MARION COUNTY BOARD OF COMMISSIONERS

Board Session Agenda Review Form

Meeting date:	July 8, 2020				
Department:	Public Works	Agenda Planning Date:	July 2, 2020	Time required:	None
☐ Audio/Visual aids					
Contact:	Joe Fennimore	Phone:	503-566-5147		

Department Head Signature: Brian Mathur

TITLE	Receive hearings officer's decision denying Administrative Review (AR) Case 20-010/Schaber.
Issue, Description & Background	The Marion County Hearings Officer conducted a public hearing on June 3, 2020. On June 29, 2020, the hearings officer issued a decision denying the case. As part of the land use process, the board must officially receive the hearings officer's decision.
Financial Impacts:	None.
Impacts to Department & External Agencies	None.
Options for Consideration:	1. Receive notice of the decision. 2. Receive notice of the decision and call the matter up.
Recommendation:	Staff recommends the board of commissioners receive notice of the decision.
List of attachments:	Hearings officer's decision
Presenter:	Joe Fennimore

Copies of completed paperwork sent to the following: (Include names and e-mail addresses.)

Copies to:	Joe Fennimore - gfennimore@co.marion.or.us

BEFORE THE MARION COUNTY HEARINGS OFFICER

In the Matter of the Application of:	)	Case No. AR 20-010
	)	
Darwin Schaber	)	**Administrative Review**

ORDER

I. Nature of the Application

This matter came before the Marion County hearings officer on appeal by Darwin Schaber of the Planning Director's denial of an administrative review to replace a dwelling on a 3.35 acre parcel in an EFU (Exclusive Farm Use) zone located in the 19200 block of Allinson Rd, Hubbard (T4S; R1W; Section 29A; tax lot 800).

II. Relevant Criteria

The standards and criteria relevant to this application are found in the Marion County Code (MCC), title 17, especially chapter 17.136, and Oregon Revised Statutes (ORS) 215.291.

III. Hearing

A public hearing was held on this appeal on June 3, 2020. At hearing, the Planning Division file was made part of the record. Case files AR 17-022 and V 18-002 were also made part of the record. The following persons appeared and provided testimony:

1.	Alyssa Schrems	Planning Division
2.	Frank Walker	For Applicant
3.	Darwin Schaber	Applicant
4.	John Schaber	For Applicant

The following documents were entered into the record as exhibits at hearing:

Ex. 1	Packet submitted by Frank Walker including the following: map of Feller's Subdivision; annotated assessor's map 04-1W-29A; site plan; aerial photograph showing homesite improvements; article from the Capital Press; photograph of original dwelling and of Applicant as a child.
Ex. 2	Summary Analysis prepared by Frank Walker and Associates.

No objections were raised to notice, jurisdiction, conflict of interest, or to evidence or testimony presented at the hearing. The record remained open until June 10, 2020 for participants to submit additional written testimony, argument, and evidence and until June 17, 2020 for Applicant's final rebuttal. No additional documents were submitted by Applicant during the open record period, but case file LLA 98-43 was made part of the record.

IV. Executive Summary

Applicant requests an administrative review to replace a dwelling on a 3.35 acre parcel in an EFU zone located in the 19200 block of Allinson Rd, Hubbard. Applicant has not met the burden of proving that criteria for a replacement dwelling have been met. The administrative review application is **DENIED**.

V. Findings of Fact

The hearings officer, after careful consideration of the testimony and evidence in the record, issues the following findings of fact:

1. The subject property is designated Primary Agriculture in the Marion County Comprehensive Plan and zoned EFU (Exclusive Farm Use). The intent of both designation and zone is to promote and protect commercial agricultural operations.

2. The subject property is located on the west side of Allinson Road, approximately 2,900 feet south of its intersection with Feller Road NE. The property is currently undeveloped.

3. The property was the subject of Administrative Review Case 17-022, which was a request to replace a dwelling that was destroyed by fire in 1967. On December 1, 2017, the planning director issued a decision denying the request. The property was also the subject of Variance Case V18-002, which was to request a variance from the temporal requirement of the replacement dwelling standards. On August 8, 2018, the hearings officer issued a decision denying the request.

