

1                   **BEFORE THE BOARD OF COUNTY COMMISSIONERS**  
2                                   **FOR MULTNOMAH COUNTY**

3  
4    In the Matter of the Review of the            )  
5    Hearings Officer decision which denied    )  
6    Significant Environmental Concern (SEC)    )  
7    and Hillside Development (HD) permits    )  
8    for an amended driveway design with a    )  
9    culvert and fill stream crossing            )

**FINAL ORDER**  
**Vacating SEC 6-91a, and**  
**Approving HDP 4-91a**

92-248

10           **I. PROCEDURAL HISTORY**

11           This matter concerns the appeal of a June 16, 1992 Hearings Officer deci-  
12           sion which denied a driveway design with a culvert and fill crossing over the  
13           Thompson Fork of Balch Creek. Dan McKenzie (McKenzie) received SEC and  
14           HD permits in 1991 to develop an access drive on property at 6125 NW Thomp-  
15           son Road, with a bridge over the creek [ref.: SEC 6-91; HDP 4-91]. McKenzie later  
16           installed a culvert and fill crossing rather than a bridge, and requested an  
17           amended permit for the design change. The Planning Director approved the cul-  
18           vert design on March 31, 1992 [ref. SEC 6-91a; HDP 4-91a]. The Friends of Forest  
19           Park (Friends) appealed the Director decision to the Land Use Hearings Officer.  
20           The Hearings Officer reversed the Director, and denied the SEC and HD permits  
21           on June 16, 1992. McKenzie appealed to the Board of County Commissioners  
22           (Board). The appeal requests Board review of the four grounds for denial of the  
23           SEC Permit cited in the Hearings Officer decision, and also of the denial of the  
24           HD Permit.

25           On August 25, 1992, the Board expanded the scope of review to allow testi-  
26           mony and evidence on the stream classification of the Thompson Fork of Balch

1 Creek, and whether the SEC zoning provisions apply. The Board received writ-  
2 ten and oral testimony and oral arguments from the parties on September 22,  
3 1992, and continued the matter to October 13, 1992 for deliberation. The record  
4 remained open for two time periods: [1] New evidence was allowed on the  
5 stream classification issue, or rebuttal of testimony or material received at the  
6 September 22, 1992 hearing, for seven (7) days, until September 29, 1992; and,  
7 [2] Written rebuttal of material received in the first open record period was  
8 received for four (4) days. The record was closed on October 5, 1992.

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10 The Board deliberated on October 13, 1992, and rendered a tie (2:2) vote  
11 on a motion to reverse the Hearings Officer's decision. Pursuant to County Res-  
12 olution 91-13, §8(J), a tie vote of the Board results in a failure of the motion.  
13 The tie vote by the Board resulted in a default denial of the SEC and HD per-  
14 mits, and prevented adoption of findings in support of the decision. On October  
15 27, 1992, the Board approved a motion to rehear the matter on November 10,  
16 1992. On November 10, 1992, the hearing was continued to December 15, 1992,  
17 with consent of the parties, because only four (4) Board members were present.

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19 The full Board reheard the case on December 15, 1992. All parties con-  
20 sented to participation by Chair, Gladys McCoy, having been advised that she  
21 had reviewed the whole record. Review was limited to the record of the prior  
22 proceedings, with oral argument allowed by the parties. After considering the  
23 evidence, the Hearings Officer decision, staff recommendations, and arguments  
24 from the parties, the Board determined that an SEC Permit was not required,  
25 and vacated the Hearings Officer and Planning Director decisions with respect  
26 to SEC 6-91a. The Board reversed the Hearings Officer decision, and approved

1 HDP 4-91a, subject to conditions.

2 **II. FINDINGS AND EVALUATION**

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4 **A. SEC Permit Application:**

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6 After hearing testimony, oral arguments and weighing the evidence, the  
7 Board finds that an SEC Permit is not required. Multnomah County Code  
8 (MCC) §11.15.6404(C) provides that:

9 *“[A]ny building, structure, or physical improvement within 100 feet*  
10 *of the normal high water level of a Class I stream, as defined by the*  
11 *State of Oregon Forest Practice Rules, shall require an SEC permit*  
*under MCC .6412, regardless of the zoning designation of the site.”*

12 The State Forest Practice Rules defines “Class I waters” in the Oregon Adminis-  
13 trative Rules (OAR) 629-24-101(8)(A) as follows:

14 *“[A]ny portions of streams, lakes, or other waters of the state which*  
15 *are significant for:*

