



MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date: August 15, 2018

Department: Public Works Agenda Planning Date: August 9, 2018 Time required: None

Audio/Visual aids

Contact: Joe Fennimore Phone: 503-566-4177

Department Head Signature:

TITLE Receive notice of hearings officer's decision denying Variance (V) Case 18-002/Shaber.

Issue, Description & Background The Marion County Hearings Officer issued a decision on August 8, 2018, denying V18-002. As part of the land use process, the Marion County Board of Commissioners must officially receive notice of the decision.

Financial Impacts: None.

Impacts to Department & External Agencies None.

Options for Consideration: 1. Receive notice of the decision.
2. Receive notice of the decision and call the matter up.

Recommendation: Staff recommends the board of commissioners receive the notice of decision.

List of attachments: Hearings officer's decision

Presenter: Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to: Joe Fennimore, gfennimore@co.marion.or.us

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the) Case No. V 18-002
)
Application of:) Clerk's File No.
)
DARWIN SCHABER) **Variance**

ORDER

I. Nature of the Application

This matter comes before the Marion County Hearings Officer on the application of Darwin Schaber for a variance from the temporal requirement of the replacement dwelling standard on a 3.35-acre parcel in an EFU (Exclusive Farm Use) zone in the 19200 block of Allinson Road NE, Hubbard, Marion County, Oregon (T4S, R1W, S29A, tax lot 800).

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and the Marion County Code (MCC) title 17, especially chapters 17.122 and 17.136.

III. Public Hearing

A public hearing was held on this application on May 30, 2018. The Planning Division file was made part of the record. Case file AR 17-022 was also made a part of the record. The record remained open until June 6, 2018 for applicant to submit additional information to the file. The following persons appeared and provided testimony on the application:

1. Lisa Milliman Planning Division
2. Frank Walker For applicant
3. Al Cronemiller Proponent

The following documents were presented, marked and entered into the record as exhibits:

- Ex. 1 Medical Hardship to Schaber Family
- Ex. 2 Letter from Darwin Schaber
- Ex. 3 Revised responses to approval criteria with 17 attached pages marked A through Q

No objections were raised as to notice, jurisdiction, conflicts of interest, or to evidence or testimony presented at the hearing.

IV. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The subject property is designated Primary Agriculture in the MCCP and zoned EFU. The major purpose of this designation zoning is to promote the continuation of commercial agricultural and forestry operations.
2. The subject property is on the west side of Allinson Road NE, about one-half mile south of its intersection with Feller Road NE. The property is undeveloped and was the subject of Administrative Review Case 17-022, to replace a dwelling that was destroyed by fire in 1967. On December 1, 2017, the planning director issued a decision denying the request. The decision was not appealed and became final on December 19, 2017.
3. Surrounding properties are all various sized EFU zoned parcels, many in farm use.
4. *Soil Survey of Marion County Area, Oregon* indicates the property is composed entirely of high-value farm soils.
5. On the variance application, applicant asked, "to obtain a variance to the temporal requirement of the Replacement Dwelling Standard." After review, the Planning Director determined applicant was asking for a variance to allow the former dwelling to be re-established without meeting standards and criteria in the code.
6. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

Marion County Public Works Land Development Engineering and Permits (LDEP) commented:

- A. Driveways must meet sight distance, design, spacing, and safety standards [MCC 11.10]. At the time of application for building permits, an Access Permit will be required.
- B. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits.

Marion County Building Inspection commented that building permits would be required.

Marion County Onsite Wastewater Program commented a site evaluation is required to determine septic feasibility.

Other contacted agencies did not respond or stated no objection to the proposal.

V. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its burden and the application must be denied. If the evidence for every criterion is a hair in applicant's favor, then the burden of proof is met and the application is approved.

