



**PLANNING DEPARTMENT**

6101 SE Johnson Creek Blvd  
Milwaukie OR 97206  
503-786-7630  
planning@milwaukieoregon.gov

RECEIVED

OCT 24 2019

CITY OF MILWAUKIE  
PLANNING DEPARTMENT

# Appeal of Land Use Decision

File # AP-2019-003

**APPEAL INFORMATION:**

Appeal of File #: <u>NR-2018-005</u>	Site Address: <u>12225 &amp; 12205 SE 19th Ave</u>
Review Type of Decision: <input type="checkbox"/> I <input type="checkbox"/> II <input checked="" type="checkbox"/> III	
Appeal Type: <u>Unrestricted De Novo</u>	<u>On the Record De Novo</u> ✓
Map & Tax Lot(s): <u>11E35DD03300-3200</u>	Zoning: <u>R5</u>
Comprehensive Plan Designation: <u>LD</u>	Size of property: <u>3.66 acres</u>

**RESPONSIBLE PARTIES:**

<b>APPELLANT:</b> <u>Gillis Properties LLC</u>	
Mailing address: <u>11650 SW 67th Ave # 210</u>	Zip: <u>97223</u>
Phone(s): <u>503-207-2055</u>	E-mail: <u>matt@bridgetownhomespdx.com</u>
<b>APPELLANT'S REPRESENTATIVE (if different than above):</b>	
Mailing address: <u>Mike Robinson, Schwabe Williams &amp; Wyatt</u>	Zip: <u>1211 SW 5th Ave Ste 1700 Portland, OR 97204</u>
Phone(s): <u>503-796-3756</u>	E-mail: <u>mrobinson@schwabe.com</u>

**STANDING FOR APPEAL (check applicable box):**

Applicant or applicant's representative from Type I, II, or III decision

Person or organization adversely affected or aggrieved by Type II decision

Person or organization that participated or provided testimony or evidence on the record for Type III decision. List the date and briefly describe the form of participation, testimony, or evidence:

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**BASIS OF APPEAL (attach a detailed statement describing the basis of the appeal):**

Identify which approval criterion or development standard is believed to have been overlooked or incorrectly interpreted or applied and/or which aspect of the proposal is believed to have been overlooked or incorrectly evaluated.

For appeal of a Type II decision, identify either an error as described above or the manner in which the person filing the appeal was adversely impacted or aggrieved by the decision.

**SIGNATURE:**

*Matt Gillis*

**ATTEST:** I have standing to appeal the land use decision identified on this application and have provided the necessary items and information for filing an appeal per Milwaukie Municipal Code (MMC) Subsection 19.1010.1. To the best of my knowledge, the information provided within this appeal package is complete and accurate.

Submitted by: Matt Gillis Date: 10-23-19

## IMPORTANT INFORMATION ON REVERSE SIDE

Attach required statement describing basis of appeal.

**APPEAL HEARINGS** (excerpted from MMC Subsections 19.1001.5 and 19.1010.3):

**Appeals of Type I and II decisions:**

Appeals of Type I and II decisions are heard by the Planning Commission. The appeal hearing is an unrestricted de novo hearing, which means that new evidence, testimony, and argument that were not introduced in the original decision can be introduced in the appeal. The standard of review for the Planning Commission is whether the initial decision has findings and/or conditions that are in error as a matter of fact or law. The Planning Commission's decision on the appeal is the City's final decision on the initial land use application per ORS 227.178. Further appeals of the application may be made to the Oregon Land Use Board of Appeals or other court.

**Appeals of Type III decisions:**

Appeals of Type III decisions are heard by the City Council. The appeal hearing is an on-the-record de novo hearing, which means that new evidence that was not introduced in the original decision cannot be introduced in the appeal. New testimony is allowed. New argument is also allowed that is based on evidence already in the record and on testimony that is new or already in the record. The standard of review for the City Council is a new evaluation of existing evidence, new and existing testimony, and new and existing arguments. The City Council's decision on the appeal is the City's final decision on the initial land use application per ORS 227.178. Further appeals of the application may be made to the Oregon Land Use Board of Appeals or other court.

**DECISIONS NOT SUBJECT TO LOCAL APPEAL:**

The initial hearing for Type IV and V decisions is held by the Planning Commission. The Planning Commission does not issue a decision on these types of review and, instead, issues a recommendation to the City Council. This recommendation is not a final decision and is not appealable.

The review authority for Type IV and V decisions is the City Council. Since there is no higher authority within the City, the City Council's decisions on these types of reviews are the City's final decision on the land use application. Appeals of these types of applications may be made to the Oregon Land Use Board of Appeals or other court.

