

STAFF REPORT

Case File: T2-2022-15660 **Permit:** NSA Expedited Review

Applicant/Owner: Fendall Winston

Appellant: Morgon Purvine

Location: 2220 NE Corbett Hill Rd, Corbett
Alternate Account #: R944260910 **Map, Tax Lot:** 1N4E26CA-00600
Property ID #: R322289

Zoning: Gorge General Residential – 5 (GGR-5)

Overlays: Geologic Hazard

Key Viewing Areas: Bridal Veil, Columbia River, Hist. Columbia River Hwy, Interstate-84, Larch Mtn Rd, State Route 14

Landscape Setting: Rural Residential

Decision Summary: The subject application is for the placement of 95 feet of 2-ft by 2-ft by 6-ft concrete blocks along the property lines as shown on the plans to construct two fence areas.

The Expedited Review Decision was approved with conditions. Noticing errors were made during the processing of the expedited review application in July and August 2022. A notice correcting those errors was sent on December 8, 2022 granting all parties the opportunity to appeal the expedited review decision. An appeal was filed on December 22, 2022 by the Appellant.

Applicable Approval Criteria:

Multnomah County Code (MCC): MCC 38.0560 Code Compliance and Applications, MCC 38.1010(A)(3) Expedited Uses, Rail, solid or semi-solid fences accessory to existing dwellings less than or equal to 6 feet in height and less than or equal to 100 feet in length, MCC 38.7100 Expedited Development Review Criteria.

Copies of the referenced Multnomah County Code sections are available by contacting our office at (503) 988-3043 or by visiting our website at <https://multco.us/landuse/zoning-codes/> under the link **Chapter 38 - Columbia River Gorge National Scenic Area**



Staff's Recommendation to Hearings Officer:

Based on the findings below and the exhibits in the case, planning staff recommends that the Hearings Officer deny the Appellant's appeal of Expedited Review T2-2022-15660 and approve, subject to the listed conditions of approval, the application for the construction of two areas of fence as shown on Exhibit A.5.

Conditions of Approval

The following conditions were placed on the Expedited Review Decision:

1. If, during construction, cultural or historic resources are discovered, the applicant/owner shall immediately cease development activities and inform the Multnomah County Land Use Planning Division, Columbia River Gorge Commission, and the US Forest Service of any discovery pursuant to MCC 38.7045(L) & (M), or MCC 38.7050(H) as applicable. Once halted, construction activities shall not resume until these standards have been satisfied. [MCC 38.7100(A)(2)]
2. Approval of this land use permit is based upon the statements made in this application and attached materials. No work shall occur under this permit other than that which is specified in these documents. [MCC 38.0660(B)]
3. Development of structures must be commenced within 2 years of the date of this decision, and completed within 2 years of the date of commencement. The property owner may request an extension of either of these timeframes, as provided in MCC 38.0700. Such a request must be made prior to expiration of the permit. [MCC 38.0690]

Potential Condition

1. Within 2 years, the property owner shall paint the concrete blocks that compose the fences to match one of the following colors: C10, C11 or C12 of the NSA Color Chart (Exhibit C.3) [MCC 38.7100(A)(1)(b) & (f)].
 - a. The paint used on the fences shall have a flat/matte paint finish [MCC 38.7100(A)(1)(c)].

Findings of Fact

FINDINGS: Written findings are contained herein. The Multnomah County Code (MCC) criteria are in **bold** font. Staff analysis and comments are identified as ‘**Staff:**’ and address the applicable criteria. Staff comments may include a conclusionary statement in *italic*.

