Department of Community Services
Land Use Planning Division
www.multco.us/landuse

1600 SE 190th Avenue, Portland Oregon 97233-5910 • PH (503) 988-3043 • Fax (503) 988-3389

Notice of Hearings Officer Decision

Attached please find notice of the Hearings Officer's decision in the matter of T2-2021-14768, mailed 10/14/2021. This notice is being mailed to those persons entitled to receive notice under MCC 39.1170(D).

The Hearings Officer's Decision is the County's final decision and may be appealed to the State of Oregon Land Use Board of Appeals (LUBA) by any person or organization that appeared and testified at the hearing, or by those who submitted written testimony into the record.

Appeal instructions and forms are available from:

Land Use Board of Appeals
775 Summer Street NE, Suite 330
Salem, Oregon 97301

503-373-1265
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For further information call the Multnomah County Land Use Planning Division at: 503-988-3043.

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DECISION OF HEARINGS OFFICER

This document is a final decision on appeal of the Planning Director's Decision in the land use case(s) cited and described below.

Case File: T2-2021-14768

Permit: *Accessory Use Determination; Lot of Record Determination*

Location: 12424 NW Springville Road
Tax Lots 2800 and 3100, Township 1 North, Range 1 West, of the Willamette Meridian
Tax Account #R9611601, R961160590, AND R961150770 (the "site").

Appellant: Scott Reed

Property Owners: Scott and Stacey Reed

Base Zone: Exclusive Farm Use (EFU) and Commercial Forest Use (CFU)

Overlays: Significant Environmental Concern for wildlife habitat and streams; Hillside Development

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Summary: The county approved permits for a dwelling customarily provided in conjunction with farm use, Significant Environmental Concern - Wildlife Habitat, and Hillside Development in Case No. T2-2014-3377 (the "Permit"), effective September 11, 2015. The Planning Director determined that the Permit expired for failure to commence construction within the time period required in the Permit. The Appellant appealed that determination.

Testified at the Hearing:
Carol Johnson, county planning director
Katherine Thomas, Assistant county attorney
Garrett Stephenson, Appellant's attorney

Scott and Stacey Reed, applicants and property owners
Rolf Vatne, area resident

Decision: The appeal is denied and the planning director's decision is affirmed

A. SUMMARY

1. The county approved permits for a dwelling customarily provided in conjunction with farm use, Significant Environmental Concern - wildlife habitat, and Hillside Development in Case No. T2-2014-3377 (the "Permit"), effective September 11, 2015. Condition 5 of the Permit provided "This Permit EXPIRES as provided in MCC 37.0690." (Attachment 1 of Exhibit H.1).[1]

2. On June 4, 2021, the planning director (the "director") issued written decisions determining that the Permit had "[e]xpired under the terms of the permit for failure to commence construction within the required time period." (6/4/21 email attached to Exhibit A.1).

3. Garrett Stephenson, the Appellant's attorney, filed an appeal of the county's determination on June 11, 2021. (Exhibit A.1).

4. County Hearings Officer Joe Turner (the "hearings officer") conducted a duly noticed public hearing to receive testimony and evidence regarding the appeal. The Appellant's attorney, the Appellant/property owners, and county staff testified orally regarding the appeal and submitted additional written testimony and evidence during the post-hearing open record period. Contested issues in this case include:

    a. Whether the Permit is subject to the two-year expiration period set out in MCC 37.0690(1);

    b. Whether the county staff's incorrect belief that the Permit was subject to the four-year expiration period provided by MCC 37.0690(C) and the fact that the county continued to take actions related to the Permit after expiration of the two-year approval period constitute a binding interpretation of the Code under the court's holding in *Holland v. City of Cannon Beach*, 154 Or. App. 450, 457 (1998), rev. den. 328 Or. 115, 977 P.2d 1171 (1998);

    c. Whether the Appellant commenced construction of the foundation or frame of the approved structure within two or four years from the effective date of the Permit;

    d. Whether the text of OAR 660-033-0140 is directly applicable in this case;

    e. Whether the county is estopped from claiming that the Permit expired on September 11, 2017; and

    f. Whether the Appellant has a vested right to complete construction of the dwelling approved in the Permit; and

[1] The Appellant identifies documents attached to their submittals as "Exhibit #_." The County identifies all submittals by Exhibit number. Therefore, in order to avoid confusion, the hearings officer refers to documents attached to an exhibit as "Attachments" to that exhibit.

g. Whether the terms of MCC 37.0690(B)(1) are clear and objective.

