ANNOTATED MINUTES

Tuesday, November 28, 1995 - 10:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BOARD BRIEFING

Chair Beverly Stein convened the meeting at 10:32 a.m., with Vice-Chair Sharron Kelley, Commissioners Gary Hansen and Tanya Collier present, and Commissioner Dan Saltzman excused.

B-1 Information on Substance Abuse Challenges in Multnomah County and Update on Alcohol and Drug Program Office Efforts in Developing and Implementing Coordinated and Collaborative Systemwide Improvements. Presented by Norma Jaeger and Mike Finigan.

NORMA JAEGER AND MICHAEL FINIGAN PRESENTATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION.

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

Tuesday, November 28, 1995 - 1:30 PM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

DE NOVO HEARING

Chair Beverly Stein convened the meeting at 1:35 p.m., with Vice-Chair Sharron Kelley, Commissioners Gary Hansen, Tanya Collier and Dan Saltzman present.

P-1 CU 4-95/MC 1-95 DE NOVO HEARING, 20 MINUTES PER SIDE Regarding Appeal of Hearings Officer Decision, APPROVING, Conditional Use Permit to Operate and Maintain a Dog Kennel Facility in an EFU (Exclusive Farm Use) District, and Expand Existing 50 Dog Kennel Facilities to Allow No More than 75 Dogs; and APPROVING Alternate Request for Resumption and

Expansion of a Non-Conforming Use, on Property Located at 23200 NW REEDER ROAD

AT CHAIR STEIN'S REQUEST THERE WERE NO OBJECTIONS TO 1000 FRIENDS OF OREGON AND OREGON DEPARTMENT OF JUSTICE APPEARING TO TESTIFY IN OPPOSITION TO THE HEARINGS OFFICER DECISION. CHAIR STEIN EXPLAINED QUASI-JUDICIAL PROCESS. AT CHAIR STEIN'S REQUEST FOR DISCLOSURE, NO EX PARTE CONTACTS WERE REPORTED. AT CHAIR STEIN'S REQUEST FOR CHALLENGES AND/OR OBJECTIONS, NONE WERE OFFERED. PLANNER BARRY ADAMSON PRESENTED HEARINGS OFFICER CONDITIONS, FINDINGS OF FACT AND CRITERIA USED IN DETERMINATION TO APPROVE ALTERNATE REQUEST FOR RESUMPTION AND EXPANSION OF NON-CONFORMING USE APPLICATION. LARRY DERR, ATTORNEY FOR APPELLANT MARQUAM FARMS, TESTIFIED IN OPPOSITION TO THE HEARINGS OFFICER. ASSISTANT ATTORNEY GENERAL CELESTE DOYLE PRESENTEDED ORAL AND WRITTEN TESTIMONY ADVISING THE HEARINGS OFFICER MISINTERPRETED CERTAIN LAND CONSERVATION AND DEVELOPMENT COMMISSION ADMINISTRATIVE RULES WHICH LED TO INCORRECT CONCLUSIONS OF LAW AND FINAL DECISIONS. ED SULLLIVAN, ATTORNEY FOR APPLICANTS ANGELA AND TIM SCHILLEREFF, TESTIFIED IN SUPPORT OF HEARINGS OFFICER DECISION AND IN OPPOSITION TO MR. DERR'S REQUEST FOR CONTINUANCE. ANGELA AND TIM SCHILLEREFF TESTIMONY IN SUPPORT OF HEARINGS OFFICER DECISION. IN RESPONSE TO CHAIR STEIN'S REQUEST FOR CONTINUANCE OR OBJECTION TO HEARING AND IN RESPONSE TO A QUESTION OF COMMISSIONER SALTZMAN, MR. DERR AND MR. SULLIVAN DEBATED CONTINUANCE REQUEST.

COUNTY COUNSEL JOHN DUBAY ADVISED GRANTING AN ADDITIONAL HEARING IS AT THE BOARD'S DISCRETION. NO MOTION. MR. DERR THEN REQUESTED THAT THE RECORD BE HELD OPEN IN ORDER TO RESPOND TO TODAY'S TESTIMONY. NO MOTION. HEARING CLOSED. MR. DUBAY RESPONSE TO BOARD QUESTIONS CONCERNING BOARD OPTIONS TO AFFIRM, AMEND AND/OR REVERSE THE HEARINGS OFFICER DECISION. COUNTY COUNSEL JOHN DUBAY AND PLANNER BOB HALL RESPONSE TO BOARD QUESTIONS REGARDING CODE PROVISIONS, CONTINUITY AND ABANDONMENT ISSUES. COMMISSIONER SALTZMAN MOVED, SECONDED BY COMMISSIONER COLLIER, TO AFFIRM THE HEARINGS OFFICER DECISION. FOLLOWING DISCUSSION IN RESPONSE TO A CLARIFICATION QUESTION OF MR. DUBAY, AND UPON MOTION OF COMMISSIONER SALTZMAN, SECONDED BY COMMISSIONER COLLIER, IT WAS UNANIMOUSLY APPROVED THAT THE HEARINGS OFFICER DECISION BE AFFIRMED AND THAT THE LANGUAGE CONTAINED IN PAGES 69-71 OF THE HEARINGS OFFICER DECISION BE STRICKEN. (FINAL ORDER 95-248 FILED DECEMBER 4, 1995). CHAIR STEIN ADVISED ALL PARTIES WILL RECEIVE A COPY OF THE BOARD'S WRITTEN DECISION, WHICH MAY BE APPEALED TO LUBA.

There being no further business, the meeting was adjourned at 2:50 p.m.

Thursday, November 30, 1995 - 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 Sharron Kelley, Commissioners Tanya Collier and Dan Saltzman present, and Commissioner Gary Hansen excused.

CONSENT CALENDAR

AT THE REQUEST OF CHAIR STEIN AND UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, CONSENT CALENDAR ITEMS C-1 THROUGH C-5 AND C-7 THROUGH C-11 WERE UNANIMOUSLY APPROVED.

SHERIFF'S OFFICE

C-1 Package Store Liquor License Renewal for BIG BEAR CROWN POINT MARKET, 31815 E CROWN POINT HIGHWAY, TROUTDALE

C-2 Package Store Liquor License Renewal for CORBETT COUNTRY MARKET, 36801 NE CROWN POINT HIGHWAY, CORBETT

C-3 Package Store Liquor License Renewal for ORIENT COUNTRY STORE, 29822 SE ORIENT DRIVE, GRESHAM

C-4 Retail Malt Beverage Liquor License Renewal for WILD WOOD GOLF COURSE, 21881 NW ST HELENS ROAD, PORTLAND

C-5 Restaurant Liquor License Renewal for BIG BEAR CROWN POINT MARKET, 31815 E CROWN POINT HIGHWAY, TROUTDALE

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-7 Amendment to Intergovernmental Agreement 102236 with the City of Fairview for the Fairview Avenue Sanitary Sewer Trunk Replacement and Depot Street Storm Drain Project

C-8 Amendment to Intergovernmental Agreement 102246 with the City of Troutdale to Include an Expanded Retaining Wall for the SE 4th Street Improvement Project

C-9 Amendment to Intergovernmental Agreement 102306 with Oregon Mental Health Division Pertaining to Alcohol and Drug Program Special Projects

C-10 Intergovernmental Revenue Agreement 103666 with the City of Portland for Funding Vulnerable and Homeless Outreach Network (VAHON) Services

C-11 Budget Modification CFSD 4 Adding $1,277,023 HUD Supportive Housing Program and City of Portland Vulnerable and Homeless Outreach Network (VAHON) Funds to the Community Action Program Office Budget

DEPARTMENT OF JUVENILE JUSTICE SERVICES

C-6 Intergovernmental Revenue Agreement 700226 with the United States Marshals Service for Use of the Detention Complex to Hold Youth Charged with or Convicted of Violations of Federal Law or Held as Material Witness

AT THE REQUEST OF CHAIR STEIN AND UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER SALTZMAN, C-6- WAS UNANIMOUSLY POSTPONED INDEFINITELY.

AT THE REQUEST OF CHAIR STEIN AND UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER KELLEY, CONSIDERATION OF THE FOLLOWING ITEM WAS UNANIMOUSLY APPROVED.

SHERIFF'S OFFICE

UC-1 Retail Malt Beverage Liquor License Renewal for BOTTOMS UP!, 16900 NW ST HELENS ROAD

UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER KELLEY, UC-1 WAS UNANIMOUSLY APPROVED.

REGULAR AGENDA

PUBLIC COMMENT

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

NO ONE WISHED TO COMMENT.

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

R-2 Presentation of the National Association for County and Community Economic Development (NACCED) 1995 Award of Excellence to Unlimited Choices, Incr.'s "Adapt-A-Home" Program

CHAIR STEIN PRESENTATION TO BOARD MEMBERS AND STAFF OF UNLIMITED CHOICES, AND ACKNOWLEDGEMENT OF TECHNICAL COUNTY STAFF CECILE PITTS, KAREN WHITTLE AND JANET HAWKINS. DEBORAH WRIGHT COMMENTS IN RESPONSE.

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-12 Budget Modification DES 6 Reclassifying a Vacant Carpenter Position into a Construction Projects Specialist in the Refurbished Section of Facilities Operations and Maintenance and Converting Temporary Carpenter Hours into a Full-time Carpenter Position

COMMISSIONER KELLEY MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF C-12. KRIS HARDWICK EXPLANATION AND RESPONSE TO QUESTIONS OF COMMISSIONER SALTZMAN. BUDGET MODIFICATION UNANIMOUSLY APPROVED.

NON-DEPARTMENTAL

R-3 RESOLUTION Adopting Citizen Involvement as a Top Priority of the County and Citizen Involvement Principles as a Guide to all County Departments and Divisions

COMMISSIONER KELLEY MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL

OF R-3. DERRY JACKSON EXPLANATION AND COMMENTS IN SUPPORT. CELIA HERON, TOM MARKGRAF, LAUREL BUTMAN, KAY DURTSCHI AND KATHLEEN TODD TESTIMONY IN SUPPORT. RESOLUTION 95-245 UNANIMOUSLY APPROVED.

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

R-9 Memorandum of Agreement with the United States Department of Housing and Urban Development, State of Oregon and City of Portland, Reaffirming the Designation of Portland, Multnomah County, Oregon as an Enterprise Community and Memorializing Various Contractual Requirements

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-9. LOLENZO POE, REGENA WARREN, CAROL CHISM, CARL TALTON AND RON HERNDON EXPLANATION, COMMENTS IN SUPPORT AND RESPONSE TO BOARD QUESTIONS AND COMMENTS IN SUPPORT. MEMORANDUM OF AGREEMENT UNANIMOUSLY APPROVED.

R-10 Intergovernmental Agreement 103646 with the Oregon Department of Human Resources and the City of Portland, to Administer Social Service Block Grant Funds for Enterprise Zone Community Development and Economic Opportunity Programs/Projects in Portions of North/Northeast Portland and the Commercial Downtown Business District

UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, THE INTERGOVERNMENTAL AGREEMENT (R-10) WAS UNANIMOUSLY APPROVED.

R-12 PUBLIC HEARING and Request for Board Action on the 1995 Affordable Housing Development Program Technical Review Committee Recommendations on the Disposition of Tax Foreclosed Property for Housing Purposes. Presented by Cecile Pitts and HC Tupper.

COMMISSIONER KELLEY MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF R-12. CECILE PITTS AND HC TUPPER EXPLANATION AND RESPONSE TO BOARD

QUESTIONS. BRUCE MELKONIAN TESTIMONY IN OPPOSITION TO RECOMMENDATION TO APPROVE HUMAN SOLUTIONS APPLICATION FOR PROJECT 25/26, AND IN FAVOR OF AWARDING PROJECT 25/26 TO NETWORK BEHAVIORAL HEALTHCARE, DUE TO LESS IMPACT ON THE NEIGHBORHOOD IN TERMS OF PEOPLE AND CARS. CRAIG KELLEY TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE APPLICATION OF PORTLAND COMMUNITY REINVESTMENT INITIATIVES. NEAL BEROZ OF NETWORK BEHAVIORAL HEALTHCARE PROVIDED WRITTEN AND ORAL TESTIMONY SUGGESTING PROCESS CHANGES IN THE PROGRAM FOR FUTURE APPLICATIONS. DIANE MEISENHELTER TESTIMONY IN SUPPORT OF RECOMMENTDATIONS. CYNTHIA WINTER TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE PORTLAND HABITAT FOR HUMANITY APPLCATIONS. JEFF MERKLEY TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE BOTH HUMAN SOLUTIONS APPLICATIONS AND RESPONSE TO QUESTIONS OF COMMISSIONER SALTZMAN REGARDING MR. MELKONIAN'S CONCERNS REGARDING INCREASED PEDESTRIAN AND AUTO TRAFFIC. DOUG GLANCY TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE REACH CDC APPLICATION. TERRI HINSON TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE CDC APPLICATION. DAVID JAY-BUNN TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE ROSE CDC APPLICATIONS. CARMEN SCHLEIGER TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE HOUSING OUR FAMILIES APPLICATIONS. KAREN VOISS TESTIMONY IN SUPPORT OF RECOMMENDATION TO APPROVE FRANCISCAN ENTERPRISE APPLICATIONS. MS. PITTS RESPONSE TO BOARD QUESTIONS. ORDER 95-246 UNANIMOUSLY APPROVED. BOARD COMMENTS IN SUPPORT. STAFF DIRECTED TO UTILIZE THE SUGGESTIONS

OF MR. BEROZ WHEN REVISING AFFORDABLE HOUSING DEVELOPMENT PROGRAM HOUSING POLICIES AND PROCESS.

R-11 Budget Modification CFSD 7 Reallocating Existing Revenues within the Community Action Program Office Budget and Adding $100,000 in City of Portland Revenue to Fund a Homeless Shelter to be Operated by the

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-11. REY ESPAÑA EXPLANATION. BOARD COMMENTS IN SUPPORT. BUDGET MODIFICATION UNANIMOUSLY APPROVED.

NON-DEPARTMENTAL

R-4 Second Reading and Adoption of an ORDINANCE Amending Ordinance No. 822, in Order to Add, Delete and Revise Exempt Pay Ranges and Titles

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER KELLEY MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF SECOND READING AND ADOPTION. ORDINANCE 840 UNANIMOUSLY APPROVED.

R-5 Second Reading and Adoption of an ORDINANCE Amending MCC Chapter 2.30 (County Administrative Departments) in Order to More Efficiently Align Departmental Responsibilities; Creating the Department of Support Services

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER KELLEY MOVED AND COMMISSIONER SALTZMAN SECONDED, APPROVAL OF SECOND READING AND ADOPTION. LAURENCE KRESSEL ADVISED FLEET AND ELECTRONICS ACCIDENTALLY OMITTED. UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER SALTZMAN, AN AMENDMENT TO PAGE 3, ADDING "(M) PROVIDE FLEET AND ELECTRONIC SERVICES" WAS UNANIMOUSLY APPROVED.

ORDINANCE 841 UNANIMOUSLY APPROVED, AS AMENDED.

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-6 First Reading of an ORDINANCE Amending Governments Eligible for Refunds of Motor Vehicle Fuel Taxes Imposed by Multnomah County Under MCC 5.30.270

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF FIRST READING. TOM GUINEY EXPLANATION. NO ONE WISHED TO TESTIFY. FIRST READING UNANIMOUSLY APPROVED. SECOND READING THURSDAY, DECEMBER 4, 1995.

R-7 Intergovernmental Agreement 300816 with State of Oregon Allowing State to Purchase Fleet Services Including the Use of County Vehicles, Fuel, Maintenance Services, and Other Related Services on an As Needed and As Available Basis

COMMISSIONER COLLIER MOVED AND COMMISSIONER SALTZMAN SECONDED, APPROVAL OF R-7. TOM GUINEY EXPLANATION AND RESPONSE TO BOARD QUESTIONS CONCERNING R-7 AND R-8. AGREEMENT UNANIMOUSLY APPROVED.

R-8 Intergovernmental Agreement 300826 with the State of Oregon Allowing County to Purchase Fleet Services Including the Use of State Vehicles, Fuel, Maintenance Services, and Other Related Services on an As Needed and As Available Basis

UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, THE INTERGOVERNMENTAL AGREEMENT WAS UNANIMOUSLY APPROVED.

There being no further business, the regular meeting was adjourned at 11:20 a.m.

Thursday, November 30, 1995 - 11:30 AM
(OR IMMEDIATELY FOLLOWING REGULAR AGENDA)
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BOARD BRIEFING

Chair Beverly Stein convened the meeting at 11:25 a.m., with Vice-Chair Sharron Kelley and, Commissioner Dan Saltzman present, and Commissioners Gary Hansen and Tanya Collier excused.

B-2 Jobs Plus and the Implementation of SB 1117 (Chapter 816) Requiring Parent of Child Receiving Aid to Dependent Children to Participate in Applicable Job Training, Education and Mental Health or Drug Addiction Programs. Presented by Robin Scapple.

ROBIN SCAPPLE, ART HAWLEY AND JERRY BURNS PRESENTATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION.

There being no further business, the meeting was adjourned at 11:45 a.m.

OFFICE OF THE BOARD CLERK
FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

Deborah L. Bogstad

MULTNOMAH COUNTY OREGON

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

NOVEMBER 27, 1995 - DECEMBER 1, 1995

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

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

Produced through Multnomah Community Television

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

AN EQUAL OPPORTUNITY EMPLOYER

Tuesday, November 28, 1995 - 10:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BOARD BRIEFING

B-1 *Information on Substance Abuse Challenges in Multnomah County and Update on Alcohol and Drug Program Office Efforts in Developing and Implementing Coordinated and Collaborative Systemwide Improvements. Presented by Norma Jaeger and Mike Finigan. 1.5 HOURS REQUESTED.*

Tuesday, November 28, 1995 - 1:30 PM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

DE NOVO HEARING

P-1 *CU 4-95/MC 1-95 DE NOVO HEARING, 20 MINUTES PER SIDE Regarding Appeal of Hearings Officer Decision, APPROVING, Conditional Use Permit to Operate and Maintain a Dog Kennel Facility in an EFU (Exclusive Farm Use) District, and Expand Existing 50 Dog Kennel Facilities to Allow No More than 75 Dogs; and APPROVING Alternate Request for Resumption and Expansion of a Non-Conforming Use, on Property Located at 23200 NW REEDER ROAD*

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

REGULAR MEETING

CONSENT CALENDAR

SHERIFF'S OFFICE

C-1 *Package Store Liquor License Renewal for BIG BEAR CROWN POINT MARKET, 31815 E CROWN POINT HIGHWAY, TROUTDALE*

C-2 *Package Store Liquor License Renewal for CORBETT COUNTRY MARKET, 36801 NE CROWN POINT HIGHWAY, CORBETT*

C-3 *Package Store Liquor License Renewal for ORIENT COUNTRY STORE, 29822 SE ORIENT DRIVE, GRESHAM*

C-4 *Retail Malt Beverage Liquor License Renewal for WILD WOOD GOLF COURSE, 21881 NW ST HELENS ROAD, PORTLAND*

C-5 *Restaurant Liquor License Renewal for BIG BEAR CROWN POINT MARKET, 31815 E CROWN POINT HIGHWAY, TROUTDALE*

DEPARTMENT OF JUVENILE JUSTICE SERVICES

C-6 *Intergovernmental Revenue Agreement 700226 with the United States Marshals Service for Use of the Detention Complex to Hold Youth Charged with or Convicted of Violations of Federal Law or Held as Material Witness*

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-7 *Amendment to Intergovernmental Agreement 102236 with the City of Fairview for the Fairview Avenue Sanitary Sewer Trunk Replacement and Depot Street Storm Drain Project*

C-8 *Amendment to Intergovernmental Agreement 102246 with the City of Troutdale to Include an Expanded Retaining Wall for the SE 4th Street Improvement Project*

C-9 *Amendment to Intergovernmental Agreement 102306 with Oregon Mental Health Division Pertaining to Alcohol and Drug Program Special Projects*

C-10 *Intergovernmental Revenue Agreement 103666 with the City of Portland for Funding Vulnerable and Homeless Outreach Network (VAHON) Services*

C-11 *Budget Modification CFSD 4 Adding $1,277,023 HUD Supportive Housing Program and City of Portland Vulnerable and Homeless Outreach Network (VAHON) Funds to the Community Action Program Office Budget*

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-12 *Budget Modification DES 6 Reclassifying a Vacant Carpenter Position into a Construction Projects Specialist in the Refurbished Section of*

Facilities Operations and Maintenance and Converting Temporary Carpenter Hours into a Full-time Carpenter Position

REGULAR AGENDA

PUBLIC COMMENT

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

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

R-2 *Presentation of the National Association for County and Community Economic Development (NACCED) 1995 Award of Excellence to Unlimited Choices, Incr.'s "Adapt-A-Home" Program*

NON-DEPARTMENTAL

R-3 *RESOLUTION Adopting Citizen Involvement as a Top Priority of the County and Citizen Involvement Principles as a Guide to all County Departments and Divisions*

R-4 *Second Reading and Adoption of an ORDINANCE Amending Ordinance No. 822, in Order to Add, Delete and Revise Exempt Pay Ranges and Titles*

R-5 *Second Reading and Adoption of an ORDINANCE Amending MCC Chapter 2.30 (County Administrative Departments) in Order to More Efficiently Align Departmental Responsibilities; Creating the Department of Support Services*

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-6 *First Reading of an ORDINANCE Amending Governments Eligible for Refunds of Motor Vehicle Fuel Taxes Imposed by Multnomah County Under MCC 5.30.270*

R-7 *Intergovernmental Agreement 300816 with State of Oregon Allowing State to Purchase Fleet Services Including the Use of County Vehicles, Fuel, Maintenance Services, and Other Related Services on an As Needed and As Available Basis*

R-8 *Intergovernmental Agreement 300826 with the State of Oregon Allowing County to Purchase Fleet Services Including the Use of State Vehicles, Fuel, Maintenance Services, and Other Related Services on an As Needed and As Available Basis*

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

R-9 *Memorandum of Agreement with the United States Department of Housing and Urban Development, State of Oregon and City of Portland, Reaffirming the Designation of Portland, Multnomah County, Oregon as an Enterprise Community and Memorializing Various Contractual Requirements*

R-10 *Intergovernmental Agreement 103646 with the Oregon Department of Human Resources and the City of Portland, to Administer Social Service Block Grant Funds for Enterprise Zone Community Development and Economic Opportunity Programs/Projects in Portions of North/Northeast Portland and the Commercial Downtown Business District*

R-11 *Budget Modification CFSD 7 Reallocating Existing Revenues within the Community Action Program Office Budget and Adding $100,000 in City of Portland Revenue to Fund a Homeless Shelter to be Operated by the Department of Community and Family Services*

R-12 *PUBLIC HEARING and Request for Board Action on the 1995 Affordable Housing Development Program Technical Review Committee Recommendations on the Disposition of Tax Foreclosed Property for Housing Purposes. Presented by Cecile Pitts and HC Tupper. 10:00 AM TIME CERTAIN, 1 HOUR REQUESTED.*

Thursday, November 30, 1995 - 11:30 AM
(OR IMMEDIATELY FOLLOWING REGULAR AGENDA)
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BOARD BRIEFING

B-2 *Jobs Plus and the Implementation of SB 1117 (Chapter 816) Requiring Parent of Child Receiving Aid to Dependent Children to Participate in Applicable Job Training, Education and Mental Health or Drug Addiction Programs. Presented by Robin Scapple. 30 MINUTES REQUESTED.*

#2

PLEASE PRINT LEGIBLY!

MEETING DATE 11-28-95

NAME CELESTE DOYLE

ADDRESS 100 JUSTICE BLDG
STREET

SALEM OR 97310
CITY **ZIP CODE**

I WISH TO SPEAK ON AGENDA ITEM # _____

SUPPORT APPELLANT **OPPOSE** _____

SUBMIT TO BOARD CLERK

DID NOT SPEAK

PLEASE PRINT LEGIBLY!

MEETING DATE Dec. 28, 1995

NAME Blair Batson

ADDRESS 1000 Friends of Oregon

STREET 534 SW Third Ave., Ste 300

CITY Portland **ZIP CODE** OR 97204

I WISH TO SPEAK ON AGENDA ITEM # _____

SUPPORT ✓ Appellant **OPPOSE** _____

SUBMIT TO BOARD CLERK

Atty for Applicants

PLEASE PRINT LEGIBLY!

MEETING DATE 11-28-95

NAME CJ Sullivan

ADDRESS 111 SW 5th #3200
STREET

Portland Or. 97204
CITY **ZIP CODE**

I WISH TO SPEAK ON AGENDA ITEM # _____

SUPPORT ✓ Schillreff Applications **OPPOSE** _____

SUBMIT TO BOARD CLERK

PLEASE PRINT LEGIBLY!

MEETING DATE 11-27-95

NAME Angela & Tim Schilleroff

ADDRESS 23200 NW Reeder Rd

STREET

Portland OR 97231

CITY **ZIP CODE**

I WISH TO SPEAK ON AGENDA ITEM # HO Decision

SUPPORT X **OPPOSE** _____

SUBMIT TO BOARD CLERK

Meeting Date: November 28, 1995

Agenda No: P-1

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Appeal of Hearings Officers decision in the matter of CU 4-95 & MC 1-95.

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING Date Requested: November 28, 1995

Amount of Time Needed: 20 minutes per side

DEPARTMENT: DES DIVISION: Planning

CONTACT: Bob Hall TELEPHONE: 248-3043
BLDG /ROOM:412/Plan

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED

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

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

Appeal of Multnomah County Hearings Officer decision approving CU 4-95 & MC 1-95. A request by Tim & Angella Schillereff for a conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approving alternate request for the resumption and expansion of a non-conforming use on Sauvie Island located at 23200 NW Reeder Road in unincorporated Multnomah County, Oregon.

Hearings Officer approved both requests.

1995 OCT 18 AM 8:53
MULTNOMAH COUNTY
OREGON
BOARD OF
COUNTY COMMISSIONERS

SIGNATURES REQUIRED:

Elected Official: _____

OR

Department Manager: KB Betsy Williams/mom

MULTNOMAH COUNTY

BOARD HEARING OF November 28, 1995

TIME 1:30pm

CASE NAME Schillereff Dog Kennel NUMBER CU 4–95 & MC 1–95

1. Applicant Name/Address

   Tim & Angella Schillereff

   23200 NW Reeder Road

   Portland 97231

ACTION REQUESTED OF BOARD

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

2. Action Requested by Applicant

Conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approve alternate request for the resumption and expansion of a non-conforming use.

3. Planning Staff Recommendation

   Denial

4. Hearings Officer Decision:

   Approval

5. If recommendation and decision are different, why?

   Evidence provided at the hearing that was not available at the time of the writing of the Staff Report which convinced the Hearing Officer that the kennel had been in continuous operation since its establishment in 1952.

ISSUES

(who raised them?)

All testimony at the hearing was in support of the application. Counsel for a neighboring property owner submitted written testimony regarding:

a. Possible defective notice,

b. Issue and claim preclusion based on a prior county denial of Design Review for the kennel,

c. Pending litigation between his client and the applicant, and

d. The location of the kennel on high-value farmland.

The Hearing Officer considered and rejected each of these issues in his decision.

Do any of these issues have policy implications? Explain.

No

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE MORRISON STREET
PORTLAND, OREGON 97214 (503) 248-3043

NOTICE OF REVIEW

1. Name: MARQUAM FARMS, INC. , , (*Last, Middle, First*)
2. Address: 53 S.W. Yamhill St., Portland, OR 97204 (*Street or Box; City; State and Zip Code*)
3. Telephone: (503) 228 - 1455
4. If serving as a representative of other persons, list their names and addresses:

5. What is the decision you wish reviewed (*e.g.*, denial of a zone change, approval of a subdivision, *etc.*)?
   Conditional use approval and alternatively, approval of a nonconforming use for a 75 dog kennel
6. The decision was announced by the Planning Commission/Hearings Officer on Sept. 15, 1995
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
   See attached Notice of Review

8. Grounds for Reversal of Decision (*use additional sheets if necessary*):

See attached Notice of Review

9. Scope of Review *(Check One)*:

(a) [ ] On the Record

(b) [ ] On the Record plus Additional Testimony and Evidence

(c) [X] *De Novo* (*i.e.*, Full Rehearing)

10. **If you checked 9(b) or (c), you must use this space to present the grounds on which you base your request to introduce new evidence** (Use additional sheets if necessary). For further explanation, see handout entitled *Appeal Procedure*.

See attached Notice of Review

Signed: _____ Date: Oct. 2, 1995

Attorney for MarquamFarms, Inc.

For Staff Use Only

Fee:

Notice of Review = $300.00

Transcription Fee:

Length of Hearing _____ x $3.50/minute = $ _____

Total Fee = $ _____

Received by: _____ Date: _____ Case No. _____

TO: MULTNOMAH COUNTY PLANNING DIRECTOR

NOTICE OF REVIEW

I. DECISION

This is a Notice of Review from a Hearings Officer Decision in Files CU 4-95 and MC 1-95, #23 issued September 15, 1995 on the application of Tim and Angella Schillereff.

II. STATEMENT OF INTEREST

The party giving this Notice of Review is Marquam Farms, Inc. Marquam Farms, Inc. is the owner of property adjacent to the applicants' property and is adversely affected and aggrieved by the decision which permits the continuation and expansion of an unlawful dog kennel. Marquam Farms, Inc. appeared in the Hearings Officer proceeding through written correspondence from its attorney.

III. GROUNDS FOR REVIEW

The Hearings Officer acted unlawfully, exceeded his jurisdiction and erred in the following respects:

1. Refusing to grant a setover or continuance of the August 16 hearing. Neither of Marquam Farms, Inc.'s attorneys could attend the August 16 hearing. The hearing was moved to August 16 from its original July 19 date at the request of the applicants and the applicants refused Marquam Farms, Inc.'s request for a further setover.

2. Allowing testimony on and approving an original conditional use permit for a 75 dog kennel when the hearing notice and the written application both refer to a request to expand an approved conditional use from a 50 dog kennel to a 75 dog kennel.

3. Refusing to continue the hearing and order a corrected notice consistent with the expanded scope of the hearing described in 2. above.

4. Overruling the most recent previous, final County decision and order (DR 4-94), dated August 19, 1994, made after exhaustive briefing and argument by experienced land use law firms, that found that the applicants have neither an approved conditional use for a kennel nor a lawfully preexisting nonconforming use for a kennel, with no intervening change of law, ordinance, policy, facts, or circumstances.

5. Overruling the most recent previous, final County

decision and order (DR 4-94) that found that MCC 11.15.2028(B) cannot be lawfully interpreted to create a permanent conditional use status for any use that was in existence but was not lawfully approved on the date that the zoning ordinance added that category of use to the conditional use list, with no intervening change of law, ordinance, policy, facts, or circumstances.

6. Holding that MCC 11.15.2028(B) grants the kennel use a super conditional use status under which it can expand without limit or conditional use review and under which it can resume after a period of abandonment without conditional use review.

7. Holding that the Planning Commission determined in 1990 that the kennel use has a permanent conditional use status under MCC 11.15.2028(B) and that the decision in DR 4-94 to the contrary is unenforceable.

8. Holding that the requirement for conditional use approval for a modification of an approved conditional use applies only to a modification of conditions of approval, and since the kennel has no conditional use permit and therefore no conditions of approval, there is no requirement for a conditional use review to approve a kennel expansion.

9. Holding that the kennel proposal satisfies the conditional use approval criteria including all statutory, state administrative rule, comprehensive plan and zoning criteria, for both a new 75 dog kennel and for an existing 50 dog kennel expanding to 75 dogs.

10. Holding that OAR 660-33-120 and 66-33-130 which prohibit new kennels on high value farm land are unlawful and unenforceable enactments of LCDC.

11. Holding that the provisions of OAR 660-33-120 and 66-33-130 that allow existing kennels on high value farm land to continue and expand apply without regard to whether the kennel is lawfully existing.

12. Overruling the most recent previous, final County decision (DR 4-94) that found that the kennel is not a lawfully preexisting nonconforming use and holding that it does have that status as a 50 dog kennel.

13. Holding that the proposal satisfies the approval criteria for a nonconforming use expansion of a 50 dog kennel to a 75 dog kennel.

14. Holding that the proposal satisfies the approval criteria for resumption of a discontinued nonconforming use.

15. Repeatedly violating the binding and applicable principles of res judicata, collateral estoppel, claim preclusiosn and issue preclusion.

IV. DE NOVO REVIEW

Marquam Farms, Inc. requests that the Board of Commissioners hear this review de novo. Conducting a de novo review with an adequate notice reciting the scope of the application under review is the only way to cure the existing notice defect. De novo review will afford Marquam Farms, Inc. the opportunity to be present and address the applicants' witnesses that it was denied by refusal to continue the previous hearing. De novo review will afford the Department of Land Conservation and Development an opportunity to appear and discuss with the Commissioners the enforceability of LCDC's administrative rules.

The entire record of both the latest August 16 hearing as well as the prior files described in the Hearings Officer's Decision are available and should be a part of this record. De novo review will not involve introduction of extensive new evidence. It will afford the Commissioners an opportunity to fully review a complicated record and proceeding uncumbered by arguments as to the scope of the proceeding below. There will be no surprise or prejudice to any party. The factual and legal issues are fully established and known to all of the parties.

DATED: October 2, 1995

Lawrence R. Derr
Attorney for Marquam Farms, Inc.

Meeting Date: OCT 1 0 1995

Agenda No: P-1

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Reporting of Hearings Officers decision in the matter of CU 4-95 & MC 1-95.

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING Date Requested: October 10, 1995

Amount of Time Needed: 5 minutes

DEPARTMENT: DES DIVISION: Planning

CONTACT: Bob Hall TELEPHONE: 248-3043
BLDG /ROOM:412/Plan

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED

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

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

Reporting of Multnomah County Hearings Officer decision in the matter of CU 4-95 & MC 1-95. A request by Tim & Angella Schillereff for a conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approve alternate request for the resumption and expansion of a non-conforming use on Sauvie Island located at 23200 NW Reeder Road in unincorporated Multnomah County, Oregon.

Hearings Officer approved both requests.

1995 SEP 25 PM 1:08
MULTNOMAH COUNTY
OREGON
BOARD OF
COUNTY COMMISSIONERS

SIGNATURES REQUIRED:

Elected Official: _____

OR

Department Manager: Betsy Williams

MULTNOMAH COUNTY

BOARD HEARING OF October 10, 1995

TIME 1:30pm

CASE NAME Schillereff Dog Kennel NUMBER CU 4–95 & MC 1–95

1. Applicant Name/Address

   Tim & Angella Schillereff

   23200 NW Reeder Road

   Portland 97231

ACTION REQUESTED OF BOARD

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

2. Action Requested by Applicant

Conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approve alternate request for the resumption and expansion of a non-conforming use.

3. Planning Staff Recommendation

   Denial

4. Hearings Officer Decision:

   Approval

5. If recommendation and decision are different, why?

   Evidence provided at the hearing that was not available at the time of the writing of the Staff Report which convinced the Hearing Officer that the kennel had been in continuous operation since its establishment in 1952.

ISSUES

(who raised them?)

All testimony at the hearing was in support of the application. Counsel for a neighboring property owner submitted written testimony regarding:

a. Possible defective notice,

b. Issue and claim preclusion based on a prior county denial of Design Review for the kennel,

c. Pending litigation between his client and the applicant, and

d. The location of the kennel on high-value farmland.

The Hearing Officer considered and rejected each of these issues in his decision.

Do any of these issues have policy implications? Explain.

No

MULTNOMAH COUNTY OREGON

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING
AND DEVELOPMENT
2115 S.E. MORRISON STREET
PORTLAND, OREGON 97214
(503) 248-3043

BOARD OF COUNTY COMMISSIONERS
BEVERLY STEIN • CHAIR OF THE BOARD
DAN SALTZMAN • DISTRICT 1 COMMISSIONER
GARY HANSEN • DISTRICT 2 COMMISSIONER
TANYA COLLIER • DISTRICT 3 COMMISSIONER
SHARRON KELLEY • DISTRICT 4 COMMISSIONER

MULTNOMAH COUNTY HEARINGS OFFICER DECISION

Attached please find a copy of the Hearings Officer's decision in the matter of CU 4–95 &MC 1 –95. A copy of the Hearings Officer's decision is being mailed to those persons entitled to be mailed notice under MCC 11.15.8220(C) and to other persons who have requested the same.

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed *Notice of Review* form and a fee of $500.00 plus a $3.50 per minute charge not to exceed $500.00 for a transcript of the initial hearings(s) [ref MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)]. Instructions and forms are available at the County Planning and Development Office located at 2115 SE Morrison Street, Portland, Oregon.

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

To appeal the Hearings Officer decision, a *Notice of Review* form and fee must be submitted to the County Planning Director. For further information call the Multnomah County Planning and Development Division at (503) 248-3043.

Signed by the Hearings Officer	September 15, 1995
Decision mailed to Parties	September 22, 1995
Decision submitted to Board Clerk	September 22, 1995
Last day to appeal decision	4:30 pm, October 2, 1995
Reported to the Board of County Commissioners:	1:30 pm, October 10, 1995

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

HEARINGS OFFICER DECISION

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

September 15, 1995

CU 4–95 and MC 1–95, #23
Conditional Use Request
(Conditional Use and Alteration of a Non–Conforming Use)

Applicant requests "conditional use approval, or, alternatively, an alteration of a non–conforming use, for a 75–dog kennel"

Location:	23200 N.W. Reeder Road
Legal:	Tax Lot 15 / Section 3, T2N, R1W
Pertinent Site Size:	9.41 acres
Applicant:	Tim & Angella Schillereff 23200 N.W. Reeder Road Portland, Oregon 97231
Property Owner:	<same as applicant>
Comprehensive Plan/Zoning:	Exclusive Farm Use/EFU

HEARINGS OFFICER DECISION:

Approved, with conditions set forth below, Applicant's request for conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50–dog kennel facilities to allow no more than 75 dogs, based upon the following "Findings" and "Conclusions" with respect to conditional use approval.

Alternatively, **Approved**, with conditions set forth below, Applicant's alternate request for the resumption and expansion of a non–conforming use, based upon the following "Findings" and "Conclusions" with respect to non–conforming use approval.

CONDITIONS OF APPROVAL:

1. Approval of the conditional use shall expire two years from the date of Board final order unless substantial construction has taken place in accordance with MCC 11.15.7110(C).

2. Prior to the commencement of any site development or the issuance of any building permit, Applicant shall comply with, and fulfill, applicable Design Review standards and criteria with respect to all construction, landscaping, fencing, paving, and all other improvements.

3. The kennel capacity shall not exceed 75 dogs.

TABLE OF CONTENTS

I. ANALYSIS OF THE PROPOSAL

A. PROPOSAL SUMMARY

On April 11, 1995, Tim and Angella Schillereff ("APPLICANT") filed an application worded as follows:

> "Applicants seek **[1]** conditional use approval, or, alternatively, **[2]** an alteration of a non–conforming use, for a 75–dog kennel. . . ." (Enumeration added.)

In a February 23, 1995, narrative, Applicant declared:

- "The [Applicant] seek[s] land use approval for a 75–dog kennel." (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION," at 3.)

- "The purpose of this application is to allow the ***expansion*** of the existing kennel operation on the property." (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION," at 4 [emphasis added].)

- "In this case, [Applicant is] applying to ***modify*** a 'conforming conditional use' [.]" (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION," at 13 [emphasis added].)

In an August 16, 1995, supplemental report, Applicant declared:

- "The applicant ***presently*** holds a lawful conditional use approval for a 50–dog kennel on their property." (August 16, 1995, "SAUVIE ISLAND KENNELS SUPPLEMENTAL LAND USE REPORT," at 1 [emphasis added].)

In an August 23, 1995, a supplemental memorandum Applicant declared:

- "In the instant proceedings, the [Applicant] request[s] conditional use approval of their kennel so they may have **[1]** formal recognition of their operation by the County ***and*** **[2]** a total of 75 kennel runs." ("APPLICANT'S SUPPLEMENTAL MEMORANDUM," at 2 [emphasis and enumeration added].)

Applicant's approval request raises a mind–numbing array of issues and questions, although the peculiar chronology of land use proceedings has contributed substantially to the complexity of the issues.

At the outset, I perceive some ambivalence in Applicant's descriptions of the scope of the conditional use approval request. The various descriptions could encompass:

- a request for conditional use approval for the expansion of the kennel facilities from 50 to 75 dogs, in which case Applicant would need to demonstrate a pre–existing conditional use — which, under the circumstances, could only derive from MCC 11.15.2028(B); *or*

- a request for pro forma conditional use approval of a 75–dog kennel facility employing only the conditional use criteria in MCC 11.15.7105, *et seq*.

- a combination of both of the above, *viz*, a request for conditional use approval for a long–standing use, upon which a further request to expand the conditional use would be based.

In any event, I assume from Applicant's detailed discussion of the various conditional use criteria and issues ***in conjunction with*** the non–conforming use criteria and issues, that Applicant anticipates the following chronology with respect to the substantive "use" issues:

- If I conclude that Applicant has a "conforming" conditional use pursuant to MCC 11.15.2028(B), and I conclude that any expansion or modification of an ***existing*** conditional use ***does*** require additional conditional use approval, then I must evaluate the current approval request

in order to determine whether Applicant fulfills the conditional use criteria with respect to the additional 25–dog capacity. [1]

- If I conclude that Applicant has a "conforming" conditional use pursuant to MCC 11.15.2028(B), and I conclude that any expansion or modification of an ***existing*** conditional use would ***not*** require additional conditional use approval, then I will make a declaration to that effect. In that event, I can go no further because the present application would comprise a request for conditional use approval that would be unnecessary under those circumstances; only Design Review approval would be required.

- If I conclude that Applicant lacks a "conforming" conditional use pursuant to MCC 11.15.2028(B), then I will need to determine whether Applicant can now seek conditional use approval for a pre–existing use that does indeed comprise a "listed" conditional use.

- If I conclude that, notwithstanding the use's status as a "listed" conditional use, Applicant does not or cannot fulfill all of the conditional use criteria, then I must determine whether Applicant possesses a valid, enduring non–conforming use.

- If I conclude that Applicant possesses a valid, enduring non–conforming use (by reason of continuity or vested right), then I must determine whether Applicant fulfills the criteria that control any alteration or expansion of that use.

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1 As I explain in the discussion beginning at page 63, the conditional use provisions in MCC 11.15.7105, *et seq.*, do not plainly resolve whether an *expansion* of a use that might *already* be a conditional use (via a prior approval or via the "conforming" conditional use provisions in MCC 11.15.2028(B)) must *again* proceed with conditional use approval.

- If I conclude that Applicant does not possess a valid, enduring non–conforming use, then I must finally determine whether Applicant fulfills the criteria that control any resumption of such a use.[2]

B. Site And Vicinity Descriptions

Applicant maintains dog kennel facilities on Sauvie Island situated on roughly 9½ acres in an EFU district. Approximately six acres comprise horse pasture, and Applicant raises some horses. Although composed of agricultural land, the property presents farming difficulties arising from its shape, inadequate drainage, and limited access.

The property contains an existing 50–dog kennel, which Applicant has operated for approximately six years as "Sauvie Island Kennels." According to Applicant,

> "Sauvie Island Kennel[s] is considered by many to be one of the premiere [*sic*] boarding, training and breeding kennel operations in the Portland/Vancouver metropolitan area."

Nothing in the lengthy historical record seems to dispute that characterization.

Applicant seeks authority to upgrade the facility in order to house up to 75 dogs, and to replace the two older kennel buildings with one large building that would

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2 I conclude that, because MCC 11.15.8805(B) provides that a discontinued use may be "re–established" if it "conforms with the requirements of this code at the time of the proposed resumption," and because Applicant's kennel facilities do indeed qualify as a "conditional use" listed in MCC 11.15.2012(B)(11), I find nothing in the Zoning Ordinance that would preclude the "re–establishment" of a discontinued use via a request for conditional use approval under the peculiar circumstances of this case.

In fact, if Applicant fulfills the criteria for the belated recognition of a conditional use, the resumption issue disappears. On the other hand, if Applicant cannot, in the words of MCC 11.15.8805(B), prove "conform[ance] with the requirements of this code," and if those requirements now mandate the conditional use process (which indeed they do; *see* MCC 11.15.2012(B)), then the resumption similarly disappears.

incorporate state–of–the–art construction techniques and amenities for kennel operations. The new building would then be connected to an existing third building, resulting in a kennel facility of one continuous design, as opposed to disparate, unconnected units.

The property contains two residences: a kennel–related "watchman's" residence occupied by Applicant — which the County approved in 1990 (CU 23–90) — and an older residence occupied by Elden and Marguerite Persinger, the former owners. The Persingers purchased the property in 1973, and still reside there pursuant to an agreement between Applicant and themselves. Applicant entered into a lease/purchase agreement with the Persingers in 1989, and that agreement allows the Persingers to reside on the property for the remainder of their lives.

Surrounding properties comprise agricultural or open space uses. A duck hunting club (Marquam Farms) operates on a 39–acre parcel to the east and north of the subject property. To the west and south lie open fields and crop lands with scattered farm houses and accessory structures, plus a large dairy farm. The several–thousand–acre Sturgeon Lake Wildlife Refuge owned by the Oregon Department of Fish and Wildlife lies to the northwest, separated from both the subject property and N.W. Reeder Road by a grass–covered dike.

As least as of 1990, the island contained (and appears to still contain) two other active kennels.

C. Comprehensive Plan and Zoning Ordinance Considerations

The Comprehensive Plan designates the site as "Exclusive Farm Use," and it lies within an EFU zoning district.

D. LAND USE BACKGROUND / HISTORY

(1). GENERAL

The current kennel operation uses two of the original buildings that the original kennel owner (Wallace) constructed when kennel operations first began on Sauvie Island at this location in 1952. The existing kennel facility comprised the first such facility on Sauvie Island; at least three other kennels followed, two of which remain active.

At some point in the 1960s, the kennel facility became known as "Lake Tree Kennels." From the original "Wallace" operation, the kennel facility proceeded through a number of owners/operators in the 1960s and 1970s, which the record identifies (by last name of the owner/operator) as Blitz, Courtway, Eaton, Meifert, Pein, Persinger.

(2). 1989 PROCEEDINGS

In 1989, Applicant filed an application for a conditional use permit, apparently to remodel the dog kennel operations, but did not seek approval to increase the number of allowed dogs.

Applicant's cover letter to the County recited:

> "Please note that this request is pertaining to an ***existing*** kennel site, in other words, the buildings and structures are intact. However, ***permits have lapsed*** for over 15 years, therefore a new request is now being sent."

The application does not otherwise identify or describe what "permits" might have "lapsed."

Although the historical record suggests that at least two kinds of "permits" might apply (or have applied) to the kennel facilities (*viz*, land use permits and animal control permits for commercial kennel operations), I can find nothing in the record

from 1989 forward to confirm that Applicant understood or intended the reference to "permits" to mean ***land use*** permits. Indeed, no entity had ever issued a land use (*viz*, conditional use) permit before that time, thus the reference to "permits" in a technical sense could only have meant animal control permits. Applicant's February 23, 1995, application narrative confirms that the reference to "permits" in the 1989 application meant the permits necessary to operate "commercial" kennel facilities. ("SAUVIE ISLAND KENNELS LAND USE APPLICATION", February 23, 1995, at 5.)[3]

In any event, the County informed Applicant that it considered a conditional use permit to be unnecessary or not required at that juncture. No one questions this historical fact. On the front page of Applicant's narrative appears the following notation: "Not req'd per B. Hall Feb. '89." The County ultimately approved a proposed remodeling of the kennel facilities, and issued a corresponding building permit. No one appealed that decision.

In reliance on the County's approval the Applicant then entered into a five–year lease/purchase agreement with the Persingers. The Applicant spent considerable sums remodeling the kennel facilities and began operations as "Sauvie Island Kennels."

(3). 1990 PROCEEDINGS

In 1990, Applicant (again) sought conditional use approval for additional remodeling of the kennel facilities, but (again) did not seek approval to increase the number of allowed dogs.

The County (again) informed Applicant that it considered a conditional use permit to be unnecessary under the circumstances. No one questions this historical fact. The County informed Applicant that it needed only to proceed with the Design

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3 A "kennel" need not qualify as a *commercial* operation. *See* MCC 11.15.0010 (definition of "kennel"). The hearings officer's decision in DR 4–94 recites that Applicant's reference to "lapsed" permits "demonstrates that the applicant either had knowledge or at least suspected that the prior kennel ***use*** had 'lapsed.'" (DECISION at 7 [emphasis added].) To the extent that the hearings officer's reference to "kennel use" meant "*commercial* kennel use," then the reference would be correct. To the extent that it meant "*non-conforming* kennel use," it would be an assumption not otherwise supported by the record.

Review process, and the County subsequently issued the desired remodeling permit in August, 1990, after the Applicant completed the requisite Design Review proceedings. (*See* DR 90–07–02.)

In the County's file in DR 90–07–02, there appears a copy of the page in the County's Zoning Ordinance that contained MCC 11.15.2028(B), which then (as now) provided, in pertinent part:

> "Conditional uses ***listed*** in subpart MCC [11.15].2012 ***legally established*** prior to August 14, 1980, ***shall be deemed conforming*** and not subject to the [non–conforming use] provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)[4]

On that same page, and directly adjacent to MCC 11.15.2028(B), there appears someone's handwritten notation — in red ink — that reads as follows:

> "The Persinger Kennel is therefore a Conforming CU — therefore does not expire per October 8, 1990, opinion from John DuBay [chief Assistant County Counsel for land use matters at the time]."

It seems reasonably apparent that the reference to "CU" in that handwritten passage presumably means "conditional use."

The record also contains Mr. DuBay's October 8, 1990, memorandum on the same subject, which declares, in pertinent part:

> "I agree with you that the zoning code provides no way to terminate CUPs[5] because of non[–]use where the permit sets no expiration date."

However, the historical record sheds no light on the question why Mr. DuBay's opinion *post–dates* the 1990 Design Review permit approval by two months. In

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4 At the time (as now), "dog kennels" comprised a conditional use "listed" in MCC 11.15.2012(B)(11).

5 Nothing in the memorandum suggests what the "P" stands for in the term "CUP." I have inferred from the remainder of the 1990 file that it likely stands for "Permit."

any event, the existence of a "conditional use" formed a condition precedent to Design Review. (*See* MCC 11.15.7820.)

Also in 1990, Applicant sought separate conditional use approval to expand kennel operations in order to construct or maintain a "watchman's residence" on the property, as an "accessory" use related to an existing conditional use, *viz*, the kennel facilities. (*See* CU 23–90.)

During a November, 1990, Planning Commission hearing on this particular request, a neighboring property owner (Marquam Farms) urged that the kennel facilities comprised an "illegal" operation because the facilities had apparently been "abandoned" in 1971. At that hearing, the Planning Commission wondered how (or whether) it could approve the watchman's residence if the underlying use was not legal or authorized. Staff at the hearing described the history of prior kennel approvals and opined that the County considered the kennel operation to be authorized as a "'conforming' conditional use" pursuant to MCC 11.15.2028(B).

The Planning Commission thereafter approved a conditional use permit for the watchman's residence in November, 1990, for all practical purposes interpreting MCC 11.15.2082(B) in a manner that rendered the existing kennel operations a "legally established" — and thus a "conforming" — use upon which the Planning Commission could then predicate the approval of an "accessory" use.

No one appealed that decision. The Applicant thereafter added a third building and a perimeter fence to the kennel facility, and constructed a watchman's residence.

(4). 1994 PROCEEDINGS

(a). Application / Initial Decision

In 1994, Applicant sought conditional use approval for an "expansion of an existing approved conditional use of the dog kennel." (Undated letter received by the

County with the application on 1–10–94.) Applicant sought to demolish two existing kennel buildings and replace them with one or more structures designed to house 75 dogs. At the time, Applicant housed up to 50 dogs.

The County (again) informed Applicant that it considered a conditional use permit to be unnecessary or not required. No one questions this historical fact. Staff apparently again contacted John DuBay about the matter, and Mr. DuBay reiterated his 1980 opinion, *viz*, the kennel comprised a

> "use that existed without limitation, could be expanded per MCC 11.15.2028(B), and that only Design Review with notice would be required." (10–6–94 memo from Bob Hall to Scott Pemble.)

The County thereafter informed Applicant that it needed only to proceed with the Design Review process. (*See* DR 4–94.)

In April, 1994, the County issued its "Administrative Decision" approving Applicant's Design Review Plan:

> ". . . [Applicant] propose[s] to demolish two exiting kennel buildings and replace them with one, larger structure, designed to house 55 adult dogs. An existing kennel building for 20 adult dogs would remain. The facility is licensed to board up to 50 dogs; the proposed expansion would increase the kennel size to 75 dogs. . . ." (April, 1994, ADMINISTRATIVE DECISION at 1.)

After Applicant received administrative Design Review Plan approval in April, 1994, but before anyone had appealed, Applicant exercised the purchase option on the property and bought it from the Persingers.