4. The subject property was also mentioned in Lot Line Adjustment Case 98-43, which included a finding that the subject property and an adjacent property were created after the requirement for land use approval and constituted an illegal land division.

5. Surrounding properties are all zoned EFU and devoted to a mix of various types of farm use and small rural residential properties.

6. Applicant is proposing to replace a previously existing dwelling on the property.

7. The Soil Survey of Marion County Oregon indicates that the property is composed entirely of high-value farm soils.

Marion County Public Works Land Development and Engineering Permits (LDEP) comments included engineering requirements and an advisory:

ENGINEERING REQUIREMENTS

A. In accordance with Marion County Code (MCC) 11.10, driveways must meet MCPW design standards. At the time of application for building permits an Access Permit will be required.

B. The subject property is within the unincorporated area of Marion County and will be assessed Transportation & Parks System Development Charges (SDCs) upon application for building permits per Marion County Ordinances.

C. Utility work in the public right-of-way requires separate PW Engineering permits.

ENGINEERING ADVISORY

Land clearing of 1.0 acre or more falls under the jurisdiction of DEQ for NPDES 1200-C erosion prevention permitting.

Marion County Building Inspection commented that permits are required for new construction or placement of a manufactured home.

Marion County Onsite Wastewater Specialist commented that a septic authorization or site evaluation is required.

All other contacted agencies either failed to respond or stated no objections to the proposal.

VI. Additional Findings of Fact and Conclusions of Law

1. Applicant has the burden of proving all applicable standards and criteria are met. As explained in *Riley Hill General Contractor, Inc. v. Tandy Corporation*, 303 Or 390 at 394-95 (1987):

> "'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any question in the case, the evidence appears to be equally balanced, or if you cannot say upon which side it weighs heavier, you must resolve that question against the party upon whom the burden of proof rests." (Citation omitted.)

Applicant must prove, by substantial evidence in the whole record, that it is more likely than not that each criterion is met. If the evidence for any criterion is equally likely or less likely, Applicant has not met his burden and the application must be denied. If the evidence for every criterion is in Applicant's favor, then the burden of proof is met and the application must be approved.

2. Applicant seeks administrative review approval for a replacement dwelling in an EFU zone.

3. Under MCC 17.110.680, the Planning Director determines whether dwellings subject to standards are permitted in the applicable zone following MCC 17.115 procedures. The Planning Director had authority to make the subject determination.

4. Under MCC 17.115.110(C), the applicant or any person aggrieved or affected by the decision may file a request for a hearing to the planning division within 15 days of the

date the decision was rendered. The Planning Director's decision was mailed on April 14, 2020. Applicant Darwin Schaber appealed the Planning Director's decision on April 27, 2020, within the 15 day time limit. MCC 17.115.110(C) was met.

5. Under MCC 17.115.110(F), on request for a hearing, the hearings officer shall hold a hearing on the matter in accordance with Chapter 17.111 MCC. The hearings officer may hear and decide this matter.

6. Under MCC 17.115.110, administrative reviews are subject to MCC 17.119.020 and .025 conditional use application requirements.

7. Under MCC 17.119.020, property owners may file an application. Under MCC 17.119.025, property owners may sign an application. A bargain and sale deed filed in the Marion County deed records at reel 533, page 171 shows the subject property was conveyed to Darwin N. Schaber on March 9, 1987. The application was signed by Darwin Schaber, who could file this application. MCC 17.119.020 and 17.119.025 are satisfied.

8. Under MCC 17.115.110(A), an administrative review decision shall be made on the basis of the comprehensive plan and applicable standards and criteria in MCC title 17.

9. Lawful Parcel. As a threshold issue, it must be determined whether or not the subject property is a lawful parcel. ORS 215.213 requires that the replacement dwelling be located on the same parcel as the dwelling being replaced. The Land Use Board of Appeals (LUBA) has held that references in ORS chapter 215 to parcels relate to lawfully created parcels. *Reeves v. Yamhill County*, 53 Or LUBA 4, 11 (2006) ("when the word 'parcel' is used in ORS Chapter 215, the parcel must be a lawfully created parcel"); *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 192, 211 P3d 297 (2009) (explaining relationship between parcel as defined in ORS 215.010 and "lawful creation"); *see also Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2019-044, Oct 15, 2019). Therefore, the parcel on which a proposed replacement dwelling is proposed to be sited must have been lawfully created.

