ANNOTATED MINUTES

Tuesday, April 9, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

PLANNING ITEMS

Chair Beverly Stein convened the meeting at 9:38 a.m., with Commissioners Sharron Kelley, Gary Hansen and Tanya Collier present, and Vice-Chair Dan Saltzman arriving at 9:40 a.m.

P-1 CU 10-94; HV 28-95 Hearings Officer Decision APPROVING Conditional Use Approval and a Minor Variance to the Minimum Yard Setback Requirement, to Construct a Single Family Dwelling Not Related to Forest Management on a 17.8 Acre Lot of Record in the Commercial Forest Use Zoning District, on Property Located at 21574 NW GILKISON ROAD, PORTLAND

DECISION READ, NO APPEAL FILED, DECISION STANDS.

P-2 HDP 21-95 Hearings Officer Decision DENYING Appeal and Approving the Administrative Decision Approving a Hillside Development Permit to Allow the Construction of a Driveway and Single Family Dwelling in the Rural Residential Zoning District, on Property Located at 12625 NW GERMANTOWN ROAD, PORTLAND

DECISION READ, NO APPEAL FILED, DECISION STANDS.

P-3 PRE 2-95 DE NOVO HEARING, Testimony Limited To 20 Minutes Per Side Regarding Appeal of Hearings Officer Decision DENYING Appeal and AFFIRMING Planning Director's Decision Which Made a Determination of Substantial Development for a Single Family Dwelling on Property Located at 6125 NW THOMPSON ROAD, PORTLAND

CHAIR STEIN EXPLAINED QUASI-JUDICIAL PROCESS. AT CHAIR STEIN'S REQUEST FOR DISCLOSURE, COMMISSIONER SALTZMAN REPORTED EX PARTE CONTACTS WITH DAN McKENZIE AND A SITE VISIT, AND ADVISED HE HAS NO BIAS IN THE MATTER. AT CHAIR STEIN'S

REQUEST FOR CHALLENGES, DAN McKENZIE REQUESTED THAT HE BE ALLOWED TO RESPOND TO THE APRIL 1 MEMO SUBMITTED BY ARNOLD ROCHLIN. MR. ROCHLIN RESPONDED THAT HIS MEMO WAS SUBMITTED TO THE PLANNING OFFICE PER STANDARD PROCEDURE, AND AT THE REQUEST OF CHAIR STEIN, PROVIDED A COPY OF HIS APRIL 1 MEMO TO MR. McKENZIE. AT CHAIR STEIN'S REQUEST FOR SAME, NO PROCEDURAL OBJECTIONS WERE RAISED. PLANNER BARRY MANNING PRESENTED CASE HISTORY. HEARINGS OFFICER JOAN CHAMBERS PRESENTED APPEAL HISTORY AND EXPLAINED CONDITIONS, FINDINGS OF FACT AND CONCLUSIONS APPLIED IN HER DECISION. IN RESPONSE TO A QUESTION OF COMMISSIONER SALTZMAN, MS. CHAMBERS ADVISED MR. ROCHLIN HAD STANDING TO APPEAL THE PLANNING DIRECTOR DECISION PURSUANT TO THE CONDITIONAL USE SECTION OF THE COUNTY CODE. ARNOLD ROCHLIN PRESENTED ORAL AND WRITTEN TESTIMONY IN OPPOSITION TO THE HEARINGS OFFICER DECISION AND INTERPRETATION OF PERMIT TIMING ISSUES. DAN McKENZIE TESTIMONY IN SUPPORT OF HEARINGS OFFICER DECISION AND REBUTTAL TO MR. ROCHLIN'S TESTIMONY. MR. ROCHLIN PRESENTED REBUTTAL TO MR. McKENZIE'S TESTIMONY. IN RESPONSE TO A QUESTION OF CHAIR STEIN, COUNSEL SANDRA DUFFY AND MS. CHAMBERS EXPLAINED THAT SINCE APPLICATION CU 5-91a WAS WITHDRAWN, AND THE THREE SEPTEMBER, 1995 BOARD DECISIONS WERE NOT APPEALED, THE ISSUES RAISED BY MR. ROCHLIN ARE MOOT. IN RESPONSE TO INQUIRIES OF CHAIR STEIN, THERE WAS NO REQUEST FOR CONTINUANCE OR OBJECTION TO HEARING RAISED. CHAIR STEIN ADVISED ALL PARTIES WILL RECEIVE A COPY OF THE BOARD'S WRITTEN DECISION, WHICH MAY BE APPEALED TO LUBA. HEARING CLOSED. MS. DUFFY, CHAIR STEIN AND MR. MANNING EXPLANATION IN RESPONSE TO QUESTIONS AND CONCERNS OF COMMISSIONER COLLIER. COMMISSIONER

KELLEY MOVED AND COMMISSIONER COLLIER SECONDED, TO DENY THE APPEAL AND AFFIRM THE HEARINGS OFFICER DECISION. CHAIR STEIN ADVISED HER CONCERNS HAVE BEEN ADDRESSED AND SHE IS PERSUADED BY THE HEARINGS OFFICER DECISION. MS. DUFFY AND MR. MANNING RESPONSE TO QUESTION OF COMMISSIONER HANSEN REGARDING TIME LIMIT BETWEEN WITHDRAWING AND FILING NEW PERMIT APPLICATIONS. MS. DUFFY CONCURRED WITH STATEMENT OF CHAIR STEIN THAT CODE PROVIDES OPPORTUNITY FOR APPLICANTS TO REAPPLY FOR PERMITS WITHIN SIX MONTHS TO A YEAR. HEARINGS OFFICER DECISION UNANIMOUSLY UPHELD.

The planning meeting was adjourned at 10:50 a.m. and the briefing convened at 11:00 a.m.

Tuesday, April 9, 1996 - 11:00 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BOARD BRIEFING

B-1 Update on Renewal of Paragon Cable Franchise, Changes in Federal Telecommunications Law, and TCI-West Cable Franchise. Presented by Ernie Bonner, David Olson and Mary Beth Henry of Mt. Hood Cable Regulatory Commission.

ERNIE BONNER AND DAVID OLSON PRESENTATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION.

There being no further business, the briefing was adjourned at 11:50 a.m.

OFFICE OF THE BOARD CLERK
FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

Deborah L. Bogstad

Thursday, April 11, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

Chair Beverly Stein convened the meeting at 9:35 a.m., with Vice-Chair Dan Saltzman, Commissioners Sharron Kelley and Tanya Collier present, and Commissioner Gary Hansen excused.

NON-DEPARTMENTAL

C-1 Appointment of Craig A. Schulstad to the REGIONAL STRATEGIES BOARD

AT THE REQUEST OF CHAIR STEIN AND UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER SALTZMAN, C-1 WAS UNANIMOUSLY POSTPONED INDEFINITELY.

CONSENT CALENDAR

SHERIFF'S OFFICE

C-2 Ratification of Intergovernmental Agreement 800067 with the Housing Authority of Portland to Provide a Supervised Inmate Work Crew to Perform General Labor Such as Ground Maintenance, Light Carpentry, Painting, Etc.

UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER SALTZMAN, CONSENT CALENDAR ITEM C-2 WAS UNANIMOUSLY APPROVED.

REGULAR AGENDA

DEPARTMENT OF SUPPORT SERVICES

R-2 Presentation of Employee Service Awards Honoring 36 Multnomah County Employees with 5 to 25 Years of Service

WITH THE ASSISTANCE OF SHERY STUMP AND GAIL FOSTER, THE BOARD GREETED,

ACKNOWLEDGED AND PRESENTED 5 YEAR AWARDS TO GLORIA BELLEAU, C. LYNN BETTERIDGE, D. RANDALL MORRISON AND LYDA OVERTON OF ASD; BARBARA HERSHEY, JACKIE JOHNSON, CATHY LILLY, JOSE MARTINEZ AND BRENT MATTHEWS OF DCFS; JILL ALSPACH OF DA; SHARON BAKER, MATTHEW MATTILA AND TRACY PUGLIANO OF DCC; SUZANNE BERGERON, PATRICIA READ, CAROL ZURAWSKI AND FRANK KAMINSKI OF DES; MARSHA EHLERS OF DSS; HELEN FERRIER OF DJJS; AND SUZANNE FLYNN AND GARY HANSEN OF NOND; 10 YEAR AWARDS TO REBECCA CORNETT OF ASD; DIANA CHAMBERLAIN AND DIANA LOVING-BLACK OF DA; HOWARD KLINK OF DCFS; AND KIP COURSER OF DES; 15 YEAR AWARDS TO GAYLE KRON OF DFCS; SHARON DAY AND SHARON HENLEY OF DA; HORACE HOWARD OF DCC; DWIGHT ROOFE OF DES; AND KENNETH CLINTON OF DSS; 20 YEAR AWARD TO GLENN HARDING OF DCC; AND 25 YEAR AWARDS TO WILLIAM JACKSON OF DCC AND SUSAN DANIELL OF DSS.

DISTRICT ATTORNEY'S OFFICE

R-4 PROCLAMATION Proclaiming the Week of April 21-27, 1996 as OREGON CRIME VICTIMS RIGHTS WEEK in Multnomah County

COMMISSIONER KELLEY MOVED AND COMMISSIONER SALTZMAN SECONDED, APPROVAL OF R-4. MICHAEL SCHRUNK EXPLANATION. PROCLAMATION READ. PROCLAMATION 96-62 UNANIMOUSLY APPROVED.

DEPARTMENT OF SUPPORT SERVICES

R-3 Second Reading and Adoption of an ORDINANCE Amending MCC Chapter 5.40 (Car Rental Tax) in Order to Clarify the Responsibilities of Commercial Enterprises for Collecting and Remitting this Tax, and to Strengthen and Clarify the County's Ability to Administer it

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER KELLEY MOVED

AND COMMISSIONER COLLIER SECONDED, APPROVAL OF SECOND READING AND ADOPTION. NO ONE WISHED TO TESTIFY. ORDINANCE 849 UNANIMOUSLY APPROVED.

PUBLIC COMMENT

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

NO ONE WISHED TO COMMENT.

SHERIFF'S OFFICE

R-5 Intergovernmental Agreement 800756 with the City of Portland Police Bureau, to Provide Certain Law Enforcement Services Involving DUII

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-5. LARRY AAB AND DAVE HADLEY EXPLANATION AND RESPONSE TO BOARD QUESTIONS. AGREEMENT UNANIMOUSLY APPROVED.

NON-DEPARTMENTAL

R-6 First Reading of an ORDINANCE Making Procedural Changes in the Bylaws of the Metropolitan Human Rights Commission

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER SALTZMAN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF FIRST READING. STEVE FREEDMAN EXPLANATION. NO ONE WISHED TO TESTIFY. FIRST READING UNANIMOUSLY APPROVED. SECOND READING THURSDAY, APRIL 18, 1996.

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

R-7 Intergovernmental Agreement 105036 with the Housing Authority of Portland, Allocating U.S. Department of Housing and Urban Development Funds to Construct the Turning Point Project as Transitional Housing for Homeless Families

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-7. REY ESPAÑA AND ROB TUCKER EXPLANATION. COMMISSIONER SALTZMAN COMMENTS IN SUPPORT. AGREEMENT UNANIMOUSLY APPROVED.

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-8 ORDER Authorizing Cancellation of Uncollectible Personal Property Taxes for 1983/84 through 1994/95

COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-8. COMMISSIONER COLLIER EXPLANATION. ORDER 96-63 UNANIMOUSLY APPROVED.

R-9 Intergovernmental Agreement 301446 with the Oregon Department of Transportation and Metro, to Conduct a Pre-Project Study of Congestion Pricing in the Portland Region

COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-9. ED ABRAHAMSON EXPLANATION AND RESPONSE TO BOARD QUESTIONS. AGREEMENT UNANIMOUSLY APPROVED.

R-10 Second Reading and Adoption of an ORDINANCE Amending Multnomah County Animal Control Code 8.10.005 et. seq.

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF SECOND READING AND ADOPTION. COUNSEL MATT RYAN EXPLANATION OF PROPOSED NON-SUBSTANTIVE AMENDMENTS. UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER KELLEY, NON-SUBSTANTIVE AMENDMENTS TO PAGES 28 AND 34 WERE UNANIMOUSLY APPROVED. COMMISSIONER COLLIER ACKNOWLEDGED EFFORTS OF STAFF AND COMMITTEE PARTICIPATING IN ORDINANCE REVISION. MR. RYAN, CHAIR STEIN,

COMMISSIONER KELLEY AND COMMISSIONER SALTZMAN COMMENTS IN SUPPORT OF EFFORTS OF COMMISSIONER COLLIER AND HER STAFF AND EVERYONE WHO WORKED ON ORDINANCE REVISION. ORDINANCE 850 UNANIMOUSLY APPROVED, AS AMENDED.

The regular meeting was adjourned at 10:14 a.m. and the executive session convened at 11:05 a.m.

Thursday, April 11, 1996 - 11:00 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

EXECUTIVE SESSION

E-1 The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(d) for Labor Negotiator Consultation Concerning Labor Negotiations. Presented by Kenneth Upton.

EXECUTIVE SESSION HELD.

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

Thursday, April 11, 1996 - 2:00 PM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

PUBLIC HEARING

TSCC Chair Charles Rosenthal convened the hearing at 2:02 p.m., with TSCC staff Courtney Wilton and Commissioners Roger McDowell and Anthony Jankans present, and Commissioner Dick Anderson arriving at 2:35 p.m.

PH-1 The Tax Supervising and Conservation Commission Will Meet to Conduct a Public Hearing on the County's Proposed Library Serial Levy, Public Safety Levy, Library General Obligation Bond, Public Safety General Obligation Bond, and 1995-96 Supplemental Budget

DAVE WARREN, JIM MUNZ, DAVE BOYER, JEANNE GOODRICH, BARBARA SIMON AND LARRY AAB PRESENTATION AND RESPONSE TO TSCC QUESTIONS AND DISCUSSION. COMMISSIONERS TANYA COLLIER, DAN SALTZMAN AND SHARRON KELLEY RESPONSE TO TSCC QUESTIONS AND DISCUSSION.

Commissioner Gary Hansen arrived at 2:42 p.m.

Commissioner Anthony Jankans left at 2:46 p.m.

There being no further business, the hearing was adjourned at 2:57 p.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 ▪ (503) 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

APRIL 8, 1996 - APRIL 12, 1996

Tuesday, April 9, 1996 - 9:30 AM - Planning Items.....Page 2

Tuesday, April 9, 1996 - 11:00 AM - Board Briefing.....Page 2

Thursday, April 11, 1996 - 9:30 AM - Regular Meeting.....Page 3

Thursday, April 11, 1996 - 11:00 AM - Executive Session.....Page 4

Thursday, April 11, 1996 - 2:00 PM - TSCC Hearing.....Page 5

1996-97 Multnomah County Budget Hearing Schedule.....Page 6

*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

Tuesday, April 9, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

PLANNING ITEMS

P-1 *CU 10-94; HV 28-95 Hearings Officer Decision APPROVING Conditional Use Approval and a Minor Variance to the Minimum Yard Setback Requirement, to Construct a Single Family Dwelling Not Related to Forest Management on a 17.8 Acre Lot of Record in the Commercial Forest Use Zoning District, on Property Located at 21574 NW GILKISON ROAD, PORTLAND*

P-2 *HDP 21-95 Hearings Officer Decision DENYING Appeal and Approving the Administrative Decision Approving a Hillside Development Permit to Allow the Construction of a Driveway and Single Family Dwelling in the Rural Residential Zoning District, on Property Located at 12625 NW GERMANTOWN ROAD, PORTLAND*

P-3 *PRE 2-95 DE NOVO HEARING, Testimony Limited To 20 Minutes Per Side Regarding Appeal of Hearings Officer Decision DENYING Appeal and AFFIRMING Planning Director's Decision Which Made a Determination of Substantial Development for a Single Family Dwelling on Property Located at 6125 NW THOMPSON ROAD, PORTLAND*

Tuesday, April 9, 1996 - 11:00 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BOARD BRIEFING

B-1 *Update on Renewal of Paragon Cable Franchise, Changes in Federal Telecommunications Law, and TCI-West Cable Franchise. Presented by Ernie Bonner, David Olson and Mary Beth Henry of Mt. Hood Cable Regulatory Commission. 45 MINUTES REQUESTED.*

Thursday, April 11, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

CONSENT CALENDAR

NON-DEPARTMENTAL

C-1 *Appointment of Craig A. Schulstad to the REGIONAL STRATEGIES BOARD*

SHERIFF'S OFFICE

C-2 *Ratification of Intergovernmental Agreement 800067 with the Housing Authority of Portland to Provide a Supervised Inmate Work Crew to Perform General Labor Such as Ground Maintenance, Light Carpentry, Painting, Etc.*

REGULAR AGENDA

PUBLIC COMMENT

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

DEPARTMENT OF SUPPORT SERVICES

R-2 *Presentation of Employee Service Awards Honoring 36 Multnomah County Employees with 5 to 25 Years of Service*

R-3 *Second Reading and Adoption of an ORDINANCE Amending MCC Chapter 5.40 (Car Rental Tax) in Order to Clarify the Responsibilities of Commercial Enterprises for Collecting and Remitting this Tax, and to Strengthen and Clarify the County's Ability to Administer it*

DISTRICT ATTORNEY'S OFFICE

R-4 *PROCLAMATION Proclaiming the Week of April 21-27, 1996 as OREGON CRIME VICTIMS RIGHTS WEEK in Multnomah County*

SHERIFF'S OFFICE

R-5 *Intergovernmental Agreement 800756 with the City of Portland Police Bureau, to Provide Certain Law Enforcement Services Involving DUII*

NON-DEPARTMENTAL

R-6 *First Reading of an ORDINANCE Making Procedural Changes in the Bylaws of the Metropolitan Human Rights Commission*

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

R-7 *Intergovernmental Agreement 105036 with the Housing Authority of Portland, Allocating U.S. Department of Housing and Urban Development Funds to Construct the Turning Point Project as Transitional Housing for Homeless Families*

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-8 *ORDER Authorizing Cancellation of Uncollectible Personal Property Taxes for 1983/84 through 1994/95*

R-9 *Intergovernmental Agreement 301446 with the Oregon Department of Transportation and Metro, to Conduct a Pre-Project Study of Congestion Pricing in the Portland Region*

R-10 *Second Reading and Adoption of an ORDINANCE Amending Multnomah County Animal Control Code 8.10.005 et. seq.*

Thursday, April 11, 1996 - 11:00 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

EXECUTIVE SESSION

E-1 *The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(d) for Labor Negotiator Consultation Concerning Labor Negotiations. Presented by Kenneth Upton. 45 MINUTES REQUESTED.*

Thursday, April 11, 1996 - 2:00 PM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

PUBLIC HEARING

PH-1 *The Tax Supervising and Conservation Commission Will Meet to Conduct a Public Hearing on the County's Proposed Library Serial Levy, Public Safety Levy, Library General Obligation Bond, Public Safety General Obligation Bond, and 1995-96 Supplemental Budget*

1996-97 BUDGET HEARING SCHEDULE
BEFORE THE
MULTNOMAH COUNTY BOARD OF COMMISSIONERS

APRIL	30	TUESDAY	9:30 AM	BUDGET REVENUES AND OVERVIEW
MAY	2	THURSDAY	9:30 AM	EXECUTIVE BUDGET MESSAGE
	7	TUESDAY	1:30 PM	COMMUNITY & FAMILY SERVICES
	8	WEDNESDAY	9:30 AM	HEALTH DEPARTMENT
	14	TUESDAY	1:30 PM	AGING SERVICES DEPARTMENT
	15	WEDNESDAY	9:30 AM	ENVIRONMENTAL SERVICES
	21	TUESDAY	1:30 PM	JUVENILE JUSTICE SERVICES
	22	WEDNESDAY	9:30 AM	COMMUNITY CORRECTIONS
	22	WEDNESDAY	2:00 PM	DEPARTMENT OF LIBRARY SERVICES
	23	THURSDAY	1:30 PM	SHERIFF'S OFFICE
JUNE	4	TUESDAY	1:30 PM	DEPARTMENT OF SUPPORT SERVICES
	5	WEDNESDAY	9:30 AM	DISTRICT ATTORNEY'S OFFICE
	5	WEDNESDAY	1:30 PM	NON-DEPARTMENTAL
	6	THURSDAY	11:00 AM	TSCC BUDGET HEARING
	6	THURSDAY	7:00 PM	HEARING @ COUNTY COURTHOUSE
	11	TUESDAY	2:00 PM	OPEN
	12	WEDNESDAY	9:30 AM	OPEN - IF NEEDED
	12	WEDNESDAY	1:30 PM	OPEN - IF NEEDED
	12	WEDNESDAY	7:00 PM	HEARING @ GRESHAM CITY HALL
	13	THURSDAY	9:30 AM	HEARING/ADOPT BUDGET

The Board welcomes this opportunity for you to provide input in the County budget process. Public comment will be limited to three minutes per person. All hearings will be held in room 602 of the Multnomah County Courthouse, 1021 SW Fourth Avenue, Portland, with the exception of the 7:00 pm, Wednesday, June 12, 1996 hearing which will be held in the Gresham City Council Chambers, 1333 NW Eastman Parkway, Gresham (the single story Public Safety and Schools building). Questions? Call Deb or Aimee in the Office of the Board Clerk, (503) 248-3277.

Meeting Date: APR 9 1996
Agenda No: P-1
Est. Start Time: 9:30

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Report to the Board the Hearings Officer's decision on CU 10-94 & HV 28-95

BOARD BRIEFING Date Requested:
Amt. of Time Needed:
Requested By:

REGULAR MEETING Date Requested: April 9, 1996
Amt. of Time Needed: 5 Min.

DEPARTMENT: DES **DIVISION:** Transportation & Land Use Planning
CONTACT: Gary Clifford **TELEPHONE:** 248-3043
BLDG/ROOM: 412 / 109

PERSON(S) MAKING PRESENTATION: Gary Clifford

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

Report to the Board the Hearings Officer's decision on CU 10-94 & HV 28-95

BOARD OF COUNTY COMMISSIONERS
96 MAR 27 PM 4:00
MULTNOMAH COUNTY OREGON

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: KB for Lou E. Nicholas

MULTNOMAH COUNTY

BOARD HEARING OF April 9, 1996

TIME: 1:30 pm

CASE NAME: Dwelling Not Related to Forest Use in Forest Zone NUMBER: CU 10-94; HV 28-95

1. Applicant Name/Address:

Randy and Christina Pousson
2373 NW 185th Avenue, #197
Hillsboro, OR 97124

ACTION REQUESTED OF BOARD

- ☑ Affirm Hearings Offficer
- ☐ Hearing/Rehearing
  - ☐ Scope of Review
    - ☐ On the record
    - ☐ De Novo
    - ☐ New Information allowed

2. Action Requested by applicant:

Approval of a residence that is not related to forest use on a 17.8 acre Lot of Record in the Commercial Forest Use zoning district. Approval of a variance to the required side yard setback for the dwelling.

3. Planning Staff Recommendation:

Approval with conditions.

4. Hearings Officer Decision:

Approval with conditions.

5. If recommendation and decision are different, why?

ISSUES *(who raised them?)*

1. Stability of the ground at the proposed dwelling site was questioned by neighbors in opposition to request. Hearings Officer accepted a report from a Geotechnical Engineer that found that the location of dwelling and on-site sanitation system would not be hazardous.
2. Neighbor had concerns about location of a water line easement. Applicant submitted property survey with water line located.
3. Neighbors questioned if there would be an impact on Joy Creek. Although the neighbors disagree on the location, the stream study and protection plan for Joy Creek in the West Hills Reconciliation Plan (which was adopted last year) designate the "significant" reach of the creek (and protection overlay) to be several hundred feet from the proposed dwelling site. Hearings Officer found that DEQ regulations requiring the septic drainfield to be at least 50 feet from a water source will protect the water resource. The Decision reads: "The Hearings Officer is not in a position to independently develop and apply other water quality standards on a case by case basis. So long as the applicant meets applicable DEQ water quality regulations prior to operating the septic system, this policy will be satisfied."

Do any of these issues have policy implications? Explain.

Implementation of DEQ water quality standards for on-site septic systems is done by contract with the City of Portland Bureau of Buildings who employ certified "Sanitarians". To use different standards would not conform to existing County regulations and require expertise not on staff.

BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON

Regarding a request by Randy and Christina Pousson for Conditional Use approval and a Minor Variance to construct a single family dwelling not related to forest management on a 17.8 acre site in the Commercial Forest Use zoning district located at 21574 N.W. Gilkison Road in unincorporated Multnomah County, Oregon.	)))))))	FINAL ORDER CU 10-94/HV 28-95 (Pousson)

I. FINDINGS

The Hearings Officer adopts and incorporates by reference affirmative findings and conclusions as set forth in the original staff report (Exhibit 7) and the addendum to the staff report (Exhibit 30), except to the extent expressly modified or supplemented below.

II. HEARING AND RECORD

A public hearing concerning this matter was held on September 20, 1995 and was continued until November 1, 1995. The hearing was continued again until January 10, 1996 in order to take testimony and evidence on a Minor Variance application submitted by the applicant, related to the side yard setback for proposed conditional use, and to take further testimony on the conditional use request itself. The written record was left open until February 14, 1996.

A list of all exhibits received in this matter is attached and incorporated by reference herein.

III. DISCUSSION

A. Lot of Record Status

MCC 11.15.2052(A) provides that:

"A dwelling not related to forest management may be allowed subject to the following: (1) the lot shall meet the lot of record standards of MCC .2062(A) and (B) and have been lawfully created prior to January 25, 1990."

The staff report adequately discusses the law and facts relative to MCC .2062(A)(2)(a) - (c). Each of these criteria are clearly met. The problem here is determining whether .2062(A)(2)(d) has been met. MCC .2062(A)(2)(d) requires substantial evidence in the record indicating that the subject parcel (Tax Lot 37) is ". . . not contiguous to another substandard parcel or parcels under the same ownership. . . ." The record indicates that on October 28, 1994 (the date on which the application was deemed complete for purposes of ORS 215.428(3)), Western International owned a small triangular tract of land (the triangle), approximately .62 acres in size. On that date, Western International also owned the subject parcel (Tax Lot 37). Western International was the original applicant for this conditional use request.

Paul Wright and Marquetta Mitchell have asserted that under MCC .2062(A)(2)(d) the fact that the original applicant, Western International, owned two contiguous properties both of which were substandard in size under the County's zoning ordinance, means that Tax Lot 37 does meet the requirements of MCC 11.15.2062 as a lot of record.

In order to determine whether requirements of .2062(A)(2)(d) have been met, an additional set of facts must be considered. First, it is clear from the record that the "triangle" was improperly sold-off from its parent parcel, Tax Lot 41. The "triangle" was not created from Tax Lot 37. Second, since the triangle was created without obtaining partition approval, it does not constitute a "parcel" for purposes of MCC .2062(A)(2)(d). As the applicant points out, even though MCC 11.15 does not define the term "parcel", MCC 11.45.010(P) does. That section defines the term "parcel", as a "unit of land that is created by a partitioning of land." Therefore, for purposes of MCC 11.15 and 11.45, the triangle is not a "parcel", because it was not created by a partitioning of land.

Returning to .2062(A)(2)(d), the Hearings Officer finds that the triangle is contiguous to another substandard unit of land (Tax Lot 37) which was at the time the application was submitted, under the same ownership. However, the triangle does not meet the Multnomah County Code definition of a "parcel", because it was not partitioned from Lot 41. Therefore, even though Lot 37 is contiguous to the triangle, and was under the same ownership as the triangle at the time this application was submitted, because the triangle is not a "parcel", it does not disqualify Tax Lot 37 from meeting the test under .2062(A)(2)(d). In short, Tax Lot 37 is not contiguous to another substandard parcel under the same ownership.

Having untangled this knot with regard to Tax Lot 37 and its status as a legal lot of record, the Hearings Officer acknowledges that the existence of the triangle is troubling. However, the problems associated with the triangle are not the subject of this application. The triangle is only relevant to the extent it may or may not affect Lot 37's lot of record status. Nonetheless, the Hearings Officer notes, without deciding, that since the triangle appears to have been improperly separated and sold apart from Tax Lot 41, the County may

want to scrutinize the issuance of further permits for Tax Lot 41, as its status may have been affected by the transfer of the triangle. The point being that the problem with the triangle is related to Tax Lot 41, not Tax Lot 37, and that action should be pursued relative to the lot that the triangle was created from, not the neighboring lot.

B. Road Access

The applicant has shown two alternative road accesses to the proposed dwelling site. The first access is via a "north-south" road which begins in the northwest corner of Lot 37 at Gilkison Road and follows a non-exclusive easement to the point where it intersects the "east-west" road, following that road to the proposed dwelling location. The applicant has agreed to improve the north-south road's westerly intersection with the east-west road so that the connection is restored.

The alternative access to the dwelling is entirely along the east-west road from its beginning in the "triangle" at Gilkison Road to its terminus at the dwelling site.

The fire district has granted preliminary approval for both access.

The Hearings Officer finds that the north-south road, which is located within land owned by the applicant, is the preferable access. The alternative east-west road involves the triangle property and therefore needlessly complicates the access issue. The final design of the road will be subject to review under MCC 11.15.2074(D) (see Condition 6).

C. Building Site Geologic Stability

When the applicant requested approval of a Minor Variance to reduce the side yard setback from 200 to 150 feet, in order to move the proposed location of the building site closer to the western boundary, it was unclear whether the new location for the house was geologically stable for purposes of Plan Policy 14.

The evidence submitted by the applicant's geotechnical engineer, Mr. Craig C. LaVille, indicate that the new site has experienced some landslide activity in the past and advises that the new site could be stabilized with certain design and construction techniques. He further indicates that the risk of any public harm or associated public cost could be minimized.

The Hearings Officer accepts the professional opinion of the applicant's engineer and will require, as a condition of approval, that prior to any on-site construction within the area identified for the new homesite, that all plans be reviewed and approved by a geotechnical engineer to insure that proper construction techniques are used to mitigate any public harm or

associated public cost and to eliminate any adverse effects on surrounding persons or property. (See Condition 5)

D. Protection of Joy Creek

Laurie and Jeff Mapes have asserted that the applicant has not demonstrated that the proposed development will not harm the water quality of the north fork of Joy Creek, which runs through the subject site.

It should be noted that there is some disagreement between the applicant and staff on one hand and the Mapes on the other, as to whether or not the north fork of Joy Creek, located on the site, is subject to SEC overlay protections. The Hearings Officer finds that the SEC overlay district was not applied to this property until November 26, 1994, which was after the date the application was submitted. Therefore, pursuant to ORS 215.428(3), the SEC overlay district is not relevant to this application, since the overlay district was not applied to this site until after the date the application was submitted.

Nonetheless, other policies in the comprehensive plan independently require consideration of various environmental impacts to adjacent streams from the proposed development. The relevant plan policies and related findings are set forth below.

1. Plan Policy 37 (G).

Plan Policy 37 (G) provides as follows:

"G. The runoff from the site will not adversely affect the water quality in adjacent streams, ponds, lakes, or alter the drainage on adjoining lands."

Plan Policy 37 (G) requires a findings that runoff from the site will not adversely affect the water quality in adjacent streams. The Mapes testimony suggests that this portion of Joy Creek begins at a spring on the southwest corner of the property and that the water quality of the spring is extremely high. The evidence also indicates that until recently, the spring was used as a domestic water source. The Mapes and others have expressed their desire to keep the water quality from this resource as unaffected as possible. In particular, the Mapes are concerned that the proposed septic system and its proximity to the creek will be a threat to the water quality of Joy Creek and that the evidence does not demonstrate that adverse impacts will not occur.

The applicant has submitted a four page report by Mr. LaVille, a geotechnical engineer, who discussed the effects of the proposed development on water quality based on stormwater impacts. However, none of Mr. LaVille's analysis focused on the possible

effects on Joy Creek from the proposed septic system. In fact, the location of the septic system has not yet been specifically identified in the record.

However, the future impacts from proposed septic system on water quality should be handled the same way in this case they have been in other cases. Namely, the applicant is required to submit a site evaluation report indicating that the requirements of OAR 340-71-290 will be met. These standards require the system to be located not less than 50 feet from a water source. This preliminary report was submitted and accepted by the relevant agencies and constitutes some evidence that the water quality in Joy Creek will be protected.

The Hearings Officer finds that in this case, prior to issuance of final permits for the septic system, the applicant should be required to satisfy all applicable DEQ regulations concerning the proposed subsurface sanitary sewage disposal system. The Hearings Officer is not in a position to independently develop and apply other water quality standards on a case by case basis. So long as the applicant meets applicable DEQ water quality regulations prior to operating the septic system, this policy will be satisfied. (See Condition 10)

2. Plan Policy 16 (G).

Plan Policy 16 (G) provides:

> "It is the County's policy to protect and, where appropriate, designate as areas of significant environmental concern, those water areas, streams, wetlands, water sheds, and groundwater resources having special public value in terms of the following: (a) economic value; (b) recreation value; (c) educational research value (ecologically and scientifically significant lands); (d) public safety (municipal water supply, water sheds, water quality, flood water, storage areas, vegetation necessary to stabilize river banks and slopes); (e) natural area value (areas valued for their fragile character as habitats for plant, animal or aquatic life, or having endangered plant or animal species)."

The Hearings Officer finds that Policy 16 (G) and the implementation strategies that follow it, by its terms, are not applicable approval criteria because its language serves as a guide for future legislative action by the County. In fact, the subsequent application of the SEC overlay district along portions of Joy Creek on the site is evidence of this fact. Therefore, this policy is not relevant to this quasi-judicial application.

3. West Hills Reconciliation Report.

The staff report adequately discusses the applicable provisions of the West Hills Reconciliation Report. The Hearings Officer notes that the report expressly states that the implementation of protections for habitat in and around Joy Creek are accomplished through

the use of the SEC overlay. This overlay did not apply at the time this application was submitted.

E. Big Game Habitat

MCC 11.15.2052(5) requires the proposed dwelling to be located outside of big game winter habitat areas defined by the Oregon Department of Fish & Wildlife, or the agency must certify that the impacts of the additional dwelling, considered cumulatively with the approval of other dwellings in the area since 1980, will be acceptable. Based upon the testimony and evidence in the record, the Hearings Officer finds that the proposed dwelling site is located outside of big game winter habitat area. Furthermore, the October 17, 1995 letter from ODF&W provides the necessary certification. Therefore, this criteria is met.

IV. CONCLUSION

Based upon all the evidence and testimony in the record, the Hearings Officer concludes that CU 10-95 and HV 28-95 (Pousson) should be approved because it does or can comply with all applicable approval criteria.

V. DECISION

CU 10-95 and HV 28-95 (Pousson) are hereby **approved**, subject to the following conditions:

1. Approval of this Conditional Use shall expire two years from the date of the Board Order unless substantial construction has taken place in accordance with MCC 11.15.7110(C).

2. The dwelling location shall be as proposed on the revised site plan (Exhibit 23).

3. Prior to approval of building permits, provide evidence that a stocking survey report has been submitted in accordance with OAR 660-06-029(5)(c).

4. Prior to the issuance of a building permit, the property owner shall provide to the Division of Planning and Development a copy of the recorded restrictions acknowledging the rights of nearby properties to conduct farm and forest practices. A prepared form is available at the Planning Offices.

5. Prior to the issuance of a building permit for the dwelling, apply for and obtain approval of a Hillside Development Permit or Grading and Erosion Control Permit as

applicable, unless it can be demonstrated that construction would be carried out in a manner and scale as to be exempt from this requirement as provided in MCC .6715. Plans submitted for the permit will incorporate as required the standards of MCC 11.15.2074(D), [see 6 below]. Furthermore, prior to any on-site construction within the area identified as the new homesite, all construction plans should be reviewed by a geotechnical engineer to insure that proper construction techniques are used to mitigate any public harm or associated public cost and to eliminate any adverse effects on surrounding persons or property.

6. Prior to the issuance of a building permit, submit confirmation that the "driveway" from Gilkison Road to the building site has been constructed to the standards of MCC 11.15.2074(D), (the "driveway" includes the existing easement road to reach Gilkison Road from the home).

7. Prior to the issuance of a building permit and as long as the property is under forest resource zoning, maintain primary and secondary fire safety zones around all structures, in accordance with MCC 11.15.2074(A)(5).

8. The dwelling shall have a fire retardant roof and all chimneys shall be equipped with spark arrestors.

9. The following Wildlife Habitat Mitigation measures outlined in the submitted Wildlife Conservation Plan for the property shall be carried out and maintained:

   A. Use only native vegetation for landscaping;

   B. Maintain as many existing trees and shrubs as possible while still meeting fire protection zone requirements;

   C. Limit exterior lighting to prevent disturbance and place all necessary lighting as close to the ground as possible to limit the affected area by lighting while still meeting the needs of safety and security;

   D. No fencing should be placed along Gilkison Road or outside of the Secondary Fire Protection Zone perimeter; and

   E. Move trees and downed logs that must be removed for the fire protection zone into the existing stands or into the downslope harvested area to provide coarse woody debris habitat for small mammals, reptiles and amphibians.

10. Prior to issuance of building permits for the residence or septic system the applicant shall demonstrate that all applicable local and state standards have been met for the

septic system, to ensure that water quality in Joy Creek will not be adversely affected by this septic system.

11. Prior to the issuance of a building permit, the applicant shall provide evidence that the domestic water supply is from a source authorized in accordance with the Department of Water Resources Oregon Administrative Rules for the appropriation of ground water (OAR 690, Division 10) or surface water (OAR 690, Division 20) and not from a Class II stream as defined in the Forest Practices Rules. If the water supply is unavailable from public sources, or sources located entirely on the property, the applicant shall provide evidence that a legal easement has been obtained permitting domestic water lines to cross the properties of affected owners.