Downtown Design Review applications are considered at a public meeting by the Design and Landmarks Committee. The Design and Landmarks Committee does not issue a decision on these types of review and, instead, issues a recommendation to the Planning Commission. This recommendation is not a final decision and is not appealable.

**THIS SECTION FOR OFFICE USE ONLY:**

	FILE NUMBER	FEE AMOUNT*	DATE STAMP
APPEAL FILE:	AP-2019-003	\$ 1,000	RECEIVED OCT 24 2019 CITY OF MILWAUKIE PLANNING DEPARTMENT
TOTAL AMOUNT RECEIVED:		\$	
RECEIPT #:			
RCD BY:			
Associated application file #s (appeals, modifications, previous approvals, etc.):			NIR-2018-005
Neighborhood District Association(s):			Island Station
Notes:			

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OCT 24 2019

CITY OF MILWAUKIE  
PLANNING DEPARTMENT

October 24, 2019

**Michael C. Robinson**  
Admitted in Oregon  
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C: 503-407-2578  
mrobinson@schwabe.com

VIA E-MAIL

Mr. Mark Gamba, Mayor  
City of Milwaukie City Council  
Milwaukie City Hall  
10722 SE Main Street  
Milwaukie, OR 97222

RE: Appeal of City of Milwaukie Planning Commission (the "Planning Commission")  
Decision in City of Milwaukie File No. NR-2018-005

Dear Mayor Gamba and Members of the Milwaukie City Council:

This office represents Gillis Properties, LLC, the Applicant. Enclosed with this letter, please find the following:

1. A Notice of Appeal meeting the requirements of Milwaukie Municipal Code ("MMC") 19.1010.1.A-C;
2. A completed and signed City of Milwaukie "Appeal of Land Use Decision" form;  
and
3. A check made payable to the City of Milwaukie in the amount of \$1,000.00 as shown in the City of Milwaukie Master Fee Schedule for fiscal year 2020.

I am the Applicant's representative. Please provide me with copies of all notices, Staff Reports and correspondence received by the City concerning this appeal.

Very truly yours,



Michael C. Robinson

MCR/jmhi  
Enclosures

cc: Mr. Matt Gillis (via email) (w/enclosure)  
Ms. Vera Koliass (via email) (w/enclosure)  
Mr. Denny Egner (via email) (w/enclosure)  
Mr. Justin Gericke (via email) (w/enclosure)  
Mr. Ken Valentine P.E. (via email) (w/enclosure)

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BEFORE THE CITY COUNCIL  
FOR THE CITY OF MILWAUKIE, OREGON

In the Matter of an Appeal of the Milwaukie Planning Commission's (the "Planning Commission") Decision in City of Milwaukie File No. NR-2018-005 to Deny the Application for Approval of a Natural Resources Cluster Development Located at 12205-12225 SE 19 <sup>th</sup> Avenue in the R-5 Zoning District	)	<b>NOTICE OF APPEAL – FINDINGS EXPLAINING HOW THE APPELLANT HAS ADDRESSED MILWAUKIE MUNICIPAL CODE ("MMC") 19.1010.1.A-C AND PROVIDING A BASIS FOR THE MILWAUKIE CITY COUNCIL (THE "CITY COUNCIL") TO GRANT THE APPEAL, REVERSE THE DECISION AND APPROVE THE APPLICATION</b>
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**1. REQUIREMENTS FOR APPEAL.**

**A. MMC 19.1010.1.A.1, date and case file number of the Decision being appealed.**

The file number of the Decision being appealed is NR 2018-005, Elk Rock Estates. The date of the Decision being appealed is October 8, 2019.

**B. MMC 19.1010.1.A.2, documentation that the person filing the Application has standing to appeal under MMC 19.1010.6.A.**

This is an appeal of a Type III Decision. A Type III decision may be appealed by the Applicant. Gillis Properties, LLC, is the Applicant. The Applicant participated in the proceedings before the Planning Commission prior to the Decision through its representatives providing testimony and evidence. The Applicant is aggrieved and adversely affected by the denial of the Application.

**C. MMC 19.1010.1.A.3.a, detailed statement describing the basis of the appeal of a Type III decision.**

The Applicant's statement in Section 3, below, identifies the applicable approval criteria overlooked, incorrectly interpreted, incorrectly applied and incorrectly evaluated in the Decision.

**D. MMC 19.1010.1.B, payment of the appeal fee.**

The Applicant has timely paid the Application fee of \$1,000.00 at the time of filing of this appeal on October 24, 2019.

