ANNOTATED MINUTES

Tuesday, October 31, 1995 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BENCHMARK FORUM WORK SESSION

Chair Beverly Stein convened the meeting at 9:32 a.m., with Vice-Chair Sharron Kelley, Commissioners Gary Hansen, Tanya Collier and Dan Saltzman present.

WS-1 Elder Abuse: Existing Situation and County's Strategy and Priorities. Presented by Betty Glantz and Others.

BETTY GLANZ, AND RODNEY HOPKINSON PRESENTATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION.

The meeting was recessed at 10:17 a.m. and reconvened at 10:26 a.m.

WS-2 Domestic Violence: The County's Role and Strategic Priorities. Presented by Chiquita Rollins and Others

CHIQUITA ROLLINS, MICHAEL SCHRUNK, MICHAEL SANTONE, ROD UNDERHILL, MARC HESS, LOLENZO POE, GARY OXMAN AND, LYNN ERVINS PRESENTATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION.

There being no further business, the meeting was adjourned at 12:00 p.m.

Tuesday, October 31, 1995 - 1:30 PM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

Chair Beverly Stein convened the meeting at 1:32 p.m., with Vice-Chair Sharron Kelley, Commissioners Gary Hansen, Tanya Collier and Dan Saltzman present.

R-1 Request for Board Determination on Whether to (1) Hold a Hearing to Accept Evidence or Argument or (2) Decide the Appeal on the Record Already Created Regarding the Robert W. Burnell Appeal of a Hearings Officer Decision on an Adult Care Home Sanction

ATTORNEY PETE KASTING EXPLANATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. COMMISSIONER COLLIER MOVED AND COMMISSIONER SALTZMAN SECONDED, TO DECIDE THE APPEAL ON THE RECORD ALREADY CREATED AND TENATIVELY AFFIRM THE HEARINGS OFFICER DECISION. IN RESPONSE TO A QUESTION OF THE BOARD, MR. KASTING ADVISED HE WOULD SUBMIT A FINAL ORDER FOR BOARD ACTION. MOTION UNANIMOUSLY APPROVED. CHAIR STEIN ADVISED THE FINAL ORDER WOULD BE CONSIDERED ON THURSDAY, NOVEMBER 9, 1995.

P-2 MC 2-95 Report Hearings Officer Decision Regarding Western States Development Corp. Appeal of Administrative Denial of Zoning Clearance on Three Building Permit Applications; Request for Recognition that Applicant Demonstrated a Vested Right to Complete and Market Lots in the SKYLINE RIDGE SUBDIVISION and the Right to Represent to Prospective Buyers that a Single Family Residence May be Constructed on Each Lot

DECISION READ, NO APPEAL FILED, DECISION STANDS.

There being no further business, the meeting was adjourned at 1:39 p.m.

Thursday, November 2, 1995 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

Vice-Chair Sharron Kelley convened the meeting at 9:34 a.m., with Commissioners Gary Hansen and Tanya Collier present, and Commissioner Dan Saltzman and Chair Beverly Stein excused.

CONSENT CALENDAR

UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER HANSEN, THE CONSENT CALENDAR (ITEMS C-1 THROUGH C-14) WAS UNANIMOUSLY APPROVED.

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-1 ORDER Authorizing Designee of Mental Health Program Director to Direct a Peace Officer to Take an Allegedly Mentally Ill Person into Custody with Probable Cause

ORDER 95-229.

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-2 ORDER Authorizing Execution of Deed D961264 Upon Complete Performance of a Contract to CHRISTOPHER & JONI FERYN

ORDER 95-230.

C-3 ORDER Authorizing Execution of Deed D961265 Upon Complete Performance of a Contract to CHRISTOPHER & JONI FERYN

ORDER 95-231.

C-4 ORDER Authorizing Execution of Deed D961266 Upon Complete Performance of a Contract to TERRY L. JACOB

ORDER 95-232.

DEPARTMENT OF JUVENILE JUSTICE SERVICES

C-5 Intergovernmental Revenue Agreement 700196 with Portland Parks and Recreation, Providing Weekly Restitution Program "PAYBACK" for Adjudicated and Diverted Youth

SHERIFF'S OFFICE

C-6 Dispenser Class A Liquor License Renewal for MULTNOMAH FALLS LODGE, S/S SCENIC HWY & COLUMBIA GORGE, BRIDAL VEIL

C-7 Dispenser Class A Liquor License Change of Ownership for ROYAL CHINOOK INN, 2609 NE CORBETT HILL ROAD, CORBETT

C-8 Dispenser Class A Liquor License Renewal for TIPPY CANOE INN, 28242 CROWN POINT HWY, TROUTDALE

C-9 Package Store Liquor License Renewal for FRED'S MARINA, 12800 NW MARINA WAY, PORTLAND

C-10 Package Store Liquor License Renewal for LARSON'S MARINA, 14444 NW LARSON ROAD, PORTLAND

C-11 Package Store Liquor License Renewal for PLAINVIEW GROCERY, 11800 NW CORNELIUS PASS ROAD, PORTLAND

C-12 Package Store Liquor License Renewal for WEECE'S MARKET, 7310 SE PLEASANT HOME ROAD, GRESHAM

C-13 Retail Malt Beverage Liquor License Renewal for HAGAR'S AT VIKING PARK, 29311 STARK STREET, TROUTDALE

C-14 Retail Malt Beverage Liquor License Renewal for PLEASANT HOME SALOON, 31637 SE DODGE PARK BLVD, GRESHAM

REGULAR AGENDA

PUBLIC COMMENT

R-1 Opportunity for Public Comment on Non-Agenda Matters. Testimony Limited to Three Minutes Per Person.

NO ONE WISHED TO COMMENT.

NON-DEPARTMENTAL

R-2 PROCLAMATION Proclaiming the Week of November 6 - 12, 1995 COMMUNITY MEDIA WEEK

COMMISSIONER COLLIER MOVED AND COMMISSIONER SECONDED HANSEN, APPROVAL OF R-2. ROB BRADING EXPLANATION AND INTRODUCTION OF MULTNOMAH COMMUNITY TELEVISION CREW TODD LOGGAN, MIKE WADE, MIKE TOPLIFF AND MICHAEL LEWIS. PROCLAMATION READ. BOARD COMMENTS IN SUPPORT. PROCLAMATION 95-233 UNANIMOUSLY APPROVED.

R-3 First Reading of an ORDINANCE Establishing a Local Public Safety Coordinating Council as Required by State Law, and Substituting the Coordinating Council for Certain Other Advisory Entities

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER HANSEN MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF FIRST READING. PETER OZANNE EXPLANATION. NO ONE WISHED TO TESTIMFY. FIRST READING UNANIMOUSLY APPROVED. SECOND READING THURSDAY, NOVEMBER 9, 1995.

DEPARTMENT OF COMMUNITY CORRECTIONS

R-4 Recommendation to Arm a Unit Supervising Offenders with a High Potential for Violence (Continued from October 26, 1995)

COMMISSIONER COLLIER MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-4. CARY HARKAWAY EXPLANATION. RECOMMENDATION UNANIMOUSLY APPROVED.

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-5 ORDER Authorizing Sale of Tax Foreclosed Property to the City of Portland, Portland Development Commission and Authorizing Chair to Execute Deed D961262 (4316 NE Garfield Avenue) (Continued from October 26, 1995)

COMMISSIONER HANSEN MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF R-5. CHRISTOPHER JUNIPER AND MICHAEL MCKELWAY EXPLANATION AND RESPONSE TO BOARD COMMENTS IN SUPPORT. ORDER 95-234 UNANIMOUSLY APPROVED.

R-6 Intergovernmental Agreement 300786 with Metro, Stipulating Conditions for County as Recipient of Local Share Component of the Open Spaces Bond Measure Approved by Voters for Metro

COMMISSIONER HANSEN MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF R-6. STAFF DIRECTED TO SCHEDULE A METRO UPDATE WITH THE BOARD. VICE-CHAIR KELLEY EXPLANATION IN RESPONSE TO BOARD QUESTIONS. AGREEMENT UNANIMOUSLY APPROVED.

There being no further business, the meeting was adjourned at 10:01 a.m.

OFFICE OF THE BOARD CLERK
FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

Deborah L. Bogstad

MULTNOMAH COUNTY OREGON

OFFICE OF THE BOARD CLERK
SUITE 1510, PORTLAND BUILDING
1120 SW FIFTH AVENUE
PORTLAND, OREGON 97204
CLERK'S OFFICE • 248-3277 • 248-5222
FAX • (530) 248-5262

BOARD OF COUNTY COMMISSIONERS
BEVERLY STEIN • CHAIR • 248-3308
DAN SALTZMAN • DISTRICT 1 • 248-5220
GARY HANSEN • DISTRICT 2 • 248-5219
TANYA COLLIER • DISTRICT 3 • 248-5217
SHARRON KELLEY • DISTRICT 4 • 248-5213

AGENDA

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

FOR THE WEEK OF

OCTOBER 30, 1995 - NOVEMBER 3, 1995

*Thursday Meetings of the Multnomah County Board of Commissioners are *cablecast* live and taped and can be seen by Cable subscribers in Multnomah County at the following times:*

Thursday, 9:30 AM, (LIVE) Channel 30
Friday, 10:00 PM, Channel 30
Sunday, 1:00 PM, Channel 30

Produced through Multnomah Community Television

INDIVIDUALS WITH DISABILITIES MAY CALL THE OFFICE OF THE BOARD CLERK AT 248-3277 OR 248-5222, OR MULTNOMAH COUNTY TDD PHONE 248-5040, FOR INFORMATION ON AVAILABLE SERVICES AND ACCESSIBILITY.

AN EQUAL OPPORTUNITY EMPLOYER

Tuesday, October 31, 1995 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BENCHMARK FORUM WORK SESSION

WS-1 *Elder Abuse: Existing Situation and County's Strategy and Priorities. Presented by Betty Glantz and Others. (Continued from October 12, 1995). 1 HOUR REQUESTED.*

WS-2 *Domestic Violence: The County's Role and Strategic Priorities. Presented by Chiquita Rollins and Others. 1.5 HOURS REQUESTED.*

Tuesday, October 31, 1995 - 1:30 PM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

R-1 *Request for Board Determination on Whether to (1) Hold a Hearing to Accept Evidence or Argument or (2) Decide the Appeal on the Record Already Created Regarding the Robert W. Burnell Appeal of a Hearings Officer Decision on an Adult Care Home Sanction*

P-2 *MC 2-95 Report Hearings Officer Decision Regarding Western States Development Corp. Appeal of Administrative Denial of Zoning Clearance on Three Building Permit Applications; Request for Recognition that Applicant Demonstrated a Vested Right to Complete and Market Lots in the SKYLINE RIDGE SUBDIVISION and the Right to Represent to Prospective Buyers that a Single Family Residence May be Constructed on Each Lot*

Thursday, November 2, 1995 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

CONSENT CALENDAR

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-1 *ORDER Authorizing Designee of Mental Health Program Director to Direct a Peace Officer to Take an Allegedly Mentally Ill Person into Custody with Probable Cause*

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-2 *ORDER Authorizing Execution of Deed D961264 Upon Complete Performance of a Contract to CHRISTOPHER & JONI FERYN*

C-3 *ORDER Authorizing Execution of Deed D961265 Upon Complete Performance of a Contract to CHRISTOPHER & JONI FERYN*

C-4 *ORDER Authorizing Execution of Deed D961266 Upon Complete Performance of a Contract to TERRY L. JACOB*

DEPARTMENT OF JUVENILE JUSTICE SERVICES

C-5 *Intergovernmental Revenue Agreement 700196 with Portland Parks and Recreation, Providing Weekly Restitution Program "PAYBACK" for Adjudicated and Diverted Youth*

SHERIFF'S OFFICE

C-6 *Dispenser Class A Liquor License Renewal for MULTNOMAH FALLS LODGE, S/S SCENIC HWY & COLUMBIA GORGE, BRIDAL VEIL*

C-7 *Dispenser Class A Liquor License Change of Ownership for ROYAL CHINOOK INN, 2609 NE CORBETT HILL ROAD, CORBETT*

C-8 *Dispenser Class A Liquor License Renewal for TIPPY CANOE INN, 28242 CROWN POINT HWY, TROUTDALE*

C-9 *Package Store Liquor License Renewal for FRED'S MARINA, 12800 NW MARINA WAY, PORTLAND*

C-10 *Package Store Liquor License Renewal for LARSON'S MARINA, 14444 NW LAARSON ROAD, PORTLAND*

C-11 *Package Store Liquor License Renewal for PLAINVIEW GROCERY, 11800 NW CORNELIUS PASS ROAD, PORTLAND*

C-12 *Package Store Liquor License Renewal for WEECE'S MARKET, 7310 SE PLEASANT HOME ROAD, GRESHAM*

C-13 *Retail Malt Beverage Liquor License Renewal for HAGAR'S AT VIKING PARK, 29311 STARK STREET, TROUTDALE*

C-14 *Retail Malt Beverage Liquor License Renewal for PLEASANT HOME SALOON, 31637 SE DODGE PARK BLVD, GRESHAM*

REGULAR AGENDA

PUBLIC COMMENT

R-1 *Opportunity for Public Comment on Non-Agenda Matters. Testimony Limited to Three Minutes Per Person.*

NON-DEPARTMENTAL

R-2 *PROCLAMATION Proclaiming the Week of November 6 - 12, 1995 COMMUNITY MEDIA WEEK*

R-3 *First Reading of an ORDINANCE Establishing a Local Public Safety Coordinating Council as Required by State Law, and Substituting the Coordinating Council for Certain Other Advisory Entities*

DEPARTMENT OF COMMUNITY CORRECTIONS

R-4 *Recommendation to Arm a Unit Supervising Offenders with a High Potential for Violence (Continued from October 26, 1995)*

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-5 *ORDER Authorizing Sale of Tax Foreclosed Property to the City of Portland, Portland Development Commission and Authorizing Chair to Execute Deed D961262 (4316 NE Garfield Avenue) (Continued from October 26, 1995)*

R-6 *Intergovernmental Agreement 300786 with Metro, Stipulating Conditions for County as Recipient of Local Share Component of the Open Spaces Bond Measure Approved by Voters for Metro*

MEETING DATE: October 31, 1995

AGENDA NO: R-1

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Appeal in the Matter of the Disapproval of Resident Manager Application for Robert W. Burnell Adult Care Home

BOARD BRIEFING: DATE REQUESTED:

AMOUNT OF TIME NEEDED:

REGULAR MEETING: DATE REQUESTED: Tuesday, October 31, 1995

AMOUNT OF TIME NEEDED: 1:30 pm 10 minutes

DEPARTMENT: Non-Departmental DIVISION: Chair Beverly Stein

CONTACT: City Attorney Pete Kasting TELEPHONE #: 823-4047
BLDG/ROOM #: 131/315

PERSON(S) MAKING PRESENTATION: Pete Kasting - Appellant Possibly

ACTION REQUESTED:

[ ] INFORMATIONAL ONLY [ ] POLICY DIRECTION [ ] APPROVAL [x] OTHER

SUMMARY (Statement of rationale for action requested, personnel and fiscal/budgetary impacts, if applicable):

Request for Board Determination on Whether to (1) Hold a Hearing to Accept Evidence or Argument or (2) Decide the Appeal on the Record Already Created (COPIED HEREIN) Regarding the Robert W. Burnell Appeal of a Hearings Officer Decision on an Adult Care Home Sanction

SIGNATURES REQUIRED:

ELECTED OFFICIAL: Beverly Stein

(OR)
DEPARTMENT MANAGER:

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

Any Questions: Call the Office of the Board Clerk 248-3277 or 248-5222

CITY OF
PORTLAND, OREGON
OFFICE OF CITY ATTORNEY

Jeffrey L. Rogers, City Attorney
1220 S.W. 5th Avenue
Portland, Oregon 97204
(503) 823-4047

October 19, 1995

INTEROFFICE MEMORANDUM

TO: Deb Bogstad, Clerk
Multnomah County Board of Commissioners

FROM: Peter Kasting
Senior Deputy City Attorney

SUBJ: Appeal of Robert Burnell from Hearings Officer Decision on an Adult Care Home License, Hearing No. 153070

At its meeting on October 31, 1995, the Board needs to decide whether it wants to (1) hold a hearing to accept evidence or argument on this appeal or (2) decide this appeal on the record that has already been created. MCC section 8.90.090 (J) and section 890-90-450 of the Administrative Rules for Licensure of Adult Care Homes give the Board discretion to follow either course.

The meeting on October 31 is not intended to address the merits of the appeal. It is only to decide whether the Board wants to receive additional evidence or argument in this matter, and to schedule further steps in the appeal.

I will be attending the meeting on the 31st. Mr. Burnell and representatives of the Adult Care Home Program might attend this meeting but are not required to attend. If they do attend and you want to hear from them on whether additional evidence or argument should be received (and on that question only), I would suggest giving each side three minutes to make a statement.

c: Robert Burnell, Pioneer Care Homes
Katie Gaetjens, Assistant County Counsel

BEFORE THE BOARD OF COUNTY COMMISSIONERS

MULTNOMAH COUNTY

In the Matter of the Disapproval of Resident Manager Application for Burnell Adult Care Home

City Hearings Office No. 1530700

REBUTTAL TO APPELLANT'S EXCEPTIONS

Following a hearing, Hearings Officer Shatzer upheld the determination of the Manager of the Multnomah County Adult Care Home Program, Department of Aging Services (Department), denying appellant's application for approval of Ms. Phyllis Jenkins as resident manager of applicant's adult care home. He sustained the Manager's findings that Ms. Jenkins had been convicted of the offense of driving under the influence of intoxicants on March 7, 1994. He also upheld the Manager's determination that driving under the influence of intoxicants was an offense involving "alcohol abuse" under MCAR 890-020-230(c) and held that the Manager's denial of the application was therefore authorized by MCAR 890-020-230(a). (Copy of September 26, 1995 order attached). On October 13, 1995 appellant filed exceptions to the order. (Copy attached).

REBUTTAL TO EXCEPTIONS

Appellant raises three exceptions to the decision. He asserts that the resident manager applicant, Ms. Perkins, has changed her employment and lifestyle since her last Driving Under the Influence

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

of Intoxicants (DUII) conviction, that no one who has observed her care of residents in the home has seen signs of alcohol abuse, and that he has no concerns about her care of residents. Each of these exceptions is in fact a challenge to the fairness of the rule. There is no dispute that applicant was convicted of DUII offenses.

To understand the appeal, it is essential to understand the rule at issue. MCAR 890-020-230(a) provides that "persons who have been convicted of one or more crimes which are substantially related to the qualifications, functions, or duties of...a manager...shall be prohibited from operating, working in, or being in an Adult Care Home on a regular basis." MCAR 890-020-230(c) defines related crimes to include "offense involving . . .alcohol abuse." MCAR 890-020-230(j) permits the Director to consider approving applicants convicted of the "related" crimes only if ten years have elapsed since the conviction. Pursuant to this scheme, Ms. Jenkins is clearly disqualified from serving as a resident care manager at this time, because she was convicted of a related offense in March, 1994. Consequently, the Board is being asked to consider not whether the rule was properly applied, but whether the rule leads to an unfair result.

1. Necessity for Rule. The Department has determined that a history of alcohol abuse, as documented by a conviction or convictions for alcohol-related offenses, is inconsistent with the provision of safe care to vulnerable elderly and disabled residents in adult care homes. In this case, Ms. Jenkins was denied approval to be a resident manager in the care home based on her DUII

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

convictions. As the hearing record indicates, Ms. Jenkins had had two convictions over six years for DUII offenses, and had completed a second diversion program only a month before the current application. (See Transcript at 9 - 11).

As resident manager, Ms Jenkins would live in the home for 12 hour shifts. Unlike care providers in hospitals or nursing homes, she would have no on-site supervision. She would be the only caretaker for five elderly or disabled adults. Only those individuals or their family members could observe her behavior if there were alcohol or drug use. Residents and family members might be poor observers, have only casual contact, or be very hesitant to report problems.

Although some of Ms. Perkins responsibilities would be fairly routine, she could also be called upon to make emergency decisions in situations such as fire or medical crises. A sober person, capable of exercising good judgment, is critical at such moments. Consequently, the Department has determined by rule to permit only individuals without a history of alcohol abuse related offenses to serve in this position. Driving while under the influence demonstrates both a history of alcohol consumption and the exercise of poor judgment. Because past behavior is a good predictor of future behavior, the Department is reluctant to approve Ms. Jenkins as Resident Manager.

The Department also needs a consistent, clearly understood rule on this issue to assure equal treatment from case to case. Appellant in effect argues that the rule is too harsh as applied to

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

Ms. Jenkins because she has undergone a change. While it is true that some alcohol abusers stop drinking permanently, it is also true that many try numerous times to quit drinking without permanent success. The Department has neither the manpower nor the expertise to analyze each such situation separately and to determine who will and who will not return to drinking. Experts in the field find this determination difficult. Such an ad hoc review would also result in inconsistent determinations from case to case. Consequently, the Department has elected to implement a rule that provides maximum protection for the elderly and disabled clients it is mandated to protect.[1]

DUII convictions are fairly common among applicants wishing to become Adult Care Home operators, Resident Manager and/or care givers. Granting an exception for Ms. Jenkins would set a precedent for other applicants with DUII convictions. While Ms. Jenkins might never drink again and be an exemplary resident manager, it can easily be predicted that other applicants with DUII convictions will not remain sober and perform adequately. Granting an exception opens the door for these applicants as well.

