

# NOTICE OF DECISION

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**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 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 Don Kienholz, Staff Planner at 503-988-3043, ext. 29270 or [don.d.kienholz@multco.us](mailto:don.d.kienholz@multco.us).

**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 Monday, May 14, 2014 at 4:00 pm.**

**Applicable Approval Criteria:** Multnomah County Code (MCC) and Multnomah County Road Rules (MCRR): 37.0560 Code Compliance; 36.0005 Lot of Record; 36.3420(A); 36.7204 Verification of a Non-Conforming Use. MCRR 4.000 Access to County Roads.

Copies of the referenced Multnomah County Code (MCC) and Multnomah County Road Rules (MCRR) 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> or <http://web.multco.us/transportation-planning>.

### **Scope of Approval**

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.

### **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. Obtain an Encroachment permit from Multnomah County for all work in the public right of way within 45 days of the close of the appeal period. Multnomah County has jurisdiction over the Dodge Park Boulevard right-of-way to the north of the property. Applicant must submit an encroachment permit for structures that currently exist in the public right of way. Applicant must also decommission the northernmost driveway servicing the property. This driveway is located entirely in the public right of way and therefore the work to decommission it will occur primarily in the right of way. A permit is required in order to assure that all work in the right of way meets County standards [MCRR 18.00]. Contact Alan Young at (503) 988-3582 to obtain the encroachment or a right-of-way 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 (MCC) criteria and Comprehensive Plan Policies are in **bold** font. Staff analysis and comments are identified as ‘**Staff:**’ and address the applicable criteria. Staff comments may include a conclusionary statement in *italic*.

### **1.00 Project Description:**

**Staff:** The applicant is seeking a determination that the two existing dwellings are a non-conforming use and that the property is a Lot of Record.

### **2.00 Code Compliance:**

#### **MCC 37.0560 CODE COMPLIANCE AND APPLICATIONS.**

**Except as provided in subsection (A), the County shall not make a land use decision approving development, including land divisions and property line adjustments, or issue a building permit 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.**

- A. **Staff:** A failed septic system initiated a review of the two dwellings on the subject property because the Orient Residential (OR) zone only allows one dwelling per legal parcel. During that review it was also discovered that one of the dwellings and its accessory shed encroach into the yard setbacks required under the OR zone and encroach into the Right-of-Way of SE Dodge Park Boulevard. Having two dwellings on the property may only be allowed and not considered a zoning violation if the second dwelling was a lawfully established Non-Conforming Use. Encroachment into a required setback is only permissible if the structure was built prior to the setback requirements established in the zoning district.

Repair or replacement of a failed septic system is typically a public safety issue exempt from the code compliance section but when the septic system is connected to a second dwelling, the County is not able to permit the development under 37.0560(A)(2) unless it is first determined the second house is lawful. Verification of a Non-Conforming Use determination is subject to discretion and must be reviewed under a Type 2 land use process.

The property owners entered into a Voluntary Compliance Agreement with the County to allow the replacement of the septic system of the second dwelling under the condition that if the dwelling attached to the septic system was found to be unlawful, the dwelling would be decommissioned and the septic system removed.

- B. The Multnomah County Road Rules only permit one access onto the public road system per property (MCRR 4.000) unless a road rules variance is approved. The subject property currently has a horseshoe driveway that provides two access points onto SE 302<sup>nd</sup> Ave, a road classified as a Rural Collector, that was permitted in 1996 (Exhibit B.7).
- C. A third driveway is present that provides access to one of the dwellings on the subject property. However, the driveway is not on the subject property and is wholly in the County's Right-of-Way for SE Dodge Park Boulevard. Because the access is not on the subject property, it is not subject MCC 37.0560. However, Multnomah County Transportation has included conditions of approval addressing the unlawful driveway.

### **3.00 Verification of Non-Conforming Uses:**

#### **A. MCC 36.7204 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:**

**Staff:** Land Use Application T2-2013-3213 is for review of a non-conforming status of having a second dwelling as well as the encroachment into the northern and eastern yard setbacks by the 1947 dwelling.

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

**Staff:** Regulation of uses on property in rural Multnomah County began with the adoption of the County's first zoning and building codes in 1955 with the establishment of the R-10 zoning district on the property. Although rudimentary compared to the current zoning and building codes, there were limitations on the number of dwellings and setback requirements. However, Multnomah County Assessment and Taxation information document the two dwellings as having year-built dates of 1928 and 1947 (Exhibit B.1). So both dwellings would have pre-dated any limitation on the number of dwellings and setback requirements. Based on the construction, it appears the accessory buildings in the setbacks also were established in the same time period of the dwellings. The earliest photos available to staff from 1977 (Exhibit B.5) show the dwellings and accessory structures in the same configuration as they are today.

