BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK BONNETT,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

ROBERT HASS,
Intervenor-Respondent.

LUBA No. 2003-144

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Mark Bonnett, Portland, filed the petition for review and argued on his own behalf.

No appearance by Deschutes County.

Norman R. Hill, Salem, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Webb Martinis and Hill.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 01/27/2004

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision that approves three land use permit applications, which collectively allow construction of a dwelling and an associated driveway and authorize placement of fill in a floodplain and in wetlands.

MOTION TO INTERVENE

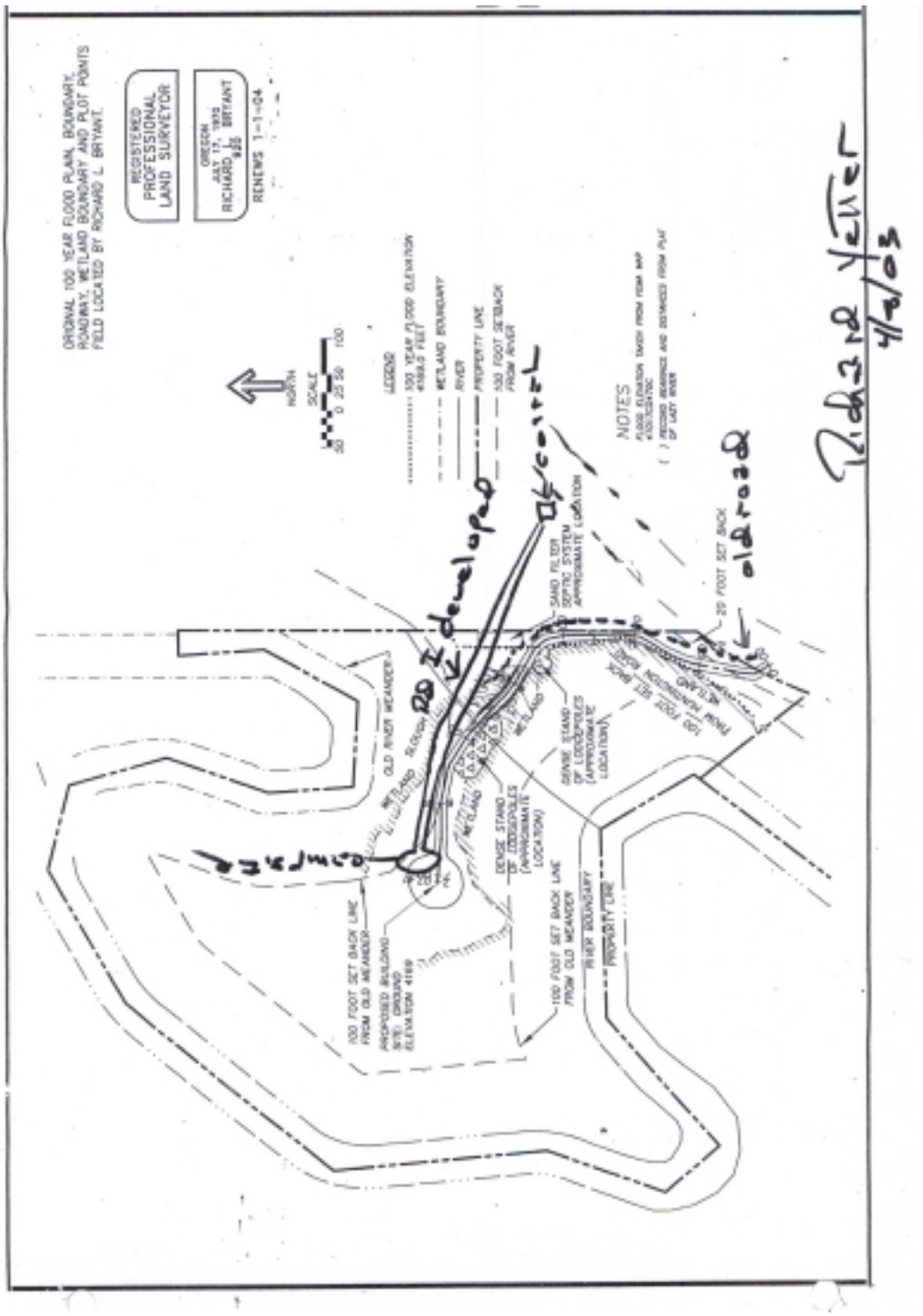
Robert Hass, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is zoned Rural Residential (RR-10) and Floodplain (FP). Both of those zoning districts permit residential development. The subject property is also subject to Landscape Management Combining Zone (LMCZ) and Wildlife Area Combining Zone (WACZ). Those combining zones impose additional approval criteria to protect views and wildlife. The challenged decision includes the following description of the subject property:

> "The subject property is approximately 10 acres in size. The topography of the site has its highest elevation along the eastern property boundary and then gradually slopes to the west for approximately 20-40 feet. For the remainder of the property, the land is moderately level with slight elevation change. At the southern, northern, and western edges of the property the land takes an abrupt and steep drop down to the river. There is an improved driveway with red cinders that begins in the southeast corner of the property at Huntington Road. The driveway travels north for approximately 330 feet and then heads west for approximately 370 feet to its termination. The driveway ends at the building pad, which is circular in shape and has also [been] improved with compacted gravel. The existing vegetation of the property consists of ponderosa pines, lodgepole pines, and native ground cover. The subject property is situated almost entirely within the 100-year floodplain associated with the Little Deschutes River and is currently undeveloped." Record 56-57.

We provide a figure that appears at page 212 of the record on the following page to assist in providing a picture of the subject property and the roadways and the proposed development that are in dispute.


ORIGINAL 100 YEAR FLOOD PLAIN, BOUNDARY, ROADWAY, WETLAND BOUNDARY AND PLOT POINTS FIELD LOCATED BY RICHARD L. BRYANT.
REGISTERED PROFESSIONAL LAND SURVEYOR
OREGON JULY 17, 1979 RICHARD L. BRYANT 942
RENEWS 1-1-04
NORTH
SCALE
LEGEND
100 YEAR FLOOD ELEVATION
WETLAND BOUNDARY
RIVER
PROPERTY LINE
100 FOOT SETBACK FROM RIVER
NOTES
SAND FILTER SEPTIC SYSTEM (APPROXIMATE LOCATION)
DENSE STAND OF LODGEPOLES (APPROXIMATE LOCATION)
OLD RIVER MEANDER
100 FOOT SET BACK LINE FROM OLD MEANDER
PROPOSED BUILDING SITE GROUND ELEVATION 4189
100 FOOT SET BACK LINE FROM OLD MEANDER
RIVER BOUNDARY
PROPERTY LINE
20 FOOT SET BACK

Figure

As the figure shows, the subject property is located in an oxbow of the Little Deschutes River. The 330-foot portion of the driveway noted above departs from Huntington Road and generally travels north along Huntington Road and the property's eastern boundary close to what is identified as the "old road" in the figure.[1] This is the higher elevation property noted in the above-quoted description. The 370-foot part of driveway travels west toward the center of the property and crosses floodplain and wetlands to the proposed building site. When the building pad and driveway that are at issue in this appeal were constructed, a significant amount of fill was placed in the floodplain and a lesser amount of fill was placed within wetlands on the property. The required conditional use permit to place fill in wetlands was not obtained by intervenor before the driveway was constructed.

FIRST ASSIGNMENT OF ERROR

A. The DCC 18.88.060 Siting Standard

As previously noted, the subject property is subject to the WACZ. The purpose of the WACZ is set out at Deschutes County Code (DCC) 18.88.010 as follows:

> "The purpose of the [WACZ] is to conserve important wildlife areas in Deschutes County; to protect an important environmental, social and economic element of the area; and to permit development compatible with the protection of the wildlife resource."

Under DCC 18.88.020, the WACZ is applied "to all areas identified in the Comprehensive Plan as winter deer range, significant elk habitat, antelope range or deer migration corridor."

One of the ways the WACZ conserves wildlife areas is by applying siting standards to minimize the impact of development on wildlife resources. DCC 18.88.060(B). The WACZ siting standards at DCC 18.88.060(B) require that a dwelling in the WACZ must be sited no more than specified distances from roads, easements and driveways that existed in 1992. DCC 18.88.060(C) establishes how applicants may go about proving when those roads,

[1] We discuss the "old road" and the "Rd I developed" later in this opinion.

easement and driveways came into existence. We set out the relevant portions of DCC 18.88.060(B) and (C) in the margin and summarize their key features below before turning to petitioner's challenge under this assignment of error.[2]

For purposes of this appeal, there are five key features of DCC 18.88.060. First, the terms "road," "easement," and "driveway," which are the operative terms that establish the measuring point for the setbacks required by DCC 18.88.060(B), are terms that are defined elsewhere in the DCC.[3] Second, if a dwelling is to be sited within 300 feet of a road or

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[2] As relevant, DCC 18.88.060 provides:

"B. The footprint, including decks and porches, for new dwellings shall be located entirely within 300 feet of *public roads, private roads or recorded easements for vehicular access existing as of August 5, 1992* unless it can be found that:

"* * * * *,

"3. The dwelling is set back no more than 50 feet from the edge of a *driveway that existed as of August 5, 1992*.