2. Under MCC 17.122.040(A), a variance application may be filed by the owner of the property that is the subject of the application. A bargain and sale deed filed in the Marion County deed records at reel 533, page 171 shows the subject property was conveyed to Darwin N. Schaber on March 9, 1987. The application was signed by Darwin Schaber who could file this application. MCC 17.122.040(A) is met.
3. Under MCC 17.122.045(A)(1), variance applications must include signatures of all owners of the subject property. A bargain and sale deed filed in the Marion County deed records at reel 533, page 171 shows the subject property was conveyed to Darwin N. Schaber on March 9, 1987. The application was signed by Darwin Schaber. MCC 17.122.045(A)(1) is met.
4. Under MCC 17.122.050, the Planning Director has the power to decide applications for all variances. The Planning Director could decide this matter.
5. Under MCC 17.122.058, after the director's final action on the application, interested persons may appeal the decision no later than 15 days after the decision is mailed. The Planning Director's decision was mailed on April 23, 2018. Applicant Darwin Schaber, an interested person, appealed the Planning Director's decision on May 8, 2018, within the 15 day time limit. MCC 17.122.058 was met.
6. Under MCC 17.122.060, if the director's decision is appealed, the hearings officer shall conduct a public hearing in accordance with MCC chapter 17.111. The hearings officer may hear and decide this matter.

7. Under MCC 17.122.010, the hearings officer has the power to vary or modify the strict application of any of the standards of MCC title 17 in any case where such strict application would result in practical difficulties or unnecessary hardships with reference to requirements governing: lot area, lot width, percentage of lot coverage and number of dwelling units or structures permitted on a lot, height of structures, location, yards, signs, parking and loading space, vision clearance and other standards when limits for an adjustment in MCC 17.116.030 are exceeded. Variances to allow uses or new uses not otherwise allowed are prohibited. Variances to criteria and definitions are also prohibited.

In 2017 applicant requested a replacement dwelling for the subject property. The Planning Director denied the application. Applicant did not appeal the denial and the Director's decision became final. Applicant later submitted this application to vary the "temporal requirement" of the replacement dwelling standard. The request is vague and does not cite a specific standard to vary. The Planning Director interpreted this as applicant's request for a use not otherwise allowed, and/or a criteria variance, both specifically not allowed under MCC 17.122.010. Applicant appealed, disagreeing that a criterion variance is not allowed, and pointing out that MCC 17.122.010 specifically allows a variance to the number of dwelling units on a lot. This statement still does not clarify the specific MCC provision applicant seeks to vary. After discussion at hearing, applicant submitted a follow up statement and other documents during the open record period (exhibit 3). The statement discusses how applicant meets various replacement dwelling criteria and then states:

MCC 17.136.030(D)B

This criterion requires that the dwelling was assessed for ad valorem taxation for the previous five years. The dwelling has not been assessed for ad valorem taxes since 1996. *It is from this standard that the property owners are seeking a variance.* The issue of the variance can best be addressed by responding to MCC 17.136.030(D)C.

17.136[.0]30(D)C This criterion speaks to the circumstances under which the improvement value of the dwelling was eliminated. This criterion specifically states that the dwelling "had to have been assessed as a dwelling until such time as the dwelling was eliminated." This criterion under sub-criterion 1. contains the word "or" at the end, which, in turn, allows the applicant the opportunity to address the permitting authority two choices regarding assessment of real property and improvements. The proponents assert that Marion County "stopped assessing the dwelling even though the owner did not request removal of the dwelling from the tax roll;"

The proponents have evidence herein contained that the Marion County Assessor's Office stopped assessing the ad valorem tax for improvements in 1995, and after that date only provided

land value. This was done without the authorization of the property owner and therefore constitutes an "improperly removed" situation. Exhibit 5, contains 11 pages of statistics regarding the assessment records of the property dating back to 1991.

Finding: This improper removal grants the permitting authority to make a determination that the removal of the dwelling from the tax rol[ls] was from a source other than the current owner.

The current owner is therefore requiring a variance from this standard since the removal was done without authorization. The owner is requesting that the five year rule be waived and that the variance be granted. The degree of the variance is from 5 years to 22 years.

(Emphasis added.)