12. The parcel owner shall owner shall request disqualification from farm deferral prior to issuance of a building permit.

It is so ordered this 19th day of March, 1996.

Phillip E. Grillo
Hearings Officer
Multnomah County

EXHIBITS RECEIVED (AS OF 2/14/96)
Application Files: CU 10-94 and HV 28-95

Exhibit # **Description**

1. General Application Form;

2. Applicant's original set of application materials entitled "Request for Approval of a Non-Forest Dwelling ...", dated and received October 28, 1994, containing narrative to approval criteria and 25 exhibits;

3. Letter, Michael Robinson to Gary Clifford, dated April 25, 1995, Re: Supplemental Information for File, CU 10-94, received April 25, 1995 in Zoning Division, containing additional responses to approval criteria and 6 exhibits;

4. Letter, Michael Robinson to Gary Clifford, dated August 30, 1995, Re: CU 10-94, received April 30, 1995 in Permits Section (Planning), containing additional responses to approval criteria and 7 exhibits;

5. Slope Hazards Map of area;

6. Areas of Significant Environmental Concern in Section 26, 3N, 2W, including streams, wildlife habitat, and scenic views;

7. Staff Report CU 10-94, dated September 20, 1995, available to public on September 13, 1995, mailed September 13, 1995;

8. Letter, Marquetta Mitchell and Laurie Mapes to Sandy Mathewson, dated October 26, 1994, comments on application after the pre-application conference, received October 27, 1994;

9. Letter, Randy Pousson to Gary Clifford, dated August 28, 1995, Re: water use / rights for CU 10-94, received September 1, 1995;

10. Letter, Howard Hecht to Gary Clifford, dated July 19, 1995, Re: support for CU 10-94, received August 1, 1995;

11. 1986 Aerial photo of Section 26, 3N, 2W at scale of 1 inch equals 200 feet submitted by applicant to demonstrate compliance with "Template Test" for 5 existing houses within area of the 160-acre square, folded and located in back pocket of file;

12. 1986 Aerial photo of Section 26, 3N, 2W at scale of 1 inch equals 200 feet with subject site and adjacent property lines outlined, folded and located in back pocket of file;

13. Site Plan at 1 inch equals 100 feet submitted with August 30, 1995, folded and located in back pocket of file;

14. Final Order on Conditional Use 2-95, Multnomah County Board of Commissioners decision, reversing the Hearings Officer denial and approving a single family dwelling in the CFU zoning district, dated May 18, 1995;

15. Letter, Lana Seely to Gary Clifford, dated September 18, 1995, in support of proposal;

16. Eight color photographs mounted on poster board, received at Sept. 20, 1995 hearing, showing two different driveway options and the desired home location;

17. Large map of Multnomah County on hearing room wall, drafted by Div. of Assessment and Taxation, used for determining the location of section 26, T. 3 N., R. 2 W., on small 8 1/2" x 11" Big Game Habitat Map that did not show all section numbers;

18. Green three ring binder, contents titled "Concerns of Application for Variance CU 10-94", submitted by Paul Wright and Marquetta Mitchell at Sept. 20, 1995 hearing, containing narrative and various exhibits regarding: 1) access easement, 2) site location, 3) water / SEC overlay map, and 4) impediment to forest practices;

19. "Survey of Proposed Road for Seabold and Co.", dated October 9, 1969, scale of 1"=200';

20. Letter, Laurie Mapes to Phillip Grillo, dated Sept. 19, 1995, testimony in opposition to application, concerns include dwelling location, tax deferral status, Oregon Dept. of Fish and Wildlife review, stocking survey, and the effect on adjoining forest lands;

21. Slides shown at Sept. 20, 1995 hearing, two plastic sheets with pockets containing 17 slides;

22. Letter, Michael Robinson to Gary Clifford, dated October 18, 1995, cover letter for Memorandum (Exhibit 23);

23. Memorandum, Applicant to Hearings Officer, dated October 18, 1995, responses to issues with 11 new exhibits;

24. Letter, Laurie Mapes to Gary Clifford, dated and received October 25, 1995, response to applicant's materials dated October 18, 1995;

25. Six page submittal with exhibits, from Paul Wright and Marquetta Mitchell to Phillip Grillo, received October 25, 1995;

26. Application for variance to side yard, case HV 28-95, response to approval criteria, received December 19, 1995;

27. Revised site plan received with variance application on December 19, 1995;

28. Memo, from R. Scott Pemble to Planning Staff, regarding implementation of Transportation Planning Rule, dated March 31, 1994;

29. Transportation Planning Rule Bulletin dated May 1, 1995 and OAR 660, Division 12 (amended April, 1995), by Dept. of Land Conservation and Development and LCD Commission;

30. Staff report for HV 28-95, prepared for the January 10, 1996 hearing;

31. Notice of public hearing for January 10, 1996, sent to surrounding property owners, CU 10-94 / HV 28-95;

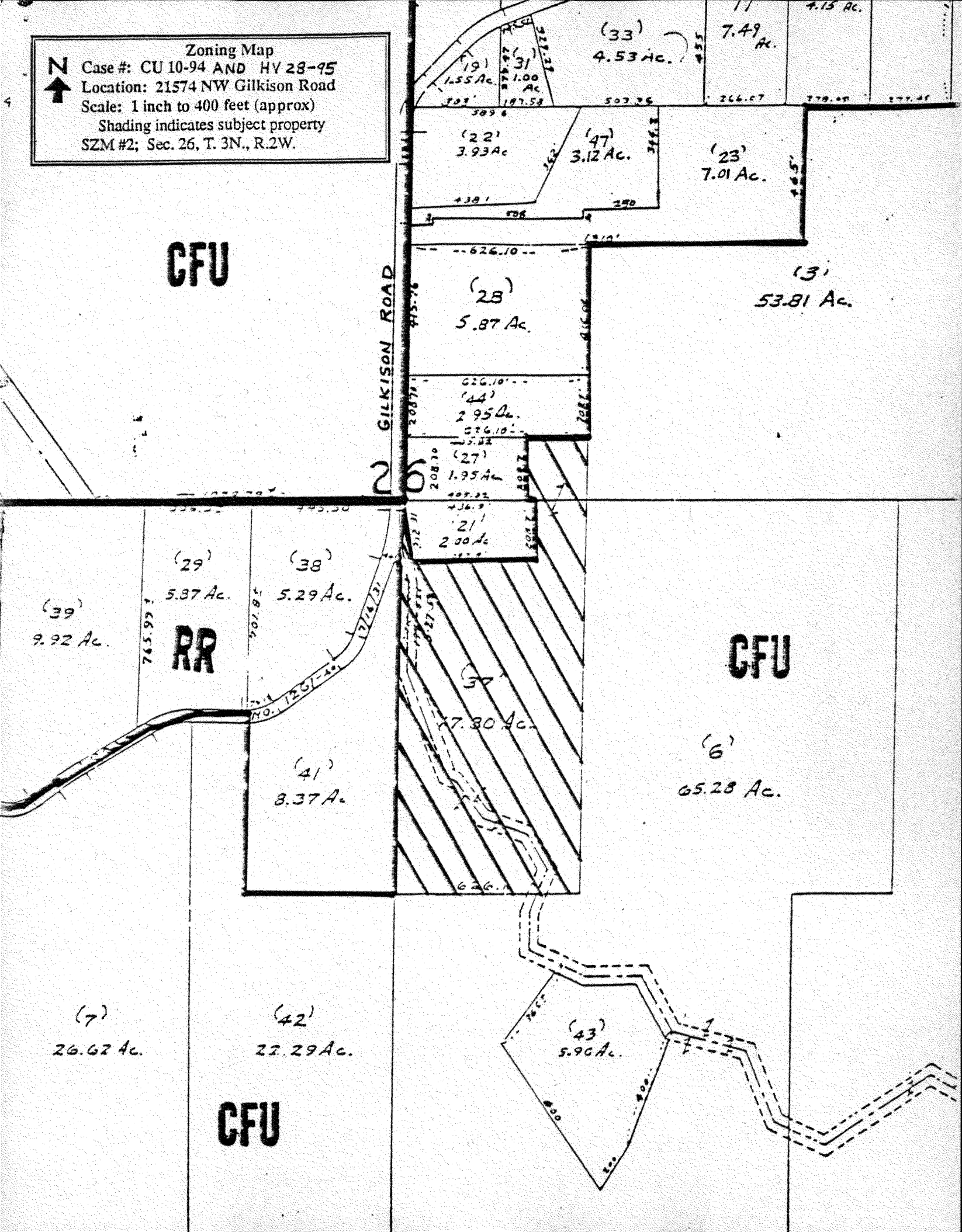
32. Applicant's Submittal with cover letter from Michael Robinson to Gary Clifford, letter is dated January 15, 1996, (submittal report is dated March 24, 1996 but because the report was received at the Planning Offices on January 24, 1996 it is assumed that was the date intended);

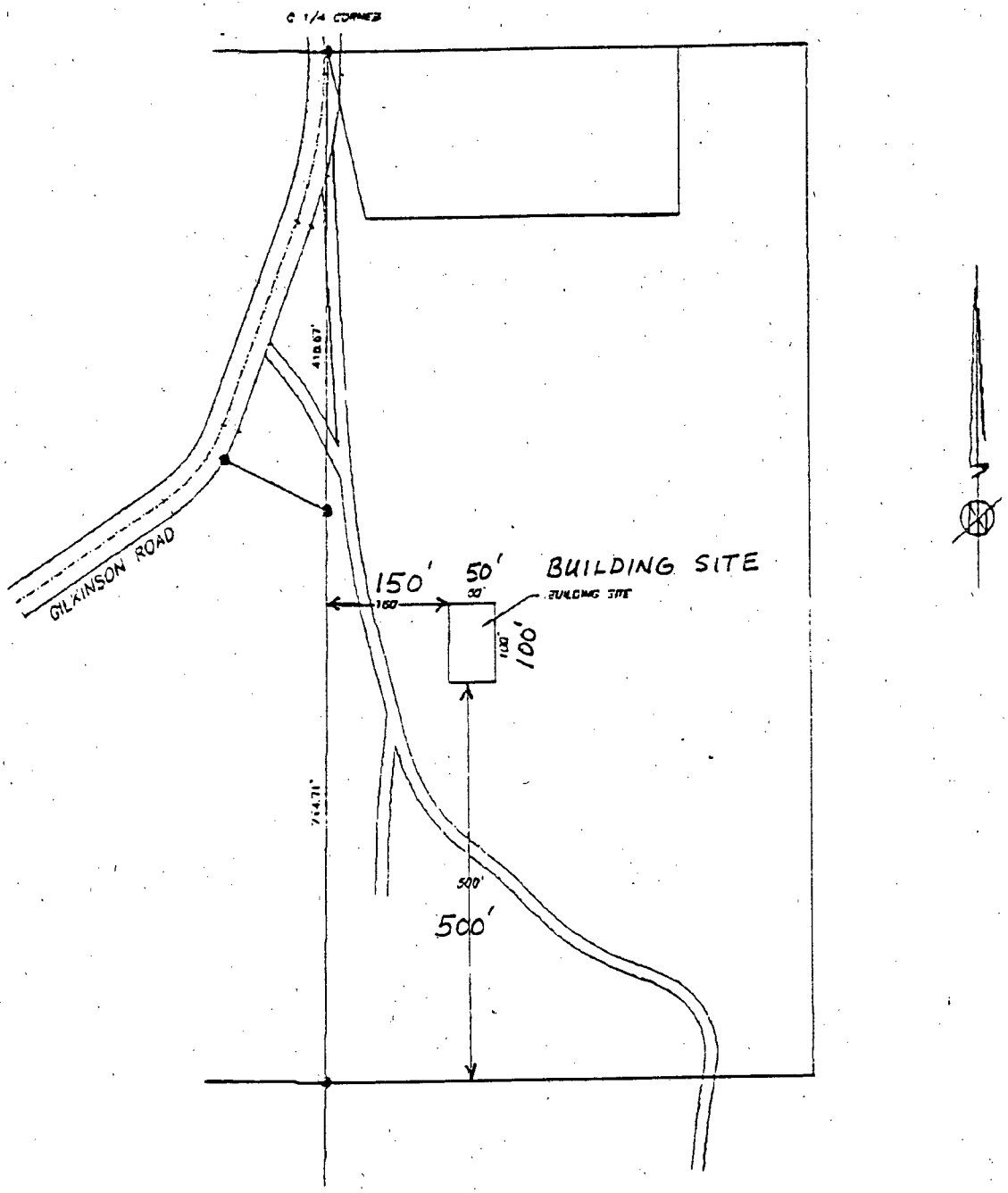
33. Letter dated February 6, 1996, Jeff Mapes and Laurie Mapes to Gary Clifford, response to applicant's submittal received by planning staff on January 24, 1996;

34. Document dated February 7, 1996, by Paul Wright and Marquetta Mitchell to Hearings Officer, response to applicant's submittal received by planning staff on January 24, 1996;

35. "West Hills Reconciliation Report (September, 1994)", an amendment to Multnomah County Comprehensive Framework Plan Volume One: Findings, (adopted as Exhibit A to Ordinance 797 on September 22, 1994 with an effective date of 30 days later);

36. Applicant's Submittal with cover letter from Michael Robinson to Gary Clifford, submittal includes responses to issues raised in exhibits 33 and 34, letter and submittal are dated February 14, 1996;


Zoning Map
N
Case #: CU 10-94 AND HV 28-95
Location: 21574 NW Gilkison Road
Scale: 1 inch to 400 feet (approx)
Shading indicates subject property
SZM #2; Sec. 26, T. 3N., R.2W.
CFU
GILKISON ROAD
(28) 5.87 Ac.
(44) 2.95 Ac.
(27) 1.95 Ac.
(21) 2.00 Ac.
(3) 53.81 Ac.
(22) 3.93 Ac.
(47) 3.12 Ac.
(23) 7.01 Ac.
(33) 4.53 Ac.
(19) 1.55 Ac.
(31) 1.00 Ac.
7.49 Ac.
4.13 Ac.
(29) 5.87 Ac.
(38) 5.29 Ac.
(39) 9.92 Ac.
RR
(37) 17.30 Ac.
(41) 8.37 Ac.
(6) 65.28 Ac.
CFU
(7) 26.62 Ac.
(42) 22.29 Ac.
(43) 5.96 Ac.
CFU



PLOT MAP SHOWING
THE PROJECTED BUILDING SITE
FOR RANDY POUSSON
IN THE SE 1/4 OF SEC 26 T3N, R2W, W.M.
MULTNOMAH COUNTY, OREGON
SCALE 1" = 100' NOV 28, 1995

DRAWN BY: DON W | CHECKED BY: | REVISED: | JOB No. 95-181

KEENON LAND SERVICES
1224 ALDER ST.
VERNONIA, OR
97064

MULTNOMAH COUNTY

DEPARTMENT OF ENVIRONMENTAL SERVICES
Division of Planning and Development
2115 S.E. Morrison Street
Portland, Oregon 97214 (503) 248-3043

Staff Report For Variance Case HV 28-95

An Addendum To The Staff Report For Conditional Use Case CU 10-94

This Staff Report consists of Findings of Fact and Conclusions.
Prepared for a Public Hearing to be held on January 10, 1996.

HV 28-95 **Variance Request**

Minor Variance to the Minimum Yard (Setback) Dimensional Requirement

Request is for approval of a minor variance to the 200 foot minimum yard (setback) requirement from a proposed dwelling and a property line not fronting on a maintained public road. The variance request is for a yard of 150 feet, a 25 percent reduction of the 200 foot standard of the Commercial Forest Use Zoning District.

This variance request is associated with the Conditional Use Case CU 10-94, a request for approval of a dwelling not related to forest management, also before the Hearing Authority.

Location: 21574 NW Gilkison Road

Legal: Tax lot '37', Section 26, T.3N., R.2W., WM.

Site Size: 17.80 Acres

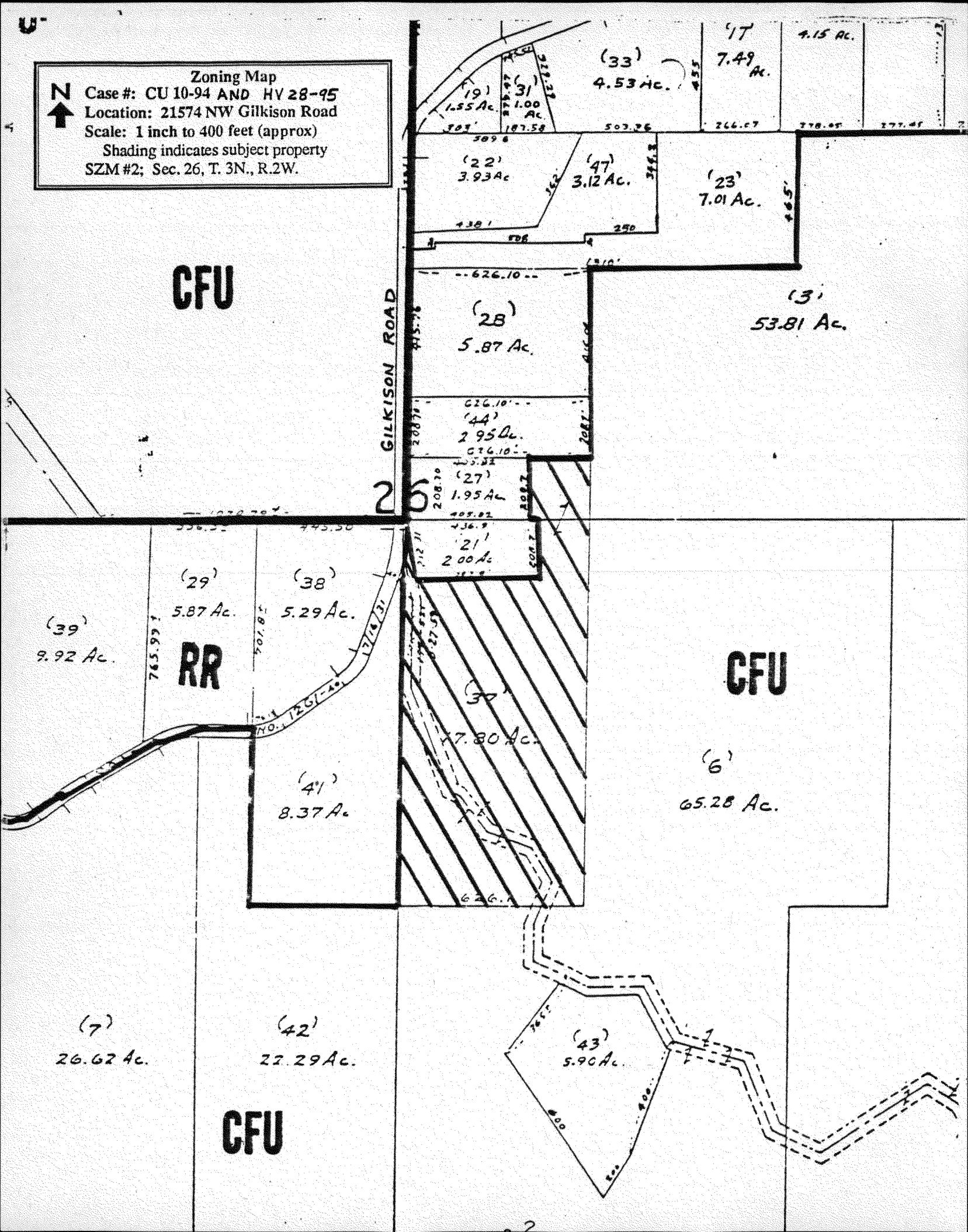
Property Owner: Randy and Christina Pousson
2373 NW 185th Avenue, #197
Hillsboro, OR 97124

Applicant's Representative: Michael Robinson
Stoel Rives Boley Jones & Grey, Attorneys At Law
Suite 2300, Standard Insurance Center
900 SW Fifth Avenue
Portland, OR 97204-1268

Comprehensive Plan: Commercial Forest **Zoning:** CFU, Commercial Forest Use

Recommended Hearings Officer Decision: APPROVE, a 50 foot variance to the 200 foot yard dimensional requirement between a dwelling and the west property line, based on the following Findings and Conclusions. In addition, the site plan accompanying the variance application (received 12/19/95) replaces prior versions in the Findings of Conditional Use case CU 10-94.

EXHIBIT
30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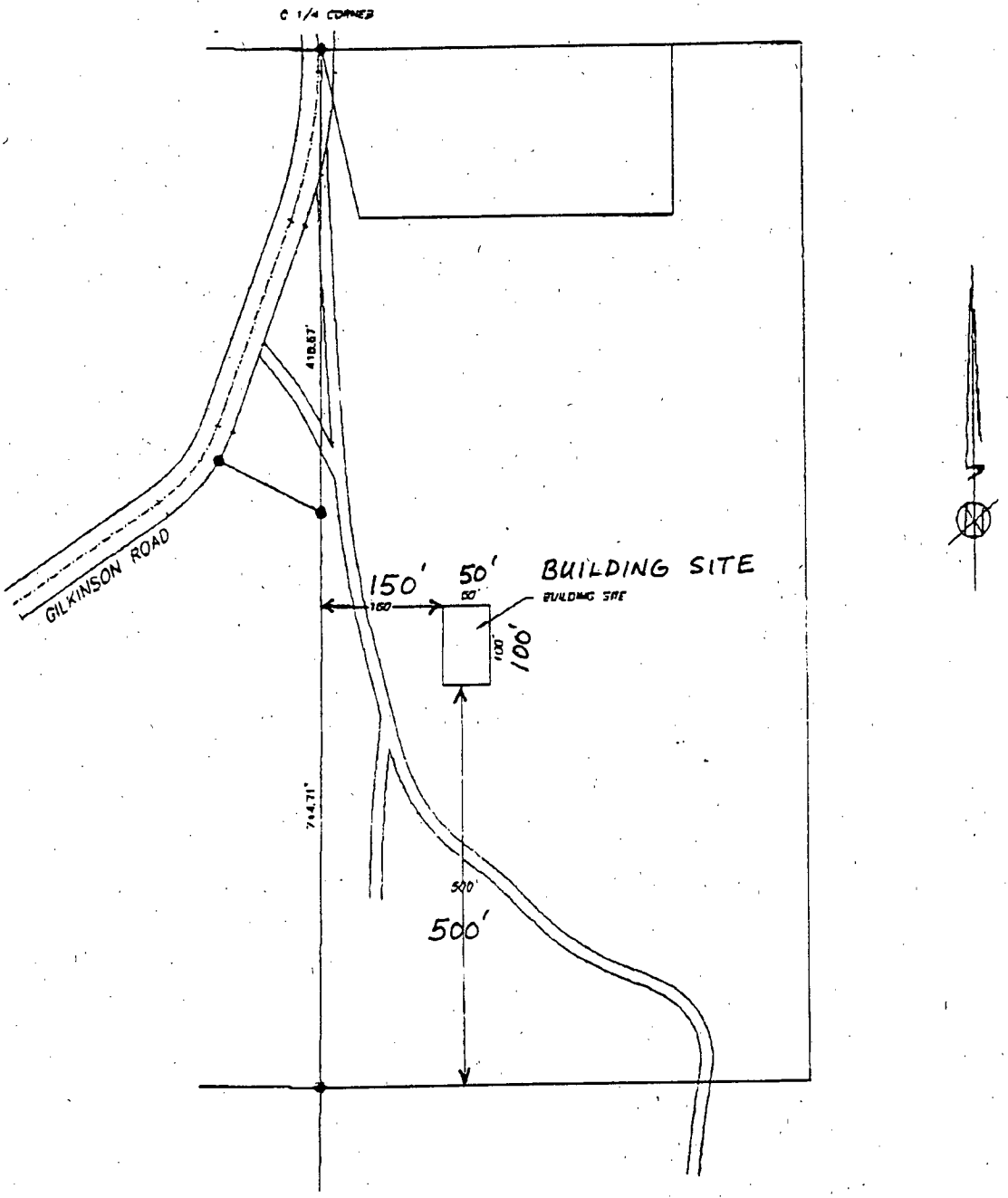
CFU
CFU



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KEENON LAND SERVICES
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DRAWN BY: DON W | CHECKED BY: | REVISED: | JOB No. 95-161

CU 10-94
HV 28-95

FINDINGS OF FACT:

1. Applicant's Proposal:

Applicant's Description: "Randy and Christina Pousson (the "Applicants") have submitted a request for approval of a non-forest related dwelling in the Commercial Forest Use District ("CFU") to the Multnomah County Division of Planning and Development. The case file number for the application is CU 10-94. The Applicants now request a minor variance to the development standards set forth in the Multnomah County Code ("MCC") to reduce the required 200 foot front yard setback to 150 feet. See Exhibit 1 [Site Plan titled: Plot Map Showing The Projected Building Site For Randy Pousson]. This is a reduction in the required standard of 25 percent. The variance qualifies for the minor variance process set forth in MCC 11.15. 8515(B)."

2. Vicinity and Site Characteristics:

Applicant's Description: "The Applicants' property abuts NW Gilkison Road and is characterized by areas with some slopes ranging from 20 degrees to 50 to 60 degrees. The site contains a few flat areas. The property is 17.80 acres and is located in the CFU district. The site is presently vacant. Adjacent properties to north and west are occupied by single family residences."

Staff Comment: The description in the Staff Report for CU 10-94 is adopted by refernce except as may conflict with the revised site plan accompanying HV 28-95 which shows a reduced setback to the west property line.

3. Applicable CFU Zoning District Minimum Yard Standards

11.15.2058 Dimensional Requirements

* * *

(C) Minimum Yard Dimensions - Feet:

Frontage on County Maintained Road	Other Front	Side	Rear
60 from centerline	200	200	200

* * *

These yard dimensions and height limits shall not be applied to the extent they would have the effect of prohibiting a use permitted outright. Variances to dimensional standards shall be pursuant to MCC .8505 through .8525, as applicable.

(D) To allow for clustering of dwellings and potential sharing of access, a minimum yard requirement may be decreased to 30 feet if there is a dwelling on an adjacent lot within a distance of 100 feet of the new dwelling.

* * *

4. Zoning Code Variance Considerations:

NOTE: THE APPLICANT'S RESPONSE TO AN APPROVAL CRITERIA WILL BE INDICATED BY THE BEGINNING NOTATION "Applicant's Response:". (Additional Planning Staff comments may be added where supplemental information is needed or where staff may not concur with the applicant's statements.)

A. **MCC 11.15.8505 Variance Approval Criteria**
11.15.8505(A) The Approval Authority may permit and authorize a variance from the requirements of this Chapter only when there are practical difficulties in the application of the Chapter. A Major Variance shall be granted only when all of the following criteria are met. A Minor Variance shall met criteria (3) and (4):

(1). **11.15.8505(A)(1)**: [Not applicable.]
* * *

(2). **11.15.8505(A)(2)**: [Not applicable.]
* * *

(3). **11.15.8505(A)(3) The authorization of the variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or district in which the property is located, or adversely affect the appropriate development of adjoining properties.**

Applicant's Response: "The Applicants seek a minor variance to reduce the required 200 foot front yard set back to 150 feet. This minor variance is in response to adjoining property owners concerns that the proposed dwelling should be sited closer to NW Gilkison Road. To accommodate these concerns, a variance to the front yard setback is required. This variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or district of the Applicant's proposed dwelling. [*Footnote:* The Applicants' pending application for a conditional use contains evidence that the original building site will not interfere with the development of adjoining properties.] The variance is similar to the setbacks of some of the existing dwellings on NW Gilkison Road. The approval authority can insure that the proposed dwelling will not adversely affect the appropriate development of adjoining properties."

Staff Comment: Staff concurs.

(a) Staff would characterize the west property line as a side property line. The short frontage on Gilkison Road in the northwest corner of the site would be the front property line.

(b) In an effort to reduce fire apparatus response time, the Code allows for a setback of only 60 feet to the centerline of a County maintained road. The access for this proposed dwelling is an easement to a County road and therefore cannot qualify for the 60 foot setback. However, the requested reduction in this setback will also act to reduce the distance to a County maintained road and reduce emergency response time.

(c) The west property line is also the zoning district boundary of the Rural Residential District. In that district the adjoining property owner could build as close as ten feet to this common property line. The requested 150 foot setback will not affect the development of that adjoining property.

(d) The requested variance will move the proposed dwelling further from the industrial scale forestry practices occuring to the east of the subject property, thereby reducing any potential, although not foreseen, conflicts with that land use. See description of forestry practices in the CU 10-94 staff report.

(4). **11.15.8505(A)(4) The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor will it establish a use which is not listed in the underlying zone.**

Applicant's Response: "The reduction of the front yard setback does not adversely affect the realization of the Multnomah County Comprehensive Plan. The Applicants request simply reduces the front yard setback by 50 feet, a 25 percent reduction of the required standard. Siting the dwelling closer to NW Gilkison Road further reduces the potential impacts that a dwelling might have on adjacent forestry practices.

In granting the proposed reduction to the front yard setback the approval authority will not be establishing a use which is not listed in the underlying zone. The Applicants are proposing a dwelling not related to forest management in the CFU district. Such a request is a conditional use in the CFU district."

Staff Comment: Staff concurs. Applicable Comprehensive Plan standards are addressed in the CU 10-94 staff report.

5. Transportation Planning Rule Considerations:

A. The property owner's representative has as part of the variance application submitted responses to certain portions of the Transportation Planning Rule (Oregon Administra-

tive Rules Division 12). The introduction reads:

> "OAR 660-12-050(3) requires that cities and counties within Metropolitan Planning Organization areas adopt or amend land use and subdivision ordinances to implement OAR 660-12-045(3), (4)(a)-(f) and (5)(d). These rules apply directly to all land use decisions if an affected city or county has not met the May 8,1994 deadline. Id. Multnomah County missed the deadline. Therefore, the relevant portions of the Transportation Planning Rule are directly applicable to this land use application."

B. The applicant's responses to the cited subsections of the Transportation Rule are made part of the record. However, this staff report does not include them because it is staff's view that they are not necessary. All of the OAR citations are regarding transportation issues in urban or rural center areas and the subject property is in neither.

(1) There is no OAR 660-12-050 section in the April 1995, version of the Rule.

(2) OAR 660-12-045(3) [4/95] reads in part: "Local governments shall adopt land use or subdivision regulations for urban areas and rural communities as set forth below. . . ." The County Planning Director has made the determination that those regulations only apply within the Urban Growth Boundary and Rural Centers (RC Zoned communities such as Burlington or Springdale).

(3) OAR 660-12-045(4)(a)-(f) [4/95] reads in part: "To support transit in urban areas containing a population greater than 25,000, where the area is already served by a public transit system or where a determination has been made that a public transit system is feasible, local governments shall adopt land use and subdivision regulations as provided in (a)-(f) below. . . ." The subject property is not in an urban area.

(4) OAR 660-12-045(5)(d) [4/95] reads in part: "In MPO areas, local governments shall adopt land use and subdivision regulations to reduce reliance on the automobile which: . . ." An MPO is a Metropolitan Planning Organization "designated by the Governor to coordinate transportation planning in an urbanized area of the state" (OAR 660-12-005(10) [4/95]. The regulations do not apply in this rural area.

6. Conclusions

A. The approval criteria for a minor variance are satisfied.

B. The Transportation Rule standards are not applicable to this request.

The Staff Report and recommendation on Minor Variance application HV 28-95 will be presented at a public hearing on January 10, 1996 before the Hearings Officer. (That public hearing is also a continued hearing in the matter of CU 10-94, a conditional use request for approval of a dwelling not related to forest management.)

The Hearings Officer MAY announce a decision on the item:

at the close of the hearing; or,
upon continuance to a time certain; or,
after the close of the record following the hearing.

A written decision is usually mailed to all parties within ten days following the Decision of the Hearings Officer.

Decisions of the Hearings Officer 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 to the record. A *"Notice of Appeal"* form and fee must be submitted to the County Planning Director, within ten days after the Hearings Officer decision is submitted to the Clerk of the Board [REF. MCC 11.15.8260(A)(1)]. The appeal fee is **$500.00 plus a $3.50-per-minute** charge for a transcript of the initial hearing(s) [REF. MCC 11.15.9020(B)]. *"Notice of Appeal"* forms and instructions are available at the Planning and Development Office at 2115 SE Morrison Street, 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

Hearings Officer decisions are typically reported to the Board for review on the first Tuesday following the ten day appeal period. The Board meets at 1:30 p.m. in Room 602 of the Multnomah County Courthouse. For further information call the Multnomah County Planning and Development Division at 248-3043.

MULTNOMAH COUNTY

DEPARTMENT OF ENVIRONMENTAL SERVICES
Division of Planning and Development
2115 S.E. Morrison Street
Portland, Oregon 97214 (503) 248-3043

Staff Report

This Staff Report consists of Conditions, Findings of Fact, and Conclusions.
Prepared for a Public Hearing to be held on September 20, 1995.

CU 10-94 Conditional Use Request

Single Family Dwelling Not Related to Forest Management

Applicant requests conditional use approval of a single family dwelling not related to forest management on a 17.80 acre Lot of Record in the Commercial Forest Use zoning district.

Location: 21574 NW Gilkison Road

Legal: Tax lot '37', Section 26, T.3N., R.2W., WM.

Site Size: 17.80 Acres

Property Owner: Randy and Christina Pousson
2373 NW 185th Avenue, #197
Hillsboro, OR 97124

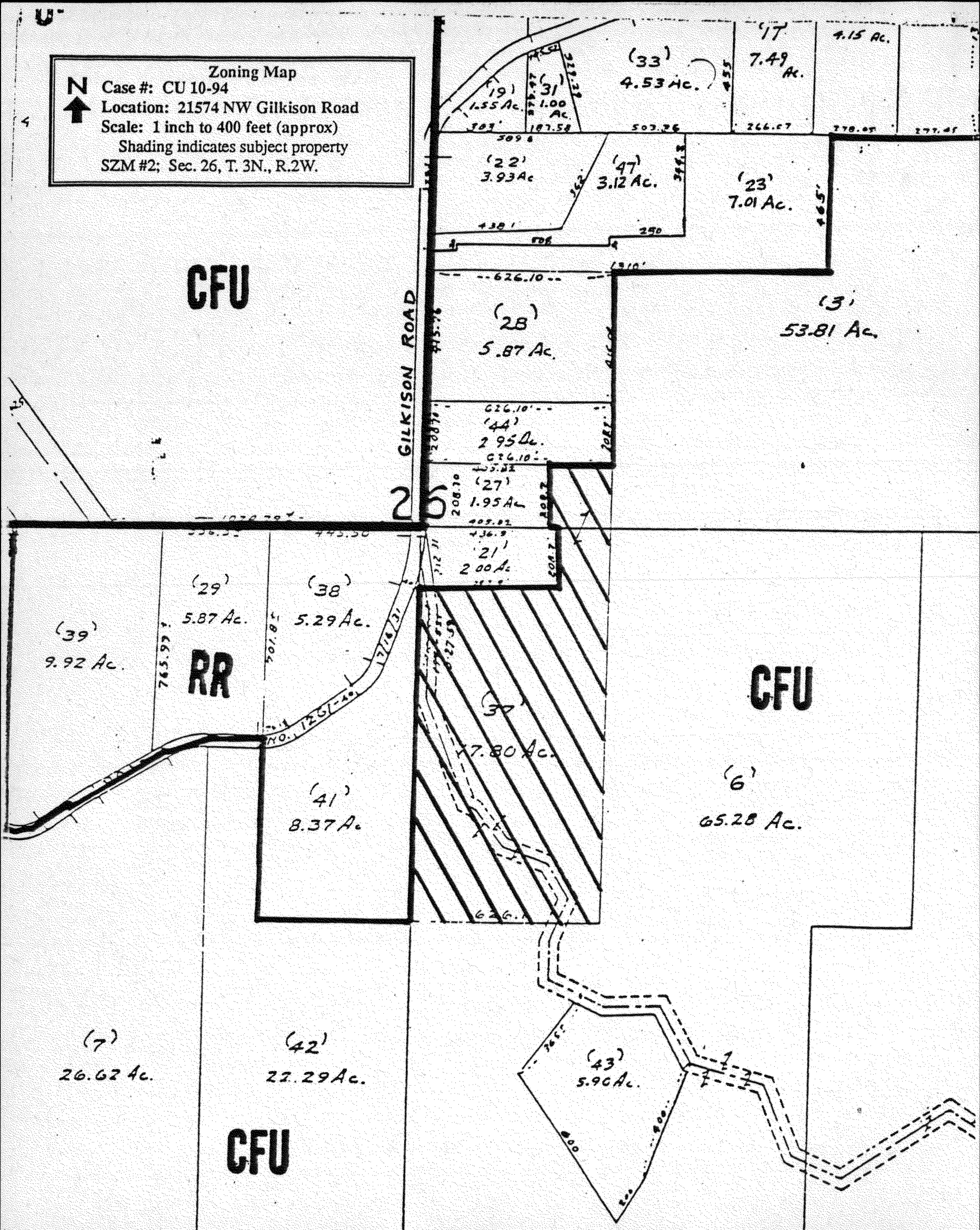
Applicant's Representative: Michael Robinson
Stoel Rives Boley Jones & Grey, Attorneys At Law
Suite 2300, Standard Insurance Center
900 SW Fifth Avenue
Portland, OR 97204-1268

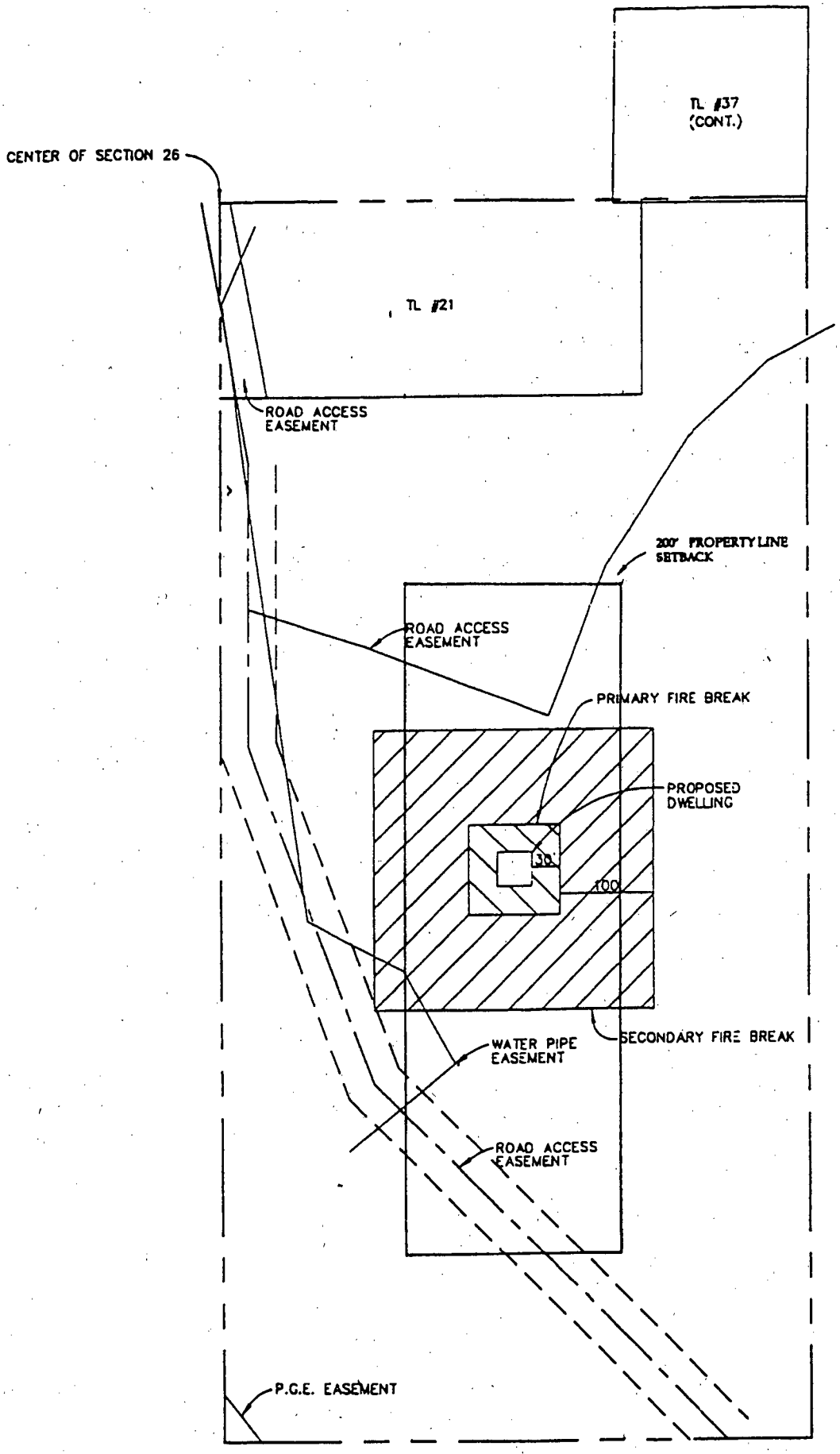
Comprehensive Plan: Commercial Forest

Zoning: CFU, Commercial Forest Use

Recommended Hearings Officer Decision: APPROVE, subject to conditions, development of this property with a single family dwelling not related to forest management, based on the following Findings and Conclusions.

