intent.

The legislature differentiates between the presence of existing sewer systems and the “establishment” of new systems.

(D) In this case the presence of a sewer system will not facilitate additional development, citing *Foland v. Jackson County*, 61 Or LUBA 264, aff’d 239 Or App 60 (2010).

iii. The Statewide Planning Goals and the comprehensive plan do not apply to the proposed subdivision. The County may only apply standards that have been codified in the ZDO, citing ORS 215.416(8). ZDO 1105 sets out the approval criteria for land divisions and that section does not include any citations to the Goals, OAR, or the comprehensive plan.

iv. A land division is not a “use” that would be listed in ZDO Table 604-1. Footnote 4 of ZDO Table 604-1 only applies to sewer systems components that serve lands inside a UGB. The septic systems on the site are located outside of the UGB. ZDO 604 does not provide that uses that are not listed are prohibited. Other Code sections do include that language.

5. The hearings officer closed the record at the conclusion of the hearing and took the matter under advisement.

### **C. DISCUSSION**

1. ZDO 1307.14 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The applicant must carry the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence.

2. ZDO Table 604-1 lists the uses permitted in the RI zone, including:

a. “Sewer System Components that Serve Lands Inside an Urban Growth Boundary, subject to ORS 660-011-0060(3)” subject to footnote 4, which provides “Components of a sewer system that serve land outside urban growth boundaries or unincorporated community boundaries are prohibited;” and

b. “Sewer Systems and Extensions of Sewer Systems to Serve Land Outside an Urban Growth Boundary and Unincorporated Community, subject to ORS 660-011-0060(4)”<sup>3</sup> subject to footnote 5, which provides:

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<sup>3</sup> ORS 660-011-0060(4) allows sewer systems outside the UGB or unincorporated community when necessary to mitigate a public health hazard.

The use is limited to sewer systems that: are designed and constructed so that their capacity does not exceed the minimum necessary to serve the area within the boundaries described under ORS 660-011-0060(4)(b)(B), except for urban reserve areas as provided under OAR 660-021-0040(6); and do not serve any uses other than those existing or allowed in the identified service area on the date the sewer system is approved.”

3. These provisions implement Clackamas County Comprehensive Plan Policy 7.A.9, which prohibits, with certain exceptions:

The establishment of new sewer systems outside urban growth boundaries or unincorporated community boundaries. 7.A.9.1;

The extension of sewer lines from within urban growth boundaries or unincorporated community boundaries in order to serve uses on land outside those boundaries. 7.A.9.2; and

The extension of sewer systems that currently serve land outside urban growth boundaries and unincorporated community boundaries in order to serve uses that are outside such boundaries and are not served by the system on July 28, 1998. 7.A.9.3

Policy 7.A.9 implements OAR 660-011.060(2)(a)-(c).

4. The Code does not define several of the terms used in the above quoted sections of ZDO Table 604-1 and Policy 7.A.9. Policy 7.A.9 implements and reiterates the terms of OAR 660-011. Therefore, the hearings officer finds that it is appropriate to rely on the definitions in OAR 660-011-0060(1), which provides, in relevant part:

(a) “Establishment of a sewer system” means the creation of a new sewage system, including systems provided by public or private entities.

(b) “Extension of a Sewer System” means the extension of a pipe, conduit, pipeline, main, or other physical component from or to an existing sewer system in order to provide service to a use, regardless of whether the use is inside the service boundaries of the public or private service provider. The sewer service authorized in section (8) of this rule is not an extension of a sewer;

...

- (e) “Sewage” means the water-carried human, animal, vegetable, or industrial waste from residences, buildings, industrial establishments or other places, together with such ground water infiltration and surface water as may be present;
- (f) “Sewer system” means a system that serves more than one lot or parcel...and includes pipelines or conduits, pump stations, force mains, and all other structures, devices, appurtenances and facilities used for treating or disposing of sewage or for collecting or conducting sewage to an ultimate point for treatment and disposal...

5. Neither the Code nor the OARs define the term “system.” Therefore, the hearings officer must look to the plain and ordinary meaning of that term. *Sarti v. City of Lake Oswego*, 106 Or. App. 594, 597, 809 P.2d 701 (1991). Merriam-Webster Dictionary defines “system” as “a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose.” “System.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/system>. Accessed 3 Aug. 2023.

6. The hearings officer finds that ZDO Table 604-1 does not prohibit the proposed subdivision.<sup>4</sup>

a. In this case there are no existing “sewer systems” on the site. Each of the three existing lots includes a septic system serving development on that lot. The hearings officer finds that the existing septic systems on the site are “sewage systems” as that term is used in OAR 660-011-0060(1)(a) (emphasis added); the septic systems are “systems” for treating and disposing of “sewage.” However, the septic systems are not “sewer systems” as defined by OAR 660-011-0060(1)(a) (emphasis added), because they do not “[s]erve[] more than one lot or parcel...”.

i. This case is distinguishable from *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010). In that case the County was proposing to construct a new sewage system to serve a proposed park. In this case, the sewage systems currently exist and approval of the subdivision will not alter, expand, or extend those systems.

b. Approval of the proposed subdivision will change the legal status of the existing septic systems. The septic systems will become “sewer systems” as defined by OAR 660-011-0060(1)(f), because the septic systems will serve more than one lot after recording of the subdivision.

