

## NOTICE OF DECISION

**Case File:** T2-2019-11563

**Permit:** Verification of a Non-Conforming Use

**Applicant(s):** Brian & Trisha Stevens      **Owner(s):** Brian & Trisha Stevens

**Location:** 33419 SE Carpenter Ln.  
Tax Lot 500, Section 21DB, Township 1S, Range 4E, W.M.  
Alternate Account #R994210400      Property ID #R342495

**Zoning:** Multiple Use Agriculture – 20 (MUA-20)

**Overlays:** None

**Proposal Summary:** The applicants request a Verification of a Nonconforming Use for two buildings located on the subject property identified as 33419 SE Carpenter Ln. to determine if the two buildings in question are legally established, nonconforming dwellings. The MUA-20 zoning district allows one single family dwelling per lot of record when all other code requirements are met.

**Determination:** Building #1, constructed prior to enactment of zoning or building codes, is a legally established single family dwelling. Building #2 was originally constructed as a utility building in 1957 and is not legally established as a single family dwelling. Based on the facts presented in this application, because the subject property only has one legally established single family dwelling as allowed under MCC 39.4310(A) in the MUA-20 zone, the subject property does not contain a nonconforming use.

**This decision is final and effective at the close of the appeal period, unless appealed. The deadline for filing an appeal is Thursday, August 15, 2019 at 4:00 pm.**

**Opportunity to Review the Record:** The complete case file, including the Planning Director Decision containing Findings, Conclusions, Conditions of Approval, and all evidence associated with this application is available for review at the Land Use Planning office. Copies of all documents are available at the rate of \$0.30/per page. For further information, contact Chris Liu, Staff Planner at 503-988-2964 or at [chris.liu@multco.us](mailto:chris.liu@multco.us).

**Opportunity to Appeal:** 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 office at 1600 SE 190<sup>th</sup> Avenue (Phone: 503-988-3043). This decision is not appealable to the Land Use Board of Appeals until all local appeals are exhausted.

Issued By:

Chris Liu

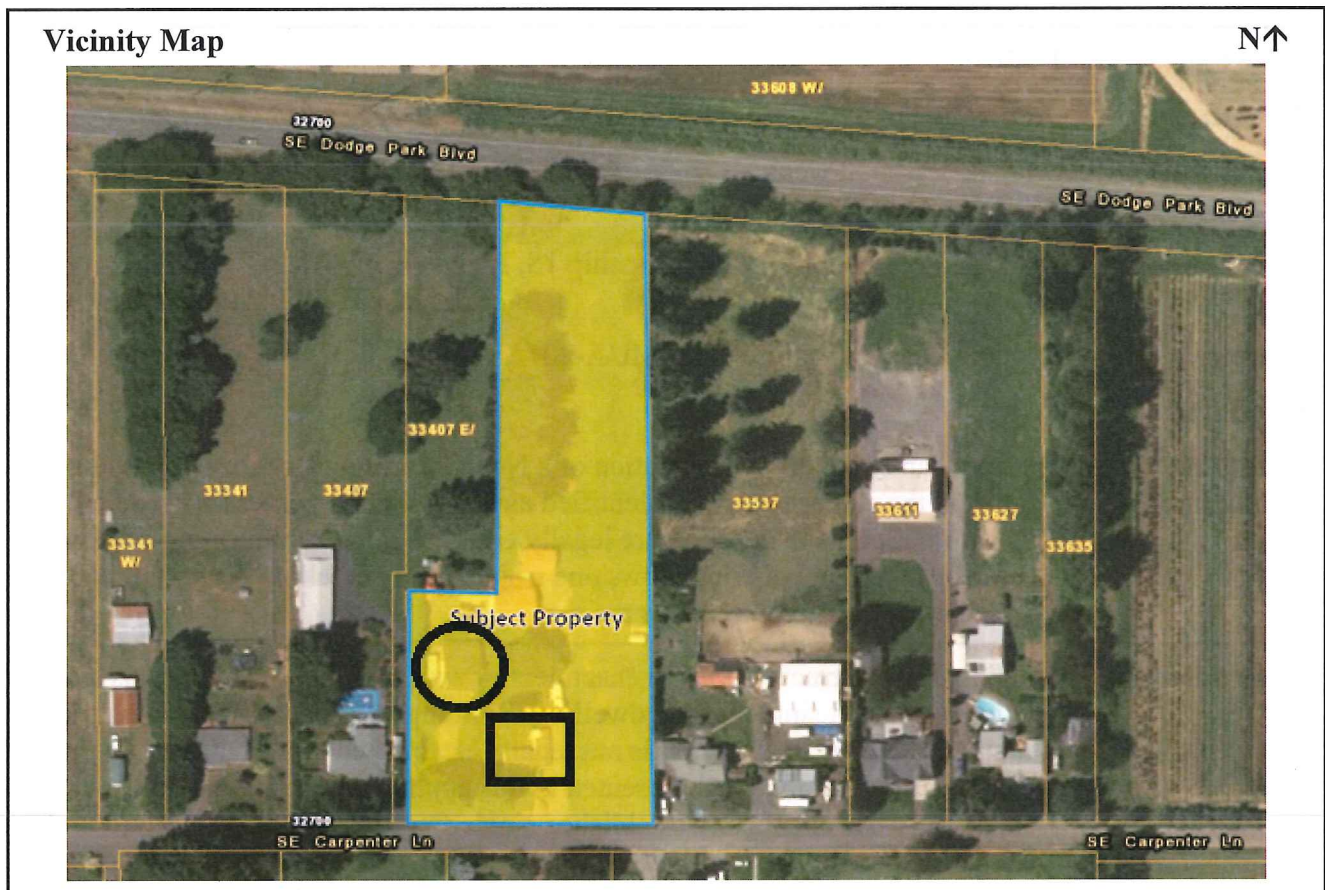
Chris Liu, Assistant Planner

For:

Adam Barber,  
Interim Planning Director

Date:

Thursday, August 1, 2019



Note: Building #1 is designated with a black rectangle and Building #2 is designated with a black circle in the vicinity map above.

