



2.140(2) of the Curry County Zoning Ordinance, The Planning Commission received oral and written evidence concerning this application.

After receiving public testimony on September 21, 2017 and October 19, 2017, the hearing portion of the proceedings was closed and the Planning Commission voted to reconvene on November 7, 2017 for deliberation only. The written record was left open until 5:00 pm on October 26, 2017 for final arguments by the Applicant.

On November 7, 2017, the Planning Commission resumed the proceedings for deliberation based on evidence submitted into the record as outlined above. No new testimony was taken.

At the conclusion of the public hearing, after consideration and discussion of the evidence and testimony, and upon a motion duly made and seconded, the Planning Commission voted to DENY the request as set forth above and proposed in Application AD-1705 based on decision criteria, findings of fact, and conclusions of law as set forth in this order.

#### **FINDINGS OF FACT:**

The Planning Commission considered the findings in the Staff Report with Exhibits dated September 21, 2017 (Exhibit "A"), the Staff Report with Exhibits and supplemental information packet dated October 19, 2017, (Exhibit "B") and staff report with exhibits dated November 7, 2017, (Exhibit "C") that are attached hereto and incorporated herein by reference, and both written and oral testimony submitted into the public hearing record prior to and on October 19, 2017 as the basis for this decision.

#### **CONCLUSIONS OF LAW:**

1. The burden of proof is upon the Applicant in proving that the proposal fully complies with applicable ordinance criteria, Oregon State Statutes and Oregon Administrative Rules.
2. The Planning Commission finds that Exhibits "A", "B" and "C" addressed the relevant comprehensive plan policies and standards of the zoning ordinance, but did not address Oregon State Statutes and Administrative Rules sufficiently to support the burden of proof needed to approve application AD-1705.
3. The Planning Commission finds that the Applicant has not met the burden of proof to support approval of the proposed application.

#### **ANALYSIS OF APPROVAL CRITERIA:**

1. Conditional Use Permit AD-1411 expired on January 16, 2016.

AD-1705 involves an application to use recycled waste-water to irrigate a golf course. However, a golf course is not a use permitted outright in an Exclusive Farm Use Zone in the Curry County Zoning Ordinance (CCZO). The conditional use permit approved pursuant to AD-1411 is not a valid basis upon which to authorize the actions of AD-1705 because it has expired.

In Planning Commission Staff Report, September 21, 2017, Attachment 4, County Counsel Memo, July 2017, county counsel referenced *Oregon Coast Alliance v. Curry County (Oregon Coast Alliance v.*

*Curry County Or 22 LUBA 080 (2016)*), and suggested that this opinion found that a golf course is a permitted use in an Exclusive Farm Use Zone. The Commission found that the case referenced was incorrect and the LUBA decision referenced was limited to a certain structure on an already approved use, and the opinion did not address the question of whether or not a golf course is a permitted use.

The Commission therefore considered whether the conditional use permit for the golf course authorized under AD-1411 would serve to support AD-1705, but found that the permit had expired. In the Curry County Board of Commissioners ("Board") resolution and order 20127 (01/16/2015) regarding appeal A-1403 challenging Planning Commission file AD-1411 approving a golf course in an Exclusive Farm Use Zone, the Board considered conditional use permit application AD-1411, de novo. When considering CCZO Article VII, Section 7.050 Time Limit on a Permit for Conditional Uses, the Board approved AD-1411 subject to conditions of approval, including:

1. *This conditional use permit is valid for one (1) year unless Applicant applies for and receives an extension of this approval.*

It is clear that in their analysis of applicable standards and criteria in Board Order 20127, the Board was aware of the full text of CCZO Article VII, Section 7.050 Time Limit on a Permit for Conditional Uses, and in their analysis and findings decided that Conditional Use Permit AD-1411 would be valid for one year unless Applicant applied for and received an extension of the Board's approval.

In considering AD-1705, Planning Commission Staff Report, October 19, 2017, confirmed that permit AD-1411 had expired because the Applicant did not apply for and receive an extension.

From the Staff Report for the Planning Commission hearing on October 19, 2017:

*The Planning Commission asked whether a time extension had been filed for the Conditional Use Permit AD-1411 related to the Pacific Gales Golf course. The answer to that question is no.*

The Applicant then proposed that the Board had approved a discretionary decision approving development on agricultural lands, however the Commission found that the language of Condition 1 in Board Order 20127 was clear - the applicant must apply for and receive an extension to the permit within one year - and found that the Commission cannot read a different meaning into the condition language.

Applicant then argued that site clearing that began in February 2015 satisfied the conditions of approval. We do not accept Applicant's argument and find that the more restrictive conditions of approval imposed by the Board are within the Board's authority to apply conditions that are more restrictive than other provisions in the CCZO.