1.0 Project Description:

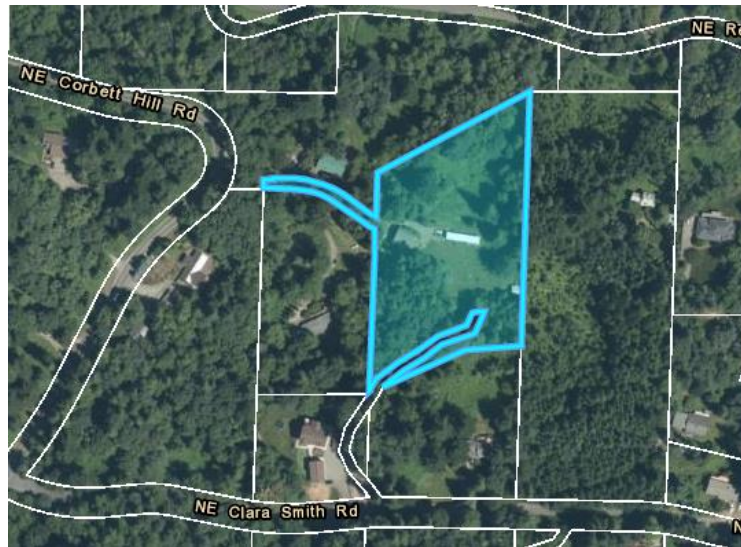
Staff: The applicant is proposing to place 2-ft high by 2-ft wide by 6-ft long concrete blocks along two areas of his property to construct two fences. The fences will be placed along the edge of the passageway/dogleg on his property as shown on Exhibit A.5. The fence will be only two feet tall. The blocks will not be stacked. Once the blocks are installed and drier weather occurs, the blocks will be painted a dark brown similar to the color C10, C11 or C12 on Exhibit A.3 as shown in Exhibit A.7 and Exhibit C.4.



The Expedited Review Decision was approved with conditions. Noticing errors were made during the processing of the expedited review application in July and August 2022. A notice correcting those errors was sent on December 8, 2022 granting all parties the opportunity to appeal the expedited review decision. Fence construction started on or around the same time as this corrected notice went out and was in the mail. The applicant chose to move forward as he believed he had a final permit from the County. Following the issuance of the corrected notice, an appeal was filed on December 22, 2022 by the Appellant.

2.0 Property Description & History:

Staff: The subject property contains an existing single-family dwelling (mobile home) and a detached garage. The property has a narrow piece / panhandle (driveway) that is used to gain access to NE Corbett Hill Road. Two other properties also take access via this driveway. The driveway is not located in a public right-of-way and any easements over this panhandle have not been reviewed by staff as enforcement is a civil matter between the parties.



3.0 Expedited Review Criteria:

MCC 38.0560 CODE COMPLIANCE AND APPLICATIONS.

Except as provided in subsection (A), the County shall not make a land use decision approving development, including land divisions and property line adjustments, or issue a building permit for any property that is not in full compliance with all applicable provisions of the Multnomah County Land Use Code and/or any permit approvals previously issued by the County.

(A) A permit or other approval, including building permit applications, may be authorized if:

- (1) It results in the property coming into full compliance with all applicable provisions of the Multnomah County Code. This includes sequencing of permits or other approvals as part of a voluntary compliance agreement; or
- (2) It is necessary to protect public safety; or
- (3) It is for work related to and within a valid easement over, on or under an affected property.

(B) For the purposes of this section, Public Safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger the life, health, personal property, or safety of the residents or public. Examples of that situation include but are not limited to issuance of permits to replace faulty electrical wiring; repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel, or power; and actions necessary to stop earth slope failures.

Staff: This standard provides that the County shall not make a land use decision approving development for a property that is not in full compliance with County Code or previously issued County approvals, except in the following instances: approval will result in the property coming into full compliance, approval is necessary to protect public safety, or the approval is for work related to or within a valid easement.

Importantly, a finding of satisfaction of this standard does not mean that a property is in full compliance with the Zoning Code and all prior permit approvals (and, accordingly, does not preclude future enforcement actions relating to uses and structures existing at the time the finding is made). Instead, a finding of satisfaction of this standard simply means that there is not substantial evidence in the record affirmatively establishing one or more specific instances of noncompliance. As such, an applicant has no initial burden to establish that all elements of the subject property are in full compliance with the Zoning Code and all previously approved permits; instead, in the event of evidence indicating or establishing one or more specific instances of noncompliance on the subject property, the applicant bears the burden to either rebut that evidence or demonstrate satisfaction of one of the exceptions in MCC 38.0560.

Due to the issue with the notification error, the property owner purchased the concrete blocks when he thought he had a final decision in the Fall. The blocks were placed on the property around the same time as the corrected Notice of NSA Expedited Decision was mailed on December 8, 2022. The applicant has not finished the final placement of the blocks on the south side of the driveway route. If the decision is upheld, no violation will exist and the fences may continue to be constructed. The applicant has verbally indicated that he would remove the blocks if the decision was overturned. For purposes of the current application, staff is not aware of any other issues on the subject property.