5. Based on the findings provided or incorporated herein, the hearings officer hereby denies the appeal and affirms the planning director's decision finding that the Permit approval issued in T2-2014-3377 expired under the terms of the Permit for failure to commence construction within the required time period.

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at the duly noticed public hearing about this appeal on September 10, 2021. All exhibits and records of testimony have been filed with the Multnomah County Department of Community Services, Land Use Planning Division. The hearings officer opened the initial hearing by making the statements required by ORS 197.763. The hearings officer disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the hearings officer of selected relevant testimony.

2. County planning director Carol Johnson summarized the history of the case, the director's decision, and the "Staff Report for the September 10, 2021 Public Hearing" (the "Staff Report).

   a. She noted that the county approved Permit T2-2014-3377 with an effective date of September 11, 2015. Condition 5 of the Permit provides "This Permit EXPIRES as provided in [former] MCC 37.0690."[2]

      i. MCC 37.0690(A) sets out the expiration timeline for approvals that do not include a structure. This Code section is inapplicable in this case, as Permit T2-2014-3377 approved a structure.

      ii. MCC 37.0690(B) provides, in relevant part, "Except for approval of residential developments as specified in (C) below…" approvals involving a structure shall expire "(1) When construction has not commenced within two years of the date of the final decision. Commencement of construction shall mean actual construction of the foundation or frame of the approved structure…"

      iii. MCC 37.0690(C) provides a four-year expiration for approvals of "[r]esidential development on land zoned for Exclusive Farm Use or Commercial Forest Use outside of an urban growth boundary…" MCC 37.0690(C)(4) defines "residential development" for the purposes of this section.

[2] County Code amendments effective November 24, 2018 modified the section numbers of the Code. All Code citations in this Final Order refer to the prior Code in when the Permit application was filed. The relevant sections of the former Code are included in the record as Exhibit B.1.

iv. MCC 37.0690(D) provides "Expiration under (A), (B), or (C) above is automatic. Failure to give notice of expiration shall not affect the expiration of a Type II or III approval."

v. The "dwelling customarily provided in conjunction with farm use" approved in Permit T2-2014-3377 is not one of the dwelling types defined as "residential development" in MCC 37.0690(C)(4). Therefore, the structure approved in Permit T2-2014-3377 is subject to the two-year expiration period set out in MCC 37.0690(B)(1). The Permit would automatically expire unless the Appellant commenced actual construction of the foundation or frame of the approved structure prior to September 11, 2017, two years from the effective date of the decision approving the Permit.

b. The Appellant failed to commence actual construction of the foundation or frame for the dwelling approved in Permit T2-2014-3377 prior to September 11, 2017. Therefore, the Permit expired on that date.

i. Grading and excavation do not constitute "construction" as that term is used in the Code and defined by the dictionary. "Construction" requires the putting together of parts. Pursuant to MCC 37.0690(B)(1), excavation only constitutes commencement of construction of underground utilities or development. Construction of a structure requires approval of a building permit and the Appellant did not submit a building permit application to the city of Portland until March 27, 2018. The city has not approved a building permit for the proposed structure.

3. Assistant county attorney Katherine Thomas responded to Mr. Stephenson's September 8, 2021, written "Statement" (Exhibit H.1). She requested the hearings officer hold the record open to allow the county an opportunity to provide additional written argument.

a. She argued that, pursuant to MCC 37.0690(B) and (D), Permit T2-2014-3377 automatically expired on September 11, 2017. Any statements by county staff that the Permit was subject to a four-year expiration period were in error and insufficient to alter the Code. Even if staff's statements constitute the county's interpretation of the Code, the Court in *Holland v. City of Cannon Beach*, 154 Or. App. 450, 457 (1998), rev. den. 328 Or. 115, 977 P.2d 1171 (1998), held that the local government may change its interpretation of the Code during the review of an application. In addition, the Court in *Jones v. Willamette United Football Club*, 307 Or. App. 502, 479 P.3d 326 (Or. App. 2020) held that a planning director's interpretation that has not been ratified by the local legislative body is not binding in a subsequent application.

b. The hearings officer has no authority to apply estoppel. LUBA has held that it does not have such authority. Therefore, the hearings officer also lacks such authority.

c. "Actual construction" as that term is used in MCC 37.0690(B) requires more than excavation. The dictionary definition of the term "construct" cited by Mr. Stephenson requires "combining parts or elements." Excavation of a hole for a foundation and basement does not involve the combining parts or elements.

d. The MCC has been acknowledged. Therefore, OAR 660-033-0140, cited by Mr. Stephenson, is inapplicable. That is consistent with LUBA's holding in *Gould v. Deschutes Co.*, 67 OR LUBA 1 (2013).

e. The vested rights doctrine is inapplicable in this case, as neither the Code nor the applicable zoning have changed, citing *Heidgerken v. Marion County*, 35 Or LUBA 313, 317 (1998).

f. The "clear and objective" requirement of ORS 197.307 is inapplicable, as SB 1051, which made this statute applicable to all residential development, was not effective until after this application was approved.