"C. For purposes of DCC 18.88.060(B):

"1. A private road, easement for vehicular access or driveway will conclusively be regarded as having existed prior to August 5, 1992 if the applicant submits any of the following:

"a. A copy of an easement recorded with the County Clerk prior to August 5, 1992 establishing a right of ingress and egress for vehicular use;

"b. An aerial photograph with proof that it was taken prior to August 5, 1992 on which the road, easement or driveway allowing vehicular access is visible;

"c. A map published prior to August 5, 1992 or assessor's map from prior to August 5, 1992 showing the road (but not showing a mere trail or footpath).

"2. An applicant may submit any other evidence thought to establish the existence of a private road, easement for vehicular access or driveway as of August 5, 1992 which evidence need not be regarded as conclusive." (Emphases added.)

[3] Those terms are defined in DCC 18.04.030 as follows:

easement, that road or easement must have existed "as of August 5, 1992." Third, if the dwelling is not to be located within 300 feet of a road or easement, it may still be allowed if it will be located within 50 feet of a driveway, provided the driveway "existed as of August 5, 1992." Fourth, in proving that a road, easement, or driveway existed on August 5, 1992, DCC 18.88.060(C)(1) provides three conclusive ways that an applicant may prove that a road, easement or driveway existed. Fifth, if an applicant is unable to submit conclusive proof under DCC 18.88.060(C)(1), an applicant may nonetheless submit other evidence which will not be regarded as conclusive, but may be sufficient to establish that a road, easement or driveway existed as of August 5, 1992. DCC 18.88.060(C)(2).

Before turning to the hearings officer's decision and the parties' arguments, some explanation of the terminology that we use in this opinion is necessary. As we have noted, the terms "road" and "driveway" are defined terms. We have already referred to the existing 700-foot access as a driveway. However, unless a garage or parking area exists at the end of that 700-foot driveway, it is not a "driveway," as that term is defined in DCC 18.04.030. *See* n 3. The central dispute under the first assignment of error is whether a primitive access, which the hearing officer found existed on the property on August 5, 1992, in fact existed on August 5, 1992. That primitive access enters the subject property from two points on Huntington road and is shown on the figure as the "old road" and the "Rd I developed." A secondary dispute is whether that primitive access falls with the DCC 18.04.030 definitions of "road" or "driveway." In discussing these issues, we refer to the disputed "old road" and the "Rd I developed" as the "primitive access," to avoid confusion with the defined terms.

> "'Road or street' means a public or private way created to provide ingress or egress to one or more lots, parcels, areas or tracts of land."
>
> "'Easement' means a grant of the right to use a parcel of land or portion thereof for specific purposes where ownership of the land or portion thereof is not transferred."
>
> "'Driveway' means a way created to provide vehicular access from a public or private road to a garage or parking area."

It is clear that the proposed dwelling site is much further than 300 feet from Huntington Road. It is also clear that neither the county nor the parties believe there is an easement or *public* road, from which the DCC 18.88.060(B) setback might be measured. The critical questions under this assignment of error are whether the disputed primitive access existed in 1992 and whether it qualified as a private "road" or "driveway."[4]

B. The Hearings Officer's Decision

1. Private Road or Driveway

A threshold problem with the hearings officer's decision is that she does not make it clear whether she is applying the 300-foot setback from "private roads" or the 50 foot setback from "a driveway." The challenged decision refers to the primitive access as both a "driveway" and a "road." Record 64-66. The hearings officer appears ultimately to apply the 50-foot setback. We agree with petitioner that, to the extent the hearings officer's decision relies on her finding that the proposed dwelling would be within 50 feet of a driveway, that finding is inadequately explained. The hearings officer's decision includes no findings that explain why the primitive access that existed on August 5, 1992 qualified as a driveway, as DCC 18.04.030 defines that term.[5] It is not possible from this record to determine whether the primitive access might have qualified as a driveway.

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[4] We refer to the disputed primitive access in the past tense, because the relevant question under DCC 18.88.060(B) is whether a road or driveway existed on August 5, 1992, not whether the road or driveway exists today. Petitioner notes in several places in the petition for review that the existing 700-foot driveway is not located in precisely the same place as the disputed primitive access that the county identified and relied on in finding compliance with DCC 18.88.060(B). Petitioner may be correct, although the 700-foot driveway appears to fairly closely follow the different parts of the primitive access. However, for purposes of resolving the first assignment of error, it is immaterial whether the existing driveway is located on portions of the primitive access.