**Applicable Approval Criteria:** Multnomah County Code (MCC): MCC 39.1515: Code Compliance and Applications, MCC 39.2000: Definitions, MCC 39.3005: Lot of Record – Generally, MCC 39.3080: Lot of Record – Multiple Use Agriculture-20 (MUA-20), MCC 39.8300: Nonconforming Uses, MCC 39.8305: Verification of Nonconforming Use Status.

Copies of the referenced Multnomah County Code sections are available by contacting our office at (503) 988-3043 or by visiting our website at <https://multco.us/landuse/zoning-codes/> under the link *Chapter 39 - Zoning Code*.

**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*.

### **1.0 PROJECT & PROPERTY DESCRIPTION:**

**Staff:** The Applicants request a Verification of a Nonconforming Use (“Verification”) for two buildings on the subject property known as 33419 SE Carpenter Lane. The Applicants seek to verify that both buildings are legally established single family dwellings.

Planning staff will refer to the building farther south and closest to SE Carpenter Lane as Building #1. The second building, located farther north on the property, will be referred to as Building #2.

The subject property is located in Rural East Multnomah County in the Multiple Use Agriculture - 20 (MUA-20) zoning district. The subject property is outside of the Metro Urban Growth Boundary. The subject property is 3.16 acres in size and contains a number of buildings, only two of which are subject to this Verification.

The facts to consider for this Verification are as follows:

#### History of Zoning and Building Codes

The County established the first Interim Building Code in February 4, 1954 and the Revised Building Code in August 4, 1955 (Exhibit B.3).

On August 4, 1955, the County established an Interim Zoning Ordinance that applied to all unincorporated areas not specifically within an existing Zoning District, including the subject property (Exhibit B.17).

Specific zoning districts were applied to the subject property area in July 18, 1958 (Exhibit B.3). The first zoning district applied to the subject parcel and surrounding properties was Suburban Residential (SR) and the area remained zoned SR until October 6, 1977 when the County amended the zone.

On October 6, 1977, the zoning district for the subject property and surrounding area changed to Multiple Use Agriculture – 20 (MUA-20). The subject property and area continues to be zoned MUA-20 through the present. MCC 39.4310(A) allows “[r]esidential use consisting of a single family dwelling on a Lot of Record.”

#### History of Building #1 and Building #2

County tax records list the year of construction for Building #1 as 1954, prior to zoning and prior to adoption of building codes (Exhibit B.1 & B.3). In addition, a County survey from 1950 prepared as an inventory of existing land uses prior to implementation of zoning identifies Building #1 as a dwelling (Exhibit B.2)



Previous property owners on November 1, 1957 obtained a building permit (no. 12603) to construct Building #2 as a 26' x 36' Utility Building for "storage of boat and tractor" (Exhibit B.5). The County Assessor in the past found that Building #2 was being used as a dwelling and listed its year of construction as 1963. At that time, as noted above, the property was zoned SR and allowed for "[s]ingle family dwellings." However, a 1986 County survey did not show Building #2 as a dwelling (Exhibit B.4) and no permits have been issued to convert the utility building into a dwelling.

## **2.0 PUBLIC COMMENT**

### **2.1 Comments from Daniel and Penny Volker, Residents of Carpenter Ln.**

The Volkens submitted written comments indicating they support the Applicants and that [Building #2] has always been a family residence since the Volkens moved to Carpenter Ln. in 1974. Further, they saw no reason why a new additional home should not be built on the property.

**Staff:** Comments noted. This application does not relate to the construction of an additional dwelling. This application is to determine whether there is a nonconforming use of the subject property. Section 4.2 below covers the permitting history for [Building #2] related to this Verification of a Nonconforming Use application.

### **2.2 Comments from Shawn Finnerty, Resident of Carpenter Ln.**

Finnerty notes that they have lived on Carpenter Ln. for 18 years and their grandparents lived on Carpenter Ln. prior to that. As long as Finnerty can recall, [Building #2] was used as a house. Finnerty notes that the County collected property taxes on the structure based on the use as a house and that should indicate the structure is legal. Additionally, Finnerty notes that a septic permit was issued in 2005.

**Staff:** Comments noted. The County Dept. of Assessment and Taxation operates under separate laws, rules, and regulations dictating how/when/why they can collect tax revenue. A structure noted for taxation purposes as a house does not mean that said structure is a legally established dwelling. It appears the County Sanitarian issued the 2005 septic permit without obtaining a LUCS (Land Use Compatibility Statement) from County Land Use Planning. Land Use Planning made no decision on the use or status of Building #1 or Building #2 at that time.

### **2.3 Comments from Derek Eisele (on behalf of Scenic Fruit Company)**

Scenic Fruit Company noted that they understand well the desire to confirm land uses and buildings. Further, that they look forward to future prosperity for the area.

**Staff:** Comments noted.

### **2.4 Comments from Angela Parker, Resident of Carpenter Ln.**

Parker notes that they have lived in the area for approximately 40 years. They state that [Building #2] has been a residence since before they moved to the area as they trained horses

on the subject property. Parker further states that the subject property has always had two homes and has been that way since the late 1950s.

