



MARION COUNTY BOARD OF COMMISSIONERS

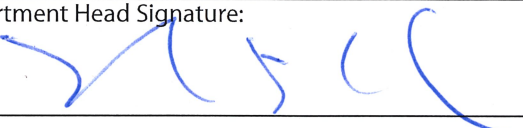
## Board Session Agenda Review Form

Meeting date: December 12, 2018

Department: Public Works      Agenda Planning Date: Dec. 6, 2018      Time required: None

☐ Audio/Visual aids

Contact: Joe Fennimore      Phone: 503-566-4177

Department Head Signature: 

**TITLE**

Receive notice of hearings officer's decision on Floodplain Development (FP) Case 18-003/Zielinski Living Trust and Windsor Island Company, LLC.

**Issue, Description & Background**

The Marion County Hearings Officer issued a decision on November 30, 2018, approving FP 18-003. As part of the land use process the Marion County Board of Commissioners must officially receive notice of the decision.

**Financial Impacts:**

None.

**Impacts to Department & External Agencies**

None.

**Options for Consideration:**

1. Receive notice of the decision.
2. Receive notice of the decision and call the matter up.

**Recommendation:**

Staff recommends the board of commissioners receive notice of the decision.

**List of attachments:**

Hearings officer's decision

**Presenter:**

Joe Fennimore

*Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)*

**Copies to:**

Joe Fennimore - gfennimore@co.marion.or.us

THE MARION COUNTY HEARINGS OFFICER

In the Matter of the	)	Case No.	FP 18-003
	)		
Application of:	)	Clerk's File No.	
	)		
ZIELINSKI LIVING TRUST & WINDSOR	)	Floodplain Development	
ISLAND COMPANY, LLC	)		

**ORDER**

**I. Nature of the Application**

This matter comes before the Marion County Hearings Officer on the application of Zielinski Living Trust and Windsor Island Company, LLC for a floodplain development permit to place fill in the identified 100 year floodplain of the Willamette River on a 56.94-acre and a 37.79-acre parcel in an EFU (Exclusive Farm Use) zone at 6770 Windsor Island Road N, Keizer, Marion County, Oregon (T6S, R3W, S28, tax lot 300 and S28D, tax lot 100).

**II. Relevant Criteria**

Standards and criteria relevant to this application are found in the Marion County Comprehensive Plan (MCCP) and Marion County Code (MCC), title 17, especially chapters 17.136 and 17.178.

**III. Public Hearing**

A public hearing was held on this matter on October 10, 2018. The Planning Division file was made part of the record. The following persons appeared and provided testimony on the application:

- |    |                |  |
|----|----------------|--|
| 1. | Brandon Reich  | Marion County Planning                           |
| 2. | Doug Zielinski | Trustee for applicant's managing member          |
| 3. | Mark Grenz     | Applicants' engineer                             |
| 4. | Nancy Sawka    | Oregon Department of Environmental Quality (DEQ) |
| 5. | Seth Sadofsky  | DEQ  |

An oversized illustration of the receiving fill area was entered into the record as exhibit 1. No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at hearing.

**IV. Findings of Fact**

The hearings officer, after careful consideration of testimony and evidence in the record, issues the following findings of fact:

1. The subject property is designated Primary Agriculture in the M CCP and zoned EFU under MCC title 17. Portions of the properties are within the 100-year and 500-year floodplain of the Willamette River.
2. The subject property, east of Windsor Island Road NE in the 6,900 block, contains portions of an old gravel extraction site.
3. Surrounding land in all directions are farmed properties zoned EFU.
4. The *Soil Survey of Marion County Area, Oregon* shows the soils on the subject property are 95% high-value soil.
5. Applicant proposes restoring an old, approximately five-acre gravel extraction site to grade, using soil determined by Oregon DEQ to be "substantially the same as clean fill." The soil would be capped with three feet of clean fill, allowing the land to be reclaimed for farming.
6. On June 13, 2016, the Federal Emergency Management Administration (FEMA) provided notice of preliminary results from a consultation regarding the effects of the National Flood Insurance Program on threatened and endangered fish habitat in Oregon. On page two of that letter, the county was given the option of voluntarily implementing the interim measures found in reasonable and prudent alternative element 2, relating to protecting fish habitat and providing mitigation for activities that degrade habitat. Applicant provided a letter from a biologist stating the existing gravel pits do not currently provide fish habitat and during a flood the pits cannot act as refuge for fish because fish would be entrapped in the excavation. According to the letter from the biologist, the proposed action to fill in the pits would provide improved fish passage in the future during a flood. Because the biologist identified the site as not providing fish habitat and filling in the pits may improve fish habitat, no additional review under the reasonable and prudent alternative appears necessary. Approval of this request would limit fill to only the area described in the application.
7. The Marion County Planning Division requested comments on the proposal from various governmental agencies.