2. Exceptions to the Rule. Implicit in appellant's argument is the request that an exception be granted in this case. As noted above, MCAR 890-020-230(j) does not permit approval of individuals

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[1] In his September, 1994 audit of the adult care home program, the Multnomah County Auditor found that the Department made inconsistent criminal history decisions, and recommended more careful application of existing rules. In particular, he faulted the Department for failing to have disapproved an adult care home operator's boyfriend to be in the care home when it knew he had had two DUII convictions in ten years.

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

to work in the adult care home unless ten years have elapsed since the conviction. Given the critical importance of a resident manager's ability to make good judgments in crisis situations, the Department believes an extended waiting period between a conviction and approval as a resident manager is necessary.

Nonetheless, the issue of a two year minimum period of sobriety was discussed at both the informal conference and the hearing. The Department indicated this is the minimum period of sobriety required of drug and alcohol counselors who are under daily supervision under the Oregon Administrative Rules. For a resident manager who works without supervision, a longer period would be essential.

While an exception is not permitted by MCAR 890-020-230(j), the Director of the Department is able to grant a variance or exception to any adult care home rule, including manager standards, under 890-050-210. However, because the operator has asked for immediate approval, with no intervening period of sobriety past applicant's completion of her second diversion in July, 1995, the Department believes that adherence to the rule specific to criminal convictions, requiring a longer intervening period, is appropriate in this case.

CONCLUSION

The issue before the Board is whether the Department correctly applied its rule governing resident manager applicants who have been convicted of offenses involving alcohol abuse. The Hearings

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

Officer and the record indicate that rule was properly applied. There is no dispute concerning the facts in the case.

Appellant's exceptions in effect argue that the rule should not be applied to this particular resident manager applicant because she is fully recovered. The Department has neither the manpower nor the ability to assess the facts underlying each criminal conviction. It must be able to apply its rules consistently. If an exception is granted in this case, an increasing number of applications and appeals from people with DUIIs can be anticipated. Consequently, the Department asks that the Board affirm the Hearing Officer's Order on the record.

DATED this 27 day of October, 1995.

Respectfully submitted,

LAURENCE KRESSEL, COUNTY COUNSEL
FOR MULTNOMAH COUNTY, OREGON

By Katie Gaetjens
Katie Gaetjens, OSB #88210
Assistant County Counsel
Of Attorneys for Department of Aging Services

F:\DATA\COUNSEL\WPDATA\EIGHTEEN\BURNELLA.MEM

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
Portland, Oregon 97207-0849
(503) 248-3138

CITY OF

PORTLAND, OREGON

HEARINGS OFFICE

1120 S.W. 5th Avenue, Room 1017
Portland, Oregon 97204-1960
Elizabeth A. Normand, Land Use Hearings Officer
(503) 823-7719
William W. Shatzer, Code Hearings Officer
(503) 823-7307
FAX (503) 823-4347

HEARINGS OFFICER'S DETERMINATION AND ORDER

APPEAL OF ROBERT W. BURNELL

HEARING NO. 153070

DATE OF HEARING: September 22, 1995

APPEARANCES:

Ms. Mary Fassell for Multnomah County

Mr. Robert W. Burnell, appellant

HEARINGS OFFICER: Mr. William W. Shatzer

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

This is an appeal from a determination by the Multnomah County Adult Care Home Program denying Mr. Burnell's application to have Phyllis Jenkins certified as a resident manager for Mr. Burnell's adult care facility.

MCAR 890-020-230(a) provides, "Persons who have been convicted of one or more crimes which are substantially related to the qualifications, functions, or duties of ... a manager ... shall be prohibited from operating, working in, or being in an Adult Care Home on a regular basis." MCAR 890-020-230(c) provides, "Such related crimes include ... offenses involving ... alcohol abuse...." After determining that Ms. Jenkins had been convicted of the offense of driving under the influence of intoxicants on March 7, 1994, the Adult Care Program found that this offense was, indeed, an offense involving alcohol abuse and denied Mr. Burnell's application to approve Ms. Jenkins as a resident manger under the above-quoted provisions of MCAR 890-020-230. This appeal followed.

The facts in this proceeding are undisputed. Ms. Jenkins does not dispute the fact of her DUII conviction. Nor does there seem to be any dispute that the offense of DUII is an offense involving "alcohol abuse".

Under these facts, the hearings officer's powers are really quite limited. It is not within the proper exercise of my functions to seek to substitute my judgment for that of the Director nor to second-guess the Director's determinations simply because I might have reached a different decision. Rather, it is only my

function to ensure that any determinations reached by the Director are authorized by law and are neither arbitrary nor capricious. In view of the clear and mandatory language of MCAR 890-020-230(a), which mandates that persons convicted of "crimes which are substantially related ... **shall** be prohibited" from working in an Adult Care Home, and the language of MCAR 890-020-230(a), which mandates that offenses involving alcohol abuse, such as DUII, are to be considered "related crimes", clearly the Director's determination was authorized by law and was neither arbitrary nor capricious.

Accordingly, the Director's determination must be sustained.

ORDER AND DETERMINATION:

1. The determination of the Multnomah County Adult Care Program dated July 26, 1995, denying the appellant Burnell's application for certification of Phyllis Jenkins as a resident manager is SUSTAINED.

2. This order and determination has been mailed to the parties on September 26, 1995 and shall become final on October 16, 1995, unless written exceptions are file with the Board of County Commissioners prior to such date.

Dated: 9-26-95

Code Hearings Officer

WWS:db

#153070

Robert W. Burnell
Pioneer Care Homes
P.O. Box 892
Sherwood, OR 97140
(503) 590-5202
October 11, 1995

Board Clerk
Multnomah County Board of Commissiioners
1120 SW 5th Avenue
Portland, OR 97204

To Whom It May Concern:

This letter is written exception to the hearings officer's determination and order in the appeal of Robert W. Burnell, Hearing No. 153070, done by Hearings Officer William W. Shatzer. Ms. Jenkins has changed her employment field and life style since the DUII, indicating good judgement and a desire to learn from her past mistakes. Resident family members, co-workers and employers see her in the home daily and have seen no sign of any use of alcohol, let alone abuse of it. I am responsible for the well -being of the five residents of our adult foster home, and I have no fear of leaving them in the hands of Ms. Jenkins. We request that the Board of Commissioners reverse this decision. Thank you.

Sincerely,

Robert W. Burnell

RECEIVED
OCT 16 1995
HEARINGS OFFICE

BOARD OF COUNTY COMMISSIONERS
1995 OCT 13 PM 2:31
MULTNOMAH COUNTY
OREGON

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 1995, I served the within document by depositing in the United States Post Office at Portland, Oregon, a full, true, and correct copy thereof, by first class mail, with postage prepaid, addressed to the following:

Peter Kastings
City Attorney's Office
Room 315, City Hall
1220 SW Fifth Avenue
Portland, OR 97204
Attorney for Board of
County Commissioners

Robert Burnell
Pioneer Care Homes
P.O. Box 892
Sherwood, OR 97140

Katie Gaetjens

MULTNOMAH COUNTY COUNSEL
1120 S.W. Fifth Avenue, Suite 1530
P.O. Box 849
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(503) 248-3138

CITY OF

PORTLAND, OREGON

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1120 S.W. 5th Avenue, Room 1017
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Elizabeth A. Normand, Land Use Hearings Officer
(503) 823-7719
William W. Shatzer, Code Hearings Officer
(503) 823-7307
FAX (503) 823-4347

I certify that attached hereto is the true and complete record of the appeal of Robert W. Burnell, during the period beginning August 31, 1995, and ending October 20, 1995.

Photocopies of the following documents:
Historical Log prepared October 20, 1995.
Appeal No. 153070, comprised of --
Undated letter Robert W. Burnell to Mary Fassell (received in her office August 17, 1995),
July 26, 1995, letter Kathy Wiseman to Burnell, and
August, 1995, letter Fassell to William W. Shatzer.
Notification List prepared August 31, 1995.
Notice of Hearing for September 22, 1995, hearing, mailed to the parties September 1, 1995.
Hearing Record prepared at the September 22, 1995, hearing.
Hearings Officer's Determination and Order mailed to the parties September 26, 1995.
Undated letter to Board of County Commissioners (received in their office October 13, 1995).

Duplicate of the tape record prepared at the September 22, 1995, hearing.

Dated: October 20, 1995

Darla J. Broberg
Hearings Clerk

On October 20, 1995, Darla Broberg appeared before me and did acknowledge that she did execute the foregoing certification in her official capacity as Code Hearings Secretary.

Dated: October 20, 1995

Deborah Lynn Bogstad
Notary Public
My commission expires 6/27/97.

OFFICIAL SEAL
DEBORAH LYNN BOGSTAD
NOTARY PUBLIC - OREGON
COMMISSION NO.024820
MY COMMISSION EXPIRES JUNE 27, 1997

Hearing # 153070

Final Historical Log

Date Prepared: 10/20/95 Time Prepared: 3:10:14 PM

Date Filed	**8/31/95**	Tapes	**YES**
Bureau	**Multnomah County**	City Exhibits	**NO**
Viol. Type	**appeal - adult care home**	Resp. Exhibits	**NO**
Date Closed	**10/20/95**	CHO Exhibits	**NO**
Status	**sustained**	Discussion	

Tapes and exhibits may be purged on or **5/17/96**

Hearings

Date	Time	Purpose	Disposition
9/22/95	9:00:00 AM		Hearing held. Appearances: Phyllis Jenkins and Robert Burnell; Fassell.

Civil Penalties, Liens, Bureau Fees

Control#	DatePosted	Type of fine/fee	Dates: Imposed / Paid / Liened / Cancelled	Amounts:	Center Code

Contacts

Date	Key	Comments
8/31/95	appeal tel	Appeal of adult care home sanction filed by Robert W. Burnell via Mary Fassell, Mult. Co. Left message for Mary Fassell of possible dates of 9/14, 15, or 22. She later left message saying all OK for her. DB
9/1/95	notm	Notices mailed. DB
9/1/95	tel hrgs	Per call from Fassell, Burnell told her 9/22 would be best for him. OK with WS. Hearing so scheduled (for 9:00 a.m.). DB
9/25/95	misc	Per WS, 2.5 hours spent on this case. DB
9/26/95	ordm	Order mailed. DB
10/16/95	docr	Deb Bogstad, Mult. Co. Board Clerks' Office, brought in copy of appeal letter from Burnell. They will need copy of our files. DB
10/20/95	closed	Case closed. DB
10/20/95	misc	Prepared copy of our record with tape duplicate and copy certificate for Board Clerk's Office. DB

4/28/93 db

153070

Robert W. Burnell
Pioneer Care Homes
P.O. Box 892
Sherwood, OR 97140
(503) 590-5202
August 15, 1995

Kathy Wiseman
Adult Care Home Program
421 SW 5th, Room 405
Portland, OR 97204

Dear Ms Wiseman:

This is in reply to your letter of July 26,1995, concerning Phyllis Jenkins, which I received on July 31. We wish to request a hearing since we feel that MS. Jenkins has demonstrated that her past is truly in her past, and that she is on a new path. Washington County has removed one of the arrests from the file since the administrative conference.

Sincerely,

Bob Burnell

Robert W. Burnell

153070

MULTNOMAH COUNTY OREGON

AGING SERVICES DIVISION (503) 248-3646
ADULT CARE HOME PROGRAM (503) 248-3000
421 SW 5TH, ROOM 405
PORTLAND, OR 97204-2221

July 26, 1995

Bob Burnell
10831 Sw 57th Place
Portland, Or 97219

Dear Mr. Burnell,

After Careful consideration and a review of the Adult Foster Home Rules, we have determined that Phyllis Jenkins will be denied as a care giver to live or work in your Adult Care Home.

We understand that this may pose some difficulty in making the transition for the residents so we will allow you some time for the transition to occur, however Ms. Jenkins must be out of the home no later than 8/30/95.

Please be advised that the requirement for hiring caregivers is that you have 15 days as a trial period, and during that time you must submit a criminal record for that person. This process eliminates the problem of residents becoming attached to a caregiver who can not be approved.

You have the right to request a hearing before an independent hearings officer. To do so send a written request stating your reasons for a hearing to: Adult Care home Program, 421 SW 5th room 405, Portland, Or 97204. Your request must be received by this office within 20 days after the day you receive this notice. This office's file on your Adult Care Home would automatically become part of the information available to the hearing officer. If you do not request a hearing in that time, this notice will become final.

Sincerely,

Kathy Wiseman
Kathy Wiseman
Adult Care home Program

MULTNOMAH COUNTY OREGON

AGING SERVICES DIVISION (503) 248-3646
ADULT CARE HOME PROGRAM (503) 248-3000
FAX: (503) 306-5722
421 SW 5TH, ROOM 405
PORTLAND, OR 97204-2221

August 29, 1995

RECEIVED
AUG 31 1995
HEARINGS OFFICE

Mr. William W. Shatzer
Hearings Officer
Portland Building
1120 S.W. Fifth Avenue, Room 1017
Portland, Oregon 97204
B106/1017

Dear Mr. Shatzer:

This office has received a request for a hearing from Mr. Robert W. Burnell. The Adult Care Home Program has denied his application to have Ms. Phyllis Jenkins work as a caregiver in his adult care home in Multnomah County, and Mr. Burnell is appealing our decision. Copies of our letter denying Mr. Burnell's request, and his letter requesting a hearing, are enclosed.

As required by Multnomah County Code 8.90.090, and as a designee of the Director, I am designating you as Hearings Officer in this matter and requesting you to set the time and place for the hearing.

Sincerely,

Mary M. Fassell

Mary M. Fassell, Sanctions Specialist
Multnomah County Adult Care Home Program

Enclosures

M 198
MULTNOMAH COUNTY OREGON
AGING SERVICES DIVISION
ADULT CARE HOME PROGRAM
421 S.W. 5TH, RM. 405
PORTLAND, OREGON 97204-2221

PORTLAND
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RECEIVED
AUG 31 1995
HEARINGS OFFICE

MR WILLIAM W SHATZER
HEARINGS OFFICER
PORTLAND BUILDING
1120 SW 5TH AVE, ROOM 1017
PORTLAND OR 97204

Change made: Creating mailing list for appeal case.

Hearing # 153070
Notification List
Date Prepared: 8/31/95

Respondent:

Robert W. Burnell
Pioneer Care Homes
P.O. Box 892
Sherwood, OR 97140
(503) 590-5202

City Representative:

Mary Fassell
Mult. Co. Adult Care Home Program
421 S.W. 5th Avenue, #405
Portland, OR 97204-2221
248-3000, x 2624

CITY OF PORTLAND -- Code Hearings Office
1120 S.W. 5th Avenue, Room 1017, Portland, OR 97204
(503) 823-7307 / FAX (503) 823-4347

NOTICE OF HEARING -- Appeal Hearing # 153070

Date Mailed: Fri, Sep 1, 1995

Multnomah County

vs.

Robert W. Burnell
Respondent(s) / Appellant(s)

Type of violation or nature of determination:	appeal - adult care home facility
Date of exclusion order or other determination:	Wednesday, July 26, 1995
Complaint or appeal was filed in the Code Hearings Office on:	Thursday, August 31, 1995
PPB case # (if appropriate):	
City / County representative:	Mary Fassell
Property:	

You are notified that a hearing will be held in the above proceeding on:

Date: **Friday, September 22, 1995** Time: **9:00:00 AM**

Place: **Meeting Room A, second floor of the Portland Building, 1120 S.W. 5th Avenue, Portland, Oregon**

Purpose: **New case**

ALL REQUESTS FOR POSTPONEMENTS AND CONTINUANCES MUST BE IN WRITING AND FILED WITH THE CODE HEARINGS OFFICE AT THE ADDRESS AT THE TOP OF THIS NOTICE.

This notice has been mailed to the following parties :

Robert W. Burnell Pioneer Care Homes
P.O. Box 892 Sherwood OR 97140

Mary Fassell Mult. Co. Adult Care Home Program
421 S.W. 5th Avenue, #405 Portland OR 97204-2221

Code Hearings Office files

If you have any questions concerning this proceeding, please call (503) 823-7307 for further information.

If you need a sign language interpreter or an FM loop amplifier for this hearing, you may contact Darla Broberg or Ruth York at the Hearings Office, 823-7307, or the City Information TDD, 823-6868.

Please call during business hours AT LEAST TWO BUSINESS DAYS PRIOR to the hearing so arrangements can be made.

CITY OF PORTLAND -- CODE HEARINGS OFFICE

Hearing No. 153070

Hearings Officer: William W. Shatzer

HEARING RECORD

Date	Tape #	Counter Reading Beg.	End	Date	Tape #	Counter Reading Beg	End
9/22/95	1	16	2607				

Exh. No.	Date	Offered by	Rc-Received Rj-Rejected Rs-Reserved	Description

CITY OF

PORTLAND, OREGON

HEARINGS OFFICE

1120 S.W. 5th Avenue, Room 1017
Portland, Oregon 97204-1960
Elizabeth A. Normand, Land Use Hearings Officer
(503) 823-7719
William W. Shatzer, Code Hearings Officer
(503) 823-7307
FAX (503) 823-4347

HEARINGS OFFICER'S DETERMINATION AND ORDER

APPEAL OF ROBERT W. BURNELL

HEARING NO. 153070

DATE OF HEARING: September 22, 1995

APPEARANCES:

Ms. Mary Fassell for Multnomah County

Mr. Robert W. Burnell, appellant

HEARINGS OFFICER: Mr. William W. Shatzer

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

This is an appeal from a determination by the Multnomah County Adult Care Home Program denying Mr. Burnell's application to have Phyllis Jenkins certified as a resident manager for Mr. Burnell's adult care facility.

MCAR 890-020-230(a) provides, "Persons who have been convicted of one or more crimes which are substantially related to the qualifications, functions, or duties of ... a manager ... shall be prohibited from operating, working in, or being in an Adult Care Home on a regular basis." MCAR 890-020-230(c) provides, "Such related crimes include ... offenses involving ... alcohol abuse...." After determining that Ms. Jenkins had been convicted of the offense of driving under the influence of intoxicants on March 7, 1994, the Adult Care Program found that this offense was, indeed, an offense involving alcohol abuse and denied Mr. Burnell's application to approve Ms. Jenkins as a resident manger under the above-quoted provisions of MCAR 890-020-230. This appeal followed.

The facts in this proceeding are undisputed. Ms. Jenkins does not dispute the fact of her DUII conviction. Nor does there seem to be any dispute that the offense of DUII is an offense involving "alcohol abuse".

Under these facts, the hearings officer's powers are really quite limited. It is not within the proper exercise of my functions to seek to substitute my judgment for that of the Director nor to second-guess the Director's determinations simply because I might have reached a different decision. Rather, it is only my

function to ensure that any determinations reached by the Director are authorized by law and are neither arbitrary nor capricious. In view of the clear and mandatory language of MCAR 890-020-230(a), which mandates that persons convicted of "crimes which are substantially related ... **shall** be prohibited" from working in an Adult Care Home, and the language of MCAR 890-020-230(a), which mandates that offenses involving alcohol abuse, such as DUII, are to be considered "related crimes", clearly the Director's determination was authorized by law and was neither arbitrary nor capricious.

Accordingly, the Director's determination must be sustained.

ORDER AND DETERMINATION:

1. The determination of the Multnomah County Adult Care Program dated July 26, 1995, denying the appellant Burnell's application for certification of Phyllis Jenkins as a resident manager is SUSTAINED.

2. This order and determination has been mailed to the parties on September 26, 1995 and shall become final on October 16, 1995, unless written exceptions are file with the Board of County Commissioners prior to such date.

Dated: 9-26-95 Wilson W Sloop
Code Hearings Officer

WWS:db

#153070

Robert W. Burnell
Pioneer Care Homes
P.O. Box 892
Sherwood, OR 97140
(503) 590-5202
October 11, 1995

Board Clerk
Multnomah County Board of Commissiioners
1120 SW 5th Avenue
Portland, OR 97204

To Whom It May Concern:

This letter is written exception to the hearings officer's determination and order in the appeal of Robert W. Burnell, Hearing No. 153070, done by Hearings Officer William W. Shatzer. Ms. Jenkins has changed her employment field and life style since the DUII, indicating good judgement and a desire to learn from her past mistakes. Resident family members, co-workers and employers see her in the home daily and have seen no sign of any use of alcohol, let alone abuse of it. I am responsible for the well -being of the five residents of our adult foster home, and I have no fear of leaving them in the hands of Ms. Jenkins. We request that the Board of Commissioners reverse this decision. Thank you.

Sincerely,

Robert W. Burnell

Robert W. Burnell
Pioneer Care Homes
P.O. Box 892
Sherwood, OR 97140
(503) 590-5202
October 11, 1995

Board Clerk
Multnomah County Board of Commissiioners
1120 SW 5th Avenue
Portland, OR 97204

To Whom It May Concern:

This letter is written exception to the hearings officer's determination and order in the appeal of Robert W. Burnell, Hearing No. 153070, done by Hearings Officer William W. Shatzer. Ms. Jenkins has changed her employment field and life style since the DUII, indicating good judgement and a desire to learn from her past mistakes. Resident family members, co-workers and employers see her in the home daily and have seen no sign of any use of alcohol, let alone abuse of it. I am responsible for the well -being of the five residents of our adult foster home, and I have no fear of leaving them in the hands of Ms. Jenkins. We request that the Board of Commissioners reverse this decision. Thank you.

