



Appeal - V25-01

From Maggie L. Bielak <MBielak@dunncarney.com>

Date Tue 11/26/2024 4:05 PM

To Jacyn Normine <Jacyn.Normine@columbiacountyor.gov>

Cc Ty K. Wyman <TWyman@dunncarney.com>; Roxy Caraway <roxy317@gmail.com>; Sarah Hanson <Sarah.Hanson@columbiacountyor.gov>; Spencer Parsons <Spencer.Parsons@columbiacountyor.gov>; Jamie Viveiros <Jamie.Viveiros@columbiacountyor.gov>

 2 attachments (481 KB)

Memo re Opposition to Kerr Contractors Variance Permit App.pdf; Columbia County Board of Commissioners - Letter.pdf;

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Good afternoon,

Attached please find the correspondence from Ty Wyman sent on behalf of Goble Water Association in opposition to Kerr Contractors' Major Variance Request.


Best,

Maggie L. Bielak

Paralegal

mbielak@dunncarney.com

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November 26, 2024

Sent Via Email - Jacyn.Normine@columbiacountyor.gov

Columbia County Board of Commissioners
Courthouse Annex
230 Strand Street
St. Helens, OR 97051

Re: Columbia County Board of Commissioners – Appeal of Final Order - V 25.01
Application of Kerr Contractors for Major Variance

Dear Board Members:

Goble Water Association, Inc. provides potable water to 27 homes around the subject site. It asked me last week to comment on the referenced application, slated for hearing before you tomorrow morning. I am happy to do so.

The applicant must demonstrate that “unusual circumstances cause undue hardship” in application of the code. CCZO 1504.1. Relatedly, under CCZO 1504.1(A)(4), the applicant must demonstrate that “strict compliance with the Zoning Ordinance would create an unnecessary hardship.”

In *Moore v. Columbia County*, 57 Or LUBA 105, 108 (2008), the Board observed as follows:

The term “unnecessary hardship” is not defined in the CCZO, and the county’s decision provides no express or implied interpretation of that term that is adequate for review. ORS 197.829(2). In construing the term, we give words their plain, ordinary, and natural meanings. “Unnecessary” is defined as “not necessary,” and “necessary” is defined as “[an] item[] that cannot be done without: things that must be had (as for the preservation and reasonable enjoyment of life)[.]” *Webster’s Third New Int’l Dictionary*, 1510 (1981). “Hardship” is defined as “suffering, privation; * * * a particular instance or type of suffering or privation[.]”

As such, in order to approve this application, the Board must find that “strict compliance with the CCZO would result in suffering or privation to the applicant.” *Id.* The Board went on to cite the case of *Kelley v. Clackamas County*, 158 Or App 159, 163 (1999), in which the court “rejected arguments that the inability to construct a pool house in that case, because the pool house would intrude into required setbacks, resulted in a hardship.” *Id.* The court observed that “many consequences that might conceivably ensue from the existence of characteristics or improvements on property that are incompatible with lawful placement of structures on it [do] not come within the plain, natural and ordinary meaning of ‘hardship.’” *Id.* I find the present request similarly a matter of the applicant’s convenience.



The applicant addresses this criterion with reference to "ODOT schedule requirements." We find in the record no statement from ODOT, backing up this assertion. Even assuming it is true, prohibiting batch plant operation between the hours of 6pm and 7am cannot reasonably be said to cause the applicant "suffering" or "privation" of a "thing that must be had (as for the preservation and reasonable enjoyment of life)." We respect the imperative of conducting business, but operating in a residential area at all hours of the night does not deprive the applicant of its ability to use the site for other projects. Indeed, given the history of legal violations associated with operation of this site, the only suffering going on here is by community members at the hands of this operator.

The applicant must also demonstrate that "the variance will not be detrimental to the public safety, health, or welfare, or injurious to other property." CCZO 1504.1(A)(1). The applicant asserts that "improving paving of Hwy 30 in Columbia County . . . contributes to improving public safety and welfare on this highway." We understand that highway paving improves public safety. That fact does nothing, however, to address the public safety, health, welfare impacts of batching asphalt all night long and trucking it through a neighborhood.

Instead of listening to their neighbors, the applicant turns a deaf ear to them. The result is a contested hearing that dumps the dispute into the Board of Commissioners' lap. Though a newcomer to the situation, I see a significant history of public safety, health, welfare impacts that have resulted from operations on the site. (The attached memo from my paralegal lists repeated violation of laws that govern stormwater effluent.) The Board can expect to hear and see more about this tomorrow from community members.

The applicant must further demonstrate that the variance arises from conditions "unique to the property" and "not applicable generally to other property." CCZO 1504.1(A)(2). The applicant again responds with simple reference to ODOT's specifications. Quite simply, the specifications of its buyer say nothing about the applicant's property, much less any condition about it that is unique.