Marion County Public Works (PW) Land Development and Engineering Permits Section (LDEP) asked to include the following as a condition of the land use case:

Condition A – Applicant shall maintain a written daily log of haul route visual monitoring during operations to ensure no materials are inadvertently deposited onto county roads and city streets. In the event deposition does occur, cleaning and/or sweeping of the deposited material will be required within the same day discovered and shall be documented on the daily log.

Nexus for this condition is to prevent the creation of road hazards along the public road [MCC 11.45].

The US Army Corps of Engineers (USACE) commented that a permit may be required.

Oregon Department of State Lands (DSL) commented that a removal-fill permit would be required.

#### **V. Additional Findings of Fact-Applicable Law-Conclusions of Law**

1. Applicant has the burden of proving by a preponderance of the evidence that all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests. (Citation omitted.)

Applicant must prove, by substantial evidence in the whole record, it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, applicant has not met its burden and the application must be denied. If the evidence for every criterion is a hair in applicant's favor, then the burden of proof is met and the application must be approved.

#### MCC 17.119

2. Under MCC 17.119.030, the hearings officer may hear and decide applications for conditional uses that are listed in MCC title 17. A floodplain permit is a conditional use under MCC 17.178.040.
3. Under MCC 17.119.020, a conditional use application may only be filed by certain people, including the owner of the property subject to the application. The case file contains a warranty deed recorded in Marion County deed records at reel 2951, page 364 showing that the subject property was conveyed to Windsor Island Company, LLC (Windsor Island) on January 10, 2008. The managing partner of Windsor Island is Zielinski Living Trust (Zielinski Trust). Doug Zielinski is the trustee of the Zielinski Living Trust. Mr. Zielinski could file the application. MCC 17.119.020 is satisfied.
4. Under MCC 17.119.025, a conditional use application shall include signatures of all property owners. A January 10, 2008 warranty deed conveyed the subject property to Windsor Island. Zielinski Trust is managing partner for property owner, Windsor Island. Doug Zielinski, trustee of the Windsor Island managing partner, signed the application. MCC 17.119.025 is satisfied.

#### MCC 17.178

5. Applicant proposes filling old gravel extraction pits on the subject property to grade, restoring the site to farm use. Fill will be brought in from one off-site source at first, and then others if needed. The primary source fill material is soil determined by Oregon DEQ to

be "substantially the same as clean fill." The soil would be capped with three feet of clean fill. Portions of the site are within the Willamette River 100-year floodplain. This project requires floodplain permitting under MCC chapter 17.178.

6. Under MCC 17.178.010, the purpose of the Floodplain Overlay Zone is to promote public health, safety and general welfare to minimize public and private losses due to flood conditions.
7. The subject property is shown on Flood Insurance Rate Map #41047C0193G in a 100-year floodplain AE zone. Portions are also within the 500-year floodplain X zone. No chapter 17.178 development requirements apply within the X zone.
8. Under MCC 17.178.050:
  - C. Prior to obtaining a building permit the owner shall be required to sign and record in the deed records for the county a declaratory statement binding the landowner, and the landowner's successors in interest, acknowledging that the property and the approved development are located in a floodplain.
  - D. Prior to obtaining a building permit, commencing development or placing fill in the floodplain the applicant shall submit a certification from a registered civil engineer demonstrating that a development or fill will not result in an increase in floodplain area on other properties and will not result in an increase in erosive velocity of the stream that may cause channel scouring or reduce slope stability downstream of the development or fill.
9. Recording the MCC 17.178.050(C) statement will be made a condition of any approval. As conditioned, MCC 17.178.050(C) will be met.
10. Applicant's engineer provided a certification stating:

Based upon the proposed fill work and the construction plan set, I find that this work will not result in an increase in floodplain area on adjacent properties and will not result in an increase in erosive velocity of the stream that may cause channel scouring or reduce slope stability downstream of the development or fill.