4. Attorney Garrett Stephenson summarized his "Appellant Statement regarding Scott and Stacy Reed Farm Dwelling (T2-2021-14768)" (Exhibit H.1) and the facts of this case.

a. In 2014 the property owners submitted an application for approval of a dwelling customarily provided in conjunction with farm use. The county greatly exceeded the 150 day deadline for issuing a final decision. Therefore, the property owners sought approval through a mandamus action in 2015. The county agreed to settle the case and approve the application if the property owners agreed not to seek attorney fees.

b. The county continued to delay as it reviewed the Appellant building plans. The property owners submitted their plans to the county in the spring of 2017. The county did not sign off on the plans until February 12, 2018.

c. On August 8, 2017, the Appellant applied for a grading permit to excavate the foundation and basement for the dwelling. The county approved the grading permit on February 14, 2018. The Appellant began construction of the foundation for the house by having a surveyor lay out the foundation and a contractor begin excavation of the foundation and basement in June 2018. It is an accepted industry standard that layout and excavation of a foundation constitutes commencement of construction of a structure, based on the written statement from BDZE Construction (Exhibit H.2). The Appellant completed excavation of the structure within four years from the effective date of the Permit. This is sufficient to finalize the Permit.

d. The plain language of the Code and OAR 660-033-0140 do not require the issuance of a building permit to "commence construction" or "initiate development." The Appellant could have commenced construction of the foundation prior to obtaining a building permit and that would be sufficient to finalizing a permit approval pursuant to MCC 37.0690, even though it would constitute a Code violation.

e. The county has consistently interpreted the Code to apply a four-year expiration date for the Permit in oral and written communications regarding the Permit. The county approved the Appellant's building plans and issued a grading permit for the structure after the two-year period expired. The county asserted a two-year expiration date for the first time in the Staff Report. The county should be precluded from changing its interpretation at this stage.

    i. The *Holland* case fully supports this argument. In this case the Board of Commissioners did not ratify staff's interpretation that the Permit was subject to a four-year expiration period. However, the county's actions in issuing approvals under the Permit more than two years after the effective date of the Permit was sufficient to ratify the county's interpretation that the Permit was subject to a four-year expiration period.

f. The Appellant reasonably believed that he had commenced construction of the residence and therefore, had no need to request an extension of the Permit approval. Mr. Khut stated in two separate emails that the Appellant had begun "construction" of their home on the site. The county should be estopped from finding otherwise, as the Appellant expended considerable sums in reliance on staff's statement that they had begun construction and therefore finalized the Permit.

g. The Appellant has a vested right to complete construction of the residence. Although the zoning has not changed, the county has changed its interpretation of the Code, resulting in an "as applied" change to the Code. This case is distinguishable from LUBA's holding in *Heidgerken*.

h. ORS 197.307, as amended by SB 1051, prohibits the county from applying criteria that are not clear and objective. Although the Permit application was submitted prior to the effective date of SB 1051, the county is applying the standard in 2021. Therefore, the county is subject to the requirements of ORS 197.307.

5. The property owners, Scott and Stacey Reed, summarized their efforts to build a home on the site.

    a. They purchased the site and submitted an application for a dwelling customarily provided in conjunction with farm use in 2014. The county failed to issue a

decision on the application until they filed a mandamus action. Six different planners worked on this project over the course of seven years and the county had four different planning directors. The county was understaffed and frequently failed to respond to their inquiries and submittals. The county required multiple changes to the building plans.

b. Staff consistently cited a four-year deadline for the Permit approval. The Staff Report is the first time the county asserted that the Permit was subject to a two-year timeline.

c. They obtained a grading permit for excavation of the building foundation and basement in February 2018. They extended electrical service to the home site pursuant to a permit from the city of Portland and they ran water to the home site from a spring on the site. They posted their grading permit on the site and notified the county that they were "starting construction." All conversations and emails from staff stated that they were "under construction."

6. Rolf Vatne testified that he lives across the street from the site and observed a lot of work on the site. He welcomed a residence on the site but expressed concerns with the amount of fill and construction traffic generated by this project.

