December 16, 2022

By electronic mail
Columbia County Board of Commissioners
c/o Deborah S. Jacob
230 Strand St.
County Courthouse Room 338
St. Helens, OR 97051
Deborah.jacob@columbiacountyor.gov

Re: Hearing Comments on Carleton Application for a Forest Template, Dwelling, RDF 22-04, Tax Map Identification Number 7315-B0-02500

Dear Commissioners:

On behalf of 1000 Friends of Oregon, please accept the comments below for the record in the following forest template dwelling application: RDF 22-04 (Tax Map Identification Number 7315-B0-02500). The property owner and applicant for the application are Timothy and Tamara Carleton ("applicant"). **Please confirm receipt of these comments, and please notify me of any future hearings, opportunities to comment, or decisions on this application.**

1000 Friends requests that the Board of Commissioners deny the application. The applicant and Planning Commission fail to demonstrate compliance with approval criteria for forest template dwellings under ORS 215.750(2)(c) and Columbia County Zoning Ordinance (CCZO) 506.4(A)(1). Both of those requirements implement the template test. The staff report's findings do not provide any additional evidence to rectify these errors. The Planning Commission decision also violates roadway design and fire safety standards that apply. CCZO 509.2 (parcels must meet Fire Safety Design Standards for Roads in the County Road Standards), 510.4 (all roads shall be constructed to provide adequate access for fire-fighting equipment according to relevant standards).

In this case, the applicants have the burden to submit evidence required to demonstrate compliance with the approval criteria. The applicants have failed to meet their burden. The applicants have not provided the county with the evidence required to comply with the dwelling "template test" or the road design and fire safety standards.

1000 Friends of Oregon participates in the land use system to create livable communities, protect family farms and forestlands, and to conserve Oregon's natural and scenic areas. We seek to uphold the integrity of the land use system by enforcing the legal requirements established in state and local land use laws. Across multiple applications for forest template dwellings, we have

observed a systematic failure to require applicants to provide the evidence necessary to demonstrate compliance with *all* of the approval criteria for forest template dwellings. 1000 Friends of Oregon has members in all parts of Oregon, including Columbia County, and believes that enforcing these criteria and requiring applicants to submit the appropriate evidence is essential to protecting forestland and creating livable communities in Columbia County.

1000 Friends briefly describes the reasons why the Board of Commissioners should deny the applicants' request for a template dwelling. First, the application and findings do not demonstrate that the subject parcel or parcels relied on for the template test were lawfully established units of land. *See* ORS 215.010(1) (defining the term "parcel" used in ORS chapter 215 to mean a lawfully established unit of land described in ORS 92.010). To qualify for a forest template dwelling, the template test requires an applicant to locate a certain number of parcels within a square or rectangular template centered on the subject property. ORS 215.750(2)(c) (template test for characteristics matching applicant's parcel requires that at least 11 other lots or parcels and 3 other dwellings that existed on January 1, 1993 be contained within a 160-acre square centered on the center of the subject tract; allowance for rectangular template under section 6); CCZO 506.4(A)(1) (same; allowance for rectangular template under section B).

To rely on the properties shown within the template, an applicant must demonstrate that the properties are lawfully established units of land or "parcels" created in compliance with all applicable planning, zoning, and partitioning ordinances and regulations. ORS 215.010(1)(a); ORS 92.010(3)(a); *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 198, 211 P3d 297 (2009) (definitions in ORS 215.010 and ORS 92.010 apply to template dwelling statute; applicants must demonstrate that properties included for test were lawfully established units of land). Only if no other planning, zoning, or partitioning laws applied at the time the property was created can the applicant rely on a deed to demonstrate that a property within the template qualifies as a lawfully established "parcel." *Id.* Even then, the applicant must provide evidence that no other relevant laws applied at that time. ORS 215.010(1)(a)(C).