[5] It also appears that there is not substantial evidence in the record that would support such a finding. There is no evidence that there was ever a garage on the property. It is clear that the reference in DCC 18.04.030 to a "parking area" envisions something more than an unimproved and undesignated area where persons driving along the primitive access may have occasionally stopped driving and turned off their engines. We understand the DCC 18.04.030 definition of "driveway" to require that the driveway end at a garage or some sort of at least minimally improved parking area that is identifiable as such.

However, both the "Rd I developed" and the "old road" shown on the figure appear to fall within the definition of road, *i.e.* a "way created to provide ingress or egress to one or more lots, parcels, areas or tracts of land." *See* n 3. Putting aside the question of whether the primitive access existed in 1992, petitioner offers no explanation for why he believes the primitive access did not qualify as a private "road," as DCC 18.04.030 defines that term. We turn to the question of whether the record demonstrates that the primitive access existed on August 5, 1992. If it does, the fact that the hearings officer appears to have explicitly applied only the 50-foot setback would not provide a basis for remand.

2. Private Road in Existence on August 5, 1992

As noted above, under DCC 18.88.060(C)(1), an applicant may conclusively establish that a private road existed on August 5, 1992 by submitting a pre-1992 "aerial photograph" on which the private road "is visible." *See* n 2. The applicant and opponents submitted a number of aerial photographs. After reviewing those photographs the hearings officer explained:

> "The hearings officer agrees with the opponents that none of the aerial photos submitted show a road or driveway on the subject property which is visible in the areas indicated by the applicant. [Under DCC 18.88.060(C)(1)(b) an applicant may demonstrate] conclusively that the road existed if the road is visible in an aerial photo taken prior to August 5, 1992. The Hearings Officer agrees that there are clearing patterns in the trees and vegetation in the general area where the applicant claims the road existed; and while these clearing patterns could indicate the presence of a roadway, a road is not visible and these clearings could also easily be old river meanders or natural growth patterns. In each of the aerial photos submitted by the applicant and the opponents, there are roads or driveways which are clearly visible in other areas. There is not, however, a road or driveway which is clearly visible on the subject property. Accordingly, the Hearings Officer finds that the aerial photos submitted by the applicant do not show a road or driveway which is visible to establish conclusively the existence of the road pursuant to DCC 18.88.060[(C)(1)(b)]. The remaining question is whether there is other evidence of the road or driveway sufficient to establish its existence prior to August 5, 1992." Record 64 (underline emphasis in original).

We have reviewed the aerial photographs in the record. We agree with the hearings officer's assessment of those aerial photographs. They are at best inconclusive. A reasonable person could easily find, as the hearings officer did, that the primitive access is not visible on the aerial photographs in the record. However, given the admittedly unimproved nature of the primitive access and its intermittent use over the years, a reasonable person could also find, as the hearings officer later did, that those photographs are not sufficient to establish that a road or driveway *did not exist* in 1992.

A great deal of additional evidence was submitted concerning the disputed existence of the primitive access. In concluding that the primitive access existed on August 5, 1992, the hearings officer relied principally on (1) an April 4, 2003 letter signed by Richard Yetter (Yetter letter), Record 210-11; (2) the figure reproduced earlier in this opinion on which Richard Yetter identified the primitive access, Record 212; (3) a March 23, 2003 letter signed by Daniel P. Aeschliman (Aeschliman letter), Record 214; and (4) testimony and report from intervenor's consulting forester Earl Nichols (Nichols testimony and report), Record 66, 241-44).[6] The hearings officer described her assessment of the above-noted evidence as follows:

> "The Hearings Officer finds that the question of whether or not there is sufficient evidence that a road or driveway existed on the subject property as of August 5, 1992 is a very close one. The letter from Dana Field at DSL does not establish a date for the existence of the road and does not explain how Ms. Field reached the conclusion that a road existed. The letters from Mr. Trumble, Mr. Swank and Mr. French confirm the existence of a road prior to the applicant's ownership but do not establish the existence of the road as of August 5, 1992. However, the [Yetter and Aeschliman letters] combined with the on-site evaluations and conclusions of Mr. Nichols are consistent with one another and support the existence of a road or driveway both prior to 1992 and after 1992. Mr. Yetter indicated that he cleared an access route from Huntington Road to the approximate location of the building site prior to 1990 and Mr. Aeschliman confirms the presence of an access road on the property from [Huntington] Road to the river in 1994. This evidence combined with

[6] The hearings officer also cited three letters in which the authors stated that they recently observed an unimproved roadway on the property (Trumbel, Swank, and French Letters). Record 215-217. The hearings officer also discusses an e-mail message from Dana Field at the Division of State Lands (DSL). Record 159-60.