7. At the end of the public hearing, the hearings officer ordered the record held open for three weeks, subject to the following schedule:

   a. For one week, until September 17, 2021, for all parties to submit additional testimony and evidence;

   b. For a second week, until September 24, 2021, for all parties to respond to anything submitted during the first week; and

   c. For a third week, until October 1, 2021, for the Appellant to submit a final written argument. The record in this case closed at 4:00 p.m. on October 1, 2021.

C. FINDINGS OF FACT

1. The county approved a permit for a dwelling customarily provided in conjunction with farm use, Significant Environmental Concern - wildlife habitat, and Hillside Development in Case No. T2-2014-3377 (the "Permit"), effective September 11, 2015. Condition 5 of the Permit provided "This Permit EXPIRES as provided in MCC 37.0690." (Attachment 1 of Exhibit H.1).

2. In the spring of 2017 the Appellant submitted building plans for the dwelling to the county for review prior to submitting a building permit application to the city of Portland. (Exhibit H.1).

3. On August 8, 2017, the Appellant submitted an application to the county for grading and erosion control permit for excavation of the foundation and basement of the residence. (Exhibit B.2).

4. The county completed its review and signed off on the Appellant's building plans on February 12, 2018. (Exhibit B.5).

5. The county issued grading and erosion control permit T1-2017-9729 on February 14, 2018. (Exhibit B.6 and Attachment 5 of Exhibit H.1).

6. The Appellant submitted an application for a building permit to the city of Portland on February 20, 2018. The City determined that the building permit application was complete and began its review on March 27, 2018. (Exhibit B.4 and Attachment 4 of Exhibit H.1).

7. On May 29, 2018, the Appellant informed the county that they "[p]lan on starting the construction of the barn and shop this week. We also plan to start the sitework for the house." (exhibit B.7). The Appellant's contractor had a surveyor lay out the foundation and begin excavation of the foundation and basement in June 2018. Nichols Excavation LLC performed excavation and grading activities on the site between July 3, 2017 and October 1, 2018. (Attachments 12 and 14 of Exhibit H.1; Exhibit P.3; Exhibit P.5).

8. On August 2, 2018, Mr. Khut emailed the Appellant:

    - That he had received communications from neighbors regarding grading activities on the site, that he informed those persons that activities on the site were within the scope of a valid Grading and Erosion Control Permit;
    - That "the construction area is well fenced and the silt fences are up";
    - To reminded the Appellant of the need to control dust on the site and comply with the City of Portland's Erosion Control Manual; and
    - Mr. Khut concluded his email with the statement, "Other than that, hope everything is going well with the construction and permitting at the City of Portland."

(Attachment 7 of Exhibit H.1).

9. On May 9, 2019, Mr. Khut emailed the Appellant:

    - That he had "[r]eceived notice that you have begun work on your single-family dwelling again" and reminding the Appellant of the need to maintain "Best Management Practices" to control dust on the site;
    - "[y]our permit that authorized the single-family dwelling required that you maintain and mark off the boundary between the where the soil is being contoured and the creek."; and

- that the approved grading and erosion control permit limits the amount of fill imported to the site "[t]o prepare for the single-family dwelling" to 3,000 cubic yards.

(Attachment 8 of Exhibit H.1).

10. On February 7, 2020, and again on April 23, 2020, the county requested that the city of Portland cancel the building permit application for the single-family residence proposed on the site, or place the building permit on hold. (Exhibit B.9).

11. On June 11, 2020, Mr. Khut emailed the Appellant to inform him that county permit T2-2014-3377 had expired as of September 11, 2019, four years after the date of approval, pursuant to MCC 37.0690(C)(1)(a). (Attachment 9 of Exhibit H.1).

12. On June 19, 2020, the Appellant submitted an appeal of the county's determination that county permit T2-2014-3377 had expired as of September 11, 2019, as stated in Mr. Khut's June 11, 2020 email. On July 1, 2020, the county rejected that "appeal" as improperly filed pursuant to MCC 39.1160(A)(2) because the county has not issued a Type II decision on the expiration of T2-2014-3377 (Exhibit 10).

13. On June 4, 2021, Multnomah county planning director Carol Johnson emailed Garrett Stephenson, the Appellant's attorney, stating that "Your permit in Case File T2-2014-3377 has expired under the terms of the permit for failure to commence construction within the required time period." (6/4/21 email attached to Exhibit A.1). Mr. Stephenson filed an appeal of the county's determination on June 11, 2021. (Exhibit A.1).

