

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

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| Regarding an appeal by Ann Delfel of a planning |) | <u>FINAL ORDER</u> |
| director decision denying an application for approval |) | FILE No. |
| of a forest template dwelling at 20988 S Olson Road |) | Z0322-21-FTT |
| in unincorporated Clackamas County, Oregon |) | (Delfel) |

A. SUMMARY

1. On July 8, 2021, Ann Delfel (the “appellant”), filed an application for approval of a Forest Template Test Dwelling to establish a new single family dwelling based on the density of residential development and parcelization of land in the immediate surrounding area, pursuant to former Clackamas County Zoning and Development Ordinance (“ZDO”) section 406.05(D)(3)(f).¹ The applicant proposed to construct the dwelling on the 20-acre parcel located at 20988 S Olson Road; also known as Tax Lot 00605, Section 27, Township 4 South, Range 3 East, Willamette Meridian, Clackamas County (the “site”). The site and surrounding properties are zoned TBR (Timber).

2. On October 14, 2021, the planning director issued a written decision concluding that the application complied with all but one of the applicable approval criteria (Exhibit 1). The planning director concluded that the applicant failed to demonstrate that the site complies with the “template test” set out in ZDO 406.05(D)(3)(f). Therefore the planning director denied the application.

3. The applicant filed an appeal of the planning director’s decision on October 22, 2021 (Exhibit 11).

4. Clackamas County Land Use Hearings Officer Joe Turner (the "hearings officer") held a public hearing about this appeal. County staff summarized the director’s decision. Representatives of the applicant testified in support of the appeal. The Clarkes-Highland CPO submitted written testimony in support of the appeal (Exhibit 19). The only contested issue in this case is whether the site complies with the “template test;” whether a 160 acre square template centered upon the site may be rotated around the center point to include at least part of a minimum of eleven (11) lots of record and a minimum of five (5) existing lawfully established dwellings on the lots within the template area. ZDO 406.05(D)(3)(f)(ii)(C).

5. Based on the findings provided or incorporated herein, the hearings officer finds the applicant failed to sustain the burden of proof that the application complies with the “template test” set out in ZDO 406.05(D)(3)(f). Therefore the hearings officer denies the appeal and affirms the planning director’s decision.

¹ ZDO 406.05 was amended on October 23, 2021. The template test language is now located in ZDO 406.05(D)(3)(h).

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at the duly noticed public hearing about this appeal on December 9, 2021. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the declaration required by ORS 197.763 and staff listed the applicable approval standards. The hearings officer disclaimed any *ex parte* contacts, bias or conflicts of interest.

2. At the hearing, county planner Melissa Lord summarized the history of the site, the director's decision, and her PowerPoint presentation, Exhibit 24. She corrected minor typographical errors in the director's decision, which were later included in the record as Exhibit 23. The applicant is requesting approval of a forest template dwelling on the 20-acre parcel located at 20988 S Olson Road. The site and surrounding properties are zoned TBR (Timber).

a. Based on the predominant soil types on the site, the county must find that a 160 acre square template centered on the site includes at least part of a minimum of 11 lots of record within the template, and a minimum of five lawfully established dwellings exist on the lots within the template area. ZDO 406.05(D)(3)(f)(ii)(C).

b. The county approved a forest template dwelling on the site in 2001, based on the county's prior process of placing a plastic template on the center of a paper tax map of the site and rotating the template around the center of the site to determine the number of legal lots of record and dwellings that fall within the area of the template. At that time the county identified 11 lots of record and seven lawfully established dwellings within the area of the template. The prior owner of the site did not construct a residence on the site and the 2001 approval expired in June 2003.

c. The applicant submitted a new application for approval of a forest template dwelling on the site on July 8, 2021 (Exhibit 1). The county reviewed that application using its current process of using Geographic Information Software (GIS) to determine the center of the site and locate and turn the template. That analysis identified ten lots of record within the area of the template. Therefore, the county denied the 2021 application, because the template does not include 11 lots of record based on the current analysis.

i. The 2021 template includes portions of 14 tax lots, but only 11 lots of record. Tax lots 601, 602, and 604 43E27 are combined as a single lot of record. Tax lots 400 and 1100 are excluded as required by ZDO 406.05(D)(3)(f)(iii)(A) as these tax lots are both larger than 80 acres.

