MULTNOMAH COUNTY
LAND USE AND TRANSPORTATION PROGRAM
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BEFORE THE HEARINGS OFFICER FOR MULTNOMAH COUNTY, OREGON FINAL ORDER

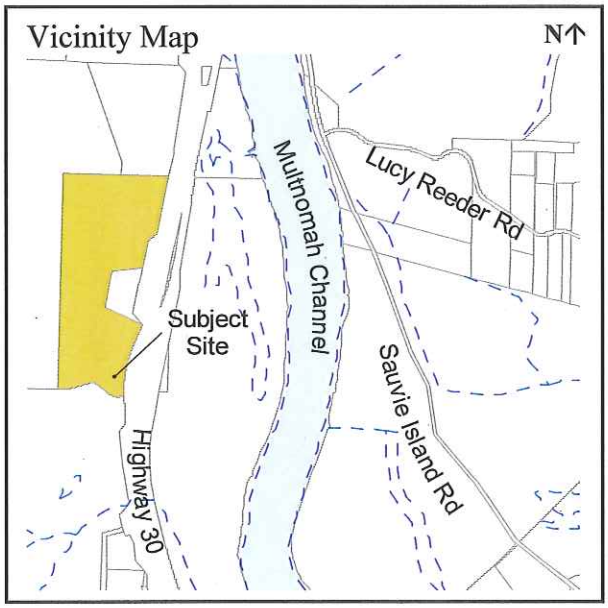
This Decision consists of Conditions, Findings of Fact and Conclusion

Case File: T2-08-007

An appeal of a planning director decision which approved a Health Hardship and Significant Environmental Concern Permit

Location: 21600 NW St. Helens Road
TL 100, Sec 01, T2N, R2W, W.M.
Tax Account #R97201-0020

Applicant/ Owner/ Appellant: Joseph Mellor
22037 NW St. Helens Rd
Portland, OR 97231



Summary: Appeal of Conditions and Findings in Planning Director's Decision approving Request to retroactively approve a manufactured home as a Health Hardship dwelling on property zoned Commercial Forest Use-1 (CFU-1) with Significant Environmental Concern and Slope Hazard overlays.

Decision: Planning Director Decision Affirmed with Conditions

PROCEDURAL ISSUES

1. Impartiality of the Hearings Officer

A. No *ex parte* contacts. I did not have any *ex parte* contacts prior to the hearing of this matter. I did not make a site visit.

B. No conflicting personal or financial or family interest. I have no financial interest in the outcome of this proceeding. I have no family or financial relationship with any of the parties.

2. Jurisdictional Issues

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

BURDEN OF PROOF

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

SCOPE OF APPEAL

An appeal from an administrative decision of the Planning Director is conducted as a *de novo* hearing. The issues raised in the notice of appeal as well as the testimony, arguments and evidence submitted at the hearing and in the record in this matter will be considered herein.

STANDARDS, CRITERIA, ANALYSIS AND FINDINGS OF FACT

1. **Project Description**

The applicant sought to retroactively permit a manufactured home as a Temporary Health Hardship dwelling on property zoned Commercial Forest Use-1 with Significant Environmental Concern overlays for Wildlife Habitat (SEC-h) and Significant Views (SEC-v) as well as a Slope Hazard Overlay (HDP). The staff approved the request and imposed conditions of approval

2. **Site Characteristics**

The subject property is located in the West Hills Rural Plan Area off of Highway 30 and directly north of Wildwood Golf Course. The property is just over 55-acres with the majority of the property heavily forested except the areas around the existing dwelling,

the existing manufactured home approved by the Planning Director as a health hardship dwelling, the barn, and other various structures. Additionally, a BPA easement appears to run north-south through the middle of the property and has been mostly cleared and maintained by the power company and/or owner. Access to the dwelling is off of a spur of State Highway 30.

3. **Testimony and Evidence Presented**

A. At the hearing on June 26, 2009, the following exhibits were received:

H-1 An aerial photo with labels showing the buildings on site.
H-2 Property line adjustment survey map
H-3 Shriner's Hospitals to Mellor Deed

B. Planner, Don Kienholz, testified for the County and summarized the history of the decision on appeal.

C. Appellant, Joseph Mellor testified about his grounds for appeal.

4. **Issues on Appeal**

A. The Appellant appears to be contending that both dwellings on the subject site were lawfully established and asks that the County be required to refund the expenses he incurred for the hardship permit expenses.

