

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

Regarding an appeal of an administrative decision denying ) **FINAL ORDER**  
a proposed property line adjustment between two lots of )  
record in the EFU zone at 14160 and 14175 SW Wilsonville ) **Z0346-22**  
Road in unincorporated Clackamas County, Oregon ) **(Wild Turkey Farm)**

**A. SUMMARY**

1. On July 19, 2022, Barbara Ellison (the “applicant”) filed an application for a property line adjustment to relocate a common boundary between two “Lots Of Record” (“LOR”) known as tax parcel 31W21 02702 (“LOR 1”) and the combination of tax parcels 31W21 01900, 31W28 00400 and 31W28 00502 (“LOR 2”). (Exhibit 2). Both Tracts and all surrounding properties are located in the EFU (“Exclusive Farm Use”) zone.

a. LOR 1 contains approximately 24 acres located between SW Wilsonville Road and the Willamette River. LOR 1 is currently vacant.

b. LOR 2 contains approximately 100 acres and is located on both sides of SW Wilsonville Road.

i. The roughly 13.95-acre portion of LOR 2 located on the south side of SW Wilsonville Road abuts the west boundary of LOR 1 and contains a residence constructed in 1966 (the “1966 residence”).

ii. The portion of LOR 2 north of SW Wilsonville Road contains roughly 86 acres and contains a residence constructed in 2007 (the “2007 residence”).

c. The proposed property line adjustment would transfer the southern roughly 13.95 acre portion of LOR 2, including the 1966 residence, to LOR 1, resulting in a single 38-acre lot of record located between SW Wilsonville Road and the Willamette River (Adjusted LOR 1) and an 86-acre lot of record located north of SW Wilsonville Road (Adjusted LOR 2). As adjusted, each lot of record would have a single residence, with the 1966 residence on Adjusted LOR 1 and the 2007 residence on Adjusted LOR 2.

2. In 1981, the County approved a “Farm Management Plan” for an accessory farmworker dwelling (File 165-81-F) in conjunction with farming on a tract consisting of LORs 1 and 2 and tax parcels 31W21 01701 and 31W21 02701. (Exhibit 7). The accessory dwelling remains on tax parcel 31W21 02701.

3. On March 6, 2023, the planning director (the “director”) issued a written decision denying the proposed property line adjustment, finding that the proposed adjustment would result in a new lot of record with a dwelling when there is no evidence that the dwelling complies with all applicable standards for the siting of a dwelling in the EFU zone, in violation of ZDO 1107.03.F.

4. The applicant filed a written appeal of the director's decision on March 20, 2023. (Exhibit 17).

5. 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's attorney testified in support of the appeal. No one else testified orally or in writing. The only contested issue in the case is whether the application complies with ZDO 1107.03.F.

6. Based on the findings adopted or incorporated in this final order, the hearings officer concludes that the applicant failed to sustain the burden of proof that the application complies with ZDO 1107.03.F. Therefore the appeal should be denied and the director's decision denying File No. Z0346-22 (Wild Turkey Farm) should be affirmed.

### **B. HEARING AND RECORD HIGHLIGHTS**

1. The hearings officer received testimony at the public hearing about the appeal on April 13, 2023. 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 Roman Sierra summarized the director's decision (Exhibit 1) and his PowerPoint presentation (Exhibit 19) and responded to the appeal.

a. He noted that the applicant proposed to adjust 13.95 acres from LOR 2 to LOR 1. The proposed adjustment would move the 1966 dwelling from LOR 2 to LOR 1. Therefore, the applicant must demonstrate that "[t]he lot of record receiving the dwelling [LOR 1] complies with all applicable standards of this Ordinance for the siting of a dwelling." ZDO 1107.03.F. The applicant failed to demonstrate compliance with this requirement. Therefore, the director denied the application.

3. Attorney Damian Hall appeared on behalf of the applicant, Barbara Ellison, summarized his PowerPoint presentation (Exhibit 20), and the appeal.

a. He testified that the applicant owns four contiguous lots of record; LORs 1 and 2, and parcels 31W21 01701 and 31W21 02701, that total roughly 200-acres (the "farm tract"). The 200-acre farm tract has been in unified ownership since at least 1971. The farm tract contains three existing residences:

i. The 1966 residence on the portion of tax parcel 31W28 00400 south of SW Wilsonville Road;

ii. The 2007 residence on the portion of tax parcel 31W28 00400 north of SW Wilsonville Road, which was approved as a replacement dwelling for an older residence located on tax parcel 31W28 00400; and

iii. An accessory farmworker dwelling on tax parcel 31W21 02701, which the County approved in 1981 based on a farm management plan for the entire 200-acre farm tract.

b. The applicant acquired the farm tract in 2001 and operates a horse farm known as Wild Turkey Farm.

c. The only issue on appeal is whether the application complies with ZDO 1107.03.F, which provides, “A property line adjustment shall not result in the adjustment of a dwelling from one lot of record to the other unless the lot of record receiving the dwelling complies with all applicable standards of this Ordinance for the siting of a dwelling.”

i. He argued that this standard refers to the standards “applicable to the dwelling.” In this case, because the 1966 dwelling is existing and allowed to remain, there are no “applicable standards” for siting of this dwelling. The property line adjustment will not alter the legal existence of the 1966 dwelling. Therefore, the application complies with ZDO 1107.03.F.

ii. Staff argue that the applicant must first demonstrate that LOR 1 qualifies for a dwelling through the options provided by ZDO 401, requiring a separate land use decision approval for a new dwelling. However, the applicant is not proposing a new dwelling and ZDO 401 does not apply to existing dwellings. ZDO 1107.03.F does not mention the siting standards of ZDO 401 and does not use the terms “eligible” or “qualify.”