Based on this information, the two dwellings and the encroachment into the setbacks were lawfully established due to a lack of any zoning standards.

*Criterion met.*

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

**Staff:** The owners and applicant's live in the main house on the property since they purchased the property. They also have provided the rental agreements dating back to August of 1997 (Exhibits A.8 through A.18 ) for the second dwelling to demonstrate it has been continuously occupied as a dwelling since 1997 without an interruption consisting of a continuous two-year period.

The encroachment into the setbacks by the 1947 dwelling has existed since the dwelling was constructed and therefore has not been abandoned or interrupted for any period of time.

*Criterion met.*

B. **(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. **(1) Description of the use;**

**Staff:** The two dwellings were established as residential uses and have remained as residential uses to the present day. The encroachment into the setbacks by the dwelling built in 1947 has not changed since establishment.

*Criterion met.*

2. **(2) The types and quantities of goods or services provided and activities conducted;**

**Staff:** A dwelling does not produce goods or services and the County considers activities associated with a dwelling to remain constant during the time the dwelling is established. This criterion does not apply to the encroachment into the setbacks.

*Criterion met.*

3. **(3) The scope of the use (volume, intensity, frequency, etc.), including fluctuations in the level of activity;**

**Staff:** The dwellings have remained single family dwellings and therefore have not had a change in the scope of the non-conforming use. The setback encroachment has not changed since the dwellings were built.

*Criterion met.*

4. **(4) The number, location and size of physical improvements associated with the use;**

**Staff:** The configuration of the subject dwellings and accessory structures have not changed since the earliest available photographs from 1977 (Exhibit A.5). Based on the construction of the accessory buildings, it appears they were established during the same time period as the dwellings.

*Criterion met.*

5. **(5) The amount of land devoted to the use; and**

**Staff:** The amount of land devoted to the two dwellings and subject accessory structures has not changed since establishment.

*Criterion met.*

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

**Staff:** There are no other applicable factors of the residential use of the dwellings and accessory buildings that require review than those already detailed above.

7. **(7) A reduction of scope or intensity of any part of the use as determined under this subsection (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:** Use of dwellings and residential structures are not considered to change scope or intensity due to the nature of residential uses - unlike commercial or industrial uses which see cyclical trends based on the economy. Residents living in dwellings use dwellings the same way as other residents who may later move in. The applicant has demonstrated through rental agreements (Exhibits A.8 through A.18) that there has been no period of discontinuance of the dwellings and accessory structures for a consecutive 2-year period.

*Criterion met.*

C. **(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 two dwellings and the encroachment into the setbacks became non-conforming with the adoption of the County's first zoning and building codes in 1955. Evidence currently in the record demonstrates that the dwellings and subject accessory structures were established prior to the adoption of the 1955 zoning codes. Since there

were no setback requirements or limitations on the number of dwellings when the homes and accessory structures were built, they were lawfully established.

*Criterion met.*

- D. **(D) Except for nonconforming uses considered under MCC 36.7214 (B), the Planning Director may impose conditions to any verification of nonconforming use status to insure compliance with said verification.**

**Staff:** No conditions are necessary for the applicants/owners to use the two dwellings as residences and for the encroachment into the setbacks by the 1947 dwelling and associated accessory building. Conditions are provided to bring the site into compliance with access requirements.

*Criterion met.*

- E. **(E) An applicant may prove the continuity, nature and extent of the nonconforming use only for the 10-year period immediately preceding the date of application. Evidence proving the continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application. Evidence proving the continuity, nature and extent of the use for the 10-year period preceding application does not create a rebuttable presumption that the use lawfully existed at the time the applicable zoning ordinance or regulation was adopted.**

**Staff:** The applicant has provided rental agreements for the second dwelling dating back to 1997. During that time period there was not a 2-year period of continuous non-use. As such, the second dwelling has maintained its non-conforming status. An air photo from 1977 shows the encroachment of the dwelling and accessory buildings into the required setbacks. Current air photos show the structures have not changed since that time period and demonstrates the required continuity under this standard.

*Criterion met.*

#### **4.00 Lot of Record:**

**MCC Lot of Record – Subject to additional provisions within each Zoning District, a Lot of Record is a parcel, lot, or a group thereof that, when created or reconfigured, (a) satisfied all applicable zoning laws and (b) satisfied all applicable land division laws, or (c) complies with the criteria for the creation of new lots or parcels described in MCC 36.7785. 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.