The appellant has stated the project already violates the height limit at the corner of his driveway as two blocks are piled up. It is staff's understanding from the applicant that the blocks have been stacked until the appeal is finalized and the driveway placement has been worked out with his neighbor. The applicant has two years from the date the permit becomes final to finalize the project and paint the fence to achieve visual subordination. The approval of this permit will rectify the situation.

4.0 Expedited Uses Criteria:

MCC 38.1010 EXPEDITED USES.

(A) The following development may be reviewed using the expedited process listed in MCC 38.0530(B), and are permitted when found to satisfy the applicable approval criteria pursuant to the provisions of MCC 38.7100.

* * *

(3) Rail, solid or semi-solid fences accessory to existing dwellings less than or equal to 6 feet in height and less than or equal to 100 feet in length.

* * *

(22) Retaining walls accessory to existing dwellings less than or equal to 2 feet in height (of exposed surface area) and less than or equal to 100 feet in length.

Staff: The applicant initially applied for a solid fence and a retaining wall. After discussions with staff, he amended his application to just a solid fence. The fences are 2-ft in height and a total of 95-ft long (Exhibit A.4 & A.5). One fence will be approximately 71 feet in length; the other 24 feet. The applicant states the purpose is to create a barrier.

Planning staff contacted Gorge Commission staff and asked if the 2-ft by 2-ft by 6-ft concrete blocks placed end-to-end would qualify as a fence and was told, yes it could as there was no width restrictions on a fence in the code. Chapter 38 does not include a definition for fence or fencing.

The Merriam Webster Dictionary defines a "Fence" as "a barrier intended to prevent escape or intrusion or to mark a boundary." A masonry wall is a type of fence. A "Retaining Wall" is defined as "a wall that is built to keep the land behind it from sliding." The blocks are not intended as a retaining wall and do not retain soil as can be seen in the ecology block plan and photograph (Exhibit A.3 &

C.4). The applicant stated that the purpose of the structure is for a barrier (Exhibit A.4). Based upon the direction of Gorge Commission staff, the use of concrete blocks can be used to create a solid fence.

The appellant has stated in the appeal (Exhibit C.1.a) that the fence is not “based on any acceptable industry standard, and the only purpose for placing this style of block in this location is to prevent free and clear access of the surrounding properties.” Staff is not aware of any requirement in the code that a fence be constructed to “acceptable industry standards” as such it is not an approval criterion that can be applied by staff to a proposed fence. The appellant’s statement that the blocks prevent access to and from the panhandle demonstrates that the blocks qualify as a barrier and hence a fence.

5.0 National Scenic Area (NSA) Site Review Criteria:

MCC 38.7100 EXPEDITED DEVELOPMENT REVIEW CRITERIA

(A) Proposed developments reviewed using the expedited review process shall comply with the following resource protection guidelines:

(1) Scenic

(a) In the General Management Area, the scenic resource protection provisions MCC 38.7100 (A)(1)(b) through (f) shall not apply to woven-wire fences for agricultural use that would enclose 80 acres or less.

Staff: The proposed project is not for a woven wire fence. Criterion is not applicable.

(b) Except signs, the colors of structures topographically visible from key viewing areas shall be dark earth-tones found at the specific site or the surrounding landscape. The specific colors or list of acceptable colors shall be included as a condition of approval. This guideline shall not apply to additions, which may match the color of existing buildings.

Staff: Based on information supplied by the Gorge Commission, the panhandle portion of the property where the fences are located is topographically visible from various Key Viewing Areas. These include Bridal Veil, Columbia River, Hist. Columbia River Hwy, Interstate 84, Larch Mtn Rd, Larch Sherrard, and State Route 14. The concrete blocks qualify as a structure; when installed, they will be composed of parts joined together in some definite manner (a fence) [MCC 38.0015 Definitions, Structure]. The fence will be painted a dark earth-tone as shown in the applicant’s Exhibit A.7. The color shown in Exhibit A.7 corresponds with the approved color chart falling between C10 and C11. Condition No. 2 requires that the applicant follow his application materials. If the Hearings Officer chooses, a more specific condition could be added to the permit.

(c) Except signs, structures topographically visible from key viewing areas shall use low or non-reflective building materials, including roofing, gutters, vents, and chimneys.

