

This meeting of the Wallowa County Planning Commission convened at 7:00 p.m. on Tuesday, March 25, 2014, with the following present:

MEMBERS: Ken Wick
Chris Bullat
Ramona Phillips
Kim Tippet
Georgene Henson

STAFF: Harold Black, Planning Director

OTHERS PRESENT:

Jody Riggs
Enterprise Resident

Bruce Dunn
Enterprise Resident

Rahn Hostetter
Enterprise Resident

Stephen Tollefson
Enterprise Resident

Kelly Walsh
Schwabe, Williamson & Wyatt

KEN WICK, CHAIRMAN: [Introduced members and staff and read agenda.]

[Please note that draft and adopted findings, staff reports, written testimony, and the official Planning Commission meeting audio record are available for review and/or purchase in the Planning Department.]

Public Hearing Procedure

Ladies and Gentlemen, I call the regular March 25, 2014 hearing session of the Wallowa County Planning Commission to order. My name is Ken Wick, and I am the Chairman of the Planning Commission for Wallowa County, Oregon. The members of the Planning Commission are appointed by the Wallowa County Board of Commissioners and we all serve as volunteers. Now I would like to introduce the current members of the Commission who are present tonight, and the staff of the Planning Commission, who have prepared the materials we will consider. (Does introductions of members and staff).

We conduct two types of hearings, legislative and quasi-judicial. Legislative hearings involve the making of rules, either new ones or revisions to existing rules. In these cases we recommend our conclusions to your elected lawmakers, the County Commissioners, who always take the final action on legislative issues. Oregon law requires that persons who attend a land-use hearing be advised of certain rights and duties before the quasi-judicial hearing begins. We must tell you about approval criteria, the raise-it-or-waive-it rule, and the right to have the record left open. First approval criteria: the law requires the County to list the applicable County and State zoning criteria. A County Planner will do so in a few minutes. The law requires us to identify those standards which an applicant must satisfy in order for the County to approve an application. Each of the standards must be supported by substantial evidence in the record. Make sure to direct your testimony, claims, or evidence toward the criteria stated by the Planner or any other criteria which you believe applies to the application.

Second, the raise-it-or-waive-it-rule. The law says that any issue which might be raised in an appeal of the decision after this hearing must be raised before the record of this hearing is closed. If you do not raise the issue before the record is closed, you cannot raise the issue on appeal. You must identify the issue clearly enough so that the County and all parties have an opportunity to respond to the issue. Third, the right to have the record remain open. The law grants the participant the right upon proper request to have the record of the hearing remain open for at least seven days. The request must be made before the conclusion of this hearing. The participant is the applicant or anyone who has submitted written or oral testimony regarding the application. The request may be made at any time during the initial hearing, but must be made prior to the time the Planning Commission Chair announces that the hearing is closed. Once the hearing is closed, there is no longer a legal right to have the record remain open for additional evidence.

Yanke APP#14-01

The **Planning Commission** discuss the hearing process and agree to adopt the DeNovo hearing procedure.

Georgene Henson moves to adopt the DeNovo hearing process procedure.

Chris Bullat seconds the motion. [Motion passes 5-0-0]

The **Planning Commission** discuss the record and agree to include all Administrative information into the record for review purposes.

Ramona Phillips moves to include the Administrative record for review purposes.

Chris Bullat seconds the motion. [Motion passes 5-0-0]

The **Planning Commission** discuss the hearing procedure and agree to follow the Quasi-judicial hearing procedure.

Chris Bullart moves to use the Quasi-judicial hearing process procedure.

Georgene Henson seconds the motion. [Motion passes 5-0-0]

Harold Black presents the staff report dated March 18, 2014 and attachments.

Bruce Dunn states his name and address for the record and explains that RY Timber acquired their land in 1989 and the Yanke family purchased the this land in 1991 from RY Timber. Dunn states that the Yanke family have always been good land stewards and have followed the law. Dunn explains that the Yanke family chose to pursue the quick route and applied for three home sites through M49. Dunn states that they have approximately 10 to 12 original parcels within tax lot 1500 and an adjacent tax lot, and explains that they chose the three home site locations based on the view from the top of the moraine and further explains that they contacted a surveyor and had the parcels staked as well as the access road to be used for those parcels. Dun feels that they can satisfy almost all the Goal 5 area

restrictions which were in place in 1991, with the exception of being located on the top of the moraine, and explains that they specifically meet the “less than 20% natural grade requirement for either a dwelling or road” requirement and further states that the Yanke family feels they have a right to situate the proposed dwellings on these parcels.

