

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

Regarding an Appeal of a Planning Director	)	<b>Case File No.</b>
Decision Denying an Alteration of a Nonconforming	)	<b>Z0227-18-E</b>
Use To Allow Amplified Music.	)	<b>(Viewpoint Springwater)</b>

**A. SUMMARY**

1. The applicant and owner is Gail Herman of Viewpoint on Springwater, Inc.
2. The appellant is Gail Herman.
3. The subject property is located at 20189 South Springwater Road, Estacada, Oregon 97023. The legal description is T3S, R3E, Section 13, Tax Lots 2000 and 2100, W.M. The subject property is approximately 4.5 acres and is zoned RRF5-5 – Rural Residential Farm Forest – 5 Acre.
4. On November 11, 2018, 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 November 11, 2018. 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 planner Rick McIntire discussed the Planning Director’s decision and recommended that the Planning Director’s decision be upheld.

3. Gail Herman, Tim Herman, and Kim Trehwella testified in favor of the application.
4. Doug and Linda Towsley testified against the application.
5. At the conclusion of the public hearing, the Hearings Officer closed the record.

### **C. FACTS**

This case involves the appeal of a Planning Director decision denying an alteration of a nonconforming use. The subject property is located at 20189 South Springwater Road, Estacada, OR 97023, and is zoned RRRFF-5. The applicants own and operate the Viewpoint on Springwater Restaurant and Lounge. Former owners of the property had established the restaurant and lounge as a nonconforming use. The owners of the restaurant and lounge in 2012 obtained an alteration to the nonconforming use to allow an outdoor patron and serving area in the wooded area south of the existing buildings. The 2012 alteration of the nonconforming use specifically disallowed amplified music. The current application seeks an alteration of the nonconforming use to allowed amplified music.<sup>1</sup> The Planning Director's decision describes the property and requested alteration:

“The applicant is requesting approval of an alteration of an existing nonconforming use, a restaurant and grocery store use, to permit use of a permitted outdoor patron seating area for amplified and unamplified musical performances in the wooded area immediately to the south of the main structure and parking lot from 11:00 am to 10:00 pm daily.

“Currently, use of this area is limited as follows: The outdoor patron seating area shall be fenced with sight obscuring materials on all sides; *no amplified sound systems are permitted* and any area lighting shall be limited in height and directed in such a manner as to avoid the spread of lighting off-site. The approved outdoor area is approximately 100 ft. by 120 ft. in size and is required to be fenced/obscured with sight-obscuring materials from off-site view. In the prior application approving the outdoor seating area, the applicant for that permit proposed that this area would be open 11 am to 10 pm, Fridays through Sundays during good weather, but the applicant also indicated that additional operating days and hours were contemplated on an occasional, infrequent basis.

“The subject property is approximately 4.5 acres in size and fronts the west side of S. Springwater Rd., approximately 300 ft. south of the

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<sup>1</sup> The applicant has already been using the area for amplified music.

intersection with S. Stormer Rd. in the Springwater area. The subject property is developed with the existing 7800 s.f. restaurant and store building and a large graveled parking area between the building and the road. The existing restaurant structure is located to the north side of the subject property and approximately 165 from the south end of the property. The structure is located more than 300 from the west property boundary, approximately 15 ft. from the north property boundary and approximately 125 ft. from the road to the east. The subject property is level and the southeast corner of the property is wooded. The surrounding area can be characterized as a mix of rural residential, farm, forest and park uses. McIver State Park, a very large parcel of land, is located directly across Springwater Rd., but at a much lower elevation than the subject property.” Planning Director Decision 4-5 (emphasis added).

An alteration of a nonconforming use determination is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director denied the alteration of the nonconforming use to allow amplified music.<sup>2</sup> This appeal followed.

#### **D. DISCUSSION**

##### **1. Alteration of a Nonconforming Use**

Clackamas County Zoning and Development Ordinance (ZDO) 1206.06(B) provides the standards for altering a nonconforming use:

“Alterations Not Required by Law: An alteration of a nonconforming structure or other physical improvements, or a change in the use, requires review as a Type II application pursuant to Section 1307, Procedures, and shall be subject to the following standards and criteria:

- “1. The alteration or change will, after the imposition of conditions pursuant to Subsection 1206.06(B)(4), have no greater adverse impact on the neighborhood than the existing structure, other physical improvements, or use; and
- “2. The nonconforming use status of the existing use, structure(s), and/or physical improvements is verified pursuant to Subsection 1206.07.
- “3. The alteration or change will not expand the nonconforming use from one lot of record to

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<sup>2</sup> 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].”

another unless:

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- “4. Conditions of approval may be imposed on any alteration of a nonconforming structure or other physical improvements, or a change in the use, permitted under Subsection 1206.06(B), when deemed necessary to ensure the mitigation of any adverse impacts.”

The only standard at issue in this appeal is ZDO 1206.06(B) regarding whether the proposed alteration would have greater adverse impacts on the neighborhood than the existing use.

The applicants argue that the amplified music is not audible off of the property and is certainly not louder than background noise from Springwater Road. Opponents, on the other hand, argue that the amplified music is very loud and extremely disturbing. The Planning Director agreed with opponents:

“Currently, there are no significant sound generators in the immediate area with the exception of permitted farm equipment on nearby farm operations and relatively low volume of vehicular traffic on this section of Springwater Rd. The immediate neighborhood contains a number of rural residential home sites in an area of flat topography at the top of a steep bluff overlooking the McIver Park and the Clackamas River immediately to the east.

