Department of Community Services
Land Use Planning Division
www.multco.us/landuse

Multnomah County

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HEARINGS OFFICER DECISION

Request for a Variance to reduce the Forest Practices Setback and Forest Development Standards Review

Case File: T3-2017-7160
Applicant: David Brannon
Property Owners: David Brannon and Philip Nemer
Location: 6700 NW Thompson Road
Tax Lot 500, Section 25, Township 1 North, Range 1 West, W.M.
Tax Account #R961250850
Base Zone: Commercial Forest Use – 2 (CFU-2)
Overlay Zones: Significant Environmental Concern for Wildlife Habitat (SEC-h)
Significant Environmental Concern for Wildlife Streams (SEC-s)
Hillside Development and Erosion Control (HD)

Summary of Decision: A determination of compliance with the Forest Development Standards is denied but the variance to the Forest Practices Setback is approved. The request for a determination that the existing structure conforms to the Fire Safety Zone is denied

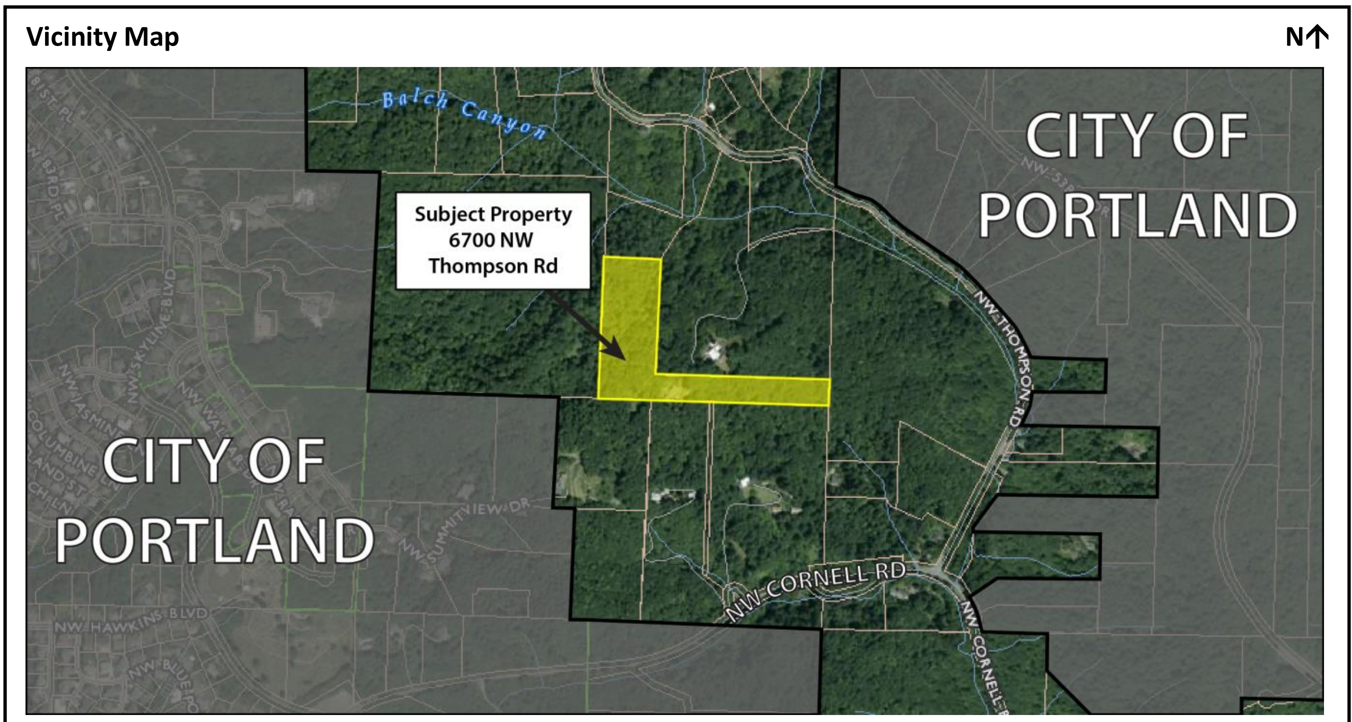
Findings and Conclusions: Except where identified as "Hearings Officer", this decision adopts the findings and conclusions in the Staff Report, with minor edits.

Applicable Approval Criteria:
Multnomah County Code (MCC): MCC 37.0560 Code Compliance and Applications, MCC 36.0005 Definitions, Commercial Forest Use, CFU-2: MCC 33.3120 Allowed Uses, MCC 33.2250 Building Height Requirements, MCC 33.2256 Forest Practice Setbacks and Fire Safety Zones, MCC 33.2261 Development Standards for Dwellings and Structures, MCC 33.2273 Access, MCC 33.2275 Lot of Record; Adjustments and Variances: MCC 33.7606 Scope, MCC 33.7616 Variance Approval Criteria.

