

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

Regarding an Appeal of a Planning Director)	Case File No.
Decision Approving Certain Nonconforming for)	Z0245-19-E
Existing Structures.)	(Patterson)

A. SUMMARY

1. The applicant is Steven Patterson, and the owner is Douglas Patterson.
2. The appellant is Steven Patterson.
3. The subject property is located at 17511 South Henrici Road, Oregon City, Oregon 97045. The legal description is T3S, R2E, Section 12D, Tax Lot 501 W.M. The subject property is approximately 4.1 acres and is zoned RRRF-5 – Rural Area Residential Farm Forest – 5 Acre.
4. On March 5, 2020, the Hearings Officer conducted a public hearing to receive testimony and evidence about the application. At the conclusion of the public hearing, the record was closed.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on March 5, 2020. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the Hearings Officer made the declaration required by ORS 197.763. The Hearings Officer disclaimed any *ex parte* contacts, bias, or conflicts of interest. The Hearings Officer stated that the only relevant criteria were those identified in the Planning Director’s decision, that participants should direct their comments to those criteria, and failure to raise all arguments may result in waiver of arguments at subsequent appeal forums.
2. At the hearing, county planner Glen Hamburg discussed the Planning Director’s decision and recommended that the Planning Director’s decision be upheld.

3. Steven Patterson, Douglas Patterson, and Bernice Patterson, testified in favor of the application.
4. No one testified against the application.
5. At the conclusion of the public hearing, the Hearings Officer closed the record.

C. FACTS

This case involves the appeal of a Planning Director decision approving a number nonconforming uses on a 4.1-acre RRFF-5 zoned property located at 17511 South Henrici Road, Oregon City, OR 97045. The property is an irregular shaped parcel that has Abernathy Creek as its northern and western boundary. The property is part of what was once a much larger property and has been in the applicant's family for a long time. There is an existing residence on the property. While there is a complicated history involving the creation and use of the property, for purposes of this decision, what is at issue is a nonconforming use determination for four existing structures/areas. The applicant sought a nonconforming use determination regarding: (1) a 126 square-foot bath house; (2) a 168 square-foot tool shed; (3) a 704 square foot A-frame structure (the cabin); and (4) a 3600 square-foot picnic/fire pit area. A nonconforming use determination is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director approved all four structures/areas but did not approve the cabin for sleeping or cooking.¹ The applicant sought to use the cabin for occasional sleeping and small-scale cooking. This appeal followed.

D. DISCUSSION

The Planning Director's decision does a very thorough job of explaining the complicated history of the property and the various uses on the property. The appellant only challenges one aspect of the Planning Director's decision. As the overwhelming majority of the Planning Director's findings are not challenged, it would be a waste of the County's money and resources to review and repeat those findings. I have reviewed the Planning Director's findings, and I agree with those findings. Therefore, I adopt and incorporate the Planning Director's findings in this decision, except as discussed further.

¹ Under ZDO 1307.03(B), the Planning Director includes "any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by the [ZDO]."

The only issue in this appeal is whether the applicant has established a nonconforming use to use the cabin for sleeping and cooking. Zoning was first applied to the property in 1967. There does not seem to be any dispute that the cabin was built after 1967. The applicant persuasively explains that the cabin has been used over the years for sleeping and cooking for occasional events such as family reunions. Unfortunately for the applicant, there is not a limited use category that encompasses this minor residential use of the cabin. In order to use the cabin for sleeping and cooking, the applicant must establish that he has a nonconforming use for residential use of the cabin. The Planning Director's decision does a thorough job of explaining why residential use of the cabin was never a permitted use on the property after the original zoning in 1967.² While the circumstances are complicated, I agree with the Planning Director's understanding of the facts and law.

The applicant disputes some of the Planning Director's findings and conclusions regarding when various improvements were made such as when a sink and stove were installed. While I tend to agree with the applicant (based on additional evidence submitted after the Planning Director's decision), unfortunately for the applicant, if or when a sink and stove were installed does not have any bearing on whether there is a nonconforming use of the cabin for sleeping and/or cooking. As residential use of the cabin was never a permitted use of the cabin under any of the circumstances after 1967, the only way the applicant would be able to establish a nonconforming use of the cabin for sleeping and cooking would be if the cabin were used for such purposes *before* zoning was established in 1967. As discussed earlier, there is no dispute that the cabin was not built until after 1967 – even if only by a couple of years. Therefore, regardless of when the sink and stove were installed, the applicant cannot establish a nonconforming use of the cabin for sleeping and cooking.

I wish that I could reach a different result. The applicant only seeks to use the cabin for sleeping and cooking on a limited basis – such as family reunions – which is hardly a regular residential use of the cabin. I also would like to commend the applicant for seeking to obtain legal approval of the allowed uses. As the family stated at the public hearing –

² Although the zoning of the property changed over the years, residential use of the cabin was never a permitted use under the circumstances.

they do not want to do something that is not legal.³ Unfortunately, I have no choice but to agree with the Planning Director's decision

E. DECISION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **AFFIRMS** the Planning Director's nonconforming use determination application in Z0245-19-E.

DATED this 18th day of March, 2020.


Fred Wilson
Clackamas County Hearings Officer

ENDANGERED SPECIES ACT NOTICE

The federal Endangered Species Act (ESA) is not a criterion for approval of this application. The County has reviewed the approval standards in light of the requirements of the ESA, believes that the criteria for approval are consistent with the terms of the ESA and has submitted the Development Ordinances for consideration for a "4(d)" programmatic limitation. However, the analysis included in this decision does not include an evaluation by the County of the applications for consistency with the ESA nor does the decision reach any conclusions concerning that federal law. The applicant are responsible for designing, constructing, operating and maintaining the activities allowed by an approval of this application in a manner that ensures compliance with the ESA. Any question concerning this issue should be directed to the applicant, their consultants and the federal agencies responsible for administration and enforcement of the ESA for the affected species.

APPEAL RIGHTS

ZDO 1307.10(F) 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).

³ Frankly, I am not even sure this issue would have ever arisen had the applicant not sought legal approval for the use.