

BEFORE THE LAND USE HEARINGS OFFICER
CLACKAMAS COUNTY, OREGON

Regarding an Appeal of a Planning Director
Decision Approving an Application for
Nonconforming Use Verification and Alteration

Case File No:
Z00137-25 Appeal

A. SUMMARY

1. The owners of the subject property are Jennifer Kapnek and Terrance Eidsmoe. The applicant is Jennifer Kapnek. The subject property is located at 40220 SE Cedar Creek Ln., Sandy, OR 97055, within Clackamas County. The legal description is T2S, R5E, Section 18BB, Tax Lot 01300, W.M. The subject property is split-zoned with an existing home built within the front setback area of the Rural Residential Farm Forest 5-Acre (RRFF-5) Zoning District. The subject property also contains Timber (TBR) zoning, but the home is not built within that portion of the property. The subject property is not located within an urban growth boundary.
2. The property owners submitted an application proposing a Non-Conforming Use verification for the existing home on the subject property built within the front property setback area required for homes built within the County's RRFF-5 Zoning District. The application also proposes an Alteration of the home, seeking approval for roof replacement and structural improvements. The application was deemed complete on May 22, 2025, and notice of the application was distributed on May 22, 2025. The application was approved by County staff on July 14, 2025. (Exhibits 1, 9, 10, 15)
3. The appellant is Lori Ryland. On July 21, 2025, Ms. Ryland submitted an appeal generally asserting that the application does not comply with ZDO Sections 202, 316, 406, 1206 and 1307. (Exhibit 28)
4. On August 14, 2025, Hearings Officer Carl Cox (the "Hearings Officer") conducted a public hearing to receive testimony and evidence in the matter, keeping the record open until 4:00pm September 4, 2025 at the request of the parties as follows: for one week until 4:00 pm on Thursday August 21, 2025 for any participant or member of the public to submit additional written evidence, argument, or testimony; an additional week until 4:00 pm on Thursday August 28, 2025 for any participant or member of the public to submit additional written evidence, argument, or testimony to respond to new evidence submitted during the prior open record period; and an additional week until Thursday September 4, 2025 for the applicant to provide a final written "last word" response or rebuttal, not to include new evidence.

B. HEARING AND RECORD HIGHLIGHTS

1. The Hearings Officer received testimony and evidence at the August 14, 2025 public hearing about this appeal and related application. All exhibits and records of testimony are filed with the Planning Division, Clackamas County Department of Transportation and Development. The public hearing was conducted virtually over the Zoom platform. Notice of this public

hearing was sent to agencies, Community Planning Organization(s) and property owners within 2,640 feet of the subject property. 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 County's staff report, 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 Mya Ganzer discussed the decision approving the application for Nonconforming Use Verification and/or Alteration, providing a presentation with related exhibits, discussion of relevant approval criteria in the County's Zoning and Development Ordinance (ZDO) and the County's recommendation to uphold the decision approving this application. Ms. Ganzer shared some background information concerning the application, including showing the location of the subject property, an aerial image showing the subject structure, its location, and zoning for the subject property. Ms. Ganzer also shared the site plan submitted by the applicant showing the two lots comprising the subject property and the approximate location of the existing single-family residential structure that is the subject of this application, indicating the approximate locations of required setbacks in this zone. (Exhibit 81)
3. Ms. Ganzer provided an overview of the proposal, explaining that the applicant applied for a Non-Conforming Use (NCU) verification for the setbacks of the dwelling, stating it was built in 1930. Ms. Ganzer stated that the structure currently does not comply with the RRFF-5 zone 30 foot front setback as stated in Table 316-2 of the ZDO. Ms. Ganzer further noted that the subject parcel became subject to zoning regulations on 12/14/1967 when it was zoned RA-1. The property's zone was changed to its current zoning designation, RRFF-5, by ZC-43-79 effective date 6/19/1980. Ms. Ganzer reported that in 1980 the RRFF-5 had a 30-foot front setback requirement. Ms. Ganzer explained that the existing dwelling encroaches into the Right-of-Way ("ROW") of Cedar Creek Lane but not the "as driven" location. Ms. Ganzer reported that County Engineering issued a "revocable encroachment permit" noting that this information is contextual and is not within the scope of the NCU. Staff found that the use existed prior to setback restrictions and with conditions of approval to mitigate impacts the roof replacement and structural improvements will not create adverse impacts. The County approved the application subject to conditions.
4. Ms. Ganzer provided discussion concerning the approval criteria, pointing to ZDO Sections 202, 316, 1206, and 1307. Ms. Ganzer pointed to the definition of "Non-Conforming Use" contained in ZDO Section 202: "A use of any building, structure or land allowed by right when established or that obtained a required land use approval when established but, due to a change in the zone or zoning regulations, is now prohibited in the zone. Ms. Ganzer pointed to ZDO Section 316.03 – Uses Permitted and explained that Table 316-1 of the ZDO lists detached single-family dwellings as an allowed use in the RRFF-5 zoning district and therefore use of the structure is not a Non-Conforming Use (NCU) but an outright allowed use that is not the subject of this NCU application or decision.
5. Ms. Ganzer then pointed to ZDO Section 316.04 – Dimensional Standards and explained that Table 316-2 states that the front setback in the RRFF-5 zone is 30 feet, whereas the existing structure is less than 30 feet from the front property lines both South and East. Thus, the structure does not comply with the RRFF-5 front setback standards. Ms. Ganzer reported that

the application's purpose was to determine if the front setback encroachment is a legal non-conforming use pursuant to Section 1206 of the ZDO. Ms. Ganzer states that this application is subject to ZDO Sections 202 (Definitions), 316 (RRFF-5), 1206 (Non-Conforming Uses), and 1307 (Procedures). Ms. Ganzer states that the scope of this Non-Conforming Use does not include anything not related to the non-conforming front setbacks of the subject structure and the ZDO criteria she listed, and does not include: transportation, such as legal access and parking; septic capabilities and water access; occupancy or use of the dwelling or vacancy; dwelling habitability and structural integrity; FEMA and RSCA regulations, or; alleged past illegal use of the property. Ms. Ganzer notes that the subject structure will be subject to the same standards any other dwelling is, including Building Code, Fire Code, and Land Use, FEMA, Engineering, and Septic standards, but these standards are addressed through separate review processes.

6. Ms. Ganzer provided discussion concerning the approval criteria in ZDO Section 1206.04 – Discontinuation of Use, pointing to the requirement of subsection 1206.04.A “If a Non-Conforming Use is discontinued for a period of more than 24 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.” Ms. Ganzer provided the following summary of staff findings:
 - *Staff reviewed aerial photographs, and as it is a built structure did not find that it had been discontinued for a period exceeding 24 consecutive months. These photos can be seen in Exhibit 1.*
 - *The 1996 Tax Jacket (in Exhibit 2a) states the 1930 home is 2371 square feet.*
 - *Assessment data from 1993 until now (Exhibit 3) demonstrated consistent residential property taxation rate for the property. Ms. Ganzer explained that while the residential use of the property is not subject to the verification, the property tax data provides information regarding the consistent presence of the subject structure.*
 - *Based on this, and the fact that the NCU is a built structure and hence unlikely to have been “discontinued,” staff found this criterion is met.*
7. Ms. Ganzer provided additional discussion of the approval criteria in ZDO Section 1206.04 - Discontinuation of Use, noting that the appellant submitted comments disputing staff findings that the use had not been discontinued and therefore did not qualify for a NCU under 1206.04. Ms. Ganzer asserts that the use as a dwelling is not subject to verification requirements for nonconforming uses as dwellings are allowed outright in the RRFF-5 zone. Ms. Ganzer states that the nonconforming “use” is the structure’s encroachment within the required 30 foot setback to the front property lines. Ms. Ganzer contends staff cannot consider the following regarding Section 1206.04 Discontinuation:
 - *Occupancy of the dwelling*
 - *Occupants not paying rent*
 - *Illegal occupancy*
 - *Payment issues with the former property owner*
 - *Habitability of the dwelling*
8. Ms. Ganzer states that in the RRFF-5 zone a dwelling is allowed outright and hence is not a Non-Conforming Use as defined by ZDO Section 202, and therefore not subject to the standards in Section 1206 of the ZDO. Ms. Ganzer asserts that it does not need to be verified, nor does discontinuation relate to the dwellings’ occupancy or habitability.

9. Ms. Ganzer points to the approval criteria contained in ZDO Section 1206.05 – Verification, and the requirement in Subsection 1206.05, reproduced below:
- A. *The nonconforming use lawfully existed at the time of the adoption of zoning regulations, or a change in zoning regulations, which prohibited or restricted the use, and the nonconforming use has not been subsequently abandoned or discontinued. Once an applicant has verified that a nonconforming use was lawfully established, an applicant need not prove the existence, continuity, nature, and extent of the nonconforming use for a period exceeding 20 years immediately preceding the date of application for verification; or*
 - B. *The existence, continuity, nature, and extent of the nonconforming use for the 10-year period immediately preceding the date of the application is proven. Such evidence shall create a rebuttable presumption that the nonconforming use, as proven, lawfully existed at the time of, and has continued uninterrupted since, the adoption of restrictive zoning regulations, or a change in the zoning or zoning regulations, that have the effect of prohibiting the nonconforming use under the current provisions of this Ordinance.*
10. Ms. Ganzer provided this summary of staff findings with respect to ZDO Section 1206.05:
- *The property became subject to restrictive zoning on December 14, 1967.*
 - *Clackamas County appraisal records from 1996 verify the existence of a dwelling built in 1930, establishing the use existed prior to zoning regulations.*
 - *Property tax data shows consistent residential property tax rates from 1993.*
 - *Staff reviewed aerial photographs (Exhibit 1) showing the dwelling in 2004 and various dates after that.*
 - *PS25450 was recorded with the County in 1993 and show the encroachment distances into the ROW.*
 - *Staff found the structure's nonconforming setbacks were established prior to zoning (in 1930), and the applicant provided proof of the continuous non-conforming use (location of the structure) exceeding the 20-year requirement.*
11. Ms. Ganzer also provided discussion concerning various arguments advanced by the appellant. Ms. Ganzer addresses the appellant's assertions that the home has been expanded without permits, pointing out that the appellant did not provide evidence to support these assertions and this application relates only to the front setback standards for the home. Ms. Ganzer notes that in 1996 the home was stated to be 2371 square feet and this is its current size. Additionally, Ms. Ganzer points to the 1993 survey showing the encroachment distance into the front setback area. Ms. Ganzer notes that the appellant provided a 1937 deed (Exhibit 57) which described the subject parcel. Ms. Ganzer agrees that this deed does not mention the dwelling, but states that this is not typically done on deeds of this nature and does not disprove that the home was built in 1930. Ms. Ganzer reports that based on the applicant's submittal and with consideration of the appellants' submittals, staff still determine that the applicant has met the burden of evidence under Subsection 1206.05. Ms. Ganzer states that the applicant need not prove the existence, continuity, nature, and extent of the Non-Conforming Use for a period exceeding 20 years immediately preceding the date of application for verification, staff found that the application complied with 1206.05(A), and therefore this criterion is met.
12. Ms. Ganzer provided discussion concerning the approval criteria in ZDO Section 1206.07 – Alteration, pointing to Subsection 1206.07.B: "Alterations Not Required by Law: Except as provided in Subsection 1206.07(C), an alteration of a nonconforming structure or other physical improvements, or a change in the use, requires review as a Type II application pursuant to Section 1307, Procedures, and shall be subject to the following standards and criteria: 1. The

alteration or change will, after the imposition of conditions pursuant to Subsection 1206.07(B)(4), have no greater adverse impact to the neighborhood than the existing structure, other physical improvements, or use.” Ms. Ganzer noted staff findings that the proposed alteration is a roof replacement and needed structural improvements and findings that the roof replacement does not expand the footprint of the structure farther into the setback. Thus, staff found the proposed roof replacement will cause no greater impact on the nonconforming setback, noting that the encroachment distance was to be verified with a Record of Survey per conditions of approval imposed in the staff decision.

