

Vera Kolias

From: Robinson, Michael C. <MRobinson@SCHWABE.com>
Sent: Tuesday, September 03, 2019 3:47 PM
To: Vera Kolias
Cc: Dennis Egner; Matt Gillis; 'Ken Valentine'; 'Todd Iselin'; 'John McConnaughey'
Subject: City of Milwaukie File No. NR-2018-005(master); Application by Gillis Properties, LLC(the "Application"); Applicant's Final Written Argument
Attachments: 9.3.19 - Gillis Properties - Letter to Milwaukie Planning Commission Chair Travis - Applicant's Final Written Argument.pdf

Dear Ms. Kolias,

Please find attached the Applicant's nine page letter as its final written argument without new evidence as allowed by ORS 197.763(6)(e).

Please place the letter before the Milwaukie Planning Commisison prior to its deliberation on September 10, 2019 and in the official Planning Department file for this application.

Thank you. Mike

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September 3, 2019

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VIA E-MAIL, SUBMITTED BEFORE 4:00 P.M.

Ms. Kim Travis, Chair
Milwaukie Planning Commission
Milwaukie City Hall
6101 SE Johnson Creek Boulevard
Milwaukie, OR 972

RE: City of Milwaukie File No. NR-2018-005 (master); Application by Gillis Properties, LLC (the “Application”); Applicant’s Final Written Argument

Dear Chair Travis and Members of the Milwaukie Planning Commission:

This office represents the Applicant. This letter is the Applicant’s final written argument submitted on September 3, 2019 before 4:00 p.m. This letter contains no new evidence.

1. Introduction.

The Milwaukie Planning Commission (the “Planning Commission”) can approve this Application because the Applicant has demonstrated by substantial evidence in the whole record that the applicable approval criteria are satisfied. Notwithstanding that some of the approval criteria are subjective and may not be applied under ORS 197.303(1) and 197.307(4), the Applicant has addressed each and every applicable approval criteria.

There are several important facts for the Planning Commission to consider as it makes its decision on this Application. First, while the August 27, 2019 Staff Report contains findings for denial, it also contains findings for approval. This means that the staff has found substantial evidence in the record to demonstrate that the applicable approval criteria are satisfied. The Applicant agrees with the staff-recommended conditions of approval and all of the conditions of approval are feasible to be satisfied.

Second, as the Staff Report notes at Page 2, the Applicant proposes only twelve single-family detached homes, including the preservation of two existing single-family dwellings and not the maximum density of eighteen dwelling units. Moreover, as explained below, the Applicant proposes not to group twelve or more attached homes along 19th Avenue but instead, and consistent with the relevant approval criteria, to place the homes throughout the site except for the proposed mitigation areas. The developable areas is about 2.0 acres of the total 3.66 acres. The Applicant does not propose any development in the Willamette Slough.

Third, the City has applied a number of subjective, discretionary approval criteria including the Willamette Greenway, the Water Quality Resource (“WQR”) areas, the habitat conservation

areas (“HCA”) and the 100-year flood plain except the upland portion of the site along 19th Avenue.

Fourth, the Staff Report’s discussion of drainage at Page 10 is erroneous. It is a given that no uphill property owner can drain stormwater onto adjoining land that would not have otherwise flowed there. Therefore, the Applicant must comply with applicable drainage requirements and the Applicant has said that it will. This is not a basis for finding that the Applicant cannot be approved. Instead, the appropriate means, pursuant to ORS 197.522, is to impose a condition of approval, which is feasible and which the City is required to do.

Finally, the Applicant has addressed the fish entrapment issue discussed at Staff Report Page 11. The proposed stormwater facility is a water quality facility designed using the Portland Stormwater Manual as required by the City of Milwaukie Standards. The Applicant has stated on the record that it will work with the Oregon Department of Fish and Wildlife (“ODFW”) and any other relevant state or federal agency to meet any applicable regulatory requirements. The Planning Commission can impose a clear and objective condition of approval requiring the Applicant to do so, as required by ORS 197.522.

The remaining issues identified in the State Report are discussed below.

2. Relevant issues for Planning Commission consideration.

A. Alternatives analysis.

The Staff Report at Page 12 asserts that the Residential Cluster Development under Milwaukie Municipal Code (“MMC”) 19.402.14.C is an alternative to a clear and objective development process. However, this is incorrect. MMC 19.402.3.A provides that regulations in Chapter 19.402 apply to all properties that contain WQR and HCA designations. Therefore, the Applicant has no choice but to apply MMC Chapter 19.402, including the Residential Cluster Development process.

