

**MULTNOMAH COUNTY****LAND USE AND TRANSPORTATION PROGRAM**1600 SE 190TH Avenue Portland, OR 97233

PH: 503-988-3043 FAX: 503-988-3389

http://www.co.multnomah.or.us/dbcs/LUT/land_use

NOTICE OF DECISION

This notice concerns a Planning Director Decision on the land use case(s) cited and described below.

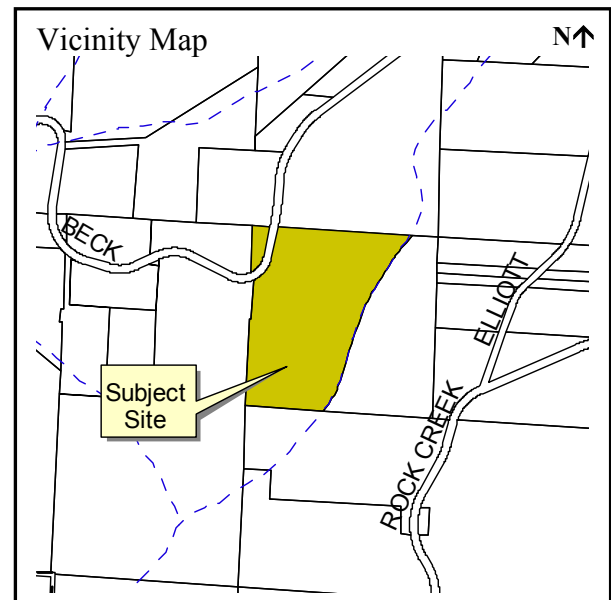
Case File: T2-05-097

Permit: Verification & Alteration Of
Nonconforming Use

Location: 21948 NW Beck Road
TL 200, Sec 23C, T 2N, R 2W, W.M.
Tax Account #R97223-0450

Applicant: Dana Krawczuk
Ball Janik LLP

Owner: Marybelle A. Allen Trust



Summary: Applicant is requesting the following approvals:

1. Verification that the existing single family dwelling and various outbuildings are Nonconforming Uses in relation to the existing setbacks; and
2. Alteration of Nonconforming Use to allow the adjustment of the existing setback on the western property line for the existing single family dwelling and various outbuildings to a distance short of the current forest practice setback of 130 ft.

Decision: Approved.

Unless appealed, this decision is effective Thursday, December 29, 2005, at 4:30 PM.

Issued by:

By: _____
Lisa Estrin, Planner

For: Karen Schilling- Planning Director

Date: Thursday, December 15, 2005

Opportunity to Review the Record: A copy of the Planning Director Decision, and all evidence submitted associated with this application, is available for inspection, at no cost, at the Land Use Planning office during normal business hours. Copies of all documents may be purchased at the rate of 30-cents per page. The Planning Director's Decision contains the findings and conclusions upon which the decision is based, along with any conditions of approval. For further information on this case, contact Lisa Estrin, Staff Planner at 503-988-3043.

Opportunity to Appeal: This decision may be appealed within 14 days of the date it was rendered, pursuant to the provisions of MCC 37.0640. An appeal requires a \$250.00 fee and must state the specific legal grounds on which it is based. To obtain appeal forms or information on the procedure, contact the Land Use Planning offices at 1600 SE 190th Avenue (Phone: 503-988-3043). This decision cannot be appealed to the Land Use Board of Appeals until all local appeals are exhausted.

This decision is final at the close of the appeal period, unless appealed. The deadline for filing an appeal is Thursday, December 29, 2005 at 4:30 pm.

Applicable Approval Criteria: Multnomah County Code (MCC):

General Provisions

MCC 33.0005 Definitions - (H)(1) Habitable dwelling, (L)(3) Lawfully established dwelling, (L)(13) Lot of Record, (N)(2) Non-Conforming Use; and

Nonconforming Use Criteria

MCC 33.7215 Verification of Nonconforming Use Status; and

MCC 33.7210 Alteration, Expansion or Replacement of Nonconforming Uses

Administration and Procedures

Chapter 37 specifically MCC 37.0530(B) - Type II Decisions, MCC 37.0550 - Initiation of Action and MCC 37.0560 - Code Compliance and Applications.

Copies of the referenced Multnomah County Code sections can be obtained by contacting our office at 503-988-3043 or by visiting our website at http://www.co.multnomah.or.us/dbcs/LUT/land_use.

