

RESPONSE MEMORANDUM

To: Record in Case No. T2-2021-14768
From: Katherine Thomas, Assistant County Attorney
Date: September 24, 2021
RE: Response to Appellant’s Additional Record Submissions

INTRODUCTION

During the first open record period, Appellant Scott Reed, through his representative Garrett Stephenson (“Appellant”), submitted the following evidence:

- (1) A series of photos of the property from January 2014 to October 2018 (Exhibit P.3);
- (2) Invoices from 2018 showing equipment rentals (Exhibit P.4); and
- (3) A June 2018 invoice for activities including importing dirt, spreading and leveling dirt, and “[s]pread[ing] concrete into courtyard.” (Exhibit P.5).

Because the Appellant did not include any written explanation or argument, other than to note that these documents are “evidence of the Reeds’ commencement of construction of their basement foundation,” the County does not know how the Appellant intends to rely on that evidence and, accordingly, will not have an opportunity to fully respond.

Nonetheless, from what can be gleaned by the Appellant’s submittal of evidence without explanation, that evidence does not change the outcome in this case because none of the evidence shows that actual construction of the foundation or frame of the dwelling occurred prior to September 11, 2017, as required by Multnomah County Code (“Code”). Even if the Hearings Officer accepts the Appellant’s argument that a longer expiration period applies, the evidence does not show actual construction occurred prior to September 11, 2019.

If the Hearings Officer nonetheless concludes that the photos in Exhibit P.3 show that actual construction of the foundation occurred prior to September 11, 2017, that activity was unlawful and cannot satisfy the commencement of construction standard because the Appellant did not obtain a Grading and Erosion Control permit for the dwelling until February 14, 2018.

Because the new evidence does not show that the Appellant timely commenced construction of the dwelling, the County requests that the Hearings Officer affirm the Planning Director's determination that the permit issued in Case No. T2-2014-3377 ("Permit") is expired.

I. The Appellant's new evidence does not show "actual construction of the foundation or frame of the approved structure" as required by MCC 37.0690.

As explained in the Staff Report and the County's Post-Hearing Opening Memorandum, the Code provides that a permit approving a structure expires when the permittee has not commenced construction, meaning, actual construction of the foundation of the approved structure, within two years of the date of final decision. (Exhibit B.1, MCC 37.0690(B)(1)); *see also* (Exhibit B.1, MCC 37.0690(C)(1)(a) (same standard, but for "residential development" and with a four year expiration period)). Based on the plain text and context of the Code, "construction" means putting together the parts of the foundation. Grading, excavation, and site preparation are not sufficient to satisfy the "actual construction" standard.

Nine of the fifteen photos the Appellant submitted predate the September 11, 2017 expiration date applicable to the Permit. For the reasons explained below, none of those photos shows "actual construction" of the foundation of the approved dwelling.

- Photos dated January 31, 2014, February 27, 2014, April 2, 2017, September 19, 2018 (Exhibit P.3, pages 2, 6, 7, 9): These photos are labeled "Electric service to house, Jan. 2014," "Water brought to house, Feb. 2014," "First property layout," and "New driveway entrance, Jan. 2014." Bringing utilities to the house, laying out the boundaries of the house, and building a new driveway entrance do not constitute "actual construction" of the foundation because they do not involve putting together parts of the foundation.
- Photo dated May 29, 2017 (Exhibit P.3, page 1): This photo is labeled "First basement start." It is not clear what activity this photo is intended to show. However, this photo predates the February 14, 2018 approval of the Appellant's Grading and Erosion Control permit (Exhibit B.6), so presumably this photo does not purport to show grading or excavation authorized by a permit; even if it did, those activities do not constitute "actual construction," as defined above, because they do not involve putting together parts of the foundation.

- Photos dated May 4, 2017 and June 6, 2017 (Exhibit P.3, pages 4, 5, 10): These photos are labeled “Excavation equipment used for basement,” “Equipment rented by Reed for original basement start,” and “First equipment used to start foundation.” The photos do not show any work being conducted on the property with the equipment, nor could grading, excavation, or foundation construction have been conducted in May or June of 2017 due to the absence of a Grading and Erosion Control permit and building permit.
- Photo dated June 10, 2017 (Exhibit P.3, page 8): This photo is labeled “First start to site work and basement on property.” This photo appears to show some grading and excavation, but those activities were not permitted at that time under a Grading and Erosion Control permit, nor do those activities constitute “actual construction” as defined above.

The remaining photos, as well as invoices, show work conducted after the September 11, 2017, expiration date. Even if the Hearings Officer were to apply the later expiration date of September 11, 2019, none of the photos or invoices shows that the Appellant commenced “actual construction,” meaning putting together parts of the foundation, prior to that date. The 2018 invoices in Exhibit P.4 show equipment rentals, but do not show that the equipment was used to put together parts of the foundation; similarly, the June 11, 2018 invoice in Exhibit P.5 shows that in May and June of 2018, dirt was brought onto the property and leveled, and that concrete was spread into the “courtyard.” Those activities involve site preparation, but not actual construction, and a courtyard is not part of the foundation of a dwelling. In sum, none of those activities constitutes putting together the foundation of the dwelling itself, as required.