**E. MMC 19.1010.1.C, timely filing of appeal.**

The Applicant timely submitted the Appeal Application form, the applicable appeal fee and the appeal statement addressing MMC 19.1010.1.A-.C.a on October 24, 2019 within the fifteen-day appeal period.

**F. Conclusion.**

The City Council can find that the Applicant has complied with the requirements of MMC 19.1010.1.A-C, "Filing an Appeal," by timely filing all the required elements of an appeal within fifteen (15) days of the Decision date of October 8, 2019.

**2. STATEMENT SATISFYING MMC 19.1010.1.A.3.a FOR APPEAL OF A TYPE III DECISION.**

**A.** The Decision addresses only those sections which the Planning Commission found the Application failed to satisfy: MMC Chapter 18.04, "Flood Hazard Area" and MMC Chapter 19.402, "Natural Resources." The City Council can find that the Applicant satisfied all other applicable approval criteria.

**B.** The Applicant relies on its complete Application, including all documents in the possession of the Milwaukie Planning Department from the initial submittal of the Application, its oral testimony to the Planning Commission at the initial evidentiary hearing on July 23, 2019, and its subsequent written submittals during the open record period including but not limited to the Applicant's letters dated April 29, 2019, July 16, 2019, August 6, 2019, and September 3, 2019.

**C.** The Applicant agreed to all staff-recommended conditions of approval (August 6, 2019 letter at Page 3).

**D.** For all alleged errors identified in this appeal, the Applicant asserts that the Decision improperly overlooks applicable approval criteria, incorrectly interprets or applies approval criteria and fails to properly consider the Applicant's argument and substantial evidence in the whole record.

**3. SPECIFIC REASONS WHY THE DECISION IS IN ERROR BECAUSE IT IMPROPERLY OVERLOOKED APPLICABLE APPROVAL CRITERIA, INCORRECTLY INTERPRETED OR APPLIED APPLICABLE APPROVAL CRITERIA AND FAILED TO PROPERLY ADDRESS THE APPLICANT'S ARGUMENT AND SUBSTANTIAL EVIDENCE.**

**A.** The Decision fails to properly apply Milwaukie Comprehensive Plan (the "MCP") Chapter 4, Map 6 (August 6, 2019 letter at Page 2).

**B.** To the extent it is relevant, the City improperly applied MCP Chapter 3, Objective 1, Policy 3 (April 29, 2019 letter at Page 1 and September 3, 2019 letter at Pages 7 and 8).

**C.** The Decision improperly applied subjective approval criteria in violation of ORS 197.303(1), 197.307(4), 197.522 and 227.175(4)(a)-(d) (the “Needed Housing Statutes”) (April 29, 2019 letter at Page 1, July 16, 2019 letter at Pages 1 and 2, August 6, 2019 letter at Pages 1 and 2 and September 3, 2019 letter at Pages 1-3 and 6 and 7).

**D.** The Decision improperly failed to explain what clear and objective application path is available to the Applicant (September 3, 2019 letter at Page 6 and 7).

**E.** The Decision failed to apply ORS 197.522 by allowing the Applicant an opportunity to provide clear and objective conditions of approval (September 3, 2019 letter at Page 2).

**F.** The Decision failed to find that the Application is subject to the Needed Housing Statutes. The property is zoned R-5, which allows residential development, is located inside the Portland Metropolitan Area Urban Growth Boundary (the “UGB”), and MCP, Chapter 4, Map 6 plainly identifies the property as buildable lands (August 6, 2019 letter at Page 2, Exhibit 2).

**G. MMC 18.04, Decision Pages 1 and 2.**

The Decision erred by finding that the Applicant’s evidence did not demonstrate that all federal and local permits can be obtained. The Planning Commission erred by failing to consider the Applicant’s substantial evidence including but limited to all written submittals, its Application as originally submitted and later amended and as later supplemented, its open record period letters and its July 23, 2019 public testimony. Even if MMC Chapter 18, “Flood Hazard Regulations,” applies to the Application, the City Council must find that the finding on Page 2 is incorrect and not supported by substantial evidence in the whole record. Finally, the Planning Commission erred by not applying ORS 197.522.

**H. MMC 18.04.150.A, “Anchoring,” Decision Page 2.**

The Planning Commission found that it was unclear what standards will apply for the foundation design and that the Applicant must meet the requirements for structures that are substantially improved.

The City Council must find that the Planning Commission erred because it failed to properly consider the Applicant’s argument and evidence demonstrating that MMC 18.04.150(a) is satisfied or can be satisfied with a clear and objective condition as required by ORS 197.522 (August 6, 2019 letter at Page 3, Exhibit 3) and additional testimony by Applicant’s civil engineer, Ken Valentine.