Rahn Hostetter states his name and address for the record and explains that he will address two questions with his testimony. Question one will address if the proposed dwellings are located on discrete parcels, and will have expert witness Jody Riggs with Wallowa Title testify to address and clarify this issue. Question two will address if the Planning Commission should relocate the proposed home sites within the discrete parcels, and explains that they indeed do have the right to do. Hostetter explains that he will start his presentation with a history of this matter. Hostetter explains that Director Black is incorrect in his bifurcated procedure process and will explain the three errors made by the Director. Hostetter explains that M37 was passed in 2005 and M49 passed in 2007. The Yanke family chose to follow the simplified procedure under M49 and asked for approval for three home sites. In 2008 DLCD began analyzing their application and in 2010 it was approved. In 2010 the Yanke family challenged the DLCD final order in circuit court, and in the end, through a stipulated judgement, the DLCD order was clarified, and specifically states that if the judgement contradicts the DLCD order, then the Judgement governs. Hostetter states that in no place within the judgement do you see a bifurcated procedure requirement. Hostetter states that part of the reason they challenged the DLCD final order is because it confuses tax lots with parcels which are not the same and further explains that Jody Riggs can explain what determines a discrete parcel.

Jody Riggs states her name and address for the record and explains the process the Title company uses to determine a discrete parcel. Riggs explains that their records go back to the late eighteen hundreds before Wallowa County existed and further explains that they can go all the way back to the first original patented deed issued by the Government for most properties in Wallowa County. Riggs and the Planning Commission review a color map created by Jody Riggs titled Exhibit 4 page 1 of 1. Riggs explains that there are 15 patented deeds for tax lot 1500 and further states that tax lots did not exist until the 50s or 60s. Riggs explains that there could be multiple parcels of land within one tax lot and further states that patented deeds show how the land was created.

The **Planning Commission, Jody Riggs, and Harold Black** discuss what constitutes a discrete parcel and it was clarified that both the Wallowa Title Company and the Planning Department view a legal parcel as either what the patent deed description shows or if a parcel is created by partition, with the exception of government lots which Planning does not recognize as discrete parcels.

Jody Riggs confirms for Rahn Hostetter that she did a parcel determination of the Yanke property for their Circuit Court hearing and found there to be 15 patent deeds for tax lot 1500 and confirms that the proposed home site locations are located on discrete parcels.

The **Planning Commission, Hostetter, and Riggs** discuss and review the map titled Exhibit 4 page 1 of 1 which shows the location of each patent deed property by color coding and is described in the legend on said map.

Jody Riggs confirms for Rahn Hostetter that when doing the discrete parcel analysis, she did not take into consideration any Goal 5 regulations, and to the best of her knowledge, the Planning Department has always honored her discrete parcel determinations.

Harold Black states that honoring Riggs' discrete parcel determination does not set a precedent.

Hostetter agrees with Black.

The **Planning Commission and Harold Black** discuss Goal 5. Black explains that Goal 5 was included in the Wallowa County Comprehensive Land Use Plan (WCCLUP) adopted in 1978 and the protection levels and maps were established in 1995. In 1991, when the Yanke acquired their property, there was language in the WCCLUP that recognized the moraines as a unique area and required a public hearing for any development that could compromise the resource. Black explains that this is why he chose not to do the parcel determination ministerially and to separate the parcel determination so it could be reviewed on their own merits.