\* \* \*

#### **MCC 36.3470 LOT OF RECORD.**

(A) In addition to the definition standards for a Lot of Record, for the purposes of this district the significant dates and ordinances for verifying zoning compliance may include, but are not limited to, the following:

- (1) July 10, 1958, SR and R zones applied;
- (2) July 10, 1958, F-2 zone applied;
- (3) December 9, 1975, F-2 minimum lot size increased, Ord. 115 & 116;
- (4) October 6, 1977, RC zone applied, Ord. 148 & 149;
- (5) October 13, 1983, zone change to RC for some properties, Ord. 395;



**(6) May 16, 2002, Lot of Record section amended, Ord. 982**

**(B) A Lot of Record which has less than the minimum lot size for new parcels or lots, less than the front lot line minimums required, or which does not meet the access requirement of MCC 36.3485, may be occupied by any allowed use, review use or conditional use when in compliance with the other requirements of this district.**

**(C) Except as otherwise provided by MCC 36.3460, 36.3475, and 36.3400 through 36.3460, no sale or conveyance of any portion of a lot, other than for a public purpose, shall leave a structure on the remainder of the lot with less than the minimum lot or yard requirements or result in a lot of less than the area or width requirements of this district.**

**(D) The following shall not be deemed to be a Lot of Record:**

**(1) An area of land described as a tax lot solely for assessment and taxation purposes;**

**(2) An area of land created by the foreclosure of a security interest.**

**(3) An area of land created by court decree.**

**Staff:** The applicants provided a deed recorded on July 16, 1974 (Exhibit A.3) describing the property in its current configuration. At that time, the property was zoned R-10. The R-10 zoning district required a 10,000 square foot minimum lot size, 50-feet of road frontage, and access to a public road. The subject property satisfied all the R-10 zoning requirements.

In 1974 there were no partition requirements for the creation of three or fewer parcels in a calendar year. As such, the creation of the property did not require a land division review.

Based on the above facts and evidence, the subject parcel is a Lot of Record.

*Criteria met.*

**5.00 Conclusion:**

Based on the findings and other information provided above, the applicant has carried the burden necessary to demonstrate the two dwellings are lawfully established non-conforming uses. Additionally, the applicant has demonstrated that the encroachment into the setbacks by the 1947 dwelling, its associated accessory structure, and the accessory structure on the southern property line was lawfully established prior to the adoption of zoning and building regulations.

## 6.00 Exhibits

‘A’ Applicant’s Exhibits

‘B’ Staff Exhibits

Exhibits with a “\*” after the exhibit # have been included as part of the mailed decision. All other exhibits are available for review in Case File T2-2013-3213 at the Land Use Planning office.

Exhibit #	# of Pages	Applicant Exhibits
A.1	1	General Application Form
A.2	1	December 13, 2013 Narrative
A.3	2	Deed Recorded on July 16, 1974 in Book 996, Pages 1936-1937 Creating the Parcel
A.4*	1	December 13, 2013 Site Plan
A.5	1	Air Photo Printed October 23, 2013
A.6	1	Applicant’s Photo of 1947 Dwelling and Accessory Building Encroaching Into the Right-of-Way and Unauthorized Driveway in the Right-of-Way
A.7	1	Applicant’s Air Photo of Property From 1985
A.8	1	Index of Rental Agreements
A.9	1	Lease to Mike and Tonya LaFollette, November 2011
A.10	8	Lease to Mathew and Taylor Ives, March 2010
A.11	1	Lease to William Pinard, November 2010
A.12	7	Lease to Robert and Rosemarie O’Donnell, September 2009
A.13	7	Lease to Pamela Edwards, December 2008
A.14	6	Lease to Denice Thompson and Hanna Gore, July 2008
A.15	1	Lease to Leanne Stewart, January 2006
A.16	1	Lease to Cory and April Anderson, September 2004
A.17	1	Lease to Kourtney and Lysha Wasser, December 2003
A.18	1	Lease to Ann and Jeanette Frommelt, August 1997
‘B’	#	Staff Exhibits
B.1	2	A&T Property Information
B.2	1	A&T Tax Map with Property Highlighted
B.3	1	January 10, 2014 Complete Letter
B.4	5	Opportunity to Comment Mailed January 27, 2014 and Mailing List
B.5	1	1977 Air Photo
B.6	1	1962 Zoning Map Depicting Zoning Adopted in 1955
B.7	1	September 30, 1996 Access Permit for Horseshoe Driveway

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20.5 Feet

1 IN = 30 FEET

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PLANNING SECTION

