



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/landuse>

NOTICE OF DECISION

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

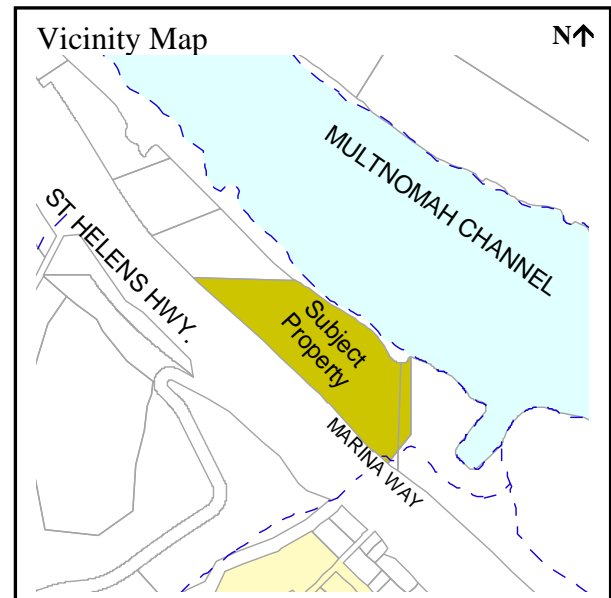
Case File: T2-07-121

Permit: Administrative Decision by the Planning Director

Location: Multnomah Yacht Harbor, LLC
12900 Marina Way
Tax Lot 200, Section 33A,
Township 2 North, Range 1 West, W.M
Tax Account #R971330160

Applicant: Joseph Ashton
Multnomah Yacht Harbor, LLC
PO Box 10447
Portland, OR 97296

Owner: Joseph & Shirley Ashton
Multnomah Yacht Harbor, LLC
PO Box 10447
Portland, OR 97296



Summary: Request for an Administrative Decision determining whether or not development of a dry moorage facility approved in Cases T3-01-007, T1-01-036 and T2-04-010 has been initiated and can continue to proceed.

Decision: The Applicant has provided sufficient evidence to show that they initiated development and may continue to develop the property as approved in the permits

Unless appealed, this decision is effective March 20, 2008 at 4:30 PM.

Issued by:

By: _____
George A. Plummer, Planner

For: Karen Schilling- Planning Director

Date: Thursday, March 6, 2008

Opportunity to Review the Record: A copy of the Planning Director's 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 George A. Plummer, Staff Planner at 503-988-3043, ext. 29152.

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 March 20, 2008 at 4:30 pm.

Applicable Approval Criteria: Multnomah County Code (MCC) 37.0700: Expiration and Extension of Type II Or Type III Decisions in Exception Areas and Lands within the UGB, Case T3-01-007: Condition Number 4 of Case T3-01-007.

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/landuse>.

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.

Note: To address Multnomah County Code requirements staff provides findings as necessary, referenced in the following section. Headings for each category of finding are underlined. Multnomah County Code language is referenced using a **bold** font. The Applicant's narrative, when provided, follows the **Applicant** label. Planning staff analysis and findings follow the **Staff** label. At the end of the report, Exhibits are described. The applicant's submittal is included and made part of this decision.

1. REQUEST FOR A VESTED RIGHTS DETERMINATION

Applicant: Formal request for vestment of Multnomah County Land Use Permit No.(s): T3-01-007; T1-01-036; T2-04-010 of the master development plan, formally issued by Multnomah County, February 27, 2002. This request is made with reference to Clackamas County v. Holmes, to vest our right to continue development and put to use the original permitted developments intended function. Since the issuance of the conditional use Multnomah County Permit, one extension has been granted. Since the issuance of the permits above, we have continued to develop and have not abandoned efforts to complete the development at any time. Efforts have been made in good faith to continuously develop, however due to the large scale of this development including multiple structures in water and on land, multiple regulatory bodies and circumstances beyond our control, delays have hindered our ability to meet the permit deadlines.

Staff: The applicant has request a vested right determination for Cases T3-01-007 (Exhibit 2.2), T1-01-036 (Exhibit 2.5), and T2-04-010 (Exhibit 2.6) to be able to continue work on the approved development project at Multnomah Yacht Harbor and to obtain related building permits (Exhibit 1.1 and 1.2).