Furthermore, the Residential Cluster Development process is neither an adjustment nor a variance. MMC 19.402.14 is entitled “Adjustments and Variance,” Subsection A is entitled “Adjustments,” Subsection B is entitled “Variances,” and Subsection C is entitled “Residential Cluster Development.” In other words, the three processes are distinguishable and a Residential Cluster Development is neither an adjustment nor a variance. Because an applicant must apply MMC Chapter 19.402, contrary to the staff opinion, there is no clear and objective development pattern for land on including or within 100 feet of a WQR or HCA. Moreover, MMC 19.402.14.C.4.b expressly provides authority for the Planning Commission to impose conditions of approval, in addition to ORS 197.522.

The Staff Report argues at Page 13 that the Applicant should have submitted an alternative with a “significantly different layout that focused on avoiding impacts. An alternative or alternatives, that emphasizes fewer homes, duplexes, or multi-family units outside of the HCA/WQR was not provided and should have been considered. However, it is difficult to know

for certain that there is a better design for this site than the preferred option.” (Staff Report at Page 12.)

The Planning Commission should respond to this assertion in two ways. First, ORS 197.307(4)(b) expressly provides that a local government’s actions on a needed housing application “may not have the effect, either in themselves or cumulatively, discouraging needed housing through unreasonable cost or delay.” Further reduction in density has the effect of discouraging needed housing through unreasonable cost by increasing the per unit cost of each dwelling unit.

Second, MMC 19.402.12.A.4 requires an alternatives analysis demonstrating that no practicable alternatives to the requested development exists that will minimize impacts to the WQR or HCA, that development in the WQR or HCA has been limited to the area necessary to allow for the proposed use, that if disturbed, the WQR can be restored to an equal or better condition and the HCA can be restored consistent with mitigation requirements and that road crossing are minimized as much as possible. The Applicant’s evidence demonstrates that a proposed alternative is the most practicable of any alternative. No alternative, including a row of tall, narrow homes that would block all views from 19th Avenue. Even that alternative would require road access on undeveloped Sparrow Street with multiple driveways in order to provide driveways behind the dwelling units that would encroach into the HCA.

The Applicant’s evidence explained why a row of tall, skinny dwellings on 19th Avenue is not an appropriate alternative. It is both impracticable in terms of design based on the Applicant’s intended development, would block all views from 19th Avenue, which staff has previously said would be unacceptable, and would require access via an undeveloped street with a driveway in the HCA. In other words, there is no alternative that avoids any impact to the HCA and WQR.

MMC 19.402.12.B.1.a-c contains the avoid, minimize and mitigation approval criteria. The standard is whether the proposed activity has less detrimental impact to the designated natural resource than other practicable alternatives. “To the extent practicable” may be applied by the Planning Commission, the evidence demonstrates that there are no other practicable alternatives with less detrimental impact to the designated natural resource than that advanced by the Applicant, which includes a reduced density.

MMC 19.201 defines “Practicable,” as:

“Capable of being realized after considering cost, existing technology, logistics, and other relevant considerations, such as ecological functions, scenic views, natural features, existing infrastructure and/or adjacent uses.”

Additionally, the evidence demonstrates that the Applicant has minimized the impact because there is no practicable alternative that avoids disturbance of the designated nature resources and has done so to the extent practicable. The Application minimizes grading, adverse

hydrological impacts on water resources, impacts on wildlife corridors and fish passage, and uses native plants for mitigation.

Finally, the Application proposes mitigation that compensates for detrimental impacts to the ecological functions of the resource areas and occurs on the site of the disturbance proposed vegetation uses native plants listed on the Milwaukie Plant List, any in-stream work will be done with allowable windows for in-water work as designated by ODFW and the Mitigation Maintenance Plan has been proposed and is feasible to be satisfied.

The Planning Commission can find that MMC 19.402.12.B.1 is satisfied.

The Planning Commission can find that the proposed alternative is the most practicable of those considered. It is capable of being realized when considering cost which is a relevant consideration under the definition of practicable. Other relevant considerations include maintenance of scenic views which would not be achieved by a row of tall, skinny dwellings adjacent to 19th Street, the preservation and mitigation of natural features and no adverse impact on adjacent uses.

The Planning Commission can find that the Applicant has satisfied the requirements of the alternatives analysis.

B. Mitigation.

Staff agrees with the Applicant's proposed mitigation plan. The Applicant agrees with all of the conditions of approval regarding mitigation, including an extended monitoring program for ten years. To the extent there is a concern about survival of the mitigation plan, the extended monitoring program addresses that issue. The current Staff Report and the past Staff Reports have concluded that the Applicant satisfies the view requirements.

