



MULTNOMAH COUNTY
LAND USE PLANNING DIVISION
1600 SE 190TH Avenue Portland, OR 97233
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**BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON
FINAL ORDER**

This Decision consists of Conditions, Findings of Fact and Conclusions.

January 11, 2005

T2-04-058 An Appeal of the Planning Director's determination that a dwelling was not lawfully established

Location: 29619 SE Stone Road

Map Description: Tax Lot 200, Section 19DC, Township 1 South, Range 4 East, Willamette Meridian

Zoning Designation: Multiple Use Agriculture - 20

Applicant/Appellant:
Ed Christensen
Welkin Engineering
8000 SW Pfaffle St.
Portland, OR 97223

Owner:
Michael G. Park
Park Development LLC
P.O. Box 369
Estacada, OR 97023

PROCEDURAL ISSUES

1. Impartiality of the Hearings Officer

- A. No ex parte contacts. I did not have any ex parte contacts prior to the hearing of this matter. I did not make a site visit.
- B. No conflicting personal or financial or family interest. I have no financial interest in the outcome of this proceeding. I have no family or financial relationship with any of the parties.

2. Jurisdictional Issues

At the commencement of the hearing I asked the participants to indicate if they had any objections to jurisdiction. The participants did not allege any jurisdictional or procedural violations regarding the conduct of the hearing.

BURDEN OF PROOF

In this proceeding, the burden of proof is upon the Applicant/Appellant.

SCOPE OF APPEAL

Pursuant to ORS 215.416(11)(a)(D), an appeal from an administrative decision of the Planning Director shall be a *de novo* hearing. At the *de novo* hearing, the presentation of testimony, arguments and evidence shall not be limited to issues raised in the notice of appeal. All relevant testimony, arguments and evidence will be considered in this matter.

FACTS

1. Applicant's Request

The applicant requested a Planning Director's Decision as to whether a single family dwelling located at 29619 SE Stone Road was lawfully established. Two homes are currently located on the 2.6-acre subject property with one located north and one south of Johnson Creek. Originally this application involved a request for a lot of exception land division to divide the subject property into two properties with each new property containing a dwelling. A lot of exception land division is possible when the lot of record to be divided contains two or more permanent habitable dwellings that were lawfully established prior to October 4th, 2000 (MCF 36.2860 (A)(1)&(2)).

Subsequently, the applicant narrowed the scope of the request and asked that the Planning Department evaluate whether the subject dwelling was lawfully established. The staff decision and this decision on appeal does not address the lot of exception land division standards, except as necessary to determine whether the dwelling in question has been lawfully established.

2. Vicinity and Property Description

The subject property is 2.6 acres in size and is located within the rural community of Orient located in the south-central portion of Multnomah County, Oregon (Exhibit A2 to staff report). The subject property is located 0.6 miles to the southeast of the Dodge Park/Orient Drive road intersection and is identified today as Tax Lot 200 of Section 19DC within Township 1 South, Range 4 East of the Willamette Meridian. Two single family dwellings are currently located on the property with the northerly dwelling being the subject of this determination. The northerly dwelling lies on the north side of Johnson Creek. An aerial photo taken in August of 2002 is presented as Exhibit A1 to the staff report and illustrates the locations of the two dwellings on the subject site. The property is roughly rectangular in shape and is bordered by Stone Road to the south and Short Road to the east. Both roads provide site access. Johnson Creek, a tributary of the Willamette River, flows westerly through the southern portion of the gently sloping property. Trees cover the majority of the site with the exception of cleared areas around both dwellings (Exhibit A1 to staff report).

The subject property is zoned Multiple Use Agriculture-20 and is surrounded by gently sloping farmland of the same zoning. Exclusive Farm Use zoned land is located to the northwest and Clackamas County lies just to the south of the property. Large to medium sized farms are located to the northwest of the subject site which is typical of Exclusive Farm Use land. In general, the area surrounding the site is characterized by gently sloping forested land, farm land and sparsely developed residential properties.

Prior to 1977, the zoning for the subject property was zoned Suburban Residential (SR).

3. Testimony and Evidence Presented

A. At the hearing on December 10, 2004, the following exhibits were received by the Hearings Officer:

- H-1 A site map
- H-2 Application for subsurface sewage inspection
- H-3 E-mail correspondence
- H-4 Building permit card

B. Planner, Adam Barber, testified for the County and summarized the history of the decision.

C. Ed Christensen, the applicant and representative of the owner, spoke in support of the application and the appeal.

D. Michael Park, the owner of the subject property, described his purchase of the property and attempts to rehabilitate the property and the houses.

E. Leah Hyman of Welkin Engineering, also spoke in support of the application and contended that the subject house was a valid non-conforming use pursuant to the provisions of MCC 36.7200.

F. After the hearing was closed, but while the record was still open, the Applicant/Appellant submitted two additional exhibits, consisting of a letter from Welkin Engineering dated November 17, 2004 [sic] which as received by the Multnomah County Planning Department on December 17, 2004, and a corrected letter from Smits & Associates.