In 2002, The Multnomah County Planning Department approved a request to reconfigure and expand an existing moorage on the subject property at 12900/12902 NW Marina Way. This previous permit – T3-01-007 – involved a Conditional Use, Community Service Use, Non-Conforming Use, Willamette River Greenway, Design Review and Minor Variance land use reviews. A copy of the Hearing's Officer Decision is presented as Exhibit 2.2 to this decision. Highlights of the proposed development approved are listed below. Please see permit T3-01-007 (Exhibit 2.2) for more complete descriptions.

- Alterations to the wet moorage (replacing 12 non-covered slips with 10, gangway replacement, installation of downward directed lighting, replacement of wood pilings with steel pilings and concrete decking).
- Dry moorage (construction of a dry moorage facility in the southeast corner of the property).
- Marina Office, chandlery and patio (construction of building to provide restrooms, showers, laundry, store/deli, reception area, information desk, marina office, sales area and meeting/conference room).
- Enhancement of existing boat repair facility (installation of steel forklift ramp, conversion to dustless sanders, addition of security fencing and planting of native vegetation for screening).
- Alterations to existing trailer/boat storage (fencing of existing storage area).
- Septic upgrade (construction of a new sewage pump-out facility including a 3,000 gallon holding tank).
- Wetland and picnic access (restoration of wetland area, installation of a foot trail and bridge)
- Parking (installation of porous paving system, planting of native vegetation).

- Storm water management (installation of porous pavement in the parking area, use of oil/grit separator and addition of storm drain filters).

The Hearing's Officer Approval of Case T3-01-007 became effective at the end of the 21-day appeal period because it was not appealed. This corresponds to the close of business on March 7, 2002. An approval becomes void if, within two years of the date of the final decision, the development action is not initiated (MCC 37.0700(A)(2)). The applicant requested a six month-extension to the expiration of permit T3-01-007 and was granted that extension through the approval of Case T2-04-010 Exhibit 2.6). Grading and Erosion Control and Floodplain Development Permit issued through Case T1-01-036 for the proposed development (Exhibit 2.5).

While applicant has styled their request as a vested rights determination under *Clackamas County v. Holmes*, this is, in fact, a determination whether the applicant has initiated development as provide in the custom expiration clause, condition of approval Number 4 in the Hearings officer's decision for Case T3-01-007, as authorized by MCC 37.0700(B).

2. SITE CHARACTERISTICS

Staff: The 10.24 acre property includes a marina, a houseboat moorage and boat repair facilities. It is located along the Multnomah Channel of the Willamette River about a quarter mile northwest of the Portland City Limits on the outside edge of the Urban Growth Boundary. The property is within the Sauvie Island and Multnomah Channel Plan Area and is zoned Multiple Use Agriculture – 20 (MUA-20) with Willamette Greenway and Floodplain Development Overlay Zones. A site visit was conducted by staff on February 26, 2008. While much of the development approved under Case T3-01-007 remains to be completed, staff noted that substantial progress has been made in implementing the development proposed under that approval. A more detailed discussion about the completed work can be found in the findings under Section 5 of this decision.

3. TYPE II CASE PROCEDURES

MCC 37.0530 (B): Type II decisions involve the exercise of some interpretation and discretion in evaluating approval criteria. Applications evaluated through this process are assumed to be allowable in the underlying zone. County Review typically focuses on what form the use will take, where it will be located in relation to other uses and natural features and resources, and how it will look. However, an application shall not be approved unless it is consistent with the applicable siting standards and in compliance with approval requirements. 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. The Planning Director's decision is appealable to the Hearings Officer. If no appeal is filed the Planning Director's decision shall become final at the close of business on the 14th day after the date on the decision. If an appeal is received, the Hearings Officer decision is the County's final decision and is appealable to the Land Use Board of Appeals (LUBA) within 21 days of when the signed Hearings Officer decision is mailed pursuant to 37.0660(D).

Staff: The applicable procedures outlined in MCC 37.0530 were followed in processing this case. An opportunity to appeal this case when the decision is issued, if no appeal is filed the decision

will become final 14 days after the date the decision is issued. The application was submitted December 28, 2007 and was deemed complete as of that day.

An "Opportunity to Comment" notice was mailed on February 4, 2008 to all owners of property within 750 feet of the subject site. They were given a 14-day period to provide comments on the application (MCC Chapter 37). No comments were submitted.