C. Flood plain.

There are a number of issues for the Planning Commission to consider.

a. Cut and fill analysis.

The Applicant analyzed the cut and fill for both the Base Flood elevation established by the FEMA flood insurance study in the 1996 inundation. The current plan meets the cut and fill requirements for both events.

b. Enclosed spaces.

The only enclosed spaces proposed are the crawl spaces and garages. The Applicant has demonstrated that these spaces meet the MMC and FEMA guidelines.

c. Existing conditions plan.

The existing conditions plan shows that the site slopes down from 19th Avenue to the Willamette River. The proposed grading plan in the record demonstrates that the site will continue to slope the same direction with all drainage directed to the proposed stormwater system and to the river. In other words, the Applicant's plans do not provide for drainage onto adjacent properties.

d. Stormwater facility.

The stormwater facility as shown in the record is a water quality facility designed using the Portland Stormwater Manual as required by the City of Milwaukie. The Applicant has stated that it will work with the Oregon Department of Fish and Wildlife and any other relevant state or federal agency to meet applicable regulatory requirements.

e. Stormwater discharge.

The record demonstrates that the stormwater from the site will discharge to the Willamette River. The calculations in the record show that the peak flow from the site is immeasurable when compared to the Willamette River flows. However, the City requires stormwater detention, the Applicant believes it is feasible to satisfy condition of approval meeting all applicable requirements, including balance cut and fill requirements and prohibiting fish entrapment.

f. Stem wall foundations.

The Applicant has stated that if the conventional stem wall foundations cannot be designed in accordance with the MMC and FEMA guidelines, then it will use pier-and-post-type foundations. This is a reasonable clear and objective condition to impose under ORS 197.522 and is feasible to be achieved.

g. Forty cubic yards of cut.

The Applicant's estimate of forty cubic yards of cut for each new building is a conservative estimate based on 540 square feet times two feet of cut. It is not an overestimation.

h. HECRAS modeling.

The Applicant has provided HECRAS modeling demonstrating that the high flow velocity on the flood plain fringe is significantly less than 5.9 fps.

i. Flood Insurance Study.

The Flood Insurance Study does not need to be revised to demonstrate that the flood plain fringe velocity is lower than the mean velocity of 5.9 fps. The Applicant has demonstrated that the flood plain fringe velocity is significantly lower than 5.9 fps utilizing a

HECRAS model previously adopted by FEMA. The project will require submitting letters of map revision (“LOMR”) in order to establish that finished floor elevations are above the base flood elevation. The model use for the LOMR will provide accurate channel velocities that are not based on simply dividing the flow rate by the cross-sectional area. No revision to the FIS will be required.

D. Applicability of needed housing.

The Staff Report dated August 6, 2019 asserts that the needed housing statutes do not apply to the Application. The Planning Commission can find that the staff is incorrect for the following reasons.

First, Comprehensive Plan Map 6 entitled, “Buildable Lands” (submitted with the Applicant’s August 6, 2019 letter as Exhibit 2). The map demonstrates that the Application site is “unbuilt lands” and is therefore buildable lands.

Second, ORS 197.303(1) does not require an analysis of whether housing is needed or not. ORS 197.303(1) provides “as used in ORS 197.307, ‘Needed Housing,’ means all housing on lands zoned for residential use that is determined to meet the needs shown for housing within an urban growth boundary at price ranges and rent levels that are affordable households within the county with a variety of income . . .” Needed housing includes both attached and detached single-family housing. ORS 197.303(1)(a).

The City asserts that the 2016 Housing Needs Analysis demonstrates that this land is not needed housing. However, the City acknowledges that the 2016 Housing Analysis showed that a dwelling unit is shown on the site. That is all that is required to demonstrate that the Application is subject to needed housing.

The fact that only one dwelling is shown in the City’s Housing Analysis, which was not identified as an applicable approval criterion in the Notice of public hearing nor does the Staff Report indicate that the Housing Analysis is acknowledged as consistent with Statewide Planning Goals is irrelevant. Nevertheless, it means that the site is zoned for residential use within the UGB and is, therefore, subject to the needed housing statutes.

Third, the City asserts that the Applicant chose to pursue a highly discretionary path for development. However, as explained above, the MMC requires a discretionary application for development at the site and does not allow a clear and objective development path.

