

BEFORE THE HEARINGS OFFICER OF KLAMATH COUNTY, OREGON

In the Matter of the Citation)	VIOLATION NO. 53-88
for Code Violation to RAY)	FINDINGS OF FACT, CONCLUSIONS
MATTSON.)	OF LAW AND DECISION

This matter came before William M. Ganong, the Hearings Officer of Klamath County, Oregon, on January 5, 1989 in the Klamath County Commissioner's Hearing Room. The Hearing was held pursuant to Notice given in conformity with the Klamath County Land Development Code and related ordinances. Ray Mattson was present and represented himself at the hearing. After Mr. Mattson, Mrs. Mattson and Planning Department Representative Kim Lundahl testified the hearing was continued to February 2, 1989 for additional testimony. The Klamath County Planning Department was represented by J. Kim Lundahl and the Recording Secretary was Karen Burg. The Klamath County Planning Department file and all contents thereof were incorporated in the record as evidence. The County Hearings Officer, after reviewing the evidence presented, makes the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT:

1. Raymond Mattson was served a Citation issued by the Klamath County Planning Department on December 7, 1988. Said Citation alleges that Mr. Mattson is maintaining a fence on property owned and controlled by Mr. Mattson which is in violation of the height limitations for fences contained in Klamath County Land Development Code Section 64.002. The subject property is located on Falvey Road, near the City of Merrill, Oregon, and is

described as Klamath County Tax Assessor lots 4110-2DC-4400 and 4500.

2. Mr. Mattson testified as follows:

a. The subject fence is approximately eight feet in height;

b. That on or about June 17, 1980, he received a letter from the Klamath County Building Department advising him that the nuisance abatement ordinance required that he construct a fence around the wrecking yard he was operating on the subject property;

c. On or about June 18, 1980, Mr. Mattson met with Building Department Director, Don Gourley, who told him that he must construct a fence eight feet in height;

d. On or about June 19, 1980, Mr. Mattson commenced construction of the subject fence;

e. On or about December 2, 1980, Mr. Mattson received a letter from the County Building Department alleging that he had failed to contact the Department concerning the alleged nuisance;

f. On or about December 3, 1980, he contacted Marge Ahern of the Building Department and advised her that he had in fact contacted Mr. Gourley; and

g. On or about December 16, 1980, Mr. Mattson met with Mr. Gourley again and discussed the type of fence he was going to build. Thereafter, Mr. Mattson completed the construction of the subject fence.

3. Pictures taken by Klamath County Building Department personnel in December, 1988, show a dilapidated fence consisting primarily of corrugated metal and weathered boards. Mr. Mattson agrees that the fence is in "bad shape," but he does not want to

spend the time, energy and money to fix it if he is going to be Ordered to tear it down.

4. On February 2, 1989, Building Department official Don Gourley testified that he did contact Mr. Mattson in June, 1980 and submitted a copy of a letter dated June 15, 1980, which states that Mr. Mattson must construct a fence. The letter does not describe the heighth of the fence. Mr. Gourley testified that the Uniform Building Code then in effect required a building permit for the construction of any fence in excess of six feet in height and that he would not have told Mr. Mattson that it was permissible to construct an eight foot heigh fence without obtaining a building permit.

5. Mr. Mattson testified that after meeting with Mr. Gourley, he thought that everything was "OK" and that he did not know that a building permit was required.

6. The subject fence has been in existence, in one form or another, for almost eight years.

7. The subject property is currently zoned Highway Commercial. Prior to the adoption of the Land Use Code, 13.2 acres of the subject land was zoned A - Light Agriculture and .27 acres of the land, the area where the Mattson residence is located, was zoned RD 10,000-residential single family. Said zoning was established by Klamath County Zoning Ordinance No. 17, adopted August 29, 1972.

8. This is Mr. Mattson's second trip through the Klamath County Land Development Code enforcement procedure. In Violation No. 40-85 Mr. Mattson was found to be in violation of the

provisions of the Land Use Code which prohibit wrecking yards in the commercial zone. Mr. Mattson entered into a stipulated Circuit Court Order which requires the abatement of said violation. Mr. Mattson is in the process of removing the inoperable vehicles from the subject property. However, he currently stores "all sorts of parts" on the property.