Sincerely,

Robert W. Burnell

☆ cc: City Hearings Office 10/10/95
cc: Katie Gaetjens } 10/18/95
Mary Fassell
cc: Pete Kasting 10/19/95
☆10/19/95 TMR Burnell notified of 10/31/95 Hearing/Consideration

HEARING BEFORE THE MULTNOMAH COUNTY ADULT CARE PROGRAM

Portland, Oregon

September 22, 1995

BE IT REMEMBERED, that the following is a transcript of the hearing held before the City Hearings Officer regarding the appeal of Robert W. Burnell resulting from a determination of the Multnomah County Adult Care Program denying application for Phyllis Jenkins, an employee of Mr. Burnell. Said hearing took place on September 22, 1995, was recorded on audio cassette tape, and thereafter transcribed by Vicki Metz, an Official Court Transcriber for the State of Oregon.

APPEARANCES

Ms. Mary Fassell,
Attorney at Law,
Appearing on behalf of the Multnomah County Adult Care Program;

Mr. Robert Burnell;

Ms. Phyllis Jenkins.

P R O C E E D I N G S

September 22, 1995

HEARINGS OFFICER: All right, this is the time set for hearing in the appeal of Robert W. Burnell, 153.070. This is an appeal from a determination of the Multnomah County Adult Care Home Program denying an application for an employee of Mr. Burnell's, a Phyllis Jenkins.

Present representing Multnomah County is Ms. Mary Fassell; the Appellate Mr. Burnell is present as well as Ms. Jenkins.

Before we get started I'll just identify a couple of documents and make them formally a part of the record. First is a document -- well, it's undated. It's dated as received by Multnomah County as August 17th, 1995, and it's from Mr. Burnell to the Multnomah County Adult Care Home Program; that is the appeal request in this proceeding. Attached to and part of that letter is a letter dated July 26, 1995 from the Multnomah County Adult Care Home Program to Mr. Burnell; that is the administrative determination being appealed from in this proceeding. And finally, a letter to myself from the Multnomah County Adult Care Home Program dated August 29th, 1995, which is the letter authorizing and appointing me to act as hearings officer in this proceeding.

For procedures this morning, folks, I'll give both sides a chance to make a brief opening statement if they desire, the County first and then you, Mr. Burnell. You're not required to make an opening statement, but if you desire to do so you'll have an opportunity to do that. After that I'll allow Ms. Fassell to present any evidence or testimony the County may have in this matter and you, of course, will have a chance to cross-examine her or any of her witnesses about their testimony. When the County is done I'll give you an opportunity to present any testimony or witnesses you may desire. Of course, Ms. Fassell will have an opportunity to cross-examine you or any of your witnesses as well if she so desires. So unless we have any procedural questions this morning we can -- all right.

All right, Ms. Fassell, do you have anything by way of opening remarks?

MS. FASSELL: No, we don't.

HEARINGS OFFICER: Okay. Mr. Burnell, anything by way of opening remarks?

MR. BURNELL: No.

HEARINGS OFFICER: Okay. Ms. Fassell, will you be presenting testimony?

MS. FASSELL: I'll be presenting testimony.

HEARINGS OFFICER: All right. Put you under oath, please.

Do you solemnly swear or affirm the testimony you're about to give in this proceeding will be the truth, the whole truth and nothing but the truth?

MS. FASSELL: Yes, I do.

HEARINGS OFFICER: All right.

MS. FASSELL: Okay. I'm the sanction specialist of the Adult Care Home Program, so as such I help make decisions regarding whether persons who have criminal records are allowed to work in adult care homes.

And Mr. Burnell is a licensed operator under the Adult Care Home Program for Multnomah County to operate his adult care home in Multnomah County. And he has submitted to Multnomah County Program --- Adult Care Program a request -- an authorization for a criminal record check for a resident manager, Phyllis Jenkins, under the requirements of the rules for adult care homes.

And Mrs. Jenkins' adult -- criminal record revealed that she has an arrest for Driving Under the Influence of Intoxicants for December 11th, '93; she was arrested for Driving Under the Influence of Intoxicants on November 16th of '93, leading to conviction on March 7th, '94 for Driving Under the Influence of Intoxicants; and she was arrested for Driving Under the Influence of Intoxicants on January 27th, '89 with adjudication withheld because of diversion. And she was also arrested for Arson of the First

Degree on October 7th of '82.

Based on her criminal record the licensing agent for the home, Kathy Wiseman denied Ms. Jenkins the right to work as a resident manager in the home and Mr. Burnell requested an administrative conference. And we had an administrative conference on January -- I mean July 21st in our offices with Ms. Jenkins and Mr. Burnell and our program manager, as required under Section I of the Criminal History Section here, 020.230.

And at that administrative conference Ms. Jenkins indicated that her December '93 arrest had been dismissed. It was an arrest because she refused to take a breath test, but the charges were later dismissed. She indicated for the November '93 arrest she had just completed diversion for that as of June '95.

Again, the Adult Care Home Program denied her permission to work in the home, as per that letter you already mentioned, and the denial is based on the Multnomah County Administrative Rule 020.230 indicating that people who have been convicted of a crime listed, and one of those is offenses involving narcotics, alcohol abuse and dangerous drugs are not permitted to live or work in an adult care home program because that -- those crimes are substantially related to qualifications of the caregiver.

And the other reason that we based it on -- the

denial on was that she's had three arrests in the last six years for Driving Under the Influence and twice has gone through diversion and we recommended that she have a clean and sober record for two years because -- before working in an adult care home -- because if a person is driving drunk it's a highly likelihood of them also being under the influence in the home and we can't have -- because -- especially a resident manager is home alone with the residents who are vulnerable, we can't have people abusing alcohol in the home; it's jeopardizing people's safety.

And this is under the Multnomah County Administrative Rule 020.220(b) and (c) which indicates that operators and resident managers have to have good judgment and ability and good personal character as determined by the Department, and we determined that people with this kind of record doesn't reflect a good judgment.

That's all I have to say.

HEARINGS OFFICER: You didn't prepare anything written for me?

MS. FASSELL: No.

HEARINGS OFFICER: Okay.

Mr. Burnell, do you have questions for Ms. Fassell?

MR. BURNELL: I --

HEARINGS OFFICER: Yeah, go ahead.

MR. BURNELL: Just one, I guess, on the -- You said the decision included a person ought to be clean for two years, or she specifically ought to be clean for two years?

MS. FASSELL: That was our recommendation.

MR. BURNELL: Right. Was that from the last conviction or the last arrest or -- or what would that be?

MS. FASSELL: I think we were basing that on from -- since she'd just completed diversion when she came into our office it indicated June of '95 -- June of '95. Okay, since you've completed diversion, we'll recommend two years from now, because we were talking in July of '95.

MR. BURNELL: That's all.

HEARINGS OFFICER: Okay, what are -- Go through those -- I was hoping I was going to have something from you.

MS. FASSELL: I'm sorry.

HEARINGS OFFICER: Do you want to go through those dates again?

MS. FASSELL: Okay.

HEARINGS OFFICER: First there was something back in 1982 -- I assume that didn't form a basis for that decision.

MS. FASSELL: No, it did not. I just included that for the record. So --

HEARINGS OFFICER: Okay.

MS. FASSELL: -- you want me to start from the

last -- the oldest?

HEARINGS OFFICER: I don't care. Whichever way is convenient for you.

MS. FASSELL: Okay. Well, I'd started from the beginning. So the most recent was an arrest in December 11th, '93. That's for DUII.

HEARINGS OFFICER: Okay, that was -- that was 12-11-93?

MS. FASSELL: Yeah.

HEARINGS OFFICER: Okay, and what was the resolution of that one?

MS. FASSELL: And she indicated that -- that -- that had been dismissed.

HEARINGS OFFICER: Dismissed. And you have no in -- no information to the -- to the contrary?

MS. FASSELL: No. It just doesn't show up on her record and --

HEARINGS OFFICER: I beg your pardon?

MS. FASSELL: It -- it doesn't show up on the criminal record printout that the County receives through the State --

HEARINGS OFFICER: This was a voluntary disclosure on her -- her part?

MS. FASSELL: Yes.

HEARINGS OFFICER: Okay. And it was --

ultimately we don't know what happened to it, but --

MS. FASSELL: We don't know.

HEARINGS OFFICER: -- did not result --

MS. FASSELL: But we --

HEARINGS OFFICER: -- did not --

MS. FASSELL: -- but we figure, the County figures that if it's nothing -- if it's -- if it's in '93 and there's nothing showing since then that that's probably true.

HEARINGS OFFICER: Probably is -- is true or -- or -- or no charges were filed or something.

MS. FASSELL: Exactly.

HEARINGS OFFICER: Okay. Okay, that's the most recent one and we'll put an asterisk by that one because that one doesn't count, because we don't know that it actually involved any -- any offense. So, all right.

MS. FASSELL: Well, she indicated to us that she had refused a breath test --

HEARINGS OFFICER: Okay.

MS. FASSELL: -- but that she'd been arrested, but refused a breath test, but later charges have been dismissed.

HEARINGS OFFICER: Okay. And then prior to that --

MS. FASSELL: And then prior to that in November 16th of '93, arrest for DUII.

HEARINGS OFFICER: Okay, and that was the one that --

MS. FASSELL: And a conviction --

HEARINGS OFFICER: That was the one that resulted in -- in a diversion agreement or a conviction?

MS. FASSELL: A conviction of Misdemeanor Driving Under the Influence, conviction dated March 7th, '94, $800 fine, two days in jail, two years probation.

HEARINGS OFFICER: Okay. So that one -- that one has been within the last two years. Okay.

MS. FASSELL: M-hm.

HEARINGS OFFICER: And prior to that we had?

MS. FASSELL: February 27th, '89.

HEARINGS OFFICER: '89. And that was a DUII again?

MS. FASSELL: Yeah.

HEARINGS OFFICER: And that resulted --

MS. FASSELL: And the criminal record indicates that adjudication has been withheld.

HEARINGS OFFICER: And that one resulted in diversion?

MS. FASSELL: Diversion.

HEARINGS OFFICER: And apparently the diversion was -- was successfully completed because the adjudication continues to be withheld --

MS. FASSELL: Exactly. And the date of the criminal record check is June of '95. So as of June of '95 it's still withheld.

HEARINGS OFFICER: Okay. So we've got -- well, do we have a -- do we have -- do we have an indication about whether the -- whether the March 7th '94 conviction -- was that a -- was that a plea or a trial?

MS. FASSELL: It doesn't say. It says conviction, Misdemeanor Driving Under the Influence of Intoxicants, $800 fine, two days jail, two years probation.

HEARINGS OFFICER: Okay. Well, that may be what happened to the -- happened to the November -- or I'm sorry -- the December arrest is it may have been folded up into the March --

MS. FASSELL: Well, it indicates two separate arrests.

HEARINGS OFFICER: Well, I know that, but what I'm saying is, is that --

MS. FASSELL: Oh, I see what you're saying.

HEARINGS OFFICER: -- is that often one charge is dismissed in exchange for the -- exchange for the plea on the other one. And seeing as how the March 7th, 1994 conviction is several months after the arrest it's -- could happen to it there. Okay.

Any further questions for Ms. Fassell? None.

Okay.

Mr. Burnell, are you going to be presenting testimony yourself or --

MR. BURNELL: Yes, sir.

HEARINGS OFFICER: -- or --

MR. BURNELL: And so will Ms. Jenkins.

HEARINGS OFFICER: Ms. Jenkins? Okay. We'll put you both under oath, if I could, please.

Do you both solemnly swear or affirm the testimony you're about to give in this proceeding will be the truth, the whole truth and nothing but the truth?

MR. BURNELL: I do.

MS. JENKINS: I do.

THE COURT: Okay, Mr. Jenkins (sic), go ahead.

MR. BURNELL: Could I start?

MS. JENKINS: Burnell.

HEARINGS OFFICER: Whoever wishes. Yes. However you want to do it.

MR. BURNELL: My wife and I have been in foster care going on six years. And one of the reasons we got into it was we were looking for solutions for my parents. And so we got into it because we weren't completely satisfied with some of the solutions we saw, including foster care. And we've been trying to keep good homes, good foster homes that we would want to put our own parents in. And so we are

interested in the welfare of the elderly who are in these homes, believe me.

I am also active at a state level in trying to promote education and information among caregivers to improve the quality of care throughout the state. And in that position I've had numerous chances to work with both Multnomah and Washington Counties, and to encounter organizations such as Oregon Fair Share and others who are interested in the welfare of the elderly. So I have some grasp of the -- the pressures that the licensor are under to enforce the rules and to not let any bad apples stay in the business or to come into the business.

What I'm afraid of is -- in this case is that we're not getting rid of really a bad apple but we're throwing one of the good apples in there, too. And I've seen a lot of caregivers, and I have confidence in her ability to do it right and not harm the residents. And I will say that because of the ongoing process -- and I've seen her at work for several months. I've talked to relief caregivers who've come in and see her come onto the job from her free time, and see her go off of the job, numerous families, and we have some families who visit every day, and residents, and never heard anything about alcohol or bad behavior. And that's the main reason that I want to go to bat for her here. So we went through the process Ms. Fassell has described.

The arson thing, Phyllis worked on her own to get that removed, talking to people down in Salem and out in Washington County and -- I believe it was Washington County. She can tell you more details about that. So although that was on the record it -- it shouldn't apply anymore.

And then the diversions, I think I have some experience with that, too. I have another caregiver who at the age of about 22 was arrested for a DUII, went through the diversion program, and she also happens to be my daughter, so I know the -- that happened about six years ago -- the pain and cost the person goes through to go through one of those programs. And it worked with my daughter. She was married in August and toasted with sparkling cider rather than champagne; that's how seriously she took it. And so I'm glad that she's had a second chance. And she's, like I say, working as a resident manager in Washington County and has for two years and she did relief before that, and I now she's straight because I see her all the time and, of course she's our daughter.

I think Phyllis is too, so I think it would be a mistake to lose her and I -- I think -- you know, the initial list of charges has really diminished and I think maybe the two years, if that were to be applied, ought to be from the last arrest, which would be almost two years ago. And I -- I would rather that the decision were changed as far as not

being able to use her as a foster care provider. That's all I have.

HEARINGS OFFICER: Ms. Fassell, questions?

MS. FASSELL: No, I don't have any questions.

HEARINGS OFFICER: All right, Ms. Jenkins, you want to give some testimony?

MS. JENKINS: Well, I -- I think I can -- of course it's just my word, but I think I can straighten the -- the questions out about the arrest -- the December arrest that was dismissed. It was dismissed because it was -- there was a question of harassment. And that's the reason I had refused a breathalizer; I had been harassed since my arrest in -- in November. And I talked to the judge about it. There was no trade off; it was just -- this was a question I had and at that time he saw fit just to -- to dismiss the charges and I -- I believe my attorney at the time had also talked to him.

The arson charge was something that I was arrested for on -- they arrested me according to someone else's word at the time and -- and it was a nighttime thing. The next morning they had enough evidence that they -- obviously it wasn't me, and I was released. And that was dismissed; it was not taken off my record, though, until after. I didn't realize it was on there, and then after the hearing -- or the conference we had I found out it was on

there and we took care of it. And it -- it is off the record now.

I haven't drank since 1993 -- since my arrest in 1993. I've been in the adult foster care system for Multnomah and Washington County now for just a little over a year, and I haven't had any problems. I have a lot of support from family members and a lot of the residents. A lot of the residents know what's going on. Most of mine do. And I have a lot of support from them and some of the professional people that come in. Our -- our home health nurse comes once a month and -- and she agrees with me it would be really bad to take me out of the home. I get along really well with the people. I do a good job. I treat them as if they were my own. I treat the home as if it were my home. And I think I'm pretty good at it, too.

HEARINGS OFFICER: Ms. Fassell, any questions?

MS. FASSELL: No.

HEARINGS OFFICER: Ms. Jenkins, why don't you tell me why the -- why the first diversion from '89 didn't -- didn't work and -- and why it's different this time.

MS. JENKINS: Okay. So basically it did work.

I -- I was a bartender and bar manager for many years, and I know better. You know, it was something that I just never did on a regular basis. I just -- it was just against how I felt about being a responsible server and

sending someone out into their car. And it was something I just never did myself. And both arrests were in a very small town, and they have a reputation there. They're right on the ball; they sit right outside the bars and -- and -- and a person knows better. And I -- I definitely knew better. I just --

Without going into detail, the arrest in November of '93 was a setup and -- and it was entrapment which you can't -- you know, there's nothing you can do, and -- and yes, I had been drinking and that's why -- and there was no plea bargaining there. I just -- I -- in front of the judge, I just pled no contest; there was nothing to contest. But I was set up and they were ready for me.

MR. BURNELL: Sir, could I --

HEARINGS OFFICER: Yeah, when Ms. Jenkins is done.

I'm going to -- you know, set up or not, you do have to admit it -- it displays poor judgment and a -- and a degree of irresponsibility on your part to -- to get behind the wheel of a motor vehicle knowing you had too much to drink, whether you're set up or -- or not. Doesn't -- and I think that's what causes Ms. Fassell concern, is that the record -- you know, whether you were caught in a trap or -- or what, but it -- it -- it shows -- it shows poor judgment to get -- it shows poor judgement, at best, to get behind the

wheel of a -- of a motor -- motor vehicle knowing you've had too much to drink. It can also be evidence of an underlying alcohol problem which -- which can be even more serious. But at the worst, assuming you're a social drinker, as opposed to having an alcoholic problem, it does demonstrate poor judgment and irresponsibility.

MS. JENKINS: I agree. I -- I will tell you -- and again, it's not a good excuse; there is no good excuse. But when -- my ex -- my ex-husband had called the police, and I didn't know it, and he's the one that gave me the drinks. And that's okay because I drank -- I mean, he didn't pour them down my throat or anything.

But when I -- I was very unaware that he had called the police. I had just left him that day and he had called me and asked me to come talk to him, so I did. And while I was out of the room he called the police and said I was an unwelcome intruder. They came, they told me I had to leave. So I went outside and I sat on the curb. You know, I -- I -- you know, I knew that they knew that I had been drinking; I told them I had -- had been drinking. But they told me I had to leave, so I kind of sat out on the curb because I didn't want to get in my car, I didn't want to be arrested. And they left, and I thought well, I'll wait a little while and -- and I realized at that .08 and over is considered legally intoxicated. I was a .11. I felt like I

was able to drive, but I knew better than -- than to drive while I was drinking.

It was raining. I sat out there. I wasn't allowed to use the phone to call a cab. And like I said, I waited maybe a half hour and I got in my car and I left, and they were waiting for me. There was only one way out of that complex. And I just -- I did what I thought I had to do.

HEARINGS OFFICER: Okay. Thank you.

Yeah, Mr. Burnell, you had something you wanted to add?

MR. BURNELL: I just wanted to bring out that I think she's tried to change her lifestyle, and gone into a different line of work completely.

HEARINGS OFFICER: Yeah, it's -- it's better not to be a bartender; you're right.

MR. BURNELL: Right.

HEARINGS OFFICER: Ms. Fassell any -- any additional questions for Mr. Burnell or -- or Ms. Jenkins?

MS. FASSELL: No. But I'd like to say something more.

HEARINGS OFFICER: Sure.

MS. FASSELL: The -- the County can't be checking up on each person's story, on each person in the home, and we just don't have the time, eyes and ears to do that. We have to pretty much go by what the record is and what the -- the

rules are.

And I know that we have an experience with a prior provider's boyfriend who had gone through diversion twice, and we allowed him to stay in the home, and the third time he hit and killed somebody. So --

HEARINGS OFFICER: One of your people?

MS. FASSELL: It was an elderly lady, but wasn't one of our people. Not that that makes any difference.

But the point is, he --

HEARINGS OFFICER: Well, right, but --

MS. FASSELL: -- he got behind the wheel of a car and did it a third time, and the third time he ended up with a manslaughter conviction. Now he's in prison.

HEARINGS OFFICER: Yeah, but in -- Sure. But if -- Okay, but he didn't harm any of the -- any of the residents in the home. He -- he would have done that, presumably, whether or not you allowed him permission to be in the home.

MS. FASSELL: Well, it -- it -- but it just indicates that just because people take diversion, we do not see that that is a clean record, and that means that from then on they definitely are no longer going to take any more alcohol. That's why we recommended to her that since her last diversion that she have a clean and sober record for two years and indicate in reality what she's saying in words.

HEARINGS OFFICER: M-hm.

MS. FASSELL: And I will say we have had one complaint of -- it actually happened the same day that we had the administrative conference -- of her being intoxicated in the home and dropping pills -- what was it -- something about dropping pills and smelling of alcohol. And unfortunately all we have done to -- to check that out is go the day we got the complaint, which was the day after the person said they saw this, and at that point she wasn't -- no indications of that.

Due to employee turnover in our office it was -- it got dropped behind the -- between the cracks and nobody has done any report on it; it's still sitting there. So it will probably be an unable-to-substantiate, meaning one person's word against another.

MS. JENKINS: Do I get to know who my accuser is?

MS. FASSELL: No, I'm sorry --

HEARINGS OFFICER: Oh, no.

MS. FASSELL: -- you don't.

MS. JENKINS: That's absurd.

MS. FASSELL: Well, that's --

HEARINGS OFFICER: Well, look, I'm --

MS. FASSELL: The rules indicate that people who have these convictions cannot be allowed in the home. And as Ms. Jenkins says, it indicates poor judgment and

irresponsibility.

HEARINGS OFFICER: Well, it does. You know, I don't think -- I don't think the DUI's fall into the Subsection C man -- mandatory --

MS. FASSELL: Driving Under the Influence?

HEARINGS OFFICER: Right.

MS. FASSELL: Offenses involving alcohol?

HEARINGS OFFICER: Alcohol abuse, yeah. I mean, I -- I think we're -- I think we're talking about something else there.