Hearings Officer: A public hearing was conducted on October 13, 2017. I provided the parties with the required notices. I indicated that I had no ex parte contacts or conflicts related to the application. I asked for but received no procedural or other objections. The applicants were represented by Christopher P. Koback. Katherine Thomas, Asst. County Attorney appeared with staff. The Weary's appeared through their counsel, Robert Callahan. At the conclusion of the hearing I informed the parties of the right to a continuance but no such request was received. See attached Exhibit List.

1.00 Project Description:

Staff: The applicant is seeking a variance request for the reduction of the Forest Practices Setback and a review of Forest Development Standards for the retroactive approval of an addition to an existing single-family dwelling in the Commercial Forest Use – 2 (CFU-2) zoning district.



2.00 Property Description & History:

Staff: The subject property is 9.6 acres and is located south of Thompson Road in West Hills Rural Area. Shaped like an "L", the property is zoned Commercial Forest Use – 2 (CFU-2) and has three overlays. The Significant Environmental Concern for Wildlife Habitat (SEC-h) overlay covers the entire property; the Significant Environmental Concern for Streams (SEC-s) covers a portion of the northwest of the property, and a Hillside Development and Erosion Control (HD) overlay that covers a portion of the west and east of the property. The property is primarily comprised of dense wooded and forested areas.

According to the Department of Assessment, Records, and Taxation (DART), the property currently contains these improvements:

- Single-Family Residence
- Deck
- Attached Garage
- Detached Garage (no building permits or County review)
- Detached Room (no building permits or County review)

The single-family dwelling was established in 1968. In 1995, an addition to the single-family dwelling and minor modifications to the driveway/garage access were reviewed and approved. The addition was to the rear of the house and the modifications were to create a parking slab to the southwest of the single-family dwelling. At some point between 1998 and 2002, a detached garage and detached room were built on top of a previously permitted paved parking area (DART has them listed as detached due to their location in proximity to the single-family dwelling and attached garage. The detached garage and detached room are actually attached to the single-family residence and attached garage). Based on the information provided by the applicant and records from the County, no building permits or County review was completed to authorize the construction of the detached garage and detached room. Below are the land use and building permits that are on record for the subject property:

- LE 15-92 – Lot of Exception creating the subject property

- HDP 2-95 – Hillside Development Permit for grading work associated with an addition to an existing single-family dwelling and minor modifications to the driveway/garage access

In 2010, a compliance case, UR-2010-847 was opened relating to work that was done between 1998 and 2002. The County was unable to locate any building permits or County review to authorize the construction of the garage and room. There has been extensive communication between the applicant and the County since the compliance case was opened. If approved, this application would continue moving the property towards full compliance.

Hearings Officer: The applicant notes that the applicant's partner, Kenneth Suid acquired the property in 2000 from Dr. Baldwin. Although he was "somewhat involved" in the transaction, the applicant first acquired an ownership interest in 2004 and full ownership in 2008. Philip Nemer was added to the deed in 2016. The applicant contends that the "detached" structure was "seamlessly" integrated into the dwelling during Dr. Baldwin's ownership. Staff concurs that the structures are attached.

3.00 Code Compliance Criteria:

3.01 § 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.

(B) For the purposes of this section, Public Safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger the life, health, personal property, or safety of the residents or public. Examples of that situation include but are not limited to issuance of permits to replace faulty electrical wiring; repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel, or power; and actions necessary to stop earth slope failures.

Staff: The subject property has an open compliance case, UR-2010-847. The compliance case relates to an addition that was added to south side of the home without permits or approvals and may encroach on or cross the southern property line. Subsequently, based on information provided to the County on April 1, 2014, a survey was sent to the County that was completed by Chase, Jones, and Associates Inc. on July 14, 2010 (see Exhibit B.6) that shows that the single-family dwelling as it exists today is .21 feet north of the south property line and not encroaching on or cross the southern property line. The applicant seeks to resolve this issue through the submittal of this application. A Voluntary Compliance Agreement is in place to sequence the remaining additional permits and processes to bring the property into full compliance (Exhibit B.8). If approved, the hearings officer can include a condition of approval requiring the remaining components of the Voluntary Compliance Agreement to be executed to ensure full compliance for the properties.

Hearings Officer: The applicant suggests that Dr. Baldwin likely relied on a prior survey showing that the setbacks were met and that it is possible that the Chase survey is not accurate, although under either

survey there is no encroachment on the neighboring parcel. Robert Callahan, counsel for the Weary's (adjacent owners to the south) thinks that the Chase survey is inaccurate and contends that the structure at issue does encroach on his client's property. (Exhibit H-1). No one has produced another survey or articulated any specific problem with the Chase survey and it is the only evidence of the true property line. Accordingly, I will rely on it in my analysis.