   ORS 215.010 provides that for purposes of ORS chapter 215, a lawfully established parcel has the definition provided in ORS 92.010(3), which states:

   > (a) "Lawfully established unit of land" means:
   >
   > (A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or
   >
   > (B) Another unit of land created:
   >
   > (i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
   >
   > (ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.

(b) "Lawfully established unit of land" does not mean a unit of land created solely to establish a separate tax account.

A lawful lot or parcel may therefore be created through the subdivision or partition process, or through a deed or land sales contract describing the area of land as a unit before planning, zoning or subdivision or partition ordinances or regulations became applicable.

The record contains no evidence that the boundaries of the subject property, as currently configured, were established through any of the lawful mechanisms described immediately above. The findings in Lot Line Adjustment Case 98-43 indicate that adjacent tax lot 700 was divided off the subject property in February of 1978, without land use review. The decision in that case found that without proof otherwise, staff must assume that the two parcels (tax lots 700 and 800) were created after the requirement for land use approval and constitute an illegal land division.

All land divisions in Marion County after September 1, 1977 required county approval in order to be recognized as lawfully created parcels. MCC 17.110.680 states:

> "No permit for the use of land or structures or for the alteration or construction of any structure shall be issued and no land use approval shall be granted if the land for which the permit or approval is sought is being used in violation of any condition of approval of any land use action, is in violation of local, state or federal law, except federal laws related to marijuana, or is being used or has been divided in violation of the provisions of this title, unless issuance of the permit or land use approval would correct the violation."

Applicant states in his Summary Analysis that the property was lawfully created by a deed prior to the date partitions were required. However, the only deed contained in the record is a bargain and sale deed recorded at reel 533, page 171 on March 23, 1987, which conveyed the property to Applicant. No additional deeds or other documentation were submitted during the open record period.

ORS 92.017 provides that "[a] lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law." In the context of land use law, division by law requires a subdivision, partition or, prior to the applicability of the land division regulations, a deed conveyance. *See Landwatch Lane County v. Lane County*, ___ Or LUBA ___ (LUBA No 2019-044, Oct 15, 2019). Based on this record, the subject property does not appear to be a lawfully created parcel, and a replacement dwelling may not be authorized on an unlawful parcel.

In the event Applicant is able to establish that the subject property is a lawful parcel, the hearings officer addresses the merits of this appeal below.

10. Replacement Dwelling. The replacement dwelling criteria are listed in MCC 17.136.030(D). However, the 2019 Oregon Legislature, through House Bill 3024, amended the criteria, and the county must apply those criteria directly until the MCC can be amended. House Bill 3024 amended ORS 215.291, which now states:

(1) A lawfully established dwelling may be altered, restored or replaced under ORS 215.213 (1)(q) or 215.283 (1)(p) if the county determines that:

(a) The dwelling to be altered, restored or replaced has, or formerly had:

(A) Intact exterior walls and roof structure;

(B) Indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

(C) Interior wiring for interior lights; and

(D) A heating system; and

(b) (A) If the dwelling was removed, destroyed or demolished:

(i) The dwelling's tax lot does not have a lien for delinquent ad valorem taxes; and

(ii) Any removal, destruction or demolition occurred on or after January 1, 1973;

(B) If the dwelling is currently in such a state of disrepair that the dwelling is unsafe for occupancy or constitutes an attractive nuisance, the dwelling's tax lot does not have a lien for delinquent ad valorem taxes; or

(C) A dwelling not described in subparagraph (A) or (B) of this paragraph was assessed as a dwelling for purposes of ad valorem taxation:

(i) For the previous five property tax years; or

(ii) From the time when the dwelling was erected upon or affixed to the land and became subject to assessment as described in ORS 307.010.

11. The first set of criteria to evaluate under ORS 215.291(1)(a) is whether the dwelling to be altered, restored or replaced has, or formerly had: 1) intact exterior walls and roof structure; 2) indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system; 3) interior wiring for interior lights; and 4) a heating system. The dwelling that was located on the property until it was destroyed by fire in 1967 appears to have had the necessary features required by this

section, based on photographs and documents submitted by Applicant, as well as testimony at hearing. ORS 215.291(1)(a) is met.

