

Variance

Staff Report for Planning Commission Public Hearing on December 6, 2022

Case File VAR 2022-05

Date: November 29, 2022

Case File: VAR 2022-05 Kirk Rucker wetland

Property Owners: Taft Development, LLC

Situs Address: Unaddressed

Location: Northwest corner of SW 50th St/SW Webb Ave intersection – bordered by SW 50th St to the south and SW Ebb Ave to the east

Tax Map and Lot: 07-11-27-DC-02800-00 through and including 07-11-27-DC-03500-00

Comprehensive Plan Designation: Taft Village Core

Zoning District: Taft Village Core (TVC) Zone

Site Size: Approximately 40,000 square feet

Proposal: Request for variance to develop in Natural Resource Overlay (NR) Zone

Surrounding Land Uses and Zones:
North: Undeveloped and residential; TVC and RC
South: Residential and commercial; TVC
East: Residential and commercial; TVC
West: Undeveloped; TVC

Authority: Lincoln City Municipal Code (LCMC) 17.76.020 states that all land use applications and approvals shall be decided by using Type I, II, III, or IV procedures. The procedure types govern the decision-making process for that application. Table 17.76.020-1 in LCMC Chapter 17.76 lists a natural resources development variance as a Type III procedure with the Planning Commission as the review authority.

Procedure: The application was received on November 1, 2022. The application was deemed complete on November 3, 2022. On November 14, 2022, pursuant to LCMC 17.76.050(E), the Planning and Community Development Department mailed a notice of public hearing to property owners within 500 feet of the subject property. The *News Guard* published the public hearing notice on November 22, 2022.

Applicable Substantive Criteria:
LCMC Chapter 17.45 Taft Village Core (TVC) Zone
LCMC Section 17.76.050 Type III Procedure
LCMC Section 17.77.112 Natural Resources Development Variance



BACKGROUND

The subject property (site) is identified as Assessor's Map 07-11-27-DC-02800-00, 02900-00, 03000-00, 03100-00, 03200-00, 03300-00, 03400-00, and 03500-00. The site is unaddressed and undeveloped. The site is located at the northwest corner of the intersection of SW 50th St and SW Ebb Ave, bordered by SW 50th St to the south and SW Ebb Ave to the east.

The site does not contain any bluff erosion hazards, trails, aesthetic resources, floodway, or flood hazard areas. The site does contain natural resource overlay zone, with the mapped natural resource identified as significant wetlands. There are no mapped significant riparian areas or wildlife habitat areas on the site.

North of the site is developed with houses to the north and northeast and undeveloped to the northwest and is zoned TVC to the north and northeast and RC to the northwest. South of the site is SW 50th St with residential and commercial uses south of the street and zoned TVC. The site is bordered on its east boundary by SW Ebb Ave with residential and commercial uses to the east of SW Ebb Ave, all in the TVC zone. Immediately west of the site is undeveloped in the TVC zone.

COMMENTS

Comments were received from Public Works, via email, on November 14, 2022. The comments are as follows: "The surrounding area for Variance 2022-05 sits within a stormwater basin served by a public stormwater pump station. This pump station is at the corner of SW 50th and SW Ebb, and sits within a utility easement on SE corner tax lot 3500; the south-easternmost tax lot of the variance application. These pumps handle normal stormwater flows but during a recent extreme storm event (November 2021), the pumps were overwhelmed by flooding in the wetlands located on & west of the subject property. This should be accounted for and additionally addressed in the 'additional mitigation measures' referenced in the application material."

Comments were received from William Thomas, via email, on November 21, 2022. The comments are as follows: "I live at 864 S.W. 50th Street which is bordered by S.W. 50th St to the north and S.W. Ebb Ave to the east, located at the southwest corner of the SW 50th St/SW Ebb Ave intersection. To be clear south across the street from the natural resource overlay zone where the eight tax lots are seeking a variance. On November 11, 2021 an Atmospheric River hit Lincoln City and on November 12, 2021 50th Street was closed from Ebb Street west to the parking lot. The pump at 50th and Ebb was overwhelmed and 50th street was flooded with over a foot of water from Ebb Street west to the parking lot. I have pictures of the water on 50th Street and the city workers are very aware of how much water was in that area. The eight tax lots across the street from my house which are seeking this variance were under water. I had water in my garage and under my house and my front yard became a lake. Where will the water drain if the eight tax lots are covered in buildings and pavement? I need to know the new plan on how to get rid of the water if another Atmospheric River event happens again?" Mr. Thomas also included photos in his comments, and the photos are attached to this staff report.

