BEFORE THE LAND USE HEARINGS OFFICER
OF CLACKAMAS COUNTY, OREGON

Regarding an Appeal of a Planning Director	)	**Case File No.**
Decision Denying a Modification to a Vested	)	**Z0174-20-MOD**
Rights Decision for a Marijuana Agricultural Use.	)	**(Troutner Farms Appeal)**

A. SUMMARY

1. The owner is Troutner Farms LLC. The applicant is Brad Troutner.
2. The appellant is Tim Ramis of Jordan Ramis PC.
3. The subject property is located at 10766 Southeast 132nd Avenue, Boring, Oregon 97009. The legal description is T1S, R4E, Section 35, Tax Lots 1901 and 1902, W.M. The subject property is approximately 19.77 acres and is zoned EFU – Exclusive Farm Use.
4. On September 20, 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 left open one week for the submission of new testimony, evidence, and argument; one additional week for responses to the new testimony, evidence, and argument; and one additional week for the applicant's final legal argument.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony at the public hearing on this application on September 20, 2020. The public hearing was conducted virtually on the Zoom platform due to the corona virus. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearings, 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 planners Glen Hamburg and Liz Dance discussed the Planning Director's decision.
3. Tim Ramis argued that the modification should be approved.
4. No one testified against the application.
5. At the conclusion of the public hearing, the Hearings Officer left the record open one week for the submission of new testimony, evidence, and argument; one additional week for responses to the new testimony, evidence, and argument; and one additional week for the applicant's final legal argument.

C. FACTS

This case involves the appeal of a Planning Director decision denying a modification request to a prior approval of a vested rights determination seeking to authorize 60 licensed marijuana premises on the 19.77-acre subject property located at 10766 Southeast 132nd Avenue, Boring, Oregon 97009. In Z0159-19-VR (Troutner Farms I), I approved a vested rights determination for the applicant's property. In Troutner Farms I, I described the property and proposed use:

> "The subject property is essentially a proposed business park for the production of marijuana. The applicant's business model is to provide multiple buildings for growing marijuana for multiple licensed marijuana premises – in other words multiple tenants. The property was first approved for marijuana production in February 2016 under a decision that authorized indoor recreational marijuana production in 30 buildings on the eastern half of the property. Z0004-16-MJ. In 2017, the property was subsequently approved for 24 more buildings on the western half of the property, in what was referred to as Phase Two of the development. Z0278-17-MJ. In 2018, the applicant then obtained approval of six more buildings on the western half of the property. Z0215-18-MJ. In 2018, the applicant obtained approval to process marijuana in one of the buildings. Z0291-18-MJ. Finally, in 2019, the applicant obtained approval to use up to four of the buildings for hemp processing. Z0087-19-PDR.
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> "When the applicant began its development and obtained approval for growing marijuana, there were no County limitations on how many

licensed premises could operate on the subject property.[1] On March 1, 2019, the County amended the Zoning and Development Ordinance to limit licensed premises to one per tract in certain zones, including EFU zones. At the time the ordinance was amended, the applicant had begun but not completed operation of its anticipated business park. Under the County code, the applicant may only complete its plan if it satisfies the requirements for a vested right."

A modification request is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director denied the modification request.[2] This appeal followed.

D. DISCUSSION

This is an unusual case. Generally, a modification request seeks to change some aspect of the decision sought to be modified. In this case, the applicant does not so much seek to change the decision in Troutner Farms I, but to clarify the decision. As the applicant explains, it understood the decision in Troutner Farms I to approve its right to complete development of its marijuana business park with up to 60 buildings and 60 licensed premises. According to the applicant, subsequent to the decision in Troutner Farms I, the County has sought to frustrate its ability to complete development. The applicant also argues that the County intends to enforce unwarranted requirements regarding continuation of the use and potential revocation of its future nonconforming use. Additionally, the modification or clarification requested has evolved during the course of the proceedings. Originally, the applicant sought 14 modifications. The applicant's final legal argument explains that after the discussions during the public hearing, that its concerns would be alleviated by significantly less modifications.