Scope of Approval

1. Approval of this land use permit is based on the submitted written narrative(s) and plan(s). No work shall occur under this permit other than that which is specified within these documents. It shall be the responsibility of the property owner(s) to comply with these documents and the limitations of approval described herein.
2. **This land use permit expires two years from the date the decision is final if; (a) development action has not been initiated; (b) building permits have not been issued; or (c) final survey, plat, or other documents have not been recorded, as required. The property owner may request to extend the timeframe within which this permit is valid, as provided under MCC 37.0690 or 37.0700, as applicable. A request for permit extension may be required to be granted prior to the expiration date of the permit.**

Notice to Mortgagee, Lien Holder, Vendor, or Seller:

ORS Chapter 215 requires that if you receive this notice it must be promptly forwarded to the purchaser.

Findings of Fact

FINDINGS: Written findings are contained herein. The Multnomah County Code criteria and Comprehensive Plan Policies are in **bold font**. The applicants statements are identified below as ‘**Applicant:**’. Staff comments and analysis are identified as ‘**Staff:**’ and address the applicable criteria. Staff comments may include a conclusionary statement in *italic*.

Project Description:

Applicant: Introduction

County Case #T2-05-070 is a property line adjustment application that will resolve the encroachment of structures owned by the Allen family onto Ted Nelson’s property. The proposal is to move the Allen’s western property line west so it aligns with an old fence that runs along the western side of the existing driveway. The requested verification of nonconforming use status of the Allen’s encroaching structures is required in order to facilitate the proposed property line that will allow structures to remain in the CFU-2 zone to be setback less than 130 feet from the property line.

Background

Multnomah County Assessor’s Map No. 2N2W23C is attached as Exhibit A1. The property owned by Ted Nelson (Tax Lot 800) is identified as the Nelson Property. The Nelson Property consists of Parcel I and Parcel II.¹ Parcel I is approximately five acres zoned RR-5 and Parcel II is approximately fifty acres zoned CFU-2. Parcel II includes a twenty foot “flag pole” connecting the lower portion of Parcel II to NW Beck Road. Adjacent to the Nelson Property is property owned by the Marybelle E. Allen Trust (Tax Lot 200) and identified on the exhibit as the Allen Property. A detail of the Nelson Property and Allen Property is a Exhibit A2. The Allen’s own a house, barn and seven sheds (labeled as sheds A, B, C, D, E, F and G on Exhibit A2) that are clustered around the property line between the Nelson Property and Allen Property. These structures are referred to collectively in this application as the “Allen Structures.”

The Allen family has owned the Allen Property since 1942.² Claude C. and Marybelle E. Allen acquired the lower “flag” portion of Parcel II in 1938. Sheds A, B, C, D, F and G and the house are owned by Marybelle Allen and encroach onto Parcel II of the Nelson Property. The barn and Shed E are located approximately 30 feet east of the property line between the Allen Property and Nelson’s Parcel II. Nelson and Allen have filed a property line adjustment application with the County to resolve the encroachments. County Case # T2-05-070. If constructed today, the Allen Structures would violate Multnomah County’s setback regulations. However, the Allen Structures were all constructed prior to 1969, so the encroachments are the result of the Allen’s 1969 conveyance of Parcel II. As detailed below, when constructed the Allen Structures are all valid nonconforming uses. The applicant requests that the County verify that the Allen Structures are valid nonconforming uses that are in full compliance with all applicable provisions of the Multnomah County Land Use Code (as required by MCC 37.0560³) so that the County may approve the property line adjustment application (County Case #T2-05-070) that will move the property line between the Allen Property and Nelson Property west of all of the Allen Structures.⁴ As depicted on Exhibit A2, after the property line adjustment in County Case #T2-05-070 is approved, the setbacks of the Allen Structures from the new property line will be approximately: Shed A – 49 feet; Shed B – 51 feet; Shed C – 57 feet; Shed D – 40 feet; Shed E – 110 feet; Shed F – 74 feet; Shed G – 34 feet; House – 69 feet; and Barn – 63 feet.

Approval Criteria

Pursuant to ORS 215.130(10)(a) and MCC 33.7215(F), if an applicant demonstrates the existence, continuity, nature and extent of the use for the 10-year period immediately preceding the date of the verification of a nonconforming use application, a rebuttable presumption that the use, as proven,

lawfully existed at the time the applicable zoning ordinance was adopted and has continued uninterrupted until the date of the application. If that presumption is rebutted, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of the application. ORS 215.130(11) and MCC 33.7215(G). As detailed below, the applicant has provided evidence that the structures and conveyance of Parcel II was lawful when created, and the Allen Structures have been occupied continuously since constructed, so the application exceeds the burden of proof required by state law and the county code.

