BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON

Regarding an appeal by David and Elaine Krueger of a planning director decision denying a proposed multiple dwelling land division at 18270 and 18280 S. Old Clarke Road in unincorporated Clackamas County, Oregon	))))	**F I N A L O R D E R** **Z0375-24** **(Krueger MDLD)**

A. SUMMARY

1. On September 18, 2024, David and Elaine Krueger (the "applicants"), filed an application for approval divide a 3.27-acre lot containing two primary dwellings into two separate lots via a Multiple Dwelling Land Division ("MDLD").

a. The property proposed for division is located at 18270 and 18280 S. Old Clarke Road; also known as tax lots 1702, 1700, 1701, and 1703, Section 18, Township 4 South, Range 3 East, of Willamette Meridian, Clackamas County (the "site"). Tax lots 1702, 1700, 1701, and 1703 form one lot of record. Tax lot 1702 was involved in a recent property line adjustment with the adjacent tax lot 1704, a separate lot of record. The site and abutting properties to the east and west are zoned TBR (Timber). Properties to the north and south are zoned EFU (Exclusive Farm Use).

b. The site is currently developed with an accessory structure and a stick-built dwelling. The accessory building was constructed on current tax lot 1702 in 1967 and included a rental apartment addressed as 18270 S. Old Clarke Road. The stick-built dwelling that was constructed in 1973 on tax lot 1701, addressed as 18280 S. Old Clarke Road.

c. In 1998 the applicants requested, and the County approved, replacement of the apartment dwelling in the accessory structure with a manufactured home located on Tax lot 1704. The conditions of the replacement dwelling approval required the applicants to remove the apartment or convert it into an accessory structure.

2. On December 19, 2024, the planning director (the "director") issued a written decision denying the Multiple Dwelling Land Division application, finding that the apartment dwelling no longer exists on the site, as it was replaced by the manufactured home located on Tax lot 1704 pursuant to the replacement dwelling approval. (Exhibit 1).

3. The applicants filed a written appeal of the director's decision on December 23, 2024. (Exhibit 22).

4. Clackamas County Hearings Officer Joe Turner (the "hearings officer") held a public hearing to receive testimony and evidence regarding the appeal. County staff testified in support of the director's decision. The applicants testified in support of the appeal. One neighboring resident testified orally and in writing and four other

neighboring residents submitted written testimony in support of the appeal. (Exhibits 24-26). Contested issue in this case include:

a. Whether the 1967 apartment unit on tax lot 1701 is "A lawfully established dwelling" as that term is used in ZDO 406.05(D)(1);

b. Whether the 1967 apartment unit on tax lot 1701had bathing facilities connected to a sanitary waste disposal system within three years prior to the date the current application was submitted as required by ZDO 406.05(D)(1)(a)(ii);

c. Whether the 1967 apartment unit on tax lot 1701 is an "existing dwelling" for purposes of ZDO 406.09(B)(4);

d. Whether the County was required to inspect the site and confirm the removal/conversion of the 1967 apartment unit on tax lot 1701 as required by the 1998 replacement dwelling agreement and whether any failure to do so is relevant to this application;

e. Whether the fact that the County approved other dwellings in the area is relevant to this application;

f. Whether the County's failure to provide copies of neighbor and staff comments with the notice of decision prejudiced the applicants' substantial rights;

g. Whether the hearings officer is biased against the applicants and asked "leading questions" of witnesses at the hearing;

h. Whether the hearings officer has authority to amend the hearing transcript to correct alleged errors noted in the applicants' final argument;

i. Whether assertions that staff turned off their cameras during the hearing are relevant to this appeal; and

j. Whether ZDO 1307.17(J) requires or allows the County to reissue the director's decision.

5. Based on the findings adopted or incorporated in this final order, the hearings officer concludes that the applicants failed to sustain the burden of proof that the application complies with the applicable approval criteria. Therefore the appeal should be denied and the director's decision denying File No. Z0375-24 (Krueger MDLD) should be affirmed.

B. HEARING AND RECORD

1. The hearings officer received testimony at the public hearing about the appeal on January 23, 2025. All exhibits and records of testimony have been filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the statement required by ORS 197.763 and disclaimed any *ex parte* contacts, bias, or conflicts of interest. The following is a summary by the hearings officer of selected testimony offered at the public hearing.