MS. FASSELL: You don't think drinking while you're driving is an alcohol -- I mean driving while you're -- have alcohol on your --

HEARINGS OFFICER: It's not necess -- it's not necessarily the abuse of alcohol, if you understand -- if you understand what I'm saying. The -- the -- and I -- I may have to just think about this awhile, but -- In other words, getting intoxicated once or twice or even 15 times in your life is not, quote, "the abuse of alcohol." It's not very smart, I suppose, but having -- in all honesty having to admit it has happened to me once or twice in my younger stupid days I -- you know, I -- I think we're talking --

MS. FASSELL: I think the public would disagree with you.

HEARINGS OFFICER: Well, all right, they may.

MR. BURNELL: Well, I'm part of the public, and I agree wholeheartedly. When I was young and stupid I should have been caught a couple of times.

MS. FASSELL: But -- but the thing is, you --

HEARINGS OFFICER: Well, I -- I didn't -- I didn't drive cars but, you know, I wasn't that -- I wasn't that stupid, but I -- I was --

MS. FASSELL: Well --

HEARINGS OFFICER: -- You know, so I -- I guess -- you know, the --

MS. FASSELL: Like I said --

HEARINGS OFFICER: I mean, it's not -- not -- not the same. It's not - not the same. We -- we -- we say you -- you -- we say you -- you can't - you can't shoot -- shoot heroin and -- under any circumstances, period. And whether you get behind a car -- car wheel or not you're still -- you're still -- you're still in violation. Alcohol is, unfortunately or fortunately, however you want to look at it from a societal standpoint, a different problem. We say you can drink all you want; there's some things you can't do after you've done it.

MS. FASSELL: Well, I think that's real clear that alcohol -- driving while you have -- have a certain --

HEARINGS OFFICER: Yeah, I'm not --

MS. FASSELL: -- level of alcohol in your blood

is --

HEARINGS OFFICER: -- I'm not -- Yeah, I'm not sure. I'm not sure. I'm not sure. I'm not sure.

MS. FASSELL: In any --

HEARINGS OFFICER I mean, I'm wondering if you -- I mean, you know, if you're -- if you're -- if you're -- if you're treating this as a Subsection C, mandatory disqualification offense, Ms. Fassell, then your suggestion that she be clean and sober for two years is silly because we go -- go back over to J, we've got to be clean and sober for ten years if it's a mandatory offense before you even -- before you even have discretionary -- discretionary authority.

MS. FASSELL: Well, you're right. That part of the rule would also come into play.

HEARINGS OFFICER: Yeah. Yeah, and I -- and --

MS. FASSELL: But we -- in order to -- you know, even started talking with her, I remember at the time she was saying something about she could get these charges dismissed after a certain amount of time --

HEARINGS OFFICER: Yeah.

MS. FASSELL: -- and that was something beyond our scope. I don't know when you can get them dismissed or taken off your record.

HEARINGS OFFICER: Yeah. Well, I think if

they're misdemeanors, what is it? I -- I think that's where your ten years comes from is that you can get misdemeanors removed after --

MS. FASSELL: Is that right?

HEARINGS OFFICER: -- after ten years, and so --

MS. FASSELL: Okay.

HEARINGS OFFICER: -- I think that's probably why you selected ten years because after ten years if they haven't had any -- any reoccurrences of offenses you can petition the court to have the misdemeanor record expunged, so --

MS. FASSELL: H-m-m. Well I know it's some period, but I don't know what the period is.

HEARINGS OFFICER: So -- but any -- but anyway -- but -- but -- I mean, if D -- if DUII is a Subsection C offense then we're not talking about two years; we're talking about ten years, unless -- unless you -- unless Ms. Jenkins moves for a -- for a rule waiver to the director. So I -- I don't know, I'm just wondering if anybody explored creative alternatives to -- to -- to --

Let -- let -- let me ask you this, Ms. -- Ms. Fassell. Assuming we were -- we were treating this as a discretionary rather than a man -- rather than a mandatory, would it be the alcohol abuse or the -- or the alcohol use and driving that -- that gave you -- gave you the concern, or

would it be the -- be the underlying poor judgment, or both?

MS. FASSELL: Well, I think it's both.

HEARINGS OFFICER: And now --

MS. FASSELL: I mean, obviously somebody who -- who has done that and -- and seems to have done it on a more-than-once basis, indicates poor judgment and -- and we can't, like I said, be in the home. We can't record what's going on all the time.

HEARINGS OFFICER: Right.

MS. FASSELL: We have to make sure that they at least have outside indicators that they have good judgment.

HEARINGS OFFICER: Well, I mean I was -- I was wondering if along the lines that if -- if -- if Mr. Burnell was -- was -- was willing to undertake the -- the cost and the expense of establishing an Antabuse treatment or -- or -- or random -- random checks or things like this, whether that would be -- whether that would be an approach that might alleviate your concerns about alcohol abuse. But I was wondering if you'd say well, you still have the underlying poor judgment or --

MS. FASSELL: Exactly.

HEARINGS OFFICER: Yeah. And you would -- you would have no desire under any circumstances to -- to take -- take another look at this?

MS. FASSELL: To what?

HEARINGS OFFICER: To take another look at this.

MS. FASSELL: I think I can speak for our office. No, we wouldn't. We've made a decision; we've gone through an administrative conference. Our feeling is fresh in our minds about the fellow who killed the lady, that people with alcohol problems don't necessarily do what they say they're going -- They have great intentions, and we hear lots of stories of great intentions, but we want to have a better record than that. And -- and there's that -- who knows what else they could be doing, that judgment factor.

HEARINGS OFFICER: Yeah. All right.

You folks have anything you'd like to add? Anything by way of closing statements?

MS. FASSELL: No.

MS. JENKINS: I would be willing to absorb the cost of random urinalysis any time.

MR. BURNELL: Yeah, I would, too.

MR. FASSELL: We considered that and we felt that that -- like you said -- didn't cover the -- the times when she wasn't taking the random urinalysis and the judgment problems.

HEARINGS OFFICER: Well, if it's truly random it should -- it should -- it should cover it fairly -- fairly well because if you're -- if you slip and go back on alcohol the random's going to -- random's going to pick it up and --

and it's going to get caught, you know. I don't know.

It -- it seems like a harsh result to me, Ms. -- Ms. Fassell. That's the only thing I'm -- I'm saying, especially as Mr. -- Mr. Burnell seems to think that Ms. -- Ms. Jenkins is a -- is a employee that is -- is worthwhile keeping and is -- and is --

MS. FASSELL: I guess --

HEARINGS OFFICER: -- -- good -- good at -- I guess -- What is Mr. Burnell's record?

MS FASSELL: I don't know; I don't have it here with me.

MR. BURNELL: What do you mean "record?" Abuse or complaints, things like that?

HEARINGS OFFICER: Yeah.

MR. BURNELL: We have none --

HEARINGS OFFICER: Zero.

MR. BURNELL: -- except this one she's talking about.

HEARINGS OFFICER: Zero. How many -- and how many -- how many residents do you care for?

MR. BURNELL: Five.

MS. JENKINS: Per home.

HEARINGS OFFICER: Yeah.

MS. FASSELL: But what -- I -- I would also like to say that --

HEARINGS OFFICER: You know, I guess maybe the problem is, Ms. -- Ms. Fassell is -- is you know -- you know -- you know what I get to see in -- in -- in caregiver situations. They're the ones that you've taken disciplinary action on. And you come in here and you parade through your social workers with their -- with their parade of -- of large and small horror stories and I have to make some decision about -- about, you know, what -- what you've done.

And I'm looking -- I'm looking at all cases in -- in care -- care givers who are -- who range between horrible and marginal. I mean, right? The -- the -- the excellent and outstanding and good and capable ones I don't get to see. I get to see between horrible and -- and marginal, are the only ones that you bring in here. And now, you know, what I'm -- and -- and maybe I have a distorted view of the situation but it does seem to me that when you have capable people and we should make an effort to -- to keep them. But I -- I lack philosophic -- that's not my job. My job is to make legal -- legal decisions.

MS. FASSELL: I -- I will say one other thing. I wasn't going to bring this up but I -- I think it's appropriate in this case, is that we were audited last year because of com -- well, anyway, we were audited by the audit -- the county auditors. And they indicated at the time that we had allowed too many people with criminal records in

work -- to be working in the home. One of the instances that they specifically brought up in their report was this instance where we allowed this operator's boyfriend to remain in the home after two DUI's and two diversions, and he ended up with a manslaughter charge.

And it was specifically told to us by the people whose job it is to audit our program and tell us what we're doing wrong that we were wrong in that case, and that we needed to strengthen and tighten up the criminal record -- the people -- excluding people with criminal records from our program.

Since then we have instituted a policy that we are strictly going by the guidelines in this -- in the criminal record section of the rules, and that people with these crimes -- and we consider DUI's to indicate -- like they had indicated to us, alcohol abuse, to -- to not be allowed in the home. And that means living or working in it. That's our new policy based on the audit recommendations.

HEARINGS OFFICER: Well, that may -- that may protect you folks from -- from -- from future criticism by the -- by the -- by the auditor. I think -- I think it is not a -- you know, I don't -- I think it not a substitute for -- for considering situations on their individual basis without speaking to this particular case, but -- but considering situations on their individual basis and -- and

being able to justify fully either a positive or a negative decision. And, you know, I suspect the story with this fellow that you relate to me is not that there was any reason to consideration of his particular situation and an enumeration of the -- of the reasons why it was worthwhile, allowing this person to remain in the -- remain working in the home, but rather that we just overlooked two -- two DUII --

MS. FASSELL: Oh, no, it wasn't.

HEARINGS OFFICER: It was, you didn't --

MS. FASSELL: The operator specifically said I want my boyfriend in the home and --

HEARINGS OFFICER: Right.

MS. FASSELL: -- he -- and she argued and argued over it --

HEARINGS OFFICER: Yeah.

MS. FASSELL: -- and she said he's not caring for anybody; he's just there mowing the lawn and fixing the light bulbs.

HEARINGS OFFICER: All right. Well, that's -- all right.

Here's my -- I'll give you a -- a written determination on this, folks. Here's -- here's my -- here's my dilemma, Mr. Burnell, is -- is my job here is to -- to overrule the County if I find that they have not followed the

rules or have engaged in abuse of -- of discretion.

Clearly there's no abuse of discretion. If I were the -- if I were the administrator I may, indeed, have made a different decision in Ms. Jenkins' case than the one the county administrator made in this particular case. But my job is not to -- not to substitute my judgment for hers or to play the job of the administrator. My job is to make sure that her determination falls somewheres within the ambit of reasonable and logical outcomes.

And in this particular case, given the language of the rules and given the underlying purposes of the rules relating to -- to -- to criminal -- criminal background and -- and past violations I cannot say that -- that her decision, while it is not necessary one I would have adopted -- and listening to me today you probably get the feeling that probably is not one I would have adopted -- but nonetheless I cannot say it does not fall within the -- within the ambit of a reasonable -- a reasonable determination under the rules that are -- that are issued.

So I -- I am, with a degree of reluctance, but nonetheless I am going to uphold the -- the administrator's decision. I will issue a written -- written determination and findings to that effect and I'll try and get a copy out of that -- out on that as soon as possible. I am sort of backed up so it may be a week or so before I actually get a

written -- written determination out. But rather than -- rather than leave you folks hanging until I can get a -- a written determination out I thought I'd tell you what I'm going to do right now.

You do have a right to appeal to both the -- the County Board of Commissioners and to -- and the Court if you so desire.

All right, thank you all very much.

MS. FASSELL: Thank you.

(Proceedings concluded.)

* * *

CERTIFICATE OF TRANSCRIBER

STATE OF OREGON)
) ss.
County of Multnomah)

I, the undersigned, Vicki Metz, Court Transcriber, do hereby certify that I transcribed the proceedings occurring in the transcript appended hereto; that said proceedings were recorded by audio cassette tape; that I thereafter reduced said cassette tape to typewriting, and the foregoing and hereto attached pages of typewritten matter, numbered 1 through 32 constitute a full, true and accurate record of the requested proceedings, to the best of my skill and ability.

IN WITNESS WHEREOF, I have hereunto set my hand at Portland, Multnomah County, State of Oregon, this 25th day of October, 1995.

Vicki Metz

Vicki Metz
Court Transcriber

Meeting Date: OCT. 31 1995

Agenda No: P-2

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Reporting of a Hearings Officers decision in the matter of MC 2-95.

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING Date Requested: October 31, 1995

Amount of Time Needed: 5 minutes

DEPARTMENT: DES DIVISION: Planning

CONTACT: Gary Clifford TELEPHONE: 248-3043
BLDG /ROOM: 412/Plan

PERSON(S) MAKING PRESENTATION: Gary Clifford

ACTION REQUESTED

[ ] Informational Only [ ] Policy Direction [X] Approval [ ] Other

Summary (Statement of rationale for action requested, personnel and fiscal/budgetary impacts, if applicable):

Reporting of Multnomah County Hearings Officer decision in the matter of MC 2-95. A request by Western States Development Corporation to request recognition of "Vested Right" to obtain building permits.

Request for recognition that the applicant has demonstrated a vested right to complete and market lots in the Skyline Ridge Subdivision and the right to represent to prospective buyers that a single-family residence may be constructed on each lot.

BOARD OF COUNTY COMMISSIONERS
MULTNOMAH COUNTY
OREGON
1995 OCT 25 AM 11:35

SIGNATURES REQUIRED:

Elected Official: _____

OR

Department Manager: KB Betsy Williams

MULTNOMAH COUNTY

BOARD HEARING OF October 31, 1995

TIME: 1:30 pm

CASE NAME: Request for Recognition of "Vested Right" to Obtain Building Permits **NUMBER:** MC 2-95
("Appeal" of Administrative Denial of Zoning Clearance on Building Permits)

ACTION REQUESTED OF BOARD

- ☑ Affirm Plan.Com./Hearings Officer
- ☐ Hearing/Rehearing
  - ☐ Scope of Review
    - ☐ On the record
    - ☐ De Novo
    - ☐ New Information allowed

1. **Applicant Name/Address:**
   Western States Development Corporation
   20285 NW Cornell Road
   Hillsboro, OR 97

2. **Action Requested by applicant:**
   (a) Appeal of administrative denial of zoning clearance on three building permit applications.
   (b) Request for recognition that the applicant has demonstrated a vested right to complete and market lots in the Skyline Ridge Subdivision and the right to represent to prospective buyers that a single-family residence may be constructed on each lot.

   The County had approved the subdivision and use permits for "forest management dwellings" on each of the subdivision lots under the zoning rules of the Multiple Use Forest (MUF) -19 District. The subdivision, named Skyline Ridge Subdivision, was platted into five 19-acre lots. The property was subsequently rezoned to Commercial Forest Use (CFU) on January 7, 1993. The CFU district greatly changed the approval criteria for new dwellings, but left a window of two years for property owners to obtain building permits for dwellings approved under the previous MUF standards. The applicant has constructed improvements on the site such as a private road. However, as a "developer" and not a "builder" the applicant wishes to market and represent to others that a single-family home may be built on each of the vacant three lots, notwithstanding the two year limitation.

3. **Planning Staff Recommendation:**
   The staff report to the Hearings Officer took the position that the Hearings Officer should only consider the case as an appeal of denial of zoning clearance on three building permits and that the denial should be upheld because the building permit applications were "not complete" (no actual building plans).

   The determination by the Hearings Officer that there is no appeal procedure for denial of a building permit "zoning signoff" mooted the above recommendation. Then, the Hearings Officer allowed the consideration of the "vested right to build" issue without complete building permit applications.

   Staff recommends that the Board accept the Hearings Officer's Decision based upon the conclusion that the expenditures toward development were "not insubstantial" and approval of a vested right to build for this property sets no new precedent that is not already available to any property owner under ***Clackamas County v. Holmes, supra***, 265 Or at 197-98 and 201.

4. **Hearings Officer Decisions (in relevant part):**
   - "I ought to, and shall, treat this proceeding as an original quasi-judicial hearing for purposes of determining Hearings Officer jurisdiction. I conclude that there exists no 'appeal' procedures for the types of matters contained in the Planning Director's July 6, 1995, letter" (denial of building permits).

   * * *

- "I conclude that the Planning Director's July 6, 1995, letter raises issues in addition to the 'completeness' of Applicant's application, and that the various matters within that letter remain subject to review."

* * *

- "I conclude the Applicants have demonstrated a vested right to (1) complete and market subdivision lots in a manner consistent with the County's prior approvals in LD 17-89 / MC 2-89 and PRE 59/62/63-92, (2) obtain "zoning clearance" from the County in order to obtain building permits, and (3) to represent to builders / owners that single-family residences may be constructed upon the lots as long as the builders / owners otherwise fulfill the development requirements of MCC 11.15.2074. Applicants substantially commenced the project, made substantial expenditures, acted in good faith, and cannot use the development that has taken place for conforming alternative uses from which they can obtain a reasonable economic return."

5. If recommendation and decision are different, why?
They are not different.

ISSUES
(who raised them?)

1. Western States Development objected to the participation of two parties at the hearing because neither of them would be directly impacted by any decision. The Hearings Officer allowed their participation because he could find nothing in the Zoning Code [MCC 11.15.8225(A)(2)] or statute that would limit or define persons who might participate in a quasi-judicial hearing.

2. The County lacks specific procedures in the Zoning Code for appeal of denial of "zoning clearance" on building permits when the applicant's right to obtain a building permit for an approved land use may have expired. The Hearings Officer determined that he would have no jurisdiction over such an appeal, but could have jurisdiction, as a new "action" case, over the request for determination of vested right to build under prior approvals.

3. Other parties contended that the Hearings Officer did have jurisdiction over an appeal of denial of the three home permit applications. They also asserted the appeal would have to be denied because the applications were not complete and the Notice of Appeal fails to specify any particular grounds for reversal of the denial.

4. The factors to be considered when evaluating a vested right claim, as described in ***Holmes***, are not clearly stated and have been unevenly applied in later court decisions. In summary, the factors serve only as a guide to evaluate whether the applicant: 1) substantially commenced the project; 2) made substantial expenditures; 3) acted in good faith; and 4) cannot use the improvements for conforming alternative uses from which the applicant can obtain economic return.

5. At least in the fact situation present in this case, expenditures for subdivision development may establish a vested right to build residences on the subdivided lots notwithstanding later adoption of restrictive zoning regulations.

Do any of these issues have policy implications? Explain.

1. Clarification of a procedure for such an appeal and review by the Hearings Officer should be added to the Zoning Code.

2. Approval of this request sets no new precedent that is not already available to property owners under other court decisions.

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 S.E. Morrison Street
Portland, Oregon 97214 (503) 248–3043

HEARINGS OFFICER DECISION

This Decision consists of Findings of Fact and Conclusions

October 13, 1995

MC 2–95
"Appeal" Of Planning Director Administrative Decision

Western States Development Corp. appeals the Planning Director's July 6, 1995, letter decision. It contends that the letter denied zoning clearance and appeals that denial.

Location: 12915–12943 N.W. Skyline Boulevard

Legal: Lots 1, 4, and 5, Skyline Ridge Estates

Site Size: 57 acres

Property Owner(s):

Western States Development Corp.
20285 N.W. Cornell Road
Hillsboro, OR. 97124

Kevin Bender
20285 N.W. Cornell Rd.
Hillsboro, OR. 97124

Nancy M. Olsson
20285 N.W. Cornell Rd.
Hillsboro, OR. 97124

Applicant(s): <same as owners>

Appellant(s): <same as Applicants>

Comprehensive Plan: Commercial Forest

Zoning: CFU–80

HEARINGS OFFICER DECISION:

Granted, a vested right to (1) complete and market subdivision lots in a manner consistent with the County's prior approvals in LD 17-89/MC 2-89 and PRE 59/62/63-92, (2) obtain "zoning clearance" from the County in order to obtain building permits, and (3) to represent to builders/owners that single-family residences may be constructed upon the lots as long as the builders/owners otherwise fulfill the development requirements of MCC 11.15.2074, based upon the determination(s) supported by the following findings and conclusions.

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I. ANALYSIS OF THE PROPOSAL

A. PROPOSAL SUMMARY

In June, 1995, the owners of Lots 1, 4, and 5 of the Skyline Ridge Estates subdivision (Western States Development Corp., Kevin Bender, and Nancy Olsson, respectively ["APPLICANTS"])[1] initiated a process to obtain "zoning clearance" from the County as a condition precedent to the issuance of building permits to construct single-family residences.

Although the County's Zoning Ordinance defines "building permit" in terms of an "action" proceeding to be conducted pursuant to MCC 11.15.8210, *et seq.* (*see* MCC 11.15.0010), and although in this particular case MCC 11.15.2074 actually prescribes a host of criteria that Applicants would need to fulfill before receiving approval to construct any residences in a CFU district, the County nevertheless lacks a specific provision within the Zoning Ordinance that otherwise defines or prescribes a certain procedure to actually obtain building permits.

The County, via an intergovernmental agreement with the City of Portland, has arranged to have the City of Portland undertake all aspects of the building permit process — with one exception: prior to the issuance of any building permit, the City requires the County to provide written verification of "zoning clearance," a phrase the parties use to describe the County's verification that the applicant has fulfilled all of the County's requirements to construct an improvement within the zoning district. At what

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1 It appears from the record that Western States Development sold Lot 2 about a year ago, and that the owner of Lot 2 has built, or is now building, a home on that site. Furthermore, although the Staff Report refers to the owner of Lot 3 (Lawrence Zivin) as a property owner affected by the most recent application, Mr. Zivin has apparently already obtained approval to construct — and may have constructed — a manufactured home on Lot 3. If I error in my reading of the record, that error proves inconsequential for purposes of this decision.

point in the process the County customarily analyzes the development criteria in MCC 11.15.2074 remains uncertain.[2]

Applicants prepared three City of Portland forms entitled "RESIDENTIAL ONE & TWO FAMILY DWELLINGS BUILDING PERMIT PROCESS," each form corresponding to one of the three lots. Each form referred to prior County approvals, *viz*, LD 17–89/MC 2–89, and PRE 59/62/63–92, which referred to the County's August, 1989, subdivision approval and the May, 1993, approval for USE UNDER PRESCRIBED CONDITIONS, respectively. (*See* the chronology described below in topic I.D, below.)