4. VESTED RIGHTS CASE LAW

Clackamas County v. Holmes, 265 Or 193, 197 (1973)

Applicant:

This letter is our formal request for vestment of Multnomah County Land Use Permit No.(s): T3-01-007; T1-01-036; T2-04-010; T3-01-007; of the master development plan, formally issued by Multnomah County, February 27, 2002. This request is made with reference to Clackamas County v. Holmes, to vest our right to continue development and put to use the original permitted developments intended function. Since the issuance of the conditional use Multnomah County permit, one extension has been granted. Since the issuance of the permits above, we have continued to develop and have not abandoned efforts to complete the development at any time. Efforts have been made in good faith to continuously develop, however due to the large scale of this development including multiple structures in water and on land, multiple regulatory bodies and circumstances beyond our control, delays have hindered our ability to meet the permit deadlines. To date, the amount vested in the development approved by the Multnomah County Permit noted above as a ratio of expenditures to total estimated cost of the development (not including land value) as a percentage is 25%. Development expenditures and property owner vestment is further described below.

The following is an outlined timeline of milestones and expenditures relating to the fulfillment of our Multnomah County Land Use permit(s) and master plan.

- 2001 – 2004 - Property cleaned of garbage, junk and debris left by previous land owner.
- 2001 - Engineering and Architectural planning commenced for development of buildings and facility layout.
- 2002 – Permits acquired from State Lands and US Corps of Army Engineers for in-water (moorage dock) work.
- February 27, 2002 – Multnomah County Land Use Permit(s) noted above issued.
- March - May 2002 -- Applied for and received driveway approach permits issued by Oregon Department of Transportation (ODOT).
- 2002 - Landscaping. Deciduous trees and Conifer trees planted (continuous thru current year)

- 2002 – 2003 – Driveway approaches constructed, inspected and approved (ODOT).
- June 2003 - Underground electrical and phone utility installation commenced, as per PGE design and County permit to all 4 locations for new buildings.
- 2003 - Water system main for fire service. Burlington Water District began construction of a new 10" water main and fire hydrants to service properties under this permit in 2003. Burlington Water District suffered many delays and didn't complete construction and initiate service until early 2004.
- May – October 2003 – Commenced and completed major grading and site grade work.
- 2003 - Landscaping. Deciduous trees and Conifer trees planted (continuous thru current year).
- July - September 2004 – Commenced and completed new driveway base per County Permit. Discontinued use of "old" driveway approach.
- June 14, 2004 – Burlington Water District's water main system met City of Portland Fire Code design requirements.
- 2004 - Equipment Storage Building Permit. City of Portland required that the fire service system be in place and operational prior to commencing the permit process for the development. After land owner provided proof that fire service was in place in June 2004, the permitting process commenced and on November 23, 2004, filed for the Equipment Storage Building Permit. The City of Portland Fire Department did not finalize the fire protection decision until January 2005.
- 2004 - Landscaping. Deciduous trees and Conifer trees planted (continuous thru current year).
- November 2004 – March 2006 – City of Portland reviewing Equipment Storage Building permit application.
- January 14, 2005 – Fire Department decision finalized for fire protection of all development project (buildings) and property access.

- February 18, 2005 – Re-submitted for structural metal building quote due to change in building manufacturer and rise of steel costs.
- 2005 - Landscaping. Deciduous trees and Conifer trees planted (continuous thru current year).
- March 10, 2006 – Final Equipment Storage Building construction permit issued.
- May 2006 – Security fence installed.
- June 2006 – Storm water discharge permit issued by Department of Environmental Quality (DEQ).
- June 2006 – Grading and Construction commenced on Equipment Storage Building.
- June 2006 – June 2007 – Special storm water system for equipment storage building installed.
- 2006 - Landscaping. Deciduous trees and Conifer trees planted (continuous thru current year).
- June 2007 – Continuation of installation of underground utilities.
- July 2007 – PGE inspection of underground utilities. *Currently awaiting final installation by PGE.
- August 2007 – Completion of Equipment Storage Building erection.
- 2007 - Landscaping. Deciduous trees and Conifer trees planted (continuous thru current year).

Expenditures to Total Cost of Development (not including land value):

- Estimated cost of development \$2,100,000
- Invested in development for above items completed or in-progress: \$525,000
- Percentage vested in development (invested dollars to estimated cost of project): 25%

The following describes progress made on the current Multnomah County permit.