> the consistent testimony and evaluation of Mr. Nichols are sufficient to establish the existence of a road or driveway from Huntington Road to the approximate location of the building site (as shown on the site plan attached to Mr. Yetter's letter * * *) as of August 5, 1992. Based on the submitted Site Plan, the Hearings Officer finds that the proposed dwelling will be set back no more than 50 feet from the edge of a driveway that existed as of August 5, 1992." Record 65.

Based on our review of the evidence, including the expert and lay testimony that petitioner submitted below to support his contention that the primitive access did not exist in 1992, we agree with the hearings officer that the question of whether the primitive access existed on August 5, 1992 "is a very close one." However, we conclude that a reasonable person could have reached the conclusion that the hearings officer did, based on the record in this appeal. The issue is a close one because no specific level of improvement is required under the DCC 18.04.030 definition of road. The disputed primitive access is admittedly not much of a road and never has been. It is the kind of road that persons might or might not notice and recognize as a road. The primitive nature of that access no doubt explains the conflicting evidence concerning its existence. Petitioner points out numerous weaknesses in the evidence the hearings officer relied on.[7] However, even with those weaknesses, we decline petitioner's invitation to conclude that a reasonable person could not have evaluated that evidence as the hearings officer did and reached the conclusion that she reached.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

DCC 18.96.060(B) prohibits construction of a dwelling within a floodplain unless the applicant demonstrates "that no alternative exists on the subject property which would allow

[7] For example, it is somewhat unclear from the Yetter letter precisely when he claims to have built the primitive access he describes in that letter. It states it was sometime before 1990, but does not state how long before 1990. Also, the Aeschliman letter seems to describe the "old road" and the western portion of the primitive access described by Yetter and does not mention the eastern portion of the primitive access Yetter describes.

the structure to be placed outside of the flood plain."[8] The proposed house is 60 feet by 40 feet and a 32-foot by 32-foot garage is proposed. The hearings officer found that the applicant adequately demonstrated that the proposed house and garage could not be located within the small narrow portion of the subject property that is located outside the floodplain. The hearings officer explained that the widest area of the narrow upland area is only approximately 75 feet wide.[9] Intervenor argues that the narrow upland area as shown on the figure is exceedingly narrow for much of its length. Intervenor contends that even the southerly upland area is clearly too small to accommodate the proposed house and garage and meet setback requirements.[10] We agree with intervenor.

Petitioner suggests the county could require that intervenor build a house with a smaller footprint that might fit within the narrow upland portion of the subject property. We agree with intervenor that DCC 18.96.060(B) does not require that an applicant reconfigure or reduce the size of the proposed house to allow it to be placed outside the floodplain.

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[8] DCC 18.96.060(B) provides:

> "No new construction of a dwelling (including manufactured housing), accessory structure or farm use structure shall be located in the flood plain unless it can be demonstrated by the applicant that no alternative exists on the subject property which would allow the structure to be placed outside of the flood plain."

[9] Apparently, the septic system drain field is to be located in a portion of that 75-foot wide area rather than the northerly portion of the upland area as shown on the figure set out earlier in this opinion.

[10] Intervenor notes that DCC 18.60.040 imposes a minimum 20-foot front yard setback from Huntington Road and might require an even larger set back if Huntington Road is a collector. As relevant, DCC 18.60.040 provides:

> "In an RR-10 Zone, the following yard and setbacks shall be maintained.
>
> "A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street right of way, 30 feet from a property line fronting on a collector right of way and 50 feet from an arterial right of way.
>
> "B. There shall be a minimum side yard of 10 feet for all uses, except on the street side of a corner lot the side yard shall be 20 feet.
>
> "C. The minimum rear yard shall be 20 feet."

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

The driveway that would serve the proposed dwelling crosses a seasonal wetland shortly after it turns west. *See* figure. Slightly less than 50 cubic yards of fill have been placed in the wetland. Under DCC 18.128.270, a conditional use permit is required to place fill in a wetland.[11] As noted earlier, that disputed driveway was constructed across the wetland without a conditional use permit. The challenged decision grants the required conditional use permit. Under this assignment of error, petitioner asserts subassignments of error that are directed at that conditional use permit. Petitioner specifically challenges findings that address the general conditional use criteria at DCC 18.128.015 and the DCC 18.128.270 considerations and conditions that apply specifically to removal and placement of fill in wetlands.