Rahn Hostetter states that in paragraph 2 of the Stipulated General Judgment it states "Petitioner is entitled under the law to locate any or all of the three homesite approvals set out in the Final Order on any existing or discrete lot or parcel located entirely within tax lot 1500 as determined pursuant to paragraph 1 above through local planning process. Such homesite approvals may, at the option of Petitioner, be located on such existing lot or parcel of petitioner's choice (if there determined to be more than one existing or discrete lot or parcel) without changing the boundaries or size thereof and without reconfiguring the lots or parcels currently in existence as determined pursuant to paragraph 1 above". Hostetter states that this language is what triggered the discrete parcel determination analysis. Hostetter further reads the first sentence in paragraph 3 of the Stipulated General Judgment which states "The establishment of a dwelling based on the home site authorization of the Final Order must comply with all applicable standards governing the siting or development of the dwelling." Hostetter explains that this language allows the dwellings to be held to current zoning standards under Article 44, however, those standards shall not be applied in a manner that would prohibit the establishment of the dwellings on the existing or discrete lot or parcel. Hostetter feels that Director Black violated the Court order when he refused to acknowledge these parcels as discrete. Hostetter explains that once the discrete parcel determination was completed by Jody Riggs, the Yankes chose the location of the three parcels they wanted to build on and hired a land surveyor to monument the parcel lines and the locations of the proposed home sites and access road. Hostetter reads a portion of the pre-application memorandum submitted to the Planning Department in January 2013 and explains that they wanted to give the Planning Director plenty of time to consult with his counsel and to review the proposed home site locations. Hostetter explains that letters were exchanged on August 2013 and October 14, 2013, and he submitted applications on November 19, 2013. The property owner notice was sent to the neighbors, as required under the administrative review process, on January 15, 2014 and the final decision was made by Harold Black on February 19, 2014. Hostetter draws attention to the Notice of Staff Decision of the Wallowa County Planning Department document and read a portion of Findings 7.05 and explains that he agrees with this conclusion, however, does not agree with a portion of Findings 7.06 which states "It also gives the applicant an opportunity to revise their Zone Permit applications once the discrete parcel determination is made as once the public hearing for the proposed dwellings is noticed, the applicants may not be significantly changed". Hostetter explains that the DLCD order does not have such language and further explains that the Stipulated General Judgment requires the County to make the discrete parcels determination and review the home site locations. Hostetter gives an example of an earlier, and unrelated, application where the discrete parcel and dwelling placement approval application were done at the same time. Hostetter feels that the Director is wrong in his denial of the parcel determination and also feels that the denial is based on Goal 5 which should not be considered for the discrete parcel determination. Hostetter then gives a brief history of how the Oregon statewide Goals the Wallowa County Comprehensive

Land Use Plan and Ordinance Articles were originally established. Hostetter explains that in 1991 version of Article 28, the Goal 5 Resource overlay only applied to those areas as designated on the Goal 5 Resource Map and further states that the map only showed the aggregate sites in Wallowa County. Hostetter explains that if the Yanke family applied for a gravel pit they would have had be 100' from any stream or wetland and be located on a parcel of at least 160 acres if within a big game habitat area. Hostetter states that the Moraines are only mentioned in two places within the WCCLUP. Once under Natural Resource Guidelines, Policies, #4, which states "That the Wallowa Lake Basin Moraines be preserved as Scientific natural areas, significant to the county, State and nation." and describe how they will reach this goal under Recommendations, #2, which states "That purchase of development rights or other means be pursued to preserve the East Moraine without loss of County tax revenue." Hostetter states that the plan in 1991 was to purchase the development rights on the East Moraine but it has never been done. Hostetter explains that on the last page of the DLCDC Final Order it states "IT IS HEREBY ORDERED that this Final Order and Home Site Authorization is entered by the Director of the Department of Land Conservation and Development as a final order of the department and Land Conservation and Development Commission under ORS 197.300 to ORS 195.336 and OAR 660-041-0000 to 660-041-0160." and also on the same page under #2 it says "Judicial review under ORS 183.484 may be obtained by filing a petition for review within 60 days from the service of this order" and explains that the time has passed to question the build ability of these properties and should not be under litigation. Hostetter points out that there are only four areas which are exempt under M49 as shown in the DLCDC Final Order and described on page 4 of 10 under #6. The Establishment of the Lot, Parcel or Dwelling Is Not Prohibited by a Land Use Regulation Described in ORS 195.305(3) which states "(a) Restricting or Prohibiting activities commonly and historically recognized as public nuisances under common law; (b) Restricting or prohibiting activities for the protection of public health and safety; (c) To the extent the land use regulation is required to comply with federal law; or (d) Restricting or prohibiting the use of property for the purpose of selling pornography or performing nude dancing". Hostetter reads a letter written by the Yanke family and explains that the reason they chose these site locations for the dwellings is because it is the best place to build a nice house and provides a view of Wallowa Lake.

The **Planning Commission, Staff, and Hostetter** discuss the previously permitted home site on tax lot 6000, which was approved under the Multi-tract test, and confirm that it does not apply to the M49 claim as it has not been built yet and further confirm that there could be multiple other home sites outside of the M49 approval.

Hostetter asks the Planning Commission to reverse Harold Black's decision and declare these parcels as discrete and visit the build ability question another day. Hostetter states that the Statutory 150 day completion deadline is May 16th and feels that there may be a problem with getting through the appeal process and further states that if this process exceeds the 150 day requirement, they intend to take it to Circuit Court.