13. Ms. Ganzer noted that the appellant raised concerns regarding structural integrity, fire safety, septic, access, and construction. Ms. Ganzer asserts that approval of the alteration will address structural concerns through the building permit process. Ms. Ganzer reported that staff did not find that the roof replacement and structural improvement would create “greater adverse impacts” related to the other concerns raised by the appellant and were outside the scope of the NCU. Ms. Ganzer provided additional discussion concerning the approval criteria in ZDO Section 1206.07 – Alteration, pointing to Subsection 1206.07(B)4: “Conditions of approval may be imposed on any alteration of a nonconforming structure or other physical improvements, or a change in the use, permitted under Subsection 1206.07(B), when deemed necessary to ensure the mitigation of any adverse impacts.” Ms. Ganzer noted that a condition of approval was imposed in the staff decision requiring the applicant to record a Record of Survey with the County showing the encroachment distance, to enter this in the record and not allow for further encroachment. Ms. Ganzer explained that building, engineering, and septic permits were not conditioned in the staff decision as they are required outright for new construction. Ms. Ganzer reported that, as conditioned, staff were able to find this criterion met.
14. Ms. Ganzer provided discussion concerning the approval criteria contained within ZDO Section 1307, noting this section regulates procedures. Ms. Ganzer referenced assertions by the appellant that the County did not follow ZDO Section 1307 on the appeal submittal, pointing to Exhibit 28. Ms. Ganzer states that Non-Conforming Uses are a Type II Land Use Procedure as shown in Table 1307, and subject to ZDO Section 1307.04(2), noting that public hearings are not held for Type II Land Use Decisions, unless appealed. Ms. Ganzer reported that the appellant was sent Notice of Application and Notice of Decision as required by ZDO 1307.09 and 1307.17. She points to the appellant’s statements that the County did not include the Community Planning Organization (CPO) recommendations in the application packet. Ms. Ganzer notes that the application packet was sent prior to the CPO comments and that email from a CPO Board Member was received by the County on June 5, 2025 (Exhibit 19). She also references Exhibit 71, noting it consists of minutes from a CPO meeting submitted by the appellant on August 1, 2025. Ms. Ganzer asserts that staff reviewed all public comments, including the CPO comments, finding that none of the submitted comments demonstrated the application did not meet the standards in Section 1206 of the ZDO and other relevant criteria, but stated their concerns were addressed in the relevant findings. Ms. Ganzer points to the statement in the staff decision that comments were received from individual neighbors, Firwood Neighbors CPO, and the Department of State Lands (Exhibit 1, page 5). Ms. Ganzer recommends approval of the application with conditions consistent with the staff decision.
15. Matt Martin is an attorney representing the applicant. Mr. Martin asserts that the objections submitted by the appellant are broader than the issues in this application, whereas the issues in this hearing concern the narrow criteria related to the application. Mr. Martin contends that the

appellant's arguments are largely not relevant to the approval criteria for the application, pointing to the provisions of ZDO Section 1206.05 for verification of nonconforming use status. Mr. Martin pointed to the tax records and aerial photos of the property supporting verification of the existing nonconforming encroachment of the house into the setback over the past 20 years, contending it is unlikely that someone deconstructed the house, left it for two years, and then rebuilt it in the same location. Mr. Martin points to Exhibit 2.D. and question D. posed by staff and the answer provided by the applicant's architect, Mr. Blane Skowhede, reproduced below:

Staff: *"Based on the provided tax jacket and site plan and building diagrams, there seem to be some discrepancies in the size and shape of the deck. It appears that the portion of the deck that extends SE was 7-feet, according to the tax jacket, and was extended to 9'3" feet at some point, based on the site plan. Please provide evidence that this extension occurred prior to zoning restrictions, or was done with County Approval."*

Architect: *"The plan drawn by the assessor is not accurate. The dimensions placed on the drawing created by the assessor establishes the north-south orientation. There is a deck on the top part of the drawing and on the left part of the drawing. This means north is to the right since the house does not have a deck on the east side. With north to the right, the 5' x 15' projection has been placed on wrong corner of the plan. It should be placed where shown on the provided sketch. This mistake would be easy to make since the building is almost square. In addition, this orientation is confirmed by the heavy line rectangular box on the plan. This is the lower level and faces to the west.*

The above explains that the 7' dimension is not on the south deck, but rather the west deck. This dimension is within the ballpark of the dimension obtained by laser while documenting the structure. The 9'-3" deck dimension is the original width of the south side deck."

16. Mr. Martin discussed the proposed alteration stating that the house has structural and roof issues that should be addressed through the building permit process, and asserts that approving the proposed alterations will have no greater impact to the neighborhood than the existing structure, as the existing house is a residence and will remain a residence with no greater encroachment into the setback and ROW than exists.
17. The appellant, Lori Ryland, has lived on Cedar Creek Lane for twenty years and owns the two properties located at 40315 SE Cedar Creek Lane and 40350 SE Cedar Creek Lane. Ms. Ryland provided testimony and pointed to evidence in support of her appeal. Ms. Ryland points to the public comments submitted by the Firwood CPO opposing the application, referencing a June 3, 2025 CPO meeting expressing concerns with the house on the property, the difficulty in getting a fire truck to the property, and advising the County to fully investigate their concerns and have the fire department visit the site before making a decision on the application. (Exhibit 19) Ms. Ryland points to ZDO Section 1206 and disagrees with the assertions by the applicant and County concerning the narrow scope of the ordinance when reviewing the application.
18. Ms. Ryland reports that there were squatters in the house on the property and contends that there has not been continuous lawful use of the house for more than 24 months. She explains that her house sits above the subject property where she can see it. Ms. Ryland asserts that the house is "trashed" and needs too much work to be restored, requiring a major remodel and not just the roof and some structural improvements or normal maintenance anticipated by ZDO 1206.03 for maintenance. Ms. Ryland reports that she made an offer to buy the property with the intention of having the house demolished. She points to the size of the lot and contends that the house is too big for the location and is a hazardous structure. Ms. Ryland points to ZDO Section 1006

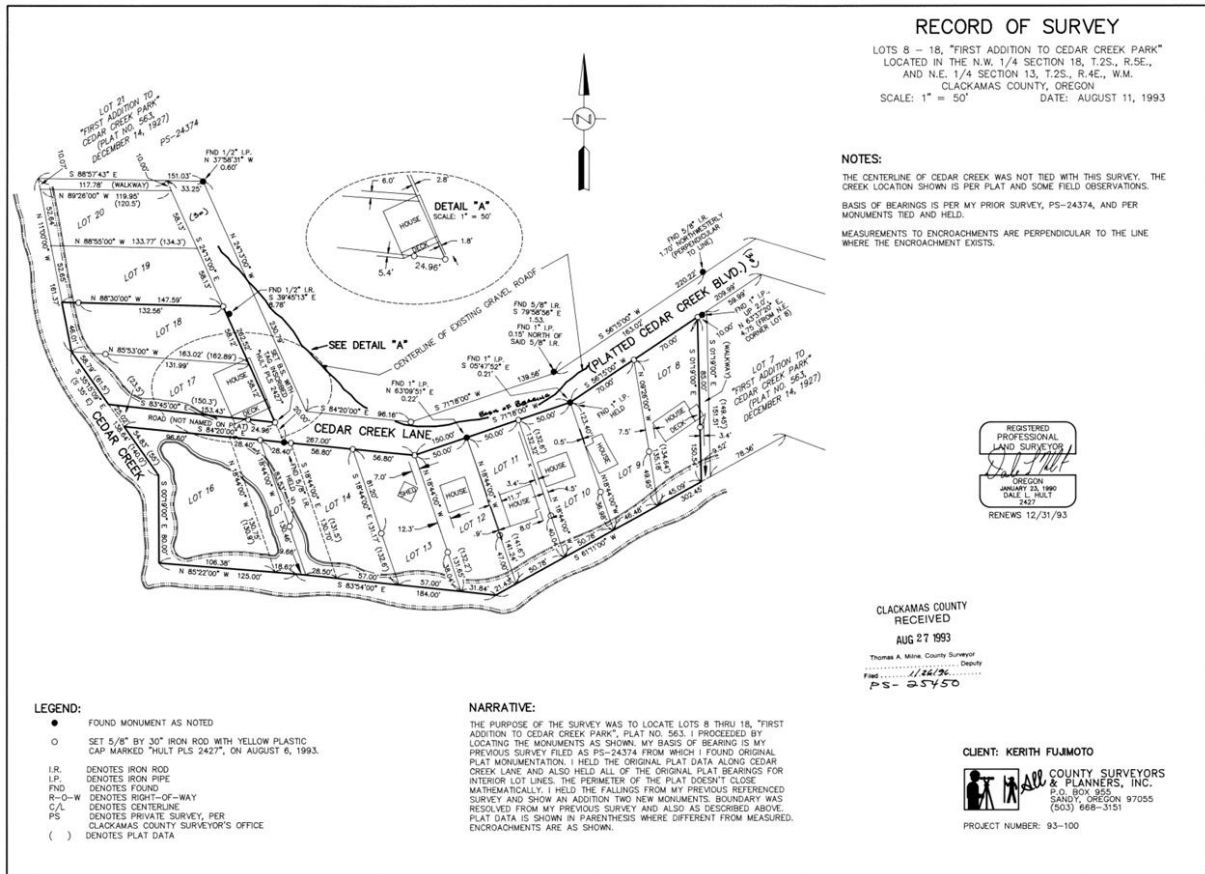
and asserts that the application should not be approved because the property lacks access to water rights. Ms. Ryland asserts that no home could have been built on the subject property before 1937, pointing to a deed she submitted of a 1937 transfer of the subject property that has no reference to any structure, dwelling, or improvements on the land. (See Exhibit 57)

