

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

Regarding an Application for a Zone Change)	Case File No.
From Farm Forest 10-Acre (FF-10) to Rural)	Z0323-19-ZAP
Residential Farm Forest 5- Acre (RRFF-5).)	(Patterson)

A. SUMMARY

1. The applicant is Frank Walker and Associates and the owners are Patrick and Heidi Patterson.
2. The subject property is located at 15028 South Mitchell Lane, Oregon City, OR 97045. The legal description is T3S, R2E, Section 22, Tax Lot 700, W.M. The subject property is approximately 10.09 acres and is zoned FF-10– Farm Forest 10-Acre.
3. On May 21, 2020, 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 May 21, 2020. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. The public hearing was conducted virtually on the Zoom platform due to the corona virus. 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 Melissa Ahrens discussed the staff report and recommended denial of the application.
3. Mike Patterson and Frank Walker 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 left the record open three weeks 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

The subject property is an approximately 10.09-acre parcel zoned FF-10. The subject property is located at 15028 South Mitchell Lane, Oregon City, OR 97045. The subject property is located in a predominantly rural area with an established agricultural character and pattern of development. The subject property is rectangular shaped with a single family residence and two accessory buildings. The applicant previously had a home occupation permit for a plumbing business, but that approval has lapsed. The subject property is in the immediate area of other FF-10 with Rural Residential Farm Forest 5-Acre (RRFF-5) properties beyond that. The applicant seeks to rezone the property to RRFF-5 with the ultimate goal of partitioning the property into two parcels.

D. DISCUSSION

The staff report does a thorough job of explaining how all of the applicable approval criteria are satisfied except for one comprehensive plan requirement. The findings in the staff report are not challenged. Other than the applicant challenging the staff report's finding regarding the one comprehensive plan policy, the findings in the staff report are not challenged. It would be a waste of the County's money and resources to review and repeat all of the unchallenged findings in the staff report. I have reviewed the unchallenged findings in the staff report and I agree with those findings. Therefore, I adopt and incorporate the findings in the staff report in this decision, except as discussed further.

Clackamas County Zoning and Development Ordinance (ZDO) 1202.03 provides the approval criteria for zone changes. The only issue in this case is whether the proposed zone change meets the approval criterion of ZDO 1202.03(A) which requires that the "proposed zone change is consistent with the applicable goals and policies of the comprehensive plan." The staff report explains that all of the goals and policies of the comprehensive plan are met except for Rural Policy 4.NN.11.2, which provides:

“The RRFF-5 zoning district shall be applied when all of the following criteria are met:

- “a. Parcels are generally five acres.
- “b. The area is affected by development.
- “c. There are no natural hazards, and the topography and soils are suitable for development.
- “d. Areas are easily accessible to an Unincorporated Community or incorporated city.

The staff report explains that Rural Policy 4.NN.11.2.(b-d) are satisfied. The only reason the staff report recommends denial of the application is a failure to satisfy Rural Policy 4.NN.11.2.a that “[p]arcels are generally five acres.”

The applicant provided a detailed area study that examined the larger exception area that the property is located in. Under the applicant’s analysis, a majority of the parcels were less than five acres with an average size of 3.25 acres. After the applicant had submitted its application, the County informed the applicant about a 2000 Board of County Commissioners’ (Board) interpretation that found that the area to be examined in determining whether parcels are generally five acres was a quarter-mile radius around the property. Using the quarter-mile radius, a majority of the parcels are not more five acres in size. The staff report recommends denial of the application on this basis:

“Based on Staff’s analysis of this area parcels are ‘generally not five acres’ and the criteria of 4.NN.11.2(a) has not been met (See Exhibit 6). The board of County Commissioners (BCC) has interpreted the use of ‘generally five acres’ to mean parcels that are “less than 6 acres”. The term ‘generally’ is interpreted to mean a ‘simple majority of the parcels within the area under consideration’. Additionally, the BCC has interpreted ‘area’ as meaning a majority of the parcels within a Rural Land Use Designation that are at least partially located within ¼ mile of the boundaries of the property being considered for a zone change, including the parcels being considered for the zone change. This BCC interpretation, made in 2000, through Board Order 2000-57, replaced a previous interpretation of Rural land use policies made in Board Order 93-1179, that was adopted in response to the LUBA appeal of a June 24th, 1992 Hearing’s Officer decision. Board Order 93-1179 found ‘generally’ to mean 2/3 of the parcels in the area under consideration, with ‘area’ defined as the zoning district the property was located in.