CCZO Article X, Section 10.040 Interpretations states in part:

*The provisions of this ordinance shall be held to the minimum requirements fulfilling its objectives. Where the conditions imposed by a provision of this ordinance are less restrictive than comparable conditions imposed by any other provision of this ordinance or of any other ordinance, resolution or regulation, the provisions which are more restrictive shall govern.*

2. Use of effluent/reclaimed water for irrigation in exclusive farm use zones.

Applicant and county counsel argue that Oregon Revised Statutes, Volume 6, Chapter 215 allows the Planning Commission to approve AD-1705 absent an identified use, relying on wording in ORS 215.283(1)(v):

*215.283 Uses permitted in exclusive farm use zones in nonmarginal lands counties; rules. (1) The following uses may be established in any area zoned for exclusive farm use: (v) Subject to the issuance of a license, permit or other approval by the Department of Environmental Quality under ORS 454.695 (License required to perform sewage disposal services), 459.205 (Permit required), 468B.050 (Water quality permit), 468B.053 (Alternatives to obtaining water quality permit) or 468B.055 (Plans and specifications for disposal, treatment and sewerage systems), or in compliance with rules adopted under ORS 468B.095 (Use of sludge on agricultural, horticultural or silvicultural land), and as provided in ORS 215.246 (Approval of land application of certain substances) to 215.251 (Relationship to other farm uses), the land application of reclaimed water, agricultural or industrial process water or biosolids for agricultural, horticultural or silvicultural production, or for irrigation in connection with a use allowed in an exclusive farm use zone under this chapter.*

The Commission rejected this argument as incomplete.

First, if an applicant is to use subsection (v) as a basis to irrigate something, it must be irrigating something that is itself an allowed use in an Exclusive Farm Use Zone, noting: "*irrigation in connection with a use allowed in an Exclusive Farm Use Zone under this chapter.*" As established above, the applicant plans to irrigate a golf course. The golf course, while a possible allowed use is a conditional use, not an outright use, and the conditional use permit the applicant obtained under AD-1411 expired. Thus, no specific permitted or allowed use has been established under ORS 215.283(1)(v).

Second, ORS 215.283(1)(v) specifically reads that issuance of a permit is:

*Subject to the issuance of a license, permit or other approval by the Department of Environmental Quality under ORS 454.695 (License required to perform sewage disposal services), 459.205 (Permit required), 468B.050 (Water quality permit), 468B.053 (Alternatives to obtaining water quality permit) or 468B.055 (Plans and specifications for disposal, treatment and sewerage systems), or in compliance with rules adopted under ORS 468B.095 (Use of sludge on agricultural, horticultural or silvicultural land), and as provided in ORS 215.246 (Approval of land application of certain substances) to 215.251 (Relationship to other farm uses).*

The Commission found that no permit can be issued unless the items following the words "*subject to*" have been satisfied, and what follows is an approval by Department of Environmental Quality (DEQ). However, in this case the DEQ has not investigated and provided an approval for using effluent to irrigate the golf course and therefore the Commission is not authorized to approve the use.

Further, the Commission finds that ORS 215.283(1)(v) is subject to ORS 215.246(1)(a):

215.246 Approval of land application of certain substances; subsequent use of tract of land; consideration of alternatives. (1) The uses allowed under ORS 215.213 (1)(y) and 215.283 (1)(v):

(a) Require a determination by the Department of Environmental Quality, in conjunction with the department's review of a license, permit or approval, that the application rates and site management practices for the land application of reclaimed water, agricultural or industrial process water or biosolids ensure continued agricultural, horticultural or silvicultural production and do not reduce the productivity of the tract.

We find that without an existing “license, permit or approval” as required by ORS 215.246(1)(a), the Planning Commission cannot approve AD-1705 because the proposed use of reclaimed water for irrigation is not in connection with a specific application site and an identified use. The applicant has no valid permit or approval for any identified use because permit AD-1411 has expired.

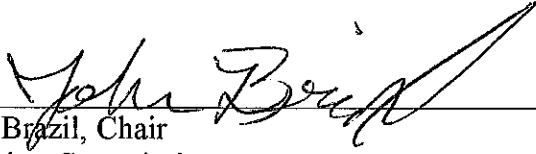
The Commission determined that the applicant failed to establish that ORS 215.283(1)(v) served as a basis to justify approval of the use of effluent to irrigate the golf course because (1) it did not provide proof of a “use[s] permitted in exclusive farm use zones” and (2) because the Department of Environmental Quality has not yet provided an approval.

#### **FINDINGS:**

1. Conditional Use Permit AD-1411 expired on January 16, 2016 because:
  - a. Condition of Approval 1 for AD-1411, imposed by the Board on January 1, 2015, required the Applicant to apply for and receive an extension for Conditional Use Permit AD-1411 within one year, and allowed no other method by which the Applicant can extend the one year time limit on the permit.
  - b. Applicant did not request and receive an extension for Conditional Use Permit AD-1411.
2. The applicant failed to establish that ORS 215.283(1)(v) served as a basis to justify the permit requested in AD-1705 to use effluent to irrigate the golf course because:
  - a. Applicant did not provide proof of a “use[s] permitted in exclusive farm use zones”
  - b. The Department of Environmental Quality has not yet provided an approval.
  - c. ORS 215.283(1)(v) is subject to ORS 215.246(1)(a).
  - d. ORS 215.246.(1)(a) requires that a permitted use be established before an approval for the land application of effluent can be considered.
  - e. Applicant has no established or permitted use because Conditional Use Permit AD-1411 expired on January 16, 2016, and thus Applicant cannot establish a permitted use required by ORS 215.246(1)(a).

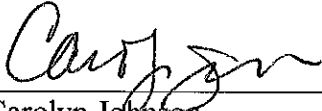
This ORDER in DENIAL of Application AD-1705 was reviewed and approved by the Planning Commission on this 14th day of December, 2017.

CURRY COUNTY PLANNING COMMISSION



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John Brazil, Chair  
Planning Commission



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Carolyn Johnson  
Planning Director