A. DCC 18.128.015 General Conditional Use Criteria

1. The Amount of Fill

Petitioner argues that, in applying DCC 18.128, the hearings officer erroneously found that less than 50 cubic yards of fill will be placed in the floodplain whereas at least ten times that quantity of fill has been or will be placed in the floodplain.

Intervenor points out that a recurring misunderstanding in petitioner's argument under the third assignment of error is petitioner's apparent assumption that the challenged conditional use permit authorizes fill for the building pad and the majority of the driveway

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[11] As relevant, DCC 18.128.270 provides:

> "Except as otherwise provided in DCC Title 18, no person shall fill or remove any material or remove any vegetation, regardless of the amount, within the bed and banks of any stream or river or in any wetland, unless such fill or removal is approved as a conditional use subject to the following standards[.]"

DCC 18.128.270 also sets out a number of factors that must be considered, and a number of conditions that must be met, to grant a conditional use permit for fill. We set out and discuss those factors and conditions below.

that is located in the floodplain but outside the small seasonal wetland that the driveway crosses shortly after it turns west. *See* figure. The conditional use permit is required for only the approximately 45 cubic yards of fill that has been placed in the affected wetland.[12] Intervenor is correct that the hearings officer's finding regarding the 45 cubic yards of fill is directed at the fill that has been placed in the wetland, not the larger amount of fill that has been placed in the portion of the floodplain that does not include wetlands. Intervenor is also correct that this larger volume of fill and the driveway and building area it facilitates is not the subject of the disputed conditional use permit, which only authorizes the approximately 45 cubic yards of fill in the wetlands. Accordingly, the finding provides no basis for reversal or remand. This subassignment of error is denied.

2. DCC 18.128.015(A)(1) and (3)

As noted above DCC 18.128.015 establishes conditional use criteria that apply to all conditional uses.[13] In her findings addressing DCC 18.128.015(A)(1), the hearings officer adopted findings that include the following:

> "As indicated by the applicant's burden of proof statement and an engineer's evaluation, the driveway and building pad are not expected to impact surrounding wetlands and possible floodwaters." Record 76.

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[12] According to the Division of State Lands (DSL), an area of approximately 611 square feet of seasonal wetlands are affected and the fill placed in the wetlands totals approximately 45 cubic yards. Record 97.

[13] As relevant, DCC 18.128.015 provides:

> "Except for those conditional uses permitting individual single-family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:
>
> "A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:
>
> "1. Site, design and operating characteristics of the use;
>
> "* * * * *
>
> "3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values."

Petitioner argues that finding is not supported by substantial evidence in the record because the record demonstrates that fill has been placed in the wetland.

Petitioner makes no attempt to explain why the disputed finding is critical to the challenged decision. Intervenor identifies testimony from his engineer below that the small amount of fill that has been placed in the wetland to accommodate the driveway will have little impact because the wetland is likely charged by high groundwater rather than by surface water that might be disrupted by the driveway. Record 167. Absent a more developed argument, we conclude the challenged finding provides no basis for reversal or remand.

Under general conditional use criterion DCC 18.128.015(A)(3), *see* n 13, another *factor* that the county was required to consider in determining the suitability of the proposed fill in the wetlands is "[t]he natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values." *See* n 13.

Petitioner contends the hearings officer failed to address DCC 18.128.015(A)(3). Petitioner's entire argument is as follows:

> "[The hearings officer] makes no finding with respect to 'natural resource values,' which is a factor to be considered under DCC 18.128.015(A)(3), despite substantial evidence provided by petitioners that the driveway would be harmful to wildlife and habitat. (Rec 376-422; *see also discussion in next section*)." Petition for Review 25.

Contrary to petitioner's argument, the hearings officer did adopt findings addressing DCC 18.128.015(A)(3). Record 76-75.[14] Petitioner makes no attempt to challenge those findings. Those findings, unlike the evidence at Record 376-422, are directed specifically at the fill in the wetlands that is the subject of the requested conditional use permit rather than at the possible impacts of driveway and residential development as a whole on natural resource values. Those findings also note that the relatively small amount of fill that has been placed

[14] Pages 21 and 22 of the hearings officer's decision are out of order. Page 22 appears at Record 75 and page 21 appears at Record 76.

in the wetland has been placed in the area of the existing primitive access that has already impacted those wetlands. Record 76-75. Petitioner's challenge to the hearings officer's finding concerning DCC 18.128.015(A)(3) provides no basis for remand.