Hearings Officer: The Appellant cites the June 28, 2002 Decision of Hearings Officer Liz Fancher in support of his contention and argues that the Hearings Officer in the 2002 decision found that he had a valid permit for the home he was trying to replace in the T2-01-044 permit application. However, the Appellant does not correctly describe the nature of the 2002 decision. The Hearings Officer found that the applicant therein had not obtained all permits needed in 1992 to lawfully establish the manufactured home on his property and that the applicant had not met his burden of proof. The 2002 decision was not appealed and is a final and binding decision in this matter. There is no basis for refunding permit fees.

The County Code defines **Lawfully established dwelling** as:

> "**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.**"

In 2002, the Hearings Officer found that the manufactured home was not a lawfully established dwelling. In the present proceeding, County staff has been working with the applicant/appellant to retroactively permit the manufactured home as a Temporary Health Hardship dwelling. Without the Health Hardship permit the manufactured dwelling would not be a lawfully established dwelling, This grounds for appeal is denied.

B. The Appellant asserts that there are egregious and careless errors in the notice of decision dated May 12, 2009 in condition 6 of the conditions of approval related to the septic system.

Hearings Officer: The Appellant appears to be contending that modifications to a septic system which require a repair permit are not repairs. The County Environmental Soils Specialist reported that the septic system "will need minor repair permit for new tank and pressure line and dist. box to tie in." (See Exhibit A-5 to staff decision).

Condition 6 reads as follows:

> **6. The owner shall repair the septic system currently connected to the mobile home. The owner shall also connect the 1944 dwelling to the repaired septic system connected to the health hardship and decommission the original system. The owner shall then submit a copy of documentation from the Sanitarian affirming the repair has been completed and the main home has been connected to the repaired septic system within six months of this decision becoming final [MCC Policy 37].**

I find that the condition imposed by the Planning Director appropriately describes the work required by the Sanitarian. Work on a septic system that requires a repair permit can certainly be referred to as a repair. The condition imposed by the Planning Director is hereby approved. This basis for appeal is denied.

C. Issues related to location of South property line, distance from South property line to manufactured home, hearsay testimony and condition requiring a survey.

Hearings Officer: In the Appellants grounds of appeal numbered 3, 4 and 5, the appellant raises multiple issues which all seem to be related to his objection to the survey requirement imposed in condition #5.

Initially, in grounds for Appeal #3, the Appellant seemed to simply want to criticize Planner Don Kienholz, without specifically stating what condition he found objectionable. The Applicant/Appellant did submit exhibits in the application process which were unclear, did not contain precise measurements and seemed contradictory and the Planning Director's Decision discussed some of those inconsistencies.

In his 4th grounds for Appeal the Appellant objects "to being told to get a $2000 survey done just because Don Kienholz is obtuse"

In the 5th grounds for appeal the Appellant objects to hearsay testimony.

During the hearing the nature of the Appellants grounds for appeal, discussed in this section, became clearer. The Appellant submitted exhibit H2, which was a 1997 property line adjustment survey involving the Appellant's property. The survey contains a notation which states "new property line to centerline of road". The Appellant stated that the notation referred to his South property line.

An easement road serves both the Appellant's property and the property to the South of the Appellant. The road easement area appears to be one-half on the Appellant's property and one-half on the property located to the South of Appellant's property. Unfortunately, there are no visible survey stakes marking the Appellant's Southern boundary, nor is the location of the manufactured home and its distance from the South property line indicated on a survey map.

There was also some contradictory evidence regarding the approximate location of the Southern property line. A neighbor to the South or a representative of that neighbor talked to Don Kienholz and gave one location for the South property line based on the improved portion of the driveway, while the Appellant gave a different location. The Appellant stated that the surveyor had told the Appellant that the improved portion of the driveway was in the center of the easement area, which made the centerline of the improved area also the centerline of the easement area (the South property line).