19. Lisa Schollmeyer is an interested citizen who resides on SE Cedar Creek Lane next door to the subject property and near Ms. Ryland's property. Ms. Schollmeyer reports that the applicant Jennifer Kapnek and Terry Eidsmoe work every weekend at the property and have cleared everything out. Ms. Schollmeyer stated that she was inside the house on the subject property the week before the hearing and sees the improvement in its condition. Ms. Schollmeyer supports the application for improvements to the structure, including the proposed new roof. She asserts that restoring this "beautiful property" will improve the values of the properties in the neighborhood. Ms. Schollmeyer also reported a fire truck and an ambulance came down the road twice in the past month before the hearing.
20. Mr. Martin provided rebuttal to some of the statements made at the hearing, asserting that the proposed alterations are within the scope of ZDO 1206.07. He points out that the house was not destroyed by fire and does not require replacement. Mr. Martin asserts that the evidence shows that the setback encroachment was not discontinued and that the issues raised by the appellant are outside the scope of this matter. Terry Eidsmoe, one of the owners of the subject property, asserts that the property has water rights and an easement to a shared well located on the appellant Lori Ryland's property, but Ms. Ryland has turned it off.

Pre-Hearing Submissions and Comments

21. The applicant submitted several exhibits related to the application in advance of the hearing that were incorporated into the staff report discussed at the hearing. Among these exhibits are several supporting documents, including County Appraisal Data and County Improvement Data dated November 1996 describing the physical characteristics of the subject property, noting the style of the house as "21" corresponding to "Houses built 1920 to 1949" and describing the house as a three bedroom house with forced air heating, one story with a finished area of 1551 square feet, and an 820 square foot ½ basement lower area, with a total square footage size of 2371 square feet, with a notation indicating the dwelling was constructed in 1930. These notes also include the notation "Est remodel 1965." The applicant also submitted exhibits related to their proposed renovation of the house on the subject property, including renovation and deck orientation drawings, and their architect's response to questions about the home's orientation referenced at the hearing. (Exhibits 2a, 2c, 2d, 2e, 2f, 2g, 5)
 22. The applicant submitted a Flood Elevation Certificate for the subject property dated May 7, 2025 stamped by registered Professional Land Surveyor Daniel T. Burton with associated photographs and data, certifying the elevation of the house. County Senior Planner Ben Blessing responded to the Flood Elevation Certificate by email noting that he was able to confirm that the home site is above BFE (Base Flood Elevation) based on the Elevation Certificate Mr. Burton provided, also confirming that no floodplain permits were required. (Exhibits 2b, 6, 7)
 23. Ms. Ganzer submitted Property Tax Statements for the subject property from November 2024 dating back to November 1993. Ms. Ganzer submitted a copy of an 10/5/79 building permit
- Hearings Officer Final Order*
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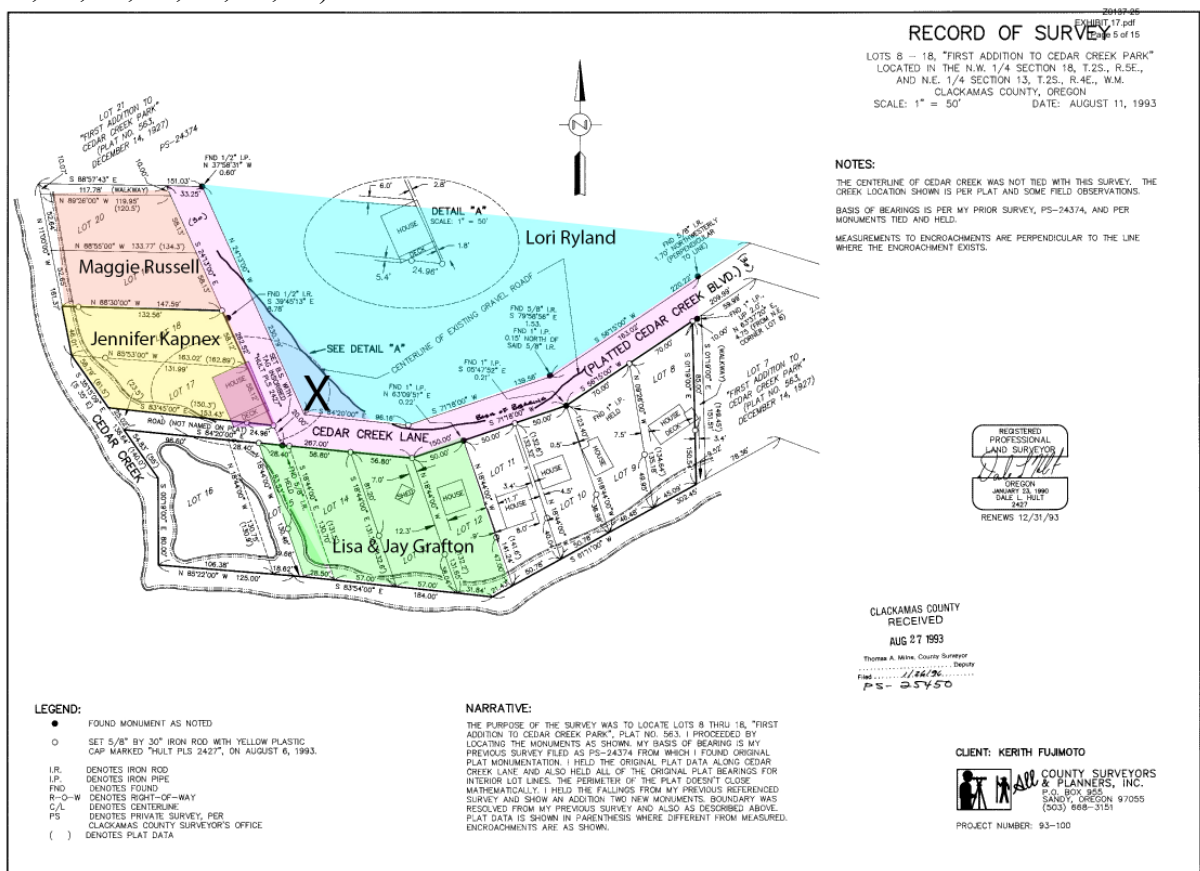
application for “Repairs to house cause by storm damage and tree falling on roof” that was issued 10/12/79. Ms. Ganzer submitted a South Encroachment Survey showing the platted lots for the subject property (Lot 17 and Lot 18), showing the location of the house and its encroachments, and showing the Cedar Creek Lane platted public roadway (Exhibit 15, reproduced below). Ms. Ganzer also submitted a South Encroachment illustration showing the house encroachment into the set-back area, with a portion extending into the ROW. She also provided photos of the house on the property, and a Tax Map of the Subject Parcel. (Exhibits 3, 4, 8, 15, 26, 36)



24. Ms. Ryland submitted several written comments to the County in response to the initial notice of this application, in opposition to its approval. Ms. Ryland asserts that the dwelling on the subject property was a “small shack” in the 1940s that increased to its current 2,371 square foot size through unpermitted additions with no available proof showing when this occurred. Ms. Ryland expresses several concerns with respect to the safety of the house, access to the property, and environmental issues. She asserts the house lacks a proper foundation and sits on a sloped grade which is partially in a flood plain. Ms. Ryland asserts there are large trees that are dying and hazardous and a rotting retaining wall that supports the roadway above. She also describes the house as having a roof that is sagging and caving in and other signs of long-term disrepair, providing photos illustrating these things. Ms. Ryland asserts that there is no access to a buried oil tank on the property and the original 80-year-old septic tank is next to the creek raising both safety and environmental concerns. In her comments Ms. Ryland contends that the structure is unsafe and uninhabitable, asserting that inspections should occur before any permits are issued. Ms. Ryland further asserts that the County should determine the structure unsafe and order its demolition, pointing to County authority to do so. Ms. Ryland also submitted comments

describing a CPO meeting that discussed the application, with the CPO opposing it due to many of these same safety concerns. (Exhibits 11, 12, 13, 14, 17, 18, 22, 41, 49, 53, 54, 60, 76, 78, 80)

25. Ms. Ryland describes Cedar Creek Lane as a narrow privately maintained public road with limited space, making it difficult for garbage trucks and emergency vehicles to turn around at the end of the road which is in front of the subject property. She describes this location as the only spot on the road large enough for service utility and emergency vehicles to turn around. Ms. Ryland also describes this spot as having multiple dying cedar trees that sit above the property and on the platted legal ROW for Cedar Creek Lane, asserting these trees need removal to widen the road. Ms. Ryland explains that the road as it is “now as driven” is not as “it was platted” and crosses a portion of property that she describes as an area that is considered part of the public road but not included in any deeds. She submitted a 1993 Record of Survey (reproduced below, Exhibit 17) showing the house on the applicant’s property and its encroachments, the platted public road Cedar Creek Lane, the centerline of the existing gravel road as it is driven, and marking a roughly triangular area with an X that is adjacent to the platted public roadway as the area she is concerned with, also asserting the road as driven crosses a portion of her property. Ms. Ryland expresses her concern with construction activity blocking the road access and using this triangular area. She also describes a past pattern of use of this area by the previous owners of the subject property, reporting that past owners of the subject property not only used this area as an access road but also used a portion of this area for parking and storage, providing photos of the area showing parking and storage use. Ms. Ryland asserts that improvements to the public road should be required. (Exhibits 11, 12, 13, 14, 17, 22, 23, 24, 54, 60, 76, 79)



