

# Nonconforming Determination/Restoration Staff Report and Decision Case File NDR 2023-02

**Date:** November 15, 2023

**Case File:** NDR 2023-02 Ozyjowski

**Project Contact:** Raymond and Connie Ozyjowski

**Property Owners:** Raymond and Connie Ozyjowski

**Situs Address:** 6381 NE Mast Ave.

**Location:** West side of NE Mast Ave., 100 feet south of the corner of NE 64<sup>th</sup> St. and NE Mast Ave.

**Tax Map and Lot:** 06-11-35-BC-05500-00

**Comprehensive  
Plan Designation:** Low-Density Residential District Roads End

**Zoning District:** Single-Unit Residential Roads End (R1RE) Zone

**Site Size:** 0.12 acre

**Proposal:** Request for a Nonconforming Determination/Restoration for a fence

**Surrounding  
Land Uses  
and Zones:**  
North: Single-Unit Dwelling; R1RE  
South: Single-Unit Dwelling; R1RE  
East: Single-Unit Dwelling; R1RE  
West: Single-Unit Dwelling; R1RE

**Authority:** Table 17.76.020-1 of Lincoln City Municipal Code (LCMC) 17.76.020 lists a nonconforming determination/restoration application as a Type II procedure with the Planning and Community Development Director (Director) listed as the review authority. LCMC 17.76.040.A states that Type II procedures apply to administrative permits and applications and that decisions on administrative applications are made by the Director, based on reasonably objective approval criteria that require only limited discretion.

**Procedure:** The application was received on October 18, 2023. The application was deemed complete on October 20, 2023. On October 23, 2023, pursuant to LCMC 17.76.040.E, the Planning and Community Development Department mailed a notice of application to property owners within 250 feet of the subject property.



**Applicable** LCMC Chapter 17.16 Single-Unit Residential Roads End (R1RE) Zone  
**Substantive** LCMC Section 17.76.040 Type II Procedure  
**Criteria:** LCMC Section 17.77.116 Nonconforming – Restoration of lawful nonconformity

### **BACKGROUND**

The subject property (site) is addressed as 6381 NE Mast Ave. The tax lot number is 06-11-35-BC-05500-00, and the assessed site size is 0.11 acre. The site is developed with a single-unit dwelling. The site is bordered by NE Mast Ave. as its west boundary is bordered with houses. To the north and south of the site are houses. Zoning surrounding the site is the R1RE zone and the east boundary with houses to the east of NE Mast Ave.

Lincoln City's GIS mapping shows the site does not contain trails, aesthetic resource, floodway, or natural resource overlays. The site does contain bluff erosion hazards. The site also contains VE flood hazard area on the western 2/3 of the site.

The site contains a single-unit dwelling that was constructed in 1964. The current owner purchased the site from the original owner's family in 2009. The site contains a fence that was restored after years of deterioration. The fence that was in place prior to the replacement did not meet the fence height requirements of LCMC 17.17.050.B. The applicant restored it to the same height and location as the original fence. A complaint was received regarding the height of the restored fence as being a code violation. The applicant subsequently submitted an application for a nonconforming determination/restoration.

### **COMMENTS**

No comments were received.

### **ANALYSIS**

*Chapter 17.17 Single-Unit Residential Roads End (R1RE) Zone*

*17.17.050 Restrictions*

*B. Fencing may not exceed three and one-half feet in height in a required front setback area or required street side setback area, or more than six feet in any other required setback area;*

**Finding:** The site is located in the R1RE zone. The site contains a fence that is taller than allowed by LCMC 17.17.050.B. This was brought to the attention of Planning and Community Development via a complaint advising of a possible fence code violation. The date of construction of the original fence is unknown, per the applicant's statements. A storm in October 2020 damaged the fence and restoration was necessary. The fence was restored at the same height and location as the damaged fence as demonstrated by photos the applicant submitted and by a visit to the site by staff to ensure the fence is the same height as before.