(b). Opponents' Appeal

A number of persons — who for convenience will simply be identified as "Marquam Farms" — then appealed the Planning Director's administrative Design Review approval. Marquam Farms urged, among other things, that:

- "The dog kennel . . . was not operated for one or more periods exceeding one year apiece[6] after the property on which the kennel is situated was zoned. Dog kennels have not been permitted uses on Applicants' property since zoning was applied. Accordingly, use of the dog kennel was 'interrupted' and 'abandoned' and its nonconforming use status no longer exists under both Oregon state law and the Multnomah County Code." (§ 1, "Grounds For Reversal," May 6, 1994, "NOTICE OF APPEAL" [emphasis added])

- "Assuming the dog kennel was a nonconforming use, . . . an application for Final Design Review Plan is the wrong way to seek its expansion or alteration. State law and the county code establish standards and procedures for alterations/expansions of nonconforming uses, none of which was sought, satisfied, or applied in DR 4–94." (§ 3, "Grounds For Reversal," May 6, 1994, "NOTICE OF APPEAL.")

The record contains nothing to suggest that Marquam Farms' NOTICE OF APPEAL itself specifically challenged the manner in which the County had previously interpreted MCC 11.15.2028(B) to allow the kennel facility as a conditional use. Indeed, the May, 1994, NOTICE OF APPEAL contained no mention of MCC 11.15.2028(B). Marquam Farms did, however, submit, a written memorandum dated July 27, 1994, that discussed MCC 11.15.2028(B) in detail. Ultimately, I find nothing in the record to suggest that the discrepancy between the issues raised within the NOTICE OF APPEAL itself and the appellants' written arguments made any difference to anyone in the course of the 1994 proceedings.

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6 Until 1990, the County's non-conforming use ordinance codified a *one–year* period for determining "abandonment" or "discontinuance" issues. The ordinance now codifies a two–year period. *See* MCC 11.15.8805(B).

(c). Planning Director's Interpretation of MCC 11.15.2028(B)

At a July, 1994, hearing on that appeal, the hearings officer concluded that he would first resolve the question whether the kennel operations comprised a lawful conditional use in the first place — a question that the Design Review process itself makes jurisdictional and thus determinative. (*See* MCC 11.15.7820 ["The provisions of MCC .7805 through .7865 shall apply to all ***conditional*** . . . uses in any district[.]" (Emphasis added.)].)

To foster the resolution of that question, the hearings officer requested an interpretation of MCC 11.15.2028(B) from the County. In a July 29, 1994, memorandum, the County's Planning Director interpreted MCC 11.15.2028(B) as follows:

> "[I]f the use was [1] ***legally established*** prior to August 14, 1980[,] ***and*** [2] was ***not abandoned or discontinued*** for any reason for more than one year . . ., then the provisions of § 2028[B] apply. . . ." (Emphasis and enumeration added.)

As so construed, the Planning Director appended the "abandoned"/"discontinued" phraseology to MCC 11.15.2028(B) and, in effect, added a condition that the ordinance provision does not make explicit. The Planning Director's interpretation would mean that a species of "'conforming' conditional use"[7] could lapse by reason of nonuse for a prescribed period of time.

Accordingly, the Planning Director further concluded that

> "[the kennel operation] ***was an established non[-]conforming use which lost its legal status in 1971*** because it was not used as a Kennel for more than one year . . . Therefore, it was ***not*** a legally established use as of August 14, 1980." (Emphasis added.)

---

7 MCC 11.15.2028(B) makes a very plain connection between "conditional uses" and "conforming" uses. Thus, the phrase "'conforming' conditional use" succinctly describes the type of use that results from an application of that provision.

(d). Hearings Officer's Decision

In his August 19, 1994, decision (the "DECISION"), the hearings officer concluded that his authority to proceed with the Design Review appeal depended at the outset on the question whether the underlying use comprised a lawful "conditional" use:

> "The outcome of this turns on whether or not staff's interpretation of MCC 11.15.2028(B) is correct. If staff's interpretation of MCC 11.15.2028(B) is wrong, and if the use is not otherwise a lawful use in the EFU zone, then the Hearings Officer ***lacks authority to approve the Design Review request, unless or until the underlying kennel use receives appropriate land use approval*** to make it a lawful use in the zone." (DECISION at 3 [emphasis added].)

Although the hearings officer's decision does not specifically describe the Applicant's interpretation of MCC 11.15.2028(B), in a July 28, 1994, memorandum (denominated "APPLICANT'S BRIEF") Applicant interpreted that provision as follows:

> "Applicants believe that this provision means precisely what it says: if (1) a use such as a kennel is listed in MCC 11.15.2012; and (2) the use was legally established prior to August 14, 1980, it is as if the county gave the use a conditional use permit on the day it was established. The use is expressly deemed 'conforming,' and the right to continue the use is not lost by abandonment." (APPLICANT'S BRIEF at 1.)

Under that interpretation of MCC 11.15.2028(B), Applicant declared that "[t]here is no question of determining whether the use was continuously as a maintained 'nonconforming use'" (APPLICANT'S BRIEF at 1–2), distinguishing between the "lawful-*at-the-time-of*-zoning-enactment" provision in the non-conforming use pro-

vision in ORS 215.130(5)[8] and the "lawful-*at-some-prior-point*-in-time" language in MCC 11.15.2028(B).

Applicant also concluded that, if MCC 11.15.2028(B) were to be construed as requiring the existence of a conditional use *permit* in order to be "legally established," the provision would be superfluous. (APPLICANT'S BRIEF at 3–4.) Applicant did not, however, examine the question whether MCC 11.15.2028(B) itself might conflict with ORS 215.130(5) or the separate "nonfarm use" provisions in ORS 215.283.

Ultimately, the hearings officer concluded that "[11.15].2028(B) cannot be interpreted in the manner suggested by the applicant and the staff, without directly conflicting with ORS 215.283." (DECISION at 3.)[9] More specifically, he concluded that

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8 ORS 215.130(5) provides, in pertinent part:

> "The lawful use of any building, structure or land ***at the time of the enactment or amendment*** of any zoning ordinance or regulation may be continued. . . ." (Emphasis added.)

9 For reference, ORS 215.283 — which applies in counties that have *not* adopted "marginal lands" provisions (*cf.* ORS 215.213) — provides, in pertinent part:

> "* * * * *
>
> "(2) The following nonfarm uses ***may be established***, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> "(m) ***Dog kennels*** not described in subsection (1)(j) of this section." (Emphasis added.)

The legislature's 1995 amendments to ORS 215.283 via SB 834 (*see* 1995 Or Laws, ch 528, § 2) did not amend any portion of ORS 215.283 that has any bearing here.

> ". . . the only way that [MCC 11.15].2028(B) can be construed in such a way so as not to be in conflict with the statutory scheme [in ORS 215.283] is to interpret the ordinance to mean that **[1]** the kennel use must not only have been ***listed*** as a conditional use, but **[2]** it must have been ***legally established as such, prior to August 14, 1980*** (i.e., it must have ***actually obtained a conditional use permit***)." (DECISION at 4 [emphasis and enumeration added].)

Because no operator of the kennel facility had ever obtained a conditional use "permit" before August 14, 1980, the hearings officer concluded that "the applicant cannot take advantage of whatever benefit MCC 11.15.2028(B) might confer." (DECISION at 4.) The hearings officer did not, however, describe or examine what "benefit" .2028(B) *does* purport to confer.

The hearings officer separately concluded that an additional inquiry into the kennel's status in 1958 must be made in order to resolve the separate question whether the kennel operation nevertheless comprised a valid "non-conforming" use. He did not, however, explain why issues of non–conforming use bore any relationship to Design Review issues.[10]

> ". . . [T]he ***only way*** in which this particular kennel could have been lawful in 1958, when zoning came into effect, was if the use was a ***lawfully established non–conforming use*** [at that time]." (DECISION at 4 [emphasis added].)

The hearings officer rendered findings with respect to the following chronology:

- From 1952 to August, 1957, the "Wallace" kennel operated on the premises. (DECISION at 5.)

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10 As I read the Design Review provisions in MCC 11.15.7805, *et seq.*, neither the resumption nor the alteration of a non–conforming use *plainly* invokes Design Review. (*See* MCC 11.15.7820 [listing the kinds of uses].)

- From August, 1957, to December, 1962, the "Blitz" kennel operated on the premises. (*Id.*)

- There exists nothing in the record to determine what occurred during the period from December, 1962, to February, 1964. (*Id.*)

Because the County's zoning ordinance first applied to the property as of July 10, 1958, the kennel facilities became a valid non-conforming use on that date. (DECISION at 5.) However, because the hearings officer viewed the record as silent with respect to the period from December, 1962, to February, 1964, he concluded that there existed no "substantial evidence" of continuous kennel usage during that period. (DECISION at 6.)

The County's non-conforming use ordinance during that era declared that the cessation of a non-conforming use for more than one year constituted, in effect, an "abandonment" or "discontinuance" of the use. Thus, the hearings officer concluded that

> "the non–conforming use status of the kennel expired on or about January 1, 1964, one year and one day after the use was discontinued in December, 1962." (DECISION at 6.)

Therefore, a discontinued "use" could not be re–established as a legal use unless and until first it demonstrated compliance with the County's Zoning Ordinance in some other proceeding. (DECISION at 6.)

The hearings officer thus concluded that, as of August, 1994, the then–existing kennel use did *not* comprise a "lawful" use, and that the absence of a "lawful" use deprived him of any authority to sustain Design Review approval. (DECISION at 7–8.) But he also concluded that that determination was "without prejudice" to some subsequent determination that a kennel use would either be permitted or otherwise declared legal. (DECISION at 7.)

Thus, as compared and contrasted, the County and hearings officer construed MCC 11.15.2028(B) as follows:

PLANNING DIRECTOR'S INTERPRETATION	HEARINGS OFFICER'S INTERPRETATION	DR 4–94 APPELLANTS' INTERPRETATION
"Conditional uses listed in subpart MCC [11.15].2012 [that were] **[1]** ***legally established*** prior to August 14, 1980[,] ***and*** **[2]** ***not abandoned or discontinued for any reason for more than one year***, shall be deemed conforming and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)	"Conditional uses listed in subpart MCC [11.15].2012 [that were] **[1]** ***legally established*** prior to August 14, 1980[,] ***and*** **[2]*legally established as a 'listed' use prior to August 14, 1980, by obtaining a conditional use permit***, shall be deemed conforming and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)	"Conditional uses ***listed*** in subpart MCC [11.15].2012 ***before August 14, 1980***, [that were] ***legally established by virtue of a permit issued*** prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)

The County (via the Planning Director's interpretation), the opponents, and the hearings officer all added interpretive clauses to MCC 11.15.2028(B) that each viewed as implicit within the language in that provision.

Applicant attempted to appeal the hearings officer's decision, but the appeal apparently arrived sometime after the 4:30 p.m. deadline on that last day on which it could be filed. As a result, the County's denial of Applicant's 1994 Design Review application became final.

(5). 1995 PROCEEDINGS

After the adverse hearings officer's decision and the resultant denial of the 1994 Design Review application in DR 4–94, on April 11, 1995, Applicant filed another application, worded as follows:

> "Applicants seek conditional use approval, or, alternatively, an alteration of a non–conforming use, for a 75–dog kennel. . . ."

The matter came before me on August 16, 1995. Numerous proponents testified in favor of the application; no one testified in opposition at that hearing. I discuss the pertinent criteria and findings in detail *infra*.

II. PROCEDURAL ISSUES

By letter dated August 15, 1995, Marquam Farms Corporation — owner of adjacent property — submitted a letter that addressed five discrete subjects. Some of the subjects comprised preliminary procedural matters upon which I made rulings at the beginning of the August 16 hearing.

Marquam Farms' August 15, 1995, letter raised the following issues.

A. REQUEST FOR SETOVER OR CONTINUANCE

The attorneys for Marquam Farms requested either a setover or a continuance of the scheduled August 16 hearing. They requested a setover because of the unavailability of two of their attorneys on that date. Alternatively, they requested that I hold the record open for twenty–one days for purposes of making "any appropriate response."

Because:

- the request for the setover comprised a veritable last–minute request that, in my opinion, lacked a sufficient explanation why the request had not been made sooner,[11]

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11 For instance, I received the faxed letter at approximately 4:40 p.m. on August 15, the afternoon before the scheduled hearing. The fax had apparently been transmitted to me at 3:23 p.m. on that same date.

- the attorneys' unavailability did not otherwise prevent them from preparing and submitting written comments or arguments, and

- ORS 197.763(4)(b) grants no right to a continuance *except* under circumstances and conditions that did not exist as of the August 15 letter,[12]

I ruled during the August 16 hearing that there would be no setover under the circumstances.

However, ORS 197.763(6) does grant any "participant" — which, by virtue of its August 15, 1995, letter I deem Marquam Farms to be — the right to request that the record remain open for at least seven days.[13] I therefore ruled that the record would remain open according to the following schedule:

- on or before August 23 at 4:30 p.m., any proponent of the application would be allowed to offer any additional evidence or further materials in support of the proposal;

- on or before August 30 at 4:30 p.m., any opponent of the application would be allowed to offer evidence or further materials in opposition to the proposal; and

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12 ORS 197.763(4)(b) provides, in pertinent part:

> ". . . If additional documents or evidence is provided in support of the application, any party shall be entitled to a continuance of the hearing. . . ."

Marquam Farms did not predicate its pre-hearing request for a setover on the presence of "additional documents or evidence."

13 ORS 197.763(6) provides, in pertinent part:

> "***Unless*** there is a continuance, if a participant so requests before the conclusion of the initial evidentiary hearing, the record shall remain open for at least seven days after the hearing. . . ." (Emphasis added.)

- on or before September 6 at 4:30 p.m., any proponent of the application would be allowed to offer any rebuttal evidence or materials directly related to any evidence or materials that an opponent had filed on or before the August 30 deadline.

Thus, Marquam Farms would have an additional 14 days beyond the August 16, 1995, hearing within which to offer additional evidence or materials.

B. CLARITY OR ADEQUACY OF NOTICE

Marquam Farms' August 15, 1995, letter also challenged the clarity or adequacy of the hearing notice, and requested that I "make a preliminary determination [at the August 16, 1995, hearing] regarding the scope of the ***application***." (Emphasis added.) I instead made a determination regarding the scope or adequacy of the ***hearing notice***.

I perceive a substantive distinction between **(1)** a hearing notice that fails in some material fashion to adequately paraphrase or describe an application or the controlling criteria, and **(2)** a hearing notice that adequately paraphrases or summarizes an application that may itself contain some ambiguity. ORS 197.763(3) — incorporated by the general notice requirement in 215.416(5) — requires that the hearing notice:

> "(a) Explain the nature of the application and the proposed use or uses which could be authorized; [and]
>
> "(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue [.]"

In its August 15, 1995, letter, Marquam Farms suggested that it was "not clear" whether the approval request comprised an approval to expand an allegedly lawful 50–dog kennel to a 75–dog kennel, or whether the request comprised an approval of a 75–dog kennel when no "lawful kennel use presently exists." It urged that the matter be re–noticed for hearing, although it offered no reason why anyone might be prejudiced if that did not occur.

I have cited Applicant's various characterizations of the pending conditional use request ***supra*** beginning at page 7. The County's hearing notice recited that

> "Applicant requests Conditional Use approval, or approval to alter a Non–Conforming Use, to expand the capacity of the existing dog kennel facility on this property from a maximum of 50 dogs to 75 dogs."

I concluded at the August 16 hearing that, notwithstanding some minimal degree of grammatical differences, the County's notice of hearing fairly paraphrased the substance of the application as required by ORS 197.763(3). Whether the ***application itself*** might have been more clearly articulated remains inconsequential for purposes of assessing the adequacy of the ***hearing notice***; the notice can scarcely be held to higher standards of clarity than the application.

Thus, as of the August 16, 1995, hearing I found the County's hearing notice to be neither fatally ambiguous nor prejudicial to any interested party, and I denied Marquam Farms' request that the hearing be re–noticed to cure any grammatical flaw (if any) that, in my opinion, did not and could not affect substantial rights of any interested party.

By a related letter dated September 6, 1995, Marquam Farms objected to my resolution of the "notice" issue during the August 16, 1995, hearing, complaining that I "ruled that matters ***outside*** of the notice permitted the scope of the hearing to include a new request for a conditional use for a 75 dog kennel." (Emphasis added.)[14]

Assuming that Marquam Farms' September 6, 1995, letter fulfills the criteria for post–hearing submittals that I established at the August 16, 1995, hearing, I cannot help but observe that:

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[14] Neither Marquam Farms nor any other interested party appeared at the August 16, 1995, hearing to challenge, or otherwise inquire about, the adequacy of the hearing notice.

- The resolution of Marquam Farms' initial objection as to the clarity of the hearing notice can scarcely be resolved without a review of, and comparison with, the application and Applicant's phraseology. I thus conclude that Marquam Farms' request for clarification invited just such a comparison and, accordingly, that Marquam Farms invited reference to matters "outside" of the notice in order to ascertain whether the notice proved fatally ambiguous.

- Marquam Farms itself specifically cited the Applicant's "application form" in its August 15, 1995, letter, following which Marquam Farms remarked that "from ***this*** [*viz*, the application form] it is not clear" what Applicant's request comprises. I thus conclude that Marquam Farms ***itself*** initially cited "matters outside of the notice" as an indispensable component of its request that I interpret the clarity of the hearing notice.

- Neither in its August 15, 1995, letter nor its September 6, 1995, letter has Marquam Farms suggested any reason why it has been misled or confused by Applicant's most recent approval request. Because Marquam Farms had adequate time and opportunity to formulate some reason why, given its participation in DR 4–94, a re–worded notice would rectify some prejudicial misunderstanding, and because I cannot conceive that a reasonable person in Marquam Farms' position could be materially misled by the wording of the hearing notice, I conclude that the hearing notice did not prejudice Marquam Farms in such a manner that it could not effectively participate here.

- Marquam Farms' September 6, 1995, letter contradicts the August 15, 1995, letter in a manner that suggests the absence of any lingering uncertainty. The earlier letter maintains that "it is ***not clear*** whether the request is for approval to expand an allegedly lawful 50 dog kennel to a 75 dog kennel, or whether the request is for approval of a 75 dog kennel where no lawful kennel presently exist" (emphasis added), while the most recent letter declares that the hearing notice was "***clearly*** limited to expansion of a kennel from 50 to 75 dogs" (emphasis added). In other words, what was apparently "not clear" on August 15 had become "clear[]" by September 6. In that light, I conclude that Marquam Farms has relinquished the objection in its August 15 letter.

C. ISSUE AND CLAIM PRECLUSION

Marquam Farms also asserted in its August 15, 1995, letter that

> "[t]o the extent that the applicants rely on either an existing conditional use permit or an existing non–conforming use for a 50 dog kennel, both issue and claim preclusion (formerly commonly referred to as collateral estoppel and *res judicata*) prevent the County from reopening those issues to overturn the previous [August, 1994] decision of the Hearings Officer [in DR 4–94]."

Because that issue implicated substantive rather than procedural issues, I determined that those issues would be addressed on the merits within this decision.

D. PENDING LITIGATION

Marquam Farms also suggested in its August 15, 1995, letter that the pendency of certain litigation in Multnomah County Circuit Court should preempt the pending land use proceedings. Because Marquam Farms itself had initially challenged the kennel operations within the context of *both* the 1990 *and* 1994 County land use proceedings, I concluded that it had already accorded the land use process a priority status in its challenges to the kennel operations.

I therefore concluded that, not only would I not abate the pending land use proceedings pending the completion of litigation, but I believed the contrary result should obtain, *viz*, any pending litigation should await a final determination as to Applicant's quest for conditional use or non–conforming use status.

E. Precedential Impact Of OAR 660–33–120

Finally, Marquam Farms urged in its August 15, 1995, letter that, notwithstanding any merit to Applicant's proposal, the 1994 promulgation of OAR 660–33–120 would prohibit kennel facilities in any event.

Because I determined that this particular subject, like the subject of "issue and claim preclusion" mentioned above, implicated substantive rather than procedural issues, I would address it on the merits within this decision.

III. Applicable Criteria — Conditional Use

The following criteria apply to the proposed development:

A. Exclusive Farm Zone Uses
[ORS 215.283]

As of Applicant's 1995 application, ORS 215.283 provided, in pertinent part:

"* * * * *

"(2) The following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:

"* * * * *

"(m) Dog kennels not described in subsection (1)(j) of this section."

The Applicant's kennel facilities comprise kennels "not described in subsection (1)(j)," *viz*, non–greyhound kennels.

The 1995 legislature's recent amendment to ORS 215.283 via SB 834 (*see* 1995 Or Laws, ch. 528, § 2) not only created an unrelated provision but could have no effect on the pending application in any event.

B. STANDARDS FOR APPROVAL OF EXCLUSIVE FARM ZONE USES [ORS 215.296]

ORS 215.296 provides, in pertinent part:

> **"(1) A use allowed under ORS . . . 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:**
>
> > **"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or**
> >
> > **"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.**
>
> **"* * * * ***
>
> **"(10) Nothing in this section shall prevent a local governing body approving a use allowed under ORS . . . 215.283(2) from establishing standards in addition to those set forth in subsection (1) of this section or from imposing conditions to insure conformance with such additional standards."**

C. LCDC "AGRICULTURAL LAND" ADMINISTRATIVE RULES [OAR 660–33–120/660–33–130]

In June, 1994, LCDC promulgated OAR 660–33–120, which provides, in pertinent part:

> **"The specific development and uses listed in the following table are permitted in the areas that qualify for the designation pursuant to this division. . . . The abbreviations used within the schedule shall have the following meanings:**
>
> **"A Use may be allowed. . . .**
>
> **"R Use may be approved, after required review. . . .**
>
> **"* Use not permitted.**
>
> **"# Numerical references for specific uses shown on the chart refer to the corresponding section of OAR 660–33–130. . . .**

HV Farm	All Other	USES
. . .	. . .	. . .
*18	R5	Dog kennels."

OAR 660–33–130, likewise effective in June, 1994, additionally provides, in pertinent part:

> **"The following standards apply to uses listed in OAR 660–33–120 where the corresponding section number is shown on the chart for a specific use under consideration. . . .**

"* * * * *

"(18) Existing facilities may be maintained, enhanced or expanded, subject to other requirements of law. . . ."

D. EFU CONDITIONAL USES [MCC 11.15.2012(B)]

MCC 11.15.2012(B) provides:

"The following uses may be permitted when approved by the Hearings Officer pursuant to the provisions of MCC .7015 to .7140:

"* * * * *

"(11) Dog kennels."

MCC 11.15.0010 defines "kennel" as

"[a]ny lot or premises on which four or more dogs, more than six months of age, are kept."

E. CONDITIONAL USE — GENERAL APPROVAL CRITERIA [MCC 11.15.7120(A)]

MCC 11.15.7120(A) — implicated via MCC 11.15.2012(B), above — sets forth general conditional use approval criteria:

"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,[15] the approval criteria listed in this section shall apply. In approving a Conditional Use listed in this section, the approval authority shall find that the proposal:

"(1) Is consistent with the character of the area;

"(2) Will not adversely affect natural resources;

"(3) Will not conflict with farm or forest uses in the area;

"(4) Will not require public services other than those existing or programmed for the area;

"(5) 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 will be acceptable;

"(6) Will not create hazardous conditions; and

"(7) Will satisfy the applicable policies of the Comprehensive Plan."

F. CONDITIONAL USE — SPECIFIC EFU APPROVAL CRITERIA [MCC 11.15.7122]

In addition to the general conditional use approval criteria in MCC 11.15.7120, MCC 11.15.7122 additionally provides:

---

15 The "Exclusive Farm Use" provisions in MCC 11.15.2002–11.15.2030 do not contain separate approval criteria for conditional uses. MCC 11.15.2012(B) specifically cites the general approval criteria in MCC 11.15.7105–11.15.7140 as controlling.

"(A) In addition to the criteria of MCC .7120, an applicant for a Conditional Use listed in MCC .2102(B) must demonstrate that the use:

"(1) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

"(2) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

"* * * * *"

With one exception, this provision duplicates the language in ORS 215.296(1), quoted above; the ordinance renders the criteria in subparagraphs .7122(A)(1) and (2) *conjunctive*, while ORS 215.296 makes the counterpart provisions in subparagraphs (1)(a) and (b) *disjunctive*.

G. ANIMAL KEEPING — CONDITIONAL USE APPROVAL CRITERIA [MCC 11.15.7205–.7240]

In addition to all of the above conditional use criteria, MCC 11.15.7205–.7240 provide additional criteria.

MCC 11.15.7205 provides, in pertinent part:

"Dog kennels . . . may be permitted only upon the approval of the approval authority as a conditional use."

MCC 11.15.7210 provides:

> **"These uses shall be permitted only in the following areas and only where they will not conflict with the surrounding property uses:**
>
> **"(A) In CFU, F–2, MUA–20, MUF, and RR districts or those areas of similar low population density.**
>
> **"(B) C–3 or C–2 commercial districts.**
>
> **"(C) Manufacturing districts."**

MCC 11.15.7215 bears the caption **"Minimum Site Size Requirements"** and provides, in full:

> **"(A) Area: Two acres.**
>
> **"(B) Width: Two hundred fifty feet.**
>
> **"(C) Depth: Two hundred fifty feet."**

MCC 11.15.7220 provides:

> **"These uses shall be located no closer than one hundred feet to any lot line, in or adjacent to an *F*, *R*, or *A* district."**

MCC 11.15.7230 provides:

> **"(A) All kennels, runs or pens shall be constructed of masonry or such other opaque material as shall provide for cleanliness, ease of maintenance, and sound and noise control.**

"(B) All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered are the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and public facilities on nearby properties, and other similar factors.

"(C) The owner or operator of a use approved under this section shall maintain the premises in a clean, orderly and sanitary condition at all times.

. . .

"(D) A separate housing facility, pen or kennel space may be required for each dog over six months of age kept on the premises over twenty–four hours."

Finally, MCC 11.15.7240 provides an exemption for certain facilities:

"Animal facilities for which Animal Control Facility licenses were issued prior to October 31, 1985[,] shall be exempted from the provisions of MCC .7205–.7235 unless:

"(A) There is an increase in the number of animals in the facility, or

"(B) The use is discontinued for a period of more than two years."

H. COMPREHENSIVE PLAN PROVISIONS [POLICIES 9, 13, 22, 37, 38, AND 40]

The Staff Report identifies Comprehensive Plan Policies 9, 13, 22, 37, 38, and 40 as applicable. (Staff Report at 5 and 11.) I will discuss the pertinent provisions of those policies *infra* in the "Findings" portion of the conditional use discussion.

IV. PRECLUSION ISSUES — CONDITIONAL USE

Before proceeding to the substantive "conditional use" issues, a labyrinthine array of preliminary issues that I broadly categorize as "preclusion" issues need to be addressed and resolved. With one exception, these comprise issues that could effectively derail Applicant's approval request *apart from* the question whether the request itself fulfills the pertinent conditional use or non-conforming use criteria in the Zoning Ordinance. Marquam Farms' August 15, 1995, letter raises some of these issues.

The lone exception comprises the question whether *Marquam Farms itself* ought to be precluded from raising challenges that it unsuccessfully asserted in 1990 but did not appeal at that time.

Thus, I need to traverse the bewildering land use history surrounding the kennel facilities and resolve the following key questions:

- Is the hearings officer's August, 1994, decision in DR 4–94 binding on Applicant, such that I am now precluded from revisiting many of the legal and factual issues that the parties debated in 1994?

- What, if any, precedential or preclusive weight ought I accord the County's sequential determinations in 1989 and 1990 that the kennel facilities did *not* require "conditional use" approval?

- What, if any, precedential or preclusive effect do the 1989 and 1990 *approvals* — as opposed to *denials* — have on subsequent proceedings involving the kennel facilities?

- What, if any, precedential or preclusive effect do I accord the fact that the Applicant successfully and appropriately obtained conditional use approval in 1990 — an approval now beyond challenge — for a "watchman's residence" as an accessory use to the kennel facilities?

- Is the current approval request sufficiently identical to the Design Review request in 4–94 that, all else aside, there exists no practical or logical reason to allow Applicant to plow the same furrow again?

- What, if any, precedential or preclusive effect do I accord the fact that Marquam Farms (1) *actively participated* in the 1990 proceedings in CU 23–90, (2) *raised* a "legality–of–use" issue in 1990 that later resurfaced in Marquam Farms' 1994 Design Review appeal, and (3) *opted to not appeal* the adverse resolution of the "legality–of–use" issue in 1990?

As I explain below, I conclude that none of the above procedural questions foreclose consideration of the merits of Applicant's current request for approval.

A. BECAUSE IT *DENIED* A REQUESTED APPROVAL, THE HEARINGS OFFICER'S 1994 DECISION DOES NOT PRECLUDE A RECONSIDERATION OF EITHER LEGAL OR FACTUAL "CONDITIONAL USE" ISSUES

Alone among the series of decisions and approvals that Applicant has sought and obtained since 1989, the hearings officer's 1994 decision in DR 4–94 *denied* a requested approval, *viz*, Design Review approval. The fact that that decision "granted" an *appeal* of Design Review approval neither cloaks nor alters the fact that, unlike the decisions in 1989 (building permit), DR 90–07–02 (design review), and CU 23–90 (conditional use), no rights vested by reason of any approval.

The County's Zoning Ordinance does not prohibit the resubmittal of an application that might have been the subject of an earlier denial. Unless accompanied by some affirmative adjudication of rights or interests, or unless made the subject of an appeal to the Land Use Board of Appeals (or beyond) in which a declaration as to the

existence or nonexistence of legal rights or interests occurs within that appellate context, the ***denial*** of a requested approval achieves nothing more the maintenance of the ***status quo***.

Indeed, the hearings officer's 1994 decision concludes with the observation that

> ". . . ***if*** the applicant is able to obtain a conditional use permit or otherwise establish the use as a lawful use, this denial of Design Review ***should not prejudice such later action***, if any. Therefore, the applicant's request for Design Review is denied, ***without prejudice***." (August 19, 1994, DECISION at 7 [emphasis added].)

When the County later placed the hearings officer's decision on the Board's September 13, 1994, acknowledgment agenda, it retained and incorporated the "without prejudice" language.

I therefore conclude that, because of the circumstances (*viz*, a denial of a request for approval followed by a subsequent resubmittal of a different nature), and because neither statute nor ordinance requires that the prior ***denial*** of a land use application binds the applicant in future proceedings, I am, in effect, writing on a slate unfettered and unconfined by the 1994 hearings officer's decision. *See Furler v. Curry County*, 27 Or LUBA 497, 506 (1994); *Reeder v. Clackamas County*, 20 Or LUBA 238, 242–44 (1990); and *S & J Builders v. City of Tigard*, 14 Or LUBA 708, 711–12 (1986).

B. THERE EXISTS NO PURE "IDENTITY OF ISSUES" SUCH THAT "CLAIM PRECLUSION" OR "ISSUE PRECLUSION" MIGHT OTHERWISE APPLY

In its August 15, 1995, letter, Marquam Farms suggested that

> "both issue and claim preclusion (formerly commonly referred to as collateral estoppel and ***res judicata***) prevent the County from reopening those issues to overturn the previous [August, 1994] decision of the Hearings Officer."

I conclude that, for three reasons, I am not bound by the hearings officer's legal conclusions in DR 4–94.

(1). "CLAIM PRECLUSION" AND "ISSUE PRECLUSION" SERVE NO PURPOSE IN THIS PARTICULAR PROCEEDING

The 1994 proceedings in DR 4–94 resulted in the ***denial*** of an approval request, leaving the ***status quo*** unaffected and vesting no rights. I can find no statute or provision in the County's Zoning Ordinance — and Marquam Farms cites none — that precludes the resubmittal of an approval request under the circumstances that accompany Applicant's request.

Given the fact that someone in Applicant's position can typically reapply for the same or similar approvals after a prescribed period of time, I can find no authority for imposing the litigation–derived doctrines urged by Marquam Farms, nor has anyone cited any. *See*, for instance, ***Nelson v. Clackamas County***, 19 Or LUBA 131, 140 (1990) (recognizing this principle).

(2). WITHIN AN ADMINISTRATIVE CONTEXT, I CANNOT BESTOW *STARE DECISIS* STATUS UPON A PRIOR INTERPRETATION OF A LOCAL ENACTMENT THAT MISINTERPRETS THE ENACTMENT

As I discuss in detail ***infra*** beginning at page 50, I conclude that the hearings officer's decision in DR 4–94 misinterpreted .2028(B). In effect, that decision renders .2028(B) superfluous and devoid of purpose.

By holding that, before .2028(B) takes effect,

> "the kennel use must not only have been listed as a conditional use, but it must have been legally established as such, prior to August 14, 1980 (i.e. ***it must have actually obtained a conditional use permit***)" (August 19, 1994, DECISION at 4 [emphasis added]),

the 1994 decision rendered .2028(B) entirely unnecessary; if a use that might otherwise qualify as a ".2028(B)" use had "actually obtained a conditional use permit" in the first place, then the existing use would *already* be "conforming" and would benefit in no respect from a provision such as .2028(B).

Stated differently, because the primary effects of .2028(B) comprise **(1)** the announcement that the antecedent use "shall be deemed ***conforming***" as a *conditional* use, and **(2)** the declaration that the referent "conforming" conditional use "shall . . . not [be] subject to the [non–conforming use] provisions of MCC .880[5]," the drafters of .2028(B) could only have envisioned the creation or recognition of a species of "use" *other than* a conditional use for which a permit already existed. If not, then the drafters of .2028(B) simply recited the obvious.

Within the administrative context, until such time as LUBA or the courts adopt an interpretation of .2028(B) — and of all of the mirror–image provisions that I have catalogued in the footnote on page 51 — that *either* overturns the Planning Commission's implicit interpretation in the 1990 proceedings in CU 23–90 *or* conforms to the hearings officer's 1994 decision in DR 4–94, I cannot adhere to an interpretation of .2028(B) that effectively renders that provision mere surplusage and thus devoid of significance.

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(3). THE ISSUES IN DR 4–94 AND THIS PROCEEDING, AND THE MANNER IN WHICH THE ISSUES AROSE IN DR 4–94, DO NOT SQUARELY ALIGN

Even assuming for purposes of argument that concepts such as "issue preclusion" or "claim preclusion" might obtain in a land use proceeding on the basis of the proceeding's administrative characteristics (*see*, generally, *Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 355–59, ___ P2d ___ (1995); *Chavez v. Boise Cascade Corp.*, 307 Or 632, 635, 772 P2d 409 (1989); and *North Clackamas School Dist. v. White*, 305

Or 48, 52, 750 P2d 485, ***modified on other grounds***, 305 Or 468, 752 P2d 1210 (1988)), I nevertheless conclude that, except for the fact that both the 1994 proceedings and this proceeding implicate a bewildering chronology and pose a veritable maze of intricate issues, the 1994 proceeding and this proceeding simply do not align. That flaw obliterates any preclusive effect with respect to the 1994 proceedings. ***Nelson v. Emerald People's Utility Dist.***, 318 Or 99, 104–05 incl. n. 4, 862 P2d 1293 (1993) (no "identity" of issues, no "issue preclusion"); ***Douglas v. Multnomah County***, 18 Or LUBA 607, 612–13 (1990) ("similarity" of issues does not equal "identity" of issues for purposes of issue/claim preclusion).

Without tracking all of the various issues in the two proceedings that I view as divergent, I simply note that a major issue in Marquam Farms' successful appeal in DR 4–94 comprised the question whether, in the absence of the issuance of a ***prior*** permit for the kennel as a "conditional use," the hearings officer had the authority to proceed with Design Review approval. The current approval request raises, among many other issues, the question whether Applicant can ***now*** fulfill the County's conditional use criteria in the Zoning Ordinance.

Thus, I conclude that notions of "issue preclusion" or "claim preclusion" are inappropriate in land use proceedings of this nature (*viz*, a subsequent approval request on the heels of a previous ***denial***). I further conclude that "issue preclusion" or "claim preclusion" — even if applicable to land use proceedings — will not derail Applicant's approval request under the circumstances.

Moreover, even if I am incorrect in my interpretation of MCC 11.15.2028(B), the proceedings in DR 4–94 would not preclude me from (1) considering the pending application as a request for a conditional use permit pursuant to MCC 11.15.7105, *et seq.*,[16] or (2) considering the pending application as a request for the resumption of a non–conforming use.

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16 If anything in the County's Zoning Ordinance purports to prohibit Applicant from seeking conditional use approval at this juncture pursuant to the criteria in MCC 11.15.7105, *et seq.*, I cannot find it, nor has anyone cited any such prohibition.

C. THE COUNTY'S SEQUENTIAL, UNIFORM DETERMINATIONS IN 1989 AND 1990 THAT APPLICANT'S KENNEL FACILITIES DID *NOT* REQUIRE "CONDITIONAL USE" APPROVAL CONNOTES IMPLICIT INTERPRETATIONS OF MCC 11.15.2028(B) IN A MANNER THAT LONG AGO RESOLVED THE ISSUE

One cannot examine the chronology underlying Applicant's land use efforts from 1989 to date and remain unaffected by both the persistence and uniformity of the County's determinations and the accompanying representations that Applicant needed no "conditional use" approval in order to maintain and operate the kennel facilities.

An historical tour of the County's cumulative interpretations of the Zoning Ordinance in 1990 alone serves to underscore the precedential impact of those interpretive efforts.

(1). 1990 CONDITIONAL USE PROCEEDINGS

When Applicant sought conditional use approval of a "watchman's residence" in 1990 in CU 23–90, MCC 11.15.2014(E) authorized "uses . . . incidental and accessory to ***the uses permitted under MCC .2008 through .2012***," and included, among other things, "[o]ther structures or uses customarily incidental to ***any use permitted or approved*** in this district."

Thus, it necessarily became a condition precedent to approval — whether implicit or otherwise — that the Planning Commission determine and conclude that there existed a dominant "use[] permitted under MCC .2008 through .2012" or "any [dominant] use permitted or approved" with the EFU district — *viz*, the kennel facilities themselves.

The Planning Commission appears to have done just that. The record contains the tape of the November 6, 1990, Planning Commission hearing, and the tape confirms the following events:

- The Planning Commission — apparently prodded to do so in some degree by Marquam Farms — inquired whether the underlying kennel use comprised the prerequisite legally–established conditional use, whether by permit or by virtue of MCC 11.15.2028(B).

- Staff informed the Planning Commission that it (staff) interpreted .2028(B) to render the kennel facilities a "'conforming' conditional use."

- Staff informed the Planning Commission that it (staff) interpreted .2028(B) to created a species of conditional use that, unlike a ***non***–conforming use, could ***not*** be terminated by abandonment or discontinuance.

- Staff informed the Planning Commission that a ".2028(B)" conditional use did not require any conditional use approval via the conditional use process in MCC 11.15.7105, ***et seq.***, because .2028(B) ***itself*** grants conditional use status.

Thus, the pivotal question appears to have percolated to the surface during the November 6, 1990, hearing in such an indelible manner that I must conclude that the Planning Commission (1) became fully cognizant of the issue and (2) necessarily — albeit impliedly — rendered an appealable interpretation of .2028(B) in the manner now advocated by Applicant.

I note that Marquam Farms' argument on the appeal in DR 4–94 mirrored that "implied–yet–indispensable" analysis. In the appeal in DR 4–94, Marquam Farms necessarily argued that the hearings officer lacked the authority to sustain the Planning Director's administrative Design Review approval because the Design Review mechanism requires, as an ***implied*** condition precedent, the pre–existence of either a "conditional" or "community" use (*see* MCC 11.15.7820) — which, according to Marquam Farms, did not actually exist. Although the Planning Director's administrative Design Review approval in DR 4–94 did not ***expressly*** find the pre–existence of the requisite "conditional" or "community" use, it ***implicitly*** made that finding. Marquam Farms then challenged that ***implicit*** finding, according it the same force and effect as an ***explicit*** finding.

(2). 1990 DESIGN REVIEW PROCEEDINGS

When the County informed Applicant in 1990 that it only needed Design Review approval for remodeling (*see* DR 90–07–02), the "FINAL DESIGN REVIEW" dated August 6, 1990, specifically incorporated a condition derived from MCC 11.15.7230, which, in turn, would not otherwise have applied at all ***unless*** the County had first determined that the requisite condition precedent in MCC 11.15.7820 — *viz*, a conditional use — existed.

Thus, it necessarily became a condition precedent to approval — whether implicit or otherwise — that the Planning Director determine and conclude that there existed the requisite "conditional use" approval, without which any Design Review approval would be for naught.

(3). THE COUNTY ITSELF HAS "INTERPRETED" MCC 11.15.2028(B) IN DISPOSITIVE FASHION

Although I agree in principle with the hearings officer's 1994 conclusion that local governments' generally ought not be bound by mistakes of law (August 19, 1994, DECISION at 7 and 8), I cannot so easily dismiss the County's consistent characterizations of Applicant's kennel facility — and the effect of the controlling ordinances — as mere "mistakes" or "staff" misinterpretations upon which the "County" inadvertently relied.

Rather, I view such consistent, ***ad seriatim*** opinions as the functional equivalent of an ***interpretation*** of the County's Zoning Ordinance upon which persons such as Applicant might rely, and with respect to which persons such as Marquam Farms and others remain bound until the Board itself adopts a contrary interpretation of .2028(B) or until LUBA or the courts undertake to do that.

The separate — and quite different — question whether independent appellate tribunals such as LUBA, the Court of Appeals, or the Supreme Court might similarly be bound by the County's uniform, historical interpretations of its land use enactments

in Applicant's 1989 and 1990 land use proceedings has no bearing here.[17] Even assuming for purposes of argument that there exists a difference between (1) a Board of County Commissioners' "acknowledgment" of a Planning Commission or hearings officer approval in the absence of an appeal to the Board,[18] and (2) a Board of County Commissioners' determination of an appeal in accordance with MCC 11.15.8270–.8280 (*see McKenzie v. Multnomah County*, 131 Or App 177, 179 n. 1, 884 P2d 868 (1994) [appeal to Board implicates the *Clark/Gage* criteria]), the question whether the County's prior unappealed staff and Planning Commission approvals in 1989 and 1990 ought to be accorded precedential status *within future County proceedings* as interpretations of a local enactment does not implicate the type of analysis that resulted in *Gage v. City of Portland*, and *Derry v. Douglas County*, *supra*. Had the 1989 and 1990 proceedings resulted in *denials*, my conclusion might be different.

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17 *Compare*, for instance, *Clark v. Jackson County*, 313 Or 508, 515–18, 836 P2d 710 (1992), and *Smith v. Clackamas County*, 313 Or 519, 524–28, 836 P2d 716 (1992) (LUBA and the courts shall generally defer to a local government's interpretations of land use enactments), *with Gage v. City of Portland*, 319 Or 308, 315–17, 877 P2d 1187 (1994) (LUBA and the courts owe no "deference" to interpretations of land use enactments by a hearings officer); and *Derry v. Douglas County*, 132 Or App 386, 389–90, 888 P2d 588 (1985) (LUBA and the courts owe no "deference" to interpretations of land use enactments by a Planning Commission).

18 MCC 11.15.8255 provides that

> "[t]he written decision of the Planning Commission or the Hearings Officer shall be submitted to the Clerk of the Board 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 meeting on planning and zoning matters for which notice can be given under the Charter."

The record reflects that the November 6, 1990, Planning Commission approval of CU 23–90 appeared on the Board of County Commissioners' November 27, 1990, "acknowledgment" agenda. The time for appealing the Planning Commission's decision expired on November 26, 1990; no one appealed

The record does not contain any similar Board consideration of any of the other 1989 or 1990 approvals. Although MCC 11.15.7865 and 11.15.8290 provide for an appeal to a hearings officer from the Planning Director's administrative Design Review approval, nothing in MCC 11.15.7805–.7870 appears to require the submittal of an *unappealed* approval to the Board in the manner otherwise required for Planning Commission or hearings officer decisions.

A local government need not specifically describe its decisions as "interpretive" of local enactments before persons such as Applicant can reasonably rely upon those decisions as reflective of approved constructions of those enactments. The more a local government consistently renders a particular interpretation of a local enactment within similar or identical circumstances, the less likely it becomes that the rest of us can look back and conclude that on each occasion the local government inadvertently made a "mistake of law," or that "staff" necessarily erred in misconstruing a provision.

Thus, when, as here, a local government — whether acting through staff, the Planning Commission, or a hearings officer — repeatedly interprets and implements its ordinances under circumstances in which interested parties (1) *could have* appealed those interpretations within the context of an *approval* but (2) elected to *not* appeal (*see* the following topic for more on that subject), I find it difficult to accept the argument that the consistency of the interpretations can never take the shape of an *interpretation*, but must remain relegated to a "mistake of law."

D. MARQUAM FARMS' FAILURE TO APPEAL THE 1990 DECISION THAT SPECIFICALLY REJECTED THE IDENTICAL "LEGALITY–OF–USE" ARGUMENT THAT IT NOW MAKES PRECLUDES IT FROM RELITIGATING THAT ISSUE

In Marquam Farms' September 6, 1995, letter, it objected to any consideration of conditional use or non-conforming use issues in *this* proceeding because "those contentions were fully aired and decided in the unappealed Hearings Officer decision in DR 4–94." The correlative question becomes whether, according to that same reasoning, Marquam Farms' current objections via its August 15, 1995, and September 16, 1995, letters likewise come too late.

As I explain beginning at page 44, *supra*, I view the Planning Commission's 1990 decision in CU 23–90 as conclusively — albeit implicitly — resolving the question whether the kennel facilities comprised a "conforming" conditional use pursuant to MCC 11.15.2028(B). The record reflects that Marquam Farms (1) actively participated in the 1990 proceedings, (2) raised a "legality–of–use" issue that later resurfaced in DR 4–94, and (3) elected to not appeal the adverse resolution of that issue in the 1990 proceedings.

In *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the Supreme Court recently rendered a poignant comment about belated efforts to raise issues in land use proceedings. With but a minor modification, that comment seems fitting here as well. Specifically, the Court championed the Court of Appeals' earlier observation that

> "'[a] party who did not raise an issue in an earlier proceeding because he chose not to participate in it should be as precluded from later raising the issue as a party who did participate but neglected to raise the issue.'" 313 Or at 153 n. 2, quoting from *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 527, 746 P2d 728 (1987).

Paraphrased only slightly, that comment from *Beck* might well read: "A party who did not ***pursue*** an issue that it had raised in an earlier proceeding because it chose not to ***appeal*** the underlying decision should be as precluded from later raising the issue as a party who ***did appeal*** the underlying decision but ***neglected to raise the issue*** in the appeal." As so paraphrased, that conclusion would not be a particularly novel proposition.

Indeed, in *Beck* the Supreme Court resolved the question whether, in a land use proceeding in which a party prevails on one or more issues but loses on one or more issues, that party might purposely refrain from pursuing an appeal with respect to the issues on which that party did not prevail, and then later appeal those same issues within the context of an appeal from a later decision. In land use proceedings, that scenario occurs (or used to occur) with some frequency: *viz*, an opponent of a proposed development appeals an underlying decision and wins some issues while losing others; content with a partial victory in round one, the opponent returns for round two; the opponent loses round two and appeals again. *Beck* makes it plain that the "lost" issues that the opponent chose to not pursue further in round one cannot form any part of an appeal of round two.[19]

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19 For reasons perhaps peculiar to the land use process, *Beck* would not apply to a land use *proponent* (*viz*, the applicant) when that proponent *fails* to obtain favorable approval and resubmits the same application after the passage of some prescribed period of time. In that event, *Beck* would also not preclude any *opponent* from raising issues in the later proceedings that had not been raised earlier. That scenario would allow, for instance, the parties to debate matters anew *vis-a-vis* the 1994 proceedings, but not the 1990 proceedings in CU 23-90.

Land use proceedings also frequently involve another scenario: an opponent of a proposed development raises a particular issue at the primary decision–making level but loses; rather than risk an unsuccessful appeal of the issue to the governing body (or higher), the opponent does not pursue any appellate resolution and simply allows the decision to become final. In 1990, Marquam Farms apparently did precisely that in CU 23–90. It (1) challenged the lawfulness of Applicant's kennel facilities (*see* tape of November 6, 1990, Planning Commission hearing), (2) received (or precipitated) a specific interpretation of MCC 11.15.2028(B) in response to that challenge, and, after the Planning Commission necessarily determined that the kennel facilities comprised what might be termed a ".2028(B) use," (3) elected to not pursue the matter further. It would not strain logic to apply *Beck*'s reasoning to that scenario as well.

Thus, I conclude that — to paraphrase Marquam Farms' September 6, 1995, letter — Marquam Farms' "contentions [about the legality of the kennel facilities] were fully aired and decided in the unappealed [Planning Commission] decision in [CU 90–23]." Marquam Farms' resurrection of issues that could have been appealed to the Board (or beyond) in 1990 comes too late. Unlike the hearings officer's rejection of the Applicant's arguments in DR 4–94, the Planning Commission's rejection of Marquam Farms' arguments in CU 23–90 was *not* "without prejudice." I again emphasize the distinction between proceedings resulting in *approvals* and proceedings resulting in *denials*.

V. Do The Kennel Facilities Already Comprise A ".2028(B)" Use?

Before resolving the question whether Applicant has fulfilled the various "conditional use" criteria in MCC 11.15.7105, *et seq.*, another preliminary question must first be answered: Do the existing kennel facilities comprise what might be termed a "conforming" conditional use, or what might also be labeled a ".2028(B) use"?

If so, then Applicant need not attempt to obtain retroactive conditional use approval for the kennel facilities themselves. If not, then the conditional use process for an *expansion* of use will be for naught and Applicant instead must fulfill the criteria in MCC 11.15.7105, *et seq.*, as if it were establishing the use for the first time.

Unfortunately, the language in .2028(B) engenders an interpretive quagmire into which everyone involved with Applicant's various land use proceedings has fallen

at one time or another. Marquam Farms earlier branded .2082(B)'s interpretation difficulties a proverbial "tar baby," and I concur. (*See* Marquam Farms' July 27, 1994, Memorandum in DR 4–94, at 2.) Nevertheless, unlike Marquam Farms' plea in 1994 that .2028(B) be left alone, I conclude that .2028(B) — its "tar baby" characteristics notwithstanding — stands squarely in the center of the path toward a resolution of Applicant's approval request, and that I do not know what direction that path takes until I confront .2028(B) directly.

MCC 11.15.2028(B) provides that

> "[c]onditional uses ***listed*** in subpart MCC [11.15].2012 ***legally established*** prior to August 14, 1980, ***shall be deemed conforming*** and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)

Virtually identical language appears in a host of provisions in the Zoning Ordinance.[20]

"Dog kennels" certainly comprise a conditional use presently "listed" in MCC 11.15.2012(B)(11),[21] and Applicant's facilities certainly comprise a "kennel" as defined in MCC 11.15.0010. Beyond those two certainties, everyone's understanding of what that language *means* and what it *does* seems to diverge.

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20 The same or similar language appears in, for example:

- MCC 11.15.2070(A) (CFU);
- MCC 11.15.2108 (F–2);
- MCC 11.15.2150 (MUA–20);
- MCC 11.15.2190 (MUF);
- MCC 11.15.2230 (RR);
- MCC 11.15.2270 (RC);
- MCC 11.15.2368 (UF–20 and UF–10);
- MCC 11.15.2488(A) (LR–40, LR–30, LR–20, LR–10, LR–7.5, LR–7, and LR–5);
- MCC 11.15.2718(A) (MR–4, MR–3, HR–2, and HR–1);
- MCC 11.15.5055 (LM, GM, HM);
- MCC 11.15.6062 (LF); and
- MCC 11.15.7040 (CS).

21 That "listing" apparently occurred in 1986. However, I do not perceive that fact to have any consequence with respect to the meaning or scope of .2028(B).

There exist two methods of interpreting .2028(B): either (1) parse its individual clauses in chronological order and construe each (*see* topics A and B, below), or (2) determine the most logical reason why the provision arose in the first place (*viz*, the goal or purpose underlying .2028(B)) and disregard linguistic imperfections along the way (*see* topic C, below).

As I discussed earlier in this decision, after reviewing and re–reviewing the hearings officer's 1994 decision in DR 4–94, I have (somewhat reluctantly) concluded that the 1994 decision simply misinterprets .2028(B). Notwithstanding all of the various arguments that might be advanced in favor of *stare decisis* with respect to hearings officers' decisions, I simply cannot follow an interpretation of .2028(B) that, in effect, renders that provision superfluous.

A. Do The Applicant's Kennels Comprise A "Listed Use" At All?

Applicant interprets .2028(B) to mean that the existing kennel facilities comprise a "conditional use listed" in MCC 11.15.2012, regardless of whether or not .2028(B) might implicitly confine those "listed" uses to those in effect on August 14, 1980. That interpretation in turn depends upon the conclusion that .2028(B) comprises an elastic provision that protects "listed" conditional uses that the County had not even "listed" as conditional uses within an EFU district as of August 14, 1980. In other words, .2028(B)'s reference to "listed" uses includes all conditional uses "listed" in MCC 11.15.2012 at any point in time from August 14, 1980, forward — until changed by amendatory legislation.

Conversely, Marquam Farms — which, by virtue of its August 15, 1995, letter has incorporated the debate from the 1994 proceedings in DR 4–94 — reads .2028(B) as necessarily meaning that Applicant's kennel facilities could not pass muster as a "listed" conditional use in the first place because the County had not even "listed" kennels as a conditional use in an EFU district as of August 14, 1980. In other words, Marquam Farms' interpretation renders .2028(B) a provision that recognizes no use "listed" after August 14, 1980 — in effect creating two classes of "listed" uses.