Creation of Lots and Encroachment

Claude C. and Marybelle E. Allen acquired the lower “flag” portion of what is now referred to as Parcel II of the Nelson Parcel in 1938. The deed for this portion of Parcel II is attached as Exhibit B. In 1942, the Allens acquired what is now referred to as the Allen Property. When purchased by deed in 1942 (deed attached as Exhibit C), the Allen Property was occupied by a house that was constructed in 1939. The barn was constructed in approximately 1939. The other outbuildings were built between 1939 and 1969. The Allen Structures were located entirely within the boundaries of the Allen Property, as it was configured until 1969.

The configuration of the Allen’s real estate holdings was altered in 1969. On December 5, 1969 the Allen’s conveyed the lower “flag” portion of Parcel II *and* the newly-created flagpole to Nina Chastain dba Chastain Realty by the deed which is attached as Exhibit D.⁵ The 20-foot flagpole was carved out of the Allen Property. This deed established Parcel II as it is currently configured. Parcel II has remained in this configuration since 1969. Sheds A, B, C, D, F and G and the house encroached in to the flagpole portion of Parcel II (that was created in 1969). The barn and Shed E were approximately 30 feet east of the new property line between the Nelson Property and the flag pole portion of Parcel II.

In 1969, both Parcel II and the Allen Property were zoned F2 (1962 ordinance). The 1962 Multnomah County Zoning Code had no dimensional standards or development standards for property in the F2 zone.⁶ Therefore, at the time that Parcel II and the portions of the Allen Structures were conveyed, there were no setback requirements. The relevant portion of the code is attached as Exhibit E. In the absence of regulations prohibiting a structure from abutting or crossing a property line, Sheds A, B, C, D, F and G and the house are considered lawful when Parcel II was conveyed in 1969. The barn and Shed E were also lawful because they were entirely on the Allen Property and there was no setback requirement.

As detailed in the attached affidavit by Marybelle Allen, since constructed, the Allens have used the Allen Structures continuously, without interruption. Exhibit F. The residence credit certificated from Qwest (Exhibit G) demonstrates that the home established phone service on May 1, 1958, which provides additional evidence of continued occupation. Photographs demonstrating that the house has intact exterior walls and roof, indoor plumbing (i.e., kitchen sink and toilet facilities), interior lights and a heating system are attached as Exhibit H.

Mrs. Allen’s affidavit also confirms the timing of the construction of the Allen Structures. The August 30, 1969 aerial photograph attached as Exhibits I1 and I2 corroborate Mrs. Allen’s recollection. The photograph was taken approximately 3 months before the encroachments arose by the transfer of a portion of the Allen’s Property to Nina Chastain dba Chastain Realty. The photograph clearly depicts all of the Allen Structures,⁷ and proves that the Allen Structures were legal when created because when constructed the Allen Structures were located entirely upon the Allen property and the existing F2 zoning did not impose any dimensional requirements such as setbacks. Although not as clear as the 1969 photograph (Exhibits I1 and I2), additional evidence of the timing of the construction of the Allen’s Structures is found in the attached US Army Corps of Engineers aerial photographs from 1963 (Exhibit J) and 1983 (Exhibit K).

Relevance of Nonconforming Use Status Determination to Property Line Adjustment

The Allen Structures are located exclusively in the CFU-2 zone, which requires structures to be setback from the property line by 130 feet. MCC 33.2260(C). The side yard setback requirement in the RR-5 zoned Parcel I is 10 feet. MCC 33.3155(C). Based upon the unique facts of this situation, it is reasonable for the County to interpret its code so that the CFU-2 zone setback requirement does not extend into the RR-5 zoned Parcel I. In other words, if the property line between Parcel I and the Allen Property was required to be moved west so that it was 130 feet from the Allen Structures, the CFU-2 setback requirement would extend into the RR-5 zone. As a result, it is appropriate to interpret the competing CFU-2 and RR-5 setback standards so that the Allen Structures must be setback 130 feet from the property line, unless a differently zoned parcel intervenes. More importantly, because all of the Allen Structures are valid nonconforming uses, their status as being permitted, despite a subsequent change in the setback requirement, should not be altered by a property line adjustment that will resolve encroachments and bring the Allen Property and Structures closer into conformance with current CFU-2 requirements. In other words, the Allen Structures do not currently violate the CFU-2 setback standards, so a property line adjustment to create a greater setback does not bring the Allen Structures out of conformance with the county code.

