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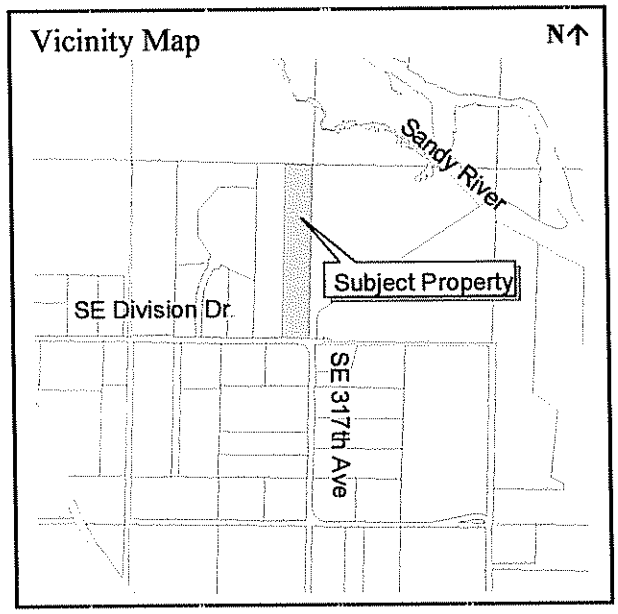
# MULTNOMAH COUNTY HEARINGS OFFICER FINAL ORDER

This Decision consists of Conditions, Findings of Fact and Conclusions

## DECEMBER 29, 2006




**Case File:** T2-06-064, T2-06-003 **APPEALS**

Appeals of two planning director decisions which each determined that the applicant failed to demonstrate that the proposed structure is customarily accessory or incidental to the primary use, a residence, on the property. In addition, T2-06-003 also denied an application for a Significant Environmental Concern Permit (although all criteria were met) because the decision found that the use is not allowed.

**Permit:** Accessory Use Determination
Significant Environmental Concern Permit

**Location:** 31631 SE Division Drive
TL 100, Sec 8, T1S, R4E, W.M.
Tax Account #R99408-0220

**Applicant:** Lee Sitton

**Owner:** Lee and Nancy Sitton

# 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 anyone had any objections to jurisdiction. The participants did not allege any jurisdictional or procedural violations regarding the conduct of the hearing.

# APPLICATION TIMELINE

The hearing in this matter was held on November 17, 2006, the 108th day of the 150-day timeline. The applicant's attorney requested that she be given until November 27, 2006 to submit a final written argument and stipulated that the timeline would be tolled during this period. Accordingly, the timeline started again on November 28, 2006. Accordingly, this is the 140th day on the 150 day timeline.

**FINDINGS:** Written findings are contained herein. The Multnomah County Code criteria are in **bold** font. Staff comments and analysis are identified as **Staff:** and follow Applicant comments identified as **Applicant:** to the applicable criteria.

3. **Project Description**

The applicant is requesting approval for a 576-square foot RV garage addition with a deck on the roof. The RV garage was added onto the accessory building on the western portion of the property approved in 2000. The applicant is also requesting approval for a 1456 square foot, two-story garage/storage building (each floor is 26x28 feet). The structure is an addition to a 384 square foot farm building and is to be used to store vehicles, family items such as holiday decorations, landscaping supplies and other assorted materials. In addition, the applicant has applied for a Significant Environmental Concern Permit. Although the decision of the Planning Director found that all of the criteria for the SEC Permit were met, the permit was denied because the decision found that the use (the 1456 square foot garage/storage building) was not allowed.

4. **Site Characteristics**

**Staff:** The subject site is located in the West of the Sandy River Rural Area planning area. The property is within a small patch of Rural Residential zone properties at the end of Division Drive and near the Sandy River. The dwelling located in the middle of the property and at the toe of a steep slope facing north that dips down to the Sandy River. Thick forested areas are to the east and north of the subject property while the area of development on the subject site is completely cleared. A dwelling and large accessory building approved in 2000 are located on the north and west portion of the property respectively while a building originally permitted as an exempt agricultural structure sits on the east. The RV addition is located on the north side of the western most accessory structure.

