
DECISION OF HEARINGS OFFICER

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: The use of Building #1, constructed prior to enactment of zoning or building codes, as a single-family dwelling is lawful. The use of Building #2 as a single-family dwelling is also a lawful use of land. The condition of having two homes on the same property is a nonconforming use that was established prior to and in existence in 1977 when Multnomah County imposed a limit of one single-family home per lot or parcel.

The following is a summary of key findings that support the above determination that the condition of having two dwellings on the subject property is a nonconforming use entitled to the protections offered by ORS 215.130(5):

1. Building #1 was built and used as a single-family dwelling on or before 1950 and prior to the adoption of County zoning or building code regulations.
2. Building #2 was built under the authority of a November 1, 1957 building permit. It was completed in March 1961. A notation on the Building Permit File Card states that the building was “completed according to County regulation.” Exhibit B.6.
3. USGS mapping based on 1960 aerial photography and a 1961 field survey shows that Building #2 was then a single-family dwelling. Evidence from long-time area residents also establishes that the only use of Building #2 has been as a single-family dwelling.
4. In 1985, Multnomah County approved a lot of exception land division to create one lot each for Buildings #1 and #2. The approval criteria required that there be two dwellings on the subject

property in order to obtain approval of the permit. The tentative plan drawing showed Buildings #1 and #2 and described them as single-family dwellings. Given County code and practice in effect at the time, it is highly unlikely that the County would have approved this land division if Building #2 was not lawfully established as a single-family dwelling prior to the adoption of restrictive zoning in 1977. This confirms my findings that the 1961 notation that Building #2 was completed according to Multnomah County building permit and code requirements and that the building completed in 1961 as a single-family house.

5. In 1977, Multnomah County prohibited the construction of two single-family dwellings on the subject property. At that time, the condition of having two single-family dwellings on one lot became a nonconforming use. This condition is protected by ORS 215.130(5) *et seq* as a nonconforming use.



Issued By:

Liz Fancher, Hearings Officer

Date:

October 16, 2019

Vicinity Map

N↑



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*. Findings written or significantly revised by the hearings officer are marked ‘**Hearings Officer:**’

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.

Hearings Officer:

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 April 19, 1955, Multnomah County adopted its first Zoning Ordinance and applied it to the northeast area of the county only at that time. Over a period of years, the zoning ordinance was applied to other areas of the property as zoning maps were prepared and adopted for those areas of the county.

On August 4, 1955, the County adopted an Interim Zoning Ordinance. This ordinance applied to a large area of the County not then subject to the 1955 Zoning Ordinance, including the subject property (Exhibit B.17). The County did not have zoning maps for lands subject to the 1955 Interim Zoning Ordinance because the area impacted by the interim code was not divided into zoning districts. All lands were subject to the same land use regulations.

The County’s historic ordinance collection includes a copy of the 1955 zoning ordinance with amendments made to the ordinance through December 22, 1960. Like the interim ordinance, Section 8.90 required building permits for the construction of structures and buildings. This section was as an original provision of the code so applied to the subject property in July 1958 through November 1962 when Ordinance #100 was adopted.

The copy of the 1955 Interim Zoning Ordinance maintained on line by the County is unsigned (Exhibit I.14). The title page of this document and the February 7, 1965 index of County zoning ordinances provided to accompany this ordinance state that this ordinance was effective on

August 4, 1955 (Exhibit I.13). This is circumstantial evidence that the original of the ordinance maintained in the County's official records is signed. The County's on-line records are not the official records of ordinances. The original ordinances are public records that should be accessible to the applicant. Absent evidence that these records are not available or show that the original ordinance was never signed, I find no reason to distrust the notations provided by the on-line records that show that the 1955 Interim Zoning Ordinance was signed and, therefore, effective as claimed by copies of these ordinances provided on-line.

Section 8.90 of the 1955 Zoning Ordinance and Section 5.70 Building Permits of the Interim Zoning Ordinance both required property owners to obtain building permits. This requirement was continued in Section 8.90, Permits of Ordinance No. 100 adopted in 1962. During the time period relevant to the construction of the second dwelling on the Stevens property, the Planning Commission was responsible for the County's building program, including the issuance of permits and inspections under the separately adopted building codes then in effect. (See, Exhibit B.6).

On July 10, 1958, the County Zoning Ordinance was amended to add the Suburban Residential (SR) zoning district. (Exhibit B.3). This zone is found in the County's 1960 version of the first Zoning Ordinance. The applicant argues this is not proof that the SR zone was in existence in 1960 for various reasons, including the legislative history provided for MCC Chapter 11.15. None of the applicant's arguments on this point are compelling, however, given the fact that Exhibit B.3 plainly shows that the SR zone was adopted on July 10, 1958. Furthermore, the record shows that specific zoning districts were applied to the subject property on July 18, 1958 (Exhibit B.3). It is unclear why the applicant wishes to create confusion about the zoning of the subject property during this time period. The burden of proof rests with the applicant. The SR zoning district allows two homes to be built on a single property. It is clear from the record that some zoning district was applied to the property by the County in 1958 and that the property was subject to the requirements of the permanent 1955 zoning ordinance, as amended, at that time. The County's on-line records contain an amended version of that ordinance in effect on December 22, 1960, which makes it possible to verify that the SR zone was a part of the code before the second dwelling use was established in 1961, and that the use was then lawful.

It is believed that the first zoning district applied to the subject property in 1958 was the Suburban Residential (SR) zone based on the oldest zoning map in the possession of the County at this time – a zoning map dated November 15, 1962. The County's website deems these maps to show 1955 to 1958 first zoning. Whether this is correct is unclear. What is clear, however, is that some zoning district was applied to the subject property on July 18, 1958. No claim has been being made that it was then unlawful to construct two homes on the subject property prior to November 15, 1962, and the zoning districts in the 1955 Zoning Code as amended through December 22, 1960 and Ordinance No. 100 adopted November 15, 2018, all allowed second dwelling in the County's agricultural and residential zoning districts.