**Staff:** Comments noted. A nonconforming use must be legally established by obtaining all necessary permits. Section 4.2 below covers the permitting history for the structure in question.

## **2.5 Comments from Kathy Cartisser, Resident of Carpenter Ln.**

Cartisser noted that she lived in the area for over 70 years and next to the subject property for over 40 years. Cartisser provided background on her interactions and opinions of the Stevens. Commenter also states that the subject property has had two homes for a long time like many [properties] in the area.

**Staff:** Comments noted. The MUA-20 zone does not provide for multiple dwellings on a property. Section 4.2 below covers the permitting history for the structure in question.

## **3.0 GENERAL PROVISIONS:**

### **3.1 MCC 39.1515 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 Zoning 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 Zoning 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:** As noted above, this application is a request for a Verification of a Nonconforming Use and is not an application for development or a building permit. Therefore, the County may make a decision on this application request regardless of any compliance issues on the property.

Nonetheless, it is worth noting that the County Code Compliance office has a compliance case no. UR-07-016 (the case status is 'pending investigation') regarding a remodel to Building #2.

The compliance case states, “Our records indicate that the dwelling may not be a legally established dwelling.” A determination that Building #2 is a legally established nonconforming dwelling would eliminate a key item in the compliance case.

Staff highlighted with orange circles, Building #1 (the southern circle) and Building #2 (the northern circle) as they appear in 1977 and 2018 aerial imagery. Staff does not need to make an affirmative finding as to the lawfulness of any structures not a part of this application, nor is staff required to make an affirmative finding that there are no existing violations on the property. This decision is solely a Nonconforming use determination related to Building #1 and Building #2 and does not address the lawfulness of any other structures on or uses of the property.

**1977 Aerial Imagery**



**2018 Aerial Imagery**



### **3.2 Lot of Record**

#### **MCC 39.3005: Lot of Record – Generally**

**(A) An area of land is a “Lot of Record” if it meets the standards in Subsection (B) of this Section and meets the standards set forth in this Part for the Zoning District in which the area of land is located.**

**(B) 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 39.9700. Those laws shall include all required zoning and land division review procedures, decisions, and conditions of approval...**

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**MCC 39.3080: Lot of Record – Multiple Use Agriculture – 20 (MUA-20)**

**(A) In addition to the standards in MCC 39.3005, for the purposes of the MUA-20 district the significant dates and ordinances for verifying zoning compliance may include, but are not limited to, the following:**

- (1) July 10, 1958, SR zone 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, MUA-20 zone applied, Ord. 148 & 149;**
- (5) October 13, 1983, zone change from EFU to MUA-20 for some properties, Ord. 395;**
- (6) May 16, 2002, Lot of Record section amended, Ord. 982, reenacted by Ord. 997...**

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**Staff:** This application is for a Verification of a Nonconforming Use only, which only requires the County to determine whether Building #1 and Building #2 were legally established as dwellings at the time the zoning code was amended to not allow the use and/or structure. Therefore, this application does not require the County to determine whether the subject property currently is a Lot of Record. In addition, the County is reviewing a separate Lot of Record verification request for the subject property in land use case T2-2019-11925.

#### **4.0 NONCONFORMING USES**

##### **4.1 MCC 39.8300: Nonconforming Uses**

**(A) The purpose of MCC 39.8300 through 39.8315 (Nonconforming Uses) is to establish standards and procedures regulating the continuation, alteration, expansion, and replacement of nonconforming uses. The intent is to allow procedures for considering changes to nonconforming uses that do not increase the level of adverse impacts on the neighborhood, or changes required for the use to comply with State or County health or safety requirements.**

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**(C) Nonconforming uses shall be allowed to continue without additional permission, except that such uses may be replaced, altered or expanded only as provided in MCC 39.8310 and 39.8315 after verification under MCC 39.8305.**

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**Staff:** The Applicants have requested a Verification of a Nonconforming Use that two buildings on the subject property are lawfully established nonconforming dwellings.

##### **4.2 MCC 39.8305: 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:

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

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

\* \* \*

(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:** To be a nonconforming use, the use and structure must have been legally established at the time the zoning code was amended to not allow the use and/or structure. **MCC 39.2000 – Definitions** includes the following terms that are applicable to the subject application:

***Nonconforming Use:** A legally established use, structure or physical improvement in existence at the time of enactment or amendment of the Zoning Code but not presently in compliance with the use regulations of the base zone. A use approved under criteria that have been modified or are no longer in effect is considered nonconforming.*

***Lawfully Established Dwelling:** A dwelling that was constructed in compliance with the laws in effect at the time of establishment. The laws in effect shall include zoning, land division and building code requirements. Compliance with Building Code requirements shall mean that all permits necessary to qualify the structure as a dwelling unit were obtained and all qualifying permitted work completed.*

Multnomah County Code utilizes two terms for *legally established* within its definitions. The terms “*Lawfully Established*” and “*Legally Established*” are synonymous and have been used interchangeably in different areas of the code. These two terms do not have separate meanings.

There are two key threshold points in this situation to determine whether each building and its associated use is a legally established dwelling unit. They are: 1) The year of lawful establishment of each building and 2) the year that each building legally established or converted to the dwelling use. At both points, the structure and use must have met the laws in effect at the time of establishment (zoning and building code requirements).