Therefore, the Appellant’s new evidence does not change the result; the Permit is expired.¹

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¹ If the Hearings Officer disagrees with the Planning Director’s decision and determines that the Permit is still valid, it will be important for the Hearings Officer to identify the date on which the Appellant “commenced construction” because that date will determine when the next expiration period began. Under both MCC 37.0690(B) and (C), a permit expires when a structure has not been completed within four years of the date of commencement of construction. (Exhibit B.1).

II. Even if the new evidence did show that “actual construction” occurred prior to September 11, 2017, those activities were undertaken without permits and therefore would not be sufficient to prevent expiration of the Permit.

As the Appellant acknowledged at the hearing, the Appellant was required to obtain a grading and erosion control permit before the Appellant could begin ground disturbing activity associated with the dwelling. That requirement stems from County Code and was expressly stated in Condition 14 of the Permit: “No earth disturbing activity is allowed under this permit without a Grading and Erosion Control permit for such activity.” (Exhibit A.1); *see also former* MCC 29.333 and MCC 29.336 (describing permits required for certain ground disturbing activity) and *former* MCC 29.331 (defining “ground disturbing activity” as “[a]ny activity that exposes soil through the use of motorized equipment”), available at <https://multco-web7-psh-files-usw2.s3-us-west-2.amazonaws.com/s3fs-public/Chapter%2029.pdf>.²

The evidence shows that the Appellant did not obtain a Grading and Erosion Control permit until February 14, 2018. (Exhibit B.6). As a result, ground disturbing activity that the Appellant may assert occurred, based on the photos submitted, which preceded February 14, 2018, would have been undertaken without the necessary land use approval.

The Appellant may nonetheless be offering those photos in support of the Appellant’s statement at hearing that unlawful activity can be used to satisfy the commencement of construction standard, even though that activity might be subject to a Code enforcement action. While the County agrees that unlawful activities are subject to Code enforcement, the Appellant is incorrect that unlawful activities are sufficient to satisfy the commencement of construction requirement. The Appellant did not cite to any state law, County Code or case law to support his

² After the Permit was issued, the County moved the Grading and Erosion Control provisions into Chapter 39 as part of the County’s Code consolidation, and later revised those provisions in 2019. Those revisions are not applicable to the current matter, but can be found at MCC 39.6200 to 39.6235, available at https://multco-web7-psh-files-usw2.s3-us-west-2.amazonaws.com/s3fs-public/ch39_0.pdf.

assertion, and, in fact, those sources demonstrate that unlawful activities cannot satisfy the commencement of construction standard.

Under both state law and County Code, property owners are prohibited from making use of their property in ways that are not authorized by County land use regulations. *See* ORS 215.190 (“No person shall locate, construct, maintain, repair, alter, or use a building or other structure or use or transfer land in violation of an ordinance or regulation authorized by ORS 215.010 to 215.190 and 215.402 to 215.438.”). *See also former* MCC 33.2215 (providing no use of land allowed in CFU-2 except for uses authorized in zone when done in compliance with code requirements); *former* MCC 33.2615 (same); *former* MCC 29.333 – 29. 336 (permits required for ground disturbing activity). In light of those provisions, the County does not have to insert the term “lawful” throughout its Code – uses of land must be undertaken in compliance with County Code, *i.e.*, lawfully. An interpretation that unlawful activity can satisfy the “commencement of construction” requirement would conflict with both state law and County Code provisions that require uses of land to comply with the County zoning code.

Further, the fact that, as Appellant acknowledges, unlawful activity is subject to enforcement forecloses any remaining uncertainty about whether a standard in the Code can be achieved through unlawful activity. One remedy for unlawful activity is the removal of the unlawful use or structure:

“In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county * * * may, in addition to other remedies provided by law, institute * * * abatement, or other appropriate proceedings to * * * abate, *or remove* the unlawful location, construction, maintenance, repair, alteration, or use.”

ORS 215.185(1) (Emphasis added.); *see also* MCC 39.1545 to 39.1550 (providing Hearings Officer with authority to order “any other action reasonably necessary to remedy the violation”).

As such, it would make little sense to interpret a standard, such as the “commencement of construction” standard in the present case, as capable of being satisfied by unlawful activity when such activity might be required to be undone through enforcement.

Lastly, interpreting the County Code as limited to authorizing, and being satisfied by, only lawful activities aligns with other land use doctrines, such as vested rights. Under the vested rights doctrine, “courts either discount[] or [do] not count expenditures made before the effective date of a zoning change when those expenditures were made in bad faith—*i.e.*, when they were made for the purpose of circumventing the new zoning law.” *Friends of Yamhill County v. Board of Commissioners*, 351 Or 219, 241, 264 P3d 1265 (2011). The Hearings Officer should apply similar reasoning here – unlawful activities cannot be used to satisfy a land use standard.

CONCLUSION

For the reasons set forth in the Staff Report, at hearing, and in the County’s post-hearing memoranda, the County requests that the Hearings Officer affirm the Planning Director’s determination that the Permit is expired.