Before turning to the applicant's specific requests for clarification, a brief explanation of the requirements for a modification may be helpful. Clackamas County Zoning and Development Ordinance (ZDO) 1309.01 provides the approval criteria for modifications:

"A. A modification shall be consistent with the prior approval;

"B. A modification shall be consistent with all Ordinance provisions in

[1] Licensed premises means an authorized grower of marijuana on the subject property. In the marijuana business, apparently it is common for there to be multiple licensed premises – or growers – on one property.
[2] 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]."

effect on the date the modification request is submitted; and

"C. A modification shall not result in any of the following:

"1. A change in the type of use (e.g. commercial, industrial, institutional);

"2. An increase of greater than 25 percent of the original approved building floor area;

"3. An increase of greater than 25 percent of the original approved lot coverage;

"4. An increase in the density of development (residential or recreational uses), or intensity of use, as demonstrated by a change in occupancy rating requiring substantial modifications to structures;

"5. An increase in traffic congestion or use of public facilities;

"6. A reduction in approved open space;

"7. A reduction of off-street parking spaces or loading berths, except as provided under Section 1015; or

"8. A reduction in required pavement widths or a change in major access locations, except as required by the County.

The Planning Director went into great detail explaining why he thought the modification request did not satisfy the first two approval criteria. Most of that reasoning involved language that the applicant no longer seeks to add to the approval in Troutner Farms I. As I agree with the applicant that the changes currently sought do not change the decision in Troutner Farms I but only clarify it, the requested changes are consistent with the prior approval and are consistent with all current ordinance provisions. In other words, because this decision does not actually change anything from Troutner Farms I, ZDO 1309.01(A & B) are satisfied. There is not any dispute that ZDO 1309.01(C) is satisfied.

In Troutner Farms I, the application involved the applicant's proposal to have up to 60 buildings and up to 60 licenses to grow marijuana in the buildings. In Troutner Farms I, the applicant was concerned that the County might require it to seek separate nonconforming use verifications for each of the potential sixty licenses or the County might seek to revoke the nonconforming use due to turnover of the licensees. The decision in Troutner Farms I very clearly approved a vested right to one use – an agricultural use of up

to 60 buildings and up to 60 licenses to grow marijuana.[3] While I thought it was clear in the decision that the approved vested right for one use not sixty, I added Footnote 6 to further clarify that I agreed with the applicant about the nature and extent of the use. Footnote 6 states:

> "In case it is not clear, I agree with the applicant that the approved use is for one 60 building business park, with up to 60 licenses, and not 60 separate buildings and licenses. As the applicant states, as a business park, tenants will inevitably come and go, and so long as the park is maintained and operated as a park, the vested right should remain valid and new tenants should not require a nonconforming use approval."

Initially, the Planning Director repeats numerous times that a marijuana business park is not a specific type of use and criticizes the decision in Troutner Farms I for approving a use that "has not ever been a land use expressly defined or allowed in the subject Exclusive Farm Use Zone (EFU) zoning district by the ZDO." Planning Director Decision 7 Footnote 2. The decision in Troutner Farms I clearly explains that the requested vested right is for growing marijuana, which is a farm use that is allowed in EFU zones. The description of a "marijuana business park" is just that – a description. It describes the particular agricultural use that the applicant intends to conduct. There are near limitless potential agricultural uses with near limitless specific descriptions to distinguish those various agricultural uses – but they are all agricultural uses. The point of a vested rights determination is to determine the nature and extent of the potential use. If I had merely approved a vested right to complete a generic agricultural use that would not have been particularly helpful. While this should not have been necessary, to reiterate – the approved vested right in Troutner Farms I was for an agricultural use and the description of that agricultural use is a marijuana business park.

The Planning Director's decision places great weight on the fact that I used the word "should" in Footnote 6. According to the Planning Director, this means that the footnote is merely dicta and apparently may be ignored. The footnote was intended to further clarify that I agreed with the applicant's position that the vested rights determination

[3] The Planning Director's finds that the distinction between vested rights and nonconforming uses weighs against approving the application. A vested right, however, is just a species of nonconforming uses – an inchoate nonconforming use. Modifying (or clarifying) the vested right is merely modifying (or clarifying) what the eventual nonconforming use will be.

was for what is now being described as a "unitary" use. In other words, the vested right is to complete a use that is one single operation involving up to 60 buildings and up to 60 licenses – not 60 different uses that would all be analyzed independently. I used the word "should" because I obviously cannot determine in advance how a future decision maker must analyze a potential nonconforming use determination or discontinuation. What I can determine is how I view the nature and extent and the vested right. Footnote 6 further clarified that I agreed with the applicant's understanding of the nature and extent of the vested right.