### **Year of Establishment of the Buildings**

Building #1: As noted, County zoning was first established in 1955 and County building codes were first established in 1954. As a result, buildings built before that time are presumed to be legally established. Here, the Applicants point to tax records that indicate a year of construction of 1954 for Building #1 (Exhibit B.1). Tax records are for taxation purposes only



and in the absence of other evidence, do not conclusively demonstrate the date that a structure is legally established for land use purposes. Here, however, there is additional evidence to support the finding that Building #1 was established prior to enactment of zoning and building codes. A Multnomah County Planning Commission land use survey initiated in 1950 (Exhibit B.2 & B.18) identifies Building 1 as a dwelling. This land use survey utilized Metro and County Staff to conduct field surveys of various areas in the County to inventory existing land uses to establish a record for planning use during the implementation of zoning throughout the County. Based on this land use survey and the tax records, Building #1 is a legally established dwelling because it pre-dates zoning regulations.

Building #2: Staff located the original building permit (permit no. 12603) and permit file card for Building #2 issued on November 1, 1957 (Exhibit B.5 and B.6). ***The permit was for a 26' x 36' Utility Building for "storage of boat and tractor" and did not note any sewage disposal, or plumbing features*** (staff used italics and bold for emphasis). The plot plan section of the permit indicates the proposed structure will be 140' from the front property line adjacent to SE Carpenter Ln. and 40' from the west side property line (see Image #1 below). According to the Permit File Card (Exhibit B.6), Building 2 was completed "according to County regulation" in March of 1961.

(Image #1)

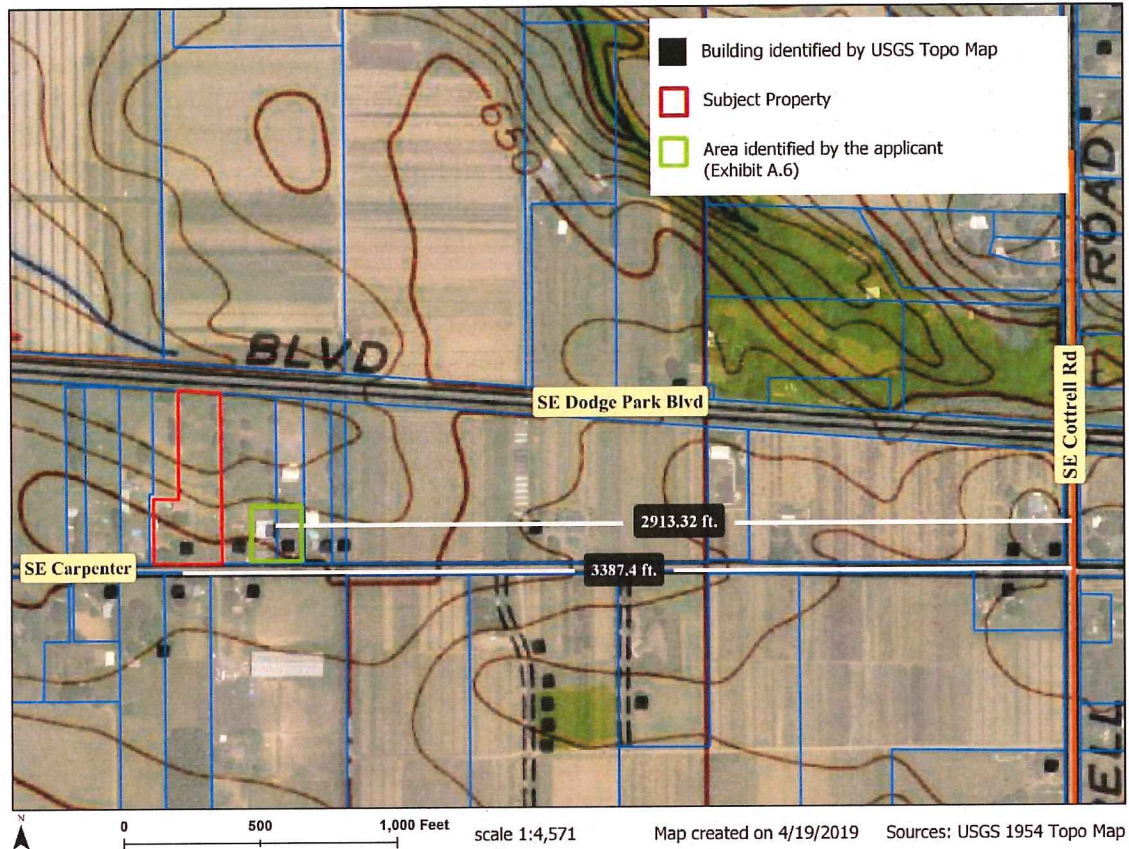
Aerial Imagery from 1977 and 2018 appear to show the original 26' x 36' size of Building #2 expanded via additions sometime between 1977 and present day. The Applicants have not provided any building or land use permit documentation regarding the building addition(s). There is no evidence in the record that these addition(s) to Building #2 are legally established in compliance with the MUA-20 zoning code [MCC 39.4305 or MCC 39.1105].

In addition to the 1957 building permit noted above, Staff utilized the Multnomah County Planning Commission land use survey initiated in 1950 (Exhibit B.2) to determine whether Building #2 had been constructed prior to the 1963 date listed in the tax records. The 1950

field surveys established a baseline of existing uses and buildings as the County adopted zoning from 1953 to 1960 (Exhibit B.3). The Land Use Survey Map for 1S4E21 (Exhibit B.2), identified a single dwelling on the subject property (formerly identified as ‘tax lot 40’) as noted by the yellow square (Exhibit B.18). No other buildings are shown on the subject property, which supports the County’s finding that Building 2 was not constructed prior to enactment of zoning and building codes.

