

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

Regarding an Appeal of a Planning Director)	Case File No.
Decision Denying a Forest Land Division In)	Z0378-18-FLD
A Timber Zone.)	(Fulop)

A. SUMMARY

1. The owners and applicants are Jeff Fulop and Linda Fulop.
2. The appellant is Jeff Fulop.
3. The subject property is located at 44800 & 45250 Southeast George Road, Estacada, Oregon 97023. The legal description is T3S, R5E, Section 21, Tax Lots 700, 800, 1300, and 1400, W.M. The subject property is approximately 135.1 acres and is zoned TBR – Timber.
4. On January 17, 2019, 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 January 17, 2019. 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 planner Rick McIntire discussed the Planning Director’s decision and recommended that the Planning Director’s decision be upheld.
3. Jeff Fulop argued in favor of the application.

4. Cyndi Bryck testified in opposition to 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 denying a forest land division in a TBR zone. The application proposes a multi-dwelling land division to divide the property into a 4.5-acre parcel and a 130.5-acre parcel. The application is based on creating a parcel for each of the two houses on the property. Two dwellings were established on the property in the 1920s. One of those dwellings was replaced in 2000 with a replacement dwelling and is currently occupied. The other dwelling was occupied until 2012 when it was severely damaged by a fire, and the dwelling has been vacant since the fire. In order to obtain a forest land division, both dwellings must meet the requirements for a replacement dwelling. The dwelling that is currently occupied easily meets this requirement, but the Planning Director found that the dwelling that was damaged in the 2012 fire does not meet the replacement dwelling criteria. Review of the proposed forest land division is subject to a type II procedure, whereby the decision is made by the Planning Director. The Planning Director denied the proposed forest land division.¹ This appeal followed.

D. DISCUSSION

Clackamas County Zoning and Development Ordinance (ZDO) 406.09 provides the standards for land divisions in timber zones. ZDO 406.09(B) provides the standards for land divisions based upon multiple dwellings on the property.

“Multiple Dwelling Land Divisions: A lot of record may be divided subject to Subsection 406.05(A)(2) and the following provisions:

“1. At least two lawfully established dwellings existed on the lot of record prior to November 4, 1993;

“2. Each dwelling complies with the criteria for a replacement dwelling under Subsection 406.05(D)(1);

“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

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].”

size;

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

“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;

“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);

“7. Existing structures shall comply with the minimum setback standards of Subsections 406.07(B) through (D) from new property lines; and

“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.”

The Planning Director found that all of the approval criteria were satisfied except for ZDO 406.09(B)(2) – complying with the criteria for a replacement dwelling under ZDO 405.05(D)(1). The 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 all of the unchallenged 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.

The Planning Director denied the application because he found that the existing dwelling did not meet the requirements for a replacement dwelling under ZDO 406.05(D)(1), which provides:

“Alteration, restoration, or replacement of a lawfully established dwelling that:

“a. Has intact exterior walls and roof structure;

“b. Has indoor plumbing consisting of a kitchen sink, toilet, and bathing facilities connected to a sanitary waste disposal system;

“c. Has interior wiring for interior lights;

“d. Has a heating system; and

“e. In the case of replacement, is removed, demolished, or—if not a manufactured dwelling or residential trailer—converted to an allowable use within 90 days from the occupancy of the new dwelling. Manufactured dwellings and residential trailers to be replaced shall be removed from the property within 30 days from the occupancy of the new dwelling.”

The Planning Director found that the dwelling that was damaged by the 2012 fire does not satisfy ZDO 405.05(D)(1)(a, b, c, or d). Regarding ZDO 406.05(D)(1)(a), the Planning Director found:

“Photographs of the rear of the dwelling show that the structure does not have intact exterior walls and roof structure. Sections of the roof and exterior walls on the back and sides of the dwelling are falling off or missing and it appears vegetation has grown through portions of the roof.

“In another photograph of the left side of the structure, plywood appears to cover a large hole created by fire damage in 2012. * * * The plywood on the exterior of the structure is clearly visible through the large hole from interior photos of the dwelling. * * * Based on the photographs submitted, staff finds this criterion is not met.” Planning Director Decision 6.

