



February 24, 2010

File(s): VR-10-01

## NOTICE OF DECISION

This is official notice of action taken by the Milwaukie Planning Commission on Feb 23, 2010.

**Applicant(s):** Hans Thygeson  
**Location(s):** 5945 and 5965 SE Harmony Rd  
**Tax Lot(s):** 1S2E31D 01800, 01900, 01990  
**Application Type(s):** Variance  
**Decision:** Application Approved with Conditions  
**Review Criteria:** Milwaukie Zoning Ordinance:

- Section 19.702 Circumstances for Granting Variances

**Neighborhood(s):** Linwood, Lake Road, Oak Lodge

The Planning Commission's decision on this matter may be appealed to the Milwaukie City Council. An appeal of this action must be filed within 15 days of the date of this notice, as shown below.

**Appeal period closes: 5:00 p.m., March 11, 2010**

Appeals to the City Council must be accompanied by the appeal fee, be submitted in the proper format, address applicable criteria, and be made on forms provided by the Planning Department. Milwaukie Planning staff (503-786-7630) can provide information regarding forms, fees, and the appeal process.

### Findings in Support of Approval

1. The applicant, Hans Thygeson of HT Investment Properties, LLC, has applied for approval to extend the timeframe within which Milwaukie Ministorage, a previously approved conditional use in the Business Industrial (BI) Zone at 5945 and 5965 SE Harmony Rd, could complete substantial construction and, thereby, retain its conditional use approval. The land use application is VR-10-01.
2. The Planning Commission approved construction of Milwaukie Ministorage at 5945 and 5965 SE Harmony Rd (formerly 5900 and 6011 SE Harmony Rd) in August 2008 (Land Use

Files CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06). Ministorage facilities are conditional uses in the BI Zone. The code requires substantial construction of conditional uses within six months of approval, with allowance for a one year extension. In February 2009 the Planning Commission approved a request to extend the deadline for substantial construction to February 27, 2010. The applicant has not been able to meet this deadline due to project and site complexities and financial complications in the construction lending market. As a result, the applicant is requesting that the Planning Commission grant a variance to the substantial construction deadline and extend it to February 27, 2012.

3. The proposal is subject to the following provisions of the Milwaukie Municipal Code (MMC):
  - Subsection 1.04.030 Interpretation of Language
  - Section 19.702 Circumstances for Granting Variances
  - Subsection 19.1011.3 Minor Quasi-Judicial Review
  - Section 19.1013 Time Limit on a Permit for a Conditional Use or Variance
4. Sections of the Milwaukie Municipal Code not addressed in these findings are found to be not applicable to the decision on this application.
5. Public notice has been provided in accordance with MMC Subsection 19.1011.3 Minor Quasi-Judicial Review. A public hearing was held on February 23, 2010, as required by law.
6. MMC Subsection 19.702.1 Criteria for Granting Variances

The Planning Commission approves the variance request upon finding the following:

- A. MMC 19.702.1.A requires that the property in question has unusual conditions over which the applicant has no control.

During the 2008 land use hearings on the underlying conditional use application (Master File #CU-07-02), it was acknowledged that the site had unusual conditions over which the applicant had no control and which, in turn, created site development challenges. These conditions included the location of the site along a complicated transportation corridor and the bisection of the site by Minthorn Creek, a designated water quality resource area. It was also recognized at that time that the proposed project was large in size and complex in nature. Understandably, the complexity and challenges associated with development of this site have continued into the construction phase of the project.

The City's conditional use policy, however, does not take site conditions or project size or complexity into consideration. It requires substantial construction of all conditional uses within six months of approval, with an allowance for a one-year extension. The Planning Commission finds that this is an unrealistic time frame within which to finance and construct this project due to the site's unusual conditions and concomitant development challenges.

The Planning Commission finds that the intent of MMC 19.1013 is to ensure that conditional uses are constructed while the circumstances under which they were approved still exist. The existing land use and development patterns in and around the project area have not changed dramatically since this project was approved and are unlikely to substantially change in the next two years. Consequently, the Planning Commission finds that the intent of MMC Section 19.1013 would not be violated by granting this variance.

The Planning Commission finds that this criterion is met.

- B. MMC 19.702.1.B requires that there are no alternatives to the variance and that the variance is the minimum variance necessary to allow for reasonable use of the property.

The Planning Commission finds that there are no alternatives to this variance. The Applicant's substantial construction deadline expires February 27, 2010. Without a variance, the conditional use approval for this site will expire and construction of this project will not be allowed to proceed under the project's 2008 land use approvals. The Applicant could seek new land use approvals for the same project by resubmitting all five land use applications. However, the Planning Commission finds that this is not in the public or the Applicant's best interests. Since there have been no significant changes to the proposal, the approval criteria, or the site conditions, it is highly unlikely that repeating the review process would result in a different decision. The public cost of re-reviewing the underlying applications would likely exceed the application fees paid by the Applicant. It would also unnecessarily add to the costs of the project and delay the redevelopment of this site.

The Planning Commission finds that the Applicant has requested the minimum variance necessary to complete substantial construction of this project, given its size and complexity, and that the Applicant's request for a two-year extension is reasonable. The Planning Commission finds that the Applicant is committed to moving this project forward in that the Applicant has prepared construction plans, submitted for building permits, and paid all applicable plan review fees to the City and the County.

The Planning Commission finds that this criterion is met.

- C. MMC 19.702.1.C requires that adverse effects upon other properties as the result of this variance shall be appropriately mitigated.

