

Variance

Staff Report for Planning Commission Public Hearing

Case File VAR 2022-02

Date: March 3, 2022

Case File: VAR 2022-02 Olson Natural Resources Variance

Applicant: James A. Olson and Jody L. Olson
12406 NW Waker Dr
Portland, OR 97229

Property Owner: James A. Olson and Jody L. Olson
12406 NW Waker Dr
Portland, OR 97229

Situs Address: Unaddressed Lake Dr

Location: South of NE Lake Dr and approximately 170 feet east of NE Regatta Park Rd

Tax Map and Lot: 07-11-11-CD-03900

Comprehensive Plan Designation: Medium-Density Residential District (R-7.5)

Zoning District: Single-Family Residential (R-1-7.5) Zone

Site Size: Approximately 5,402 square feet

Proposal: Construction of a detached single-unit dwelling in the Natural Resource Overlay Zone

Surrounding Land Uses and Zones: North: undeveloped land, houses; R-1-7.5, OS
South: Devils Lake
East: undeveloped land, houses; R-1-7.5
West: houses; R-1-7.5

Authority: Lincoln City Municipal Code (LCMC) 17.76.050.G states that Table 17.76.020-1 identifies the decision authority for each Type III application. Table 17.76.020-1 of LCMC Chapter 17.76 identifies a variance as a Type III application with the decision authority given to the Planning Commission.

Procedure: The Planning and Community Development Department mailed notice to the owners of all properties within 250 feet of the site on February 22, 2022. The *News Guard* published the public hearing notice on March 1, 2022.



Applicable	LCMC Chapter 17.16 Single-Family Residential (R-1) Zone
Substantive	LCMC Section 17.46 Natural Resource Overlay (NR) Zone
Criteria:	LCMC Section 17.756.050 Type III Procedures
	LCMC Section 17.77.140 Variances

BACKGROUND

The subject property (site) is unaddressed and undeveloped. The site is bordered by NE Lake Dr to the north and Devils Lake to the south. The property adjacent to the site's west boundary is developed with a single-unit dwelling. The property adjacent to the site's east boundary is undeveloped, but it is zoned R-1-7.5 for future residential development.

The applicant obtained the services of Kim Biafora with Schott & Associates to determine the location of wetlands, if any, on the site. In the study site area, it was determined that there is no hydrophytic vegetation present, no hydric soil present, no wetland hydrology present, and the study site is not within a wetland. Ms. Biafora's report indicates that wetland occurs just beyond the study site boundary and to the south of the study site along the site's southern boundary and adjacent to Devils Lake (see attached Determination Report). The Determination Report was submitted to the Oregon Department of State Lands (DSL), who subsequently issued a concurrence approval letter on September 2, 2021, concurring that there are no jurisdictional wetlands or other waters of the state within the study area and noting that there are jurisdictional wetlands and water located immediately south of the study area boundary (see attached DSL letter to Jim Olson, dated September 2, 2021).

Since it was determined that no wetland currently exists in the study area, and since DSL concurred, the applicant submitted an application to Planning and Community Development for a claim of map error as allowed under LCMC 17.46.090. Based on the wording of LCMC 17.46.090 and the DSL concurrence letter, the claim of map error application was approved. However, the Oregon Department of Land Conservation and Development (DLCD) brought it to staff's attention that the claim of map error was not approvable because the wetland did, in fact, exist in 1996 when the original mapping of the natural resource overlay zone occurred. The fact that the wetland does not now exist does not negate the fact that the wetland was accurately mapped originally in 1996, and adopted as a natural resource overlay zone. If the wetland had not existed in 1996, and the natural resource overlay zone was adopted on the site anyway, that would be a mapping error.

The site does have a mapped natural resource overlay zone that was mapped correctly at the time of the original overlay zone mapping adoption in 1996. The fact that the natural resource no longer exists does not eliminate the natural resource overlay zone. Per LCMC 17.46.060 a variance must be approved prior to any development occurring within the natural resource overlay zone. Accordingly, the applicant submitted the requested variance for future construction of a dwelling on the site.

COMMENTS

On February 22, 2022, Dan Wentz with Lincoln City Public Works emailed that there are existing city water and sewer utilities to the property.

No other comments were received.

ANALYSIS

17.46.040 Uses allowed

- A. *By Underlying Zoning. Except as limited below, the uses allowed in the natural resource overlay zone are the same as, and only, those allowed by the underlying zoning.*

Finding: The site is located in the R-1 zone. A single-family dwelling is an allowed use in the R-1 zone, listed as 17.16.020.A.1.

- B. *In the Natural Resource Overlay Zone. All development is excluded from the natural resource overlay zone, with the following exceptions:*

Finding: Single-family dwellings are not listed as one of the exceptions; therefore, they are excluded from the natural resource overlay zone unless a variance is granted as per LCMC 17.46.060.A.