16 \* \* \*

17 (B) *Angling;*

18 \* \* \*

19 (D) *Spawning, rearing or migration of anadromous or game fish.”*

20 In March, 1991, when McKenzie applied for a bridge crossing, and later in  
21 January, 1992, when he requested permits for an amended design with a cul-  
22 vert/fill crossing, County Staff believed the Thompson Fork of Balch Creek was a  
23 Class I Stream. This belief was based upon a 1986 map from the Oregon  
24 Department of Forestry (DOF), Forest Grove office which shows streams in the  
25 Portland area. However, the legend on the map indicates:

26 *“The identification of streams shown on this map as Class I streams is*  
*intended for preliminary planning use only. See OSFD district*  
*headquarters for official maps.”*

1           After hearing testimony, oral arguments, and weighing the evidence, the  
2 Board concludes that the Thompson Fork of Balch Creek is not now a Class I  
3 stream, as defined by the State Forest Practice Rules; nor was it in January,  
4 1992, when Mr. McKenzie applied for permits to amend the driveway design.  
5 Substantial evidence in the record indicates the Thompson Fork is a Class II  
6 Stream. Specifically, the Board is persuaded by an August 13, 1992 letter,  
7 addressed to Mark Hess, from Thomas Savage, Forest Practices Forester (DOF  
8 Forest Grove District), which states:

9           *“Our Forest Practices Class I stream designation is for the lower  
10 stretch of the stream [Balch Creek] below the fork where NW  
11 Thompson Rd. and NW Cornell Rd. meet. Up stream from this  
point both forks of the stream are Class II.”*

12           Further support for the Board conclusion is found in a letter dated  
13 September 11, 1992, addressed to Dan Kearns, and in letters dated September  
14 2, and September 25, 1992, addressed to McKenzie, from Michael Simek (former  
15 Forest Practices Forester in the Forest Grove District), and in a letter dated  
16 October 5, 1992, addressed to Mark Hess, from Jay Massey, District Fish Biolo-  
17 gist with the Oregon Department of Fish and Wildlife (ODFW).

18  
19           The Forest Practice Rules (OAR 629-24-116) require the State Forester to  
20 evaluate, classify and map all waters in the State. The ODFW assists the State  
21 Forester with the identification and classification of waters significant for fish  
22 habitat. These agencies thus have statutory authority and staff expertise to  
23 evaluate and classify streams.

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25           The State Forester’s map at the time of application showed, and presently  
26 shows, the Thompson Fork as a Class II stream. McKenzie argued that MCC

1 §11.15.6404(C) did not require an independent County assessment of the stream  
2 classification. Friends argued that the County should review the evidence, and  
3 independent of the State Forester and ODFW conclusions, evaluate and deter-  
4 mine whether the Thompson Fork meets the Class I stream definition in the  
5 Forest Practice Rules. The County Planning Division has, however, historically  
6 relied on DOF maps to determine stream classifications. The Board concludes  
7 that this reliance is appropriate, and neither contrary to the express language of  
8 the code, nor to its apparent purpose or policy. Further, the Board notes that the  
9 alternate interpretation argued by Friends could produce conflicting County and  
10 State classifications of the same stream.

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12 The Hearings Officer decision on SEC 6-91a cites four SEC Permit crite-  
13 ria as grounds to deny the permit. The Board concludes that the Hearings Offi-  
14 cer was misdirected in applying SEC criteria, since the SEC Permit is not  
15 required for projects on Class II streams.

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17 **B. HD Permit Application:**

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19 The Hearings Officer decision on HDP 4-91a cites four SEC Permit crite-  
20 ria as grounds for denial. However, the Hearings Officer concluded that all  
21 other applicable criteria [MCC 11.15.6730] are or could be met if the conditions  
22 in the Director's March 31, 1992 decision are imposed [HO decision; pp. 10-16].  
23 The Board review of the HD decision is limited to the SEC criteria cited by the  
24 Hearings Officer. The Board concurs with the Hearings Officer findings and  
25 concludes that the HD Permit should be approved, subject to the conditions in  
26 the March 31, 1992 Planning Director decision.

1     **III. CONDITIONS**

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3     **1.**    The amended SEC and HD permits for the creek crossing work do not  
4            change the decision of the County Planning Commission regarding a pro-  
5            posed non-resource related residence on the site (Reference File CU 5-91).

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7     **2.**    Cut and remove only those trees within the immediate area required for  
8            the driveway grading and house site. All trees of 6-inch or greater trunk  
9            diameter at breast height (d.b.h.) shall be retained to the maximum prac-  
10           ticable extent. Retained trees and wooded areas shall be protected during  
11           construction. Avoid cutting roots, compacting soil or placement of fill  
12           within the root zones (drip line) of trees to be retained.