4.00 Lot of Record Criteria:

4.01 § 33.0005 DEFINITIONS.
§ 33.2275 LOT OF RECORD

Staff: The subject property was found to be a Lot of Record in land use case, LE 15-92. The current Bargain Sale Deed recorded as instrument number 2016-065283 on May 31, 2016 matches the description from land use case, LE 15-92 (Exhibit B.4). Therefore, the property, tax lot 500, Section 25, Township 1 North, Range 1 West, W.M. satisfied all applicable zoning laws and applicable land division laws at the time the property was created or reconfigured to be a Lot of Record. *These criteria are met.*

5.00 Commercial Forest Use – 2 Criteria:

5.01 § 33.2220 ALLOWED USES

(D) Alteration, maintenance, replacement or restoration of an existing lawfully established habitable dwelling as defined in MCC 33.0005 and located within 100-feet from an existing dwelling.

Staff: The applicant is requesting retroactive approval of an alteration to an existing lawfully established habitable dwelling. Alteration of dwellings may only be permitted based on the provisions above, in addition to demonstration that the alteration meets Building Height Requirements (MCC 33.2250), Forest Practice Setbacks and Fire Safety Zones (MCC 33.2256), and Development Standards for Dwellings and Structures (MCC 33.2261). Below provides an analysis of the standard above that is needed to make a determination that the County can entertain this application.

Initially in 1968, a building permit was issued and finaled in 1975, which established the single-family dwelling and attached double garage (Exhibit A.5). When the original building permit was issued, the zoning for this property was Single Family Residential (R-20). Subsequently in 1973, a building permit was issued for a shed (Exhibit A.5). Then in 1995, a Hillside Development Permit was applied for and approved for grading work associated with an addition to southeastern portion the existing single-family dwelling and minor modifications to the driveway/garage access to the southwest of the house (Exhibit A.7). The site plan that was submitted indicates that the dwelling was located 33 feet from the southern property line (Exhibit A.7). There is sufficient evidence that the dwelling that was established in 1968 and altered in 1995 was a lawfully established habitable dwelling and was eligible to be further altered.

After 1995, the single-family dwelling was further altered without building permits or land use approval. Based on aerial photography, between 1998 and 2000, the area labeled as a "new parking slab" in the site plan for HD 2-95 was built upon and a new addition to the single-family dwelling was placed on the slab (Exhibit B.5). There are no land use approvals or building permits on file that were issued for this alteration. The applicant's narrative and photographs of the addition indicate that the addition was originally constructed to house a recreation vehicle and contain a loft area with a bathroom and a small kitchen (Exhibit A.14).

Hearings Officer: Staff's position is that the dwelling as it exists today does not meet the Code in three particulars: a) it constitutes a two-dwelling unit as it has a kitchen and bathroom. Two-unit dwellings are not permitted; b) it does not conform to the minimum Forest Safety Zone (FSZ) and c) does not conform to the Forest Practices Setback (FPS). The applicant states that it does not use, or intend to use, the addition as a dwelling unit and is amenable to removing kitchen fixtures and recording a

covenant prohibiting such occupancy. Accordingly, that issue is not an obstacle to resolving the alleged code compliance issues.

5.02 § 33.2250 BUILDING HEIGHT REQUIREMENTS

(A) Maximum structure height – 35 feet.
(B) Structures such as barns, silos, windmills, antennae, chimneys, or similar structures may exceed the height requirements.

Staff: The addition is two stories tall and it would appear that the photographs provided by the applicant shows that the addition is less than 35 feet. However, to ensure compliance with this requirement a condition will be required that the applicant provide plans and drawing showing the height of the addition. As conditioned, these criteria are met.

5.03 § 33.2256 FOREST PRACTICES SETBACKS AND FIRE SAFETY ZONES

The Forest Practice Setbacks and applicability of the Fire Safety Zones is based upon existing conditions, deviations are allowed through the exception process and the nature and location of the proposed use. The following requirements apply to all structures as specified:

Use	Forest Practice Setbacks			Fire Safety Zones
Description of use and location	Nonconforming Setbacks	Front Property Line Adjacent to County Maintained Road (feet)	All Other Setbacks (feet)	Fire Safety Zone Requirements (FSZ)
Replaced or restored dwelling in same location & greater than 400 sq. ft. additional ground coverage; Alteration and maintenance of dwelling	May maintain current nonconforming setback(s) if less than 30 ft. to property line	30	30	Primary is required to the extent possible within the existing setbacks

(A) Reductions to a Forest Practices Setback dimension shall only be allowed pursuant to approval of an adjustment or variance.

(B) Exception to the Secondary Fire Safety Zone shall be pursuant to MCC 33.2310 only. No reduction is permitted for a required Primary Fire Safety Zone through a nonconforming, adjustment or variance process.

…

(D) Fire Safety Zones on the Subject Tract

(1) Primary Fire Safety Zone

(a) A primary fire safety zone is a fire break extending a minimum of 30 feet in all directions around a dwelling or structure. Trees within this safety zone shall be spaced with greater than 15 feet between the crowns. The trees shall also be pruned to remove low branches within 8 feet of the ground as the maturity of the tree and accepted silviculture practices may allow. All other vegetation should be kept less than 2 feet in height.