“Taking the currently applicable Board Order 2000-57 BCC

interpretation of the subject Rural Comprehensive Plan Policies into consideration, staff has reviewed the properties within the Rural designation that are wholly or partially within ¼ mile of the boundaries of the subject property. Specifically, staff's analysis concluded that there were 33 total properties wholly, or partially, within ¼ mile of the subject property. Of those 33 properties, twelve (12) were 5.99 acres or less and twenty one (21) were 6 acres or more in size. As such, over 50%, or a majority, were 6 acres or more. **Therefore, the parcels are generally not five acres and the criteria of 4.NN.11.2(a) has not been met.**

“The applicant submitted materials in the application (see Appendix 3 in the application) stating that the BCC Board Order does not have the statutory authority to enforce the Comprehensive Plan. Planning staff have communicated with the applicant, since the pre-application project stage, to clarify that the appropriate course of action to change the current board order interpretation would be to submit a request for a new interpretation of the Rural Comprehensive Plan Policies in Chapter 4. The applicant did not submit an application for a new interpretation and has not made such a request part of the current zone change proposal. As such, the BCC's most recent 2000 interpretation of the County's Comprehensive Plan Rural land use policies continues to be relevant for considering the subject zone change's consistency with the legal standard of review required by Zoning and Development Ordinance Section 1202.03(A).” Staff Report 7 (underscoring in original, footnote omitted).

As the final paragraph quoted from the staff report illustrates, the applicant argues that the Board's interpretation should not be binding in this case. The 2000 interpretation was made pursuant to the County interpretation ordinance that is essentially the same as in the current ZDO. At oral argument, I advised the applicant that it had the burden of demonstrating that I was not bound by the Board's 2000 interpretation. I also advised the applicant that there likely was a case pending at the Land Use Board of Appeals (LUBA) that might be addressing some of the same arguments the applicant was making about whether such an interpretation should be binding. Although neither the County nor the applicant discuss it, LUBA did issue a decision on this issue during the open record period. In *Jones v. Clackamas County*, ___ OR LUBA ___ (LUBA No. 2019-135, June 8, 2020), LUBA considered the issue of whether an interpretation under the ZDO could be binding in a separate land use proceeding. In *Jones*, the Planning Director made an interpretation that a proposed sports facility was a potentially allowed conditional use in the RRF5-5 zone as a similar use to recreational uses that are allowed as potential conditional uses. A

soccer club subsequently filed a conditional use to construct such a facility and argued that due to the Planning Director's interpretation, under the ZDO I was required to agree that the proposed sports facility was a similar use to a recreational use and therefore a potential conditional use in the RRFF-5 zone. As the ZDO requires that I be bound by such an interpretation, I agreed with the applicant. LUBA, however, determined that it was error to rely on the Planning Director's interpretation. I do not think it is necessary to attempt to determine the exact parameters of LUBA's decision (the case has apparently been appealed to the Court of Appeals), but suffice it to say that the decision renders reliance on such interpretations almost certainly impermissible.

The only basis for staff's recommendation to deny the application was failure to demonstrate that "[p]arcels are generally five acres." The only basis for staff concluding that parcels are not generally five acres is the 2000 interpretation. Under *Jones*, it would be improper to rely on the 2000 interpretation. Absent the 2000 interpretation, the only proffered analysis for how to determine whether parcels are generally five acres is the analysis provided by the applicant which demonstrates that parcels are less than five acres. While reasonable minds could certainly differ on the size of the area that should be considered under Rural Policy 4.NN.11.2.a, the applicant's preferred analysis is certainly plausible. Absent any remaining argument in opposition to that analysis, I conclude that for purposes of this decision the applicant's analysis is correct.¹ Furthermore, there is no opposition to the application, and, in fact, numerous neighbors submitted their support for the application. Finally, the result of an approval would only result in one additional parcel, so the potential impact is minimal. Therefore, Rural Policy 4.NN.11.2.a is satisfied as well as ZDO 1202.03(A).²

All of the applicable approval criteria are satisfied.³

¹ If in a future case a different interpretation is advanced than a different result could potentially be reached. Absent any opposition, however, I do not see that it would be appropriate for the Hearings Officer to play devil's advocate to try and reach a contrary result.

² I wish to emphasize that I am not disagreeing with the Board's 2000 interpretation or disregarding direction from the Board. Under *Jones*, I believe I am precluded from relying on the Boards' 2000 interpretation. In addition, the applicant provides persuasive evidence that the 2000 interpretation was not meant to apply to the specific situation at issue, including evidence from the Commissioner who signed the 2000 interpretation.

³ Although I ultimately disagree with the staff's recommendation that is through no fault of the staff. At the time the staff report was written, *Jones* had not been issued and there was no reason to believe the Board's 2000 interpretation was not binding.

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** application Z0323-19-ZAP.

DATED this 14th day of July, 2020.



Fred Wilson
Clackamas County Hearings Officer

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 the decision (which date appears above my signature).