26. Ms. Ryland asserts that the property no longer qualifies as a non-conforming use because the house was vacant for approximately 1.5 years, followed by illegal occupancy by individuals who were evicted for non-payment of rent. In response to Ms. Ganzer's reply to this comment that the period for a finding of discontinuance is 24 consecutive months, Ms. Ryland also submitted comments asserting that the house was unoccupied or illegally occupied "far beyond the 24-month threshold...". She contends that the nonconforming use was "automatically forfeited" as the use was discontinued and the structure became uninhabitable. Ms. Ryland also submitted additional comments referencing the same CPO meeting asserting that the application should require a public hearing, also stating if the application were approved without a public hearing then she would appeal the decision, and requesting information related to filing the appeal. (Exhibits 20, 21, 22, 24, 27, 29, 30, 46, 49, 51, 54, 66, 69, 70, 71, 72, 76, 78, 80)
27. Ms. Ryland submitted additional written comments in response to the County's approval of the application requesting reversal of the decision, contending the approval was based on misleading or incomplete information and the structure does not meet standards for approval. She expresses floodplain compliance concerns and implies that the elevation certificate is false and the structure unsafe. She points to the property's location adjacent to Cedar Creek, noting it is a protected fish-bearing stream near a fish hatchery and sensitive wetlands, suggesting the house's septic system may be compromised and also asserting the presence of a degraded/failing oil tank under the house, stating the County declining to investigate these complaints is unacceptable. She further asserts that the structure fails to maintain a minimum required 100-foot setback from Cedar Creek. Ms. Ryland contends that there is no permit or record of any building or remodeling activity before the 1979 roof repair application, asserting no evidence exists showing a structure prior to the adoption of zoning regulations in 1967. She asserts that the applicant should be required to submit, at a minimum, verified construction history for the structure, and contends the applicant failed to carry her burden of proof. Ms. Ryland further asserts that the County's procedure in reviewing and approval the application was inadequate, failed to include a site visit, and ignored the votes of the 25 people at the CPO meeting opposing the application, resulting in arbitrary and capricious findings. She also questions whether the existing structure qualifies as a legal dwelling, pointing to the deficiencies she has asserted. (Exhibit 30, 42, 45, 48, 49, 50, 51, 54, 67, 68, 71, 73, 74, 76, 80)
28. Ms. Ryland submitted materials related to Quiet Title Complaint Case No. 25V43349, an action she has filed asserting that the subject property has no legal access use established to the "road as driven" that has been used to provide access to the subject property. Ms. Ryland contends the outcome of her quiet title action will directly impact this matter, with references to exhibits submitted in that matter and copies of several historical deeds. Ms. Ryland points to a 1937 deed for the transfer of Lots 17 and 18 (the subject property), pointing out the deed does not reference any structure or dwelling, contending that 1937 is the earliest possible date for residential development of the property. She also submitted several surveys, some showing the "road as traveled" indicating it varies from a 30-foot-wide paved road to a road that is 12-15 feet wide, with a paved portion ending just past the subject property, portions of the road appearing to cross Ms. Ryland's property, and portions of the remaining road gravel. Some of these surveys omit the "road as travelled," and other surveys indicate that the large triangle area adjacent to the platted ROW where the "road as travelled" is located is separate from Ms. Ryland's property. Further, Ms. Ryland asserts violations of ZDO provisions 1005.01(A), 1005.02(A-C), 1005.07(B), 706.03(A-C), 1006, 707, 1010, and 1006.05, asserting that: "Use does not meet criteria for lawful nonconforming use"; "No evidence of lawful establishment or

continuous use”; “Structure exceeds permitted alteration scope”; “Site does not meet standards for Alteration approval (creek setback, slope hazards)”; “Major development permit may be required due to structural slope”; “Inadequate site plan and lack of public notice”; “No legal access established across road as driven”; “Slope exceeds 20% in many areas, triggering special criteria.” Ms. Ryland also cites ORS 92.014, asserting that development of the property potentially violates this statute’s access requirements, pointing to her quiet title action. Ms. Ryland asserts that she owns the “triangle shaped” portion of property that the access road to the subject property crosses, contending there is no existing legal deeded access to the property and the County’s permit is therefore invalid. Ms. Ryland contends that the application misrepresents when the structure was built, the extent of required structural changes, the property’s access rights, available water and sewer, and location with respect to the floodplain, ignores the instability of the slope and existing hazards, and asserts related staff findings are incorrect. (Exhibits 38, 39, 43, 44, 45, 46, 49, 51, 54, 55, 56, 57, 58, 75, 76, 79)

29. Ms. Ryland submitted a written rebuttal of staff findings, asserting that: no evidence was submitted to support the staff finding that the structure was legally established before 1967 ; the use was discontinued for more than 12 months as the house was uninhabitable and had no legal water supply from 2021 to the present, reporting that the former estate representative for the property was removed by court order for abandonment and mismanagement, providing documents related to the sale of the property, unpaid liens, and taxes. She contends that the property has no legal access or formal right-of-way, depending entirely on a revocable encroachment permit; the elevation certificate incorrectly identifies the structure as outside the floodplain; the existing septic and water are not adequate or not legally restored, and; the application does not qualify as an alteration because the major work proposed exceeds simple alteration of the structure, pointing to proposed new piers, slope work, and structural change. Further, Ms. Ryland points to the site plan submitted by the applicant and contends it is deficient, asserting it does not comply with minimum standards for review as it does not show: the septic system; the oil tank or heating source; Cedar Creek and related setback; contours or slope analysis; utilities or easements; use of surrounding areas for stairs or parking; access for emergency vehicles; landscaping, stormwater, or drainage plan; and legal setbacks. Ms. Ryland points to challenges related to the existing slope, contending issues with addressing the trees, slope, and risks with the retaining wall are not addressed. She contends the applicant should be required to submit additional evaluations of the elevation of the structure, riparian and habitat evaluations identifying related setbacks, independent structural, geotechnical, septic reports, a detailed site plan identifying various additional items, and proof of lawful vehicular access, a plan to “remedy encroachments” and to confirm emergency access. (Exhibits 40, 41, 42, 43, 45, 46, 47, 48, 49, 51, 52, 54, 61, 62, 63, 64, 76)
30. Carol Hager, Clackamas County Survey and Right-of-Way Supervisor, responded to communication from the appellant, Lori Ryland, clarifying that an encroachment permit was issued to the property owner (the applicant Jennifer Kapnek). Ms. Hager notes that the permit is non-transferable and states: “Per the terms of the Permit the Property Owner will work with County departments on necessary permitting with the goal of rehabilitating the structure and retaining walls and where possible remove Encroachments from the right of way.” (Exhibit 32)

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Post-Hearing Submissions and Comments

31. The Appellant, Lori Ryland, submitted several post-hearing statements and comments during the open-record period following the hearing. On August 14, 2025, Ms. Ryland submitted a written statement summarizing her arguments regarding discontinuance of nonconforming use, asserting the proposed alterations will intensify the degree of nonconformity, contending no proof exists establishing the structure existed pre-1967, asserting lack of required legal access, asserting noncompliance with FEMA and County flood hazard standards, contending the structure is a dangerous building, and that the dead-end lane fails to meet road and fire safety standards. (Exhibit 82)
32. In her August 14, 2025 statement, Ms. Ryland also submitted rebuttal to statements made by Ms. Ganzer at the hearing, contending that Ms. Ganzer misinterprets applicable law by limiting ZDO §1206 to the physical presence and size alone, contending this interpretation ignores statutory requirements for lawful establishment, lawful use, limits on intensification, access, and safety under Oregon Law. She further contends that the County has misclassified the application, and the structure is an abandoned “tear down” requiring new development. Ms. Ryland contends that her arguments asserting 24-month discontinuance applies to lawful use, asserting the nonconforming use of the property was discontinued. She points to the proposed alteration raising the roof of the structure by approximately 5 feet and other proposed structural work, and the addition of bathrooms, contending these changes would intensify the nonconformity. Ms. Ryland rebuts Ms. Ganzer’s statements regarding the establishment of the structure as nonconforming, contending no permit or record shows lawful establishment of the structure prior to 1967. She also contends access and safety requirements cannot be deferred to later permit stages, asserts floodplain and environmental risks are not complied with and the applicant’s elevation certificate is defective, pointing to records of flooding and fire hazards. Ms. Ryland asserts that approval of the application is improper, and points to several previously submitted records, (Exhibit 82)
33. On August 19, 2025, Luann (Maggie) Russell submitted a written statement in support of the applicant and the staff decision approving it. Ms. Russell is an interested citizen who owns property at 40200 SE Cedar Creek Rd. and 40360 SE Cedar Creek Rd. Ms. Russell states she has been a resident for 40 years at the 40200 property which shares a property line with 40220 SE Cedar Creek Rd. (the subject property). Ms. Russell reports that she has known four families of the subject property and her children attended school and local 4H clubs with those children. Ms. Russell asserts that Ms. Ganzer’s research of the home on the subject property is accurate and the footprint of that home did not change in those 40 years. Ms. Russell reports that a few modest changes were made to the house such as sheetrock in the dining room and kitchen, terracotta tile installed in the dining room, and a few deck boards and railings were replaced due to age, but “nothing that changes the actual footprint.” Ms. Russell describes the home as historic to Cedar Creek Lane but agrees there was a lack of care of the house during the previous ownership of the Property. (Exhibit 83)
34. On August 20, 2025, Ms. Ryland submitted a written statement titled “Z0137-25 Core Argument” with Exhibits & Checklists” reiterating and expanding her arguments in opposition to the application and providing additional rebuttal of staff findings and discussion of the application. Ms. Ryland reiterates her arguments concerning discontinuance of lawful use, lack of evidence establishing the structure existed prior to 1967, access issues (asserting that the

revocable encroachment permit approved by the County fails to cure the issues), intensification of use, misclassification of the proposal as an “alteration,” septic and environmental concerns, the need for evaluations such as geotechnical reports on slope and foundation, arborist report on trees, asbestos and hazardous materials, DEQ review of the oil tank, septic feasibility study, FEMA floodplain analysis with updated elevation certificate, and verification of legal driveway access. Ms. Ryland contends the application should be denied, and a building permit required to remove the encroachments into the setback requirements and the ROW. Ms. Ryland also points to records from a 2008 County Dispute Resolution mediation concerning the need to re-align Cedar Creek Lane with the platted ROW. She argues that approval fails to protect the public and surrounding community. Ms. Ryland asserts the testimony of the next-door-neighbor in support of the application is not credible and not relevant, reporting the neighbor sold her home and is moving. Ms. Ryland suggests it would be inappropriate to approve the application due to the risks she has identified, and not in the best interests of the community or the applicant. On August 20, 2025, Ms. Ryland also submitted a video of a waste management truck turning around in the area in front of the property. (Exhibits 84, 85)