(b) On lands with 10 percent or greater slope the primary fire safety zone shall be extended down the slope from a dwelling or structure as follows:

Percent Slope	**Distance In Feet**
Less than 10	**No additional required**
Less than 20	**50 additional**
Less than 25	**75 additional**
Less than 40	**100 additional**

(c) The building site must have a slope less than 40 percent

….

(4) Required Primary and Secondary Fire Safety Zones shall be established within the subject tract as required by Table 1 above.

Staff: Based on Table 1 the applicant is required to provide a Primary FSZ to the "extent possible". When applying this standard, staff cannot view the unpermitted addition as being legitimate, instead we must review the proposal as if the addition is not there and being proposed today. This results in the need to provide an 18-foot setback and a corresponding 18-foot Primary FSZ within the subject tract. As discussed above, approval of the requested variance to the Forest Practices Setback does not alleviate the applicant from the need to comply with the Primary FSV, which cannot be varied or adjusted. This criterion is not met.

Hearings Officer: The County did not have the Forest Practices Setbacks and Fire Safety Zones when either the original dwelling was approved in 1968 or the parking slab was approved in 1995. The Code, however, had a 30' setback. It appears that Dr. Baldwin and the County thought that the dwelling was 33' from the boundary line. The application for the approved 1995 modification included a site plan showing the dwelling to be 33' from the south property line. The Chase survey now shows the setback from the originally approved dwelling was, in fact, 18'. The County, however, issued approvals for both the original dwelling and the parking slab and, therefore, does not contend that either – as approved – is unlawful. The later conversion to dwelling space, however, was done with no approvals or permits. The Chase survey indicates that the addition, as modified, is only .21 feet from the property line. Staff contends that current development standards apply to the addition because it was not lawful when constructed. The addition is approximately 624 square feet. Accordingly, the applicant is required to maintain the lawful nonconforming Forest Practice Setback of 18' from the south property line and that 18' is the "extent possible within existing setbacks" for the Fire Safety Zone. There is no setback issue with any other property line.

The applicant contends that the 1995 site plan, including a rather cryptic reference to a survey, establishes that the addition is 30' from the south property line. As noted above, the current Chase survey is the most credible evidence of the location of the structure and the property lines. Applicant's contention is rejected. The applicant also argues that it has acquired at least 30' of the Weary property through adverse possession. The Weary's do not concede that point and there has been no judgment awarding the property to the applicant. I am aware of no authority granting me, as opposed to the Circuit Court, authority to adjudicate ownership disputes. This contention also is rejected.

The applicant contends that staff has misread or misapplied the Code in two respects. First, the applicant notes that Section 33.2256 states that the "Forest Practices Setbacks and applicability of the Fire Safety Zones is based upon *existing conditions*…." (Emphasis Added) Second, the Fire Safety Zone requirement states that the primary is required "to the extent possible within existing setbacks". The "existing condition" is that the unpermitted addition is located approximately .21' from the property line. This is the "existing setback". Thus, the structure, *ipso facto*, meets the setback requirement. He notes that the code does not say something like "lawfully established setback".

The County argues that the purpose of the "existing conditions" language was to avoid creating nonconforming structures throughout the County if the Code setback requirements were to change. It

relates to the language regarding current nonconforming setbacks in Table 1. The County notes that Section 33.2256 refers to the "location of the *proposed* use" and to nonconforming structures, not to existing unlawful structures. (Emphasis added) The terms existing conditions and existing setbacks must be read in the context of lawfully established structures.

The applicant argues that the literal plain text supports its position. The County's reading, he asserts, requires the impermissible insertion of language. The first level of statutory interpretation, however, includes the context in which the disputed language appears. Courts will not read passages in isolation as doing so is contrary to the objective of discerning the legislative intent. *See e.g., State v Gaines*, 346 Or 160, 206 P3d 1042 (2009). The language cited by the County clearly is context that must be considered. As regards the Forest Practices Setback, the use may maintain "current nonconforming setbacks." MCC 33.0005 defines a "nonconforming use" as a "legally established" use, structure or physical improvement. The addition at issue was not legally established. Thus, the exception is inapplicable.

The primary FSZ "is a fire break extending a minimum of 30 feet …around a dwelling or structure." MCC 33.2056 (D) (1). No reduction is permitted through a nonconforming, adjustment or variance. MCC 33.2056 (B). It clearly is a public safety standard with the only flexibility being afforded through application of Table I, i.e. "required to the extent possible within the existing setbacks" for a replaced or restored dwelling or an addition to an existing structure. This contrasts with, and the applicant contends is broader than, the "maintain current nonconforming setbacks" language for the FSP. In other words, had the County intended it to be limited to nonconforming setbacks it would have used the same language.