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<sup>4</sup> The hearings officer assume for sake of this analysis that the Code prohibits sewer systems in the rural area other than the two types listed in ZDO Table 604-1.

c. However, approval of the subdivision will not “establish” a “sewer system,” as it will not “*create*[...] *a new sewage system...*” (emphasis added). Nothing new will be created by approval of the subdivision. The sewage systems currently exist and approval of the subdivision will not require any changes to those existing sewage systems. Therefore, approval of the subdivision will not violate prohibition on the establishment of new sewer systems outside a UGB or unincorporated community provided in ZDO Table 604-1, Policy 7.A.9.1, and OAR 660-011-0060(2)(a).

d. Approval of the subdivision will not extend sewer lines from within the UGB or unincorporated community boundaries to serve rural lands. Therefore, approval of the subdivision will not violate Policy 7.A.9 or OAR 660-011-0060(2)(b).

e. Approval of the subdivision will not extend existing sewer systems that currently serve land outside the UGB or unincorporated community boundaries to serve rural lands that were not served by the systems on July 28, 1998. Although the subdivision will change the legal status of the existing septic systems, to “sewer systems,” approval of the subdivision will not extend those systems. Therefore, approval of the subdivision will not violate Policy 7.A.9.3, or OAR 660-011-0060(2)(c).

7. The proposed subdivision complies with all other applicable approval criteria, based on the affirmative findings in the director’s decision. The hearings officer adopts those findings as his own and approves the proposed subdivision subject to conditions of approval necessary to ensure actual compliance with those approval criteria.

#### **D. CONCLUSION**

Based on the above findings and discussion, the hearings officer concludes that the proposed subdivision does or can comply with the applicable approval criteria, provided the applicant complies with conditions of approval warranted to ensure that the proposed development in fact complies with those standards. Therefore the application should be approved subject to the attached conditions of approval.

#### **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 Z0064-23-SS (Firwood Subdivision), subject to the following conditions:

#### **Conditions of Approval**

1. Approval of this land use permit is based on the submitted written narrative and plan(s) filed with the County on February 7, 2023. No work shall occur under this permit other than which is specified within these documents, unless otherwise required or specified in the conditions below. It shall be the responsibility of the property owner(s) to comply with this document(s) and the limitation of any approval resulting from the decision described herein.



2. Pursuant to ZDO 1105.09, this approval is valid for four years from the date of the final decision. If the County's final decision is appealed, the approval period shall commence on the date of the final appellate decision. During this four-year period, the final plat shall be recorded with the County Clerk, or the approval will become void. If a final plat is not recorded within the initial four-year approval period, a two- year time extension may be approved pursuant to ZDO Section 1310; however, approval of a time extension is not guaranteed.
3. Finalizing this approval requires the completion of a final plat, the form and content of which shall comply with this decision and applicable provisions of Chapters 11.01 and 11.02 of the Clackamas County Code and Oregon Revised Statutes Chapters 92, 94, 100, and 209. The final plat shall be prepared by a registered professional land surveyor and submitted to the County for review. None of the individual parcels may be sold, transferred or assigned until the final plat has been approved by the County Surveyor and recorded with the County Clerk.
4. Utilities shall be installed in a coordinated manner and consistent with the requirements of the district or company serving the development. Except where otherwise prohibited by the utility district or company, all new or relocated utilities shall be installed underground.
5. All existing, proposed, and required easements shall be shown upon the final plat. New easements shall include a statement that the easements are for the lots shown and any future divisions thereof.
6. Prior to final plat approval, the existing onsite wastewater treatment systems shall comply with the requirements of the County Septic and Onsite Wastewater Program and the associated regulations of the Oregon Department of Environmental Quality for community onsite wastewater treatment systems. At a minimum, this will require an application, including the items listed in OAR 340-071-0500, and review fee for each of the three systems that will be serving more than one lot. Each application must include information and plans describing how the system is to be operated, maintained, and financed. Required easements for the shared systems shall be shown on the final plat.
7. Shared vehicle access easements encompassing the minimum 20-foot wide access road from SE Veneer Lane to the lots within the plat shall be provided. The easement shall encompass the existing access road and drive aisle improvements. The applicant shall provide a site plan identifying existing improvements and the easements serving the new lots.
8. Written approval from Sandy Fire District #72 shall be submitted indicating adequate emergency access is available or can be provided to each lot.

9. Prior to recording of the final plat, the applicant's attorney, surveyor or engineer shall provide written verification that all proposed lots have legal access and utility easements and storm drainage easements as required.

### **ADVISORY NOTE**

This advisory note is not a part of the decision on this land use permit. It is not a condition of land use approval and is not subject to appeal. In the context of this decision, it is advisory and informational only; however, it reflects a requirement of an applicable regulation other than the Zoning and Development Ordinance.

1. Due to the number of lots served, a new road name is required by the County Addressing and Road Naming Code. A road name that conforms to the Code shall be selected and must be approved by county staff prior to Planning and Zoning approval of the final plat. Addresses will be assigned to the site when the draft final plat is routed for County staff review. Road name signage that conforms to County standards must be installed prior to approval of the final plat.

DATED this 7th day of August 2023.



Joe Turner, Esq., AICP  
Clackamas County Land Use Hearings Officer

### **APPEAL RIGHTS**

ZDO 1307.14(D)(6) 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).