35. On August 26, 2025, Ms. Ryland submitted a written statement rebutting Mr. Eidsmoe’s testimony at the hearing that the property has water rights, but that she turned the water off. Ms. Ryland reiterates her argument that a dwelling without a lawful water supply cannot lawfully function as a residence. On August 27, 2025, Ms. Ryland submitted “Appellant’s Final Rebuttal” in opposition to this application. Ms. Ryland reiterates her arguments that the applicant failed to submit sufficient evidence that the structure is lawfully nonconforming, and the County improperly narrowed the scope of the inquiry, ignored discontinuance of residential use of the property and failed to make an advance determination concerning whether the structure is capable of lawful and safe residential use. Ms. Ryland points to a lack of inspection of the property by County staff and asserts staff ignored or failed to meaningfully address the recommendation of the CPO. She points to the encroachments and access issues and contends the County has a “backwards process” and ignores safety and liability issues. Ms. Ryland asserts that approval is inappropriate, reiterating the reasons she previously provided, reporting the house “is approximately 1,000 square feet larger than any other home in the First Addition to Cedar Creek Park (platted 1928)” and expressing her concerns over congestion on the single-lane dead-end road. In each of these submissions, Ms. Ryland includes evidentiary assertions and arguments that are outside the scope of rebutting evidence or argument submitted during the first open-record period. (Exhibits 86, 87)
36. Andrew Stamp is an attorney representing the applicant and owners of the property. Mr. Stamp submitted a copy of the appellant Lori Ryland’s rebuttal submittal to the Clackamas County Circuit Court in a quiet title action she initiated concerning a triangular parcel of land adjacent to 40220 SE Cedar Creek Lane. Mr. Stamp also submitted photos of the subject property and the adjacent ROW. Mr. Stamp submitted a copy of the First Addition to Cedar Creek Park, and copies of communications between himself and Ms. Ryland. (Exhibits 88, 89, 90, 91, 92)
37. On August 28, 2025 at 4:00 pm (at the close of the second open-record period) the applicant Jennifer Kapnek submitted a written statement rebutting assertions by the appellant Ms. Ryland that the house on the subject property has no potable water, asserting that her property has legal water rights to a well on Ms. Ryland’s property that has been shut off. On September 4, 2025, the day the record closed, Mr. Stamp submitted objections to Exhibit 86 submitted by the appellant Ms. Ryland on 8/26/25 and to Exhibit 87 submitted by the appellant Ms. Ryland on

8/27/25. In his objection, Mr. Stamp asserts that these two sets of materials go beyond the scope of what is allowed. Specifically, Mr. Stamp points out that these two sets of materials were submitted during the second week of the open record period and are not responsive to evidence or arguments submitted during the first open record period. On September 4, 2025, the day the record closed, Mr. Stamp also submitted applicant's final written argument. In this statement, Mr. Stamp contends that the appellant's concerns are unsubstantiated and not supported by the relevant legal standards, citing the Oregon State statutes concerning nonconforming uses the County's ordinances implement. (Exhibits 93, 94, 95)

C. FACTS AND DISCUSSION

The evidence presented is reliable, probative and substantial evidence upon which to base a determination in these matters. This application was originally processed as a Type II Permit, pursuant to Clackamas County Zoning and Development Ordinance (ZDO) Section 1307, approved by the Planning Director's designee, County Planner 1 Mya Ganzer¹, and this appeal followed. Table 1307-01 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), an appeal of an administrative decision is reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record, is not bound by the prior decision of the planning director and does not defer to that decision in any way. The record of the initial proceedings shall, however, be made a part of the record of the appeal. New evidence may be introduced in an appeal, and new issues may be raised. The applicant/appellant must carry 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. This application is subject to Clackamas County Zoning and Development Ordinance (ZDO) Sections 202, 316², 1206, 705, and 1307, and the County's Comprehensive Plan. The findings below identify the standards and criteria that are relevant to this decision, state the facts relied upon in rendering the decision, and explain the justification for the decision. This appeal concerns a Planning Director decision approving application File No. Z0137-25 seeking a Non-Conforming Use (NCU) Verification and Alteration of a 1930 dwelling that does not conform with the front setback standards for the RRFF-5 Zoning District, as stated in ZDO Table 316-2. Additionally, the applicant is seeking an alteration of an NCU for a roof replacement and structural upgrades and improvements to the existing dwelling. The findings below identify the standards and criteria that are relevant to this decision, state the facts relied upon in rendering the decision, and explain the justification for the decision.

Property History and Proposal: *[Hearings Officer]:* The applicant is proposing roof replacement and structural upgrades to an existing home built in the Rural Residential Farm Forest 5-Acre (RRFF-5) zoning district that the applicant states was built in 1930. The structure does not comply with the required 30 foot front setback of the RRFF-5 zone established in Table 316-2. The applicant has applied for a Nonconforming Use (NCU) verification of lawful establishment of the dwelling to allow the dwelling to continue to encroach into the front setbacks. The applicant has also requested an NCU alteration to replace the roof and provide structural upgrades to the dwelling. Section 202 of the ZDO defines an NCU as: "A use of any building, structure or land allowed by right when established or that

¹ See ZDO Table 1307-1. Also See ZDO 1307.03(B), stating that 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]." County Planner 1 Mya Ganzer acted in this capacity.

² A portion of the subject property is zoned RRFF-5 (subject to ZDO 316) and contains the dwelling that is the subject of this application. Another portion of the subject property is zoned TBR; however, no part of the dwelling is within the TBR zone and is not subject to TBR standards.

obtained a required land use approval when established but, due to a change in the zone or zoning regulations, is now prohibited in the zone.” The property became subject to restrictive zoning on December 14, 1967 when it was zoned RA-1 and became subject to the 30 foot minimum front setback standard. The property has two front setbacks as defined by Section 202 of the Zoning and Development Ordinance (ZDO). The structure extends past the property lines into the adjacent Right-of-Way (ROW) by approximately 5 feet to the south, and 2 to 3 feet to the east, with no setback to either of these two front property lines. This decision addresses verification of the structure’s non-compliance with the setback standards stated in Table 316-2 of the ZDO and addresses whether the structure meets the alteration standards of Section 1206.07. The property contains floodplain and is within the mapped River and Stream Corridor Area (RSCA) for Cedar Creek. Cedar Creek is classified as a Large stream and requires a 100-foot setback from the mean highwater line. Staff report the dwelling meets the 100-foot setback requirement. Regardless, if the dwelling is verified as an NCU, then the setback exceptions stated in ZDO 704.05(A)(2) apply. The applicant provided an Elevation Certificate showing the subject dwelling is above the Base Flood Elevation and therefore is not subject to the Floodplain Development Standards in Section 703 of the ZDO. The Department of State Lands also provided comments in response to this application stating the proposed development “appears[s] to avoid impacts to Cedar Creek and associated wetlands.”

The original plat for the First Addition of Cedar Creek Park shows Cedar Creek Lane as a named and platted road immediately east of the subject property, and an unnamed platted road immediately south of the subject property. Neither of these platted roads was ever developed as shown on the plat. No access was ever developed for the unnamed road to the south. A narrow partially paved and partially graveled road provides access to the subject property and lots further north and east, with its centerline indicated on the survey PS25450 (1993) in an “as-driven” location. The as-driven location is shown on this survey to encroach on the property to the east, 25E18BB00800, which is owned by the appellant Lori Ryland. As shown in the survey below (Figure 1) the actual “as-driven” location of Cedar Creek Lane is not aligned with the mapped (platted) portion of the ROW shown on the tax map, also included below. There are slopes on the platted area of the road which staff point to as the likely reason for the location of the “as driven” portion of the road (also shown below in Figure 1). Any encroachment of the “as-driven” access road is not the subject of this Land Use application. The determination concerning the NCU application will not address Ms. Ryland’s issue with the platted ROW vs. the as-driven location as it is outside the scope of the NCU.

The portion of the subject structure that encroaches into the platted ROW is along the eastern front lot line, not the “as-driven” ROW. The southern front lot line remains an undeveloped ROW. The portion of the property with the dwelling is zoned RRFF-5 and detached single-family dwellings are identified as a primary allowed use in this zone. See Table 316-1. In other words, residential use of the property is a *conforming* use allowed outright in the RRFF-5 zone and is not a *nonconforming* use subject to verification or the principles of *abandonment* or *discontinuation*. Therefore, no application is required of the owners of this property for the residential use of the existing dwelling on their property. Thus, the appellant’s arguments asserting that residential use of the dwelling on the property was discontinued *are not relevant* to this application. The NCU verification is only needed to determine whether the nonconforming front setbacks of this existing structure meet the standards in ZDO Section 1206. The alteration approval is required for the roof replacement and structural improvements as these proposed alterations are outside the scope of the normal maintenance allowed by Subsection 1206.03. Further, the proposed alterations must meet the standards of Subsection 1206.07, meaning, in this case, that the proposed alteration will, after imposition of conditions of approval, have no greater impact to the neighborhood than the existing structure.

The appellant Ms. Ryland has submitted numerous public comments related to this application and the ROW and appealed the County's approval of this application. This application relates to the subject property's front setbacks and whether the applicant has established the structure's encroachments meet the criteria for an NCU. I carefully considered the appellant's varied arguments and assertions with respect to access and transportation issues (including contentions there is no legal access to the property), congestion, parking, narrowness of the access road, need to keep the roughly triangular area clear as a turn-around area (particularly for emergency vehicles), potential septic system issues, potable water and water access issues, potential violations of FEMA and RSCA regulations, discontinuation of occupancy or residential use of the dwelling, vacancy or periods of disuse of the dwelling, payment issues with the former owner and/or past occupants not paying rent or evicted, residents that were squatters, occupancy of the dwelling being illegal, illegal activity on the property, dwelling being uninhabitable, the dwelling having a sagging roof and structural integrity issues, past owners failing to maintain the dwelling, and that approval of the application will result in an "intensification" of use, increased fire risk, and safety issues to the community. In addition to the comments submitted by Ms. Ryland, the Firwood CPO submitted written comment opposing the application and expressing a number of similar concerns, particularly with respect to potential fire danger. I find no relevance, or a lack of supporting evidence to support these arguments or assertions with respect to this application, as discussed in the relevant sections below.