9. Mr. Mattson testified that he started the auto wrecking business in the 1950's. However, a property use survey dated November 13, 1978 and conducted by Planning Department staff member Wendy S. Ott does not show the wrecking yard use, but rather shows that the majority of the land was irrigated pasture.

LEGAL ISSUES:

1. Is this process legally insufficient because the "Complaint" which led to the issuance of the subject Citation is not "sworn under oath?"

Mr. Mattson argues that the County is following an "insufficient process" because ORS 131.005 (3) defines Complaint to require a document sworn under oath. He alleges that a Complaint is a "written accusation" which "serves to start prosecution."

ORS 131.005 contains definitions used to interpret sections 1 to 311, Chapter 836, Oregon Laws 1973. Said Chapter codified the Oregon Criminal law and applies to "criminal actions and proceedings" and "criminal procedure."

ORS 203.810 provides for the prosecution of offenses under "County law." Subsection (2) of said statutes provides in part:

"Except as otherwise provided by County Law:
(a) . . .

- (b) . . .
(c) The practice and procedure as to the prosecution, trial and punishment of county offenses shall be the same as in the case of similar crimes or offenses defined or made punishable by state law."

In this case, the practice and procedure for prosecuting an alleged violation of the County Land Development Code is set out in Article 14 of the Code. Said Article does not require any "complaint" or "information" such as are required by the State Criminal Code. Rather it requires that the County Sheriff and all "Code Enforcement Officers" initiated Administrative hearings to support voluntary compliance with the provisions of the Code and to issue citations for violations of applicable ordinances. (LDC §14.002 B) If a citation is issued, it must contain the information described in LDC §14.005 (B). In order to carry out the provisions of the Code, the County has adopted a Uniform Violation/Citation form. Neither the Land Development Code nor the Citation form require that the information therein be sworn under oath.

In this proceeding, Mr. Mattson has been cited for an alleged violation of the Klamath County Land Development Code. Said violation is a "County offense" and is not state "criminal action" or "offense." This proceeding is subject to the County law procedure set out in the Klamath County Land Development Code and is not subject to the procedure set out in the Oregon Criminal Code.

The procedure adopted by the County, when followed, provides procedural and substantive Due process. Neither the State nor

Federal Constitutions require a sworn complaint to initiate the prosecution of an alleged County offense.

The procedure and process followed in the matter is legally sufficient.

2. Is the fence "grandfathered" because it predates the effective date, November 25, 1981, of the Klamath County Land Development Code?

Mr. Mattson argues that the fence is "grandfathered" because the use of the subject property, wrecking yard, predated any Land use regulation and the subject fence predates the Land Development Code.

The Klamath County Board of Commissioners has found that the use of the property as a wrecking yard was not a permissible non-conforming use of the land because that use had not been legally established prior to the adoption of the zoning ordinance.

The same logic and precedent applies to Mr. Mattson's argument that the fence was grandfathered. Building Director Gourley testified that the Uniform Building Code then in effect required that a building permit be obtained for any fence in excess of six feet in height. Mr. Mattson did not obtain a building permit but did construct a fence which is in excess of six feet in height. The fence was therefore not legally established.

LDC §97.008 provides that a nonconforming structure may continue to be used provided that:

" . . . The structure was established and has been maintained in a lawful manner . . . "

The subject fence is non-conforming because LDC §64.002 (B) limits fences on front Lot Lines to three feet, except the fence may be six feet if constructed of open mess or other materials that do not obscure vision. LDC §64.002 requires fencing of the side and rear property lines of non-residential uses which border residential or agricultural uses and limits the height of said fencing to six feet.

Planning staff refers to LDC §64.002 (G) which requires screening on all sides of items stored outside to the height of the item, but in no event to exceed twelve (12) feet. However, §64.002 (G) does not apply for two reasons:

1. The outside storage of automobile parts, as exists on the Mattson property, for sale or not for sale, constitutes an "Automobile Wrecking Yard" and is not allowed in the Highway Commercial zone; and

2. One of the purpose of the fencing standards is "to increase compatibility between different land uses by visual screening." (LDC §64.001) No one can argue that the Mattson fence "increases the compatibility" between the Mattsons' industrial use of the property and the neighboring residential and agricultural uses. The six foot height limitation of subsection (D) is much less intrusive than the twelve foot fence potentially allowed by subsection (G). As between subsections (D) and (G), (D) controls.