Staff Contact: Gary Clifford


Zoning Map
N
Case #: CU 10-94
Location: 21574 NW Gilkison Road
Scale: 1 inch to 400 feet (approx)
Shading indicates subject property
SZM #2; Sec. 26, T. 3N., R.2W.
CFU
CFU
CFU
RR
GILKISON ROAD
(33) 4.53 Ac.
(17) 7.49 Ac.
4.15 Ac.
(19) 1.55 Ac.
(31) 1.00 Ac.
(22) 3.93 Ac
(47) 3.12 Ac.
(23) 7.01 Ac.
(3) 53.81 Ac.
(28) 5.87 Ac.
(44) 2.95 Ac.
(27) 1.95 Ac
(21) 2.00 Ac
(29) 5.87 Ac.
(38) 5.29 Ac.
(39) 9.92 Ac
(37) 17.80 Ac.
(6) 65.28 Ac.
(41) 8.37 Ac
(7) 26.62 Ac.
(42) 22.29 Ac.
(43) 5.90 Ac.
26

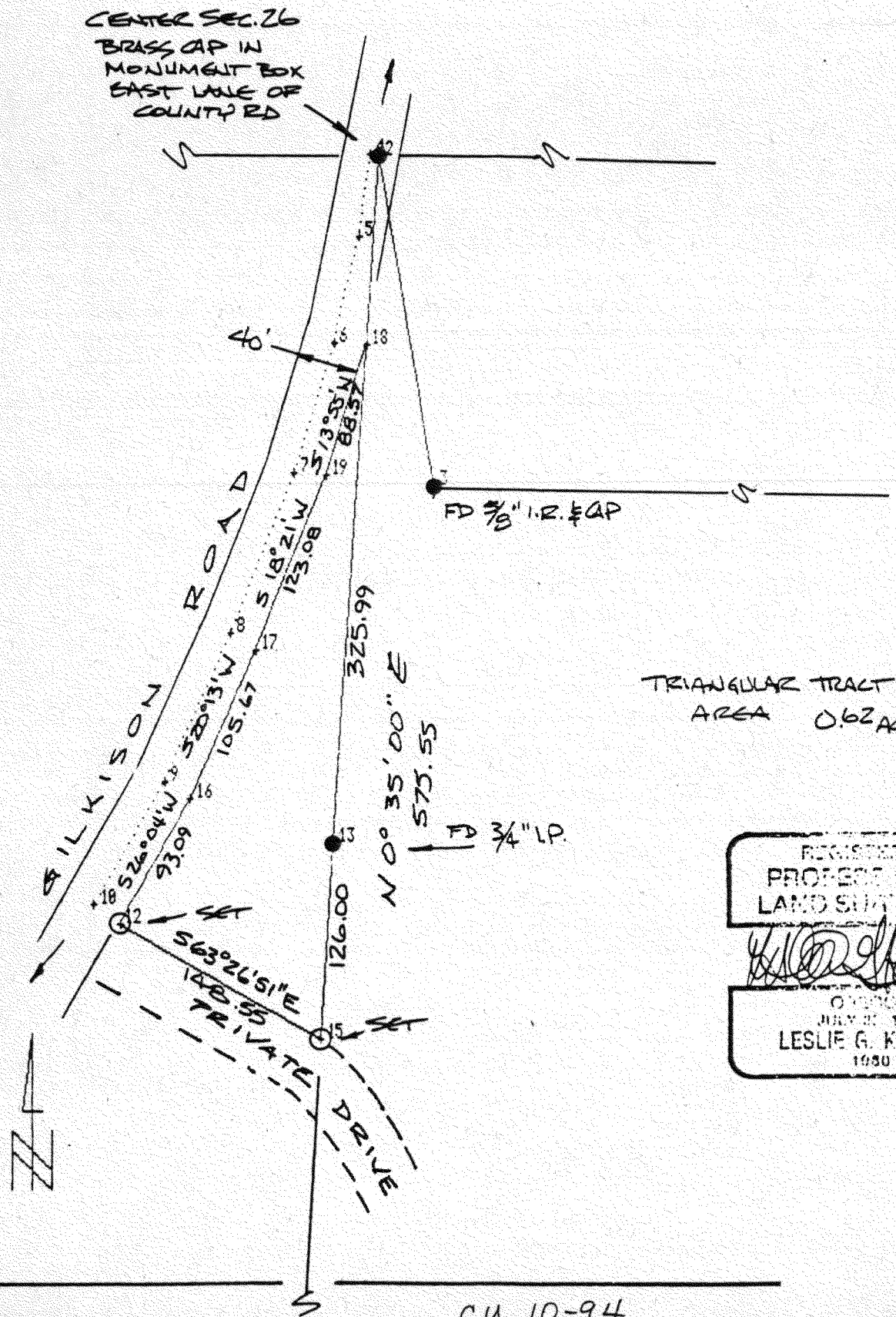

TL #37
(CONT.)
CENTER OF SECTION 26
TL #21
ROAD ACCESS
EASEMENT
200' PROPERTY LINE
SETBACK
ROAD ACCESS
EASEMENT
PRIMARY FIRE BREAK
PROPOSED
DWELLING
30'
100'
SECONDARY FIRE BREAK
WATER PIPE
EASEMENT
ROAD ACCESS
EASEMENT
P.G.E. EASEMENT

CU 10-94

WESTERN INTERNATIONAL SPECIALTY PRODUCTS

TRACT IN E½NE¼ SW¼
SECTION 26
TWP 3N, R2W, W.M.
MULTNOMAH COUNTY, ORE.

SCALE 1" = 100' MARCH 11, 1993



TRIANGULAR TRACT
AREA 0.62 ACRES

REGISTERED
PROFESSIONAL
LAND SURVEYOR
OREGON
JULY 31, 1975
LESLIE G. KEENON
1980

CU 10-94
p. 4

EXHIBIT 1
Page 1 of 1

CONDITIONS OF APPROVAL:

1. Approval of this Conditional Use shall expire two years from the date of the Board Order unless substantial construction has taken place in accordance with MCC 11.15.7110(C).

2. The dwelling location shall be as proposed on the submitted site plan.

3. Prior to approval of building permits, provide evidence that a stocking survey report has been submitted accordance with OAR 660-06-029(5)(c).

4. Prior to the issuance of a building permit, the property owner shall provide to the Division of Planning and Development a copy of the recorded restrictions acknowledging the rights of nearby properties to conduct farm and forest practices. A prepared form is available at the Planning Offices.

5. Prior to the issuance of a building permit for the dwelling, apply for and obtain approval of a Hillside Development Permit or Grading and Erosion Control Permit as applicable, unless it can be demonstrated that construction would be carried out in a manner and scale as to be exempt from this requirement as provided in MCC .6715. Plans submitted for the permit will incorporate as required the standards of MCC 11.15.2074(D), [see 6 below].

6. Prior to the issuance of a building permit, submit confirmation by an Oregon Professional Engineer that the "driveway" from Gilkison Road to the building site has been constructed to the standards of MCC 11.15.2074(D), (the "driveway" includes the existing easement road to reach Gilkison Road from the home).

7. Prior to the issuance of a building permit and as long as the property is under forest resource zoning, maintain primary and secondary fire safety zones around all structures, in accordance with MCC 11.15.2074(A)(5).

8. The dwelling shall have a fire retardant roof and all chimneys shall be equipped with spark arrestors.

9. All, except the last, of the Wildlife Habitat Mitigation measures outlined in the submitted Wildlife Conservation Plan for the property shall be carried out and maintained:
   A. Use only native vegetation for landscaping;
   B. Maintain as many existing trees and shrubs as possible while still meeting fire protection zone requirements;
   C. Limit exterior lighting to prevent disturbance and place all necessary lighting as close to the ground as possible to limit the affected area by lighting while still meeting the needs of safety and security;
   D. No fencing should be placed along Gilkison Road or outside of the Secondary Fire Protection Zone perimeter; and
   E. Move trees and downed logs that must be removed for the fire protection zone into the existing stands or into the downslope harvested area to provide coarse woody debris habitat for small mammals, reptiles and amphibians.

Staff Report Format Outline

FINDINGS OF FACT

1. Applicant's Proposal
2. Site and Vicinity Characteristics
3. Applicable Oregon Revised Statute Requirements
4. Applicable Oregon Administrative Rule Requirements
5. Multnomah County Conditional Use Approval Criteria
6. Multnomah County Comprehensive Plan Approval Criteria
7. Multnomah County "West Hills Reconciliation Report" Considerations

CONCLUSIONS

The application materials submitted for this request are made part of this record and accepted as findings, except as may be noted in this report. In particular, the "applicant responses" in this report also refer to exhibits in support of their position in addressing the approval criteria.

NOTE: THE APPLICANT'S RESPONSE TO AN APPROVAL CRITERIA WILL BE INDICATED BY THE BEGINNING NOTATION "*Applicant Response:*". (Additional planning staff comments may be added where supplemental information is needed or where staff may not concur with the applicant's statements, "*Staff Comments*".)

FINDINGS OF FACT:

I. Applicant's Proposal:

The applicant requests Hearings Officer approval to develop the above described 17.8 acre lot with a single family dwelling not related to forest management (also referred to in other jurisdictions as a "template dwelling".

Applicant's Additional Comments: Status of Application. The application was submitted on October 28, 1994. The County notified the applicant on November 7, 1994 that additional information was required by April 26, 1995. The applicant submitted the information on April 25, 1995. The County confirmed on July 3, 1995 that the application was complete by April 26, 1995. Therefore, the application is to be judged by the standards and criteria effective on October 28, 1994. ORS 215.428(3). The evidentiary hearing is scheduled for September 20, 1995. The applicant has waived the 120-day period until November 23, 1995.

Staff Comment: The applicant has submitted application materials and supplemental information in three different "packets", each of which has its own set of exhibits referred to in the text quoted within this staff report. The three are the original application narrative dated October 28, 1994, a letter which included supplemental information dated April 25, 1995, and a letter which included additional information to the file dated August 30, 1995.

2. Site and Vicinity Characteristics:

A. *Applicant's Description:*

(1) The property is in the extreme western part of Multnomah County. Surrounding land uses are as follows:
North: single-family home (tax lot 21)
East: forest land (tax lot 6)
South: forest land (tax lot 6)
West: single-family home (tax lot 41)

(2) The surrounding lands are zoned Commercial Forest Use ("CFU"). This parcel has been logged. Access to the site is from Gilkison Road, a paved county road with a 40-foot right-of-way. The parcel is crossed by an existing access road easement from Gilkison Road, which will serve as the access to the dwelling site. The easement will serve only one dwelling. A driveway will connect this dwelling to the easement.

(3) Access.
Multnomah County Code ("MCC") 11.15.2058(c) requires frontage on a road. The parcel abuts Gilkison Road. This frontage satisfies the access requirement. MCC 11.15.2074(D)(2) requires a twenty (20)-foot wide private road or a twelve (12)-foot wide driveway. The existing access to Gilkison Road meets this requirement.

However, Western International (Forest City Trading) owns a triangularly-shaped parcel adjacent to Gilkison Road. See Exhibit 1 [with letter of August 30, 1995]. Western International will grant at least a twenty (20)-foot wide access easement across its parcel to Gilkison Road. The access easement contains an improved road that the fire district has determined is satisfactory. See Exhibit 4 to original application.

(4) An unclassified stream (not classified as Class I or II) crosses the northern portion of the parcel.

B. *Additional Staff Description:*

(1) The property is roughly rectangular in shape, with an extension to the northeast and a small extension to the northwest to obtain frontage on Gilkison Road. Topography generally slopes down from southwest to northeast, although the terrain is uneven and contains ridges, bowls and drainageways.

(2) The property has been logged in the last few years. There are a number of slash piles on the northern portion of the property. The property contains a number of branching logging roads in poor condition. There appear to be a number of easements attached to the property, both for logging roads and water, but the exact location of these is somewhat unclear.

(3) One of the easements is to allow a water line from a spring to an adjoining property. Another nearby property obtains domestic water from the tributary of Joy Creek that runs through the subject property. Determination of whether the water is withdrawn on the subject property or further down the tributary cannot be made from the information submitted.

(4) The surrounding vicinity consists of a number of small lots with residences adjacent to Gilkison Road, backed by larger parcels containing forest land.

3. APPLICABLE OREGON REVISED STATUTE REQUIREMENTS:

A. The applicant's representative has selected what they determined to be the applicable criteria of approval contained in the Oregon Revised Statutes (ORS) and the Oregon Administrative Rules (OAR), along with responses to each of those criteria. Staff does not agree with the applicability of some of the ORS and OAR approval criteria selected in the application and will note as such in the listing of these criteria in the Findings sections 3 and 4 of this report.

B. In the Board of County Commissioners' (BCC) Decision of March 3, 1995 regarding Conditional Use case number CU 2-95 the main issue of the appeal to the Board was the determination of the relevant ORS and OAR regulations that must be considered because the County Zoning Code is not updated to include those regulations. The findings in CU 2-95 on the determination of approval criteria are also made part of the record for this case, CU 10-94. The BCC Decision agreed with the County Counsel and Planning Staff recommendation to interpret the complex and difficult to understand organization of the statute and rule criteria, in basic terms, to allow three different alternatives for obtaining approval of a single family dwelling in a forest zone. Those alternatives are:

(1) "Lot or Parcel of Record Dwellings" (applicant acquired property prior to January 1, 1985), ORS 215.705 and OAR 660-06-027(1)(a)&(g)
(2) "Large Tract Forest Land Dwellings" (applicant owns 160 acres), ORS 215.740 and OAR 660-06-027(1)(c)
(3) "Alternative Forestland Dwellings" or better known Statewide as "Template Test Dwellings" (a template test where 11 other parcels and 3 existing dwellings must be within a 160 acre square centered on the subject parcel), ORS 215.750 and OAR 660-06-027(1)(d).

The appropriate ORS and OAR provisions for the subject application, CU 10-94, are those under alternative number 3 – a "Template Dwelling". The ORS and OAR approval criteria listed in the application that **do not apply** to a "Template Dwelling" are ORS 215.705(4), ORS 215.720(1), and OAR 660-06-027(1)(a).

C. **ORS 215.750** (Template Dwelling) **"Alternative forestland dwellings; criteria.**

(1) In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

*** * ***

(c) Capable of producing more than 85 cubic feet per acre per year of wood fiber if:

(A) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels.

*** * ***

(3) Lots or parcels within urban growth boundaries shall not be used to satisfy the eligibility requirements under this subsection."

Staff Comment: The present Multnomah County Code (MCC) subsection 11.15.2052(A)(3) is based upon an OAR adopted in December, 1992. That 1992 OAR standard was later, with some lessening of requirements, adopted by the 1993 Legislature into ORS 215. The MCC standard is more stringent in requiring: five dwellings instead of three, the dwellings must be inside the template instead of just on the lot, and the sides of the template must be oriented north-south. A proposal that meets the MCC standard will also meet the ORS standard. Therefore, findings of compliance of this standard will be found in the County Code Conditional Use portion of the staff report (see no. 4 below).

D. **ORS 215.750** (Template Dwelling) **"Alternative forestland dwellings; criteria.**

*** * ***

(4) A proposed dwelling under this subsection is not allowed:

(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law.

(b) Unless it complies with the requirements of ORS 215.730.

(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under ORS 215.740(3) for the other lots or parcels that make up the tract are met.

(d) If the tract on which the dwelling will be sited includes a dwelling.

Staff Comment: This subsection allows the county to be more restrictive if land use regulations are acknowledged. ORS 215.730 standards are required, see below. Concept of "tract" is covered in the conditional use criteria under MCC 11.15.2052(A)(1).

E. **ORS 215.730** (Applicable to all forest dwellings, including a Template Dwelling)
"Additional criteria for forestland dwellings under ORS 215.705.

(1) A local government shall require as a condition of approval of a single-family dwelling allowed under ORS 215.705 on lands zoned forestland that:

(a) The property owner submits a stocking survey report to the assessor and the assessor verifies that the minimum stocking requirements adopted under ORS 527.610 to 527.770 have been met.

Applicant Response: The owner will submit a stocking survey report to the assessor and the assessor verifies that the requirements as noted above have been met.

Staff Comment: A stocking report is a condition of approval. See MCC 11.15.2052(A)(8) for more discussion.

(b) The dwelling meets the following requirements:

(A) The dwelling has a fire retardant roof.

Applicant Response: The Applicant will agree to construct the dwelling with a fire retardant roof. In the event the Applicant sells this property, a restrictive covenant will be recorded requiring a fire retardant roof.

(B) The dwelling will not be sited on a slope of greater than 40 percent.

Applicant Response: The Applicant will site the dwelling on a slope of less than 40 percent. The dwelling is sited on a slope of less than 20 percent. See Exhibit 3 [original application].

(C) Evidence is provided that the domestic water supply is from a source authorized by the Water Resources Department and not from a Class II stream as designated by the State Board of Forestry.

Applicant Response: The Applicant intends to provide domestic water supply from a well. The well will be authorized by the Water Resources Department prior to construction. The County may impose conditions of approval to insure compliance with this criterion.

(D) The dwelling is located upon a parcel within a fire protection district or is provided with residential fire protection by contract.

Applicant Response: The Applicant and the Scappoose Rural Fire Protection District have entered into a contract to provide fire protection to this parcel. See Exhibit 4 [original application].

(E) If the dwelling is not within a fire protection district, the applicant provides evidence that the applicant has asked to be included in the nearest such district.

Applicant Response: The Applicant is within the Scappoose Rural Fire Protection District.

(F) If the dwelling has a chimney or chimneys, each chimney has a spark arrester.

Applicant Response: The Applicant will agree to comply with this condition if the dwelling has a chimney or chimneys.

(G) The owner provides and maintains primary fuel-free break and secondary break areas.

Applicant Response: The Applicant will agree to comply with this requirement.

4. APPLICABLE OREGON ADMINISTRATIVE RULE REQUIREMENTS:

A. **OAR 660-06-027(1)(d)** (Template Dwelling)

Dwellings in Forest Zones
660-06-027
(1) Dwellings authorized by OAR 660-06-025(1)(d) are:

* * *

(d) In western Oregon, a governing body of a county or its designate may allow the establishment of a single family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

* * *

(C) Capable of producing more than 85 cubic feet per acre per year of wood fiber if:

(i) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the center of the subject tract; and

(ii) At least three dwellings existed on January 1, 1993 on the other lots or parcels;

* * *

Staff Comment: A more restrictive version of this standard is evaluated in the portion of this report on MCC 11.15.2052(A)(3) below.

B. **OAR 660-06-027(4 & 5)** (Template Dwelling)

Dwellings in Forest Zones
660-06-027

* * *

(4) A proposed dwelling under this rule is not allowed:

(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law.

(b) Unless it complies with the requirements of OAR 660-06-029 and 035.

(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under subsection (6) of this rule for the other lots or parcels that make up the tract are met.

(d) If the tract on which the dwelling will be sited includes a dwelling.

(5) The following definitions shall apply to this rule:

(a) "Tract" means one or more contiguous lots or parcels in the same ownership. A tract shall not be considered to consist of less than the required acreage because it is crossed by a public road or waterway.

* * *

Staff Comment: See comments for ORS 215.750(4) and MCC 11.15.2052(A)(1).

C. **OAR 660-06-029, 035, and 040** (Siting and fire safety standards for all dwellings including a Template Dwelling)

OAR 660-06-029 Siting Standards for Dwellings and Structures in Forest Zones
The following siting criteria or their equivalent shall apply to all new dwellings and structures in forest and agriculture/forest zones. These criteria are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks and to conserve values found on forest lands. A governing body shall consider the criteria in OAR 660-06-029 together with the requirements in OAR 660-06-035 to identify the building site.

(1) Dwellings and structures shall be sited on the parcel so that:

(a) They have the least impact on nearby or adjoining forest or agricultural lands;

Applicant Response: There are no agricultural lands adjoining this tract. The only adjacent parcel which is used for forest practices is Tax Lot 6, a 65.28-acre parcel located to the southwest of this property. This property contains Douglas Firs. No clear-cutting or chemical spraying presently occurs on that property. Consideration for the Siting of Dwellings on Forest Land, Land Use Planning Notes, No. 2, Oregon Department of Forestry, Salem, Oregon, 1991, states: "Generally, a setback of 300 feet is desirable from any areas that are planned for harvest." The proposed dwelling will be 380 feet from the south property line, 400 feet from the east property line, 200 feet from the west property line, and 700

feet from the northern property line. The Applicant's setbacks from the southwest parcel meet this Oregon Department of Forestry standard. Additionally, adjoining and nearby forest land will benefit from the proposed siting of the dwelling as the existing logging road is in disrepair and the Applicant will undertake major improvements to improve grade, condition and maintenance of the logging road.

The Applicant has conducted a survey of adjacent properties. There are no ongoing forest or agricultural uses adjacent to the site, with the exception of the commercial forest practices on Tax Lot 6. As described above, the proposed dwelling site location is sufficiently removed from Tax Lot 6 to ensure that it will have the least impact on that adjoining land.

[August 30, 1995 letter] [A letter to the file argues] ... that spraying of herbicides on adjacent forest land and the proposed dwelling site will have more than the least impact on nearby or adjoining forest or agricultural lands. The applicant will sign and record a waiver of the right to sue because of forest or agricultural practices.

Staff Comment: Staff comments on these standards are found under MCC 11.15.2052(A)(1) below.

(b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;

Applicant Response: The Applicant proposes to construct a single-family dwelling on the 17.80-acre parcel. The dwelling will be located as close as possible to the access road and as far as possible from the boundaries of the tract. This will minimize any impacts from the residential dwelling on forest operations on the tract.

The parcel's topography dictates the proposed siting of the dwelling and ensures that adverse impacts of forest operations on the tract will be minimized. The northern one-third portion of the parcel has slopes ranging from a minimum of 28 percent to a maximum of 38 percent. The southern two-thirds of the parcel has slopes ranging from 17 to 19 percent.

The parcel's soils are susceptible to erosion and slumping on slopes greater than 30 percent. "Homes should not be sited below areas of unstable slopes or within the alluvial plain of a stream that flows from forest lands." "Considerations for the Siting of Dwellings on Forest Land," id. at 5. The proposed dwelling site removes the need for costly erosion control measures for forest operations on the tract and minimizes the impacts on forest operations.

Staff Comment: Staff comments on these standards are found under MCC 11.15.2052(A)(2) below.

(c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and

Applicant Response: The amount of land necessary to site the structure will require less than one acre. No additional service corridors are required because all utilities will be brought to dwellings by poles placed along the existing road easement or by buried electrical, phone and cable service lines. The road will utilize an existing road and an access easement which crosses the property. See Exhibit 3 [original application]. The amount of forest land necessary to site the road and the dwelling are therefore minimized.

Staff Comment: Staff comments on these standards are found under MCC 11.15.2052(A)(3) below.

(d) The risks associated with wildfire are minimized.

Applicant Response: The Applicant will comply with the fire siting standards in OAR 660-06-035. Moreover, the Applicant has signed an agreement with the Scappoose Rural Fire Protection District to provide fire protection to this site. The Rural Fire Protection District has adequate equipment to protect the dwelling on this tract. See Exhibit 4 [original application].

According to Scappoose Rural Fire Protection District Chief Mike Greisen, the parcel is within the contract service district. The following equipment could respond to the Applicant's parcel:

Equipment	Water Capacity
Engine 431	1,000 gallons
Engine 432	2,000 gallons
Engine 436	750 gallons
Tanker 431	3,250 gallons
Command	7,000 gallons
Rescue Units 431 and 436	
Medic Unit 431	

Staff Comment: Staff comments on these standards are found under MCC 11.15.2052(A)(5) below.

(2) Siting criteria satisfying subsection OAR 660-06-029(1) may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.

(3) The applicant shall provide evidence to the governing body that the

domestic water supply is from a source authorized in accordance with the Water Resources department's administrative rules for the appropriation of ground water or surface water and not from a Class II stream as defined in the Forest Practices Rules (OAR Chapter 629).

* * *

Applicant Response: ORS 537.545(1)(d) exempts single domestic uses from groundwater permit requirements. The Applicant's use is a domestic use. The Applicant will supply the County with a copy of the well constructor's report upon completion of the well.

Staff Comment: See MCC 11.15.2052(C) below, section 5.

(4) As a condition of approval, if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the United States Bureau of Land Management, or the United States Forest Service, then the applicant shall provide proof of a long-term road access use permit or agreement. The road use permit may require the applicant to agree to accept responsibility for road maintenance.

Staff Comment: The initial proposal obtained access directly from Gilkison Road. However, the current proposal is to use an easement over property to the west that contains an improved logging road that has received the approval of the fire protection district for access. See MCC 11.15.2052(A)(7).

(5) Approval of a dwelling shall be subject to the following requirements:
   (a) Approval of a dwelling requires the owner of the tract to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking requirements at the time specified in Department of Forestry administrative rules.
   (b) The planning department shall notify the county assessor of the above condition at the time the dwelling is approved.
   (c) The property owner shall submit a stocking survey report to the county assessor and the assessor will verify that the minimum stocking requirements have been met by the time required by Department of Forestry Rules. The assessor will inform the Department of Forestry in cases where the property owner has not submitted a stocking survey report or where the survey report indicates that minimum stocking requirements have not been met.
   (d) Upon notification by the assessor the Department of Forestry will determine whether the tract meets minimum stocking requirements of the Forest Practices Act. If the department determines that the tract does not meet those requirements, the department shall notify the owner and the assessor that the land is not being managed as for-

est land. The assessor shall then remove the forest land designation pursuant to ORS 321.359 and impose the additional tax pursuant to ORS 321.372.

Applicant Response: The Applicant will plant the number of trees required to demonstrate that the Applicant is meeting Department of Forestry stocking requirements.

Staff Comment: See MCC 11.15.2052(A)(8) for discussion. This OAR requirement has been determined by planning staff to supercede the requirement to automatically disqualify a parcel from any tax deferral program. The disqualification would only occur if the property owner did not carry the requirement to reforest the parcel.

OAR 660-06-035 Fire Siting Standards for Dwellings and Structures
The following fire siting standards or their equivalent shall apply to new dwelling or structures in a forest or agriculture/forest zone:

(1) The dwelling shall be located upon a parcel within a fire protection district or shall be provided with residential fire protection by contract.

* * *

Applicant Response: The dwelling will be located within a fire protection district. See Exhibit 4 [original application]. The driveway access from the easement will be constructed to accommodate the turnaround of fire fighting equipment during the fire season.

(2) Road access to the dwelling shall meet road design standards described in OAR 660-06-040.

Applicant Response: The County has not adopted road access standards pursuant to this Administrative Rule. See note 1, page 2 [below].

[1] OAR 660-06-035(2) and 660-06-040 concern road design standards. OAR 660-05-003(2) requires counties to amend their comprehensive plans and land use regulations to comply with these requirements by September 6,1994. Planner Sandy Mathewson has said that the Department of Land Conservation and Development determined that the County's road design requirements are sufficient and need not be amended.

Staff Comment: See MCC 11.15.2074(D).

(3) The owners of the dwellings and structures shall maintain a primary fuel-free break area surrounding all structures and clear and maintain a secondary fuel-free break area in accordance with the provisions in "Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads" dated March 1, 1991 and published by the Oregon Department of Forestry.

Applicant Response: The Applicant's site plan demonstrates that this criterion is met. See Exhibit 3 [original application].

(4) The dwelling shall have a fire retardant roof.

Applicant Response: The Applicant will agree to a condition of approval requiring a fire retardant roof on the dwelling.

(5) The dwelling shall not be sited on a slope of greater than 40 percent.

Applicant Response: The Applicant's site plan demonstrates that the site of the Applicant's dwelling site has a slope of 17 percent. The dwelling will not be sited on a slope of greater than 40 percent. See Exhibit 3 [original application].

(6) If the dwelling has a chimney or chimneys, each chimney shall have a spark arrester.

Staff Comment: See MCC 11.15.2074(B).

OAR 660-06-040 Fire Safety Design Standards for Roads
The governing body shall establish road design standards, except for private roads and bridges accessing only commercial forest uses, which ensure that public roads, bridges, private roads and driveways are constructed so as to provide adequate access for fire fighting equipment. Such standards shall address maximum grade, road width, turning radius, road surface, bridge design, culverts, and road access taking into consideration seasonal weather conditions. The governing body shall consult with the appropriate Rural Fire Protection District and Forest Protection District in establishing these standards.

Staff Comment: See MCC 11.15.2074(D).

D. **OAR 660-12-045, and 060 Subsections of the Transportation Planning Rule**
The applicant chose to include these references to demonstrate that they are not applicable to this application.

Applicant Response:
OAR 660-12-045, "Implementation of a Transportation System Plan."
OAR Chapter 660, Division 12, is the Transportation Planning Rule. OAR 660-12-055(3) requires that counties in metropolitan planning organization areas (such as Multnomah County) must adopt the land use and subdivision ordinances or amendments required by OAR 660-12-045(3), (4)(a)-(e) and (5)(b) by May 8,1994 means that the rule is directly applied to all land use and limited land use decisions. OAR 660-12-055(3). Because Multnomah County has not amended its land use regulations and comprehensive plan, the applicable provisions of the Transportation Planning Rule are directly

applicable to this permit application.

OAR 660-12-045(3)(a)-(e). These requirements apply to new multi-family residential developments, retail, office and institutional developments. This application is for a single-family dwelling, so this section is inapplicable.

OAR 660-12 045(4)(a)-(e). This section applies to urban areas. This site is outside the urban area, so it is inapplicable.

OAR 660-12-045(5)(d). This section applies to major industrial, institutional, retail and office developments. It is inapplicable to this application.

OAR 660-12-060, "Plan and Land Use Regulation Amendments." This provision of the Transportation Planning Rule requires that amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall be mitigated so that the transportation facility continues to function appropriately. This application is not an amendment to a functional plan or acknowledged comprehensive plan. The term "land use regulations" is defined at ORS 197.0015(11) to mean an ordinance which contains standards for implementing a comprehensive plan. This application does not amend the Multnomah County land use regulations or the official zoning map. Therefore, this section is inapplicable to this request.

5. CONDITIONAL USE ORDINANCE CONSIDERATIONS AND FINDINGS:

Except as given above, staff has chosen to address the ORS and OAR criteria for the most part where the criteria are not already incorporated into the Multnomah County Code (MCC) or where the criteria differ / supercede MCC standards. Further explanation of how this is formatted is in B. below.

Applicant Response: This parcel is in the CFU zone. A dwelling not related to forest management is a conditional use. MCC §11.15.2050(B). The applicable criteria for a dwelling not related to forest maintenance are contained in MCC 11.15.2052, .2058, .2062, .2074 and .7120. The standards are discussed below.

The County has not yet adopted land use regulations to implement the ORS and OAR sections discussed above. Therefore, the MCC provisions apply only to the extent they do not conflict with ORS and OAR provisions regulating the same area. The MCC provisions are addressed below unless noted that a conflict exists. Where the MCC is addressed, the Applicant expressly reserves and does not waive its right to argue that the MCC provision is preempted.

A. MCC 11.15.7120 Conditional Use Approval Criteria (General): "(A) A Conditional Use shall be governed by the approval criteria listed in the district under which the conditional use is allowed. If no such criteria are provided, the approval criteria listed in this section shall apply." The approval criteria listed below are listed in the district; therefore, the general criteria in this subsection **do not apply**.

B. Amendments to the statutes, see 3 above, and revisions to OAR 660-06, adopted on February 18, 1994, see 4 above, have not yet been adopted by the county. Consequently, any requirements of the ORS or OAR that are not included in the county code, as well as any ORS or OAR requirements that are more restrictive than county code criteria, must also be applied to this proposal. Applicable ordinance criteria are given below in **bold**. Because the OARs implement the statutes, the differences between them and the county code are adequately shown by citing only the OAR requirements in the following findings ***[OARs will be indicated by the type being bold, italics and bracketed]***.

C. **MCC 11.15.2052 (A): A dwelling not related to forest management may be allowed subject to the following:**

(1) The lot shall meet the lot of record standards of MCC .2062 (A) and (B) and have been lawfully created prior to January 25, 1990;

Applicant Response: The parcel meets the lot of record provisions of 11.15.2062(A)(2). See Section 3(c), page 18, below [original application]. The County acknowledges that the parcel is a lot of record. See Exhibit 5 [original application], Hearing Officer's Decision, PRE 38 92, p. 5, January 11,1993.

The parcel was created by deed in 1967. See Exhibit 6 [original application]. No county road was created at that time, so county approval of the parcel's creation was not required.

The parcel was zoned "Agricultural, F-2" in 1967. The F-2 district permitted agricultural uses on two-acre lots. See Exhibit 11 [original application]. The lot satisfied all applicable laws when created and is not contiguous to another substandard parcel under the same ownership.

This parcel contains 17.80 acres. The minimum parcel size in CFU zone is 80 acres. See ORS 215.780(1)(c). However, the parcel is a lot of record pursuant to MCC 11.15.2062(2)(A)(a)-(d). A deed for the parcel was recorded prior to February 20,1990. See Exhibit 6 [original application]. The parcel satisfied all applicable laws when created. The parcel does not meet the minimum lot size requirements of MCC 11.15.2058. The parcel is not contiguous to another substandard parcel under the same ownership. Therefore, it is a lot of record. The lot meets the requirements of MCC 11.15.2062(A)(2).

All currently contiguous ownerships must be considered to be the subject "tract" of this application. ***["Tract" means one or more contiguous lots or parcels in the same ownership. A tract shall not be considered to consist of less than the required acreage because it is crossed by a public road or waterway. OAR 660-06-027(5)(a)]***

Under the OAR, an additional dwelling is not allowed if there is an existing dwelling on the "tract". ***[A proposed dwelling under this rule is not allowed: ... Unless no dwellings are allowed on other lots or parcels that make up the tract ... If the tract***

on which the dwelling will be sited includes a dwelling. OAR 660-06-027(4)(c)&(d)]

Staff Comment: Staff concurs that the lot is a Lot of Record. There have been no "same ownerships" of any adjacent lots by the owner of this lot since August, 1980. On that date the "same ownership" provision of the MUF and CFU zoning districts affected the Lot of Record status of some lots.

(2) The lot shall be of sufficient size to accommodate siting the dwelling in accordance with MCC .2074 with minimum yards of 60 feet to the centerline of any adjacent County maintained road and 200 feet to all other property lines. Variances to this standard shall be pursuant to MCC .8505 through .8525, as applicable;

Applicant Response: The lot contains 17.80 acres and is 626 feet by 1352 feet, so a dwelling can be sited with a 60-foot setback to Gilkison Road and a 200-foot setback to other property lines. See Exhibit 4 [original application].