The subject property was zoned SR no later than November 15, 1962 when the County adopted Ordinance No. 100, and retained that zoning until October 6, 1977, when the County applied a new zoning district to the property. Until 1977, the County's interim zoning ordinance and permanent zoning ordinance allowed single-family dwellings as a use permitted outright on the subject property and did not limit the number of single-family dwellings allowed on a parcel.

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) currently allows “[r]esidential use consisting of a single family dwelling on a Lot of Record.” The County staff and the applicant agree that on October 6, 1977, the MUA-20 zone restricted parcels to one single-family home.

History of Building #1 and Building #2

County tax records list the year of construction for Building #1 as 1950, prior to zoning and prior to adoption of building codes (Exhibit B.1 & B.3) that would regulate the use of the property.¹ 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).

On November 1, 1957, prior owners of the subject property 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). In 1959, it appears a County official inspected the progress of the building and allowed it to continue. The records state “just foundation (not Home)” followed by “new lumber, may continue.” (Exhibit B.6). This notation implies that the structure being constructed was, by 1959, a home rather than a utility building. If the building were a utility building, the notation would have been “just foundation (not utility building).” County records show that Building #2 was completed in March 1961, and the County determined at that time that Building #2 was “completed according to County regulations.” (Exhibit B.6). From other evidence in the record, it is reasonable to find that Building #2 was a dwelling at this time. The zoning district in effect was likely the SR zone and, if not, some other agricultural or residential zone that allowed multiple single-family dwellings.

In 1961, the USGS revised its 1950s era maps using aerial photographs taken in 1960 and field checked in 1961. This map, unlike the 1950s USGS map, shows that a second dwelling was built north and west of the first dwelling – apparently in the location of the current second dwelling. (Exhibit I.5).

The County Assessor’s records list Building #2 as a dwelling that was completed and placed on the tax rolls in 1963. In 1963, the property was zoned SR. This zone allowed for “[s]ingle family dwellings.”

In 1985, the County approved a tentative plan to create two separate parcels for each of two single-family dwellings located on the subject property. The approved plan map shows Buildings #1 and #2 as being houses and shows they were located where they are located in 2019. (Exhibit B.8). The tentative plan map shows that a shop and barn were also located on the property. It is nearly inconceivable that the County would have approved this partition unless each of the two dwellings was lawfully established on the subject property. Furthermore, it is clear that the second dwelling on the property was not any structure other than Building #2. The

¹ The first county zoning ordinance was a May 26, 1953 interim zoning ordinance. This ordinance required building permits and special use permits for certain uses but did not create zoning districts. Single-family dwellings and farm use did not require approval of a special permit. The 1955 zoning ordinance and interim zoning ordinance are typically considered to be the first zoning ordinances by Multnomah County staff.

1985 applicant had no known reason to misrepresent the location of the second dwelling. Misrepresenting the location of the dwelling would have offered him no discernible benefit.

In 1986, Multnomah County conducted a survey of land uses in the area, including of the subject property. This survey shows that the subject property contained two dwellings in 1986. (Exhibit B.4). Building #2 is shown in its current location but is marked as being a building other than a dwelling. Either the shop building or the barn is erroneously marked as being a dwelling because it is illogical to find: (a) Building #2 was a residence in 1961 per the USGS map; and (b) Building #2 was a residence in 1985 per the tentative plan; and (c) Building #2's use was changed to some use other than a dwelling use by 1986; and (d) that Building #2 was reoccupied and used as a single residence by 1999 when County pre-application meeting notes indicate that Building #2 was used as a residence. (Exhibit B.9). Additionally, evidence provided by long-term residents of the area confirms that Buildings #1 and #2 were located on the subject property in the 1960s and in subsequent decades and that the location of Building #2 has not changed. (Exhibit D.1, D.4, I.2). As a result, it is clear that in 1985 and 1986, Building #2 was a dwelling; not a utility building (Exhibit B.8) and that Building #2 was a second single-family dwelling when the County adopted the MUA-20 zone and applied it to the subject property in 1977.

The record shows that two-dwelling use has been occurring continuously during the 20 year period prior to the filing of the nonconforming use application. As a result, I find that the use has not been abandoned or discontinued.

2.0 PUBLIC COMMENT

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

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

Hearings Officer: 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. This evidence demonstrates that the 1985 Plan Map, not the 1986 County survey, accurately depicts the location of Building #2 and its use as a dwelling from 1974 until the present. As the County's zoning ordinance allowed the property owner to establish two single-family dwellings on the subject property in 1974 and two dwellings were on the property in 1974, the two single-family use that became nonconforming in 1977 was established prior to the date it was prohibited.

2.2 Comments from Shawn Finnerty, Resident of Carpenter Ln.

Staff: 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.

Hearings Officer: The County Dept. of Assessment and Taxation operates under separate laws, rules, and regulations dictating how/when/why they can collect tax revenue. It does not determine the legal status of the dwellings for purposes of applying land use regulations. County staff has opined that it appears the County Sanitarian issued the 2005 septic permit without obtaining a LUCS (Land Use Compatibility Statement) from County Land Use Planning and that 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)

Staff: 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.

2.4 Comments from Angela Parker, Resident of Carpenter Ln.

Staff: 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.

Ms. Parker, in comments dated 9-16-2019, advised that the two homes have been in their current locations for as long as she can remember. She advised that County information that indicates that the second home was in a different location on the property is erroneous.

Hearings Officer: This is strong evidence that the use of two dwellings on one parcel was established prior to the date in 1977 when the use was prohibited by the County's zoning code.

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.

Hearings Officer: This letter provides additional support for the applicant's position that the two dwellings were established on the subject property at a time when zoning laws allowed two dwellings on a single parcel.