Applicants then submitted these forms directly to the County as opposed to the City, a procedure that the County accepts and approves as an alternative means of commencing the "zoning clearance" process. In other words, the fact that Applicants commenced the building permit process with the County instead of the City of Portland does not give rise to any procedural flaw in the process.

Formally, the Applicants sought "zoning clearance" in order to test MCC 11.15.2072(C), which authorizes the issuance of a building permit

> "up to two years after January 7, 1993[,] if approval from the Planning Director was given in an administrative proceeding for a 'residential use, in conjunction with a primary use' pursuant to the applicable Use Under Prescribed Conditions provisions of MCC .2050(A) or MCC .2170(A) in effect prior to January 7, 1993."

Applicants had earlier obtained the requisite administrative approvals to construct single-family residences in PRE 59/62/63-92 in May, 1993. However, because Applicants missed the deadline in MCC 11.15.2072(C) by six months, in practical effect Applicants sought to challenge the two–year limitation period in .2072(C).

The Planning Director responded to Applicants' request for "zoning clearance" with a letter of July 6, 1995, the pertinent portions of which have been excerpted

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2 As I explain in detail *infra*, for purposes of this case the Planning Director has proposed, and I find Applicants to have accepted and approved, a bifurcated procedure wherein procedural determinations will be made in this decision. Substantive considerations, such as Applicants' fulfillment of MCC 11.15.2074, will occur later, not subject to the 120-day limit in ORS 215.428(1).

a page 28 herein. The parties dispute the content and meaning of that letter, and I address that particular issue in detail beginning at page 28.

After an exchange of letters to determine the scope and nature of the present proceeding, the Planning Director — acting upon what he perceived to be (and what I find to be) Applicants' request(s) that the procedural obstacles be adjudicated first — accommodated Applicants' desires and

> "***bifurcate[d] the approval process*** to first consider only the land use claim and defer review of items requested in my July 6th letter." (Scott Pemble's letter of August 24, 1995 [emphasis added].)

The procedural detail assumes some significance, as I discuss later.

B. Site And Vicinity Descriptions

The properties are located adjacent to N.W. Rock Creek Road, with access from N.W. Skyline Boulevard. The Applicants' three properties comprise separate 19 acres parcels in the five–lot "Skyline Ridge Estates" subdivision that the County approved in 1989. *See* file numbers LD 17–89/MC 2–89.

Although the record does not explicitly say so, I infer (and thus I might be incorrect) that the subdivision itself has been substantially completed, and that little remains to be done before on–site construction of homes might otherwise begin.

C. Comprehensive Plan and Zoning Ordinance Considerations

The properties bear a "Commercial Forest" designation in the County's Comprehensive Plan and lie within the CFU ("Commercial Forest Use") District.

Nothing in the ***current*** CFU provisions in MCC 11.15.2042–.2074 otherwise allows the construction of site-built single–family homes within the Skyline Ridge Estates subdivision. Newly–constructed, non–replacement, single–family residences no

longer constitute "uses permitted outright" or "uses permitted under prescribed conditions" (*see* MCC 11.15.2048 and .2049), nor do Applicants' lot sizes or locations qualify for, or otherwise allow, the construction of any residences pursuant to the "forest management dwelling" provisions in MCC 11.15.2051 or the "dwelling–not–related–to–forest–management" provisions in MCC 11.15.2052.

D. BACKGROUND / HISTORY

In June, 1995, Applicants took the most recent in a lengthy series of steps to obtain approval to construct single–family dwellings on the subject properties.

The pertinent chronology can be summarized as follows:

DATE	EVENT	ADDITIONAL REMARKS
November 18, 1988	Western States Development Corp. ("WSD") sought approval for a three–lot partition of a 99–acre site in an MUF–19 zone.[3]	The County rejected the application (*see* November 29, 1988, entry).
November 29, 1988	County rejected partition approval because a three–acre portion of the site overlapped into an EFU zone.	
February, 1989	WSD sought a comprehensive plan amendment and accompanying zone change in order to bring the three–acre EFU parcel into MUF–19 zone.	The County approved the request (*see* March 13, 1989, entry).
March, 1989	County Planning Commission approved comprehensive plan amendment and zone change in file numbers PR 3–89 and ZC 3–89; entire 99–acre parcel now within MUF–19 zone.	
June, 1989	WSD sought approval for a 5–lot subdivision in the then–existing MUF–19 zone.	Revised application submitted June 26, 1989.

3 The County later rezoned the subject property from MUF–19 to CFU–80 effective January, 1993.

DATE	EVENT	ADDITIONAL REMARKS
August 14, 1989	County Planning Commission approved 5-lot subdivision in file numbers LD 17-89 and MC 2-89.	Approval listed ten conditions for LD 17-89 and six conditions for MC 2-89. With the exception of a one-year period for filing the plat, neither the approval nor the then-applicable provisions in MCC 11.15.2170 referred to or otherwise incorporated any time limitation within which to obtain a building permit.
August 24, 1989	Board of County Commissioners approved the Planning Commission's approval in LD 17-89 and MC 2-89.	
June, 1990	WSD delivered final plat to County.	WSD fulfilled Condition 1 in LD 17-89, which required delivery of final plat within one year (or before August 13, 1990).
March, 1991	WSD sought to (1) modify LD 17-89 in order to eliminate condition 8, which required the County Engineer to approve the adequacy of water, and (2) modify MC 2-89 in order to eliminate condition 6, which required the County Engineer to approve the road design.	County Engineer declined to do so with respect to either of the cited conditions, citing lack of authority.
May, 1991	Planning Commission modified condition 8 in LD 17-89 and condition 6 in MC 2-89.	WSD appealed the Planning Commission's modification of condition 8 in LD 17-89.
June, 1991	Board of County Commissioners amended condition 8 in LD 17-89 in the manner desired by WSD.	
September 28, 1992	Planning Division approved final plat for Skyline Ridge Estates Subdivision.	WSD recorded the subdivision plat on January 13, 1993.
November 8, 1992	WSD submitted forest management plans for the five lots, pursuant to MCC 11.15.2170(A)(2) and condition 7 in LD 17-89. I also infer from the record that WSD's submittal served as a precursor to the "administrative" approval described in *current* MCC 11.15.2072(C).	County approved the plans and issued an "administrative approval" in May, 1993 (*see* May, 1993, entry).

DATE	EVENT	ADDITIONAL REMARKS
January, 1993	County Assessor removed the subdivision property from farm deferral, based upon the recording of the subdivision plat.	WSD appealed the Assessor's action (*see* March, 1993, entry).
January 7, 1993	County rezoned the subject property from MUF (Multiple Use Forest) to CFU (Commercial Forest Use); the CFU designation concurrently prescribed a January 6, 1995, deadline for obtaining building permits.[4]	
March, 1993	WSD appealed the County Assessor's valuation of the subject property.	WSD partially prevailed (*see* May, 1994, entry).
May 14, 1993	County issued an "administrative" approval for WSD's request for a use described in MCC 11.15.2072(C), and concurrently approved WSD's forest management plans. (*See* file numbers PRE 59/61/62/63-92.) Each of the "administrative" approvals contained the following condition: "This approval will expire on January 7, 1995[,] if building permits have not been issued by that date."	Approval of the forest management plan fulfilled condition 7 in LD 17-89. WSD did not appeal the approvals' inclusion of, or reference to, the two-year limitation period or the January 7, 1995, expiration date.
Also May, 1994	Department of Revenue hearings officer modified the County Assessor's valuation of the subject property. He concluded that the property "shall be considered at a highest and best use of five individual, approximately 20-acre homesites" from 1990-91 forward.	*See* the March, 1993, entry. The hearings officer also found that WSD purchased the property for $260,000 in 1986, and that WSD had expended $365,991 "in costs, until final approval was gained in early 1993," which must refer to May, 1993.
July, 1994	To preserve its right to build, WSD apparently applied for, and received, approval to site manufactured homes on the subject properties. (*See* file number GC 7-94.)	This approval remains valid.

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[4] Paragraph (C) of MCC 11.15.2072 prescribes a deadline of January 7, 1995 ("up to two years after January 7, 1993"), for the issuance of any building permit

> "if approval from the Planning Director was given in an ***administrative proceeding for a 'residential use, in conjunction with a primary use'*** pursuant to the applicable Use Under Prescribed Conditions provisions of . . . MCC [11.15].2170(A) in effect prior to January 7, 1993." (Emphasis added.)

DATE	EVENT	ADDITIONAL REMARKS
"Fall," 1994	WSD sold one of the lots; the buyer began construction of a home.	
October, 1994	County sent notices to owners of all properties that have received approval of forest management plans in the CFU zoning district that the County will issue no building permits after January 6, 1995.	
November, 1994	WSD asserted, by letter to the County, that (1) the two-year limitation in MCC 11.15.2072(C) cannot apply to the subdivision lots, and (2) ORS 215.428(3) precludes any post-1992 version of the Zoning Ordinance from altering rights created prior to 1993.	
January 7, 1995	Pursuant to MCC 11.15.2072(C), the County could issue no further building permits for the construction of single-family residences in the CFU district of the type sought by WSD.	Neither WSD nor either of the other two Applicants had filed any request for issuance of a building permit.
April, 1995	WSD filed an action in Multnomah County Circuit Court requesting, *inter alia*, judicial recognition of a "vested right" to "develop and market the Property pursuant to the County Approval[.]"	The court dismissed the litigation either because (1) it lacked subject matter jurisdiction to declare the existence of a "vested right," or (2) WSD had not exhausted its administrative remedies. The County also declared in that litigation that WSD needed to apply for a building permit in order to make the "vested right" issue ripe, and that any denial would be appealable to a Hearings Officer.
June 27,1995	Circuit Court dismissed the Multnomah County Circuit Court litigation.	
June 28, 1995	Applicants filed requested for "zoning clearance" with the County.	County responded via a July 6, 1995, letter (*see* July 6, 1995, entry).

DATE	EVENT	ADDITIONAL REMARKS
July 6, 1995	County's Planning Director responded to the June 28, 1995, request for "zoning clearance" and declared that (1) the Applicants had submitted an incomplete request, and (2) the County could not issue "zoning clearance" in any event because of the two-year limitation in MCC 11.15.2072(C).	The County's July 6, 1995, letter said nothing about any "vested right." The letter also declared that any appeal from the letter's contents would occur by appeal to a Hearings Officer.
July 12, 1995	By letter of July 11, 1995, Applicants appealed the Planning Director's July 6, 1995, letter determination.	

II. APPLICABLE CRITERIA

Because of the dominant procedural characteristics of the current bifurcated appeal proceeding, the following criteria apply to the proposed development:

A. "RIGHT TO COMPLETE SINGLE-FAMILY DWELLING" [MCC 11.15.2072(C)]

MCC 11.15.2072(C) provides, in pertinent part:

> "A building permit for a new single family dwelling may be issued ***up to two years after January 7, 1993***[,] if approval from the Planning Director was given in an administrative proceeding for a 'residential use, in conjunction with a primary use' ***pursuant to the applicable Use Under Prescribed Conditions provisions of . . . MCC .2170(A) in effect prior to January 7, 1993***." (Emphasis added.)

B. "APPEAL OF ADMINISTRATIVE DECISION BY THE PLANNING DIRECTOR" [MCC 11.15.8290(A)]

MCC 11.15.8290(A) provides, in pertinent part:

> "A decision by the Planning Director ***on an administrative matter made appealable under this Section by ordinance provision***, shall be final . . . unless . . . the applicant files a Notice of Appeal with the Department, under subsections (B) and (C)." (Emphasis added.)

C. ORS 215.428(3)[5]

ORS 215.428(3) provides, in pertinent part:

> "If the ***application*** was complete . . . and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the ***application*** was first submitted." (Emphasis added.)

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[5] The legislature recently modified a number of pertinent land use statutes in ORS chapters 197 and 215. References in this decision to particular statutes that might have been amended — such as ORS 215.428 — will not specifically address or cite the 1995 legislation *unless* a particular amendment has a material effect.

The 1995 legislation did not become effective until September 9, 1995, thus with the exception of amendments to statutes such as ORS 197.763 that control certain procedural or mechanical aspects of hearings, none of the 1995 legislation has any bearing on Applicants' request for "zoning clearance."

D. "VESTED RIGHT"

Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973), declared the following criteria to apply to a determination whether a "vested right" exists to continue to develop a project suddenly rendered illegal by an unanticipated zone change or other local government legislation:

- the ***substantiality*** of expenditures, which the courts sometimes (but do not necessarily) measure by a "ratio" test that compares expenditures actually to the total projected cost of a project (265 Or at 197);

- the ***good faith*** of the landowner (265 Or at 198);

- whether the landowner had ***actual notice*** of any proposed zoning or regulatory changes before commencing development or spending funds (265 Or at 198);

- the ***type of expenditures***, that is, whether the expenditures were directly, but not necessarily exclusively, related to the proposed development (265 Or at 198);

- the ***kind of project***, a phrase not easily summarized or distilled for purposes of a vested right inquiry (265 Or at 198);[6]

- the ***location of the project***, that is, whether the project generally conformed to the types of uses previously authorized in the area, or the extent to which the project might be ideally suited for the site (265 Or at 198);

- the project's ***ultimate cost*** (265 Or at 198);

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6 Within the confines of "vested right" rubric, the term "kind of project" obviously does not mean whether the project qualifies as a permitted or allowed use for zoning purposes; if it did, the question of "vested right" would be moot.

- whether the landowner's acts arose beyond a mere *contemplated use*, that is, whether an objective commitment to a particular, identifiable use or development had occurred (265 Or at 198); and

- whether the landowner continuously advanced the development at all times, or whether *abandonment* had occurred at any point (265 Or at 201).

III. PROCEDURAL ISSUES

A. HEARINGS OFFICER JURISDICTION

1. THE COUNTY'S REPRESENTATIONS / INTERPRETATIONS

Although the current appeal proceeding arose within the framework of MCC 11.15.8290(A), quoted above at page 12, at both the September 20 and October 2 hearings I questioned whether that provision truly applies. If it does not, and if no other provision does, then I can decide nothing here — other than to decide the question whether I have jurisdiction to proceed at all.

Everyone assumes that MCC 11.15.8290(A) controls this proceeding. MCC 11.15.8290(A) plainly requires, as a condition precedent to any appeal thereunder,

> "[a] decision by the Planning Director on an administrative matter ***made appealable under this Section by ordinance provision*** . . ." (Emphasis added.)

Assuming for purposes of argument that the Planning Director's July 6, 1995, letter constitutes what might be described as a decision "on an administrative matter," there exists no decision ***"made appealable under this Section by ordinance provision."*** Although Applicants followed the procedure that the County had previously declared to

be the correct procedure,[7] nothing in the County's Zoning Ordinance mentions "zoning clearance" or any right to appeal therefrom, or any right to appeal the kind of decision that appears in the July 6, 1995, letter.

However, on more than one occasion within the chronology summarized above the County has declared *either* that a Planning Director's decision with respect to a request for "zoning clearance" can be appealed to a Hearings Officer pursuant to MCC 11.15.8290(A) *or* that a building permit approval proceeds to a Hearings Officer in the first instance; obviously, both interpretations contradict each other. For instance, in its motion to dismiss the circuit court litigation captioned *Western States Development v. Multnomah County*, the County took contradictory stances on at least three occasions.

- FIRST INTERPRETATION: The County declared that

> "[t]he proper procedure [to obtain 'zoning clearance' approval] would be to apply to the County for a building permit. ***If denied, to appeal to the County's Hearings Officer.*** (MCC . . . ***.8210***; ***.8230***.)" (MOTION TO DISMISS at 2, n. 1 [emphasis added].)

The concept of an "appeal" to a Hearings Officer pursuant to ".8210" and ".8230" — the provisions the County cited — connotes an impossibility. MCC 11.15.*8290* controls *appeals* to a Hearings Officer, while .8210 and .8230 necessarily refer to *original* proceedings before a Hearings Officer.

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7 In the Multnomah County Circuit Court litigation entitled *Western States Development v. Multnomah County*, the County moved to dismiss the complaint because, *inter alia*, WSD asked for relief "without ever having applied for building permits." (MOTION TO DISMISS, at 1–2.) In a footnote, the County remarked that "[t]he proper procedure [to apply for 'zoning clearance'] would be to apply to the County for a building permit." (*Id.* at 2, n. 1.) The County cited, among other provisions, the "catchall" provision in MCC 11.15.8205(F) that allows an applicant to commence an "action" proceeding in order to determine

> "[o]ther requests for permits [not otherwise enumerated in .8205(A) to (E)] and other contested cases determining permissible uses of specific property."

- SECOND INTERPRETATION: The County also declared that if WSD had initiated an application for a building permit,

> "[their] application, if denied as they anticipate, ***would be appealable to a hearings officer***." (*Id.* at 5 [emphasis added].)

Again, the only Zoning Ordinance provision that controls "appeals" to a Hearings Officer would be .8290, which, in turn, presupposes the existence of an antecedent "administrative" decision by the Planning Director.

- THIRD INTERPRETATION: Finally, the County proclaimed that

> "under subsection (F) of [MCC 11.15.8210], plaintiffs may apply for the 'site-built single family residences' it seeks[.] . . . The matter will be heard by the hearings officer, ***MCC 11.15.8230 to .8255***, and may be appealed to the Board of County Commissioners, 11.15.8260 to .8285." (*Id.* at 9 [emphasis added].)

The procedure outlined in that this particular passage — *viz*, an *original* proceeding governed by .8230 to .8255, followed by an appeal to the Board governed by .8260 to .8285 — refers *solely* to a procedure in which the Hearings Officer functions as the decision-maker of *first* resort, *not* as an appellate tribunal.

Finally, in his July 6, 1995, letter the Planning Director announced that

> "[i]f you disagree with this determination of permissible uses of the subject properties, then you may apply [*sic*] ***appeal*** this determination to a Multnomah County Hearings Officer." (*Id.* at 1 [emphasis added].)

However, the implications of that July 6, 1995, letter become muddled by the Planning Director's apparent understanding — as evidenced in the Planning Director's

subsequent July 20, 1995, letter[8] — that the only "determination" rendered in the July 6, 1995, letter comprised an "administrative" determination that the Applicants' request for "zoning clearance" had been incomplete when filed. In other words, I find it less than clear that the Planning Director's July 6, 1995, letter necessarily took the position that a decision on "zoning clearance" comprised a purely administrative decision that might be *appealed* to a Hearings Officer, as opposed to a decision that would proceed before a Hearings Officer *in the first instance*.

2. JURISDICTION IN "APPEAL" MODE

Thus, if the focus remains on MCC 11.15.8290 as the basis for Hearings Officer jurisdiction for this proceeding I am left with:

- (1) a County "procedure" with respect to the issuance of building permits — a request for "zoning clearance" — that nowhere appears within the Zoning Ordinance;

- (2) an appeal provision — *viz*, .8290(A) — that seems to be inapplicable on its face to any "administrative" decision *not* "made appealable . . . by ordinance provision";

- (3) a number of contradictory stances taken by the County itself within the context of the circuit court litigation described above, some of which presume that a "zoning clearance" decision might be appealable pursuant to a provision that, on its face, does not allow for an appeal, and some of which presume that the decision must come from a Hearings Officer acting as the decision–maker of first resort; and

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8 ". . . [W]e will not contest your right to appeal the determination in my July 6th letter that the materials submitted were insufficient to grant zoning clearance."

- (4) an ambiguous July 6, 1995, opinion by the Planning Director with respect to the question whether the reference in that letter to an "appeal" referred to anything beyond the preliminary determination that an application might be deemed "complete."

Therefore, if the focus remains on .8290(A) I can either:

- (1) read MCC 11.15.8290(A) as written and reject jurisdiction of any "appeal" under the circumstances because of the lack of "[a] decision by the Planning Director on an administrative matter ***made appealable under this Section by ordinance provision*** . . ." — in which case the County did not adequately describe the scope of .8290(A) in its various descriptions in the circuit court proceedings, and — worse still — the time for appealing the July 6, 1995, decision to LUBA has long since expired; [9]

- (2) interpret MCC 11.15.8290(A) to apply to *any* administrative decision by the Planning Director, regardless of whether any particular provision of the Zoning Ordinance purports to authorize an appeal — in which case I must simply ignore a pivotal limitation in .8290(A), or

- (3) concoct an appeal mechanism that functions as the counterpart to the "zoning clearance" procedures employed by the County, *viz*, procedures that do not appear within the Zoning Ordinance but which have historically been employed as a necessary adjunct to the intergovernmental agreement between the City and County with respect to building permit procedures — in which case I must, in effect, legislate a procedure where none presently exists and exercise Hearings Officer authority that nowhere appears in MCC 11.15.8115.

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9 Although the County does not have to provide an *internal* appeals process for "administrative" decisions (*see* ORS 215.422(1)(b)), any "administrative" decision that falls within the definition of "land use decision" in ORS 197.015(a)(A) can be appealed to LUBA. *See Smith v. Douglas County*, 98 Or App 379, 382, 780 P2d 232, *rev den* 308 Or 608 (1989).