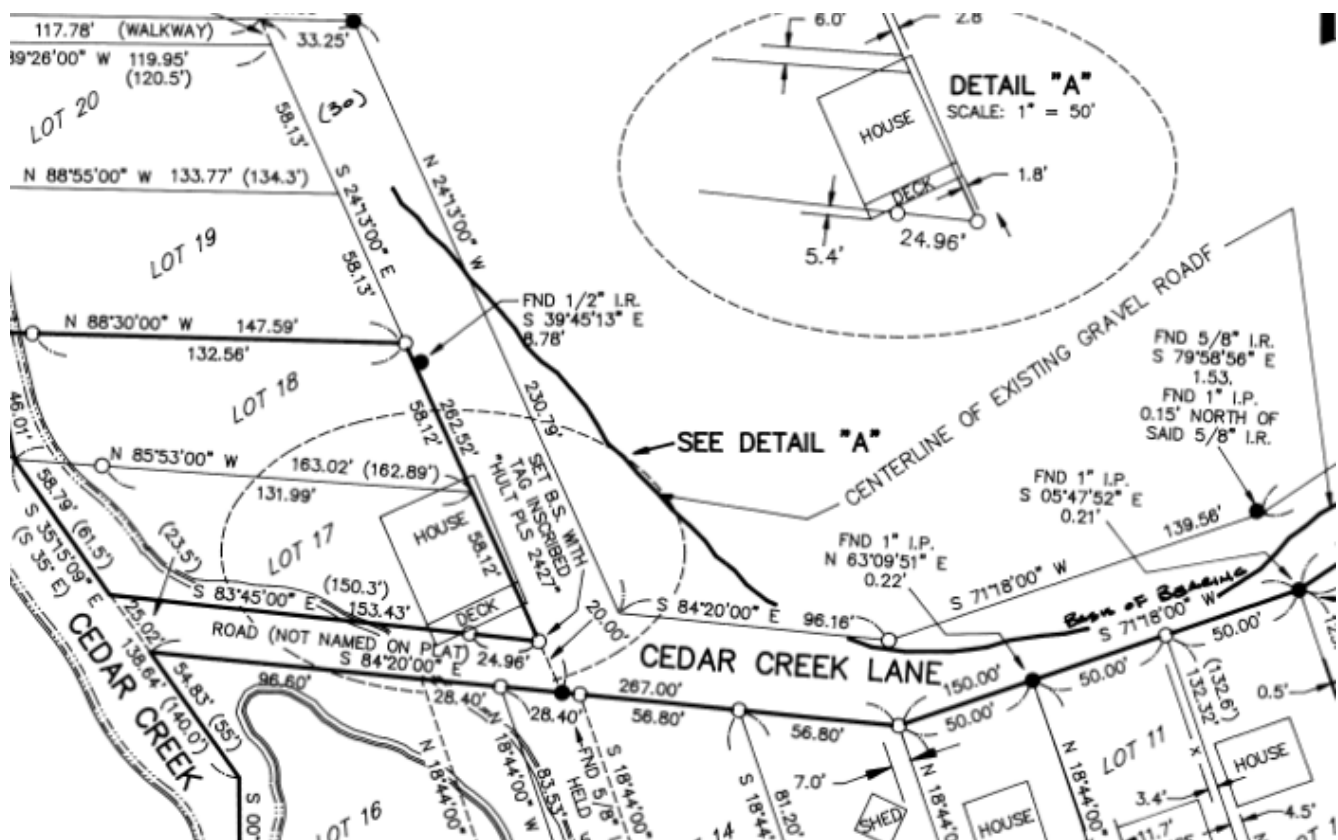


Figure 1 - PS25450, 1993

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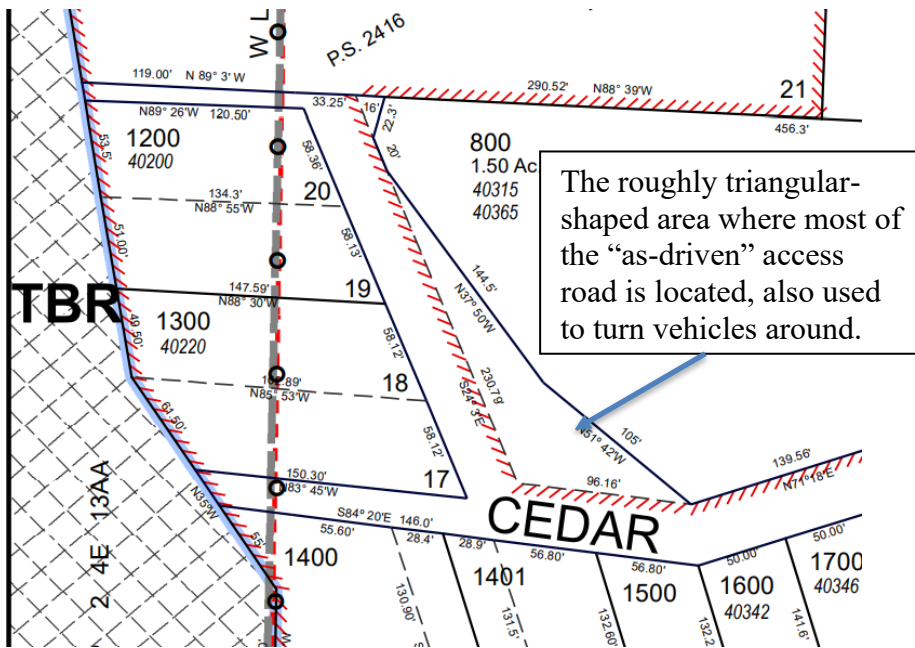


Figure 2 - Assessors Map showing current ROW

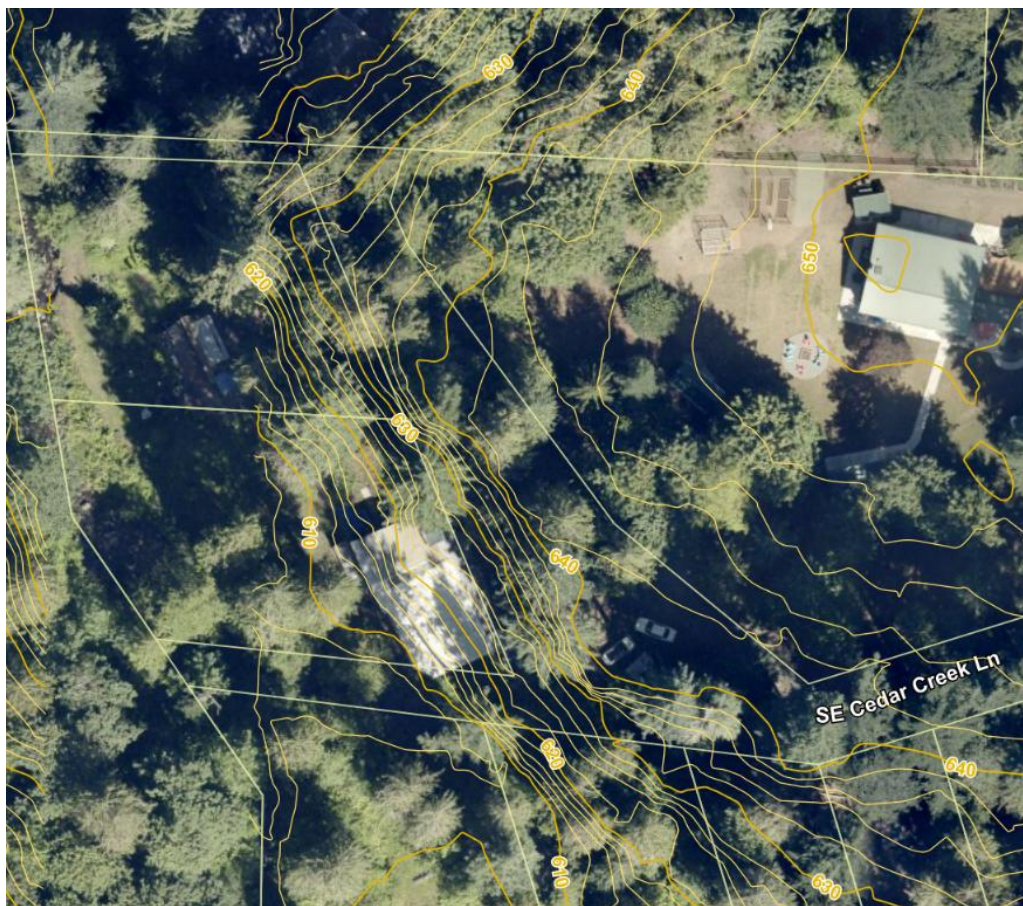


Figure 33 – Contours of SE Cedar Creek Ln (PlanMap)

the minimum front setback in the RRFF-5 zone is 30 feet. The existing dwelling does not conform to this dimensional standard for either of the two front property lines. This nonconformance is the subject of this NCU Verification and Alteration.

2. ZDO SECTION 1206, NONCONFORMING USES AND VESTED RIGHTS

Section 1206 is adopted to provide standards, criteria, and procedures under which a nonconforming use may be continued, maintained, verified, restored, replaced, and altered and under which a vested right may be determined.

1206.02 - STATUS

A nonconforming use may be continued although not in conformity with the regulations for the zoning district in which the use is located. Nonconforming use status applies to the lot(s) of record on which the nonconforming use is located and may not be expanded onto another lot of record, except as provided under Subsection 1206.07(B)(3)(a) and (b) or, in the case of nonconforming premises for marijuana production, with an alteration approved pursuant to Subsection 1206.07(C). A change in ownership or operator of a nonconforming use is permitted

Finding: [Hearings Officer]: The applicant does not propose to expand a nonconforming use onto another lot of record. As discussed, portions of the existing dwelling extend into the required 30 foot setback area and partly into the ROW, requiring verification of a nonconforming use. **This criterion is met.**

1206.04 - DISCONTINUATION OF USE

A. If a nonconforming use is discontinued for a period of more than 24 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.

Finding: [Hearings Officer]: The non-conforming use is the encroachment of portions of an existing structure into the 30 foot front setback area required in the RRFF-5 zone, and into the ROW. Staff provided aerial photographs showing that the structure with its encroachments into the front setback area was on the property in 2004, still remained on the property in 2023, and still exists today. Therefore, the applicant and staff assert that the dwelling's encroachments into the front setback areas have not been discontinued for a period exceeding 24 consecutive months. The subject property consists of Lots 17 and 18 of the First Addition to Cedar Creek Park, a platted subdivision recorded in 1927. The property became subject to zoning regulations on December 14, 1967, when it was first zoned RA-1. At the time, the RA-1 zoning district had the same 30 foot front setback as the dimensional standard for the current RRFF-5 zone for the property.

The applicant provided assessment data that includes County Appraisal Data and County Improvement Data dated November 1996 describing the physical characteristics of the subject property and assessing the dwelling as a 2371 square foot dwelling at that time, the same size it remains. The County appraiser who completed the report completed sketches of the dimensions of the dwelling and took a photo of the property showing the dwelling appearing as it currently appears. The County appraiser noted the style of the house as "21" and indicated it was a style of house built between 1920 and 1949. The County appraiser described the structure as a three-bedroom house with forced air heating, one story with a finished area of 1551 square feet, and an

820 square foot ½ basement lower area, with a total square footage size of 2371 square feet, with a notation indicating the dwelling was constructed in 1930. These notes include the notation “Est remodel 1965.” Staff also submitted a copy of an October 1979 building permit application for repairs to the house on the property from storm damage and a tree falling. Staff submitted property tax information showing that between 1993 and 2024 property taxes regularly increased, supporting their finding that the structure was not somehow “discontinued.”