“In the prior application, file no. Z0261-12-E, the Planning Division specifically limited the use of the patron seating area to maintain the relatively quiet ambient noise levels of the immediate neighborhood for the most part. Outdoor musical performances within the limited area of the approved outdoor seating area were generally limited to the hours between 11:00 am and 10:00 pm, Fridays through Sundays during good weather with occasional events outside those limitations. The staff could not see a way to approved amplified music performances without creating significant additional adverse noise impacts upon the surrounding neighborhood.

“The staff’s opinion on this matter is unchanged. The applicant seeks to permit amplified music performances on every day of the week for the entire day of each week. While the actual number of performances may not be that frequent if approved, the point is that they could. Even reducing the hours and days when amplified performances could be permitted would not avoid the creation of additional adverse noise impacts upon residents of the immediate area given the relatively short

distances involved, relatively quiet ambient noise levels in the area and the lack of physical barriers such as topography to limit sound transmission across the flat terrain.

“Public comments have been received indicating that since the applicant has been scheduling amplified music performances prior to seeking land use permit approval, these events have also resulted in higher than normal traffic volumes and numbers of patrons on site. This contributes to an increase in the noise generated by the facility during such events impacting upon nearby residents.

“The applicant states that, if approved, the proposed amplified music performances will have the same or less impact than use of the indoor area within the restaurant, however no acoustical studies have been submitted to substantiate this claim and the staff has no reason to believe such would be the case. The applicant also states that sound levels generated by an event when measured at the road did not exceed the sound levels of passing traffic. While this may or may not be the case, the fact is that permitting amplified music on each and every day of the week for several hours at a time would increase the time period during which nearby residents would experience increased sound levels in the immediate area. Passing traffic is a background level that the County cannot control and is sporadic depending upon time of day, but would be expected to be at its lowest level during the evening hours when performances would be also be occurring.

**“Conclusion:** Based upon the Findings discussed above, the staff finds that the request cannot be approved as it would result in an increase in adverse noise impacts upon the surrounding neighborhood. **This criterion is not satisfied.**” Planning Director Decision 7-8 (emphasis in original).

On appeal of the Planning Director’s decision, the parties essentially repeat their arguments. Initially, opponents argue that noise from the restaurant itself and noise from the parking lots also disturbs neighbors in the area. While this may be true, the property is already approved for a nonconforming use for the restaurant and outdoor seating area. Therefore, any adverse impacts from the existing nonconforming use are not relevant to the proposed alteration of the nonconforming use. The only question is whether the amplified use would have greater adverse impacts on the neighborhood than the existing use.

Generally, determining whether a proposed alteration of a nonconforming use would have greater adverse impacts than the existing use is a speculative endeavor as the exact impact of the proposed alteration is not known. In the present case, however, the

applicant has already been conducting amplified concerts. A number of opponents testified that the noise is very loud even with their windows closed, lasts until late in the evening, keeps them from falling asleep, and is causing serious adverse impacts to their use and enjoyment of their property. In particular, the Towsleys, who live directly north of the property, testified that the amplified music (particularly the bass) rattles the pictures on their walls, prevents them from hearing the television very well, and forces them to use earplugs to try and fall asleep. Although there appears to be quite a bit of antipathy between the applicant and the Towsleys, I believe the Towsleys testimony (which is also supported by other neighbors).

The applicant testified that she conducted a sound test that demonstrated that the amplified noise does not carry to adjoining properties. According to the applicant, the decibel readings demonstrate that there are no greater adverse impacts to neighboring properties. Initially, the sound test was conducted by the owners of the property rather than by any type of expert acoustical engineer. Secondly, and more importantly, the results of this sound test are clearly contradicted by the testimony of neighbors who clearly can hear the amplified music well off of the property. Finally, Kim Trewhella (Trewhella), who lives on the other side of the Towsleys from the restaurant and testified in favor of the application, stated that she could hear the amplified music. Trewhella lives approximately 1000 feet north of the Towsleys and even further from the restaurant, and she can still clearly hear the amplified music. While Trewhella states that music does not bother her, her testimony rather conclusively establishes that the amplified music is clearly audible well off of the property.

While different people's responses to hearing amplified music can certainly be different, I do not think it is unreasonable for opponents to be bothered by music that rattles their pictures, forces them to close windows, and prevents them from falling asleep. The no greater adverse impacts standard is a very exacting standard. Nonconforming uses are uses that are not supposed to occur in the underlying zoning and are only allowed because they existed before the use became nonconforming. Therefore, it is understandable that the ZDO requires a very exacting standard before allowing any alteration of such uses. I agree with the Planning Director and opponents that the proposed alteration would have greater impacts on the existing neighborhood. Therefore, ZDO 1206.06(B)(1) is not satisfied.

## 2. Other Issues

The applicant argues that amplified events are not scheduled all that often. Even if that is true, as the Planning Director stated under the proposed application the applicant could hold such events every day. Furthermore, as the Planning Director stated even reducing hours or days of operation would still create greater adverse impacts on the neighborhood. The applicant also argued that other restaurants are allowed to have amplified music. The applicants did not provide any of the specific details regarding such other restaurants. As staff noted, a number of the establishments noted by the applicant are located within city limits that allow much greater impacts. Furthermore, even if there were other restaurants with the same zoning classification, operating under a nonconforming use permit, seeking the same use (which the applicant has not even remotely established) – each case is a different situation – the application of the same standards can result in a different outcome based upon the facts of the particular situation.

The applicant has not satisfied the approval criteria for an alteration of a nonconforming use.<sup>3</sup>

### E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **DENIES** the nonconforming use alteration application in Z0227-18-E.

DATED this 28<sup>th</sup> day of November, 2018.



Fred Wilson  
Clackamas County Hearings Officer

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<sup>3</sup> The Planning Director's decision also addressed other issues that were not challenged. I agree with the Planning Director's decision on those issues. I therefore adopt and incorporate the Planning Director's decision in this decision, except as discussed earlier.

## **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).