This subassignment of error is denied.

B. Wetland Fill Considerations and Conditions

Under the county's regulatory scheme, in addition to applying the general conditional use criteria discussed above, approval of fill in wetlands requires "consideration" of certain additional "factors" and that certain "conditions [be] met." DCC 88.128.270(D).[15] Petitioner argues that the county inadequately considered one factor and failed to establish that three required conditions are met.

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[15] As relevant, DCC 88.128.270(D) provides:

> "[A]n application for a conditional use permit for activity involving fill or removal of material or vegetation within the bed and banks of a stream, river or wetland:
>
> "1. Shall be granted only after *consideration of the following factors*:
>
> "* * * * *
>
> "b. The effects on aquatic life and habitat, and wildlife and habitat. The Oregon Department of Fish and Wildlife will be requested to review and comment on the application.
>
> "2. Shall not be granted unless all of the following conditions are met:
>
> "* * * * *
>
> "b. That there is no practical alternative to the proposed project which will have less impact on the surrounding area, considering the factors established in DCC 18.128.270(D)(1).
>
> "c. That there will be no significant impacts on the surrounding area, considering the factors established in DCC 18.128.270(D)(1).
>
> "* * * * *
>
> e. That the essential character, quality, and density of existing vegetation will be maintained. Additional vegetation shall be required if necessary to protect aquatic life habitats, functions of the ecosystem, wildlife values, aesthetic resources and to prevent erosion."

1. DCC 88.128.270(D)(1)(b) (Effects on Aquatic Life and Habitat, and Wildlife and Habitat)

DCC 88.128.270(D)(1)(b) requires that the county consider the effect of the proposed fill on "aquatic life and habitat, and wildlife and habitat," and that the county seek the review and comment of the Oregon Department of Fish and Wildlife (ODFW). The hearings officer's finding concerning DCC 88.128.270(D)(1)(b) is as follows:

> "The record shows that [ODFW] had one significant concern regarding the siting of the dwelling. ODFW commented that the application should be denied unless the applicant can show the driveway [was] in existence prior to August 5, 1992. As previously discussed, the evidence in the record is sufficient to establish the existence of a road or driveway on the subject property from Huntington Road to the building site as of August 5, 1992." Record 77-78.

Petitioner contends that the above finding mischaracterizes ODFW's position, which petitioner describes as inferring that the proposal will have "adverse effect on wildlife or habitat." Petition for Review 26. Petitioner also argues that the above findings erroneously assume that the county may rely entirely on ODFW's assumed lack of concern to demonstrate that the proposal complies with DCC 88.128.270(D)(1)(b).

ODFW's comments regarding DCC 88.128.270(D)(1)(b) are clearly relevant, since DCC 88.128.270(D)(1)(b) specifically requires that the county seek ODFW's comments. However, we agree with petitioner that the county may not simply rely on ODFW's failure to express any particular concern with the fill in the wetlands to meet the county's obligation to "consider" the "factor" stated in DCC 88.128.270(D)(1)(b). The above finding can be read to abdicate the county's obligation to consider this factor entirely to ODFW. Nevertheless, petitioner's contention under this "consideration," like his position under the general conditional use permit "considerations" is that the entire driveway and building site must be considered. We have previously rejected that contention and we reject it again here. The city's position concerning DCC 88.128.270(D)(1)(b) can be adequately discerned from its finding on the similar general conditional use consideration at DCC 18.128.015(A)(3). *See* n

13 (and related text above). As we have already explained, the county's consideration of that factor led the county to conclude that approval of the relatively small amount of fill was not inconsistent with that factor given that the affected wetland area has already been impacted by the existing primitive access.

Petitioners' arguments concerning DCC 88.128.270(D)(1)(b) provide no basis for reversal or remand. This subassignment of error is denied.

2. DCC 88.128.270(D)(2)(b) (No Practical Alternative to the Proposed Project)

This criterion requires that the county find there is "no practical alternative to the proposed project which will have less impact on the surrounding area, considering the factors established in DCC 18.128.270(D)(1)." *See* n 15. Again, for purposes of the conditional use permit, the proposed project is the proposal to allow fill, or more accurately the retention of fill, in the wetlands. If the house is sited where the applicant proposes, that fill appears to be necessary to provide access. The question becomes whether there is a practical alternative to doing so. If the house could be located east of the area where the wetland is to be filled, so that access would not require crossing the wetland, that would seem to be a practical alternative that must be selected instead of allowing fill in the wetland for the westward reach of the driveway that is necessary to access the proposed building site.