5. **Full Compliance**

**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:** In January of 2004, a complaint was filed with the County regarding the construction of a building without permits on the subject property. On January 30,

2004, the County sent the property owner a letter to the most current address from County Assessor indicating a complaint had been received for the property and attempted to set up a meeting to discuss resolution of the compliance issues. Additional correspondence was sent February 12, February 19, and posted at the property on March 18. The property owner contacted the County following the posting and correspondence between the County and owner continued through the balance of 2004 and 2005. Several iterations of a Voluntary Compliance Agreement (VCA) were drafted identifying compliance issues and how the owner could address them. A signed VCA was received on April 11, 2006.

The VCA identifies three compliance issues that need to be addressed. They are as follows:

- Issue #1 involves the accessory building on the west side of the property that the County approved in 2000. Subsequent to the approval, the owner made internal alterations to the structure without the required land use approval and building permits. To address this issue, the owner has obtained land use approval for this work and we understand that they are in the process of obtaining the necessary building permits. An RV garage addition was built onto this structure in late 2004 or 2005, without land use approval or building permits. The owner is seeking land use approval for this addition with a separate application for accessory use determination (Case #T2-06-064).

- Issue #2 in the VCA involves the building on the far east side of the property. This structure was approved in 1993 as an agricultural building. The owner has since constructed a two story, 1450 square foot garage/storage building addition to the structure without required land use approval and building permits. With this application, the owner is seeking land use approval for the addition. The application was submitted on January 6, 2006 and made complete on June 2, 2006.

- Issue #3 in the VCA pertains to the excavation and construction of a pool without permits. The owner has not yet taken steps to resolve this compliance issue and the VCA indicates that they have until October 31, 2006 to obtain permits for this structure.

Because a VCA has been signed, the County can make land use decisions and sequence the issuance of permits on this property even if a particular action does not bring the property into full compliance (MCC 37.0560(A)(1)).

6. **Are the Proposed Structures Customarily Accessory Or Incidental To Any Use Permitted Or Approved In This District?**

**Hearings Officer**: The Appellant has raised a number of issues on appeal related to this fundamental question. If these issues are resolved in the appellant's favor than the SEC permit would also be approved, because the only basis for the County's

denial was the Planning Director's determination that the proposed garage/storage building was not allowed.

**MCC 36.3120 Allowed Uses**

**(G) Other structures or uses customarily accessory or incidental to any use permitted or approved in this district;**

**Staff:** The code does not define the terms customarily accessory or incidental. Because of this, the County drafted an internal guideline in 2001 to provide a consistent means of determining when an accessory structure could be signed off without review and when a discretionary decision is needed. This is Administrative Guideline 13 (Exhibit 3). This guideline was prepared by the Planning Director, who is authorized to decide all questions of interpretation or applicability of the code (MCC 37.0740). It identifies common accessory structures and indicates that discretionary review is required for structures that are not listed or are larger than the structure to which they are accessory. As discussed below, the County looks at cumulative square footage. In this case, the applicant is seeking approval of an RV garage that is accessory to a single family residential use. Since the dwelling is 2400 square feet in size and the cumulative square footage of the two residential accessory buildings is 2936 square feet, a discretionary review is needed. The applicant has also come in under case T2-06-003 for an additional 1450 square feet of garage and storage space.

To determine if the use or structure is accessory, staff compares the structure/use to other similar structures/uses in the same district in the immediate area. This methodology takes into account sheer size as well as cumulative size of all similar structures on site. The analysis helps demonstrate if the proposed structure/use is common in the area and if it is commonly accessory or incidental to a primary use of a residence.

**Hearings Officer**: The staff analysis indicates that the staff is applying two interpretations to this code section that are not set forth in the code itself. The County is applying a cumulative square footage standard. In addition, the County is limiting the comparison of the structure/use to the immediate area as opposed to the district as a whole. The appellant contends that these interpretations are contrary to the express words of the code criteria.

The following is staff's analysis of the proposed structures and uses under its interpretation of the code requirements.

**The County interprets the code to require "like type" analysis when determining whether or not a use is customarily accessory or incidental in the zone district.**

**Staff**: Because the scope, intensity, size and purpose of different uses are rarely consistent with each other, the County limits its analysis to accessory structures associated with the primary use at hand. In this case it is structures accessory to a single family dwelling. This approach has been upheld on appeal in case T2-04-046

(Exhibit 8). That case involved a proposed farm building. In her decision, the Hearings Officer states:

> *"This standard directs the County to look to what is customary for farm operations of the type proposed by the applicant."*

It follows, therefore, that the county will use that same approach in this application to look at what type of structures are customarily accessory or incidental to a residential use, which is inherently different than a farm use. Thus the need for an apples to apples comparison.