Conclusion

Parcels I and II of the Nelson Property and the Allen Property were legal when created because the lots complied with all dimensional requirements. The Allen Structures are also all legal nonconforming uses because when the encroachments arose in 1969, there were no applicable dimensional requirements or related regulations addressing the placement of structures. In the absence of regulations prohibiting a structure from abutting or crossing a property line, Sheds A, B, C, D, F and G and the house are considered lawful when Parcel II was conveyed in 1969. The barn and Shed E were also lawful because they were entirely on the Allen Property and there was no setback requirement. Therefore, although the Allen Structures would violate current setback standards, the Allen and Nelson Properties and the Allen Structures were all legally established. Since establishment, use of the Allen Structures has not been abandoned or interrupted. Accordingly, we respectfully request that the County verify the existing property lines between the Nelson Property and Allen Property, and the Allen Structures are valid nonconforming uses and the properties comply with MCC 37.0560. Further, we request that the County approve the property line adjustment (Case #T2-05-070) that will resolve the encroachment of Sheds A, B, C, D, F and G and the house, and will allow Shed E and the barn to remain in their current location.

¹ Multnomah County is currently reviewing an application filed by Mr. Nelson to consolidate Parcels I and II into a single 55 acre Parcel. Multnomah County Case #T2-05-069.

² As detailed below, the current configuration of the Allen Property is slightly different than the Property's configuration in 1942. In 1969 the Allens carved a 20-foot wide strip of land out of the western-most portion of the Allen Property to create the "flagpole" of Parcel II. Therefore, when acquired in 1942, the Allen Property had an additional 20 foot wide strip along the western side of the property

³ MCC 37.0560 requires, "[t]he County shall not approve any application for a permit or other approval, including building permit applications, 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 permit or other approval, including building permit applications, may be authorized if it results in the parcel coming into full compliance with all applicable provisions of the Multnomah County Code"

⁴ The nonconforming use verification application is responsive to the County's August 5, 2005 letter of incompleteness for property line adjustment case #T2-05-070.

⁵ The County's August 5, 2005 letter of incompleteness for the property line adjustment (Case #T2-05-070) requests a copy of the deed of creation for the property known as 2N2W23C – 00200, the Allen Property. The deeds attached to the nonconforming use verification application are responsive to the County's request. The letter of incompleteness also requests a copy of Warranty Deed 2004024617, which attached as Exhibit D2.

⁶ The F2 zone did not include setback standards until 1975.

⁷ Outbuildings other than the house, barn and Sheds A-G are depicted in the submitted aerial photographs, but are not part of this application because these other outbuildings no longer exist.

Staff: The applicant has submitted an application for a Verification & Alteration of a Nonconforming Use at the staff's direction to facilitate a Property Line Adjustment between the Nelson and Allen Properties to correct encroachment problems. MCC 33.2270(A)(3) requires the new lot line in a property line adjustment to be in compliance with the CFU-2 dimensional requirements of MCC 33.2260 (C) through (E). The Forest Practice Setback requirements are as follows:

Road Frontage	Other Front	Side	Rear
60 from centerline of road from which access is gained	130	130	130

Provided the buildings are determined to be nonconforming uses, the Alteration to a Nonconforming Use criterion (MCC 33.7210) may allow for the shared lot line to be moved allowing the buildings to be brought closer into conformance with present day setback requirements without having to apply for an Exception to the Forest Practice Setbacks and all the physical improvement that would entail to meet a Class I or Class II Fire rating. Should this application be approved, the next step in the correction process would be for the review and approval of a Property Line Adjustment. Mr. Nelson has submitted that application to the County and it is known as T2-05-070.

1.00 *Administration and Procedures*

1.01 **Type II Case Procedures**

MCC 37.0530(B): ...Upon receipt of a complete application, notice of application and an invitation to comment is mailed to the applicant, recognized neighborhood associations and property owners within 750 feet of the subject tract. The Planning Director accepts comments for 14 days after the notice of application is mailed and renders a decision...

Staff: The application was submitted September 14, 2005 and became complete on the same day. An "Opportunity to Comment" notice was mailed on November 16, 2005 to all properties within 750 feet of the subject properties in compliance with MCC 37.0530. No written comments were received.

1.02 **Proof of Ownership**

MCC 37.0550 Initiation of Action

Except as provided in MCC 37.0760, Type I – IV applications may only be initiated by written consent of the owner of record or contract purchaser. PC (legislative) actions may only be initiated by the Board of Commissioners, Planning Commission, or Planning Director.