ANALYSIS

Chapter 17.76 Procedures

17.76.050 Type III procedure

- A. *General Description. Type III procedures apply to quasi-judicial permits and applications. Decisions on quasi-judicial permits and applications are made by either the planning commission or city council, and require substantial exercise of discretion and judgment in applying approval criteria. Type III procedures require public notice and one or more public hearings.*
- B. *When Applicable. Table 17.76.020-1 identifies Type III applications. Applications not listed in Table 17.76.020-1 may be identified as Type III by the director based on the general description in this section.*

- C. *Pre-Application Conference.* A pre-application conference is not required prior to application submittal of a Type III application, but is strongly encouraged. Guidelines for pre-application conferences are set forth in LCMC 17.76.090.
- D. *Application Requirements.* Type III applications shall:
1. *Be submitted on application forms provided by the department and shall include all information, exhibits, plans, reports, and signatures requested on the application forms.*
 2. *Be accompanied by the required fee as adopted by city council resolution.*
 3. *Be subject to the completeness review procedure set forth in LCMC 17.76.110(D) and (E).*

Finding: The required application forms and materials were submitted, along with the required fee. The application was deemed complete in accordance with LCMC 17.76.110(D) and (E).

- E. *Notice of Public Hearing.*
1. *After a Type III application has been accepted as completed under LCMC 17.76.110(E), the department shall mail a written public notice to the following:*
 - a. *The applicant and applicant's representative;*
 - b. *Owner of record of the subject property;*
 - c. *Property owners of record within 500 feet of the perimeter property line of the property or properties subject to the application, using the most recently provided property tax assessment roll of the Lincoln County assessor's office as provided to the city to determine property owners of record; and*
 - d. *Any neighborhood or community organization or association recognized by the governing body and whose boundaries include the site.*
 - e. *At the discretion of the application, the department also shall provide notice to the Oregon Department of Land Conservation and Development.*

Finding: The Planning and Community Development Department mailed the public notice of a public hearing to the parties noted in LCMC 17.76.050(E)(1)(a) through (e).

2. *The notice of public hearing shall include the following:*
 - a. *A brief description of the request;*
 - b. *A list of the applicable criteria from the ordinance and the comprehensive plan that apply to the application at issue;*
 - c. *The street address or other easily understood geographical reference to the subject property;*
 - d. *The date, time, and location of the hearing;*
 - e. *A statement that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the Board based on that issue;*
 - f. *The name of a department staff member to contact and the telephone number where additional information may be obtained;*
 - g. *A statement that a copy of the application, all documents and evidence submitted by or on behalf of the applicant, and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;*
 - h. *A statement that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and*
 - i. *A general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.*

Finding: The public notice of hearing contained all the information required in LCMC 17.76.050(E)(2)(a) through (i).

- F. Public notices for Type III applications shall be mailed a minimum of 20 days prior to the first evidentiary public hearing. The failure of a property owner to receive notice does not invalidate the land use action if the notice was sent. Notice of the public hearing for Type III applications shall also be published in a newspaper of general circulation in the city, at least 10 days but not more than 21 days before the first scheduled public hearing on the proposal.*

Finding: The public hearing is scheduled for December 6, 2022. The notice of public hearing was mailed on November 14, 2022. The notice of public hearing was published in *The News Guard* on November 22, 2022.

Chapter 17.77 Applications

17.77.112 Natural Resources Development Variance

- A. Procedure. Natural resources development variance applications are subject to the Type III procedure, as described in LCMC 17.76.050.*

Finding: The request for a natural resources development variance is being processed as a Type III procedure.

- B. Submittal Requirements. Type III application submittal requirements are set forth in LCMC 17.76.050 and more specific submittal requirements are provided on application forms and checklists as authorized in LCMC 17.76.110.*

Finding: The required documents were submitted.