The applicant presents a case law analysis involving such "unitary" nonconforming use. In particular, the applicant cites *Campbell v. Columbia County*, ___ Or LUBA ___, LUBA No. 2019-112, May 21, 2020, for the proposition that when a nonconforming use involves fungible units such as mobile home spaces or apartments that vacancies do not lead to partial discontinuations of the nonconforming use. As LUBA held:

> "* * * vacancy of individual spaces in the entirety of the mobile home park business does not lead to a discontinuance of the lawful nonconforming use status of those spaces, any more than a vacant apartment in a nonconforming use apartment building would lead to a partial discontinuance of the apartment building's nonconforming use status." *Id*. at 18.

While I certainly did not anticipate that further additional clarification would be necessary, apparently it is. The applicant proposes to move Footnote 6 into the body of the decision and amend it as follows:

> "The approved use is for one unitary 60 building business park, with up to 60 licenses, and not 60 separate buildings and licenses."

While I cannot determine how a future decision maker would analyze any future disputes involving the property, I can determine that I find the vested right (and eventually nonconforming use) to be analogous to such rights involving mobile home parks and apartments. I agree with the applicant's proposed modification. While the requested modification does not change the essence of the decision in Troutner Farms I, hopefully it will clarify this issue once and for all.

The remaining issue involves the expiration dates for the Type I permits previously obtained by the applicant. Those permits contained four-year deadlines for implementation

of the approvals. Due to delays from the ongoing dispute, the applicant is concerned that the County may argue that those approvals will expire before construction is completed. This issue came up in Troutner Farms I, but as the County had not indicated any position I did not address the issue. I stated:

> "The applicant also asks for a finding that the four-year periods provided in its original approvals for growing marijuana in Z0004-16-MJ and Z0215-18-MJ be tolled for the period that the County required the applicant to cease additional activities until it obtained a vested rights determination. While I tend to agree with the applicant, I do not see that that issue is before me and I do not address that issue. It may be that the County will agree with the applicant on this matter." Footnote 8.

During the public hearing, the County explained that as long as the applicant continues to make progress on the Type I applications that those applications would not expire. Therefore, I agree with the applicant's request for the following modification:

> "So long as continuous construction toward completion of the unitary business park does not cease for a period of 12 consecutive months, the vested right shall remain in effect and supersede the deadlines for implementation in Revised Notice of Type 1 Land Use Action dated February 17, 2016, File No. Z0004-16-MJ, and in the Notice of Type 1 Land Use Action dated May 21, 2018, File No. Z0215-19-MJ."[4]

I must confess to experiencing quite a bit of dissonance in this case. I certainly thought the issue of the, as we are now describing it, unitary nature and extent of the vested right was conclusively decided. The applicant's concerns were apparently prescient, however, as certain planners are allegedly trying to thwart the decision in Troutner Farms I. At the public hearing, on the other hand, the County argued that it was not trying to stop the development and is diligently working with the applicant to bring the development to fruition. While it would seem odd for the applicant to incur the costs of another application and further excellent legal representation, perhaps there was just a misunderstanding. In any event, I take no position on whose version of the case is more accurate. The case on paper certainly seemed different than the more cooperative positions described during the

[4] I will also remove Footnote 8 from Troutner Farms I as the County has now taken a position on the matter.

public hearing. I hope that the public hearing version of the case is the one that continues. Hopefully this modification settles the matter.[5]

E. CONCLUSION

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the Hearings Officer hereby **APPROVES** a modification in Z0174-20-MOD of the vested rights approval for a business park with 60 buildings and up to 60 licensed premises in Z0159-19-VR.

DATED this 30th day of September, 2020.

Fred Wilson
Clackamas County Hearings Officer

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 the decision (which date appears above my signature).

[5] An amended version of the decision in Troutner Farms I with the discussed modifications is attached as an exhibit to this decision.