*Chapter 17.64 Nonconforming Situations*

*17.64.010 General provisions*

*D. Restoration or Replacement of a Damaged or Destroyed Lawful, Nonconforming Structure or Use. A lawful, nonconforming structure or use that has been damaged or destroyed may be restored or replaced to its former height and footprint, as approved through a Type II procedure as set forth in LCMC 17.76.040, with the application process outlined in LCMC 17.77.116. All the following criteria shall also be met:*

*1. The damage or destruction was not intentionally caused by the property owner;*

**Finding:** The property owner states that the damaged/destroyed fence was damaged/destroyed as a result of years being exposed to the natural environment. The property owner does not have control over weather or damage/destruction inflicted as a result of weather. This criterion is met.

*2. The restoration or replacement does not increase the degree of nonconformity or add new conformity;*

**Finding:** The property owner has replaced the fence in the same place and at the same height as the original fence without any increase in the non-conformity.

*3. The restored or replaced structure does not encroach on adjacent properties.*

**Finding:** Staff's site visit determined that the restored/replaced fence does not encroach on adjacent properties.

*Chapter 17.76 Procedures*

*17.76.040 Type II procedure*

- A. General Description. Type II procedures apply to administrative permits and applications. Decisions on administrative applications are made by the director, based on reasonably objective approval criteria that require only limited discretion. Type II procedures require public notice and an opportunity for appeal, but do not require a public hearing or a public meeting.*
- B. When Applicable. Table 17.76.020-1 identifies Type II applications. Applications not listed in Table 17.76.020-1 may be identified as Type II by the director based on the general description in this section.*
- C. Pre-Application Conference. A pre-application conference is not required for Type II procedures.*

**Finding:** A pre-application conference is not required.

- D. Application Requirements. Type II applications shall:*
  - 1. Be submitted on application forms provided by the department and shall include all information, exhibits, plans, reports, and signatures requested on the application forms.*
  - 2. Be accompanied by the required fee as adopted by city council resolution.*
  - 3. Be subject to the completeness review procedure set forth in LCMC 17.76.110(D) and (E).*

**Finding:** The required application forms and materials were submitted, along with the required fee. The application was deemed complete in accordance with LCMC 17.76.110.D and E.

- E. Public Notice of Application and Comment Period. Type II applications require public notice of receipt of a complete application with an opportunity for area property owners and other interested parties to provide written comment prior to issuance of the decision.*
  - 1. After a Type II application has been accepted as completed under LCMC 17.76.110(E), the department shall mail a written public notice to the following:*
    - a. The applicant and applicant's representative;*
    - b. The owners of record of the subject property;*
    - c. Property owners of record within 250 feet of the perimeter property line of the property or properties subject to the application, using the most recently provided property tax assessment roll of the Lincoln County assessor's office as provided to the city to determine property owners of record; and*
    - d. Any neighborhood or community organization or association recognized by the governing body and whose boundaries include the site.*

**Finding:** The Planning and Community Development Department mailed the public notice of a complete application to the parties noted in LCMC 17.76.040.E.1.a through d.

- 2. The written public notice shall include the following:*
  - a. A brief description of the request;*
  - b. The applicable criteria from the ordinance and the comprehensive plan that apply to the application at issue;*

- c. *The street address or other easily understood geographical reference to the subject property;*
  - d. *Statement that failure of an issue to be raised in writing prior to the expiration of the public comment period, or failure to provide statements or evidence sufficient to afford the review authority an opportunity to respond to the issue precludes appeal to the Land Use Board of Appeals (LUBA);*
  - e. *The name of a department staff member to contact and the telephone number where additional information may be obtained; and*
  - f. *Statement that a copy of the application, all documents and evidence submitted by or on behalf of the applicant, and applicable criteria are available for inspection at no cost and will be provided at reasonable cost.*
3. *The failure of a property owner to receive notice does not invalidate the land use action if the notice was sent.*
  4. *Public notices for receipt of complete Type II applications shall include a written comment period of 14 days from the date the notice was mailed for the submission of written comments before the decision is issued.*

**Finding:** The written public notice contained all the information required in LCMC 17.76.040.E. The written public notice included the written comment period of 14 days.