The appellant, Ms. Ryland, contends that the structure was originally a small shack that was remodeled without permits. However, she provided no evidence to support this assertion. She also points to a 1937 deed that does not mention the dwelling and contends that, therefore, 1937 is the earliest date a structure could have been built. Staff disagree, stating that deeds of this nature do not typically mention the dwelling. Ms. Ryland points out that the applicant did not submit any building permits or records of the construction of the dwelling, contending that the applicant failed to meet her burden of proof.

I am persuaded that the County appraiser conducting the November 1996 appraisal accurately described the style of the dwelling as the type built between 1920 and 1949, and either verified that the house was built in 1930 or provided an informed estimate that the house was built in 1930, squarely within the description of the type of dwelling. In making this finding, I note the significant detail the County’s appraiser provided, including sketches, a photo, calculations of the size of the dwelling (2,371 square feet, the same size the dwelling remains), descriptions of the roofing, flooring, interior finish, accommodations, heating system, and plumbing. I also note that the County appraiser provided the note “Est remodel 1965” indicating that the County appraiser observed that the home was older and had been remodeled, providing estimates of the original build date of 1930 and the remodel date of 1965 based on an on-site appraisal inspection. The applicant has provided substantial evidence of the existence of the nonconforming dwelling prior to the adoption of zoning regulations requiring a 30 foot front setback. I also note here the corroborating written statement in support of this application submitted by Ms. Maggie Russell, a resident of the neighboring parcel located at 40200 SE Cedar Creek Rd. for 40 years, reporting there has been no change made to the footprint of the dwelling, with only modest interior changes and maintenance taking place. Based on the evidence discussed above, I find that the applicant has met her burden of proving that the dwelling on the subject property was built within the required front yard setbacks prior to the adoption of these front yard setback requirements, and the encroachment was not discontinued for a period exceeding 24 consecutive months. **This criterion is met.**

B. Notwithstanding Subsection 1206.04(A) and pursuant to Oregon Revised Statutes (ORS) 215.130(7)(b), a nonconforming surface mining use shall not be deemed to be discontinued for any period after July 1, 1972, provided:

- 1. The owner or operator was issued and continuously renewed a state or local surface mining operating permit, or received and maintained a state or local exemption from surface mining regulation; and*
- 2. The surface mining use was not inactive for a period of 12 consecutive years or more. Inactive means no aggregate materials were excavated, crushed, removed, stockpiled, or sold by the owner or operator of the surface mine.*

Finding: [Hearings Officer]: This proposal does not involve surface mining. **This criterion is not applicable.**

1206.05 VERIFICATION

Verification of nonconforming use status requires review as a Type II application pursuant to Section 1307, Procedures, and shall be subject to the following standards and criteria:

A. The nonconforming use lawfully existed at the time of the adoption of zoning regulations, or a change in zoning regulations, which prohibited or restricted the use, and the nonconforming use has not been subsequently abandoned or discontinued. Once an applicant has verified that a nonconforming use was lawfully established, an applicant need not prove the existence, continuity, nature, and extent of the nonconforming use for a period exceeding 20 years immediately preceding the date of application for verification; or

B. The existence, continuity, nature, and extent of the nonconforming use for the 10- year period immediately preceding the date of the application is proven. Such evidence shall create a rebuttable presumption that the nonconforming use, as proven, lawfully existed at the time of, and has continued uninterrupted since, the adoption of restrictive zoning regulations, or a change in the zoning or zoning regulations, that have the effect of prohibiting the nonconforming use under the current provisions of this Ordinance.

Finding: [Hearings Officer]: In this matter, verification of nonconforming use status is largely dependent on the same evidentiary findings discussed above that support the discussion concerning whether the nonconforming use was discontinued. Again, I note that the subject property consists of Lots 17 and 18 of the First Addition to Cedar Creek Park, a platted subdivision recorded in 1927. The applicant provided assessment data that includes County Appraisal Data and County Improvement Data dated November 1996 describing the physical characteristics of the subject property and assessing the dwelling as a 2371 square foot dwelling at that time, the same size it remains. The County appraiser who completed the report completed sketches of the dimensions of the dwelling and took a photo of the property showing the dwelling appearing as it currently appears. The County appraiser noted the style of the house as “21” and indicated it was a style of house built between 1920 and 1949. The County appraiser described the structure as a three-bedroom house with forced air heating, one story with a finished area of 1551 square feet, and an 820 square foot ½ basement lower area, with a total square footage size of 2371 square feet, with a notation indicating the dwelling was constructed in 1930. These notes include the notation “Est remodel 1965.” Staff also submitted a copy of an October 1979 building permit application for repairs to the house on the property from storm damage and a tree falling. Staff submitted property tax information showing that between 1993 and 2024 property taxes regularly increased, supporting their finding that the structure was not somehow “discontinued” which remains relevant to findings of continuity prior to adoption of the relevant zoning regulations.

As discussed, I am not persuaded by Ms. Ryland’s assertions concerning the structure originally being a small shack that was remodeled without permits. I note again that Ms. Ryland provided no evidence to support this assertion. She also points to a 1937 deed that does not mention the dwelling and contends that, therefore, 1937 is the earliest date a structure could have been built. Staff disagree, stating that deeds of this nature do not typically mention the dwelling. Ms. Ryland also points out that the applicant did not submit any building permits or records of the construction of the dwelling, contending that the applicant failed to meet her burden of proof.

As discussed, I find persuasive the records from the County appraiser conducting the November 1996 appraisal. I note that this County appraiser described the style of the dwelling as the type built between 1920 and 1949, and either verified that the house was built in 1930 or provided an informed estimate that the house was built in 1930, squarely within the description of the type of dwelling being appraised. In making this finding, I note the significant detail the County's appraiser provided, including sketches, a photo, calculations of the size of the dwelling (2,371 square feet, as it remains today), descriptions of the roofing, flooring, interior finish, accommodations, heating system, and plumbing. I also note that the County appraiser provided the note "Est remodel 1965" indicating that the County appraiser observed that the home was older and had been remodeled, providing estimates of the original build date of 1930 and the remodel date of 1965 based on an on-site appraisal inspection. I also note that the photo of the dwelling taken by the County appraiser appears to be of the same house shown in recent photos. The applicant has provided substantial evidence of the existence of the nonconforming dwelling prior to the December 1967 adoption of zoning regulations requiring a 30 foot front setback.

As noted by staff and discussed above, the existing structure is not compliant with the 30 foot front setback required in the RRFF-5 zone (*See* ZDO Table 316-2) adopted after this dwelling was built. The subject property is a "corner lot" as the south and east property lines each abut the platted ROW as defined in Section 202 of the ZDO. The dwelling was built around 2 to 3 feet over the front property line to the east, encroaching on the 30 foot front yard setback and encroaching on the platted ROW for Cedar Creek Lane. The dwelling was built about 5 feet over the property line to the south, encroaching on the 30 foot front yard setback and encroaching on the platted ROW for the platted but unnamed ROW. These setbacks do not conform to the current RRFF-5 dimensional standards in Section 316 of the ZDO, Table 316-2. The relevant issue here concerns whether the existing dwelling was constructed before the adoption of the underlying zone that established these front setback requirements.

Staff point to the Record of Survey, PS25450, which shows the dwelling's encroachment distances into the front setbacks and ROW. These encroachment distances, as surveyed in 1993, closely match the approximate site plan provided by the applicant's architect. County staff report there is a slight difference between the architect's site plan's east encroachment and the surveys. Staff also report, however, the survey includes a rough sketch of the house's shape, and the architect's site plan includes a disclaimer that the building location is approximate. Staff recommend requiring a new Record of Survey as a condition of approval to verify the encroachment distances.

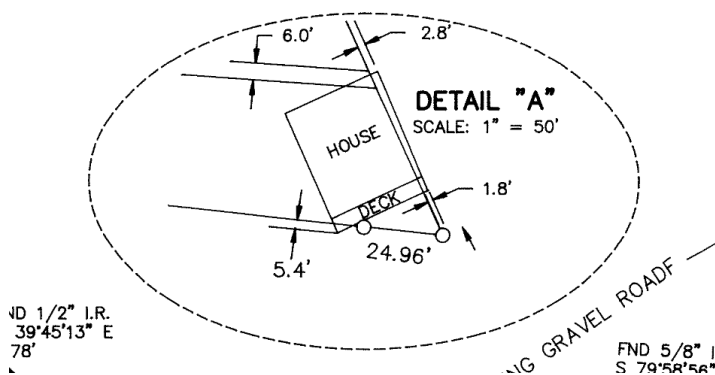


Figure 4 - Detail A of PS25450

With respect to the appellant's assertion that the structure was originally a 600 square foot structure remodeled without permits, Staff report that no evidence of this alleged expansion was provided. Staff also point to the structure's location on a slope and the dwelling's multiple crawl spaces, questioning how feasible the alleged expansion would have been. Staff point to the assessment data from 1996 that describes the dwelling as 2371 square feet and built in 1930. Staff assert this establishes that the structure lawfully existed at the time of the adoption of zoning regulations in December 1967. Therefore, staff state that the applicant need not prove the existence, continuity, nature, and extent of the nonconforming use for a period exceeding 20 years immediately preceding the date of application for verification, 4/10/2025. Nevertheless, staff also point out that the assessment data comes from a 1996 assessment which precedes the 20-year requirement to prove the existence, and the extent and nature of the NCU. Staff assert this property tax data verifies a 20+ year history of the structure in its 2371 square foot configuration. Additionally, staff point to property tax valuation history stating it shows relatively standard increases in property taxes since 1993, with a slight decrease in 1996 after the property was assessed in that same year. Staff assert that this 32-year property tax record indicates no major changes occurred to the property, supporting staff findings that the 1930-era dwelling was neither removed nor increased in nature or extent within the 20-year period preceding the date of this application. Staff further report they were able to verify the existence of the structure in 2004 aerial photographs from Google Earth, also reporting that the structure is visible in years after the 2004 date leading up to the most current image.



Figure 5 - Property in 2023 (PlanMap)

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Figure 6 - Property in 2004 (Google Earth)

The County assessment data and 1996 notes from the County appraiser verify that the dwelling was lawfully established in the 1930s-era decades prior to the adoption of restrictive zoning regulations in December 1967. The submitted property tax information and aerial images confirm that the front yard setback encroachments are a non-conforming use that existed on the property prior to December 1967 and has not been discontinued for a period exceeding 24 months within the 20-year period standard in ZDO Section 1206.05(A). Based on the evidence discussed above, I find that the applicant has met her burden of proving that the dwelling on the subject property was built within the required front yard setbacks prior to the adoption of these front yard setback requirements, and the encroachment was not discontinued for a period exceeding 24 consecutive months. Therefore, the dwelling on the subject property is a lawful nonconforming use pursuant to Subsection 1206.05. **These criteria are met.**

1206.06 - RESTORATION OR REPLACEMENT FOLLOWING DAMAGE OR DESTRUCTION

If a nonconforming use is damaged or destroyed by fire, other casualty, or natural disaster, such use may be restored or replaced consistent with the nature and extent of the use or structure lawfully established at the time of loss, subject to the following ZDO 1206.06 A through C.