The parties bolster their respective interpretations by citing different historical enactments, but neither discusses those cited by the other. Marquam Farms says that "[d]og kennels were not added to the list of EFU–zone conditional uses (MCC

.2012) until the enactment of Ordinance No. 509 on ***May 17, 1986***." (July 27, 1994, Memorandum ["MARQUAM MEMORANDUM"] at 11, n. 2 [emphasis added].) But Applicant points out that "Multnomah County Ordinance No. 100, which went into effect on ***November 15, 1962***, provided in section 7.5401(A) . . . that kennels were a conditional use 'in F-2 districts or those areas of similar low population density.'" (Applicant's July 28, 1994, Brief ["APPLICANT'S BRIEF"] at 2 [emphasis added].)

Given that the "F-2" designation that attains significance in Applicant's argument comprised the predecessor of the current "EFU" designation (*see* Ordinance No. 148, § 3 [redesignating the "F-2" district as "EFU-38"]), the available chronology supplied by the parties leaves me somewhat baffled. To confuse matters further, when the County enacted Ordinance No. 148 in September, 1977, § 3.103.3 thereof established the predecessor of the conditional use provisions in current MCC 11.15.2012(B), but no longer mentioned "kennels" as a conditional use.

I conclude that the legislative chronology — assuming that it can be translated into a cogent proposition — has scant significance at this point. Notwithstanding the fact that kennels could not have comprised a "listed" conditional use until May 17, 1986, for purposes of .2028(B) Applicant's kennel *now* comprises a "[c]onditional use[] listed in subpart MCC [11.15].2012" if only because I would have to insert additional language or conditions into the provision, or surmise some non-explicit connotation, in order to disagree with Applicant's interpretation. My interpretation also renders .2028(B) an elastic provision that does not otherwise segregate conditional uses according to "listing" dates.

However, given the greater uncertainties with the remainder of the language in .2028(B) (below), I am not confident that this particular debate makes any difference.

B. WERE THE KENNELS "*LEGALLY ESTABLISHED* PRIOR TO AUGUST 14, 1980"?

As the Court of Appeals recently observed in *Von Lubken v. Hood River County*, 133 Or App 286, 288, ___ P2d ___ (1995), it is indeed possible to construct, operate, maintain, and otherwise "establish" a conditional use within an EFU district (a golf course) while proponents and opponents endure a five-year debate within LUBA and the Court of Appeals as to the legality and finality of the local government's ap-

proval in the first place. If ultimately successful, it would be equally possible for the parties in *Von Lubken* to urge at least two different dates upon which the use in question had been "legally established." Given that possibility, the question whether phrases such as "legally established" mean anything in particular cannot be answered with the ease suggested by Applicant and Marquam Farms.

(1). DOES THE TERM *"LEGALLY ESTABLISHED"* DIFFERENTIATE USES THAT WERE *"ILLEGALLY* ESTABLISHED" ?

I approach the meaning of the term "legally established" by asking whether it purports to distinguish its converse. Can it be said that Applicant's kennel facilities represent a conditional use "***illegally*** established" prior to August 14, 1980? In other words, can there be an "illegal" ***conditional*** use? If not, then the differentiation in .2028(B) resulting from the term "legally" would be irrelevant insofar as it purported to draw a line between "legal" and "illegal" conditional uses.

Either the County employed the term "legally" for a particular reason, *viz*, in order to differentiate between "***legally***" established conditional uses and "***illegally***" established conditional uses, or it simply created a two–word phrase when one would have sufficed. Because I can think of no circumstances in which a particular use might be described as an "illegal" conditional use (as opposed to some other kind of use), I conclude that .2028(B) simply asks whether a particular had been "established" at its inception in a legal manner, and that the reference to "legally" does not signify other types of conditional use. Otherwise, the phrase "legally established" suggests that the converse exists, which, in the context of a conditional use, would yield an oxymoron.

However, I do not necessarily read the reference to "legally" out of .2028(B) altogether; rather, I interpret the term "legally" to refer to the ***origins*** of the use that .2028(B) then makes "conforming," regardless of whether that use comprised a "conditional" use when first established or something else. I conclude that Applicant's kennel facilities were long ago "established" in a legal manner, albeit not necessarily as a conditional use for which a permit had been given.

(2). DOES THE TERM *"LEGALLY ESTABLISHED"* NECESSARILY INCORPORATE NOTIONS OF "ABANDONMENT" OR "DISCONTINUANCE," AS THOUGH IT PERTAINED SOLELY TO PRE–EXISTING NON-CONFORMING USES?

Applicant — and staff as well in 1989 and 1990 — maintains that, as long as a "listed" conditional use has been "legally established" ***at any point prior to*** August 14, 1980, notions of "abandonment" or "discontinuance" become irrelevant. (APPLICANT'S BRIEF at 1–2.) Applicant reasons that the language in .2028(B)

> "differs markedly from the language for determining whether a use is a nonconforming use: 'lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation' (ORS 215.130(5))." (APPLICANT'S BRIEF at 2 [underscore in original].)

Marquam Farms, on the other hand, declares that .2028(B) comprises "a 'grandfather' clause; not a resurrection clause. It cannot be used to restore to life rights which were extinguished (for reasons unrelated to the Code amendments) before the effective date of MCC .2028(B)." (MARQUAM MEMORANDUM at 8.) It fears that .2028(B) would otherwise allow a resumption of various conflicting uses that had long since ceased to exist within an EFU district, although I suspect that the conflicting uses would no longer be "listed" among the conditional uses allowed in the district under MCC 11.15.2012, and thus could not be "resurrected" anyway.

Both arguments make sense, although for different reasons:

- Applicant focuses solely on a language differential that does indeed reflect a material deviation from the nonconforming use provisions in ORS 215.130(5), yet offers nothing to determine whether that differential might have been intended or merely inadvertent. Moreover, Applicant suggests no rationale why .2028(B) ought to be read to ignore or minimize the possibility of long–since–discontinued uses being brought back to life.

- Marquam Farms focuses solely on the prospect of a "crazy patchwork of historical uses" that .2028(B) might condone if continuity of use were not implicit in .2028(B)'s language, although, as I note above, it seems equally logical to assume that obviously contradictory uses would no longer comprise "[c]onditional uses ***listed*** in subpart MCC [11.15].2012 [.]"

There exists yet a third consideration that neither party mentions: To accept Marquam Farms' argument that the use in question must have been continuous until August 14, 1980 (which necessarily suggests a focus solely on non-conforming uses), the interpreter must be able to construct a rationale for the provision's existence in the first place; that is, what purpose does the provision serve if it achieves nothing more than a name change of pre–existing *non-conforming* uses to *"conforming"* uses and correlatively grants enhanced protection for those uses (*viz*, "not subject to the provisions of MCC .880[5]")? **None.**

In other words, in the interpretive scenario advocated by Marquam Farms, .2028(B) achieves ***precisely*** what Marquam Farms says it *cannot* achieve: it "***improves*** the status of a [non-conforming] use that, even before amendment of the code, was not consistent with zoning." (MARQUAM MEMORANDUM at 5 [emphasis in original].)

Put differently, if Marquam Farms is correct in its premise that .2028(B) can only apply to a pre–existing "legally established" non-conforming use, then I agree with the hearings officer's decision in DR 4–94 that ORS 215.130 prohibits the conversion of a non-conforming use to a "conforming conditional use," which, in turn, seems to strongly suggest that .2028(B) has as its target "use" something ***other than*** a "legally established" non-conforming use. In other words, ***either*** .2028(B) impermissibly conflicts with ORS 215.130 — in which case I must necessarily presume that the drafters of .2028(B) purposefully crafted an enactment that flouts state law — ***or*** it envisions the provision as implicating some other situation entirely — in which case it serves to explain why the language in .2028(B) cannot easily be reconciled with traditional notions of "non-conforming" uses or "conditional" uses.

Because Marquam Farms' interpretation does not yield a rationale that adequately explains the purpose for the provision in the first place, and because in the interpretive scenario advocated by Marquam Farms .2028(B) does ***precisely*** what Marquam Farms says it *cannot* do, I cannot accept it. Linguistics alone does not a law make. At least Applicant's contrary interpretation implies a purpose for the provision, *viz*, to render uses such as Applicant's kennel facilities a "conforming" conditional use as of the date it appears "listed" in MCC 11.15.2012.

I therefore conclude that .2028(B) does not necessarily operate solely on "non-conforming" uses. For that reason, I further conclude that, at least for purposes of this case, a literal reading of the language in .2028(B) does not plainly suggest that the phrase "legally established prior to August 14, 1980" means that the use must, in addition to having been "legally established" at some point in time, have been "legally established ***and continually maintained***" prior to August 14, 1980.

(3). THERE EXISTS NO SUBSTANTIAL EVIDENCE OF "ABANDONMENT" OR "DISCONTINUANCE" IN ANY EVENT

Finally, as I explain in detail in the non–conforming use portion of this decision, I conclude that there exists no "substantial evidence" of "abandonment" or "discontinuance" of kennel facilities on the property since their establishment in the early 1950s. Thus, even if Marquam Farms' interpretation of .2028(B) proves correct and that provision requires a continuity of use until August 14, 1980, the debate becomes moot.

C. WHAT OVERALL PURPOSE DOES .2028(B) SERVE?

The other method of resolving the meaning or scope of .2028(B) rests upon a determination of the purpose for which the County might have enacted that language in the first place.

(1). THE "LITERAL" APPROACH

Applicant suggests that .2028(B) means

> "precisely what it says: if (1) a use such as a kennel is listed in MCC 11.15.2012; and (2) the use was legally established prior to August 14, 1980, it is as if the county gave the use a conditional use permit ***on the day it was established***." (APPLICANT'S BRIEF at 1 [emphasis added].)

But Applicant does not identify what date the kennel facilities might be deemed to have "established." If there exists more than one possible date (and I can think of a couple), then the "literal" approach proves not very helpful.

It would be more correct from the "literal" perspective to declare that a "use" becomes a "conforming conditional use" (*viz*, a ".2028(B) use") on the ***later*** of **(1)** August 14, 1980, or **(2)** the date the "use" appears listed among the various conditional uses in MCC 11.15.2012.

Thus, because Applicant's "literal" interpretation implicates some uncertainty as to the timing component, I cannot accept it as conclusive.

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(2). THE "SAVING GRACE" APPROACH

Marquam Farms suggests that .2028(B) serves to protect a previously–authorized conditional use — *viz*, a use with a permit — from the various restrictions that otherwise burden ***non***–conforming uses in the event that the County subsequently revamps its conditional use provisions in such a fashion that the previously–authorized conditional use becomes, in effect, a non–conforming use. (MARQUAM MEMORANDUM at 4 [preserving the use's right to be "expanded, enlarged, or intensified"].)

However, that interpretation does not explain .2028(B)'s explicit correlation to MCC 11.15.8805, which does ***not*** insulate any .2028(B) use from the "alteration" criteria in MCC 11.15.***8810***. In other words, the protection–of–use that assumes significance in Marquam Farms' hypothesis does not really exist.

Moreover, Marquam Farms' interpretation must also account for the possibility that, instead of merely restructuring the criteria under which a conditional use operates (as in the example on page 4 of its July, 1994, memorandum), the County might very well ***eliminate*** the use itself from among the list of conditional uses. In that event,

nothing about .2028(B) serves to explain why the County would want to protect ***unlisted*** conditional uses.

Finally, Marquam Farms' interpretation would appear to render .2028(B) duplicative of the "pre-existing use" provisions in MCC 11.15.7610 and .7615, which I find susceptible to the very interpretation that Marquam Farms offers as a justification for .2028(B), *viz*, protection of "delisted" uses:

> "A use ***conforming*** to the provisions of this Chapter prior to July 26, 1979, ***but not thereby listed*** in the applicable district as [1] a primary use, [2] a use permitted under prescribed conditions or [3] a conditional use, is subject to the provisions of MCC .7615 through .7640" MCC 11.15.7610 (emphasis and enumeration added).
>
> ". . . [E]xpansion, change in construction or enlargement of a use ***described in MCC .7610*** shall be permitted [.]" MCC 11.15.7615 (emphasis added).

See also MCC 11.15.7620 (allowing restoration of a ".7610" use) and 11.15.7625 (allowing a "change" of a ".7610" use).

(3). THE "SIGNIFICANCE-OF-THE-EXEMPTION-*VIS-A-VIS*-11.15.8805" APPROACH

No one discusses the significance of .2028(B) in terms of MCC 11.15.8805, which is, after all, specifically mentioned in .2028(B).

A dominant effect of MCC 11.15.2028(B) lies in its exemption from the nonconforming use criterion in MCC 11.15.8805. MCC 11.15.8805 sets forth three limitations:

- Any "restoration" or "replacement" shall be allowed only for prescribed reasons. (.8805(A).)

- Any "non–conforming structure or use" that suffers abandonment or discontinuance "for more than two years" cannot be resumed unless the "resumed use conforms with the requirements of this code at the time of the proposed resumption." (.8805(B).)

- Any "non–conforming structure or use may be maintained with ordinary care." (.8805(C).)

However, .2028(B) plainly leaves its referents subject to the "alteration" provisions in MCC 11.15.88***10***. Why?

Because .2028(B) contains an express reference to "conforming," and because MCC 11.15.8805(B) contains a correlative reference to a resumption of an abandoned or discontinued as long as the resumed use "conforms" with pertinent Zoning Code requirements, I find it logical to construe .2028(B) as establishing a presumption that any "resumed" use that, at the time of resumption, (1) comprises a use that appears "listed" in MCC 11.15.2012 ***and*** (2) had been "legally" established at any point prior to August 14, 1980, automatically "conforms with the requirements of this code at the time of the proposed resumption."

In other words, the use may very well have been "abandoned" or "discontinued," but its resumption shall be treated as the resumption of a ***conditional use*** instead of a non–conforming use. Any "alteration" of the use would, however, still be subject to MCC 11.15.8810.

Thus, when the County added "dog kennels" to its list of .2012(B) conditional uses in 1986, any question of "abandonment" or "discontinuance" became, in effect, a moot point as long as the use after 1986 did not comprise any "alteration" of use. That interpretation would accord a .2028(B) use the same treatment as would otherwise be afforded any other conditional use for which a permit had been granted but which might have been discontinued; as long as the use remains listed as an authorized conditional use within, for instance, MCC 11.15.2012, discontinuance has no impact or effect on a ***conditional*** use.

(4). THE "QUASI–CONDITIONAL USE" (OR "WHAT ELSE COULD IT MEAN?") APPROACH

Applicant also suggests that .2028(B) has as its intended purpose

> "to make the uses conforming if they are listed as conditional uses, regardless of whether they have actually obtained conditional use permits." (APPLICANT'S BRIEF at 3 [underscore in original].)

Under this interpretation, .2028(B) grants "quasi"–conditional use status to any use that, "but for" the absence of the required permit, ***would be*** a true (*viz*, allowed) "conditional" use. That interpretation of .2028(B) would not apply to just any "use," a fact that placates Marquam Farms' concern that .2028(B) would otherwise ***enhance*** or ***improve*** the status of a true non-conforming use.

An apparent flaw in this interpretation lies in the fact that, until a pre–existing use actually appears ***listed*** as a conditional use (in, for instance, MCC 11.15.2012), it could only be a non-conforming use, in which case it would not fulfill the "but for" test of the preceding paragraph until such time as it became a "listed" conditional use.

In response, Applicant correctly observes that, if .2028(B) does ***not*** achieve the suggested purpose (and if Marquam Farms' hypothesis proves correct), the only remaining category of uses to which .2028(B) might apply would be conditional uses for which a permit ***already*** existed, and that

> "interpreting MCC 11.15.2028(B) to apply only to uses covered by prior conditional use permits ***would essentially read the provision out of the code***. . . . [I]f a use is already covered by a conditional use permit, the right to continue that use is [***already***] governed by the permit and MCC 11.15.7105 to 11.15.7135." (APPLICANT'S BRIEF at 3–4.)

I agree.

MCC 11.15.2028(B) makes no sense — and becomes utterly superfluous — if it can only apply to conditional uses for which a prior permit has been granted. It ***only***

makes sense if it purports to apply to a use that, "but for" the absence of a conditional use permit, ***would be*** a true conditional use.

For that reason, I reject Marquam Farms' argument that .2028(B) only applies to conditional uses for which a prior permit has been issued. (*See* MARQUAM MEMORANDUM at 3–4 and 6–7.) If Applicant's kennel facilities ***had*** a conditional use permit, the debate about whether .2028(B) confers "quasi"–conditional use status would never occur.

Because I cannot construe .2028(B) to be superfluous and thus unnecessary, I am left with giving it the meaning that Applicant suggests: .2028(B) "makes the uses conforming [conditional uses] if they are listed as conditional uses [within MCC 11.15.2012], regardless of whether they have actually obtained conditional use permits." As so construed, .2028(B) alleviates a logical — if not legal — defect in the status of a use that had perhaps been non–conforming (or even a "delisted" conditional use) at some point in time, but later became a "listed" conditional use. After being "listed" as a conditional use, a pre–existing use — whether established by permit approval or otherwise — could scarcely be described as a "non–conforming" use. MCC 11.15.2028(B) resolves that conundrum.

(5). SUMMARY OF PROBABLE MEANINGS

None of the above outcome–based interpretations explain the meaning of .2028(B) with certainty. Unfortunately, the only alternatives comprise declarations that .2028(B): (1) has no discernible purpose, (2) runs afoul of ORS 215.130 in some unspecified fashion, or (3) remains hopelessly ambiguous. Because I conclude that none of those alternatives comprises the ***only*** reasonable alternative, I cannot in this case accept an alternative that would effectively obliterate a local enactment.

I therefore conclude that the most probable and reasonable meaning to be accorded .2028(B) is this: It purports to apply to a use that, but for the absence of a conditional use permit, ***would be*** a true conditional use. The resulting use comprises a "conforming" conditional use or what might be described as a ".2028(B)" use. Such a "conforming" conditional use may be curtailed or discontinued and resumed in the same manner as a true conditional use, unburdened by notions of "abandonment" or "discontinuance" normally associated with ***non***–conforming uses.

That interpretation also resolves a profound dilemma for a use that had, for example, been a non–conforming use and later became a "listed" conditional use. A pre–existing use that suddenly becomes a "listed" conditional use can scarcely be described as a "non–conforming" use.[22] MCC 11.15.2028(B) renders that species of use a "conforming" conditional use without the need to apply for a conditional use permit in order to maintain a use that, but for the absence of a permit, is ***already*** a conditional use.

VI. DOES THE CONDITIONAL USE PROCESS APPLY AT ALL TO AN *EXISTING* "CONDITIONAL USE"?

Applicant has proceeded upon the assumption that the modification and expansion of the kennel facilities would constitute an alteration or modification of an existing conditional use (*viz*, a ".2028(B) use") for which a conditional use permit would be necessary.

However, I find the Zoning Ordinance less than clear under the circumstances with respect to the following question: Must an applicant who ***already has*** a conditional use — via .2028(B) or otherwise — proceed with conditional use approval each time a change is sought with respect to components of the "use" apart from the "use" itself?

The following conditional use provisions within MCC 11.515.7105, ***et seq.***, seem to suggest different results:

- MCC 11.15.7110(B) recites that the conditional use criteria control any "***modification***" of a conditional use, but otherwise provides no indication of what the term "modification" encompasses.

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22 MCC 11.15.0010's definition of "non–conforming use," for instance, describes a use "which does ***not*** conform with the use regulations of the district in which it is located." Obviously, a "non–conforming use" that suddenly attains a new status as a "listed" ***conditional*** use falls outside that definition. Even if the definition of "non–conforming use" said "***did*** not conform" instead of "***does*** not conform," it would defy logic or reason to describe a "listed"–but–never–formally–approved conditional use as a "nonconforming" use.

- MCC 11.15.7110(D) recites that "[a]ny ***change of use***" shall be subject to approval, but does not purport to define "change of use" as encompassing a change in the amount of activity associated with a listed "conditional" use, in other words, no change in "use."

- MCC 11.15.7110(D) also recites that "[a]ny . . . ***modification of limitations or conditions***" shall be subject to conditional use approval, but does not specify the source of any such "limitations or conditions" (*viz*, in a prior conditional use permit, or some other approval).

- MCC 11.15.7130 prescribes a conditional use permit "for each conditional use approved, ***before development*** of the use," but says nothing about the expansion of an existing conditional use that does not involve an altogether new "use." Applicant does not propose to "develop" a listed conditional use; "develop" presupposes previous nonexistence.

First of all, I do not construe the "before–development–of–the–use" language in MCC 11.15.7130 as requiring a conditional use permit in order to expand or modify components of an *existing* conditional "use" that has already been "developed."

Nor do I construe the "change–of–*use*" language in MCC 11.15.7110(D) as requiring a conditional use permit in order to expand or modify components of an *existing* conditional "use." Applicant proposes to retain the same "***use***," as identified within the conditional use provisions in MCC 11.15.2012(B)(11). By comparison, although the "'conforming' conditional use" provisions in MCC 11.15.2028 — as well as the host of similar provisions cited in the footnote at page 51 — require that any "change of use" must be governed by the applicable conditional use criteria (*see* .2028(B)), they then define "change of use" as meaning only a change "***from*** one conditional use listed in MCC 11.15.2012 ***to another*** such conditional use" (*see* .2028(C)). Applicant, however, proposes no change to another conditional use.

The reference to "limitations or conditions" in MCC 11.15.7110(D) seemed, upon an initial reading, to be broad enough to include the August 6, 1990, "FINAL DESIGN REVIEW" approval for "50 Dogs" and the accompanying comment in the August 6, 1990, "NOTICE OF PLANNING DIRECTOR DECISION" in 90–07–02 that "no additional dogs are authorized by this permit." However, I note that the phrase "limitations or conditions" initially appears in the first sentence in MCC 11.15.7110(D) ***only in connection with a conditional use permit.*** Thus, the identical reference in the second sentence of MCC 11.15.7110(D) to a "modification" of those same "limitations or condi-

tions" relates back to the first sentence simply as a matter of internal consistency, which, in turn, suggests that "limitations or conditions" contained in, for instance, a Design Review approval would ***not*** trigger the conditional use approval process. I therefore interpret MCC 11.15.7110(D)'s reference to "limitations or conditions" to mean ***only*** those "limitations or conditions" that appear in a prior ***conditional use permit***; no other interpretation would make grammatical or contextual sense, especially in a two–sentence provision.

I therefore conclude that, because the "conditions" in the 1990 Design Review approval did not occur within the context of a conditional use permit (as the first sentence of MCC 11.15.7110(D) otherwise suggests), Applicant's request to increase the kennel capacity from 50 to 75 dogs does ***not*** implicate a prior "limitation[] or condition[]" as to the amount of dogs allowed, and therefore does ***not*** require conditional use approval for that increase — as long as Applicant at least has an existing conditional use, via the "'conforming' conditional use" provisions in .2028(B) or otherwise.

VII. FINDINGS — CONDITIONAL USE

In the event that I am incorrect in my interpretation of .2028(B), or am incorrect in my conclusion that nothing about DR 4–94 has any preclusive effect under the circumstances, or am incorrect in my conclusion that nothing in MCC 11.15.7105, *et seq.*, requires a conditional use permit in this particular case, I have considered all of the pertinent conditional use criteria as well.

Because of the peculiar — if not unique — circumstances of this approval request, I have considered the conditional use criteria for two purposes. ***First***, I have considered and resolved the question whether Applicant fulfills the conditional use criteria with respect to the existing kennel facilities as if those facilities did not yet exist. ***Second***, I have considered and resolved the question whether Applicant fulfills the conditional use criteria with respect to an ***expansion*** of kennel capacity.

The distinction between the two purposes that I describe in the preceding paragraph appear minimal in the context of the differences between the existing 50–dog kennel facilities and the proposed 75–dog kennel facilities. However, from a procedural perspective the distinction proves significant. A 45–year–old "use" that comprises a "listed–but–unapproved" conditional use ought to be accorded conditional use

status, if it is to attain any status at all. Furthermore, as I read the non–conforming use language in MCC 11.15.8805(B),[23] any *resumption* of what might otherwise be a "discontinued" non–conforming use would necessarily utilize the conditional use criteria if, as here, that use comprised a "listed" conditional use within the zoning district. I can think of no other criteria within the meaning of MCC 11.15.8805(B) that would control the resumption of such a non–conforming use under the circumstances.

Thus, as I observed earlier, because MCC 11.15.8805(B) provides that a discontinued use may be "re–established" if it "conforms with the requirements of this code at the time of the proposed resumption," and because Applicant's kennel facilities do indeed qualify as a "conditional use" listed in MCC 11.15.2012(B)(11), I find nothing in the Zoning Ordinance that would preclude the "re–establishment" of a discontinued use via a request for conditional use approval under the peculiar circumstances of this case. If Applicant fulfills the criteria for the belated recognition of a conditional use, the resumption issue actually disappears. On the other hand, if Applicant cannot, in the words of MCC 11.15.8805(B), prove "conform[ance] with the requirements of this code," and if those requirements now mandate the conditional use process, then the resumption issue similarly disappears.

A. ORS 215.283

ORS 215.283(2) provides, in pertinent part, that

> "[t]he following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *

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23 MCC 11.15.8805(B) provides, in pertinent part:

> "If a non–conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re–established ***unless the resumed use conforms with the requirements of this code*** at the time of the proposed resumption." (Emphasis added.)

"(m) Dog kennels not described in subsection (1)(j) of this section."

I find that ORS 215.283(2)(m) describes Applicant's kennel facilities.

B. ORS 215.296 / MCC 11.15.7122

ORS 215.296 provides, in pertinent part:

"(1) A use allowed under ORS . . . 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:

"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; ***or***

"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use." (Emphasis added.)

MCC 11.15.7122 similarly provides:

"(A) In addition to the criteria of MCC .7120, an applicant for a Conditional Use listed in MCC .2102(B) must demonstrate that the use:

"(1) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; ***and***

"(2) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use." (Emphasis added.)

The County's conjunctive provision represents a permissible narrowing of the approval criteria in ORS 215.296(1). *See* ORS 215.296(10).

(1). "Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use"

"Erring on the side of conservatism," Applicant has identified an "impact" area comprising a 1,500–foot area surrounding the kennels. The only "impact" identified in the record would be the noise generated by the barking of the dogs. Applicant's noise study reflects that

- Within the kennel itself, the noise generated by the dogs' barking could approach (or slightly exceed) that comparable to "a jet flying overhead."
- Thirty feet outside the kennel, at the Marquam Farms property line, the noise generated by the dogs slightly exceeded the ambient noise level at that particular location.
- Five hundred feet from the kennel, the noise generated by the dogs almost paralleled the ambient noise level at that particular location, and measured less than the noise generated by geese flying overhead.
- 1,500 from the kennel, Applicant predicts any kennel–generated noise to be "marginally audible."

Applicant identifies but one commercial farming operation within the 1,500 "impact area": the Vetsch dairy farm. Nothing in the Zoning Ordinance defines "surrounding" or "adjacent." I conclude that, under the circumstances and for purposes of this, Applicant's chosen "impact area" adequately determines the extent of the "surrounding lands" that MCC 11.15.7122(A)(1) requires the Applicant to address.

The record contains no evidence of "forest practices" on surrounding lands "devoted" to a "forest use." Accordingly, the "forest" component of this criterion could

not possibly apply, and I find that the kennel facilities could not force any "significant" change in accepted forest practices on surrounding lands devoted to forest use.

(2). "Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use"

The record identifies the Vetsch dairy as the only farming operation on "surrounding" land, as I have applied that term for purposes of this case in the previous section.

Because, as I noted in the previous section, Mr. and Mrs. Vetsch submitted a letter dated August 11, 1995, in which they laud the existing kennel operations and urge approval of Applicant's proposal, I conclude that any suggestion that an expanding kennel operation would increase the cost of dairy operations would be incongruous with that letter. I thus find that the kennel facilities will not "significantly" increase the cost of accepted farming practices on surrounding lands devoted to farm use.

The record contains no evidence of "forest practices" on surrounding lands "devoted" to a "forest use." Accordingly, the "forest" component of this criterion could not possibly apply, and I find that the kennel facilities could not "significantly" increase the cost of accepted forest practices on surrounding lands devoted to forest use.

C. OAR 660–33–120/ 660–33–130

(1). OAR 660–33–120 AND 660–33–130 EXPRESSLY ALLOW "EXISTING" KENNEL USES TO CONTINUE, AND TO BE "MAINTAINED, ENHANCED OR EXPANDED"

In June, 1994, LCDC promulgated OAR 660–33–120 and 660–33–130, the pertinent text of which appears beginning on page 32, *supra*. Those rules declare two things:

- According to OAR 660–33–120, dog kennels comprise a "use not permitted" within an EFU district comprised of "high–value farmland."

- According to OAR 660–33–130, "***[e]xisting*** facilities [located within 'high–value farmland'] may be maintained, enhanced or expanded[.]"

Staff reports that Applicant's kennel facilities comprise "high–value farmland," and Applicant does not suggest otherwise.

Because (1) OAR 660–33–130 specifically declares that "***[e]xisting*** facilities may be maintained, enhanced or expanded," and (2) neither OAR 660–33–120 nor OAR 660–33–120 mentions, infers, or intimates some unspoken meaning for the term "existing," I conclude that Applicant's kennel facilities comprise an "existing" use for purposes of OAR 660–33–120 and 660–33–130. I do not, in other words, subscribe to the metaphysical anomaly that Applicant's kennel facilities can described as the *converse* of "existing."

Furthermore, because neither OAR 660–33–120 nor OAR 660–33–130 purports to make distinctions between conditional uses and non–conforming uses, and because OAR 660–33–120 in particular appears concerned with the establishment of *new* uses that heretofore have never previously existed in any form, I additionally conclude that OAR 660–33–120 and 660–33–130 expressly allow Applicant's kennel facilities to continue, and to be "maintained, enhanced or expanded[.]"

Staff concluded that OAR 660–33–120/660–33–130 would alone prevent any approval of Applicant's request. (STAFF REPORT at 10 ["OAR 660–33–110 [*sic*] does not allow dog kennels on High Value Farmland."].) Yet OAR 660–33–130 ***specifically allows*** dog kennels, as long as they comprise "existing" kennels. Staff did not suggest or conclude that Applicant's kennels comprise something ***other than*** "existing" kennels, nor, as I read OAR 660–33–130, could it.

Thus, I conclude that neither OAR 660–33–120 nor 660–33–130 have any preclusive effect under the peculiar circumstances of this case. Rather, they prohibit only the development of *new* uses that, by obvious implication, never previously existed. This interpretation also allows the rules to co–exist with state law (*see* the following topic).

(2). TO THE EXTENT THAT OAR 660–33–120 AND 660–33–130 DIFFER WITH STATE LAW, STATE LAW CONTROLS

Applicant also asserts that OAR 660–33–120 and 660–33–130 clash with state law. In the event that I am incorrect in my conclusion that neither of those rules purports to preclude the continued operation or expansion of "existing" kennel facilities, I will address that alternative challenge to the preclusive effect of those rules.

The discussion in this topic assumes that OAR 660–33–120 and 660–33–130 together ban any local government approval of kennel facilities that lack any prior approval. Because of the unusual circumstances surrounding Applicant's approval request, I need to further assume that those rules also prohibit any attempt to obtain local government approval for ***either*** **(1)** a conditional use that has existed for many years but which never obtained a conditional use permit, ***or*** **(2)** the resumption of a non–conforming use by the fulfillment of the requisite standards, per MCC 11.15.8805(B).

ORS 215.283(2) provides in pertinent part:

> "The following nonfarm uses ***may be established***, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use . . .:
>
> "* * * * *
>
> "(m) ***Dog kennels*** not described in subsection (1)(j) of this section." (Emphasis added.)

Applicant's kennel facilities comprise those described — and allowed with County approval — by ORS 215.283(2)(m). [The County has reproduced the provisions of ORS 215.283(2)(m) within MCC 11.15.2012(B)(11).]

I will assume for purposes of this discussion that the rules would preclude local governments from granting conditional use (or other) permits to any kennel operations even in instances in which, as here, a local government ordinance allows **(1)** "conforming" conditional uses with respect to which permits have not been granted, and **(2)** the resumption of non–conforming uses by the fulfillment of prescribed standards. If so, then ORS 215.283(2)(m) and OAR 660–33–120/ 660–33–130 run head-

long into each other; the former allows kennels to be approved in EFU districts, while the latter does not.

Staff concluded that OAR 660–33–120/660–33–130 would alone prevent any approval of Applicant's request. (STAFF REPORT at 10.) Staff did not, however, examine the impact of ORS 215.283(2)(m), except to report that

- the County's present Zoning Ordinance mirrors ORS 215.283(2)(m) but has not yet been amended to incorporate OAR 660–33–120/660–33–130, and

- County Counsel had advised staff that "until the [Zoning Ordinance] is amended to include the OAR provisions, the OAR provisions must be considered in the review of any application for proposed uses within the Exclusive Farm District." (STAFF REPORT at 10.)

LCDC's promulgation of OAR 660–33–120/660–33–130 has rendered staff's task more difficult that it ought to be, and puts staff in the position of asserting the preclusive effect of administrative rules that, in my opinion, conflict with a higher authority: state law. Because of the hierarchy of land use laws, staff cannot simply ignore OAR 660–33–120/660–33–130, notwithstanding the apparent conflict between uses that state law plainly allow in ORS 215.283 and uses that OAR 660–33–120/660–33–130 purport to prohibit.

I conclude that LCDC lacks the authority to enact an administrative rule that purports to delimit or extinguish the types and availability of uses otherwise allowed by statute. No state agency has the authority to diminish statutory rights by administrative fiat. *See Cook v. Workers' Compensation Department*, 306 Or 134, 138–39, 758 P2d 854 (1988), and *Miller v. Employment Division*, 290 Or 285, 289, 620 P2d 1377 (1980); *see also Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 355–59, ___ P2d ___ (1995) (state agency cannot create an administrative rule at odds with statute). Although the 1995 legislature had the opportunity to amend ORS 215.283 to recognize the limitations in OAR 660–33–120/660–33–130, and in fact did amend ORS 215.283 in a manner not relevant here (*see* 1995 Or Laws, ch. 528, § 2 [amending subsection (1)]), it nevertheless left subsection (2) intact.

Just as LCDC lacks the authority to alter the various Goals by promulgating conflicting administrative rules (*see 1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 399–402, 752 P2d 271 (1988)), and just as LCDC similarly lacks the authority to acknowledge a local government's comprehensive plan in a fashion that would alter

any of the various Goals (*see 1000 Friends of Oregon v. LCDC (Lane Co.*, *supra*, 305 Or at 396–97; and *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 369, 703 P2d 207 (1985)), LCDC's authority does not extend to the promulgation of administrative rules that purport to modify statutes.

If the question were instead whether LCDC might require local governments to "'enact more restrictive ***criteria*** than ORS 215.283 imposes ***for permitting the uses described*** in that statute'" (*see Brentmar v. Jackson County*, 130 Or App 438, 441, 882 P2d 1117 (1994), *review allowed* 320 Or 453 (1994); *see also Kenagy v. Benton County*, 112 Or App 17, 20 n. 2, 826 P2d 1047 (1992), and *Von Lubken v. Hood River County*, 104 Or App 683, 687, 803 P2d 750 (1990), *adhered to on reconsideration* 106 Or App 226, 806 P2d 727, *rev den* 311 OR 349 (1991)), the issue would disappear. I would analogize from the discussions in *Brentmar*, *Kenagy*, and *Von Lubken*, *supra*, that LCDC might well be able to promulgate "restrictive criteria." But OAR 660–33–120/660–33–130 together do not purport to merely implement "more restrictive criteria" for "permitting" the statutory uses; they purport to *eliminate* the uses altogether.

D. MCC 11.15.2012(B)

MCC 11.15.2012(B) requires the fulfillment of the conditional use criteria in MCC 11.15.7015–.7140 for the development of "dog kennels," among other listed conditional uses. Applicant's facilities comprise a "kennel" as defined in MCC 11.15.0010.

Applicant has specifically addressed the conditional use criteria in MCC 11.15.7015–.7140 in the approval request. I discuss those criteria in the following section.

E. MCC 11.15.7120(A)

(1). "CONSISTENT WITH THE CHARACTER OF THE AREA"

Sauvie Island encompasses a combination of agricultural and rural/recreational uses, the latter of which include private hunting facilities and kennels. Dog kennels have historically been a part of Sauvie Island for almost half a century, and at least two long-standing kennels remain active on the island.

Applicant's kennel facilities both serve and exemplify the island's rural/recreational uses, and serve as a logical place to board and train hunting dogs, which, in turn, have long been used for hunting on the island. Some farmers maintain "duck ponds" on their property as a private hunting reserve, and dog kennels function as a natural adjunct to that sort of activity. The other dog kennels have in the past maintained hunting facilities in conjunction with, and in direct proximity to, the kennel operations. Some members of Marquam Farms board and train their dogs at Applicant's kennel facilities.

Applicant has documented abundant and, with the exception of Marquam Farms, seemingly unanimous support among Sauvie Island residents and others who actively participate in various activities on the island. No one else suggests that a dog kennel would be significantly inconsistent with the area's agricultural and rural/recreational attributes. Indeed, two other active kennels have co-existed with island uses for quite some time.

In prior years, Marquam Farms has voiced concern about the impact that the dogs might have on its hunting facilities,[24] and has also raised a number of complaints about historical difficulties concerning the noise generated by dogs barking at night and Applicant's observation of property boundaries and other problems associated with the close proximity of the kennels. As I read the record, it seems that, of all

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[24] Marquam Farms has participated in this proceeding only via its August 15, 1995, and September 6, 1995, letters. The August letter suggested that the proceedings in DR 4-94 ought to preclude the necessity for further hearings. Although Marquam Farms asserted in DR 4-94 that Applicant's dog kennels would adversely impact its hunting operations, it has not specifically reincorporated or raised that issue here. I will, however, treat Marquam Farms' August 15, 1995, letter liberally and proceed as if Marquam Farms had actually voiced the same compatibility issues once again.

the hunting operations on the island, Marquam Farms seemingly stands alone in its complaints about potential adverse impacts and conflicts caused by Applicant's kennel facilities (or, for that matter, nay other kennel facilities on the island). I also observe that most of the complaints arose in recent years after Applicant successfully obtained various land use approvals in 1989 and 1990 (twice). In any event, I do not find that those sorts of complaints have much bearing on the question whether the kennel facilities remain consistent with the character of the area.

Finally, the record offers a number of observations by people who purport to be knowledgeable about hunting in general — and about Marquam Farms' hunting operation in particular — who conclude that any adverse effects suffered by Marquam Farms over the years resulted only from what can be summarized as "overhunting," rather than the presence of dog kennels on adjacent property. Not only has no other proprietor of a private hunting facility voiced similar complaints of an inherent conflict with kennels, but both of the other kennel operators maintain duck hunting facilities on the same property — without any apparent problem.

Applicant contends that more dogs will not necessarily translate into more noise. Applicant proposes improvements to the kennel facilities (*viz*, soundproofing, enclosed runs, wall along shared access, redesigned parking lot) which have been designed specifically to reduce and minimize noise generated by barking dogs. Applicant's noise test results seem to confirm that, even without the improvements, the noise levels at different points on the property do not vastly exceed other environmental noise levels.

I find that kennel facilities have long been a part of the Sauvie Island environment, form a natural adjunct to the hunting activities on the island, and conform to the agricultural and rural/ recreational activities on the island. I therefore find, in addition, that Applicant's kennel facilities will be, and have long been, consistent with the character of the area.

(2). "Will Not Adversely Affect Natural Resources"

The property contains no inventoried natural resource site, and the closest such resource site would be the Sturgeon Lake Wildlife Refuge across Reeder Road. However, because Applicant does not allow dogs to run loose on the property, and

because Applicant's property is fenced in any event, I find it improbable that the kennel facilities could have any impact on the Sturgeon Lake wildlife refuge, let alone "adversely affect" it.

I therefore find that the kennel facilities will not adversely affect any natural resources.

(3). "WILL NOT CONFLICT WITH FARM OR FOREST USES IN THE AREA"

Because MCC 11.15.7122(A) prescribes more extensive criteria for the operation of Applicant's dog kennels in the EFU district, and because I have already found that the kennel facilities fulfill the criteria in MCC 11.15.7122(A), *supra*, I further find, based upon the discussion and findings in connection with .7122(A), that Applicant's kennel facilities will not conflict with farm uses in the area.

No "forest" uses exist in the area, thus I also find that Applicant's kennel facilities cannot conflict with forest uses in the area.

(4). "WILL NOT REQUIRE PUBLIC SERVICES OTHER THAN THOSE EXISTING OR PROGRAMMED FOR THE AREA"

Applicant proposes nothing that will require additional public services, and the service provider forms in the record confirm that existing services will be adequate.

I therefore find that Applicant's kennel facilities will not require public services other than those existing or programmed for the area.

(5). "WILL BE LOCATED OUTSIDE A BIG GAME WINTER HABITAT AREA"

No big game winter habitat area exists on or near the property. I therefore find that Applicant's kennel facilities will be located, and has long been located, outside a big game winter habitat area.

(6). "WILL NOT CREATE HAZARDOUS CONDITIONS"

Dogs themselves do not comprise "hazardous conditions," and nothing else about Applicant's kennel facilities create the likelihood of generating any such conditions. All dog owners must present proof of current vaccinations before admittance to the kennel. The dogs remain kenneled and do not run at-large. Applicant processes all waste material on-site according to prescribed DEQ criteria.

I therefore find that Applicant's kennel facilities will not create hazardous conditions.

(7). "WILL SATISFY THE APPLICABLE POLICIES OF THE COMPREHENSIVE PLAN"

I address this particular criterion separately below. Because I conclude that Applicant's kennel facilities fulfill pertinent plan policies, I therefore find for purposes of this criterion that the facilities will, and do, satisfy the applicable policies of the comprehensive plan.

F. MCC 11.15.7205–.7240

(1). Location Requirements

Applicant's kennel facilities will be located within an area of "low population density" similar to that in districts such as F–2 — the district's zoning designation prior to the EFU–38 redesignation. Sauvie Island has long represented an area of historically low population density.

I therefore find that Applicant's kennel facilities fulfill the locational requirements in .7210(A).

(2). Minimum Site Size Requirements

The site comprises more than nine acres, and the drawings depict a width ranging from 333 feet in the rear of the property to more than 900 feet along Reeder Road, and a depth ranging from 390 feet to 1,800 feet.

I therefore find that Applicant's kennel facilities, both existing and as expanded, fulfill the minimum site size requirements in .7215.

(3). Minimum Setback Requirements

The property does not lie in or adjacent to an F, R, or A district. Thus, the one–hundred–foot minimum setback requirements in .7220 do not apply.

(4). OTHER REQUIREMENTS

Applicant has constructed the kennels, runs, and pens of concrete block, with chain–link fencing dividers and concrete floors. The roofing is opaque. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(A).

Applicant proposes to remodel the existing kennel facilities within a single, continuous, enclosed building, which will provide "optimal sound control" and thus minimize the noise impact on adjacent and surrounding properties. The dogs will be able to move from the individual pens without entering the open courtyard. They will also have their view of neighboring activities obstructed, which, in turn, will reduce barking. The trees and landscaping surrounding the existing kennel facilities will be retained, as will the trees and landscaping within the courtyard. Prevailing winds from the northwest will carry sounds and smells toward the open land to the southeast of the kennel facilities. The nearest residence lies 1,000 feet distant. Although Marquam Farms has in the past lodged complaints about the noise of barking dogs, I note that, not only did the kennel facilities apparently ***precede*** the hunting operations on Marquam Farms' property, but Applicant proposes to design and construct any expansion so as to do precisely what .7230 requires, *viz*, "minimize" — as opposed to eliminate — adverse impacts. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(B).

Twice daily, Applicant disinfects the dog areas, feeding pans, water pails, and public areas. Applicant also inspects each dog twice daily. Multnomah County Animal Control regularly inspects the kennel facilities. Testimony from others reflects that Applicant maintains a well–respected, highly–professional kennel operation of considerable quality. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(C).

Applicant's proposal will allow all dogs at the kennel facilities to be kept in separate housing facilities. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(D).

Although .7240 allows an exemption from .7205–.7235 for kennels "for which Animal Control Facility licenses were issued prior to October 31, 1985," Applicant does not suggest — and the record does not otherwise confirm — that the exemption provision applies.

G. COMPREHENSIVE PLAN PROVISIONS

(1). POLICY 9 — AGRICULTURAL LAND

Policy 9 ("Agricultural Land") recites, among other things, that it serves to

> "restrict the use of these [agricultural] lands to exclusive agricultural and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural lands from inappropriate and incompatible development."

Although Policy 9 does not require specific findings, I find that Applicant's kennel facilities comprise an "other use[], consistent with state law," within the meaning of Policy 9. The kennel facilities will not inhibit or impede the use of any agricultural land, nor will they withdraw any land from agricultural use.

(2). POLICY 13 — AIR, WATER AND NOISE QUALITY

Policy 13 ("Air, Water and Noise Quality") requires, prior to approval,

> "a statement from the appropriate agency that all standards can be met with respect to air quality, water quality, and noise levels. . . ."

The kennel facilities create no air emissions, and all waste products from the facilities are handled on–site in an approved septic system. Thus, the kennel operations will have no adverse impact on "healthful air quality levels in the regional airshed" or "healthful ground and surface water resources."

Finally, I find that Applicant's kennel facilities will, as designed, either "prevent or reduce excessive sound levels," while simultaneously balancing the needs of adjacent and surrounding properties. For instance:

- Applicant proposes to construct a solid wall for the full length of the kennel along the shared access with the Marquam Farms property. The dogs will be unable to see vehicles as they drive past on the shared driveway, which, in turn, will reduce the dogs' propensity to bark at passing cars *etc.*

- Applicant proposes to completely cover the kennels with an insulated roof, in contrast to the partial exposure that currently exists. The insulated roof will reduce noise transmission from within the kennel.

- Applicant proposes to redesign the manner in which dogs will be moved from one building to another for grooming, bathing, and exercise; these activities are currently visible and audible to dogs in the kennel, which, in turn, causes them to bark.

- Applicant proposes to redesign the parking area, allowing owners to exit their vehicles and pick up dogs out of sight of the dogs, which, in turn, will eliminate one cause of barking.

(3). POLICY 22 — ENERGY CONSERVATION

Policy 22 ("Energy Conservation") provides that

> "[t]he County shall require a finding prior to the approval of . . . quasijudicial 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 [*sic*; 'climatic'] conditions to advantage.

"E. Finally, the County will allow greater flexibility in the development and use of renewable energy resources."

I have duly "considered" each of the designated criteria, and I conclude that only "A" applies under the circumstances. Applicant has designed the proposed kennel facilities to reduce energy consumption, because the new kennel structures will be enclosed from the elements and insulated.

(4). POLICY 37 — UTILITIES

Policy 37 ("Utilities") requires a pre–approval finding that the water, sanitation, drainage and communication facilities are available as follows:

"WATER AND DISPOSAL SYSTEM

"A. The proposed use can be connected to a public sewer and water system, both or 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 on the site; or

"D. There is an adequate private water system, and a public sewer with adequate capacity.

"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.

"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 has an adequate private water supply system and the kennel facilities have an existing, adequate and approved septic system. I find that Applicant's kennel facilities fulfill paragraph "D" of this Policy, which renders "A," "B," and "C" moot.

Applicant handles all storm water runoff on–site, and does not come in contact with any waste material generated by the kennel operations; all runoff from kennel floors goes directly into the septic system. I find that Applicant's kennel facilities fulfill paragraphs "F" and "G" of this Policy, which renders "E" moot.

The existing electrical and telephone service appears adequate to continue to handle the kennel's needs, even after an expansion. I find that Applicant's kennel facilities fulfill paragraphs "H" and "I" of this Policy.

(5). POLICY 38 — FACILITIES

Policy 38 ("Facilities") requires a pre-approval finding 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 comments [*sic*] on the proposal.

"POLICE PROTECTION

"D. The proposal can receive adequate police protection in accordance with the standards of the jurisdiction providing police protection."

The various service provider forms confirm that Applicant's kennel facilities will be adequately served by water for firefighting purposes and by the Sheriff for police protection. The school district will have an opportunity to comment on Applicant's proposal. I find that Applicant's kennel facilities fulfill paragraphs "A" through "D" of this Policy.

(6). POLICY 40 — DEVELOPMENT REQUIREMENTS

Policy 40 ("Development Requirements") requires a pre-approval finding 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."

I conclude that none of these criteria are "appropriate" because they have no application to the specific proposal.

VIII. CONCLUSIONS — CONDITIONAL USE

With respect to the conditional use issues, I conclude as follows:

- Nothing about the hearings officer's decision in DR 4–94 precludes me from considering and resolving the various conditional use issues raised in this 1995 approval request.

- Marquam Farms' failure to appeal the Planning Commission's 1990 *approval* in CU 23–90, in which the Planning Commission addressed and rejected the "legality–of–use" issues that Marquam Farms has now raised in both the 1994 and 1995 proceedings, and in which the Planning Commission interpreted MCC 11.15.2028(B) in a manner adverse to Marquam Farms, precludes Marquam Farms from now revisiting the interpretive question.

- The County's sequential interpretations and consistent applications of MCC 11.15.2028(B) in the 1989 and 1990 proceedings — each of which ***approved*** proposals and thus vested certain rights — constitutes implicit interpretations of MCC 11.15.2028(B) which I accord deference, notwithstanding the fact that no party appealed those interpretations to the Board.

- Applicant's kennel facilities already comprise a "'conforming' conditional use" pursuant to MCC 11.15.2028(B). That provision purports to apply to a "listed" conditional use that, but for the absence of a conditional use permit, would be an approved conditional use. Any other reading or interpretation of .2028(B) either requires that additional language be added to it or renders it superfluous and of no purpose.

- Unless otherwise the subject of "limitations or conditions" imposed by a prior conditional use approval, nothing in the conditional use provisions in MCC 11.15.7105, *et seq.*, plainly requires that an applicant must seek additional conditional use approval in order to modify or alter components of an existing conditional use that do not otherwise comprise any change in the "use" itself.

- Alternatively, Applicant has fulfilled all of the applicable conditional use criteria in MCC 11.15.7105, *et seq.*, MCC 11.15.7122, MCC 11.15.7205, *et seq.*, and the pertinent Comprehensive Plan policies with respect to both of the following: (1) the initial establishment of a conditional use approval for a dog kennel, and (2) the expansion of an existing conditional use — whether arising from .2028(B) or from the previous clause — to allow an increase from a 50–dog kennel facility to a 75–dog kennel facility.

- Nothing in OAR 660–33–120 or 660–33–130 precludes or prohibits conditional use approval for an "existing" kennel under the circumstances. If those rules did purport to do so, they would clash with ORS 215.283, which allows the establishment of dog kennels in EFU districts.

IX. PRECLUSION ISSUE — NON–CONFORMING USE

As I discussed earlier in the conditional use part of this decision, Marquam Farms' August 15, 1995, letter urged, among other things, that the hearings officer's August 19, 1994, decision in DR 4–94 precludes any revisitation of issues already examined in that decision. Among other things, the hearings officer addressed the non–conforming use issue in some detail, and discerned a gap in kennel use between December, 1962, and February, 1964. (DECISION at 6.)

Thus, I need to resolve the question whether the hearings officer's August, 1994, decision binds Applicant, such that I an now precluded from revisiting the evidentiary and legal arguments that the parties debated in 1994 with respect to the non–conforming use issues.

I conclude that:

- because of the specified conditions precedent to the Design Review mechanism in the Zoning Ordinance, the hearings officer lacked the authority in DR 4–94 to venture beyond the question whether the kennel facilities comprised a "conditional use" at that time.

- the only evidentiary "gap" in the record comprises an unexplained gap in the County's intermittent inspection records, a flaw that renders those records something considerably less than "substantial evidence" of the sort described in, for instance, ***1000 Friends of Oregon v. LCDC (Lane Co.)***, 305 Or 384, 402–04, 752 P2d 271 (1988), and ***Younger v. City of Portland***, 305 Or 346, 356–57, 752 P2d 262 (1988).

- because the decision in DR 4–94 resulted in the ***denial*** of an approval request, that denial attains no preclusive effect for the same reasons discussed in the conditional use portion of this decision, beginning at page 39, ***supra***.

A. THE HEARINGS OFFICER LACKED THE AUTHORITY TO PROCEED BEYOND THE JURISDICTIONAL QUESTION IN THE DESIGN REVIEW PROCEEDINGS IN DR 4–94, AND TO DETERMINE NON–CONFORMING USE ISSUES

Because DR 4–94 comprised a "Design Review" proceeding prescribed by MCC 11.15.7805, *et seq.*, the only non–substantive, procedural question that could be raised in any appeal from the Planning Director's administrative decision would comprise the inquiry whether Applicant fulfilled the condition precedent to Design Review in MCC 11.15.7820:

> "The provisions of MCC .7805 through .7865 shall apply to all [1] ***conditional*** and [2] ***community service*** uses in any district ***and to*** [3] [a list of seven categories of other uses not pertinent here]." (MCC 11.15.7820 [emphasis and enumeration added].)

All other issues would necessarily implicate the ***substantive*** Design Review criteria.

At the outset of his opinion, the hearings officer addressed the "jurisdictional" question whether he

> "lacks authority to approve this Design Review request, unless or until the underlying kennel use receives appropriate land use approval to make it a lawful use in the zone." (DECISION at 3.)