At a minimum, the record must contain information that shows when and how the properties within the template were created. For the properties counted by the applicant, the record does not contain that information. The record does not contain the evidence needed to establish that at least 11 properties within the template are "parcels," *i.e.*, lawfully established units of land. The record also fails to demonstrate that the dwellings identified by the county within the template are located on lawfully established parcels. In short, neither the applicant nor the county provide the evidence required to show that the properties within the template are lawfully established units of land. ORS 215.010(1)(a); ORS 92.010(3)(a). Without that information the county lacks the ability to make adequate findings that demonstrate that the application meets the criteria for a

forest template dwelling. *See Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992) (establishing criteria for adequate findings).

To compound this error, the county has not listed or made available the applicable laws that determine whether the properties shown within the template were lawfully created. Statute requires the planning staff to provide notice of and make available the applicable approval criteria for a permit. ORS 197.797(3)(b) and (h), 197.797(5) (*formerly* ORS 197.763). The standards for adequate findings also require the county to identify and apply applicable law. *Heiller*, 23 Or LUBA 551, 556. In this case, the planning staff failed to provide notice of, make publicly available, or apply the specific criteria that determine whether the template in this case includes the required number of lawfully created parcels. A "parcel" must have been created "[i]n compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations." ORS 215.010(1)(a)(B). That means the county must make available and apply the specific laws that applied to land divisions at the time the properties shown within the template were created. ORS 197.797(3), (5). The planning staff failed to comply with those requirements.

Finally, the applicant has not demonstrated that the access road to the dwelling has satisfied access requirements and fire safety standards as required by CCZO 509.2, CCZO 510.4, and the Columbia County Road Standards (CCRS). The parameters of the access road meet the definition of a private road, not a driveway, and must adhere to private road standards. The existing access easement is too narrow to accommodate the roadway width required by the county's standards for a private road.

The following paragraphs explain why the applicants have failed to meet their burden in this case and why the Planning Commission and staff report findings are inadequate and not supported by substantial evidence in the record. Without the additional information and analysis required by law, the county cannot approve the applicants' request. The applicants have failed to demonstrate that they meet the requirements for approval of a template dwelling. For that reason, 1000 Friends asks the Board of Commissioners to deny the template dwelling application.

A. The record does not contain substantial evidence that the properties shown in the template (including the subject property) are lawfully established units of land.

1000 Friends requests that the Board of Commissioners deny this Forest Template Dwelling Application because it fails to demonstrate compliance with the approval criteria in ORS 215.750(2)(c) and CCZO 506.4(A)(1). The applicant must show that the subject property was lawfully established. *Id.*; ORS 215.705(1)(a) (requiring that the lot or parcel where a forest dwelling is sited be lawfully created); OAR 660-006-0027(6)(a), (e) (template dwelling only

permitted if the subject parcel was lawfully established). All parcels counted within the template or otherwise used to qualify the subject parcel for a dwelling must also be lawfully established parcels. *Yamhill County*, 229 Or App at 198.

A lawfully established parcel is one that was created pursuant to ORS chapter 92 (subdivisions and partitions), created in compliance with all applicable land use laws, or created by deed or land sales contract prior to the passage of land use laws. ORS 215.010(1); ORS 92.010(3); *Yamhill County*, 229 Or App at 198. The applicants have not submitted any evidence, let alone substantial evidence, demonstrating that the subject parcel or parcels included in the template test were lawfully established. ORS 197.835(9)(a)(c) (requiring that local governments support decisions with substantial evidence in the whole record); *1000 Friends of Oregon v. LCDC* (Lane County), 305 Or 384, 405 (1988) (local governments cannot use unsupported assertions to justify planning decisions). The county's findings fail to identify the laws that applied at the time the properties located within the template were created, identify the properties' creation dates, or demonstrate that the properties' creation complied with the applicable laws that governed divisions of land.