iii. To the extent the 1966 dwelling is a nonconforming use, the applicant is not expanding the use. The property line adjustment will not increase the number of residences in the area or increase the impact of the nonconforming use.

d. The 1981 farm management plan applies to the entire 200-acre farm parcel and approved the accessory farmworker dwelling as a third dwelling. Staff argue that the farm management plan did not recognize the existing dwellings as legally established. However, the farm management plan is not relevant to this application and is not subject to collateral attack in this proceeding.

e. The 1966 dwelling is a nonconforming use. It was established prior to the adoption of zoning. It was used as a residence for more than 20 years. It was included in the 1981 farm plan and it existed in 2006 when the replacement dwelling was approved. Therefore, it complies with the ten and twenty year “look back” standards of ZDO 1206.07.

f. The alternative to the proposed property line adjustment is to create a “lollipop” parcel for the portion of LOR 2 south of Wilsonville Road that contains the residence, which would be nonsensical.

4. Clackamas County planning director Jennifer Hughes argued that a property line adjustment cannot serve as a mechanism to qualify a lot for a dwelling. The applicant’s interpretation of the Code would undermine the purpose of state law and the ZDO regarding dwellings on separate lots of record. The property line adjustment process cannot be used to create a lot of record dwelling. ZDO 1107.03.F applies to the receiving lot, not the existing dwelling. The applicant must demonstrate that the receiving lot qualifies for a dwelling and the only way to do that is through a land use application.

a. Only one of the two dwellings on LOR 2 is tied to the farm management plan. There is no obligation to continue farming without the third (farm help) dwelling.

5. At the conclusion of the hearing the hearings officer held the record open until April 27, 2023, to allow the applicant an opportunity to submit a final written argument.

### **C. DISCUSSION**

1. ZDO Table 1307-1 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a)(D), 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 hearings officer must decide whether the applicant carried 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. The only disputed issue on appeal is whether the application complies with ZDO 1107.03.F, which provides:

A property line adjustment shall not result in the adjustment of a dwelling from one lot of record to the other unless the lot of record receiving the dwelling otherwise complies with all applicable standards of this Ordinance for the siting of a dwelling.

4. The plain language of this provision applies to “the lot of record receiving the dwelling” (the receiving lot”). When and how the dwelling was created is irrelevant, i.e., whether the existing dwelling is a nonconforming use, approved as part of the farm management plan, or allowed as a farm income dwelling. For purposes of this analysis the hearings officer assumes that the 1966 residence was legally established. Therefore, the

only issue is whether a dwelling is allowed on the receiving lot; the proposed 38-acre lot of record located between SW Wilsonville Road and the Willamette River (Adjusted LOR 1).

a. In a residential zone, the second part of ZDO 1107.03.F would only require the applicant to demonstrate that the dwelling met applicable setback requirements, as dwellings are a permitted use in residential zones.

b. However, in the EFU zone dwellings are only allowed pursuant to ZDO 401. Therefore, the applicant must demonstrate, pursuant to ZDO 401, that a dwelling is allowed on the receiving lot before the County can approve this property line adjustment.

c. The applicant is not proposing a new dwelling. But the applicant is proposing to create a new (modified) lot of record with a dwelling. Currently the applicant has two dwellings on existing LOR 2. The proposed property line adjustment will move the 1966 residence to LOR 1, creating a lot of record with a dwelling where one does not currently exist. Therefore, the plain language of ZDO 1107.03.F requires that the applicant demonstrate that Adjusted LOR 1 “[c]omplies with all applicable standards of this Ordinance for the siting of a dwelling.” ZDO 401 contains the applicable standards for the siting of a dwelling in the EFU zone. Consequently, the applicant must demonstrate that the Adjusted LOR 1 complies with applicable standards for siting of a dwelling by submitting a separate land use application demonstrating compliance with the siting requirements of ZDO 401.

d. The applicant’s interpretation, that ZDO 401 is inapplicable because it only applies to “new” dwellings, would render the second portion of ZDO 1107.03.F irrelevant. A property line adjustment cannot result in the adjustment of a dwelling from one lot of record to another unless the dwelling currently exists. As noted above, the applicant is not proposing a new dwelling, but is proposing a new lot of record containing a dwelling. Therefore, the “new dwelling” provisions of ZDO 401 are applicable.

#### **D. CONCLUSIONS**

Based on the findings adopted or incorporated above, the hearings officer concludes that the applicant failed to sustain the burden of proof that the application complies with ZDO 1107.03.F. Therefore the appeal and this application should be denied.

#### **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 the appeal, affirms the director’s decision, and denies File No. Z0346-22 (Wild Turkey Farm).

DATED this 15th day of May 2023.



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

### **ENDANGERED SPECIES ACT NOTICE**

This decision addresses only the applicable criteria under the ZDO. It does not address whether the activities allowed by this decision will comply with the provisions of the federal Endangered Species Act (“ESA”). This decision should not be construed or represented to authorize any activity that will conflict with or violate the ESA. It is the applicant, in coordination, if necessary, with the federal agencies responsible for the administration and enforcement of the ESA, who must ensure that the approved activities are designed, constructed, operated, and maintained in a manner that complies with the ESA.

### **APPEAL RIGHTS**

ZDO 1307.14.D(6) provides that the Land Use Hearings Officer’s decision is the County’s final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules adopted by LUBA describe when and how an appeal must be filed with LUBA. 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.” ZDO 1307.17.I(1) provides that this decision will be “final” for purposes of a LUBA appeal as of the date of mailing of this final order (which date appears on the last page herein).