Staff: The fences may be topographically visible from various key viewing areas (KVAs), but the height of the structure at two feet reduces the potential visibility from the KVAs. The dark earth-tone paint can be conditioned to be a flat/matte paint medium which will qualify as a low or non-reflective building material. If necessary, planning staff recommends that a condition be added by the Hearings Officer that the paint used have a flat/matte finish.

(d) Outdoor lights shall be directed downward and sited, hooded, and shielded such that they are not highly visible from key viewing areas. Shielding and hooding materials shall be composed of non-reflective, opaque materials.

Staff: The applicant has not proposed any exterior lighting as part of the project.

(e) Signs shall comply with the applicable sign provisions of MCC 38.0080.

Staff: The applicant has not proposed any signs as part of the project.

(f) Structures within ½-mile of a key viewing area and topographically visible from the key viewing area shall be sited, screened and/or designed to achieve the applicable scenic standard (e.g., visual subordination, not visually evident).

Staff: The proposed fences are within a ½ mile of Interstate -84 and the Columbia River. The applicable scenic standard is visual subordination. The term “**Visually Subordinate**” is defined as “**The relative visibility of a structure or use where that structure or use does not noticeably contrast with the surrounding landscape, as viewed from a specified vantage point (generally a Key Viewing Area). Structures which are visually subordinate may be partially visible, but are not visually dominant in relation to their surroundings....**” [MCC 38.0015]. The 2-ft tall fences that will be painted a dark earth-tone will blend with the surrounding environment if they are visible at all from the nearest Key Viewing Areas and will be visually subordinate from these areas. The fences at 2 feet tall and painted dark earth-tone will not be visually dominate (Exhibit C.4) from approximately 1000 feet from Interstate -84 and an elevation change of 280 ft (29.5% slope rise from I-84 to the panhandle). The applicant has also provided photographs from across the river (Exhibit A.6). The photos were taken with a camera with a telescopic lens allowing it to zoom in to the area during summer months. There is significant vegetation to screen the area during the spring, summer and fall.

The appellant submitted photos of the fences looking out towards the Columbia River during the current season (Exhibit C.1.b). The photos show evergreen trees and deciduous trees between the fences and the KVAs. The standard of Visual Subordination is not from the property to the Key Viewing Areas but vice-a-versa. The fences are under construction and when finished will blend in with the gravel, tree trunks and other vegetation behind them and in front of them to achieve visual subordination from the KVAs if any portion of the fences are visible. The standard is not whether the fences are visually subordinate to the adjacent private properties but from the KVAs. It is not within the purview of the approval criteria that the fence allows unrestricted access to a property. Easement enforcement is a civil matter between parties.

As conditioned, criteria met.

(2) Cultural

(a) The expedited development review process shall only be used to review proposed development that does not require a reconnaissance survey or historic survey. The GMA Cultural Resources Reconnaissance Survey Criteria in MCC 38.7045(A)(1), (2), and (3) shall be used to determine if a reconnaissance and/or historic survey is required for a proposed development.

(b) The GMA provisions that protect cultural resources in MCC 38.7045(L) and human remains discovered during construction in MCC 38.7045(M) shall be applied as conditions of approval for all development approved under the expedited development review process.

Staff: The proposed fences are exempt from a reconnaissance survey as the placement of the blocks will not disturb the ground and the area is an existing graveled area which has been disturbed by human activities in the past [MCC 38.7045(A)(1)(b) & (d)]. No historic survey is required as the fences are new and do not alter the exterior appearance of a building over 50 years of age [MCC 38.7045(A)(4)]. The US Forest Service provided comment that neither a Cultural Resource Reconnaissance Survey nor a Historic Survey is required (Exhibit C.2). Condition No. 1 requires work to cease if cultural resources or human remains are discovered. *Criteria met.*

(3) Recreation

The development shall not detract from the use and enjoyment of established recreation sites on adjacent parcels.

Staff: The uses on adjacent parcels are residential in nature. No recreational sites exist on adjacent parcels. *Criterion not applicable*

(4) Natural

(a) Wetlands, Streams, Rivers, Ponds, and Lakes

The development is outside buffer zones for wetlands, streams, rivers, ponds, and lakes. This guideline shall not apply to lot line adjustments or development located inside road, utility or railroad rights-of-way or easements that have been previously disturbed and regularly maintained.

