

**BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON**

Regarding an appeal of an administrative)	<u>FINAL ORDER</u>
decision approving verification and alteration)	
of a nonconforming use at 28899 SE Woods Road)	Z0315-24
in unincorporated Clackamas County, Oregon)	(Jewell NCU)

A. SUMMARY

1. On July 31, 2024, Pamela Jewell (the “applicant”) filed an application (Exhibit 2) for verification and alteration of a nonconforming use (“NCU”) on a parcel located at 28899 SE Woods Road; also known as Tax Lot 05100, Section 13AA, Township 3 South, Range 3 East of the Willamette Meridian, Clackamas County, Oregon (the “site”). The applicant requests verification that an existing detached garage that does not comply with the current ten-foot side yard setback standards is lawfully nonconforming. The applicant also requests retroactive approval of an addition to the top of the garage that was constructed in 2019 as an expansion of the nonconforming use.

2. On December 5, 2024, the planning director (the “director”) issued a written decision verifying that the detached garage was lawfully established and has never been discontinued for 12 consecutive months. In addition, the director retroactively approved the 2019 addition to the lawfully established nonconforming use, subject to conditions requiring alteration of the addition to meet building code requirements. (Exhibit 1).

3. On December 16, 2024, Bennett Johnson (the “appellant”) filed a written appeal of the director’s decision, arguing that approval of the 2019 addition will reduce the value of other properties in the same development by obstructing views of the river from properties surrounding the site. (Exhibit 9).

4. Clackamas County Hearings Officer Joe Turner (the "hearings officer") conducted an online public hearing regarding the appeal. County staff recommended that the hearings officer deny the appeal and affirm the director’s decision. The applicant and her attorney testified in support of the director’s decision. The appellant, her attorney, and two area residents testified in support of the appeal. Principal contested issues in the case include the following:

- a. Whether the addition to the existing garage will have no greater adverse impact to the neighborhood than the existing structure (ZDO 1206.07.B), specifically whether the addition will impact views of the Clackamas River from properties surrounding the site;
- b. Whether the garage addition will increase the risk of fire; and
- c. Whether existing zoning and building code violations in the area are relevant to the approval criteria for this proposal.

5. The hearings officer concludes the applicant sustained the burden of proof that the alteration of the nonconforming garage does or can comply with the applicable approval criteria of the ZDO subject to conditions of approval needed to ensure such compliance in fact occurs. The appellant did not rebut the substantial evidence in the record in support of the application. Therefore the hearings officer denies the appeal and upholds the planning director's decision, based on the findings and conclusions adopted or incorporated herein and subject to the conditions of approval at the end of this final order.

B. HEARING AND RECORD HIGHLIGHTS

1. The hearings officer received testimony at the public hearing about the appeal on January 9, 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 the testimony offered at the public hearing.

2. County planner Mya Ganzer summarized the director's decision (Exhibit 1) and responded to the appeal.

a. She noted that a detached flat roof garage was constructed on the site in 1962, prior to the effective date of restrictive zoning and setback requirements. The site was zoned RA-1 in 1967. The site was rezoned to RRF-5 in 1980. The RRF-5 zone requires a minimum ten-foot side yard setback.

b. The applicant's husband constructed a pitched roof attic addition on top of the garage in 2019 without required permits and approvals. The western edge of the roof of the addition does not extend further east into the nonconforming setback; the addition encroaches into the current side yard setback on the east side of the site the same amount as the original roof. However, the attic addition increased the height of the structure within the setback, thereby increasing the nonconformity.

c. In addition, the attic included an awning on the west side of the garage which extends further west than the original roof, beneath the eaves of the existing residence on the site, in violation of the building code. The conditions of approval in the director's decision require the applicant to bring the western portion of the addition into compliance with the building code by modifying the awning on the west side of the garage to either provide a minimum three feet of separation between the garage and the dwelling or provide the garage with a firewall and protected eave to prevent the spread of fire between the garage and the residence.

d. The appellant argues that the attic addition blocks views of the Clackamas River, which abuts the south boundary of the site. However, the abutting properties do not appear to have views of the river. The site is at a higher elevation than the river, and trees, the existing residence, and the garage, without the addition, already block views of the river.