The Applicants offer evidence they believe demonstrates the legal establishment of Building #2 as a dwelling; however, this evidence is insufficient compared to the evidence detailed above by Staff. The Applicants’ narrative (Exhibit A.2) implies that based on USGS surveys from 1954 (Exhibit A.6), Building #2 was established prior to 1954 as a home. The USGS survey provided by the Applicants is a Topographical Map (“Topo Map”) that utilized aerial imagery to show streets, *buildings*, streams and vegetation per the USGS Historical Topographic Map Collection Symbols Guide (pre-2006) (Exhibit B.13). There is no additional information provided by the Applicants that documents that buildings shown on the map specifically show dwellings or accessory buildings. Because the Topo Map shows a pattern that is “similar” to the current alignment of Building #2 and Building #1, the Applicants believe the map proves Building #2 was in place in 1954 and was a dwelling.

As the 1954 USGS Topo Map does not clearly designate lot lines, the Applicants’ stance is speculative without actual measurements. Staff (with the assistance of a County GIS Data Analyst) created a map (shown below; Exhibit B.15), utilizing the 1954 USGS Sandy Oregon GeoTiff from USGS *topoVIEW*, a Geographic Information Systems (GIS) based program that provides authoritative georeferenced data. The County map identifies the distance from SE Cottrell Rd., at an easier to interpret scale than the 1:18,056 scale provided on the 1954 USGS Topo Map, to allow more accurate measurement of the ground distance to the subject property and the building that Applicants identify as Building #2.



As illustrated in the County map above and in Exhibit B.15, the area identified by the Applicants (Exhibit A.2 and A.6) is not the subject property. Although the USGS *topoVIEW* program does not provide a measurement feature, the program offers a search feature where a user can search a specific property address similar to an online map/direction program. Staff utilized this *topoVIEW* search feature, which also illustrates that the area identified by the applicants is not the subject property (Exhibit B.14).

The information highlighted on the 1954 USGS Topo Map submitted by the applicants (Exhibit A.6) does not demonstrate that Building #2 was in place on the subject property in 1954, nor that the Building was a dwelling.

The Applicants provided a permit file card for permit no. 3745 issued on January 5, 1955, which states the construction project is “MOVE – Defense House...” on to “Gov. Lt. 5, 1S4E21 of Dodge Park Blvd.” (Exhibit A.24). In the Applicants’ supplemental information (Exhibit A.23), the Applicants explain that they believe Building #2 was the house referenced in the 1955 permit and previously addressed 33424 SE Dodge Park Blvd. as shown on a Fire District Address list (Exhibit A.27). To support their claim, the Applicants provided a deed (Exhibit A.25) for the property they believe is associated with the 1955 permit. The submitted deed describes an area of land south of Dodge Park Blvd., more specifically the, “*West half of the west half of the northeast quarter of Section 21, Township 1 South, Range 4 East of the Willamette Meridian, in the County of Multnomah and State of Oregon.*” The subject property is located in the southeast quarter of Section 21, Township 1 South, Range 4 East of the Willamette Meridian and in 1950’s was approximately 4.0 acres in size .

No. Floors	MULTIPLASH COUNTY		Permit No.	3745
No. Rooms	BUILDING PERMIT APPLICATION		Fee	500
Height	NEW		Receipt No.	2572
Size of Structure	ALTERATION		Map No.	
<i>More</i>	R		Zone	
<i>Defense Home</i>	<i>Dodge Park Blvd</i>		Material (Circle One.)	
1. Dedicatd	<i>Address R.2 Breakin</i>		1. Frame	
2. Easement			2. Brick	
	Between and		3. Brick Veneer	
Width	Loc 5 <i>Sublot 21</i>		4. CMU	
1. 20' or more	Address <i>1 S E</i>		5. Precast	
2. 25' <i>border</i>			6. Block	
3. 30'			7. Other	
4. 35'				
5. 40'			Plumbing (Circle One.)	
6. 50'			1. Toilet	
7. 60'			2. Bath	
8. 90' or more			3. Shower	
	Use (Circle One)		4. Basin	
	1. Single Family 4. Garage		5. Sink	
	2. Duplex 5. Detached Bldg.		6. Hot Water, Gas	
	3. Apartment 6. Conversion		7. Hot Water, Elec.	
	7. Other		8. Sewer	
Fire Dist.			9. Septic Tank	
Water Plat.			10. Cesspool	
Owner Plat.	Owner <i>W.H. Senter</i>		Heat (Circle One)	
Park Plat.	Address <i>R.2 Bx 552 Breakin</i>		1. Oil Furnace	
School Dist.			2. Coal (other)	
	Builder <i>Hoffman</i>		3. Gas (other)	
Garage (Circle One)	Address		4. Electric	
1. Detached				
2. Attached			Health Dept.	
3. No Provision			Approved By:	
Parking Space	Estimated Valuation <i>2,000</i>		<i>Issued subject to</i>	
1. One Space			<i>Health approval</i>	
2. Two			Date	
3. Three or more				
Lot:	Plans By:			
Width	1. Architect 3. Designer			
Depth	2. Engineer 4. Owner			
Area <i>1/2 a</i>	I agree to build according to above description, plans and specifications and that all work is to conform with all applicable code and rules of this county.		Health Dept.	
	Signature <i>W.H. Senter</i>		Approved By:	
Owner Built	Phone <i>5646</i>		<i>R.W.H.</i>	
Speculative			Date <i>Jan 6/65</i>	
Description	Plot Plan			

*Based on the information described above, Staff finds Building #1 was legally established prior to the enactment of zoning regulations or County building codes. In addition, Staff finds that Building #2 was legally established on November 1, 1957 as a 26' x 36' Utility Building based on building permit no. 12603. It appears Building #2 expanded in footprint without required building permits and land use approvals/ permits. The expanded areas of Building #2 are not legally established. See findings on the establishment of the dwelling use below.*

**Building #2:** The Applicants did not provide any permits, land use decisions, or other records that demonstrate Land Use Planning authorized the conversion of Building #2 from an accessory use (utility building) to a dwelling use (Exhibits A.1 – A.30). Interim Building Codes were in effect starting in 1954 (Exhibit B.3). The County’s Interim Zoning Code was in



effect in 1955 based on Exhibit B.17. Zoning and Building Codes have been effect since their adoption by the County and remain in effect to this day. To convert the 1957 Utility Building (Building #2) to a dwelling from its completion in 1961, building and land use permits were required (Exhibit B.11). No evidence of the required permits have been presented by the Applicants or found by staff.