Staff: The proposed project is located on Tax Lot 200, Section 23C, Township: 2 North, Range: 2 West. Assessment & Taxation records show that the land is owned by Marybelle A. Allen Trust. The property owners have granted approval for Dana Krawczuk of Ball Janik,

LLP to make application for a verification of nonconforming uses on the subject property located at 21948 NW Beck Road (Exhibit A.1). *This criterion has been met.*

1.03 **MCC 37.0560 Code Compliance And Applications.**

Except as provided in subsection (A), the County shall not make a land use decision, or issue a building permit approving development, including land divisions and property line adjustments, 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: The applicant is requesting a Verification and Alteration of Nonconforming Use on the Allen Property (TL 200) in order to facilitate a property line adjustment between Tax Lot 200 and the property to the west (Tax Lot 800). Due to a surveying issue, the location of the shared property line between Tax Lot 800 and 200, a number of structures and the existing dwelling are split by the interior property line between these two tax lots. The two property owners have applied for the necessary applications to correct the situation (T2-05-069, T2-05-070 and T2-05-097). Upon completion of the property line adjustment process, all structures will be in compliance with applicable zoning regulations.

2.00 **General Provisions**

2.01 **MCC 33.0005 Definitions.**

As used in this Chapter, unless the context requires otherwise, the following words and their derivations shall have the meanings provided below.

(A)(1) Accessory Building – A subordinate building, the use of which is clearly incidental to that of the main building on the same lot.

(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.

(L)(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.

(L)(13) Lot of Record – Subject to additional provisions within each Zoning District, a Lot of Record is a parcel, lot, or a group thereof which when created and when reconfigured (a) satisfied all applicable zoning laws and (b) satisfied all applicable land division laws. Those laws shall include all required zoning and land division review procedures, decisions, and conditions of approval.

(a) “Satisfied all applicable zoning laws” shall mean: the parcel, lot, or group thereof was created and, if applicable, reconfigured in full compliance with all zoning minimum lot size, dimensional standards, and access requirements.

(b) “Satisfied all applicable land division laws” shall mean the parcel or lot was created:

- 1. By a subdivision plat under the applicable subdivision requirements in effect at the time; or**
- 2. By a deed, or a sales contract dated and signed by the parties to the transaction, that was recorded with the Recording Section of the public office responsible for public records prior to October 19, 1978; or**
- 3. By a deed, or a sales contract dated and signed by the parties to the transaction, that was in recordable form prior to October 19, 1978; or**
- 4. By partitioning land under the applicable land partitioning requirements in effect on or after October 19, 1978; and**
- 5. “Satisfied all applicable land division laws” shall also mean that any subsequent boundary reconfiguration completed on or after December 28, 1993 was approved under the property line adjustment provisions of the land division code. (See Date of Creation and Existence for the effect of property line adjustments on qualifying a Lot of Record for the siting of a dwelling in the EFU and CFU districts.)**

(c) Separate Lots of Record shall be recognized and may be partitioned congruent with an “acknowledged unincorporated community” boundary which intersects a Lot of Record.

- 1. Partitioning of the Lot of Record along the boundary shall require review and approval under the provisions of the land division part of this Chapter, but not be subject to the minimum area and access requirements of this district.**
- 2. An “acknowledged unincorporated community boundary” is one that has been established pursuant to OAR Chapter 660, Division 22.**

(N)(2) 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.

Staff: The above are the applicable definitions for this application.

3.00 ***Nonconforming Use Criteria***

3.01 **MCC 33.7215 Verification of Nonconforming Use Status**

(A) The Planning Director shall verify the status of a nonconforming use upon application for a determination by an owner on application for any land use or other permit for the site, or on finding there is a need for a determination (e.g., on learning of a possible Code violation). The determination shall be based on findings that the use:

(1) Was legally established and operating at the time of enactment or amendment of this Zoning Code, and

(2) Has not been abandoned or interrupted for a continuous two year period.

