

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

Regarding an appeal by Rick Stringfield of an administrative decision approving an application for a residential addition within the RSCA setback of Milk Creek at 29600 S. Hult Road in unincorporated Clackamas County, Oregon ) **FINAL ORDER**  
) **Z0528-21-RSCA**  
) **(Hendrickson Addition)**

**A. SUMMARY**

1. On November 18, 2021, Rickie Hendrickson (the “applicant”) filed an application for approval of 2,800 square-foot addition to the existing residence (manufactured dwelling) within the 100-foot River and Stream Conservation Area (“RSCA”) setback at 29600 S. Hult Road; also known as tax lot 00500 Section 33D, Township 4 South, Range 3 East of the Willamette Meridian (the “site”). (Exhibit 2).

2. The 0.68-acre site is currently developed with a single-family residence (manufactured dwelling), a gravel surfaced driveway and parking area west of the residence, an old log structure southwest of the residence, and a septic drainfield northwest of the residence. (Exhibit 2A). Milk Creek, a large Type F stream, abuts the south boundary of the site. The site and abutting properties are zoned RA2 (Rural Area Residential, two-acre minimum lot size).

3. On January 31, 2022, the planning director issued a written decision approving the application subject to conditions. (Exhibit 1).

4. On February 14, 2022, Rick Stringfield (the “appellant”) filed an appeal of the director’s decision. (Exhibit 5A).

5. County Hearings Officer Joe Turner (the "hearings officer") conducted a duly noticed public hearing to receive testimony and evidence regarding the appeal. County staff recommended the hearings officer deny the appeal and affirm the director’s decision. The applicant testified at the hearing in support of the application and the appellant testified in support of the appeal. One person testified in writing in support of the application. (Exhibit 8). Contested issues in this case include:

a. Whether the application may be denied based on the applicant’s failure to fully comply with the submittal requirements of ZDO 704.08 and 1307.07(C);

b. Whether the applicant is required to demonstrate compliance with the purpose statements in ZDO 704.01;

c. Whether the proposed building addition will be located closer to Milk Creek than existing structures and development on the site;

d. Whether the size of the proposed building addition is relevant to the applicable approval criteria;

e. Whether county staff were required to conduct a site visit prior to approving the application;

f. Whether allegations of prior clearing and grading violations on the site are relevant to the applicable approval criteria for this application; and

g. Whether the applicant is required to determine the location of the underground powerline easement on the site or the capacity of the existing septic system as part of this application for an RSCA setback exception.

6. Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer denies the appeal, upholds the planning director's decision, and approves casefile Z0528-21-RSCA (Hendrickson Addition).

## **B. HEARING AND RECORD HIGHLIGHTS**

1. The hearings officer received testimony at an online public hearing about this application on March 10, 2022. All exhibits and records of testimony are filed at the 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 following is a summary by the hearings officer of selected testimony offered at the public hearing.

2. County planner Ben Blessing summarized the Staff Report, the applicable approval criteria, and his PowerPoint presentation, Exhibit 10.

a. He noted that Milk Creek, which abuts the south boundary of the site, is a large Type F stream. ZDO 704.04(B) requires that structures be located a minimum of 100 feet from the mean high water line (the "MHWL") of this stream. However, ZDO 704.05(A)(2) provides an exception for:

Repairs, additions, alterations to, or replacement of structures, roadways, driveways, or other development, which is located closer to a river or stream than permitted by the setback requirements of Subsection 704.04, provided that such development does not encroach into the setback any more than the existing structures, roadways, driveways, or other development;

b. In this case the site is developed with a residence (manufacture dwelling) located roughly 65 and 70 feet from the MHWL for Milk Creek and a log structure, which is located significantly closer to the creek than the residence.

c. The applicant proposed to construct a two-story, 2,968 square foot addition to the existing residence. Mr. Blessing recently visited the site and confirmed that the addition will be no closer to the stream than the existing residence and the existing log structure will be located between the proposed addition and the creek. (Exhibit 6). Conditions of approval in the director's decision require that the applicant confirm that the addition is no closer to the MHWL than the existing house. The Code does not require that staff conduct a site visit or inform neighboring residents of the date/time of a site visit.

d. No vegetation removal is needed to accommodate the proposed addition; The applicant will construct the addition in a previously cleared area on the site, including the existing driveway. The applicant is required to retain 75-percent of the existing vegetation within the stream setback.

e. Staff determined that the application was complete when it was submitted.

f. This application only addresses the stream setback issue. The applicant will be required to obtain additional permits and reviews prior to constructing the proposed addition, including building, utility, and septic permits. The county can confirm the location of the powerline easement on the site during review of those permits.

g. ZDO 704.04(A), cited by the appellant, only applies to "principal rivers." Milk Creek is not a "principal river" listed in ZDO 704.03(A).