County Tax records list the age of Building #2 as a dwelling as of 1963 (Exhibit B.1). As noted, in the absence of other evidence, the Assessor's records do not definitively establish that the building has been legally established from that date as a dwelling. This 1963 date gives only a tentative establishment date and is the only time prior to 1985 where a County record of any type refers to Building #2 as a dwelling. The Assessor's records are only for taxation purposes, and while those records may be informative, they are not conclusive evidence of the legality or use of a structure. That is particularly true where, as here, there is evidence in the record that demonstrates that Building 2 was not legally established as a dwelling by 1963 (Exhibit B.4 – B.5). Therefore, those records alone do not establish that Building #2 was a legally established dwelling as of 1963.

Similarly, neighbors' statements about the use of Building 2 as a dwelling dating back many years is insufficient to show that Building 2 was a *legally established* dwelling, *i.e.*, that it met all zoning and building code requirements.

In a 1986 Multnomah County Land Use Inventory (Exhibit B.4), the map shows the subject property (formerly identified as 'tax lot 40') contains Building #1 (the original pre-zoning dwelling), Building #2 (noted as an Accessory Structure by the white square as indicated on the map legend included as Exhibit B.19), and an additional dwelling NE of Building #2. The Applicants have not represented to the County that this other structure is or was a dwelling as part of their submittal, and the County makes no finding as to the status of that third building. Unlike the 1950 land use inventory, which can be used as evidence of legal establishment because it represents buildings existing prior to zoning and building codes, the 1986 land use inventory does not represent legally established buildings and/or uses. Instead, the 1986 survey is solely an inventory of buildings the County found in the area at the time. Land Use staff utilizing this inventory must also verify the use and building(s) are lawfully established if it is used as part of a land use application. Nonetheless, the 1986 survey provides additional evidence that Building #2 was not being used as a dwelling as of 1986.

The Applicants' narrative (Exhibit A.2) states that County Land Use decision no. LD 27-85 contained findings where the Staff Planner noted the subject property contained "two existing residences", "two houses", "two existing dwellings" and other similar references. The Applicants further state, the zoning code in effect in 1985 did not appear to define the terms 'existing', 'legal', or 'lawfully established'. Therefore, the Applicants believe 'existing' and 'dwelling' when used in the 1985 findings hold the same weight as the current definition for "lawfully established", which they believe proves the subject property has two legal houses. The Applicants also discuss what they believe constitutes a "final land use decision" and provide further detail in a supplemental information narrative (Exhibit A.23).

Contrary to the Applicants' assertions, LD 27-85 does not require a finding that Building 1 and Building 2 were legally established by 1985. The standard of approval in this case requires the County to determine whether the use "[w]as legally established and operating at the time of enactment or amendment of this Zoning Code." MCC 39.8305(A)(1). Where the standard of

approval expressly requires the County to inquire into the legal establishment of a structure, that inquiry does not constitute a collateral attack on any prior County decisions. *See Hogrefe v. Lane County*, 54 Or LUBA 514, 515-17 (2007) (explaining that in some land use decisions, there is a “necessity to inquire into whether the unit of land in question was lawfully created,” and that such an inquiry is not “an impermissible collateral attack”); *Maxwell v. Lane County*, 178 Or App 210, 220-21, 35 P3d 1128 (2001), *adh’d to as modified on recons*, 179 Or App 409, 40 P3d 532 (2002) (“[A] local government entity **must** determine the legal status of a lot or parcel ‘in connection with’ a current proceeding involving the parcel if required to do so by ‘applicable legislation.’” (emphasis added)). Therefore, LD 27-85 does not alter the County’s obligation for purposes of this application to determine pursuant to MCC 39.8305(A)(1) whether Building 1 and Building 2 were legally established as dwellings.