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. The County 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...***

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... ***

Staff: This application is for a Verification of a Nonconforming Use only. In this case, the question is whether Building #1 and Building #2 were legally established as dwellings at the

time the zoning code was amended to prohibit the use in question. Therefore, this application does not require the County to determine whether the subject property 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. ***

(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.

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.

Hearings Officer: To be a nonconforming use, the use must have been legally established at the time the zoning code was amended to prohibit the use. In this case, the second dwelling use was prohibited in 1977 when the MUA-20 code was applied to the subject property. The code requires that the use was established in compliance with all land use procedures, standards and criteria applicable at the time the use was prohibited in order to qualify as a nonconforming, protected use. Only land use requirements, if any, in effect at the time the second dwelling use of Building #2 was established on the subject property are relevant.

The applicant has claimed that the subject property was not subject to the County's zoning ordinance during the time Building #2 was being constructed due to provisions of former ORS 215.130. That law said:

"No ordinance adopted under ORS 215.010 to 215.190 shall regulate lands used for grazing, agriculture, horticulture or for the growing of timber."

The building plans for Building #2 describe the subject property as a four-acre farm. The plans are labeled to show that the building would be occupied, in part, by a tractor and tractor equipment, including a disk, plow, cultivator, and duster sprayer. (Exhibit I.7). Agricultural uses were common in the area of the subject property at the time Building #2 was being constructed. Given these facts, former ORS 215.130 would have exempted the subject property from regulation by the County's zoning ordinances during the entire period of time that Building #2 was being constructed if the farm use shown on the 1957 were continued during this period of time. 28 Op Atty Gen Ore 197 (1957)(County may not require that agricultural use be the principal source of income for the property owner).

Former ORS 215.130 is of little consequence, however, as it relates to the lawfulness of the use. No party is claiming that the second dwelling use was not lawful at any time prior to 1977. A second dwelling was allowed on the subject property by the zoning ordinance in effect when Building #2 was constructed and occupied as a dwelling (1957 – 1961) as it would have been if former ORS 215.130 had been shown to have prevented application of the zoning ordinance to the subject property. Former ORS 215.130, according to research of former versions of the ORS was in effect prior to 1957 and remained in effect until amended in 1963.

I find that the building permit requirement imposed by the County's former zoning ordinances was not a land use regulation. Instead, it is a requirement that a property owner obtain a permit that will assure that the property owner will follow building codes in constructing buildings and structures in which uses will, thereafter, be conducted if allowed by the land use laws. Building codes are not land use or zoning laws. The Oregon Supreme Court in *Warren v. Marion County*, 222 Or 307, 353 P2d 257 (1960), held that a county building code was not a "zoning or land use regulation" and was not subject to former ORS 215.120 which required such regulations to be approved by the County electorate. Instead, building codes and permit requirements were and are laws that give counties the authority to "provide for the issuance of permits as a prerequisite to construction, alteration or enlargement of any building or structure otherwise subject to ORS 215.010 to 215.190." ORS 215.160 (1955). *See also*, ORS 215.108 (1955).

The 1953-1961 version of ORS 215.130 would have been relevant to this decision if I had found that the zoning ordinance's requirement that property owners obtain building permits was a land use or zoning law. If the County's building permit requirement is determined to be a land use or zoning law in 1957-1961 when Building #2 was built and in use as a residence (Exhibit I.5), the building permit requirement would not have been applicable to the construction of Building #2 if it could be shown that the 1957 agricultural use of the property continued through 1961. *But see*, Informal Opinion No. 5643 of the Attorney General of the State of Oregon, 31 Op Atty Gen Ore 221 (1963) that that ORS 215.130 did not prohibit the county from applying its building code to the construction of dwellings on lands exempted from county regulation by former ORS 215.130 during the time in question – 1957 through 1962.

County staff relied on the following definitions and reasoning in the appealed decision:

MCC 39.2000 – Definitions

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.

The staff decision found that Multnomah County Code utilizes two terms for *legally established* within its definitions and that the terms “*Lawfully Established*” and “*Legally Established*” are synonymous. I need not address this argument because I have found that Building #2 was built under the authority of a 1957 building permit. I address the issue, nonetheless, because this decision may be appealed and I wish to provide an alternative basis for affirming my decision that the single-family residential use of Building #2 is a nonconforming use subject to the protections of ORS 197.130(5) *et seq.*

The Hearings Officer finds that the term “Lawfully Established Dwelling” is not a relevant approval criterion applicable to the review of a nonconforming use determination. First, the term is “Lawfully Established Dwelling” is not the same as a “legally established use” and each serves a different function in the zoning ordinance. The first term is a term derived from state law that is used to determine when a dwelling may be replaced as a use permitted outright in resource zones. *See*, ORS 215.283(1)(p), Section 2 of Chapter 462, Oregon Laws 2013 and 215.755(1). It is not used by state law to determine whether a use is a grandfathered nonconforming use under ORS 215.130(5) – the law that controls the outcome of this application.

MCC Chapter 39 uses the term “Lawfully Established Dwelling” in the same way as it is used in state law by specifically allowing the alteration, restoration and replacement of lawfully established dwellings in the EFU and CFU zones as it is allowed under state law. MCC 39.1185(C)(4)(a) and (g), MCC 39.4220(lawfully established habitable dwelling qualifies a replacement dwelling). The County also uses the term in defining the term “replacement” related to dwellings, buildings or structures which is consistent with how the term is used in state law. MCC 39.2000, Replacement.²

The only place a truly similar term is used in the County’s nonconforming use rules in MCC 39.8300(H). This part of the code uses the term “lawfully established habitable dwelling” and says that a lawfully established habitable dwelling may be altered and modified without review

² ORS 215.454 also allows the replacement of uses or structures at wineries established on or before June 28, 2013 as a matter of right. The County code applies this concept in its code in addressing bed and breakfast inns at wineries in lawfully established dwellings.

for compliance with nonconforming use rules. This type of dwelling, to be replaced without review under nonconforming use rules, must have been built with the benefit of a building permit. Building #2 meets this definition and, therefore, may be altered or replaced without further County review.³

The question in a nonconforming use application is different than the question posed when a property owner is seeking to replace an existing structure or building. The question in a nonconforming use review is whether the use, and only the use, of a building, structure or land was established in compliance with land use laws prior to the time it was prohibited by the enactment or amendment of the County's land use laws or "legally established." The law does not ask whether all required building, electrical, plumbing and other permits were obtained over half a century ago.