3. The applicant, Rick Hendrickson responded to issues raised in the appeal and in the appellant's testimony.

a. He testified that the southern wall of the proposed addition will be roughly parallel to and north of the north wall of the log structure on the site and five feet further from the MHWL of the stream than the existing residence.

b. The proposed development will not impact the PGE easement on the site. He had PGE relocate the former overhead powerlines on the site to an underground conduit within an easement in order to allow construction of the proposed building addition. The easement is outside of the planned building footprint.

c. He waived his right to submit a written final argument.

4. The appellant, Rick Stringfield, summarized his education and experience as a professional forester and a member of the county planning commission. He owns the

property south of the site, across Milk Creek. He submitted several photos of the site and surrounding area to illustrate his testimony. (Exhibit 9).

a. The applicant is adding nearly 3,000 square feet to the existing 1,200 square foot residential structure on the site. Based on the applicant's site plan, the proposed addition is located ten feet closer to Milk Creek than the southernmost portion of the existing residence, as illustrated at page 38 of Exhibit 9/Page 16 of Attachment D of Exhibit 9. He argued that the Code prohibits the applicant from locating the proposed addition any closer to the stream than the structure that is being added onto.

b. The applicant or his predecessor in interest previously removed much of the vegetation within the 100-foot stream setback area. That vegetation screened views of the site from his property across the creek. The site is now clearly visible from his property. In 2002 the then owner of the site used a bulldozer to clear vegetation within the stream setback and push dirt over the bank, into the creek to create a gravel parking area in the portion of the site south of the proposed addition. The gravel surfaced area now extends to the top of the stream bank.

c. PGE owns a utility easement across the site. (Pages 77-84 of Exhibit 9/Attachments J and K of Exhibit 9). An underground conduit that carries electrical power to his property is located within the easement. However, the easement document does not specify the location of the easement on the site. Therefore, the applicant cannot confirm that the proposed addition will not impact the easement.

d. ZDO 704.04(A) allows the county to increase the setback up to 150 feet from the MHWL, based on, among other things, the size and design of proposed structures, the topography of the land between the site and the river, and the type and density of existing vegetation between the site and the river.

e. He argued that the application is incomplete, as it does not include all of the information, plans, and documents required by ZDO 704.08.

- i. The applicant's site plan is not drawn to scale;
- ii. The north arrow is pointing the wrong direction;
- iii. The site does not show the boundaries of the site or the slopes/topography of the site;
- iv. The plan does not show the gravel surfaced parking area created in 2002, extending to the top of the stream bank;
- v. The PGE easement for an underground powerline that crosses the site; and

vi. The plan shows an undeveloped triangle between the southwest corner of the existing residence and the southeast corner of the proposed addition. However, this area will actually be developed.

f. The proposed development is inconsistent with the purpose of the RSCA chapter of the Code, ZDO 704.01.

g. The site contains 0.68 acres, not 0.99-acres as listed in the director's decision.

h. The proposed addition includes additional bathrooms. Therefore, the county will need to review the existing septic system on the site to confirm that it capable of accommodating additional discharge volumes from the addition.

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

### **C. FINDINGS**

1. ZDO Table 1307-01 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), an appeal of an administrative decision is 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. Assertions that the application is incomplete are irrelevant. The submittal requirements of ZDO 704.08 and 1307.07(C) are not approval criteria and failure to submit all of the listed information is not in and of itself a basis for denial. In some cases, failure to fulfill all of the submittal requirements may prevent the decision maker from finding that the application complies with an applicable approval criterion. However, that is not the case here. In addition, ZDO 1307.07(C)(2) expressly authorizes the planning director to waive any submittal requirement other than the completed application form required by ZDO 1307.07(C)(1)(a).