*F. Review Authority. The review authority for Type II applications shall be the director.*

**Finding:** The Director reviewed the submitted Type II application.

*G. Decision.*

1. *Based on the criteria and facts contained within the record, the director shall approve, approve with conditions, or deny the request. The decision shall address all relevant approval criteria and consider written comments submitted before the close of the comment period.*

**Finding:** The relevant approval criteria are addressed in detail throughout this staff report. Consideration of the written comments received, if any, is given at the beginning of this report.

2. *The decision is considered final for purposes of appeal on the date the notice of the decision is mailed. Within seven days after the director has issued the decision, a notice of the decision shall be sent by mail to the following:*
  - a. *The applicant and applicant's representative;*
  - b. *The owners of record of the subject property;*
  - c. *Any person, group, agency, association, or organization who submitted written comments during the comment period; and*
  - d. *Any person, group, agency, association, or organization who submitted a written request to receive notice of the decision.*

**Finding:** Within seven days after the Director has issued the decision, the notice of that decision shall be mailed by the Planning and Community Development Department, pursuant to LCMC 17.76.040.G.2.

3. *The notice of the decision shall include the following:*
  - a. *A brief description of the request;*
  - b. *A statement of the decision and the applicable approval criteria used in making the decision;*
  - c. *The street address or other easily understood geographical reference to the subject property;*
  - d. *A statement that the decision is final, unless appealed as provided in LCMC 17.76.180;*
  - e. *The requirements for filing an appeal of the decision, including a statement of the date and time by which an appeal must be filed;*
  - f. *A statement that the complete file is available for review; and*

- g. *The name of a department staff member to contact and the telephone number where additional information may be obtained.*

**Finding:** The Planning and Community Development Department will issue the notice of decision that shall contain all the information noted in subsection 17.76.040.G.3.

*Chapter 17.77 Applications*

*17.77.116 Nonconforming – Restoration of lawful nonconformity*

- A. *Procedure. Applications to restore a lawful nonconforming structure or use are subject to the Type II procedure, as described in LCMC 17.76.040.*
- B. *Submittal Requirements. Type II application submittal requirements are set forth in LCMC 17.76.040 and more specific submittal requirements are provided on application forms and checklists as authorized in LCMC 17.76.110.*
- C. *Approval Criteria. To approve a request to restore a lawful nonconforming structure or use, the director shall make findings of fact, based on evidence provided, that all of the following circumstances exist:*
  - 1. *The damage was not intentionally caused by the current property owner;*
  - 2. *The restoration does not increase the degree of nonconformity or add new nonconformity;*
  - 3. *The restoration is according to plans approved by the fire marshal, building official, and floodplain manager, and, if required, in conformance with a geotechnical report;*
  - 4. *The restored structure or use does not encroach unlawfully on adjacent properties;*
  - 5. *The restoration complies with reasonable conditions imposed by the city on a structural permit to mitigate any new or increased adverse impact on adjacent property; and*
  - 6. *In the case of a multi-unit dwelling; mixed-use structure, or commercial structure, the reconstructed use or structure would not interfere with the intent and purpose of the zone in which it is located.*

**Finding:** It has been determined that the restoration of the fence that existed prior to November 17, 2017 meets all criterion of the LCMC 17.77.116 and the Single-Unit (R1-RE) Zone LCMC 17.17.

**DECISION**

Based upon an analysis of the submitted application and accompanying materials against applicable criteria, the Director concludes that all criteria have been or will be met, and thus **APPROVES** the nonconforming determination/restoration request.

*Richard Townsend*

Richard Townsend, Interim Director  
Planning and Community Development

*Nov. 22. 2023*

Date

*Please be advised: Pursuant to case law, Lincoln City Planners are not your planners and owe you no special or heightened duty. It is recommended that you hire your own land use professional to advise you. Ultimately, the burden is on you and your consultant to ascertain from the municipal code what is required. Reliance on erroneous information from a local government employee does not relieve a party from complying with statutory or local code requirements.*