D. CONCLUSIONS OF LAW

1. MCC § 37.0330.B authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The hearings officer must decide whether the Appellants have carried the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence submitted during the appeal process.

2. The hearings officer finds that the Permit expired on September 11, 2017, based on the plain language of the Code.

   a. MCC 37.0690 provides, in relevant part:

      …

(B) Except for approval of residential developments as specified in (C) below, a Type II or Type III land use approval issued pursuant to this Chapter for a use or development that includes a structure shall expire as described in 1 or 2 below:

(1) When construction has not commenced within two years of the date of the final decision. Commencement of construction shall mean actual construction of the foundation or frame of the approved structure. For utilities and developments without a frame or foundation, commencement of construction shall mean actual construction of support structures for an approved above ground utility or development or actual excavation of trenches for an approved underground utility or development. For roads, commencement of construction shall mean actual grading of the roadway.

(C) A Type II or III decision approving residential development on land zoned for Exclusive Farm Use or Commercial Forest Use outside of an urban growth boundary is subject to the following provisions:

(1) The approval shall expire as described in (a) or (b) below:

(a) When construction has not commenced within four years of the date of the final decision. Commencement of construction shall mean actual construction of the foundation or frame of the approved structure.

…

(4) For the purposes of this section, "residential development" only includes dwellings as provided for under:

(a) ORS 215.283(1)(s) – alteration, restoration or replacement of a lawfully established dwelling in the EFU zones as provided in MCC 33.2620 (J), (L) & (M); 34.2620 (J), (L) & (M); 35.2620 (J), (L) & (M); 36.2620 (J), (L) & (M); and

(b) ORS 215.284 – dwelling not in conjunction with farm use in the EFU zones (not currently provided for in any MCC Chapter); and

(c) ORS 215.705 (1) to (3) – "Heritage Tract Dwelling" in the EFU zones as provided for in MCC 33.2625 (F); 33.2630 (M) & (N); 34.2625 (F); 34.2630 (M) & (N); 35.2625 (F); 35.2630 (M) & (N); 36.2625 (F); 36.2630 (J) & (K); and

(d) ORS 215.720 – "Heritage Tract Dwelling" in the CFU zones as provided in MCC 33.2230 (C); and 35.2230 (C); 36.2030 (C); and

(e) ORS 215.740 – "Large Acreage Dwelling" in the CFU zones as provided for in MCC 33.2030 (A); 33.2230 (A); 35.2230 (A); 36.2030 (A); and

(f) ORS 215.750 – "Template Dwelling" in the CFU zones as provided for in MCC 33.2230 (B); 33.2430 (A); 35.2230 (B); 36.2030 (B); and

(g) ORS 215.755 (1) – alteration, restoration or replacement of a lawfully established dwelling in the CFU zones as provided in MCC 33.2020 (D) & (E); 33.2025 (A) & (B); 33.2220 (D) & (E); 33.2225 (A) & (B); 33.2420 (D) & (E); 33.2425 (A) & (B); 35.2020 (D) & (E); 35.2025 (A) & (B); 35.2220 (D) & (E); 36.2020 (D); 36.2025 (A) & (B); and

(h) ORS 215.755 (3) a caretaker residence for a public park or public fish hatchery in the CFU zones as provided for in MCC 33.2020 (H); 33.2220 (H); 33.2420 (H); 35.2020 (H); 35.2220 (H); and 36.2020 (G).

(D) Expiration under (A), (B), or (C) above is automatic. Failure to give notice of expiration shall not affect the expiration of a Type II or III approval.

b. MCC 37.0695 authorizes the Planning Director to grant an extension of a development approval provided the applicant makes a written request for extension prior to the expiration of the approval period.

c. The Permit (T2-2014-3377) approved a "dwelling customarily provided in conjunction with farm use" as provided for under ORS 215.283(e) and MCC 33.2625(D)(3). A "dwelling customarily provided in conjunction with farm use" is not listed in MCC 37.0690(C)(4). Therefore, it does not qualify as "residential development" subject to the four-year expiration period provided in MCC 37.0690(C)(1). The Permit is subject to the two-year expiration period provided in MCC 37.0690(B)(1).

d. The Permit became effective on September 11, 2015. There is no evidence in the record before the hearings officer that the Appellant "[c]ommenced construction of the of the foundation or frame of the approved structure" prior to September 11, 2017, two years after the effective date of the Permit and they did not request an extension of the approval pursuant to MCC 37.0695. Therefore, the Permit

automatically expired on September 11, 2017, pursuant to MCC 37.0690(B)(1) and (D).