Staff Comment: The site plan submitted by the applicant shows that setback standards can be met at the proposed location for the dwelling. Other siting standards of MCC .2074 are discussed later in this report.

(3) The lot shall meet the following standards: ...

(c) The lot shall be composed primarily of soils which are capable of producing above 85 cf/ac/yr of Douglas Fir timber; and

(i) The lot and at least all or part of 11 other lots [*that existed on January 1, 1993, OAR 660-06-027(1)(d)(C)(i)*] exist within a 160-acre square when centered on the center of the subject lot parallel and perpendicular to section lines; and

(ii) Five dwellings [*that existed on January 1, 1993, OAR 660-06-027(1)(d)(C)(ii)*] exist within the 160-acre square.

Applicant Response: The site's soils are Cornelius Silt Loam, 8 to 15 percent slopes (symbol 10C) and Goble Silt Loam, 15 to 30 percent slopes (symbol 17E) and are capable of producing 176 cf/ac/yr of Douglas Fir timber. Therefore, there must be eleven other lots with at least five dwellings within a 160-acre square. Fifteen other lots or parts of lots exist within a 160-acre square and six dwellings exist within the square. See Exhibit 7 [original application]. This standard is met. However, this section conflicts with ORS 215.705(4), which permits a dwelling without regard to the grid test.

Seven dwellings are located within a 160-acre square centered on this property. Thirteen other dwellings are located within one mile of the property along Gilkison Road. The dwellings and parcelization mean that this site (which has been logged) has little habitat value.

Staff Comment: Staff concurs that this standard is met. Staff finds all or part of 16 lots exist within a 160 acre square template centered on the subject lot. Tax assessor and building permit records show that 6 houses existed within the template prior to January 1, 1993.

ORS 215.705(4) does not apply to this type of request, see discussion at beginning of Findings section of this staff report. The property has been determined to have wildlife habitat values which are discussed in section 7 of these Findings.

(d) Lots and dwellings within urban growth boundaries shall not be counted to satisfy (c) above.

Applicant Response: This standard is inapplicable because this site and adjacent properties are not near or within the Urban Growth Boundary.

Staff Comment: Staff concurs.

(e) The lot is not capable of producing 5,000 cubic feet of wood fiber per year from commercial tree species recognized by the Forest Practices Rules.

Applicant Response: The lot is not capable of producing 5000 cubic feet of wood fiber per year. 28.41 acres are needed to produce 5,000 cubic feet per year of commercial tree species. 17.8 acres will produce only 3,132.80 cubic feet of commercial tree species per year. See Exhibit 12 [original application].

Staff Comment: Staff concurs. Soils on the property are primarily Goble silt loam, symbol 17D and 17E, with a very small portion of the property near Gilkison Road comprised of Cornelius silt loam, symbol 10C. The Goble soil has a potential yield in cubic feet per acre per year of 135-145. Since the lot contains just under 18 acres, the potential yield is about 3000 cubic feet per year.

(4) The dwelling will not force a significant change in, significantly increase the costs of, or impede accepted forestry or farming practices on surrounding forest or agricultural lands;

Applicant Response: The dwelling can be sited below the ridge line so as to be away from adjacent forest lands.

The only adjacent parcel which is used for forest practices is the 65.28-acre parcel located to the southwest of this property. No clear cutting or chemical spraying presently occurs on that property. The proposed dwelling will be at least 330 feet from the nearest sensitive production area located southwest of the property. The topography of the parcel's northern portion is characterized as having a severe slope into a basin abutting the northern parcel containing a single family dwelling.

Due to the presence of soils characterized as having a moderate to high hazard of slumping in areas where the slope is greater than 30 percent, the Applicant has sited the proposed dwelling on a flat portion of ridge crest to minimize any effects of the downhill movement or slumping of soils which will occur during uphill or nearby harvesting of timber. Additionally, the proposed dwelling site will minimize additional erosion control costs needed to protect a dwelling sited within the toe of the slope.

Because of the dwelling site location and the lack of accepted forestry or farming practices on surrounding forest lands (with the exception of tax lot 6), the dwelling will not force a significant change in, significantly increase the cost of or impede accepted forest or farming practices.

[The applicant has also added to the file a seven page supplemental report on this issue. The report was submitted on April 25, 1995 and is entitled "Forest & Agricultural Practices Survey, 21754 Gilkison Road". That report is made a part of these findings.]

Staff Comment: The April 25, 1995 supplemental report inventoried all farm and forest practices by individual property within one-half mile of the subject property. Staff concurs with the conclusion that this one dwelling will not "force a significant change in, significantly increase the costs of, or impede accepted forestry or farming practices on surrounding forest or agricultural lands".

(5) The dwelling will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife, or that agency has certified that the impacts of the additional dwelling, considered with approvals of other dwellings in the area since acknowledgement of the Comprehensive Plan in 1980, will be acceptable;

Applicant Response: The site may be within a big game winter habitat area. The ODFW has certified that an additional dwelling will be acceptable. See Exhibit 8 [original application].

[August 30, 1995 letter] This criterion requires that the Oregon Department of Fish and Wildlife ("ODFW") to state that the site is either outside of a big game habitat area or certify that the impacts of a dwelling will be acceptable. The parcel is outside of a big game winter habitat area. See Exhibit 4 [with August 30, 1995 letter]. In any event, Gene Herb, ODFW District Wildlife Biologist, stated in a July 29, 1993 letter that the agency will not oppose the application. See Exhibit 8 to original application. This statement is sufficient to demonstrate the dwelling's impacts will be acceptable.

Further, Mr. Gordon Howard of the Planning Division has reviewed the attached Wildlife Habitat map. Mr. Howard stated that the map reflects ODFW big game habitat areas. Mr. Howard concluded that this parcel is not within the area. See Exhibit 5.

Staff Comment: Staff concurs.

(6) The proposed dwelling will be located on a lot within a rural fire protection district, or the proposed resident has contracted for residential fire protection;

Applicant Response: The owner has contracted for residential fire protection with the Scappoose Rural Fire Protection District.

(7) Proof of a long-term road access use permit or agreement shall be provided if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the Bureau of Land Management, or the United States Forest Service. The road use permit may require the applicant to agree to accept responsibility for road maintenance;

Applicant Response: [August 30, 1995 letter] . . . Western International (Forest City Trading) owns a triangularly-shaped parcel adjacent to Gilkison Road. See Exhibit 1 [with letter of August 30, 1995]. Western International will grant at least a twenty (20)-foot wide access easement across its parcel to Gilkison Road. The access easement contains an improved road that the fire district has determined is satisfactory. See Exhibit 4 to original application.

(8) The parcel on which the dwelling will be located has been disqualified from receiving a farm or forest tax deferral;
The following OAR requirement supercedes the above requirement to disqualify the property from farm or forest deferral. If the property is planted to Department of Forestry standards then the property can be retained or added onto tax deferral programs.
[OAR 660-06 029(5): Approval of a dwelling shall be subject to the following requirements:

(a) Approval of a dwelling requires the owner of the tract to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking requirements at the time specified in Department of Forestry administrative rules.

(b) The planning department shall notify the county assessor of the above condition at the time the dwelling is approved.

(c) The property owner shall submit a stocking survey report to the county assessor and the assessor will verify that the minimum stocking requirements have been met by the time required by Department of Forestry Rules. The assessor will inform the Department of Forestry in cases where the property owner has not submitted a stocking survey report or where the survey report indicates that minimum stocking requirements have not been met.

(d) Upon notification by the assessor the Department of Forestry will determine whether the tract meets minimum stocking requirements of the Forest Practices Act. If the department determines that the tract does not meet those requirements, the department shall notify the owner and the assessor that the

land is not being managed as forest land. The assessor shall then remove the forest land designation pursuant to ORS 321.359 and impose the additional tax pursuant to ORS 321.372.]

Applicant Response: This criteria conflicts with OAR 660-06-029(5)(d), which permits continued tax deferral unless the assessor takes the required action.

Staff Comment: The OAR supercedes the county requirement. Current Tax Assessor records indicate that the property has been receiving a tax deferral. The county Tax Assessor will be notified of the stocking requirement should this request be approved. A condition of approval requires the submission of a stocking report.

(9) The dwelling meets the applicable development standards of MCC .2074;

MCC .2074 Development Standards for Dwellings and Structures
Except as provided for the replacement or restoration of dwellings under MCC .2048 (E) and .2049 (B), all dwellings and structures located in the CFU district after January 7, 1993 shall comply with the following:
(A) The dwelling or structure shall be located such that:

(1) It has the least impact on nearby or adjoining forest or agricultural lands and satisfies the minimum yard and setback requirements of .2058 (C) through (G);

Applicant Response: The dwelling can be located so that it has the least impact on nearby or adjoining forest and agricultural lands and still satisfy the minimum yard and setback requirements. The dwelling will be sited away from the property lines which separates this lot from adjacent forest lands. See also Response to OAR 660-06-029(1)(a). The amount of forest land for the dwelling and access road is minimized. The amount of land necessary to site the structure requires less than one acre. There is no need to use additional forest land to access the site. Access to the proposed dwelling site is serviced by an existing logging road.

11.15.2074(A)(1) also requires conformance with 11.15.2058(C)-(G). See Section 3(b), pages 17 to 18, above [in original application].

Staff Comment: See also discussion in MCC 11.15.2052(A)(4). The application included responses showing compliance with the dimensional standards in MCC .2058(C) through (G) that are not reproduced in this staff report.

(2) Forest operations and accepted farming practices will not be curtailed or impeded;
[*OAR 660-06-029(1)(b): The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;*]

Applicant Response: Adjacent forest operations will not be curtailed or impeded by the dwelling. The dwelling's location will preclude it from being subject to spray drift. However, no spraying is conducted. There are no accepted farming practices on adjacent land.

Staff Comment: Also see preceding commentary for MCC .2052(A)(4).

(3) The amount of forest land used to site the dwelling or other structure, access road, and service corridor is minimized;

Applicant Response: The amount of forest land for the dwelling and access road is minimized. The dwelling and driveway to the existing access road will require less than one acre.

[August 30, 1995 letter] The amount of forest land used is minimized for two reasons. First, the applicant is using an existing access road. Second, the proposed dwelling site size is minimal. This criterion is not met simply by siting a structure adjacent to a road.

(4) Any access road or service corridor in excess of 500 feet in length is demonstrated by the applicant to be necessary due to physical limitations unique to the property and is the minimum length required; and

Applicant Response: The access road to the dwelling site exceeds 500 feet, but it is an existing road.

[April 25, 1995 letter] The Applicant's property is characterized by slopes ranging from 20 degrees to 50 to 60 degrees. The Applicant proposes to place the dwelling in the area identified as having the least slope on the property and is the most stable, as determined by the geotechnical consultants. The physical limitations of the property's extreme slopes require that the non-farm dwelling be sited as depicted in the attached site plan and that the existing access road exceed 500 feet. The road is existing to the proposed dwelling site.

[August 30, 1995 letter] . . . MCC 11.15.2074(A)(4) does not require that the dwelling be located as close as possible to Gilkison Road. It requires that an access road in excess of 500 feet be justified. The access road to the proposed dwelling site is existing. The proposed dwelling site can be located anywhere along the existing access road, subject to other requirements.

Staff Comment: The best argument for the proposed house location is that it is on a less sloping portion of the property.

(5) The risks associated with wildfire are minimized. Provisions for reducing such risk shall include:

(a) **Access for a pumping fire truck to within 15 feet of any perennial water source on the lot. The access shall meet the driveway standards of MCC .2074(D) with permanent signs posted along the access route to indicate the location of the emergency water source;**

(b) **Maintenance of a primary and a secondary fire safety zone. ...** [MCC .2074(A)(5)(b)(i) through (iv) describes in detail the extent of each fire zone in relation to property slope.]

(c) **The building site must have a slope less than 40 percent.**

Applicant Response: The Applicant will comply with these requirements intended to reduce risk of wildfire. There is a perennial spring on the property, but it is captured by an underground pipeline which crosses the property and services a single-family dwelling north of the Applicant's property. Therefore, there is no available perennial water source on the lot. The Applicant has submitted a site plan depicting a 30-foot primary fire break and a 100-foot secondary fire break and agrees to continually maintain these fire protection measures. The dwelling site has a slope less than 20 percent.

[August 30, 1995 letter] . . . The applicant has demonstrated that he does or can comply with criteria relevant to prevention of fire. The fire district has indicated that it can serve this site at the proposed dwelling site. The proposed dwelling site is also located more than 200 feet away from the parcel's boundaries, thus minimizing the danger of fire spreading to adjacent parcels. Further, the applicant has identified primary and secondary fire fuel-free break areas.

Staff Comment: As indicated on the County Slope Hazard Map, the homesite is in a mapped hazard area, but would be located on a slope of less than 20 percent.

(B) The dwelling shall:

(1) Comply with the standards of the Uniform Building Code or as prescribed in ORS 446.002 through 446.200 relating to mobile homes;

(2) Be attached to a foundation for which a building permit has been obtained; and

(3) Have a minimum floor area of 600 square feet.

Applicant Response: The dwelling will comply with Uniform Building Code standards. The dwelling will be attached to a foundation for which a building permit has been obtained. The dwelling will have a minimum floor area exceeding 600 square feet.

Staff Comment: These standards will be verified at the time of application for building permits. Other building code requirements are the jurisdiction of the Portland Building Bureau.

[OAR 660-06-035(5) The dwelling shall have a fire retardant roof.]
[OAR 660-06-035(6) If the dwelling has a chimney or chimneys, each chimney shall have a spark arrester.]

Staff Comment: These provisions are included as a condition of approval.

(C) The applicant shall provide evidence that the domestic water supply is from a source authorized in accordance with the Department of Water Resources Oregon Administrative Rules for the appropriation of ground water (OAR 690, Division 10) or surface water (OAR 690, Division 20) and not from a Class II stream as defined in the Forest Practices Rules. If the water supply is unavailable from public sources, or sources located entirely on the property, the applicant shall provide evidence that a legal easement has been obtained permitting domestic water lines to cross the properties of affected owners.

Applicant Response: The Applicant intends to provide water to this site from a well located on the property and not from a Class II stream. See also response to OAR 660-06-029(3)(c).

[In response to questions about potential impacts of this proposal on the water sources to other nearby residences, a letter from the property owner was submitted as Exhibit 6 with the August 30, 1995 letter. The letter from Mr. Pousson reads in part:] I want to clarify the water use/rights situation on our property on Gilkison Road.

There is a spring on the south side of our property with a pipeline extending from it to the lot directly north of ours on Gilkison Road (owned by Howard Hecht). This water source was granted by an earlier easement and was used for irrigation purposes. As of the end of July 1995, that easement has been relinquished.

There is also a spring just across the far eastern boundary line of our property (behind the back ridge on our property as viewed from Gilkison Road). That spring, while not located on our property, has a pipeline running across our property. There is an existing easement that provides for that pipeline, which serves as the domestic source for the 2nd lot directly north of ours on Gilkison Road (Marqueeta Mitchell residence).

Our application for a Conditional Use Permit places the proposed dwelling in the center of our lot, which is separated by distance and a ridge of land from the source of the Mitchell's water supply.

Staff Comment: The applicant has indicated that a well will be drilled. Staff can foresee no impact on other homes water sources from this proposed dwelling.

(D) A private road (including approved easements) accessing two or more dwellings, or a driveway accessing a single dwelling, shall be designed, built, and maintained to:

(1) Support a minimum gross vehicle weight (GVW) of 52,000 lbs. Written verification of compliance with the 52,000 lb. GVW standard from an Oregon Professional Engineer shall be provided for all bridges or culverts;

(2) Provide an all-weather surface of at least 20 feet in width for a private road and 12 feet in width for a driveway;

(3) Provide minimum curve radii of 48 feet or greater;

(4) Provide an unobstructed vertical clearance of at least 13 feet 6 inches;

(5) Provide grades not exceeding 8 percent, with a maximum of 12 percent on short segments, except as provided below:

(a) Rural Fire Protection District No. 14 requires approval from the Fire Chief for grades exceeding 6 percent;

(b) The maximum grade may be exceeded upon written approval from the fire protection service provider having responsibility;

(6) Provide a turnaround with a radius of 48 feet or greater at the end of any access exceeding 150 feet in length;

(7) Provide for the safe and convenient passage of vehicles by the placement of:

(a) Additional turnarounds at a maximum spacing of 500 feet along a private road; or

(b) Turnouts measuring 20 feet by 40 feet along a driveway in excess of 200 feet in length at a maximum spacing of 1/2 the driveway length or 400 feet whichever is less.

Applicant Response: This section defines a private road to include an approved easement. The dwelling site obtains access from Gilkison Road via an easement. The access easement will serve only the proposed dwelling on this site. See Exhibit 7 [original application]. Therefore, the private road from Gilkison Road to the driveway need not meet the requirements of MCC 11.15.2074(D)(1)-(7). The Applicant will agree to construct the driveway from Gilkison Road to the building site to meet the requirements of (D)(1)-(7).

[April 25, 1995 letter] The Fire Chief for the Scappoose Rural Fire District has signed the form entitled "Multnomah County Minimum Design Standards for Residential Driveways and Privately Maintained Roads" (*see* Exhibit 3) [with April 25, 1995 letter].

Staff Comment: The above applicant's response is not clear in its distinction between a private road and a driveway. Staff interprets the requirement to be that the only difference between the requirement for a "private road", (defined as access serving two or more homes), and a "driveway", (defined as serving one home), is the width of improvement — 20 feet or 12 feet. Therefore, the width of driveway improvement for this proposal can be 12 feet wide, except for required

turnouts, but all other requirements of MCC .2074(D)(1) through (7) apply **from the house to Gilkison Road** (the existing easement and any driveway branch off it). Other than the form signed by the Scappoose Rural Fire District, there has been no evidence provided, such as engineered plans, that demonstrate the above standards can be met. Before the issuance of a building permit, a condition of approval requires (1) the submittal of engineered plans showing how the above standards will be met and (2) verification from the same or equally qualified engineer that the improvements have been made.

The engineered drive plans should be part of the submittal an application for a Hillside Development or Grading and Erosion Control permit that is also a condition of approval.

(10) A statement has been recorded with the Division of Records that the owner and the successors in interest acknowledge the rights of owners of nearby property to conduct forest operations consistent with the Forest Practices Act and Rules, and to conduct accepted farming practices;

Applicant Response: [April 25, 1995 letter] Attached is an executed Deed Condition and Restriction (*see* Exhibit 4) [with April 25, 1995 letter]. The Deed can be recorded prior to dwelling approval as a condition of approval.

Staff Comment: Recordation of this restriction is a condition of approval.

D. **MCC 11.15.2052 (B): Dwellings not related to forest management shall not be allowed upon the effective date of a small scale resource land program adopted pursuant to the requirements of OAR 660, Division 6 and 33.**
No longer applicable. See below.
[OAR 660-06-070, Small-Scale Resource Land, Repealed by LCDC February 18, 1994.]

Applicant Response: Multnomah County has not adopted a Small Scale Resource Land Program, so this standard is inapplicable.

5. MULTNOMAH COUNTY COMPREHENSIVE PLAN APPROVAL CRITERIA

A. Applicable Comprehensive Framework Plan Policies (including those Policies requiring a Finding prior to a quasi-judicial decision):

(1) POLICY NO. 13, AIR, WATER AND NOISE QUALITY.
MULTNOMAH COUNTY, ... SUPPORTS EFFORTS TO IMPROVE AIR AND WATER QUALITY AND TO REDUCE NOISE LEVELS. ... FURTHERMORE, IT IS THE COUNTY'S POLICY TO REQUIRE, PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION, A STATEMENT FROM THE APPROPRIATE AGENCY THAT ALL STANDARDS CAN BE MET WITH RESPECT TO AIR QUALITY, WATER QUAL-

ITY, AND NOISE LEVELS.

Applicant Response: This policy calls for the maintenance and enhancement of air and water quality and the reduction of noise.

This parcel is not in a "noise congested area" nor is it a "noise generator." No state or federal agency imposes air quality standards on a single family dwelling nor does this use pose a threat to the County's air quality.

Water quality could be threatened by inadequate on-site sewage disposal. The Applicant will apply for and receive the appropriate permits prior to installing a disposal system. This will mitigate any adverse water quality impact. See Exhibit 11.

The parcel is not crossed by a Class I or II stream, according to the Oregon Department of Fish and Wildlife ("ODFW") [, b]ased on telephone conservation between Jay Massey, Oregon Department of Forestry, and Mike Robinson, July 14, 1993.

Staff Comment: The proposed residence is not a noise generator and is not in a noise impacted area. Water quality standards can be met as evidenced by the approved Land Feasibility Study for on-site sewage disposal.

(2) POLICY NO. 14, DEVELOPMENTAL LIMITATIONS.
THE COUNTY'S POLICY IS TO DIRECT DEVELOPMENT AND LAND FORM ALTERATIONS AWAY FROM AREAS WITH DEVELOPMENT LIMITATIONS EXCEPT UPON A SHOWING THAT DESIGN AND CONSTRUCTION TECHNIQUES CAN MITIGATE ANY PUBLIC HARM OR ASSOCIATED PUBLIC COST, AND MITIGATE ANY ADVERSE EFFECTS TO SURROUNDING PERSONS OR PROPERTIES. DEVELOPMENT LIMITATIONS AREAS ARE THOSE WHICH HAVE ANY OF THE FOLLOWING CHARACTERISTICS:

A. Slopes exceeding 20%;
B. Severe soil erosion potential;
C. Land within the 100 year flood plain;
D. A high seasonal water table within 0-24 inches of the surface for 3 or more weeks of the year;
E. A fragipan less than 30 inches from the surface;
F. Land subject to slumping, earth slides or movement.

Applicant Response: This policy calls for development to be directed away from or mitigated on land with development limitations. This parcel is not within a 100year flood plain.

The parcel is comprised of two soil types, Cornelius Silt Loan (symbol 10C), eight to 15 percent slopes, and Goble Silt Loan (symbol 17D), 15 to 30 percent slopes. See Exhibit 2, Soil Survey Multnomah County, Oregon, Soil Conservation Service, USDA, 1983. Cornelius Silt Loam 10C has a moderate shrink-swell potential. Id. at

215. Soil erosion potential is moderate. Id. at 33. Goble Silt Loam 17D has a low shrink-swell potential. Id. at 216. The soil erosion potential is high, but not severe.

The dwelling site has been moved from the north end of the property where the slope is between 33 and 38 percent, to a more southerly site where the slope is between 17 and 19 percent. The dwelling is sited on property with a slope less than 20 percent.

The parcel is not subject to other limitations described in Policy 14, including high seasonal water table or fragipan less than 30 inches from the surface. Therefore, the portion of this parcel intended for development is not subject to development limitations.

[April 25, 1995 letter] Wright/Deacon & Associates has prepared a geotechnical reconnaissance report. The letter recommends mitigation to avoid public harm and adverse effects to surrounding property (*see* Exhibit 5) [with April 25, 1995 letter].

Staff Comment: All of the property is within a designated potential "hazard area" on a map referred to in MCC 11.15.6710(A) as a "Slope Hazard Map". Obtaining a Hillside Development Permit (HDP) is a condition of approval before the issuance of a building permit, unless it can be demonstrated that construction would be carried out in a manner and scale as to be exempt from this requirement as provided in MCC .6715. The application for the HDP will include specific engineered road and house foundation construction plans. Until that level of information is available, the Geologic Reconnaissance report submitted provides adequate assurance at this time that a dwelling can be constructed that could met all necessary hazard precaution standards.

(3) POLICY NO. 22, ENERGY CONSERVATION.
THE COUNTY'S POLICY IS TO PROMOTE THE CONSERVATION OF ENERGY AND TO USE ENERGY RESOURCES IN A MORE EFFICIENT MANNER. ... THE COUNTY SHALL REQUIRE A FINDING PRIOR TO THE APPROVAL OF LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT THE FOLLOWING FACTORS HAVE BEEN CONSIDERED:

A. THE DEVELOPMENT OF ENERGY-EFFICIENT LAND USES AND PRACTICES;
B. INCREASED DENSITY AND INTENSITY OF DEVELOPMENT IN URBAN AREAS, ESPECIALLY IN PROXIMITY TO TRANSIT CORRIDORS AND EMPLOYMENT, COMMERCIAL AND RECREATIONAL CENTERS;
C. AN ENERGY-EFFICIENT TRANSPORTATION SYSTEM LINKED WITH INCREASED MASS TRANSIT, PEDESTRIAN AND BICYCLE FACILITIES;
D. STREET LAYOUTS, LOTTING PATTERNS AND DESIGNS THAT UTILIZE NATURAL ENVIRONMENTAL AND CLIMACTIC CONDITIONS TO ADVANTAGE.
E. FINALLY, THE COUNTY WILL ALLOW GREATER FLEXIBILITY IN THE DEVELOPMENT AND USE OF RENEWABLE ENERGY RESOURCES.

Applicant Response: This policy encourages energy conservation. This parcel is adjacent to an existing county road and other dwellings. No transit service is provided to this site. It can also be served by existing nearby utilities. This request is not for urban development because it is on an existing lot of record. Therefore, the request does not encourage urban sprawl and relies on existing transportation and utility facilities to serve the dwelling. Sections (A)-(E) of this policy are inapplicable to a single-family dwelling permit on an existing lot of record. This policy is met.

Staff Comment: The proposed residence is in a rural area. Urban energy, transportation and lotting pattern issues do not apply.

(4) POLICY NO. 37, UTILITIES.
THE COUNTY'S POLICY IS TO REQUIRE A FINDING PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:
WATER AND DISPOSAL SYSTEM

A. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC SEWER AND WATER SYSTEM, BOTH OF WHICH HAVE ADEQUATE CAPACITY; OR
B. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC WATER SYSTEM, AND THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ) WILL APPROVE A SUBSURFACE SEWAGE DISPOSAL SYSTEM ON THE SITE; OR
C. THERE IS AN ADEQUATE PRIVATE WATER SYSTEM, AND THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ) WILL APPROVE A SUBSURFACE SEWAGE DISPOSAL SYSTEM; OR
D. THERE IS AN ADEQUATE PRIVATE WATER SYSTEM, AND A PUBLIC SEWER WITH ADEQUATE CAPACITY.

Applicant Response: The applicant will establish a private well to provide water to this site. Based upon the adjacent property wells, the Applicant expects to drill a 150-foot well, obtain a 40-foot static water level, and have a flow rate of 15 gallons per minute.

The site can accommodate an adequate subsurface sewage disposal system. See Exhibit 11.

DRAINAGE

E. THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR
F. THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND
G. THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.

Applicant Response: Drainage can be retained on site.

ENERGY AND COMMUNICATIONS

H. THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND

I. COMMUNICATIONS FACILITIES ARE AVAILABLE.

Applicant Response: Adequate telephone and electric utilities serve the site. This policy is met.

(5) POLICY NO. 38, FACILITIES.
THE COUNTY'S POLICY IS TO REQUIRE A FINDING PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:

SCHOOL

A. THE APPROPRIATE SCHOOL DISTRICT HAS HAD AN OPPORTUNITY TO REVIEW AND COMMENT ON THE PROPOSAL.

FIRE PROTECTION

B. THERE IS ADEQUATE WATER PRESSURE AND FLOW FOR FIRE FIGHTING PURPOSES; AND

C. THE APPROPRIATE FIRE DISTRICT HAS HAD AN OPPORTUNITY TO REVIEW AND COMMENT ON THE PROPOSAL.

POLICE PROTECTION

D. THE PROPOSAL CAN RECEIVE ADEQUATE LOCAL POLICE PROTECTION IN ACCORDANCE WITH THE STANDARDS OF THE JURISDICTION PROVIDING POLICE PROTECTION.

Applicant Response: The school district has reviewed and commented on the application and has no negative comment. The Multnomah County Sheriff's Office has commented on the application. The Fire District has had an opportunity to review and comment on the proposal. See Exhibit 3 [original application]. This policy is met.

(6) POLICY NO. 40, DEVELOPMENT REQUIREMENTS.
THE COUNTY'S POLICY IS TO ENCOURAGE A CONNECTED PARK AND RECREATION SYSTEM AND TO PROVIDE FOR SMALL PRIVATE RECREATION AREAS BY REQUIRING A FINDING PRIOR TO APPROVAL OF LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:

A. PEDESTRIAN AND BICYCLE PATH CONNECTIONS TO PARKS, RECREATION AREAS AND COMMUNITY FACILITIES WILL BE DEDICATED WHERE APPROPRIATE AND WHERE DESIGNATED IN THE BICYCLE CORRIDOR CAPITAL IMPROVEMENTS PROGRAM AND MAP.

B. LANDSCAPED AREAS WITH BENCHES WILL BE PROVIDED IN COMMERCIAL, INDUSTRIAL AND MULTIPLE FAMILY DEVELOPMENTS, WHERE APPROPRIATE.

C. AREAS FOR BICYCLE PARKING FACILITIES WILL BE REQUIRED IN DEVELOPMENT PROPOSALS, WHERE APPROPRIATE.

Staff Comment: The subject property is not identified as being a necessary connection between recreation areas or bicycle corridors. Bicycle parking is not required for single family residences.

6. MULTNOMAH COUNTY "WEST HILLS RECONCILIATION REPORT" CONSIDERATIONS, (A COMPONENT OF THE "MULTNOMAH COUNTY COMPREHENSIVE FRAMEWORK PLAN"):

A. Background:

The following section is required pursuant to ORS 197.625(3)(a) because Multnomah County has adopted amendments to its Comprehensive Framework Plan that have not been acknowledged by the Land Conservation and Development Commission (LCDC).

In response to the LCDC's Remand Order of April 23, 1993, the Multnomah County Board of Commissioners, in September 1994, adopted the "West Hills Reconciliation Report" (hereafter, Reconciliation Report) which applied Statewide Planning Goal 5 requirements to specific scenic, stream, wildlife and mineral resources in the West Hills. The Reconciliation Report is an unacknowledged amendment to the Multnomah County Comprehensive Framework Plan.

B. **Compliance with Specific Protection Measures in the "West Hills Reconciliation Report" for Secondary Wildlife Habitat Areas:**

Applicant Response: [August 30, 1995 letter] The Report also establishes protection for wildlife areas. Residential uses are allowed conditionally. Report at VI-23. This parcel is located in a secondary wildlife habitat area. See Exhibit 3. The Report contains protection measures for secondary wildlife habitat areas.

[Footnote to last sentence:] The Report does not establish mandatory standards applicable to this application. The Report states that specific protection measures "should include the following: ..." The Report language clearly shows that its recommendations are to be implemented through subsequent measures. The applicant will address the Report but does not believe that the Report contains mandatory approval criteria for this application. The applicant reserves the right to challenge the applicability of the Report.

Continuation of Staff Commentary: The subject site is mapped as "secondary wildlife habitat area" for the reasons set out in the Reconciliation Report, pages V-3 through V-16. Conflicts with the proposed use, and the Goal 5 analysis showing how conflicts are to be resolved to comply with Goal 5 are detailed in the Reconciliation Report, pages V-18 through V-51. Except for findings showing how the proposal protects Goal 5 resources, which are set forth below, the findings of significance and Goal 5 analysis in the Reconciliation Report, together with the included relevant maps and tables, are herby adopted by this reference.

Specific measures to protect secondary wildlife habitat areas in the West Hills are detailed on page VI-25 and 26 of the Reconciliation Report. These measures are applicable to this proposal and are discussed below.

Applicant Response: The application does or can comply with the recommended protection measures.

(1) **Where a parcel to be developed contains both secondary and impacted wildlife habitat areas, development activities should be limited to the impacted areas to the maximum extent feasible.**

Staff Comment: Parcel contains only secondary wildlife habitat areas.

(2) **Fencing should be prohibited along roadways, thus reducing barriers to wildlife movement. Design standards for fences outside of the "cultivated" area discussed below should be adopted which ensure that fences do not block passage for a wide range of wildlife species.**

Applicant Response: No new fencing is proposed along Gilkison Road.

(3) **New development activities should be located on existing cleared areas of the site to the maximum extent feasible. Existing forested areas should be maintained consistent with approved forest management practices.**

Applicant Response: The proposed dwelling site is located on a cleared area.

(4) **Certain introduced vegetation should be prohibited (e.g., English Ivy, Vinca, and other invasive species), even in cultivated areas.**

Staff Comment: The Wildlife Habitat Mitigation Plan explained in the next section includes the strategy of using only native vegetation.

(5) **Erosion control standards should be adopted where there will be prolonged exposure of soils, or excavation, associated with residential development.**

Staff Comment: A Hillside Development Permit and/or a Grading and Erosion Permit are required for vulnerable hillsides or larger scale ground disturbance.

(7) **Development along significant streams should be regulated as proposed in the discussion of streams.**

Staff Comment: No development along a significant stream is proposed.

C. **Compliance with the "Significant Environmental Concern" section of the Zoning Code in demonstration of compliance with the Protection Measures listed in the "West Hills Reconciliation Report" for Secondary Wildlife Habitat Areas:** (B. above).

In addition to the resource protection measures on page VI-25 and 26 of the Reconciliation Report, the Report finds additional standards in the Significant Environmental Concern (SEC) overlay zone for wildlife protection will protect the Goal 5 wildlife habitat areas. While the SEC overlay zone designation was not made applicable to the subject site at the time of Conditional Use permit application, the code standards and criteria for the SEC overlay zone provide adequate guidelines to determine compliance with the Goal 5 requirements. On page VI-24 of the Reconciliation Report it reads:

> "e. Program to achieve the goal
> Residential and Community Service/Conditional Uses
> Standards for protection of wildlife habitat should consider various measures to ensure the maintenance and enhancement of the designated primary habitat areas as homes for various species of wildlife. Differing standards are necessary for protection of primary, secondary, and impacted wildlife habitat areas. **Implementation of these standards as regards residential** and community service/conditional **uses should be accomplished through use of a Significant Environmental Concern** (SEC) **overlay zone** for wildlife habitat protection." (bolding added)

MCC 11.15.6426 Criteria for Approval of SEC-h Permit
Wildlife Habitat

* * *

MCC 11.15.6426(B) Approval shall be based on the ability of the proposal to meet the following standards:

MCC 11.15.6426(B)(1) **Where a parcel to be developed contains any combination of primary, secondary, and impacted wildlife habitat areas, development activities shall be limited to the less valuable of the wildlife habitat areas, except as necessary to provide access.**

MCC 11.15.6426(B)(2) **The proposed development shall be located so as to maintain existing forested areas which are broadly contiguous with forested areas or areas being reforested on adjacent properties.**

MCC 11.15.6426(B)(3) **The proposed development shall satisfy either** (a) or (b) below:

(i) MCC 11.15.6426(3)(a) **Development location and fencing standards:** *NOTE: THE APPLICANT HAS CHOSEN TO ADDRESS SUBSECTION .6426(3)(b) INSTEAD OF SUBSECTION .6426(3)(a).*

MCC **11.15.6426(B)(3)(b) Wildlife Conservation Plan**
The applicant shall prepare a wildlife conservation plan for the proposed development which shall demonstrate that the proposed development has either:

MCC 11.15.6426(B)(3)(b)(i) Fully mitigated any adverse impacts to wildlife habitat on the site, or

MCC 11.15.6426(B)(3)(b)(ii) Provided for wildlife enhancement measures which compensate for the loss of any wildlife habitat values on the site.

Applicant Response: [August 30, 1995 letter] The County adopted amendments to MCC 11.15.6400 that became effective on November 26, 1994. These amendments are not applicable to this application. ORS 215.428(3). The applicant will, however, demonstrate compliance with 11.15.6426(B)(3)(b). SRI/Shapiro has prepared a wildlife conservation plan that complies with this criteria. See Exhibit 4 [with August 30, 1995 letter].

Staff Comment: The Wildlife Conservation Plan prepared for the applicant includes an extensive inventory of existing vegetation on the site and an analysis of the potential impact of the proposed dwelling on wildlife. To offset those impacts a mitigation plan is on page 3 of the report. Those mitigation measures are also recommended to be included in the conditions of approval of this application. The last mitigation measure deals with incorporating "new forestry" techniques, which staff does not recommend including as a condition of approval in light of ORS prohibitions on county regulation of forestry.

The applicant has addressed the issues raised by the adoption of the Reconciliation Report.

D. Streams

Staff Comment: The proposed house location is not within any adopted significant stream impact area.

E. Scenic

Staff Comment: The property is not within the West Hills significant scenic area.

CONCLUSIONS FOR CONDITIONAL USE REQUEST

1. The proposal complies with the template test requirement of 11 lots and 5 houses, that existed on January 1, 1993, being located within a 160 acre square centered on the center of the subject property.

2. The proposed dwelling will not have an adverse effect on farm or forest operations on the property or in the surrounding area.

3. The proposed dwelling location and fire safety area minimize risks associated with wildfire.

4. The applicant has provided adequate evidence to show that the requirements for a dwelling not related to forest management in the CFU district can be met.

5. The applicant has addressed all Statewide Planning Goal 5 issues raised in the "West Hills Reconciliation Report".

6. Conditions are necessary to assure compliance with all code requirements.

The Staff Report and recommendation on Conditional Use application CU 10-94 will be presented at a public hearing on September 20, 1995 before the Hearings Officer.

The Hearings Officer MAY announce a decision on the item:
at the close of the hearing; or,
upon continuance to a time certain; or,
after the close of the record following the hearing.

A written decision is usually mailed to all parties within ten days following the Decision of the Hearings Officer.