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14    **3.**    Plant shrubs and trees to screen the ends of the culvert from NW Thomp-  
15           son Road. Installation shall be after May 1, 1993 and completed by Octo-  
16           ber 1, 1993, and sufficient to achieve the screening objective within 24-  
17           months. Avoid planting between June 15th and September 15th, unless  
18           irrigation can be provided. Plant selections and placements shall be min-  
19           isterially reviewed and approved by Design Review Staff prior to installa-  
20           tion; and shall at a minimum meet the following specifications:

- 21  
22           •   **PLANT AT LEAST FOUR (4) EVERGREEN TREES IN THE AREA BETWEEN**  
23           **THE CREEK AND THOMPSON ROAD** — Tree species shall be either:  
24           *Thuja plicata 'fastigiata'* (Hogan Cedar), *Thuja plicata* (Western Red  
25           Cedar), or other approved species. Trees shall be at least 5-feet in  
26           height at the time of planting, and spaced approximately 5 – 10 feet  
            apart. Trees should be randomly placed or clustered to display a  
            more naturalized appearance. Avoid planting trees in rows.

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- **PLANT AT LEAST SIX (6) EVERGREEN SHRUBS IN THE AREA BETWEEN THE CREEK AND THOMPSON ROAD** — Species shall be *Gaultheria shallon* (Salal), *Berberis nervosa* (Dull Oregon Grape), or other approved species; plants shall be 1-gallon size or larger, and spaced approximately 3-feet apart.
  
- **PLANT AT LEAST TWO (2) DECIDUOUS TREES IN THE AREA BETWEEN THE CREEK AND THOMPSON ROAD** — Species shall be *Acer circinatum* (Vine Maple), or other approved species; plants shall be 3-gallon size or larger, and spaced appropriate to the species.

4. Implement erosion control measures on-site to minimize sediments or other waterborne materials which may leave the site. Specifically, maintain a “sediment fence or barrier” at the toe of all disturbed and filled areas; and re-establish vegetation and landscape materials prior to removal of erosion control measures. The sediment fence or barrier shall be installed prior to deposition of any fill on the site. Any stockpiled soil or other debris shall be stored and covered (if necessary) to avoid any discharges into the creek. All land disturbing activity shall be limited to the period from May first and October first of any year.
  
5. Fill or cut slopes shall not be steeper than 2:1 unless a geological and/or engineering analysis certifies that steeper slopes are safe and erosion control measures are specified.
  
6. Cut and fill slopes shall not encroach onto neighboring properties (unless authorized). Exposed soils shall be seeded, mulched and/or covered to avoid erosion or drainage effects onto neighboring sites or into the creek.
  
7. Storm drainage from the roof and drains of the new house shall be

1 approved by the plumbing section for the City of Portland. Applicant  
2 shall provide an on-site "dry-well" or other approved system to handle this  
3 water and prevent discharges into the creek.  
4

- 5 8. Within 30-days of completion of grading, replant any exposed soil or dis-  
6 turbed areas associated with the tree clearing or other work. Plants or  
7 seeds used to meet this condition shall be selected from the *Preferred*  
8 *Native Plants* listed in Appendix 'F' of the Balch Creek Watershed Pro-  
9 tection Plan [Portland Planning Bureau, 1990]. Alternative seed or  
10 replanting plans may be ministerially approved by County Design Review  
11 Staff if consistent with the "*EROSION CONTROL PLANS TECHNICAL*  
12 *GUIDANCE HANDBOOK*". All disturbed or filled areas shall be replant-  
13 ed no later than October 1st of the year the work was initiated.  
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- 15 9. Any pollution associated with the project such as pesticides, fertilizers,  
16 petrochemicals, solid wastes, or wastewaters shall be prevented from  
17 leaving the project site through proper handling, disposal, and clean-up  
18 activities.  
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- 20 10. Obtain a Driveway Access Permit for the new Thompson Road access.  
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#### 22 IV. CONCLUSIONS AND DECISION

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24 Based on the above findings and evaluation, the Board hereby vacates the  
25 Hearings Officer and Planning Director decisions with respect to SEC 6-91a.  
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Based on the above findings and evaluation, the Board hereby reverses the Hearings Officer decision and approves HDP 4-91a, subject to conditions.



DATED this 29th Day of December, 1992

*Gladys McCoy*  
Gladys McCoy, Multnomah County Chair

REVIEWED AS TO FORM:  
LAURENCE KRESSEL, COUNTY COUNSEL  
FOR MULTNOMAH COUNTY, OREGON

By: *Peter Lurayston*  
John DuBay, Chief Deputy County Counsel