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3 September 2022

Alan Rappleyea
Hearings Officer
Multnomah County Department of Community Services
Land Use Planning Division
1600 SE 190th Avenue
Portland OR 97233
(503) 988-3043

Re: Appellants' Second Open Record Period - Final Argument
Appeal of Notice of Decision T2-2022-15537 dated June 30, 2022
For an EFU-zoned parcel located at 22140 NW Reeder Rd., Portland OR
(Map, Tax Lot 2N1W04-00900, property ID #R324793)

Dear Mr. Rappleyea,

This office represents the Applicants/Appellants, Angela Schillereff, Nick Rossi, and CS Reeder LLC. Thank you for the opportunity to provide this final argument. We write to address the points raised by staff in their response memorandum dated August 31, 2022 (Exhibit J-1). The Applicants have until September 6th to offer final argument, so this submission is timely.

I. Scope of the Appeal.

In the August 31, 2022 memo (Exhibit J-1), staff argues that the issue of whether an agricultural building approval requires the verification of a Lot of Record is outside the scope of this appeal. That was an unhelpful response.

We must reiterate it was staff – *not* the Applicants - who asserted that an application for an agricultural building approval requires the verification of a Lot of Record. When the Applicants simply requested permission to build a barn, staff insisted that the Applicants file a Lot of Record verification request. This is established by the testimony of Applicant Nick Rossi during the initial hearing as well as the Declaration filed in the Record as Exhibit I-1:

> "We applied to Multnomah County for permission to build a barn. We were told by Planning staff that we needed to file an application for a Lot of Record Verification in order to build a barn, so we did so."

See Declaration of Nick Rossi, Exhibit I-1, page 1, paragraph 3.

That was the *only* reason the Applicants filed a Lot of Record verification request. The Applicants had no interest in such a verification, but staff told them that was the only way to get approval for a barn.

Having taken that (unfounded and unjustifiable) position, staff is now estopped from faulting the Applicants from following staff's demand. The Applicants are not land use lawyers. When told they had to file a Lot of Record verification request in order to build a barn, they conscientiously did so. The scope of this appeal properly concerns the conduct and positions taken by staff in denying the Applicants their goal of building a barn on their farm property.

II. Legal Analysis.

A. State Law Does Not Allow the County To Require a "Permit" to Conduct Farming Operations.

Oregon law favors the use of EFU land for farm use:

> ***215.243 Agricultural land use policy. The Legislative Assembly finds and declares that:***
> ***(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.***
> ***(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.***
> ***(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.***
> ***(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones. [1973 c.503 §1]***

ORS 215.203 is entitled "Zoning ordinances establishing exclusive farm use zones; definitions." ORS 215.203(1) grants the County the authority to create EFU-zoned land. ORS 215.203(1) further provides, as a general rule, that "[l]and within such [EFU] zones <u>*shall be used exclusively for farm use*</u> except as otherwise provided in ORS 215.213, 215.283 or 215.284." Thus, state law <u>*mandates*</u>, as a general rule, that EFU land be used for "farm use." The state's definition of

"farm use" includes "on-site * * * equipment and facilities" used for "farm use." Staff does not question that a barn is a "facility" used for farming. For this reason, state law *requires* that the County allow a barn on land zoned EFU. Any provision of local law that prohibits use of EFU zoned land for farming is per se inconsistent with state law. ORS 215.203(1) also takes farm uses and barns outside of the realm of cases such as *Gross v. Jackson County*, __ Or LUBA __ LUBA No. 2016-091 (2016).

Furthermore, no "permit" or "approval" of any kind is needed to build a barn as a matter of state law. More specifically, agricultural buildings constructed outside of a special overlay zone on Exclusive Forest Use zoned properties with a farming practice are permitted outright without requiring land use or building permits. Note, in this regard, that there are some situations, such as when the land use in a floodplain overlay zone, where this general rule set forth in the preceding sentence does not apply. *See, e.g., Bratton v. Washington County*, 65 Or LUBA 461 (2012). None of those situations are present here. Frankly, we know of no jurisdiction that requires any sort of zoning-related permit to build a barn.