Multnomah County is required by state law to recognize any use protected as a nonconforming use by ORS 215.130(5) – (11).⁴ The law, in relevant part, provides:

215.130 Application of ordinances and comprehensive plan; alteration of nonconforming use.

(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

(7)(a) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:

(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application.

³ The record shows that Building #2 is habitable. As a result, it may be altered and modified without review for compliance with nonconforming use rules. The Stevens home is habitable as defined by MCC 39.2000, Habitable Dwelling. Building #2 was lawfully established in 1961 under the authority of a 1957 building permit, Exhibit B.6. Photographs provided by the applicant show the home meets all requirements of a "habitable dwelling" with the exception of the requirement of a connection to a sanitary waste disposal system. The home has intact exterior walls and a roof, indoor plumbing consisting of a kitchen sink, toilet and bathing facilities, interior wiring for interior lights (lights in some photos are illuminated) and heating system (heating system vents in ceiling). The record establishes that the home is connected to a sanitary waste disposal system because as a permit was issued to repair that system.

⁴ Only subsection (10) is optional.

Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application;

(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or

(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section.

(11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application.

In *Morgan v. Jackson County*, 290 Or App 111, 414 P3d 917 (2018), the Oregon Court of Appeals determined that an auto yard that was established without a required DMV license for auto dealers was entitled to protection as a nonconforming use. The Court held that the term “lawful use” in ORS 215.130(5) refers to uses that are contrary to zoning and land use laws. It rejected arguments that an applicant must demonstrate that all other permits required to conduct the use were obtained by the person conducting the use. Staff argues, quoting *Morgan*, that under state law, a building permit is “a matter that involves laws concerning the use of a building[.]” Staff’s reading of *Morgan*, however, is incomplete. The entire sentence from which the quotation is taken says: “The context of subsection (5) of ORS 215.130 further reinforces the proposition that “lawful use” is a matter that involves laws concerning the use of a building, structure or land as do zoning and land use regulation.” The final part of this sentence is key. To be relevant to a nonconforming use review, the law in question must concern the use of a building as do zoning and land use regulations.

Building permits and laws, by and large do not regulate uses; they regulate the construction buildings. The issue of how the building is used is governed by land use laws. Many times, when a building permit is reviewed by a local government, the government also concurrently addresses the issue whether the future use of the building complies with land use laws. Such reviews may be land use decisions if they are not made subject to clear and objective standards only. ORS 197.015(10)(b)(B). ORS 197.015(10)(b)(B) does not, however, mean that if a concurrent review of land use laws is conducted with building permit review, that the review of compliance with building code criteria (as opposed to land use regulations) is a land use decision.

Multnomah County’s building code rules, themselves, are not land use regulations. ORS 197.015(11). They are not acknowledged by LCDC for compliance with the Statewide Land Use Planning Goals. A review for compliance with building code regulations only clearly does not fit the definition of a land use decision in the first place. ORS 197.015(10)(a).

To be a land use decision, a County’s issuance of a building permit must meet the definition of ORS 197.015(10)(a):

(10) “Land use decision”:

(a) Includes:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

(i) The goals;

- (ii) A comprehensive plan provision;
- (iii) A land use regulation; or
- (iv) A new land use regulation;
- (B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or
- (C) A decision of a county planning commission made under ORS 433.763 [mass gatherings]; ***

The issuance of a building permit in the 1950s and 1960s did not involve the application of the goals, comprehensive plan, land use regulations (defined as laws adopted under the authority of ORS 92.044 or 92.046 or similar ordinance implementing a comprehensive plan), a decision of a state agency required to apply the goals adopted in the 1970s or a mass gathering. It, therefore, was not a land use decision as presently defined by State law.

County staff correctly notes that *Morgan* case does not present a case where a building permit is the missing permit. The Oregon Land Use Board of Appeals has, however, specifically decided that violations of building code and fire code applicable to an existing structure used by a nonconforming use do not disqualify the use from the protections of ORS 215.130(5). *Coonse v. Crook County*, 22 Or LUBA 138 (1991). In *Coonse*, LUBA stated in *dicta* that where building and fire codes are made a part of zoning and land use regulations or are integrally related to zoning rules, a structure would need to comply with those requirements on the date a new or amended zoning or land use law is adopted to be protected by ORS 215.130(5).

LUBA later stated, in *Spathas v. City of Portland*, 28 Or LUBA 351, 358 (1994), *rev'd* 133 Or App 275, 891 P2d 664 (1995) that if “building code requirements are incorporated into a local government’s land use regulations” an existing structure would need to comply to be protected by ORS 215.130(5). Multnomah County did not incorporate its building code regulations into its zoning ordinance. They only required that building permits be obtained for development on land subject to the ordinance.

As explained earlier, at all relevant times during the construction of Building #2, the County’s zoning ordinances required building permits for new construction. County staff argues that because County zoning codes required landowners to obtain building permits, the building permit requirement is a zoning regulation that must be shown to have been met in 1957 or thereafter in order to establish that the second single-family dwelling use of Building #2 was a lawful use when it was prohibited in 1977. This is a solid argument but one disproven by *Warren v. Marion County*, 222 Or 307, 353 P2d 257 (1960) that held that building codes and permit requirements in effect when Building #2 was constructed are not land use or zoning regulations subject to then-existing laws that required zoning and land use rules to be approved by County voters to be effective.