12. If ORS 215.291(1)(a) is met, the criteria under either ORS 215.291(1)(b)(A), (B), or (C) must next be evaluated. Under ORS 215.291(1)(b)(A), if the dwelling was removed, destroyed or demolished, 1) the dwelling's tax lot must not have a lien for delinquent ad valorem taxes, and 2) any removal, destruction or demolition must have occurred on or after January 1, 1973.

The hearings officer finds that the dwelling Applicant wants to replace has been removed, destroyed, or demolished. Both removal and demolishment indicate, on the plain reading of those terms, that the dwelling no longer exists. According to Applicant's argument, destruction, in contrast, can take place in stages, over time. Applicant argues that the county assessor showed improvement values for the property in 1973-74 and 1978-79, and that the final destruction of the home and all appurtenances occurred in this six year period. Applicant argues that the question should be: "On or after January 1, 1973, was *any* part of the dwelling removed, destroyed or demolished?" (emphasis added).

Applicant provides that a fire destroyed most of the dwelling in 1967, and what remains are remnants that include the following: a well, a septic drainfield, a hearth/chimney support made of reinforced steel and concrete, post and beam concrete supports, a front entryway step, and sidewalks on the east and north sides of the former building footprint. Under Applicant's logic above, a dwelling could be largely destroyed prior to January 1, 1973, but as long as *some* destruction occurs after that time, i.e. a piece of a dilapidated front step falls to the ground during a small earthquake, the criterion would be met. Such an interpretation gives no effect to the statutory provision. If the legislature intended to allow incremental and ongoing destruction occurring after 1973 to fulfill the requirement, the statute would provide as much. Applicant's interpretation renders the criterion meaningless. A plain reading of the statute is that once the dwelling is destroyed to the point that it is uninhabitable, the destruction referenced in the statute has occurred. If such destruction (or removal or demolishment) is not on or after January 1, 1973, the criterion is not met.

This interpretation is further strengthened by maxims of statutory construction. Under the maxim *noscitur a sociis*, the meaning of an unclear word may be clarified by the meaning of other words used in the same context. *Johnson v. Gibson*, 358 Or 624, 629-30, 369 P3d 1151, 1154 (2016). The courts often apply this interpretive rule, meaning "it is known by its associates," to help determine the meaning of a word or phrase by considering other words in the same sentence or provision. *See Capital One Auto Fin. Inc. v. Dep't of Revenue*, 363 Or 441, 453, 423 P3d 80, 87 (2018)(*internal citation omitted*). The hearings officer does not find the meaning of "destroyed" to be unclear. However, even assuming arguendo that it is, its grouping with the words "removed" and "demolished" indicates a dwelling that no longer exists or is no longer habitable. The criterion does not provide that the removal, destruction, or demolition must happen during a single event, such as the fire that destroyed this dwelling in 1967, nor does it provide that destruction must be complete and utter. However, if some major destruction takes place that renders the dwelling uninhabitable, "the destruction," for

purposes of interpreting the statute, has occurred. Any de minimus destruction of the remnant pieces occurring after January 1,1973 is not enough to satisfy the criterion.

The planning director interpreted this criterion to require that all four elements in ORS 215.291(1)(a) must be present on or after January 1, 1973. The hearings officer finds it is unnecessary to reach such a conclusion, because the evidence in the record plainly shows that the dwelling was destroyed by a fire in 1967. At hearing, Applicant's representative explained that the house is not totally gone, as the foundation and other structural elements still remain. If Applicant's argument is that, due to the remnants of the house remaining, ORS 215.291(1)(b)(A) does not apply, because the dwelling was not removed, destroyed, or demolished, then the analysis moves to either ORS 215.291(1)(b)(B) or (C). As discussed in Findings 13 and 14 below, this property does not qualify for a replacement dwelling under either subsection (B) or (C). Therefore, if it does not meet the criteria under subsection (A), it cannot be replaced, and the hearings officer finds that ORS 215.291(1)(b)(A) has not been met.