2. County planner Aldo Rodriguez summarized the director's decision, the applicable approval criteria, and his PowerPoint presentation. The applicants propose to divide the 4.89-acre parcel consisting of tax lost 1700, 1701, 1702, and 1703, into two separate lots.

a. The site is currently developed with an accessory structure located on tax lot 1702, addressed as 18270 S. Old Clarke Road, and a stick-built dwelling located on tax lot 1701, addressed as 18280 S. Old Clarke Road. The accessory building included a rental apartment when it was constructed in 1967. The stick-built dwelling that was constructed in 1973.

b. The 1967 apartment was replaced by a manufactured home located on tax lot 1704 pursuant to a replacement dwelling application approved in 1998. The conditions of the replacement dwelling approval required the applicants to remove the apartment or convert it to an accessory structure. Tax lot 1704 is a separate lot of record; it is not part of the site.

c. Mr. Rodriguez argued that the applicants failed to demonstrate that the application complies with ZDO 406.09(B), because the apartment dwelling no longer exists on the site. It was required to be removed as a condition of the 1998 replacement dwelling approval.

d. He argued that tax lot 1702 was not taxed as a residence during the five year period preceding submittal of the current application, citing the tax assessor's "property account summary". (Exhibit 20).

3. Applicant David Krueger summarized his PowerPoint presentation, Exhibit 27.

a. He argued that the acreage of the site listed in director's decision is incorrect. The site consists of a 1.22-acre and a 2.05-acre tax lot which totals 3.27-acres.

b. The director's decision contains "inaccurate, incomplete, inconsistent and vague information."

i. The director's decision unlawfully "interpreted" the language of ZDO 406.05(D)(1), which provides "A lawfully established dwelling may be altered, restored, or replaced if". The director incorrectly interpreted this provision to require that the dwelling currently exist on the site. Both dwellings lawfully existed on the site prior

to November 4, 1993: the apartment in the accessory structure was lawfully constructed in 1967 and the stick built residence was constructed in 1973, and both structures remain on the site.

ii. He did decommission the apartment as required by the 1998 replacement dwelling agreement. (Exhibit 16). He removed the refrigerator, disconnected the wiring for the range, removed the washer dryer, and decommissioned the shower by moving a hot water heater into the shower stall. The apartment has not been used for residential purposes, it is used primarily for storage. (Exhibit 27 at 14-17). The County "through errors and omissions" never inspected the apartment to verify that it had been removed or converted to a non-residential use as stated in the replacement dwelling agreement. The inspection statement is no longer included in the County's current replacement dwelling agreement form.

iii. However, the Clackamas County Assessor continued to value and tax the accessory structure as a structure containing a 1,218 square foot apartment residence. (Exhibit 27 at 19-22). As a result they paid taxes on an unusable residence. The "property account summary" cited in the director's decision is incomplete and inconsistent with the actual assessment.

iv. The County failed to include with the notice of decision comment letters submitted by neighboring residents in support of the application and comments from County transportation staff as staff stated they would at an in-person meeting with the applicants on October 22, 2024.

v. The director's decision failed to address the fact that the County recently approved residences on three nearby properties. (Exhibit 27 at 24-28).

4. Neighboring resident Tim Krueger testified that the applicants met with County staff, who advised them that the Multiple Dwelling Land Division approval process was the correct process for separating the two residences on the site. The applicants completed a property line adjustment in the fall of 2024 based on that advice.

5. County planning manager Lindsey Nesbitt agreed that the apartment in the accessory structure continues to be assessed as a dwelling despite the 1998 replacement dwelling approval. However, the onus is on the property owner to review their property assessment records and correct any errors.

6. At the conclusion of the hearing the hearings officer held the record open for one week, until January 31, 2025, to allow the applicants to submit a final legal argument. The applicants submitted a written final argument (Exhibit 30) and a copy of the November 6, 2024, "findings & conditions" from the County transportation engineering department (Exhibit 31).

C. DISCUSSION

1. ZDO 1307.14 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The applicants must carry the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence.

2. It appears Mr. Rodriguez's PowerPoint presentation misstated the size of the site as 4.89-acres. Based on the legal description included with the application (Exhibit 2 at 1), the site contains 3.27-acres. Regardless, the size of the site is not relevant to any of the applicable approval criteria.