3. The fact that county staff believed that the Permit was subject to the four-year expiration period provided by MCC 37.0690(C) and the county continued to take actions pursuant to the Permit (approving building plans and issuing a grading and erosion control permit) after the two-year approval period had expired is immaterial. The county's incorrect interpretation did not change the Code.

    a. The hearings officer finds that the Court's holding in *Holland*, that a prior interpretation can be binding on the local government, is inapplicable here as the staff's interpretation was never adopted by the Board of County Commissioners. This is consistent with the Court's holding in *Jones v. Willamette United Football Club*, 307 Or. App. 502, 479 P.3d 326 (2020), where the Court held that a written planning director interpretation was not binding on the county's hearings officer in a subsequent conditional use review. The *Jones* court distinguished *Holland* based on the fact that the city council in *Holland* ratified a prior staff determination,

    b. This is also consistent with the other cases cited by the Appellant – *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613, (1997) and *Alliance for Responsible Land Use v. Deschutes County*, 149 Or. App. 259, 942 P.2d 836 (1997) ", rev. dismissed as improvidently allowed, 327 Or. 555, 971 P.2d 411 (1998) – both of which rely on deference to the local government's interpretation of its code required by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or. 508, 514-15, 836 P. 2d 710 (1992). The Courts are only required to defer to interpretations made by the local legislative body. The Courts owe no deference to staff interpretations. *Gage v. City of Portland*, 319 Or. 308, 317, 877 P. 2d 1187 (1994).

4. Even if the Permit were subject to the four-year expiration period provided by MCC 37.0690(C)(1)(a), the Appellant did not "commence…actual construction of the foundation or frame of the approved structure" prior to September 11, 2019.

    a. The Code does not define the terms "commence," "actual," or "construction." Therefore, these words should be should be "[g]iven their plain, natural and ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 611, 859 P.2d 1143 (1993). Courts "[g]enerally look to the dictionary to determine a word's ordinary meaning." *City of Lake Oswego v. Albright*, 222 Or. App. 117, 120, 193 P.3d 988 (2008), citing *State v. Murray*, 340 Or. 599, 604, 136 P.3d 10 (2006).

    b. The parties provided the following definitions from *Webster's Third Int'l Dictionary*:

- "actual" means "1. involving or relating to acts or deeds," "2. existent—contrasted with potential or possible," "3. not spurious," "4. in existence or taking place at the time." (*Webster's* 1981 Ed.)

- "actual" means "existing in fact or reality : really acted or acting or carried out * * * distinguished from *apparent* and *nominal* <the ~ cost of goods>." (*Webster's* unabridged 2002 Ed. at 22).

- "nominal" means "existing or being something in name or form but usu[ually] not in reality" and "being so small, slight, or negligible as scarcely to be entitled to the name." (*Webster's* unabridged 2002 Ed. at 1534).

- "construction" means "the act of putting parts together to form a complete integrated object." (*Webster's* unabridged 2002 Ed. at 489).

c. The Appellant notes that "The word 'construction' in this context is a use of the transitive form of the verb 'construct,' which means to 'form, make, or create by combining parts or elements,'" citing (*Webster's* 1981 Ed.) (p. 5 of Exhibit H.1).

d. The hearings officer notes that the dictionary defines "commence" as "to enter upon **:** BEGIN **:** to have or make a beginning **:** START." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/commence. Accessed 8 Oct. 2021.

e. The hearings officer finds that the words "construction" and "construct" require the putting together or combining of parts or elements. This is consistent with the dictionary definition of "construction," the word used in the Code. It is also consistent with the dictionary definition of the word "construct." Given the placement of the comma in the dictionary definition, the last antecedent rule would hold that the phrase "[b]y combining parts or elements" only applies to the word "create." However, "When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Price v. Lotlikar*, 285 Or. App. 692, 703, 397 P.3d 54 (2017), quoting *Porto Rico Railway, Light & Power Co. v. Mor* , 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920). In this case, the phrase "[b]y combining parts or elements" is equally applicable to all of the remaining words used in the definition, "form, make, [and] create." This is also consistent with the definition of the word "construction," which is derived from the word "construct" and requires the putting together of parts.

f. Therefore, the hearings officer finds that in order to finalize the Permit, MCC 37.0690(C)(1)(a) required that the Appellant commence (begin) actual (more than

nominal) construction (putting together or combining parts) of the foundation or frame of the approved structure prior to September 11, 2019.

g. The hearings officer finds that excavation of the foundation alone does not constitute construction as that term is used in MCC 37.0690(C)(1)(a).