Completed Items:

- ✓ Engineering and Architectural planning completed for all buildings and facility layout.
- ✓ Property cleaned of garbage, junk and debris left by previous land owner.
- ✓ Pile and dock equipment purchased and some in-service.
- ✓ Permits with State Lands and US Corps of Army Engineers for in-water work.
- ✓ New driveway approaches completed and approved by ODOT.
- ✓ Major grading and grade work complete.
- ✓ Landscaping. 40+ deciduous trees and 50+ new conifer trees planted.
- ✓ Electrical. Installed all new underground electrical conduits as per PGE and permit to all 4 locations for new buildings.
- ✓ Job creation at facility for repair services.
- ✓ New underground water system on property. Permitted and completed.
- ✓ New driveway base installed and being used.
- ✓ Old driveway closed off and berm built at discontinued entrance to match existing landscape.
- ✓ Security fence installed.
- ✓ Storm water permit with DEQ.
- ✓ Equipment Storage building erected.

In Progress 2007:

- ✓ New berm located where old driveway existed continues with plants & trees added to landscape.
- ✓ Final occupancy of Equipment Storage Building
- ✓ PGE scheduling final electrical installation

Staff: The applicant has requested a vested rights determination utilizing case law, specifically, *Clackamas County v. Holmes*, 265 Or 193, 197 (1973). A vested right is a development right to continue an uncompleted development when it is found the development meets certain conditions established by the Oregon Supreme Court decision for the case *Clackamas County v. Holmes*. The Holmes vested rights case focused on investment made before the zoning designation, allowing the use outright, was changed to a zoning designation that did not allow the use. The applicant of this current case, T2-07-121, obtained a Conditional Use, Community Service, Non-Conforming Use, Willamette Greenway, Design Review and Minor Variance Permit approval through Case T3-01-007, and a Grading and Erosion Control and Floodplain Development Permit approval through Case T1-01-036 as well as a Time Extension approval through Case T2-04-010. There has not been a Zone Change or Ordinance Amendment for the subject property that would prohibit the development approved under Case T3-01-007.

However the Oregon Land Use Board of Appeals (LUBA) ruled in *Heidgerken vs. Marion Count, Or LUBA (1998)* that “The judicial doctrine of vested rights does not apply to development allowed under a conditional use permit, where the permit is approved under an ordinance obligating the user to commence construction within six months or request an extension from the city.” This case included the following ruling:

“The county responds that *Holmes* is inapposite. The county argues that the *Holmes* factors focus on reasonable investment made in reliance on a particular zoning scheme, and whether, when that zoning scheme changes, the investment has reached such a substantial stage of completion that the right to continue development is deemed vested notwithstanding the subsequent zoning change. The county contends that that rationale does not apply to conditional use permits in general or the present case in particular. Here, the county argues, there was no change in the law; all expenditures were made on the basis of the conditional use permit, which was subject from the beginning to the requirement, at MCZO 122.090, that exercise of the right granted under the permit must be commenced within six months of the permit's effective date, at the risk that the permit will expire.”

“We agree with the county that *Holmes* is distinguishable and that the vested rights doctrine has no application in the present context. In *Holmes*, when the property owner began development of the disputed use, the use was allowed under county law and, importantly, there was no obligation that the use be constructed or "commenced" before a specified date.”

Staff finds that since the development was approved as a Conditional Use, a Community Service Conditional Use, Willamette Greenway, Design Review, and Minor Variance Permit, and given the *Heidgerken vs. Marion County* ruling that the *Clackamas County v. Holmes* case for vested rights did not apply to the Heidgerken case, the County can not deem the development was vested under *Clackamas County v. Holmes*. The expenditures outlined by the applicant included as Exhibit 1.3 and the applicant's narrative above (Exhibit 1.2) are relevant to whether or not the development has been initiated under the terms of the approval issued by the Hearings Officer for Case T3-01-007, as discussed in Finding Number 5 of this decision.

5. CASE T3-01-007 EXPIRATION CONDITION

Staff: The Hearing's Officer Approval (T3-01-007) became effective at the end of the 21-day appeal period to the Land Use Board of Appeals. An approval becomes void if, within two years of the date of the final decision, the development action is not initiated (MCC 37.0700(A)(2)). The applicant applied for a Time Extension Permit, Case T2-04-010 requesting a six month-extension to the expiration of permit T3-01-007 due to hardship discussed in detail within that case. The time extension approved in Case T2-04-010 extended Case T3-01-007 to September 8, 2004 to meet condition of approval Number 4.