Decisions of the Hearings Officer 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 to the record. A *"Notice of Appeal"* form and fee must be submitted to the County Planning Director, within ten days after the Hearings Officer decision is submitted to the Clerk of the Board [REF. MCC 11.15.8260(A)(1)]. The appeal fee is **$500.00 plus a $3.50-per-minute** charge for a transcript of the initial hearing(s) [REF. MCC 11.15.9020(B)]. *"Notice of Appeal"* forms and instructions are available at the 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

Hearings Officer decisions are typically reported to the Board for review on the first Tuesday following the ten day appeal period. The Board meets at 1:30 p.m. in Room 602 of the Multnomah County Courthouse. For further information call the Multnomah County Planning and Development Division at 248-3043.

Meeting Date: APR 9 1996
Agenda No: P-2
Est. Start Time: 9:30

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Report to the Board the Hearings Officer's decision on HDP 21-95

BOARD BRIEFING Date Requested:
Amt. of Time Needed:
Requested By:

REGULAR MEETING Date Requested: April 9, 1996
Amt. of Time Needed: 5 Min.

DEPARTMENT: DES **DIVISION:** Transportation & Land Use Planning
CONTACT: Lisa Estrin **TELEPHONE:** 248-3043
BLDG/ROOM: 412 / 109

PERSON(S) MAKING PRESENTATION: Lisa Estrin

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

Report to the Board the Hearings Officer's decision on HDP 21-95

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: KB Lou E. Nicholas

BOARD OF COUNTY COMMISSIONERS
96 MAR 27 PM 4:00
MULTNOMAH COUNTY
OREGON

MULTNOMAH COUNTY

BOARD HEARING OF 3/9/96

TIME: _____

CASE NAME: Hillside Development Permit for a Single Family Dwelling NUMBER: HDP 21-95

1. Applicant Name/Address:
   Anthony Maris
   17855 SW Kinnaman Road
   Aloha, OR 97007

2. Action Requested by applicant:
   Hillside Development Permit to allow a single family dwelling and detached garage in the Rural Residential zoning district..

3. Planning Staff Recommendation:
   Approval with conditions.

4. Hearings Officer Decision:
   Approval with conditions.

5. If recommendation and decision are different, why?
   The recommendation and the decision are the same.

ACTION REQUESTED OF BOARD

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

ISSUES

(who raised them?)

1. A Notice of Violation (ZV 41-95) was sent to property owner, Anthony Maris for a large volume of grading work completed without a Hillside Development Permit. Hillside Development Permit No. 21-95 was an application to legalize work already completed on the parcel and to permit the construction of a single family dwelling and detached garage for use by the Mr. and Mrs. Maris.

2. The Hillside Development Permit No. 21-95 administrative decision was appealed by Patricia Perry. Ms. Perry and surrounding neighbors submitted evidence during the public hearing that while grading the site without a permit, Mr. Maris had trespassed onto their properties. In addition, the decision was based on false and incomplete information which did not take into consideration a year-round spring/creek within 60 feet from the proposed development and that an old landslide existed on the site which was not identified in the engineering report. The testimony and evidence presented in opposition to the application called into question the adequacy of the geological report.

3. In addition, Ms. Perry questioned the use of the Goal 5 provision (as setforth in the West Hills Reconciliation Report) as the criteria in HDP 21-95 instead of the more stringent SEC wildlife and streams criteria. The application for Hillside Development Permit No. 21-95 was submitted one day before the SEC maps and new criteria went into effect. Under ORS 215.428(3), 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.

Do any of these issues have policy implications? Explain.
No.

HEARINGS OFFICER DECISION

This Decision consists of Conditions, Findings of Fact and Conclusions.

March 22, 1996

HDP 21-95	An appeal of an Administrative Decision that approves a Hillside Development Permit to allow the construction of a driveway and single family dwelling.
Location:	12625 NW Germantown Road Portland, Oregon 97231
Legal Description:	Lot #4, Section 9, Township: 1 North, Range: 1 West
Plan Designation:	Rural Residential
Zoning Designation:	RR, Rural Residential
Site Size:	1.73 acres
Appellant:	Patricia M. Perry 12525 NW Germantown Road Portland, Oregon 97231
Property Owner and Applicant:	Anthony Maris 17855 SW Kinnaman Road Aloha, Oregon 97007

Hearings Officer Decision:

Deny appeal and approve the Administrative Decision as modified, subject to conditions, approving a Hillside Development Permit to allow the construction of a driveway and single family dwelling based on the Findings and Conclusions contained herein.

Conditions of Approval:

1. An evaluation of the geotechnical report by another Certified Engineering Geologist or Geotechnical Engineer, to be chosen by the County Planning Department, shall be conducted at the applicant's expense. The applicant shall be required to comply with any recommendations for any further work or changes in proposed work which may be necessary to ensure reasonable safety from earth movement hazards as determined by the engineering geologist or geotechnical engineer who evaluates the report submitted by applicant. After selection by the County of the party who is to evaluate the geological report, the applicant shall make arrangements satisfactory to the County for the payment of the cost of the report prior to the commencement of the evaluation.

2. The applicant shall perform all remedial and additional work in accordance with the recommendations in the Geotechnical Report evaluation. All work required or authorized by the Geotechnical Report shall be performed under the observation of a Certified Engineering Geologist or Geotechnical Engineer at applicant's expense. All remedial work shall be performed prior to the issuance of a building permit for the residence.

3. The applicant will be required to provide an engineered design plan for the retaining wall on the eastern corner of the property that borders the Perry and Marquard properties. In addition, plans need to be submitted and approved by the County, correcting and eliminating the slippage onto the northwest corner of the Perry property. As part of those plans, the applicant will provide a survey of the property line between the Maris and Perry properties showing the corners and replace the pins marking the corners and northern boundary of the Perry property. The engineering plan will be developed in a fashion so that all portions of the retaining wall(s) including the toe and/or slope will be on the applicant's property. The observation of the construction/removal and/or repair of the retaining wall(s) shall be conducted by a Certified Engineering Geologist or Geotechnical Engineer who shall submit verification that the wall(s) have engineering approval and are constructed in accordance with plans approved by the County. In addition, the Engineer will certify that cut and fill slopes are not steeper than 3:1 unless the Engineer has made a specific determination that steeper slopes are safe and appropriate erosion control measures have been implemented.

4. The applicant is also directed to remove any boulders that have encroached on the adjoining properties and correct disturbances to adjoining property, provided that adjoining property owners consent to

applicant's entry onto their property to make requested corrections. This condition shall not be construed as permission for the applicant to trespass on adjoining parcels. In the event the adjoining property owners do not want to allow applicant to do the corrective work on their property, this condition will be deemed satisfied.

5. After conclusion of the corrective work and/or reconstruction of the retaining wall bordering the Perry and Marquard properties, the applicant will provide a survey of the wall indicating its "as built" location, on applicant's property.

6. Applicant shall have ninety (90) days from the date of this order (or ninety (90) days from the final resolution of any appeals reasonably related to this order) to submit evidence to the County Planning Department that applicant has legal authority (easement, lot line adjustment, etc.) to access applicant's property on the road as constructed. In the event he does not submit the evidence in the time provided, applicant will construct his access drive in accordance with the submitted plans. He will then be required to restore and revegetate the areas he excavated on the Tindall property.

7. Applicant will hold harmless and indemnify Tindall from claims of any nature or from any enforcement action by Multnomah County arising by reason of the excavation and grading work applicant did on Tindall property.

8. The applicant shall hold harmless and indemnify Multnomah County, its Board of Commissioners, its other officers, and employees, from claims of any nature arising or resulting from any claims for damages or injury to property or persons arising by reason of work on the subject property, or any work done pursuant to this order.

9. Except as modified by conditions herein, grading and development activity shall be confined to that described in the application narrative, site plan and geotechnical evaluation conducted by Geotechnical Resources Incorporated (Dated: October 5, 1995) and shall be limited to the work areas illustrated. Any erosion control devices or measures shall be maintained in an operable condition until permanent groundcover has been re-established.

10. Any existing or future exposed soils, disturbed areas, and all cut or fill slopes shall be stabilized with temporary erosion control measures to prevent or minimize any sedimentation off-site. Silt fences shall be

installed immediately on disturbed areas and/or before any additional soil is disturbed. In addition,

* Install a "sediment fence or barrier" at the toe of all disturbed and filled areas;

* Store and cover any stockpiled soil or other debris sufficient to prevent sedimentation or other discharges to surface waters on or off-site; and,

* Reseed exposed soils as soon as practicable during construction. Stabilize exposed cut or fill slopes of 10% or greater with a winter cover crop, straw-mulch or other effective cover material during rainy months. Final re-vegetation shall occur before occupancy of the single family dwelling.

11. Prior to occupancy of the dwelling, the roadway on the west side of the property shall be re-vegetated with native, non-invasive plants. No species of an invasive vegetation (English Ivy, Vinca, etc.) shall be introduced in any cultivated" area.

12. Save existing trees and native vegetation other than those noted for removal or otherwise effected by grading work areas. Protect the root-zones of trees to be saved during construction; and maintain retained trees in a healthy state.

13. Prior to occupancy of the dwelling, remove any existing nuisance plants on the property and re-vegetate with native, non-invasive plant material. A list of nuisance plants may be found in MCC 11.15.6425(B)(7).

14. Prior to occupancy of the dwelling, install rip-rap and sediment catching bio-bags on all culvert entrances.

15. Discharge from rain and foundation drains shall be transmitted in a closed drain line that discharges into a suitably designed drywell or soaking trench as approved by the Portland Building Bureau (Plumbing Section). All grading in the vicinity of the residence should provide positive drainage away from the residence, and no areas that could pond water should be created anywhere on the property.

16. Any fill materials shall be clean and non-toxic. This permit does not authorize dumping or disposal of hazardous or toxic materials, synthetics (i.e., tires), asphalt or other solid wastes which may cause adverse

leachates or other off-site water quality effects. Any pollution associated with the project shall be contained on the site.

17. Erosion control techniques required herein shall be supplemented if turbidity or other down-slope erosion impacts result form grading work on the site. Multnomah County will accept recommendations from The Portland Building Bureau (Special Inspections section), the West Multnomah County Soil & Water Conservation District, or the U.S. Soil Conservation Service who can also advise or recommend measures to respond to unanticipated erosion effects.

18. No fencing shall be permitted along the roadways (public or private).

19. Prior to occupancy of the dwelling, the property shall comply with the Wildlife and Stream Mitigation Plan completed by A.G. Crook Company (Dated October, 1995).

20. The dwelling shall be moved or modified to meet the minimum yard dimensions of MCC 11.15.2218(C). Specifically, the dwelling shall be modified or moved to have a minimum 30 ft rear yard setback along the entire length of the dwelling.

21. Prior to occupancy of the dwelling, the applicant shall contact the Planning Division for a Final Inspection to ensure compliance with the Conditions of Approval of HDP 21-95. Please contact the Planning Division at (503) 248-3040. In order to provide better customer service, the Applicant shall request an appointment for the final inspection a minimum of 48 hours before the expected date of completion.

22. The applicant herein shall post a Performance Bond in an amount not less than $50,000 to assure performance of all conditions imposed herein related to erosion control, engineering evaluations and inspections, construction and/or reconstruction of retaining walls, removal of encroachments and excavating and grading work to be done in conformance with the specifications, requirements and conditions imposed herein. In the event that the engineering evaluation required in this order indicates that the cost of the remaining grading, excavation, erosion control and restorative work to be done exceeds $50,000, the applicant will be required to provide a Performance Bond in accordance with the greater amount. The bond shall be executed by a surety company authorized to transact business in the State of Oregon.

23. No residential unit may be included in the garage structure. NO phasing of this development is allowed.

24. The driveway/road access is to be a gravel driveway. It shall not be constructed with an impervious surface.

25. If it appears that the upper site, is the more appropriate place for the location of the septic drainfield, the applicant will be allowed to revise his plans to site the septic system accordingly. The plans will be subject to review and approval by the County. If the septic system is located a the upper site, to the west of the proposed residence, the applicant will submit a revised planting and revegetation plan for approval by the County.

26. The applicant shall fully comply with conditions of approval numbers 1, 2, 3, 4, 5, 6, 22, 23 and 24 as a prerequisite for the issuance of a building permit for the construction of the residence. Building permits may be issued for the construction and/or reconstruction of retaining walls if necessary.

PARTY STATUS

Parties to the Proceeding

1. Parties:

The persons, agencies and organizations who submitted written or oral testimony in this proceeding as follows:

A. Tony Maris appeared personally as the applicant and also appeared by and through his authorized representatives.

B. Representatives of the applicant:

(1) John Rankin, Attorney, 22151 SW 55th Ave., Tualatin, OR 97062;

(2) Aaron English, Wildlife Biologist with A.G. Crook Company, 1800 NW 169th Place, Suite B-100, Beaverton, OR 97006;

(3) Phil Wurst, Geotechnical Resources, Inc., 18867 S. Fernwood Rd., Molalla, Oregon;

(4) Lynette Jones, Land Use Consultant, 22601 NW Dairy Creek Rd., Cornelius, OR 97113.

C. Other persons supporting the application:

(1) John L. Jersey II, 14660 NW Rock Creek Rd., Portland, OR 97231-2408.

D. Persons opposed to the application:

(1) Patricia Perry, 12525 NW Germantown Road, Portland, OR 97231;

(2) Robert Mossberger, 12525 NW Germantown Road, Portland, OR 97231;

(3) Benell Tindall, 12040 NW Tualatin Ave., Portland, OR;

(4) Darr Tindall, 12040 NW Tualatin Ave., Portland, OR;

(5) James Marquard, 534 SW Bancroft, Portland, OR 97201, personally and through his representative;

(6) Elizabeth Marquard, 534 SW Bancroft, Portland, OR 97201, personally and through her representative;

(7) Judy Tindall, 12845 W. Germantown Road, Portland, OR;

E. Opponents' representative:

(1) Roger Tilbury, Attorney at Law, 1123 SW Yamhill St., Portland, OR 97205, representing the Marquards.

F. Determination of party status:

(1) Tony Maris is the property owner and applicant and has appeared personally and through his authorized representatives. Mr. Maris has party status.

(2) The persons listed above who appeared personally or through their representatives in opposition to this request are entitled to party status pursuant to MCC 11.15.8225(A)(2) and made an appearance of record either personally or in writing in accordance with MCC 11.15.8225(B).

PROCEDURAL ISSUES

1. Impartiality of the Hearings Officer

A. No ex parte contacts. I did not have any ex parte contacts prior to the initial hearing of this matter or during the period of time between the initial hearing of January 17, 1996 and February 21, 1996, the date to which the hearing was continued. I did not make a site visit.

B. No conflicting personal or financial or family interest. I have no financial interest in the outcome of this proceeding. I have no family or financial relationship with any of the parties.

2. Procedural Issues

At the commencement of the hearing I asked the participants to indicate if they had any objections to jurisdiction. The participants did not allege any jurisdictional or procedural violations regarding the conduct of the hearing.

During the initial hearing in this matter applicant's attorney, John Rankin, requested that the hearing of this matter be continued to a future date and the date of February 21st was mutually agreed upon by the parties. Mr. Rankin stipulated for the record that the 120 day period set by statute for final action on permit applications would not run during the period of time of the continuance. The number of days by which this period was extended as the result of the waiver was 35 days.

BURDEN OF PROOF

In this proceeding, the burden of proof is upon the applicant.

SCOPE OF APPEAL

A hearing before the hearings officer on the matter appealed under MCC .8290 shall be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal. The appellant's attachment to the Notice of Appeal is attached hereto as Exhibit "A" and is incorporated by this reference herein. The specific grounds raised by the appellant will be discussed in the body of this decision under the relevant approval criteria as appropriate.

FACTS

1. Applicant's Proposal

The applicant requested approval of his application for a Hillside Development Permit for the construction of a new single family dwelling and driveway. The Planning Department did approve in an administrative decision, subject to conditions, a Hillside Development Permit for proposed grading in conjunction with the construction of the single family home referenced herein.

2. Site and Vicinity Information

The site is located south of Germantown Road, less than a mile west of Skyline Blvd., in Multnomah County, Oregon. The site is 1.73 acres in size and slopes deeply to the south and southwest.

The majority of the property has been logged. There were discrepancies in the testimony as to when the logging occurred. The southeast corner of the site adjacent to Germantown Road contains a young stand of Big Leaf Maple with an understory of Western Sword Fern, Oregon Grape and Himalayan Blackberry.

The property is zoned by Multnomah County as Rural Residential which allows for one dwelling. There are other residences in the vicinity.

3. Enforcement History

The applicant had done a substantial amount of grading and excavation work on the property prior to submitting this application for an HDP permit. A Notice of Violation was issued by Multnomah County on September 27, 1995 for non-permitted grading work in a Slope Hazard area, as identified on Multnomah County Slope Hazard Map. Attached to that notice was a copy of the Hillside Development and Erosion Control Ordinance. As an alternative to further enforcement action, the County gave Mr. Maris thirty (30) days to apply for a Hillside Development Permit approval. On October 6, 1995, Mr. Maris did in fact make application for a Hillside Development Permit.

In reviewing this application, it is important to separate questions relating to enforcement of County ordinances and possible sanctions for doing work without a permit, and questions relating to whether it would be appropriate to approve a Hillside Development Permit. Much of the testimony by the opponents to this application was directed towards the fact that a significant amount of grading and excavation work had been done without a permit and the significant problems that resulted therefrom. The question before us is whether it is appropriate to grant a Hillside Development Permit in the instant case. The questions of remedial actions necessary to restore portions of the property where grading and excavation work was done without a permit, will be addressed in the form of conditions attached to the issuance of the permit.

4. Testimony and Evidence Presented

A. During the course of the hearings on January 17, 1996 and February 21, 1996, the exhibits listed on the attached Exhibit "B", which is incorporated by this reference herein, were received by the Hearings Officer.

B. Lisa Estrin testified for the County, summarized the history of the prior Notice of Violation and Zoning Ordinance application, and summarized the findings made in the Administrative Decision granting approval of the Hillside Development Permit.

C. The parties listed above in opposition spoke in regards to their concerns about the work that had been done without a permit and their concerns about the applicant's ability and willingness to comply with the requirements of the Zoning Ordinance provisions relating to Hillside Development permits. Specific issues raised by the various parties will be addressed in more detail in the body of this order. However, it is clear from the testimony presented that the work done on the subject parcel without a permit created encroachments as to at least three of the surrounding parcels, specifically those owned by Tindall, Perry and Marquard.

STANDARDS AND CRITERIA, ANALYSIS AND FINDINGS OF FACT

1. 11.15.6725 Hillside Development Permit Process and Standards

(A) A Hillside Development permit may be approved by the Director only after the applicant provides:

(1) Additional topographic information showing that the proposed development to be on land with average slopes less than 25 percent, and located more than 200 feet from a known landslide, and that no cuts or fills in excess of 6 feet in depth are planned. High groundwater conditions shall be assumed unless documentation is available, demonstrating otherwise; or

(2) A geological report prepared by a Certified Engineering Geologist or Geotechnical Engineer certifying that the site is suitable for the proposed development; or,

(3) **An HDP Form-1 completed, signed and certified by a Certified Engineering Geologist or Geotechnical Engineer with his/her stamp and signature affixed indicating that the site is suitable for the proposed development.**

(a) **If the HDP Form-1 indicates a need for further investigation, or if the Director requires further study based upon information contained in the HDP Form-1, a geotechnical report as specified by the Director shall be prepared and submitted.**

ANALYSIS:

Paragraphs (1), (2), and (3) above are alternative provisions. The applicant is only required to meet one of those provisions. The applicant has provided a geotechnical and geological evaluation of Tax Lot 4, 12000 Block, NW Germantown Road, dated October 5, 1995. The geological report was prepared by a geotechnical engineer and a geologist from the offices of Geotechnical Resources Incorporated. The report did indicate that the property was suitable for development for a single family residence from a geotechnical standpoint. However, the report also stated: "no indication of active or inactive landslides, rotational slumps, or other mass failures were observed". There was direct testimony from some of the parties in opposition to granting this permit that a survey had been done which indicated that there was slippage on the property on top of the old slippage. The testimony indicated that there was an old landslide in the area which information was not reflected in the geological report. A copy of a survey detailing the slippage was also submitted (Exhibit III. The testimony and evidence presented in opposition to the application calls into question to adequacy of the geological report. See also Exhibit 114.

Pursuant to MCC 11.15.6725(B)(4), the Director, at the applicant's expense, may require an evaluation of HDP Form-1 or the Geotechnical Report by another Certified Engineering Geologist or Geotechnical Engineer. Accordingly, I will impose as a condition of this approval that an evaluation of the geotechnical report by another Certified Engineering Geologist or Geotechnical Engineer, to be chosen by the County Planning Department, shall be conducted at the applicant's expense. The applicant shall be required to comply with any recommendations for any further work or changes in proposed work which may be necessary to ensure reasonable safety from earth movement hazards as determined by the engineering geologist or geotechnical engineer who evaluates the report submitted by applicant. The evaluating engineer should also provide an estimate of the approximate cost to do the corrective work, construction or reconstruction of retaining walls, remaining grading, inspections, excavation work and the cost of implementing erosion control measures. After selection by the County of the party who is to evaluate the geological report, the

applicant shall make arrangements satisfactory to the County for the payment of the cost of the report prior to the commencement of the evaluation.

(B) Geotechnical Report Requirements

(1) A geotechnical investigation in preparation of a Report required by MCC .6725(A)(3)(a) shall be conducted at the applicant's expense by a Certified Engineering Geologist or Geotechnical Engineer. The Report shall include specific investigations required by the Director and recommendations for any further work or changes in proposed work which may be necessary to ensure reasonable safety from earth movement hazards.

(2) Any development related manipulation of the site prior to issuance of a permit shall be subject to corrections as recommended by the Geotechnical Report to ensure safety of the proposed development.

(3) Observation of work required by an approved Geotechnical Report shall be conducted by a Certified Engineering Geologist or Geotechnical Engineer at the applicant's expense; the geologist's or engineer's name shall be submitted to the Director prior to issuance of the Permit.

(4) The Director, at the applicant's expense, may require an evaluation of HDP Form-1 or the Geotechnical Report by another Certified Engineering Geologist or Geotechnical Engineer.

ANALYSIS:

As indicated in the analysis of subsection (A) of this section, there is a question regarding the adequacy of the geological report. During the course of the evaluation of the geographical report as required above and in reviewing the report submitted by applicant and making further recommendations, the Certified Engineering Geologist or Geotechnical Engineer shall review the excavation and grading work performed prior to issuance of permit and determine what corrections are necessary to ensure safety of the proposed development and the surrounding parcels. The applicant shall perform all remedial work in accordance with the recommendations in the evaluation Geotechnical Report. All work required by the Geotechnical Report shall be performed under the observation of a Certified Engineering Geologist or Geotechnical Engineer at applicant's expense. All remedial work shall be performed prior to the issuance of a building permit for the residence.

(C) Development plans shall be subject to and consistent with the Design Standards For Grading and Erosion Control in MCC .6730(A) through (D). Conditions of approval may be imposed to assure the design meets those standards.

ANALYSIS:
The specific requirements of the Grading and Erosion Control standards will be discussed in a subsequent section of this order.

2. 11.15.6730 Grading and Erosion Control Permit Standards

Approval of development plans on sites subject to a Grading and Erosion Control Permit shall be based on findings that the proposal adequately addresses the following standards. Conditions of approval may be imposed to assure the design meets the standards:

(A) Design Standards For Grading and Erosion Control

(1) Grading Standards

(a) Fill materials, compaction methods and density specifications shall be indicated. Fill areas intended to support structures shall be identified on the plan. The Director or delegate may require additional studies or information or work regarding fill materials and compaction;

(b) Cut and fill slopes shall not be steeper than 3:1 unless a geological and/or engineering analysis certifies that steep slopes are safe and erosion control measures are specified;

(c) Cuts and fills shall not endanger or disturb adjoining property;

(d) The proposed drainage system shall have adequate capacity to bypass through the development the existing upstream flow from a storm of 10-year design frequency;

(e) Fills shall not encroach on natural watercourses or constructed channels unless measures are approved which will adequately handle the displaced streamflow for a storm of 10-year design frequency.

ANALYSIS:

The Notice of Appeal does not specifically address the individual ordinance criteria in MCC 11.15.6730. However, various concerns expressed in statements made by the parties in opposition to the application at the hearing are related to several of these ordinance standards. Of particular concern is subsection (c) above which provides that "cuts and fills shall not endanger or disturb adjoining property".

It is clear that the driveway access to the property as constructed encroaches on the Tindall property.

The stone boulder retaining wall that the applicant has built along the southeastern portion of his parcel, has encroached on two adjoining parcels. Rock boulders from that wall have fallen onto the adjoining property.

Work done on the Maris property has caused significant "slippage" onto the northwest corner of the Perry property. See Exhibits II, 113, 114 and 122.

It is apparent that work done without a permit did endanger or disturb adjoining property. Remedial work needs to be done prior to the issuance of any building permit for the residence in conjunction with this project. All work done pursuant to this approval shall be performed in a manner so as to not further endanger or disturb the adjoining properties.

In addition, the Code provides that "cut and fill slopes shall not be steeper than 3:1 unless a geological and/or engineering analysis certifies that steep slopes are safe and erosion control measures are specified". Conditions of approval may be imposed to ensure that the design meets these standards. Accordingly, as a condition of approval, the applicant will be required to provide an engineered design plan for a retaining wall on the eastern corner of the property that borders the Perry and Marquard properties.

In addition, plans needs to be submitted to correct and eliminate the slippage onto the northwest corner of the Perry property. As part of that plan, the applicant will provide a survey of the property line between the Maris and Perry properties showing the corners and replace the pins marking the corners and the northern boundary of the Perry property.

The engineering plan will be developed in a fashion so that all portions of the retaining wall(s) will be on the applicant's property. The observation of the construction/removal and/or repair of the retaining wall(s) shall be conducted by a Certified Engineering Geologist or Geotechnical Engineer who shall submit verification that the wall(s) have engineering approval and are constructed in

accordance with plans approved by the County. In addition, the Engineer will certify that cut and fill slopes are not steeper than 3:1 unless the Engineer has made a specific determination that steeper slopes are safe and appropriate erosion control measures have been implemented.

The applicant is also directed to remove any boulders and correct disturbances and encroachments to adjoining property, provided that adjoining property owners consent to applicant's entry onto their property to make requested corrections. This condition shall not be construed as permission for the applicant to trespass onto adjoining parcels. In the event the adjoining property owners refuse to allow applicant to do the corrective work on their property, this condition will be deemed satisfied.

After conclusion of the corrective work and/or reconstruction of the retaining wall bordering the Perry and Marquard properties, the applicant will provide a survey of the wall indicating its "as built" location.

The access driveway as constructed followed a portion of an old logging road. The applicant testified that he thought that the legal description of the access easement corresponded with the physical location of the old logging road. The access drive as constructed does not comply with the approved site plan, nor does it correspond to the actual access easement location. Accordingly, there is a substantial encroachment on the Tindall property. (Exhibits WW and 122). Since the work in constructing the access road involved excavating and grading activity on the Tindall property, it has created the situation of placing Tindall in technical violation of the ordinance requirements requiring permits for such work.

At hearing, Tindall and Maris appeared willing to discuss a negotiated resolution of that encroachment issue. However, in the event those parties are unable to resolve that issue, the applicant will be required to bring the roadway access into compliance with the submitted plans.

Applicant shall have ninety (90) days from the date of this order (or ninety (90) days from the final resolution of any appeals reasonably related to this order) to submit evidence to the County Planning Department that applicant has legal authority (easement, lot line adjustment, etc.) to access his property on the road as constructed. In the event he does not submit the evidence in the time provided, applicant will construct his access drive in accordance with the submitted plans. He will then be required to restore and revegetate the areas excavated on the Tindall property.

Applicant will hold harmless and indemnify Tindall from claims of any nature or enforcement action by Multnomah County arising by reason of the excavation and grading work applicant did on Tindall property.

(2) **Erosion Control Standards**

(a) *not applicable, as site is not within the Tualatin River Drainage Basin*

(b) **Stripping of vegetation, grading, or other soil disturbance shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time during construction;**

(c) **Development Plans shall minimize cut or fill operations and ensure conformity with topography so as to create the least erosion potential and adequately accommodate the volume and velocity of surface runoff;**

(d) **Temporary vegetation and/or mulching shall be used to protect exposed critical areas during development;**

(e) **Whenever feasible, natural vegetation shall be retained, protected, and supplemented;**

* * *

(f) **Permanent plantings and any required structural erosion control and drainage measures shall be installed as soon as practical;**

ANALYSIS:
There was significant soil disturbance activity performed prior to the issuance of this permit. The applicant has implemented some erosion control measures on the property. This approval and the conditions imposed pursuant thereto, anticipates additional soil disturbance activity, and it will be necessary for the applicant to comply with all erosion control standards and implement additional erosion control measures. As indicated elsewhere in this opinion, the applicant will be required to revegetate the roadway on the west side of the property which is being abandoned and to revegetate riparian areas. All erosion control devices and/or measures shall be maintained in an operable condition until permanent ground cover has been re-established. Erosion control devices and

measures will be implemented in such a fashion so that all such silt fences and/or erosion control measures are installed on the applicant's property.

(g) Provisions shall be made to effectively accommodate increased runoff caused by altered soil and surface conditions during and after development. The rate of surface water runoff shall be structurally retarded where necessary;

(h) Sediment in the runoff water shall be rapped by use of debris basins, silt traps, or other measures until the disturbed area is stabilized;

(i) Provisions shall be made to prevent surface water from damaging the cut face of excavations or the sloping surface of fills by installation of temporary or permanent drainage across or above such areas, or by other suitable stabilization measures such as mulching or seeding;

(j) All drainage provisions shall be designed to adequately carry existing and potential surface runoff to suitable drainageways such as storm drains, natural watercourses, drainage swales, or an approved drywell system;

(k) Where drainage swales are used to divert surface waters, they shall be vegetated or protected as required to minimize potential erosion;

(l) Erosion and sediment control devices shall be required were necessary to prevent poiluting discharges from occurring.
*** * ***

(m) Disposed spoil material or stockpiled topsoil shall be prevented from eroding into streams or drainageways by applying mulch or other protective covering; or by location at a sufficient distance from streams or drainageways; or by other sediment reduction measures;

(n) Such non-erosion poilution associated with construction such as pesticides, fertilizers, petrochemicals, solid wastes, construction chemicals, or wastewaters shall be prevented from leaving the construction site through proper handling, disposal, continuous site monitoring and clean-up activities.

(o) *not applicable - site is not within the Balch Creek Drainage Basin*

ANALYSIS:

The approval by staff of the HDP 21-95 application was for a single phase development. Subsequent to receipt of the approval, applicant proposed constructing a garage/shop as a garage/residence, with the actual "house" to be constructed later. Two residential units on this parcel would not be allowed under the Code. At hearing, the applicant indicated that he was seeking approval of the original non-phased site plan. Similarly, the discussed modifications would have replaced the gravel driveway with a driveway with an impervious surface. The discussed revisions further contemplated the six inch pipe which would channel water and sediment to the creek. Such revisions are not acceptable and cannot be approved. The conditions of approval of HDP 21-95 required all rain drains to be discharged into a suitably designed drywell or soaking trenches. No phasing of this development will be allowed. No residential unit may be included with the garage structure. The driveway will remain a gravel driveway. The original site plan with conditions imposed by staff does adequately address the drainage concerns set forth above. A copy of that plan is attached hereto as Exhibit "C" and is incorporated by this reference herein.

(B) Responsibility

(1) Whenever sedimentation is caused by stripping vegetation, regrading or other development, it shall be the responsibility of the person, corporation or other entity causing such sedimentation to remove it form all adjoining surfaces and drainage systems prior to issuance of occupancy or final approvals for the project;

(2) It is the responsibility of any person, corporation or other entity doing any act on or across a communal stream watercourse or swale, or upon the floodplain or right-of-way thereof, to maintain as nearly as possible in its present state the stream, watercourse, swale, floodplain, or right-of-way during such activity, and to return it to its original or equal condition

ANALYSIS:

This section sets forth the responsibility of the applicant/property owner to remove sedimentation from all adjoining surface and drain systems prior to issuance of occupancy or final approvals of the project. In the instant case, it is clear that the applicant performed substantial grading and excavation work on the site without an approved HDP permit. That is an ordinance enforcement

issue. Multnomah County gave the applicant the opportunity to apply for a permit to obtain approval for work done and for any necessary additional work. At this point in the process, the majority of the work that remains to be done is corrective work as the result of negative impacts to adjoining properties resulting from the work performed without a permit. As the result of the clearing, excavation and grading activities some sedimentation has occurred on adjoining properties. In addition, as the result of excavation work there has been slumping onto the Perry property. Construction of a rock wall has resulted in encroachments on both the Perry and Marquard property. In constructing the driveway access to the parcel, the applicant has encroached upon the Tindall property. It is the applicant's responsibility to rectify these encroachments and appropriate conditions will be imposed pursuant to the following implementation section as a prerequisite to applicant obtaining a building permit to construct a house on the subject property.

(C) Implementation

(1) Performance Bond - A performance bond may be required to assure the full cost of any required erosion and sediment control measures. The bond may be used to provide for the installation of the measures if not completed by the contractor. The bond shall be released upon determination that the control measures have or can be expected to perform satisfactorily. The bond may be waived if the Director determines the scale and duration of the project and the potential problems arising therefrom will be minor.

(2) Inspection and Enforcement. The requirements of this subdistrict shall be enforced by the Planning Director. If inspection by County staff reveals erosive conditions which exceed those prescribed by the Hillside Development Permit or Grading and Erosion Control Permit, work may be stopped until appropriate correction measures are completed.

ANALYSIS:

This section deals with implementation of grading and erosion control standards through the imposition of the requirement of a performance bond. In the instant case, the property owner has undertaken significant grading and excavation work leading to erosion and slumping on adjoining properties without having a permit. The applicant has submitted evidence in this proceeding (Exhibit 111), indicating that his expenses, not including the property purchase, are in excess of $75,000. Much of this would be attributable to excavation and grading work performed without a permit. Elsewhere in this opinion a number of conditions have been imposed requiring the applicant herein to do significant

corrective work to remove encroachments, slumping, erosion and sediment problems on adjoining properties which have resulted from the applicant's unauthorized grading and excavation activities. Accordingly, this does appear to be an appropriate instance in which to require a performance bond. Subsection C(1) provides that a performance bond may be required to assure the full cost of any required erosion and sediment control measures. Some of the measures that are required exceed simple erosion control. In addition, much of the erosion has been caused by the unauthorized grading and excavation activity. To correct the encroachment problems caused by unauthorized grading and excavation additional grading and excavation work may be necessary which will lead to additional erosion. The initial paragraph of Section 11.15.6730 provides that: "Conditions of approval may be imposed to assure the design meets the standards".

Adjacent property owners expressed a number of concerns regarding the applicant's prior disregard for compliance with ordinance standards and a similar concern that applicant would not follow or adhere to any conditions imposed if he were to receive approval of the Hillside Development Permit. In addition, in points one and two of the Appeal Notice, the appellants question the applicant's good faith and veracity. While I do not find that there is a basis for ruling that the applicant was deliberately untruthful, there are significant concerns about the applicant's ability and willingness to faithfully comply with all ordinance requirements. Accordingly, I find that in the instant situation it is appropriate to impose a requirement of a Performance Bond, which would assure payment of the full cost of any required erosion and sediment control measures as well as the full cost of all restoration measures and conditions imposed in this order. Accordingly, I find that the applicant herein shall post a Performance Bond in an amount not less than $50,000 to assure performance of all conditions imposed herein related to erosion control, engineering evaluations and inspections, construction and/or reconstruction of retaining walls, removal of encroachments and excavating and grading work to be done in conformance with the specifications, requirements and conditions imposed herein. In the event that the engineering evaluation required in this order indicates that the cost of the remaining grading, excavation, erosion control and restorative work to be done exceeds $50,000, the applicant will be required to provide a Performance Bond in accordance with the greater amount.

(D) Final Approvals

A certificate of Occupancy or other final approval shall be granted for development subject to the provisions of this subdistrict only upon satisfactory completion of all applicable requirements.

3. Goal 5 Compliance/Applicability of West Hills Reconciliation Report

In September of 1994, Multnomah County adopted the "West Hills Reconciliation Report" which is considered an amendment to the Multnomah County Comprehensive Framework Plan. The Reconciliation Report consists of both findings and policy recommendations. The policy recommendations were not yet separately incorporated into the Comprehensive Framework Plan as of the date of this application, nor had the report yet been acknowledged by LCDC. However, pursuant to ORS 197.625(3)(a), this unacknowledged but adopted Comprehensive Plan provision is effective for purposes of this application, because no stay has been granted under ORS 197.845. Accordingly, the West Hills Reconciliation Report will be applied in this matter as a general guideline.

(A) Wildlife

The subject tract is part of the West Hills area of Multnomah County that has been designated a significant Goal 5 wildlife habitat area in the reconciliation report. The report contains a Goal 5 ESEE Analysis that discusses the various conflicting uses relative to the wildlife habitat. Ultimately, the plan adopts a balanced approach which limits, but does not prohibit, conflicting uses in order to protect wildlife habitat. Accordingly, under the provisions of the plan, residential use is a "conflicting use" which is allowed in the areas where significant wildlife habitat exists. The approach of the report is to protect the resources by imposing conditions which minimize impact upon the wildlife resources.

The West Hills Reconciliation Report indicates that different standards are necessary for protection of primary, secondary and impacted wildlife habitat areas. The subject site includes a significant Goal 5 wildlife habitat area classified as impacted wildlife area for the reasons set out in the West Hills Reconciliation Report at pages V-3 through V-16. Specific measures to protect impacted wildlife habitat areas in the West Hills are at pages VI-25 and VI-26 of the reconciliation report.