i. Excavation is limited to the removal of earthen material. It does not involve the putting together or combining of parts. Therefore, it does not constitute "construction."

ii. This is consistent with the text of MCC 37.0690(C)(1)(a), which uses the terms "construction" and "excavation" in the same subsection. Where different words are used in the same ordinance they generally mean different things. *Johnson v. Dep't of Pub. Safety Standards & Training*, 253 Or.App. 307, 313-314, 293 P.3d 228 (2012), citing *State v. Keeney*, 323 Or. 309, 316, 918 P.2d 419 (1996) (holding that the legislature intends different meanings when it uses different terms in a statute). MCC 37.0690(C)(1)(a) uses the term "actual construction" in reference to structures that involve a frame, foundation, or support structures. The Code only uses the term "excavation" in reference to trenches for underground utilities or development that do not involve a structure.

iii. The Appellant argues, based on the letter from BDZE Construction (Attachment 6 of Exhibit p. 7), that the construction industry considers the layout and excavation of a foundation as "commencing construction." However, there is no evidence in the record that the Board of County Commissioners was aware of the construction industry's understanding of this phrase nor that the Board intended the Code to apply that understanding. Absent such evidence, the hearings officer must apply the plain and ordinary meaning of the words used in the Code.

h. It is unnecessary to address the Appellant's assertion that a permittee can finalize a permit beginning construction of the foundation or frame of an approved structure without a required building permit, as there is no evidence that the Appellant actually undertook actual construction of the foundation in this case. The Appellant excavated a hole for the foundation, but there is no evidence that the Appellant commenced "actual construction" by putting together or combining parts to begin forming a foundation for the proposed structure.

5. The "initiate development" language in OAR 660-033-0140 is not applicable in this case because the county's Code is acknowledged. The statewide planning goals are not applicable where a county's comprehensive plan and land use regulations have been acknowledged. ORS 197.175(2)(d); *Byrd v. Stringer*, 295 Or. 311, 313, 666 P. 2d 1332 (1983) (after acknowledgment, land use decision must be measured against the acknowledged plan and implementing ordinances, not the goals). *Gould v Deschutes County*, 67 Or LUBA 1 (2013) (County may apply expiration standard in county code

that varies from the standard in OAR 660-033-0140. State rule did not apply because the county's comprehensive plan and land use regulations had been acknowledged).

a. *Jones v. Douglas Cnty.*, 247 Or.App. 81, 270 P.3d 278 (2011), cited by the Appellant, is not inconsistent with *Gould*. The Court in *Jones* held that where OAR 660-033-0140 was the source of the county's authority to grant extensions of a prior approval the decision to grant the extension was a not land use decision subject to LUBA's jurisdiction, pursuant to OAR 660–033–0140(3). The Court did not hold that a county is prohibited from applying acknowledged Code language that varies from OAR 660-033-0140.

6. The hearings officer likely lacks the authority to address the Appellant's equitable estoppel claims. However, assuming, without deciding, that the hearings officer has such authority, the hearings officer finds that the Appellant failed to demonstrate compliance with the elements of equitable estoppel.

a. The Appellant argues that the county should be estopped from claiming that the Permit expired on September 11, 2017, based on Mr. Khut's 2018 and 2019 emails.

i. On August 2, 2018, Mr. Khut emailed the Appellant:

- That he had received communications regarding grading activities on the site, that he informed those persons that activities on the site were within the scope of a valid Grading and Erosion Control Permit;
- That "the construction area is well fenced and the silt fences are up";
- To reminded the Appellant of the need to control dust on the site and comply with the City of Portland's Erosion Control Manual; and
- Mr. Khut concluded his email with the statement, "Other than that, hope everything is going well with the construction and permitting at the City of Portland."

(Attachment 7 of Exhibit H.1).

ii. On May 9, 2019, Mr. Khut emailed the Appellant:

- That he had "[r]eceived notice that you have begun work on your single-family dwelling again" and reminding the Appellant of the need to maintain "Best Management Practices" to control dust on the site;
- "[y]our permit that authorized the single-family dwelling required that you maintain and mark off the boundary between the where the soil is being contoured and the creek."; and

- that the approved grading and erosion control permit limits the amount of fill imported to the site "[t]o prepare for the single-family dwelling" to 3,000 cubic yards.

