

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

Regarding an Appeal of a Planning Director)	Case File No.
Decision Approving a Time Extension for)	Z0263-19-TE
Approval of a Conditional Use Permit.)	(Neighborhood Church)

A. SUMMARY

1. The owner and applicant is the Neighborhood Church Assembly of God.
2. The appellant is Andrew Rice.
3. The subject property is located at 21065 SW Stafford Road, Tualatin, OR 97062. The legal description is T2S, R1E Sections 29, Tax Lot 300, W.M. The subject property is approximately 27.40 acres and is zoned RRFF-5 - Rural Residential Farm Forest – 5 Acre.
4. On September 26, 2019, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the conclusion of the public hearing, the record was closed.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on September 26, 2019. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearings, 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 Planning Director’s decision, 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 planners Carol Dawson and Clay Glasgow discussed the Planning Director’s decision.
3. Paul Owens and Ray Hacke testified in favor of the application.
4. Andrew Rice, Mitch Jones, and Julie Mast testified against 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, testimony, and argument; one additional week for responses to the new evidence, testimony, and argument; and one additional week for the applicant's final legal argument.

C. FACTS

This case involves the appeal of a Planning Director decision approving a two-year time extension for the applicant's previously approved conditional use permit to expand the existing church and school facility with a three-story multi-purpose building. The underlying decision approving the conditional use permit set out the relevant facts:

"The subject property is located at 21065 SW Stafford Road, Tualatin, OR 96062, at the intersection of SW Stafford Road and SW Ek Road. The subject property is approximately 27.49 acres and is zoned RRFF-5. The Neighborhood Church Assembly of God (church) currently operates the property pursuant to an earlier conditional use permit for the church and Stafford Academy (school). The church proposes to build a new three-story multi-purpose building for the church and school. The new building will be for indoor sports, classrooms, a kitchen, ministry, fellowship, and an open area. There will also be a parking garage.

"The subject property is irregularly shaped and sloped, particularly along the western boundary. The site is covered in grasses, trees, and formal landscaping, as well as the existing buildings and parking lot. The property is surrounded on all sides by RRFF – 5 properties ranging from 2 to 18.12 acres. Interstate I-205 borders the property to the north. The western edge of the property adjoins a ravine and creek and includes a Habitat Conservation Area (HCA). Previous approvals for the property required various protections and buffers for the HCA. In two separate applications not at issue here, the County approved a Construction Management Plan (CMP) in the HCA. The new building would encroach within the buffer area and require mitigation." Stafford Academy, Z0002-15-C (September 11, 2015).¹

The Planning Director approved the time extension request.² This appeal followed.

¹ The underlying decision was titled Stafford Academy after the school on the property.

² 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

Under the conditions of approval in Stafford Academy, the applicant had four years to implement the approved conditional use. The applicant determined that it would not implement the conditional use within the four-year time period, so the applicant applied for a two-year extension pursuant to Clackamas County Zoning and Development Ordinance (ZDO) 1310.01, which provides:

“A time extension may be permitted only when specified elsewhere in this Ordinance for specific land use permit types. A time extension requires review as a Type II application pursuant to Section 1307 and shall be subject to the following standards and criteria:

- “A. A time extension application shall be submitted to the Planning Director prior to the expiration of the initial approval period for the land use permit.
- “B. The proposed development as originally approved, or as modified pursuant to Section 1309, shall be consistent with the relevant provisions of this Ordinance in effect on the date the application for a time extension is submitted, provided that the application is complete when submitted or is made complete pursuant to Subsection 1307.07(E)(4); and
- “C. There shall have been no changes on the subject property or in the surrounding area that would be cause for reconsideration of the original decision.”

1. ZDO 1310.01(A)

ZDO 1310.01(A) requires that the request for a time extension be submitted before the expiration of the initial approval. The expiration of the initial conditional use approval was September 14, 2019. The request for the time extension was submitted on June 5, 2019. Therefore, ZDO 1310.01(A) is satisfied.

2. ZDO 1310.01(B)

ZDO 1310.01(B) requires that the “proposed development shall be consistent with the relevant provisions of the ZDO in effect on the date the application for a time extension is submitted.” The Planning Director found that the “proposed development remains consistent with Clackamas County Zoning Ordinance provisions in effect at this time. Planning Director Decision 6.

Opponents argue that the conditional use approved in Stafford Academy is no longer consistent with the relevant portions of the ZDO. One of the approval criteria for conditional uses is ZDO 1203.03(A), which requires that the proposed use be listed as a conditional use in the underlying zoning district. There was no opposition to the original application and no dispute that the proposed use was allowed as a recreational use in the underlying RRFF-5 zone. Although there have been no relevant changes to the ZDO regarding recreational uses in the RRFF-5 zone, opponents argue that subsequent cases have rendered the originally approved conditional use no longer consistent with the ZDO.

Subsequent to the conditional use approval at issue in this case, Neighborhood Church applied for a conditional use permit to allow, among other things, outdoor sports fields on the subject property. That case generated substantial opposition, and opponents raised an issue that had not been raised before regarding outdoor sports fields – whether they were recreational uses. In that case, I agreed with opponents that “ball fields” were not potential conditional uses in the RRFF-5 zone. Neighborhood Church, Z0289-16-C, October 26, 2016. According to the current opponents (which include some of the same opponents from Neighborhood Church), the decision in Neighborhood Church means that the conditional use at issue in the time extension is also not an allowable recreational use in the RRFF-5 zone.