13. ORS 215.291(1)(b)(B) relates to a dwelling that is currently in such a state of disrepair that the dwelling is unsafe for occupancy or constitutes an attractive nuisance. To be a dwelling that is unsafe for occupancy, a dwelling must exist. This might include a dilapidated structure where, for example, the roof is caving in or the stairs are falling down. It does not refer to a non-existent building. According to Applicant, all that remains of the dwelling are concrete supports, a front step, support for a chimney, a sidewalk, and clay tile remnants of a septic drainfield. Photographs submitted into the record show most of these elements are only partially intact, some to the point of being unrecognizable. Such components do not constitute a dwelling, but rather, are remnants. The dwelling is not unsafe for occupancy, because no dwelling exists. There is also no evidence in the record that the dwelling constitutes an attractive nuisance.[1] As stated, the photographs submitted by Applicant show minimal remnants of a dwelling, not indicating a nuisance of any kind or meeting any of the elements of an attractive nuisance. At hearing, Applicant's representative stated that a county code

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[1]Oregon courts have embraced the rule of attractive nuisance as stated in the Restatement (Second) of Torts, §339, *cf Karoblis v. Liebert*, 263 Or 64, 69, 501 P2d 315, 317 (1972), which defines the rule as follows:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if:
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.
>
> Restat 2d of Torts, § 339

enforcement officer visited the property in April 2020 and did not find it to be a nuisance. An attractive nuisance is not found.

14. Under ORS 215.291(1)(b)(C), if the dwelling does not fall under subsection (A) or (B), it still may be replaced if it was assessed as a dwelling for purposes of ad valorem taxation for either: 1) the previous five property tax years, or 2) from the time when the dwelling was erected upon or affixed to the land and became subject to assessment as described in ORS 307.010. Applicant does not claim to meet these criteria, and there is no evidence in the record indicating that such criteria have been met. **ORS 215.291(1)(b) has not been satisfied.**

Both the record and testimony at hearing show this property once contained a family dwelling, and the hearings officer found above that it did. Applicant suggested at hearing that property taxes received by the county would be much higher if a new dwelling could be placed on the property, and that may well be the case. Applicant also points to the unique circumstances of this matter and asks the hearings officer to consider other mitigating factors. However, this is an application for a replacement dwelling, and this decision and the hearing's officer authority is limited to determining whether the applicable criteria under ORS 215.291 have been met. The hearings officer finds they have not been met, and so the administrative review must be denied.

Because Applicant has failed to satisfy the criteria under ORS 215.291(1)(b), it is unnecessary to reach the remaining criteria in the statute.

VII. Order

It is hereby found that Applicant has not met his burden of proving the applicable standards and criteria for approval of an administrative review application for a replacement dwelling have been met. Therefore, the administrative review application is **DENIED**.

VIII. Appeal Rights

An appeal of this decision may be taken by anyone aggrieved or affected by this order. An appeal must be filed with the Marion County Clerk (555 Court St. NE, Salem, OR 97301) by 5:00 p.m. on the 14th day of July 2020. The appeal must be in writing, must be filed in duplicate, must be accompanied by a payment of $500, and must state wherein this order fails to conform to the provisions of the applicable ordinance. If the Board denies the appeal, $300 of the appeal fee will be refunded.

DATED at Salem, Oregon, this 29th day of June, 2020.

Stephanie L. Schuyler
Marion County Hearings Officer

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing order on the following persons:

Darwin Schaber
5725 Christofferson Rd
Turlock, CA 95380

Frank Walker & Associates
Attn: Frank Walker
4674 Commercial St SE,
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Salem, OR 97302

John Schaber
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Roger Kaye
Friends of Marion County
P.O. Box 3274
Salem, OR 97302

Fire Chief Joe Budge
Woodburn Fire District
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Woodburn, OR 97071

Agencies Notified:

Planning Division
(via email: gfennimore@co.marion.or.us)
(via email: aschrems@co.marion.or.us)
Code Enforcement
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AAC No. 6 (no members)

By mailing to them copies thereof. I further certify that said copies were placed in sealed envelopes addressed as noted above, that said copies were deposited in the United States Post Office at Salem, Oregon, on the 29th day of June, 2020, and that the postage thereon was prepaid.

Susan Hogg
Administrative Assistant to the
Hearings Officer