Because Design Review would, by its terms, apply to, among other things, a ***"conditional"*** use and not necessarily to a ***"non-conforming"*** use (*see* MCC 11.15.7820),[25] the hearings officer's inquiry would necessarily entail the question whether Applicant's kennel facilities comprised the former use. Although the hearings officer in DR 4–94 indeed answered that question (DECISION at 3–4), he also answered

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[25] If there exist any other portions of the Zoning Ordinance that subjects non–conforming uses to Design Review, no one has cited it.

the separate question whether the kennel facilities comprised a non–conforming use. (DECISION at 4–6.)

As I noted earlier in the discussion of that decision, the hearings officer did not explain why or how issues of non–conforming use attained significance once he made the determination that there existed no underlying conditional use for purposes of Design Review. However, as I read and construe MCC 11.15.7805, *et seq.*, the hearings officer did not have the jurisdictional authority under MCC 11.15.7820 to make that sort of determination within the context of an appeal from the Planning Director's administrative Design Review determination, and the parties themselves could not grant him that authority.

Applicant raised this "jurisdictional" issue at the August 16, 1995, hearing in the context of whether the hearings officer's opinion comprised *dictum* on the issue of non-conforming use. I agree with Applicant that the hearings officer's decision in 4–94 purports to resolve factual and legal issues with respect the question of non-conforming use that nothing in MCC 11.15.7805, *et seq.*, gives him the authority to decide.

I thus conclude that the portion of the hearings officer's decision in DR 4–94 that purported to resolve questions of fact with respect to non-conforming use could not be binding. As surplusage, the non–conforming use discussion in DR 4–94 does not preclude a revisitation of that issue. *See Reeves v. Washington County*, 24 Or LUBA 483, 493 (1993).

B. THERE EXISTS NO EVIDENTIARY GAP IN KENNEL USAGE

I have independently examined the record with respect to the chronology of kennel usage. I conclude that reality differs from the findings in the decision in DR 4–94.

The record in this case (which includes all earlier land use proceedings) documents that the kennel facilities proceeded through a number of owner/operators: Wallace, Blitz, Courtway, Eaton, Meifert, Pein, Persinger, and now the Schillereffs. Unfortunately, at this late date the documentation of kennel operations proves somewhat skimpy. The record yields different methods of determining whether kennel operations have been continuous since the Wallace operations began in 1952.

A number of opponents testified in similar affidavits in the proceedings in DR 4–94 that: (1) they never saw any "recognizable" kennel structures on the property before 1990, (2) they never perceived any kennel use on the property before 1990, and (3) they never saw more than one dog on the property until 1990. Marquam Farms also offered excerpts from County records that, according to them, do not reflect descriptions of the existence or degree of kennel usage during the following time periods:

- December, 1962, to February, 1964;
- February, 1965, to October, 1965;
- October, 1966, to September, 1967; and
- 1971 to the present.

Marquam Farms relies upon County inspection reports in 1967 and 1969 that contain the following:

Date Of Record	Information In Various Labeled Blanks In Record
10–18–67	"Zone": F–2 "Non–conforming": "Approved" "Owner": Meifert ("Lake Tree Kennels") "Occupant": Meifert "Date Established": "Moved in 9–5–67" "Use": Dog kennel Additional information: ♦ Use "limited to 50 dogs" ♦ "Occupant" from 10–65 to 10–66: "Eaton," who maintained "15 to 20 dogs" ♦ "Occupant" from 2–64 to 2–65: "Courtway," who maintained four to five dogs ♦ "Occupant" from 8–57 to 12–62: "Blitz," who maintained "up to 50 dogs" ♦ Occupant before Blitz: "Wallace," who maintained kennels "for about 5 yrs" before Blitz
1–28–69	"Zone": F–2 "Non–conforming": Left blank "Owner": Pein ("Lake Tree Kennels") "Occupant": Meifert "Date Established": Nothing helpful "Use": Dog kennel

Additional Information:

- contains the following notation:

"8–4–71 Kennel gone all of 71 – 2 dogs in 1970"

Thus, the County's two reports do ***not*** account for the following time periods:

- December, 1962, to February, 1964
- February, 1965, to October, 1965
- October, 1966, to September, 1967
- October, 1967, to January, 1969
- January, 1969, to date

The question becomes whether I can surmise from the record that the County's two inspection reports are themselves so complete and inherently trustworthy that I might conclude that any "gaps" in kennel operations can be inferred from corresponding "gaps" in the reports. If there were any evidence in the record that might shed some light on the frequency of the inspection reports or the methodology underlying the facts detailed in the reports, I might be able to conclude that the reports themselves comprise a complete and accurate chronology. However, there exists no such confirming evidence. For example, nothing in the record allows me to conclude that the two inspection reports purport to account for ***all*** of the time periods for which the reports themselves reflect a gap. The extremely intermittent characteristics of the proffered inspection reports irretrievably deprives them of any reliability for time periods not mentioned.

Thus, although I conclude that the County's various inspection reports comprise "substantial evidence" as to the existence of kennel operations during the ***reported*** times, I find that they do ***not*** comprise "substantial evidence" sufficient for me to infer that there existed no kennel operations during "gap" times.

Applicant, on the other hand, relies upon an unbroken chain of owners/operators, each of whom maintained some level of kennel operations:

- **Wallace**, beginning in 1952 and ending with the transfer to Blitz in 1957;
- **Blitz**, beginning in 1957 and ending with the transfer to Meifert in 1966;

- **Meifert**, beginning in 1966 and ending with the transfer to the Peins in 1970;
- **Peins**, beginning in 1970 and ending with the transfer to the Persingers in 1973;
- **Persingers**, beginning in 1973 and ending with the transfer to the Schillereffs in 1989;
- **Schillereffs** beginning in 1989 and continuing to date.

All of the listed owners/operators maintained *some* degree of kennel operations.

In addition, the record contains:

- a November 27, 1967, letter from Elden Persinger received by the Planning Commission on December 1, 1967 (for unknown purposes) that declares that "I have known the Lake Tree Kennels to have been in [the] business of boarding & training dogs ***since the year of 1954*** . . .";

- a November 27, 1967, letter from C. Dondo received by the Planning Commission on December 1, 1967 (again for unknown purposes), that declares that Lake Tree Kennels "have been in the business of boarding and training dogs ***since the year of 1952***."

- an affidavit dated August 23, 1995, from George Douglas, who has resided on Sauvie Island for nearly 50 years, and who "particularly remember[s] Mrs. Blitz who operated a kennel there from the late 1950s until she sold the property to Myron Meifert [in 1966]. During that time there were always many dogs at the kennel."

- an affidavit dated August 23, 1995, from Timothy Schillereff who recites that, as a youngster, he occasionally visited the kennel operations maintained by the Persingers — to whom he is related — and that he recalls "there were always dogs in the kennels," numbering more than four and up to at least ten.

- an affidavit dated August 23, 1995, from Norman Crowe, who began working on Sauvie Island in the early 1950s and who has lived there since 1964, who recites that he particularly remembers the Blitz kennel operations during the early and mid–1960s, which he describes as "always operating at capacity or near capacity – – in the neighborhood of 50 dogs," and who further recites that he has traveled the island roads regularly since 1964 and "cannot recall a time when there were not barking dogs in the kennel every years."

- an affidavit dated August 23, 1995, from Mildred Meifert — mother of previous kennel operator Myron Meifert — who has resided on Sauvie Island for over thirty years and who recites that she, too, recalls the Blitz kennel operations from the late 1950s until the transfer to her son in 1969, and that the property continuously maintained kennel operations with at least four and often more dogs, and, in addition, she recalls the Pein kennel operations during the early 1970s, which maintained at least 10 kennel runs and consistently boarded dogs.

- an affidavit dated August 23, 1995, from Marguerite Persinger, who owned the kennel operation with her husband from 1973 to 1989, who recites that the maintained no fewer than "four to six adult dogs living or boarded on our property each year from 1973 until the time we sold the property and kennel," and who further recites that she annually visited the Pein kennel operations from 1970 to 1973 and recalls no fewer than four — and sometimes more — dogs at the kennel facilities during those years.

- an affidavit dated July 27, 1994, from Elden Persinger, who owned the kennel facilities from 1973 to 1989, and who recites that he knew the Peins and their kennel operations during the early 1970s and that the Peins routinely kenneled no fewer than four or five dogs, and who further recites that from 1973 to 1989 the Persinger kennel operation "regularly cared for 4–5 dogs at the kennel."

- a letter dated August 22, 1995, from Pat Baggett who regularly visited the Blitz kennel operations and who recites that every time she visited the Blitz kennels those facilities "always had 25 dogs or so in the kennels," and who further recites that the Peins "never shut done [*sic*] the kennel" when they owned it in the early 1970s and that the Peins routinely kenneled at least six dogs, and who finally recites that the Persinger kennel operations "always had between 3 to 10 dogs in their kennels" each time she visited them during their ownership from 1973 to 1989.

Finally, Mr. and Mrs. Persinger testified at the August 16, 1995, hearing that some degree of kennel operations had been present throughout the 1950s and 1960s, and in particular in the early 1960s during a period that the 1994 hearings officer's decision in DR 4–94 identifies as lacking in evidence. Although neither the Persingers nor the Peins maintained what the record describes as "commercial" kennels,[26] both owners maintained their own dogs in the kennel facilities and "regularly" boarded other dogs for friends or acquaintances. I note that the recent testimony mirrors Mr. Persinger's November, 1967, letter that I describe just above.

Thus, the apparent gaps (or "discontinuances") from December, 1962, to February, 1964, from February, 1965, to October, 1965, and from October, 1966, to September, 1967, that Marquam Farms infers from the County's 1967 and 1969 inspection records disappear Indeed, the two 1967 letters described above eliminated those gaps as a matter of record within the proceedings in DR 4–94, but the hearings officer made no mention of that.

I find, therefore, that:

- Nothing upon which Marquam Farms relies for this issue comprises "substantial evidence" in the sense that I deem it sufficiently reliable or complete to conclude that all "gaps" in the County's inspection records necessarily mean that no kennel facilities existed during those "gaps."

---

26 Nothing in the County's definition of "kennel" refers to "commercial" facilities; rather, "kennel" comprises "[a]ny lot or premises on which ***four or more dogs, more than six months of age, are kept***." (MCC 11.15.0010 [emphasis added].)

- Although less satisfactory than other means of demonstrating continuity of use, the unbroken succession of owners/operators from 1952 to date — each of whom operated and maintained kennel facilities of some sort — coupled with the absence of affirmative evidence that any of those same individuals subsequently discontinued or abandoned the very facilities that each was known for maintaining, comprises "substantial evidence" that *some* degree of kennel operations has persisted unabated from 1952 forward.

- The November, 1967, letters to the Planning Commission, *supra*, which attest to continued kennel use from 1952 and 1954, respectively, through 1967 — thus plugging the evidentiary gap cited in the 1994 hearings officer's decision — coupled with Mr. Persinger's recent testimony 28 years later that kennel operations have always been present to some extent, comprise "substantial evidence" that kennel operations endured continuously, and certainly during the "gap" periods that Marquam Farms has urged.

- The proliferation of 1995 affidavits from people who have lived or worked on the island for a number of years, and who were each personally familiar with various owners from the 1950s forward, comprise "substantial evidence" that kennel operations in an amount consistent with the definition of "kennel" in MCC 11.15.0010 endured without abatement or discontinuance from the 1950s to now. The fact that not all of the owners/operators maintained what might be described as "commercial" kennel facilities remains, as the hearings officer also noted in DR 4–94, entirely beside the point.

I thus reject Marquam Farms' assertions that no recognizable kennel facilities existed, or could be seen, on the property until approximately 1989 or 1990. Given the proliferation of non–partisan testimony in the record about the existence of *some* degree of kennel operations on the property from 1952 forward, I simply cannot accept declarations that there existed no kennel operations on the property before 1989 or 1990. If the intent of the various Marquam Farms affidavits is to comment on the existence and location of particular buildings or structures, as opposed to the presence of kennel operations, that would be altogether different matter, but it would also be entirely irrelevant to the question.

C. BECAUSE IT *DENIED* A REQUESTED APPROVAL, THE HEARINGS OFFICER'S 1994 DECISION DOES NOT PRECLUDE A RECONSIDERATION OF EITHER LEGAL OR FACTUAL "NON–CONFORMING USE" ISSUES

As I discussed earlier, the hearings officer's 1994 decision in 4–94 ***denied*** a requested approval, *viz*, Design Review approval. No rights vested, and the ***denial*** of the requested approval in 1994 achieved nothing more the maintenance of the ***status quo***.

The County's Zoning Ordinance does not prohibit the resubmittal of an application that might have been the subject of an earlier denial. Indeed, the hearings officer's 1994 decision concludes with the observation that

> ". . . ***if*** the applicant is able to . . . establish the use as a lawful use, this denial of Design Review ***should not prejudice such later action***, if any. Therefore, the applicant's request for Design Review is denied, ***without prejudice***." (August 19, 1994, DECISION at 7 [emphasis added].)

I therefore conclude that, because of the peculiar circumstances (*viz*, a denial of a request for approval followed by a subsequent resubmittal of a different nature), and because neither statute nor ordinance requires that the prior ***denial*** of a land use application bind the applicant in future proceedings, I am not bound by the non–conforming use aspects of the hearings officer's decision in DR 4–94. *See **Furler v. Curry County**, **supra***, 27 Or LUBA at 506; *Reeder v. Clackamas County*, *supra*, 20 Or LUBA at 242–44; and *S & J Builders v. City of Tigard*, *supra*, 14 Or LUBA at 711–12.

D. "CLAIM PRECLUSION" AND "ISSUE PRECLUSION" SERVE NO PURPOSE WITHIN THIS PROCEEDING

The 1994 proceedings in DR 4–94 resulted in the ***denial*** of an approval request, leaving the ***status quo*** unaffected and vesting no rights. I can find no statute or provision in the County's Zoning Ordinance — and Marquam Farms cites none — that

precludes the resubmittal of an approval request under the circumstances that accompany Applicant's request.

Given the fact that someone in Applicant's position can typically reapply for the same or similar approvals after a prescribed period of time, I can find no authority for imposing the litigation–derived doctrines urged by Marquam Farms, nor has anyone cited any. *See*, for instance, *Nelson v. Clackamas County*, *supra*, 19 Or LUBA at 140 (recognizing this principle).

X. APPLICABLE CRITERIA — NON-CONFORMING USE

A. ALTERATION / RESUMPTION OF A NON–CONFORMING USE [ORS 215.130]

ORS 215.130 provides, in pertinent part:

"* * * * *

> **"(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted to reasonably continue the use. . . .**
>
> "* * * * *
>
> **"(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.**
>
> "* * * * *
>
> **"(9) As used in this section, 'alteration' of a nonconforming use includes:**

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

B. OAR 660–33–120 AND 660–33–130

The provisions of OAR 660–33–120 and 660–33–130 appear beginning at page 32, *supra*.

C. RESTORATION, REPLACEMENT, OR ABANDONMENT OF A NON–CONFORMING USE
[MCC 11.15.8805]

MCC 11.15.8805 provides, in pertinent part:

"* * * * *

"(B) If a non–conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re–established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption.

D. ALTERATION OF A NON-CONFORMING USE [MCC 11.15.8810]

MCC 11.15.8810 provides, in pertinent part:

"* * * * *

"(C) An alteration as defined in [ORS 215.130(9)] may be permitted to reasonably continue the use.

"* * * * *

"(E) An alteration of a non-conforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent than the current use, considering:

"(1) The character and history of the use and of development in the surrounding area;

"(2) The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line;

"(3) The comparative numbers and kinds of vehicular trips to the site;

"(4) The comparative amount and nature of outside storage, loading and parking;

"(5) The comparative visual appearance;

"(6) The comparative hours of operation;

"(7) The comparative effect on existing vegetation;

"(8) The comparative effect on water drainage;

"(9) The degree of service or other benefit to the area; and

"(10) Other factors which tend to reduce conflicts or incompatibility with the character or needs of the area."

E. VESTED RIGHT

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

- the ***substantiality*** of expenditures, which the courts sometimes (but do not necessarily) measure by a "ratio" test that compares expenditures actually to the total projected cost of a project (265 Or at 197);
- the ***good faith*** of the landowner (265 Or at 198);
- whether the landowner had ***actual notice*** of any proposed zoning changes before commencing development or spending funds (265 Or at 198);
- the ***type of expenditures***, that is, whether the expenditures were directly, but not necessarily exclusively, related to the proposed development (265 Or at 198);
- the ***kind of project***, that is, its desirability in terms of meeting the existing or proposed needs of the area (265 Or at 198);[27]

---

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

- the ***location of the project***, that is, the extent to which the project might be ideally suited for the site (265 Or at 198);

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

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

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

XI. FINDINGS — NON-CONFORMING USE

A. OAR 660–33–120 AND 660–33–130

As I discuss in detail ***supra*** beginning at page 32, OAR 660–33–130(18) specifically provides that "[e]xisting facilities may be maintained, enhanced, or expanded, subject to other requirements of law."

By getting to this point, I have already determined that Applicant's kennel facilities comprise an "existing" use, the alteration of which remains unimpacted by OAR 660–33–120 or 660–33–130. Any other conclusion would run afoul of ORS 215.130(7), which specifically allows the resumption of an non–conforming use if it "conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption."

B. MCC 11.15.8810

(1). "A change in the use of no greater adverse impact on the neighborhood"

Although Applicant proposes to expand the capacity of the kennel facilities from 50 to 75 dogs, Applicant correlatively proposes a redesign of the kennel facilities so that noise levels will be reduced from current levels.

I therefore find that the increased kennel capacity will have no greater adverse impact on the neighborhood, and that the evidence suggests a lesser impact.

(2). "A change in the structure or physical improvements of no greater adverse impact on the neighborhood"

Although Applicant proposes to expand the capacity of the kennel facilities from 50 to 75 dogs, Applicant correlatively proposes a redesign of the kennel facilities so that all of the kennel structures will be consolidated within one larger facility. As I understand Applicant's proposal, the new facility will effectively replace, rather than add to, the existing facilities.

I therefore find that the redesigned kennel facilities will have no greater adverse impact on the neighborhood, and that the evidence suggests a lesser impact than the existing configuration.

(3). "The character and history of the use and of development in the surrounding area"

Both the character and history of the kennel facilities, and other pertinent locational information, appears in detail earlier in this decision. It would serve no purpose to repeat it here.

Based upon that information, I find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the character and history of the use and of development in the surrounding area. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area, such that the term "lesser negative extent" has any significance here.

(4). "The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line"

I have discussed the noise issue earlier in the context of the EFU approval criteria and the Comprehensive Plan Policy 13, and it would serve no purpose to repeat those discussions here.

I find that issues pertaining to "dust," "fumes," "glare," or "smoke" have no material bearing on Applicant's proposal. Based upon a prior discussion of the manner in which Applicant disposes of waste on–site, I find that issues pertaining to "odor" have been effectively negated altogether.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area, such that the term "lesser negative extent" has any significance here.

(5). "The comparative numbers and kinds of vehicular trips to the site"

Concededly, Applicant's proposal might result in a 50% increase in vehicular trips to the kennel facilities. Applicant projects the average daily trips to be 6.3 in 1995, 7.5 in 1996, and 8.4 in 1997.

However, given the projected trip data and the historical data with respect to the average number of daily trips in the past three years (*viz*, 4.2 in 1992, 5.1 in 1993, and 5.6 in 1994), and also given the fact that there exists an inverse relationship between the peak kennel season (March through September) and peak hunting season (October through January), I find that, with respect to the surrounding area, the vehicular traffic will be almost *de minimis*, and that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative numbers and kinds of vehicular trips to the site.

Finally (and alternatively), I also interpret MCC 11.15.8810(E) to depict something *other than* a conjunctive list of mandatory requirements, each of which must be fulfilled. I instead construe the listed factors to represent guidelines in determining whether, when considered *as a whole*, the proposal will "affect the surrounding area to a lesser negative extent than the current use." One of more of the listed factors may, under that interpretation, indeed have a greater impact than previously. *See*, by analogy, *Union Oil Co. v. Board of Co. Comm. of Clack. Co.*, 81 Or App 1, 5–6, 724 P2d 341 (1986) (nine "vested rights" criteria not to be treated as independently or singularly dispositive).

(6). "The comparative amount and nature of outside storage, loading and parking"

Applicant maintains no outdoor storage, and has no plans to do so in the future.

Because Applicant proposes to redesign the parking area in such a manner as to reduce, for example, the barking that results when the dogs see the arrival of cars and the congestion associated with customers' automobiles in the office area, I find that the redesign parking area will reduce noise and congestion associated with customer traffic.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative amount and nature of outside storage, loading, and parking. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area, such that the term "lesser negative extent" has any significance here.

(7). "The comparative visual appearance"

The redesigned, state-of-the-art kennel building will improve upon the long-standing quonset hut facilities. The parking area will be redesigned, and Applicant proposes new landscaping and fencing.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative visual appearance.

(8). "The comparative hours of operation"

Although Applicant's hours of operation will not change, this criterion has no significant bearing on uses in the surrounding area.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative hours of operation, because I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

(9). "The comparative effect on existing vegetation"

Applicant will provide some new landscaping, which will also benefit the adjacent Marquam Farms to some extent.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative effect on existing vegetation. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

(10). "The comparative effect on water drainage"

Impervious surface area will increase because of the enclosed kennel. However, because Applicant handles all water drainage on–site, I find that there will be no increase in off–site water drainage.

I also find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative effect on

water drainage, because I further find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

Finally (and alternatively), I also interpret MCC 11.15.8810(E) to depict something ***other than*** a conjunctive list of mandatory requirements, each of which must be fulfilled. I instead construe the listed factors to represent guidelines in determining whether, when considered ***as a whole***, the proposal will "affect the surrounding area to a lesser negative extent than the current use." One of more of the listed factors may, under that interpretation, indeed have a greater impact than previously.

(11). "The degree of service or other benefit to the area"

Applicant envisions that the degree of service and benefit to the island and its users will actually increase. Because I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place with respect to the degree of service or other benefit to the area, I conclude that the term "lesser negative extent" has no significance here.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the degree of service or other benefit to the area.

Finally (and alternatively), I also interpret MCC 11.15.8810(E) to depict something ***other than*** a conjunctive list of mandatory requirements, each of which must be fulfilled. I instead construe the listed factors to represent guidelines in determining whether, when considered ***as a whole***, the proposal will "affect the surrounding area to a lesser negative extent than the current use." One of more of the listed factors may, under that interpretation, indeed have a greater impact than previously.

(12). "Other factors which tend to reduce conflicts or incompatibility with the character or needs of the area"

Other than Marquam Farms, no one has voiced any objection to the existing kennel operations or to any proposed expansion. Marquam Farms has historically confined the bulk of its objections to noise issues, all of which will be diminished and minimized by any redesign of the kennel operations. I discern no other material factors in the record that have given rise to "conflicts or incompatibility with the character or needs of the area.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to "other factors."

C. VESTED RIGHT

Applicant additionally asserts a "vested right to the nonconforming use." (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION" at 11.) This particular argument only has relevance as a "last resort" argument, that is, if Applicant can fulfill neither the conditional use criteria nor the non–conforming use that I have discussed above. Thus, everything in this particular discussion assumes that Applicant has exhausted all other means of establishing the right to continue the operation of the kennel facilities.

There exists a pivotal differentiation between

- a right to continue development that, when complete, will result in a non–conforming use, according to the criteria in *Clackamas Co. v. Holmes*, 265 Or 193, 197–201, 508 P2d 190 (1973) (discussing the factors underlying a "vested" right to continue and finish a development and actually *begin* a use), and

- a right to resume a use that may have been abandoned or discontinued after having been in place for some period of time. *See*, for instance, the discussion in ***Polk County v. Martin***, 292 Or 69, 636 P2d 952 (1981).

In ***Polk County v. Martin***, the Court described the seminal "vested rights" decision in *Clackamas Co. v. Holmes* as

> "concern[ing] the degree of development which must exist ***before an owner of partially developed property can be said to have established a 'lawful use' of property*** under the statutes, so as to use the property as intended even though the use would not be permitted under the zoning law ***which became effective while the property was being improved***." *Polk County v. Martin, supra*, 292 Or at 80 (emphasis added).

I can find no authority for the proposition that a discontinued non–conforming use — and by using the term "discontinued" I infer nothing contrary to the findings and conclusions that I have already reached in this decision — can be resurrected under the circumstances here by using "vested right" as a vehicle. Even assuming that Applicant may have spent substantial sums to purchase and remodel the kennel facilities, that factor would only be pertinent if, after Applicant had begun making those expenditures, the County had downzoned the property in such a manner that kennels were no longer allowed. That is not what has happened. Indeed, one of the *Holmes* factors requires an inquiry into whether the proponent "had notice of any proposed zoning or amendatory zoning before starting his improvements[.]" 265 Or at 198. Applicant's 1994 approval request did not get derailed because of any mid–stream zoning; instead, it became untracked just as effectively as if LUBA, the Court of Appeals, or the Supreme Court had rendered the ruling that the hearings officer instead rendered in DR 4–94.

Thus, I reject the argument that Applicant has a "vested right to complete the work sanctioned by DR 90–07–02 and CU 23–90." (*See* Applicant's February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION" at 11.) Even assuming for purposes of argument that Applicant has not yet completed the "work sanctioned" by DR 90–07–02 and CU 23–90, that "work" would not result in the *creation* of a "use" in the manner envisioned by *Clackamas Co. v. Holmes*; the "use" itself evolved long ago.

XII. CONCLUSIONS — NON-CONFORMING USE

As an alternative to my conclusions in the conditional use portion of this decision, I conclude as follows:

- Nothing about the hearings officer's decision in DR 4–94 precludes me from considering and resolving the various non–conforming use issues raised in this 1995 approval request.

- Applicant has demonstrated to a reasonable, objective certainty that the kennel facilities have been in continuous operation as a "kennel" defined in MCC 11.15.0010 since at least 1952, and that, despite fluctuations in what might be described as "commercial" usage, nevertheless has endured without any abandonment or discontinuance since that time.

- Nothing in OAR 660–33–120 or 660–33–130 precludes or prohibits the resumption of a non–conforming use with respect to an "existing" kennel under the unique circumstances of this case. If those rules did purport to do so, they would clash with ORS 215.130(7), which allows the resumption of a use in conformity with local government enactments.

- Applicant has fulfilled the criteria in MCC 11.15.8810 with respect to the "alteration" of a non–conforming use.

- Alternatively, Applicant has fulfilled the criteria mentioned in MCC 11.5.8805(B) — which, under the circumstances of this proceeding, I find to be the conditional use criteria discussed earlier in this decision — with respect to the "resumption" of any discontinued non–conforming use.

DATED this 15th day of September, 1995.

BARRY L. ADAMSON, Hearings Officer

11/28/95
Appellant oral & written testimony

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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION
November 28, 1995

Board of County Commissioners
Multnomah County Courthouse
1021 SW 4th Avenue
Portland, OR 97204

Re: Appeal of Hearings Officer's Approval of the Schillereff Application for an Expanded Dog Kennel on EFU Land
CU 4-95 and MC 1-95, #23 (Schillereff)
DOJ File No. 660-005-GND0363-95

Dear Commissioners:

The Department of Land Conservation and Development (DLCD) requests permission to participate in your proceedings concerning the above-referenced matter. Specifically, we ask that you accept into the record and consider the enclosed memorandum, which contains only legal argument based on the hearings officer's September 15, 1995, decision. We have reviewed that decision and believe the hearings officer misinterpreted certain administrative rules of the Land Conservation and Development Commission. Those misinterpretations led the hearings officer to incorrect conclusions of law and possibly, to incorrect final decisions. We believe our participation will help clarify these issues and assist you in your review and decision-making.

Thank you for your consideration.

Sincerely,

Celeste J. Doyle

Celeste J. Doyle
Assistant Attorney General
Natural Resources Section

CJD:jmf/0350.LET
Enclosure
c w/enc: Richard Benner, DLCD
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Blair Batson, 1000 Friends of Oregon

BEFORE THE MULTNOMAH COUNTY

BOARD OF COMMISSIONERS

In the Matter of the Appeal of the Hearings Officer Approval for a Conditional Use Request, or alternatively, a Request for Alteration of a Non-Conforming Use for a dog kennel on EFU land for up to 75 dogs.	))))))))	CU 4-95 and MC 1-95, #23

Memorandum of Points and Authorities
of the Department of Land Conservation and Development

On September 15, 1995, the Multnomah County hearings officer issued a decision granting the Schilleriff application for conditional use approval for a dog kennel on EFU-zoned land for up to 75 dogs and, in the alternative, granting the Schilleriff application for the alteration of a non-conforming use (expansion of a 50-dog kennel to a 75-dog kennel). The decision is lengthy and somewhat convoluted, but the hearings officer made conclusions of fact and assumptions or interpretations of law that control the correctness of his alternative approvals. In one instance in particular, the hearings officer made several assumptions of law, and then misunderstood or misinterpreted applicable state law: The hearings officer concluded that Oregon Administrative Rules (OAR) 660-33-120 and 660-33-130 "differ with state law," and that the Land Conservation and Development Commission (LCDC) has no authority to adopt such rules. (Hearings Officer Decision at

DEPARTMENT OF JUSTICE
JUSTICE BUILDING
SALEM, OREGON 97310
PHONE 378-4400

69-73.) The Department of Land Conservation and Development (DLCD or the Department) addresses only this issue, and expresses no opinion about whether the hearings officer correctly interpreted or applied the Multnomah County Code.

At pages 69-70 of his decision, the hearings officer correctly stated that LCDC's administrative rules prohibit the establishment of *new* dog kennels (and other uses) on high value farmland, but that existing kennels "may be maintained, enhanced or expanded, *subject to the requirements of law*." OAR 660-33-130(18) (emphasis supplied).[1/] The hearings officer's first mistake is his assumption that the term "existing" as used in OAR 660-33-130(18) has no special meaning. According to the hearings officer, if the use at issue is "on the ground" it is "existing" for purposes of the OARs and it does not matter whether the use is a conditional use, a non-conforming use or something else. DLCD submits that as used in the OARs, the term "existing" necessarily means "*lawfully* existing."

LCDC cannot by rule allow that which the statutes prohibit. ORS 215.185 prohibits unlawful uses and authorizes the county governing body or a person whose real property interest is or may be affected to seek injunctive relief against an unlawful use. Consequently, LCDC's rules cannot protect and allow the expansion or maintenance of a use that "exists" unlawfully. Similarly, ORS 215.130 addresses "non-conforming" uses and controls when and

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[1/] For the Commissioners' convenience, OAR ch 660, div 33 is included here as Appendix A.

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JUSTICE BUILDING
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whether such a use is "lawful," when and whether it may be resumed after a period of "interruption or abandonment" and when and whether such a use may be "altered.[2/]" ORS 215.130(6), (7) and (8). The statute defines the term "alteration" to mean a change in the use, structure or physical improvements that is "of no greater adverse impact to the neighborhood." ORS 215.130(9).

Consequently, when read in conjunction with controlling statutes, the administrative rules allow the expansion of a dog kennel (and other listed uses) on high value farmland *only if* the dog kennel is a *lawful* existing use.[3/]

The hearings officer should have ended his analysis of the administrative rules with his conclusion that the kennel is an "existing" use and thus allowed to expand under OAR 660-33-130(18). However, the hearings officer continued with an unnecessary and incorrect analysis and conclusion that LCDC does not have the authority to adopt the rules at issue. DLCD asks the Board to strike that analysis and reverse the hearings officer on that point. LCDC acted well within its authority in adopting its administrative rules for uses on high value farmland, and those rules are consistent with state law.

[2/] A "non-conforming use" is one that was lawfully established, and became non-conforming because of later changes in the applicable code provisions. ORS 215.130(5). A non-conforming use should not be confused with an unlawful use, which is one established in violation of applicable code provisions.

[3/] Whether the kennel is a "lawful existing" use is a question for this Board to decide based on the evidence in the record. DLCD has not seen or reviewed that record and so takes no position on the status of the kennel in this regard.

DEPARTMENT OF JUSTICE
JUSTICE BUILDING
SALEM, OREGON 97310
PHONE 378-4400

At the beginning of his analysis of the validity of the rules, the hearings officer stated

> The discussion in this topic assumes that OAR 660-33-120 and 660-33-130 together ban any local government approval of kennel facilities that lack any prior approval. Because of the unusual circumstances surrounding the Applicant's approval request, I need to further assume that those rules also prohibit any attempt to obtain local government approval for *either* (1) a conditional use that has existed for many years but which never obtained a conditional use permit, *or* (2) the resumption of a non-conforming use by the fulfillment of the requisite standards, per MCC 11.15.8805(B).

Hearings Officer Decision at 71 (emphasis in original). These assumptions are wrong, and the hearings officer offers no basis or support for them.

The first assumption in this paragraph, that the OARs "ban" local approval of a use that does not already have some form of local approval, is simply wrong. OAR 660-33-120 and 660-33-130 establish restrictions on *where* certain *new* uses can be sited. The rules provide that *new* kennels (and certain other uses) may not be sited on high value farmland, but they may be sited elsewhere in an EFU zone. The rules also provide that lawfully existing kennels (and other uses) may be allowed to expand, even if they are on high value farmland. The rules do not require that a use already have some form of local government approval. Whether a use is a lawfully existing use does not necessarily turn on whether that use already has some sort of formal approval from the governing body. Rather, whether a use is a lawfully existing use turns on provisions of state law (*e.g.*, ORS 215.130) and controlling land use regulations (*e.g.*, MCC 11.15.2028). As

DEPARTMENT OF JUSTICE
JUSTICE BUILDING
SALEM, OREGON 97310
PHONE 378-4400

pointed out above, a non-conforming use can be a lawful use under ORS 215.130, even without a formal local government approval. In his second assumption, the hearings officer holds that the OARs at issue prohibit local approval of a use that exists and qualifies as a conditional use under applicable code provisions, but does not have a conditional use permit. The hearings officer also holds that the OARs prohibit the resumption of a non-conforming use according to the requirements of MCC 11.18.8805(B). Once again, these assumptions are simply wrong. OAR 660-33-120 and 660-33-130 do not speak to these circumstances, both of which are controlled by state law and applicable provisions of the local government's land use code.

Finally, based on these mistaken assumptions, the hearings officer concluded that these rules "run head-long" into ORS 215.283, because "the [statute] allows kennels to be approved in EFU districts, while the [rules] do not." The rules *do not* prohibit kennels in EFU districts, rather they impose limitations on where *new* kennels can be sited. The Land Conservation and Development Commission has the authority to establish and refine land use policy. ORS 197.040; 197.045; 197.230; *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369 *modified* 94 Or App 33, 764 P2d 927 (1988) (LCDC has broad statutory authority to use the Goals and rules to interpret and "refine" statutory provisions and to establish substantive policy. *Id.* at 37-39). The specific rule provision at issue in this case, the siting and expansion of kennels on high value farmland, concerns a use

DEPARTMENT OF JUSTICE
JUSTICE BUILDING
SALEM, OREGON 97310
PHONE 378-4400

listed in ORS 215.283 as a *conditional* use, subject to the requirements of ORS 215.296(1), and LCDC and local government authorities to impose approval criteria. *Newcomer v. Clackamas County, supra*; ORS 215.296(10).

Furthermore, LCDC's rules for high value farmland are consistent with legislative policies. The 1993 legislature adopted a definition of "high value farmland" and recognized such land as the state's most productive farmland. ORS 215.700; 215.710. In relevant part, the legislature found that, in order to "protect[] the state's more productive resource land from the detrimental effects of uses not related to agriculture and forestry, it is necessary to * * * [l]imit the future division of and the siting of dwellings upon the state's more productive resource land." ORS 215.700; see also ORS 215.243. In addition, LCDC is authorized and obligated to adopt and implement statewide land use policy, *e.g.*,ORS 197.040, and to adopt rules to implement, define and refine statutory land use provisions. *Id.*; *Newcomer v. Clackamas County, supra*. In exercising that authority, it is appropriate and necessary for LCDC to consider and apply legislative land use policies as well as the interaction of various statutes and statutory schemes.

The hearings officer's analysis and decision concerning the applicability and validity of OAR 660-33-120 and 660-33-130 is simply wrong. It is based on mistaken and unsupported assumptions and disregards the legislative intent and policies to protect high value farmland more carefully and strictly than

DEPARTMENT OF JUSTICE
JUSTICE BUILDING
SALEM, OREGON 97310
PHONE 378-4400

other agricultural lands, and to authorize and rely on LCDC to adopt and implement statewide land use policies and to refine and implement statutory provisions. Based on the foregoing, DLCD requests the Board of Commissioners to strike the hearings officer's analysis and to reverse the hearings officer on this issue.

DATED this 28th day of November, 1995.

Respectfully submitted,

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jmf/CJD0369.MEM

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OREGON ADMINISTRATIVE RULES
CHAPTER 660, DIVISION 33 — LAND CONSERVATION AND DEVELOPMENT COMMISSION

DIVISION 33

AGRICULTURAL LAND

Purpose

660-33-010 The purpose of this division is to implement the requirements for agricultural land as defined by Goal 3.

Stat. Auth.: ORS Ch. 183, 197.040, 197.230 & 197.245
Hist.: LCDC 5-1992, f. 12-10-92, cert. ef. 3-7-93; LCDC 3-1994, f. & cert. ef. 3-1-94

Definitions

660-33-020 For purposes of this division, the definitions in ORS 197.015, the Statewide Planning Goals and OAR Chapter 660 shall apply. In addition, the following definitions shall apply:

(1)(a) "Agricultural Land" as defined in Goal 3 includes:

(A) Lands classified by the U.S. Soil Conservation Service (SCS) as predominantly Class I - IV soils in Western Oregon and I - VI soils in Eastern Oregon;

(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and

(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands.

(b) Land in capability classes other than I - IV/I - VI that is adjacent to or intermingled with lands in capability classes I - IV/I - VI within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed;

(c) "Agricultural Land" does not include land within acknowledged urban growth boundaries or land within acknowledged exception areas for Goal 3 or 4.

(2)(a) "Commercial Agricultural Enterprise" consists of farm operations that will:

(A) Contribute in a substantial way to the area's existing agricultural economy; and

(B) Help maintain agricultural processors and established farm markets.

(b) When determining whether a farm is part of the commercial agricultural enterprise, not only what is produced, but how much and how it is marketed shall be considered. These are important factors because of the intent of Goal 3 to maintain the agricultural economy of the state.

(3) "Contiguous" means connected in such a manner as to form a single block of land.

(4) "Date of Creation and Existence". When a lot, parcel or tract is reconfigured pursuant to applicable law after November 4, 1993, the effect of which is to qualify a lot, parcel or tract for the siting of a dwelling, the date of the reconfiguration is the date of creation or existence. Reconfigured means any change in the boundary of the lot, parcel or tract.

(5) "Eastern Oregon" means that portion of the state lying east of a line beginning at the intersection of the northern boundary of the State of Oregon and the western boundary of Wasco County, then south along the western boundaries of the Counties of Wasco, Jefferson, Deschutes and Klamath to the southern boundary of the State of Oregon.

(6) "Exception Area" means an area no longer subject to the requirements of Goal 3 or 4 because the area is the subject of a site specific exception acknowledged pursuant to ORS 197.732 and OAR Chapter 660, Division 4.

(7) "Farm Use" as that term is used in ORS Chapter 215 and this division means "farm use" as defined in ORS 215.203.

(8)(a) "High-Value Farmland" means land in a tract composed predominantly of soils that are:

(A) Irrigated and classified prime, unique, Class I or II; or

(B) Not irrigated and classified prime, unique, Class I or II.

(b) In addition to that land described in subsection (a) of this section, high-value farmland, if outside the Willamette Valley, includes tracts growing specified perennials as demonstrated by the most recent aerial photography of the Agricultural Stabilization and Conservation Service of the U.S. Department of Agriculture taken prior to November 4, 1993. "Specified perennials" means perennials grown for market or research purposes including, but not limited to, nursery stock, berries, fruits, nuts, Christmas trees, or vineyards, but not including seed crops, hay, pasture or alfalfa;

(c) In addition to that land described in subsection (a) of this section, high-value farmland, if in the Willamette Valley, includes tracts composed predominantly of the following soils in Class III or IV or composed predominantly of a combination of the soils described in subsection (a) of this section and the following soils:

(A) Subclassification IIIe, specifically: Bellpine, Bornstedt, Burlington, Briedwell, Carlton, Cascade, Chehalem, Cornelius Variant, Cornelius and Kinton, Helvetia, Hillsboro, Hullt, Jory, Kinton, Latourell, Laurelwood, Melbourne, Multnomah, Nekia, Powell, Price, Quatama, Salkum, Santiam, Saum, Sawtell, Silverton, Veneta, Willakenzie, Woodburn and Yamhill;

(B) Subclassification IIIw, specifically: Concord, Conser, Cornelius, Variant, Dayton (thick surface) and Sifton (occasionally flooded);

(C) Subclassification IVe, specifically: Bellpine Silty Clay Loam, Carlton, Cornelius, Jory, Kinton, Latourell, Laurelwood, Powell, Quatama, Springwater, Willakenzie and Yamhill; and

(D) Subclassification IVw, specifically: Awbrig, Bashaw, Courtney, Dayton, Natroy, Nott and Whiteson.

(d) In addition to that land described in subsection (a) of this section, high-value farmland, if west of the summit of the Coast Range and used in conjunction with a dairy operation on January 1, 1993, includes tracts composed predominantly of the following soils in Class III or IV or composed predominantly of a combination of the soils described in subsection (a) of this section and the following soils:

(A) Subclassification IIIe, specifically: Astoria, Hembre, Knappa, Meda, Quillayutte and Winema.

(B) Subclassification IIIw, specifically: Brenner and Chitwood;

(C) Subclassification IVe, specifically: Astoria,

Hembre, Meda, Nehalem, Neskowin and Winema; and

(D) Subclassification IVe, specifically, Coquille.

(e) In addition to that land described in subsection (a) of this section, high-value farmland includes tracts located west of U.S. Highway 101 composed predominantly of the following soils in Class III or IV or composed predominantly of a combination of the soils described in subsection (a) of this section and the following soils:

(A) Subclassification IIIw, specifically, Ettersburg Silt Loam and Croftland Silty Clay Loam;

(B) Subclassification IIIe, specifically, Klooqueth Silty Clay Loam and Winchuck Silt Loam; and

(C) Subclassification IVw, specifically, Huffling Silty Clay Loam.

(f) The soil class, soil rating or other soil designation of a specific lot or parcel may be changed if the property owner submits a statement of agreement from the SCS that the soil class, soil rating or other soil designation should be adjusted based on new information;

(g) Soil classes, soil ratings or other soil designations used in or made pursuant to this definition are those of the SCS in its most recent publication for that class, rating or designation before November 4, 1993.

(h) Lands designated as "marginal lands" according to the marginal lands provisions adopted before January 1, 1993, and according to the criteria in ORS 215.247 (1991), are excepted from this definition of "high-value farmlands";

(i) Any county that adopted marginal lands provisions before January 1, 1993, may continue to designate lands as "marginal lands" according to those provisions and criteria in ORS 215.247 (1991), as long as the county has not applied the provisions of ORS 215.705 to 215.750 to lands zoned for exclusive farm use.

(9) "Irrigated" means watered by an artificial or controlled means, such as sprinklers, furrows, ditches, or spreader dikes. An area or tract is "irrigated" if it is currently watered, or has established rights to use water for irrigation, including such tracts that receive water for irrigation from a water or irrigation district or other provider.

(10) "Tract" means one or more contiguous lots or parcels in the same ownership.

(11) "Western Oregon" means that portion of the state lying west of a line beginning at the intersection of the northern boundary of the State of Oregon and the western boundary of Wasco County, then south along the western boundaries of the Counties of Wasco, Jefferson, Deschutes and Klamath to the southern boundary of the State of Oregon.

(12) "Willamette Valley" is Benton, Clackamas, Linn, Marion, Multnomah, Polk, Washington and Yamhill Counties and that portion of Lane County lying east of the summit of the Coast Range.

Stat. Auth.: ORS Ch. 183, 197.040, 197.245 & Ch. 215
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDC 3-1994, f. & cert. ef. 3-1-94; LCDC 6-1994, f. & cert. ef. 6-3-94

Identifying Agricultural Land

660-33-030 (1) All land defined as "agricultural land" in OAR 660-33-020(1) shall be inventoried as agricultural land.

(2) When a jurisdiction determines the predominant soil capability classification of a lot or parcel it need only look to the land within the lot or parcel being inventoried. However, whether land is "suitable for farm use" requires an inquiry into factors beyond the mere identification of scientific soil classifications. The factors are listed in the definition of agricultural land set forth at OAR 660-33-020(1)(a)(B). This inquiry requires the consideration of conditions existing outside the lot or parcel being inventoried. Even if a lot or parcel is not predominantly Class I-IV soils or suitable for farm use, Goal 3 nonetheless defines as agricultural "lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands". A determination that a lot or parcel is not agricultural land requires findings supported by substantial evidence that addresses each of the factors set forth in OAR 660-33-020(1).

(3) Goal 3 attaches no significance to the ownership of a lot or parcel when determining whether it is agricultural land. Nearby or adjacent land, regardless of ownership, shall be examined to the extent that a lot or parcel is either "suitable for farm use" or "necessary to permit farm practices to be undertaken on adjacent or nearby lands" outside the lot or parcel.

(4) When inventoried land satisfies the definition requirements of both agricultural land and forest land, an exception is not required to show why one resource designation is chosen over another. The plan need only document the factors that were used to select an agricultural, forest, agricultural/forest, or other appropriate designation.

(5) Notwithstanding the definition of "farm use" in ORS 215.203(2)(a), profitability or gross farm income shall not be considered in determining whether land is agricultural land or whether Goal 3, "Agricultural Land", is applicable.

(6) More detailed data on soil capability than is contained in the U.S. Soil Conservation Service soil maps and soil surveys may be used to define agricultural land. However, the more detailed soils data shall be related to the U.S. Soil Conservation Service land capability classification system.

Stat. Auth.: ORS Ch. 183, 197 & 215
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93

Identification of Small-Scale Resource Land

660-33-040 [LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; Repealed by LCDC 3-1994, f. & cert. ef. 3-1-94]

Designation of Small-Scale Resource Land

660-33-050 [LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; Repealed by LCDC 3-1994, f. & cert. ef. 3-1-94]

Uses on Small-Scale Resource Land

660-33-060 [LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; Repealed by LCDC 3-1994, f. & cert. ef. 3-1-94]

Minimum Lot Size Requirements in Small-Scale Resource Land

660-33-070 [LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; Repealed by LCDC 3-1994, f. & cert. ef. 3-1-94]

Designation of High-Value Farmland

660-33-080 (1) The Commission may review comprehensive plan and land use regulations related to the identification and designation of high-value farmland under procedures set forth in ORS 197.251 or 197.628 through 197.644.

(2) Counties shall submit maps of high-value farmland described in OAR 660-33-020(8) and such amendments of their plans and land use regulations as are necessary to implement the requirements of this division to the Commission for review. Counties shall submit high-value farmland maps no later than the time of the first periodic review after December 31, 1994. The submittal shall include the notice required by OAR Chapter 660, Division 18 or 25, whichever applies.

Stat. Auth.: ORS Ch. 183, 197.040, 197.230 & 197.245
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDC 3-1994, f. & cert. ef. 3-1-94

Uses on High-Value Farmland

660-33-090 Uses on high-value farmland shall be limited to those specified in OAR 660-33-120. Counties shall apply zones that qualify as exclusive farm use zones under ORS Chapter 215 to high-value farmland.

Stat. Auth.: ORS Ch. 183, 197 & 215
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93

Minimum Parcel Size Requirements

660-33-100 (1) Counties shall establish minimum sizes for new parcels for land zoned for exclusive farm use. For land not designated rangeland, the minimum parcel size shall be at least 80 acres. For land designated rangeland, the minimum parcel size shall be at least 160 acres.

(2) A county may adopt a minimum parcel size lower than that described in section (1) of this rule by demonstrating to the Commission that it can do so while continuing to meet the requirements of ORS 215.243 and that parcel sizes below the 80 or 160 acre minimum sizes are appropriate to maintain the existing commercial agricultural enterprise within an area. This standard is intended to prevent division of farmland into parcels that are too small to contribute to commercial agriculture in an area. This standard does not require that every new parcel created be as large as existing farms or ranches in an area. The minimum parcel size may allow creation of parcels smaller than the size of existing farms or ranches. However, the minimum parcel size shall be large enough to keep commercial farms and ranches in the area successful and not contribute to their decline. Lots or parcels used, or to be used, for training or stabling facilities shall not be considered appropriate to maintain the existing commercial agricultural enterprise in any area where other types of agriculture occur.

(3) To determine a minimum parcel size under this rule, the county shall complete the following steps:

(a) Identify different agricultural areas within the county, if any;

(b) Determine the nature of the commercial agricultural enterprise in the county, or within areas of the county;

(c) Identify the type(s) and size(s) of farms or ranches that comprise this commercial agricultural enterprise; and

(d) Determine the minimum size for new parcels that will maintain this commercial agricultural enterprise.

(4) To determine whether there are distinct agricultural areas in a county, the county should consider soils, topography and landforms, land use patterns, farm sizes, ranch sizes and field sizes, acreage devoted to principal crops, and grazing areas and accepted farming practices for the principal crops and types of livestock.

(5) To determine the nature of the existing commercial agricultural enterprise within an area, a county shall identify the following characteristics of farms and ranches in the area: Type and size of farms and ranches, size of fields or other parts, acreage devoted to principal crops, the relative contribution of the different types and sizes of farms and ranches to the county's gross farm sales, and their contribution to local processors and established farm markets. The following sources may assist in a county's analysis: The most recent Census of Agriculture and special tabulations from the census developed by Oregon State University, the Oregon Department of Agriculture, the United States Department of Agriculture's Agricultural Stabilization and Conservation Service (ASCS), Soil and Water Conservation Districts, the Oregon State University Extension Service and the county assessor's office.

(6) To determine the minimum parcel size, a county shall evaluate available data and choose a size that maintains the existing commercial agricultural enterprise within the county or within each area of the county. In areas where the size of commercial farms and ranches is mixed, and the size of parcels needed to maintain those commercial farms and ranches varies, the county shall not choose a minimum parcel size that allows larger farms, lots or parcels to be divided to the size of the smallest farms, lots or parcels in the area. The activities of the larger as well as smaller holdings must be maintained.

(7) A minimum size for new parcels for farm use does not mean that dwellings may be approved automatically on parcels that satisfy the minimum parcel size for the area. New dwellings in conjunction with farm use shall satisfy the criteria for such dwellings set forth in OAR 660-33-130(1).

(8) A minimum size for new parcels may be appropriate to maintain the existing agricultural enterprise in the area, but it may not be adequate to protect wildlife habitat pursuant to Goal 5. When farmland is located in areas of wildlife habitat, the provisions of Goal 5 continue to apply.

(9) A county may choose to establish a different minimum parcel size for distinct commercial agricultural areas of the county. The appropriate minimum lot or parcel size for each area shall reflect the type of commercial agriculture in the area, consistent with sections (3) - (6) of this rule.

(10) Counties may allow the creation of new parcels for nonfarm uses authorized by this

division. Such new parcels shall be the minimum size needed to accommodate the use in a manner consistent with other provisions of law except as required under paragraph (1)(a)(D) of this rule.

(1)(a) Counties may allow the creation of new lots or parcels for dwellings not in conjunction with farm use. In the Willamette Valley, a new lot or parcel may be allowed if the originating lot or parcel is equal to or larger than the applicable minimum lot or parcel size, and:

(A) Is not stocked to the requirements under ORS 527.610 to 527.770;

(B) Is composed of at least 95 percent Class VI through VIII soils; and

(C) Is composed of at least 95 percent soils not capable of producing 50 cubic feet per acre per year of wood fiber; and

(D) The new lot or parcel will not be smaller than 20 acres.

(b) No new lot or parcel may be created for this purpose until the county finds that the dwelling to be sited on the new lot or parcel has been approved under the requirements for dwellings not in conjunction with farm use in ORS 215.283(5) and (6), 215.236 and OAR 660-33-130(4).

Stat. Auth.: ORS Ch. 183, 197.040, 197.230 & 197.245
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDC 3-1994, f. & cert. ef. 3-1-94

Important Farmland

660-33-110 [LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; Repealed by LCDC 3-1994, f. & cert. ef. 3-1-94]

Uses Authorized on Agricultural Lands

660-33-120 The specific development and uses listed in **Table** 1 are permitted in the areas that qualify for the designation pursuant to this division. All uses are subject to the general provisions, special conditions, additional restrictions and exceptions set forth in this division. The abbreviations used within the schedule shall have the following meanings:

(1) **A** — Use may be allowed. Authorization of some uses may require notice and the opportunity for a hearing because the authorization qualifies as a land use decision pursuant to ORS Chapter 197. Minimum standards for uses in the table that include a numerical reference are specified in OAR 660-33-130. Counties may prescribe additional limitations and requirements to meet local concerns as authorized by law.

(2) **R** — Use may be approved after required review. The use requires notice and the opportunity for a hearing. Minimum standards for uses in the table that include a numerical reference are specified in OAR 660-33-130. Counties may prescribe additional limitations and requirements to meet local concerns as authorized by law.