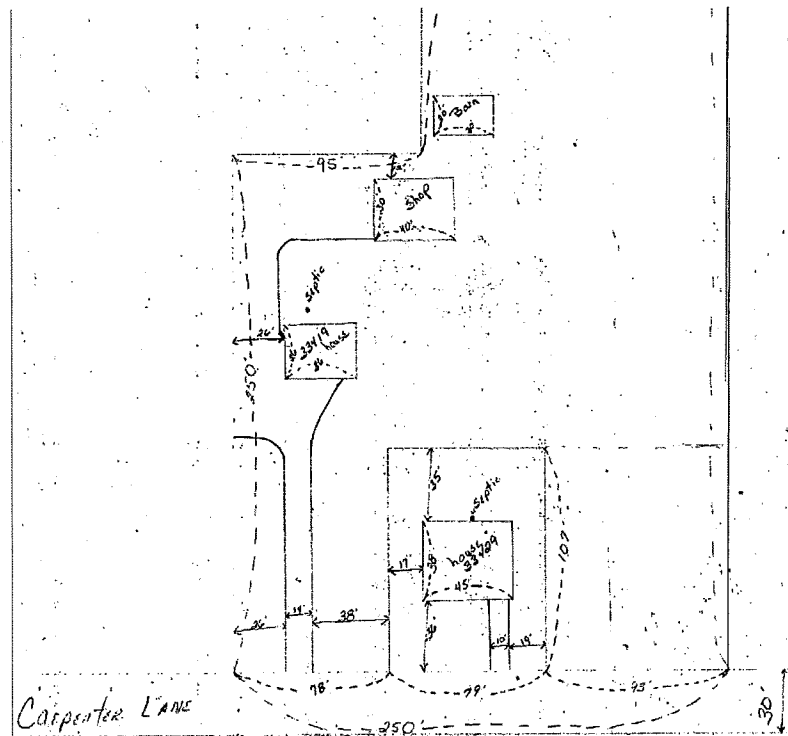
In addition, MCC 39.8305(C) provides, in part, “A final and effective County decision allowing the use shall be accepted as a rebuttable presumption of such compliance [with all land use procedures, standards and criteria applicable at that time].” LD 27-85 was a Tentative Plan Decision for a Type III Land Division in accordance with MCC 11.45. However, LD 27-85 is not currently “effective,” nor did it “allow[] the use” that Applicants are seeking in this determination, and it therefore does not create a rebuttal presumption that Building 2 was legally established as a dwelling.

First, LD 27-85 is not currently “effective” because it expired. Condition of Approval #2A states, “The applicant has one year in which to finalize the land division.” Condition #2B limited an extension of that timeline to six additional months. There is no evidence, such as a recorded final partition map, that demonstrates the conditions of approval were met within the one year period or that an extension was requested or approved. Under MCC 11.45.440, “After the expiration of the approval period, and extension, if any, a tentative plan shall be re-filed and considered as a new application.” Therefore, because the decision was not perfected, it appears that the decision expired.

Second, as noted, LD 27-85 was a Type III Land Division. Although it referenced two existing houses as part of its findings, it was not a decision “allowing the use” of a dwelling in either building referenced. In addition, in the Findings section under finding 2, staff noted that, “Site conditions as shown on the tentative plan map ***prepared by the applicant*** include the following...” In finding 3, Staff stated, “A ***site inspection to verify information shown on the tentative plan map was not made by Land Development Section Staff***.” These findings simply show that the applicant represented information to the County and the County made a Tentative Plan Decision. As staff was clear to state, the applicant’s information ***was not verified*** (bolded and italicized for emphasis). The decision does not present evidence of lawful establishment of two dwellings, but only takes the applicant’s word that two houses exist.

Even if LD 27-85 were “[a] final and effective County decision allowing the use,” at most, a prior County decision creates a “rebuttable presumption” that a use was legally established. Here, even if the 1985 created a presumption that Building #2 was legally established, that presumption has been rebutted by the evidence cited above. Therefore, the statements regarding “existing residences” or similar language are not adequate support to find ‘lawful establishment’ or ‘legal establishment’ that is required for a Nonconforming Use pursuant to MCC 39.8305(A)(1).

See a zoomed-in screen shot of the submitted plan map from case #LD 27-85 in Image #3 below.



(Image #3)

As illustrated in Image 3, the 1985 site plan from LD 27-85 refers to the 26' x 36' Building (Building #2) as a "House". Consistent with the County's decision here, in pre-file meetings since 1985, the County has indicated that it does not intend to rely on the 1985 decision in determining whether Building #1 and Building #2 have been legally established.

*Staff finds that Building #1 was legally established as a dwelling prior to enactment of zoning or building codes. Staff finds that there is not substantial evidence that the dwelling use of Building #2 was established prior to enactment of zoning or building codes or that Building #2 was established with the required land use approvals and building permits. The Applicants have not provided any building or land use permit records demonstrating the lawful conversion of Building #2 from a utility building to a dwelling. Therefore, the dwelling use in Building #2 was not legally established. This criterion is not met.*

*Because Building #2 was not legally established, it is not necessary to consider whether the dwelling use had "been abandoned or interrupted for a continuous two year period." MCC 39.8305(A)(2). In addition, because Building #2 was not legally established, there is no need for further analysis of Building #1 under the nonconforming use provisions because the presence of a single home on a property is not nonconforming. See MCC 39.4310(A) (allowing "Residential use consisting of a single family dwelling on a Lot of Record"). Based on the facts presented in this application, Building #1 is the only legally established dwelling on the property.*

#### **4.3 MCC 39.8305 (B), (C), (D), (E), and (F)**

**Staff:** (B), (C), (D), (E), and (F) relate to the nature and extent of a continued legally established nonconforming use. As noted in section 4.2 above, the dwelling use of Building #2 was not legally established, and therefore Building #1 is not nonconforming. As a result, there is no need to further consider the nonconforming use criteria.

## 5.0 CONCLUSION

Based on the findings and other information provided above, the Applicants have not carried the burden necessary to verify that there is a Nonconforming Use of two dwellings on the subject property. Staff finds that Building #1 was legally established as a single family dwelling prior to enactment of zoning or building codes, but that Building #2 is not a legally established single family dwelling. Based on the facts presented in this application, Building #1 is the only legally established dwelling on the property, and therefore is not nonconforming under MCC 39.4310(A).

## 6.0 EXHIBITS

‘A’ Applicant’s Exhibits

‘B’ Staff Exhibits

‘C’ Procedural Exhibits

‘D’ Comments Received

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 T2-2019-11563 at the Land Use Planning office.