3. The hearings officer finds that the application includes most of the required information.

a. The applicant submitted a site plan showing the approximate locations of existing vegetation and development on the site and the location of the proposed development as required by ZDO 704.08(A). (Exhibit 2A). The Code does not require that the site plan be drawn to scale. Based on the photographs Mr. Blessing took during his site visit (pages 3 and 4 of Exhibit 6), the site plan does not show the full extent of the

gravel surfaced areas on the site or the location of existing vegetation. However, that does not affect review of this application.

i. Although not required, the site plan includes a north arrow. The north arrow appears to be inaccurate, based on the aerial photos of the site. (Page 43 of Exhibit 9/page 6 of Attachment E of Exhibit 9). However, this inaccuracy does not impact the county's review of the application.

b. The application includes elevation drawings of the proposed building addition, as required by ZDO 704.08(B). (Pages 85 and 86 of Exhibit 2).

c. The application does not identify the exterior materials to be used on the proposed addition, including type and color of siding and roofing, as required by ZDO 704.08(C). However, this information is not relevant to the applicable approval criteria for this application. The visual impact standard of ZDO 704.04(A) does not apply to this application, as the site is not located on a principal river. However, condition of approval 2.C of the director's decision requires that the applicant submit this information.

d. No grading, filling, or excavating is proposed within the vegetative buffer or filter strip of Milk Creek. All grading, filling, and excavating for the proposed building addition will occur within previously cleared and gravel surfaced areas on the site. Therefore, it is unnecessary to include a cross-section of the vegetative buffer or filter strip as required by ZDO 704.08(D) or a stream buffer restoration plan required by ZDO 704.08(E). However, condition of approval 2.D of the director's decision requires that the applicant submit this information.

4. The purpose statements in ZDO 704.01 are not applicable approval criteria. The goals set out in the purpose statements are achieved through compliance with the implementing regulations and approval criteria. The purpose statements themselves are not relevant unless they include specific approval criteria or the implementing regulations that follow are ambiguous, and resort to the purpose statements is necessary to determine the context and meaning of ambiguous terms. *See, e.g., Beck v. City of Tillamook*, 18 Or LUBA 587 (1990) (Purpose statement stating general objectives only is not an approval criterion); *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479 (2013).

5. The hearings officer finds that the proposed development complies with the approval criteria for an exception to the setback standards.

a. ZDO 704.04(B) prohibits structures within 100 feet from the mean high water line of large streams, including Milk Creek. However, ZDO 704.05(A)(2) provides an exception for:

Repairs, additions, alterations to, or replacement of  
structures, roadways, driveways, or other development,  
which is located closer to a river or stream than permitted

by the setback requirements of Subsection 704.04, provided that such development does not encroach into the setback any more than the existing structures, roadways, driveways, or other development;

b. In this case the applicant is proposing to construct an addition to an existing structure on the site. Based on the appellant's drawing, the proposed addition appears to be ten feet closer to the stream than the existing residence. ((Page 38 of Exhibit 9/page 16 of Attachment D of Exhibit 9). However, the proposed addition is clearly further from the stream than the existing log building on the site. (Exhibits 2A and 6). The plain language of the Code requires that the addition be located no closer to the stream than "[t]he existing structures, roadways, driveways, or other development." Use of the plural rather than the singular, "the structure being repaired, added to, altered, or replaced," shows an intent to require that the addition be no closer to the stream than any other development on the site. The Code does not require that the addition be located no closer than the particular structure that is being added to. The hearings officer finds that the proposed addition complies with ZDO 704.05(A)(2), because it will be no closer to the stream than the existing log structure on the site. Condition 2.a should of the director's decision should be modified to this effect.

6. The size of the proposed building addition is not relevant to the applicable approval criteria. ZDO 704.04(A), cited by the appellant, authorizes increased setbacks based on the size and design of a proposed structure, among other things,. However, ZDO 704.04(A) only applies to "principal rivers" ZDO 704.03(A) defines "principal rivers" as "[l]and that is generally within a quarter mile of the mean high water line of the Clackamas, Sandy/Salmon, Molalla/Pudding, Roaring, Tualatin, and Zig Zag Rivers." Milk Creek is not a "principal river" subject to ZDO 704.04(A). Milk Creek is a "large Type F stream" subject to the setback requirements of ZDO 704.04(B).

7. The fact that Mr. Blessing did not visit the site prior to approving the application is also irrelevant. The Code does not require that county staff conduct a site visit. Mr. Blessing determined that the proposed addition complies with the approval standards of ZDO 704.05(A)(2) based on his review of the application materials and aerial photos of the site and surrounding area. In addition, Mr. Blessing visited the site in response to the appeal and confirmed the information in the site plan.