The applicant argues that the code allows residential uses to be compared with farm uses, and vice versa, by saying the proposed RV garage should be compared with the examples of various farm buildings they supplied as evidence the structures are customary in their March 1, 2006 and March 17, 2006 letters. The applicant goes so far as to say that as long as a proposed building is accessory to any of the listed allowed uses, the County is required to approve it – regardless of whether or not the use the building is accessory to is actually existing on the property (Page 3 of the March 1, 2006 letter). This approach is inconsistent with the County's interpretation of the code. Additionally, the County code defines the term Accessory Building to mean "a subordinate building, the use of which is clearly incidental to that of the main building on the same lot" (MCC 36.0005(A)(1)). Given this definition, it is clear that a primary use to which a building is accessory must be situated on the same parcel or lot.

**Hearings Officer**: I concur with staff on their determination that the analysis be limited to accessory structures associated with the primary use of the property. The definition of "accessory building", in essence, treats the word "accessory" as being synonymous with the word "subordinate". On the subject property, the primary use is a single-family residence. The determination of whether the proposed structures are customarily accessory or incidental will be based on structures that are customarily accessory or incidental to a single family residence.

**Customarily Accessory or Customarily Incidental**

**Staff**: To be "Customarily Accessory" or "Customarily Incidental" not only means the use/structure is common in the zone, but also that it is common in intensity, size, and scope. This is supported by the Hearings Officer in the prior mentioned case when she states:

> *"The Hearings Officer does not, however, agree that ... the size of the structure is irrelevant. Size is one component in determining whether a structure is 'customarily accessory or incidental' to a farm operations of the type proposed by the applicant. The applicable legal standard also requires that the storage building be subordinate to the primary use of the property. An extremely large building with a tiny garden plot of Christmas trees would clearly not be accessory or incidental to the farm use of the land."*

**Staff**: The Hearing's Officer recognized that size is one of several components that must be considered when determining whether or not the structure is subordinate to the primary use. The number of and cumulative square footage of the accessory structures on the site is also subject to an analysis of whether the accessory structures are customary or incidental to the residential use. For example, it is customary to have a garage with two or three bays. However, when a home already has a two bay attached garage and a detached structure already exists with 5 additional double deep bays it is less clear that the use of the structure is incidental and customary. Staff asked the applicant to provide additional information to support their claim that the proposed RV structure is customarily accessory and incidental.

In the March 17, 2006 letter, the applicant argues that the mere fact that the addition consists solely of an RV garage renders it accessory and incidental, regardless of the scope and size, or lack of comparative buildings found in the RR district nearby because it has no other function than as an "incident to the fact that the family lives on the property and owns an RV they vacation in, and this RV needs a garage." The applicant states that the there is no independent significance to the RV garage or the deck other than the fact they both support the residential uses of the Sitton Family. They do not explain why the existing 2400 square feet of garage space is inadequate, how it is customary to have this much garage space on a residential property, or how the aggregate amount of garage use is incidental to the residential use. Without such evidence, we cannot find that the use of this building as a garage and storage to be customarily accessory or customarily incidental to the residence.

**Hearings Officer**: When staff requires the applicant to demonstrate why "2400 square feet of garage space is inadequate", the staff is imposing a requirement that the applicant demonstrate a <u>need</u> for the proposed structure. This is contrary to the definitions of the words "accessory" and "incidenta"l which staff cites in its decision.

**Staff**: The American Heritage® Dictionary of the English Language, Fourth Edition Copyright © 2000 by Houghton Mifflin Company defines "accessory" as: 1. A subordinate or supplementary item; an adjunct. 2. Something nonessential but desirable that contributes to an effect or result. It also defines "incidental" as: "1. Occurring or likely to occur as an unpredictable or minor accompaniment 2. Of a minor, casual, or subordinate nature."

**Hearings Officer**: By definition an accessory use is <u>nonessential</u> but desirable. The applicant has explained that they desire to have the additional garage space to pursue a car hobby and to provide additional storage space. They also wanted an RV garage which could be used to garage an RV or as it is now being used to hold a large awkwardly sized boat.