3. Attorney Andrew Stamp, the applicant Pamela Jewell, and area residents Ron Neiger and Tom Palmer testified in support of the application.

a. Mr. Stamp responded to the appeal and showed photos and video of the site and surrounding area.

i. He testified that the applicant will modify the garage addition to bring the building into compliance with the building code.

ii. The appellant argues that the garage addition reduced the value of surrounding properties by blocking views of the Clackamas River and that any reduction of properties near the site will affect the value of all properties in the in the Twin Island Park development, including the appellant's property located some distance east of the site. However, photos in the record demonstrate that the garage addition did not impact views of the river from surrounding properties.

(A) The Clackamas River abuts the south boundary of the site. The river is roughly 15 feet lower than the site and is not visible from offsite properties that do not abut the river. Residents must walk to the edge of the terrace to see the river. (Exhibit 18). In addition, the site is roughly three feet higher than SE Wood Road abutting the north boundary of the site. Therefore, the river would not be visible from offsite even if there were no buildings on the site.

(B) Only two lots have a potential view of the river, Lots 36 and 37 of Twin Island Park plat shown in Exhibit 15, also known as tax lots 2000 and 1800, located across SE Woods Road from the site. Lot 38 (tax lots 1700), also located across the street from the site, is a vacant non-buildable parcel as it contains groundwater wells that serve the development. Lot 37 is currently developed with a single-story residence and has no view of the river even if the garage on the site were removed. (Exhibit 18 at 22). Lot 36 is located to the northeast of the site and the existing residence on that parcel is fully screened by existing landscaping and has no view of the river. (Exhibit 18 at 26). Existing development without the garage addition on the site and on the properties located to the east and west of the site would block any views of the river from those properties. The appellant's property is located roughly 300 yards east of the site. (Exhibit 18 at 32). The garage on the site has no impact on views from that property.

iii. Because the garage addition has no impact on neighbors views of the river it will have no impact on the value of those or other properties in the development.

b. Ms. Jewell testified that her husband began construction of the garage attic in 2019. She is seeking this approval to legalize the existing garage structure.

c. Mr. Neiger testified that he purchased a riverfront lot in the Twin Island Park development in 1974. The Clackamas River is not visible from his kitchen; he must stand in the front 20 feet of his home in order to see the river. There are 80 lots in the

Twin Island Park development, none of which are more than three to five feet higher than his. The river is not visible from the road anywhere in the development, even during high water. Residents on the north side of Woods Road cannot see the river from the second floor of their homes; structures would have to be four stories high to achieve a view of the river.

d. Mr. Palmer testified that all of the homes in the Twin Island Park development that abut the river are at a significantly higher elevation than the river. The river is not visible from properties that do not abut the river. The garage addition has no impact on views of the river.

4. The appellant, Bennett Johnson, testified that many of the homes in the Twin Island Park development are likely to be replaced in the future, which will increase the value of all properties in the development. New dwellings are likely to be two stories, which may provide those residents partial views of the river. Many of the existing two-story homes on the north side Woods Road have a partial river view and any view of the river increases the value of the property, which will also increase the value of other properties in the development. To the extent the applicant's garage addition limits river views it will impact the value of all properties in the development, including hers. She argued that the County's failure to enforce code violations also impacts the value of other properties in the development. She noted that this area is difficult for fire vehicles to access and any fire in the area is likely to rapidly spread uphill. The Fire District expressed concerns that the garage addition significantly increased the fire risk on the site.