The subject fence was not legally established and is not "grandfathered." It is a non-conforming structure.

3. Is the prosecution of this matter barred by a Statute of Limitations?

Mr. Mattson argues that the prosecution of this matter should be barred by a statute of limitations. The County Land Development Code does not contain any statute of limitation for code enforcement matters.

The Oregon Criminal Code does contain a six month statute of limitations for "violations." (ORS 131.125(2)(c)). However, the statute does not begin to run until the day after the offense is committed. In this case the citation alleges that Mr. Mattson committed the violation on or about 28 October 1988 to and including 30 November 1988. The evidence establishes that as of said dates, Mr. Mattson was committing the violation alleged in the citation. The six month statute of limitation has not expired with respect to the violation alleged in the citation.

4. Is the County "estopped" from enforcing the provisions of the Land Development Code?

Mr. Mattson is rightfully frustrated by the fact that he built the subject fence in 1980, the County adopted the subject code in 1981, but took no action to enforce the provision of the Code until 1988. A party, including a public body and officer, can waive the ability to enforce a right or take an action and be estopped from asserting a right by its failure to take the action when it is aware that it has the right to do so. All citizens, are presumed to know the law.

In order to establish a defense based on waiver and estoppel Mr. Mattson must establish that the County officials with the

power to waive a requirement of law or ordinance was aware of the condition, that the official indicated that the condition would be waived or allowed to continue, and that Mr. Mattson relied on the action or inaction of the County official to his detriment.

Mr. Mattson testified that he reviewed with Don Gourley, Building Department Director, the type of fence that he intended to construct and that Mr. Gourley assured him that said fence would be acceptable. Mr. Gourley testified that the Building Code required a building permit for a fence in excess of six feet in height and that he would not have told Mr. Mattson that he could build an eight foot high fence without requiring a building permit.

It is not necessary to choose between Mr. Mattson's and Mr. Gourley's testimony in this case because, Mr. Gourley did not have the authority to waive the requirement of the State Building Code which requires a building permit for a fence in excess of six feet high. (ORS 455.040, 455.110)

The Oregon Court of Appeals ruled in 1987 that:

"Those who deal with state officers must know the extent of their authority and cannot claim by estoppel what they could not receive by contract. A state is no more bound by a promise that it may not lawfully make or perform than is a municipality."
(Harsh Investment Corp. v. State Housing Division,
88 Or App 151, 158 (1987))

The County is not estopped from enforcing the provisions of the Land Development Code at this time.

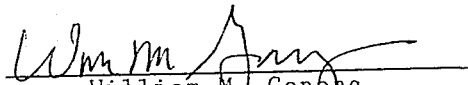
CONCLUSIONS AND ORDER

Raymond Mattson, on 28 October 1988, to and including 30 November 1988, was in violation of the Klamath County Land

Development Code, as alleged in Citation No. 53-88, because he is maintaining a fence which exceeds six feet in height around a commercial use which abuts another land use type.

Raymond Mattson is Ordered to abate said violation on or before June 30, 1989. If said violation is not abated on or before said date, the Planning Director is Ordered to refer the matter to Klamath County Legal Counsel or the Klamath County District Attorney for initiation of proceeding consistent with LDC §14.012 and §14.013.

DATED this 6th day of February, 1989.


William M. Ganong
Hearings Officer

Klamath County Land Development Code Section 24.007 provides:

"An Order of the Hearings Officer shall be final unless appealed within ten (10) days of its mailing by a party having standing in accordance with the procedures set forth in Chapter 3, Article 33 of this Code."

STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of Klamath County the 9th day
of Feb. A.D., 19 89 at 10:59 o'clock AM., and duly recorded in Vol. M89,
of Deeds on Page 2545.

Evelyn Biehn, County Clerk

FEE none

By Pauline Muller

Return: Commissioners Journal