Staff: MCC 33.0005(N)(2) defines a *Nonconforming Use* as “*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.*” The County began regulating land uses in all areas of unincorporated Multnomah County in 1953 with an interim zoning ordinance. Permanent zoning was applied to the northwestern region of the County known as the West Hills in July 1958. The subject property has had a series of zoning designation from that time forward to present. The following table specifies the zoning and time period:

Zoning	Dates
F-2	7/10/1958 to 10/5/1977
MUF-20	10/6/1977 to 8/13/1980
MUF-19	8/14/1980 to 1/6/1993
CFU	1/7/1993 to 10/6/1995
CFU/SEC – h & s	10/7/1995 to 8/7/1998
CFU-2/SEC – h & s	8/8/1998 to present

When the County adopted zoning, the subject property did not immediately become nonconforming. The F-2 zoning district allowed the single family dwellings and accessory buildings. It was not until setbacks were added to the F-2 district in December 1975 that certain buildings became nonconforming. At that time the F-2 zoning district was amended to require the following setbacks:

Minimum Yard Dimensions - Feet			
Front	Side	Street Side	Rear
30	10	30	30

Since 1969, the following structures have been located on the subject property:

Applicant's Designation	Sq. Ft	Existing Setback (ft)*
House	1,419	0+/-
Barn	864	24+/- &

		37.5+/-
Shed A	672	0+/-
Shed B	263	On TL 800
Shed C	255	16+/- & 12.5 +/-
Shed D	412	0+/- & 27 +/-
Shed E	408	38+/-
Shed F	40	On TL 800
Shed G	56	On TL 800

*Between TL 200 & 800, 2N2W23C

The House, shed A, B, and shed D became nonconforming structures in 1975 as they did not meet the minimum side yard requirement of 10 ft from the property line. In 1993, the property was rezoned from MUF-19 to CFU. In August 1995, the CFU zoning district had its Minimum Yard Dimensions increased from the County standard of 30 ft - front, 30 ft – street side, 10 – side, 30 ft – rear (and became known as Forest Practice Setbacks) to the following:

Forest Practice Setbacks – Ft			
Frontage on County Maintained Road	Other Front	Side	Rear
60 ft from centerline	200	200	200

All structures on the site became nonconforming to the 200 ft side yard requirement from the western side property line at that time. Current County records and aerial photos show the buildings continue to exist on the subject site. No evidence has been found of abandonment or discontinuance of the accessory structures or the use of the house as a dwelling (Exhibit A.11 through A.17). The applicant has submitted into the record (Exhibit A.13) evidence that the existing house has the components to qualify has a *Habitable Dwelling* as listed under MCC 33.0005(H)(1). Based on the evidence in the record, the dwelling and accessory structures are lawfully established uses that are nonconforming to present day Yard requirements as listed above. *These criteria have been satisfied.*

3.02

(B) The Planning Director shall verify the status of a nonconforming use as being the nature and extent of the use at the time of adoption or amendment of the Zoning Code provision disallowing the use. When determining the nature and extent of a nonconforming use, the Planning Director shall consider:

- (1) Description of the use;**
- (2) The types and quantities of goods or services provided and activities conducted;**
- (3) The scope of the use (volume, intensity, frequency, etc.), including fluctuations in the level of activity;**
- (4) The number, location and size of physical improvements associated with the use;**
- (5) The amount of land devoted to the use; and**

(6) Other factors the Planning Director may determine appropriate to identify the nature and extent of the particular use.

(7) A reduction of scope or intensity of any part of the use as determined under MCC 33.7215 (B) for a period of two years or more creates a presumption that there is no right to resume the use above the reduced level. Nonconforming use status is limited to the greatest level of use that has been consistently maintained since the use became nonconforming. The presumption may be rebutted by substantial evidentiary proof that the long-term fluctuations are inherent in the type of use being considered.

Staff: The applicant has clarified the various uses occurring in the accessory structures (Exhibit A.19) and the information is shown below:

Applicant's Designation	Sq. Ft	Actual Use in Structure
House	1,419	S.F. Dwelling
Barn	864	Barn
Shed A	672	Equipment Maintenance
Shed B	263	Building Maintenance & Material Storage
Shed C	255	Livestock Shelter
Shed D	412	Seedling & Plant Shed
Shed E	408	Wood Shed
Shed F	40	Hand Tool Storage
Shed G	56	Storage

Setting aside the single family dwelling, the eight accessory structures are being utilized for typical accessory uses found in a rural landscape. The nature and extent of the nonconforming structures are established by their square footage and listed uses. No additional activity levels or scope are required to be determined for a residential use and accessory structure. *This criterion has been satisfied.*

- 3.03 **(C) In determining the status of a nonconforming use, the Planning Director shall determine that, at the time of enactment or amendment of the Zoning Code provision disallowing the use, the nature, scope and intensity of the use, as determined above, was established in compliance with all land use procedures, standards and criteria applicable at that time. A final and effective County decision allowing the use shall be accepted as a rebuttable presumption of such compliance.**