(Attachment 8 of Exhibit H.1).

b. The Oregon Supreme Court set out the elements of equitable estoppel in *Coos County v. State of Oregon*, 303 Or. 173, 734 P. 2d 1348 (1973), as follows: "to constitute estoppel by conduct there must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; [and] (5) the other party must have been induced to act upon it.* * *"" Id. at 180-81 (quoting *Oregon v. Portland Gen. Elec. Co*., 52 Or. 502, 528, 95 P 722 (1908)).

c. There is no evidence that Mr. Khut's emails contained "false representations." Based on the text and context of his emails, Mr. Khut appears to use the word "construction" in a broad sense of the term, to include the grading activities that were taking place on the site and that he referenced in his emails. To that extent Mr. Khut's statements are true; the Appellant was performing grading and excavating activities on the site that required the implementation of erosion control Best Management Practices. There is no evidence that Mr. Khut was intending to say or imply that the Appellant had commenced construction of the foundation or frame of the approved structure and thereby finalized the Permit pursuant to MCC 37.0690(B)(1) or (C)(1)(a).

d. In addition, there is no evidence that Mr. Khut intended the Appellant to act on his statement by assuming that the Permit was finalized and not request an extension pursuant to MCC 37.0695. It appears that Mr. Khut intended the Appellant to act on his statements by implementing Best Management Practices to control dust on the site. But that intent is unrelated to expiration of the Permit, the action the Appellant is seeking to estop.

7. The hearings officer finds that the vested rights doctrine is inapplicable in this case.

a. A vested right allows development that is approved but incomplete to continue, despite changes to applicable comprehensive plan or land use regulation requirements that prohibit the use. *Clackamas County v. Holmes*, 265 Or. 193, 197–198, 508 P. 2d 190 (1973). In this case there was no change in the applicable zoning or comprehensive plan. The Code in effect at the time the application was filed required that the Appellant finalize the Permit by commencing construction of the foundation within two years from the effective date of the Permit. That requirement has not changed. Therefore, as in *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998), the Appellant's right to complete construction of the residence is determined by MCC 37.0690(B)(1), not the vested rights principles discussed in *Holmes. Heidgerken*, LUBA No. 98-090 at p. 5.

b. In addition, the alleged change in the county's interpretation of the expiration deadline from four years to two years occurred more than four years after the effective date of the Permit. Therefore, any change did not affect the Appellant's ability to comply with the four-year deadline.

c. The Appellant's argument that the Courts have not affirmed the holding in *Heidgerken* is inappropriate. LUBA's decisions are binding precedent which the hearings officer must follow.

8. The hearings officer finds that the terms of MCC 37.0690(B)(1) are clear and objective. Therefore, assuming, without deciding, that the Permit is subject to ORS 197.307(4), this statute does not preclude the county from applying the expiration standard of MCC 37.0690(B)(1).

   a. A standard is clear and objective if it can plausibly be interpreted in only one way. *Tirumali v. City of Portland*, 169 Or. App. 241, 7 P.3d 761, 763 (2000), rev. den. 331 Or. 674, 21 P.3d 96 (2001).

   b. MCC 37.0690(B) provides:

      > Except for approval of residential developments as specified in (C) below, a Type II or Type III land use approval issued pursuant to this Chapter for a use or development that includes a structure shall expire…(1) When construction has not commenced within two years of the date of the final decision.

   The Code goes on to define "commencement of construction" as "[a]ctual construction of the foundation or frame of the approved structure." MCC 37.0690(C)(4) defines "residential developments" by reference to a list dwelling types authorized in specific sections of ORS 215 and the MCC.

   c. The hearings officer finds that the wording of MCC 37.0690 can plausibly be interpreted in only one way. The Permit at issue in this case does not constitute "residential development" as defined by MCC 37.0690(C)(4), because the proposed structure is not one of the dwelling types listed in that subsection. Therefore, the Permit will expire if construction is not commenced within two years of the date of the final decision. It appears that the county and the Appellant both assumed that the proposed structure constituted "residential development" subject to the four-year expiration period provided by MCC 37.0690(C). However, that assumption was based on a failure to read the definition of "residential development" in MCC 37.0690(C)(4), not on any ambiguity in the language of the Code.

   d. The phrase "commencement of construction" is clear and objective based on the definition in the Code and the plain meaning of the terms used the Code.

E. DECISION

Based on the findings, discussion, and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby denies the appeal and affirms the planning director's decision finding that Permit T2-2021-14768 is expired as the Appellant failed to commence construction of the foundation or frame of the approved structure within the deadline provided by MCC 37.0690.

DATED this 14th day of October 2021.

Joe Turner, Esq., AICP
Multnomah County Land Use Hearings Officer

This Decision is final when mailed. Appeals may be filed with the Oregon Land Use Board of Appeals within the time frames allowed by State law.