17.46.060 Natural resources development variance.

- A. *A variance must be granted per the provisions of Chapter 17.68 LCMC for all permitted uses not specified in 17.46.040, prior to any development occurring within the natural resource overlay zone. The planning commission must determine that the variance request meets all the following criteria in addition to those found in LCMC 17.68.020:*

Finding: A single-family dwelling is not specified in LCMC 17.46.040; therefore, a variance must be granted prior to construction of a dwelling on the site.

- 1. *Strict adherence to the natural resource overlay zone standards would effectively preclude a use of the lot or parcel that reasonably could be expanded to occur in the zone, and that the property owner would be precluded a substantial property right enjoyed by the majority of the landowners in the vicinity; and*

Finding: Per LCMC 17.46.040 development of a dwelling in the natural resource overlay zone is not allowed. Staff approximated the square footages of the areas on the site that are outside of the natural resource overlay zone. The attached VAR 2022-02 Figure A shows an approximate triangular area of 1,480 square feet on the west side of the natural resource overlay zone and an approximate triangular area of 1,102 square feet on the east side of the natural resource overlay zone. Staff notes that the southern portion of the 1,480-square-foot triangular area does contain wetland, even though it's not mapped as natural resource overlay zone. The attached VAR 2022-02 Figure B shows the approximate distances between the edges of the natural resource overlay zone and the site's property lines. Staff's conclusion is that there is not enough area on the site to construct a dwelling outside of the natural resource overlay zone and outside of the wetland area along the southern boundary. Accordingly, strict adherence to the natural resource overlay zone standards would preclude construction of a dwelling on the site.

The site, as well as those in the vicinity, is in the R-1-7.5 zone, which allows outright both detached and attached single-unit dwellings. The standards for the R-1 zone are listed in Chapter 17.16, and the purpose in Chapter 17.16 states, in part, that the R-1 zone is intended to provide primarily for single-family dwellings. The surrounding properties are either already developed with dwellings or will be developed with dwellings in the future. Since most of the surrounding properties are already developed or will be developed with dwellings in the future, preclusion of the applicant being allowed to construct a dwelling would deny a right that is enjoyed by surrounding property owners.

Staff finds that this criterion is met.

2. *The variance requested, of the possible variances necessary to create a buildable area outside of the natural resource overlay zone, has the least impact to the natural resource functions; and*

FINDING: As stated above and shown on VAR 2022-02 Figure A and VAR 2022-02 Figure B, staff does not feel it is possible to create a buildable area outside of the natural resource overlay zone and the wetland along the southern boundary. However, the applicant has created a buildable area outside of the site's wetland area, which in this case, is different from the natural resource overlay zone. Even though the site is in the mapped natural resource overlay zone that was mapped in 1996, between 1996 and the present time, the wetland area that was mapped as the natural resource overlay zone in 1996 is gone. Instead, the site's wetland area is at the southern edge along Devils Lake. This is unusual in that the mapped natural resource overlay zone and the wetland are typically the same area. In this case, though, the location of the mapped natural resource overlay zone on the site is not consistent with the location of the wetland on the site. While the applicant is not able to create a buildable area outside of the natural resource overlay zone due to its configuration, the applicant has adhered to the intent of the standard which is to create a buildable area outside of the wetland. The applicant's submitted materials show the proposed 1,750-square-foot buildable area at the northern end of the site. The buildable area is approximately 24 feet north of the site's wetland area. By creating the proposed buildable area that is at least 24 feet from the site's wetland, there is no anticipated impact to the functions of the site's wetland. A buildable area has been created that is completely outside of the site's wetland and at least 24 feet from that wetland, with the expectation that development of the site will have no impact to the natural resource functions. Staff concludes that this criterion is met.

3. *The proposed development, including actions to mitigate impacts to natural resource functions, can be accommodated without substantial negative impact to the applicable natural resource functions.*

FINDING: As noted above, the proposed development is taking place outside of the site's wetland area with the expectation that development of the site will have no impact to the site's natural resource functions. Again, the site's natural resources are along the southern edge of the site and the development is proposed to be at least 24 feet from the natural resources. No disturbance to the natural resources will take place, so there will be no impacts that need to be mitigated.

The applicant submitted a memorandum, dated February 17, 2022, from Kim Biafora, a wetland ecologist and GIS analyst with Schott & Associates. In the memorandum, Ms. Biafora states the following: "The study site as represented by the red outline does not appear to have any natural resource or wildlife habitat value or function as it currently exists. It contains no wetlands, waters or intact upland forest canopy and is vegetated predominantly by invasive species. Development of the site should not impact the wetland to the south or Devil's Lake provided appropriate erosion and sedimentation control measures are implemented during construction to avoid any discharge of materials into the wetland and lake." Staff concludes that this criterion is met.