d. In the 2001 analysis (page 7 of Exhibit 24) a small portion of tax lot 2000 fell within the bottom left corner of the template and a corner of tax lot 700 also fell within the template. The 2021 analysis using GIS software determined that there is no

alignment of the template centered on the site that includes both tax lot 2000 and 700. An alignment that includes tax lot 700 results in tax lot 2000 being located 40 feet outside of the template area (page 8 of Exhibit 24). An alignment that includes tax lot 2000 results in tax lot 700 falling outside the template area (page 9 of Exhibit 24).

e. The county received notice from DLCD on August 10, 2020, regarding HB 2225, which amended the template dwelling statute and took effect on January 1, 2020. (Exhibit 21). The county mailed notice of the changes to affected property owners on November 5, 2020 as required by Measure 56.

f. HB 2225 did not have a significant impact on this application. Prior to HB 2225, ORS 215.750 required that the template be “[c]entered on the center of the subject tract...” HB 2225 amended the statute to provide, “As used in this section, ‘center of the subject tract’ means the mathematical centroid of the tract.” In this case, the site is a “perfect rectangle.” Therefore, it is easy to determine the center and the mathematical centroid of the site.

3. The applicant Ann Delfel, testified in support of the appeal.

a. Her family purchased the site in 2016. The site was marketed as a “buildable lot,” based on the 2001 approval. The prior owner of the site drilled a well and constructed a well house and barn on the site. Her brother-in-law met with county staff prior to the purchase and was told that the site was buildable, based on the 2001 approval.

b. In July 2021, she applied for approval of a forest template dwelling. The county denied the application, because the template was 40 feet short of including tax lot 2000 with the template centered on the “mathematical centroid” of the site as required by current ORS 215.750.

c. State law was amended to define the center of a parcel subject to a forest template test as the “mathematical centroid” of the parcel. However, she did not receive notice of this change to state law until November 2020, when it was too late to submit an application prior to the January 1, 2020 effective date of the new law. Marion and Tray Johnson, who are also on the deed for the site, did not receive notice.

e. The proposed dwelling will not impact existing forest practices on surrounding properties. The CPO supports their appeal.

f. She agreed to extend the 150-day clock to accommodate the open record period.

4. County planning manager Lindsey Nesbitt testified that the county previously reviewed applications for forest template dwellings by placing a plastic template on a paper map. The current process using GIS mapping is more accurate.

5. The applicant's brother in law, Marvin Johnson, testified that he met with county staff prior to the applicant's purchase of the property. The planner he met with reviewed the prior template test approval and noted that nothing had changed since the 2001 approval. The planner stated that the site was buildable as far as they could tell, but someone must submit an application in order for the county to make a definitive determination. Mr. Johnson argued that the county could have reviewed the site with GIS in 2016 to confirm the planner's analysis. The lot sizes have not changed since 2001. Therefore, the site should be buildable based on the prior approval.

6. At the conclusion of the hearing, the hearings officer held the record open one week, until December 16, 2021, for anyone to submit new written testimony and evidence and for a second week, until December 23, 2021, for the applicant to submit a final written argument, without any new evidence. The following exhibits were submitted during the open record period:

a. An amended copy of the director's decision correcting the typographical errors that Ms. Lord noted at the hearing (Exhibit 23);

b. A letter from Marvin and Tracy Johnson dated December 16, 2021 (Exhibit 25); and

c. The applicant's closing argument dated December 23, 2021 (Exhibit 26).

C. DISCUSSION

1. ZDO Table 1307-1 authorizes the hearings officer to hear appeals of the planning director's decision. Pursuant to ZDO 1307.13(D)(1), appeals are subject to *de novo* review. 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 hearings officer must decide whether the applicant has carried 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. The hearings officer finds that the application does not comply with the requirements of the template test.

a. The predominant soil types on the site are capable of producing greater than 85 cubic feet per acre per year of wood fiber (Exhibit 10). Therefore, ZDO 406.05(D)(3)(f)(ii)(C) requires that at least part of a minimum of eleven (11) lots of record and a minimum of five (5) lawfully established dwellings exist on the lots within a 160 acre square template centered on the site. Based on the county's GIS analysis, the template contains a maximum of ten lots of record. Tax lot 2000 is located roughly 40 feet outside the boundaries of the template (page 8 of Exhibit 24).