The Appellant objected to the admissibility of the neighbor's comments because the statements were "hearsay". The Appellant's own statements about what the surveyor told the Appellant are "hearsay", but hearsay is admissible in a Land Use proceeding. The existence of hearsay testimony in a land use proceeding goes to the weight and reliability of the evidence, not to its admissibility. The Appellant's objection to the admission of "hearsay" evidence is denied.

Condition #5 of the Planning Director's Decision reads as follows:

> **5. Prior to building permit sign-off, the owner shall hire a surveyor to survey the location of the southern property line and clearly mark it with pins or other such permanent identifier. The closet point of the Temporary Health Hardship shall be located at least 30-feet from the southern property line. If the current location of the hardship dwelling is less than 30-feet from the property line, the owner shall move the hardship north to meet the setback as long as no additional grading of the earthen embankment to the north and west of the mobile home must be disturbed. The owner shall then submit copy of the survey with the hardship dwelling clearly shown with the accurate distance to the southern property line [MCC 33.0515(A)(4), MCC 33.2256 Table 1].**

The evidence in the record did not clearly establish the exact location of the South property line or the distance of the manufactured home from the Applicant/Appellant's south property line. The condition simply requires the Applicant to provide verification of the representations he has made to the planning Department. It is reasonable to require a survey that shows the actual location of the property line in relation to the manufactured home and that such distance is at least 30 or more feet from the property line. Accordingly, I find that condition #5 is appropriate and the Appellant's 3rd, 4th and 5th grounds of appeal are denied.

D. In his 6th basis for appeal, the Appellant raises several issues related to the separation of this permit application from the application for a Hillside Development permit.

Hearings Officer: The Appellant states that the Hillside Development Permit he was referring to was T2-08-045 and was approved August 20, 2008, and that he does not know why it was split off from the Health Hardship Dwelling Permit Application. At the hearing, Mr. Kienholz explained the basis for the separate processing of the permit applications. The permits needed to be sequenced in order to resolve earlier alleged violations of failure to obtain a required hillside development permit for development or site clearing work (including tree removal) performed in 2001, on portions of the Appellant's property located in hazard areas. (See Voluntary Compliance Agreement attached as Exhibit A-3 to the Planning Director's Decision). The sequencing of the permits made it possible to process the Appellant's Application for a Health Hardship Dwelling which the County Planning Director approved. The sequencing of permits was done for the Appellant's benefit.

The Appellant raises two other issues within this Appeal grounds. The Appellant makes the following assertion which he numbers feature one that he contends is discriminatory.

1. "For the Disability Hardship permit there is a stipulation that nuisance plants be removed. No such mention was made with then hillside development permit. There seems to be a more restrictive standard for a disabled person making application for a hardship dwelling than when merely dirt is involved."

Hearings Officer: The applicant is talking about two different permits with different code requirements. The nuisance plant provision is not a requirement of the hillside development permit for anyone.

The applicant's property is in the Commercial Forest Use-1 Zone with Significant Environmental Concern and Slope Hazard Overlays. Single family homes are only allowed in the CFU-1 zone under limited circumstances, as detailed in the code. A mobile home, in conjunction with an existing dwelling may be allowed as a "Review Use", upon obtaining an annual Temporary Health Hardship Permit **pursuant to all applicable approval criteria**.

The Significant Environmental Concern Overlay provisions, set forth in Code Section 33.4570, Criteria for Approval of SEC-H Permit-Wildlife Habitat, applies to **all** development in the overlay zone. It is not part of the Temporary Health Hardship Permit Provisions. The code provision relating to removal of nuisance plants is applicable because the Applicant is applying for a permit to develop in the SEC-H permit overlay zone.

If a property owner without a health hardship was proposing to develop in the CFU-1 Zone and his or her property had the SEC-H permit wildlife Habitat overlay, that property owner would have to comply with the nuisance plants provision, however the property owner without the Health Hardship would not be able to get the approval for the placement of a manufactured home which was approved for the Appellant herein.

There has been no discrimination. The provision Appellant objects to is applicable to all applications for development in the overlay zone referenced herein. This basis for appeal is denied.