* **Where a parcel to be developed contains both secondary and impacted wildlife habitat areas, development activities should be limited to the impacted areas to the maximum extent feasible.**

* **Fencing should be prohibited along roadways, thus reducing barriers to wildlife movement. Design standards for fences outside of the "cultivated" area discussed below should be adopted which ensure that fences do not block passage for a wide range of wildlife species.**

* **New development activities should be located on existing cleared areas of the site to the maximum extent feasible. Existing forested areas should be maintained consistent with approved forest management practices.**

* **Certain introduced vegetation should be prohibited (e.g., English Ivy, Vinca, and other invasive species), even in cultivated areas.**

* **Erosion control standards should be adopted where there will be prolonged exposure of soils, or excavation, associated with residential development.**

* **Development along significant streams should be regulated as proposed in the discussion of streams.**

ANALYSIS:
The first protective measure listed above is actually inapplicable since the subject tract is entirely within an area designated as impacted wildlife habitat. Since all of the development activities will only be in impacted areas no specific "limits" are necessary.

The second protective measure listed above will be met by imposing a condition that no fencing shall be permitted along roadways. The condition shall apply to both County maintained roadways and private access drives.

A substantial portion of the property has already been cleared. Confining additional grading and development activities to the locations described in the site plan and to the work necessitated as a result of conditions imposed herein, will limit development activities to existing cleared areas of the site to the maximum extent feasible.

The fourth protective measure will be implemented through a condition prohibiting the introduction of invasive plant specifies in cultivated areas. The fifth protective measure listed above provides that erosion control standards should be adopted where there will be prolonged exposure of soils or excavation associated with the residential development. The preceding discussion relating to erosion control standards and the conditions imposed pursuant thereto does address the issues raised by this protective measure.

The measures relating to streams will be discussed in the following section of this order.

The appellants have pointed out accurately that the applicant submitted his application for this permit on the day before Multnomah County's adoption of stricter environmental provisions took effect. The appellants would like to have the County impose the stricter standards. At the hearing on this matter several parties expressed a number of sincere concerns regarding the environmental issues that would need to have been answered under the more stringent standards. However, ORS 215.428(3) provides that:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted, 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."

Accordingly, the County must apply the standards that were in effect at the time the application was submitted. The applicant has an absolute statutory right to have his application reviewed under the standards that were in effect as of the date he submitted his application.

Similarly, in point four of appellant's Notice of Appeal, the appellant comments on and questions the habitat quality evaluation given by A.G. Crook. However, irregardless of that independent evaluation, the fact remains that the West Hills Reconciliation Report indicated that the property in question was within an area designated "impacted" and that designation was made before the applicant herein ever owned the property. Accordingly, I do find that the standards of the West Hills Reconciliation Report (September 19, 1994) are relevant to the decision in question today as guidelines that should be addressed. Accordingly, I find the project herein to be in conformance with the above-mentioned guidelines subject to the conditions imposed herein.

(B) Streams

The subject site is within a significant Goal 5 stream resource area, as determined by the West Hills Reconciliation Report (September 1994). The designated level of protection for the significant streams in the West Hills area is 3C - Limit conflicting resources. The plan proposes that residential uses will be allowed, and that standards for protection of stream resources should consider erosion control, native vegetation maintenance and enhancement and fish and wildlife maintenance and enhancement for any of the conflicting uses proposed for development within the riparian zone.

The plan further contemplated the placement of an overlay zone similar in concept to the Significant Environment Concerns overlay currently within the Multnomah County Zoning Ordinance. The plan also contemplated that at the time the overlay zone was proposed, it would be for an applicant under the SEC provisions to provide evidence as to more precise boundary of the riparian zone on the property because of the generalized nature of the stream study. However, as of the date of this application, no such overlay zone was effective. Accordingly, this application will be reviewed utilizing the following protection measures listed in the West Hills Reconciliation Report as guidelines:

* **Maximum provision of landscaped area, scenic and aesthetic enhancement, open space, or vegetation between any use and a stream.**

* **Preservation of agricultural and forest land adjacent to streams for farm and forest use.**

* **Building, structure, or use located so as to best preserve and protect the riparian zone area**

* **Minimum conflict between recreational uses and the riparian zone area**

* **Protection of public safety and private property from vandalism and trespass to the maximum extent practicable considering environmental values of the riparian zone**

* **Protection and enhancement of opportunities for fish and wildlife to live and travel through the riparian zone.**

* **Protection and enhancement of natural vegetation along streams**

* **Retention of areas of annual flooding and wetlands in their natural state**

* **Limit development to portions of a site located away from steep slopes, soils, and other unstable geological conditions**

* **Protection of areas within and adjacent to the riparian zone from erosion**

* **Regulation of construction practices and schedules in order to minimize erosion into streams from water runoff and soil erosion**

* **Minimization of impervious surface area in order to reduce pollution of stream waters**

* **Do not allow expansion of the Angell Brothers quarry site any further into the watershed of the "North Angell Brothers" stream than is currently approved**

* **Provide for a minimum setback from the ordinary high water mark of each stream which will protect the stream's resources.**

ANALYSIS:

The property in question is east of the Rock Creek south tributary number VI, a stream which is designated as a 3C resource, which is on the Tindall property. There is also a stream that is not recognized in the West Hills Reconciliation Report that appears to be on the Marquard property (see Exhibit 104).

The applicant has submitted information through his representative, A.G. Crook Company that the proposed house and garage are located as far as possible from the resource stream, taking into consideration the topographic restrictions of the property. The only use that is adjacent to the stream is the access driveway. The driveway was located over the pre-existing logging roads that were on the property. The applicant's representatives also indicated that locating the driveway further from the stream would have required additional grading of the site, which additional grading would likely have resulted in greater overall adverse impact to both wildlife habitat and the stream itself.

During the course of the hearing there was discussion regarding the appropriate placement of the septic system. Some of the evidence regarding the appropriate and/or approved location for the septic system appears to be in conflict. See Exhibits Y, Z, AA, BB and 108. Exhibit AA, a letter from Jason Abraham, environmental soil specialist for the County, indicates that a tentative plan to place a sand filter drainfield to the west of the proposed house has been tentatively approved. That letter also indicates that the site would be over 100 feet from the spring and would drain to the west of the house. It appears that such a location would be in close proximity to the house and yet would not negatively impact the streams. The letter indicates that the site would be preferable to a site near Germantown Road. Accordingly, if it appears that the upper site, is the more appropriate place for the location of the septic drainfield, the applicant will be allowed to revise his plans to site the septic system accordingly. The plans will be subject to review and approval by the County. If the septic system is located a the upper site, to the west of the proposed residence, the applicant will submit a revised planting and revegetation plan for approval by the County.

The applicant will be required to enhance the riparian zone by planting native vegetation which will also serve to help prevent erosion.

In reviewing the protective measures listed above, the goal is not to apply these measures so as to prohibit development. Rather, these measures should be used to determine the most appropriate location size and scope of the proposed development in order to make the development compatible with the purposes of this report. Accordingly, I find the project herein if developed in accordance with the conditions imposed herein to be in conformance with the above-referenced guidelines.

CONCLUSION

Based on the findings and the substantial evidence in the record, I conclude that this application for a Hillside Development Permit to allow the construction of a driveway and single family dwelling, if developed in accordance with all specified conditions herein should be approved. Accordingly, the appeal is denied and the issuance of the permit is approved, as modified, subject to all conditions imposed herein.

IT IS SO ORDERED, this 22nd day of March, 1996.

JOAN M. CHAMBERS, Hearings Officer

NOTICE OF APPEAL - ITEM 7

POINT 1. APPLICANT, ANTHONY MARIS, HAS KNOWINGLY SUBMITTED FALSE OR INCOMPLETE INFORMATION (eg. GEOTECHNICAL RESOURCES INC. DATED OCTOBER 5, 1995 AND A.G. CROOK REPORT DATED OCTOBER 1995), ALONG WITH HIS REQUEST FOR HILLSIDE DEVELOPMENT PERMIT.

THE MAIN POINT IS THAT MARIS, NOT A PRIOR OWNER OF TWO YEARS, HEAVILY LOGGED OVER THE PARCEL AND IMMEDIATELY BEGAN A PROGRAM OF EXCAVATION OF THE LAND IN PREPARATION OF ACTUAL BUILDING, WITHOUT ANY OF THE REQUIRED PERMITS.

THE PRESENT CLEARCUT APPEARANCE AND WHOLLY DISTURBED NATURE OF THE SITE IS RECENT. BY RECENT, WE MEAN JUNE/JULY OF 1995. NOT 1993 AS REPEATEDLY STATED AS FACT IN ABOVE REPORTS. SEE COPIES OF AERIAL PHOTOGRAPHS ATTACHED. THE FIRST PHOTO, DATED JUNE 1992, CLEARLY SHOWS A DENSELY FORESTED PARCEL. THE SECOND PHOTO, DATED JULY 1994, SHOWS A SMALL AREA NEAR THE TOP OF THE MARIS PARCEL WHICH HAD BEEN CLEARED BY DIRK KNUDSEN IN THE FALL OF 1993 FOR A PROPOSED HOMESITE. SEE ATTACHED COPY OF LOGGING PERMIT DATED SEPTEMBER 1993. THE EVIDENCE OF REMOVAL OF 30 TREES APPEARS IN THE JULY 1994 PHOTO.

A SUBSEQUENT OWNER, DANIELSEN, DID NOT FURTHER REMOVE ANY TREES. DANIELSEN SOLD THE LAND IN JUNE OF 1995 TO MARIS.

THE LAST LOGGING PERMIT THAT THE OREGON DEPARTMENT OF FORESTRY HAS ON FILE IS THE ONE PROPERLY TAKEN OUT BY KNUDSEN ON 8/30/93. WHAT THIS INDICATES IS THAT A LOGGING OPERATION WAS CONDUCTED ON THE PROPERTY AND TREES REMOVED OFFSITE ILLEGALLY.

A HILLSIDE DEVELOPMENT PERMIT IS REQUIRED PRIOR TO SUCH CLEARING.

POINT 2. ON JULY 23RD, 1995, MARIS WAS PERSONALLY (LATER BY WRITING IN VARIOUS LETTERS) MADE AWARE OF THE EXISTENCE OF A "YEAR-ROUND" SPRING/CREEK LOCATED APPROXIMATELY 60 FEET FROM THE MARIS DEVELOPMENT. THIS FACT IS TOTALLY OMITTED IN BOTH REPORTS SUBMITTED AS PART OF HIS APPLICATION.

THE SPRING/CREEK IS LOCATED ON THE MARQUARD PROPERTY (TAX LOT #12, EAST OF THE MARIS PARCEL). THE WATER FROM THIS SOURCE HAS HISTORICALLY BEEN THE ONLY WATER SOURCE FOR THE SINGLE FAMILY RESIDENCE THAT WAS LOCATED THERE.

UNDER PROVISIONS OF GOAL 5 COMPLIANCE / STREAMS, THE SUBJECT SITE ACTUALLY EFFECTS TWO, NOT ONE AS REPORTED, STREAMS. FURTHER STUDY IS REQUIRED TO SPECIFY MEASURES PERTAINING TO PROTECTION OF BOTH STEAMS, ONE OF WHICH HAS BEEN A DOMESTIC WATER SOURCE.

THERE IS A STONE/BOULDER RETAINING WALL THAT THE APPLICANT HAS BUILT ALONG THE SOUTH AND EAST PORTION OF HIS LAND. THE WALL, NEARLY EIGHT FEET IN HEIGHT IN PORTIONS, HAS PARTIALLY CRUMBLED AND THE QUESTION IS WHETHER IT IS STRUCTURALLY SOUND. SEE ATTACHED COPIES OF PHOTOGRAPHS. THERE IS A REAL SAFETY CONCERN. THE WALL WILL NEED AN ENGINEERS REVIEW, ESPECIALLY IN LIGHT OF THE RECENT HEAVY RAIN FALLS.

THERE IS A CONSIDERATION RELATING TO THE LOCATION OF THE SPRING/CREEK AND THE APPROVED SITE PROPOSED FOR THE DEVELOPMENTS SEPTIC FIELD. A SET-BACK OF 100 FEET IS REQUIRED FOR SEPTIC FIELDS FROM WATER SOURCES WHICH ARE OR HAVE BEEN USED FOR DOMESTIC WATER SUPPLIES.

THE PRIOR APPROVAL FOR SEPTIC LOCATED THE SEPTIC FIELD AT THE SITE OF THE PRESENT PLAN'S HOUSE. MARIS HAS UNILATERALLY, APPARENTLY, RELOCATED THE SEPTICS DRAIN FIELD AT A CONSIDERABLE DISTANCE CLOSE TO GERMANTOWN ROAD AND HIS DRIVEWAY ENTRANCE. SEE WEST HILLS RURAL AREA PLAN - POLICY 13.

GOAL 5 SPECIFIC MEASURES PERTAINING TO STREAMS NEED TO BE REVIEWED IN LIGHT OF THE FACT THAT THE PROPERTY WAS CLEARED AND EXCAVATED ONLY IN THE LAST FEW MONTHS. THIS PUTS A DIFFERENT INTERPRETATION ON ALL THE FOLLOWING POINTS:

a. MAXIMUM PROVISION OF LANDSCAPED AREA, SCENIC AND AESTHETIC ENHANCEMENT, OPEN SPACE, OR VEGETATION BETWEEN ANY USE AND A STREAM.
b. PRESERVATION OF AGRICULTURAL AND FOREST LAND ADJACENT TO STREAMS FOR FARM AND FOREST USE.
c. BUILDING, STRUCTURE, OR USE LOCATED SO AS TO BEST PRESERVE AND PROTECT THE RIPARIAN ZONE AREA.
d. PROTECTION AND ENHANCEMENT OF OPPORTUNITIES FOR FISH AND WILDLIFE TO LIVE IN AND TRAVEL THROUGH THE RIPARIAN ZONE.
e. PROTECTION AND ENHANCEMENT OF NATURAL VEGETATION ALONG STREAMS.
f. LIMIT DEVELOPMENT TO PORTIONS OF A SITE LOCATED AWAY FROM STEEP SLOPES, SOILS, AND OTHER UNSTABLE GEOLOGICAL CONDITIONS.
g. PROTECTION OF AREAS WITHIN AND ADJACENT TO THE RIPARIAN ZONE

FROM EROSION.

h. REGULATION OF CONSTRUCTION PRACTICES AND SCHEDULES IN ORDER TO MINIMIZE EROSION INTO STREAMS FROM WATER RUNOFF AND SOIL EROSION.

GOAL 5 SPECIFIC MEASURES ALSO NEED TO BE REVIEWED CONCERNING WILDLIFE HABITAT. THE SITE APPARENTLY IS CLASSIFIED AS "IMPACTED WILDLIFE AREA". IF THAT MEANS THAT ESSENTIALLY THE ENTIRE 1.73 ACRE PARCEL, WITH THE EXCEPTION OF A VERY FEW TREES, CAN BE CLEARCUT AND VIRTUALLY THE ENTIRE STEEP SLOPE GRADED DOWN TO BARE SOIL - THEN SOMETHING IS TERRIBLY WRONG. SPECIFICALLY:

a. WHERE A PARCEL TO BE DEVELOPED CONTAINS BOTH SECONDARY AND IMPACTED WILDLIFE HABITAT AREAS, DEVELOPMENT ACTIVITIES SHOULD BE LIMITED TO THE IMPACTED AREA TO THE MAXIMUM EXTENT FEASIBLE.

b. NEW DEVELOPMENT ACTIVITIES SHOULD BE LOCATED ON EXISTING CLEARED AREAS OF THE SITE TO THE MAXIMUM EXTENT FEASIBLE. EXISTING FORESTED AREAS SHOULD BE MAINTAINED CONSISTENT WITH APPROVED FOREST MANAGEMENT PRACTICES.

c. EROSION CONTROL STANDARDS SHOULD BE ADOPTED WHERE THERE WILL BE PROLONGED EXPOSURE OF SOILS, OR EXCAVATION, ASSOCIATED WITH RESIDENTIAL DEVELOPMENT.

POINT 3. MARIS HAS APPLIED FOR THIS PERMIT ON THE VERY DAY BEFORE THE FULL IMPLEMENTATION OF THE STRICTER REQUIREMENTS OF MULTNOMAH COUNTY'S SIGNIFICANT ENVIRONMENTAL CONCERN (SEC) PROVISIONS TAKE EFFECT. IF HE WERE HELD TO THE NOW ACCEPTED STANDARDS, IT IS HELPFUL TO LOOK AT ONE POINT THE APPLICANT MAKES AS PART OF THE SUPPORTIVE REPORTS HE SUBMITTED. FOR EXAMPLE, SEC # 11.15.6426. CRITERIA FOR APPROVAL OF SEC-h PERMIT WILDLIFE HABITAT.

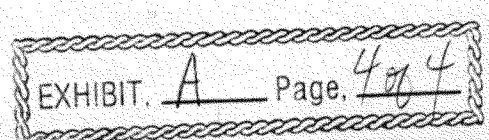
IN ADDRESSING 11.15.6426 (3)(a)(ii), MARIS' REPORTS STATE "ACCESS ROAD IS 500 FEET IN LENGTH". PLEASE REFER TO BOTH THE GRI REPORT FIGURE 2 AND CROOK REPORT FIGURE 5. THE CROOK REPORT UTILIZES THE SAME SITE PLAN AS THE GRI REPORT, WITHOUT HOWEVER, THE SIZE SCALE INDICATION. USING THE SCALE PROVIDED WITH THE GRI REPORT, DRIVEWAY LENGTH WOULD RANGE FROM APPROXIMATELY 600 FEET, TO NEARLY 980 FEET, DEPENDING ON WHETHER OR NOT ONE INCLUDES ALL THE ACCESS ROAD/DRIVEWAY THAT MARIS HAS NOW PUT IN.

THE PROPOSED DEVELOPMENT DOES NOT SATISFY (3)(a)(ii) AND MARIS

HAS NO, ITEM (b), WILDLIFE CONSERVATION PLAN. THERE ARE MANY OTHER PROVISIONS OF THE NEW CODES WHICH COULD BE NOTED, BUT APPARENTLY DO NOT APPLY TO THIS APPLICANT DUE TO HIS MAKING HIS APPLICATION ON THE EXACT DAY THAT HE DID.

POINT 4. THE REPORT BY A.G. CROOK, DOCUMENTS A MODERATELY LOW VALUE OF 33 FOR EXISTING HABITAT QUALITY. SEE REPORT PAGES SEVEN AND THEIR CHART ENTITLED "WILDLIFE HABITAT ASSESSMENT". SMALL WONDER THAT THE MARIS PARCEL HAS EVEN A RATING OF 33, GIVEN WHAT HAS BEEN DONE TO IT SINCE JUNE 1995. YOU SHOULD CONSIDER THE PROBABLE SCORE VALUE IF THE SAME ASSESSMENT HAD BEEN DONE IN MAY OF THIS YEAR. USING THE CROOK REPORT, A VALUE OF 77 WOULD HAVE BEEN VERY ACCURATE, IF DONE PRIOR TO THE MARIS PROJECT. THIS WOULD PUT THE PARCEL IN THE HIGH VALUE CATEGORY FOR HABITAT. THE HIGHEST POSSIBLE SCORE, USING THEIR FIGURES, WOULD BE 98.

POINT 6. IN LIGHT OF THIS INFORMATION , APPROVAL OF HDP21-95, SHOULD BE REVERSED. APPLICANT HAS SHOWN A WANTON DISREGARD FOR BOTH THE TRUTH IN THIS APPLICATION AND THE PROCESS ITSELF. WE STRONGLY URGE A FULL REVIEW OF THE HISTORICAL FACTS AS THEY PERTAIN TO THE APPLICATION AND DENIAL FOR DEVELOPMENT AS CURRENTLY PROPOSED.



HILLSIDE DEVELOPMENT PERMIT NO. 21-95
EXHIBIT LIST
FEBRUARY 21, 1996

EXHIBITS

A. General Application
B. Notice of Violation - Dated September 27. 1995
C. Notice of Appeal -
D. Administrative Decision - Dated November 20, 1995
E. Hydrologist Report - Dated November 13, 1995
F. Geotechnical Evaluation - Dated October 5, 1995
G. Goal 5 Compliance Report - Dated October, 1995
H. Unauthorized Grading Letter - Dated December 8, 1995
I. Response to Unauthorized Grading Letter by Geotechnical Resources, Inc.
J. Copy of Slope Hazard Map Enlarged with Property Identified
K. Site Plan
L. Supplemental Staff Report For the January 17, 1996 Public Hearing
M. Letter from Jerry Renfro, Tualatin Valley Fire & Rescue
N. Building Permit Zoning Review Check List
O. Agency Contacts List
P. Fire Service Form
Q. Photograph of Maris Property
R. Photograph of Slumpage Along Driveway Retaining Wall
S.1-26 Photographs of Maris Homesite
T. Geotechnical Resources, Inc. Site Visit Report - Dated December 22, 1995
U. Maris Affidavit - Dated January 12, 1996
V. Geotechnical Resources, Inc. Meeting Record - Dated January 12, 1996
W. Mounted Site Plan Submitted at January 17, 1996 Hearing
X. A.G. Crook letter to John Rankin - Dated January 16, 1996
Y. Site Evaluation Report (LFS: 252-93) Dated October 29, 1993
Z. Site Evaluation Report (LFS: 252-93) Dated November 9, 1993
AA. Letter from City of Portland, Bureau of Buildings Regarding Septic System - Dated January 11, 1996
BB. Duplicate of Exhibit Z
CC. John L Jersey & Son, Inc. Invoice for Maris Residence
DD. Intended Use and Zoning Approval - Dated October 19, 1993
EE. TM Rippey's Retaining Wall Plan - Dated October 25, 1995
FF. Photographs submitted by ? showing tree cover
GG. List of Animal Species seen or heard September, 1995 through January, 1996
HH. Photographs Submitted Showing Trespass on Perry Property
II. Property Survey Showing Apparent Slippage Area for the Perry Property - Dated January 12, 1996

EXHIBIT B Page 1 of 3

Exhibit List, Continued.

JJ. Aerial Photograph of Maris Property - Dated June , 1992
KK. Aerial Photograph of Maris Property - Dated September 13, 1993
LL. Aerial Photograph of Maris Property - Dated July, 1994
MM. State of Oregon Department of Forestry Notification of Operation by Dirk Knudsen to Log 30-35 Fir Trees - Dated August 30, 1993
NN. View of Maris Parcel Showing Extent of Clearcut Taken 11/95
OO 1-6 Shows Clearing of Trees on Maris Property - Taken January 10, 1996
PP. Letter to Mr. Tony J. Maris from James Marquard - Dated July 25, 1995
QQ. Letter to Mr. Tony J. Maris from James Marquard - Dated August 7, 1995
RR. Letter to James and Elizabeth Marquard from John L Jersey & Son, Inc. - Dated October 31, 1995
SS. Letter to James and Elizabeth Marquard from John L Jersey & Son, Inc. - Dated November 3, 1995
TT. 1- 4 Photographs of Retaining Wall Adjacent to Marquard Property - Taken November 19 & 26, 1995
UU. Invoices from WAC Corporation & Northern Light Studio for Aerial Photographs submitted by James Marquard
VV. Invoice from Sabbatta, Inc. for Landscaping to Repair Damage Done to Marquard Property

New Exhibits submitted between January 18 - February 14, 1996

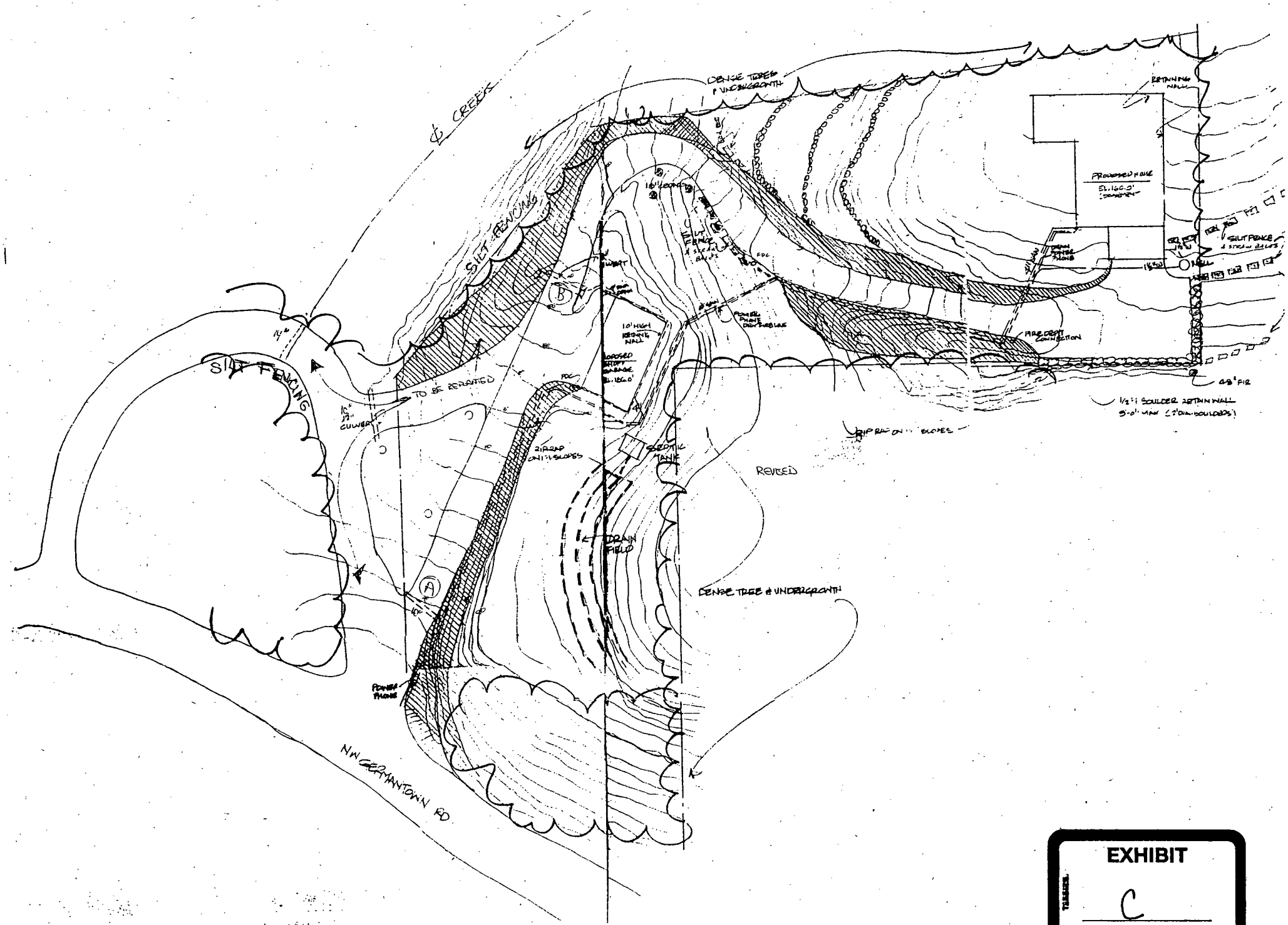
WW. Letter Survey Drawings from Benell Tindall Regarding Work Completed On His Property - Received February 9, 1996
XX. 1-12 Photographs of the Perry Property Majority - Taken in January, 1996
YY. List of Exhibits submitted by the Marquards - Received February 14, 1996
ZZ-1. Oregon Dept. Fish and Wildlife Sensitive Species: Red-Legged Frog
ZZ-2. U.S. Fish and Wildlife Service Ecological Service Federal List of Threatened, Endangered, Proposed and Candidate Species Within Oregon: Red-Legged Frog
101. West Hills Reconciliation Report: Stream Profile of South Rock Creek, Page III 120 - 122, 145, 51
102. Marquard Spring/Creek Photos
103. West Hills Reconciliation Report: Stream Significance Criteria, Page III-46A, 46B
104. USGS Map - Topographic Maps of Significant Streams/Germantown Area
105. Copy of Jersey Letter/Photos 11/3/95 to Marquard
106. Marquard Property: Plat Map Showing Spring/Reservoir/House. Photo of House
107. West Hills Reconciliation Report, Page V-8 Germantown Area Showing Close Mix of Secondary and Impacted Wildlife Habitat
108. Septic Approval Map: LFS 252-93 - Jason Abraham to Dirk Knudsen
109. Skyline West Conservation Plan 8/94 - Notes Vital Habitat for Red-Legged Frog, Page 29, 64-69
110. Cover Letter submitting additional information from Tony Maris - Received February 14, 1996
111. Updated Expense Summary for Maris Residence - Submitted by Tony Maris
112. John L. Jersey & Sons Invoice as of February 14, 1996

EXHIBIT B Page 2 of 3

Exhibit List, Continued.

113. Sketch added to John Summer's survey map for Pat Perry
114. Sketch added to John Summer's survey map for Pat Perry
115. a-o Photographs taken of the property after the recent flooding; Photographs were taken 2/12/96 per Mr. Maris
116. Additional Information for the Record Letter from A.G. Crook - Dated February 12, 1996
117. Tualatin Valley Fire & Rescue Letter - Dated February 14, 1996
118. Cancelled Check - T. Maris to J.L. Jersey & Co. work completed
119. John L. Jersey from Marquard (September 1, 1995)
120. Planting plan for Marquard
121. Letter - October 5, 1995 - J.J. & Sons & Marquard
122. Survey of driveway and rock wall encroachment onto Tindall property

EXHIBIT B Page 3 of 3


℄ CREEK
DENSE TREES & UNDERGROWTH
SILT FENCING
SILT FENCE
PROPOSED HOUSE
EL. 166.0'
RETAINING WALL
SILT FENCE
10' HIGH RETAINING WALL
PROPOSED ENTRY GARAGE EL. 166.0'
SEPTIC TANK
DRAIN FIELD
TO BE REMOVED
16" CULVERT
RIPRAP SIDE SLOPES
RIPRAP SIDE SLOPES
REVISED
FIRE DEPT CONNECTION
49' FIR
1½:1 BOULDER RETAIN WALL
5'-0" MAX (2' DIA. BOULDERS)
POWER POLE
NW GERMANTOWN RD

EXHIBIT

C

Meeting Date: APR 9 1996
Agenda No: P-3
Est. Start Time: 9:30

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: DeNovo Hearing in the Matter of an Appeal of Hearings Officer's decision on PRE 2-95

BOARD BRIEFING Date Requested:
Amt. of Time Needed:
Requested By:

REGULAR MEETING Date Requested: April 9, 1996
Amt. of Time Needed: 1.5 hours

DEPARTMENT: DES **DIVISION:** Transportation & Land Use Planning
CONTACT: Barry Manning **TELEPHONE:** 248-3043
BLDG/ROOM: 412 / 109

PERSON(S) MAKING PRESENTATION: Barry Manning

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

DeNovo Hearing in the Matter of an Appeal of Hearings Officer's decision on PRE 2-95.

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: KB Lane E. Kindred

BOARD OF COUNTY COMMISSIONERS
96 MAR 27 PM 4:00
MULTNOMAH COUNTY OREGON

MULTNOMAH COUNTY

BOARD HEARING of April 9,1996

CASE NAME: PRE 2-95: Appeal of Hearings Officer's Decision in the appeal of the Planning Director's Determination of Substantial Development

ACTION REQUESTED OF BOARD

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

1a. Appellant Name/Address:
Arnold Rochlin
P.O. Box 83645
Portland, OR 97283

1b. Applicant Name/Address:
Dan Mc Kenzie
6125 NW Thompson Road
Portland, OR 97210

2. Action Requested by Appellant:

Appellant (Mr. Rochlin) requests de novo review of the March 13, 1996 Hearings Officer decision which denied Mr. Rochlin's prior appeal of the Planning Director's Determination of Substantial Development.

3. Original Action Requested by Applicant:

Applicant (Mr. Mc Kenzie) requested Planning Director's Determination of Substantial Development for a single family dwelling and related accessory structures located at 6125 NE Thompson Road. The determination was appealed by Mr. Rochlin. Mr. Mc Kenzie subsequently motioned to dismiss the appeal filed by the appellant.

4. Hearings Officer Decision:

1. Deny the appeal and affirm the Planning Director's Decision.
2. Deny Mr. Mc Kenzie's (applicant) motion to dismiss the Rochlin appeal.

5. Planning Director's Decision:

Planning staff issued an affirmative Determination of Substantial Development on January 4, 1996. This decision was appealed to the Hearings Officer and heard on February 21, 1996.

6. If Director's Decision and Hearings Officer's Decision are different, why?

They are the same.

7. Issues:

Mr. Mv Kenzie originally obtained a Conditional Use Permit to develop a single family residence on property located at 6125 NW Thompson Road. A dwelling has been placed on the property, but the pro-

posed garage has not been built. The most controversial issue revolves around crossing the Thompson Fork of Balch Creek for access to the property. A bridge crossing was originally approved in CU 5-91, but a culvert/fill crossing was installed. The culvert/fill crossing was "permitted" under Board Final Orders dated August 1995.

MCC .7110(C) states that a Conditional Use expires two years from the date of issuance, or *two years from the date of final resolution of subsequent appeals*... The Parties continue to argue the date that all *related* appeals were resolved and the start of the two-year clock. PRE 2-95 determined that all related appeals were resolved in August/September 1995, because Final Orders issued in August 1995 were not appealed. Rochlin argued that CU 5-91 expired in 1993 because, among other issues, permits needed to complete the Conditional Use *as originally approved (i.e., with a bridge)* were not appealed. He also asserts that the deadline for filing an application for a Determination for Substantial Development was finally decided by LUBA in *Mc Kenzie v. Multnomah County*, which established April 26, 1993 as the final date for filing. The appellant questions whether PRE 2-95 was timely filed.

Please see attached statement from appellant.

8. Implications related to this case:

The Decision may impact the way that the Planning Director determines substantial completion. The Decision will also have bearing on whether Mr. Mc Kenzie has a legally established development.

ATTACHMENT TO NOTICE OF REVIEW

File No.: PRE 2-95 Determination of Substantial Development

8. *Grounds for Reversal of the decision:*

The decision wrongly fails to address issues required to be addressed by the Land Use Board of Appeals (LUBA) and the Court of Appeals in the remand of the county's earlier determination of substantial construction (CU 5-91a). Those issues are: Can the requirement of final design review approval be satisfied by a design review plan that was, in substantial part, not even submitted to the county until after CU 5-91 would have otherwise expired? Can the requirement be satisfied when the purported "final" design review approval was not finally approved by the county before CU 5-91 would have otherwise expired? How could a design review approval that, by its own terms, required amendment and further design review, be a "final" design review approval? *McKenzie v. Multnomah County*, 27 Or LUBA 523, 541-42, *Aff'd,* 131 Or App 177 (1994). Without addressing the remand issues, the decision wrongly concludes there is compliance with 11.15.7110(C)(3)(b)(i).

The decision implicitly and wrongly decides the county does not have to address the remand issues because the applicant withdrew CU 5-91a and filed a new application for exactly the same determination of substantial development. The decision does not address appellant's relevant claim that substitution of a new application for an old, does not change the law or the facts relevant to determination of substantial development in CU 5-91. It cannot relieve the county of the need to comply with the remand order.

The decision misstates appellant's contention that *McKenzie v. Multnomah County* finally decided "that the 2 year duration of CU 5-91 ended on April 26, 1993, for the purpose of determining timely application for vesting." (Exhibit 25, page 3) That was wrongly changed to "Appellant contends that McKenzie v. Multnomah County ... made a dispositive determination that the Conditional Use permit expired on 4/26/93." (Decision, page 9) Such an assertion would be absurd. LUBA remanded CU 5-91a, it did not reverse. But LUBA made determinations that the county is required to accept as the law of this case. Among them is that the application for determination of substantial construction filed on March 26, 1993 was filed "31 days before the two-year period expired on April 26, 1993." *I.d.* at 540. As a matter of law, the PRE 2-95 application, filed on December 19, 1995, is nearly 3 years late.

The decision misinterprets *McKenzie v. Multnomah County* as holding that CU 5-91 had not expired. (Decision, page 9). LUBA decided only that it had not expired for want of timely application for vesting. It held the CU 5-91a application was filed 31 days before CU 5-91 would have expired (2 days before the deadline). The part of the LUBA decision quoted by the Hearings Officer only describes a county determination in a decision that LUBA proceeds to review and remand. Had LUBA decided CU 5-91 had not expired, as the Hearings Officer says, the remand would have been irrational.

The provision of .7110(C) concerning subsequent appeals, is wrongly invoked to support a holding that expiration was delayed beyond two years from the final approval. CU 5-91 and necessary related permits HDP 4-91 and SEC 6-91 were never appealed. No permit necessary for implementing the conditional use, was appealed during the 2 years following finality of approval of CU 5-91. Only approval of optional amendments to the HDP and SEC permits, to allow a culvert instead of a bridge, was appealed during those 2 years. The decision correctly holds that expiration of a CU permit is tolled by appeals only when the appeals are of "land use decisions necessary to construct work under the conditional use permit, including all related and supplemental permits." But the decision does not explain how the decision in HDP 4-91a and SEC 6-91a, to allow the applicant's choice of a culvert instead of a bridge, was necessary to implement the CU permit. After correctly interpreting the regulation, the Hearings Officer wrongly addressed only whether or not the appealed permits were related to the CU permit, not whether they were necessary, and, they were not necessary.

It was wrongly decided that appeal of DR 14-93 tolled expiration. DR 14-93 was a design review decision issued on May 26, 1993, a month after the 2 years. The decision relies on its holding that appeal of HDP 4-91a and SEC 6-91a tolled expiration until August, 1993, to conclude that appeal of the design review in May, 1993 could continue the tolling of expiration. If the conclusion that appeal of HDP 4-91a and SEC 6-91a tolled expiration is wrong, then the decision is also wrong in failing to address appellant's relevant claim that appeal of DR 14-93, after the end of the 2 year CU duration, could not have tolled expiration.