The County decisions under review herein cite the hearings officer decision in case file T2-05-046 as precedent in this case. However there are several factors that diminish the value of that case as precedent in this matter. In the Knittle case, the applicant sought approval of a proposed structure as a building that is customarily accessory and incidental to the farm use of the land. However, the Hearings Officer specifically

stated: "Yet, as no Christmas tree operation currently exists on the subject property, the building proposed by the applicant cannot be a structure accessory to farm use"

In addition, the Hearings Officer stated that "the code does not require a demonstration of need and does not require that accessory buildings be limited to the minimum size necessary for the farm use."

I agree that there is no requirement that an applicant demonstrate a "need" for a proposed accessory use.

**Staff**: The applicant has not explained how 2936 square feet garage area is secondary or of a minor and casual nature, especially when taking into account the dwelling it would be accessory to only comprises roughly 2400 square feet of floor area. To put this into perspective, one can look to the parking standards of the Off-Street Parking code to see how many parking spaces exist and are proposed with this application. Based on a floor plan submitted by the applicant, the proposed garage would occupy 576 square feet. There is already 2360 square feet of garage space with the building approved in 2000. The Off-Street Parking Standards of the zoning code require parking spaces to be 9x18, or 162 square feet. Using those dimensions, the existing garages have enough space to park 14.6 vehicles. The 576 square feet of proposed additional garage space would add an additional 3.5 parking spaces for a total of 18.1 parking spaces.

The applicant has not provided any evidence to show that it is customary to have this much parking on a residential property or how it is incidental to a residential use. Additionally, they have not shown how that much garage is customary in the district and incidental and of a casual or secondary nature to a dwelling that is substantially smaller.

The applicant argues that Chapter 36 of the Multnomah County Code does not require staff look deeply at the issue of accessory uses, stating that it is broad and easy to meet - a simple exercise for planners to approve at the counter during a building permit sign-off (Page 4 of the March 1, 2006 letter). As a result, the applicant demands that the County look only at the proposed use/structure.

For the reasons stated above, the County does not agree that it is appropriate to limit its analysis to the structure at hand, as we have shown that the cumulative number of structures has bearing on whether or not an additional structure is customarily accessory or customarily incidental. Furthermore, it is important that the County apply its code consistently to all properties. The County has been consistent in its interpretation of this code provision and has not allowed the kind of comparison the applicant demands the County make.

**Hearings Officer**: Staff contends that they have been consistent in their interpretation of this code provision. However, hearing exhibit H3 submitted by the appellant contains examples of other decisions of hearings officers and staff related to "accessory uses" and Guideline 13 which take varied positions.

In Case File T2-04-038, the County Planning Director interpreted Administrative Guideline 13. In that case, the applicant sought after the fact approval of a 60 foot by 120 foot riding arena. There was already an existing barn on the site where the horses were stabled. The decision included the following analysis:

> **"Staff**: A farm use structure (barn, pole building, and riding arena) that does not exceed the ground floor area of the dwelling is considered an accessory building pursuant to Land Use Planning's Administrative Guideline 13 . . . The existing ground-floor footage of the dwelling on the site is 2,976 square feet. The proposed riding arena is 7,200 square feet in size. So, it is not possible to determine just by size and use that the riding arena is subordinate. We then need to look at the use of the building. The existing structure is to be used as a riding arena. The horses are boarded within an existing barn on the site. The single family dwelling is the primary use. People live in this structure and occupy it on a nearly daily basis. One would not usually find a riding arena alone on a site unless it was subordinate to an existing use. In this case, the riding arena will be used by the owners to ride their horses. Their horse riding is a hobby and is ancillary to their enjoyment of the use of the single family dwelling. Since, the riding arena allows for the property owners to enjoy horse riding on their property during sunny or inclement weather and would not be needed if their hobby is discontinued, it appears that the proposed riding arena is an accessory building and is subordinate in use to the single family dwelling on the lot."

The decision of the planning director in case file T2-04-038 demonstrates that size alone does not determine whether a use is subordinate or accessory.

The planning director's decisions in the instant cases contained an analysis of assessor's records related to the size of residential accessory structures within a ¼ acre of the property. The appellant contended that the assessor's records were not reliable. In addition, the appellant submitted photos of some neighboring properties that had very large outbuildings on them. During the hearing, staff stated that some of the properties referred to by the appellant were not in the same zone. The code criteria under review herein requires that the comparison be made to structures that are customarily accessory or incidental to the primary use of the property in the district (same zone). However, neither the code provision or guideline 13 limits the comparison to those properties within ¼ mile.