Condition of approval Number 4 of Case T3-01-007 stated the following

4. Pursuant to MCC 37.0690, 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 and 37.0700. Such a request must be made prior to the expiration date of the permit.

The relevant question for this case is whether Case T3-01-007 expired on September 8, 2004 because (a) “development action has not been initiated” or (b) “building permit have not been issued.” The development approved under T3-01-007 was a master plan type of development that has several phases outlined in the case and summarized in staff finding Number 1 of this decision.

The plan includes three buildings, a boat repair yard, boat storage facilities, boat trailer parking, in-water facilities, a boat lift operation, wetland and picnic area access, a new driveway, parking and associated utilities improvements and installations.

Prior to the expiration date for Case T3-01-007, extended by Case T2-04-010 to September 8, 2004, the property owner installed the new access and driveway; closed off the old access driveway, completed major grading and site grade work for the building, boat storage area and boat trailer area; installed underground electrical and phone utilities to the four building locations; installed the new 10" water main and required fire hydrants; install fencing for the boat storage area, installed landscaping along the water front, the southwestern property line and the wetland picnic area, installed the boat lift facility, and obtained County Land Use Planning Building Permit Zoning Review approval for the three proposed buildings (Exhibit 2). While the City of Portland delayed reviewing the building plans until November 2004 until the fire hydrants were installed and inspected, a building permit for the first building for the equipment storage shed was issued March 6, 2006 after amendments to the plans. The equipment storage building has been completed.

Given the development work that was initiated and the building permit zoning review approval issued by the County prior to the September 8, 2004 expiration date, staff finds that the property owner met Condition Number 4 of Case T3-01-007. Prior to the expiration date, extended to September 8, 2004 by Time Extension Permit T2-04-010, the property owner initiated substantial development action including grading, new access, utility installation, fencing, boat lift facility, and landscaping. The property owner also obtained County Land Use Planning Building Permit Zoning Review approval for all the buildings. The property owner acted on that Building Permit Zoning Review approval in obtaining a building permit for the equipment storage building. Given that the property owner met Condition Number 4 of Cases T3-01-007, this approval has not expired and development work approved by that case can continue until complete. All the conditions of approval for case T3-01-007 continue to apply. Grading and Erosion Control and Floodplain Development Permit T1-01-036 did not have a expiration date. Given grading work and floodplain development was initiated within the two year period, the permit continues to apply to the development.

Hearing Officer's Condition 4 of Case T3-01-007 is more lenient then the standard language under MCC 37.0700 because it takes the approach that any of the listed circumstances allow the applicant to continue to act on the permits. The code under MCC 37.0700(A) is stricter, voiding the permit if any of the listed circumstances are not met. The Hearings Officer exercised authority under MCC 37.0700(B) in setting out the more lenient language.

6. CONCLUSION

Vested rights under *Clackamas County v. Holmes* do not apply to this case. Given that the property owner met Condition Number 4 of Case T3-01-007, the permit issued under T3-01-007 has not expired and development work approved by that case can continue until completed. Likewise given that the grading work was initiated within the two year period, Grading and Erosion Control Permit T1-01-036 continues to apply to the development. The property owner can continue to act on the permit issued under T3-01-007 so long as the land use rules remain the same.

7. EXHIBITS

7.1 Exhibits Submitted by the Applicant:

- Exhibit 1.1: Application form (1 page)
- Exhibit 1.2: Narrative (1 page)
- Exhibit 1.3: Receipts for work and equipment requested by applicant to be keep confidential (119 pages)
- Exhibit 1.4: City of Portland building inspect record (5 pages)

7.2 Exhibits Provided by the County

- Exhibit 2.1: County Assessment Record for the subject property (8 pages);
- Exhibit 2.2: Case T3-01-007 (53 pages)
- Exhibit 2.3: County Building Permit Reviews (2 pages)
- Exhibit 2.4: County Building Permit Review approved site plan (1 page)
- Exhibit 2.5: Case T1-01-036 (6 pages)
- Exhibit 2.6: Case T2-04-010 (9 pages)