The reference to "existing conditions" in MCC 33.2256 is, at least in part, a recognition that the FPS and FSZ can vary depending on how close the structures are to each other and the slope of the property. The applicant would extend this to the location of a structure even if the structure is illegal. The definition of "setback" indirectly provides some guidance. It states that, in the context of public safety, it is a "requirement" as opposed to a physical condition. MCC 33.0005.

Neither the applicant nor the County's reading is entirely satisfactory. Ultimately, the answer falls back on the original intent or how the Board of Commissioners likely would construe the language. The County points out that the applicant's reading means that the setback essentially becomes whatever the property owner decides because the property owner simply could construct an unpermitted structure, which then becomes the "existing condition/setback". It rewards failure to obtain required permits. The applicant responds that the application of its interpretation could be limited to circumstances, such as the present case, where the applicant appears blameless and arguably had no reasonable way to learn of the violation prior to purchasing the property. The problem is that there is no Code language supporting such a distinction. It would require the insertion of much more speculative language than the County's insertion of "lawful" that the applicant contends is impermissible. Ultimately, I do not think that it is a great stretch to conclude that, absent language to the contrary, the Code presumes that setbacks and other criteria are based on lawful structures and uses.

The applicant next argues that he meets the FSZ and FPS minimums because the Weary property is subject to a "Private Utility Easement" benefitting the subject property. The easement was granted to the Baldwin's in 1997, for the purpose of accessing and maintaining the septic system drain field that serves the residence on the subject property. It measures 60 by 70 feet. Ex. A.15 The applicant asserts that this creates an "effective setback" extending 60' south of the property line.

The County asserts that the Code does not permit the use of an easement to satisfy either the FSZ or the FPS. The parties concede that nothing in MCC 33.2256 expressly allows or prohibits use of an easement. The County cites to easement references elsewhere in the Code for the proposition that the County knows how to specify when use of an easement is permitted and that, failure to do so here, means an

easement is not acceptable. The applicant, however, correctly notes that those references are outside the context of MCC 33.2256 so are only marginally relevant at best.

MCC 33.2256(D) (4) states that required Primary Fire Safety Zones "shall be established within the subject tract". A "tract" is one or more contiguous Lots of Record in the same ownership. MCC 33.2210. A "Lot of Record" consists of one or more "parcels" or "lots". MCC 33.0005, 33.2275. The Code recognizes that the terms lot and parcel may be used interchangeably and "Lot Lines" are defined as "the lines bounding a lot." MCC 33.0005. "Easement" is not defined by the Code but has been held to be a "nonpossessory interest in the land of another than entitles the owner of the interest to a limited use or enjoyment of the other's land." *See, Luckey v. Deatsman*, 217 Or 628, 634, 343 P2d 723 (1959). It is clear, therefore, that an easement does not satisfy the FSZ.

I am not aware of similar language regarding the FPS. A setback most commonly is measured from a property line, but the definition at MCC 33.0005 suggests that in some cases it may be between buildings or between a structure and a natural feature. The definition of Forest Practices Setback, however, is a type of dimensional setback "that provides for separation between structures and property lines". MCC 33.0005. So although perhaps less clear, it appears to preclude an easement that extends beyond the property line.

Even if an easement is a permitted option, the applicant would have to demonstrate that the easement fulfills the same function as the FPS/FSZ. The easement does not purport to be anything other than an easement for a septic drainfield. Presumably the applicant may go on the property for septic line maintenance and the grantors expressly are precluded from taking actions detrimental to the system. The applicant asserts that no trees are permitted over a drainfield. The Weary's assert that trees are permitted and exist in the area today. The applicant cites no administrative rule and provides no expert testimony in support of its assertion. I cannot conclude that it fulfills the purpose of the FSZ. Further, to the extent the easement precludes commercial forestry in the easement area it appears to be contrary to the purpose of the FPS which is to permit forestry practices to occur on adjacent properties without interference.

I find that the application fails to conform to the Forest Practices Setback and the Fire Safety Zone standards. The applicant also has filed for a variance. As noted, MCC 33.2256(B) expressly prohibits a variance to the FSZ. Accordingly, the application must be denied. I will, however, address the variance request in the event that my conclusion regarding MCC 33.2256 is overturned or the issue otherwise is resolved.

(C) The minimum forest practices setback requirement shall be increased where the setback abuts a street having insufficient right-of-way width to serve the area. The county Road Official shall determine the necessary right-of-way widths based upon the county "Design and Construction Manual" and the Planning Director shall determine any additional setback requirements in consultation with the Road Official.

Staff: Multnomah County Transportation Division has reviewed the project and it has been determined that the public right-of-way is sufficient; therefore, the forest practices setback does not need to be increased (Exhibit B.7). This criterion is met.