I do not believe that the County’s 1955 temporary and permanent zoning ordinances intended to transform laws that regulate how structures are built (building code laws that are not a part of the zoning ordinances) into laws that regulate the use of land. I see the County’s zoning code requirement to obtain a building permit under building codes that are not land use laws to be a means of insuring compliance with its building code regulations; not as a regulation of the use of land. I also note that the Planning Commission served as the building official for the county during the time the second home was built so including a building permit requirement in the

zoning code made sense and did not make the building permit process a land use or zoning review process.

I have found no law that makes it unlawful to convert a utility building permit to a single-family dwelling permit or any zoning code rule that prohibits conversion. No party has identified a law in effect from 1957 through 1961 that says that a new permit would have been required if the use of the utility building was changed to a single-family dwelling use as the building was being constructed. Presumably more stringent rules would have applied to the construction of a house but this does not necessary mean that a new permit would have been required.⁵ The fact that the building was a house in 1961 according to the USGS and the structure received approval from the County as being in compliance with the applicable law in 1961 convinces me that the property owner either lawfully converted the 1957 permit to a single-family dwelling permit or obtained a second building permit for the house by the time of sign-off on the 1957 permit in March 1961. This issue is discussed in more detail below.

Based on the above analysis, it is clear that the County's building permit requirement in its zoning codes was not a zoning and land use law.⁶ As a result, the *Morgan* decision makes it impermissible for the county to require the Stevens to establish that a building permit was obtained for Building #2 in order to be able to continue a single-family dwelling use that was clearly allowed by the zoning ordinance when established in 1961.

This case illustrates the extreme hardship caused by requiring a property owner to prove that building permits were obtained in the 1950s for uses in existence in 2019 and in the years ahead. Building permit records are incomplete and the persons who obtained the permits in the first place are, in most cases, deceased. The public benefit of enforcing a building permit requirement is slim to none. If in fact a building permit was not obtained over half a century ago, the proper remedy would have been to require the property owner to obtain a building permit. If the 1985 land division had been completed as approved and each home had its own parcel, the County's only recourse for the failure to obtain a building permit would have been to require the property owner to obtain a building permit and review. Only because the houses are still on a single parcel – a land use issue – is the building code requirement one that, under the County staff's view, a requirement that cannot be corrected. This approach, if followed would punish a current, innocent property owner for a possible code violation committed over 60 years ago by a prior property owner. Furthermore, the penalty imposed is draconian as well as unjust; a taking of a private property owner's home.

⁵The applicant has shown that thousands of Multnomah County building permits from the relevant time period have been lost or destroyed so the inability of the applicant to find a permit for a house does not establish that no such permit was issued if a new permit would have been required to change the intended use of the building permitted in 1957.

⁶ The essence of a nonconforming use is that the use is undesirable and must be discontinued. Only if a use was allowed when established, may it be continued. A building permit is different. It is not a use. A building permit may be issued for Building #2 even though it may lack earlier, required permits. No such cure is possible for a use not allowed by zoning codes if it did not exist when the use was first prohibited. I, therefore, believe ORS 215.130(5) is focused on the lawfulness of the use; not the lawfulness of construction.

Based on the foregoing findings, the Hearings Officer finds that the issue of whether or not the Stevens home obtained a building permit for residential use is not a proper reason to disqualify the second single-family home use of Building #2 from the protections of ORS 215.130(5). The Hearings Officer also finds that limiting the application of ORS 215.130(5) and the County's nonconforming use protections to "lawfully established dwellings" would violate ORS 215.130(5).

Year of Establishment of the Buildings

Building #1: County zoning regulations was first applied in 1955 and County building codes were first established in 1954. Buildings built before then are presumed to be legally established. Here, the Applicants point to tax records that indicate a year of construction of 1950 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 and conducted in 1952 (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: County 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) in the approximate location of Building #2. More detailed plans filed with the 1957 building permit application show that the proposed structure was a utility building. (Exhibit I.7).

RECEIVED

MULTNOMAH COUNTY PLANNING COMMISSION
Residential Building Permit Application

Permit No. **12603**
Fee **9.50**
Receipt No. **10420**
Zone **2-134E**
Map No. **2-134E**
Neighborhood No.
School District No.

☒ New Construction ☐ Alteration ☐ Addition
Size **24x36** No. of Rooms **1**
Valuation **3400** No. of bed-rooms

Address **1221 1/2 NW 36th Ave**
Between **122nd and 124th**

Legal Description
Lot **40** Block **134** Addition **134E**

Owner **R. G. Mulling**
Address **Same add**
Builder **Same**
Address

Use: (Check One) ☒ Single family res. ☐ duplex ☐ garage
☐ utility building ☐ apartment ☐ other

Plans By **Same** Architect ☐ Designer ☐ Engineer ☐ Builder

Sewage Disposal: ☐ sewer ☐ septic tank ☐ cesspool

Garage: ☐ attached ☐ detached ☐ no provision

Street: ☐ dedicated ☐ easement ☐ none ☐ standard ☐ one ☐ two ☐ three or more

Lot Width **20x70** Depth **70** Area

Description:

Plot Plan:

(Image #1)

The Building Permit File Card Exhibit B.6, however, provides circumstantial evidence that the building constructed under the authority of the Exhibit B.5 permit, above, was converted to a dwelling while it was under construction. As discussed earlier, a notation on the Building Permit File Card related to a March 1959 inspection states “just foundation (not home)” and “new lumber, may continue [to build the home].” I read this note to mean that the foundation in question is one for a future home; not for a utility building. While other explanations are possible, including those suggested by County staff, I believe the notation means that the foundation was inspected and that the home was either not then being built or that it was not finished and was not inspected.