Initially, the current indoor facility is significantly different than the outdoor facility at issue in Neighborhood Church. County planning staff submitted a memorandum explaining how the conditional use at issue in this case is still consistent with the ZDO and how the Neighborhood Church proposed conditional use was different. I do not see that I need to determine what, if any effect, my interpretation in Neighborhood Church would have on this application if this were the original application. As staff explained at the public hearing, ZDO 1310.01(B) involves situations where the relevant ZDO provisions have changed. For instance, if a conditional use approved a park in a certain zone, and prior to the application for a time extension the ZDO was changed to no longer allow parks in that zone – then ZDO 1310.01(B) would likely require a denial of a time extension request. In the present case, however, recreational uses were allowed in the RRFF-5 zone when the original application was approved and recreational uses are still allowed in the RRFF-5 zone. Opponents are not arguing that the ZDO has changed. Opponents are essentially arguing

that the initial decision was wrongly decided (based on the subsequent interpretation in Neighborhood Church). An application for a time extension is not an opportunity for opponents to reargue the merits of the initial decision.³

Therefore, ZDO 1310.01(B) is satisfied.

3. ZDO 1310.01(C)

ZDO 1310.01(C) requires that “there have been no changes on the subject property or in the surrounding area that would be cause for reconsideration of the original decision.” Opponents argue that there have been such changes in the surrounding area – involving additional development and primarily increased traffic. Frankly, I am not sure what to make of this provision. Under opponents’ view, potentially any changes that could result in a different resolution of the application if were filed in the present day would be enough to deny the time extension request. This would certainly seem to be at odds with the County’s accepted practice. The applicant has provided evidence that such time extensions are routinely approved. As far as I can tell, a time extension has never been denied under ZDO 1310.10(C). The issue, however, as far as I can tell has never been raised before.

Initially, opponents argued that if there were such changes then the applicant would be required to show compliance with all of the original approval criteria from the initial application that was approved in the time extension application. I understand opponents now to argue that if such changes have occurred then the time extension application must be denied and the applicant must file a new conditional use application and essentially start over. I tend to agree with opponents that if ZDO 1310.01(C) is not satisfied then the time extension application would not be the proper venue to re-argue the merits of the underlying application and a new application would have to be filed.

The problem, however, is determining what changes in the surrounding area would constitute grounds for “reconsideration of the original decision.” At the public hearing, staff suggested that it would have to be a very significant change to justify denying a time extension request. I am not exactly sure how to draw the line at what constitutes grounds

³ The parties also discussed an interpretation made by the Planning Director pursuant to ZDO Section 106 Authorization of Similar Uses that determined that a similar type application to that which was denied in Neighborhood Church could be permitted as a similar use. Z0487-17-I – which is apparently on appeal to the Land Use Board of Appeals. Given my disposition under ZDO 1310.01(B), I do not see that the interpretation in Z0487-17-I has any bearing on this case.

for reconsideration of the original decision, but I tend to agree with staff that it would have to be something very significant. Otherwise, applicants would essentially have to re-justify their original approval. In the present case, opponents argue that increased development from churches and residential use have resulted in failing traffic conditions, particularly with respect to the I-205 exchange. While the subject property is certainly in an area of heavy traffic – and traffic tends to increase almost everywhere – I do not see that reasonably typical development as is the case here requires an applicant to lose its approval and be forced to file a brand new application. Wherever the line for how significant changes in the property or surrounding area must be, I do not see that that line is reached in the present case.

Therefore, ZDO 1310.10(C) is satisfied.

4. RLUIPA

The applicant also argues that the County treats non-religious entities differently than churches in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 USC 2000cc *et seq.* In a September 23, 2019 letter to the County, the applicant listed three demands:

- 1) Extend [the applicant's] implementation period for construction of its multipurpose facility for six years, with an option to extend for another five if implementation cannot be accomplished in the 10 years dating retroactively to the County's initial approval of the Church's CUP in 2015;
- 2) Approve [the applicant's] application for a CUP to construct outdoor soccer facilities; and
- 3) Amend the Zoning Ordinance to ensure that the County treats religious and government entities equally in compliance with RLUIPA.

Although this letter is in the record for the time extension application, the applicant's attorney confirmed at the public hearing that those demands were directed towards the County in general rather than tailored specifically towards this proceeding. The applicant's demands are outside the scope of my review in this proceeding. I therefore express no opinion on the RLUIPA claims.

As discussed above, the applicant has satisfied all of the requirements of ZDO 1310.10. Therefore, the applicant is entitled to an extension of its conditional use 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** the application for a time extension in Z0263-19-TE, with the following conditions of approval.

F. CONDITIONS OF APPROVAL

1. The requested Time Extension is subject to the original conditions of approval specified in the written decision of the Clackamas County Planning and Zoning Division dated September 14, 2015 for File No. Z0002-15-C.
2. Per Section 1203.05(C): If the approval of a conditional use is not implemented within the initial approval period established by Subsection 1203.05(A), a two-year time extension may be approved pursuant to Section 1210, Time Extension. This approval extends the approval period for the conditional use to be implemented to September 14, 2021.

DATED this 4th day of November, 2019.


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).