STANDARDS, CRITERIA, ANALYSIS AND FINDINGS OF FACT

MCC 36.2860

MCC 36.2860 provides in relevant part:

“(A) Lots of Exception

An exception to permit the creation of a parcel of less than 20 acres, out of a Lot of Record, may be authorized when in compliance with the requirements of MCC 36.2855(C) to (E). Any exception shall be based on the following findings:

* * * * *

- (2) The permanent habitable dwellings were lawfully established on the Lot of Record before October 4, 2000;” (emphasis added)

ISSUES ON APPEAL

The Planning Director’s decision found that the building permit issued in 1964 for the northerly dwelling located at 29619 SE Stone Road expired prior to completion of the dwelling. Accordingly, the Planning Director determined that the dwelling cannot be considered lawfully established.

The Appellant contends that the dwelling is habitable, that it was lawfully established, and that the statutory provisions of ORS 215.130 and MCC 36.7200 to 36.7215 related to the verification of a non-conforming use status, should be construed so that the

Applicant/Appellant does not have to verify the existence of the house in question for a period in excess of twenty years.

The issues raised by the Applicant/Appellant will be addressed in order.

1. Is the Dwelling a “Permanent Habitable Dwelling”?

Hearings Officer: MCC 36.0005(H)(1) defines a habitable dwelling as follows:

“(H)(1) Habitable dwelling - An existing dwelling that:

- (a) Has intact exterior walls and roof structure;
- (b) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
- (c) Has interior wiring for interior lights; and
- (d) Has a heating system.”

From the testimony and evidence presented by the Applicant, it appears that the northerly single family dwelling located on the subject property is in fact a habitable building. The Applicant's submittal indicated that in 1964 a building permit was issued for a second house on the property. The address of the new house was 8321 SE Short Road. Staff indicates there is no record as to when the house became an intact structure, or when it was first occupied. Staff further found that no approval appears to ever have been granted for the septic system, as a plan check sheet was never finalized.

Exhibit H-2 indicates that the septic system located at 8321 SE Short Road was inspected in May of 1999. The inspection report indicates “It is the opinion of the local sanitation division this individual sewage disposal system conforms to present requirements.” It appears that the dwelling on Short Road has intact exterior walls and a roof structure, has the appropriate indoor plumbing, and interior wiring and has a heating system. In addition, it appears that sink, toilet and bathing facilities are connected to a sanitary waste disposal system. Accordingly, I find that the dwelling is in fact a “habitable dwelling”.

2. Is the Dwelling a “Lawfully Established Dwelling”?

Hearings Officer: The definition of a lawfully established dwelling is set forth in MCC 36.0005(L)(3):

“(3) Lawfully established dwelling - A dwelling that was constructed in compliance with the laws in effect at the time of establishment. The laws in effect shall include zoning, land division and building code requirements. Compliance with Building Code requirements shall mean that all permits

necessary to qualify the structure as a dwelling unit were obtained and all qualifying permitted work completed.”

Applicant: The Applicant submitted the following information in support of the request for a determination of a lawfully established dwelling:

“The 2.66-acre parcel was created in 1948, according to county records. The exact date of the construction of the original house on the property, 29619 SE Stone Road was not determined, but the house had been constructed prior to 1956 according to previous discoveries and the assessors [sic] office began keeping records for the property in 1949. In 1964, a building permit was issued for a second house on the property, whose address is 8321 SE Short Road. The second house's building permit expired in 1972, and no reissuance or completion certificates were issued for the Short Road residence. No notice of the intent to pull the building permit by Multnomah County Building Department was found in the file. And there is no Notice in the file of any violation for the occupancy of the dwelling without a certificate of occupancy. Nor is there a date certain that the house was occupied. Note: Both houses were owned by the same family members.

The assessor's office indicates, as well as Metro's database, that the effective occupancy of the Short Road house was 1970. In October of 1980, Multnomah County evaluated the houses and appears to have noted that it needed ownership information for the Short Road house. Both houses and the property were foreclosed on in October of 2003.

As noted earlier, the first house was built prior to the requirements for building permit record keeping. The second house was permitted for a building permit in 1964 to Roy Combs. The 1964 building permit appears to have an approval by the Zoning Department, with the plans being forwarded to the Health Department for review. The first building inspection was February 3, 1967. The inspector noted that the first building would 'take years to complete' at the rate it was being built. In October of 1969, the second notation made simply states, '2nd story & roof framed'. Finally, on May 3, 1972, the last notation made indicates 'expired', and is initialed by RLH.

John Smits, RS (Registered Sanitarian) was asked to review the records of these dwellings to ascertain whether-or-not the dwellings were Lawfully Established, given his 33-years of experience in reviewing and reestablishing records for septic systems throughout the state. Mr. Smits notes in the attached letter, that the records form [sic] the era from which these systems were constructed are woefully difficult to obtain. He attempted to obtain copies of the permits and notes the acquisition of the 1999 Septic System modification permit for the Stone Road house for evidence of compliance. He also notes where the building permit issued for the Short Road house in

1964, indicates compliance with the building permits requirements of that day with a sign off from Zoning Department which would indicate, land use approval, and the Heath Department notice, which would indicate, septic system approval.