I will not, however (and need not), enter the debate whether the Planning Director's July 6, 1995, letter represents a "land use decision" as defined in ORS 197.015(a)(A) or instead represents a *non*–"land use decision" as defined in ORS 197.015(b)(B) (a decision that "approves or denies a building permit issued under clear and objective land use standards").

I am not confident that either Applicants or the County foresaw that limitation of options.

3. JURISDICTION AS AN ORIGINAL, QUASI-JUDICIAL HEARING

I conclude that there remains yet another construction of the applicable provisions in the Zoning Ordinance: notwithstanding the County's intermittent references to an "appeal" to a Hearings Officer pursuant to MCC 11.15.8290(A), for all practical purposes this proceeding comprises an "action" proceeding properly initiated by the Applicants pursuant to MCC 11.15.8205(F) and 11.15.8210(B), in which case the present proceeding constitutes the requisite quasi-judicial "hearing" specified in .8205(F) and otherwise required at some point by ORS 215.416(3).

> "*Action* means a proceeding . . . in which the legal rights are determined ***only after a hearing in which such parties are entitled to appear and be heard***, including requests for:
>
> "* * * * *
>
> "(F) Other requests for permits and ***other contested cases determining permissible uses*** of specific property." (MCC 11.15.8205 [emphasis added].)

Because ORS 215.402(2)(a) and (b) distinguish between "permit" and "contested case," and because the County, at least as I understand the unwritten "zoning clearance" procedures, would ***not*** issue any building "permit," I conclude that, ***at the very least***, MCC 11.15.8205(F) envisions a "hearing" on a contested case as defined by ORS 215.402(2)(b). *See also* ORS 215.416(3) (hearings officer "shall" hold at least one public hearing on any application for a "permit," which ORS 215.402(4) defines as including "discretionary approval" of the kind that the development criteria in MCC 11.15.2074 seem to envision).

Except for a reference within the definition of "building permit" to MCC 11.15.8210(A) [*see* MCC 11.15.0010[10]], the County otherwise has no prescribed procedures to govern the decision–making process when an applicant requests "zoning clearance." Given that fact, the procedures in .8220–.8285 can be the *only* procedures. Applicants availed themselves of the correct procedural mechanism to obtain "zoning clearance," a procedure that the County itself had repeatedly urged Applicants to utilize. The record seems plain enough that the Applicants appropriately commenced an "action" proceeding pursuant to MCC 11.15.8205(F), for which a "hearing" remains essential. Thus, I am uncertain that the Planning Director has the authority within the procedural confines of MCC 11.15.8205(F) to render an "administrative" decision with respect to any request for "zoning clearance." A quasi-judicial hearing *must* occur.

Obviously, the Planning Director's July 6, 1995, letter decision did not occur within the "quasi–judicial" procedural context required by MCC 11.15.8205 and ORS 215.416(3). Actually, given the fact that ORS 215.428(2) does not allow a local government to do anything more than alert an applicant to missing information in an application, I question whether the Planning Director's July 6, 1995, letter decision could comprise any "administrative" decision at all; rather, ORS 215.428(2) simply renders that letter a notice that the application for "zoning clearance" would otherwise be "deemed complete" as of July 29, 1995 (the 31st day after the County received it), if, as here, Applicants refused to supplement the application.

Indeed, notwithstanding the purely mechanical decision–making process associated with the phrase "zoning clearance," MCC 11.15.2074 — which prescribes development standards for all dwellings located in the CFU district after January 7, 1993 — plainly envisions some fact–finding process with respect to the criteria in that provision. It therefore seems plain enough that Applicants' compliance with the development criteria in MCC 11.15.2074 — **which, for purposes of this case, the Planning Director has bifurcated with Applicants' consent** — could not occur within the confines of an "administrative" decision by the Planning Director.

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10 MCC 11.15.0010 defines "building permit" as

> "[a] permit required pursuant to Multnomah County Code 11.15.8210(A), certifying compliance with all applicable building regulations."

The reference to MCC 11.15.8210(A) necessarily connects the issuance of a building permit to the quasi–judicial hearing process in MCC 11.15.8220–.8285.

Thus, notwithstanding Applicants' purported "appeal" from the Planning Director's July 6, 1995, decision, and notwithstanding the "appeal" nomenclature with which everyone has thus far described this proceeding, I interpret the present proceeding to comprise the "hearing" to which Applicants are otherwise plainly entitled pursuant to the procedures in .8205, *et seq.*, and ORS 215.416(3).

Finally, I perceive another reason why the Planning Director's July 6, 1995, letter determination does not comprise any decision from which an "appeal" can be taken: the statutory scheme in ORS 215.428 does not envision that any such ostensibly–final "administrative" decision can occur in this context in the first place. For example, a decision that an application may be "incomplete" does not stop the 120–day clock. *See* ORS 215.428(2) and (3). If, as occurred here (*see* Mr. Bachrach's July 11, 1995, letter), the applicant "***refuses*** to submit the missing information, the application ***shall be deemed complete*** for purposes of [the 120–day period] in subsection (1) of this section ***on the 31st day after the governing body first received the application***" (ORS 215.428(2) [emphasis added]), which, in turn, means that the local government would be ***required*** to render a decision under those circumstances within 151 days after it first received the application — "completeness" (or lack thereof) notwithstanding. That being the case, the notion of a contemporaneous appeal from an "administrative" decision that an application may not be complete seems irreconcilable with the notion that the local government must nevertheless proceed to render a decision on the merits — the appeal notwithstanding.[11]

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[11] Obviously, I will leave the application of ORS 215.428 to Staff to decipher in the first instance, but it appears that, the present "appeal" notwithstanding, had not the Planning Director bifurcated the process (pursuant to Applicants' request) via his August 24, 1995, letter, the County would have been compelled to take "final action" on Applicants' request for "zoning clearance" on or before November 26, 1995 — the 151st day after the County first received Applicants' June 28, 1995, request for "zoning clearance." ORS 215.428(1) and (2). Thus, the circumstances of this application help to illustrate why the Planning Director's decision as to "completeness" probably falls outside the realm of appealable decisions in the first place.

If the County's interpretation of the issues for "review" proves correct, and if I have nothing to decide except the question whether the Planning Director correctly determined that the application was not complete as of June 28, 1995, then the Applicants might well appeal from my decision here — which they plainly have a right to do — in which case there exists a possibility that some tribunal (such as LUBA or beyond) might eventually determine that the Planning Director erred at a point in time well beyond the "final action" date otherwise prescribed by ORS 215.428.

I therefore conclude that, for a number of reasons (both legal and logical), this proceeding does ***not*** constitute an "appeal" for purposes of .8290(A), but, instead, comprises a hearing of the kind contemplated by .8220–.8285. The fact that the County has implicated the appeal procedures in .8290, and has otherwise advised Applicants to "appeal" the Planning Director's July 6, 1995, determination, cannot inadvertently misdirect the proceedings in such a manner that the hearing procedures prescribed in .8220–.8285 get bypassed. The Planning Director's July 6, 1995, letter would amount to a misinterpretation — but certainly not a misrepresentation — of MCC 11.15.8290(A) that cannot bind the County. *See DLCD v. Benton County*, 27 Or LUBA 49, 62–63 (1994), *aff'd per curiam* 128 Or App 637, 874 P2d 1372 (1994); *McInnis v. City of Portland*, 25 Or LUBA 376, 379 (1993), *aff'd* 123 Or App 123, 859 P2d 1208 (1993).

From a practical perspective, with the exception of debates over (1) Hearings Officer jurisdiction (which I have now resolved) and (2) the issues preserved within the "NOTICE OF APPEAL" (which I resolve below in the topic labeled "Reviewable Issues"), the hearings that occurred on September 20, 1995, and October 2, 1995, differed in no material respect from the sort of hearing that would have occurred had the County simply set the Applicants' June 28, 1995, application for a bifurcated hearing before a Hearings Officer in the first instance.

In the event that I am incorrect in my characterization of this proceeding as an original quasi-judicial hearing to be conducted pursuant to MCC 11.15.8220–.8285, and if this proceeding can instead ***only*** be characterized as an "appeal" to be conducted pursuant to MCC 11.15.8290(A), then I must conclude that I lack jurisdiction under this latter provision, because the Planning Director's July 6, 1995, letter determination plainly constitutes a decision by the Planning Director on an administrative matter ***not*** "made appealable under this Section by ordinance provision." *See Smith v. Douglas County*, 98 Or App 379, 382, 780 P2d 232, *rev den* 308 Or 608 (1989).

The fact that the Planning Director's decision might also constitute a "land use decision" as urged by Applicants (*see* "APPLICANT'S CLOSING MEMORANDUM AND PROPOSED FINDINGS" dated October 9, 1995, at 6) makes no difference with respect to the question ***whether*** the decision might be appealed; it would only resolve the question to ***whom*** that decision might have been appealed.

Neither Applicants nor anyone else has cited any ordinance provision that makes the July 6, 1995, determination appealable, and I have been unable to find any. I could only circumvent that language by simply omitting it, and I conclude that to omit that language would be to commit reversible error in the guise of "interpreting" an otherwise–unambiguous provision.

B. STANDING IN THIS PROCEEDING

1. APPLICANT(S) / APPELLANT(S)

As I have tried to make plain in the "jurisdiction" discussion in the previous topic, this particular application does not fit squarely within the confines of customary "appeal" procedures. I have already concluded in the previous topic that, notwithstanding the fact that the matter came before me in the form of an "appeal" from the Planning Director's July 6, 1995, letter, the proceeding in its present posture comprises the original hearing that MCC 11.15.8220–.8285 mandates, which, in turn, renders the "appeal" a superfluous procedural route to get to this point.

I conclude, therefore, that the failure of the other two Applicants' to join in the "appeal" filed on behalf of WSD (*see* the discussion below) does not, and *cannot*, prejudice the rights of all of the Applicants to receive the hearing to which they remain entitled by virtue of MCC 11.15.8220–.8285. The "appeal," in other words, remains a misnomer.

Even if I am correct that the proceeding more appropriately constitutes an original proceeding, there remains an issue that I mentioned briefly at the October 2 hearing, but with respect to which neither party offered anything particularly helpful.

I am troubled by the fact that *only WSD* has offered arguments and evidence in support of the various issues. Although the request for "zoning clearance" filed by Mr. Bachrach's office indeed referred to each of the three properties owned by the three Applicants, as far as I can tell Mr. Bachrach has not filed or offered any subsequent document that purports to have been offered on behalf of anyone other than

WSD. The individual Applicants (Mr. Bender and Ms. Olsson) have likewise filed or offered nothing in their behald.

Thus, my choices are but two: (1) I can conclude that, although Mr. Bender and Ms. Olsson comprise parties to this proceeding, they nevertheless have utterly failed to participate in an effective manner such that I can address and analyze arguments or evidence offered on their behalf. (2) I can infer, based upon the fact that WSD has historically wielded the laboring oar for all of the subject properties, that all of Mr. Bachrach's submissions on behalf of WSD can be treated (and were intended by all Applicants to be treated) as having been offered on behalf of Mr. Bender and Ms. Olsson as well. The first choice seems extraordinarily technical, while the second seems extraordinarily generous.

I conclude that,

- based upon the fact that Mr. Bachrach filed the initial request for "zoning clearance" on behalf of *all* of the Applicants,
- based upon the fact that until that point Mr. Bachrach had become accustomed to filing documents only on behalf of WSD, and
- based upon Mr. Bachrach's emphatic clarification at the October 2 hearing that Mr. Bachrach did not consider WSD to be the only applicant-participant in this proceeding,

it seems more logical than not to suppose that Mr. Bachrach has intended that all of his arguments and evidence be treated as having been offered on behalf of all three Applicants, and not just WSD alone.

Thus, for clarity's sake further references in this decision to "WSD" shall mean all three Applicants, and references to "Applicants" in the context of arguments or testimony offered from June 28, 1995, through Mr. Bachrach's October 9, 1995, "closing memorandum" shall refer to arguments or testimony offered by Mr. Bachrach on behalf of all three Applicants.

In the event that I am incorrect in my characterization of this proceeding as a proceeding to be conducted pursuant to MCC 11.15.8220–.8285, and if this proceeding

can instead *only* be characterized as an "appeal" to be conducted pursuant to MCC 11.15.8290(A), then I must conclude that only WSD has perfected any appeal from the Planning Director's July 6, 1995, letter determination.

Although three parties applied for "zoning clearance" and have been labeled "Applicants" thus far, only WSD filed a notice of appeal of the Planning Director's July 6, 1995, letter decision.

WSD's "NOTICE OF APPEAL — ADMINISTRATIVE DETERMINATION" recites that Mr. Bachrach represents "Western States Development Corporation" and no other person. That "NOTICE OF APPEAL" also refers to an "attached" letter of July 11, 1995, which read, in pertinent part:

> "This letter, along with the enclosed form entitled 'Notice of Appeal Administrative Decision,' are submitted on behalf of ***Western States Development Corporation*** in order to appeal the denial of zoning approvals issued in your letter to this office of July 6, 1995." (Emphasis added.)

The "NOTICE OF PUBLIC HEARING" similarly recites that

> "[a]n appeal has been filed by Jeff Bachrach ***representing Western States Development Corporation*** to contest the Planning Director's determination of permissible uses of specific property.

Ordinarily, a participant's failure to perfect an appeal from an underlying decision forecloses the participant's ability to later challenge that decision. Although MCC 11.15.8290(B) does not specifically require that a notice of appeal identify the *appellant* (as opposed to the "person filing the Notice" [.8290(B)(1)]), in this instance both the NOTICE OF APPEAL and Mr. Bachrach's July 11, 1995, letter specifically identified one and only one appellant: Western States Development Corp.

Accordingly, the Planning Director's July 6, 1995, letter determination would be final with respect to the other two applicants under those circumstances, and the issues resolved in that letter — a difficult issue by itself (*see* the next topic labeled "Reviewable Issues" that begins at page 28) — will bind the two other applicants.

2. OBJECTORS / "AGGRIEVED" PARTIES

At the October 2, 1995, hearing (but not at the September 20, 1995, hearing) WSD objected to the attempted participation by Arnold Rochlin and Chris Foster, contending that neither Rochlin nor Foster would be directly impacted by any decision that might be rendered. WSD cited certain "Rules of Procedure" of uncertain origin that the County apparently mailed to WSD and which employed the term "substantial right," but otherwise did not address any other "standing" provision in the Zoning Ordinance.

WSD failed to raise this issue at the September 20 hearing, and, as a result, both Rochlin and Foster testified. Thus, by the time WSD objected to their participation at the October 2 hearing, each of them had already become "aggrieved" as that term has been defined in land use matters by the Supreme Court. *See Jefferson Landfill Comm. v. Marion Co.*, 297 Or 280, 284, 686 P2d 310 (1984), *Warren v. Lane County*, 297 Or 290, 300, 686 P2d 316 (1984), and *Benton County v. Friends of Benton County*, 294 Or 79, 89, 653 P2d 1249 (1982). I conclude that WSD therefore waived any objection to the participation of Rochlin and Foster.

Alternatively, as I explain below I conclude that nothing in either state law or the Multnomah County Zoning Ordinance requires that I exclude Rochlin and Foster from participating in this proceeding. MCC 11.15.8225(A) defines "parties" for purposes of hearings pursuant to .8220–.8285 as, *inter alia*,

> ". . . persons who demonstrate to the approval authority at its hearing, under the Rules of Procedure,[12] that they ***could be aggrieved*** or ***have interests adversely affected*** by the decision." (MCC 11.15.8225(A)(2) [emphasis added].)

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12 The term "Rules of Procedure" remains undefined with the Zoning Ordinance. MCC 11.15.8125 bears the *caption* of "Rules of Procedure," but merely provides that

> "[t]he conduct of hearings of the Hearings Officer shall be according to procedures prescribed by ORS and order ***of the [Hearings] Officer*** and filed with the Clerk of the Board." (MCC 11.15.8125(A) [emphasis added].)

I am unaware of any procedures prescribed by "order of the Hearings Officer."

Because I have concluded that the present proceeding represents an *original* proceeding pursuant to MCC 11.15.8220–.8285 (in lieu of an "appeal" proceeding controlled by MCC 11.15.8290), the definition of "parties" in MCC 11.15.8225 becomes important; otherwise, the appeal provisions in MCC 11.15.8295 do not incorporate the "parties" provision in MCC 11.15.8225.

Both Rochlin and Foster claim that they "could be aggrieved" for purposes of MCC 11.15.8225(A)(2); neither contended that they "could . . . have interests adversely affected." The County has not defined the term "aggrieved." However, I conclude, based upon the terminology in .8225(A)(2) and the timing of its most recent amendment in 1985, that the County likely intended that the language mirror the language in *former* ORS 197.830[13] that the Supreme Court addressed in *Jefferson Landfill Comm. v. Marion Co.*, 297 Or 280, 686 P2d 310 (1984), *Warren v. Lane County*, 297 Or 290, 686 P2d 316 (1984), and *Benton County v. Friends of Benton County*, 294 Or 79, 653 P2d 1249 (1982).

The parallel diverges to some extent, because in *Jefferson Landfill Comm.*, *Warren*, and *Benton County* the question whether a person had been "aggrieved" for purposes of an appeal to LUBA depended upon whether the local government had "recognized" a person in the first place. *Jefferson Landfill Comm. v. Marion Co.*, *supra*, 297 Or at 284; *Warren v. Lane County*, *supra*, 297 Or at 300; *Benton County v. Friends of Benton County*, *supra*, 294 Or at 89 ("[a] person whose interest in the decision has been recognized . . . can be 'aggrieved' "; "decision must be contrary to the request or other position that the person espoused during the proceeding"). *See also* ORS 215.422(1)(a) (a person "aggrieved" by a Hearings Officer decision may appeal to the Board, if the County otherwise allows appeals at all). Unless I allow Mr. Rochlin and Mr. Foster to participate, they will not be "aggrieved" for purposes of *further appeals*. However, that possibility does not resolve whether they "could be aggrieved" *now* for purposes of MCC 11.15.8225(A)(2).

In literal terms, .8225(A)(2) implicates a circular inquiry: in order to be a "party," the person must qualify as someone who "could be aggrieved"; a person "could be aggrieved" — per the Supreme Court trilogy above — if a Hearings Officer allows that person to appear and testify; but before that person may appear and testify, that person must qualify as a "party" pursuant to .8225(A). In other words, if I allow Mr. Rochlin and Mr. Foster to testify, then I will have *rendered* them someone who

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13 The term "aggrieved" endured in ORS 197.830 until 1989.

"could be aggrieved" within the meaning of .8225(A)(2). I cannot, therefore, apply the "aggrieved" test in advance of a decision to allow them to testify.

I conclude that nothing in .8225(A)(2) can be read to limit the right of any interested person to participate in a quasi–judicial proceeding in order to assert "a position on the merits" (*Benton County v. Friends of Benton County*, *supra*, 294 Or at 89). That being the case, I also conclude that no "Rules of Procedure" that do not otherwise appear within the Zoning Ordinance could constrict the meaning that I accord .8225(A)(2).

Finally, I find nothing in ORS 197.763 or ORS 215.416 that otherwise purports to limit or define persons who might participate in a quasi–judicial hearing.

C. REVIEWABLE ISSUES

The County, the Applicants, Mr. Rochlin, and Mr. Foster each offers different perspectives with respect to the issues before me for decision. The confusion derives from a short letter.

The Planning Director's July 6, 1995, letter recited, in pertinent part:

> "On June 28, 1995[,] [Applicants] delivered a packet of material to our office which contained four site plans [.] . . . While very detailed with respect to topography, sanitation system and access, ***those site plans are unclear*** as to the location and type of proposed structures. I am enclosing our *Building Permit Zoning Review Check List* which indicates the type of ***additional information we would need*** to conduct our normal zoning review of your submittal.

> "Before you expend the time and resources required to submit complete 'Plot Plans' . . ., however, I want to advise you that ***we will not be able to issue zoning approvals for these properties***. While these properties have previously been approved for development with mobile homes (PRE 59, 61, 62 & 63–92 and GEC 7–94), ***those approvals expired on January, 1995[,] pursuant to MCC 11.15.2072(C).***[14] . . .
>
> "In the event you have evidence or documents to suggest the above [provisions] do not apply and you believe you are entitled to a specific use, ***please forward these materials for my review***. After the review of these materials, I will prepare a written response concerning your arguments. . . .
>
> "I understand your client ***may assert a vested right*** to continue claim. If so, the evidence you submit should address all relevant factors to establish a vested right. . . ." (Emphasis added.)

Part of the interpretive problem derives from the fact that the County lacks specific procedures tailored to the "zoning clearance" issue and to resolve disputes with respect to an applicant's right to obtain a building permit for an approved "use" whose approval may have expired.

The remainder of the interpretive problem derives from the parties' considerable efforts to frame the issues in this proceeding within the rigid confines of appellate procedure in MCC 11.15.8295. For example, Rochlin argues that the NOTICE OF APPEAL itself falls short of what MCC 11.15.8290(B)(3) requires, or, alternatively, the NOTICE OF APPEAL precludes "meaningful" review pursuant to MCC 11.15.8295(A) because the Notice fails to specify any particular ground or grounds for reversal or modification. (*See* Rochlin's September 20 and September 25, 1995, letters.) However, if, as I have decided above, this proceeding must necessarily be treated as the quasi-judicial hearing to which Applicants would be entitled, this sort of semantical jousting becomes inconsequential.

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14 The letter cites other provisions of the Zoning Ordinance and mentions administrative rules promulgated by LCDC that regulate the siting of dwellings on forestland. Applicants, however, have never contended they fulfill these additional provisions and rules.