1. The Applicant Has Not Demonstrated That the Subject Parcel Was Lawfully Established

The application and findings do not include the required evidence or analysis needed to demonstrate that the subject parcel was lawfully established. To demonstrate that the subject property was lawfully created, the applicant must (1) establish the creation date of the subject property, and (2) demonstrate that the division that created the property complied with applicable planning, zoning, and land division laws or show that such laws did not yet apply. *Yamhill County*, 229 Or App at 198 (holding that ORS 215.010's definition of parcel applies to forest template dwellings). The county's decision does not meet those requirements.

The Planning Commission and staff report findings do not address criteria that require the subject property to be a lawfully created parcel, and the applicant has not submitted evidence to support that requirement. ORS 215.705(1)(a) (requiring that the lot or parcel where a forest dwelling is sited be lawfully created); OAR 660-006-0027(6)(a), (e) (template dwelling only permitted if the subject parcel was lawfully established); *Yamhill County*, 229 Or App at 198. The record includes a 1959 warranty deed that conveyed the subject property and access easement. Staff Report, Att. 5. The record also includes a 2006 statutory warranty deed that conveyed the subject property to the applicants. *Id*. However, the record does not include the information needed to determine whether any planning, zoning, and/or land division laws were in effect at the time of the original creation of the parcel. For instance, the record does not show

whether the 1959 deed created the subject property by division from a parent parcel and what planning, zoning, or partition laws, if any, would have applied at that time.

Assuming that the subject property was created in 1959, the applicants and county must show that either a division by deed in 1959 complied with applicable laws, or that no laws governing land divisions were in effect at that time. For reference, the first statewide subdivision law was passed in 1947. OCLA 95-1396a. Prior to the establishment of the land use planning system in 1974, many counties had their own laws regarding zoning and land division. In some cases, the applicable law may have required the applicant to demonstrate that the parent parcel for the subject property was not subject to additional divisions by deed within a single calendar year.

To summarize, the applicant must show that the subject property was created as an approved subdivision or partition, created pursuant to local laws that applied to property divisions, or that no local or state subdivision laws were in effect at the time. To make those findings, the county must (1) provide substantial evidence establishing the date the subject property was first created, (2) determine what laws did or did not apply when the property was created, and (3) make adequate findings that show that the property qualifies as a "parcel." Although it is likely that the subject property was lawfully established, the record does not contain the necessary evidence to support that conclusion, and the county's findings are inadequate.

2. The Applicant Has Not Demonstrated that the Parcels Included in the Template Test Were Lawfully Established

The application and findings do not include the required evidence or analysis needed to demonstrate that the properties included for the template test were lawfully established. The applicant must demonstrate that all properties included in the template to justify the dwelling were lawfully created according to the parameters for demonstrating lawful establishment described above. *Yamhill County*, 229 Or App at 198 ("[O]nly parcels lawfully created may be counted in determining whether the requirements of the forest template dwelling statute have been met.").

The findings do not address criteria that require the properties included in the template test to be a lawfully created parcel, and the applicant has not submitted evidence to support that requirement. To reiterate the applicable requirements, the applicant must show that at least 11 properties and 3 dwellings included in the template were lawfully established by (1) providing evidence of the creation date (for example, by providing deed or subdivision or partition approval), and (2) demonstrate that the division complied with the applicable laws by providing an excerpt of the applicable zoning and land use division laws. *Id.* All parcels and dwellings

included in the template must also be demonstrated to have existed prior to January 1, 1993. ORS 215.750(2)(c); CCZO 506.4(A)(1). The county cannot establish that fact without providing documentation that shows when and how the parcels were created. ORS 215.750(2)(a)(A); CCZO 506.4(A)(1). Without that evidence, the applicant has not demonstrated that the parcels within the template qualify the subject property for a template dwelling. ORS 215.750; CCZO 506.4(A).