Alternatively, even if a simple subdivision application could be used to develop this site, the approval criteria in MMC 17.12.040.A.1-5 are subjective and not clear and objective because the approval criteria uses words such as “reasonable,” “duplicative,” and “conform” and the phrases “will not create the need” and “public interest. Thus, the Applicant has no clear and objective path for development at this site and because the City’s Comprehensive Plan controls and shows the site as buildable land, and because the City’s own Housing Analysis demonstrates

that it is suitable for residential development, the requirements of ORS 197.303 and 197.307(4) apply.

E. MMC Chapter 18.04.

MMC 18.04.150(f)(II)(4) is satisfied or can be satisfied with a clear and objective condition of approval regarding foundation type under ORS 197.522.

MMC 18.04.150(g) is satisfied based on the Applicant's engineer's evidence regarding a lower flow velocity because the site is outside the main channel where the higher flow velocity is located. Other requirements of MMC Chapter 18.04 can be addressed with clear and objective conditions of approval as required by ORS 197.522.

F. MMC Chapter 19.400.

The Planning Commission can find that MMC 19.401(6)(e) does not require public access to the river since it is predicated on the "greatest possible degree, by appropriate legal means." No public easement exists on the property to provide public access to the river. This is not a basis for denial.

The Staff Report at Page 81 under MMC 19.402.11.B states that the Applicant "did not provide information about how the mitigation area will be accessed to perform the required work." This is incorrect. Mr. John McConnaughey testified at the July 23, 2019 public hearing that during dry periods, maintenance workers can walk to the island and during wet periods, maintenance workers can reach the island by boat. This is substantial evidence demonstrating that the island can be maintained at all times.

The Planning Commission can find that MMC 19.401(2)(a) is satisfied because the site is both properly zoned and is within the Portland Metropolitan Area Urban Growth Boundary (the "UGB") and is therefore appropriate for urban use, in addition to identification of the site as "buildable land" on Milwaukie Comprehensive Plan Map 6. Additionally, the Planning Commission can find that MMC 19.400(2)(c) is satisfied by substantial evidence in the record and because prior Staff Reports have said that the view standard is satisfied. The Applicant also addressed this standard at Page 2 of its August 6, 2019 letter.

The Planning Commission can find that MMC 19.402 is satisfied by substantial evidence in the whole record.

G. Milwaukie Comprehensive Plan.

The Planning Commission can find that Milwaukie Comprehensive Plan Natural Hazards Element, Objective No. 1, Policy 4 and Natural Resources Objective No. 2, Policy 1 are not a basis for denial. Natural Hazards Element Objective No. 1 is simply a requirement to manage the identified 100-year flood plain in order to protect their natural function as waterways and to protect the lives and property within and along the flood plain boundary. The proposed

Application does both. Natural Hazards Elements Objective No. 1, Policy 4 is predicated upon “whenever possible” the flood plain will be retained as open space but in this case, the property is properly zoned for urban residential use. Finally, Environmental and Natural Resources Objective No. 2, Policy 1 is not applicable to this application because it calls for purchase of certain areas but does not regulate development.

H. MMC Chapter 19.905.

The Planning Commission can find that MMC 19.905.4.A(1)-(7) are satisfied. First, the characteristics of the lot are suitable for the proposed use as proposed and based on conditions of approval.

Second, the operating and physical characteristics of the proposed use are reasonably compatible with and have a minimal impact on nearby uses based on evidence demonstrating that the site can be appropriately developed within the flood plain.

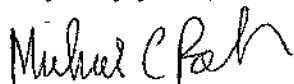
Third, all identified impacts are mitigated to the extent practicable based on the definition of “practicable” in MMC 19.201.

Fourth, the Application satisfies all applicable development standards and requirements of the R-5 zone, as well as applicable overlay zones. Further, the cited Milwaukie Comprehensive Plan Policies are not applicable approval criteria. In addition, because this Application is subject to only clear and objective standards under ORS 197.307(4), the subjective standards of the conditional use section may not be applied to this Application.

4. Conclusion.

The Applicant appreciates the staff’s thorough analysis of this Application including the proposed finding for approval at Staff Report Pages 24-65. The Applicant agrees with the proposed conditions of approval located in Staff Report Pages 91-95. For these reasons, the Applicant respectfully requests that the Milwaukie Planning Commission find that the Application satisfies applicable approval criteria and approve the Application with the staff-recommended conditions of approval.

Very truly yours,



Michael C. Robinson

MCR:jmhi

cc: Mr. Matt Gillis (*via email*)
Mr. Ken Valentine (*via email*)
Mr. Todd Iselin (*via email*)

Ms. Kim Travis, Chair
September 3, 2019
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Mr. John McConnaughey (*via email*)
Mr. Denny Egner (*via email*)
Ms. Vera Kolas (*via email*)