(3) **"** — Use not permitted.

(4) **#** — Numerical references for specific uses shown on the chart refer to the corresponding section of OAR 660-33-130. Where no numerical reference is noted for a use on the chart, this rule does not establish criteria for the use.

(ED. NOTE: The Table(s) referenced in this rule is not printed in the OAR Compilation. Copies are available from the Land Conservation and Development Commission.)

Stat. Auth.: ORS Ch. 183, 197.040, 197.245 & Ch. 215
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDC 3-1994, f. & cert. ef. 3-1-94; LCDC 6-1994, f. & cert. ef. 6-3-94

Minimum Standards Applicable to the Schedule of Permitted and Conditional Uses

660-33-130 The following standards apply to uses listed in OAR 660-33-120 where the corresponding section number is shown on the chart for a specific use under consideration. Where no numerical reference is indicated on the chart, this division does not specify any minimum review or approval criteria. Counties may include procedures and conditions in addition to those listed in the chart as authorized by law.

(1) A dwelling on farmland may be considered customarily provided in conjunction with farm use if it meets the requirements of OAR 660-33-135.

(2) The use shall not be approved within three miles of an urban growth boundary unless an exception is approved pursuant to ORS 197.732 and OAR Chapter 660, Division 4.

(3)(a) A dwelling may be approved if:

(A) The lot or parcel on which the dwelling will be sited was lawfully created and was acquired by the present owner:

(i) Prior to January 1, 1985; or

(ii) By devise or by interstate succession from a person who acquired the lot or parcel prior to January 1, 1985.

(B) The tract on which the dwelling will be sited does not include a dwelling;

(C) The proposed dwelling is not prohibited by, and will comply with, the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law;

(D) The lot or parcel on which the dwelling will be sited is not high-value farmland except as provided in subsections (3)(c) and (d) of this rule;

(E) When the lot or parcel on which the dwelling will be sited lies within an area designated in an acknowledged comprehensive plan as habitat of big game, the siting of the dwelling is consistent with the limitations on density upon which the acknowledged comprehensive plan and land use regulations intended to protect the habitat are based.

(b) When the lot or parcel on which the dwelling will be sited is part of a tract, the remaining portions of the tract are consolidated into a single lot or parcel when the dwelling is allowed;

(c) Notwithstanding the requirements of paragraph (3)(a)(D) of this rule, a single-family dwelling may be sited on high-value farmland if:

(A) It meets the other requirements of subsections (3)(a) and (b) of this rule;

(B) The lot or parcel is protected as high-value farmland as defined in OAR 660-33-020(8)(a); and

(C) A hearings officer of the State Department of Agriculture, under the provisions of ORS 183.413 to 183.497, determines that:

(i) The lot or parcel cannot practicably be managed for farm use, by itself or in conjunction with other land, due to extraordinary circumstances inherent in the land or its physical setting

that do not apply generally to other land in the vicinity;

(ii) The dwelling will comply with the provisions of ORS 215.296(1);

(iii) The dwelling will not materially alter the stability of the overall land use pattern in the area.

(d) Notwithstanding the requirements of paragraph (3)(a)(D) of this rule, a single-family dwelling may be sited on high-value farmland if:

(A) It meets the other requirements of subsections (3)(a) and (b) of this rule;

(B) The tract on which the dwelling will be sited is:

(i) Identified in OAR 660-33-020(8)(c) or (d); and

(ii) Not high-value farmland defined in OAR 660-33-020(8)(a); and

(iii) Twenty-one acres or less in size.

(C)(i) The tract is bordered on at least 67 percent of its perimeter by tracts that are smaller than 21 acres, and at least two such tracts had dwellings on January 1, 1993; or

(ii) The tract is bordered on at least 25 percent of its perimeter by tracts that are smaller than 21 acres, and at least four dwellings existed on January 1, 1993, within 1/4 mile of the center of the subject tract. Up to two of the four dwellings may lie within an urban growth boundary, but only if the subject tract abuts an urban growth boundary.

(e) If land is in a zone that allows both farm and forest uses and is acknowledged to be in compliance with both Goals 3 and 4, a county may apply the standards for siting a dwelling under either section (3) of this rule or OAR 660-06-027, as appropriate for the predominant use of the tract on January 1, 1993;

(f) A county may, by application of criteria adopted by ordinance, deny approval of a dwelling allowed under section (3) of this rule in any area where the county determines that approval of the dwelling would:

(A) Exceed the facilities and service capabilities of the area;

(B) Materially alter the stability of the overall land use pattern of the area; or

(C) Create conditions or circumstances that the county determines would be contrary to the purposes or intent of its acknowledged comprehensive plan or land use regulations.

(g) For purposes of subsection (3)(a) of this rule, "owner" includes the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, nephew, stepparent, stepchild, grandparent or grandchild of the owner or a business entity owned by any one or a combination of these family members;

(h) The county assessor shall be notified that the governing body intends to allow the dwelling.

(4) Requires approval of the governing body or its designate in any farmland area zoned for exclusive farm use:

(a) In the Willamette Valley, the use may be approved if:

(A) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;

(B) The dwelling will be sited on a lot or parcel that is predominantly composed of Class IV through VIII soils that would not, when irrigated, be classified as prime, unique, Class I or II soils;

(C) The dwelling will be sited on a lot or parcel created before January 1, 1993;

(D) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated; and

(E) The dwelling complies with such other conditions as the governing body or its designate considers necessary.

(b) In the Willamette Valley, on a lot or parcel allowed under OAR 660-33-100(11)(a) of this rule, the use may be approved if:

(A) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;

(B) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated and whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area; and

(C) The dwelling complies with such other conditions as the governing body or its designate considers necessary.

(c) In counties located outside the Willamette Valley require findings that:

(A) The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;

(B) The dwelling is situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract. A lot or parcel shall not be considered unsuitable solely because of size or location if it can reasonably be put to farm or forest use in conjunction with other land. If the parcel is under forest assessment, the dwelling shall be situated upon generally unsuitable land for the production of merchantable tree species recognized by the Forest Practices Rules, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the parcel. A lot or parcel is not "generally unsuitable" simply because it is too small to be farmed profitably by itself. If a lot or parcel can be sold, leased, rented or otherwise managed as a part of a commercial farm or ranch, it is not "generally unsuitable". A lot or parcel is presumed to be suitable if, in Western Oregon it is composed predominantly of Class I - IV soils or, in Eastern Oregon, it is composed predominantly of Class I - VI soils. Just because a lot or parcel is unsuitable for one farm use does not mean it is not suitable for

another farm use. If a lot or parcel is under forest assessment, the area is not "generally unsuitable" simply because it is too small to be managed for forest production profitably by itself. If a lot or parcel under forest assessment can be sold, leased, rented or otherwise managed as a part of a forestry operation, it is not "generally unsuitable". If a lot or parcel is under forest assessment, it is presumed suitable if, in Western Oregon, it is composed predominantly of soils capable of producing 50 cubic feet of wood fiber per acre per year, or in Eastern Oregon it is composed predominantly of soils capable of producing 20 cubic feet of wood fiber per acre per year. If a lot or parcel is under forest assessment, to be found compatible and not seriously interfere with forest uses on surrounding land it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land;

(C) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern in the area, a county shall consider the cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated. If the application involves the creation of a new parcel for the nonfarm dwelling, a county shall consider whether creation of the parcel will lead to creation of other nonfarm parcels, to the detriment of agriculture in the area; and

(D) The dwelling complies with such other conditions as the governing body or its designate considers necessary.

(d) If a single-family dwelling is established on a lot or parcel as set forth in section (3) of this rule or OAR 660-06-027, no additional dwelling may later be sited under the provisions of section (4) of this rule;

(e) Counties that have adopted marginal lands provisions before January 1, 1993, shall apply the standards in ORS 215.213(3) - (8) for nonfarm dwellings on lands zoned exclusive farm use that are not designated marginal or high-value farmland.

(5) Approval requires review by the governing body or its designate under ORS 215.296. Uses may be approved only where such uses:

(a) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

(b) Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use.

(6) Such facility shall not seriously interfere with accepted farming practices and shall be compatible with farm uses described in ORS 215.203(2). Such facility may be approved for a one-year period which is renewable and is intended to be only portable or temporary in nature. The primary processing of a forest product, as used in this section, means the use of a portable chipper or stud mill or other similar methods of initial treatment of a forest product in order to enable its shipment to market. Forest products as used in this section means timber grown upon a tract where the primary processing facility is located.

(7) A personal-use airport as used in this section means an airstrip restricted, except for aircraft emergencies, to use by the owner, and on an infrequent and occasional basis, by invited guests, and by commercial aviation activities in connection with agricultural operations. No aircraft may be based on a personal-use airport other than those owned or controlled by the owner of the airstrip. Exceptions to the activities permitted under this definition may be granted through waiver action by the Oregon Aeronautics Division in specific instances. A personal-use airport lawfully existing as of September 13, 1975, shall continue to be permitted subject to any applicable rules of the Oregon Aeronautics Division.

(8)(a) A lawfully established dwelling is a single-family dwelling which:

(A) Has intact exterior walls and roof structure;

(B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;

(C) Has interior wiring for interior lights; and

(D) Has a heating system.

(b) In the case of replacement, the dwelling to be replaced shall be removed, demolished, or converted to an allowable use within three months of the completion of the replacement dwelling;

(c) An accessory farm dwelling authorized pursuant to OAR 660-33-130(24)(a)(B)(iii), may only be replaced by a manufactured dwelling.

(9) To qualify, a dwelling shall be occupied by persons whose assistance in the management and farm use of the existing commercial farming operation is required by the farm operator. The farm operator shall continue to play the predominant role in the management and farm use of the farm. A farm operator is a person who operates a farm, doing the work and making the day-to-day decisions about such things as planting, harvesting, feeding and marketing.

(10) A manufactured dwelling allowed under this provision is a temporary use for the term of the hardship suffered by the existing resident or relative as defined in ORS Chapter 215. The manufactured dwelling shall use the same subsurface sewage disposal system used by the existing dwelling, if that disposal system is adequate to accommodate the additional dwelling. If the manufactured home will use a public sanitary sewer system, such condition will not be required. Governing bodies shall review the permit authorizing such manufactured homes every two years. When the hardships end, the governing bodies or their designate shall require the removal of such manufactured homes. Oregon Department of Environmental Quality review and removal requirements also apply. As used in this section "hardship" means a medical hardship or hardship for the care of an aged or infirm person or persons.

(11) The housing shall also meet the requirements of ORS 197.685. For purposes of this rule, nine months means 273 days within any calendar year.

(12) In order to meet the requirements specified in the statute, a historic dwelling shall be listed on the **National Register of Historic Places**.

(13) Such uses may be established, subject to the adoption of the governing body or its designate of an exception to Goal 3, Agricultural Lands, and to any other applicable goal with which the facility or improvement does not comply.

(14) Home occupations may be authorized in existing dwelling and structures accessory to an

existing dwelling. Home occupations may not be authorized in structures accessory to resource use. A home occupation located on high-value farmland may employ only residents of the home.

(15) New uses that batch and blend mineral and aggregate into asphalt cement may not be authorized within two miles of a planted vineyard. Planted vineyard means one or more vineyards totalling 40 acres or more that are planted as of the date the application for batching and blending is filed.

(16) A facility is necessary if it must be situated in an agricultural zone in order for the service to be provided.

(17) A power generation facility shall not preclude more than 12 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to OAR Chapter 660, Division 4.

(18) Existing facilities may be maintained, enhanced or expanded, subject to other requirements of law. An existing golf course may be expanded consistent with the requirements of sections (5) and (20) of this rule, but shall not be expanded to contain more than 36 total holes.

(19) A campground is an area devoted to overnight temporary use for vacation, recreational or emergency purposes, but not for residential purposes. A camping site may be occupied by a tent, travel trailer or recreational vehicle. Campgrounds authorized by this rule shall not include intensively developed recreational uses such as swimming pools, tennis courts, retail stores or gas stations.

(20) "Golf Course" means an area of land with highly maintained natural turf laid out for the game of golf with a series of 9 or more holes, each including a tee, a fairway, a putting green, and often one or more natural or artificial hazards. A "golf course" for purposes of ORS 215.213(2)(f), 215.283(2)(e) and this division means a 9 or 18 hole regulation golf course or a combination 9 and 18 hole regulation golf course consistent with the following:

(a) A regulation 18 hole golf course is generally characterized by a site of about 120 to 150 acres of land, has a playable distance of 5,000 to 7,200 yards, and a par of 64 to 73 strokes;

(b) A regulation 9 hole golf course is generally characterized by a site of about 65 to 90 acres of land, has a playable distance of 2,500 to 3,600 yards, and a par of 32 to 36 strokes;

(c) Non-regulation golf courses are not allowed uses within these areas. "Non-regulation golf course" means a golf course or golf course-like development that does not meet the definition of golf course in this rule, including but not limited to executive golf courses, Par 3 golf courses, pitch and putt golf courses, miniature golf courses and driving ranges;

(d) Counties shall limit accessory uses provided as part of a golf course consistent with the following standards:

(A) An accessory use to a golf course is a facility or improvement that is incidental to the operation of the golf course and is either necessary for the operation and maintenance of the golf course or that provides goods or services customarily provided to golfers at a golf course. An accessory use or activity does not serve the needs of the non-golfing public. Accessory uses to a golf course may include: Parking; maintenance buildings; cart storage and repair; practice range or driving range; clubhouse; restrooms; lockers and showers; food and beverage service; pro shop; a practice or beginners course as part of an 18 hole or larger golf course. Accessory uses to a golf course do not include: Sporting facilities unrelated to golfing such as tennis courts, swimming pools, and weight rooms; wholesale or retail operations oriented to the non-golfing public; housing;

(B) Accessory uses shall be limited in size and orientation on the site to serve the needs of persons and their guests who patronize the golf course to golf. An accessory use that provides commercial services (e.g., food and beverage service, pro shop, etc.) shall be located in the clubhouse rather than in separate buildings.

(21) "Living History Museum" means a facility designed to depict and interpret everyday life and culture of some specific historic period using authentic buildings, tools, equipment and people to stimulate past activities and events. As used in this rule, a living history museum shall be related to resource based activities and shall be owned and operated by a governmental agency or a local historical society. A living history museum may include limited commercial activities and facilities that are directly related to the use and enjoyment of the museum and located within authentic buildings of the depicted historic period or the museum administration building, if areas other than exclusive farm use zone cannot accommodate the museum and related activities or if the museum, administration buildings and parking lot are located within one quarter mile of the metropolitan urban growth boundary. "Local historical society" means the local historical society recognized as such by the county governing body and organized under ORS Chapter 65. A Living History Museum is permitted only in counties that are subject to ORS 215.213 (Marginal Lands).

(22) A power generation facility shall not preclude more than 20 acres from use as a commercial agricultural enterprise unless an exception is taken pursuant to OAR Chapter 660, Division 4.

(23) A farm stand may be approved if:

(a) The structures are designed and used for sale of farm crops and livestock grown on farms in the local agricultural area, including the sale of retail incidental items, if the sales of the incidental items make up no more than 25 percent of the total sales of the farm stand; and

(b) The farm stand does not include structures designed for occupancy as a residence or for activities other than the sale of farm crops and livestock and does not include structures for banquets, public gatherings or public entertainment.

(24) An accessory farm dwelling may be considered customarily provided in conjunction with farm use if:

(a) It meets all the following requirements:

(A) The accessory farm dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land and whose assistance in the management of the farm use is or will be required by the farm operator; and

(B) The accessory dwelling will be located:

(i) On the same lot or parcel as the dwelling of

the principal farm dwelling; or

(II) On the same tract as the principal farm dwelling when the lot or parcel on which the accessory dwelling will be sited is consolidated into a single parcel with all other contiguous lots and parcels in the tract; or

(III) On a lot or parcel on which the principal farm dwelling is not located, when the accessory farm dwelling is a manufactured dwelling and a deed restriction is filed with the county clerk. The deed restriction shall require the manufactured dwelling to be removed when the lot or parcel is conveyed to another party. An accessory farm dwelling approved pursuant to this rule may not be occupied by a person or persons who will not be principally engaged in the farm use of the land and whose assistance in the management of the farm use is not or will not be required by the farm operator. The manufactured dwelling may remain if it is reapproved under these rules; and

(C) There is no other dwelling on the lands designated for exclusive farm use owned by the farm operator that is vacant or currently occupied by persons not working on the subject farm or ranch and that could reasonably be used as an accessory farm dwelling; and

(b) In addition to the requirements in subsection (a) of this section, the principal farm dwelling to which the proposed dwelling would be accessory, meets one of the following:

(A) On land not identified as high-value farmland, the principal farm dwelling is located on a farm or ranch operation that is currently employed for farm use, as defined in ORS 215.203, and produced in the last two years or three of the last five years the lower of the following:

(I) At least $40,000 (1994 dollars) in gross annual income from the sale of farm products. In determining the gross income, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract; or

(II) Gross annual income of at least the midpoint of the median income range of gross annual sales for farms in the county with the gross annual sales of $10,000 or more according to the 1992 Census of Agriculture, Oregon. In determining the gross income, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract; or

(B) On land identified as high-value farmland, the principal farm dwelling is located on a farm or ranch operation that is currently employed for farm use, as defined in ORS 215.203, and produced at least $80,000 (1992 dollars) in gross annual income from the sale of farm products in the last two years or three of the last five years; or

(C) On land not identified as high-value farmland in counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edition) before January 1, 1993, the principal farm dwelling meets the standards and requirements of ORS 215.213(2)(a) or (b).

(c) The governing body of a county shall not approve any proposed division of a lot or parcel for an accessory farm dwelling approved pursuant to this section. If it is determined that an accessory farm dwelling satisfies the requirements of OAR 660-33-135, a parcel may be created consistent with the minimum parcel size requirements in OAR 660-33-100.

(d) An accessory farm dwelling approved pursuant to this section cannot later be used to satisfy the requirements for a dwelling not provided in conjunction with farm use pursuant to section (4) of this rule.

[**Publications:** The publication(s) referred to or incorporated by reference in this rule are available from the Land Conservation and Development Commission.]

Stat. Auth.: ORS Ch. 183, 197.040, 197.245 & Ch. 215
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 3-7-93; LCDC 1-1994, f. & cert. ef. 3-1-94; LCDC 6-1994, f. & cert. ef. 6-3-94

Dwellings in Conjunction with Farm Use

660-33-135 (1) On land not identified as high-value farmland pursuant to OAR 660-33-020(8), a dwelling may be considered customarily provided in conjunction with farm use if:

(a) The parcel on which the dwelling will be located is at least:

(A) 160 acres and not designated rangeland; or

(B) 320 acres and designated rangeland; or

(C) As large as the minimum parcel size if located in a zoning district with an acknowledged minimum parcel size larger than indicated in paragraph (A) or (B) of this subsection.

(b) The subject tract is currently employed for farm use, as defined in ORS 215.203;

(c) The dwelling will be occupied by a person or persons who will be principally engaged in the farm use of the land, such as planting, harvesting, marketing or caring for livestock, at a commercial scale;

(d) Except as permitted in ORS 215.213(1)(r) and 215.283(1)(p), there is no other dwelling on the subject tract.

(2) On land not identified as high-value farmland pursuant to OAR 660-33-020(8), a dwelling may be considered customarily provided in conjunction with farm use if:

(a) The subject tract is at least as large as the median size of those commercial farm or ranch tracts capable of generating at least $10,000 in annual gross sales that are located within a study area which includes all tracts wholly or partially within one mile from the perimeter of the subject tract; and

(b) The subject tract is capable of producing at least the median level of annual gross sales of county indicator crops as the same commercial farm or ranch tracts used to calculate the tract size in subsection (a) of this section; and

(c) The subject tract is currently employed for a farm use, as defined in ORS 215.203, at a level capable of producing the annual gross sales required in subsection (b) of this section; and

(d) The subject lot or parcel on which the dwelling is proposed is not less than ten acres in western Oregon or 20 acres in eastern Oregon; and

(e) Except as permitted in ORS 215.213(1)(r) and 215.283(1)(p), there is no other dwelling on the subject tract; and

(f) If no farm use has been established at the time of application, land use approval shall be subject to a condition that no building permit may be issued prior to the establishment of the farm use required by subsection (c) of this section.

(3) In order to identify the commercial farm or ranch tracts to be used in section (2) of this rule,

Pg. 8 of 12

the gross sales capability or each tract in the study area including the subject tract must be determined, using the gross sales figures provided by the Commission pursuant to section (4) of this rule as follows:

(a) Identify the study area. This includes all the land in the tracts wholly or partially within one mile of the perimeter of the subject tract;

(b) Determine for each tract in the study area the number of acres in every land classification from the county assessor's data;

(c) Determine the potential earning capability for each tract by multiplying the number of acres in each land class by the gross sales per acre for each land class provided by the Commission pursuant to section (4) of this rule. Add these to obtain the potential earning capability for each tract;

(d) Identify those tracts capable of grossing at least $10,000 based on the data generated in subsection (3)(c) of this rule;

(e) Determine the median size and median gross sales capability for those tracts capable of generating at least $10,000 in annual gross sales to use in subsections (2)(a) and (b) of this rule.

(4) The Commission shall annually provide each Oregon county with a table of the estimated potential gross sales per acre for each assessor land class (irrigated and nonirrigated) required in section (3) of this rule. The table shall be prepared as follows:

(a) Determine up to three indicator crop types with the highest harvested acreage for irrigated and for nonirrigated lands in the county using the most recent OSU Extension Service Commodity Data Sheets, Report No. 790, "Oregon County and State Agricultural Estimates", or other USDA/Extension Service documentation;

(b) Determine the combined weighted average of the gross sales per acre for the three indicator crop types for irrigated and for nonirrigated lands, as follows:

(A) Determine the gross sales per acre for each indicator crop type for the previous five years (i.e., divide each crop type's gross annual sales by the harvested acres for each crop type);

(B) Determine the average gross sales per acre for each crop type for three years, discarding the highest and lowest sales per acre amounts during the five year period;

(C) Determine the percentage each indicator crop's harvested acreage is of the total combined harvested acres for the three indicator crop types;

(D) Multiply the combined sales per acre for each crop type identified under paragraph (B) of this subsection by its percentage of harvested acres to determine a weighted sales per acre amount for each indicator crop;

(E) Add the weighted sales per acre amounts for each indicator crop type identified in paragraph (D) of this subsection. The result provides the combined weighted gross sales per acre.

(c) Determine the average land rent value for irrigated and nonirrigated land classes in the county's exclusive farm use zones according to the annual "income approach" report prepared by the county assessor pursuant to ORS 308.345;

(d) Determine the percentage of the average land rent value for each specific land rent for each land classification determined in subsection (c) of this section. Adjust the combined weighted sales per acre amount identified in paragraph (b)(E) of this section using the percentage of average land rent (i.e., multiply the weighted average determined in paragraph (4)(b)(E) of this rule by the percent of average land rent value from subsection (4)(c) of this rule). The result provides the estimated potential gross sales per acre for each assessor land class that will be provided to each county to be used as explained under subsection (3)(c) of this rule.

(5) On land not identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:

(a) The subject tract is currently employed for the farm use, as defined in ORS 215.203, that produced in the last two years or three of the last five years the lower of the following:

(A) At least $40,000 (1994 dollars) in gross annual income from the sale of farm products; or

(B) Gross annual income of at least the midpoint of the median income range of gross annual sales for farms in the county with gross annual sales of $10,000 or more according to the 1992 Census of Agriculture, Oregon; and

(b) Except as permitted in ORS 215.213(1)(r) and 215.283(1)(p), there is no other dwelling on the subject tract; and

(c) The dwelling will be occupied by a person or persons who produced the commodities which grossed the income in subsection (a) of this section;

(d) In determining the gross income required by subsection (a) of this section, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract.

(6) In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edition) before January 1, 1993, a dwelling may be considered customarily provided in conjunction with farm use if it is not on a lot or parcel identified as high-value farmland and it meets the standards and requirements of ORS 215.213(2)(a) or (b).

(7) On land identified as high-value farmland, a dwelling may be considered customarily provided in conjunction with farm use if:

(a) The subject tract is currently employed for the farm use, as defined in ORS 215.203; that produced at least $80,000 (1994 dollars) in gross annual income from the sale of farm products in the last two years or three of the last five years; and

(b) Except as permitted in ORS 215.213(1)(r) and 215.283(1)(p), there is no other dwelling on the subject tract; and

(c) The dwelling will be occupied by a person or persons who produced the commodities which grossed the income in subsection (a) of this section;

(d) In determining the gross income required by subsection (a) of this section, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract.

Stat. Auth.: ORS Ch. 183, 197.040, 197.230 & 197.245
Hist.: LCDC 3-1994, f. & cert. ef. 3-1-94

Permit Expiration Dates

660-33-140 (1) A discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or

regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.

(2) A county may grant one extension period of up to 12 months if:

(a) An applicant makes a written request for an extension of the development approval period;

(b) The request is submitted to the county prior to the expiration of the approval period;

(c) The applicant states reasons that prevented the applicant from beginning or continuing development within the approval period; and

(d) The county determines that the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible.

(3) Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.

(4) Additional one year extensions may be authorized where applicable criteria for the decision have not changed.

Stat. Auth.: ORS Ch. 183, 197 & 215
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93

Notice of Decisions in Agriculture Zones

660-33-150 (1) Counties shall notify the department of all applications for dwellings and land divisions in exclusive farm use zones. Such notice shall be in accordance with the county's acknowledged comprehensive plan and land use regulations, and shall be mailed to the department's Salem office at least ten calendar days before any hearing or decision on such application.

(2) Notice of proposed actions described in section (1) of this rule shall be provided as required by procedures for notice contained in ORS 197.763 and 215.402 to 215.438.

(3) The provisions of sections (1) and (2) of this rule are repealed on September 6, 1995.

Stat. Auth.: ORS Ch. 183, 197.040, 197.230 & 197.245
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDC 3-1994, f. & cert. ef. 3-1-94

Effective Date

660-33-160 The provisions of this division shall become effective upon filing.

Stat. Auth.: ORS Ch. 183, 197.040, 197.230 & 197.245
Hist.: LCDC 6-1992, f. 12-10-92, cert. ef. 8-7-93; LCDC 3-1994, f. & cert. ef. 3-1-94

OREGON ADMINISTRATIVE RULES
CHAPTER 660, DIVISION 33, RULE 120

Uses Authorized on Agricultural Lands

OAR 660-33-120 The specific development and uses listed in the following table are permitted in the areas that qualify for the designation pursuant to this division. All uses are subject to the general provisions, special conditions, additional restrictions and exceptions set forth in this division. The abbreviations used within the schedule shall have the following meanings:

A: Use may be allowed. Authorization of some uses may require notice and the opportunity for a hearing, because the authorization qualifies as a land use decision pursuant to ORS Chapter 197. Minimum standards for uses in the table that include a numerical reference are specified in OAR 660-33-130. Counties may prescribe additional limitations and requirements to meet local concerns as authorized by law.

R: Use may be approved, after required review. The use requires notice and the opportunity for a hearing. Minimum standards for uses in the table that include a numerical reference are specified in OAR 660-33-130. Counties may prescribe additional limitations and requirements to meet local concerns as authorized by law.

*: Use not permitted.

#: Numerical references for specific uses shown on the chart refer to the corresponding section of OAR 660-33-130. Where no numerical reference is noted for a use on the chart, this rule does not establish criteria for the use.

HV Farm	All Other	USES
		Farm/Forest Resource
A	A	Farm use as defined in ORS 215.203.
A	A	Other buildings customarily provided in conjunction with farm use.
A	A	Propagation or harvesting of a forest product.
R6	R6	A facility for the primary processing of forest products.
		Natural Resource
A	A	Creation of, restoration of, or enhancement of wetlands.
R5	R5	The propagation, cultivation, maintenance and harvesting of aquatic species.
		Residential
A1	A1	Dwelling customarily provided in conjunction with farm use.
R9	R9	A dwelling on property used for farm use located on the same lot or parcel as the dwelling of the farm operator, and occupied by a grandparent, grandchild, parent, child, brother or sister of the farm operator or the farm operator's spouse, whose assistance in the management of the farm use is or will be required by the farm operator.
A24	A24	Accessory Farm Dwellings.
A3	A3	One single-family dwelling on a lawfully created lot or parcel.
R5,10	R5,10	One manufactured dwelling in conjunction with an existing dwelling as a temporary use for the term of a hardship suffered by the existing resident or a relative of the resident.
R4	R4	Single-family residential dwelling, not provided in conjunction with farm use.
R11	R11	Seasonal farmworker housing as defined in ORS 197.675.
R5	R5	Residential home or facility as defined in ORS 197.660, in existing dwellings.
R5	R5	Room and board arrangements for a maximum of five unrelated persons in existing residences.
R12	R12	Replacement dwelling to be used in conjunction with farm use if the existing dwelling has been listed in a county inventory as historic property as defined in ORS 358.480.
A8	A8	Alteration, restoration, or replacement of a lawfully established dwelling.
		Commercial
R5	R5	Commercial activities in conjunction with farm use.
*18	A	The breeding, kenneling and training of greyhounds for racing in any county over 200,000 in population in which there is located a greyhound racing track or in a county of over 200,000 in population contiguous to such a county.
R5,14	R5	Home occupations as provided in ORS 215.448.
*18	R5	Dog kennels.
*18	R5	Destination resort which is approved consistent with the requirements of Goal 8.
A	A	A winery as described in ORS 215.452.
A23	A23	Farm stands.
		Mineral, Aggregate, Oil, and Gas Uses
A	A	Operations for the exploration for and production of geothermal resources as defined by ORS 522.005 and oil and gas as defined by ORS 520.005, including the placement and operation of compressors, separators and other customary production equipment for an individual well adjacent to the wellhead.

A	A	Operations for the exploration for minerals as defined by ORS 517.750.
R5	R5	Operations conducted for mining and processing of geothermal resources as defined by ORS 522.005 and oil and gas as defined by ORS 520.005 not otherwise permitted under this rule.
R5	R5	Operations conducted for mining, crushing or stockpiling of aggregate and other mineral and other subsurface resources subject to ORS 215.298.
R5,15	R5,15	Processing as defined by ORS 517.750 of aggregate into asphalt or portland cement.
R5	R5	Processing of other mineral resources and other subsurface resources.
		Transportation
R5,7	R5,7	Personal-use airports for airplanes and helicopter pads, including associated hangar, maintenance and service facilities.
A	A	Climbing and passing lanes within the right of way existing as of July 1, 1987.
R5	R5	Construction of additional passing and travel lanes requiring the acquisition of right of way but not resulting in the creation of new land parcels.
A	A	Reconstruction or modification of public roads and highways, not including the addition of travel lanes, where no removal or displacement of buildings would occur, or no new land parcels result.
R5	R5	Reconstruction or modification of public roads and highways involving the removal or displacement of buildings but not resulting in the creation of new land parcels.
A	A	Temporary public road and highway detours that will be abandoned and restored to original condition or use at such time as no longer needed.
A	A	Minor betterment of existing public road and highway related facilities such as maintenance yards, weigh stations and rest areas, within right of way existing as of July 1, 1987, and contiguous public-owned property utilized to support the operation and maintenance of public roads and highways.
R5	R5	Improvement of public road and highway related facilities, such as maintenance yards, weigh stations and rest areas, where additional property or right of way is required but not resulting in the creation of new land parcels.
R13	R13	Roads, highways and other transportation facilities, and improvements not otherwise allowed under this rule.
		Utility/Solid Waste Disposal Facilities
R16	R16	Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over 200 feet in height.
R5	R5	Transmission towers over 200 feet in height.
*18	R	A site for the disposal of solid waste that has been ordered to be established by the Environmental Quality Commission under ORS 459.049, together with the equipment, facilities or buildings necessary for its operation.
R5,17	R5,22	Commercial utility facilities for the purpose of generating power for public use by sale.
*18	R5	A site for the disposal of solid waste approved by the governing body of a city or county or both and for which a permit has been granted under ORS 459.245 by the Department of Environmental Quality together with equipment, facilities or buildings necessary for its operation.
		Parks/Public/Quasi-Public
*18	R2	Public or private schools, including all buildings essential to the operation of a school.
*18	R2	Churches and cemeteries in conjunction with churches.
*18	R5,19	Private parks, playgrounds, hunting and fishing preserves and campgrounds.
R5	R5,	Parks, playgrounds or community centers owned and operated by a governmental agency or a nonprofit community organization.
*18	R5,20	Golf courses.
R5,21	R5,21	Living history museum

(The numbers in the table above refer to the section numbers in OAR 660-33-130)

p:\33-120a

1000 FRIENDS OF OREGON

534 SW Third Avenue, Suite 300, Portland, Oregon 97204-2597, Phone: (503) 497-1000 • FAX: (503) 223-0073

11/28/95
Appellant written testimony

November 28, 1995

Beverly Stein, Chair
Multnomah County Board of Commissioners
1120 SW 5th Avenue
Portland, OR 97204

Re: Appeal of Hearings Officer's Sept. 15, 1995 Decision
Regarding Permit Request CU 4-95 and MC 1-95, # 23

Dear Chair Stein:

Enclosed for submission into the referenced case file is the testimony of 1000 Friends of Oregon. I have included five (5) copies, for distribution to the commissioners. I have also served your legal counsel separately, this date.

If you have any questions, or need additional information, please let me know.

Very truly yours,

Blair Batson
Staff Attorney

cc: Lawrence R. Derr
Edward J. Sullivan
John L. Du Bay

1000 FRIENDS OF OREGON

534 SW Third Avenue, Suite 300, Portland, Oregon 97204-2597, Phone: (503) 497-1000 • FAX: (503) 223-0073

Testimony of 1000 Friends of Oregon
In De Novo Appeal of the Sept. 15, 1995 Hearings Officer Decision on Schillereff Application (CU-95 & MC-95, #23)

November 28, 1995

Requested Action by the Board of Commissioners

Pursuant to MCC 11.15.8280(A), 1000 Friends of Oregon (1000 Friends) requests that the Multnomah County Board of Commissioners reverse the rulings of the Hearings Officer regarding the interpretation and application of the Commission's high-value farmland rules at OAR Chapter 660, Division 33, contained on pages 69-73 of the September 15, 1995 decision. 1000 Friends does not take a position on the other issues reached by the Hearings Officer in the September 15, 1995 decision, or on the underlying permit request.

1000 Friends' Interest in the Proceedings

1000 Friends is a nonprofit, public interest organization formed in 1975 to protect Oregon's quality of life by advocating the responsible use of land. 1000 Friends works primarily through Oregon's pioneering land use program to conserve farm and forest lands for productive use, to protect natural, scenic, and historic resources, and to promote efficient urban development while providing for livable cities. 1000 Friends has a well-defined and recognized interest in the interpretation, implementation, and enforcement of Oregon's land use planning program. 1000 Friends of Oregon v. Wasco County, 80 Or App 532,

537-538, 723 P2d 1034 (1986), rev'd on other grounds, 304 Or 76, 742 P2d 39 (1987).

1000 Friends appears in this matter to represent both the interests of its members and the public interest. The public has a recognized interest in the proper implementation and enforcement of Oregon's land use planning laws. See Valley & Siletz Railroad v. Laudahl, 296 Or 779, 788 (1980). The public also has an interest in the implementation of Oregon's agricultural land use policy at ORS 215.243, which is articulated in Statewide Planning Goal 3 and the Commission's Goal 3 administrative rules (OAR Chapter 660, Division 33). See, e.g., Nelson v. Benton County, 23 Or LUBA 392, 399-400 (1990); Masters v. Department of Revenue, 5 OTR 134, 140 (1970). That state policy is to maintain the maximum amount of Oregon's limited supply of agricultural land.

This proceeding affects the interests of both 1000 Friends and the public in the proper implementation and enforcement of Oregon's land use laws at the county level. If the Board upholds the Hearings Officer's ruling that LCDC's high-value farmland rules are beyond the agency's authority and without effect, both 1000 Friends' and the public's interest in the implementation of Oregon's agricultural land use policy and the state's land use

laws would be adversely affected and aggrieved.

Issues Raised By Hearings Officer Decision:

Whether the Land Conservation and Development Commission (LCDC) has the statutory authority to adopt rules that regulate agricultural lands differently than the exclusive farm use zone provisions Of ORS 215.213 and 215.283.

Whether this authority includes the authority to specify a category of lands where certain ORS 215.213 and 215.283 uses are prohibited.

Whether the provisions of OAR 660-33-120 and 660-33-130 allow the continuation or expansion of all existing dog kennels in high-value farmland areas regardless of other legal limitations on the continuation or expansion of these uses.

Summary of Arguments

LCDC has the authority to adopt rules that regulate agricultural lands differently than the provisions of ORS 215.213 and 215.283. LCDC's rulemaking authority comes from ORS 197.040, not ORS Chapter 215. ORS 215.213 and 215.283 are optional zones that counties <u>may</u> apply. Counties <u>must</u> apply the mandatory requirements of Goal 3 and the Goal 3 administrative rule.

LCDC acted within its statutory authority under ORS 197.040 in adopting OAR 660, Division 33 regulations for high-value

farmland.

OAR 660-33-120 and 660-33-130 specifically state that any authorization to continue or expand an existing dog kennel in high-value farmland is subject to other provisions of law.

Background

With the exception of the marginal lands provisions, before 1992, Goal 3 recognized only one class of agricultural land and required all agricultural land to be preserved through placement in EFU zones pursuant to ORS chapter 215. LCDC changed this in 1993.

On December 3, 1992, LCDC adopted amendments to Goal 3 and the Goal 3 administrative rules ("1992 Goal and rules"), which became effective on August 7, 1993.[1] These 1992 amendments made several major changes to the regulatory structure governing land uses on agricultural lands. Most notably:

1) Goal 3 was amended to remove the requirement that agricultural land be preserved through placement in exclusive farm use (EFU) zones pursuant to ORS chapter 215; and

2) Goal 3 was amended to create three new classes of agricultural land: "high-value farmlands," "important farmlands," and "small-scale resource lands." id.

LCDC's 1992 high-value farmland rules did not allow all the

[1]The Goal 3 administrative rule was moved from Division 5 to Division 33 of OAR Chapter 660.

uses listed in ORS chapter 215 on high-value farmland. Ibid. For example, the 1992 high-value farmland rules prohibited the siting of golf courses, dog kennels, parks, schools, churches and solid waste disposal sites on high-value farmland. Former OAR 660-33-120. The rule also limited farm dwellings on high-value farmland to those that could meet the rule's actual gross income production test. See former OAR 660-33-120 and 660-33-130(1).

In 1993, the Oregon Legislative Assembly passed HB 3661, which (among other things) amended the provisions of ORS chapter 215 regarding land uses allowed in exclusive farm use zones. See 1993 Or Laws Ch. 792. Rather than approving LCDC's new regulatory program to identify and designate "secondary" or "small-scale resource lands," the bill substituted a program to allow "lot-of-record" dwellings on all but the best farm and forest lands. See ORS 215.306.

Accordingly, the bill directed LCDC to repeal its rule provisions for identifying and designating "secondary" or "small-scale resource lands." ORS 215.304(1). The bill also directed LCDC to amend its rules to incorporate the new "lot-of-record" provision in ORS 215.705 to ORS 215.780. ORS 215.304(2). Finally, the bill repealed the "marginal lands" provisions listed

above on a prospective bases. ORS 215.316.[2]

The bill did not change LCDC's rules regulating uses other than "lot-of-record" dwellings on high-value farmland, or direct LCDC to change or repeal them. Id. The bill did identify a class of "high-value farmland" for purposes of the "lot-of-record" provisions in ORS 215.705. See ORS 215.710.

After the adoption of HB 3661, in 1994 LCDC again amended Goal 3 and the Goal 3 rule. See OAR chapter 660, Division 33 (1994). In the 1994 amendments, LCDC repealed the provisions for the identification, designation and regulation of small-scale resource land. LCDC also repealed the provisions regarding important farmland. LCDC retained, however, the provisions authorizing the designation and regulation of high-value farmland, though these provisions were substantially modified. LCDC amended the criteria for designating high-value farmland to bring it close to the HB 3661 definition in ORS 215.710. See OAR 660-33-020(8) and compare with ORS 215.710.

---

[2]The bill authorized, however, Lane and Washington Counties to continue to apply those provisions unless they adopted or applied the lot-of-record provisions of ORS 215.705-215.780. Id. HB 3661 prohibited LCDC from adopting or implementing any rules inconsistent with the marginal lands provisions discussed above. ORS 215.304(3).

I. The Hearings Officer Erred in Concluding that LCDC Lacked the Authority to Adopt Administrative Rules that Prohibit Certain Uses in Designated High-Value Farmland Areas that Are Allowed Generally in Exclusive Farm Use Zones

The Hearings Officer concluded that LCDC lacked the authority to regulate agricultural lands differently than ORS chapter 215 regulates exclusive farm use zones. Specifically, the Hearings Officer concluded that LCDC did not have the authority to adopt administrative rules that prohibit in a designated class of agricultural lands uses that are authorized generally under ORS 215.283. (HOD, Page 72) The hearings officer reasoned:

> LCDC lacks the authority to enact an administrative rule that purports to delimit or extinguish the types and availability of uses otherwise allowed by statue. No state agency has the authority to diminish statutory rights by administrative fiat.

Id.

A. The Scope of LCDC's Authority to Regulate Agricultural Land: The Case Law

In Newcomer vs. Clackamas County, 94 Or App 33, 36-37, 773 P2d 779 (1988), the Court of Appeals set forth the scope of LCDC's authority to regulate agricultural lands in relation to ORS Chapter 215. The court found that under LCDC's "extensive legislative mandate" in ORS 197.040(1)(c), the agency had the authority to adopt "consistent supplements" to ORS chapter 215.

In Newcomer, Clackamas County had argued that LCDC's Goal 3 rule for farm dwellings exceeded the scope of the agency's rulemaking authority because the rule was more restrictive than the standards in ORS chapter 215. The Newcomer court rejected the county's argument and held that LCDC acted within its statutory authority under ORS 197.040 in adopting an administrative rule that stated substantive policy supplementing the provisions of ORS chapter 215. Newcomer, 94 Or App at 36-39.

The Land Use Board of Appeals (LUBA) has held that under Newcomer, LCDC has the authority to restrict by rule a use that might otherwise be authorized under ORS 215.213 and ORS 215.283. In BTA v. Washington County, 26 Or LUBA 265, 292-293 (1993), reversed on other grounds, 127 Or App 312 (1994), LUBA held: "By prohibiting median turn lanes in rural areas [in the Goal 12 rule], DLCD has precluded utilization of the general statutory authority for certain transportation facilities on EFU zoned lands that might otherwise have provided such authority." Id. at 293

Similarly, in 1000 Friends of Oregon v. Marion County, 27 Or LUBA 303, 309 (1994), LUBA held that a county was prohibited from authorizing "farm" dwellings under standards that satisfied the

criteria in ORS 215.213, where the standards did not satisfy LCDC's Goal 3 rule criteria for farm dwellings on "important" farmland.

There is also Oregon Court of Appeals precedent for the proposition that a regulation prohibiting certain uses on a specified class of agricultural land can be consistent with a regulation that authorizes those uses generally on agricultural land. See Von Lubken v. Hood River County, 104 Or App 683, 803 P2d 750 (1990), adhered to 106 Or App 226, 806 P2d 727, rev den 311 Or 349 (1991). In Von Lubken, a Hood River County's comprehensive plan policy (Standard D-9) prohibited development "on lands capable of sustaining accepted farming practices" in the county's EFU zone. Another plan policy (Standard D-7) authorized golf courses in the county's EFU zone.

The court found that Standard D-9 was consistent with Standard D-7, even though the effect of D-9 was to prohibit the siting of golf courses on some EFU zoned land. Von Lubken, supra, 104 Or App at 688. The court reasoned

The Von Lubken court rejected the county's argument that Standard D(9) was inconsistent with Standard D(7) because it prohibited uses that were authorized under Standard D(7). The court reasoned:

> [S]tandard D(9) simply imposes an additional condition on development that standard D(7) and some of the other standards make conditionally permissible Standard D(7) does not state, or even suggest, that a golf course may be developed on all or any particular locations in the zone. Standard D(9) describes the type of land in the zone where a golf course may not be located, and the two standards can be read with perfect consistency to mean that a golf course may be developed only on land of lesser agricultural quality in the zone.

Von Lubken, 104 Or App at 688.

The court's rationale in Von Lubken applies with equal force to LCDC's high-value farmland rules. Like Standard D(9) in the Von Lubken case, LCDC's high-value farmland rules describe a type of land in the EFU zone where certain uses such as golf courses may not be located, even though ORS 215.213, 215.283 and LCDC's rules generally allows these uses in EFU zones, and on agricultural land, respectively.

As in Von Lubken, ORS 215.283 and LCDC's high-value farmland rules "can be read with perfect consistency to mean that a [dog kennel and the other uses prohibited on high-value farmland] may be developed only on land of lesser agricultural quality in the zone." Id. at 688 (emphasis added).

Conclusion Under Newcomer Analysis:

Under the BTA, Marion County and Von Lubken cases, it would be reasonable to conclude that LCDC's high-value farmland rules

are "consistent supplements" to ORS 215.213 and 215.283. The high-value farmland rules are like an overlay zone that apply to a special class of agricultural land.

In the first adjudication on the issue of LCDC's authority to adopt its high-value farmland rules, the Washington County Hearings Officer relied on these cases to conclude that LCDC's high-value farmland rules regulating farm dwellings were within its rulemaking authority under ORS 197.040. See App-1.

B. Since Newcomer, LCDC Has "Unlinked" ORS Chapter 215 from Goal 3. Goal 3 No Longer Regulates Agricultural Land Through Use of ORS chapter 215

When Senate Bill 100 and 101 were passed in 1973, adoption of exclusive farm use zones under ORS chapter 215 was optional. ORS Chapter 215 does not define agricultural lands or require that counties adopt EFU zones. Kola Tepee, Inc. v.Marion County, 17 Or LUBA 910, 916, aff'd, 99 Or App 481 (1989). ORS 215.203(1) provides:

> Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise proved in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan.

ORS 215.213, 215.283 and 215.284 set forth the other uses that may be established in exclusive farm use zones if they are established. The incentive for adopting exclusive farm use zones

under ORS 215.203 is the land within the zone is eligible for preferential tax assessment under ORS 308.370. State statutes do not make EFU zoning mandatory.

In 1975, LCDC adopted Goal 3 which did define agricultural land and make the EFU zones in ORS 215 mandatory. LCDC could have adopted its own regulatory structure for agricultural land, as it did for forest land, but it chose to use the EFU zone in ORS Chapter 215 as a land use regulatory zone. Specifically, Goal 3 required counties to place agricultural land in EFU zones established under ORS 215 unless the land was designed for another use, such as forest or urban.

As the court of appeals has observed, however:

> * * * Although LCDC was free to [tie a land use regulation to ORS 215.203], doing so did not convert ORS 215.203 from being primarily a tax statute into a land use statute. The legislature's intent when it enacted that statute, not LCDC's subsequent use of the statue in its rule, determines what the purpose of the statute itself is.
>
> * * *

Springer v. LCDC, 111 Or App 262, 268-269 (1992).

In August 1993, LCDC amended Goal 3 to no longer require counties to place agricultural lands in EFU zones. Now, agricultural lands are regulated through LCDC administrative rules, OAR Chapter 660, Division 33.

Oregon's appellate courts have not addressed LCDC's

rulemaking authority in relationship to ORS Chapter 215, since LCDC adopted its new rules in 1993, and amended them in 1994. Newcomer was decided in 1988 -- when Goal 3 still used ORS 215 EFU zones to regulate agricultural land. Because Goal 3 no longer regulates agricultural land by application of the exclusive farm use zone in ORS chapter 215, it would appear that LCDC's rulemaking authority is even broader than discussed in Newcomer.

In Newcomer, the Court of Appeals found:

ORS 197.040(1)(c) empowers and requires LCDC to:

> "[a]dopt by rule in accordance with ORS 183.310 to 183.550 or by goal under ORS chapters 196 and 197 any statewide land use policies that it considers necessary to carry out ORS chapters 196 and 197."
>
> Although that conferral of policymaking authority does not expressly refer to the agricultural lands provisions of ORS chapter 215, they are implicitly within its scope. ORS 197.040(1)(c) does not restrict LCDC's goal and rulemaking authority to the implementation of the specific provisions which comprise ORS chapters 197 and 197. It confers authority to adopt the statewide land use policies which LCDC considers necessary to carry out those chapters, which establish the general framework of all land use law in the state. [Moreover, one of the exercises of LCDC's policymaking authority was the adoption of Goal 3, pertaining to agricultural land.

Newcomer, 94 Or app at 36-38. The court of appeals then observed:

> The goal [Goal 3] is inexorably connected with the provisions of ORS chapter 215 that deal with the same subject.

Id. Based on this "inexorable connection," the court concluded that LCDC had the authority to adopt "consistent supplements" to the standard in ORS chapter 215. 94 Or App at 36-38. No longer limited by Goal 3's requirement to regulate agricultural lands through the application of ORS chapter 215 -- disconnected from the inexorable connection -- LCDC's rulemaking authority is also extended to more than "consistent supplements."

II. ORS 215.304 Did Not Repeal LCDC's Authority to Regulate High-Value Farmland More Restrictively than the EFU Provisions of ORS chapter 215.

Amplement 215.304 Did Not Prohibit LCDC from Adopting or

In 1993, the legislature expressly addressed LCDC's rulemaking authority in relationship to the regulation of agricultural land in ORS 215.304. ORS 215.304 did not limit LCDC's authority to regulate high-value farmland more restrictively than the EFU provisions of ORS 215.213 and 215.283. Specifically, ORS 215.304 did not prohibit LCDC from implementing its 1992 high-value farmland rules. Rather, ORS 215.304:

1) Directs LCDC to not adopt or implement rules that identify and designate small-scale farmland or "secondary" land;

2) Directs LCDC to adopt the "lot-of-record" provisions of ORS 215.705 to 215.780; and

3) States that after March 1, 1994, any portion of LCDC's rules that are "inconsistent" with the provisions of the marginal lands legislation and HB 3661's "lot-of-

> record" provisions, shall not be implemented or enforced and shall have no legal effect.

See App-6.

ORS 215.304 does not prohibit LCDC from adopting or implementing its 1992 high-value farmland rules, even though those rules prohibited certain uses on high-value farmland that were authorized under ORS chapter 215. Ibid.

The failure of ORS 215.304 to address LCDC's high-value farmland rules, when it could easily have done so, is "strong evidence" the legislature did not intend to prohibit LCDC from implementing its high-value farmland rules. Whipple v. Howser, 291 Or 475, 486 (1981). "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; * * * ." ORS 174.010 (emphasis added). Whipple, supra, 291 Or at 486; Hughes v. State of Oregon, 314 Or 1, 28 (1992).

Had the legislature intended to limit LCDC's authority to implement the provisions of its high-value farmland rules that prohibited certain uses on high-value farmland, it would have been a simple matter to say so. It could have included in ORS 215.304(1) the following underlined text:

> (1) The Land Conservation and Development Commission

> shall not adopt or implement any rule to identify or designate or regulate small-scale farmland, high-value farmland or secondary land.

Under Whipple, the fact that the legislature did not include the underlined language is strong evidence that the legislature intended only to limit LCDC's rulemaking authority vis-a-vias small-scale and secondary lands, but not high-value farmlands. Id. at 486.

ORS 215.253(1) provides:

> No state agency . . . may exercise any of its powers to . . . impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 . . . in a manner that would unreasonably restrict or regulate farm structures . . . .

The inverse of this prohibition against the unreasonable regulation of farm structures is the reasonable regulation of farm structures.

II. The Hearings Officer Erred in Concluding that OAR 660-33-120 and 660-33-130 Allow the Expansion of Existing Kennels in High-Value Farmland Regardless of Other Legal Limitations on Expansion

OAR 660-33-120 lists "dog kennels" as a use allowed on high-value farmland subject to the criteria in OAR 660-33-130(18). OAR 660-33-130(18) provides: "Existing facilities may be

maintained, enhanced or expanded, subject to other requirements of law." (emphasis added) The Hearings Officer concluded that OAR 660-33-120 and 660-33-130 allow existing kennels in high-value farmland to be "maintained, enhanced or expanded," regardless of other applicable laws -- such as the laws regulating nonconforming uses. This conclusion was clearly wrong and inconsistent with the plain language of OAR 660-33-120 and 660-33-130. OAR 660-33-130(18) specifically states that expansions of existing facilities are allowed subject to other legal requirements; the Hearings Officer ignored this plain language.

III. Conclusion

For the foregoing reasons, 1000 Friends of Oregon respectfully requests that the Board of Commissioners reverse the conclusions of the Hearings Officer regarding the interpretation and application of the Commission's high-value farmland rules at OAR Chapter 660, Division 33, contained on pages 69-73 of the September 15, 1995 decision. 1000 Friends does not take a position on the other issues reached by the Hearings Officer or on the underlying permit request.

THE END

HEARING BEFORE

WASHINGTON COUNTY HEARINGS OFFICER

CASEFILE NO. 95-500-AD

APPLICANT: Dave Heikes

PROPOSED DEVELOPMENT ACTION: Special Use Approval for Dwelling in Conjunction with Farm Use

FINDINGS, CONCLUSIONS, AND ORDER

FINDINGS

1. The Applicable Regulations are those set forth in Attachment C, Paragraph I of the Staff Report of November 17, 1995.

2. Mr. Bill Avery presented the Staff Report dated November 17, 1995. He summarized the Staffs' position. He stated that the Staff recommend approval of the Application subject to the recommended Conditions in the Staff Report.