3. The only issue before the hearings officer is whether the application complies with the applicable approval criteria, which are set out in ZDO 406.09(B). The hearings officer makes the following findings regarding those criteria:

> (1) *At least two lawfully established dwellings existed on the lot of record prior to November 4, 1993*;
>
> **Finding:** Based on the unrebutted findings in the director's decision, the apartment dwelling was lawfully established within the accessory structure in 1967. The stick built residence was lawfully established in 1973. (Exhibit 1 at 9). Both dwellings remained in existence on November 4, 1993. (*Id*.) The fact that the apartment was replaced by the mobile home approved on tax lot 1704 in 1998 is not relevant to this criterion.
>
> **This criterion is met.**
>
> (2) *Each dwelling complies with the criteria for a replacement dwelling under Subsection 406.05(D)(1)*;

ZDO 406.05(D)(1):

> *A lawfully established dwelling may be altered, restored, or replaced if*
>
> **Finding:** The hearings officer finds that the 1967 apartment unit on tax lot 1701 is no longer "A lawfully established dwelling…" The apartment was disestablished as a dwelling when the County approved the replacement dwelling in 1998. (Exhibits 3, 16, and 17). Although the apartment structure remains in place and is used for storage (Exhibit 27 at 14-17), the structure ceased to exist as a legal dwelling on the site, because the dwelling was

replaced by approval of a manufactured home on tax lot 1704. The fact that the County continued to assess the apartment as a dwelling, while unfortunate, does not change the decommissioned apartment to a dwelling unit.

This criterion is NOT met.

> *a. The dwelling to be altered, restored, or replaced has, or formerly had, the following features. "Formerly had" means that the dwelling possessed all the listed features within three years prior to the date an application is submitted for a replacement dwelling.*
>
> …
>
> *ii Indoor plumbing consisting of a kitchen sink, toilet, and bathing facilities connected to a sanitary waste disposal system;*
>
> …

Finding: The text of this section refers to "[t]hree years prior to the date an application is submitted for a replacement dwelling." However, this language must be construed in context. ZDO 406.09(B)(2) requires that an application for a Multiple Dwelling Land Division must comply with the criteria for a replacement dwelling. Therefore, when reviewing an application the reference to an "[a]pplication… for a replacement dwelling" must be interpreted as an application for a Multiple Dwelling Land Division . Any other interpretation would render this provision meaningless and without applicability to an application for a Multiple Dwelling Land Division .

Based on the applicants' unrebutted testimony and photos, the 1967 apartment unit on tax lot 1701 does not comply with ZDO 406.05(D)(1)(a)(ii), because it did not have "Indoor plumbing consisting of…bathing facilities connected to a sanitary waste disposal system" within three years prior to the date the current application was submitted. The applicants rendered the apartment's bathing facilities (shower) inoperable by placing a water heater in the shower stall. (Applicant's testimony and Exhibit 27 at 15).

This criterion is NOT met.

> *b. The dwelling to be altered, restored, or replaced meets one of the following conditions:*

i Unless the value of the dwelling was eliminated as a result of destruction or demolition, was assessed as a dwelling for purposes of ad valorem taxation since the later of:
A) Five years before the date of the application;
or
…

Finding: Based on the tax assessor evidence submitted by the applicants (Exhibit 27 at 19-22), the 1967 apartment unit on tax lot 1701 was assessed as a dwelling for purposes of ad valorem taxation. The "Property Account Summary" cited in the director's decision is not sufficient to overcome the more specific assessment records provided by the applicants. However, as noted above, this does not change the fact that the 1967 apartment unit ceased to exist as a dwelling when it was replaced pursuant to the 1998 replacement dwelling approval.

This criterion is met.

c. For replacement of a lawfully established dwelling, the dwelling to be replaced must be removed, demolished, or converted to an allowable nonresidential use within three months from the date the replacement dwelling is certified for occupancy pursuant to ORS 455.055 or, in the case of a manufactured dwelling, within three months after the date of final inspection by County Building Codes.

Finding: The 1967 apartment unit on tax lot 1701 was "converted to an allowable nonresidential use" pursuant to the 1998 replacement dwelling approval. (Applicants' testimony and Exhibit 27 at 14-17). Therefore, the 1967 apartment unit on tax lot 1701 no longer exists as a lawfully established dwelling. The applicants are not seeking approval of a replacement dwelling pursuant to the current 2004 application. Therefore, this criterion, and the remaining criteria in ZDO 406.05(D)(1)(d)-(i) are inapplicable.

This criterion is inapplicable.

3. Except for one lot or parcel, each lot or parcel created under this provision is not less than two nor greater than five acres in size;

Finding: The applicants propose dividing the property into two parcels, one of approximately 2.05 acres and one of approximately 1.22 acres. (Exhibit 2 at 13). Therefore, except for one lot, each lot created will be not less than two nor greater than five acres in size. A final plat would be required to complete the proposed land division, and the survey may result in differences in the final parcel sizes; therefore, a condition of approval would be required to ensure compliance with this criterion.

This criterion could be met with a condition of approval.

4. *At least one of the existing dwellings is located on each lot or parcel created under this provision;*

Finding: As discussed above, the 1967 apartment unit on tax lot 1701 is no longer an "existing dwelling"; the dwelling ceased to exist in 1998, when the replacement dwelling was approved on tax lot 1704. Therefore, although the stick built residence would be located on one of the proposed lots, there is no "existing dwelling" to be located on the other lot.