Staff, on the other hand, believes that the County has permitting authority to require a Type I zoning "permit" before allowing a barn. Staff cited to MCC §39.4215, which states that "no * * * land shall be used * * * when found to comply with MCC 39.4245 through 39.4260 * * *. That language is grammatically incorrect, and makes no sense. Putting that aside, however, staff's reading suggests that a farmer would need to get a permit of some sort prior to planting row crops, as an example. However, the County has never required permits in that situation. Our point is that a barn is the same as row crops when it comes to permitting status, because it is a farm use. There is no code language that differentiates between planting row crops and building barns. They are treated as one-in-the-same under state law. ORS 215.203(2). *See also* MCC 39.1105 (making "allowed uses" subject to Type I review), and MCC 39.4220(A) (stating that "farm use" is an allowed use.").

Furthermore, as extensively discussed in our letter of August 24, 2022 (Exhibit I-4) and supported by the agricultural article evidence (Exhibit I.5) and testimony (Exhibit I.1), a barn is indispensable for conducting the Applicants' farm operations (*e.g.* cattle-raising, hay production, grass seed, etc.). Therefore, it is not "accessory" use to farming.

At the hearing, staff stated that such a permit requires the farmer to submit an application form, a $77 fee, a site plan showing setbacks, building elevations, a stormwater plan. Staff further states that the applicant is requires to disclose what items will be stored in the barn and also explain what farm uses are occurring on the property. Of course, no such criteria or mandates are found in the code. Furthermore, it is difficult to see how such a permit would not venture off into discretionary territory. So staff's arguments do not make any sense. Staff concedes that it cannot require a landowner to obtain a "building permit" prior to building a barn.[1] It also makes little sense to think that the Legislature intended that farmers would be exempted from creating building plans for the building department, but somehow would need to create site plans and elevation drawings to satisfy the planning department.

[1] Oregon law exempts barns from the Building Code. *See* ORS 455.315 Exemption of agricultural buildings, agricultural grading, equine facilities and dog training facilities. (1) The provisions of this chapter do not authorize the application of a state structural specialty code to any agricultural building, agricultural grading, equine facility or dog training facility.

As previously mentioned, the Multnomah County Zoning Code (MCC) contains a definition of an "Agricultural Building," as follows:

> ***Agricultural Building – Pursuant to ORS 455.315 and any amendments made thereto, means a structure located on a farm and used in the operation of the farm for: (a) Storage, maintenance or repair of farm or forest machinery and equipment; (b) The raising, harvesting and selling of crops or forest products; (c) The feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees; (d) Dairying and the sale of dairy products; or (e) Any other agricultural, forestry or horticultural use or animal husbandry, or any combination thereof, including the preparation and storage of the produce raised on the farm for human use and animal use, the preparation and storage of forest products and the disposal by marketing or otherwise, of farm produce or forest products. (f) Agricultural and forest practice buildings do not include a dwelling, a structure used for a purpose other than growing plants in which 10 or more persons are present at any one time, a structure regulated by the State Fire Marshal pursuant to ORS chapter 476, a structure used by the public, or a structure subject to sections 4001 to 4127, title 42, United States Code (the National Flood Insurance Act of 1968) as amended, and regulations promulgated thereunder.***

See MCC §39.2000 DEFINITIONS. Nowhere in that definition is there a requirement for a Type I permit. In fact, the only place in the entire Code where the term "agricultural building" is used is MCC §39.5515(B). This provision states that

> "(B) Within Metro's 2009 jurisdictional boundary, an SEC-s permit is required for agricultural buildings, structures and development associated with farm practices and agricultural uses, except that agricultural fences shall not require an SEC-s permit.