The City Council must reverse the Decision on this basis.

**I. MMC 18.04.150.B, “Construction Materials and Methods,” Decision Pages 2 and 3.**

The Planning Commission found that the standards apply to the proposed and substantially improved structures, that the proposed development is in an area of likely high flood velocity, that the Applicant’s foundation designs are discouraged by federal guidelines and that the Applicant failed to consider minimizing flood damage through utilizing pier, post or piling foundations.

The Planning Commission erred because the basis for the Decision is not related to the approval criteria in MMC 18.04.150(b) because the FEMA guidelines are not relevant approval standards and the Applicant’s substantial evidence in its Application, written submittals, open record period submittals and oral testimony including the August 6, 2019 letter at Page 3, Exhibit 3, demonstrates by substantial evidence that this standard is satisfied. Additionally, the Planning Commission erred by failing to provide an opportunity for the Applicant to provide a clear and objective condition as required by ORS 197.522.

The Planning Commission erred in finding that the foundation types are superior to the Applicant’s proposed solutions pursuant to MMC 19.402.12.B.1.b(2)(a), Decision Page 3.

**J. MMC 18.04.150.C, “Utilities,” Decision Page 2.**

The Decision found that the Application failed to minimize or eliminate the possibility of the infiltration of flood waters and that there is an inherent risk associated with locating water supply and sanitary sewer systems in areas that are susceptible to flooding.

The City Council must reverse the Planning Commission on this finding because the Planning Commission failed to provide the Applicant with an opportunity to propose a clear and objective condition as required by ORS 197.522 and the Applicant’s substantial evidence including its Application, its written statements and its oral testimony, demonstrates that it is feasible to satisfy this standard.

**K. MMC 18.04.150.E, “Review of Building Permits,” Decision Page 4.**

It is unclear if the Planning Commission found this standard to be satisfied or not satisfied. However, the City Council can find that the Application contains substantial evidence demonstrating that this criterion is satisfied (August 6, 2019 letter at Page 7, Exhibit 3 and additional written and oral testimony and substantial evidence submitted on behalf of the Applicant).

**L. MMC 18.04.150.F, “Balanced Cut and Fill,” Decision Pages 4 and 5.**

The Planning Commission found that the Applicant failed to satisfy the standard. The City Council must reverse the Planning Commission because the Applicant’s argument and substantial evidence addressed these standards (August 6, 2019 letter at Page

7, Exhibit 3) and because the Planning Commission failed to provide an opportunity for the Applicant to submit a clear and objective condition as required by ORS 197.522.

**M. MMC 18.04.150.G, “Crawlspace Construction,” Decision Pages 6-9.**

The Planning Commission found that the Applicant failed to satisfy the requirements regarding crawlspaces.

The City Council must reverse the Planning Commission because it failed to give the Applicant an opportunity to submit a clear and objective condition of approval as required by ORS 197.522. Further, the Applicant’s written and oral testimony, including its August 6, 2019 letter at Page 7, Exhibit 3, its September 3, 2019 letter at Pages 4-6 and Page 7, contains substantial evidence demonstrating that these criteria are satisfied.

**N. MMC 18.04.160.A, “Residential Construction,” and E, “Miscellaneous Provisions,” Decision Pages 9 and 10.**

The Planning Commission found that the Applicant’s proposal for automatic flood vents might not appropriately address the expected hydrodynamic loadings and that the construction of a dock in the Willamette River Floodway requires state authorization after City approval and a “no rise” certificate for work within the floodway. The Planning Commission also found that the Applicant must meet the requirements for substantial improvements on an existing building but that applicable regulations do not allow basements to extend below the base flood elevation (“BFE”).

The City Council must reverse the Planning Commission because it failed to give the Applicant an opportunity to provide clear and objective conditions required by ORS 197.522.

Additionally, the City Council must reverse the Planning Commission because it failed to consider the Applicant’s oral and written testimony demonstrating that these standards could be satisfied, including but limited to, the August 6, 2019 letter at Page 7, Exhibit 3.

The City Council can find that the statement regarding MMC 18.04.170, “Floodway,” Decision Page 10 is not a finding for denial.

**O. MMC 19.402.8, “Activities Requiring Type III Review,” Decision Pages 10 and 11.**

The Planning Commission found that the Applicant’s proposed activities are subject to a Type III review and the discretionary process established in MMC 19.402.12. The Planning Commission further found that the Applicant elected to propose a discretionary review process.