(2) Secondary Fire Safety Zone

A secondary fire safety zone is a fire break extending a minimum of 100 feet in all directions around the primary safety zone. The goal of this safety zone is to reduce fuels so that the overall intensity of any wildfire is lessened. Vegetation should be pruned and spaced so that fire will not spread between crowns of trees. Small trees and brush growing underneath larger trees should be removed to prevent the spread of fire up into the crowns of the larger trees. Assistance with planning forestry practices which meet these objectives may be obtained from the State of Oregon Department of Forestry or the

local Rural Fire Protection District. The secondary fire safety zone required for any dwelling or structure may be reduced under the provisions of 33.2310.

Staff: As required in Table 1 of MCC 33.2256, a Secondary Fire Safety zone is not required for an addition; therefore, this requirement is not applicable. This criterion is met.

(3) No requirement in (1) or (2) above may restrict or contradict a forest management plan approved by the State of Oregon Department of Forestry pursuant to the State Forest Practice Rules; and

Staff: The applicant has not indicated that a forest management plan approved by the State of Oregon Department of Forestry is currently being conducted on the property and dwellings are allowed to be maintained pursuant to State Forest Practice Rules. This criterion is met.

(4) Required Primary and Secondary Fire Safety Zones shall be established within the subject tract as required by Table I above. (See discussion above)

(5) Required Primary and Secondary Fire Safety Zones shall be maintained by the property owner in compliance with the above criteria listed under (1) and (2).

Staff: If the requested application is approved, this criterion can be met with a condition.

5.04 § 33.2261 DEVELOPMENT STANDARDS FOR DWELLINGS AND STRUCTURES

All dwellings and structures shall comply with the approval criteria in (B) through (D) below except as provided in (A). All exterior lighting shall comply with MCC 33.0570:

(A) For the uses listed in this subsection, the applicable development standards are limited as follows:

(b) Expansion of more than 400 square feet additional ground coverage to an existing dwelling: Shall meet the development standards of MCC 33.2261(C);

(C) The dwelling or structure shall:

(1) Comply with the standards of the applicable building code or as prescribed in ORS 446.002 through 446.200 relating to mobile homes;

(2) If a mobile home, have a minimum floor area of 600 square feet and be attached to a foundation for which a building permit has been obtained;

(3) Have a fire retardant roof; and

(4) Have a spark arrester on each chimney.

Staff: Because of the addition was never reviewed by County Staff or the City of Portland Building Official, a condition will be required that the applicant provide plans for review to ensure compliance with these standards. *If the requested application is approved, this criterion can be met with a condition.*

5.05 § 33.2273 ACCESS

All lots and parcels in this district shall abut a public street or shall have other access deemed by the approval authority to be safe and convenient for pedestrians and for passenger and emergency vehicles. This access requirement does not apply to a pre-existing lot and parcel that constitutes a Lot of Record described in MCC 33.2275(C).

Staff: The parcel does not abut a public road; however, as part of the land use case, LE 15-92, staff found that the site was served by a long driveway easement, which travels over the other two proposed lots.

Additionally, the Right-of-Way Department reviewed the access on March 17, 1995 and was signed off by Alan Young, Right-of-Way Specialist. This criterion is met.

6.00 Variance Criteria

6.01 § 33.7606 SCOPE

(B) Dimensional standards that may be modified under a Variance review are yards, setbacks, forest practices setbacks, buffers, minimum front lot line length, building height, sign height, flag lot pole width, cul-de-sac length, cul-de-sac turnaround radius, and dimensions of a private street, except the following: …

(2) Modification of fire safety zone standards given in Commercial Forest Use districts; and

(C) The dimensional standards listed in (A) and (B) above are the only standards eligible for Adjustment or Variance under these provisions. Adjustments and Variances are not allowed for any other standard including, but not limited to, minimum lot area, modification of a threshold of review (e.g. cubic yards for a Large Fill), modification of a definition (e.g. 30 inches of unobstructed open space in the definition of yard), modification of an allowed density in a Planned Development or houseboat moorage, or to allow a land use that is not allowed by the Zoning District.

Staff: The applicant is requesting a variance to reduce the 30-foot Forest Practice Setback requirement listed under MCC 33.2256 Table 1. The existing single-family dwelling that was established prior to the construction of the addition is 18 feet from the southern property line based on the survey provided on April 1, 2014, that was done by Chase, Jones, and Associates Inc. on July 14, 2010 (Exhibit B.6). The applicant is requesting a variance to reduce the Forest Practice Setback. The ability to adjust or vary the Primary FSV is specifically precluded by MCC 33.2256(B); furthermore, the ability to reduce the FSZ is not permitted MCC 33.7606(B) (2) above. It is possible to reduce Forest Practices Setback, if approved this will not reduce the Primary FSZ. The scope of the request is limited to review of the Forest Practices Setback.