- C. Approval Criteria. To approve a natural resources development variance, the planning commission shall make findings of fact, based on evidence provided, that all of the following circumstances exist:*
- 1. Strict adherence to the natural resource overlay zone standards of Chapter 17.46 LCMC would effectively preclude a use of the property that reasonably could be expected to occur in the zone, and that the property owner would be precluded a property right which is substantially the same as owners of other property in the same zone or vicinity;*

Finding: The subject site is in the Taft Village Core (TVC) zone. The uses allowed by any property owner owning property in the TVC zone are listed in LCMC 17.45.020. Allowed uses include, but are not limited to, bed and breakfast accommodations; hotels and motels with 10 units or less; vacation rental dwellings; restaurants; financial institutions; mixed-use developments; personal service establishments such as barber/beauty/nail shops, health/athletic clubs, travel agent, and therapeutic massage; single-unit dwellings; attached single-unit dwellings; duplexes; multi-unit dwellings; manufactured homes; and four-flat dwellings. Any of the allowed uses in the TVC zone could reasonably be expected to occur on the site if the site was not in the natural resource overlay zone. Strict adherence to Chapter 17.46 LCMC precludes development in the natural resource overlay zone, thereby effectively precluding the use of the site for any of the allowed uses in the TVC zone that any other property owner in the TVC zone is allowed to do.

Specifically, the applicant's submitted narrative states the desired development of the site is a multi-unit residential development. Such development is an allowed use in the TVC zone. Such development is allowed on any property in the TVC zone. Staff finds that Circumstance #1 exists.

- 2. The proposed development can be accommodated, including actions to mitigate impacts to natural resource functions, without substantial negative impact to the property's significant wetland, significant riparian, and/or significant wildlife habitat areas;*

Finding: The applicant states in the submitted narrative that Schott & Associates has delineated a buildable area for the site and that with proper mitigation measures, the wetland area will not be impacted by development on the site.

The site does not contain any significant riparian or significant wildlife habitat areas. The site does significant wetland as generally determined in 1996, which is why the site is in the natural resource overlay zone. A wetland delineation specific to the site was completed in October 2020, by Anita Cate Smith of Westbrook Design, LLC and concurrence from DSL was received in August 2021 (WD2020-0630 attached). In part, the concurrence states the following:

“The Department of State Lands has reviewed the wetland delineation report prepared by Westbrook Science & Design, LLC, for the site referenced above. Based upon the information presented in the report, and additional information submitted upon request, we concur with the wetland boundaries as mapped in revised Figure 5 of the report.”

Figure 5 is a map showing the site-specific boundaries of the delineated wetland as determined by Ms. Smith. A review of the submitted Figure 5 shows the western portion of the site containing significant wetland, with the eastern and northeastern portion of the site being free from any wetland.

Martin Schott of Schott & Associates conducted a site visit in July 2022 and reviewed both Ms. Smith’s delineation report and DSL’s concurrence letter. Mr. Schott agreed with the delineated wetland boundaries and states the following in a buffer assessment memo, dated September 21, 2022, to Trisha Clark:

“S&A agreed with the delineated wetland boundaries and found the wetland and adjacent upland to be in mostly good ecological condition. The wetland was found on lots 3000, 3100 and 3200 and extended offsite to the north and west. Any associated buffers would affect lots 2900 and 3300. No wetlands were documented on lots 2800, 3400 and 3500.”

...

“Development near or adjacent to wetlands has the potential to negatively impacts [sic] the wetlands and functions. Common practice is to require an upland buffer to protect the adjacent wetland. However, in lieu of a buffer, potential impacts can e minimized or el9minated through careful development.”

“One of the most common impacts to wetlands during construction phases is incidental encroachment into the wetland by large equipment and ground disturbance. This type of impact can be avoided by installing a construction fence along the wetland boundary or buffer boundary. All equipment operators should be instructed not to encroach beyond the construction fence.”

Mr. Schott continues in the memo with additional recommendations to avoid impacts to the wetlands on the site.

The applicant’s submittal shows that the entire site is not wetland, that only a portion of the site is wetland. The professionally prepared delineation report identifies that the only portion of the site containing wetland is the western portion of the site. DSL reviewed the delineation and agreed with the identified wetland boundary. The applicant obtained an additional assessment from a different professional who also agreed with the identified wetland boundary and provided recommendations for development to avoid impacts to the delineated wetland.

There is sufficient space on the site for development to occur outside of the identified wetland. With adherence to conditions of approval outlining wetland impact avoidance measures, including compliance with

all city codes and public works design standards, the code does not prevent development of non-wetland properties. Staff finds that Circumstance #2 exists.