The applicant has not submitted any evidence to demonstrate that the properties included in the template were lawfully established. Template Test 21-06 (TT 21-06) submitted by the applicant does not include any evidence establishing when or how the parcels included in the rectangular template were created. The report provided with TT 21-06 states, without providing evidentiary support, that the test revealed 30 "parcels prior to Jan. 1, 1993" and 12 "dwellings prior to 1/1/93," with no indication that only lawfully established parcels created prior to January 1, 1993 were included in the template count. The actual template test consists only of a map with a rectangular template around the subject property without any identifying information for any of the properties. This is not sufficient to establish that the properties included in the test were lawfully created as required for purposes of ORS 215.750. *Yamhill County*, 229 Or App at 198. Without the proper supporting documentation, the Planning Commission's findings are not adequate and fail to demonstrate whether any of the properties included in the template test were lawfully created. Staff Report at 7, Finding 2 (finding, without further support regarding lawful establishment, that the template test "determined that within a 160-acre rectangular template area, 12 dwellings and 30 parcels were in existence on January 1, 1993.").

The Board of Commissioners must deny the application because it lacks the necessary evidence and required findings to demonstrate compliance with the template test as described in ORS chapter 215 and CCZO 506.4(A)(1). The record does not contain deeds or records of approved divisions that establish when the properties located in the template were first created. The record does not contain any evidence about the applicable subdivision, partition, or land division laws that applied at the time of the properties' creation. And finally, the county's findings are inadequate and do not demonstrate that the parcels counted within the template were lawfully established.

3. The County failed to make available all documents submitted by or on behalf of the applicant.

In this case, the record contains an assertion by county planning staff in TT 21-06 report that the properties shown within the template were lawfully established parcels, created prior to January 1, 1993. That document, TT 21-06, was not subject to any proceedings required for a

land use decision, such as notice or opportunity for public comment pursuant to a hearing. It also appears that the template test document itself is not a final decision but simply a report provided by the planning staff. Based on staff's response to 1000 Friends' inquiries, these proceedings appear to be the public's first and only opportunity to review and comment on TT 21-06. However, staff also states that it does not provide (and does not have collected as part of the record) any documentation that supports the conclusion made by staff in the template test report TT 21-06.

The failure to make available the documents used to support the conclusion violates ORS 197.797(3)(h), (3)(b), and (5). The documents and evidence "submitted by or on behalf of the applicant" must be made available to the public. As explained above, a conclusion that a property's creation was lawful also depends on the laws in effect at the time. The county's failure to make available what laws applied when these properties were created also violates ORS 197.797(3)(h), which requires that the county make available the "applicable criteria."

The lack of the documentation that supports the legal conclusions made in TT 21-06 means that the county's decision that the applicant meets the requirements for a template dwelling is not supported by any evidence in the record. An assertion—even one made by someone with expertise at reviewing deeds—is still an assertion that lacks support of evidence required by law. The statute requires the county to provide supporting documents, and it has failed to do so. The county and the applicant must provide the deeds, other documents of creation, and applicable laws that they claim support their conclusion that the properties shown in the template qualify as lawfully established units of land. The county's failure to do so violates ORS 197.797(3)(h), (3)(b), and (5). The failure also means that the county's decision is not supported by substantial evidence in the record.

B. The Applicant Has Not Demonstrated That the Access Road Can Meet Minimum Road Design and Fire Safety Standards

The applicant has not demonstrated that the access road for this parcel is capable of meeting the Fire Safety Design Standards for Roads in the County Road Standards and access standards required for the PF-80 zone. CCZO 509.2 (access to parcels must meet Fire Safety Design Standards for Roads in the County Road Standards and access standards found in section 510), 510.4 ("All roads in this zone . . . shall be constructed so as to provide adequate access for fire fighting equipment according to" applicable standards); Final Order RDF 22-04 Condition of Approval 7.c (access road "shall comply with applicable provisions of Sections II, III, and IV of the County Road Standards Ordinance related to Fire Service Requirements, Access Approach, and Private Roads[.]"). The standards require a minimum width that exceeds the terms of the

access easement applicants intend to use for an access road. The applicant and Planning Commission have not addressed this applicable criteria or provided evidence that the proposed access road is capable of conforming to these road standards.