This criterion is not met.

5. *The landowner of a lot or parcel created under this provision provides evidence that a restriction has been recorded in the Deed Records for Clackamas County that states the landowner and the landowner's successors in interest are prohibited from further dividing the lot or parcel. This restriction shall be irrevocable unless released by the Planning Director indicating the land is no longer subject to the statewide planning goals for lands zoned for Forest use;*

Finding: The applicants would be required to provide evidence that a restriction was recorded if this application were approved.

This criterion could be met with a condition of approval.

6. *A lot of record may not be divided under this provision if an existing dwelling on the lot of record was approved through:*
   a. *A statute, an administrative rule, or a land use regulation that prohibited or required removal of the dwelling or prohibited a subsequent land division of the lot of record; or*
   b. *A farm use zone provision that allowed both farm and forest uses in a mixed farm and forest use zone under Goal 4 (Forest Lands);*

Finding: Neither of these standards apply to the proposed site.

This criterion is not applicable.

7. *Existing structures shall comply with the minimum setback standards of Subsection 406.07(B) through (D) from new property lines; and 406.07*
    - *B. Minimum Front Setback: 30 feet.*
    - *C. Minimum Side Setback: 10 feet.*
    - *D. Minimum Rear Setback: 30 feet; however, accessory buildings shall have a minimum rear yard setback of 10 feet.*

Finding: As proposed by the submitted site plan, all existing structures would comply with these minimum setback standards.

This criterion could be met with a condition of approval.

8. *The landowner shall sign a statement that shall be recorded with the County Clerk, declaring that the landowner and the landowner's successors in interest will not in the future complain about accepted farming or forest practices on nearby lands devoted to farm or forest use.*

Finding: The applicants would be required to provide evidence that a restriction was recorded if this application were approved.

This criterion could be met with a condition of approval.

4. Assertions that the County did not inspect the site and confirm the removal/conversion of the 1967 apartment unit on tax lot 1701 are irrelevant. The apartment ceased to lawfully exist when replacement dwelling was approved and the applicants decommissioned the bathing facilities and converted the apartment unit to a non-residential storage use. Neither the Code nor the replacement dwelling agreement required the County to inspect and confirm removal/conversion of the apartment. There is no evidence that the 1998 replacement dwelling agreement created any form of contract between the applicants and the County or if such a contract existed that it would require the County approve this Multiple Dwelling Land Division application.

5. The fact that the County approved other dwellings in the area as noted in Exhibit 5 is irrelevant as the recently approved dwellings cited by the applicants were subject to different approval standards. The applicants failed to demonstrate that this application complies with the applicable approval criteria for a Multiple Dwelling Land Division.

6. The fact that the County did not provide the applicants' with copies of the neighbor's comment letters and Transportation and Development comments with the notice of decision while unfortunate, did not prejudice the applicants' substantial rights.

7. The hearings officer is not biased against the applicants and did not ask "leading questions" of any witness. The hearings officer merely asked clarifying questions and rephrased witnesses' testimony to ensure he understood their testimony. This is not a court hearing and the rules of evidence do not apply.

8. The hearings officer has no authority to amend the hearing transcript to correct the alleged errors noted in the applicants' final argument. (Exhibit 30). The transcript is not part of the record for this case and the hearings officer did not review or rely on the transcript. The video of the hearing is part of the record and provides an accurate record of the testimony provided at the hearing.

9. The applicants' assertion that staff turned off their cameras during the hearing is also irrelevant.

10. The County cannot reissue the director's decision in this case. ZDO 1307.17(J) provides that that County "may" reissue a decision "[a]s a result of a clerical error, a misstatement of facts, or the erroneous imposition or omission of conditions of approval." The County is not required to do so and this section expressly prohibits reissuance after an appeal has been filed. To the extent any alleged errors are relevant to the approval criteria they are resolved by the findings in this Final Order.

D. CONCLUSION

Based on the above findings and discussion, the hearings officer concludes that the applicants failed to carry the burden of proof that the proposed Multiple Dwelling Land Division complies with the applicable approval criteria. Therefore the appeal should be denied, the director's decision should be affirmed, and the application should be denied for the reasons provided herein.

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby denies Z0375-24 (Krueger MDLD).

DATED this 10th day of February 2025.

Joe Turner, Esq., AICP
Clackamas County Land Use Hearings Officer

APPEAL RIGHTS

ZDO 1307.14(D)(6) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." This decision will be "final" for purposes of a LUBA appeal as of the date of mailing (which date appears on the last page herein).