5. County planning manager Lindsey Nesbitt noted that the existing garage is nonconforming due to setbacks, not the height of the building. The applicant could build an accessory structure on the site up to the maximum building height allowed and in compliance with current setback requirements. Potential impacts to offsite views would be irrelevant to the approval of such a structure.

6. At the conclusion of the hearing the hearings officer held the record open for one week, until January 16, 2025, to allow all parties the opportunity to submit additional written testimony and evidence. The hearings officer held the record open for an additional week, until January 23, 2025, to allow all parties the opportunity to respond to anything submitted during the first week, and for a third week, until February 6, 2025, to allow the applicant to submit a final written argument. The record in this case closed at 5:00 p.m. January 29, 2025, upon receipt of the applicant's final argument (Exhibit 27). The applicant's final argument is the only exhibit submitted during the open record period.

C. DISCUSSION

1. ZDO Table 1307-01 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), an appeal of an administrative decision is 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. The hearings officer adopts as his own the findings in the director's decision, Exhibit 1, except to the extent that those findings are inconsistent with the findings in this final order.

3. A nonconforming use is "A use of any building, structure or land allowed by right when established or that obtained a required land use approval when established but, due to a change in the zone or zoning regulations, is now prohibited in the zone." ZDO 202. A nonconforming use may be continued although not in conformity with the regulations for the zoning district in which the use is located. ZDO 1206.02.

4. A flat roof detached garage was constructed in the northeast corner of the site in 1962, before restrictive zoning was applied to the site. The eastern portion of the garage was located very close to the east boundary of the site, well within the ten-foot side yard setback required by the current RRF-5 zoning. However, the regulations in effect when the building was constructed did not require setbacks from property lines. The garage has remained in continuous use since that date. Therefore, the structure is allowed to remain on the site as a nonconforming use, even though it does not comply with current setback requirements.

5. The applicant's husband constructed an attic addition on top of the garage in 2019, effectively replacing the existing flat roof with a pitched roof. The applicant's husband constructed the addition without required permits or approvals. Therefore, the addition was not legally established. With this application the applicant is seeking retroactive approval of the addition.

6. ZDO 1206.07.B provides that existing nonconforming uses may be altered or changed provided:

1. The alteration or change will, after the imposition of conditions pursuant to Subsection 1206.07(B)(4), have no greater adverse impact to the neighborhood than the existing structure, other physical improvements, or use.
2. The nonconforming use status of the existing use, structure(s), and/or physical improvements is verified pursuant to Subsection 1206.05.
3. The alteration or change will not expand the nonconforming use from one lot of record to another...

7. There is no dispute that no existing homes in the Twin Island Park development have a view of the river across the site, because the river is at a lower elevation and

properties north of the site are developed with single-story homes, screened by vegetation, or offset from the site.

8. The appellant argues that properties north of the site could be redeveloped with two-story homes that might have a view of the river. The applicant argued that potential future development is not relevant as it is speculative. (Exhibit 27). However, it is the hearings officer's understanding that property values are based on their development potential; a property that can be developed with a residence has a higher value than the same property that cannot be developed with a residence. A property that can provide a river view if developed with a two-story home has a higher value than the same property without a view. The farm use cases cited by the applicant relate to a different issue, impacts to farming, not property value.

9. The hearings officer finds that the applicant sustained its burden of proof that the attic addition to the existing garage will have no greater adverse impact to the neighborhood than the existing structure. The only potential impact noted in the record is potential views of the Clackamas River from surrounding properties. The applicant could build a 35-foot high addition to the garage, provided the addition complied with the required ten-foot setback from the east boundary of the site. Therefore, the only potential view impact from the garage addition is from the portion of the addition located within the ten-foot side setback.

a. The south boundary of the site abuts a terrace adjacent to the Clackamas River, as do the properties to the east and west. All of the properties abutting the river are roughly 15 feet higher than the river. The garage addition will have no impact on views from the properties to the east and west of the site.