6.02 § 33.7616 VARIANCE APPROVAL CRITERIA

The Approval Authority may permit and authorize a variance from the dimensional standards given in MCC 33.7606 upon finding that all the following standards in (A) through (F) are met:
…
(B) The circumstance or condition in (A) above that is found to satisfy the approval criteria is not of the applicant's or present property owner's making and does not result solely from personal circumstances of the applicant or property owner. Personal circumstances include, but are not limited to, financial circumstances.

Hearings Officer: I am taking the standards out of order because I think (B) is relevant to the disagreement regarding how to apply the criteria. Staff argues that the variance criteria must be applied as if the addition does not exist because it received no permits or approvals. In other words, the applicant must meet the variance criteria as if he were applying to construct the addition, not to legalize it. The County correctly is concerned that taking the unlawful addition into account may encourage violations by permitting violators to use the existence of an unpermitted structure to justify a variance or to "launder" the violation by selling the property.

The applicant notes that nothing in the language expressly requires this approach. Further (B) states that the condition giving rise to the variance request "is not of *the applicant's or present property owner's making* and does not result solely from personal circumstances of the applicant or property owner." (Emphasis added) It is clear that the improper acts of a predecessor are not imputed to the applicant. This suggests that the variance criteria may be read as an avenue to relieve a current applicant of a condition not of his/her making, i.e. one that currently exists. The criteria must be read

together in a consistent manner. It seems to absolve the current owner from the prior owner's acts for one criterion but hand but require him to stand in the shoes of the prior owner for the others.

In this respect, the Code is less proscriptive that the code in *Doyle v Coos County*, 51 Or LUBA 402 (2006) in which LUBA upheld an interpretation establishing an exception to the "self-inflicted" prohibition because the applicant relied on advice from staff. The law relating to variances is a mix of common law and code provisions, but I found nothing prohibiting consideration of the existence of an unpermitted structure. *See generally*, *Walker v. Josephine County,* 46 Or LUBA 777 (2004) (LUBA sustained an objection to a variance where the property owner purchased the property knowing that the property that he knew did not meet the minimum area requirements because of the actions of his predecessor. LUBA did not find that this was a self-imposed hardship as a matter of law; rather the County had not adequately explained why it was other than a self-imposed hardship.) *Cf. Gionet v City of Tualatin,* 30 Or LUBA 96 (1995) (Code expressly included actions of the previous owner as "self-imposed".)

The County's concern largely is addressed by the fact that any collusion between the prior owner and the applicant, or the applicant's failure to perform at least reasonable due diligence, likely would support a conclusion that the need for the variance is of the applicant's own making or arises from his personal circumstances. In the present case, there is no contention that the applicant, or his partner, knew of the violation. Indeed, staff concluded that the circumstances are not of the applicant's making.

Nor does the application result solely from the applicant's personal circumstances. Any current owner would be faced with the need to obtain a variance to correct the violation.

The Weary's contend that no reasonable person would purchase forest land in an urban setting without first obtaining a survey. While obtaining a survey might be prudent, I am not convinced that failure to do so rises to the level of the problem being of the applicant's making in this case. The County and the prior owner apparently relied on a professionally prepared site plan showing the approved dwelling to be 33' from the property line in approving the 1995 addition and the "new parking slab". The applicant also produced information from the realtor stating that a survey was done. (Exhibit A.8). It appears that the applicant did not research the building permit records for the property. Rather he relied on the statements of the prior owner and the assumption that the improvements at issue were done as part of the 1995 work. Ordinarily, not reviewing the building permit records likely would be a failure to exercise due diligence sufficient to attribute the problem to the applicant's making. In this case, however, the applicant notes that the nature of the work and its integration into the structure made it reasonable to assume that the work was part of the 1995 project. It is not clear that the applicant would have reached any different conclusion had it reviewed the building permit records. Further, the lack of a building permit is only tangentially related to the improper location of the structure and it may well be that the County would have relied on the 1995 site plan in reviewing a subsequent building permit application.

I conclude that the Code does not require that the existence of the structure be excluded from consideration in addressing the variance criteria. This criterion is met.

(A) A circumstance or condition applies to the property or to the intended use that does not apply generally to other property in the same vicinity or zoning district. The circumstance or condition may relate to:

(1) The size, shape, natural features and topography of the property, or

(2) The location or size of existing physical improvements on the site, or

(3) The nature of the use compared to surrounding uses, or

(4) The zoning requirement would substantially restrict the use of the subject property to a greater degree than it restricts other properties in the vicinity or district, or

(5) A circumstance or condition that was not anticipated at the time the Code requirement was adopted.

(6) The list of examples in (1) through (5) above shall not limit the consideration of other circumstances or conditions in the application of these approval criteria.

Hearings Officer: At the hearing the applicant submitted new photos and testimony addressing these criteria. (Exhibits H.2-4) He asserts that the property primarily is quite steep with few flat spots and the topographical evidence suggests that that largely is true. He contends that locating the addition in front of the dwelling would violate the front yard setback standards. Locating it at the northwest would interfere with a shared access driveway. Similarly, the area to the west has an existing water line that serves two properties.