The Planning Commission finds that there are no adverse impacts to adjacent property owners as a result of this variance. On the contrary, the Planning Commission finds that redevelopment of this site as proposed will provide more benefits to the surrounding area and its residents than allowing it to remain vacant and abandoned. Specifically, redevelopment will improve pedestrian safety and mobility through the construction of frontage improvements and will improve water quality and riparian habitat through mitigation plantings along Minthorn Creek. Moreover, this project's low trip generation will have only minor impacts on the Harmony Rd corridor and the two adjacent three-legged intersections as detailed in the underlying land use approval for this project (Master File #CU-07-02).

The Planning Commission finds that this criterion is met.

7. MMC Subsection 1.04.030 Interpretation of Language.

The term "substantial construction," as used in MMC 19.1013, is not defined. Pursuant to MMC 1.04.030, however, all words and phrases shall be construed according to the common and approved usage of the language and all technical words and phrases, as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning. The Planning Commission finds that the term "substantial construction" is a technical phrase that has acquired a peculiar and appropriate meaning in the construction industry. The Planning Commission finds that a building is considered to be substantially constructed when it is ready to be occupied, but not necessarily ready to receive a final certificate of occupancy due to punch list items that could include anything from street improvements to landscaping.

In applying this definition, the Planning Commission finds that substantial construction of this particular project means the following:

- Completion of the project in phases. The Applicant is allowed to complete the project in phases by constructing Building 1 now, and Building 2 and the bridge over Minthorn Creek later. Phasing of large projects is common, and, in this case, makes sense since the site's design allows Building 1 and Building 2 to operate independently. The Planning Commission finds that completion of Building 1 is an appropriate utilization of the project's conditional use approval.
  - Complete construction of Building 1 by February 27, 2012. This includes completion of all interior and exterior building improvements (and associated inspections) that are necessary for Building 1 to be operational including, but not limited to, any exterior HVAC equipment, electrical cabinets, and stormwater management facilities. All other required on- and off-site improvements would be required for final occupancy and need not be completed by February 27, 2012.
8. The Planning Commission finds that the existing Transportation Impact Study and Water Quality Resource Report that are associated with the underlying land use approvals for this project (Master File# CU-07-02) are still valid. The Planning Commission also finds that construction of all on- and off-site transportation improvements and installation of all mitigation plantings on the south side of Minthorn Creek prior to final occupancy for Building 1 are consistent with the underlying land use approvals for this project (Master File# CU-07-02).
9. The proposal was referred to the following departments, agencies, and associations on January 12, 2010: City of Milwaukie Engineering and Building Departments; Lake Road and Linwood Neighborhood District Associations (NDA); Oak Lodge Community Council; and Clackamas County Department of Transportation and Development. The comments received are summarized as follows:
- **Paul Hawkins, Land Use Chair, Lake Road NDA:** Supportive of the variance request.
  - **Eleanore Hunter, Chair, Oak Lodge Community Council:** Supportive of the variance request.
  - **Chris Maciejewski, City of Milwaukie Traffic Engineer, DKS Associates:** Updating the Applicant's October 2008 transportation impact study would likely not result in any new findings or mitigations.
  - **Robert Hixson, Civil Engineering Associate, Clackamas County Department of Transportation and Development:** No objections to the variance request.
  - **Tom Larsen, Building Official, City of Milwaukie:** No comment.

### **Conditions of Approval**

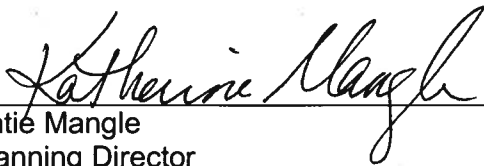
1. Complete substantial construction of the Milwaukie Ministorage project by February 27, 2012. (Refer to the underlying Notice of Decision for a more detailed description of this project: Master File #CU-07-02). Substantial construction includes the following:
  - **Complete Construction of Building 1.** This includes completion of all interior and exterior building improvements that are necessary for Building 1 to be operational including, but not limited to, any exterior HVAC equipment, electrical cabinets, and stormwater management facilities. All building inspections related to Building 1 must be completed and Building 1 must be ready for occupancy by the substantial construction deadline.

Construction of the above-listed improvements shall be completed in accordance with the underlying Notice of Decision dated August 27, 2008 for Land Use Files CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06.

2. Obtain a certificate of occupancy for Building 1. A certificate of occupancy requires completion of the following improvements:
  - Construction of all on-site improvements related to the operation of Building 1 including, but not limited to parking and loading areas, landscaping, and frontage improvements.
  - Construction of all off-site transportation improvements.
  - Construction of all mitigation measures related to Building 1 including, but not limited to, vegetative screening.
  - Installation of all water quality resource mitigation plantings on the south side of Minthorn Creek as described in the Applicant's 2008 Water Quality Resource Report or submission of a Water Quality Resource application for Type II review that includes an analysis of Building 1's impacts on the water quality resource area and an alternate mitigation plan for review, approval, and implementation.

Construction of the above-listed improvements shall be completed in accordance with the underlying Notice of Decision dated August 27, 2008 for Land Use Files CU-07-02, WQR-07-01, TPR-07-12, TAR-07-01, and VR-07-06.

3. Provide annual progress reports in January via e-mail to the City of Milwaukie Planning Director until a final certificate of occupancy is obtained for Building 1.



Katie Mangle  
Planning Director

cc: Applicant  
Planning Commission  
Kenny Asher, Community Development/Public Works Director  
Katie Mangle, Planning Director  
Gary Parkin, Engineering Director  
Brad Albert, Civil Engineer  
Tom Larsen, Building Official  
Bonnie Lanz, Permit Specialist  
Doug Whiteley, Lieutenant Deputy Fire Marshal  
Robert Hixson, Clackamas County Department of Transportation and Development  
Ron Weinmann, Clackamas County Department of Transportation and Development  
NDA(s): Linwood, Lake Road, Oak Lodge  
Interested Persons: Terry Dolan  
File(s): VR-10-01