The decision wrongly fails to address appellant's contention that because the applicant and the county did not claim in earlier proceedings on CU 5-91 and CU 5-91a, that expiration was tolled by appeals of other decisions, they are precluded from making that claim now. The issue of date of expiration was squarely before LUBA in *McKenzie v. Multnomah County*. All the appeals the decision now relies on had already been filed. There are no new facts that could not have been brought to LUBA's attention. An attempt to re-litigate a settled issue with a new argument should not be allowed when the argument could have been made in an earlier proceeding that reached a final decision.

The decision does not address appellant's challenge of the erroneous determination in the administrative decision that vesting was achieved by virtue of the development having been completed as approved. As the Hearings Officer characterizes the decision as "affirming administrative decision", it is not clear whether failure to address the issue is endorsement or rejection.

The decision wrongly concludes that the timeliness requirement of MCC 11.15.7110(C)(3)(a), that an application for vesting in the CU permit be filed at least 30 days before expiration, was met. It wrongly concludes that CU 5-91 (for a dwelling in a forest zone), did not expire in April, 1993, 2 years after final approval as provided by MCC 11.15.7110(C).

AR

HEARINGS OFFICER DECISION

This Decision consists of Conditions, Findings of Fact and Conclusions.

March 13, 1996

PRE 2-95 Appeal of an Administrative Decision

Appeal of an administrative decision which made a determination of substantial development for a single family dwelling and related accessory building permitted as a Conditional Use under application CU 5-91. The applicant filed a Motion to Dismiss the appeal.

Location: 6125 NW Thompson Road
Portland, OR 97210

Map Description: Tax Lot 1 of lot 37, Mountain View Park Addition 1

Zoning Designation: CFU, Commercial Forest Use

Applicant & Owner: Dan McKenzie
6125 NW Thompson Road
Portland, OR 97210

Appellant: Arnold Rochlin
P.O. Box 83645
Portland, OR 97283

Hearings Officer Decision:

Motion to Dismiss Appeal: Deny Motion to Dismiss appeal

Appeal of Administrative Decision: Deny appeal and affirm administrative decision, which made a determination of substantial development for a single family dwelling.

PROCEDURAL ISSUES

1. Impartiality of the Hearings Officer

A. No ex parte contacts. I did not have any ex parte contacts prior to the hearing of this matter. I did not make a site visit.

B. No conflicting personal or financial or family interest. I have no financial interest in the outcome of this proceeding. I have no family or financial relationship with any of the parties.

2. Jurisdictional Issues

At the commencement of the hearing I asked the participants to indicate if they had any objections to jurisdiction. The participants did not allege any jurisdictional or procedural violations regarding the conduct of the hearing. The applicant, however, did raise two other jurisdictional questions and filed a Motion to Dismiss the appeal on two grounds:

(A) Applicant contended that:

"Pursuant to MCC .8290(a) the decision becomes final in ten days unless the applicant files an appeal. Since the applicant has not filed an appeal, the decision has become final on 1/16/96, and the Hearings Officer lacks jurisdiction."

(B) Applicant further contended that:

"The person who filed the appeal, Arnold Rochlin, does not have standing as a party, was not entitled to notice under MCC .8220(C), and has not demonstrated that he is aggrieved nor adversely affected by the decision."

A. The right of appeal is not limited to the applicant.
MCC 11.15.7110(C)(3)(c) provides that notice of a planning director decision of determination of substantial construction or development shall be mailed to all parties as defined in MCC .8225.

Subparagraph d of Section .7110(C)(3) provides that the decision of the planning director shall become final at the close of business on the tenth day following mailed notice unless a party (emphasis added) files a written notice of appeal. Such notice of appeal and decision shall be subject to the provisions

of MCC .8290 and .8295. Accordingly, I find that any party has a right to appeal a decision of substantial development. The reference in the Conditional Use provisions to the notice of appeal being subject to the provisions of MCC .8290 and .8295 relates to the mechanics of filing the appeal and the procedure on appeal. Any limitations on who may file an appeal contained in MCC 11.15.8290 would not be applicable where MCC 11.15.7110(C)(3)(d) specifically gives broader appeal rights. Accordingly, I find that any party to the decision does have the right to appeal.

The applicant also argues that the application of PRE 2-95 is not an application for a "permit" as defined in ORS 215.402(4) and the right of appeal under ORS 215.416 does not apply here. However, this point is irrelevant since I have found that the Multnomah County Code itself provides the right for a party to appeal the Planning Director's decision. The State statutes provide minimum appeal rights. A local jurisdiction may grant more procedural safeguards to participants in the local land use process than those minimum rights mandated by State law. Thus, it is unnecessary to decide whether the provisions of ORS 215.416 would provide a right of appeal in the instant case.

B. Arnold Rochlin has standing as a party to the decision.

The applicant contends that Arnold Rochlin does not have standing to appeal a decision of the Planning Director because Mr. Rochlin has not demonstrated that he is aggrieved or adversely effected by the decision. MCC 11.15.8225 (A)(2) provides that persons can become parties by demonstrating at a hearing that they could "be aggrieved or have interests adversely affected by the decision."

The Multnomah County Code does not define the terms "aggrieved" or "adversely affected". These terms are substantially similar to terms found in State statutes. Absent a clear expression of intent to the contrary, where a local government adopts a requirement in terms substantially similar to a statutory provision, the local Code provision must be interpreted in the same fashion as the State statute. Joseph vs. Lane County, 18 Or LUBA 41, 51 (1989), O'Brien vs. City of West Linn, 18 Or LUBA 665 (1990).

The terms aggrieved or adversely affected are substantially similar to terms used in ORS 215.416 and 215.422. In interpreting these terms, Oregon courts have distinguished between adverse affect and aggrievement. In League of Women Voters vs. Coos County, 76 Or App 705 (1985), the Court of Appeals indicated that "the facts that Respondents have no geographic proximity to the area effected by the decision and that they can suffer no economic or non-economic harm are germane to whether or not they were adversely affected, not to whether they were aggrieved by the Planning Commission's decision."

supra at 711. In that instance, the Court found that the Respondents' long-standing interest in the "correct application of land use laws" was sufficient to establish they were aggrieved by the Planning Commission's rejection of the position they asserted.

In the instant case, the appellant, Arnold Rochlin, provided a statement indicating that he would be aggrieved by approval of the request for a determination of substantial development which he believed would be in violation of applicable land use laws and regulations. Accordingly, I do find that the appellant has met the applicable standard in demonstrating that he could be aggrieved by the decision of the Planning Director and that he does have standing to appeal the administrative decision in this matter.

C. Decision on Motion to Dismiss.

Accordingly, for the reasons state above, I find that the right to appeal an administrative decision of substantial completion is not limited to the applicant. A party to the proceeding may appeal the decision of the Planning Director. In the instant case, Mr. Rochlin has demonstrated that he could be aggrieved by the decision of the Planning Director and does have standing to appeal that decision. For these reasons, I deny applicant's Motion to Dismiss the appeal.

BURDEN OF PROOF

In this proceeding, the burden of proof is upon the applicant.

SCOPE OF APPEAL

A hearing before the Hearings Officer on a matter appealed under MCC .8290 shall be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal. The appellant's attachment to the Notice of Appeal stating the grounds for the appeal of the administrative decision is attached hereto as Exhibit "A" and is incorporated by this reference herein. The specific grounds raised by the appellant will be discussed in the body of this decision.

FACTS

1. Applicant's Proposal

Applicant requested that the Planning Director make a determination of a substantial development for a single family dwelling permitted as a conditional use under Conditional Use Application 5-91 in accordance with MCC .7110(C)(3). The Planning Director did determine that substantial construction or development had taken place on the subject property.

2. Procedural History

The procedural history of this application was detailed in the Board of Commissioner Findings 95-186, 95-187 and 95-188. This development has been the subject of multiple land use applications, including CU 5-91, CU 5-91a, SEC 6-91, SEC 6-91a, SEC 6-94, HDP 4-91, HDP 4-91a, HDP 56-94, DR 14-93, DR 14-93a. All concern a driveway which crosses the Thompson Fork of Balch Creek. Applicant Dan McKenzie (McKenzie) received three permits in 1991 covering the subject property - (1) CU 5-91, a Conditional Use (CU) permit for a dwelling; (2) HDP 4-91, a Hillside Development (HD) permit authorizing grading and construction associated with the development including an access drive off NW Thompson Road; and (3) SEC 6-91, a Significant Environmental Concern (SEC) permit approving an access drive with a bridge over the creek.

McKenzie later installed a culvert and fill crossing rather than a bridge and requested amendments to HD and SEC permits to allow the culvert and fill crossing (HDP 4-91a, SEC 6-91a). In July, 1993, LUBA issued a decision reversing the county's approval of SEC 6-91a and HDP 4-91a because the Board's motion for a rehearing was one day late.

In 1993 McKenzie sought approval of DR 14-93, a Final Design Review Plan for the non-resource dwelling allowed by Conditional Use permit (CU 5-91). In August, 1993, the Hearings Officer affirmed and modified the Director's decision on for DR 14-93.

A related application, CU 5-91a requested a determination that substantial development had taken place within two years of approval of CU 5-91.

In 1993, McKenzie and Arnold Rochlin (Rochlin) each appealed the Board decisions regarding DR 14-93 and CU 5-91a to the State Land Use Board of Appeals (LUBA). On July 21, 1994, LUBA remanded applications: DR 14-93 and CU 5-91a for reasons detailed in McKenzie v. Multnomah County, 27 Or LUBA 523 (1994). Rochlin and McKenzie challenged the LUBA ruling at the Oregon Court of Appeals. 131 Or App

177 (1994). The Court of Appeals affirmed the LUBA decision in an opinion filed November 2, 1994. The LUBA remand decision was to become effective December 21, 1994. It directed the County to clarify, correct, and complete certain procedures for the DR 14-93 and CU 5-91a applications. The application for CU 5-91a was withdrawn on December 13, 1994.

In May, 1993, before the LUBA decision on SEC 6-91a and HDP 4-91a, the Planning Director approved the "Final Design Review Plan" (DR 14-93). Rochlin appealed that decision to the Hearings Officer (representing a neighborhood association). In September, 1993, Rochlin appealed the HO decision to the Board on behalf of the neighborhood association.

On November 2, 1993, the Board issued Final Order 93-339 approving the Final design Review Plan with a condition that the plan be amended to include a bridge. the Decision stated that "the Final Design Review Plan satisfied applicable criteria only if modified to include a bridge rather than a culvert".

On October 6, 1994, Applicant submitted a joint application for land use permits HDP 56-94 and SEC 6-94. HDP 56-94 is an application for a Hillside Development permit to install a culvert and fill design. SEC 6-94 is a Significant Environmental Concern permit asking the County to vacate prior SEC decisions on the subject property because the subject property is not in an SEC zone. When the County failed to take action on applications HDP 56-94 and SEC 6-94 within 120 days after the applications became final, the applicant filed two petitions for alternate Writs of Mandamus, in Multnomah County Circuit Court. In each matter an Order Allowing a Petition for Alternate Writ of Mandamus was approved by the Circuit Court. In response to McKenzie's application and the Circuit Court Orders Allowing the Petitions for Alternative Writ of Mandamus, the Board of County Commissioners for Multnomah County issued Final Orders 95-186, and 95-187.

In Final Order 95-186, the Board approved McKenzie's application for a culvert fill crossing, finding compliance with all HDP criteria.

In Final Order 95-187, the Board vacated the Hearings Officer and Planning Director decisions with respect to SEC 6-91 and SEC 6-91a, based on the findings that the Thompson Fork of Balch Creek has not been classified as a Class I stream and has not been designated an area of significant environmental concern. Accordingly, the County Code did not require an SEC permit when the SEC 6-91 and SEC 6-91a applications were made. Orders 95-186 and 95-187 were approved on August 22, 1995.

On August 22, 1995, the Board of County Commissioners also approved Order 95-188, which granted approval of DR 14-93a an amended final Design Review plan for

the subject property. Order 95-188 modified the Board's prior Order 93-339 regarding applications DR 14-93 and CU 5-91a and approved a culvert rather than a bridge in the design.

3. Site and Vicinity Information

The subject property is a lot of record of three acres located on the east side of NW Thompson Road approximately 800 feet north of its intersection with NW Cornell Road. It is vegetated with a mixture of conifer and deciduous trees. The Thompson Fork of Balch Creek flows south near the west end of the property, approximately 50 feet from the NW Thompson Road frontage. the property abuts Forest Park to the north and east; the park boundary is about 200 feet to the north and 200 feet to the south of the culvert.

The culvert and fill work approved in Board Order 95-186 is located in a 50 foot wide access strip which connects the property to NW Thompson Road. The grading work is associated with development of vehicular access to the site for forest practices.

4. Testimony and Evidence Presented

A. During and prior to the Hearing and during the course of the Hearing on February 21, 1996, the following exhibits were received by the Hearings Officer:

(1) General Application Form
(2) Applicant's Narrative Statement
(3) MCC 11.15.7110, General Provisions of Conditional Use Code (Applicant's Attachment 1)
(4) Final Order 95-188: DR 14-93, 14-93a (Applicant's Attachment 2)
(5) Receipts & Invoices related to development of subject property (Applicant's Attachment 3a-k)
(6) Permit Receipt 93-8232, Re: erection of new 25x30 detached garage (Applicant's Attachment 4)
(7) Final Order 95-187: SEC 6-94
(8) Final Order 95-186: HDP 56-94
(9) PRE 2-95: Planning Director's Determination of Substantial Development
(10) Notice of Appeal of Administrative Decision (including one Attachment): PRE 2-95
(11) Applicant's Motion to Dismiss Appeal
(12) Applicant's Memorandum
(13) History of events

(14) Transcript of Portion of H.O. Meeting of July 19, 1993
(15) Planning Director Decision CU 18-90a
(16) Letter from Doug Ripley
(17) 10/11/93 Petition from Forest Park Neighborhood Association
(18) Portion of Hearings Officer's Decision SEC 6-91a, HDP 4-91a
(19) 1/17/95 Minutes of Forest Park Neighborhood Association Development Committee
(20) 12/27/94 correspondence from McKenzie to Rochlin
(21) Letter from Arnold Rochlin to BCC
(22) BCC Final Order SEC 6-91a, HDP 4-91a
(23) Memo from R. Scott Pemble, 8/17/92
(24) Portion of HO Decision SEC 6-91a, HDP 4-91a
(25) Letter from Rochlin to Hearings Officer, 2/14/96
(26) Applicant's Testimony
(101) Letter from Rochlin to Hearings Office, 2/14/96
(102) Rochlin: Appendix; 400+ pages
(103) LUBA opinion 93-019
(104) Rochlin: Basis of Entitlement to Status as a Party; 2/21/96
(105) Rochlin: Testimony to Hearings Officer, 2/21/96

B. Barry Manning testified for the County, summarized the history of the application and the administrative decision and subsequent appeal therefrom.

C. Mr. McKenzie, the applicant, submitted oral and written testimony and filed a Motion to Dismiss the appeal.

D. Arnold Rochlin, the appellant, submitted oral and written testimony.

FINDINGS

The parties to this proceeding have a long and voluminous history in regards to various development applications for this property. Over 500 pages of written materials have been submitted as evidence in this matter (PRE 2-95) alone. In the instant case, the appellant has raised a number of subissues. However, stated in its most basic terms, the ultimate decision that the appellant is asking the Hearings Officer to reach is that CU 5-91 expired prior to the applicant filing an application in PRE 2-95 and that therefore the standards of MCC 11.15.7110(C)(3) have not been met. In the administrative decision under appeal, the Planning Department interpreted the phrase "subsequent appeals" under MCC 11.15.7110(C) to mean "appeals of all land use decisions necessary to construct work under the conditional use permit, including all related and supplemental permits." Appellant contends that CU 5-91 was never

appealed and that other final decisions have previously determined that CU 5-91 would expire in April of 1993. Appellant has also contended that the requirement that final design review approval be received prior to expiration of the CU permit was not met, again arguing that the CU permit expired in 1993. In addition, the appellant contends that evidence in the record did not demonstrate that lawfully allowable and adequately documented expenses, incurred prior to the end of the two-year permit period, equal or exceeded ten percent (10%) of the total project value. The specific issues raised by appellant will be discussed in this opinion within the context of the ordinance criteria.

1. Did applicant file PRE 2-95 at least thirty days prior to the expiration date of CU 5-91?

Appellant's Argument Regarding the Law of the Case

Appellant contends that McKenzie vs. Multnomah County, 27 Or LUBA 523 made a dispositive determination that the Conditional Use permit expired on 4/26/93. The appellant has submitted substantial oral and written testimony arguing that position.

However, in the referenced case, LUBA succinctly restated what determination was actually made in the challenged decision. LUBA found "the challenged decision determines the previously approved Conditional Use permit for a non-forest building has not expired." 27 Or LUBA 523 at 537. LUBA upheld that decision and denied Rochlin's Assignment of Error. In upholding the decision of the Board, LUBA deferred to the Board's interpretation of MCC 11.15.7110(C) regarding the meaning of "the approval of a conditional use shall expire two years from the date of issuance of the Board of Commissioners' Order in the matter,". Neither the decision under appeal in CU 5-91a or the subsequent LUBA decision construed the section of the Multnomah County Code which we are concerned with herein.

In the matter currently under appeal, PRE 2-95, the County is construing the phrase "two years from the date of the final resolution of subsequent appeals". MCC 11.15.7110(C) provides in relevant part that "the approval of a conditional use shall expire two years from the date of issuance of the Board order in the matter, or two years from the date of resolution of subsequent appeals". There is an "or" separating the two clauses. The LUBA decision referenced above only affirmed and deferred to a Board interpretation of the first clause in this section. The interpretation of the Planning Director that is now in question is the determination that "subsequent appeals" means "appeals of all land use decisions necessary to construct work under the conditional use permit including all related and supplemental permits."

This interpretation of the Planning Director on appeal herein is in fact consistent with the Final Orders in 95-186, 95-187, and 95-188, in which the Board specifically found in each instance that the applications in question under each of those orders was related to a number of other applications in regards to the same property. I cannot accept the appellant's contention that LUBA has made a conclusive determination that CU 5-91 expired on April 26, 1993. Similarly, I find that the LUBA interpretation in question did not construe the portion of the Code language which is relevant to the interpretation that is being challenged in the instant matter. Accordingly, I find that no dispositive determination has been made that the permit for CU 5-91 expired on April 26, 1993.

Subsequent Appeals Extended the Expiration Date of CU 5-91

Appellant has contended that the appeals of decisions relating to Hillside Development permits and SEC permits did not extend the expiration date of CU 5-91. The appellant further contends that these decisions were not necessary to protect the applicant's legitimate opportunity to use the permit, rather they simply enabled the applicant to submit alternate and cheaper designs. However, I do not concur with the appellant's position.

It is clear that these permits are relevant to this application and the resolution of all issues relative to those permits were necessary for the appropriate implementation of the conditions of CU 5-91. As conditions of approval for CU 5-91, the applicant was required to satisfy the conditions of SEC 6-91 and to obtain a Hillside Development and Erosion Control permit. The County has interpreted "subsequent appeals" to mean appeals of all land use decisions necessary to construct work under the conditional use permit, including all related and supplemental permits. I find this to be a reasonable interpretation. Any other interpretation would be inconsistent with other provisions of the State Land Use Law. To hold otherwise would allow an appellant to "bifurcate" a decision by appealing only other permits mandated by the decision. For example, if a conditional use permit imposed a condition requiring other permits such as a SEC permit, the applicant might not be able to commence work on the property as authorized by the conditional use approval until the SEC permit was obtained. An appeal of an SEC permit could then take longer than the two years originally authorized by the conditional use permit. The conditional use permit would then expire without the applicant ever having had the opportunity to do any work under the conditional use permit. Such an interpretation or holding would be inconsistent with provisions such as ORS 215.416 which require a consolidated procedure for land use applications.

The County's interpretation that appeals of permits related to an application are considered a "subsequent appeal" is a reasonable interpretation. It is clear that the various rulings regarding SEC permits, Hillside Development permits and Design

Review are all clearly related to the Conditional Use permit decision in the instant case. The original Conditional Use permit required compliance with provisions of the SEC sections of the Multnomah County Code. However, as later determined by the Board of Commissioners in Final Order 95-187, an SEC permit was not required by the County Code when the applications were made.

Pursuant to ORS 215.428(3), approval or denial of an application shall be based upon the standards and criteria that were applicable at the time the application was first submitted. The subject property was not in an SEC zone and it should not have been subject to the requirements of an SEC permit or the SEC provisions of MCC. Accordingly, appeals and issues relevant to an SEC permit, which permit was required as a condition of CU 5-91, are relevant subsequent appeals. It was not until August 22, 1995 with the adoption of Final Order 95-187, an Order of the Board of Commissioners which vacated SEC 6-91 and SEC 6-91a on the grounds that those permits were not required, that those issues related to SEC conditions were resolved.

Similarly, CU 5-91 required that the applicant obtain a Hillside Development and Erosion Control permit. Subsequent decisions relating to a Hillside Development permit were appealed. On appeal, a June 16, 1992 Hearings Officer Decision found compliance with all HDP criteria but denied the HDP 4-91a application based upon four SEC permit criteria which were subsequently found to be inapplicable. Accordingly, decisions relating to the SEC provisions of the Ordinance also directly impacted the applicant's ability to comply with the requirement to obtain a Hillside Development permit.

Ultimately, on August 22, 1995, the Board of County Commissioners for Multnomah County entering a Final Order in the matter of 95-186, issuing a Hillside Development Permit to Dan McKenzie and in the matter of 95-187, entered a Final Order vacating SEC 6-91 an SEC 6-91a on the grounds that an SEC permit was not required by the County Code when the applications in question were made. Thus, these were "subsequent appeals" and the two year period limitation on the Conditional Use application which runs from the "final resolution of subsequent appeals" did not begin to run (at the earliest) until these Board Orders became final. Thus, those decisions which were not appealed did not become final until sometime in September, 1995, when the 21 day appeal period passed without an appeal being filed.

Appellant contends that even if appeals of HDP 4-91a and SEC 6-91a were held to have "tolled expiration", it would not help with the timeliness of the application. Appellant contends that the LUBA Order in Rochlin vs. Multnomah County, which dealt with HDP 4-91a and SEC 6-91a, was issued on July 22, 1993 and became final on August 12, 1993. Appellant contends that the two year duration would have ended on August 12, 1995. However, the application for DR 14-93, Design Review, was made on March 25, 1993 and the Planning Director issued a written decision on

May 26, 1993. That decision was appealed. Thus, on August 12, 1993 the time on which the LUBA Order in Rochlin vs. Multnomah County became final, there was also a pending appeal of a decision mandated by the Conditional Use permit. Accordingly, as of July 22, 1993, there had been no final resolution of all subsequent appeals, and the two year time period from "final resolution of all subsequent appeals" had not yet started to run.

For the reasons stated above, I found that the Planning Director's interpretation of subsequent appeals to mean "appeals of all land use decisions necessary to construct work under the conditional use permit including all related and supplemental permits" a reasonable interpretation and one that is consistent with the express words, purpose or policy of this section of the MCC. Accordingly, I find that in the case of CU 5-91 related permits include SEC 6-91, SEC 6-91a, SEC 6-94; HDP 4-91, HDP 4-91a, HDP 56-94; DR 14-93, DR 14-93a and CU-91a. Therefore, the earliest date on which CU 5-91 could expire would be a date two years after the date the Decision in Orders 95-186, 95-187, and 95-188 became final. Accordingly, I do find that the applicant filed a request that the Planning Director make a determination of substantial development on December 19, 1995, which application was made on appropriate forms and filed with the Director at least thirty (30) days prior to the expiration date of the Conditional Use permit in question.

2. Has the applicant met the criteria set forth in MCC 11.15.7110 (C)(3)(b)?

11.15.7110(C)(3)(b)(i) -
Final Design Review Approval has been granted under MCC .7845 on the total project. On August 22, 1995, the Multnomah County Board of Commissioners issued an order approving DR 14-93a, an amended final Design Review plan for this project. That decision became final 21 days after the Notice of Decision when no appeal was filed. Accordingly, I find that design approval granted in Order 95-188 became final in September of 1995, and that at the time of this application for determination of substantial development final design approval had been granted.

11.15.7110(C)(3)(b)(ii) -
At least ten percent (10%) of the dollar cost of the total project value has been expended for construction or development authorized under a sanitation, building or other development permit. Project value shall be as determined by MCC .9025(A) or .9027(A). Appellant has contended that evidence in the record does not show that lawfully allowed or adequately documents expenses incurred prior to the end of the two year permit equal or exceed ten percent (10%) of adequately and lawfully determined total project value. However, appellant further conceded that if the two

year duration of CU 5-91 was tolled by the appeal of the DR 14-93, then the facts and arguments on those issues must fail. However, it is still necessary to review the factual basis for the finding that at least ten percent (10%) of the dollar cost of the total project value has been expended for construction or development authorized under a sanitation, building or other development permit.

Project value shall be determined in accordance with MCC .9025(A) or .9027(A) Apparently .9027(A) has been repealed. Accordingly, Section .9025 would be applicable which section provides that project value shall be determined in accordance with the Uniform Building Code or as otherwise determined by the Director. In the instant case, the Director has determined that it is appropriate to use the Building Code valuations for the portion of the work that has not yet been completed, i.e., the garage, and to use the actual cost to determine the project values for the balance of the project. This approach appears to be reasonable and accordingly, I will use the same system in evaluating whether the development meets the ten percent (10%) test standard.

At the hearing, the applicant testified that in addition to the expenses listed in his memorandum submitted as Exhibit "2", which values were supported by other exhibits in the record, the applicant also incurred the expense of the $990.00 for skirting in the manufactured home. Accordingly, I am including that amount in the project value.

The appellant contends that the applicant's figures are insufficiently supported and include amounts for development not authorized under a permit, expenditures after April of 1993 and a total project value not adequately demonstrated.

As indicated above, I find the Planning Director's determination of project value to be reasonable under the facts and circumstances of this case. The applicant has submitted written documentation for his figures and has provided direct testimony in regards to items such as the skirting and the cost of the manufactured home. I find his testimony to be credible. The appellant further contends that the cost of materials for the culvert and fill should not be included because the work was done prior to obtaining a valid permit for the work in question. However, the point has little relevance, since even without those particular expenditures, the amount expended to date is far in excess of ten percent (10%) of the total project value. Accordingly, for purposes of making this decision, I will not include those expenditures within the approved expenditure amounts.

Expense Type	Project Value	Approved Expenditures
Septic system	$ 8,110.00	$ 8,110.00
Road work	$ 1,580.00	$ 1,580.00
Culvert cost	$ 1,443.20	$ 0.00
Culvert & road work	$ 2,854.86	$ 0.00
Geotechnical	$ 410.20	$ 410.20
Site preparation	$ 2,861.00	$ 2,861.00
Well	$ 8,619.00	$ 8,619.00
Well pump, plumbing, and pressure tank	$ 4,047.00	$ 4,047.00
Utility work	$ 2,248.54	$ 2,248.54
Landscaping	$ 300.00	$ 300.00
Foundation	$ 2,000.00	$ 2,000.00
House	$ 30,971.00	$ 30,971.00
Garage	$ 11,580.00	$ 0.00
Skirting	$ 990.00	$ 990.00
Total	$ 78,014.80	$ 62,136.74

Accordingly, based on the evidence in the record and the figures cited above, I find that ten percent (10%) of the total project value is $7,801.48. The total approved expenditures in the amount of $62,136.74 far exceed the ten percent (10%) project value. Accordingly, I find that the applicant has met the requirements of MCC 11.15.7110 (C)(3)(b)(ii).

CONCLUSION

Based on the findings and the substantial evidence cited or referenced herein, I conclude that the application for a single family home permitted as a conditional use under application CU 5-91 satisfies all applicable approval criteria. Accordingly, the Planning Director's determination of substantial development is affirmed and the appeal of that decision is denied.

IT IS SO ORDERED, this 12th day of March, 1996.

JOAN M. CHAMBERS, Hearings Officer

ATTACHMENT TO NOTICE OF APPEAL
ADMINISTRATIVE DECISION

File No.: PRE 2-95 Determination of Substantial Development

7. *Describe specific grounds relied on for reversal or modification of the decision:*

The Planning Director (Director) wrongly relies in part on DR 14-93, which was never finally approved. (DR 14-93a is not the same.)

The decision wrongly concludes that the timeliness requirement of MCC 11.15.7110(C)(3)(a) was met. It wrongly concludes that CU 5-91 (for a dwelling in a forest zone), did not expire in April, 1993, 2 years after final approval as provided by MCC 11.15.7110(C). The provision of .7110(C) concerning subsequent appeals is wrongly invoked to support a holding that expiration was delayed beyond two years from the final approval. CU 5-91 was never appealed. Whether or not the permit expired in 1993 remains a matter to be finally determined as required by prior final orders concerning DR 14-93 and CU 5-91a, which settled the expiration date, conditional only on resolution of particular issues not addressed in this decision. Issues required to be addressed in this case include, among others, whether or not approval of substantial construction in CU 5-91a could done before there was final design review approval, and, whether or not it could be based on a design review plan submitted after expiration of the 2 year period of duration of CU 5-91. The decision fails to establish that there is compliance with 11.15.7110(C)(3)(b)(i) which requires "Final Design Review approval" as a pre-requisite of vesting by substantial construction before actual expiration of the CU permit.

Concerning 11.15.7110(C)(3)(b)(ii), the conclusion that total project value is $76,553.80 is not supported by adequate findings or based on any substantial evidence identified in the decision. The decision wrongly allows expenditures made after the CU permit expired in 1993 as expenses toward the requirement of expenditure of 10% of total project value. Conclusions concerning amount of expenses are not supported by adequate findings based on substantial evidence identified in the decision.

Appellant does not waive the right to challenge compliance with any standards or criteria, or other requirements, not identified in the notice of decision dated January 4, 1996.

Daniel Kearns
January 14, 1996

EXHIBIT A Page 1 of 1

April 1, 1996

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
(503) 289-2657

Board of County Commissioners
c/o Planning Division
2115 S.E. Morrison St.
Portland, OR 97214

Testimony by appellant re.: **PRE 2-95** Determination of Substantial Development, for **hearing on April 9, 1996**.

Background and Summary of Argument

This case concerns whether or not the applicant has vested in CU 5-91, a conditional use (CU) permit for a dwelling in a forest zone. If not, the CU permit has expired. The governing regulations provide in relevant part:

11.15.7110(C) "... the approval of a Conditional Use shall expire two years from the date of issuance of the Board Order in the matter, or two years from the date of final resolution of subsequent appeals, unless:

"(1) The project is completed as approved, or

"(3) The Planning Director determines that substantial construction or development has taken place. That determination shall be processed as follows.

"(a) Application shall be ... filed with the Director at least 30 days prior to the expiration date.

"(b)(i) Final Design Review approval has been granted under MCC .7845 on the total project;"

The appeal concerns Part 1 of the decision, pages 9-12. Appellant challenges the determination of compliance with the requirements of (3)(a) and (3)(b)(i). (The decision does not address (C)(1).) There is no disagreement that the date of "issuance of the Board Order", was settled in 1993 by LUBA to be April 26, 1991. And, there is no dispute, that if the common 2 year duration of the CU were extended by "subsequent appeals", as provided by .7110(C), the application in PRE 2-95 would have been timely, and there would have been the required Final Design Review Approval." The dispute is over the county's position that the 2 year duration was extended by appeals of permits necessary for implementation of the CU.

There was only one county decision appealed during the two year period, and it was for permits demonstrably unnecessary for implementation of the CU permit. The appeal was of permits to allow the applicant to substitute a culvert for the already approved bridge access. The Planning Director and Hearings Officer have agreed that appeal of only a necessary permit can toll expiration. There can be no reasonable claim that it was necessary for the applicant to change the culvert permits to bridge permits.

Alternatively, for the purpose of deciding timeliness of an application for determination of substantial development (hereafter, "vesting"), the county has no authority to extend the

2 year duration beyond April 26, 1993, because LUBA decided that April 26, 1993, is the end of the duration for the purpose of determining if an application was filed "at least 30 days prior to the expiration date". As a matter of law, the application for Pre 2-95 filed in December, 1995, was over two years late.

LUBA remanded the county's prior approval of vesting, CU 5-91a. The order required the county to address specific issues concerning compliance with the approval criteria. Instead of addressing those issues, the applicant and county sought to avoid them, by withdrawal of the application in CU 5-91a and filing a new application designated PRE 2-95. The ploy does not affect the issues on remand. The county is required to address those issues, however it packages the decision. The effect of the reapplication is only to put the application date after expiration of the CU permit.

These issues are discussed in more detail, after review of the case history. The following is from LUBA's statement of facts in *Rochlin v. Multnomah County*, 25 Or LUBA 637 (1993):

> "In 1991, the applicant obtained three permits covering the subject property: (1) a conditional use permit [CU 5-91] for a dwelling, (2) a HD permit [HDP 4-91] to allow the construction of a bridge and driveway on slopes in excess of 20%, and (3) a SEC permit [SEC 6-91] to construct a bridge to provide access to the dwelling. However, the applicant did not construct a bridge crossing. Rather, the applicant constructed a culvert and fill crossing over the stream. Thereafter, the applicant requested permission to modify the HD and SEC permits, to allow the culvert and fill crossing. The planning department approved the request [HDP 4-91a and SEC 6-91a], and petitioner appealed to the hearings officer. The hearings officer reversed the decision of the planning department and denied the request. The applicant appealed the hearings officer's decision to the board of commissioners.
>
> "Before the board of commissioners, a motion was made to approve the request. However, that motion failed due to a tie vote (denial). The board of commissioners conducted a rehearing on the matter and, on rehearing, determined that a SEC permit is not required, and approved the request for a modification of the HD permit to allow the culvert and fill crossing. This appeal followed."

The following additional facts are from *McKenzie v. Multnomah County*, 27 Or LUBA 523, *Aff'd,* 131 Or App 177 (1994) (copies in Exh. 102, Appendix A):

> "We reversed the decision challenged in Rochlin I [*Rochlin v. Multnomah County, supra*] because under the county code, the board of commissioners lacked authority to adopt that decision. As we explain below, this had the effect of restoring the original, unmodified SEC and HD permits. While Rochlin I was pending before this Board, the planning director granted design review approval [DR 14-93] based on the board of commissioners' decision modifying the HD permit and determining that an SEC permit is unnecessary. The planning director also determined that substantial construction occurred [CU 5-91a] and, therefore, the conditional use permit for a nonforest dwelling had not expired, notwithstanding the passage of time. An appeal of the planning director's decision was filed with the county hearings officer. While the local appeal before the county hearings officer was pending, we issued Rochlin I. The hearings officer considered the design review appeal in light of Rochlin I, and affirmed the design review decision, but added an additional condition of approval requiring the applicant to comply with the SEC and HD permits as originally granted or subsequently amended. The hearings officer

also affirmed the planning director's decision that substantial construction has occurred and that the conditional use permit remains valid. The hearings officer's decision was appealed to the board of commissioners. The board of commissioners affirmed the hearings officer's decision, but amended the condition of approval to require the submittal of an amended design review plan, which would include a bridge crossing, and also to require review of the amended design review plan under Multnomah County Code (MCC) 11.15.7840 to 11.15.7845. These appeals followed."

McKenzie v. Multnomah County decided consolidated appeals by McKenzie and Rochlin. McKenzie's assignments of error were denied. Four of Rochlin's assignments of error were sustained. Of those, only one, the fifth, is significant here. It claimed that the final design review pre-requisite for Determination of Substantial Construction had not been achieved.

Rochlin's fourth assignment of error was denied. It claimed that the county erred in determining that the 2 year period allowed for duration of McKenzie's CU permit ended on April 26, 1993. It is decisive in this case, that in denying Rochlin's claim, LUBA expressly affirmed the county's determination, with all of its reasoning, facts and conclusions, that the 2 year duration of CU 5-91 ended on April 26, 1993, for the purpose of determining timely application for vesting.

From the Court of Appeals affirmation on November 2, 1994, until August, 1995, the county neglected the remand order. McKenzie had filed 2 more applications. On October 6, 1994, he applied for HDP 56-94, again seeking approval of the culvert and fill crossing and for SEC 6-94, to vacate SEC 6-91 which had specified a bridge crossing. Then, on March 17, 1995, he filed for DR 14-93a, a new Final Design Review application for the complete project with a culvert and fill crossing. (Exh. 102 B 51, 53, 55) The county neglected these three applications, allowing McKenzie, after 120 days, to apply for writs of mandamus, to which the county reacted without opposition, and with its own hasty approval of the three applications by Board Orders on August 22, 1995 (Numbers 95-186, 187 and 188, Exh. 102 B 1-19, 20-22, 23-37).

Of all the permits ever approved for the project, CU 5-91 (dwelling), SEC 6-91 (bridge), HDP 4-91 (bridge), HDP 56-94 (culvert), and DR 14-93/14-93a (design review 8/22/95) were never appealed. Only one decision was appealed during the 2 year duration of the CU. It approved two permits, SEC 6-91a and HDP 4-91a, which were requests only to change what was already an approved and practicable development proposal, to allow access by a culvert crossing instead of the approved bridge. DR 14-93, the Design Review application, was appealed, but for two reasons, that appeal could not have tolled expiration of CU 5-91. First, DR 14-93 had not been even initially approved by the Planning Director until May 26, 1993, a month after the April 26th expiration of the 2 year CU 5-91 permit. (Exh. 102 B 60-71) Second, the site plan the Director approved had not even been submitted to the Planning Division until May 5, 1993, 9 days after expiration of the CU permit. (Exh. 102 B 62)

Expiration of CU 5-91 - 11.15.7110(C) and .7110(C)(3)(a)

MCC 11.15.7110(C) provides for expiration of a conditional use in 2 years, counted from a "Board Order" or from resolution of appeals unless certain circumstances prevail, or certain requirements are met.