The appellant contends that the county has attempted to improperly amend its code to create standards by interpretation. The County staff contends that the cumulative number of structures has bearing on whether or not an additional structure is customarily accessory or customarily incidental. I agree with the County that the cumulative effect in some instances may have a bearing on whether an additional structure is customarily accessory or incidental.

LUPAdministrative guideline 13 is a useful tool that identifies common accessory structures and indicates that discretionary review is required for structures that are not listed or are larger than the structure to which they are accessory. However, when that discretionary review is sought, cumulative square footage alone is not determinative of whether a use is customarily accessory or incidental.

The applicant/appellant is not required to show that the proposed structure is needed. As the planning director determined in Case File T2-04-038, size alone does not determine whether a proposed structure is subordinate.

I have thoroughly reviewed all of the exhibits submitted by the appellant and the County file. The fact that the two "proposed" accessory structures have already been built without permits was troubling. Although this application was initiated as the result of an enforcement action, the applicant did enter into a Voluntary Compliance Agreement and appears to be proceeding in good faith at this time. The entry into the VCA does not constitute an admission of any violation, but rather signifies agreement to make voluntary corrections.

Mr. Sitton, who resides at the property, testified about his interest in cars. Exhibit H-11 showed various cars being worked on. One of the photos showed an American muscle car and an old roadster which appeared to date back to the 1930's. Both vehicles were of the type an automobile enthusiast would be interested in owning and restoring. The collecting and restoration of automobiles is a hobby and is ancillary to the Sittons enjoyment of their single family dwelling. Testimony was also presented regarding the other hobbies of the Sittons and explained why they desired more storage.

The RV/boat garage for which approval is sought is the only RV/boat garage on the property and is a subordinate building the use of which is incidental to the residence.

I find that the two buildings for which the accessory use determinations were sought in Case File # T2 -06-003 and T2-06-064 are both customarily accessory or incidental.

7. **Should the Applicant's Request for a Significant Environmental Concern Permit be Approved?**

In case FileT2-06-003, the applicant applied for an after the fact SEC permit. One aspect of the permit request was the removal of an inaccurate SECh line and the movement of the line to its correct location.

In the staff decision, staff made the following finding:

**Finding**: Two Significant Environmental Concern overlays are located on the property- Wildlife Habitat and Scenic Waterways. The methodology to determine the exact locations of the overlay boundaries were not done on a site-specific basis. Staff concurs with the applicant that the information provided by Schott & Associates (See Schott & Associates report titled "Review of the SEC-h Overlay Mapping For the Sitton

Property" in the case file) correctly maps the protected resources and edge of the SEC-h overlay with the site-specific study. As a result, staff concurs that the SEC- does not cross over the area of the proposed addition and the eastern portion of the property.

However, the SEC-sw does apply to the property and has been in place since 1977. As such, the applicant is required to meet the approval standards for the SEC-sw permit.

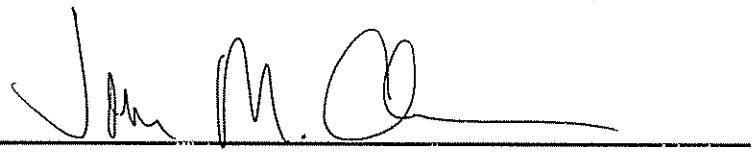
**Hearings Officer**: The Decision of the Planning Director then went on to find that all Criteria for Approval of SEC-sw Permit were met. The Permit was only denied because the County found the use was not permitted.

Accordingly, I find that the SEC-h overlay should be adjusted to the location shown on the Schott and Associates map attached to the Application in the report titled "Review of the SEC-h Overlay Mapping For the Sitton Property". In addition, the SEC-sw approval criteria have been met based on the findings set forth in the County decision in case file T2-06-003 related to the SEC-sw criteria, which I adopt by this reference herein.

**Conclusion:**

The decisions of the Planning Director are reversed. The applicants have demonstrated the proposed building is customarily accessory or incidental to the residential use on the property. The applicant is entitled to the SEC-sw permit and a determination that the SEC-h overlay line should be relocated as provided in the Schott & Associates report referenced in this decision.

IT IS SO ORDERED, this 29th day of December, 2006



Joan M. Chambers, Hearings Officer