Based on the foregoing, the application fails to demonstrate compliance with the Major Variance criteria. Accordingly, we ask Board Members to deny the appeal, and thank you for your attention.

Very truly yours,

Ty K. Wyman

Enclosure

Cc: Sarah Hanson, County Counsel, sarah.hanson@columbiacountyor.gov
Roxy Caraway, Secretary of Goble Water Association, Inc. roxy317@gmail.com

To: Ty Wyman
From: Maggie Bielak
Date: November 26, 2024
File No: DCA111.0020
Subject: Kerr Contractors/Willow Creek Land LLC's Temporary Major Variance Request

Kerr Contractors received on May 25, 2023 a civil penalty of \$19,604 from the Department of Environmental Quality. Kerr violated ORS 468B.050(1)(d) and OAR 340-045-0033(6) by operating an industrial activity that causes an increase in the discharge of wastes into waters of the state without a coverage under the National Pollutant Discharge Elimination System Industrial Stormwater General Permit. The permit cited the following incidents:

- 6/10/22 turbid stormwater discharged from the Site's driveway to a roadside ditch that parallels Nicolai Road. The roadside ditches discharge into a wetland, and ultimately the Columbia River, waters of the state.
- 6/10/22 a stockpile of crushed rock was in a wetland at the Site.
- "Stormwater runoff that has been exposed to [Kerr's mining and quarrying activities carries sediment and is an industrial waste as it will or may alter the physical, chemical or biological properties of waters of the state, and tends to render such waters harmful, detrimental or injurious to beneficial uses, including aquatic life or habitat thereof by smothering insects and other aquatic macroinvertebrates as well as vegetation. Industrial waste is included in the definition of "wastes" at ORS 468B.005(9)." ¹
- "Wetlands, springs, streams and other bodies of surface and underground water that combine or effect a junction with natural surface or underground waters, such as a roadside ditch, a wetland and the Columbia River are considered "waters of the state" according to ORS 468B.005(10)." ²

Willow Creek Land LLC received on May 25, 2023 a civil penalty of \$42,392 from the DEQ. The reasons cited for the penalty were:

- On or about June 10, 2022, [Willow Creek] violated ORS 468B.025(2) and Schedule A, condition 2(a) of the Permit by failing to select, design, install, implement and maintain control measures to meet the narrative technology based effluent limits in

¹ Notice of Civil Penalty Assessment and Order, Case No. WQ/SW-NWR-2023-524; In the matter of : Kerr Contractors, Inc., dated May 25, 2023

² Notice of Civil Penalty Assessment and Order, Case No. WQ/SW-NWR-2023-524; In the matter of : Kerr Contractors, Inc., dated May 25, 2023



Schedule A.1 of the Permit and describe those measures in the Stormwater Pollution Control Plan (SWPCP). The March 2022 SWPCP failed to identify any specific control measures that are implemented at the Facility. This is a Class II violation according to OAR 340-012-0053(2).³

- On or about June 10, 2022, through the present, Respondent has violated ORS 468B.025(2) and Schedule A, condition 7, and condition 8.b of the Permit by failing to keep current and implement a SWPCP. Specifically, Respondent failed to implement control structures described in its March 2022 SWPCP, failed to identify areas where industrial activities were taking place, failed to update the plan to reflect changes at the Facility and failed to provide a complete site map as described in Section II above. This is a Class I violation according to 340-012-0055(1)(r).⁴
- On or about April 20, 2023, [Willow Creek] violated ORS 468B.025(1)(a) by causing pollution to waters of the state. Specifically, [Willow Creek] violated numerous conditions of the Permit, as described in Section II, paragraphs 1-14, above, and discharged turbid stormwater from its Facility to a roadside ditch that drains to a wetland and to the Columbia River. The roadside ditch, the wetland, and the Columbia River are considered "waters of the state" according to ORS 468B.005(10) as they are bodies of surface waters which combine or effect a junction with natural surface waters. The turbid stormwater altered the turbidity and the physical and biological properties of the roadside ditch in a manner that will or tends to render such wastes detrimental to aquatic life and other beneficial uses. Such alterations are considered "pollution" according to ORS 468B.005(5). This is a class I violation according to OAR 340-012-0055(2)(1)(a).⁵

³ Notice of Civil Penalty Assessment and Order, Case No. WQ-SW-NWR-2022-562; In the matter of Willow Creek Land LLC., dated May 25, 2023

⁴ Notice of Civil Penalty Assessment and Order, Case No. WQ-SW-NWR-2022-562; In the matter of Willow Creek Land LLC., dated May 25, 2023

⁵ Notice of Civil Penalty Assessment and Order, Case No. WQ-SW-NWR-2022-562; In the matter of Willow Creek Land LLC., dated May 25, 2023