The Hearings Officer found the PRE 2-95 application was timely because the 2 year time was delayed by appeal of the application for a culvert and because during the time that

appeal was pending, there was an appeal of an application for design review which was not resolved until August, 1995. For reasons of fact and law, the hearings officer is wrong. The 2 year countdown began on April 26, 1991 and ended on April 26, 1993 and the 1995 PRE 2-95 application was late.

Law of the Case

The issue of when the 2 year duration began and ended was tried and decided in *McKenzie v. Multnomah County , supra* at 537-540. LUBA's holding applies specifically to CU 5-91, which is the same permit of which expiration is at issue in PRE 2-95. The decision in *McKenzie* is the law of CU 5-91 and of this case. After an extensive quote and discussion of the county's own position that the 2 year duration of the CU permit would have ended on April 26, 1993, were it not for the timely filing of an application for vesting, LUBA concluded its discussion as follows:

> "Under this interpretation [the county's in 1993], the planning commission decision approving the conditional use permit became final on April 26, 1992[1], ten days after it was received by the Clerk. Further, the applicant's request for a determination of substantial construction was timely filed on March 26, 1993, 31 days before the two-year period expired on April 26, 1993. Therefore, under MCC 11.15.7110(C)(3)(a), the conditional use permit has not expired if the planning director determines substantial construction occurred.[10] (underline added)
>
> "We are required to defer to a local government's interpretation of its own code unless the interpretation is contrary to the express words, purpose or policy of the enactment. ORS 197.829. In other words, we must determine the local government's interpretation is "clearly wrong" to justify reversal or remand of a challenged decision. *West v. Clackamas County*, 116 Or App 89, 94, 840 P2d 1354 (1992). We cannot say the challenged county interpretation is clearly wrong.
>
> "10 The substance of the planning director's interpretation is challenged in petitioner Rochlin's fifth and sixth assignments of error."
> *I.d.* at 540.

An issue that has been finally decided in one of a series of proceedings on the same substantive matter cannot be raised in the subsequent proceedings. LUBA has made this point many times, coincidentally in *McKenzie v. Multnomah County*. Concerning what had already been decided in *Rochlin v. Multnomah County, supra.* LUBA said:

> "* * * First, petitioner McKenzie seeks to challenge the correctness of our previous decision in *Rochlin I.* Petitioner McKenzie did not appeal our decision in *Rochlin I* to the Court of appeals and may not collaterally attack that decision in this appeal proceeding. * * *
>
> "Second, petitioner McKenzie argues the subject property is not within a SEC overlay zone and that the county erroneously required him to obtain the significant environmental concern (SEC) permit required for properties within the SEC zone.
>
> "In *Rochlin I, supra,* 26 Or LUBA at 638, we determined the subject property is within a SEC overlay zone. We may not revisit that determination here. *McKenzie v. Multnomah County, supra* at 528, citations omitted.)

[1] LUBA's reference to "1992" is a scrivener's error. 1991, when CU 5-91 was approved, was intended.

Rochlin v. Multnomah County concerned county approvals of SEC and HDP permits. *McKenzie v. Multnomah County* concerned different permits, Design Review and Determination of Substantial Construction. Because all concerned one development permit, CU 5-91, LUBA held that later decisions are governed by earlier determinations. Replacing CU 5-91a with PRE 2-95 will not annul LUBA's order on CU 5-91a.

By the time the appeal in *McKenzie* was filed at LUBA, all of the appeals that McKenzie and the Hearings Officer now rely on as having delayed expiration had been resolved (HDP 4-91a and SEC 6-91a in *Rochlin v. Multnomah County, supra*) or were the subject of the decision in *McKenzie v. Multnomah County* (DR 14-93). This is not a case where critical information was not available until after LUBA's decision. All parties appeared, all the relevant facts were available and all arguments could have been made.

Because the application for vesting was not filed until December, 1995, the law of this case is the 2 year duration of CU 5-91 expired on April 26, 1993. The Hearings Officer failed to address this issue. Instead, she distorted appellant's position into an argument wrong on its face, and then held it to be unsupportable. My claim, as stated in my 2/14/96 letter to the Hearings Officer, is: "... LUBA expressly affirmed the county's determination, with all its reasoning, facts and conclusions, that the two year duration of CU 5-91 ended on April 26, 1993, for the purpose of determining timely application for vesting." (Exh. 101, p.3, ¶2, line 3.) The Hearings Officer turned that into a nonsensical claim that she could summarily reject: "Appellant contends that McKenzie v. Multnomah County, 27 Or LUBA 523 made a dispositive determination that the Conditional Use permit expired on 4/26/93." (Decision, p. 9, 10). It's nonsensical because LUBA would have reversed rather than remanded, if it had decided the permit had expired. LUBA remanded, not because the application for vesting was untimely, but because the county had not shown the requirement of Final Design Review approval had been lawfully met, and because issues concerning that requirement had to be addressed in the first instance by the county. The Hearings Officer's error is grievous; the misstatement was made first by McKenzie, and was expressly rebutted during the hearing (transcript attached).

The Hearings Officer also misunderstands *McKenzie v. Multnomah County.* She says that LUBA upheld the County determination that CU 5-91 did not expire. The decision was remanded! The Hearings Officer quotes LUBA's description of the county decision: "LUBA found 'the challenged decision determines the previously approved Conditional Use permit for a non-forest building [sic dwelling] has not expired'." Then she says: "LUBA upheld that decision and denied Rochlin's Assignment of Error." (Decision, p.9) She omits LUBA's conclusion: "the conditional use permit has not expired **if** the planning director determines substantial construction occurred." She omits LUBA's footnote 10: "The substance of the planning director's determination is challenged in petitioner Rochlin's fifth and sixth assignments of error" and she omits that the fifth and sixth assignments of error were sustained.[2] The relevant determination by LUBA was only that CU 5-91 did not expire for want of timely application for vesting. The Hearings Officer misunderstood the essence of the LUBA decision which, applied to this case, puts the application in PRE 2-93 two years after the deadline.

If the Board adopts the Hearings Officer's decision, it will make a decision that fails to address the primary issue of this appeal. It is well established law that a party is entitled to have relevant issues addressed by the decision maker.

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[2] LUBA's decision on the fourth and fifth assignments of error is appended, reprinted from West's ORLAW.

The closest the Hearings Officer comes to addressing the issue is a claim that because LUBA did not interpret the "subsequent appeals" clause, the decision is not dispositive (Decision, p. 9). But the issue of deadline for filing a vesting application was squarely decided. Of course LUBA didn't address the appeals clause; no party invoked it! (All relevant LUBA briefs and county decisions are in Exh. 102.)

The applicant withdrew the application for CU 5-91a (the remanded determination of substantial construction, Exh. 102 B 24). The county now treats a request, identical in substance, filed on December 19, 1995, as a new application, assigning it a new file number, PRE 2-95. Neither withdrawal of CU 5-91a, nor treatment of PRE 2-95 as a new application, changes the essential fact that PRE 2-95 is a request for the same vesting in CU 5-91 as was requested in CU 5-91a. It remains the facts of CU 5-91 that are relevant, and the same law that was in effect when application was first made for CU 5-91 must be applied now. *Forest Park Neighb. v. City of Portland*, 27 Or LUBA 215, 225-227, *Aff'd* 129 Or App 641 (1994). The county does not change what are the relevant facts or law by taking a new application to which the original facts and law must apply. The situation is not like a new development application, where approval or denial is based only on what is now proposed. PRE 2-95 is a redetermination regarding exactly the same development as was addressed in CU 5-91a. In PRE 2-95 approval or denial is based on the substance of CU 5-91, and the expiration of CU 5-91 is judged by the same facts and same law whether the application for extension is filed in 1993 or 1995. Passage of time and substitution of PRE 2-95 have changed none of the relevant facts, but one. The significance of the substitution is found in LUBA's final determination regarding CU 5-91a: "... the applicant's request for a determination of substantial construction was timely filed on March 26, 1993, 31 days before the two-year period expired on April 26, 1993." LUBA's order is binding on the county. Corresponding to that order, the December 19, 1995 PRE 2-95 application must be held to have been filed more than 2 years and 8 months after the deadline and CU 5-91 must be held to have expired.

Facts Concerning Appeals

Even if the 2 year duration had not been established by LUBA, the facts of this case would preclude any delay because of appeals. In providing that the duration of a conditional use does not run until resolution of appeals, the purpose of MCC 11.15.7110(C) is to preserve a 2 year period for the applicant to use the development permits, free from impediment caused by challenges to the conditional use permit or other permits necessary for implementing it. It is not intended to extend the time of the conditional use permit beyond two years merely to allow a developer, who has changed his mind, to obtain final approval (or denial) of permits for a revised proposal.

In this case, the applicant had unhindered use of the permits for which he made timely application during the first two years, SEC 6-91 issued in March, 1991, CU 5-91 issued in April, 1991 and HDP 4-91, issued in May, 1991. None of those permits was appealed. In October, 1991, the applicant installed a culvert and fill stream crossing. He later applied for approval of a culvert in SEC 6-91a and HDP 4-91a. Both were initially approved by the Planning Director, denied by the hearings officer, denied (tie vote) by the Board of Commissions, approved on rehearing, and finally denied by LUBA (the first decision had become final before the motion to rehear).

No party appeals the Hearings Officer's determination, that the Planning Director correctly defined "subsequent appeals" as used in 11.15.7110(C) to mean "appeals of all land use decisions necessary to construct work under the Conditional Use permit, including all related and supplemental permits." (Decision, p.10, Planning Director's decision, p.2) As the HDP 4-91a/SEC 6-91a approval of the request to change the bridge to a culvert was

not essential to the CU, and, as that was the only decision appealed during the first two years, there was plainly no appeal that tolled expiration.

Proof that those permits were not necessary is provided by the applicant. The culvert and fill driveway, the only matter at issue in the appealed permits, was installed before they were issued! Even after the later issued culvert permits were overturned by LUBA in July, 1993 (and not reissued until August, 1995) McKenzie continued the project, installing the house and all necessary facilities, leaving only the unfinished garage, which has nothing to do with the culvert appeal. It cannot be reasonably disputed that the appeals did not hinder development; it's verified by the same receipts McKenzie put into this record to prove substantial development: utility installation (across the culvert!) 3/15/93, manufactured home 7/5/94, well 7/12/94, well equipment 7/29/94. Notwithstanding unresolved appeals, he moved in before August 22, 1994, which he could legally do only with a county occupancy permit. A hand addressed mailing from McKenzie on August 22nd gives the subject site as his return address and certified mail sent on August 9th was returned by the post office giving the subject site as his new address (copies attached). Significantly, after correctly defining the standard as concerning permits necessary for developing the project, the Hearings Officer's decision does not actually find compliance. There is an inadequately supported conclusion of necessity, that relies in part on a 1992 decision that was rendered null by subsequent appeals. The Hearings Officer cites substantial evidence that can support only her alternate conclusion, that the permits are "related to the CU".

The hearings Officer argues the applicant was required to obtain an HDP permit and was entitled to a redetermination of the need for an SEC permit (Decision, p. 4). There is no logic. The applicant had all the HDP and SEC permits necessary to develop the CU. The Hearings Officer makes no attempt to address the claim that changing the permits from a bridge to a culvert was unnecessary. She only explains why the applicant wanted the culvert permits and had a right to apply for them.

The decision also cites appeal of DR 14-93, a Final Design Review decision as tolling expiration. The county did not make the first Design Review decision in this case until the Planning Director's decision in DR 14-93 and CU 5-91a on May 26, 1993, a month after the CU expiration date. McKenzie didn't even apply for Design Review until March 25, 1993, 23 months into a 24 month permit. 11.15.7110(C) says that expiration is delayed by appeals, not by applications. That the application for DR 14-93 preceded expiration is given no significance by 7110(C) or other provision. The only appeal of a necessary permit was not filed until the two years had lapsed. And, the "Revised Site Plan", the plan approved on May 26th, was not even submitted to the county until May 5, 1993, 9 days after the CU expired (Exh. 102 C 244). That a post-expiration appeal of a post-expiration Design Review plan would delay the start or end of the 2 year duration is not sensible. And that is not what the regulations say. McKenzie and the Hearings Officer argue that an opponent could obstruct development for years by appealing a Design Review application filed on the very day of approval of a conditional use. Therefore they argue, appeal of any Design Review must toll expiration. The problem with the argument is that it doesn't fit the facts of this case. Under the most liberal interpretation of the language of the code, appeal of a necessary permit at any time during the two years would give the developer two years from resolution of the appeal. But nothing in the code gives appeal of Design Review, weeks after expiration, the effect of restoring the expired permit.

The Hearings Officer read appellant's argument in the preceding paragraph and the decision does not contradict the reasoning or facts. Instead, she relies on a chain of appeals with overlapping periods of pendency. She reasons that, if the appeal of the HDP/SEC culvert permits was not finally resolved until August, 1993, and if the appeal of DR 14-93 was filed in May, 1993, and not resolved until August, 1995, then the overlapping periods

constitute a continuous period of appeals that tolled expiration (Decision 11-12). If the Hearings Officer were correct that the HDP/SEC culvert appeal delayed expiration, then she would be correct about the DR appeal. But if she is wrong about the HDP/SEC appeals, then the finding on the DR 14-93 appeal has no basis.

The purpose of the provision delaying the 2 year duration is not to toll expiration while a developer seeks after-the-fact approval of unauthorized development or optional modifications. The culvert was not necessary to achieve the approved CU 5-91 project; it was just something preferred by the applicant because it was less costly than the already approved bridge.

Expiration was not deferred by any appeals and therefore occurred on April 26, 1993 and the application in PRE 2-95 was filed more than 2 years too late.

Final Design Review Approved - 11.15.7110(C)(3)(b)(i)

A standard for approval of vesting is that there was Final Design Review approval. The requirement can be found to have been met only if CU 5-91 did not otherwise expire before August 22, 1995, when the Board approved the Design Review as DR 14-93 and 14-93a, purportedly in satisfaction of the remand in *McKenzie v. Multnomah County*. (Exh. 102 B 25) In Final Order 95-188, the county addressed issues concerning remand of DR 14-93, but it did not address the unrelated Design Review issue in the remand of CU 5-91a.

LUBA sustained Rochlin's fifth assignment of error in *McKenzie v. Multnomah County*, which claimed that the Final Design Review approval requirement had not been met. LUBA held the county had erred in concluding that the Planning Director's approval was sufficient, even though there had not yet been a hearing required by statute to be available. LUBA held that there could not be Final Design Review approval until at least the county process was complete. And the remand required the county to address whether there could be Final Design Review approval when the terms of the approval itself required the plan to be amended through the design review process, and whether the standard can be considered to have been met by a design review plan submitted in substantial part, after the 2 year duration of CU 5-91 would have otherwise expired.

The Court of Appeals held LUBA gave the wrong reason for deciding the county's interpretation of what is a Final Design Review was wrong. But it affirmed the conclusion with a different analysis and expanded its embrace. The Court held that the requirement of "Final Design Review approval" means both an ultimate design and a completed process.

The actions of the county in DR 14-93a and PRE 2-95 fail to address the implications of either definition or the other issues of the remand order. The effect of withdrawal of CU 5-91a and substitution of PRE 2-95, is only to establish a new date of application for vesting. If the Board were to reject every other argument, it is plain that the county cannot lawfully approve vesting without addressing the issues it was ordered to address in *McKenzie v. Multnomah County*. Nothing in the decision before you purports to explain how withdrawal of the application in CU 5-91a and the filing of PRE 2-95 for exactly the same thing, relieves the county of the obligation of satisfying the law as determined in *McKenzie v. Multnomah County,* and of addressing the issues it is expressly required to address. The only relevant discussion in the decision is an attempt to belittle the issues to insignificance by mischaracterizing the LUBA order: "It [the LUBA remand] directed the county to clarify, correct, and complete certain procedures for the DR 14-93 and CU 5-91a applications". (Decision, p. 6.) If that was all there was to it, the 1994 remand would have been addressed immediately and this proceeding would not be taking place. Why would the applicant, in consultation with county staff, withdraw the application for vesting

that they fought through the Court of Appeals to validate, if all the county had to do to satisfy the remand was "clarify, correct, and complete certain procedures?" Why does the county not even yet "clarify, correct and complete"? It is because the remand involves serious issues of law that senior personnel doubted could be successfully addressed.

Conclusion

If the Board overturns the decision, the applicant will not lose his house. He will have to apply for a new CU under the current CFU standards. (He will not have to remove the culvert; the decision approving it is final.) He might have to move the mobile home closer to where his driveway tops the steep incline from Thompson Road. He would need a variance from the setback requirements, a variance provided for by the code. Moving the dwelling would minimize the amount of variance needed. Fortunately, the dwelling was built to be movable. He would likely be required to move the future garage site to adjoin the dwelling, to minimize resource disturbance. He could be required to repair collapsing embankments at the edge of the huge area bulldozed for the house, and he might be required to reforest about half of the cleared area. I know of no standard that would prevent approval of a properly designed conditional use.

Alternatively, if the Board affirms the decision, I urge you to direct that new findings be written that address the issues. Everyone would prefer a final lawful resolution to another remand. The county must forthrightly confront the issues of the law of the case regarding timeliness of application, of timeliness and adequacy of Final Design Review approval, and of whether or not the appealed HDP 4-91a and SEC 6-91a culvert permits were necessary to implement the CU.

April 1, 1996

Arnold Rochlin
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Transcript of part of testimony of Arnold Rochlin at hearing on PRE 2-95, before the Hearings Officer on February 21, 1996

Attachment to testimony by appellant for **hearing on April 9, 1996.**

Tape Counter 880

Rochlin: ... Mr. McKenzie says that LUBA never said that the conditional use permit 5-91 expired in April of 93, on April 26, 1993. That is literally accurate. However, they expressly accepted the county's decision that April 26, 1993 was the date by which it would have expired and the date from which the submission of the application was to be measured. ... They expressly determined that March 26th was 31 days before the two year period expired. And, it was expressly for the purpose of determining timeliness of application for determination of substantial development in the conditional use permit. ...

Petitioner Rochlin's second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR (ROCHLIN)

Petitioner contends the approved design review plan does not comply with the conditional use, HD and SEC permits for the proposed use because it does not provide for a bridge. Petitioner notes the challenged decision includes the following condition of approval:

> "The applicant shall amend the Final Design Review Plan * * * to include a bridge for the driveway crossing over the Thompson Fork of Balch Creek. Construction plans and grading design for the bridge shall be consistent with related [HD and SEC permits]. The amended Final Design Review Plan required herein shall be reviewed by the Planning Director pursuant to [MCC] 11.15.7840 [to MCC 11.15].7845. Public notice of the Planning Director's decision on the amended plan shall be provided to the parties with an opportunity for a public hearing as provided in ORS 215.416(11)." Record 40.

Petitioner argues the above condition constitutes an "unlawful remand in the county decision." Petition for Review 14.

We see nothing improper in the county requiring the applicant to amend his design review plan to show a creek crossing by a bridge. It is apparent the county believes that doing so will bring the design review plan into conformity with the requirements of the previously issued HD and SEC permits. Further, under the condition imposed, the planning director will review the amended design review plan and, specifically, will review the bridge proposed by the amended plan. Members of the public will be provided with notice of the planning director's decision on the amended design review plan and will be provided an opportunity for appeal. The county did not err by utilizing this procedure.

Petitioner Rochlin's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (ROCHLIN)

The challenged decision determines the previously approved conditional use permit for a nonforest dwelling has not expired. Petitioner argues the challenged decision misconstrues

certain MCC provisions, particularly MCC 11.15.7110(C), governing expiration of conditional use permits.

MCC 11.15.7110(C) provides, in relevant part:

> "*[T]he approval of a Conditional Use shall expire two years from the date of issuance of the Board [of Commissioners'] Order in the matter*, or two years from the date of final resolution of subsequent appeals, unless:
> "* * * * *
> "(3) The Planning Director determines that substantial construction has taken place. That determination shall be processed as follows:
> "(a) .[The a]pplication shall be * * * filed with the [Planning] Director at least 30 days prior to the expiration date.
> "* * * * *" (Emphasis supplied).

Petitioner contends the minutes of the board of commissioners' April 23, 1991 meeting indicate the board of commissioners accepted and implemented the planning commission's decision to approve the subject conditional use permit by "Board Order" on that date. Record 312. Therefore, according to petitioner, under MCC 11.15.7110(C) the subject conditional use permit expired on April 23, 1993, unless intervenor McKenzie filed an application for a determination that substantial construction had taken place at least 30 days prior to that date, *i.e.* no later than March 24, 1993. Because intervenor McKenzie's application was filed on March 26, 1993, petitioner contends it was untimely and, therefore, the conditional use permit expired.

The challenged decision contains the following interpretation of MCC 11.15.7110(C):

> "There is a dispute about how to construe MCC [11.15].7110(C) * * *. The dispute follows from the fact that the Board of Commissioners did not issue a `Board Order' [on the conditional use permit]. Therefore, there is no date of issuance of such an order from which to measure the expiration of the permit. The [Board of Commissioners] does not issue a written order when acknowl-edging a [planning commission] decision that has not been appealed. Therefore, the use of the term `Board Order' in MCC [11.15].7110(C) * * * is ambiguous and must be construed. * * *

"* * * * *

"[T]he term `Board Order' should be construed to mean `the final order of the most superior county approval authority to address the merits of a proposed conditional use permit.' This best reflects the legislative intent that a [conditional use] permit expire two years *after it is approved.* It is not approved until the county issues a final order. The most superior county approval authority to issue a final order [on the disputed conditional use permit] was the planning commission. [Its] decision was final [ten] days after submitted to the Clerk [of the Board of Commissioners].[8]

"Given the ambiguity regarding the term `submittal' [in MCC 11.15.8260(A)], the Hearings Officer finds that it should be construed to mean `received,' because:

"a. The [MCC] does not expressly provide that mailing is sufficient for submittal in this context, as it does in other instances where that is the case.

"b. [T]he purpose for providing a [ten]-day period between the date the decision is submitted and the date it becomes final is to ensure that all interested persons have an adequate opportunity to receive and review the decision and to determine whether to file a Notice of Appeal, and to ensure that the [Board of Commissioners has] ample time to determine whether to file a Board Order for Review. Until the Clerk actually receives the decision, the Clerk cannot distribute it. Therefore, the [ten] day time period should not begin to run until the Clerk actually receives the decision.

"The Hearings Officer finds the oral [Board of Commissioners] acknowledgment on April 23[, 1991] is not a Board Order, because it was not memorialized in any written form. All

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8 MCC 11.15.8260(A) provides:

"Decisions of the Planning Commission or the Hearings Officer shall be final at the close of business on the tenth day following submittal of the written decision to the Clerk of the Board under MCC [11.15].8255 unless:

"(1) A Notice of Review from a party is received by the Planning Director within ten days after the decision has been submitted to the Clerk of the Board [of Commissioners] under MCC [11.15].8255; or

"(2) The Board [of Commissioners], on its own motion, orders review under MCC [11.15].8265."

contested case decisions are required to be in writing and signed by the approval authority to * * * facilitate judicial review. Nowhere does [the MCC] provide for a decision to be made without a written decision containing findings and conclusions. In the absence of a written decision or an appeal of that decision by a party or [Board of Commissioners] member, the reporting of a decision to the [Board of Commissioners] is just that — a report and acknowledgment of that report. It does not affect the permit decision. [Board of Commissioners] acknowledg-ment of an unappealed [planning commission] decision is not required by MCC [11.15].8255[9] nor given any weight or meaning by another provision of [the MCC]." (Emphasis in original.) Record 55-56.

9 Under this interpretation, the planning commission decision approving the conditional use permit became final on April 26, 1992, ten days after it was received by the Clerk. Further, the applicant's request for a determination of substantial construction was timely filed on March 26, 1993, 31 days before the two-year period expired on April 26, 1993. Therefore, under MCC 11.15.7110(C)(3)(a), the conditional use permit has not expired if the planning director determines substantial construction occurred.[10]

We are required to defer to a local government's interpretation of its own code unless the interpretation is contrary to the express words, purpose or policy of the enactment. ORS 197.829. In other words, we must determine the local government's interpretation is "clearly wrong" to justify reversal or remand of a challenged decision. *West v. Clackamas County*, 116 Or App 89, 94, 840 P2d 1354 (1992). We cannot say the challenged county interpretation is clearly wrong.

Petitioner Rochlin's fourth assignment of error is denied.

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9 MCC 11.15.8255 provides:

"The written decision of the Planning Commission * * * *shall be submitted* to the Clerk of the Board [of Commissioners] by the Planning Director not later than ten days after the decision is announced. The Clerk shall summarize each decision on the agenda for the next Board [of Commissioners] meeting on planning and zoning matters * * *." (Emphasis supplied.)

10 The substance of the planning director's determination is challenged in petitioner Rochlin's fifth and sixth assignments of error.

FIFTH ASSIGNMENT OF ERROR (ROCHLIN)

MCC 11.15.7110(C)(3)(b) provides:

"[The Planning Director's] decision [that substantial construction occurred] shall be based on findings that:

"(i) Final Design Review approval has been granted under MCC [11.15.]7845 on the total project[.]

"* * * * *"

Petitioner argues a determination that substantial construction occurred cannot be made (1) before final design review approval is obtained, and (2) where the design review plan is submitted after the two-year period allowed by MCC 11.15.7110(C) has expired. Petitioner states final design review approval has not been obtained for the proposal. Petitioner maintains this is clear from the following statement in the challenged decision:

> "The design review decision is inconsistent with the permits reinstated by [*Rochlin I*] because it does not provide for a bridge to cross the creek. A condition of approval is warranted requiring the design review plan to be amended to be consistent with those permits * * * before the design review plan is approved in final form, to conform the design review plan to the now-applicable [SEC and HD] permits. * * *" Record 54.

According to petitioner, the absence of final design review approval means a determination that substantial construction occurred may not lawfully be made. Petitioner also argues that the applicant failed to submit a design review plan for review prior to the expiration of the two-year period established under MCC 11.15.7110(C) and that the determination of substantial construction cannot be based on approval of a design review plan submitted after that date.[11]

As stated above, this Board is required to defer to a local government's interpretation of its own code so long as the interpretation is not contrary to the words, purpose or policy of the enactment. The county's only interpretation of MCC 11.15.7110(C)(3)(b)(i) is the following:

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11 Petitioner notes that even if the "Revised Site Plan," discussed *infra*, is ultimately determined to be the design review plan, it was not received by the county until May 5, 1993.

> "[F]inal design review approval was granted under MCC [11.15].7845 on the total project as it existed and was approved at that time. [*Rochlin I*] has since effectively reinstated the decisions [on the SEC and HD permits]. Therefore, the design review plan is no longer consistent with the applicable permits * * *. However, *when the planning director made the determination [granting design review approval]*, there was a final design review plan that complied with applicable permits and standards. *That is the appropriate reference time for compliance with MCC [11.15].7110(C)(3)(b)(i)*, because that is when the decision being appealed was made. [*Rochlin I*] should not void the design review decision for purposes of compliance with MCC [11.15].7110(C)(3)(b)(i), because it is not clearly required by the [MCC], and it would conflict with the purpose of MCC [11.15].7110(C)(3) generally." (Emphases supplied.) Record 57.

10 As we understand it, the above interpretation simply states the "final design review approval" required under MCC 11.15.7110(C)(3)(b)(i) is granted where the planning director *issues* a determination granting design review approval, regardless of whether the planning director's decision is appealed. This is contrary to MCC [11.15].7110(C)(3)(b)(i), which requires *final* design review approval. At a minimum, no final design review approval can be granted until the local design review process is complete. That no final design review approval was granted here is clear from the fact that the planning director's decision was appealed. As we explain above, under ORS 215.416(3) and (11), the planning director's design review approval decision could not mature into a final design review approval decision if a local appeal was filed. For the county to interpret MCC 11.15.7110(C)(3)(b)(i) to mean a final design review decision was made by the planning director, for purposes of adopting a "substantial construction" determination, would make the public hearing on appeal of the planning director's design review decision required by ORS 215.416(3) and (11) meaningless. Because the county's interpretation is inconsistent with ORS 215.416(3) and (11), we may not defer to it. *See Forster v. Polk County, supra.* On remand, the county must interpret MCC 11.15.7110(C)(3)(b)(i) in a manner that is consistent with ORS 215.416(3) and (11) and must address the two relevant interpretational issues raised by petitioner under this assignment of error.

Petitioner Rochlin's fifth assignment of error is sustained.

Arnold & Kaye Rochlin
Post Office Box 83645
Portland, OR 97283-0645

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CERTIFIED

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MAIL

UNITED STATES POSTAL SERVICE

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97225

U.S. POSTAGE
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PORTLAND,OR
97203
AUG 09, '94
AMOUNT

$3.67
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RETURN RECEIPT REQUESTED

Dan McKenzie
7400 SW Barnes Rd., #1063
Portland, Or 97225

MCKE400 972253038 1393 08/10/94
FORWARDING TIME EXPIRED
MCKENZIE'DAN
6125 NW THOMPSON RD
PORTLAND OR 97210-1056

RETURN TO SENDER

Is your RETURN ADDRESS completed on the reverse side?

Thank you for using Return Receipt Service.

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

3. Article Addressed to:
Dan McKenzie
7400 SW Barnes Rd #1063
Portland, OR 97225

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery
Consult postmaster for fee.

4a. Article Number
Z 777 068 191

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent)

PS Form **3811**, November 1990 ☆U.S. GPO: 1991—287-066 **DOMESTIC RETURN RECEIPT**

McKenzie
6125 NW Thompson Rd
Portland OR 97210

RETURN RECEIPT REQUESTED

Fold at line over top of envelope to the right of the return address

CERTIFIED

Z 731 723 607

MAIL

UNITED STATES POSTAL SERVICE

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U.S. POSTAGE
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SALEM, OR
97308
AUG 22, '94
AMOUNT

$3.67
00065849-07

VR
8.23

Arnold Rochlin
PO Box 83645
Portland OR 97283

April 9, 1996

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
(503) 289-2657

Board of County Commissioners
c/o Planning Division
2115 S.E. Morrison St.
Portland, OR 97214

Testimony by appellant re.: **PRE 2-95** Determination of Substantial Development

1. In July, 1994, LUBA remanded CU 5-91a, the county's first determination of substantial construction. The remand order specifically identified issues that the county must address on reconsideration of the application for vesting.

a. Can the prerequisite of Final Design Review Approval be satisfied by a decision that by its own terms, required additional design review? That refers to your earlier requirement of amendment to include a bridge.

b. Can the prerequisite be satisfied by a decision approving a design plan that, in substantial part, was not even submitted to the county until after the CU permit expiration date? That refers to the approved site plan dated 5/5/93, 9 days after expiration of the CU permit.

c. Can the prerequisite be satisfied by a design review approval when there had not yet been a hearing required by statute to be available?

None of these issues are addressed in the decision before you. Rather, the decision is part of a process of avoiding the requirements of law as expressed in LUBA's order.

Senior county staff knew, from the time of the remand, it would be difficult or impossible to lawfully approve vesting if the remand issues were forthrightly addressed. What later transpired could have no purpose but evasion. In December, 1994, just a month after the Court of Appeals affirmed LUBA's decision, McKenzie withdrew his CU 5-91a application for vesting. A year later, he filed a new application for exactly the same thing, which is before you as PRE 2-95. Why? What possible reason could there be for withdrawal of one application and filing of another for exactly the same thing? Why in the world would McKenzie withdraw the application for vesting, that he and the county fought tooth and nail to validate, through LUBA and the Court of Appeals? Why would he do that only a month after the Court of Appeals decision became final? There is only one plausible answer, and that is, it was the only possible way of approving vesting without addressing the remand issues and without overtly defying the remand order. It was a plan with which the county inexplicably cooperated. The planner approved it as if there were no remand order, without even an explanation of why the remand order should not apply.

2. I filed this appeal because preservation of the process and law transcends even the subject of the dispute.

a. When, through astonishing circumstances and devices, the county approved the culvert and design review in August of 95, I said my piece, but I filed no appeal with LUBA; I did not intervene in the Circuit Court proceeding. That was out of

consideration for my own weariness, as well as for the obvious wish of the Board that the matter come to final rest.

b. So it stood, and would have stood forever, had not the Planning Division directed a kick at my head in January, approving vesting, without reference to, and in defiance of, LUBA's remand order. The staff took that action without the courtesy of discussing it with me, though I'm a party of record in the case; without the courtesy of even informing me it was pending, until the administrative decision was made. The county is snakebit in this matter. Everyone assigned to it tries to get out of a pit by digging down.

In *McKenzie v. Multnomah County*, LUBA had found that the CU permit expired on April 26, 1993, unless there was vesting by a lawful and timely determination of substantial development. But the current county decision makes a different determination, that because there was an appeal of the culvert permits before the CU expired, the two year duration was suspended until the culvert appeal was resolved. And then, before the culvert appeal was resolved, there was appeal of design review that wasn't resolved until your August, 95 decisions.

It is significant that when this case was before LUBA and the Court of Appeals, neither the county nor McKenzie claimed that any deadline was extended by appeals. The deadline issue was squarely before LUBA and it was squarely and finally decided on the basis of the arguments made by the parties. It's far too late to raise new claims.

c. I appealed to the Hearings Officer on three principal bases:

i. This case is a further process of the same case started with the application for vesting in CU 5-91a. LUBA determined that the CU 5-91a application was filed exactly 31 days before the CU permit would have otherwise expired. (1 day before the filing deadline.) LUBA concluded the filing deadline was 30 days before April 26, 1993. That decision is the law of this case, and PRE 2-95, accordingly, must be held to have been filed over 2 years late, and the CU has expired.

ii. Any approval of vesting in CU 5-91 must address the issues of LUBA's remand of the CU 5-91a decision. Calling it PRE 2-95 can change neither what it is, nor the applicable law.

iii. The two year duration of a CU permit is deferred by appeal only when the appeal is of the CU permit, or of a permit necessary to implement it. Changing from a bridge to a culvert was not a necessary permit.

d. I appeal the Hearings Officer's decision affirming the approval, because it utterly failed to come to grips with the issues that I expressly raised, and that were the core of the appeal.

i. I claimed LUBA decided that the 2 year CU duration ended in April, 1993 for the purpose of determining timeliness of application for vesting. The Hearings Officer changed that to an absurd claim that LUBA decided the CU had expired. It's absurd because LUBA could not have remanded if the CU expired; it must have reversed. The Hearings Officer found that she could not agree that LUBA decided the CU expired. Neither can I. But I'm still entitled to have the real issue addressed. Did LUBA decide that the deadline for filing

an application for vesting was 30 days before April 26, 1993? If the answer is yes, and I am certain it is, the PRE 2-95 application was filed 2 years late and the CU has expired. I am entitled to have you address issues relevant to the approval criteria. As the Hearings Officer's decision did not address the issue, yours must.

ii. The Hearings Officer's decision omits any discussion of the claim that the County must address the three issues identified in LUBA's 1994 remand of CU 5-91a. Instead, the Hearings Officer mischaracterizes LUBA's decision as holding that the CU did not expire. That interpretation is utterly implausible in the face of the remand of CU 5-91a. The Hearings Officer tried to trivialize the remand issues by describing them as requiring the county only to "clarify, correct and complete certain procedures." Everyone concerned knows the county would have promptly complied if there were no more than that. Everyone must know that it is utterly implausible that McKenzie would have withdrawn the CU 5-91a application, which LUBA had just found to have been timely filed, if that were the case. What the actual case is, is that the county could not address the issues in a manner that would allow an approval of vesting that could hold up under review. The remand issues are relevant to the approval criterion requiring final design review approval. I am entitled to a decision that addresses those issues. As the Hearings Officer's decision did not, yours must.

iii. The Hearings Officer did partly address the third issue, delay of expiration by appeals. She correctly held that for an appeal to delay expiration, it must be of a permit necessary for implementation of the CU. She correctly found that the appealed permits allowing a culvert were related to the CU. She made a conclusory statement that the permits were necessary for the CU, but she did not relate facts to the standard, and explain why the permits were necessary. In fact, she explained why the applicant wanted the permits for a culvert and why she thought the county correctly approved them. But, she did not explain why the applicant could not implement the CU without a culvert permit. Every relevant fact in the case is exactly contrary to the Hearings Officer's conclusion. The culvert and fill crossing was installed without a permit. McKenzie submitted a dozen documents to prove that he spent over $60,000 developing the project through 1994, long before he received a final culvert permit in August of 95. He installed the culvert, he built the driveway, he built a foundation and installed the house, he installed utilities, he installed a well, and he moved in in July, 1994. Every element of the project was finished by mid-1994, except the garage, which is utterly unrelated to the culvert permits. Given these facts, how could anyone say the culvert permits, not finally approved until August, 1995, were necessary to implement the project. Because the Hearings Officer's decision, did not relate the relevant facts to the Approval criteria, yours must.

The history of this case is a trail of pragmatic compromises with the law. Every decision was likely made in good faith belief that, though only arguably legal, it seemed the best way to get the county out of a bad situation. The dreadful course of this case was epitomized by the occasion in 1992, when counsel advised the Board that the county code presented some problems with holding a rehearing, but if challenged, the county would probably prevail at LUBA. The Board did not seek counsel's opinion of the right and lawful course; it acted only on advice that it could prevail, and it was reversed.

The lesson remains unlearned. In the decision before you, the Hearings Officer says that LUBA reversed in 1993, "because the Board's motion to rehear was one day late." That case was not about demerits for tardiness. LUBA reversed because you decided to rehear a decision that was final that you had no authority to rehear. And you had been informed by the parties, and had a warning of the problem from your counsel. The lesson is that this case requires a decision that does not take doubtful shortcuts to convenient ends. It needs a decision that fully and forthrightly addresses the issues, so we can escape this vortex.