Thus, MCC §39.5515(B) does not provide the basis of requiring a permit.

MCC §39.1105 also does not assist staff because it cannot be interpreted in a manner that violates state law. Again, ORS 215.203(1) states that "[l]and within such [EFU] zones *shall be used exclusively for farm use* except as otherwise provided in ORS 215.213, 215.283 or 215.284." There is no room for a permitting exercise because the land "shall be used" for barns.

As a final note, it is worth pointing out that the Code is even wrong as to how and where a Type I decision may be appealed. MCC §39.1105(A) states:

> ***Because no discretion is involved, Type I decisions do not qualify as land use or limited land use decisions. The process requires no notice to any party other than the applicant. The Planning Director's***

> ***decision is final and not appealable by any party through the normal land use process. Type I decisions may only be appealed through a writ of review proceeding to circuit court.*** (Emphasis added).

However, by definition, a "writ of review" only allows review of a local government's judicial or quasi-judicial (as opposed to legislative or administrative / ministerial) decisions. *Graziano v. City Council of Canby*, 35 Or App 271, 273, 581 P2d 552 (1978). So MCC §39.1105(A) creates a jurisdictional problem for anyone that actually follows the code.

B. There is No Necessity to Apply for a "Lot of Record" Verification Before Building a Barn, because a Barn Can Be Built On a Property that is Not a "Lot of Record."

Staff was wrong when they told the Applicants to file a Lot of Record verification request if they wanted to construct a barn. The "requirement" that a farm property be a Lot of Record before being used for farm purposes is not – and cannot be – justified under Oregon law. Our previous submittal discusses that matter, and staff provides no response to that analysis. The main point is that a barn is a farm use, and a County cannot generally prohibit a farm use on EFU land.

Furthermore, staff never responds to the argument that the lot aggregation provision is not self-executing. In our appeal, we stated:

> Finally, even assuming, *arguendo*, that the two parcels at issue were in the "same ownership" on February 20, 2022, the lot aggregation provisions are not self-executing, and because no permit was applied for while the property was in such same ownership. The subject property is now in different ownership, and therefore was never "aggregated" with the dairy at any time when it was arguably in such same ownership.

Generally, a lot aggregation provision can only operate if it is effectuated by the recording of a deed or if it is aggregated via a land use decision while still in the same ownership. *See McKeel v. Multnomah County*, 55 Or LUBA 608 (2008) (consolidation by deed) and *Turner v. Multnomah County*, __ Or LUBA __, LUBA No. 2019-071 (2020) (aggregation by decision of a hearings officer while still in same ownership.). Otherwise, the County is effectively making the property unusable for any pupose. In this case, the two properties are in separate ownership. Moreover, the parties never submitted any land use applications during the time when the two parcels where in the ownership of Evelyn S. Vetsch and Richard W. Vetsch. There was no deed that ever made them one parcel or otherwise consolidated them for development purposes. Now that the properties – which staff concedes are lawfully created units of land created prior to zoning, are in separate ownership, MCC §39.3070(A) cannot operate to aggregate the lots in a manner that prohibit farm use of the property.

III. Conclusion.

The County erred in denying the Applicants' application for a building permit for a barn. That permit is not (and cannot be) required, under state law. Whether or not the Applicants'

parcel is a "lot of record" is immaterial. That being the case, the Applicants intend to proceed without a County building permit, and construct their barn.

We ask that the Hearings Officer provide guidance on this issue, and not "punt" on the issue, as staff suggests. Doing so would not be "advisory" in nature because a "case and controversy" does exist (*i.e*. we believe no permits are needed to engage in any farm use, including building a "facility" described in ORS 215.203).

Please see that this letter is included in the Record of this appeal, case no. T2-2022-15537.

Sincerely,

ANDREW H. STAMP, P.C.

Andrew H. Stamp

Andrew H. Stamp

AHS
Cc: Client