Regarding ZDO 405.05(D)(1)(b), the Planning Director found:

“Photographs indicate that the dwelling has a kitchen sink, toilet, and a shower head. It is not clear in the photographs if a shower stall or bathtub exist. A photograph of the outside of the dwelling shows a broken pipe coming from the house. The caption on the photograph states, ‘waste water drain to septic – pipe broken.’ The photograph clearly shows the

broken section of the pipe ending approximately six inches above the ground. No further evidence was submitted showing the dwelling was connected to a sanitary waste system. Comments received on the application state that ‘when the building was occupied, wastewater was routinely discharged from a pipe through the back of the wall of the house directly to the surface of the ground below.’ Based on this evidence and a lack of supporting evidence showing that the sink, toilet, and bathing facilities are connected to a sanitary waste system, staff finds that this criterion is not met.” Planning Director Decision 6-7.

Regarding ZDO 406.05(D)(1)(c), the Planning Director found:

“The dwelling had electrical service, and photographs indicate interior lights exist in the dwelling. Historically, the dwelling had electrical service, however, a photograph of the electrical service panel shows that it is not connected to any interior wiring, not does it contain any circuit breakers. Additionally, photographs show that the electrical meter has also been removed.

“* * * While the dwelling had interior wiring for interior lights, at this time there is no indication that the electrical wiring in the structure is functional. This criterion is partially met.” Planning Director Decision 7.

Regarding ZDO 406.05(D)(1)(d), the Planning Director found:

“Photographs submitted by the applicant do not include a heating system in the dwelling, furthermore, a caption of the picture showing the burnt hole in the wall states, ‘heating – woodstove was here before the fire.’ * * * records indicate that the only heating source in the dwelling was a woodstove. No other evidence of a heating source was submitted to the file. Based on the evidence submitted staff cannot conclude that the dwelling currently has a heating system.” Planning Director Decision 7.

The Planning Director found four bases for denying the application. The applicant does not really challenge the Planning Director’s findings. Any attempt to challenge the Planning Director’s findings would be futile, as the evidence overwhelmingly demonstrates that the application fails to satisfy numerous requirements for a replacement dwelling. In the applicant’s defense, his argument is not that the requirements for a replacement dwelling are satisfied. Instead, the applicant argues that he could easily provide the required materials, such as walls, roofing, plumbing, lighting, and heating. The applicant argues that it would make little sense to provide repairs to satisfy ZDO 406.05(D)(1) when he plans to demolish the dwelling and build a new house.

Although the Planning Director’s decision does not explain why this is not a viable option, at the public hearing staff explained why the applicant could not provide repairs sufficient to satisfy the replacement dwelling criteria and then proceed with the forest land division. ZDO 406.05(1) provides for “[a]lteration, restoration, or replacement of a *lawfully established dwelling* that” meets the subsequent requirements. As the emphasized language illustrates, in order to obtain a replacement dwelling, the dwelling to be replaced must be a lawfully established dwelling. In timber zones, only one dwelling is allowed on a parcel. When more than one dwelling exists on a parcel, in order to be a lawfully established dwelling the additional dwellings must be nonconforming uses. That was the situation in the present case as both dwellings were established in the 1920s – long before land use laws prohibited more than one dwelling per parcel.

When an additional dwelling is a nonconforming use, it is subject to the standards governing nonconforming uses. Those standards include ZDO 1206.03(A), which provides:

“If a nonconforming use is discontinued for a period of more than 12 consecutive months, the use shall not be resumed unless the resumed use conforms to the requirements of this Ordinance and other regulations applicable at the time of the proposed resumption.”

After the 2012 fire, the additional dwelling was abandoned and use of the dwelling has not been resumed. Thus, the use of the dwelling was discontinued for a period of more than 12 months. Therefore, under ZDO 1206.03(A) the additional dwelling was no longer a valid nonconforming use. Because the additional dwelling was no longer a valid nonconforming use, it was also no longer a lawfully established dwelling. Because it is no longer a lawfully established dwelling, it cannot satisfy the requirements for a replacement dwelling under ZDO 406.05(D)(1) and therefore cannot satisfy the requirements for a forest land division under ZDO 406.09(B). Once a nonconforming use has been lost, it cannot be reestablished merely by restarting the use. That is why the applicant cannot satisfy ZDO 406.05(D)(1) by making the repairs that would satisfy the subsections of ZDO 406.05(D)(1). While it is unfortunate that the applicant did not make the repairs or seek a replacement dwelling or forest land division within 12 months of the 2012 fire, under the ZDO I have no choice but to deny the forest land division.

F. 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 decision in Z0378-18-FLD and denies the proposed forest land division.

DATED this 11th day of February, 2019.


Fred Wilson
Clackamas County Hearings Officer

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).