b. The site is identified as Lot 20 on Exhibit 15. Lot 38, located directly north of the site is undevelopable based on Mr. Stamp's unrebutted testimony. Therefore, the garage addition will have no impact on current or future views from that lot.

c. The west boundary of Lot 37 on the north side of SE Woods Road is roughly ten feet west of the east boundary of the site and skews slightly east to west. The east boundary of the site skews slightly west to east. (Exhibit 15). A new two-story residence constructed on Lot 37 would be subject to a ten-foot setback from the west boundary of that lot, so the western edge of a future residence on Lot 37 would roughly align with the east boundary of the site. Therefore, given the alignment of the lots and lot lines, a future two-story home on Lot 37 would not have a view of the river through the ten-foot setback between the applicant's garage and the east boundary of the site. Looking directly south, the sightline from the westernmost portion of such a structure would cross onto Lot 21. Looking southwest, the existing residence and/or the portion of the garage addition located outside of the setback area on the site would block views of the river.

d. Lot 36 on the north side of SE Woods Road is further east of the site. The existing residence on the site would block any sightline looking across the site between a future two-story home on Lot 36 and the river.

e. Therefore, the hearings officer finds that the attic addition to the garage has no greater adverse impact to the neighborhood than the existing structure because the addition will not block offsite views of the river from potential two-story homes on any nearby parcels.

10. The conditions of approval in the director's decision require the applicant to modify the awning on the west side of the garage to meet building code requirements, which will eliminate any increased fire hazard created by the addition.

11. The garage addition will not alter the existing limited fire and evacuation access to this area.

12. The appellant argued that there are a number of zoning and building code violations on properties within the Twin Island Park development. That is unfortunate, but it is not relevant to the current application, as approval of this application will alleviate the existing violation on the site. Violations on other properties are not relevant to this application. The County's enforcement process is largely complaint driven. Residents can report violations to the County, and the County can take actions to require compliance.

13. Therefore, the hearings officer finds that the attic addition to the existing nonconforming garage, as conditioned, will have no greater impact to the neighborhood than the existing structure. Therefore, the application complies with ZDO 1206.07.B(1).

14. The planning director verified the nonconforming use status of the existing garage pursuant to Subsection 1206.05 and that finding was not disputed on appeal. Therefore, the application complies with ZDO 1206.07.B(2)

15. The garage addition did not expand the nonconforming use onto another lot of record. Therefore, the application complies with ZDO 1206.07.B(3).

D. CONCLUSIONS

Based on the findings adopted or incorporated above, the hearings officer concludes that the applicant sustained the burden of proof that the proposed nonconforming use alteration does or can comply with the applicable approval criteria and the appellant failed to rebut that proof with at least equally probative substantial evidence. Therefore the appeal should be denied and the director's decision approving the application subject to conditions of approval should be affirmed.

E. DECISION

Based on the above findings and discussion, the hearings officer hereby grants the appeal, modifies the director's decision, and approves File No. Z0315-24 (Jewell NCU), subject to the following conditions of approval:

CONDITIONS OF APPROVAL

The conditions listed are necessary to ensure that approval criteria for this land use permit are satisfied. Where a condition relates to a specific approval criterion, the code citation for that criterion follows in parentheses.

1. Approval of this land use permit is based on the submitted written narrative and plan(s) filed with the County on 7/31/24 with additional narrative, site plan and reservation materials provided. No work shall occur under this permit other than which is specified within these documents, unless otherwise required or specified in the conditions below. It shall be the responsibility of the property owner(s) to comply with these documents and the limitation of any approval resulting from the decision described herein.
2. The *verification* of a nonconforming use approved in this application (i.e., the verification that the following are lawfully nonconforming to ZDO Section 316: an existing home with reduced setbacks) is **valid for 24 months from the date of the County’s final written decision on this application pursuant to ZDO 1206.04.**
3. **The applicant shall obtain a building permit from Clackamas County Building Codes Department and shall complete any associated work for the attic addition.**

DATED this 4th 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).