3. Mr. Hunnicutt and Mr. Vincent appeared on behalf of the Applicant. Mr. Vincent stated that the applicant plans to plant 4.5 to 7 acres of strawberries and agrees with the Staff Report. Mr. Hunnicut introduced a memorandum of law into the record. He summarized it.

4. Mr. James W. Johnson entered into the record a memorandum on behalf

of the Oregon Department of Land Conservation and Development(DLCD).

5. The application and the record show that the subject parcel is zoned Exclusive Farm Use (EFU) or Agriculture/Forest (AF-20) and that it is composed entirely of high value farmland soils as defined in ORS 215.710 and OAR 660-33-020(8).

6. The DLCD argues that since, the subject parcel is high value farmland the application must be judged by the approval criterion in OAR 660-33-135(7), which requires that the property produce $80,000 in annual gross income before the proposed farm dwelling can be approved. The Applicant and County Staff have taken the position that OAR 660-33-135(7) is "inconsistent" with ORS 215.213(2)(b)(A), which is codified in CDC Section 430-37.2, and uses a $20,000 gross annual income from farm products, "the $20,00 test". Therefore, The Applicant and County Staff believe that OAR 660-33-135(7) does not establish criteria that apply to or control the County's decision in this matter.

7. The Applicant and Staff in support of their position cite ORS 215.304 which provides in part that:

> (3) Any portion of a[n LCDC] rule inconsistent with the provisions of ORS * * * 215.213 * * * (a) [s]hall not be implemented or enforced; and (b) [h]as no legal effect.

DLCD maintains that the rule is consistent with the statute, that it is within the Land Conservation and Development Commission's (LCDC) authority and that it establishes an applicable criterion that requires the County to deny the land use application.

8. The 1993 legislature adopted a definition of "high value farmland" and recognized such land as the state's most productive farmland. ORS 215.700; 215.710. In relevant part, the legislature found that, in order to "protect[] the state's more productive resource land from the detrimental effects of uses not related to agriculture and forestry, it is necessary to * * * [l]imit the future division of and the siting of dwellings upon the state's more productive resource land." ORS 215.700; see also ORS 215.243.

9. In March, 1994, LCDC adopted amendments to Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands) and revised the implementing rules for those Goals (OAR ch 660, div 33 and 6 respectively) to implement House Bill 3661 (Or Laws 1993, ch 792). As part of the new implementing rules, LCDC adopted the legislature's definition of "high value farmland." ORS 215.710; OAR 660-33-020(8). LCDC also adopted provisions to protect those high value farmlands for agricultural purposes. LCDC adopted a rule that, it acknowledges, more strictly limits the circumstances in which a farm dwelling may be approved, on high value farmland, as compared to other agricultural lands. LCDC's rules provide that a dwelling customarily provided in conjunction with farm use may be sited on high value farmland if the property:

> Is currently employed for farm use * * * that produced at least $80,000 (1994 dollars) in gross annual income from the sale of farm products in the last two years or three of the last five years[.]

OAR 660-33-135(7). This is the so-called "$80,000 test."

10. DLCD argues that the "$80,000 test" was adopted pursuant to "broad rule making authority under ORS 197.040, specifically as it relates to ORS chapter 215 and the regulation of agricultural lands." The DLCD also argues that the "$80,000 test"

for high value farmland is consistent with ORS 215.213(2)(b)(A). As noted above ORS 215.213(2)(b)(A) which is codified in CDC Section 430-37.2, establishes a "$20,000 test," for all EFU land.

11. In Newcomer v. Clackamas County, 94 Or App 33, 36-37, 773 P2d 779 (1988), the Court of Appeals set forth the scope of LCDC's authority to regulate agricultural lands, in relation to ORS Chapter 215 and discussed the issue of consistency. The court found that under LCDC's "extensive legislative mandate" in ORS 197.040(l)(c), the agency had the authority to adopt "consistent supplements" to ORS chapter 215. In Newcomer, Clackamas County had argued that LCDC's Goal 3 rule for farm dwellings exceeded the scope of the agency's rulemaking authority because the rule was more restrictive than - and hence inconsistent with -- the standards in ORS chapter 215. The Newcomer decision rejected the county's argument and held that there was no inconsistency between the statutory standards for farm dwellings in ORS chapter 215 and LCDC'S more restrictive regulatory provision in the Goal 3 rule. Newcomer, 94 Or App at 37. The Land Use Board of Appeals ("LUBA") has held that under Newcomer, LCDC had the authority to restrict by its rule making authority a use that might otherwise be authorized under ORS 215.213 and ORS 215.283.

12. The authority of DLCD to impose restrictions on general statutory authority was discussed in BTA v. Washington County, 26 Or LUBA 265, 292-293 (1993), reversed on other grounds, 127 Or App 312 (1994). LUBA held: "By prohibiting median turn lanes in rural areas [in the Goal 12 rule), DLCD has precluded utilization of the general statutory authority for certain transportation facilities on EFU zoned lands that might otherwise have provided such authority." Id. at 293. Similarly, in 1000 Friends of Oregon v. Marion County, 27 Or LUBA 303, 309 (1994), LUBA held that a county was prohibited from authorizing "farm" dwellings under standards that satisfied the criteria in

ORS 215.213 where the standards did not satisfy LCDC's Goal 3 criteria for farm dwellings on "important" farmland. In the Hearings Officer's opinion the rationale of BTA and Marion applies to the DLCD restrictions on the general statutory authority in ORS 215.213(2)(b)(A).

13. In Von Lubken v. Hood River County, 104 Or App 683, 803 P2d 750, adhered to 106 Or App 226, 806 P2d 727, rev den 311 Or 349 (1991) , Hood River County's Comprehensive plan policy (standard D-9) prohibited development" on lands capable of sustaining accepted farming practices" in the county's EFU zone. Another plan policy (standard D-7) authorized golf courses in the county's EFU zone pursuant to ORS 215.213(2). The court found that standard D-9 was consistent with standard D-7, even though the effect of D-9 was to prohibit the siting of golf courses on some EFU zoned land. Von Lubken, supra, 104 Or App at 688. The court reasoned that counties could enact more restrictive standards for permitting the land uses enumerated in ORS 215.213 than the statute requires, and that such restrictive standards were consistent with ORS chapter 215. The Von Lubken decision rejected the county's argument that standard D(9) was inconsistent with Standard D(7) because it prohibited uses that are authorized by ORS 215.213 under Standard D (7) . The court reasoned:

> [S]tandard-D(9) simply imposes an additional condition on development that standard D(7) and some of the other standards make conditionally permissible standard D(7) does not state, or even suggest, that a golf course may be developed on all or any particular locations in the zone. Standard D(9) describes the type of land in the zone where a golf course may not be located, and the two standards can be read with perfect consistency to

mean that a golf course may be developed only on land of lesser agricultural quality in the zone.

Von Lubken, 104 or pp at 688.

14. In the Hearing's Officer judgement the court's rationale in Von Lubken applies to LCDC's high-value farmland rules. Like Standard D(9) in the Von Lubken case, LCDC's high-value farmland rules describe a type of land in the EFU zone where certain uses may not be located, even though ORS 215.213 and LCDC's rules generally allows these uses in EFU zones, and on agricultural land. As in Von Lubken, ORS 215.213 and LCDC's high-value farmland rules can be read with consistency to mean that farm dwellings, which do not meet the $80,000 test may be developed only on land of lesser agricultural quality.

15. Under the rationale in Newcomer, BTA, Marion County, and Von Lubken, it is reasonable to conclude that LCDC's high-value farmland rules are "consistent supplements" to ORS 215.213. The Hearings Officer finds that OAR 660-33-135(7) is "consistent" with ORS 215.213(2)(b)(A), and establishes a criterion that applies to the decision in this matter. The Hearings Officer finds that the Applicant does not meet the $80,000 test of OAR 660-33-135(7).

16. As noted above, Applicant is seeking approval of a farm dwelling, pursuant to CDC 430-37.2 A.(2)(b), as it existed at the time of the Application. This section permits a dwelling in conjunction with a farm use, if the lot or parcel, on which the dwelling is located:

"Is planted in perennials capable of producing upon harvest an average of at least

$20,000 in annual gross farm income." CDC 430-37.2 A. (2)(b)."

In the Hearings Officer judgement the Code language is unequivocal and requires that the parcel "is planted." It does state "will be planted." The only future act under the Code is a Type I determine pursuant Appendix A 4. C. 1 that the farm management plan required by Appendix A 1 has been implemented. The Applicant has not met the "is planted" requirement of CDC 430-37.2 A.(2)(b).

CONCLUSION

Based on the foregoing, the application for a farm dwelling must be reviewed according to the approval criteria provided in OAR 660-33-135(7). The record does not show, and cannot support a finding, that the property at issue has produced $80,000 in annual gross farm income, consequently the application should be denied. In addition the Applicant has not met the "is planted" requirement of CDC 430-37.2 A.(2)(b).

ORDER

The Application is denied.

Dated this 20th day of November 1995.

Dale M. Hermann, Hearings Officer

Multnomah County Commissioners
1120 SW 5th Room 1410
Portland, Oregon

Dear Members Of The Commission:

I am Frank Newton, retired from The Oregon Department of Fish And Wildlife where I spent my life as a wildlife biologist and a wildlife habitat biologist. I have been a resident of Sauvie Island for the past 25 years. For 10 years, 1970 to 1980 I was the manager of the Sauvie Island Wildlife Area and after that I moved to our Portland office where I was staff wildlife coordinator for Oregons non game program for 2 years and then coordinated all of Oregons wildlife habitat program until I retired in 1991. While I was manager of The Sauvie Island Wildlife Area I became acquainted with Sauvie Island and the key role the people and the area play in the continued success the Island continues to play in providing a wintering area for waterfowl and a major hunting area for hunters from the surrounding urban and suburban areas. Dog kennels provide a very necessary service. I understand one of our kennels has come under attack through the land use process. I would like to share some of my observations with you about one of the kennels. I am referring to Tim and Angella Schillereff doing business as The Sauvie Island Kennel, located at 23200 NW Reeder RD.

As any one who has lived on the Island for any number of years can tell you, the area has been a dog kennel and has been known as " the dog kennel site " for 50 years. In fact when I came to Sauvie Island in August of 1970, one of my fellow Oregon department employees told me he would meet me at the Dog Kennel site in the middle of the Island on Reeder road. For many years before, at that time and to the present the area has been and is known as The Dog Kennel site. So it was only fitting that Tim and Angella should continue to operate a kennel at that site.

Dog kennels and duck hunting go hand in hand. Dogs are trained by the Schillereffs for duck hunters. The dogs are only in the field when a trainer is present or when a hunter takes the dog hunting. Many hunters pay the kennel for boarding their dog, so when

they go hunting they stop, pick up their dog and away they go. Many people who hunt waterfowl live in town and do not have facilities to keep a dog on their own. The only way they can provide for a dog is to board it at a kennel. What better place to have a kennel than on Sauvie Island, where there is waterfowl and farmland.

Is not the whole object to find a niche, provide a service, pay taxes, live by the rules and be a good neighbor? This is what Tim and Angella did. They followed all the regulations laid out by Multnomah County. Then 6 years later they were told, sorry you cannot be there. This is not their fault. They put their blood, sweat and tears along with a lot of money into the site because the county told them, go ahead. How can a kennel that was okay for the past 50 years all of a sudden be wrong after it was okayed by a member of Multnomah county planning.

I understand that a member of a private duck lake next to the Sauvie Island Kennels feels there is a conflict between dogs and duck hunting. This is not true. There are several other kennels located on Sauvie Island with at least 2 of them being very close to very productive duck hunting areas.

Prior to 1970 & until the present group took over the hunt club next to the dog kennel site there were very successful hunt clubs operating on that site, if the site were hunted in a frugal manner, 3 days a week instead of every day it is very possible that hunting would return to normal. The presence of the dog kennel has nothing to do with waterfowl use on the adjacent hunt club land.

We hope in your final analysis you will find in favor of The Sauvie Island Kennels. It would be strange, very unproductive and very costly if the services provided by the kennels were destroyed. It would also be very unhandy for the clients that use the services offered by the kennel.

Sincerely,

Frank V Newton Retired ODFW Wildlife Habitat Biologist
18331 NW Reeder Rd
Portland, Oregon 97231

WPS *WINTEROWD PLANNING SERVICES*

Monday, November 27, 1995

Multnomah County Board of Commissioners
1120 SW 5th Avenue, Room 1510
Portland, Oregon 97204

Dear Commissioners:

Universal support among Island residents for expansion of the Schillereffs' existing kennel use is documented in Tab I of the notebook submitted last week by the applicants.

Attached is a letter signed by all of the Schillereffs' immediate neighbors -- all of whom are farmers and long-term residents of Sauvie Island. Although some properties have changed hands, please note that many of the signatories to this letter appear as owners of record on the 1964 map. The lone exception and the only opponent is Marquam Farms. The following immediate neighbors support approval of the Schillereffs' land use application:

Jerome J. Parson	**Donald Anderson**	**Elizabeth B. Anderson**
Kathleen M. Lerch	**Martha F. Lerch**	**George M. Ray, Jr.**
John Ray	**Evelyn Vetsch**	**Robert R. Vetsch**
Richard B. Vetsch	**Richard N. Vetsch**	**Sherri A. Vetsch**
Kurt Vetsch	**Michael C. Jacobson**	**Linda Reeder Burns**
Ryan W Burns	**Rosemary L. Burns**	**Atwell B. Burns**
Dale L. Johnston	**J. Marshall**	

The attached copy of a 1964 map of Sauvie Island indicates the names and locations of neighboring farmers and property owners in support of the expansion of Schillereffs' existing kennel use.

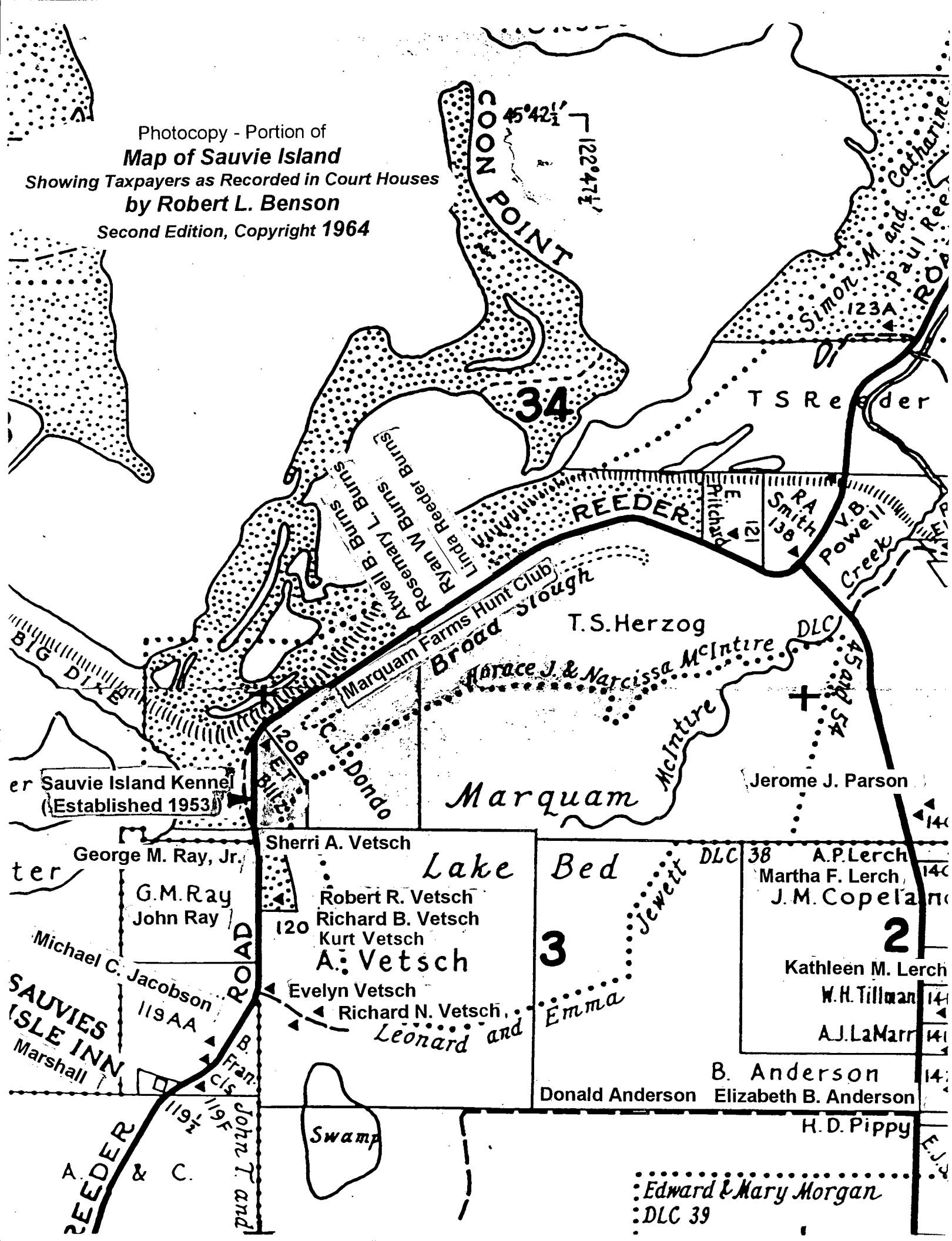
The Oregon Department of Fish & Wildlife (ODFW), as a matter of policy, does not participate in local land use proceedings unless their interests are adversely affected. ODFW does not object to expansion of the existing kennel operation.

Please accept this letter with attachments into the record of these proceedings.

Sincerely,

Greg Winterowd

Land Use and Resource Planning • Growth Management • Site Development
Suite 385, Office Courts Building • 700 North Hayden Island Drive • Portland, OR 97217
Tel: (503) 735-0853 Fax: (503) 735-4622


Photocopy - Portion of
Map of Sauvie Island
Showing Taxpayers as Recorded in Court Houses
by Robert L. Benson
Second Edition, Copyright 1964
COON POINT
45°42½'
122°47½'
34
Simon M and Catharine Paul Ree
123A
T S Reeder
REEDER
E Pritchard
121
R A Smith
138
V B Powell
Creek
Ryan W Burns
Rosemary L Burns
Atwell B Burns
Linda Reader Burns
Marquam Farms Hunt Club
Broad Slough
T.S.Herzog
Horace J. & Narcissa McIntire DLC
BIG DIKE
120B
E T Bill
C.J.Dondo
McIntire
Jerome J. Parson
Sauvie Island Kennel
(Established 1953)
Marquam
George M. Ray, Jr.
Sherri A. Vetsch
Lake
Bed
DLC
38
A.P.Lerch
Martha F. Lerch
J.M.Copela
G.M.Ray
John Ray
Robert R. Vetsch
Richard B. Vetsch
Kurt Vetsch
120
A. Vetsch
3
Jewett
2
Kathleen M. Lerch
W.H.Tillman
A.J.LaMarr
Michael C. Jacobson
119AA
Evelyn Vetsch
Richard N. Vetsch
Leonard and Emma
SAUVIES ISLE INN
Marshall
B. Francis
ROAD
REEDER
119½
119F
John T. and
B. Anderson
Donald Anderson
Elizabeth B. Anderson
H.D.Pippy
Swamp
A & C
Edward & Mary Morgan
DLC 39

22 November, 1995

The Board of County Commissioners
Mult. County Court House
Room 602

Regarding Case File CU 4-95 & MC 1-95, #23

I have written about this before. Briefly :- we own, live on and operate a 160 acre dairy farm since 1949 directly south of Schillereffs Kennels and Marquam Duck Club property. In the 1950's Peter Alphort established a dog kennel. Since that time it has always been "the dog kennel" whether for the owners and a few others or as a business in itself. When a group of mostly Doctors and lawyers bought a farm and developed it as a duck club for their own pleasure they knew the dog kennel was there next to their property. Some of them kept their hunting dogs at the kennel.

The owners of the Marquam Duck Club got along fine with the Persingers, owners of the kennels. In fact, for a time hired Mr. Persinger to plant the area to corn and other plants for the ducks. The problems arose only since Mr. and Mrs. Persinger sold the dog kennel to their nephew Jim Schillereff.

In my own heart I believe the Marguam Duck Club hoped to buy the Persingers Kennels and property as Mr. and Mrs. Persinger are elderly and have no children of their own. This would probably not be possible if the Schilleffs are allowed to remain there. This is just my personal opinion.

The Marguam Duck Club knows the Schilleffs have limited means to hire attorneys, while they have unlimited means and if they can keep delaying and appealing to higher courts they will ultimately win, as the Schilleffs are worn down and unable to hire more lawyers.

Meanwhile this young couple just starting their business and a family is being put through worry, turmoil and much cost to keep their home and their livelihood.

Yes, dogs bark. I don't believe it bothers the ducks and geese. We have duck & goose hunters on our property, too. Our cows get out from time to time and trample neighbors yards. We all try to get along. I don't believe any of the Marguam Duck Club owners live on Sauvies Island. I sincerely hope this dispute can end.

Yours truly,

Evelyn Vetsch

Others living in the near vicinity who believe the dog kennel and barking do not bother the ducks or geese; that the Schillereffs are good neighbors and will do all they can to keep the barking to a minimum; and keep a neat and clean kennel are:

Mr. George Parson
Oswald Anderson
Elizabeth B. Anderson
Kathleen M. Lynch
Martha F. Lynch
George M. Kay Jr
John Kay
Robert R. Vetsch
Richard B. Vetsch
Kent Vetsch
Marshall
Michael C. Jacobsen
Sherri A. Vetsch

Linda Burns
Roy W Burns
Dale L. Johnston
Rosemary L Burns
Atwell B Burns

BEFORE THE BOARD OF COUNTY COMMISSIONERS

FOR MULTNOMAH COUNTY

In the Matter of the Review of the Hearings Officer Decision which approved a Conditional Use to operate and maintain a dog kennel facility in an EFU district and to expand from 50 to 75 dogs; and alternately, resume and expand a non-conforming use located at 23000 NW Reeder Road.	))))))	**FINAL ORDER** **CU 4–95/** **MC 1–95** 95-248

WHEREAS this matter is before the Multnomah County Board of Commissioners as an appeal, filed by Marquam Farms, of the Hearing Officer's decision in land use case CU 4–95/MC 1–95; and

WHEREAS after proper notice of a public hearing, the Board of County Commissioners heard the testimony and evidence of parties at a de novo hearing on November 28, 1995; and

WHEREAS the Board of County Commissioners being fully advised hereby orders:

The Hearing Officer's decision dated September 15, 1995 in the matter of CU 4–95/MC 1–95 is affirmed subject to the following modification:

Finding VII(C) [pp. 69–71 of the Hearing Officer's decision] is eliminated.

DATED this 4th day of December, 1995

Beverly Stein, Multnomah County Chair

REVIEWED AS TO FORM:

LAURENCE KRESSEL, COUNTY COUNSEL

FOR MULTNOMAH COUNTY, OREGON

By: _____

John DuBay, Chief Deputy County Counsel

PRESTON GATES & ELLIS
ATTORNEYS

EDWARD J. SULLIVAN
DIRECT LINE
(503) 226-5727

November 22, 1995

HAND DELIVERED

Board Clerk
Board of County Commissioners
Multnomah County
1120 SW 5th Avenue, Rm. 1510
Portland, OR 97204

Re: Applications for Conditional Use and for Expansion of a Nonconforming Use by Tim and Angela Schillereff, File Nos. CU-4-95 and MC-1-95

Dear Commissioners:

Accompanying this letter please find, for your consideration in the above matter, a notebook of the proceeding under review and related proceedings involving the subject site.

Because the Board allows only 20 minutes per side, we hope your review of these materials in advance of the hearing will assist you in your deliberations.

The attached notebook contains the following matters, which are set off by tabs:

Tab A	Subject Index of Issues before the Board
Tab B	Applicants' Hearing Memorandum to the Board
Tab C	The two 1995 applications, which are the subject of these proceedings
Tab D	The 1995 Hearings Officer Decision appealed from
Tab E	Excerpts from the 1995 Hearings Officer Record, including a transcript
Tab F	Excerpts from the 1990 Conditional Use Proceedings for a Watchman's Dwelling
Tab G	Excerpts from the 1990 Design Review Proceedings for a kennel addition
Tab H	Excerpts from the 1994 Design Review Proceedings for a kennel addition
Tab I	Letters and Petitions of Support for Approval of the Application
Tab J	Nonconforming Use Documents

We recommend that you review the applicants' Hearing Memorandum at Tab B first so that you may be familiar with the issues. The Hearings Officer decision appealed from (Tab D) might be the next document reviewed, then the application (Tab C) and the Hearings Officer record (Tab E). The previous decisions in this case from 1990 and 1994 should then be reviewed (Tabs F, G, and H). Finally, the nonconforming use documents at Tab J and the letters and petitions of support at Tab I will be helpful. The subject index, chronology (immediately following this letter) and this letter itself are useful as reference points. In this way, the information before the Board may be manageable.

We look forward to the hearing in this matter and request that you affirm the decisions of the hearings officer. The applicant is prepared to assist the County in the preparation of a final order, should the Board affirm the Hearings Officer decisions.

Sincerely,

Edward J. Sullivan

EJS:dm
Enclosure
cc: Bob Hall, Planner
John DuBay, Esq.
Larry Derr, Esq.
Winterowd Planning Services
Clients

J:\EJS\33536-00.001\5YL2HR.DOC

ORIGINAL

SAUVIE ISLAND KENNEL

(Appeals)

SCHILLEREFF **Case File: CU 4-95 & MC 1-95**

RECORD TABLE OF CONTENTS

Item or Tab	Date	Document Title	Submitted By	File Number / Outcome
		1990 Conditional Use		
1	9/21/90	Request for Expansion of CU permit to Include Watchman's Residence.	Schillereffs	CU 23-90
2	11/6/90	Staff Report	M. Hess, Multnomah Co.	Recommends approval with conditions
3 / F	11/6/90	Decision	Planning Comm.	Approval with conditions
		1990 Design Review		
4	7/13/90	Design Review Application	Schillereffs	DR 90-07-02
5 / G	8/6/90	Final Design Review (Decision)	M. Hess, Multnomah Co.	Approval with conditions
		1994 Design Review		
6	1/10/94	CU expansion request (County determines only Design Review needed)	Schillereffs	DR 4-94
7	4/27/94	Administrative Decision - Final Design Review Plan	M. Hess, Multnomah Co.	Approval with conditions
8		Marquam Farms' Appeal Memorandum	F. Josselson	
9	7/12/94	Memo to Hearings Officer with file materials	M. Hess Multnomah Co.	
10 / H	8/19/94	Decision of Hearings Officer	P. Grillo	DR denied
		1995 CU / NCU		
11 / C	3/27/95	CU / NCU Application	Schillereffs	CU 4-95 & MC 1-95
12	8/16/95	Staff Report	R. Hall, Multnomah Co.	Deny
13	8/23/95	WPS Memorandum to Hearings Officer re Meaning of "Conditional Use"	GW & EE	
14	8/23/95	Applicants' Supplemental Memorandum, and affidavits from Island residents	E. Sullivan	
15	8/23/95	WPS Memorandum to Hearings Officer re MCC .2028	E. Eisemann	
16 / D	9/15/95	Hearings Officer Decision	B. Adamson	Approved with conditions

SCHILLEREFF
SUBJECT INDEX

SUBJECT	TAB	CITATION
• **Public support for kennel, evidence of**	I	Petitions and letters from Island residents, 1995.
• **Nonconforming use**		
– Establishment of kennel use, evidence of	J	Chart documenting nonconforming use, and letters and affidavits from Island residents showing kennel established in early 1950s.
	E	1995 Hearing Transcript, pages 41-71.
– Continuance of kennel use, evidence of	J	Letters from Island residents from 1967 and 1995.
	D	1995 HO Decision, page 89. "There exists no evidentiary gap in kennel usage."
	D	1995 HO Decision, "Conclusions - Non-Conforming Use," page 110. "Applicant has demonstrated to a reasonable, objective certainty that the kennel facilities have been in continuous operation as a 'kennel' defined in MCC 11.1.0010 since at least 1952, and that, despite fluctuations in what might be described as 'commercial' usage, nevertheless has endured without any abandonment or discontinuance since that time."
– MCC .2028, interpretation of	C	Applicants' Supplemental Memorandum of August 23, 1995, pages 4-8.
	D	1995 HO Decision, "Conclusions-Conditional Use," page 86. "The County's sequential interpretations and consistent applications of MCC 11.15.2028(B) in the 1989 and 1990 proceedings-each of which approved proposals and thus vested certain rights-constitutes implicit interpretations of MCC 11.15.2028(B) which I accord

		deference, . . ."
	E	1995 Hearing Transcript, page 7.
	G	"Applicant's kennel facilities already comprise a 'conforming' conditional use' pursuant to MCC 11.15.2028(B)." (Page 86)
		1990 Staff DR Approval, page 3. Staff note says "The Persinger kennel is therefore a conforming CU - therefore does not expire per October 8, 1990 opinion from John DuBay."
– Criteria for alteration, compliance with	C	1995 Application, page 26.
	D	1995 HO Decision, pages 102-108 and 110. "Applicant has fulfilled the criteria in MCC 11.15.8810 with respect to the 'alteration' of a non-conforming use."
• Procedural issues		
– Notice of decision	E	1995 Hearing Transcript, pages 4-5.
	F	1990 CU Approval mailed to eight neighboring property owners in accordance with MCC 11.15.8220(C)(2)(b). Notice to all property owners within 250 feet of the subject property.
	G	1990 DR Approval mailed to five neighboring property owners.
– Opponents' participation in kennel-related land use proceedings.	D	1995 HO Decision, page 15. "During a November 1990, Planning Commission hearing on this particular request, a neighboring property owner (Marquam Farms) urged that the kennel facilities comprised an 'illegal' operation . . ." See 1990 CU, Tape B.
– Opponents' failure to appeal previous final land use decisions.	D	1995 HO Decision, page 15. "No one appealed that decision," referring to 1990 Planning Commission decision on CU application for watchman's residence.
	D	1995 HO Decision, page 86. ". . .no party appealed those [1989

		and 1990] interpretations to the Board."
	H	1994 HO Decision, page 8: "CU 23-90 was not appealed beyond the planning commission and it is therefore a final decision, which cannot be collaterally attacked in this proceeding."
– *Res judicata*	H	1994 HO Decision, page 8: "CU 23-90 . . . cannot be collaterally attacked in this proceeding."
	D	1995 HO Decision, pages 39 and 48-50. "Marquam Farms' resurrection of issues that could have been appealed to the Board (or beyond) in 1990 comes too late." (Page 50)
– *Stare decisis*	D	1995 HO Decision, page 41: "Within an administrative context, I cannot bestow *stare decisis* upon a prior interpretation of a local enactment that misinterprets the enactment."
– Pending litigation	E	1995 Hearing Transcript, page 5.
• Issue preclusion		
– 1994 denial does not preclude issues from being raised now.	D	1995 HO Decision, page 87. "I conclude that because the decision in DR 4-94 resulted in the *denial* of an approval request, that denial attains no preclusive effect . . ."
	E	Transcript of August 16, 1995 hearing.
• Agricultural lands goal		
– OAR 660-33-120, interpretation of	C	Applicants' Supplemental Memorandum, August 23, 1995, pages 3-4.
	D	1995 HO Decision, page 110. "Nothing in OAR 660-33-120 or 660-33-130 precludes or prohibits the resumption of a non-conforming use with respect to an 'existing' kennel under the unique circumstances of this case. If those rules did purport to do so, they

		would clash with ORS 215.130 (7), which allows the resumption of a use in conformity with local government enactments." "OAR 660-33-120 and 660-33-130 expressly allow 'existing' kennel uses to continue, and to be 'maintained, enhanced or expanded.'" (Page 69) "Nothing in OAR 660-33-120 or 660-33-130 precludes or prohibits conditional use approval for an 'existing' kennel under the circumstances. If those rules did purport to do so, they would clash with ORS 215.283, which allows the establishment of dog kennels in EFU districts." (Page 86)
	E	1995 Hearing Transcript, pages 83-84.
– ORS 215.283, interpretation of	C	Applicants' Supplemental Memorandum, August 23, 1995, pages 3-4.
	D	1995 HO Decision, page 66-67. "I find that ORS 215.283(2)(m) describes Applicant's kennel facilities." "
– Conditional use criteria, compliance with	C	1995 Application, pages 13-22.
	D	1995 HO Decision, pages 74-79 and 86. "Alternatively, Applicant has fulfilled all of the applicable conditional use criteria . . . and the pertinent Comprehensive Plan policies with respect to both of the following: (1) the initial establishment of a conditional use approval for a dog kennel, and (2) the expansion of an existing conditional use . . . to allow an increase from a 50-dog kennel facility to a 75-dog kennel facility." (Page 86)
– MCCP policies, compliance with	C	1995 Application, pages 19-20.
	D	1995 HO Decision, pages 80-86. "Alternatively, Applicant has fulfilled all of the applicable conditional use criteria . . . and the pertinent Comprehensive Plan policies . . ." (Page 86)

• **"Conforming" conditional use, kennel**		
– Underlying kennel use, establishment of	D	1995 HO Decision, "Conclusions-Conditional Use," page 86. " . . . nothing in the conditional use provisions in MCC 11.15.7105, *et seq.*, plainly requires that an applicant must seek additional conditional use approval in order to modify or alter components of an existing conditional use that do not otherwise comprise any change in the 'use' itself."
– Accessory uses, consistent with underlying kennel use	F D	1990 Planning Commission CU Approval. 1995 HO Decision, "1990 Conditional Use Proceedings," page 44. "Thus, it necessarily became a condition precedent to approval . . . that the Planning Commission determine and conclude that there existed a dominant 'use permitted under MCC .2008 through .2012' . . . The Planning Commission appears to have done just that."
– Design review, consistent with underlying kennel use	G	1990 Staff DR Approval.
– Approval criteria, conformance with	D	1995 HO Decision, "Conclusions-Conditional Use," page 86. "Alternatively, Applicant has fulfilled all of the applicable conditional use criteria . . ."
– "Conditional use," kennel listed as	C D	1995 Application, pages 8 and 23. 1995 HO Decision, "Conclusions-Conditional Use," page 86. "Nothing in OAR 660-33-120 or 660-33-130 precludes or prohibits conditional use approval for an 'existing' kennel under the circumstances."
• **Site description, kennel**	C E	1995 Application, page 12, and Attachments B and C. 1995 Hearing Transcript, pages 2-3.

• **Land use approvals, kennel**		
– Conditional use	F	1990 Planning Commission CU Approval.
	D	1995 Hearings Officer's Decision
– Design review	G	1990 Staff DR Approval.
	E	1995 Hearing Transcript, page 8.
• **Impact mitigation, kennel**	D	1995 HO Decision, page 103. "Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a 'negative' impact on the surrounding area, such that the term 'lesser negative extent' has any significance here."
Noise	C	1995 Application, pages 26-27.
	D	1995 HO Decision, pages 80-81. ". . . I find that Applicant's kennel facilities will, as designed, either "Prevent or reduce excessive sound levels, . . ."
		"Marquam Farms has historically confined the bulk of its objections to noise issues, all of which will be diminished and minimized by any redesign of the kennel operations." (Page 108)
Traffic	C	1995 Application, pages 28-30.
	D	1995 HO Decision, pages 80-81 and 103. "I therefore find that the proposed alteration will 'affect the surrounding area to a lesser negative extent than the current use' with respect to the comparative numbers and kinds of vehicular trips to the site."
Agricultural land	C	1995 Application, pages 13-18 and 23-25.
	D	1995 HO Decision, page 80. ". . . I find that applicant's kennel facilities comprise an "other use[], consistent with state law," within the meaning of Policy 9 (Agricultural Land)."

Appearances	C	1995 Application, page 30.
	D	1995 HO Decision, page 105. "I therefore find that the proposed alteration will 'affect the surrounding area to a lesser negative extent than the current use' with respect to the comparative visual appearance."
Services	C	1995 Application, page 18.
	D	1995 HO Decision, pages 82-85. Hearings Officer finds that Applicant's kennel facilities fulfill Policy 37 - Utilities, and Policy 38 - Facilities.

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF MULTNOMAH COUNTY

IN THE MATTER OF THE APPLICATION OF TIM AND ANGELA SCHILLEREFF FOR CONDITIONAL USE, OR, ALTERNATIVELY, FOR THE EXPANSION OF A NON-CONFORMING USE. FILE NOS. CU4-95, MC-95	)))))))	APPLICANTS' MEMORANDUM

I. INTRODUCTION

Tim and Angela Schillereff ("applicants") have requested county approval of the expansion of their existing dog kennel operations on Sauvie Island. They were successful in that effort before the Hearings Officer and now request that the Hearings Officer decision be affirmed. The opponent, Marquam Farms, Inc. ("opponent"), an adjoining property owner, has appealed this decision to the Board.

The applicants showed that there was a kennel operation on the subject site since before zoning regulations were imposed on Sauvie Island. Additionally, there were previous kennel applications made on this site by these applicants in 1990. Both were granted, and one of them was brought before the Planning Commission at which time this same opponent challenged the issuance of the permit. The Planning Commission found otherwise and that decision was not appealed. In 1994, the applicants requested design review of alterations to the kennel. Staff granted the permit, but the hearings officer in that case found no conditional use existed, so that design review could not be granted. In doing so, the Hearings Officer overturned longstanding county policy, interpretation and administration of the zoning ordinance. An attempt was made to appeal that decision, but the appeal was not filed in time. The applicants then filed these new applications to deal with the new interpretations which came from the 1994 decision.

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II. NATURE OF THE APPLICATION

The applicants seek conditional use approval of the expansion of their existing kennel operations from 50 to 75 dogs; alternatively (and in a lower order of preference), they seek expansion of their nonconforming kennel use.

III. FACTUAL BACKGROUND

A dog kennel has operated on the subject site since the 1950s and predates the application of the Multnomah County Zoning Ordinance to Sauvie Island. The continuity of that use is set forth in detail at Tab "J".

The individual applicants came on the scene in 1989, when they bought out the operations of Red Persinger, the previous owner who still lives on the site. At that time, the applicants inquired of the planning staff as to what permits were required and were prepared to file a conditional use permit application. The staff informed the applicants that such a request was unnecessary because of a specific provision of the Multnomah County Code, i.e., MCC 11.15.2028. The planning staff and county counsel, using this section, interpreted and administered the zoning ordinance to determine that the kennel was a recognized pre-existing use and, therefore, a conditional use permit application was unnecessary.

Accordingly, the applicants requested two permits from Multnomah County in 1990, a design review permit to alter their existing 50 kennel facility and a conditional use permit for a nonfarm watchman's dwelling, so they could oversee their kennel operations. See Tabs "F" and "G" respectively. Both permits were granted for the same reason that the conditional use permit for a kennel was unnecessary, i.e., because of the provisions of MCC 11.15.2028, which stated (and still states) the following:

> Conditional uses listed in subpart MCC .2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC .8804, provided, however, that any change of use shall be subject to approval pursuant to the provisions of MCC .2012. (Emphasis supplied)

Each of those 1990 permits was quasi-judicial, so that there was notice and an opportunity to be heard. The conditional use permit for the dwelling was, in fact, heard by the Multnomah

County Planning Commission and, over the objections of the same appellants in this case, issued. The objections which were overruled in those proceedings included the legal authority of the county to grant the application without a previously issued conditional use "permit". The Planning Commission found a lawfully existing kennel on the site and issued the conditional use permit for the watchman's dwelling as an accessory use to that kennel. See Final Order in Multnomah County File No. 23-90 at Tab "F" (regarding the conditional use permit) and the staff notes and county counsel memorandum at the third and fourth pages of Tab "G" (regarding the design review decision in File No. 90-07-02). There was no appeal of either decision.

In 1994, the applicants requested an additional design review approval to allow the expansion of their kennel from 50 to 75 dogs. See Tab "H". Consistent with the understanding of the law shared by the applicants and planning staff (after consultation with county counsel), the planning staff did not require additional conditional use approval for the kennel. The planning staff then approved design review for the 75-run kennel.

On appeal, the opponent persuaded the Hearings Officer that previous interpretations of MCC 11.15.2028 should be changed and that a formal conditional use "permit" was required for the underlying use before design review could be approved. By way of dictum (i.e., an observation not necessary to the decision), the Hearings Officer also found insufficient evidence to document the kennel's nonconforming use status, because of an evidentiary gap (1962 to 1964) as to the continued kennel use of that property. See Tab "H" (Final Order in File No. DR 9-94, finding 6 at p. 6). However, the Hearings Officer observed that the door remained open to validate the underlying use in the future. See Tab H, same final order, Part C at p. 7. Moreover, there was no formal application for either a conditional use permit or expansion of a nonconforming use before the Hearings Officer at that time.

The applicants sought to appeal that design review decision to the Board of Commissioners; however, they missed the filing deadline by a few minutes. The 1994 Hearings Officer decision became final by default. Subsequently, the applicants sought new counsel to assist them in securing land use approval of the 75 dog kennel they desired.

The present request is for expansion of an existing kennel use by filing two alternative applications, one for a conditional use permit and one for expansion of a pre-existing nonconforming use. See Tab "C". The grant of either of those applications would allow the 75 kennel runs sought by the applicants. Further explanation of both applications follows.

1. The Conditional Use Request

The 1995 conditional use application is intended both to validate the existing kennel use and to expand this existing use from 50 to 75 kennel runs. The conditional use request is based on three reasonable and alternative grounds. First, in 1990, the Planning Commission approved a conditional use permit for an accessory night watchman's facility on the same property, and in so doing explicitly validated the existing conditional use status of the underlying kennel use. Second, MCC 11.15.2208 expressly recognizes the validity of existing uses that are listed as "conditional uses" in the underlying EFU zone, regardless of whether the listed use has been in continuous operation since its inception.

Finally, and as a last resort, the applicants argue that an LCDC administrative rule prohibiting new kennels on high value farmland cannot be inconsistent with the state EFU statute that explicitly authorizes Multnomah County to determine whether new kennels should be allowed as a conditional use in the EFU zone. We note that ORS 215.283(2), OAR 660-33-120 and MCC 11.15.0228 all allow expansion of an existing kennel use in the EFU zone on so-called "high value farmland." Thus, the Board does not need to reach this third issue if it finds any of the following to be true:

a. That the kennel qualifies as an "existing" conditional use based on the interpretation of MCC 11.15.2208 given by the Hearings Officer or of the Planning Commission's 1990 conditional use decision; or

b. The kennel is a nonconforming use.

The opponent claims the kennel is a "new" use and that the LCDC rules apply. Not only is that position utterly refuted by the careful analysis by the Hearings Officer in 1995, but it also denies

the fact of the existence of the kennel and its repeated recognition by the County, even by the 1994 decision which did not challenge the existing structures or uses.

In addition to validating the underlying kennel conditional use, the Schillereffs' 1995 application clearly demonstrates that the criteria for approval of a new, or expansion of an existing kennel use are met through the project design and conditions of approval.

2. Nonconforming Use.

The application for expansion of a pre-existing nonconforming use only makes sense if the Board rejects the notion that the Schillereffs' kennels are an existing "conforming" conditional use and the Board does not grant the conditional use requested in these proceedings. As noted above, the 1994 Hearings Officer's decision found there was an evidentiary gap that needed to be filled to determine that the kennel had been in continuous use since its establishment. In 1995, the applicants provided substantial evidence to the Hearings Officer sufficient to fill this gap and thus to document that the nonconforming use had not been abandoned. The findings presented by the applicant clearly demonstrate that the code criteria for expansion of the nonconforming use are met through the proposed project design and conditions of approval. The Hearings Officer concurred in his final order.

The alternative requests were set before the Hearings Officer for August 16, 1995. As is noted in the transcript, the Hearings Officer received a letter the previous day from counsel for the opponent, noting that they would not be present, making objections to notice and jurisdiction, and requesting that the record be left open for three weeks. The Hearings Officer overruled the objections and established a schedule by which the applicant would be given one week to add to the record, the opponent would be given a further week for response, and the applicant would have a further week for reply. The applicant submitted a memorandum and other materials for the record within the first week. Opponents submitted nothing to the Hearings Officer within the time they had to present their case. As there were no opponent materials, the applicant did not reply. On the day set for the applicant to reply, the opponent faxed a letter saying that they were misled by the staff into thinking their request for a three week period had been granted and had

only found out of the Hearings Officer ruling in listening to the tape. The opponent did not ask for any opportunity to reopen the record, but repeated its objections to notice and jurisdiction. The Hearings Officer issued his decision on September 15, 1995 and the opponent appealed. See Tabs "E" (Hearings Officer Record) and "D" (Hearings Officer Decision).

IV. ISSUES ON APPEAL

The opponent has set forth fifteen separate grounds for appeal. Opponent also requested de novo review, claiming that such review "will not involve introduction of extensive new evidence." As of this date, the applicants have seen no evidence at all from opponents to respond to that presented before the Hearings Officer.

A brief response to opponent's grounds for appeal follows:

1. Hearings Officer refusal to grant a continuance or setover -- Opponent asked for such a continuance; however, the Hearings Officer correctly found no grounds for the same. Opponent does not explain why the Hearings Officer erred. Further, opponent asked in the alternative to keep the record open for 21 days. ORS 197.763 (1993 version applicable to these proceedings) requires a seven day period for leaving the record open. The Hearings Officer granted the applicant fourteen days. Opponent waited until the twenty first day and claimed to be misled by an unidentified county staffer to the effect that its request had been granted. Opponent did not ask the Hearings Officer to reopen the record and was granted a de novo appeal hearing. There is no merit to this ground.

2. Hearings Officer Allowing a 75 unit dog kennel when the notice referred to an expansion of an approved conditional use permit from 50 to 75 kennels -- The applicant requested conditional use approval for a 75 dog kennel (see application). The staff described the use otherwise in its notice. The applicant presented evidence under either theory, saying that, if a conditional use permit is necessary to formalize its operations, it so requested, but if the current use was already recognized up to 50 dogs, the request was for conditional use approval for 75 dogs. The opponent presented nothing. Opponent made the technical objection to the Hearings Officer and was not misled. Opponent had the opportunity to present evidence before the

Hearings Officer and this Board as to either alternative. The objection is, at best, a technical procedural objection, for which opponent can show no prejudice. There is no basis for this ground.

3. Refusing to continue the hearing and order a new notice -- This ground reiterates the first two grounds and is equally meritless.

4. Overruling the 1994 Hearings Officer Decision -- Opponent claims the 1994 decision was final and conclusive. The Hearings Officer in these proceedings found otherwise:

a. The 1994 decision determined that a design review application for a kennel could not proceed in the absence of a formally granted conditional use. This application seeks that very use the Hearings Officer found lacking.

b. The 1994 decision made observations about the kennel use which were unnecessary to the decision and were not before the Hearings Officer in that case. However, that same Hearings Officer said in that decision that it was possible for the applicants to show the existence of a nonconforming use at another time and said that his decision was made :"without prejudice" to that possible future showing. The Hearings Officer in this case found that the applicants had made that showing.

Therefore, there is nothing inconsistent between the two decisions. The 1995 decision did find some of the other legal conclusions in the 1994 decision to be incorrect. However, there is nothing in the law which prevents reconsideration of how the law applies. If that were the case, the decisions in 1990 discussed below would have negated the 1994 decision.

A little realism might be added. The only reason this matter was not brought before this Board was a failure by a delivery agency to find the right office to file the appeal papers on time. The Board now has the full case before it for decision. The fact that another decision was made on another application for different approvals does not preclude Board action on the two alternative applications before the Board in these proceedings. This ground is meritless.

5. Overruling a previous interpretation of MCC 11.15.2028 -- This is a variation on the fourth ground, above, in which opponent contends the Board cannot decide how to interpret

its own ordinance differently from that of a hearings officer. First, the elected governing body, and not an appointed hearings officer, has the primary responsibility for ordinance interpretation under Clark v. Jackson County. Second, there is no principle of law which prevents the Board from deciding how to interpret its ordinance differently from the way it did many years ago. Again, if that were the case, the 1990 decisions could not be revisited in 1994. There is no merit to this ground.

6. The correctness of the Hearings Officer interpretation of MCC 11.15.2028 -- The 1995 decision at pp. 50-65 presents a carefully reasoned approach to this code section and is consistent with the way the county staff and county counsel interpreted this section before the 1994 Hearings Officer decision. Opponent's objection here is to what it calls "super conditional use status" by which it does not need a permit to expand or to resume after a period of discontinuance. However, the Hearings Officer deals carefully with the words of this section as they are written, rather than how one might want them to be written.

It may be that this Board no longer wishes to use the approach past Boards of Commissioners used to deal with the difficult problem of lawfully established uses which pre-dated zoning regulations and were otherwise allowed only as conditional uses (such as churches, schools, and kennels in farm zones). Those past Boards simply stated that, if those uses were lawfully established as of a certain date, they were deemed conditional uses and were not required to go through the nonconforming use or conditional use processes. That was the way the County dealt with these uses before 1994 and that was the reason the applicants got their approvals in 1990. If this Board no longer wishes to use this approach, the proper thing to do is amend the zoning ordinance. In any event, this ground is without merit.

7. The collateral attack on the 1990 staff and Planning Commission Decision -- The Hearings Officer used opponent's own reasoning against them, saying that, if previous actions of the County could not be collaterally attacked after the appeal period had run, then the 1990 decisions, which were based on the predicate that there was a valid kennel use on the site, could not have been revisited by the 1994 decision.

While the Hearings Officer was correct, the discussion of ground four above, distinguishes the 1994 proceeding from this one. The 1994 denial of a design review application is based on the lack of a conditional use permit, which is being applied for here, and the Hearings Officer in the 1994 proceedings allowed the applicant to demonstrate at a later date that it had a nonconforming use and he made his decision on that point "without prejudice". There is no basis for this contention.

8. Hearings Officer Interpretation of Requirements for Modification of a Conditional Use Permit -- As with the previous two grounds, opponent quarrels with interpretations given the County's zoning regulations by the Hearings Officer. The Hearings Officer carefully explained his conclusions at pp. 50-66 of his decision. Opponent offers nothing more here than in the sixth and seventh grounds above -- mere disagreement without further explanation.

While the applicants believe the Hearings Officer is correct on the matters in all three grounds (the sixth, seventh, and eighth grounds), none of these grounds are necessary for the applicants to prevail. Under the sixth ground (the challenge to the ability of the kennel to expand without further permits), the challenge is moot, as the applicants did request such expansion in both their conditional use and their expansion of a nonconforming use applications. Under the seventh ground (the challenge to whether a permanent conditional use status was given in 1990), the applicants requested both a conditional use and expansion of their nonconforming use. And under the eighth ground (no need to file an application to modify conditions of approval), the applicants did make such a request in each of their two applications. While a long list of quarrels with the Hearings Officer decision may look impressive, the fact is that the applicants took care to make all necessary requests in the alternative. This ground is without merit.

9. The Hearings Officer erred in finding the proposed use met all state and local criteria -- This ground is both overbroad and unfair to the applicants and the Board. There is no specific error alleged, no specific criteria for which the applicants may answer. MCC 11.15.8270(G) limits these appeal hearings to the grounds stated in the notice of review. ORS 197.763 requires that issues be raised with such specificity so that this Board and the parties may

respond. This ground meets neither requirement and the applicants request that the Board find no merit in this ground for these reasons.

10. The validity of OAR 660-33-120 and -130 -- The applicants have raised the validity of these administrative rules because they believe these rules cannot contravene a statute which gives the judgment as to whether a kennel (or a church or school) can be placed on certain soils to counties, and not to LCDC. The recent Brentmar v. Jackson County decision reaches that conclusion in an analogous situation and indicates that the statutes must be amended before LCDC has this authority. The applicants understand that the Department of Land Conservation and Development and 1000 Friends of Oregon disagree with this view and will join this case to present their views on the validity of these rules.

While this exercise should be undertaken, it need not be undertaken in this case. The rules only apply if the kennel is deemed "new." The Hearings Officer found that the kennel application is an expansion of an existing kennel, which is allowed under the LCDC rules. The Hearings Officer, seeking to decide all issues presented to him, made a ruling which the applicants believe to be correct, but which is unnecessary to the decision in this case, if the Board finds that the kennel is an existing use. The 1990 approvals establish the use, as does the nonconforming use status of the site as a kennel since before 1958. This ground is without merit.

11. Interpretation of OAR 660-33-120 and 66[sic]-33-130 -- This ground is a variation on the tenth ground, above, and is similarly meritless.

12. Overruling the 1994 decision on the nonconforming use status of the kennel -- This ground is a variation on the fourth ground and is answered in the response to that ground, above. Suffice it to say that the Hearings Officer dealt with this issue in dicta, i.e., an opinion unnecessary to decide the case, but also did so "without prejudice," allowing the applicants to come back at another time to prove their nonconforming status. That decision, even if it were construed to be binding, allowed the applicants to do exactly what they applied for, and proved, in this case, i.e., that there was a nonconforming use. This ground is without merit.