2. The Appellant states that the County had questioned him about when his barn was built and asserts that if the County could have determined the barn was out of compliance, the County would not need to give him the Health Hardship permit.

Hearings Officer: The Appellant's concern seems to be moot at this time. His application for a Health Hardship Dwelling Permit was approved by the County Planning Director, and there were no conditions relating to the barn in the Planning Director's Decision. Accordingly, this basis for Appeal is denied.

5. Adoption of Planning Directors Findings

Except as modified herein, the provisions of the Planning Director's Decision dated May12, 2009, in case file T2-08-007 is adopted and incorporated by this reference

Conditions of Approval

The conditions listed are necessary to ensure that approval criteria for this land use permit are satisfied. Where a condition relates to a specific approval criterion, the code citation for that criterion follows in parenthesis.

1. **After the decision is final and prior to building permit sign-off, the property owner shall record the Notice of Decision cover sheet through the conditions of approval with the County Recorder along with a copy the site plan showing required tree retention (Exhibit A-4). The Notice of Decision shall run with the land. Proof of recording shall be made prior to the issuance of any permits and a copy filed with Land Use Planning. Recording shall be at the applicant's expense. [MCC 37.0670].**

2. **Prior to building permit sign-off, the owner shall submit a copy of the recorded deed describing the property configuration as approved in the lot line adjustment LE 3-93.**

3. **Prior to building permit sign-off, the owner shall post a $1000 bond with the County to insure removal of the mobile home within six months after the health hardship ceases to exist [MCC 33.0515(A)(5)].**

4. **The owner shall remove the attached porch enclosure which is currently secured to the mobile home within six months of this permit becoming final [MCC 33.0515(A)(4)(d)].**

5. **Prior to building permit sign-off, the owner shall hire a surveyor to survey the location of the southern property line and clearly mark it with pins or other such permanent identifier. The closet point of the Temporary Health Hardship shall be located at least 30-feet from the southern property line. If the current location of the hardship dwelling is less than 30-feet from the property line, the owner shall move the hardship north to meet the setback as long as no additional grading of the earthen embankment to the north and west of the mobile home must be disturbed. The owner shall then submit copy of the survey with the hardship dwelling clearly shown with the accurate distance to the southern property line [MCC 33.0515(A)(4), MCC 33.2256 Table 1].**

6. **The owner shall repair the septic system currently connected to the mobile home. The owner shall also connect the 1944 dwelling to the repaired septic system connected to the health hardship and decommission the original system. The owner shall then submit a copy of documentation from the Sanitarian affirming the repair has been completed and the main home has been connected to the repaired septic system within six months of this decision becoming final [MCC Policy 37].**

7. **The owner must paint the mobile home Miller Acri-Lite Velvet 85-29, Sherman Williams Arts & Crafts Polished Mahogany, or Roycraft Brass (or a combination thereof) within six months of this decision becoming final [MCC 33.4565(C)(2)].**

ON-GOING CONDITIONS THROUGH LIFE OF PERMIT AND RENEWAL

8. **Every two years from the date the decision is final the owner shall submit the Health Hardship Verification form to demonstrate the hardship continues to exist. The form shall be signed and dated at least six months prior the two year deadline and in accordance to the renewal requirements of the County at that time [MCC 33.0515(A)(6)].**

9. **The owner shall maintain a primary fire safety zone around the health hardship as described in MCC 33.2256(D)(1).**

10. **All lighting on the temporary health hardship shall be hooded and directed downward [MCC 33.4565(C)(3)].**

11. **The property owner shall retain trees along the eastern property line as seen in Exhibit A-4 that provide screening of the health hardship. If a tree is damaged or dies, the owner shall replace the dead/fallen tree with a 6-foot coniferous tree in the same location within three months of the tree dying or falling [MCC 33.4565(C)(4)].**

12. **The applicant shall continue to maintain the property free of the nuisance plants listed in MCC 33.4570(B)(7).**

CONCLUSION

The Decision of the Multnomah County Planning Director in Case File T2-08-007 is affirmed subject to the conditions of approval contained herein. The appeal is denied.

IT IS SO ORDERED, this 6th day of July, 2009

JOAN M. CHAMBERS, Hearings Officer