Staff: The fences line portions of the driveway within the panhandle area. There are no known wetlands, streams, rivers, ponds or lakes within the area; hence, the fences are located outside of any buffer zones for these features. It is believed a portion of the driveway is covered with easements for the properties to the north and south for access onto NE Corbett Hill Road. *Criterion met.*

(b) Sensitive Wildlife and Sensitive Plants

1. The development meets one of the following:

a. The development is at least 1,000 feet from known sensitive wildlife areas or sites (excluding sensitive aquatic species, deer winter range, and turkey habitat) and known sensitive plants; or

b. The development does not disturb the ground or is inside road, utility or railroad rights-of-way or easements or other areas that have been previously disturbed and regularly maintained; or

c. For sensitive wildlife, the development is within 1,000 feet of known sensitive wildlife areas or sites (excluding sensitive aquatic species, deer winter range and turkey habitat), but an appropriate federal or state wildlife agency determines

1) the sensitive wildlife area or site is not active; or

2) the proposed development would not compromise the integrity of the wildlife area or site or occur during the time of the year when wildlife species are sensitive to disturbance.

For sensitive plants, the development is within 1,000 feet of known sensitive plants, but the Oregon Natural Heritage Program or a person with recognized expertise in botany or plant ecology hired by the applicant has determined that the development would be at least 200 feet from the sensitive plants.

2. Development eligible for expedited review shall be exempt from the field surveys for sensitive wildlife in MCC 38.7065 (A) or sensitive plants in MCC 38.7070 (A).

Staff: The proposed fences do not disturb the ground. Various Gorge Agencies were sent notice of the Expedited Review application and no comments were received that the project would occur within 1000 feet of a known sensitive wildlife area or site or sensitive plant site. *Criteria met.*

(B) Proposed developments reviewed using the expedited review process shall comply with the following treaty rights protection guidelines:

(1) Proposed developments shall not adversely affect treaty or other rights of any Indian tribe.

(2) The expedited development review process shall cease and the proposed development shall be reviewed using the full development review process if an Indian tribe submits substantive written comments during the comment period that identify the treaty rights that exist in the project vicinity and explain how they would be affected or modified by the proposed development.

(3) Except as provided in MCC 38.7100(B)(2) above, the GMA and SMA treaty rights, and the consultation process discussed in MCC 38.0110 shall not apply to proposed developments reviewed under the expedited review process.

Staff: Notice was given to the Governments of the four Columbia River treaty tribes as required by the expedited review process. No comments from the treaty tribes were received. *Criterion met.*

6.0 Exhibits

- 'A' Applicant's Exhibits
- 'B' Procedural Exhibits
- 'C' Pre-Hearing Exhibits

All exhibits are available for Case File T2-2022-15660 at www.multco.us/landuse/hearings-officer.

Exhibit #	# of Pages	Applicant Exhibit	Date Received / Submitted
A.1	6	NSA Expedited Residential Application	4/12/2022
A.2	1	Property Survey	4/12/2022
A.3	1	Ecology Block Plan	4/12/2022
A.4	1	Applicant Narrative	7/05/2022
A.5	1	Revised Site Plan	7/05/2022
A.6	6	Photos Page 1 & 2: Photos from Key Viewing Areas Page 3: Photo from Driveway looking towards Neighbors house to North Page 4: Aerial with Subject Property Highlighted and Surrounding Area Shown Page 5: Aerial Page 6: Subject Property	7/05/2022
A.7	1	Paint Chip (Color C12)	7/05/2022
'B'	#	Procedural Exhibits	Date
B.1	3	Incomplete Letter	5/12/2022
B.2	6	NSA Expedited Decision	8/12/2022
B.3	11	Notice of NSA Expedited Decision	12/8/2022

B.4	5	Mailing Lists a. 8.11.2022 Mailing List – 1 page b. 12.8.2022 Mailing List – 2 pages c. 1.20.2023 Mailing List – 2 pages	Various
‘C’	#	Pre-Hearing Exhibits	Date
C.1	9	Notice of Appeal - Appellant a. Appeal Narrative – 2 pages b. Photographs – 4 pages c. Appeal Fee – 1 page	12/22/2022
C.2	2	USFS Cultural Resources Survey Determination dated August 2, 2022 - Staff	1/18/2022
C.3	1	NSA Color Chart - Staff	1/18/2022
C.4	1	Photograph of Painted Concrete Block submitted by Applicant	1/18/2022
C.5	10	T2-2022-15660 Staff Report	1/31/2023