13. The Hearings Officer determination that the nonconforming use expansion criteria are met -- This ground is similar to the ninth ground, in that it states that the applicants did not meet the criteria, but does not do so in a specific way so that the applicants may respond. The applicants will have 20 minutes to respond to anything the opponent will present at the hearing. To date, the applicants have seen nothing to respond to and asks the Board to take the same position on this ground as suggested under the ninth ground, above.

14. Resumption of the nonconforming use -- This is another interpretation (as with the sixth, seventh, and eighth grounds above) which the Hearings Officer found flowed from the text of the ordinance. See pp. 99-110. However, the Hearings Officer also carefully made findings in the alternative that there was no discontinuance of the nonconforming use. In either event, this ground is meritless.

15. Res judicata, collateral estoppel, claim preclusion, and issue preclusion -- The Hearings Officer also spent a great deal of time and effort at pp. 39-50, 87, and 96-97 of his decision on these claims, which were not developed by opponent in the Hearings Officer proceedings and barely mentioned in the appeal notice. The Hearings Officer was correct in his analysis. Moreover, as indicated in the response to the ninth ground, opponent has not specified any grounds for review so that the applicants can respond. The Board should dismiss this ground for the reasons given in the response to the ninth ground or find it meritless.

In order to understand the Hearings Officer's decision in this case, it is necessary to review the grounds on which the applications were based, and approved, and the alternative grounds given by the Hearings Officer for approval.

A. The Applications Requested There is no need to provide extensive evidence or argument on the two alternative permits requested for that is dealt with in the Hearings Officer decision. The applicants have provided complete information addressing each of the approval criteria. The staff did not dispute either the information, nor the analysis concluding that the criteria had been met. Instead, staff focused on the 1994 Hearings Officers decision, which overruled staff's recommendation of design review approval. But, the 1995 staff report

stated (incorrectly) that the Hearings Officer had found no nonconforming use and that a new kennel use was precluded by the LCDC rules (because it was somehow not "existing" and therefore could not be expanded), and recommended denial of the applications on that basis.

At the hearing, the opponent presented no evidence. The Hearings Officer analyzed the evidence provided by the applicants and those who testified at the public hearing. He provided findings, conclusions, and reasons for his determinations that the kennel was "existing" and that all applicable criteria for expansion had been met. See Tab "D". The conditional use criteria, facts, and analysis are found at pp. 30-38 and 65-87 of the Hearings Officer decision; while the non-conforming use criteria, findings, and conclusions are found at pp. 97-110. Nothing would be served by reiterating this discussion. The Board is referred to these pages for the analysis based on the undisputed facts presented at the hearing.

With respect to the conditional use criteria, it is important to note that the Hearings Officer reviewed the application from the standpoint of the initial approval of a conditional use permit for the entire facility as well as for the expansion from 50 to 75 dogs, and found in both instances that the conditional use permit criteria had been met.

With respect to the nonconforming use criteria, the Hearings Officer viewed the kennel from the standpoint of its continued existence before 1958. He also viewed the expansion of such a nonconforming use and the resumption of the nonconforming use under the provisions of ORS 215.130(7).

B. Additional Grounds for Approval The Hearings Officer made a full inquiry into the facts and law of this case and made some important determinations which form additional grounds for approval of the proposed use.

1. The 1990 Decisions Granting the Kennel and Kennel Related Uses Establish the Use, Even If It Were Not Previously Established as a Nonconforming Use (Hearings Officer Decision pp. 44-50) -- The Hearings Officer explained in great detail that the 1990 proceedings resulting in both the design review approval and the conditional use approval for the watchman's residence had recognized the kennel use. Neither decision was appealed. The

Hearings Officer also determined that these decisions could not be contradicted by the 1994 decision which denied the second design review application.

Even if the Hearings Officer were incorrect with regard to the 1994 decision, it is clear that the 1990 decisions were final and could not be collaterally attacked. In other words, once the appeal period had expired on those decisions, the applicant waived its ability to contest them and is estopped from doing so. The result of the two 1990 decisions was the establishment of the kennel regardless of whether the use had been otherwise recognized as a nonconforming use. Moreover, as the Hearings Officer noted, the consistent interpretation of MCC 11.15.2028 gave a predictable decisional basis on which the applicants could, and did, rely -- even to the extent of forgoing a separate conditional use application.

The Hearings Officer in this case noted that the opponent knew about and participated in the 1990 proceedings and challenged the lawfulness of the kennel on the grounds it did not have a formal conditional use permit. The Planning Commission followed the staff and legal counsel recommendation that the use was lawful, and there was no further challenge to that determination by the opponent.

Moreover, the establishment of the use in 1990 was not necessarily before the Hearings Officer in the 1994 proceedings for design review. The Hearings Officer decided he could not grant the design review because there was no piece of paper which formally granted a conditional use permit. He did not agree with the staff, which said, based upon a longstanding zoning ordinance interpretation and practice, and on the advice of county counsel, that the conditional use permit issued by operation of law. The 1994 Hearings Officer decision went beyond the necessities of the case and gave his opinion on the validity of the nonconforming use, an issue not before him in that case. However, the Hearings Officer also noted in the 1994 proceeding, that this was an issue on which the applicant could provide further evidence. The Hearings Officer did not finally determine the nonconforming use issue. In fact, the Hearings Officer rendered his decision "without prejudice" so that the applicants could make a new application and prove their case, which is what these proceedings are about. All the 1994 decision stands for is that there

cannot be design review approval without an established use. The applicants have demonstrated that there is a lawful use for the kennel, and have remedied the difficulty posed by the Hearings Officer in 1994 with the current applications.

2. The Interpretation of MCC 11.15.2028 (pp. 50-65) -- In 1995, the Hearings Officer considered this code section at some length. He agreed with the pre-1994 interpretation of MCC 11.15.2028 and found that the applicants had a conditional use by operation of law and were not required to undertake an application for a new conditional use. Again, MCC 11.15.2028 states:

> Conditional uses listed in subpart MCC .2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC .8804, provided, however, that any change of use shall be subject to approval pursuant to the provisions of MCC .2012. (Emphasis supplied)

Kennels are listed in MCC 2012; this kennel was legally established before August 14, 1980 and, as contended by the applicant and found by the Hearings Officer, are "deemed conforming" and did not require a conditional use permit. The Hearings Officer noted that there is no requirement that the use be continually in operation after August 14, 1980, but concluded that, in this case, there was evidence that convinced him that the use had been in effect continually since that date.

The Hearings Officer has done a particularly good job in examining MCC 11.15.2028 in the context of the entire zoning ordinance. He concluded that the significance of the exemption from the nonconforming use provisions of MCC 11.15.8805 [mistakenly referred to as 11.15.8804] but not MCC 11.15.8810 lies in the ability of the listed, lawfully established use (i.e., the kennel) to be restored or replaced (in the event of fire or other casualty), resumed if discontinued (even if discontinued beyond two years) and maintained. If the kennel use is changed or altered, MCC 11.15.8810 applies, and the applicant must request conditional use approval. While the applicants in this case seek a change in the number of dog runs in the kennel operation, the lawfulness of the underlying kennel use has already been recognized and deemed lawfully established, as the Hearings Officer indicated at pp. 58-60 of his decision. The Hearings

Officer further found that, so long as the use remained a kennel, no separate conditional use permit is required for a different number of dog runs. Only if the kennel use changes entirely to another conditional use listed in this zone entirely is there a requirement that the conditional use process be used.

The Hearings Officer also agreed with the applicant that MCC 11.15.2028 is not limited to those situations in which a conditional use permit has been granted by the county, but rather allows all uses listed as conditional uses (whether or not a conditional use permit has been granted) which were lawfully established before August 14, 1980 to be deemed to be lawfully existing conditional uses. See Hearings Officer Decision, pp. 61-62. Specifically, the Hearings Officer states:

> MCC 11.15.2028(B) makes no sense -- and becomes utterly superfluous -- if it can only apply to conditional uses for which a prior permit has been granted. It only makes sense if it purports to apply to a use that, "but for" the absence of a conditional use permit, would be a true conditional use.

Hearings Officer Decision pp. 61-62.

Because the Hearings Officer found that MCC 11.15.2028 conferred conditional use status on certain uses, he concluded that the conditional use process was not necessary for the establishment of the kennel. The Hearings Officer also found that the kennel use was not proposed to be changed to another use (but merely expanded) and, since no conditions on a previously issued conditional use permit were being changed, there was no need for a separate conditional use permit. (Hearings Officer Decision pp. 63-65). To be sure, the Hearings Officer did make alternative findings showing compliance with the conditional use criteria, both with respect to the establishment of the use and the expansion of the same. However, he clearly believed that the conditional use permit is not necessary.

3. The Hearings Officer Could Determine the Alternative Basis of the Application, i.e., the Non-Conforming Use Expansion Request (pp. 87-97). -- As an alternative basis for granting the requested use, the Hearings Officer determined that the applicants qualified for a non-conforming use expansion.

The Hearings Officer in this case found that the 1994 decision did not relate to the issue of the existence of a nonconforming use, even though that matter was discussed in dicta, because the only subject of the 1994 application was design review. He also said that the 1994 decision found an evidentiary gap in the county's inspection records as to the existence of the kennel use from December, 1962 to February, 1964. He further found that the denial of the design review application was without prejudice to a later attempt to show continued use in the appropriate proceedings. The recitation of unrefuted evidence with regard to the continuous operation of the kennel use from 1952 to the present is set out at pp. 89-95 and will not be repeated here.

The Hearings Officer thus correctly concluded that the evidentiary basis is sufficient to make the alternative determination that a continuous nonconforming use existed. The decision should be upheld on this alternative basis as well.

V. CONCLUSION

To summarize, the applicant has applied for two alternative approvals to expand its kennel facilities from 50 to 75 dog runs, i.e., a conditional use permit and a permit to expand a nonconforming use. The Hearings Officer granted both permits, but found that neither may be necessary under MCC 11.15.2028. The applicants are entitled to their permits unless each of the following alternative bases is negated:

1. The conditional use permit application for the expansion of the existing use meets all of the conditional use criteria and should issue. The existing 50-unit kennel was established by the 1990 permits for design review and a watchman's residence accessory to the kennel. The opponent had the opportunity to raise issues as to why the permits should have been denied, and did raise those issues. When the Multnomah County Planning Commission heard these objections and resolved them against the opponent and in favor of the kennel, the opponent did not appeal. The opponent has thus waived its rights and is estopped from challenging the current application Thus, the use was established and qualified for consideration for expansion. That expansion request met the conditional use requirements and was approved. The expansion would not be

subject to LCDC rules which purport to prevent new kennels on certain soils, as the application relates to expansion of an existing kennel.

2. The conditional use permit could also be granted as if it were considered with regard to a new 75 unit kennel, because the Hearings Officer also found it meets all the criteria for the issuance of a conditional use permit. In this event only would there be a conflict with the LCDC rules noted above. The applicants would challenge those rules for the reasons correctly cited by the Hearings Officer, i.e., that they conflict with statutes which give this decision to counties. However, this is the only alternative which involves the validity of the LCDC rules.

3. If for any reason the conditional use permit were denied, the applicants still have a lawful nonconforming use and have met all the requirements for expansion of the same. The 1994 decision involved an application for design review. The Hearings Officer comments on the nonconforming use were dicta and the 1994 application for design review was denied without prejudice to the nonconforming use issue. The applicants provided information sufficient to establish the existence and continuance of the nonconforming use of the kennel.

4. No conditional use permit or nonconforming use expansion is necessary because MCC 11.15.2028 allows those uses listed as conditional uses in this zone to exist, so long as the use lawfully existed on August 14, 1980. So long as the use is the same, the additional kennels may be added without any further permits.

On each of the alternative grounds listed above, Tim and Angela Schillereff respectfully request this Board's approval of their request to have their 75 unit dog kennel.

DATED this 22nd day of November, 1995.

Edward J. Sullivan, OSB 69167
of Attorneys for Tim and Angela
Schillereff

MULTNOMAH COUNTY

Planning and Development
2115 S.E. Morrison St.
Portland, Oregon 97215
(503) 248-3043

Pre–Application Conference Notes

Staff: Hall

Date: 3/23/95

PA # 4-95

Property Location: 23200 NW Reeder Road

Legal Description: TL '15', Sec. 3, T2N, R1W

Request: Conditional Use and/or alteration of a non-conforming use for a 75 dog Commercial dog kennel.

Applicant: Tim & Angela Schilleroff

Address: 23200 NW Reeder Road
PDX 97231

Zoning: EFU 3/24 → Comprehensive Plan: EFU 5/17

Closing Date: 4/28 Hearing Date: 6/21

Fees:

Action fees: $ CU-$400.00 Non-Conforming-$500.00

Sign fees: 40% = $20

Total: $

The Staff suggests addressing the following issues or items to improve your application :

- Attachments H & I
- You haven't considered the OAR requirements for the CU portion of your application.

GENERAL APPLICATION FORM

DEPT. OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
(503) 248-3043

2115 SE MORRISON ST.
PORTLAND, OR 97214

MULTNOMAH COUNTY

Property Address 23200 NW Reeder Rd., Portland, OR 97231
Tax Roll Description TL 15, Section 3, T2N, R1W
Site Size 9.41 acres
County Assessment &Taxation Account No. R97103-0150
State Identification No. _____ Levy Code _____

Applicant Tim and Angela Schillereff
Address 23202 NW Reeder Rd. Phone 621-3204
City Portland State OR Zip Code 97231

Property Owner/Deed Holder Elden and Marguerette Persinger
Address 23200 NW Reeder Rd. Phone 621-3249
City Portland State OR Zip Code 97231

Contract Purchaser Applicants
Address _____ Phone _____
City _____ State _____ Zip Code _____

At Applicant's Request, Other Parties To Receive Notice And Decision, (e.g., Surveyor, Planning Consultant, Attorney):
Name Greg Winterowd, Winterowd Planning Services
Address 700 N. Hayden Isl. Dr., Suite 385
City Portland State OR Zip Code 97217

Name Ed Sullivan, Preston Gates & Ellis
Address 111 SW Fifth Ave., Suite 3200
City Portland State OR Zip Code 97204

GENERAL DESCRIPTION OF APPLICATION: (To be filled in by the applicant and reviewed by staff. This is to be only a brief description. Responses to the approval criteria must be attached to this application.)

Applicants seek conditional use approval, or, alternatively, an alteration of a non-conforming use, for a 75-dog kennel. A 50-dog kennel operated on the property with County approval for over 5 years (see DR 90-07-02). A request to expand the kennel was filed last year and processed through design review (DR 4-94).

FOR STAFF USE

CASE NUMBER

Associated Cases

Past Case

DESCRIPTION

Comp. Plan Desig.

Community

Zoning District

Zoning Map No.

A&T Map

PRE-APPLICATION

Pre-App. Accepted
Date: By:

Pre-App. Number

Date and Time

SUBMITTAL

Application Received
Date: By:

30 Days After Rec.

Staff Reviewer

Notified Missing Info.

Info. Submitted

Date Complete

GENERAL APPLICATION FORM Page 2

DEPT. OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
(503) 248-3043

2115 SE MORRISON ST.
PORTLAND, OR 97214

MULTNOMAH COUNTY

Case Number

—TO THE APPLICANT—

Below is a list of service providers. County staff will indicate in the "Yes" column those districts, agencies, etc. you must contact to fill out a service certification form or some other type of review verification. The forms are needed to have a complete application.

FOR STAFF USE

Service Availability Certification Form Required

	Yes	Date Received
—Comprehensive Plan Policy 37 - Utilities—		
Electricity (write in provider's name): _____		
Natural Gas (write in provider's name): _____		
Telephone (write in provider's name): _____		
Water Service Certification. Attach Form	____	____
Public Sewer Service Certification (if available). Attach Form	____	____
Private On-Site Sewage Disposal Certification (if used). Attach Form	____	____
Other: _____	____	____
—Comprehensive Plan Policy 38 - Facilities—		
School District Review. Attach Form(s)	____	____
Police Services Review. Attach Form	____	____
Fire District Review. Attach Form	____	____
State Fire Marshal Access Certification (Roads and Driveways). Attach Form.	____	____
Other: _____	____	____
Other: _____	____	____
—Other Agency Reviews and Certifications—		
Flood Elevation and/or Floodproofing Certification. Attach Form(s)	____	____
State Scenic Rivers Program, Parks and Recreation Dept. Attach Decision	____	____
State Dept. of Forestry. Attach Reviewed Forest Management Plan Forms	____	____
State Dept. of Fish and Wildlife. Attach Comment Letter	____	____
State Dept. of Environmental Quality. Attach Comment Letter	____	____
Division of State Lands / U.S. Army Corps of Engineers. Attach Letter	____	____
Other: _____	____	____

—To Be Completed By The Applicant Only In The Presence Of A Notary Public—

STATE OF OREGON
COUNTY OF MULTNOMAH

I, (Print Name) Angela Schillereff

EACH BEING FIRST DULY SWORN, DEPOSE AND SAY THAT I AM (ONE OF) THE APPLICANT(S) IN THE FOREGOING APPLICATION AND THAT THE SAME IS TRUE AS I VERILY BELIEVE.

Angela Schillereff
(Applicant Signature)

OFFICIAL SEAL
PAMELA F. RYMAN
NOTARY PUBLIC - OREGON
COMMISSION NO. 033136
MY COMMISSION EXPIRES MAR. 22, 1998

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 23rd DAY OF February 23, 1995
NOTARY Pamela F. Ryman
MY COMMISSION EXPIRES 3/22/98

Sauvie Island Kennel Land Use Request

APPLICANT:	**Tim and Angela Schillereff** **Sauvie Island Kennel** **23200 NW Reeder Road** **Portland, OR 97231** ***represented by*** **Winterowd Planning Services (*WPS*)** **Suite 210, 700 N Hayden Island Road** **Portland, OR 97217** **(Contact Greg Winterowd at 735-0853)**
LOCATION:	**South of Sturgeon Lake on Sauvie Island** **Township 2 North, Range 1 West, Section 3, Tax Lot 15**
SITE SIZE:	**9.41 Acres**
ZONING:	**EFU**
PLAN:	**Agriculture**
REQUEST:	**Approval of:** **(1) a conditional use permit to allow a dog kennel in the EFU zone (MCC 11.15.7120(A)); or, in the alternative,** **(2) alteration of a nonconforming use to allow remodeling and expansion of the capacity of the existing dog kennel.**
DATE:	**March 27, 1995**

LIST OF ATTACHMENTS

Attachment A:	**Vicinity Map**
Attachment B:	**Existing Site Plan**
Attachment C:	**Proposed Site Plan**
Attachment D:	**Letters from Neighboring Property Owners Supporting the Community Use**
Attachment E:	**Rose City Sound Report**
Attachment F:	**A Brief History of Sauvie Island Kennel**
Attachment G:	**Property Owner Authorization (Persinger)**
Attachment H:	**Service Provider Forms**

TABLE OF CONTENTS

I. INTRODUCTION

Dog kennels have been recognized as an appropriate use in Multnomah County's agricultural zones since the County first implemented rural zoning in 1958. The reasons are straightforward. Kennels belong in the country, not in an urban residential setting. Where dogs are properly controlled (*i.e.*, prevented from chasing or frightening livestock), there is no evidence that kennels interfere with accepted agricultural practices. Kennels, however, sometimes cause noise problems for adjacent rural residential neighbors, which is a principal reason for requiring conditional use review. (See, for example, MCC 11.15.7230.D.2.) In this case, there are no nearby residential neighbors and there are no adverse impacts on surrounding agricultural operations. This is true because the Schillereffs are experienced kennel operators.

Sauvie Island Kennels is located on the site of the first kennel established on Sauvie Island, and currently uses two of the original buildings in its operations. Sauvie Island Kennel has operated commercially on this property for more than five years, boarding, breeding and training dogs with full knowledge of our neighbors and with repeated approvals from Multnomah County staff and the Planning Commission:

- March 1989, Administrative approval for kennel interior remodeling;
- August 1990, Administrative Design Review approval for new kennel building;
- November 1990, Planning Commission approval of a Conditional Use Permit of Watchman's Residence; and
- December 1990 Administrative Design Review Approval for Watchman's Residence.

Unfortunately, in September 1994, after relying once again upon the advise of County staff, the Schillereffs lost an appeal of Design Review approval to expand the existing kennel, in that case. Contrary to the Hearings Officer's opinion, and for reasons included in subsections C and D below, the kennel is a legitimate land use -- either a conforming conditional use or a lawful nonconforming use.

This kennel is considered by many to be one of the premier boarding, training and breeding kennels in the Portland/Vancouver metropolitan area. The Schillereffs seek land use approval for a 75-dog kennel. They wish to replace the two older kennel huts with one modern building which would then be connected to a third existing building. In effect the kennel would be one continuous design, not three disparate units. The operating footprint, however, would remain unchanged.

The single kennel design will realize several economies of scale. First and foremost, the dogs would be housed in a state of the art kennel with radiant heating and cooling in the concrete floor. Second, heating, cooling, maintenance, lighting, plumbing and telephone services would be consolidated and would operate more efficiently with less energy costs. Third, dog care in one building will be easier and will result in less disruption (barking) to the neighborhood.

The new kennel design, because it is totally covered, will protect the animals from the elements. The dogs will be healthier, happier and quieter. Because the kennel will be totally covered, and because the Schillereffs propose to incorporate a solid masonry wall into the new design, there will be greater sound buffering then the current three unit design provides.

A. NATURE OF THE APPLICATION

The purpose of this application is to allow the expansion of the existing kennel operation on the property. The kennel is permitted for 50 dogs (see DR 90-07-02). The Schillereffs would like to remodel and expand the kennel to accommodate up to 75 dogs.

Sauvie Island Kennel is widely recognized for the high level of canine care provided. (See Attachment D.) However, Sauvie Island Kennel was originally constructed in the 1950s, and would benefit from remodeling based on modern kennel design standards. With design improvements and proposed noise and site buffers, impacts on neighboring properties (especially Marquam Farms to the northeast) will decrease.

As indicated in subsection B below, and despite the best intentions of County planning staff, Sauvie Island Kennel has had an unusually difficult time in acquiring necessary land use permits. Sauvie Island Kennels has been victimized by changes in state land use rules, interpretative disparities among County officials, and a singularly disagreeable neighbor.

Because the regulatory situation is uncertain, the Schillereffs are applying -- simultaneously and alternatively -- for *both* a conditional use permit and an alteration of a nonconforming use.

The goal of each process is the same: expansion and improvement of an existing kennel, consistent with the intent and purpose of Statewide Planning Goal 3 (Agricultural Lands) and the Multnomah County Comprehensive Plan and Zoning Code. The proposal is consistent with the intent of Goal 3 because no additional agricultural land will be converted to non-farm use, and the kennel will not adversely affect commercial agricultural enterprises in the area. The proposal is consistent with the MCCP and the EFU zone, because Sauvie's Island is a logical place to operate and expand a kennel, the kennel provides useful services to County residents, and the improved design will decrease impacts on surrounding properties.

B. PLANNING HISTORY

A kennel, either commercial or private, has operated on the property since 1952. The County code defines a kennel as: "Any lot or premises on which four or more dogs, more than six months of age, are kept." MCC 11.15.0010 Definitions.

The County first applied zoning to this property (Farm-2) on July 10, 1958. It is not disputed that as of that date the kennel use was a lawful nonconforming use. The County currently defines a nonconforming use as:

A use to which a building or land was put at the time this chapter became effective and which does not conform with the use regulations of the district in which is located. MCC 11.15.0010 Definitions.

1. 1994 Design Review: DR 9-94.

In 1994, the Schillereffs made a Design Review application to expand a dog kennel use from 50 dogs to 75 dogs. Multnomah County DR 9-94. The Schillereffs selected the Design Review path because, consistent with its previous statement, County Staff informed Tim and Angela that a conditional use permit was not required, only Design Review. In a contested case hearing which resulted from that application, the Hearings Officer first addressed the question of whether the underlying use, the kennel, was a lawful use in an EFU zone as contended by the County and the property owners - the Schillereffs.

The Hearings Officer found that the kennel use was an earlier lawful nonconforming use. However, when challenged to prove whether the use had discontinued, the applicants failed to meet their burden of proof, by substantial evidence in the record at that time, that the kennel was maintained for the statutory period. Therefore, the Hearings Officer determined that the nonconforming use status of the kennel expired on or about January 1, 1964. His decision does not foreclose the option of lawfully resuming the nonconforming use under statute and County code.

2. 1989 Building Permit for Remodeling Kennel

On February 24, 1989, the Schillereffs applied for a conditional use permit, pursuant to MCC 11.15.2028(B)(C), to expand a dog kennel already in existence on their property. In his letter to the Division of Planning and Development, Mr. Schillereff stated:

Please note that this request is pertaining to an existing kennel site, in other words, the building and structures are intact. However, the permits have lapsed for over 15 years, therefore a new request is now being sent.

Mr. Schillereff specifically advised the County that the kennel site was intact and that he was seeking permission to continue the use of the site as a commercial kennel. In recognition of the need for permits for commercial operation, he noted that permits had lapsed for over 15 years. Permits are not required for a non-commercial dog kennel, and there would have been no need for a permit to operate a private kennel for the previous 15 years. Here, the Schillereffs were merely attempting to resume commercial kennel operations and believed that a conditional use permit was the preferred method of doing so.

Mr. Schillereff, because he was informed by the County that a conditional use permit was not necessary, deferred to the County staff. On March 2, 1989, the County issued zoning approval for remodeling the existing kennel and issued a building permit for that purpose. In reliance on the County's permit approval and determination that a conditional use permit was not

required, the Schillereffs entered into five year lease purchase with the owners, remodeled the kennel and began commercial operation.

At that time, there was no allegation that the County action was unlawful and no appeal of the County administrative decision was filed. Nor was any notice of intent to appeal filed with LUBA within 21 days of when a party knew, or should have known, of the decision. ORS 197.130 (3)to(5). Consequently, that decision is not subject to review. MCC 11.15.8290(D)(1)(2).

3: DR #90-07-02: Kennel Remodel

In 1990, the Schillereffs requested a conditional use permit for additional remodeling of the kennel (to add a new kennel building without increasing the number of dogs). County Planner Robert Hall informed them that a conditional use permit was not required, that design review would suffice.

Subsequently, on July 13, 1990, the Schillereffs submitted drawings and design plans for remodeling a kennel for 50 dogs. DR #90-07-02. On August 6, 1990, County planner Mark Hess reviewed the final design plans and found them conforming with MCC 11.15.7805 to .7865 with conditions.

Notice of the County's decision was mailed to 5 persons on August 6th, 1990. The notice stated that, "The Planning Director has approved remodeling plans for an existing 50 dog kennel, no additional dogs are authorized by this permit."

The Planning Director's decision became final ten days later on August 16, 1990. No appeal was filed pursuant to MCC 11.15.8290(A). Nor was any notice of intent to appeal filed with LUBA within 21 days of when a party knew, or should have known, of the decision. ORS 197.130 (3)to(5). Consequently, that decision is not subject to review. MCC 11.15.8290(D)(1)(2).

4. CU #23-90: Watchman's Residence

In 1990, the Schillereffs also requested a Conditional Use permit to place a Watchman's Residence, a manufactured home, on the property. CU #23-90. Conditional use permits in EFU zones are governed by MCC 11.15.2012. Dog kennels, as of the 1986 code amendments, are allowed as a conditional use in an EFU zones. MCC 11.15.2012(B)(11). Structures which are *customarily* accessory to a dog kennel may be permitted when they are found to satisfy conditional use approval found at MCC 11.15.7105 to .7140. MCC 11.15.2014(E) *emphasis added.*

The County Planning Commission, in an decision issued on November 6, 1990, found that watchman's residences are customarily provided in conjunction with kennel operations. The Commission found that the proposed watchman's residence was not inconsistent with nearby

agricultural lands, wildlife conservation lands, or rural residential areas. The Commission further found the proposed development would negligibly effect farm or forest uses in the area. Since the residence is customarily provided for kennel uses, the Commission found that the watchman's residence was consistent with County plan policies: 9, Agricultural Lands; 13, Air, Water & Noise Quality; or 14, Development limitations (flooding).

The Commission concluded that the "watchman's residence for the existing kennel satisfied Conditional Use approval criteria."

At the Planning Commission's public hearing for the conditional use permit, John Maring appeared for Marquam Farm and argued that the kennel had been abandoned in 1971. During the discussion that followed, a Commissioner observed that the Planning Commission could not approve a watchman's residence as an accessory use for the kennel if the underlying kennel was illegal. County staff responded that the County considered the use to be a conditional use rather than a nonconforming use. County counsel provided an interpretation that conditional uses do not lapse or expire. The Planning Commission accepted County counsel's and staff's interpretation and unanimously approved the conditional use permit for the watchman's residence, based on the staff report.

The Commission's decision at page 8 specifically stated that:

> *A watchman residence to oversee the security and well-being of all the kennel animals and the kennel buildings and equipment is an accessory use to the well-established kennel operation. Therefore, such an expansion would be consistent with the character of the land.*

Moreover, the Commission's decision at page 10 described the kennel as an "existing conditional use":

> *The Comprehensive Plan wishes to maintain the agricultural uses or conditional uses in the EFU areas as permitted in ORS 215.213. The watchman residence would exist to better facilitate the existing conditional use, our dog kennel, and would not adversely affect the natural resources in the surrounding areas.*

(See tape of Multnomah County Planning Commission, November 6, 1990, side B.)

The action to approve the conditional use request for the watchman's residence also validated the existing conditional use -- the dog kennel which provided the justification for the watchman's residence in the first place. This decision was properly noticed and filed with the Clerk of the County Board. No appeal was filed. Nor was any notice of intent to appeal filed with LUBA within 21 days of when a party knew, or should have known, of the decision. ORS 197.130 (3)to(5). On November 27, 1990, the decision to grant a conditional use permit associated with an existing kennel became final and is not subject to appeal.

C. LEGAL FOUNDATION

1. Conforming Conditional Use

As noted above, in the spring of 1990, the Schillereffs applied for a conditional use permit to remodel the existing 50 dog kennel. County staff argued that Design Review, not a conditional use permit was all that was required.

The County file for that application, DR 90-07-02, reveals that staff looked to MCC 11.15.2028(B)(C), "Exemptions form Nonconforming Use Provisions" for guidance. MCC 11.15.2028(B)-(C), at that time, and currently, reads:

> *Conditional uses listed in subpart MCC.2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC.8804, provided, however, that any change of use shall be subject to approval pursuant to the provisions of MCC.2012.* MCC .2028(B).
>
> *The term "Change of use", as used in this Section, means change from one conditional use listed in MCC.2012. to another such conditional use.* MCC .2028.

The staff notes regarding these two sections state:

> *The Persinger Kennel is therefore a Conforming CU - therefore does not expire per October 8, 1990 opinion of John DuBay.*

Staff interpretation is perfectly logical. MCC 11.15.2012.(B)(11), added to the County code in 1986, allowed dog kennels in EFU zones as conditional uses. The Persinger/Schillereff kennel could trace its beginnings to 1952. Although a conditional use permit had never been formally issued for that kennel, MCC.2028(B) operated to elevate the kennel to conforming conditional use status because the kennel was legally established prior to August 14, 1980.

Prior to that time, as long as the owner or operator of the existing kennel did not seek to change or expand the kennel use there would have been no reason to seek a conditional use permit for the kennel. The use would have been a lawful nonconforming use. Because MCC.2012(B)(11) listed dog kennels as conditional uses in EFU zones, and because the kennel was legally established prior to August 14, 1980, the County staff had every right to make an administrative decision that the Schillereffs 1990 Conditional Use application for kennel remodeling, not expansion, merely required Design Review. MCC 2028(B), by operation, "deemed" the kennel conforming and not subject to MCC .8804 the nonconforming use section of the code.

Conditional use approval might be required for expansion of the kennel, not simple remodeling. This is true for kennels as it is true for single family homes (farm dwellings) in farm zones [MCC.2028(A)] or for churches which predate a zoning in a residential neighborhood. Only

when the applicant seeks to change or expand the underlying use must the applicant seek a conditional use permit.

The finding of the County for DR 90-07-02 specifically limited the kennel use to the existing 50 dog size. The logic is consistent with a decision to require Design Review, not a new conditional use permit, for a remodel of a "deemed" conforming conditional use. In fact, when the Schillereffs applied for, and received, a conditional use permit to add a secondary residence to the property, the Planning Commission found that the underlying kennel was a "well established operation." CU 23-90, p.8.

The County properly noticed this Administrative decision. No one filed an appeal pursuant to MCC 11.15.8290(A). Consequently, DR 90-07-02 is not subject to review. MCC 11.15.8290(D)(1)(2).

In DR 9-94, the Hearings Officer erred by re-visiting the question of whether the underlying kennel use was a lawful use. MCC 11.15.8290(D)(1)(2) takes review of an Administrative decision, such as Design Review, out of the jurisdiction of the Hearings Officer once the decision becomes final. The Hearings Officer had no authority to decide whether MCC .2028(B) exempted the kennel from MCC.8804, nonconforming use[1]. That decision was made administratively under DR 90-07-02 four years earlier. It was a final, non-reviewable decision.

2. The Subject Property is a Lawful Nonconforming Use

If the County does not agree that the kennel is a conforming conditional use, it should find that the kennel was re-established as a nonconforming use as a result of County actions in 1989 and 1990.

(a). ***A Discontinued Nonconforming Use May Lawfully Resume***

The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. ORS 215.130(5). The County defines nonconforming use as:

> *A use to which a building or land was put at the time this chapter became effective and which does not conform with the use regulations of the district in which is located.* MCC 11.15.0010 Definitions.

In the case of the Schillereffs' property, the Hearings Officer found that, due to a lack of sufficient evidence that the use had continued, the kennel's lawful nonconforming use discontinued on or about January 1, 1964. DR 9-94, at 6. (The burden of proof is on the one asserting that the use has not been discontinued.)

---

[1] MCC.8804 does not exist. From the language of MCC.2028(B), it is clear that this section of the code references MCC.8805, the nonconforming use section.

The County code is clear, the right to a nonconforming use may be lost through discontinued use. However, a use once lost is not necessarily lost forever. The former lawful use may be revived and made lawful once again under certain circumstances. The Schillereffs' resumption of a lawful use is a case in point as to how such a use may be revived.

(b). ***The Schillereffs' Nonconforming Use was Lawfully Resumed after 1989.***

The Hearings Officer found that the kennel, once a lawful nonconforming use, was discontinued on or about January 1, 1964. DR 9-94, at page 6. That decision does not bar the Schillereffs from reestablishing the nonconforming kennel use. The Schillereffs contend that the nonconforming kennel use was lawfully reestablished, with full knowledge and approval by the County.

The Schillereffs attempted to resume the lawful nonconforming use beginning in 1989. From 1989 through 1990, the Schillereffs applied for and received three discretionary permits from the County. Each permit is a binding, non-appealable decision, and supports the argument that the County recognized that the property was being put to lawful nonconforming use.

In the **first** instance, the 1989 building permit, Tim & Angela Schillereff, in applying for a CUP, were attempting to lawfully resume kennel use in conformance with county zoning ordinances and regulations then in existence.

A CUP would be necessary to expand an existing nonconforming use or a conditional use. Since expansion of the use was not at issue, the County only required Design Review and a building permit. Had the County not believed that the Schillereffs were resuming the earlier nonconforming use, it could not have lawfully issued a building permit for an unlawful use.

The Schillereffs placed the County on notice that they were attempting to resume a commercial use for which permits had lapsed. No appeal was filed and the decision to grant a permit based upon an admitted existing use became final.

In the **second** instance, the 1990 Design Review approval for remodeling the existing kennel, the Planning Director "...approved remodeling plans for an existing 50 dog kennel...". Adequate notice was mailed on 06 August 1990 and no appeal was filed. The County could not approve the Design Review permit unless the underlying use was lawful. This is exactly the same conclusion the Hearing Officer reached in DR 9-94..

Initially, the Schillereffs again applied for a conditional use permit to remodel the kennel facilities. In the file for DR 90-07-02, County Planner Robert Hall noted that a conditional use permit was not required. The use was either a conforming conditional use already, or the County recognized that the earlier nonconforming use was re-established in accordance with existing regulations. Mark Hess, County Planner, reviewed the final design plans and found them conforming with MCC 11.15.7805 to .7865 with conditions. Neither the county nor the state require any other action to lawfully resume a Nonconforming use.

DR 90-07-02 was properly noticed and no appeal was filed. Indeed, later that year , John Maring (representing Marquam Farms at the hearing for the conditional use permit for the watchman's residence) stated that Marquam Farms was aware of the Schillereffs' work to develop the kennel and intentionally said nothing until the watchman's residence was later proposed. (Tape of Planning Commission Hearing, November 6, 1990, Side B.) The validity of the former permits was not before the Hearings Officer and anything he said relating to those permits was dicta.

Finally, in the **third** action, the County approved a conditional use permit for a watchman's residence for the underlying kennel use. The County expressly found that the residence was in conformity with the underlying use and that the residence was not in conflict with any of the enumerated County's plan policies or regulations. During the public hearing on the CUP, a representative from Marquam Farms alleged that the kennel's nonconforming use status had been discontinued in 1971. After full discussion of this and other issues, the Planning Commission adopted the Staff Report, including Conditions of Approval and Findings of Fact and Conclusions, and unanimously approved CU 23-90.

The decision was properly noticed, there was ample public discussion as to the merits of the applications and the lawfulness of the underlying use. The County could not approve a CUP for the watchman's residence unless either: the underlying use was a conforming conditional use; or the kennel's nonconforming use status remained valid or had been resumed after a period of discontinuance. That decision has never been challenged.

3. ***The Schillereffs have a Vested Right to the Nonconforming Use***

> *In some circumstances, a vested right may exist to use and develop property under previously existing land use regulations even though subsequently adopted land use regulations prohibit such use or development.* DLCD v. Benton County, 17 Or LUBA 49, 55 (1994), citing Clackamas County v. Holmes, 508 P2d 190, 265 Or 193 (1973).

The determination of vested rights must be done by a case-by-case determination. 1000 Friends of Oregon v. LCDC, 78 Or App 270, 276, 717 P2d 149 (1986).

In looking to establish a vested right one looks to a variety of factors, among the most important being the good faith expenditures made by the property owner in developing his or her property. See, Polk County v. Martin, 292 Or 69, 81 N7, 636 P2d 952 (1981). Once a vested right is established, the owner may complete the improvements in a manner which is consistent with the nonconforming use. DLCD v. Curry County, 19 Or LUBA 249, 254 (1990).

Since 1989, the Schillereffs have spent in excess of $100,000 beyond the purchase price of the land to in reliance upon County permits: building permits, remodeling permits, and placing a watchman's residence upon the kennel property. They have a vested right to complete the

work sanctioned by DR 90-07-02 and CU 23-90. They have a further vested right to maintain the kennel property as a re-established nonconforming use kennel for 50 dogs.

D. SITE CHARACTERISTICS

The 9.4 acre site (Tax Lot 15) is relatively flat and irregularly shaped. Approximately 6 acres of the Schillereffs' property is a horse pasture. (Attachment A, Vicinity Map #1.) The site is comprised of agricultural land[2] but is difficult to farm due to its shape, inadequate drainage and limited access. With only 6 acres of tillable property (the remainder is already occupied by structures or by a drainage swale), the property is too small for row crops.[3] The structures on the site (a single family residence[4], a kennel watchman's residence, two kennel buildings, horse stalls and an equipment building) are located at the northeast end of the property. Horses are raised on the site. A small pigeon house is located at the southwest corner of the site, near Reeder Road. A small pond on the site attracts water fowl and, like several neighboring properties, the Schillereff's property is used as a hunting preserve. Drainage ditches or swales are located on three sides of the property. The site is accessed via Reeder Road, from a common access easement and driveway shared with Marquam Farms, a hunting club. (See Attachment B, Existing Site Plan, Map #2.)

Marquam Farms, a hunting club, adjoins the Schillereffs' property to the northeast. Feed grains are produced on the property as food for ducks and geese.[5] The western property line follows the curvature of NW Reeder Road, which was constructed between a drainage swale on the Schillereff property and the "Big Dike" which protects Sauvie Island from the floodwater of Sturgeon Lake. Approximately 800 feet to the southwest are two single family homes and a duck pond (Tax Lots 12 and 18, owned by the Rays). A large dairy farm (Vetsch) is located south of the Schillereffs' property. However, as noted above, this farming operation is separated from the Schillereffs by a large drainage canal, which is covered with blackberry bramble on both sides.

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[2] At the pre-initiation conference, opponents argued that OAR 660.33.120(3) prohibits dog kennels on "high value farmland" and that Multnomah County recognizes Moag Silty Clay Loam (protected), Sauvie Silt Clay Loam (protected) and Rafton Silt Loam (protected), as "high value farmland." The Schillereffs believe that the rule does not apply in their case, because the County recognized their dog kennel as valid conditional use in previous proceedings. The Schillereffs note that Division 33's prohibition of dog kennels on high value farm land directly contradicts ORS 215.283(2)(m), which explicitly allows dog kennels as a conditional use in the EFU zone. Moreover, the County's existing regulations are consistent with ORS 215.283, but not Division 33. Finally, Division 33 provides a method of modifying soils classifications on individual sites.

[3] Personal communication with Dave Kunkel, who farms several properties on Sauvie's Island, including Marquam Farms. Mr. Kunkel also noted that property is separated from the dairy/grazing operation to the southeast by an irrigation canal, which is impossible to cross with farm machinery.

[4] The watchman's residence for the kennel is occupied by the Schillereffs. An older residence located nearer to Reeder Road, is occupied by Tim's great uncle and aunt, Eldon and Marguerite Persinger. The Persingers hold a life estate in the older home.

[5] Several years ago, Mr. Kunkel used to turn his tractor around on the Schillereff property, and tilled the ground in the process. However, the site has not produced a commercial agricultural crop within recent history.

II. CONDITIONAL USE APPROVAL CRITERIA

The following criteria apply to approval of a new or modified conditional use permit. In this case, the Schillereffs are applying to modify a "conforming conditional use," based on the justification provided in Section I of this report.

A. The proposed use is consistent with the character of the area.

Response: Sauvie Island is characterized by a combination of agricultural operations, recreational uses (including hunting clubs), sale of agricultural products at roadside stands, and kennels. In addition to the Sauvie Island Kennel, which is permitted to board up to 50 dogs, there currently are two other commercial kennels[5] on Sauvie Island.

Sauvie Island is a logical place to board and train hunting dogs, because hunting dogs are used extensively for bird hunting on the island, and Sauvie Island is close to the Portland metropolitan area. Many farmers also maintain "duck ponds" for private hunting purposes, to that hunting is a major source of income for island residents. All three kennels have adjacent hunt clubs and agricultural operations.

Both Charlton Kennels and Minoggie Kennels conduct their operations *on the same property* as their respective duck clubs, within sight of duck ponds and duck hunters' blinds. Thus, dog kennels and hunting clubs are considered complementary uses on Sauvie Island. It is common for hunting club members to use the training and boarding services of kennels on the island.

Successive kennel operations have existed in relative harmony on what is now the Schillereff property since about 1952. (See "A Brief History of Sauvie Island Kennels," Attachment F.) As evidenced in Attachment F, most neighboring farmers and hunting club owners support the continued operation of Sauvie Island Kennel at its present location. Ironically, several members of Marquam Farms hunt club use the boarding and training services of Sauvie Island Kennel.

The 1,500-foot impact area (Attachment A), like most of Sauvie Island, is a combination of farming operations, publicly-owned recreational land, and hunting clubs.

Northwest: The Sturgeon Lake Wildlife Refuge lies across Reeder Road to the northwest is owned and managed by the Oregon Department of Fish & Wildlife. The refuge area has public access, and is used frequently for hunting and hiking purposes. Both user groups often bring dogs. The kennel will have no adverse impacts on the recreational use or wildlife management functions of the refuge, because dogs are not permitted to run free and noise from the kennel is buffered effectively by Reeder Road and the "Big Dike" separating the refuge from Reeder Road.

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[5] Charlton Kennels is permitted to board 100 dogs; Minoggie Kennels is permitted to board 50 dogs.

Northeast: Marquam Farms hunt club lies to the northeast. Realistically, the only property which may now be adversely affected by the kennel is the hunting club. This 39-acre club occupies the old Marquam Lake bed which was drained when the island was reclaimed for agricultural purposes. Marquam Farms currently produces feed grains to attract migratory foul. Marquam Farms contracts with Dave Kunkel, a Sauvie Island farmer, to prepare and plant the land. Large tractors are used in the spring and fall. Duck and goose hunting occurs on the site during hunting season, which usually runs from October through January of each year. The hunt club has approximately 30 members. During the hunting season, hunters often arrive early in the morning, which, under present conditions, often causes the dogs to bark.

Marquam Farms shares a common access easement and gravel driveway with Sauvie Island Kennel. When hunters get out of their cars to open the first of two gates to access the parking area, Sauvie Island Kennel dogs can see and hear them, and naturally, they bark. The proposal is to redesign the kennel such that the dogs cannot see or readily hear hunters as they arrive, and such that noise from barking dogs is greatly diminished. Thus, despite the increased number of dogs, noise impacts on the hunting club will be reduced. The means of *reducing* noise impacts on Marquam Farms is addressed in greater deal in Section VI of this report, under nonconforming use criteria. Suffice to note here that the noise from three barking dogs (which are permitted outright), if tethered outside without a sound barrier, would exceed the noise from 75 dogs behind a covered block wall.

A barn has existed on the Marquam Farms property for many years, and has served as a meeting place (or clubhouse) and storage area for hunt club members. A "machine shed" was approved in February of 1993, the south wall of which is approximately 65 feet from the north wall of the existing (and proposed) kennel. This "exempt farm structure" was approve as a "machine shed" on February 12, 1993. By the terms of the permit, the use of the farm structure cannot include "a structure which accommodates more than 10 people assembled for more than 12 hours a week," or "a place used by the public." Thus, the "machine shed" provides an excellent noise buffer between the hunting club lands and the clubhouse.

Kennels, hunting clubs and agricultural uses have existed harmoniously together on Sauvie Island for many years. The other two kennels have all these three uses on the same property. With measures to ensure proper handling of dogs, maintenance of kennel facilities, and noise reduction, this criterion can be met.

B. The proposed use will not adversely affect natural resources.

Response: No inventoried natural resource site exists on the property. The Sturgeon Lake wildlife refuge is located across Reeder Road. This refuge has public access and a public parking lot, with trails. The kennel will have no adverse impact on the refuge. Dogs are not permitted to leave the fenced boundary of the Schillereff property, except when leased and under the care of a trained handler.

This criterion is met because the kennel would cause no adverse impacts on natural resources.

C. The proposed use will not conflict with farm or forest uses in the area.

Response: There are no forest uses in the area. There are agricultural uses, as indicated on Map #2, the Vicinity Map. The Vicinity Map shows a 1,500 foot impact area has been established. (See Section III of this report for the justification for the impact area.)

Potential conflicts with farm uses include the following:

- Dogs running free, and frightening or attacking livestock.

As noted above, dogs are not permitted to run free. The Schillereffs are experienced dog handlers, and have taken several steps to ensure against dogs escaping from their facility, including:

- Each dog will be confined to a fenced/walled kennel run, which meets the latest design standards for safety and comfort of dogs.
- The kennel area has an additional fence/wall around its entire perimeter, in case a dog "escapes" during feeding or exercise.
- When boarded dogs are exercised, they remain on a leash at all times. They are not permitted to roam free.
- Training of dogs occurs only in the confined pasture area, which is fully fenced and separated from neighboring properties by a blackberry covered drainage canal.

There is no history of dogs roaming free or causing damage to livestock in the area. As documented in Attachment D, neighboring farmers support this application, and testify to the quality and maintenance practices of Sauvie Island Kennels.

- Barking dogs within the kennel disturbing livestock or disturbing the sleep of farmers living in the area.

The letters in Attachment D demonstrate that neighbors within the impact area support this application.

There is no evidence to indicate that barking dogs within the kennel building disturb livestock in the area. For example, the Vetsch family owns and operates a dairy farm adjacent to, and south of, the Schillereff property. According to the Rose City Sound study (November 2, 1990), the ambient noise level at the south property line (shared with the Vetsches and approximately 500 feet from the kennel) was 42 db. When dogs are "excited" and barking in the kennel, the noise level currently increases only 6 decibels, to 48 db. The decibel level would decrease even more on the other side of the drainage canal, because noise would be buffered by blackberry brambles, trees and distance. With proposed improvements to the kennel (walls and roof cover), the noise level at the south property line is likely to decrease to ambient levels. Since noise events from jet aircraft (82 db) and wild geese (53 db) are

common in this area of Sauvie Island, barking dog noise currently have no impact on this livestock operation.

The closest residences to Sauvie Island Kennel are owned by the Ray family (Map #1, Tax Lots 12 and 8), and are located 800 to 1,000 feet away from the kennel itself. The houses are separated from the kennel by an earthen dike and NW Reeder Road. The Ray family provided letters in support of this application, indicating that they do not find noise from barking dogs to be a problem. Moreover, upon completion of new walls and an insulated kennel roof, noise from barking dogs within the kennel will be considerably less than passing vehicles on Reeder Road, noise from aircraft, or noise from flocks of geese overhead.

Impact on Marquam Farms

MCC 11.15.2012(A)(5) lists "hunting preserves" as a conditional use in the EFU zone.[6] Some Marquam Farms members have stated that barking dogs at Sauvie Island Kennel disturb their access to the hunting preserve, and disturb wildlife (ducks and geese). The existing dog kennel design, coupled with self-imposed design decisions made by Marquam Farms, contribute to these problems.

The supposed "conflict" between hunting on the Marquam Farms property (Tax Lot 14) and the dog kennel on the Schillereffs' property (Tax Lot 15) is recent. During the 1950s, 1960s, 1970s and 1980s, there were no conflicts between hunting on what is now the Marquam Farms property and kennel use on what is now the Schillereff property. Contributing factors to the supposed conflict are generally extraneous to land use issues before the County.

In 1993 (after the kennel had been operating for three years), Marquam Farms (a) constructed a new "machine shed" between the existing club house and the shared gravel driveway, and (b) constructed a cyclone fence and gate, which required club members to get out of their vehicles, open the gate, and get back into their vehicles before entering the Marquam Farms parking lot. Prior to fence construction, members could drive directly past the kennel to the hunting club parking lot, which usually did not excite the dogs. The 1993 design decision directly increased noise from barking dogs, who routinely become excited by human activity within site and sound (50 feet) of the kennel.

One solution to this self-imposed problem would be for the hunting club to provide an automatic gate opener for members for the gate closest to NW Reeder Road, which would eliminate the need to get in and out of vehicles. Moreover, use of the gate closest to Reeder Road which decrease disturbance to the existing dog kennel, which is currently separated from the northwest gate by a solid wall.

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[6] Note: meeting buildings associated with clubs require CS zoning, which does not apply to the Marquam Farms property.

According to the 1990 Rose City Sound study, ambient noise at driveway property line separating Marquam Farms from the Schillereffs' property is 53 decibels. This contrasts with 68 decibels when excited dogs are barking. (See Attachment E.) However, the current design (Map #2), with its exposed dog runs, means that noise from excited barking dogs is only partially mitigated effectively (from 85 db to 68 db). However, contrary to the protestations of Marquam Farms, it is not axiomatic that more dogs will result in more noise. As a result of proposed improvements to the kennel and parking lot design (walls, insulated roofing, out-of-site and sound parking area), noise impacts to Marquam Farms -- even with 25 more dogs -- will decrease.

Based on a comparison of Maps #2 (Existing Site Plan) and #3 (Proposed Site Plan), the proposed design improvements to Sauvie Island Kennel further reduce potential noise impacts for the following reasons:

- The proposed design includes a 100' solid wall for the full length of the kennel along the shared access. The boarded dogs will not be able to see vehicles as they drive past on the shared driveway. Noise from vehicles and people will be effectively blocked by the wall, thus greatly reducing barking incidents, and greatly reducing the noise impacts from barking when it does occur.

- The proposed design will completely cover the kennels, which currently are partially exposed. The roof will be insulated, thus reducing noise transmission to and from the kennel. As a result, dogs will bark less frequently, and noise from barking will decrease substantially.

- The proposed parking lot design will also result in reduced barking impacts on Marquam Farms. The current design requires dogs to be moved from one building to another for grooming, bathing and exercise. These activities are visible and audible to dogs in the kennel, which causes the dogs to bark. In contrast, the new design keeps all of the dogs within a single, walled and roofed structure. This design not only results in less frequent barking, but also buffers sound from barking dogs to Marquam Farms.

- Finally, the proposed design allows dog owners to park, get out of their vehicles, and pick up their animals without causing dogs to bark. As mentioned above, patrons' vehicles will not be visible to dogs as they drive past the kennel. The parking lot itself will be invisible to dogs. Noise from vehicle access and parking activities will be greatly reduced because the kennel will be walled and covered.

In summary, with the proposed improvements, noise impacts to Marquam Farms from barking dogs will decrease significantly, both in terms of duration and decibel level.[7]

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[7] It is informative to compare potential noise impacts from an enclosed dog kennel with those of a permitted outright use -- three adult dogs plus an unlimited number of puppies under the age of 6 months. It is not uncommon for rural residential property owners to own several dogs, and to keep these dogs outside on a

Finally, Marquam Farms has complained that kennel patrons occasionally block the shared access driveway, which inconveniences club members. Aside from the fact the club members also inconvenience kennel patrons and the Schillereffs for the same reason, the new parking design will eliminate this problem for club members. The new kennel circulation and parking lot design (a) includes signs directing kennel patrons where to park and (b) clearly identifies the office area, so that patrons will not stop temporarily in the driveway as they look for the kennel office.[8]

D. The proposed use will not require public services other than those existing or programmed for the area.

Response: Services are essentially the same as they were for the previous design review applications. Any changes which come to light will be updated. Utilities and facilities provided are consistent with comprehensive plan policies 37 and 38. The proposal public services other than those already provided.