Harold Black states that in 1991 Article 28 had administrative review requirements however, if the resource was found to be in jeopardy it could be taken to public hearing. Black further explains that it is not clear if these home sites would have been approved on the crest of the Moraine as there were wildlife resources among others. Black states that with regard to the M49 Final Order, on page 7 of 10, #2, it states "The home site authorization will not authorize the establishment of land division or dwelling in violation of land use regulations described in ORS 195.305(3) or in violation of any other law that is not a land use regulation as defined by ORS 195.300(14)". Black explains that

ORS195.305(3) states that “Subsection (1) of this section shall not apply to land use regulations that were enacted prior to the claimants acquisition date”. Black explains that in paragraph 1 on page 2 of the Stipulated Judgment it says that the discrete parcel determination shall be made by the governing body of Wallowa County or it’s authorized designee and feels that Wallowa County has the right under the Stipulated Judgment Court Order to make that determination. Black further explains the Stipulated Judgment lays out the process to be followed which is the County first determines the discrete parcels, then the Yanke Trust chooses the home sites, and finally the County regulates but can not deny those home sites. Black explains that he chose the bifurcated process to allow the opportunity to look at each step on it’s own merits.

Testimony in Opposition

Harold Black presents letters of opposition submitted by the Wallowa Mountain’s Chapter of the Oregon Equestrian Trails, 1000 Friends of Oregon, and the Nez Perce Tribal Executive Committee. [Copies of these documents are available for review in the Planning Department]

Rebutal

Rahn Hostetter submits the 1988 Wallowa County Comprehensive Land Use Plan and the Yanke family statement into the record and further requests that the record be left open for 7 days. [Copies of these documents are available for review in the Planning Department]

Rahn Hostetter states that regardless of whether the applications for home sites would or would not have been taken to public hearing based on the 1991 WCCLUP, DLCD determined in their Final Order that the home sites would have been approved as shown in the Findings of Fact and Conclusions on page 4 of 10 which states “Based on the documentation submitted by the claimant, it does not appear that the establishment of the three home sites for which the claimant may qualify on the property is prohibited by land use regulations described in ORS195.305(3)”. Hostetter further states that the Goal 5 protection only applied to aggregate sites in 1991 and does not apply in this case. Hostetter explains that the only requirement under Goal 5 for aggregate sites in 1991 are to not be less than 100’ from any stream or wetland and be located on a parcel of at least 160 acres if within a big game habitat area. The WCCLUP does classify the moraines as having geological importance and suggests purchasing the property to insure preservation, which has never been done. Hostetter feels that ORS195.305(3) does not require the Planning Commission to revisit the home site approvals as they have already been approved by DLCD. Hostetter states that in paragraph one of the Stipulated General Judgment it states “The statements made in the Final Order do not constitute a determination under Measure 49 of the number and location of existing or discrete parcels on the Measure 37 claim property. That determination shall be made by the governing body of Wallowa County, Oregon, or its authorized designee, upon future application by petitioner”, and explains that it does not require a bifurcated procedure as Harold Black claims.

Kelly Walsh of Schwabe, Williamson & Wyatt states her name and address for the record and reads ORS195.305 (1) which states “If a public entity enacts one or more land use regulations that restrict the residential use of private real property or a farming or forest practice and that reduce the fair market value of the property, then the owner of the property shall be entitled to just compensation from the public entity that enacted the land use regulation” and further reads ORS 195.305(3) which states “Subsection (1) of this section shall not apply to land use regulations that were enacted prior to the claimants acquisition date or to land use regulations: (a) Restricting or Prohibiting activities commonly and historically recognized as public nuisances under common law; (b) Restricting or

prohibiting activities for the protection of public health and safety; (c) To the extent the land use regulation is required to comply with federal law; or (d) Restricting or prohibiting the use of property for the purpose of selling pornography or performing nude dancing”.

Ramona Phillips moves to close the hearing.

Chris Bullat seconds the motion. [Motion passes 5-0-0]

Georgene Henson and Ramona Phillips agree that they would like to have reassurances from an expert in this field before making a decision.

The **Planning Commission and Harold Black** discuss the ramifications of declaring the parcels in question as discrete and whether the County has the right to deny those parcels and further agree to leave the record open for 7 days. This would allow all those with standing 7 days to submit new information, which would then allow the parties an additional 7 days to respond to the new information, and finally the appellant would have 7 days to rebut and give his final argument.

Ramona Phillips moves to keep the record open.

Kim Tippett seconds the motion [Motion passes 4-1-0]

Planning Commission agrees to hold a special meeting on Thursday, April 17, 2014.

Other Business

Harold Black states that we still have an opening on the Planning Commission and urges the members to encourage others to apply.

Minutes

Georgene Henson moves to approve the November 19, 2013 minutes as written.

Chris Bullat seconds the motion. [Motion passes 5-0-0]

There being no further business before the commission, the meeting was, on motion duly made and seconded, adjourned at 9:30 p.m.

Chrystal Allen
Permit Technician

Date