We have already rejected petitioner's second assignment of error. At first blush the reasoning that led us to deny the second assignment of error would seem to require that we reject petitioners "practical alternative" argument under DCC 88.128.270(D)(2)(b) as well. However, the question under DCC 18.96.060(B) in the second assignment of error was whether "no alternative exists on the subject property which would allow the structure to be placed *outside of the flood plain*." (Emphasis added.) While our resolution of that question in the county's and intervenor's favor under the second assignment of error establishes that there is no alternative site on the subject property that would avoid encroaching into the *floodplain*, it does not answer the question of whether it might be practical to construct the

proposed house at a location on the subject property that is wholly or partially in the floodplain that would avoid the need for a driveway on fill across the wetlands.[16]

Petitioner contends that such a location exists. As noted earlier, intervenor apparently has secured approval for a septic drainfield in the southern portion of the property. Petitioner contends there is an alternative site on the subject property north of where the driveway turns west. Observing a 10-foot side yard setback, there appears to be a potential building site in that area that is approximately 125 feet long, north to south, and approximately 65 feet wide at the southern end tapering to approximately 25 feet wide at the northern end. Petitioner contends that while a majority of this potential building site falls within the floodplain, which rules the site out as an *alternative to developing in the floodplain*, this potential building site is outside the wetland area and must be considered as a practical alternative site that would avoid having to place fill in the wetland for a driveway to access intervenor's preferred site. Record 346. A map showing that area appears at Record 423. It appears to us that siting intervenor's 60-foot by 40-foot proposed house and 32-foot by 32-foot garage on that area would likely be an exceedingly tight squeeze. However, although it may be too small to provide a practical alternative, we cannot rule it out as a practical alternative based on the record before us.[17]

The hearings officer's findings addressing DCC 88.128.270(D)(2)(b) do not consider whether this potential building site might be a "practical alternative" to placing fill in the wetland to access the proposed building site. Intervenor incorrectly assumes that this potential building site need not be considered as a practical alternative under DCC 88.128.270(D)(2)(b) because part of the site is located in the floodplain. For the reasons we

[16] Nearly the entire property is within the 100-year floodplain, whereas a much smaller area of the property qualifies as wetlands.

[17] Petitioner also suggests that the survey that appears at Record 575 appears to show a smaller area in this location than is shown on the assessors map at Record 634.

have explained, that assumption is incorrect. Although part of the potential building site is in the floodplain, it does not include wetlands. Therefore, it is a potential alternative to the proposed building site, which requires placement of fill in the wetland for access.

This subassignment of error is sustained.[18]

3. DCC 88.128.270(D)(2)(c) (No Significant Impacts on the Surrounding Area)

Petitioner's argument under DCC 88.128.270(D)(2)(c) is based on his erroneous assumption that the county must consider the impact of the entire driveway and proposed building site rather than the fill in the wetland. Therefore, petitioner's arguments under DCC 88.128.270(D)(2)(c) provide no additional basis for reversal or remand.

This subassignment of error is denied.

4. DCC 88.128.270(D)(2)(e) (Maintenance of Existing Vegetation)

In applying this criterion, the hearings officer found that "the applicant * * * indicated that all remaining vegetation in the wetland shall remain in its natural state." Record 80. Citing a letter that appears at Record 49, petitioner contends that intervenor's plans might change in the future.

The letter that petitioner cites addresses a condition of approval that required retention of vegetation between the dwelling and the Little Deschutes River. Petitioner expressed concerns that the condition might restrict certain activities over a much broader area than the area of the wetland.[19] Petitioner's speculation that intervenor might decide to attempt to remove vegetation in the future is insufficient to establish that the county's decision is inconsistent with its obligations under DCC 88.128.270(D)(2)(e).

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[18] It seems unlikely that the assessor's map at Record 634 provides a more accurate description of the subject property than the survey at Record 575. *See* n 16. However, given our decision to sustain this subassignment of error, and the lack of any response to petitioner's suggestion that the assessor's map may establish that an even larger area is available in the northeast portion of the property for a potential homesite, the county should address that issue as well on remand.

[19] For example, actions to protect against fire and bug infestations and maintain access points to the water.

This subassignment of error is denied.

Petitioner's subassignment of error concerning DCC 88.128.270(D)(2)(b) is sustained. Otherwise the third assignment of error is denied.

The county's decision is remanded to address our resolution of subassignment of error 2(b) under the third assignment of error. Otherwise, the county's decision is affirmed.