As this information was presented at the hearing, staff had little opportunity to respond. Staff indicates that the need to move a water line or constructing a retaining wall is not that unusual and ordinarily would support a variance. Staff states that the survey (Exhibit B.6) suggests that there is ample room but I note that it contains no topographical information.

It would have been helpful, for example, to have a letter or testimony from a builder or engineer. It is not clear why the existing turnaround could not have been used, or perhaps the "new deck" area. (Exhibit A.7.) There is no information about the feasibility or cost of relocating the water line or constructing a retaining wall.

It does appear, however, that the addition was fully integrated into the dwelling. The uncontroverted testimony is that it is tied in with joists running into the dwelling. There is a hallway connecting them. So the location and nature of the improvement weighs in favor of the applicant. Staff notes that it is not uncommon for structures to be built without permits and, therefore, this is not a unique situation. But the Code does not require the situation to be unique, only one that does not apply generally to other properties. The history of this property including the apparently erroneous issuance of prior permits and the representations of the prior owner and owner's agents, likely is unusual. The septic drainfield easement also is an unusual feature that is relevant as discussed below. The facts and circumstances that led to the need for a variance appear to be quite atypical. I find that, under these specific facts, this criterion is met.

(C) There is practical difficulty or unnecessary hardship to the property owner in the application of the dimensional standard.

Hearings Officer: The uncontroverted testimony is that it would be very expensive and difficult to remove the addition, including substantial repairs or modifications to the approved portion of the structure. Based on my interpretation as of the Code as discussed above, this criterion is met.

(D) The authorization of the variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or zoning district in which the property is located, or adversely affects the appropriate development of adjoining properties.

Staff: The property to the south contains a dwelling that is located approximately 500 feet to the south. Between the two dwellings is a forested area. Additionally, the applicant has an easement that extends 60 feet south of the southern property line that is cleared of brush and maintained by the property owner as a yard space. The development is located entirely on the subject property as shown in Exhibit B.6 and should not affect the appropriate development of adjoining properties. *This criterion is met.*

Hearings Officer: I concur. To clarify, the easement is not sufficient to satisfy the Fire Safety Zone nor is an easement permissible to satisfy the FSZ or the Forest Practices Setback, but it is relevant to this variance criterion because, as a practical matter for the foreseeable future, the easement appears to preclude commercial forestry on the subservient estate are not covered by the easement; the structure does not interfere with commercial forestry.

(E) The Variance requested is the minimum necessary variation from the Code requirement which would alleviate the difficulty.

Hearings Officer: Based on my reading of the Code that considering the current conditions is permissible, this is the minimum necessary. This criterion is met.

(F) Any impacts resulting from the variance are mitigated to the extent practical. That mitigation may include, but is not limited to, such considerations as provision for adequate light and privacy to adjoining properties, adequate access, and a design that addresses the site topography, significant vegetation, and drainage.

Staff: The impacts resulting from the variance are mitigated to the extent practical. The adjacent neighbor's dwelling is located approximately 500 feet to the south and between the two dwellings is a heavily forested area. The distance between the two dwellings should provide for buffer and forested area and topography should mitigate any impacts from this variance. The existing easement provides a mechanism for the applicant to control vegetation consistent with the intent of the standard sought to be varied. This criterion is met.

7.00 Conclusion

Based on the record and the findings and conclusions above, the application for a determination of compliance with the Forest Development Standards is denied but the variance to the Forest Practices Setback is approved. The request for a determination that the existing structure conforms to the Fire Safety Zone is denied. Staff proposed several conditions of approval should the existing structure be found to be in conformance with the Code. The status or import of the requested conditions is questionable given that the dwelling remains non-compliant. In the event that my denial is overturned or an alternative for legalizing the dwelling is found, the following conditions shall apply to the approval of the FPS variance:

1. The applicant shall comply with the remaining components of the Voluntary Compliance Agreement to ensure full compliance for the property.

2. Either the bathroom or kitchen shall be removed from the addition so that it cannot serve as a second dwelling. The applicant also shall record a covenant, reasonably acceptable to the County, stating that the owner understands and agrees that neither the owners nor their successors shall use or permit use of this portion of the dwelling as a separate dwelling.

3. The applicant shall submit professionally prepared plans and drawings demonstrating that the height of the addition is no more than 35 feet.

4. The owner of the subject property may not relocate or decommission the septic drain field such that the private utility easement terminates or otherwise voluntarily terminate or agree to terminate the private utility easement unless the Forest Practices Setback is satisfied (such as through a lot line adjustment).

5. The applicant shall demonstrate that the addition complies with the standards of Section 33.2261 (C).

Dan R. Olsen

Dan R. Olsen November 9, 2017
Hearings Officer

This decision may be appealed to the Land Use Board of Appeals within 21 days of the date of mailing as provided in MCC 37.0540 and the Oregon Revised Statutes.