Building #2 was identified as being on the property by a 1961 USGS map based on a 1960 aerial photograph and 1961 field check. It is shown by the map as being a dwelling. (Exhibit I.5). The USGS map was a revision of an earlier map completed in the 1950s. This map, unlike the earlier USGS map, shows that a second dwelling north and west of Building #1 –in the approximate location of the Building #2. (Exhibit I.5). This evidence is consistent with evidence from Angela Parker who said that Building #2 was a residence for as long as she can remember in its current location and was on the subject property in the late 1950s when permit records show Building #2 was being built (late 1959 – 1961). To find otherwise would require a finding that Building #2 was completed as a utility building in March of 1961 and then converted to a residential use no later than the end of 1961. This is highly improbable.

The 1957 building plans show that the property owner intended to build a second home on the property. This supports the finding that the property owner started to build a utility building and then decided to finish the building as a second home rather than as a utility building. The length of time between issuance of the permit and completion of the structure is also, according to a former County planner with extensive knowledge of County land use history, longer than would be expected for a utility building and more consistent with the amount of time it would take to build a single-family home.

According to the Building Permit File Card (Exhibit B.6), Building 2 was completed “according to County regulation” in March of 1961. The building was recognized by the County Tax Assessor as a dwelling completed in 1963. According to evidence in the record, the Assessor’s date of completion often lags actual completion – until such time the property is observed and added to the tax rolls – making the two year discrepancy in dates of no consequence. All of these facts support my finding that when the County building official noted that Building 2 was completed “according to County regulation” in March of 1961 he or she determined that a single-family house – not a “utility building” was completed according to County building regulations.

This evidence also establishes that the builder of second dwelling obtained a building permit for a residential use of Building #2 prior to completion of the home in 1961. As the County found the building in question to meet applicable building codes and permitting requirements in March 1961 and the record shows that the building that existed on the property in 1961 was a single-family home, I find that the single-family home complied with all applicable building codes and building permit requirements⁷ in effect at that time.

Other Issues Raised During Review of the Application

Changes to Building #2

Planning staff noted that aerial Imagery from 1977 and 2018 appears 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]. These changes altered the structure but did not alter or expand the use of the building which is and has remained that of a single-family dwelling. As a result, these changes do not preclude me from finding that the second single-family dwelling use of the subject property is a lawful nonconforming use.

Claims that Building #2 Predates Zoning

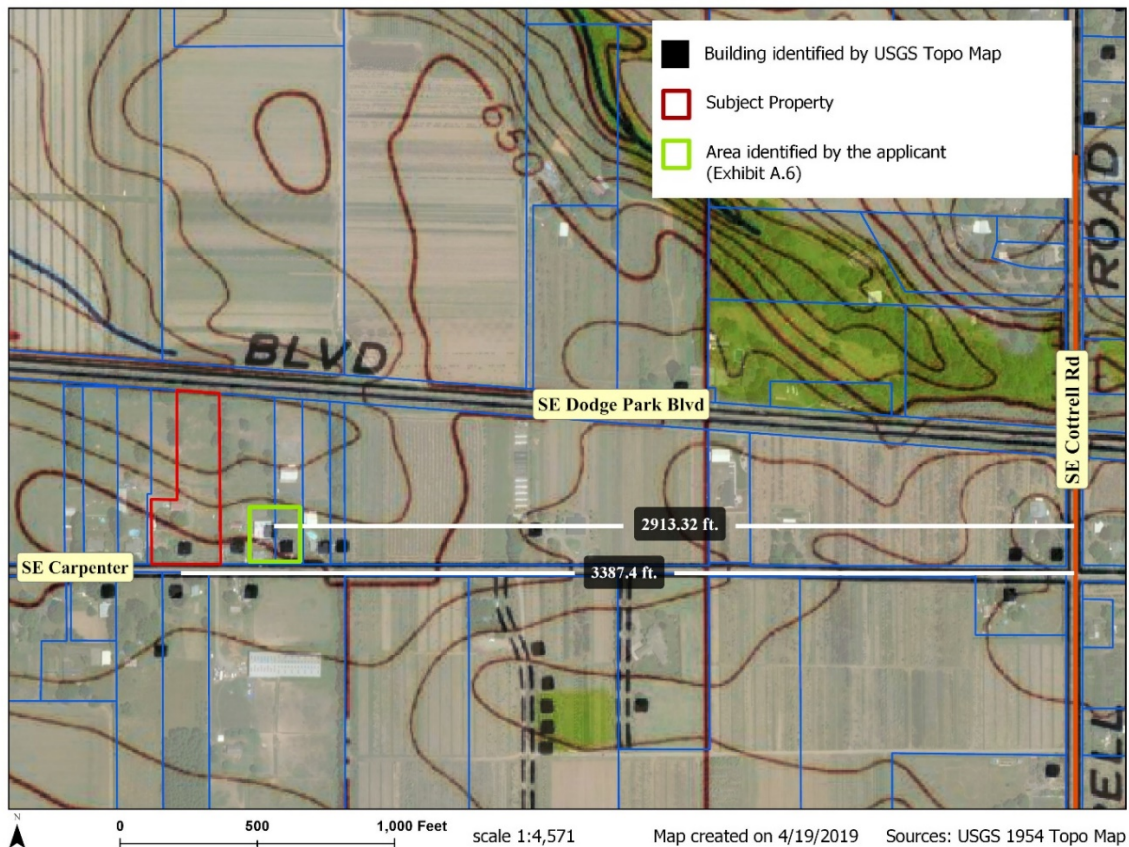
In addition to the 1957 building permit noted above, Staff utilized the Multnomah County Planning Commission land use survey initiated in 1950 (Exhibit B.2) to determine whether Building #2 had been constructed prior to the 1963 date listed in the tax records. The 1950 field surveys established a baseline 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 applicant’s consultant, Don Kienholz, argued that the survey was conducted in 1952 (as shown by Exhibit B.18) and was not updated by staff. Exhibit B.3,