In Mr. Smits opinion, 'the written record and an investigation of the site support the fact that two (2) separate, apparently legitimate residences have existed on the site for many years. The written record shows a second dwelling was approved by 'Zoning' on October 4, 2004'."

After the hearing was closed, but while the record was still open, Mr. Smits submitted a corrected copy of his letter to indicate that "The written record shows a second dwelling was approved by 'Zoning' on October 14, 1964".

Hearings Officer: The Applicant presented significant evidence establishing that the house had been lived in for a significant period of time, certainly in excess of twenty years. The Applicant was also able to address some of staff's concerns regarding permitting for the septic and sewage systems. On December 17, 2004, Welkin Engineering submitted additional information obtained from Michael Ebeling, currently employed by the City of Portland, as a senior environmental soils inspector. Mr. Ebeling also worked in sanitation for Multnomah County prior to those services being placed in the jurisdiction of the City of Portland. Welkin Engineering indicated that Mr. Ebeling stated there was no certificate of occupancy required for residences prior to 1966 when the building code changed. According to Welkin Engineering, Mr. Ebeling also verified that there was no process in place for permitting septic and sewage systems at the time the initial permitting took place for the subject property, so there most likely be a lack of information regarding septic permitting and the final inspection of septic and sewage systems upon the completion of the home.

Compliance with building code requirements means that all permits necessary to qualify the structure as a dwelling unit were obtained and all qualifying permitted work completed. If the permit expired prior to the completion of the work, then the building code required that a new permit be obtained. Welkin Engineering, in its December 17, 2004 letter [letter was received 12/17, but dated 11/17], indicates that Ms. Hyman asked Mr. Ebeling to verify the definition of "expired" as it was written on the permit certificates for the subject property. According to Welkin Engineering, Ebeling said that "at the time, a permit would have expired had there not been any work done on the property for six months". Welkin Engineering goes on to assert that this "supports the applicants notion that the house was being built slowly out of pocket at the land owners expense, and that although the permit expired, it doesn't verify that the house was not finished in a livable manner".

The problem with the Applicant's analysis is that the question of whether or not the house is habitable is a separate question from the one of whether it is a lawfully established dwelling. I concur with the Applicant that the house was finished in a livable manner. However, that does not mean that the house built was lawfully established.

The Multnomah County Code clearly requires that in order for a dwelling to be lawfully established, it must have been constructed in compliance with the laws in effect at the time of establishment. The building code required a permit. A permit was obtained in 1964. Work on the house progressed extremely slowly. The permit expired in 1972. The permit was not renewed. At the time the permit expired, the building was not completed. In order to complete the work, a new building permit was required. Accordingly, I find that the dwelling located on the northern portion of the subject parcel, at the address 8321 SE Short Road, is not a lawfully established dwelling.

3. Do the Non-Conforming Use Provisions Cited by Applicant Negate the Requirement that the Use be Lawfully Established?

The Applicant in the written materials and verbal presentation referred to non-conforming use provisions and appeared to contend that because the use (a dwelling) had existed in excess of twenty years, it should be deemed lawfully established. In the written materials, the Applicant cited the provisions of MCC 11.15.9050 and 11.15.8810. The Applicant also generally referenced the state statutes dealing with non-conforming uses.

The applicable ORS reference is ORS 215.130 and the Multnomah County Code reference is MCC 36.7200 through 36.7215.

MCC 36.0005(N)(2) defines a non-conforming use as:

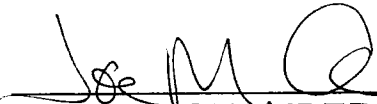
“Non-Conforming Use - A legally established use, structure or physical improvement in existence at the time of enactment or amendment of the zoning code but not presently in compliance with the use regulations of the zoning district in which it is located.”

Again, the non-conforming use definition has a multi-part structure. The use must first be legally established, then it must be in existence at the time of enactment or amendment of the zoning code. ORS 215.130(11) provides in part that the County may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period in excess of twenty years. However, the question of the lawful establishment of a non-conforming use is a separate question from the issue of the continuous existence of that use, and the nature and extent of the use. The zoning of the subject property changed in 1977. Prior to 1977 the zoning for the property was Suburban Residential. Thus, the Applicant must demonstrate that the use in question was lawfully established prior to the zone change in 1977. The evidence clearly indicates that a building permit for the dwelling in question was obtained and did expire prior to completion of the dwelling. A new permit was required and was not obtained. Thus, the requirements of the building code were not met, and the dwelling was not lawfully established.

CONCLUSION

The decision of the County Planning Director in Case File T2-04-058 is affirmed. The appeal is denied.

IT IS SO ORDERED, this 11th day of January, 2005.



JOAN M. CHAMBERS, Hearings Officer