Summarized, the parties have staked out the following territory:

- In its September 20, 1995, Staff Report, the County maintains that, among other things, the July 6, 1995, Planning Director decision determined that the Applicants' submittal lacked certain information. (STAFF REPORT at 3, § 4.)[15] [Mr. Foster concurs in this interpretation of the July 6 letter. (*See* Mr. Foster's September 20, 1995, letter.)]

- In its "NOTICE OF PUBLIC HEARING," however, the County described the Planning Director's July 6, 1995, letter as something *more than* a determination of "completeness," *viz*, a "determin[ation] that [the subject] property . . . cannot be approved for single family dwellings under provisions of Multnomah County Zoning Code." (NOTICE at 2.) To some extent, the September 20, 1995, Staff Report echoes that alternate interpretation, reciting that the July 6 letter determined that "[n]ew residential construction would be impermissible under current County zoning." (STAFF REPORT at 3, § 4.) [Mr. Foster also concurs in this interpretation of the July 6 letter. (*See* Mr. Foster's September 20, 1995, letter.)]

- The County disputes the notion that the July 6, 1995, letter determined or adjudicated any aspect of Applicants' contention that Applicants possess a "vested right" to the issuance of building permits. (*See*, for instance, Scott Pemble's July 20, 1995, and August 24, 1995, letters and the County's September 20, 1995, STAFF REPORT at 3, § 4.)[16]

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15 The County's argument necessarily assumes that a Hearings Officer would otherwise have jurisdiction of that sort of administrative decision under MCC 11.15.8290(A).

16 Inferentially, the County would suggest — and at times during the September 20, 1995, hearing appeared to suggest — that the issues on appeal might well include the question whether Applicants ought to have submitted their "vested right" *evidence* to the Planning Director at the outset. Because the County requested a continuance at the September 20 hearing in order to evaluate Applicants' "vested right" evidence, and because the County has now responded to that evidence on the merits, this additional point has been rendered moot.

- The Applicants maintain that, in addition to the "completeness–of–application" issue, the July 6, 1995, letter represents a substantive determination that (1) MCC 11.15.2072(C) precludes the issuance of a building permit under any circumstances, and (2) Applicants lack a "vested right" to obtain "zoning clearance." (*See*, for instance, Mr. Bachrach's July 7, July 11, July 24, 1995, and September 26, 1995, letters, andMr. Bachrach's September 18, 1995, "APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL.")

- In both their September 26, 1995, letter and their remarks at the October 2 hearing, however, Applicants describe the "vested right" issue as one that may first be raised as a *defense* to, or in *response* to, any adverse decision with respect to "zoning clearance" necessitated by the two–year limitation period in MCC 11.15.2072(C).

I conclude that the Planning Director's July 6, 1995, letter decides four matters. *First*, it declares Applicants' request for "zoning clearance" to be incomplete, in which case the 120–day period in ORS 215.428(1) would not begin to run until the 31st day after June 28, 1995. The declaration of "incompleteness" in the July 6 lettter otherwise has no determinative or preclusive effect, since ORS 215.428 allows "incomplete" application to go forward anyway.

Second, it declares that even if Applicants were to supply the missing items (and thereby rendered their application "complete"), MCC 11.15.2072(C) would prevent any approval in any event. Whether this sort of decision falls within the types actions or interpretations that a Planning Director can undertake in the first place seems doubtful, particularly in light of the manifest requirement for a "hearing" before a Hearings Officer pursuant to MCC 11.15.8205(F) and .8220–.8285. Moreover, this portion of the letter renders futile any attempted compliance with the initial paragraph of the letter.

Third, it invites the Applicants to offer reasons why the two–year limitation period in MCC 11.15.2072(C) would not apply. Applicants would certainly need to do that in any event, within the context of the required quasi–judicial hearing that MCC 11.15.8205(F) contemplates as part of an "action" proceeding.

Fourth, it anticipates Applicants will or might assert a claim of "vested right" to obtain the requisite "zoning clearance," and suggests by implication that the County had not seen any evidence that otherwise might support that claim. Because of the

plain requirement that Applicants be afforded a quasi-judicial hearing in connection with any request filed under MCC 11.15.8205(F), it would have been premature for the Planning Director to have insisted that he be presented with "vested right" evidence prior to the requisite hearing. In any event, that deficiency has now been cured between the September 20 and October 2 hearing, so that concern has become a moot point.

Thus, I interpret the Planning Director's July 6, 1995, letter as purporting to decide something more than the "completeness" issue.

If I am correct that this proceeding represents — and must therefore be characterized as — the initial quasi-hearing hearing that Hearings Officers ordinarily conduct in *non*-appeal mode, then I perceive the following two broad issues to be before me:

- What, if any, preclusive effect does the County's 1993 approvals in PRE 59/62/63-92 have on the current request for "zoning clearance"? Alternatively stated, does MCC 11.15.2072(C) apply to Applicants under the circumstances?

- Do Applicants have a "vested right" to obtain "zoning clearance" notwithstanding the two-year limitation in MCC 11.15.2072(C)?

If, on the other hand, I am *in*correct in my characterization of this proceeding as an original quasi-judicial hearing, and this proceeding can only constitute an "appeal" proceeding under MCC 11.15.8290(A), ***and*** if I am likewise *in*correct in my earlier conclusion that I lack jurisdiction to proceed because of the absence of an "administrative" decision that the Zoning Ordinance makes appealable to a Hearings Officer, then I must resolve Mr. Rochlin's procedural objections to the sufficiency or completeness of the NOTICE OF APPEAL itself.

Mr. Rochlin argues that the NOTICE OF APPEAL falls short of the specificity that MCC 11.15.8290(B)(3) and 11.15.8295(A) otherwise require:

> "(B) A Notice of Appeal shall contain:
>
> "* * * * *

"(3) The ***specific grounds relied on*** for reversal or modification of the decision." (MCC 11.15.8290(B)(3) [emphasis added].)

❖ ❖ ❖

"(A) A hearing before the Hearings Officer on a matter appealed under MCC .8290(A) shall be limited to the ***specific grounds relied on*** for reversal or modification of the decision in the Notice of Appeal." (MCC 11.15.8295(A) [emphasis added].)

The Applicants' "NOTICE OF APPEAL — ADMINISTRATIVE DECISION" refers to an attached July 11, 1995, letter as the source of the "specific grounds relied on for reversal or modification." That letter recites, in pertinent part:

> "As you are aware, Western States is seeking zoning approval from the county in order to be able to apply to the City of Portland for building permits to construct a site-built house on each of four lots in the Skyline Ridge Estates Subdivision. The requested zoning approval should be granted because ***the January 7, 1995, expiration date established in MCC 11.15.2072(C) is not applicable*** to Skyline Ridge Estates Subdivision for the reasons set out in my November 16, 1994, letter to Multnomah County and in the complaint filed on behalf of Western States." (*Id.* at 1–2 [emphasis added].)

Rochlin maintains that the letter's reference to "reasons" that Applicants incorporate by reference from materials *outside* the NOTICE OF APPEAL — without any accompanying description of the portion or portions of those materials that Applicants deem pertinent — fails to impart adequate notice and, therefore, fails to provide interested parties an adequate opportunity to respond. (*See* Rochlin's September 20, 1995, written testimony.)

In other words, Rochlin assumes that someone with no knowledge about the case or the underlying facts ought to be able to discern all pertinent information from the NOTICE OF APPEAL. But MCC 11.15.8290(B)(3) merely requires that the NOTICE OF APPEAL recite the "specific grounds relied on for reversal or modification," and I construe the emphasized portion of the above excerpt as achieving precisely that; I

construe the NOTICE OF APPEAL as challenging the applicability of MCC 11.15.2072(C) as well as asserting, by implication, Applicants' vested right.[17] If, on the other hand, Applicants had merely incorporated prior letters, memoranda, or arguments by reference without any further description, then I might well conclude that Rochlin's objection would be well taken. MCC 11.15.8290(B)(3) says nothing, however, about setting forth the "reasons" that support the "specific grounds."

Rochlin further contends that "meaningful review is impossible" (*see* Rochlin's September 20, 1995, written testimony at 1) because the absence of "specific grounds" renders the scope of review so narrow "that it includes nothing" (*id*). I concluded in the previous paragraph that, in my opinion, the NOTICE OF APPEAL adequately identifies the "specific grounds" for appeal. I can readily ascertain the issues associated with Applicants' declaration that "the January 7, 1995, expiration date established in MCC 11.15.2072(C) is not applicable."

I do conclude, however, that the NOTICE OF APPEAL fails to adequately refer to the Planning Director's decision that Applicants' request for "zoning clearance" remains incomplete. Thus, that aspect of the Planning Director's July 6, 1995, letter would not be subject to appellate review within this proceeding (assuming I have jurisdiction). In light of my earlier discussion, I also conclude that an appeal of that issue would be inconsequential.

D. PRECLUSIVE EFFECT OF FAILURE TO APPEAL THE MAY, 1993, APPROVALS

The County and Mr. Rochlin contend that Applicants' failure to appeal the May, 1993, "use" approvals in PRE 59/62/63–92 now precludes Applicants from rendering what might be described as a collateral attack on the two–year condition in those approvals. If so, and if there exists no reason why Applicants' failure to challenge the two–year condition ought not be disregarded, then the condition in PRE 59/62/63–92 — whether right or wrong — would bind Applicants.

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17 As I have noted elsewhere, the *evidentiary* impediment mentioned in the July 6, 1995, letter has been effectively mooted by the County's opportunity to review and respond to Applicants' vested right expenditure evidence. The vested right issue is as ripe as it will ever be.

Each of the decisions in PRE 59/62/63–92 contained the following condition:

> "This approval will expire on January 7, 1995[,] if building permits have not been issued by that date."

Although they could have done so, Applicants did not appeal the insertion of that condition in the approvals, and have offered no reason why they did not appeal — *except* to declare that they *already* possessed a "vested right" to obtain "zoning clearance" before May, 1993. (*See* Mr. Bachrach's letter of September 26, 1995, at 7.) If they did possess a vested right by that time, then the condition quoted above would be for naught, as would any appeal therefrom. [The separate discussion whether Applicants have a vested right begins in the next topic at page 37, *infra*.]

Throughout the course of correspondence and memoranda, Applicants have isolated the following dates by which they urge that they possessed a vested right to "zoning clearance":

- August, 1989, when the County approved the subdivision. (*See* "APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" at 9; *see also* the Multnomah County Circuit Court complaint in *Western States Development Corporation v. Multnomah County, et al.*, at 2, ¶ 12.)

- "As of January 7, 1993," when the County rezoned the subject properties and adopted MCC 11.15.2072(C). (*See* Mr. Bachrach's September 26, 1995, letter at 6, and "APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" at 1 and 7.)

- May 14, 1993, when the County issued administrative approvals in PRE 59/62/63-92. (Per Mr. Bachrach's comments at the October 2, 1995, hearing.)

At the hearing on October 2, 1995, Applicants settled on the January 7, 1993, date as the date by which they would have obtained a vested right, if at all. The County, on the other hand, seems content with the May 14, 1993, date and has used that date in its analysis of the vested right issues. (*See* "COUNTY MEMORANDUM IN RESPONSE TO HEARING[S] OFFICER REQUEST," at 1-9.)

Thus, no activities beyond May 14, 1993, would have any effect on the question whether Applicants had a vested right; Applicants could not bolster their claim by citing expenditures made after May 14, 1993, and, conversely, nothing the County did after May 14, 1993 (whether by self-executing ordinance [*viz*, MCC 11.15.2072(C)] or otherwise), could have any effect on a vested right that might have existed by that date.

Therefore, I conclude that, *if* Applicants can establish that they had a vested right as of May 14, 1993, then the fact that they did not appeal the May, 1993, use approvals would have no preclusive effect with respect to this proceeding. I likewise conclude that, *if* there exists *no* vested right, Applicants' failure to appeal the May, 1993, use approvals *will* preclude any collateral attack on MCC 11.15.2072(C) in this proceeding. *See Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

If I am *in*correct in my conclusion that a vested right arising prior to May 14, 1993, would render the condition in the approvals in PRE 59/62/63–92 superfluous and unenforceable, then the separate question whether Applicants ought to now be able to debate the effect of ORS 215.428(3) actually becomes a moot point.

The only conceivable relevance of ORS 215.428(3) lies in Applicants' contention that all proceedings from 1989 forward should be governed by criteria in the MUF–19 district that existed at that time, or, alternatively, as of November, 1992, when Applicants filed their requests for "use" approval. However, ***that*** argument would necessarily have been the crux of any appeal of the condition imposed in the approvals in PRE 59/62/63–92.

Thus, any resurrection of that argument in this proceeding would amount to a collateral attack on the two–year period imposed in the unchallenged approvals in PRE 59/62/63–92. *Beck v. City of Tillamook*, ***supra***. ORS 215.428(3) could logically form no issue here in that event.

IV. FINDINGS ON VESTED RIGHT CLAIM

Whether this proceeding comprises an "appeal" or an "original" (and, in this case, bifurcated) quasi-judicial proceeding makes no difference in my findings and conclusions on the "vested right" issue.

A. WHAT *IS* THE NATURE OF THE "RIGHT"?

Before I can assess the Applicants' claim of vested right under the *Holmes* criteria, I need to be certain that I understand the nature of the claimed right in this particular case. In other words, assuming for purposes of argument that I find such a right exists, how would the right be described?

This conceptual issue — which apparently never occurred within the context of the various "vested right" decisions reported by the Supreme Court or Court of Appeals — arises only because of a semantical conundrum of Applicants' own making that occurred prior to this proceeding. In the Multnomah County Circuit Court proceedings, WSD faulted the County for assuming that WSD "is in the business of applying for building permits." ("PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS," at 1.) WSD declared in those proceedings that it "is a developer, not a builder. Builders, not developers, apply for building permits." (*Id.* at 1 [underscore in original].) ***But see Eklund v. Clackamas County***, 36 Or App 73, 583 P2d 567 (1978), in which a "developer" apparently sought "building permits."

WSD elaborated:

> "Western purchased the subject property to develop a five–lot subdivision. Development of a subdivision includes the legal, engineering and construction work necessary to transform a single, larger parcel into several smaller lots, with accompanying infrastructure, to the point where the lots can be sold to ***others who then build homes*** on the lots."

> "In its complaint, Western alleges that it intends to sell the subdivision lots to others and that ***those purchasers*** (and presumably, their architects) would then create the house plans and ***submit the necessary applications to obtain building permits***. Yet, the County's motion repeatedly and ***incorrectly*** states, assume or implies that Western can and should simply apply for those permits.
>
> "Western's claims are ***not*** premised upon an intention or desire to obtain building permits. Rather, . . . the County's pronouncement . . . effectively prohibits Western from ***marketing*** the lots to the potential purchasers[.]" ("PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS," at 1–2 [underscore in original; emphasis added].)

Just as the County made certain representations in the circuit court litigation about the availability of procedures to obtain "zoning clearance" that the Applicants urge cannot now be disavowed, I ought to accept the above remarks by Applicants in that same manner and under that same condition.

If I do so, it makes a difference, because Applicants describe their claim to vested right in different ways:

- the right to "have a house constructed" ("APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" at 1);
- the right to "complete" the "development of a project" ("APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" at 6);
- the right to "obtain building permits" ("APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" at 8);
- the right to "complete the development approved by the County in August, 1989" ("APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" at 9);

- the right to "construct single family houses" ("APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" at 10);

- the right to "apply for single family building permits" (Mr. Bachrach's September 26, 1995, letter at 6);

- the right to "develop the Project as approved" as of August, 1989 (*see* the Multnomah County Circuit Court complaint in *Western States Development Corporation v. Multnomah County, et al.*, at 2, ¶ 12); and

- the right to "develop and market the Property pursuant to County Approval" (*see* the Multnomah County Circuit Court complaint in *Western States Development Corporation v. Multnomah County, et al.*, at 11).

At the October 2, 1995, hearing, Applicants specifically identified the "conclusion" portion of Mr. Bachrach's September 18, 1995, "APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" as descriptive of their claim of vested right in this proceeding:

> "[T]he four[18] lots at issue in Skyline Ridge Estates have a vested right to ***construct single family houses*** subject only to appropriate building code regulations." (*Id.* at 10 [emphasis added].)

I emphasize this latter description because I asked the Applicants to formulate a solitary description of the nature of the vested right that they seek.

If, as Applicants plainly declared in their arguments in the circuit court proceedings, there exists a fundamental differentiation between a "builder" and "developer," and if, as Applicants there declared, "***[b]uilders***, not developers, apply for building permits," then there ought to be a corresponding and equivalent distinction

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18 As far as I can tell from the record, WSD, Mr. Bender, and Ms. Olsson own three of the subdivision parcels; the record contains "zoning clearance" requests for Lots 1, 4, and 5 only. Mr. Zivin, who the County listed on the Staff Report (but not the Notice of Public Hearing) as another "owner," owns Lot 3 but has written the County to disavow any interest in this proceeding. Nothing in the record otherwise identifies Lot 2 or its owner as having anything to do with this proceeding.

between (1) *builder*–oriented phrases such as the right to "have a house constructed," "obtain building permits," "construct single family houses," and "apply for single family building permits," and (*2*) *developer*–oriented phrases such as the right to "complete" the "development of a project," "complete the development approved by the County in August, 1989," "develop the Project as approved [as of August, 1989]," and "develop and market the Property pursuant to County Approval."

The County's September 27, 1995, "COUNTY MEMORANDUM IN RESPONSE TO THE HEARING[S] OFFICER'S REQUEST" alludes to that distinction:

> "Even if the expenditures were substantial, the critical question remains, i.e.[,] can substantial expenditures to ***complete a subdivision*** vest a right to ***construct dwellings*** on the subdivision lots? . . .
>
> "N[one] [of the] vested right precedent[s] in Oregon[] address[es] the question whether ***subdivision*** development expenses can create a vested right to construct ***dwellings*** on the subdivided lots[.]" (*Id.* at 7 [emphasis added].)

As the County correctly emphasized in that quoted excerpt, not only have the pertinent vested right cases (which I discuss in the next topic) failed to make or observe the distinction that Applicants made in the circuit court proceedings, but the distinction makes little sense in this instance because of the limited manner in which Applicants have defined the scope of the vested right. If, as Applicants proclaim, the vested right in this instance comprises the right to obtain building permits to construct single–family residences, then according to WSD only a ***builder***, as opposed to a ***developer***, can properly assert that right. A developer could claim a vested right to do *other* things, as the cases demonstrate.

I conclude that a developer in Applicants' position really has little concern with the right to obtain building permits — unless that developer purports to do what Applicants say only a "builder" does. Rather, Applicants want a declaration that they have a vested right to market and sell buildable lots in the subdivision, and that the subdivision may proceed to fruition in the manner in which it had been approved by the County in 1989. *See*, for instance, *Cook v. Clackamas County*, 50 Or App 75, 81–83, 622 P2d 1107, *rev den* 290 Or 853 (1981), and *Milcrest Corp. v. Clackamas County*, 59 Or App 177, 180, 650 P2d 963 (1982). A vested right to "develop" an approved subdivision or PUD necessarily includes the correlative right to actually build resi-

dences thereon. To carve up the nature of the right into discrete components, such as Applicants have done with their distinction between a "builder" and a "developer" and the distinction between obtaining building permits and developing/ marketing the subdivision lots, puts Applicants in a hole into which they need not have fallen.

To paraphrase the Court of Appeals in an unrelated matter, although a Hearings Officer should not improve the parties' arguments in order to span gaps that otherwise prove fatal to those the arguments, the parties likewise cannot compel a Hearings Officer to error by urging the adoption of an illusory or illogical distinction. *See PacifiCorp v. City of Ashland*, 89 Or App 366, 370, 749 P2d 1189, *rev den* 305 Or 594 (1988). As the Court of Appeals reasoned in that case, the decision–maker can either rule against the party that fails to urge a properly–constructed argument but which might otherwise prevail if it had done so, or it can ignore the defect and simply resolve the issue within the correct legal framework. I opt to do the latter.

Therefore, because Applicants have identified and described their claim of vested right as including not only the right of a "builder" to the issuance of building permits but the right of a "developer" to complete and market subdivision lots, I will error on the side of common sense and the expeditious resolution of the issue [19] and *not* abide by the distinction that Applicants draw between builders and developers in the circuit court litigation. If I did otherwise, then Applicants — as a "developer" who requests nothing but building permits — might well lack "standing," for lack of a better term, to assert a vested right to the issuance of something that only a "builder" obtains

B. HAVE APPLICANTS FULFILLED THE *HOLMES* CRITERIA?

1. SUBSTANTIALITY OF EXPENDITURES AND THE PROJECT'S "TOTAL COST"

I am befuddled by Applicants' accounting for expenditures directly related to the subdivision. Applicants' Exhibit 6 contains an inch–thick assortment of documents that purport to relate to the subdivision. The exhibit contains no summary page, other

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19 If I denied Applicants' vested right claim solely on the ground that Applicants too–narrowly limited their request to "building permits" when, as a "developer," they must formulate a different request, Applicants could conceivably re–apply and change the phraseology to encompass a claim of vested right more in line with one that a "developer" might urge. I can think of no reason why such a hyper–technical procedure would serve any beneficial purpose.

than Applicants' September 18, 1995, letter (submitted as part of Exhibit 6) which contains the following cost allocation:

CATEGORY	EVIDENCE
Consulting	$139,832.00
Permits and Approvals	$8,982.00
Property Taxes	$47,928.00
Construction	$217,405.00
TOTAL	**$414,147.00**

Applicants' September 18, 1995, "APPELLANT'S MEMORANDUM IN SUPPORT OF THE REQUESTED ZONING CLEARANCE APPROVAL" recites that "by January 1993, when the lots were rezoned, Western States had spent $365,991 (not including land acquisition costs) developing Skyline Ridge Estates." (*Id.* at 1.) It further recites that approximately $207,000 in costs had been incurred "by the end of 1992" (*id.* at 7), which I presume roughly corresponds with the September, 1992, final plat approval and the November, 1992, request for "use" approval pursuant to MCC 11.15.2170(A).