Although the Planning Commission left the question unanswered as to whether the access road qualified as a driveway or private road, the access to the subject parcel crossing the easement does not meet the definition of a driveway and must instead comply with private road standards. Staff Report, Finding 10 (indicating that there is some ambiguity about whether the access road will be a private road and allowing applicant to meet either the driveway or private road standards). Columbia County Road Standards (CCRS) at 26 (defining driveway as "an access from a road that serves up to two lots or parcels."). Per the Clatskanie Fire District, the proposed dwelling would establish the third residence served by the access road. 6/30/2022 Comments submitted by Steven Sharek, Clatskanie Fire District. The access road does not qualify as a "driveway," and the access road must comply with the private road standards.

That the access road must comply with private road standards is corroborated by other provisions of the CCRS. In addition to failing to meet the definition of a "driveway," any portion of an access to a property that is located on a private easement must adhere to private road standards to the extent feasible within the limits of the easement rather than driveway standards. CCRS I.A.2. In this case, the access road triggers both requirements. The proposed access road serves more than two lots or parcels and utilizes a private easement. The county must apply the private road standards in CCRS IV to the access roadway and demonstrate compliance to satisfy CCZO 509.2 and 510.4.

As currently configured, the applicants' access road does not meet the requirements for a private roadway. The minimum easement width for a private road is 40 feet, and additional right-of-way "will be required to be dedicated from developers of property if the easement is not currently 40 feet wide or if additional right-of-way is required for the necessary improvements within the limits of the property being developed." CCRS IV.A.2. Neither the application nor the County's findings address how the current 20-foot access easement will satisfy this requirement.

The proposed easement is too narrow to allow applicants to comply with the County Road Standards. When serving 3 to 6 lots, private roads require a 20-foot wide travel surface along with a four-foot-wide clear zone outside of the travelled surface. CCRS IV.B.1. The applicant has not addressed how the access road to the subject property will meet these standards considering that the easement required for access is only 20 feet wide. The easement cannot accommodate the 28 feet needed for the 20-foot wide travel surface and two additional 4-foot

clear zones on either side of the road. *See* CCRS IV.C (showing diagram of required road surface and clear zone) (page 38).

Even if the standards could be applied in a way that satisfies the terms of the easement, the applicant must still demonstrate that the road will provide adequate access for fire-fighting equipment and that it will minimize wildfire risk. CCZO 510.4. CCRS II.A and the Columbia County Fire Services Fire Apparatus Access Roads & Driveways Standard require that access roads used for fire apparatus be at least 20 feet wide. The applicant fails to demonstrate how the access road crossing the easement can satisfy this requirement while also adhering to the private road standards requiring clear zones beyond these 20 feet. Without such a demonstration, the County cannot find that the access standards required for a dwelling in the PF-80 zone can be satisfied. CCZO 509.2, 510.4.

The applicant has failed to demonstrate that the access road satisfies CCZO 509.2 and 510.4, requiring compliance with county road standards. The Planning Commission's findings that these provisions are satisfied is not supported by substantial evidence in the whole record. For that reason, the Board of Commissioners must deny the application.

Sincerely,

Andrew Mulkey
Rural Lands Staff Attorney
1000 Friends of Oregon
(503) 497-1000x138
andrew@friends.org

1000 Friends of Oregon is a 501(c)(3) non-profit organization founded by Governor Tom McCall shortly after the Legislature passed Senate Bill 100, which created the land use planning rules that shape Oregon's communities. Since its founding in 1974, 1000 Friends has served Oregon by defending Oregon's land use system—a system of rules that creates livable communities, protects family farms and forestlands, and conserves the natural resources and scenic areas that make Oregon such an extraordinary place to live. 1000 Friends accomplishes this mission by monitoring local and statewide land use issues, enforcing state land use laws, and working with state agencies and the Legislature to uphold the integrity of the land use system.