The MCC 17.136.030(D) provisions applicant addresses are:

2. The dwelling was assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years, or, if the dwelling has existed for less than five years, from the time the dwelling was established; and
3. If the value of the dwelling was eliminated as a result of either of the following circumstances, the dwelling had to have been assessed as a dwelling until such time as the value of the dwelling was eliminated:
 - a. The destruction (i.e., by fire or natural hazard), or demolition in the case of restoration, of the dwelling; or
 - b. The applicant establishes to the satisfaction of the permitting authority that the dwelling was improperly removed from the tax roll by a person other than the current owner. "Improperly removed" means that the dwelling has taxable value in its present state, or had taxable value when the dwelling was first removed from the tax roll or was destroyed by fire or natural hazard, and the county stopped assessing the dwelling even though the current or former owner did not request removal of the dwelling from the tax roll;

(Emphasis added.)

The hearings officer still finds applicant's request hard to understand, but if applicant is asking to waive the MCC 17.136.030(D)(2) five-year assessment requirement, that is a criterion variance and is strictly forbidden under MCC 17.122.010. Perhaps applicant is asking to look back five years from 1996, but that is still a criterion variance that is disallowed. (The hearings officer reviewed tax information provided by

applicant, and it shows subject property was assessed for land value only, with no improvement value, from 1991 on.)

Applicant also mentions needing a variance to allow assertion that MCC 17.136.030(D)(3)(b) applies. MCC 17.136.030(D)(3) already applies to replacement dwellings as alternate criteria to MCC 17.136.030(D)(2). If (2) does not apply or is not met, then (3)(a) and (b) are considered. MCC 17.136.030(D) is based on state administrative rule, which more clearly illustrates the alternative nature of MCC 17.136.030(D)(2) and (3). Under OAR 660-033-0130(8)(a)(B) and (C):

- (B) The dwelling was assessed as a dwelling for purposes of ad valorem taxation for the previous five property tax years, or, if the dwelling has existed for less than five years, from that time.
- (C) *Notwithstanding paragraph (B)*, if the value of the dwelling was eliminated as a result of either of the following circumstances, the dwelling was assessed as a dwelling until such time as the value of the dwelling was eliminated:
 - (i) The destruction (i.e., by fire or natural hazard), or demolition in the case of restoration, of the dwelling; or
 - (ii) The applicant establishes to the satisfaction of the permitting authority that the dwelling was improperly removed from the tax roll by a person other than the current owner. "Improperly removed" means that the dwelling has taxable value in its present state, or had taxable value when the dwelling was first removed from the tax roll or was destroyed by fire or natural hazard, and the county stopped assessing the dwelling even though the current or former owner did not request removal of the dwelling from the tax roll.

(Emphasis added.)

In AR 07-022, the Planning Director addressed MCC 17.136.030(D)(3)(a) but not (b) in AR 17-022, but applicant did not address criterion (b) either or provide proof related to it. The planning director also articulated other reasons for denial. Applicant did not appeal the Planning Director's decision. If applicant wants the Planning Director to reconsider the replacement dwelling criteria based on new argument and evidence, another replacement dwelling application is the vehicle for that review, not a variance.

VI. Order

It is hereby found that applicant asks to vary a criterion, which is prohibited under MCC chapter 17.122.010. The variance application is **DENIED**.

VII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 13th day of August 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 8th day of August 2018.



Ann M. Gasser
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

| | <u>Agencies Notified</u> |
|-----------------------------|---|
| Frank Walker | Planning Division (via email: gfennimore@co.marion.or.us) |
| Frank Walker and Associates | (via email: lmilliman@co.marion.or.us) |
| 1480 Jamestown St. SE | Code Enforcement (via email: bdickson@co.marion.or.us) |
| Salem, OR 97302 | Building Inspection (via email: twheeler@co.marion.or.us) |
| | Assessor (via email: assessor@co.marion.or.us) |
| | PW Engineering (via email: jrassmussen@co.marion.or.us) |
| Al Cronemiller | Tax Office (via email: adhillon@co.marion.or.us) |
| Premiere Property Group | 1000 Friends of Oregon (via email: meriel@friends.org) |
| 1255 Lee St. SE, Suite 110 | AAC Member No. 6 (no members) |
| Salem, OR 97302 | |
| Darwin Schauber | |
| 5725 Christofferson Road | |
| Turlock, CA 95380 | |
| Al Cronemiller | |
| 4590 Labish Garden Road NE | |
| Salem, OR 97305 | |

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 8th day of August 2018, and that the postage thereon was prepaid.


Susan Hogg
Secretary to Hearings Officer