Finding: [Hearings Officer]: The Applicant does not propose the restoration or replacement of a nonconforming use that was damaged or destroyed by fire, other casualty, or natural disaster. **Subsection 1206.06 is not applicable.**

1206.07 - ALTERATION

A. *Alterations Required by Law:*

Finding: [Hearings Officer]: The applicant is not proposing an alteration to a nonconforming use as required by law. **Subsection 1206.07(A) is not applicable.**

B. *Alterations Not Required by Law: Except as provided in Subsection 1206.07(C), an alteration of a nonconforming structure or other physical improvements, or a change in the use, requires review as a Type II application pursuant to Section 1307, Procedures, and shall be subject to the following standards and criteria:*

- 1. The alteration or change will, after the imposition of conditions pursuant to Subsection 1206.07(B)(4), have no greater adverse impact to the neighborhood than the existing structure, other physical improvements, or use.*

Finding: [Hearings Officer]: The applicant's proposed alterations include replacing the dwelling's roof, increasing its height by about 5 feet to a total height of 31 feet. The ZDO does not set a height restriction for this dwelling. The proposed roof alteration extends over the existing decks to the same extent as the current roof, with the proposed alteration including structural improvements to the whole dwelling in order to support the new roof and renovate the dwelling. The proposed alteration will not extend any portion of the dwelling further into the front setbacks or further into the ROW and therefore will not create greater adverse impacts in relation to the nonconforming front setback. In other words, the applicant's proposed alterations will not result in the dwelling encroaching any further into the front setbacks or ROWs than already exists. I find that the proposed alteration will have no greater adverse impact to the neighborhood than the existing structure.

The appellant Ms. Ryland and the members of the Firwood CPO expressed significant concerns regarding the structural integrity of the dwelling, its condition, including its sagging roof, and potential fire hazard. This alteration will address concerns with the structural integrity and sagging roof and will not create any greater structural issues. The applicant will be required to obtain an approved Building Permit from the Clackamas County Building Codes Division which will bring the structure into compliance with the current Building Code.

With respect to concerns about fire safety, County staff report they did not receive any comment from the Fire Department. However, the local Fire Department will review the building permit for compliance. County staff assert that the issues raised by neighbors are not subject to the standards in ZDO Section 1206.07. Staff included the below analysis for clarity for those who provided public comment.

Staff: *Neighbors raised additional concerns regarding the septic tank. Septic staff confirmed that there was a violation in 1986, but no permits were applied for, Septic staff hypothesized that this likely meant none was needed. There was a complaint filed last year but Septic staff was not provided with evidence and could not see if the violation was occurring from the ROW when a site visit was conducted. The applicant will be required to work with septic staff as part of permit review process and any issues identified through the building permit review will be required to be resolved.*

Neighbors raised concerns regarding access during construction; however, this is not included within the scope of what is considered a 'greater adverse impact' as it does not relate to the nonconforming setbacks. Additionally, this would be a temporary impact on the neighborhood,

that would be allowed outright for any other property within the neighborhood. If staff considered construction a greater adverse impact, no improvements could ever be made to the dwelling, which would allow it to fall further into disrepair and increase structural concerns. The applicant will still be subject to any parking regulations and noise regulations in place in the area. These will not be conditioned as is compliance is required outright.

Staff has determined that the roof and structural improvements will not create greater adverse impacts as they are not pushing the structure any further past the front setback standards. Additionally, the applicant must have a professional survey done to verify the encroachment distances of the structure and have it recorded with the County Surveyors office. While not an applicable standards, this allowed alteration will improve the structural integrity of the dwelling which is a primary concern of neighbors.

With acknowledgement of neighbors' concerns, staff has determined that the concerns related to access during construction, structural integrity, and the septic system, are not applicable to the nonconforming application regarding the noncompliant front yard setback for the structure.

As conditioned, this criterion is met.

- 2. The nonconforming use status of the existing use, structure(s), and/or physical improvements is verified pursuant to Subsection 1206.05.*
- 3. The alteration or change will not expand the nonconforming use from one lot of record to another unless:*
 - a. The lot of record on which expansion is proposed and the lot of record on which the nonconforming use currently is established have been part of the same tract continuously since the date the nonconforming use became nonconforming; or*
 - b. The expansion would allow only for facilities necessary to support the nonconforming use, such as driveways, storm water management facilities, and on-site wastewater treatment systems.*

Finding: [Hearings Officer]: The nonconforming use status of the dwelling structure was verified as discussed above in this decision pursuant to Subsection 1206.05. The proposed alteration will not expand the nonconforming use from one lot of record to another. The dwelling has always been on the subject lots and there is no record of a property line adjustment moving it from one lot to another, nor any evidence suggesting that the dwelling structure has ever been moved. **This criterion is met.**

- 4. Conditions of approval may be imposed on any alteration of a nonconforming structure or other physical improvements, or a change in the use, permitted under Subsection 1206.07(B), when deemed necessary to ensure the mitigation of any adverse impacts.*

Finding: [Hearings Officer]: A condition of approval will be imposed requiring the applicant to record a Record of Survey with the County showing the encroachment distance to enter this in the record and not allow for further encroachment, consistent with the recommendation by County staff. Building, engineering, and septic permits have not been conditioned as they are required outright for new construction. **As conditioned, this criterion is met.**

C. *Alterations To Nonconforming Marijuana Production Premises Not Required by Law*

Finding: [Hearings Officer]: The Applicant does not propose an alteration to a nonconforming marijuana production premises. **This criterion is not applicable.**

3. ZDO Section 1307, Procedures:

This section provides standards and criteria for processing land use applications according to their type; this application is being processed as a **Type II Permit**, pursuant to Section 1307. No further written findings regarding Section 1307 are warranted.

D. DECISION

Based on the findings, discussion, conclusions provided or referenced and incorporated herein, and the public record in this matter, the Hearings Officer hereby APPROVES application Z0137-25 for a Nonconforming Use Verification and Alteration, subject to the following conditions of approval:

E. CONDITIONS OF APPROVAL

The Clackamas County Land Use and Zoning staff recommended approval of this application subject to the following conditions, consistent with the July 14, 2025 Planning Director decision approving this application, reviewed, adopted and/or modified by the Hearings Officer as denoted by boldface type in italics:

The conditions listed are necessary to ensure that approval criteria for this land use permit are satisfied. Where a condition relates to a specific approval criterion, the code citation for that criterion follows in parentheses.

1. Approval of this land use permit is based on the submitted written narrative and plan(s) filed with the County on 4/10/25 with additional materials provided on 5/10/25, 5/11/25, and 5/16/25. No work shall occur under this permit, other than which is specified within these documents, unless otherwise required or specified in the conditions below. It shall be the responsibility of the property owner(s) to comply with these documents and the limitation of any approval resulting from the decision described herein.
2. **Prior to Planning Approval of a building permit for the roof replacement, the applicant must record a Record of Survey showing the Right-of-Way encroachment distance with the County Surveyor and submit it to the Planning and Zoning Division to verify the encroachment distance.**

Dated: October 14, 2025



Carl D. Cox
Clackamas County Hearings Officer

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ADVISORY NOTES

Advisory notes are not a part of the decision on this land use permit. The items listed below are not conditions of land use approval and are not subject to appeal. They are advisory and informational only but may represent requirements of other agencies/departments. As such, they may be required by these other agencies/departments to complete your proposed development.

1. The County Septic and Onsite Wastewater Program has reviewed the proposal and has provided the following advisory notes:
 - A. A Septic Authorization Notice is required to connect the existing system to the dwelling. For details, contact them at septicInfo@clackamas.us or (503) 742-4740.
2. The applicant shall comply with Clackamas County's Engineering requirements regarding the Right-of-Way encroachment.
 - A. All access improvements in, or adjacent, to Clackamas County ROW, and all on-site improvements, shall be in compliance with the Clackamas County Roadway Standards. Contact County Development Engineering at engineering@clackamas.us or 503-742-4691 for permitting requirements that may apply to your development.
3. The applicant shall obtain a building permit from Clackamas County Building Codes Department and shall complete any associated work for the roof and structural improvements.
 - A. Contact County Building Codes for details on permitting requirements for a new dwelling (building, manufactured dwelling placement, mechanical, electrical, plumbing) at bldservice@clackamas.us or 503-742-4240.
4. The Department of State Lands provided comments after County Staff submitted a Wetland Land Use Notice. They are attached. **[See Exhibit 22]**
5. ALTERATION APPROVAL PERIOD AND TIME EXTENSION ZDO SECTION 1206.08. This is the only notice you will receive of this deadline.
 - A. Approval Period: Approval of an alteration of a nonconforming use, pursuant to Subsection 1206.07(B) or (C), is valid for a period of two years from the date of the final decision. If the County's final decision is appealed, the approval period shall commence on the date of the final appellate decision. During this two-year period, the approval shall be implemented, or the approval will become void.
 - (1) Implemented means all other necessary County development permits (e.g., grading permit, building permit for an accessory structure) shall be obtained and maintained.
 - a. A major development permit is:
 - i. A building or manufactured dwelling placement permit for a new primary structure that was part of the alteration of a nonconforming use approval; or

- ii. A permit issued by the County for parking lot or road improvements required by the alteration of a nonconforming use approval.
- (2) Notwithstanding Subsection 1206.04(A), the allowed discontinuance period for a nonconforming use approved for an alteration pursuant to Subsection 1206.07(B) is extended to 24 consecutive months from the date of implementation of the alteration pursuant to Subsection 1206.08(A)(1). In no event shall the total period of discontinuance exceed 48 consecutive months (i.e., any discontinuance period preceding the filing of an application for an alteration, plus the period during which the alteration application is under review, plus the approval period allowed by Subsection 1206.08(A), plus the 24 consecutive months from the date of implementation).
- B. Time Extension: If the approval of an alteration of a nonconforming use is not implemented within the initial approval period established by Subsection 1206.08(A), a two-year time extension may be approved pursuant to Section 1310, *Time Extension*. However, in no event may the total period of discontinuance exceed 48 months, inclusive of those discontinuance periods identified in Subsection 1206.08(A)(2).

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 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 is "final" for purposes of a LUBA appeal as of the date of the decision appearing by my signature.