8. Assertions of prior clearing and grading violations which increased the visibility of the existing and proposed structures on the site are not relevant to the applicable approval criteria for this application, as those uses/activities are not proposed as part of this application. Those clearing activities may constitute a violation of the Code, which the county can address through its enforcement procedures. But they are not relevant to this application. The applicant's past behavior does not show that he cannot or will not comply with the applicable approval criteria. If the applicant sustains the burden of proof that the application complies with the approval standards, or if it can comply

provided certain conditions are imposed, the hearings officer must as a matter of law approve the application subject to those conditions, ORS 197.522(4).

9. The applicant is not required to determine the location of the underground powerline easement on the site or the capacity of the existing septic system as part of this application, because these issues are not relevant to the approval criteria for the proposed RSCA exception. The county will review these issues through its building, utility, and septic permit review processes for construction of the proposed addition.

#### **D. CONCLUSION**

Based on the findings and discussion provided or incorporated herein, the hearings officer concludes that Case No. Z0528-21-RSCA (Hendrickson Addition) should be approved, because the applicant sustained the burden of proof that the application does or can comply with all of the applicable approval criteria.

#### **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 appeal, affirms the planning director's decision, and approves casefile Z0528-21-RSCA (Hendrickson Addition), subject to the following conditions:

#### **Conditions**

##### **1. General Conditions:**

- a. Approval of this land use permit is based on the submitted written narrative and plan(s) dated November 15, 2021. 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.
- b. The approval of this Stream Conservation Area (SCA) permit is valid for four (4) 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.
  - i. "Implemented" means all major development permits shall be obtained and maintained, or if no major development permits are required to complete the development contemplated by the approved SCA permit, "implemented" means all other necessary County development permits (e.g. grading permit, building permit for an accessory structure) shall be obtained and maintained.

(A) A "major development permit" is:



- (1) A building or manufactured dwelling placement permit for a new primary structure that was part of the SCA permit approval; or
    - (2) A permit issued by the County Engineering Division for parking lot or road improvements that were part of the SCA permit approval.
  - ii. If the approval of this SCA permit is not implemented within the initial approval period established by Subsection 704.09(C), a two-year time extension may be approved pursuant to Section 1310.
2. Required Submittal Materials (If Not Submitted With Original Application):
- a. Site Plan: Pursuant to Subsection 704.08(B), and prior to finalization of the Building Permit for the proposed addition, the applicant shall submit a site plan and photographs that show existing vegetation and development within roughly 80 feet of the mean high water line of Milk Creek.
  - b. Advisory Note: A site visit may be required to confirm the proposed development is not encroaching closer to Milk Creek than the existing log structure on the site.
  - c. Exterior Materials: Pursuant to Subsection 704.08(D), and prior to issuance of the Building Permit for the proposed addition, the applicant shall submit a list of the exterior materials to be utilized in the construction of the proposed addition, including the type and colors of siding and roofing.
  - d. Stream Buffer Restoration Plan: Pursuant to Subsection 704.08(F), and prior to issuance of the Building Permit for the proposed addition, the applicant shall provide a Stream Buffer Restoration Plan that illustrates the location, number, and species of vegetation to be planted within the disturbance area. Any exposed soils shall be replanted immediately with native grasses and shrubs.
  - e. Tree Removal is not requested or authorized with this development, unless approved by the Planning and Zoning Division.
3. Standards for Buffers/Setbacks from Rivers & Streams
- a. Exceptions to Buffers/Setbacks:
    - i. Pre-Existing Development: Pursuant to Subsection 704.05(A)(2), the proposed addition to the existing dwelling, which is located roughly 80 feet from the mean high water line of Milk Creek, shall not encroach any closer than the existing log structure on the site.
    - ii. Markers: The location of the maximum setback encroachment must be clearly marked and visible by construction crews and inspectors at all time. At least two markers indicating the maximum extent of the permitted setback

encroachment must be installed, adjacent to the development area. Photos of these markers must be submitted to planning and zoning staff prior to excavation or construction.

4. 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 the area within 100 feet from the mean high water line of Milk Creek, 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:
  - i. Tree cutting has not been requested and is not authorized with this permit. Any exposed ground shall be replanted with native grasses and shrubs.

DATED this 24th day of March 2022.



Joe Turner, Esq., AICP  
Clackamas County Land Use 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).