Staff: The structures became nonconforming to the County's Yard Dimensions in 1975 and 1995. Current CFU-2 Forest Practice Setbacks are as follows:

Forest Practice Setbacks			
Road Frontage	Other Front	Side	Rear
60 from centerline of road	130	130	130

These new Forest Practice Setbacks have reduced the nonconformity for the side yard from the 1995 level of intensity. *The level of nonconformity has been established.*

- 3.04 **(D) Except for nonconforming uses considered under MCC 33.7210 (B), the Planning Director may impose conditions to any verification of nonconforming use status to insure compliance with said verification.**

(E) Any decision on verification of nonconforming use status shall be processed as a Type II permit as described in MCC Chapter 37.

Staff: No conditions have been included with this verification. This nonconforming application has been processed as a Type II permit as discussed above under section 1.01. *These criteria have been satisfied.*

- 3.05 **(F) An applicant may prove the existence, continuity, nature and extent of the nonconforming use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application.**

(G) For purposes of verifying a nonconforming use, the Planning Director shall not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application.

Staff: The applicant in her narrative under *Project Description* indicated that demonstrating the existence, continuity, nature and extent of the use for the 10-year period immediately preceding the date of the verification, creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance was adopted. The County does not concur with the applicant's understanding of *lawfully existed*. The County's code requires the use to be, as demonstrated, to have been *lawfully established* in conformance with the zoning regulations at that time. This understanding of ORS 215.130 is consistent with the Appeals Court decision *Aguilar v. Washington County*. The County has demonstrated that the single family dwelling, barn and various accessory structures were lawfully established in compliance with the zoning regulations at the time. In addition, the applicant has proven existence of the various buildings from 1969 to present. *These criteria have been satisfied.*

4.00 **MCC 33.7210 Alteration, Expansion or Replacement of Nonconforming Uses**

(C) After verification of the status of a nonconforming use pursuant to the applicable provisions of MCC 33.7215, the Planning Director may authorize alteration, expansion or replacement of any nonconforming use when it is found that such alteration, expansion or replacement will not result in a greater adverse impact on the neighborhood. In making this finding, the Planning Director shall consider all of the criteria listed below. Adverse impacts to one of the criterion may, but shall not

automatically, constitute greater adverse impact on the neighborhood.

- (1) The character and history of the use and of development in the surrounding area;**
- (2) The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable within the neighborhood;**
- (3) The comparative numbers and kinds of vehicular trips to the site;**
- (4) The comparative amount and nature of outside storage, loading and parking;**
- (5) The comparative visual appearance;**
- (6) The comparative hours of operation;**
- (7) The comparative effect on existing flora;**
- (8) The comparative effect on water drain-age or quality; and**
- (9) Other factors which impact the character or needs of the neighborhood.**

Staff: The single family dwelling and barn were constructed around 1939 per the Affidavit of Marybelle Allen (Exhibit A.11) and Assessment & Taxation records (Exhibit B.1). The remaining accessory buildings were constructed by 1969 (Exhibit A.14). The use of the buildings has continued through the present with the Allen family living on the property throughout the years (Exhibits A.11, A.12 & A.13). The nonconforming setbacks and building encroachments have existed since at least 1965 when the 20 ft strip of land along the west property line was transferred for access to an adjacent property (Exhibit B.5).

The proposed property line adjustment (T2-05-070) will move the western side property line various distances ranging from 30 ft to 70 ft. This will alter the existing setbacks to the buildings as follows:

Applicant's Designation	Existing Setback (ft)*	Proposed Setbacks
House	0+/-	69 ft
Barn	24+/- & 37.5+/-	63 ft
Shed A	0+/-	49 ft
Shed B	On TL 800	51 ft
Shed C	16+/- & 12.5 +/-	57 ft
Shed D	0+/- & 27 +/-	40 ft
Shed E	38+/-	110 ft
Shed F	On TL 800	74 ft
Shed G	On TL 800	34 ft

*Between TL 200 & 800, 2N2W23C

While the existing buildings will not be brought into conformance with the current Forest Practice setbacks of MCC 33.2260(C), it will correct the encroachment issues and allow the property owner to install a 30 ft Primary Fire Safety zone around each building if they desire.