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 purpose of the TVC zone is to provide for a wide variety of uses, including retail, professional office, service-oriented businesses, single-unit and multi-unit dwellings and combinations of the those uses in mixed-use developments. The purpose of Chapter 17.46 is to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of natural resources.

The applicant seeks to develop the non-wetland portion of a site with a residential use as allowed in the zone in which it is contained. Development of a use allowed in the zone and/or already existing in the vicinity will not be materially detrimental to property in the zone or vicinity, since those property owners are afforded the same right to develop an allowed use as the applicant. The applicant has hired two different professionals who have determined the boundaries of the wetland on the site and the Oregon Department of State Lands (DSL) concurs with the determination. By developing the non-wetland portion of the site as a residential use, and complying with all city rules and public works design standards, the applicant satisfies the purposes of the TVC zone and Chapter 17.46 by providing multi-unit dwellings in a non-wetland area, thus allowing for conservation and protection of the wetland area and simultaneously giving housing options. Staff finds that Circumstance #3 exists.

4. *The variance requested, of the possible variances necessary to create a buildable area outside of a significant wetland, significant riparian, and/or significant wildlife habitat area, has the least impact to the functions of any significant wetland, significant riparian, and/or significant wildlife habitat areas on the property.*

Finding: The site does not contain any significant riparian or significant wildlife habitat areas. The site does not contain significant wetland as generally determined in 1996, which is why the site is in the natural resource overlay zone. A wetland delineation specific to the site was completed in October 2020, by Anita Cate Smith of Westbrook Design, LLC and concurrence from DSL was received in August 2021 (WD2020-0630 attached). In part, the concurrence states the following:

“The Department of State Lands has reviewed the wetland delineation report prepared by Westbrook Science & Design, LLC, for the site referenced above. Based upon the information presented in the report, and additional information submitted upon request, we concur with the wetland boundaries as mapped in revised Figure 5 of the report.”

Figure 5 is a map showing the site-specific boundaries of the delineated wetland as determined by Ms. Smith. A review of the submitted Figure 5 shows the western portion of the site containing significant wetland, with the eastern and northeastern portion of the site being free from any wetland.

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The applicant’s submittal shows that the entire site is not wetland, that only a portion of the site is wetland. The professionally prepared delineation report identifies that the only portion of the site containing wetland is the western portion of the site. DSL reviewed the delineation and agreed with the identified wetland boundary. The applicant obtained an additional assessment from a different professional who also agreed with the identified wetland boundary and provided recommendations for development to avoid impacts to the delineated wetland.

There is sufficient space on the site for development to occur outside of the identified wetland. With adherence to conditions of approval outlining wetland impact avoidance measures, the code does not prevent development of non-wetland properties. Staff finds that Circumstance #4 exists.

RECOMMENDATION

Staff recommends that the Planning Commission hold a public hearing on the natural resources development variance request, take public testimony, close the public hearing, deliberate, and make a motion to approve or deny the request.

Staff concludes that the request does meet all the circumstances for granting approval, and recommends approval with the following recommended conditions of approval:

1. To ensure there is no disturbance or potential impact to the site’s wetland, no development shall take place on any wetland identified in Figure 5 of the concurrence letter. Additionally, there shall be a 10-foot-wide no-development buffer around the wetland and no development shall take place within the buffer.
2. A deed restriction shall be placed on the site to prohibit camping in the wetland.
3. A deed restriction shall be placed on the site such that the wetland shall be permanently protected and preserved from development.
4. As part of development, and prior to issuance of any temporary or permanent certificates of occupancy, the wetland shall be enhanced through removal of all weeds, invasive plant species, and non-native vegetation and replacement with native vegetation appropriate for a wetland in this location.
5. As part of development, and prior to issuance of any temporary or permanent certificates of occupancy, the 10-foot-wide no-development buffer shall be enhanced through removal of all weeds, invasive plant species, and non-native vegetation and replacement with native vegetation appropriate for the site.
6. A deed restriction shall be placed on the site that an appropriate method for maintenance and upkeep of the wetland and the 10-foot-wide no-development buffer is in place, such as through a neighborhood association, homeowners’ association, or similar. Proof of such method shall be

provided to the Planning & Community Development Department prior to issuance of any temporary or permanent certificates of occupancy.

7. All development shall adhere to municipal code requirements, building and fire code requirements, and all federal, state, and local government requirements, including public works design standards and stormwater standards.