Testimony Before the Multnomah County Community Advisory Committee – Subcommittee on Farm, Forest and Rural Economy

Concerning the County's Forest Template Dwelling Criteria

May 19, 2015

To the members of the Farm, Forest and Rural Economy Subcommittee:

The following testimony is submitted on behalf of Tasha Bollermann and Joseph West for your consideration of possible amendments to Multnomah County's forest template criteria. We urge the subcommittee to consider a recommendation to the Community Advisory Committee to make the county's template criteria more consistent with state criteria.

I. Background of Our Case

In 2010, my wife and I purchased our 41-acre property at 16528 NW Johnson Road with a legal entitlement to a replacement dwelling, but spent our first few years doing extensive forest and habitat restoration on what had been a badly abused and mismanaged forest parcel. Our restoration has included extensive trash removal, strenuous, on-going invasive species removal, and measures to ensure seedling survival and streamside habitat enhancement. The vast majority of our work has been performed without chemical herbicides. The West Multnomah Soil and Water Conservation District forester (Michael Ahr) and Trout Mountain Forestry (one of only four entities in Oregon managing FSC-certified forests) have endorsed our restoration efforts and provided a forest and wildlife management plan to govern stewardship of our property.

In the early stages of our restoration work, metal thieves removed the wiring in the existing dwelling on our property and we removed the kitchen sink in order to control rodent infestation of the structure.

When we later prepared to submit a dwelling application, the county stated that an existing dwelling like ours (i.e., one that had been without electrical wiring and a kitchen sink for more than two years) is an abandoned

CHARLES SWINDELLS
ATTORNEY SPECIALIZING IN LAND CONSERVATION AND DEVELOPMENT

THE AMBASSADOR - 1207 S.W. SIXTH AVENUE
PORTLAND, OR 97204
(503) 226-2209
CHARLIE@EASYSTREET.NET

non-conforming use, and thus ineligible for replacement, although that position was contrary to existing LUBA precedent (*Heceta Water District v. Lane County*). We instead sought a template dwelling approval, and were ultimately denied, because one of the five dwellings in the template around our property was considered too run-down to qualify as a "dwelling that continues to exist" for template approval purposes.

That denial was upheld by LUBA and the Court of Appeals based on the county's construction of code definitions unrelated to template approval. However, the county would have been well within its permissible legal discretion to construe its definitions differently in order to approve our application.

II. The County's Template Test and Inconsistency with State Policy and the West Hills Rural Area Plan

The county's template test requires five dwellings surrounding a proposed template site, while state law only requires three. More importantly, the county's test requires that surrounding dwellings fall within the template, rather than anywhere on parcels that fall partially within a template. Thus, the county's test requires more dwellings in the vicinity, and requires that they be much closer to the proposed template site. The county's test therefore denies template dwellings in many cases where the surrounding land use pattern easily warrants approval under the state test.

The county's template test is also inconsistent with the West Hills Rural Area Plan and contrary to optimal stewardship of CFU-2 parcels that are similar to ours. Multnomah County's West Hills Rural Area Plan distinguishes CFU-2 lands as generally suitable for "small woodlot management," as opposed to CFU-1 lands, which are generally suitable for "commercial forest uses." The Plan explains (emphasis added):

> *"Clearly, forest practices are conducted differently within [CFU-1 and CFU-2 zones]. Certain industrial practices used in [CFU-1] lands, such as controlled burns and aerial spraying are most likely not appropriate in [CFU-2] lands. <u>Forest practices on smaller lots, many with existing residences, will be more limited in scope, since many property owners in these areas have other land use objectives</u>*

CHARLES SWINDELLS
ATTORNEY SPECIALIZING IN LAND CONSERVATION AND DEVELOPMENT

THE AMBASSADOR - 1207 S.W. SIXTH AVENUE
PORTLAND, OR 97204
(503) 226-2209
CHARLIE@EASYSTREET.NET

(e.g. aesthetic considerations) and have greater constraints (on activities such as controlled burns and aerial spraying) which prevent maximization of their lands for industrial forest practices. Most of these lands were Multiple Use Forest prior to 1993 and thus many are already developed with uses, particularly residences, which prevent full-scale forest practices. The increased flexibility provided in the State rules relating to Commercial Forest Use lands allows Multnomah County to adopt more flexible land use and zoning rules for [CFU-2] lands which provide a better fit to their actual character."