The movement of the western property line will not effect or alter the use of the single family dwelling and accessory structures on the site. The same number of vehicle trips and usage will continue, but the buildings will no longer impact the adjacent property owned by Mr. Nelson. The proposed alteration of nonconforming setbacks will create less impacts to adjacent property owners and allow for the continued use of the single family dwelling and accessory buildings on the site. *These criteria have been met.*

- 4.01 **(D) Any decision on alteration, expansion or replacement of a nonconforming use shall be processed as a Type II permit as described in MCC Chapter 37.**

Staff: This application for an Alteration of a Nonconforming Use has been processed as a Type II permit as described above under section 1.01. *This criterion has been met.*

5.00 **Lot of Record Criteria**

5.01 **MCC 33.2275 Lot of Record**

(A) In addition to the Lot of Record definition standards in MCC 33.0005, for the purposes of this district a Lot of Record is either:

- (1) A parcel or lot which was not contiguous to any other parcel or lot under the same ownership on February 20, 1990, or**
- (2) A group of contiguous parcels or lots:**
 - (a) Which were held under the same ownership on February 20, 1990; and**
 - (b) Which, individually or when considered in combination, shall be aggregated to comply with a minimum lot size of 19 acres, without creating any new lot line.**

Staff: In November 1965, the subject 25.95 acre property was divided out of its parent parcel. At the time, the zoning was F-2 with a minimum lot size of 2 acres. The property met the zoning requirements at the time of creation. The Allen Trust did not own any adjacent property in February 1990. Based upon the evidence in the record, the subject property is a Lot of Record. *This criterion has been met.*

6.00 **Conclusion**

Based on the findings and other information provided above, the applicant has carried the burden necessary to allow the Alteration of a Nonconforming Use in the CFU-2 zoning district.

7.00 **Exhibits**

‘A’ Applicant’s Exhibits

‘B’ Staff Exhibits

‘C’ Procedural Exhibits

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
A.1	1	General Application Form	9/14/05
A.2	5	Narrative Statements	9/14/05
A.3	1	Map Showing Nelson Properties & Allen Property – Applicant’s Exhibit A1	9/14/05
A.4	1	Map Showing Nelson Properties Combined into Tax Lot 800 – Applicant’s Exhibit A.2	9/14/05

A.5	2	Letter from Dana Krawczuk Regarding Letter of Incompleteness for Property Line Adjustment Application (Case No. T2-05-070)	9/14/05
A.6	2	Corporation Warranty Deed Recorded 3/29/1938 (Book 442, Page 232 & 233) – Applicant’s Exhibit B	9/14/05
A.7	2	Corporation Warranty Deed Recorded 10/9/1942 (Book 712, Page 71 & 72) – Applicant’s Exhibit C	9/14/05
A.8	1	Warranty Deed Recorded 12/5/1949 (Book 710, Page 465) – Applicant’s Exhibit D1	9/14/05
A.9	2	Warranty Deed Recorded 2/18/04 (2004-024617) – Applicant’s Exhibit D2	9/14/05
A.10	5	1962 Zoning Ordinance (Replaced 7/1973) – Applicant’s Exhibit E	9/14/05
A.11	3	Affidavit of Marybelle A. Allen – Applicant’s Exhibit F	9/14/05
A.12	2	Qwest Residence Credit Certificate indicating telephone service since 05/01/1958 at the subject site – Applicant’s Exhibit G	9/14/05
A.13	4	Photos of Exterior & Interior of Dwelling – Applicant’s Exhibit H	9/14/05
A.14	1	1969 Aerial Photo of Subject Site – Applicant’s Exhibit I1	9/14/05
A.15	1	1969 Aerial Photo of Subject Site with Structures Labeled – Applicant’s Exhibit I2	9/14/05
A.16	1	1963 Army Corps Photo – Applicant’s Exhibit J	9/14/05
A.17	1	1983 Army Corps Photo – Applicant’s Exhibit K	9/14/05
A.18	1	Site Map Showing Existing Buildings in Relation to Existing and Proposed Property Line	9/14/05
A.19	1	Email Clarifying Size and Use of Structures	12/8/05
‘B’		Staff Exhibits	Date of Document
B.1	3	A&T Property Record for TL 200, 2N2W23C	11/28/05
B.2	1	A& T Improvement Information for TL 200 2N2W23C	11/28/05
B.3	1	Property Survey for Fred Sanchez Located in Sec. 23, T.2N., R.2N W.M.	11/28/05
B.4	9	Zoning Maps for 2N2W23	various
B.5	1	A&T Parcel Record Card describing TL 200, 2N2W23C	9/15/04

B.6	8	Aguilar v. Washington County	12/12/05
'C'		Administration & Procedures	Date
C.1	1	Complete Letter – Day 1	9/14/05
C.2	8	Opportunity to Comment	11/16/05