MCC 17.178.050(D) states the certification must demonstrate that the development will not result in increases to the floodplain on adjacent properties or to erosive velocities that cause or reduce slope stability downstream. The engineer's certification provides the required statement, but does not *demonstrate* why the statement is accurate. At hearing, applicant's engineer explained the reasoning behind the certification, including noting that the floodplain is wide in this area, that water does not flow over the pit, but backs into it due to pit area topography, and that the pit area accepts water in 10-year flood event, causing little impact during a 100-year event. This is a lay interpretation of the engineer's testimony. Applicant needs to provide the engineer's reasoning in writing to clarify how the certification demonstrates compliance with this criterion. As a condition of any approval, applicant shall

amend, addend or replace the engineering certification to make sure it explains why the engineer's findings demonstrates the accuracy of the statement. With this condition, MCC 17.178.050(D) will be met.

11. Under MCC 17.178.060(H), materials that are buoyant, flammable, obnoxious, toxic or otherwise injurious to persons or property, if transported by floodwaters, are prohibited. Storage of materials and equipment not having these characteristics is permissible only if the materials and equipment have low damage potential and are anchored or are readily removable from the area within the time available after forecasting and warning.

At hearing, applicant's engineer explained that most of the site where the pit is located, is elevated above the floodplain and what little equipment is on-site during the fill process, can be readily moved to and stored at the higher north end of the site, out of the floodplain, during a flood event. The engineer also explained how water will not flow across the pit, but will instead backfill into the pit, and when floodwater recede, any remaining water will infiltrate downward. The site will also be compacted during the fill process to ensure the fill remains stable and on the site during an event.

Applicant also addressed the nature of fill dirt being brought to the site. Oregon DEQ conducted an extensive study of the primary fill dirt source site and found pesticide contamination above the level set for residential use, but determined the dirt was substantially the same as clean fill for other purposes. DEQ okayed the subject property as a receiving site, and requires the site to be finished with a three foot clean fill cap. Applicant's engineer explained that the pesticide in question is not water soluble; it does not bind to water molecules and will not infiltrate into the aquifer or wash off the site bound to water. The dirt will be kept on-site during the fill process and after the site capped. Given the topography of the subject site, the wide floodplain area (the site is over a mile from the Willamette River), DEQ's source material study, conclusions and conditions, and the insoluble nature of the pesticide, there is low damage potential attributable to this project.

MCC 17.178.060(H) requirements can feasibly be met and will be made a condition of any approval.

## VI. Order

It is hereby found that applicant met the burden of proving applicable standards and criteria for approval of a conditional use floodplain permit application to place fill in the identified 100 year floodplain of the Willamette River on a 56.94-acre and a 37.79-acre parcel in an EFU zone have been met. The conditional use application is **GRANTED**, subject to the conditions and advisories set forth below, that are necessary for the public health, safety and welfare:

- A. Prior to placing fill, applicant shall amend or addend the engineering certificate to demonstrate the reasoning behind the engineer's conclusion.
- B. Prior to placing fill, applicant shall sign and submit to the Planning Division a Declaratory Statement acknowledging that the property and the approved development are located



within a floodplain. The applicant shall record this statement with the Marion County Clerk after it has been reviewed and signed by the Planning Director.