<b>Exhibit #</b>	<b># of Pages</b>	<b>Description of Exhibit</b>	<b>Date Received/ Submitted</b>
A.1	2	Application Form	02.05.2019
A.2	6	Narrative	02.05.2019
A.3	18	Exhibit 1: Multnomah County Interim Zoning Ordinance	02.05.2019
A.4	10	Exhibit 2: Land Use Decision T2-2012-2601	02.05.2019
A.5	8	Exhibit 3: 12-22-1960 Zoning Ordinance	02.05.2019
A.6	3	Exhibit 4: USGS Survey Maps	02.05.2019
A.7	12	Exhibit 5: Excerpts from Tentative Plan Decision for LD 27-85	02.05.2019
A.8	11	Exhibit 6: Land Use Decision T2-2012-2445	02.05.2019
A.9	14	Exhibit 7: Land Use Decision T2-2013-3052	02.05.2019
A.10	1	Exhibit 8: Letter from Pleasant Home Water District	02.05.2019
A.11	1	Exhibit 9: Letter from PGE	02.05.2019
A.12	2	Exhibit 10: Affidavit from Kathryn Cartisser	02.05.2019
A.13	1	Exhibit 11: Affidavit from Scott Beyers	02.05.2019
A.14	1	Exhibit 12: Affidavit from Lonnie Atkinson	02.05.2019
A.15	1	Exhibit 13: Photos of 33419 SE Carpenter Ln.	02.05.2019
A.16	2	Exhibit 14: Photos of 33429 SE Carpenter Ln.	02.05.2019



A.17	1	Cover Page for submitted deed information	02.05.2019
A.18	5	Statutory Warranty Deed recorded July 1, 2016 as instrument # 2016-081034 and accompanying map	02.05.2019
A.19	2	Statutory Warranty Deed recorded November 14, 1979 on Book 1400, Page 707 and accompanying map	02.05.2019
A.20	2	Warranty Deed recorded February 18, 1971 on Book 777, Page 973	02.05.2019
A.21	1	Letter from Scott Beyers	03.29.2019
A.22	7	Letter from Brian Stevens	03.29.2019
A.23	6	Supplemental Information Narrative	07.02.2019
A.24	1	Multnomah County Planning Commission Building Permit File Card for Permit No. 3745	07.02.2019
A.25	2	Quitclaim Deed recorded October 15, 1954 on Book 1685, Page 570-571	07.02.2019
A.26	1	Land Donation Map	07.02.2019
A.27	1	Fire District Address List – Dodge Park Blvd.	07.02.2019
A.28	1	Fire District Address List – Carpenter Ln.	07.02.2019
A.29	1	Supplemental Address Map	07.02.2019
A.30	1	Survey Map from February 1900 of 1S4E21.	07.02.2019
<b>'B'</b>	<b>#</b>	<b>Staff Exhibits</b>	<b>Date</b>
B.1	7	A&T Property Information	02.05.2019
B.2	1	Multnomah County Planning Commission Land Use Survey (1950-1961)	02.05.2019
B.3	1	Historic Dates Handout	03.08.2019
B.4	1	Multnomah County Land Use Survey (1986)	03.08.2019
B.5	1	Building Permit No. 12603 issued November 1, 1957	03.08.2019
B.6	1	Multnomah County Planning Commission Building Permit File Card for Permit No. 12603	03.08.2019
B.7	2	1977 Aerial Photos for 1S4E21	03.08.2019
B.8	33	Land Use Case No. LD 27-85	03.08.2019
B.9	1	Pre-Application Meeting Notes for PA 1-99 (Pg. 1-3)	03.08.2019
B.10	1	Zoning Map from November 15, 1962	03.08.2019
B.11	5	General Provisions - Zoning Ordinance No. 100 effective November 15, 1962	03.08.2019
B.12	1	Section 8.20 Non-Conforming Uses – Zoning Ordinance No. 100 effective November 15, 1962	03.08.2019

B.13	4	Historical Topographic Map Collection Symbols Guide (pre-2006) via <a href="https://ngmdb.usgs.gov/topoview/help">https://ngmdb.usgs.gov/topoview/help</a>	03.08.2019
B.14	4	USGS topoView Maps for 33611 SE Carpenter Ln.	03.08.2019
B.15	1	County made map from the 1954 USGS Sandy Oregon GeoTiff from USGS TopoView	04.19.2019
B.16	1	Building Permit No. 3745 issued January 5, 1955	07.02.2019
B.17	18	Interim Zoning Ordinance Adopted August 4, 1955	07.02.2019
B.18	1	Legend for symbols utilized in the 1950 Planning Commission Survey	07.02.2019
B.19	1	Legend for symbols utilized in the 1986 County Land Use Map	07.02.2019
<b>'C'</b>	<b>#</b>	<b>Administration &amp; Procedures</b>	<b>Date</b>
C.1	1	Complete Letter (Day 1)	03.05.2019
C.2	2	Opportunity to Comment	04.04.2019
C.3	1	Applicant Request to Toll Decision Clock	04.11.2019
C.4	1	Applicant Second Request to Toll Decision Clock	05.14.2019
C.5	2	Request for Waiver of Pre-Filing Meeting Requirement	02.05.2019
C.6	18	Administrative Decision	07.31.2019
<b>'D'</b>	<b>#</b>	<b>Comments Received (if needed)</b>	<b>Date</b>
D.1	1	Letter from Daniel and Penny Volker	04.15.2019
D.2	1	Letter from Shawn Finnerty	04.18.2019
D.3	1	Letter from Derek Eisele (via e-mail) on behalf of Scenic Fruit Company	04.19.2019
D.4	1	Letter from Angela Parker	04.19.2019
D.5	1	Letter from Kathy Cartisser	04.19.2019