Our property and the neighboring ownerships on NW Johnson Road match the above-quoted description of CFU-2 lands exactly. The Plan envisions small woodlot management in conjunction with limited residential development on CFU-2 lands when that use is consistent with the existing land use pattern.

However, the county's application of its template test to CFU-2 lands will often prevent dwellings in conjunction with small woodlot management in areas where the Plan recognizes them as appropriate. This can have a long-term practical effect of preventing appropriate forest and habitat restoration of parcels – especially those that have historically been occupied as single ownerships. Our property and similarly situated properties (including the neighboring property with the dwelling considered too run-down to "continue to exist") often will not qualify for county template approval, even though they typically would qualify under state rules. They are thus regulated as CFU-1 forestlands, although commercial forestland owners are unlikely to ever manage them as such. Commercial forestland owners are unlikely to acquire these properties for commercial forest management because:

(1) they generally have very high per-acre acquisition costs, given the expectations of sellers in areas characterized by existing parcelization and residences;

(2) they are not economically viable for industrial timber production and harvest, because they tend to have high per-acre site clearance and broad-spectrum herbicide site preparation costs (often because of decades of

CHARLES SWINDELLS
ATTORNEY SPECIALIZING IN LAND CONSERVATION AND DEVELOPMENT

THE AMBASSADOR - 1207 S.W. SIXTH AVENUE
PORTLAND, OR 97204
(503) 226-2209
CHARLIE@EASYSTREET.NET

debris accumulation, poor competing vegetation management, inadequate tree stocking, abandoned dwellings, outbuilding and legacy fences, etc.);

(3) they are inefficient to convert to commercial forest use because they usually can't be managed in conjunction with contiguous forest operations, for example, during pre-commercial thinning;

(4) most importantly, as emphatically repeated by virtually every commercial forest manager in Oregon, commercial forest owners are unlikely to acquire these properties for industrial operations because of myriad complications associated with nearby residential use.

The above-quoted portion of the West Hills Rural Area Plan explicitly and implicitly acknowledges these foregoing factors as determining when forest lands should be regulated for commercial forest use, or instead regulated for small woodland management in conjunction with limited dwelling approval. The Oregon Forest Industries Council (traditionally a "pro-land-use" organization) and the Oregon Small Woodland Owners Association (traditionally an "anti-land-use" organization) have testified to the Oregon legislature consistently for over four decades that these factors determine when the policy choice to restrict dwellings is justified by the commercial management potential of forestlands.

The template test adopted by the legislature in HB 3661 (1993) strikes the appropriate balance to restrict dwelling approval when justified by commercial forestry potential. It relies on the cumulative experience of Oregon's large and small forestland managers to determine when small woodland management in conjunction with residential use combines the motivation and dual objectives of small woodland owners (as described in the West Hills Rural Area Plan), and therefore results in better stewardship of sub-commercial parcels. Every other western Oregon county regulates its forestland consistently with this cumulative experience.

Our experience on NW Johnson Road is another example that confirms the balance struck by HB 3661. The sellers of our property would not have sold their property at a per-acre cost comparable to remote industrial forest holdings. Because of this and the other factors cited above, the property likely would not have been acquired for commercial forest

CHARLES SWINDELLS
ATTORNEY SPECIALIZING IN LAND CONSERVATION AND DEVELOPMENT

THE AMBASSADOR - 1207 S.W. SIXTH AVENUE
PORTLAND, OR 97204
(503) 226-2209
CHARLIE@EASYSTREET.NET

management. The property would have remained neglected and increasingly overgrown with invasive species while its structures and fencing continued to deteriorate. Multnomah County is not well served by continued neglect of such properties under a too-abstract state policy to prevent erosion of the forestland base when that policy does not apply effectively to CFU-2 lands.

Because my wife and I intended to exercise the best possible forest and wildlife habitat stewardship in conjunction with residential use, our property has been painstakingly restored in a manner that has been described by foresters with wildlife habitat expertise as "exemplary." The property now significantly enhances the county's natural resource land base, and a new dwelling in place of the one that has existed for many decades would not alter the rural character of the area. It would instead be entirely consistent with the existing land use pattern in the area, consistent with the West Hills Rural Area Plan, and consistent with sound rural land use policy.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

Charles Swindells on behalf of Tasha Bollermann and Joseph West

CHARLES SWINDELLS
ATTORNEY SPECIALIZING IN LAND CONSERVATION AND DEVELOPMENT

THE AMBASSADOR - 1207 S.W. SIXTH AVENUE
PORTLAND, OR 97204
(503) 226-2209
CHARLIE@EASYSTREET.NET