- C. Materials that are buoyant, flammable, obnoxious, toxic or otherwise injurious to persons or property, if transported by floodwaters, are prohibited unless stored within a structure or on land elevated above the base flood level. Storage of materials and equipment not having these characteristics is permissible only if the materials and equipment have low-damage potential and are anchored or are readily removable from the area within the time available after forecasting and warning.
- D. Soil rated substantially the same as clean fill shall be capped with three feet of clean fill.
- E. Fill related to this permit is approved only on the area of the property identified in the application. Construction of new structures, fill or other development of the property shall not occur outside the existing developed area without prior consultation with the Marion County Planning Division. Federal regulations may require additional approvals for development outside the existing developed area of the property identified in the application.
- F. Applicant shall obtain all necessary permits from the Oregon Division of State Lands and the US Army Corps of Engineers for development in wetlands.
- G. Applicant shall obtain all necessary permits, and stay in compliance with all US Army Corps of Engineers and Oregon Department of Environmental Quality permits for transportation and placement of fill.
- H. Applicant shall maintain a written daily log of haul route visual monitoring during operations to ensure no materials are inadvertently deposited onto county roads and city streets. In the event deposition does occur, cleaning and/or sweeping of the deposited material will be required within the same day discovered and shall be documented on the daily log.
- I. Applicant is advised that all development in the floodplain is subject to federal, local and state regulations and standards at the time development is begun. These regulations and standards are in the process of being revised and the development proposed in this application may be subject to additional regulations and standards at the time construction of structures or placement of fill on the property begins.
- J. Applicant is advised that based on preliminary information provided by the National Marine Fisheries Service on April 14, 2016, federal law might only recognize as legal, under the county current floodplain ordinance, building permits that are issued prior to September 15, 2016, and where work is begun prior to March 15, 2017. Permits issued after September 15, 2016, or not begun until after March 15, 2017, may be in violation of federal law and may invalidate this local permit.

## VII. Other Permits

Applicant herein is advised that the use of the property proposed in this application may require additional permits from other local, state, or federal agencies. The Marion County land use review and approval process does not take the place of, or relieve applicant of responsibility for, acquiring such other permits, or satisfy any restrictions or conditions thereon. The land use permit approved herein does not remove, alter, or impair in any way any covenants or restrictions imposed on this property by deed or other instrument.

## VIII. Effective Date

The application approved herein shall become effective on the 18<sup>th</sup> day of December 2018, unless the Marion County Board of Commissioners, on their own motion or by appeal timely filed, is asked to review this order. In case of Board review, this order shall be stayed and shall be subject to such final action as is taken by the Board.

## IX. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court Street NE, Salem) by 5:00 p.m. on the 17<sup>th</sup> day of December 2018. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of \$500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, \$300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 30<sup>th</sup> day of November 2018.



Ann M. Gasser  
Marion County Hearings Officer



## CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Zielinski Living Trust  
6770 Windsor Island Road N.  
Salem, OR 97303

Windsor Island Co. LLC  
5050 Hazelgreen Road NE  
Salem, OR 97305

Mark Grenz  
1155 13<sup>th</sup> Street SE  
Salem, OR 97302

Marvin Nisly  
7525 Windsor Island Road N.  
Salem, OR 97303

Randy Singer  
9550 SE Clackamas Road  
Clackamas, OR 97015

Nancy Sawka  
Oregon DEQ  
4026 Fairview Industrial Dr. S.  
Salem, OR 97302

Seth Sadofsky, Ph.D., RG  
Oregon DEQ  
165 E. 7th Avenue, Suite 100  
Eugene, OR 97401

### Agencies Notified

Planning Division *(via email: gfennimore@co.marion.or.us)*

*(via email: breich@co.marion.or.us)*

*(via email: lmilliman@co.marion.or.us)*

Building Inspection *(via email: twheeler@co.marion.or.us)*

Assessor *(via email: assessor@co.marion.or.us)*

PW Engineering *(via email: jrasmussen@co.marion.or.us)*

*(via email: mhepburn@co.marion.or.us)*

U.S. Army Corps of Engineers

*(via email: Kinsey.m.friesen@usace.army.mil)*

*(via email: andrea.r.wagner@usace.army.mil)*

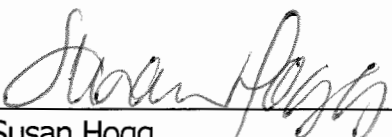
AAC Member No. 4 (*no members*)

Michael De Blasi  
Oregon Department of State Lands  
775 Summer St. NE, Suite 100  
Salem, OR 97301

Roger Kaye  
Friends of Marion County  
P.O. Box 3274  
Salem, OR 97302

Meriel Darzen  
1000 Friends of Oregon  
133 SW 2<sup>nd</sup> Avenue, Suite 201  
Portland, OR 97204

by mailing to them copies thereof, except as specified above for agencies/parties notified by email. I further certify that said mailed copies were placed in sealed envelopes, addressed as noted above, and deposited with the United States Postal Service at Salem, Oregon, on the 30<sup>th</sup> day of November 2018, and that the postage thereon was prepaid.

  
\_\_\_\_\_  
Susan Hogg  
Secretary to Hearings Officer