Applicants later filed a "Revised" Exhibit 6 that simply identifies gross expenditures of $304,434.33, with $187,698.75 occurring between November, 1988, and May 14, 1993.

The County made a valiant effort to analyze Applicants' costs, and it breaks down Applicants' Exhibit 6 as follows:

CATEGORY	EVIDENCE	AS REDUCED
Construction	$50,120.82	$50,120.82
Planning and Designing	$73,468.17	$55,967.52[20]
Attorney Fees	$51,438.83	$0.00[21]
Non–Project Expenses	$85,883.91	$0.00[22]
Post–5/14/93 Expenses	$100,020.36	$0.00[23]
Miscellaneous	$7,554.00	$7,554.00
Cancelled Checks	$26,452.94	$0.00[24]
TOTAL	**$394,939.03**	**$113,642.34**

After having analyzed Applicants' evidentiary support for Applicants' claim of vested right under the criteria in *Clackamas County v. Holmes*, *supra*, 265 Or at 197–98 and 201,[25] the County concluded that, with respect to amount of money spent:

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20 The County maintains, and I concur, that a portion of Applicants' expenditures for some of the consultants' fees included work on projects or matters other than the subdivision itself. ("COUNTY MEMORANDUM IN RESPONSE TO THE HEARING[S] OFFICER'S REQUEST," at 3–4.) The Applicants have the burden of disentangling these sorts of things.

21 The County maintains, and I concur, that Applicants' expenditure for attorney fees commingles work on projects or matters other than the subdivision itself. ("COUNTY MEMORANDUM IN RESPONSE TO THE HEARING[S] OFFICER'S REQUEST," at 3–4.) The Applicants have the burden of disentangling these sorts of things.

22 The County maintains, and I concur, that Applicants' expenditures for such things as property taxes and the purchase of heavy equipment do not necessarily relate to the subdivision. ("COUNTY MEMORANDUM IN RESPONSE TO THE HEARING[S] OFFICER'S REQUEST," at 3.) These represent the equivalent of overhead that would be incurred in any event.

23 No expenditures beyond May 14, 1993, could support any claim of vested right, if, as Applicants maintain, they had a vested right as of, or prior to, the approvals that the County rendered on that date.

24 The County maintains that this figure represents payments of invoices already included in Exhibit 6, and thus represents a "double" counting of expenditures. ("COUNTY MEMORANDUM IN RESPONSE TO THE HEARING[S] OFFICER'S REQUEST," at 2–3.) Applicants have not disputed the County's characterization of these items.

25 *Holmes* identified the following factors to consider: (1) substantiality of expenditures, (2) good faith, (3) actual notice, (4) type of expenditures, (5) kind of project, (6) location of the project, (7) ultimate cost, (8) acts beyond a mere contemplated use, and (9) abandonment.

- Expenditures made by Applicant after May 14, 1993 — the date of the approvals in PRE 59/62/63–92 and the imposition of the January 7, 1995, cut–off date for building permits — should be excluded from consideration. ("COUNTY MEMORANDUM IN RESPONSE TO THE HEARING[S] OFFICER'S REQUEST," at 4–5.)

- The sum of $113,642 (*see* the above table) is "not insubstantial." (*Id.* at 6.)

- Applicants have offered no evidence of the subdivision's total cost, including the proposed single–family dwellings. (*Id.* at 5.)

- Because Applicants have not identified the costs associated with the construction of the single–family residences, but have instead confined their cost evidence to the development of the subdivision itself, Applicants have "failed to set out the legal basis for [their] claim that expenditures for subdivision improvements create a vested right to construct nonconforming uses on the subdivided lots." (*Id.* at 9.)

I can find nothing in the record that describes the nature and extent of any improvements constructed from 1988 forward — other than undated pictures comprising Applicants' Exhibit 7. Applicants acknowledge only that "[t]here [were] little in the way of ***physical improvements*** to the site until after the county accepted the final plat in September[,] 1992." ("APPELLANT'S CLOSING MEMORANDUM AND PROPOSED FINDINGS," at 13 [emphasis added].)

I have no idea what comprises the "physical improvements" to which Applicants refer. As I read cases such as *Eklund v. Clackamas County*, 36 Or App 73, 80–81, 583 P2d 567 (1978), *Webber v. Clackamas County*, 42 Or App 151, 153, 600 P2d 448, *rev den* 288 Or 81 (1979); *Cook v. Clackamas County*, 50 Or App 75, 81–83, 622 P2d 1107, *rev den* 290 Or 853 (1981), and *Milcrest Corp. v. Clackamas County*, 59 Or App 177, 180, 650 P2d 963 (1982), that sort of information proves pivotal to any assessment of the existence of a vested right. Because, however, the County takes no issue with the existence or extent of the improvements as of May, 1993, I will presume there to be no issue here, and will focus only the amount and nature of Applicants' expenditures.

As the parties' differing interpretations of the various cases demonstrates, the trouble with *Holmes* dollar–based criterion lies in the lack of any objective means by which a decision–maker can conclude that an applicant has or has not passed the *Holmes* threshold with respect to the "substantiality" of expenditures. Indeed, some of

the Court of Appeals' decisions simply abandoned any hope of making sense of this particular criterion, and concluded that a particular sum proved "substantial." *See Eklund v. Clackamas County*, *supra*, 36 Or App at 81; *Webber v. Clackamas County*, *supra*, 42 Or App at 154–55.

Somewhat surprisingly, the County has not mentioned the significance of *Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529, *rev den* 299 Or 314 (1985), which suggests that expenditures that might be labelled as "anticipatory" of *final* project approval — which might comprise either PUD approval, as in *Mason*, or subdivision approval — cannot bolster a claim of vested right. 73 Or App at 338–40. Mr. Rochlin correctly observes that MCC 11.45.750 provides that "[s]ubdivision . . . approvals shall become final upon the recording of the approved plats." That occurred in September, 1992, in this case. However, because a great deal of site preparation precedes the recording of the final plat, I am uncertain that MCC 11.45.750 ought to be interpreted in the same manner that the Court of Appeals interpreted Linn County's PUD provisions in *Mason*.

Nevertheless, for purposes of analysis (although not necessarily for purposes of my final assessment), I will conclude that Applicants could not properly claim any vested right before September 28, 1992, and that any expenditures before that date would be "anticipatory" expenditures. In that event, I find that Applicant's evidence of expenditures of $394,939.03 — as discussed and analyzed by the County in its September 26, 1995, memorandum — should be reduced by the pre–September 28, 1992, expenditures of $177,857.37, leaving expenditures from September 28, 1992, to May 14, 1993, of $216,081.66. The County's corresponding figure of $113,642.34 should similarly be reduced by $68,087.17, leaving expenditures — according to the County's calculations — of $ 45,555.17.

Without adequate guideposts in the cases to lead me in a contrary direction, I find that the sum of $45,555.17 — which under my worst-case scenario represents the lowest possible level of expenditures incurred between September 28, 1992, and May 14, 1993 — does *not* constitute an "*in*substantial" level of expenditure for that time period. If I eliminate my uncertainties about the effects of *Mason v. Mountain River Estates*, *supra*, the County's figure rises to $113,642.34, which even the County stipulates to be "not insubstantial."

I also conclude that I need not translate expenditures into a "ratio" test, for the simple reason that there exists no case law that tells me what ratio would represent the lowest acceptable level. Not even *Webber v. Clackamas County*, *supra*, identified any ratio in its rejection of a vested right (*see* 42 Or App at 155), although if it had done

so it would have faced the prospect of valuing 250 homes, as opposed to the three that Applicants propose to build. *Union Oil Co. v. Board of Co. Comm. of Clack. Co.*, 81 Or App 1, 724 P2d 341 (1986), did uphold LUBA's conclusion that a 1:47 ratio would not suffice (81 Or App at 5, n. 1), although to reach that ratio with expenditures of $45,555 I would have to find that total development costs — *excluding* the cost of actually constructing the homes[26] — would need to approach $2,140,000. The highest figure in the record, however, remains the figure of $414,147 — since adjusted downward — that appeared in Applicants' Exhibit 6.

Moreover, even *Union Oil Co. v. Board of Co. Comm. of Clack. Co.* presumes to allow a local government to reject particular criteria as dispositive and focus on others instead. 81 Or App at 8. None of the various Court of Appeals' decisions examines all of the *Holmes* criteria, and none provides any insight as to the respective weight to be accorded particular elements. Cases upholding claims of vested rights have done so after concluding that the owner fulfilled only some of the *Holmes* criteria (*see Milcrest Corp. v. Clackamas County*, 59 Or App 177, 181, 650 P2d 963 (1982); *Cook v. Clackamas County*, 50 Or App 75, 81-84, 622 P2d 1107 *rev den* 290 Or 853 (1981); and *Eklund v. Clackamas County*, 36 Or App 73, 81-82, 583 P2d 567 (1978)), while cases denying claims of vested rights have done so on the basis of an examination of only a few of the *Holmes* criteria (*see Mason v. Mountain River Estates*, 73 Or App 334, 337-39, 698 P2d 529, *rev den* 299 Or 314 (1985) (not discussing *Holmes* but wielding a couple of the *Holmes* criteria nonetheless); *Webber v. Clackamas County*, 42 Or App 151, 153-57, 600 P2d 448 *rev den* 288 Or 81 (1979); and *Pohrman v. Klamath County Comm.*, 25 Or App 613, 616-17, 550 P2d 1236 (1976)).

Thus, even if I can be faulted for finding the sum of $45,555.17 to be "substantial" for purposes of *Holmes*, I further conclude that Applicants' level of expenditures does not represent the dominant criterion to be applied in this particular case. It remains but one of roughly nine criteria, and certainly not determinative.

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26 I conclude that nothing in the various vested right cases requires a developer, who plans on selling lots to others who will then build the homes, to include the cost of actually constructing all of the subdivision homes in order to demonstrate a vested right to, in effect, market the subdivision as a buildable subdivision.

2. APPLICANTS' GOOD FAITH

The County does not challenge the Applicants' good faith in pressing forward with development throughout with the chronology detailed in the early pages of this decision, nor do I find anything in the record that would support any such challenge.

Although I am somewhat befuddled by the fact that from May, 1993, until June, 1995, Applicant apparently never applied for a building permit or "zoning clearance." However, Applicant explained that, because it merely markets the properties, it focused its energies during that time period on the preparation and sale of the lots to owners/builders who Applicants presumed would undertake that task. While I remain puzzled why so little sales activity occurred during that two-year period, I cannot conclude that the record demonstrates anything that detracts from Applicants' good faith pursuit of the subdivision.

I find that Applicants have consistently demonstrated good faith with respect to the expenditures for the subdivision.

3. APPLICANTS' ACTUAL NOTICE OF ANY REGULATORY CHANGE

Applicants *could* have had actual notice of the County's creation of the January 7, 1995, deadline in late 1992, when the County apparently passed the legislation that eventually became effective on January 7, 1993. However, I find nothing in the record that infers that Applicants *did* have actual notice. *Holmes* requires "actual" notice of a regulatory change.

Thus, I find that Applicants gained actual notice of the January 7, 1995, deadline no earlier than May 14, 1993. As I discuss earlier, if Applicants have any vested right at all, they gained it on or before that date.

4. THE "TYPE" OF EXPENDITURES AND "CONTEMPLATED USE"

In addition to the ***amount*** of expenditures, the parties lock horns over these additional money-related criteria, although not very vigorously.

The County argues that Applicants' expenditures bear questionable relationship to the construction of single-family residences. (*See* the County's September 27, 1995, "COUNTY MEMORANDUM IN RESPONSE TO THE HEARING[S] OFFICER'S REQUEST" at 7-8.) Although to some extent the County's stance challenges Applicants' "developer"/"builder" dichotomy, it infers the absence of a sufficient connection between the expenditures made and the type of vested right sought. Conspicuously absent from the County's argument, however, is the kind of argument that a local government almost has to make in these circumstances, *viz*, Applicants nevertheless retain at *some* beneficial use of the property. *See Webber v. Clackamas County*, *supra*.

I look at the matter chronologically and logically:

- In August, 1989, the County approved the five-lot subdivision, and I can infer from the record and the chronology that Applicants directed their expenditures toward the completion of that subdivision. However, at this point I find that the level of expenditures fell somewhere between a "more-consistent-than-not" commitment to subdivision use and mere preparation for a contemplated use. Thus, if regulatory obstacles had occurred at this point, I would find against Applicants on these related criteria.

- By September, 1992, the subdivision had progressed to the point where Applicants had filed, and the County accepted, the final plat. At this point I find that the project had progressed to the point where, in the words of the trial court that the Court of Appeals adopted in *Cook v. Clackamas County*, *supra*,

  > "the expenditures . . . were, as a matter of fact, made in furtherance of [Applicants'] intention to establish a [subdivision] and further finds that the bulk of such expenditures were made for purposes more consistent with [subdivision] construction] than other potential uses." 50 Or App at 82 n. 4.

- In November, 1992, Applicants filed a request for "use" approval for the construction of single-family residences in the subdivision. At that point (or actually prior thereto), Applicants had irretrievably committed their funds to the completion of the subdivision. Although *Cook v. Clackamas County* scolded itself for having used that analysis in *Webber v. Clackamas County*, and in reality requires something less, I nevertheless find and conclude that, as a factual matter, the phrase "irretrievably committed" appropriately describes Applicants' level of development and expenditures at this point. Neither the County, nor Mr. Rochlin, nor Mr. Foster has offered an alternative means of describing Applicants' level of development at this point, nor has any of them proposed any alternate economic use of the property if not for a subdivision.

- On January 7, 1993, the time for even *filing* approval requests of the nature that Applicants had already filed in November, 1992, expired. *See* MCC 11.15.2072(C)(3). Thus, after this point in time no subdivision of this kind could exist again (until zoning changed).

- On May 14, 1993, the County rendered approvals for "a single family residence in conjunction with forest management use" for each of the Applicants' parcels. Quite frankly, I view the County's "use" approvals as documenting the subdivision's commitment to residential use in the manner continually sought by Applicants.

In retrospect, I find it highly improbable that an objective decision-maker could conclude that, as of May 14, 1993, Applicants had not fully committed their resources to the completion of the subdivision in precisely the manner that they had envisioned in 1989, and in precisely the manner for which the County had given approvals in 1989 and 1993. I also find it improbable that, given the level of site improvements necessary to obtain plat approval, Applicants could have made any alternate use of the property by that point in time that would have rendered a reasonable economic return. The absence of suggestions to the contrary in the record only underscore that reality.

Although the Applicants did apparently obtain approval in 1994 to site manufactured homes on the properties, they did so only to preserve their rights in the event that all else fails. I find that Applicants have not thereby elected to forego the subdivision and pursue an altogether different development, but, instead, have merely sought to mitigate their potential losses. Moreover, Applicants testified that the propect of sit-

ing manufactured homes on the properties and then seeking to "replace" those homes by site-built homes — as presently allowed by the County's Zoning Ordinance — represents anything but a viable, reasonable, economic use of the property. No one has disputed that, and I find in favor of Applicants on that point.

5. THE "KIND" OF PROJECT AND "LOCATION" OF THE PROJECT

Holmes does not require the analysis and assessment of all of the factors that it mentions. Before I can apply these two criteria, I must first be able to discern what *Holmes* intended to convey when it employed these terms.

Because I have little idea what these terms suggest (other than their literal meaning), and because the various cases provide no guidance as to the meaning or priority to be accorded these factors, I conclude that the other criteria that I have discussed form the more pivotal considerations. The various cases make it plain enough that not all of the *Holmes* criteria need to be addressed by findings.

6. "ABANDONMENT"

No one suggests, and the record would not support any suggestion, that the Applicants have "abandoned" the subdivision at any point. The chronology detailed at the outset of this decision demonstrates otherwise.

7. SUMMARY OF THE PERTINENT *HOLMES* CRITERIA

I conclude that Applicants have demonstrated a vested right according to the criteria in *Clackamas County v. Holmes*. I find the following language from *Milcrest Corp. v. Clackamas County*, *supra*, to be particularly *apropos* here:

". . . [Applicants] substantially commenced the project, made substantial expenditures, acted in good faith, and cannot use the development that has taken place for conforming alternative uses from which plaintiff can obtain a reasonable economic return." 59 Or App at 181.

V. CONCLUSION(S)

In the movie "SUPPORT YOUR LOCAL SHERIFF," James Garner drifts into a gold-rush town whose economic frenzy has attained comic proportions. In the center of town lies an eatery whose prices the proprietors have posted on an easily-erasable chalkboard — for reasons that quickly become obvious. Every few minutes (or less), the owners increase prices, and, as they do so, they fetch still-full plates from patrons in order to take full advantage of the inflationary spiral; to "finish" a meal, you must continually buy a new one — at higher prices. As Garner gawks with disbelief, and as his table-mate resigns himself to enduring this phenomenon, the latter forewarns Garner that "sometimes it catches ya between mouthfuls." The scene is hilariously whimsical, and we laugh because of its absurdity.

The chalkboard is gone, but the whimsy remains. The County in this case has served up an appetizer, soup-and-salad, and the main course, roughly corresponding to (1) the 1989 subdivision approval in LD 17-89/MC 2-89, (2) the 1992 plat approval, and (3) the 1993 "use" approvals in PRE 59/62/63-92. It now tells Applicants that dessert — long since ordered and paid for — cannot now be consumed because, alas, Applicants should have consumed it some time ago. I conclude that if Applicants ***paid*** for dessert appropriately, if dessert ***made*** it to the table in acceptable fashion, if the dessert ***remains*** on the table awaiting consumption in customary fashion, and if Applicants have not yet left the table, dessert is theirs to consume at their leisure.

I conclude as follows:

- I ought to, and shall, treat this proceeding as an original quasi-judicial hearing for purposes of determining Hearings Officer jurisdiction. I conclude that there exists no "appeal" procedures for the types of matters contained in the Planning Director's July 6, 1995, letter.

- I conclude that, if I am *in*correct in my treatment of this matter as an original quasi-judicial proceeding, I lack "appeal" jurisdiction under MCC 11.15.8290(A) because of the lack of the requisite ***appealable*** Planning Director decision.

- Because I find that Applicants' series of letters from June, 1995, forward reflect a strong desire to do whatever it takes to resolve the various procedural obstacles, I find and conclude that those letters reasonably constitute a waiver of the 120-day limitation of remaining ***substantive*** issues (such as Applicants' fulfillment of the development criteria in MCC 11.15.2074). I also conclude that the Planning Director appropriately bifurcated the proceedings in order to resolve the procedural issues, as Applicants have steadfastly urged. I conclude, finally, that the 120-day limitation in ORS 215.428 applies to these procedural issues, but not to the remaining issues (such as Applicants' fulfillment of the development criteria in MCC 11.15.2074), which, incidentally, Applicants have yet to address in ***this*** record.

- I conclude that Mr. Rochlin and Mr. Foster may appear in this proceeding.

- I conclude that the Planning Director's July 6, 1995, letter raises issues in addition to the "completeness" of Applicants' application, and that the various matters within that letter remain subject to review.

- I conclude that Applicants' NOTICE OF APPEAL fulfills the content requirements of MCC 11.15.8290(B)(3) and 11.15.8295(A), and that it broadly recites the "specific grounds" for appeal.

- I conclude that Applicants' arguments that ORS 215.428(3) favors them in these proceedings has been mooted by the fact that those arguments would necessarily have been the crux of any appeal from the May, 1993, approvals — from which Applicants never appealed.

- I conclude that Applicants' failure to appeal the May, 1993, approvals (and the accompanying January 7, 1995, deadline) does not constitute a preclusive event *if* Applicants had a vested right on or before May 14, 1993.

- I conclude that Applicants have demonstrated a vested right to (1) complete and market subdivision lots in a manner consistent with the County's prior approvals in LD 17-89/MC 2-89 and PRE 59/62/63-92, (2) obtain "zoning clearance" from the County in order to obtain building permits, and (3) to represent to builders/owners that single-family residences may be constructed upon the lots as long as the builders/owners otherwise fulfill the development requirements of MCC 11.15.2074. Applicants substantially commenced the project, made substantial expenditures, acted in good faith, and cannot use the development that has taken place for conforming alternative uses from which they can obtain a reasonable economic return.

DATED this 24th day of October, 1995.

BARRY L. ADAMSON, Hearings Officer

Signed by the Hearings Officer:	October 13, 1995
Decision Mailed to Parties:	October 18, 1995
Decision Submitted to Board Clerk:	October 18, 1995
Last day to Appeal Decision:	October 28, 1995
Reported to Board of County Commissioners:	November 28, 1995

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed *Notice of Review* form and a fee of $500.00 plus a $3.50-per-minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)]. Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street (in Portland).

Failure to raise an issue by the close of the record at or following the final hearing, (in person or by letter), precludes appeal to the Land Use Board of Appeals (LUBA) on that issue. Failure to provide specificity on an issue sufficient for the Board to respond, precludes appeal to LUBA on that issue.

To appeal the Hearings Officer decision, a *Notice of Review* form and fee must be submitted to the County Planning Director. For further information call the Multnomah County Planning and Development Division at 248-3043.

Signed by the Hearings Officer:	October 13, 1995
Decision Mailed to Parties:	October 18, 1995
Decision Submitted to Board Clerk:	October 18, 1995
Last day to Appeal Decision:	October 28, 1995
Reported to Board of County Commissioners:	November 21, 1995

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