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Via Email

Joe Turner
Multnomah County Hearings Officer
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Re: RRV-2024-0004: 18611 Sauvie Island Rd (R971170130), Applicant's Final Legal Argument

Dear Hearings Officer,

This office represents the Applicant in the above-referenced appeal. This letter constitutes our final legal argument in the above-referenced matter.

As the record demonstrates, the County staff in the first open record period proposed conditions of approval under which the Applicant would maintain Access 1 as residential access and Access 2 as agricultural access. In the second open record period, the Applicant responded that it would concur with these offered conditions with minor amendments. (Ex. G.1) The County did not object to the minor amendments. The County did however submit an additional legal argument in the second record period arguing that the County would not have necessarily reviewed the three existing access points during the 1990 lot line adjustment because under the code, the County argues, they could have just determined that the lot had frontage on a street. (Ex. G.2) On this basis, the County seems to argue that the County would not approve the existing second residential access point, either under this application or a future application.

We address the County's legal argument here with a request that the Hearings Officer preserve all three access points, or in the alternative adopt the conditions proposed by the County, as amended by the Applicant, and allow the applicant to proceed with a later Existing Non-Conforming Access (ENCA) application to confirm the legal existence of the third access point.

Under MCRR 4.700(A), "access locations that were previously approved through a prior land use decision but for which there is no record of an access permit having been granted by the County, are accepted as Existing Non-Conforming Accesses (ENCA)." This is a two-part criterion: (1) demonstrate that the access location was previously approved under a prior land use decision; and (2) demonstrate that there is no record of an access permit. If these criteria are satisfied, then the access point is "accepted as an Existing Non-Conforming Access (ENCA)." (Emphasis added). This plain code language does not defer you into another application process. Instead, it plainly states that if you meet these two elements, the access is accepted as an ENCA. As discussed in the hearing, the Road Rules Variance does not even list or require a particular form for an ENCA application.

To confront this language, the County argues that the Multnomah County Code ("MCC") would not have required the County to review the existing access locations at the time it approved the lot line adjustment

Exhibit H.1

in 1990. (Ex. G.2). Instead, the County argues that it would have only determined that the reconfigured lot has street frontage. That conclusion strains reason in these circumstances. The applicable standard in 1990, which the Applicant submitted into the record, was MCC 11.15.2148 that reads:

> "Any lot in this district shall abut a street or shall have other access determined by the approval authority to be safe and convenient for pedestrians and for passenger and emergency vehicles." (Ex. E.3).

First, plainly under this applicable code language, there was no "one access" standard at the time the County approved the land use decision for the lots of exception. The standard in 1990 would have permitted multiple driveways, as is the case here. Second, the 1990 lot line adjustment was not simply a reconfiguration of a lot line between two vacant lots. For vacant lots, the County would have to determine if each reconfigured lot had street frontage that would provide access or other access determined to be safe and convenient. Here, in 1990, there was an existing home on one of the lots with an existing residential circular driveway with two access points, and a single agricultural access point, all of which would have been allowed by the above standard. [Exhibit xx]. The County reviewed the lot line adjustment and the record of survey which shows the existing house and did not prohibit or require removal of the two existing residential driveways or the agricultural driveway. (Ex. E.3). The County approved the lot line adjustment. Thus, the County presumably must have found the application compliant with the criterion.

There is no evidence in the record that suggests the County only looked at the street frontage and ignored existing conditions. Ignoring existing conditions would have been inconsistent with the County's past and current practice of reviewing existing site conditions to determine if the proposed development or application satisfied the applicable criterion.

The County's legal argument does not defeat what actually occurred in 1990. Specifically, there was an access standard that applied to this property at the time of the lot line adjustment, to approve the lot line adjustment the County was required to make a finding that the access conformed to code, in 1990 there were two residential driveways and one agricultural driveway, the code allowed three driveways and the driveways have been in operation from at least 1990 to today.

The Applicant has submitted substantial evidence in record that demonstrates the driveways were in place as early as 1956 and certainly in 1990 and have continued in place without any interruption. (Ex. E.2).

It is unclear whether the photographs presented by the County in Exhibit F.6 are relevant to this legal analysis. The photos seem to show paving improvements in the same driveways over time. (Ex. F.6). The County does not seem to be contesting the existence of the driveways; instead, they seem to highlight without specific measurement, that the driveways were in place but have been

resurfaced over time, as would be expected from continued use over decades and common maintenance that is normal and typical in a residential and agricultural use.

Because the applicant has submitted substantial evidence a reasonable person would rely on to prove the prior existence of the driveways and to prove that they must have been approved as part of a prior land use decision, we are requesting that the County reaffirm the right to continue using the driveways, as they are "accepted as an Existing Non-Conforming Access (ENCA)" under MCRR 4.700(A).

Finally, as we testified at the hearing on this matter, an ENCA is treated as any other accepted non-conforming use. ORS 215.130(5), states that "the lawful use of any … land at the time of the enactment … of any … regulation may be continued." The Road Rules also provide a definition of "non-conforming condition", which references the condition being "present in the public right of way prior to the adoption of these Rules and the DCM (March 23, 2004)." Thus, under ORS 215.130(5), this is a nonconforming condition that existed at the time of adoption of the road rules on March 23, 2004. The two-driveway configuration, and one agricultural driveway, was present in 1956 when the house was constructed, was approved in 1990 under the lot line adjustment and was in place well before the adoption of the road rules in March of 2004. (Ex. E.2 and E.3).

Similarly, under ORS 215.130(11), a nonconforming use of land must only be proven for the 20-year period immediately preceding the date of application. The 20-year period would terminate in or about 2004. Even if you look only to the affidavit of Kristin Ford, the driveways existed in their current configuration when the Fords bought the property back in 1990, well before the 20-year proof window. (Ex. E.2).

ORS 215.130(5) and (11) provide an additional and independent basis to find that these are Existing Nonconforming accesses that are allowed to remain under state statute.

If the Hearings Officer agrees that the two residential access points and the single agricultural access point have been in existence since before 2004 and they have continued in operation with no 2-year interruption, we request that the Hearings Officer approve the three access points.

If the Hearings Officer finds a material flaw in this legal analysis, the requested alternative is to approve Access 1 as continuing residential access and Access 2 as the agricultural access subject to the proposed conditions of approval as amended by the Applicant. Under this alternative, the Applicant would also appreciate recognition by the Hearings Officer that the Applicant will be allowed to proceed with a separate application to request approval of Access 3.

Best regards,

Christe C. White