- B. *Development Guidelines. Variances for proposed development within the natural resource overlay zone will be considered only when the following development guidelines are met:*

1. *The yard setback opposite the natural resource area may be reduced by up to one-half of the standard setback, but not to less than three feet.*

Finding: All minimum setback requirements will be met without any setback reductions. This requirement is met.

2. *The allowed reduction must be the minimum necessary to site proposed use. At most, exclusions may be reduced to create a buildable area of no more than 1,750 square feet.*

Finding: The applicant's submitted materials show a proposed buildable area of 1,750 square feet. The proposed area is approximately 24 feet north of the site's wetland. This requirement is met.

17.77.140 Variance

C. *Approval Criteria. To approve a variance, the planning commission shall make findings of fact, based on evidence provided, that all of the following circumstances exist:*

1. *Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity and result from lot size or shape legally existing prior to the date of the ordinance codified in this title, topography, or other circumstances over which the applicant has no control;*

Finding: The applicant's narrative states the following:

"Neither of the adjacent and bordering properties are the natural resource overlay zone even though they are also lakefront properties. Furthermore, it should be noted that we purchased the property in August 1993 which was prior to the city's adoption of the natural resource overlay zone; this same condition did not exist for at least one of the neighboring properties."

In 1996, Lincoln City adopted a natural resource overlay zone based on mapping performed by Shapiro. At that time, the site was determined by Shapiro to contain wetlands and was, therefore, included in the natural resource overlay zone. The applicant had no control over the presence of wetlands on the site in 1996. Neither of the adjacent properties to the east or the west contain wetlands and were, accordingly, not included in the mapped natural resource overlay zone. The expanse of wetland area, as determined in 1996, encompassed most of the site, rendering it largely unbuildable. This circumstance is not generally applicable to properties in the vicinity. Staff concludes that this criterion is met.

2. *The variance is necessary for the preservation of a property right of the applicant which is substantially the same as owners of other property in the same zone or vicinity possess;*

Finding: The property right of the applicant which is substantially the same as owners of other property in the R-1-7.5 zone is the right to construct a detached single-unit dwelling. The R-1-7.5 zone allows outright both detached and attached single-unit dwellings. Surrounding properties in the R-1-7.5 zone are either already developed with dwellings or will be developed with dwellings in the future. The only way a dwelling can be constructed on the site is with approval of the variance. Denial of the variance will preclude the applicant from constructing a dwelling on the site, and thus deny the applicant's property right to have a dwelling on a site that is located in the R-1-7.5 zone. In the purpose section of LCMC Chapter 17.16, it states that the R-1 zone is intended to provide primarily for single-family dwellings.

The applicant's narrative states that they purchased the property nearly 29 years ago to build a home in their retirement years. The applicant notes that the property to the west is developed and the site to the east is under development.

Staff concludes that this criterion is met.

3. *The variance should not be materially detrimental to the purposes of this title, or to property in the zone or vicinity in which the property is located, or otherwise conflict with the objectives of any city planning policy;*

Finding: The site is in the R-1-7.5 zone. The site is surrounded on all sides by properties also in the R-1-7.5 zone. Surrounding properties either already contain detached dwellings or are planned for the future construction of detached dwellings. In the purpose section of LCMC Chapter 17.16, it states that the R-1 zone is intended to provide primarily for single-family dwellings. The applicant indicates in the submitted application materials that future construction of a single-family dwelling is intended. The applicant also states that development plans will be subject to city ordinances pertaining to building a single-family dwelling. Staff concludes that this circumstance for granting a variance exists.

4. *The variance requested is the minimum variance which would alleviate the hardship.*

Finding: The hardship in this case is that the Natural Resource Overlay Zone encompasses most of the site, which renders it largely unbuildable. Note that LCMC 17.46.040.B states that all development is excluded from the Natural Resource Overlay Zone, with a few exceptions. The exceptions do not include construction of a dwelling. In accordance with LCMC 17.46.060.B.2, the applicant shows a proposed buildable area in the submitted application materials that is the smallest area that will accommodate a detached dwelling, yard area, and driveway. The proposed buildable area is 1,750 square feet, which is the minimum allowed by LCMC 17.46.060.B.2. The remainder of the site will not be developed. By proposing the smallest area possible, the applicant has provided the minimum necessary to alleviate the hardship, and thus make a small portion of the site buildable, while retaining the majority of the site as undeveloped. Staff concludes that this criterion is met.

RECOMMENDATION

Staff submits that the evidence presented in the submitted application materials, as concluded in the findings in this report, is sufficient to show that every criterion is being met, and recommends approval of the request.