⁷ By making this finding, I am not implying that such a finding is necessary to establish that the Stevens home is a nonconforming use. Such a finding is needed to determine whether the house may be repaired, replaced or remodeled without undergoing a review of an alteration of a nonconforming use. It may be that the County will require the applicant to obtain permits for prior work conducted without a building permit before allowing the applicants to expand or replace Building #2.

however, contradicts that position as it contains notes and signatures that strongly imply the map was updated as claimed by Staff. I find that this evidence is consistent with my conclusion that the utility building was built under the authority of the 1957 permit and does not pre-date 1957. The dimensions and location of the utility building and the existing home are nearly identical, making it virtually certain that the building was not constructed prior to adoption of the County's interim zoning ordinance in 1955.

The Applicants offer evidence they believe demonstrates the legal establishment of Building #2 as a dwelling prior to the County's adoption of land use regulations and building codes. This evidence is insufficient compared to the evidence provided 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 applicant presented Exhibit H.5, an aerial photograph of area homes with the location of homes noted. The applicant claimed this shows that the subject property is the only property that is currently developed with two homes so must be the property shown on the USGS Topo Map in 1954 that may depict a property with two homes (one home set back further from Carpenter Lane). The applicant's illustration and the Staff illustration, above, however, appear to show that the "two home" grouping is located on the property immediately to the east of the subject property. The second home is shown where a large barn is now located – possibly having replaced an old dwelling. The USGS map and County aerial photograph, above, shows that existing homes and the black squares on the USGS match line up nearly perfectly. Also, counting the number of houses built near the front property line starting from the east place the second dwelling east of the fourth dwelling from the east shown on Exhibit H. 5; not west of the fifth dwelling on Exhibit H.5 where Building #2 is located. Furthermore, the 1961 USGS map confirms staff's analysis as it shows Building #2 as a new structure located on or near the subject property. (Exhibit I.5). The information highlighted on the 1954 USGS Topo Map submitted by the applicants (Exhibit A.6), therefore, does not demonstrate that Building #2 was in place on the subject property in 1954, nor does it establish 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). The Exhibit A.24 permit, however, is issued to an address at Rt. 2, Box 552, Gresham whereas the subject property had an address of Rt. 2, Box 486, Gresham. *See*, Exhibits B.5 and B.6. Additionally, the Exhibit A.24 permit was for a property located in Government Lot 5 whereas the subject property is located in Government Lot 1 according to the Stevens deed to the subject property. *See*, Exhibit A.18 (legal description). The building permit record for permit no. 3745 (Exhibit B.16) indicates it was issued for a property ½ acre in size. The subject property is much larger. As a result, the 1955 permit was not issued to authorize the construction of Building #2.

Year of Establishment of the Dwelling Use

Building #1: As described above, based on County tax records and the 1950 survey, Building #1 is a legally established dwelling that pre-dates zoning and building codes.

Building #2: The evidence discussed above shows that the single-family dwelling use was established in 1961.

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).

The law reviewed by LD 27-85 does not expressly require a finding that Building 1 and Building 2 were legally established by 1985. This does not rise to the level of a binding determination that precludes a contrary conclusion under the rule against impermissible collateral attacks on prior land use decisions because the issue was not issued in a first stage review of a multi-stage development approval and did not squarely address the issue of whether a building permit had been issued for Building #2.

The County code in effect at the time required that uses on properties be lawful at the time a use of land was altered. A land division would not alter the use of land so this rule would not have been an applicable review criterion for the 1985 decision. It was not treated as a review criterion by the 1985 decision. It seems highly likely, however, that the land division would not have been approved if the buildings had not been lawfully established, because the land division allows a significant exception to the minimum lot size and the creation of two substandard lots if there are two dwellings located on a single lot or parcel. It is nearly certain that if the property owner had built a house without a permit in 1980 that the County would not have approved the land division.

A hand-drawn floor plan of a room, likely a kitchen or bathroom, with various dimensions and labels. The plan includes a door at the top right, a sink area labeled "SINK" with a "SEPTIC" line, a stove area labeled "STOVE" with a "SEPTIC" line, and a bathtub area labeled "TUB" with a "SEPTIC" line. Dimensions are given in feet and inches, including overall room dimensions (10' x 10'), door dimensions (3' x 6'), and various offsets and clearances (e.g., 1' 6", 1' 10", 1' 11"). The drawing is on a grid background.

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." This is Building #2, the building constructed under the authority of a 1957 building permit and completed in 1961.

I have not relied on evidence filed by County staff (in particular, evidence regarding the adoption of County ordinances) after the close of the record in making this decision. As a result, this information is not included in the record. This decision does not rely on that evidence. I, also, have not included objections to the receipt of that evidence filed by Don Kienholz on behalf of the applicant on October 14, 2019, after the deadline for filing final argument because the evidence is not being included in the record so the objections are moot.

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

Hearings Officer: (B), (C), (D), (E), and (F) relate to the nature and extent of a continued legally established nonconforming use. The following are the findings required by these code sections.

The nature and extent of the use at the time of the adoption of the zoning code disallowing the second home use in 1977 was as a single-family dwelling use. The use has not been changed to a more intensive residential use and the building in which the use is conducted is essentially the same as it was when constructed. The home is in the location shown in the 1957 building permit and it occupies the amount of land shown on the permit with the exception of minor additions. The use of the dwelling was continuous and typical of a single-family residential use. There is no evidence that the scope or intensity of the use changed – the home was always a single-family home.

5.0 CONCLUSION

Hearings Officer: Building #1 was legally established prior to the enactment of zoning regulations or County building codes.