The City Council must reverse the Planning Commission because it failed to demonstrate that there was a clear and objective path available to the Applicant and the Decision does not adequately respond to the Applicant's arguments regarding the lack of a clear and objective path. Consequently, the Planning Commission failed to comply with the Needed Housing Statutes.

**P. MMC 19.402.12.A, "Impact Evaluation and Analysis," Decision Pages 11-14.**

The Planning Commission found that the Application did not provide a detailed description of ecological functions of riparian habitat.

The City Council must reverse this finding because the Planning Commission failed to consider the Applicant's argument and evidence, especially that of Mr. John McConnaughey (August 6, 2019 letter at Page 2), and Mr. McConnaughey's other oral and written testimony.

The Planning Commission found that the Applicant failed to satisfy Subsection (iv), "Alternatives Analysis."

The City Council must reverse the Planning Commission because it failed to consider the Applicant's oral and written testimony addressing MMC 19.402.12. The Applicant's August 6, 2019 letter at Pages 1 and 2 and its September 3, 2019 letter at Pages 2-4 satisfactorily address the alternatives analysis, the requirement that no "practicable alternative" exists and a mitigation plan. In fact, the Decision is also deficient because it fails to address the definition of "practicable" found in MMC 19.201 and required by MMC 19.402.12.1.B.1.a-.c in the Applicant's September 3, 2019 letter at Pages 3 and 4.

**Q. MMC 19.402.12.B.1.a, "Avoid," Decision Pages 14 and 15.**

The Planning Commission found that it is not possible to avoid impacts to the WQR and habitat conservation areas ("HCA") (Decision Page 14) and that the Applicant failed to provide a "serious attempt" to avoid the impacts (Decision Page 15).

The City Council must find that the Planning Commission erred by ignoring the Applicant's oral and written argument and substantial evidence demonstrating several alternatives analysis explaining that it is not "practicable" to avoid intrusion of the development into the WQR and HCA and that the proposed alternatives have less detrimental impact in the natural resource areas than other practicable alternatives, each of which was described and discussed by the Applicant in its oral and written submittals.

The Planning Commission particularly faults the Application by failing to avoid impacts to the HCA by clustering development near 19<sup>th</sup> Avenue but the Planning Commission ignored the Applicant's substantial evidence demonstrating that clustering development would not avoid impacts to the HCA and that that alternative was not practicable.

**R. MMC 19.402.12.B.1.b, “Minimize” and B.1.c, “Mitigation,” Decision Page 15.**

The Planning Commission found that there was “not a serious consideration” given to an alternative that “truly” minimizes impact.

The City Council must reverse the Planning Commission because the Applicant’s oral and written testimony and substantial evidence demonstrates that there is no practicable alternative to avoid disturbance and that the proposed activity minimized detrimental impacts, keeping in mind the definition of “practicable” in MMC 19.201 as:

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

The Applicant’s oral and written testimony considered all of these factors and the Planning Commission’s Decision fails to consider any of them.

The findings on mitigation is internally inconsistent and is not supported by substantial evidence.

**4. CONCLUSION.**

For the reasons contained in this Notice of Appeal, the Applicant respectfully requests that the City Council find that this Application is subject to the Needed Housing Statutes, that the Planning Commission erred in numerous ways, including improperly applying subjective approval criteria in each of the Decision findings identified above. The City Council should grant the appeal, reverse the Planning Commission and approve the Application, applying only clear and objective approval criteria and imposing clear and objective conditions of approval, including the conditions of approval agreed to by the Applicant and additional clear and objective conditions of approval as necessary to satisfy the clear and objective approval standards.



www.milwaukieoregon.gov

# Transaction Receipt

**601-19-000103-PLNG**

**Receipt Number: 17805**

**Receipt Date: 10/24/19**

Milwaukie Planning Department

6101 SE Johnson Creek Blvd  
Milwaukie, OR 97206  
503-786-7630  
Fax: 503-774-8236  
planning@milwaukieoregon.gov

Worksite address: 12225 SE 19TH AVE, MILWAUKIE, OR 97222  
Parcel: 11E35DD03300

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### Fees Paid

Transaction date	Units	Description	Account code	Fee amount	Paid amount
10/24/19	1,000.00	Amount Appeal to City Council Fee Notes: AP-2019-003.	110-000-4480	\$1,000.00	\$1,000.00

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Payment Method: Check number: 2682	Payer: Gillis Properties LLC	Payment Amount:	\$1,000.00
Transaction Comment: Gillis Properties LLC			
11650 SW 67th Ave #210			
Tigard, OR 97223			

Cashier: Tempest Blanchard

**Receipt Total: \$1,000.00**