b. This is a change from the 2001 analysis, which was based on the county's prior process using a plastic template and paper map. The current GIS method provides a more accurate analysis. The hearings officer cannot ignore the evidence, which clearly shows that this application does not meet ZDO 406.05(D)(3)(f)(ii)(C).

c. The fact that DLCD and the county failed to provide timely notice of the changes required by HB 2225 is irrelevant to this review. State law does not appear to provide a remedy if the notice was inadequate or untimely. However, even if the law provided a remedy, such remedy is beyond the scope of the hearings officer's authority. In addition, it appears unlikely that the differences between the 2001 and 2021 analyses resulted from changes required by HB 2225, which defined the "center of the subject tract" as "the mathematical centroid of the tract." HB 2225, 2019 Oregon Session Laws. As Ms. Lord noted, the site is a rectangle with 90-degree corners. Therefore, it is fairly simple to determine the mathematical centroid of the site, whether using a paper map and plastic template or GIS software. The changes likely resulted from a slight misplacement of the template in the 2001 analysis. As shown on pages 8 and 9 of Exhibit 24, even a slight shift in the location of the center of the template would be sufficient to include tax lot 2000 and such an error is more likely to occur when conducting the analysis on a paper map.

3. The fact that the applicant's representative met with county staff and was told that the site appeared to meet the template test requirements is irrelevant. As Mr. Johnson testified, the planner stated that the site was buildable as far as they could tell, but someone must submit an application to make a definitive determination. Absent a formal application and county decision, the applicant had no right to rely on statements from county staff. County planning staff owe no duty to the public beyond the common law duty to exercise reasonable care. *Loosli v. City of Salem*, 345 Or 303, 193 P.3d 623 (Or. 2008). The applicant could have protected herself by making the offer to purchase the site dependent on county approval of an application for a forest template dwelling.

4. The nonconforming use provisions of ZDO 1206 are inapplicable in this case.

a. ZDO 1206.02 provides "A nonconforming use may be continued although not in conformity with the regulations for the zoning district in which the use is located." ZDO 202 defines "nonconforming use" as "A use of any building, structure or land allowed by right when established or that obtained a required land use approval when established but, due to a change in the zone or zoning regulations, is now prohibited in the zone."

b. In this case there is no existing use that can be continued. The prior owner of the site obtained approval of a forest template dwelling on the site. However, a residence was never constructed and that approval expired. Therefore, residential use of the site was never legally established and there is no existing use that can be continued.

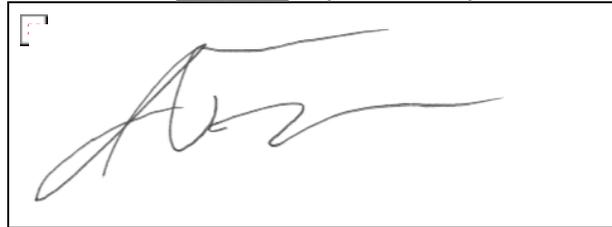
5. The hearings officer understands and sympathizes with the significant financial impact that this decision will have on the applicant. But the hearings officer cannot consider that impact in making this decision, because it is not relevant to the applicable approval criteria. The hearings officer must make this decision based on the laws of Clackamas county and the state of Oregon.

D. CONCLUSION AND DECISION

1. Based on the findings and discussion provided or incorporated herein and the public record in this case, the hearings officer concludes that the applicant failed to sustain the burden of proof that the application complies with ZDO 406.05(D)(3)(f)(ii)(C)

2. Based on the above findings and discussion, the hearings officer hereby denies the appeal and upholds the planning director's decision in the matter of Casefile no. Z0322-21-FTT (Delfel).

DATED this 4th day of January 2022.

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'Joe Turner'. There is a small square icon in the top-left corner of the box.

Joe Turner, Esq., AICP
Clackamas County Hearings Officer

APPEAL RIGHTS

ZDO 1304.01 provides that the Land Use Hearings Officer's decision is the county's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules adopted by LUBA describe when and how an appeal must be filed. Presently, ORS 197.830(8) 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." ZDO 1304.02 provides that 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).