Building #2 was established in 1961. Building #2 was legally established under the authority of a November 1, 1957 building permit no. 12603 as a 26' x 36' dwelling. It appears that the footprint of Building #2 may have been expanded without required building permits. While building permits may need to be acquired to rectify this situation, the expansion of Building #2 is not subject to this nonconforming use review per MCC 39.8300(H) because the dwelling is a "lawfully established dwelling."

6.0 EXHIBITS

'A' Applicant's Exhibits
'B' Staff Exhibits
'C' Procedural Exhibits
'D' Comments Received
'H' Hearing Exhibits
'I' Post Hearing Exhibits

Exhibits with a "*" after the exhibit # have been included as part of the mailed decision. All other exhibits are available for review in Case File T2-2019-11563 at the Land Use Planning office.

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
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’	#	Staff Exhibits	Date
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	03.08.2019

		File Card for Permit No. 12603	
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 https://ngmdb.usgs.gov/topoview/help	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
‘C’	#	Administration & Procedures	Date
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	37	Administrative Decision	07.31.2019
C.7	3	Notice of Appeal	08.15.2019
C.8	5	Notice of Public Hearing	08.21.2019
‘D’	#	Comments Received (if needed)	Date
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

‘H’	#	Hearing Exhibits	Date
H.1	2	Pictures of subject house, submitted by applicant's representative	9.13.2019
H.2	2	1982 MUA-20 Code Lot of Exception (used for LD 27-85), submitted by applicant's representative	9.13.2019
H.3	1	On-site sewage permit dated 5.24.05 for 33419 SE Carpenter Lane for SFD, submitted by applicant's representative	9.13.2019
H.4	4	USGS Geological Survey Circular dated 1955 showing topographic map symbols, submitted by applicant's representative	9.13.2019
H.5	1	House locations along SE Carpenter Ln, submitted by applicant's representative	9.13.2019
H.6	1	1954 USGS Map key submitted by applicant's representative	9.13.2019
H.7	1	Building cards for 33537 SE Carpenter Ln, submitted by applicant's representative	9.13.2019
H.8	18	Sandy Homestead Patent for Adolf Sester beginning 1898, submitted by applicant's representative	9.13.2019
H.9	4	Examples of lost building permits, submitted by applicant's representative	9.13.2019
H.10	1	Screenshot showing microfilm missing Reel #6 consisting of 1,990 lost building permits in 1956, submitted by applicant's representative	9.13.2019
H.11	12	Excel spreadsheet of missing or incomplete Reels of BP's, submitted by applicant's representative	9.13.2019
H.12	13	Copy of T2-2016-5246 Decision, submitted by applicant's representative	9.13.2019
H.13	1	1962 permits showing many with missing addresses, submitted by applicant's representative	9.13.2019
‘I’	#	Post Hearing Exhibits	Date
I.1	6	Post appeal narrative submitted by Don Kienholz	9.20.2019
I.2	1	Angela Parker second letter dated 9.16.19	9.20.2019
I.3	5	Table of contents of 1955 Code submitted by Don Kienholz	9.20.2019
I.4	21	Section 84 history submitted by Don Kienholz	9.20.2019
I.5	1	1961 USGS Map showing subject houses submitted by Don Kienholz	9.20.2019
I.6	2	City of Gresham Building Division pamphlet re: building permits w/building code inspector Johnny Vollendroff business card and notes submitted by applicant	9.20.2019
I.7	67	Staff's Post-Hearing Memo dated 9.20.19 w/attachments	9.20.2019
I.8	17	Email dated 9.26.19 from Liz Fancher re: SR zone and reply dated 9.27.19 from Chris Liu w/attachments	9.27.2019

		a. I.8.a -Copy of 03 Residential ZO 1962-11-15 b. I.8.b – Copy of 00 Table of Contents ZO 1979-3-6	
I.9	2	Email from Don Kienholz dated 9.26.19 requesting extension of rebuttal period and final argument deadlines and reply from Liz Fancher dated 9.27.19 granting request	9.27.2019
I.10	1	Email from Don Kienholz dated 10.4.19 w/post hearing rebuttal exhibits	10.4.2019
I.11	8	Post Hearing rebuttal arguments from Mr. Kienholz and the Stevens	10.4.2019
I.12	1	Applicant's Attachment 1 – County's historical zoning code and map page	10.4.2019
I.13	5	Applicant's Attachment 2 – April 4, 1955 Zoning Code Table of Contents	10.4.2019
I.14	1	Applicant's Attachment 3 – August 8, 1955 unsigned 1955 ordinance by Board of County Commissioners	10.4.2019
I.15	2	Applicant's Attachment 4 – List of Zoning Districts for 1960 Zoning Code – No SR Zone	10.4.2019
I.16	1	Applicant's Attachment 5 – 1962 Zoning Code	10.4.2019
I.17	1	Applicant's Attachment 6 – 1960 Zoning Code with Different Fonts	10.4.2019
I.18	7	Applicant's Attachment 7 – 1960 Zoning Code Pages 1 – 7 from online. SR pages appears from 1962 code	10.4.2019
I.19	1	Applicant's Attachment 8 – Multnomah County Code Chapter 29 Policy and Purpose	10.4.2019
I.20	1	Applicant's Attachment 9 – Multnomah County Code Titles	10.4.2019
I.21	12	Applicant's Attachment 10 – 1955 OR 215.130	10.4.2019
I.22	12	Applicant's Attachment 11 – 1959 OR 215.130	10.4.2019
I.23	14	Applicant's Attachment 12 – 1961 OR 215.130	10.4.2019
I.24	1	Email from Don Kienholz w/applicant's final argument & letter from Andrew Stamp, attorney	10.11.2019
I.25	2	Applicant's final argument	10.11.2019
I.26	10	Letter dated 10.11.19 from Andrew Stamp, Attorney at Law, Kruse Mercantile Professional Offices	10.11.2019