E. The proposed use will be located outside big game winter habitat area.

Response: This criterion is not applicable.

F. The proposed use will not create hazardous conditions.

Response: The kennel operation does not involve the use of hazardous materials or substances. All dog owners must present proof of current vaccinations before they are admitted to the kennel, thus assuring against the spread of disease. Dogs are confined within the kennel area and all waste material is processed on-site according to DEQ regulations.

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permanent basis (perhaps tethered or fenced, perhaps not). Often times, outdoor dogs bark and chase vehicles as they approach the property line. In such a situation, members of the hunting club could expect to be barked at by three adult dogs and an unlimited number of puppies. Unlike the kennel, there would be no sound buffer. The dogs might be able to run along the fence line, parallel to the driveway, barking the entire time. The dogs might even come up to the fence and growl at hunting club members as they got out of their vehicles to open the gate. The dogs would be much more likely to escape beyond the property line, because they probably would not be handled by trained people and they most certainly would not be enclosed in professionally designed dog runs. In such a situation -- again, allowed outright under County zoning -- the impact on the hunting club (and surrounding agricultural uses) would be much greater than for a properly managed, enclosed kennel. Moreover, enforcement of dog impacts from rural residential owners is much more difficult (and costly to the County taxpayer) than enforcement of rules governing kennel operations. Kennel operators must be insured and bonded, which is not the case for rural residential dwellers. In short, the potential impacts from outdoor dogs in a single family residence are greater than for a well-managed, enclosed kennel, even with 75 dogs.

[8] Office functions are currently found in two locations on the site, and kennels themselves are located in three separate structures.

The subject property is protected from flooding by a dike structure (the "Big Dike") maintained by the US Army Corps of Engineers. The site is not designated as a flood hazard area by Multnomah County.

Other possible hazardous conditions are runaway dogs and traffic. As noted above, the Schillereffs have already taken steps to ensure that dogs do not run at large. The Schillereffs currently maintain the gravel driveway which serves both the dog kennel and Marquam Farms hunting club members. The new parking lot design will reduce driveway congestion and provides ample space for kennel patron parking.

G. The proposed use and project design will satisfy the applicable policies of the Comprehensive Plan.

The following listed policies appear to be applicable to this application.

Comprehensive Plan Policy 9 (Agricultural Land Area) states:

> *The County's policy is to restrict the use of (exclusive agricultural) lands to exclusive agriculture and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural lands from inappropriate and incompatible development.*

The kennel satisfies this policy because, as described elsewhere in this application, the kennel is not compatible with the agricultural use of surrounding lands, or even the agricultural use (pasture) of the remainder of the 9.4 acre parcel. The kennel takes no agricultural land out of production. The kennel facilities have existed for many years, and the design for the 75-dog kennel will not take up any more space than is committed to the existing kennel structures and operations.

Comprehensive Plan Policy 13 (Air, Water and Noise Quality) states Multnomah County's policy to:

> *Maintain healthful air quality levels in the regional airshed; to maintain healthful ground and surface water resources; and to prevent or reduce excessive sound levels while balancing social and economic needs in Multnomah County.*

The proposed kennel design is consistent with this policy. The kennel operations create no air emissions. All waste and fecal matter from the kennel is handled in on-site septic systems. Finally, although barking is inevitable at a kennel or anywhere there is a dog, the facility is separated from the nearest residence on another property by approximately 800 feet and the facility is designed to enclose the kennels (including roofing over all portions of the kennels) so as to reduce disruptions that lead to barking and to buffer and minimize noise impact on surrounding properties. The kennel provides a valuable service to dog owners, and the rural setting results in fewer conflicts with surrounding uses and a much better environment for kennel services such as dog training.

Comprehensive Plan Policy 37 (Utilities) is satisfied because there is an adequate private water system (private well) and the facility has an existing, adequate and approved septic system. In addition, stormwater runoff can be handled on-site, and there is no potential for adverse impact on water quality (stormwater runoff will not come into contact with fecal matter from the kennel; the kennels will be covered, and any water running off of the kennel floors is directed t the septic system). Finally, there is adequate existing electrical and phone service to the property.

Comprehensive Plan Policy 38 (Facilities) is satisfied because the appropriate school district will have the opportunity to comment on the proposal; there is adequate existing fire protection; and the use can (and already does) receive adequate protection from the Multnomah County Sheriff's Department.

H. The proposed use and project design will satisfy such other applicable approval criteria as are stated in this section.

MCC 11.15.7210 sets forth specific design criteria and standards for approval of dog kennels. Those standards are listed below, along with the Schillereffs' response demonstrating compliance with this section.

1. Location Requirements (MCC 11.15.7210)
These use shall be permitted only in the following areas and only where they will not conflict with surrounding property uses:

(a) ***In CFU, F-2, MUA-20, MUF and RR districts or those areas of similar low population.***

Response: The Schillereffs property is located in an EFU zone on Sauvie Island. It is surrounded by other EFU and MUA-20 uses. Each of these zones requires "low population densities". Dog kennels are specifically listed as a conditional use in the EFU zone. (MCC 11.15.2012(B)(11)).

2. Minimum Site Requirements (MCC 11.15.7215)
(a) Area: Two Acres

Response: The site in question is approximately 9.4 acres.

(b) Width: Two hundred fifty feet.

Response: The width of the site ranges from 333 feet at the rear of the property line to over 900 feet along Reeder Road.

(c) Depth: Two hundred fifty feet.

Response: Property depths range from 390 feet to 1,800 feet. (See Attachment A, Vicinity Map).

3. **Minimum Setback Requirements (MCC 11.15.7220)**
   These uses shall be located no closer than one hundred feet to any lot line, in or adjacent to an F, R or A district.

Response: The property is in an EFU zone, therefore the standard is not applicable. The new kennel structure will be 33 feet from the nearest lot line in conformance with other setback requirements.

4. **Other Requirements (MCC 11.15.7230)(A)**
   All kennels, runs or pens shall be constructed of masonry or such other opaque material as shall provide for cleanliness, ease of maintenance and noise control.

Response: The kennels, runs and pens are constructed of concrete block, with chain link fencing dividers and concrete floor. The roofing is opaque. All materials were selected to provide for ease of maintenance, and will provide excellent sound and noise control. The perimeter chain link fence with vinyl slats provides adequate security. It also provides additional sound and noise control.

5. ***All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered are the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and other public facilities on nearby properties, and other similar factors.***

Response: The new building, which encloses the kennel and runs will provide optimal sound control. This design will minimize adverse impacts to neighboring residential and non-residential properties. The new design will be a substantial improvement in several respects. First, one large building will replace the quonset huts and will incorporate the third building, creating one continuous design unit. Dogs can then be taken from their individual pens without ever entering the open courtyard, thereby minimizing noise disruptions. Enclosing the kennels and roofing the runs will also help to eliminate noise since the dogs will no longer be able to witness any activities on the adjacent Marquam Farms property.
Second, mature birch trees and landscaping inside the courtyard will be retained, as will the mature trees to the west of the existing huts. The dogs will be more relaxed and quiet under such a setting.

Third, the new design will consolidate the kennel parking and office in one location. Therefore, the kennel complex will appear more cohesive and of a unified design to those viewing it from nearby properties.

The prevailing winds here are from the Northwest. Sounds and smells will generally be carried by these prevailing winds to the open lands lying southeasterly of the kennel. The nearest residence to the south of the kennel is 1,000 feet away. (See, Attachment "A", Vicinity Map.) In a radius of 1,500 feet around the existing kennel there are only three residences (excluding the subject property). (See, Attachment "A", Vicinity Map.)

6. ***The owner or operator of as use approved under this section shall maintain the premises in a clean, orderly and sanitary condition at all times. No garbage, offal, feces, or other waste material shall be allowed to accumulate on the premises. The premises shall be maintained in such a manner that they will not provide a breeding place for insects, vermin or rodents.***

Response: The Schillereffs have adopted a standard operating procedure from which they rarely, if ever, deviate. That is one reasons why their kennel is held in such high regard and is increasing in demand. Twice daily they disinfect the dog areas, feeding pans, water pails and public areas. Each dog is inspected and observed in the daytime and at night. The kennels are regularly inspected by officers of the Multnomah County Animal Control, and a animal facility permit has been obtained for kennel operation. The kennel has and continues to receive the highest ratings from the inspecting officers and from the County.

The Schillereffs are the owners and operators of the kennel. They live on the property, and manage their business in a professional manner. They board all breeds of dogs. They breed English Pointers and English Setters, and they train dogs for hunting and for obedience. They are dog owners themselves, and compete in licensed field trials and hunting tests. Tim Schillereff is an AKC Licensed Judge and a professional handler of pointer dogs.

Angela Schillereff is a professional dog handler, an apprentice judge and a professional groomer of all breeds. Both the Schillereffs have devoted their personal and professional lives to working with and caring for dogs.

7. ***A separate housing facility, pen or kennel space may be required for each dog over six months of age kept on the premises over 24 hours.***

Response: The permit request is for a maximum of 75 dogs. The new kennel design will allow 75 dogs to be kept in separate housing facilities.

8 **Other Approvals (MCC 11.15.7235)**
The approval authority may request the advice of the County Dog Control Officer, official of humane societies, and veterinarians before approving an application hereunder.

Response: The Schillereffs have not been advised of the need for review by any other body. However, because they are professional dog kennel operators they are not adverse to subjecting themselves to review by other professional dog care organizations or agencies.

III. STATUTORY EXCLUSIVE FARM USE CONDITIONAL USE CRITERIA

A. IMPACT AREA

The Oregon Legislature recognized the value of siting dog kennels in the county, away from concentrations of people, when it authorized counties to approve kennels as an "alternative use" on agricultural land. (ORS 215.283(2)) As with other alternative uses on EFU land, ORS 215.296 requires each county to review these alternative uses for impacts on agricultural land and practices, and to require conditions where necessary to mitigate impacts.

In determining an appropriate agricultural "impact area," the principal factor considered was noise from barking dogs. Because dogs are restrained on-site, there are no other probable impacts on agricultural land. There are no forest uses within the impact area.

In November of 1990, Rose City Sound took decibel readings at three locations on the property, with the following results:

TABLE III.A
NOISE IMPACTS FROM BARKING DOGS[9]

Location	Ambient Decibel Level	Excited Barking Decibel Level
Inside Kennel	64 db	85 db
Northeast Property Line adjacent to kennel	53 db	68 db
South Property Line	42 db	48 db

Inside the kennel, the sound of excited barking dogs is comparable to a jet flying overhead, at 85 decibels. Thirty feet northeast of the kennel, at the property line shared with Marquam Farms, the sound of excited barking dogs had already decreased dramatically to 68 decibels. At the south property line located approximately 500 feet from the kennel, the sound of excited barking dogs was only slightly louder (48 decibels) than the ambient noise level (42 decibels). The 48 db reading was roughly comparable to honking geese flying overhead, measured at 53 decibels.

The Schillereffs do not have sound pressure measurements at a distance greater than 500 feet. Erring on the side of conservatism, the proposed impact area shown on Attachment A (Vicinity Map #1) is 1,500 feet. At this distance, under current conditions, excited barking dogs may

[9] Outside the kennel, passing jets and wild geese (frequent occurrences over Sauvie Island) were measured at 82 db and 53 db, respectively.

be marginally audible. At a distance of greater than 1,500 feet, it is doubtful that noise from the kennel would be audible.

B. WILL NOT FORCE A SIGNIFICANT CHANGE IN ACCEPTED FARM AND FOREST PRACTICES ON SURROUNDING LANDS DEVOTED TO FARM AND FOREST USE.

Response: As noted in Section II of this report, dog kennels have existed harmoniously with agricultural uses on Sauvie Island since the 1950s. In fact, the two other dog kennels on the island are located *on the same property* as farming operations and hunting preserves. The dog kennel would have no adverse impacts on livestock in the area. The Schillereffs raise several horses on their property, without ill-effect from the dog kennel.

In this situation, there is only one commercial farming operation within the designated 1,500 foot impact area. The northern boundary of the Vetsch dairy farm is separated from the dog kennel by approximately 500 feet *in addition to* an irrigation/drainage channel with dense blackberry bramble on both sides. As indicated above, intermittent noise from excited barking dogs will have no adverse impact on grazing dairy cattle, because this sound will be quieter at the property line than migrating geese. Because the Schillereffs confine the dogs to the kennel except when dogs are on a leash, there is little likelihood of dogs "escaping" from the site and chasing cattle. In any case, the Vetsches have not complained of loose dogs during the five years that Sauvie Island Kennel as operated on the Schillereffs' property.

The existing kennel design results in the sound of excited, barking dogs being audible at the north property line of the Vetsch dairy farm. However, with proposed design changes, and recognizing the noise buffering affect of the blackberry brambles adjacent to the drainage channel, it is doubtful whether there will be any measurable sound impacts on the dairy farm.

Although "Marquam Farms" is not a commercial farming operation (because harvested crops are not sold commercially), impacts on the hunting preserve are addressed elsewhere this report. Marquam Farms is fenced (6 foot cyclone) for the full length of its border with Sauvie Island Kennel, thus preventing dogs from entering the property in the unlikely event one should get loose.

With proposed design improvements, potential farming operations (row crops, dairy operations, grains, berries, nursery crops and orchards) will be further protected from potential adverse impacts.

This criterion is met.

C. WILL NOT SIGNIFICANTLY INCREASE THE COST OF ACCEPTED FARM OR FOREST PRACTICES ON SURROUNDING LANDS DEVOTED TO FARM OR FOREST USE.

Response: Typical farming practices on Sauvie Island include row crops, dairy operations, grains, berries, nursery crops and orchards. Because the dogs will be restrained on-site, inside of a kennel, the costs of these activities will not increase as a result of approval of a 75-dog kennel, or continuance of the existing 50-dog kennel use.

Sauvie Island Kennel has been in business since 1989. Since opening, there have been no reported instances of dogs under the Schillereffs' care causing damage to crops or livestock on Sauvie Island.

With the updated kennel design, noise from the kennel will decrease, and the remote possibility of "escaped" dogs will be even less.

For these reasons, the continuance and expansion (to 75 dogs) of Sauvie Island Kennel will not increase the cost of accepted farm or forest practices within the impact area, or on Sauvie Island. This criterion is met.

IV. ALTERATION OF A NONCONFORMING USE (MCC 11.15.8810.E)

An alteration of a nonconforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent that the current use, considering:

A. THE CHARACTER AND HISTORY OF THE USE AND OF DEVELOPMENT IN THE SURROUNDING AREA.

Response: The character and history of the use and surrounding area are addressed in Section I of this report. A commercial dog kennel was established on the property in 1952, using relocated quonset huts. The commercial kennel use was re-established in 1990, and has operated as a 50-dog kennel since that time.

The surrounding area is sparsely developed (only 3 residences within a quarter mile), and in this sense is an ideal location for a dog kennel. The kennel operation complements recreational use of the island for hunting, since hunting dogs are boarded and trained at Sauvie Island Kennel. For example, several members of the Marquam Farms hunting club have voiced their support for continuance, renovation and expansion of the kennel operation.

The nearest residence is approximately 800 feet from the kennel, separated by Reeder Road and a 15 foot dike. With proposed kennel improvements (insulated roof, walls, parking and circulation), it is doubtful whether barking dogs will be audible at this distance. Most neighbors support continuance and expansion of the existing kennel use of the property, as evidenced in Attachment D. At 500' from the existing kennel (which lacks the proposed noise buffering improvements), the sound of excited dogs barking is quieter than the commonly heard sound of geese flying overhead.

There is only one commercial farming operation within a 1,500 foot radius which defines the "impact area." This dairy operation has not been adversely affected by this, or by other dog kennels on the property in the past. With proposed improvements to the kennel, the likelihood of adverse impacts on the dairy farm is further reduced.

The only identified conflict between the proposed 75-dog kennel and neighboring land uses is with Marquam Farms. A 6 foot cyclone fences ensures that no dogs can get on to the Marquam Farms property. These impacts are addressed, and mitigation measures proposed, in the following subsections.

B. THE COMPARABLE DEGREE OF NOISE, VIBRATION, DUST, ODOR, FUMES, GLARE OR SMOKE DETECTABLE AT THE PROPERTY LINE.

1. Noise According to the 1990 Rose City Sound study, ambient noise at driveway property line separating Marquam Farms from the Schillereffs' property is 53 decibels. This contrasts with 68 decibels when excited dogs are barking. (See Attachment E.) However, the

current design (Map #2), with its exposed dog runs, means that noise from excited barking dogs is only partially mitigated effectively (from 85 db to 68 db). However, contrary to the protestations of Marquam Farms, it is not axiomatic that more dogs will not result in more noise. As a result of proposed improvements to the kennel and parking lot design (walls, insulated roofing, out-of-site and sound parking area), noise impacts to Marquam Farms -- even with 25 more dogs -- will decrease.

Based on a comparison of Maps #2 (Existing Site Plan) and #3 (Proposed Site Plan), the proposed design improvements to Sauvie Island Kennel further reduce potential noise impacts for the following reasons:

- The proposed design includes a 100' solid wall for the full length of the kennel along the shared access. The boarded dogs will not be able to see vehicles as they drive past on the shared driveway. Noise from vehicles and people will be effectively blocked by the wall, thus greatly reducing barking incidents, and greatly reducing the noise impacts from barking when it does occur.

- The proposed design will completely cover the kennels, which currently are partially exposed. The roof will be insulated, thus reducing noise transmission to and from the kennel. As a result, dogs will bark less frequently, and noise from barking will decrease substantially.

- The proposed parking lot design will also result in reduced barking impacts on Marquam Farms. The current design requires dogs to be moved from one building to another for grooming, bathing and exercise. These activities are visible and audible to dogs in the kennel, which causes the dogs to bark. In contrast, the new design keeps all of the dogs within a single, walled and roofed structure. This design not only results in less frequent barking, but also buffers sound from barking dogs to Marquam Farms.

- Finally, the proposed design allows dog owners to park, get out of their vehicles, and pick up their animals without causing dogs to bark. As mentioned above, patrons' vehicles will not be visible to dogs as they drive past the kennel. The parking lot itself will be invisible to dogs. Noise from vehicle access and parking activities will be greatly reduced because the kennel will be walled and covered.

In summary, with the proposed improvements, noise impacts to Marquam Farms from barking dogs will decrease significantly, both in terms of duration and decibel level.

Barking dogs are not unique to kennels. As noted earlier, it is informative to compare potential noise impacts from an enclosed dog kennel with those of a permitted outright use -- three adult dogs plus an unlimited number of puppies under the age of 6 months. It is not uncommon for rural residential property owners to own several dogs, and to keep these dogs outside on a permanent basis (perhaps tethered or fenced, perhaps not). Often times, outdoor dogs bark and chase vehicles as they approach the property line. In such a situation, members of the hunting

club could expect to be barked at by three adult dogs and an unlimited number of puppies. Unlike the kennel, there would be no sound buffer. The dogs might be able to run along the fence line, parallel to the driveway, barking the entire time. The dogs might even come up to the fence and growl at hunting club members as they got out of their vehicles to open the gate. The dogs would be much more likely to escape beyond the property line, because they probably would not be handled by trained people and they most certainly would not be enclosed in professionally designed dog runs. In such a situation -- again, allowed outright under County zoning -- the impact on the hunting club (and surrounding agricultural uses) would be much greater than for a properly managed, enclosed kennel. Moreover, enforcement of dog impacts from rural residential owners is much more difficult (and costly to the County taxpayer) than enforcement of rules governing kennel operations. Kennel operators must be insured and bonded, which is not the case for rural residential dwellers. In short, the potential impacts from outdoor dogs in a single family residence are greater than for a well-managed, enclosed kennel, even with 75 dogs.

2. Vibration Neither the existing kennel nor the proposed expanded kennel will have adverse vibration impacts detectable at the property line.

3. Dust There will be some dust from customer and employee vehicles using the gravel driveway. However, the amount of dust is considerably less than would be expected from normal agricultural operations associated with row crops on Sauvie Island.

This driveway is maintained now by the Schillereffs. During the summer months, the Schillereffs would consider a condition of approval requiring periodic watering of the driveway, if deemed necessary by the approval authority.

4. Odor Sauvie Island Kennel is well-maintained and clean. Waste materials from dogs are flushed into the on-site sewage disposal system on a daily basis. Kennel runs are cleaned daily. For these reasons, there are no detectable odors at the property line.

5. Glare There are no off-site impacts from lighting for the kennel.

6. Smoke The kennel produces no smoke.

C. THE COMPARATIVE AMOUNT AND NATURE OF OUTDOOR STORAGE, LOADING AND PARKING.

Response: There is no outdoor storage associated with the kennel now, nor will there be in the future.

The existing gravel parking lot is syphoned to accommodate the parking needs of proposed (75-dog) kennel customers and employees, as evidenced by the Planning Director's 1994 design review approval. Fourteen off-street spaces are provided (4 customer parallel spaces adjacent to the northeast wall of the kennel, 8 customer spaces adjacent to the storage building

and 2 employee spaces inside the storage building). These spaces are located so that they are invisible to dogs inside the kennel building, to minimize barking as customers come and go to pick up their dogs. Sauvie Island Kennel does not attract a large number of vehicles. Mrs. Schillereff has maintained a customer log since the business opened. The average daily customer visits from 1992-1994 are described in Table IV.C.

TABLE IV.C
AVERAGE DAILY CUSTOMER VISITS TO SAUVIE ISLAND KENNEL
(1992-1994)

	1992	1993	1994
January	1.7	2.7	4.6
February	2.4	2.9	4.9
March	5.0	5.0	6.5
April	3.2	3.8	4.8
May	4.2	5.3	5.1
June	5.3	5.8	6.1
July	5.9	7.6	7.3
August	5.5	7.2	7.4
September	4.8	6.2	5.5
October	3.4	4.0	4.5
November	4.7	4.9	4.7
December	5.2	5.5	5.3
DAILY AVERAGE	4.2	5.1	5.6

This relatively small number of customer visits represents a daily average of 8.4 vehicle trips in 1992, 10.2 vehicle trips in 1993 and 11.2 vehicle trips in 1994. This is not heavy traffic, nor does it represent a significant impact on Marquam Farms. Moreover, there is an inverse relationship between the hunting season (October through January) and peak kennel season (March through September). Except for the Thanksgiving and December holiday week-ends, the kennels least busy months (October, November, December, January and February) correspond with the hunting season, when there is the traffic presumably is greatest at Marquam Farms hunting club.

The proposal is to increase the capacity of Sauvie Island Kennel by 50 percent. Assuming that this translates directly to a 50 percent increase in customer visits, the annual daily averages would look something like this:

	1995	1996	1997
Customer Visits:			
Projected Daily Average	6.3	7.5	8.4

The increase in customers will generate a relatively few additional vehicle trips. More importantly, the customer traffic which does come to the kennel will be better managed. One of Marquam Farms principal complaints regarding the kennel is that its customers block the driveway serving both properties. With the new parking lot design, this problem will go away, because: (a) there will be one central office (rather than two); (b) signs will direct customers where to park and to avoid blocking the driveway; and (c) parking spaces will be clearly marked with wheel stops. Each customer will be advised to park in designated spaces and to avoid blocking the driveway.

The new parking lot design will also discourage dogs behind the kennel walls from barking. Under existing conditions, dogs can see and hear customers and hunting club members coming and going from their respective facilities. The new design ensures that cars are parked out of sight and sound from dogs inside the kennel. The new design also ensures that hunting club members (who must get in and out of their vehicles to open the hunting club gates) are invisible to the dogs, because of the proposed wall separating the driveway from the kennel runs. Finally, even if dogs do bark occasionally, the sound from their barking will be muffled by walls and insulated roofs enclosing the kennel runs.

D. THE COMPARATIVE VISUAL APPEARANCE.

Response: Visually, the dog kennel will look much better, for the following reasons:

- The old quonset huts will be replaced with a new, state-of-the art building.
- The parking lot will be provided with wheel stops and signs to ensure that customer vehicles are parked in an orderly fashion.
- New landscaping and fencing are proposed, which will enhance the appearance of the kennel.

E. THE COMPARATIVE HOURS OF OPERATION.

Response: The hours of operation will not change from existing conditions.

F. THE COMPARATIVE EFFECT ON EXISTING VEGETATION.

Response: As shown on Attachment C, existing vegetation will be maintained and new landscaping provided. Marquam Farms will directly benefit from landscaping separating the parallel parking area from the northeast wall of the new kennel building.

G. THE COMPARATIVE EFFECT ON WATER DRAINAGE.

Response: Impervious surface area will increase slightly because the kennel will be completely covered. The site is reasonably well-drained with (a) drainage ditches maintained

by the Sauvie Island Drainage District, and (b) drainage tiles installed in the swale between the Persinger residence and the kennel. The Schillereffs will comply with all applicable County drainage regulations. There are no known wetlands on the property.

H. THE DEGREE OF SERVICE OR OTHER BENEFIT TO THE AREA.

Response: The public will benefit substantially from the high quality services provided by Sauvie Island Kennel. As noted in previous applications, Sauvie Island is readily accessible to a large Portland metropolitan area, and meets a demonstrated public need for accountable dog boarding and care. The kennel's location near hunting areas is convenient for hunting dog owners, and may reduce vehicle miles travelled due to combined, dog-related trips (hunting, training and boarding).

Sauvie Island Kennel, like the other two commercial kennels on the island, is compatible with the agricultural and recreational uses which predominate on Sauvie Island. Because the kennel is well-managed by experienced and knowledgeable dog handlers, Sauvie Island Kennel provides a needed service without adversely affecting agricultural or recreational uses in the vicinity.

I. OTHER FACTORS WHICH TEND TO REDUCE CONFLICTS OR INCOMPATIBILITY WITH THE CHARACTER OR NEEDS OF THE AREA.

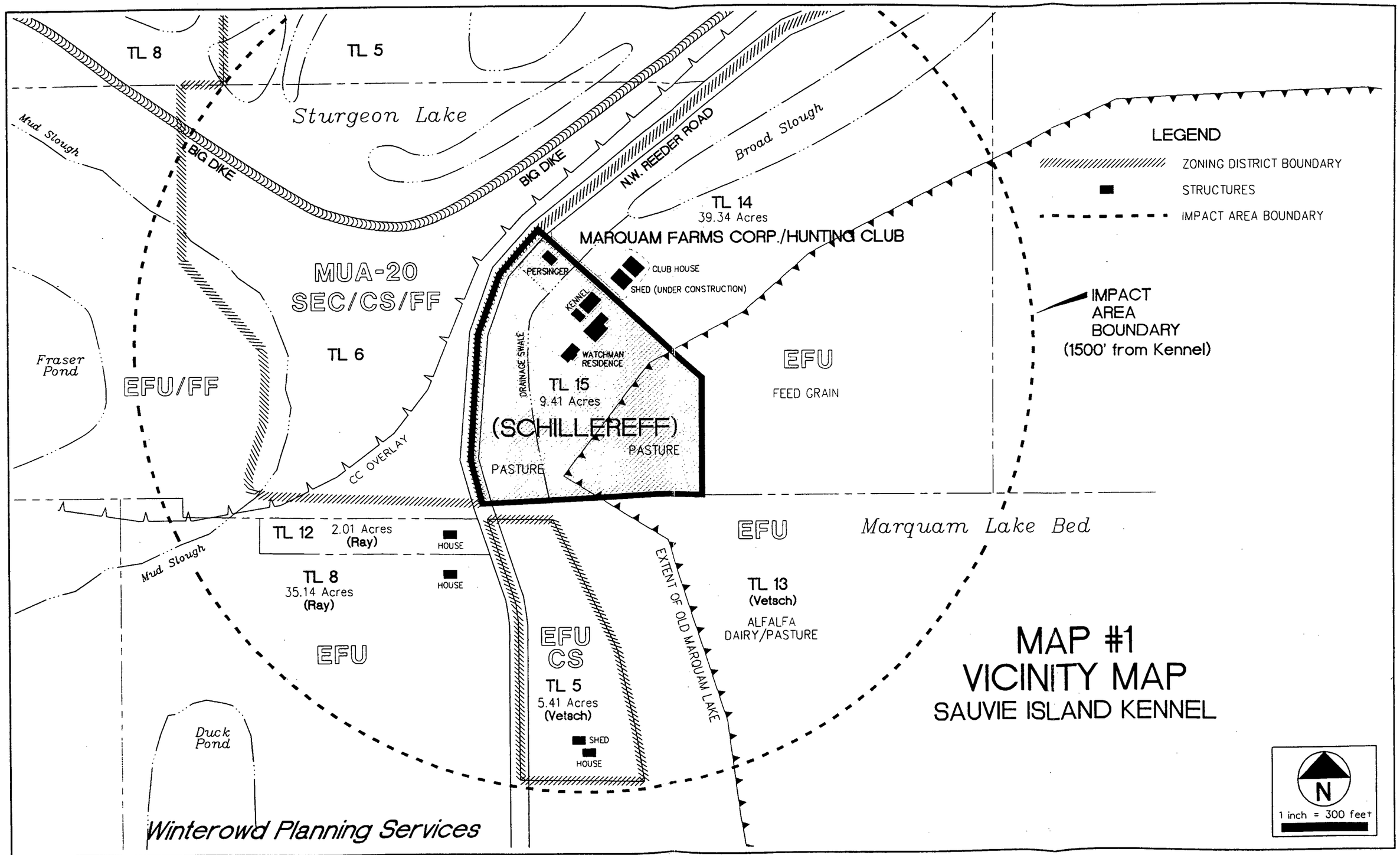
Response: As noted repeatedly in this application, there are no significant conflicts between the kennel use and agricultural or recreational uses within the impact area.

The only possible exception is Marquam Farms hunting club, which shares a common driveway with the Schillereffs and the Persingers. As demonstrated in Sections II and III of this application, the state-of-the art design of the reconstructed kennel will significantly reduce impacts from barking dogs inside the kennel and from parked vehicles which have (in the past) occasionally blocked the common driveway.

The Schillereffs would gladly implement any reasonable conditions of approval to mitigate other impacts that are defined as a result of this land use review process. The Schillereffs' intent has always been to resolve conflicts through open communication, sound facility management, and on-site improvements where justified.

Attachment A

Vicinity Map



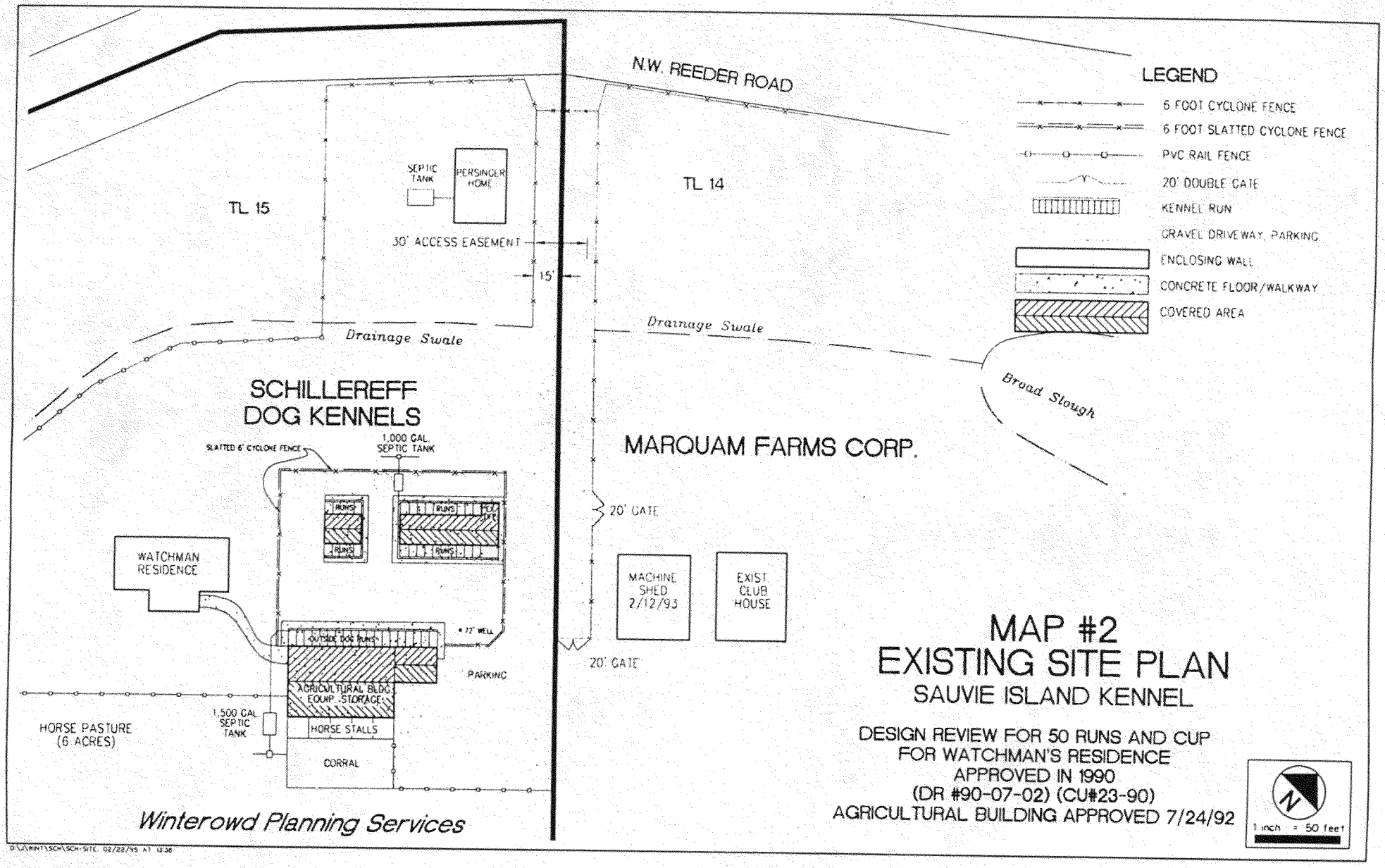
MAP #1
VICINITY MAP
SAUVIE ISLAND KENNEL

Winterowd Planning Services

D:\J\WINT\SCH\SCH-BASE. 02/20/95 AT 13:25

Attachment B

Existing Site Plan



MAP #2
EXISTING SITE PLAN
SAUVIE ISLAND KENNEL

DESIGN REVIEW FOR 50 RUNS AND CUP
FOR WATCHMAN'S RESIDENCE
APPROVED IN 1990
(DR #90-07-02) (CU#23-90)
AGRICULTURAL BUILDING APPROVED 7/24/92

Winterowd Planning Services

D:\J\PRINT\SCH\SCH-SITE 02/22/95 AT 13:36

N.W. REEDER ROAD

TL 15

TL 14

SEPTIC TANK

PERSINGER HOME

30' ACCESS EASEMENT

15'

Drainage Swale

Drainage Swale

Broad Slough

SCHILLEREFF DOG KENNELS

MARQUAM FARMS CORP.

SLATTED 6' CYCLONE FENCE

1,000 GAL. SEPTIC TANK

RUNS

RUNS

RUNS

RUNS

EX. OFF.

WATCHMAN RESIDENCE

72' WELL

OUTSIDE DOG RUNS

PARKING

AGRICULTURAL BLDG.: EQUIP. STORAGE

HORSE STALLS

CORRAL

1,500 GAL. SEPTIC TANK

HORSE PASTURE (6 ACRES)

20' GATE

MACHINE SHED 2/12/93

EXIST. CLUB HOUSE

20' GATE

LEGEND

- 6 FOOT CYCLONE FENCE
- 6 FOOT SLATTED CYCLONE FENCE
- PVC RAIL FENCE
- 20' DOUBLE GATE
- KENNEL RUN
- GRAVEL DRIVEWAY, PARKING
- ENCLOSING WALL
- CONCRETE FLOOR/WALKWAY
- COVERED AREA

MAP #2
EXISTING SITE PLAN
SAUVIE ISLAND KENNEL

DESIGN REVIEW FOR 50 RUNS AND CUP
FOR WATCHMAN'S RESIDENCE
APPROVED IN 1990
(DR #90-07-02) (CU#23-90)
AGRICULTURAL BUILDING APPROVED 7/24/92

N

1 inch = 50 feet

Winterowd Planning Services

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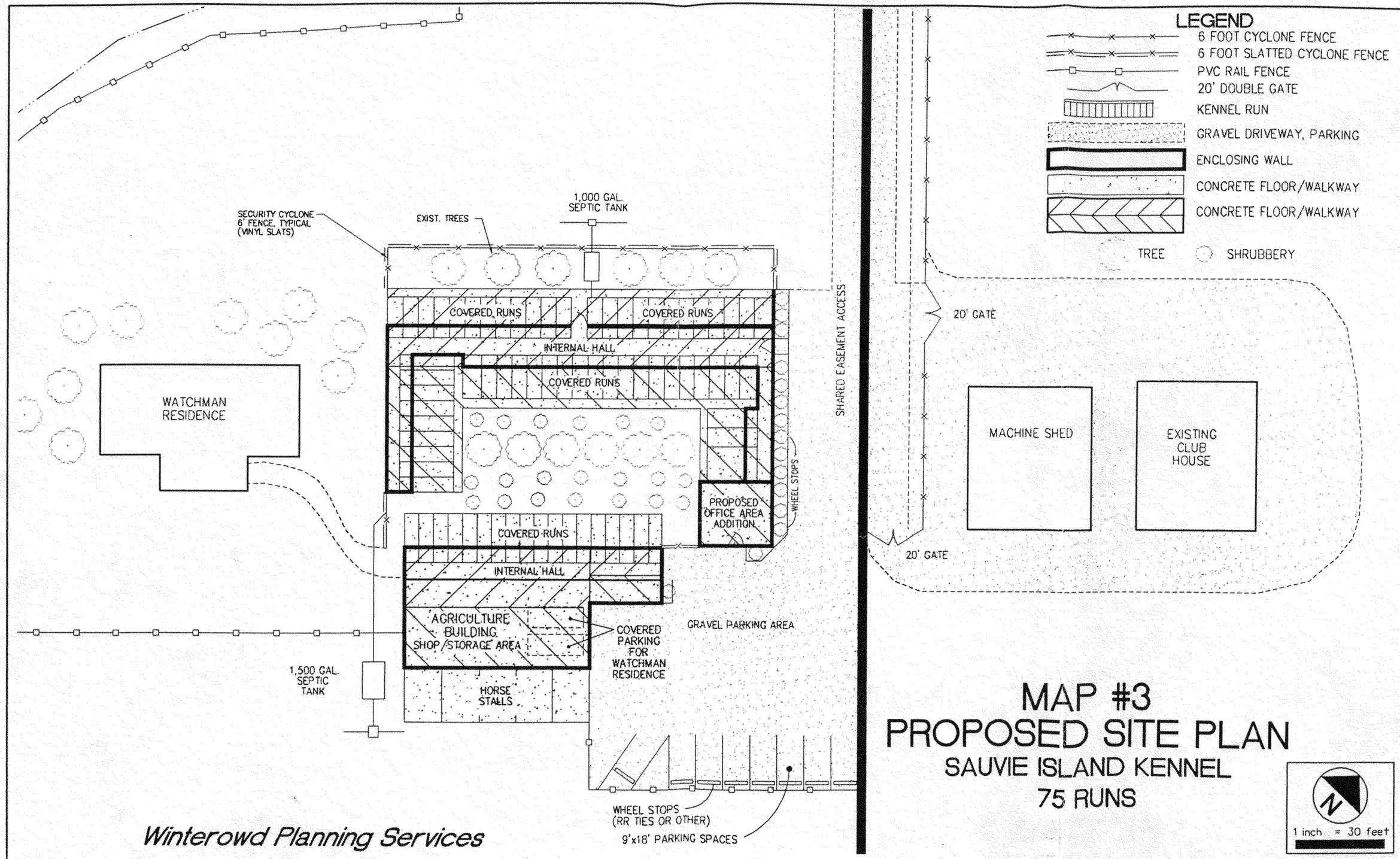
Attachment C

Proposed Site Plan



MAP #3
PROPOSED SITE PLAN
SAUVIE ISLAND KENNEL
75 RUNS

1 inch = 30 feet

Winterowd Planning Services

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Attachment D

Letters from Neighboring Property Owners Supporting the Community Use

See "Tab I"

Attachment E

Rose City Sound Report

ROSE CITY SOUND

2515 S.E. Ankeny
Portland, Oregon 97214
(503) 238-6330

Sauvie Island Kennel

On November 2, 1990, at 11:45 am, Harvey Goodling of Rose City Sound, performed a service call to the Sauvie Island Kennel. Measurements were taken to give general reference to the sound pressure generated from the barking of the animals in the kennel. Sound pressure measurements were taken inside the kennel, and at two locations at the property boundary.

The results of these measurements are as follows :

Sound pressure	Ambient	Excited Barking
Inside Kennel	64db	85db
Driveway property line	53db	68db
South property boundary	42db	48db

The sound pressure measured at the south property is influenced by many other sources. For example: jets overhead were causing meter readings of 82dbs. Wild geese were displaying meter readings of 53dbs over an ambient level of 42dbs.

Attachment F

A Brief History of Sauvie Island Kennels

A Brief History of Sauvie Island Kennels

The kennel originated in the early 1950s and was the first commercial kennel on Sauvie Island. Later to follow would be Minoggie Kennels, Charlton Kennels, and Blackthorne Kennels.

Roy Wallace was the founder, establishing the kennel operation in 1952. He brought to the Island the refurbished Army buildings, which were converted to the kennel buildings. He poured the concrete pad and foundation on which the buildings rest. He also poured sloped concrete dog runs with a drainage trough for the proper disposal of dogs stool and urine in the septic system. He assembled the chain link dividers and gates for the individual dog runs. The interior of the kennel buildings allowed for individual sleeping areas for each dog, adjacent to the outside runs. Finally Roy planted several Birch, Maple and Elm trees around the kennel buildings for shade and beauty. The original kennel buildings, concrete foundation and dog runs, and original trees planted by Roy still remain today. Only the chain link fencing was replaced with new fencing as the original was deteriorating due to rust.

For the 1950s, this kennel was state of the art and very modern. Kennels at that time were commonly constructed very cheaply, using chicken wire partions, crude enclosures and dirt as the flooring material. Not very safe, nor sanitary for housing dog or animals of any sort. The kennel was designed to hold 50 dogs.

Through the years after Roy Wallace, the kennel was leased and operated by many different individuals. However, it always remained a dog kennel, as evidenced by county records.

Evelyn Blitz, now deceased, owned and operated the kennel in the 1960s. She bred, raised and trained Labrador Retrievers and the famed "Gun Thunder Oly" was born in this kennel. She later sold the property and kennel business to Myron Meifert.

Myron Meifert operated the kennel as Lake Tree Kennels. He boarded dogs of all breeds, in addition to training dogs. He later sold the property and relocated to Scappoose, Oregon, where he currently operates Meifert Kennels.

In 1970, Henry and Irene Pein, both now deceased, purchased the property from Myron Meifert. They also owned the adjoining 39.75 acres currently owned by Marquam Farms, Inc. They maintained the kennel operation privately, keeping their three dogs, "Sam", "Betsy" and "Pat" on the place. In addition, as favors for their friends, Elden and Marguerette Persinger, they would board the Persingers dogs "Duke" and "Toby" on the place. Therefore, the Peins kept 4-5 dogs on a regular basis at the kennel during the years that they owned the property.

History of Sauvie Island Kennels, Cont.

Henry Pein preceded his wife in death. The widow, Irene then sold the property to their friends, the Persingers.

Elden "Red" and Marguerette Persinger came to the Island and brough with them their dogs, "Duke", "Toby" and "Charlie". They also, because of the existing kennel setup on the property, would keep or house friends and relatives dogs on the place. An example is William and Michael Warrington's dogs "Oly" and "Henry" who spent many monthes and years at the kennel when the Persinger's owned it. Also Frank Meifert, a relative of the Persingers, would bring his dogs, "Tuck" and "Mitsey" to the kennel when he and his family went deer hunting in the fall. The Persingers acquired a fourth dog when the Warringtons gave him the pup "Bud" who still lives on the property today. The fact is, the kennel operation continued, only now privately by the Persingers, as they did not charge a fee for this service to their friends and relatives.

In 1989, Tim and Angela Schillereff, grand nephew and niece of the Persingers, inquired as if they could remodel and run the kennel business. In February of that year, the Schillereffs submitted an application to the county for the Conditional Use for a dog kennel. The county told them it was not necessary, that the use was pre-existing, and issued the proper permits to remodel the existing kennel facility. With the permit secured, the Schillereffs signed a five year lease with the Persingers, which had an option to purchase. By the summer of 1989, the remodeling was complete and the kennel became known as Sauvie Island Kennels, housing up to 50 dogs.

In 1990, with the county's approval, Sauvie Island Kennels added a third building and a perimeter fence to the kennel facility.

In 1991, the Schillereffs sought to add a watchman residence to oversee the kennel operation, and again received approval from the county.

Now in 1994, hoping to meet the increasing demand for their kennel services, the Schillereffs asked and received county approval to expand and upgrade their kennel facility. Also in April of 1994, the Schillereff completed the lease and took the option to purchase the property.

In conclusion, looking at the history of Sauvie Island Kennels, it is clear that the kennel was and is a continued use from the early 1950s. Some years the kennel housed up to 50 dogs and was operated commerically for profit, other years it remained a privately owned kennel, but always a kennel.

Attachment G

Copy of Deed and Owner Authorization

February 21, 1995

Tim and Angela Schillereff
23202 NW Reeder Road
Portland, OR 97231

Dear Tim and Angela,

We, the owners of said property street address known as 23200 NW Reeder Road, do hereby authorize you, Tim and Angela Schillereff, DBA Sauvie Island Kennels, to apply for a Conditional Use Permit or in the alternative, an alteration of an existing Non-Conforming Use for the dog kennel business on our property.

We authorize you to perform such actions necessary for the operation of the business of a dog kennel.

Sincerely,

Elden E. Persinger

Elden E. Persinger

Marguerette Persinger

Marguerette Persinger

We concur with the above authorization.

Tim Schillereff

Tim Schillereff

Angela Schillereff

Angela Schillereff

G

4 00036 1

FORM No. 633—WARRANTY DEED. STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

1967/50

BOOK 906 PAGE 1445

KNOW ALL MEN BY THESE PRESENTS, That IRENE PEIN, *hereinafter called the grantor, for the consideration hereinafter stated, to grantor paid by* ELDEN E. PERSINGER and MARGUERETTE F. PERSINGER, husband and wife, *hereinafter called the grantee, does hereby grant, bargain, sell and convey unto the said grantee and grantee's heirs, successors and assigns, that certain real property, with the tenements, hereditaments and appurtenances thereunto belonging or appertaining, situated in the County of* Multnomah *and State of Oregon, described as follows, to-wit:*

See Exhibit "A" attached hereto and made a part hereof.

**Grantee hereby agrees as a consideration of purchase to maintain and keep open all drainage ditches which drain from grantors' property and grantor retains an easement over and across the herein described property for drainage of waters from the property of grantor adjacent hereto.

(IF SPACE INSUFFICIENT, CONTINUE DESCRIPTION ON REVERSE SIDE)

To Have and to Hold the same unto the said grantee and grantee's heirs, successors and assigns forever.

And said grantor hereby covenants to and with said grantee and grantee's heirs, successors and assigns, that grantor is lawfully seized in fee simple of the above granted premises, free from all encumbrances and that grantor will warrant and forever defend the above granted premises and every part and parcel thereof against the lawful claims and demands of all persons whomsoever, except those claiming under the above described encumbrances.

The true and actual consideration paid for this transfer, stated in terms of dollars, is $24,000.00 .

①*However, the actual consideration consists of or includes other property or value given or promised which is part of the whole consideration (indicate which).*① **

In construing this deed and where the context so requires, the singular includes the plural.

WITNESS grantor's hand this 25th *day of* January, 1973.

Irene Pein

STATE OF OREGON, County of Multnomah) ss. Jan. 25, 1973

Personally appeared the above named Irene Pein

and acknowledged the foregoing instrument to be her *voluntary act and deed.*

Before me: L. Guy Marshall

(OFFICIAL SEAL) *Notary Public for Oregon*

My commission expires 2/15/76

NOTE—The sentence between the symbols ①, if not applicable, should be deleted. See Chapter 462, Oregon Laws 1967, as amended by the 1967 Special Session.

Recorded by Pioneer National Title Insurance Company

633

No. 37167

WARRANTY DEED

IRENE PEIN

TO

ELDEN E. PERSINGER

AFTER RECORDING RETURN TO

~~L. GUY MARSHALL~~
~~1201 Yeon Building~~
~~Portland, Ore. 97204~~

Please Receipt and Return to:
DAVIS, JENSEN, DeFRANCO & HOLMES
ATTORNEYS AT LAW
SUITE 620 [illegible] BUILDING

STATE OF OREGON } ss.
County of Multnomah }

I certify that the within instrument was received for record and recorded in the records of said County.

JOHN D. WELDON, Director, Department of Records and Elections

By [illegible] Deputy.

DEED

JAN 29 3 38 PM '73

JOHN D. WELDON
DIRECTOR OF ELEC.
MULTNOMAH COUNTY, OREGON

RETURN TO: RECORDING DEPARTMENT OF RECORDS
JOHN D. WELDON, Director, Department of Records and Elections, in and for said County, do hereby certify that the within instrument of writing was received for record and recorded in the records of said County.

WITNESS my hand and seal of office affixed.

JOHN D. WELDON, Director, Department of Records and Elections

By [illegible] Deputy.

BOOK 906 PAGE 1445

Grantee

EXHIBIT "A" BOOK 906 PAGE 1444

The following described property in Section 3, T. 2 N., R. 1 W., of the W. M., in the County of Multnomah and State of Oregon:

Beginning at a point in the center of the County Road No. 911 (Reeder Road) from which point a meander corner on the South line of Horace J. McIntire D.L.C. #54 in Section 3, T. 2 N., R. 1 W., of the W. M., marking West edge Marquam Lake bears North 87° 36' East, a distance of 580 feet; thence from described beginning point North 14° 19' West along the center of said county road, 66.4 feet to a point where said county road crosses main Sauvies Island Drainage Canal running Easterly and Westerly and true place of beginning following the center of said county road the following courses and distances:
North 14° 19' West 86.0 feet to a point; thence North 3° 28' East 429.3 feet to a point; thence North 19° 21' East 214.8 feet to a point; thence North 40° 08' East 195.2 feet to a point from which an iron bears South 47° 28' East 20.0 feet; thence leaving said county road and running thence South 47° 28' East 745.3 feet to the center of a drainage ditch; thence following the center of drainage ditch South 0° 03' East 333.5 feet to a point in the center of the main Sauvies Island Drainage Canal; thence following the center of said canal North 88° 31' West 155.2 feet to a point; thence continuing in the center of said canal South 87° 05' West 596.8 feet to the true place of beginning; EXCEPTING therefrom that portion lying Westerly of the Easterly right of way line of Reeder Road No. 2325.

SUBJECT TO the following:

1. Said premises are located within the Sauvie Island Drainage District and are subject to the regulations, assessments, etc., thereof.
2. The rights of the State of Oregon in and to so much of said premises as may lie in the bed of any navigable stream or body of water.
3. Easement and right of way in favor of Sauvie Island Drainage District, as decreed in Judgment entered December 27, 1939 in condemnation suit, Sauvie Island Drainage District, a municipal corporation, vs. McIntire Farms, Inc., an Oregon corporation, et al, J. R. 133620.
4. Easement granted in deed from Sauvie Island Drainage District, to United States of America, dated April 10, 1940, recorded April 11, 1940 in Book 543 page 359, Deed Records.
5. Easement, including the terms and provisions thereof, from McIntire Farms, Inc., an Oregon corporation, to Sauvie Island Drainage District of the Counties of Multnomah and Columbia, State of Oregon, recorded May 8, 1941 in Book 606 page 164, Deed Records.
6. Easement, including the terms and provisions thereof, from Laura E. McIntire, widow, to Sauvie Island Drainage District of the Counties of Multnomah and Columbia, State of Oregon, an Oregon corporation, dated January 6, 1941, recorded May 8, 1941 in Book 606 page 168, Deed Records.
7. Easement for water drainage as reserved by that certain easement recorded July 5, 1951 in Book 1483 page 198, Deed Records, to Verne F. Everett and Florence I. Everett, husband and wife, to Costante J. Dondo and Angela Dondo, husband and wife.
8. Coal and mineral rights as reserved by the State of Oregon, as disclosed by deed from Florence I. Everett and Verne F. Everett, husband and wife, to Bernard A. Alport and Lucille D. Alport, husband and wife, dated Jan. 15, 1953, recorded Jan. 16, 1953, in Book 1579 page 487, Deed Records.
9. Necessary slope easements for Reeder Road No. 2325.

Attachment H

Service Provider Sign Offs

PLANNING & DEVELOPMENT SECTION

GENERAL APPLICATION FORM

SUPPLEMENTAL INFORMATION (TO BE PROVIDED BY APPLICANT)

[redacted]

SCHOOL DISTRICT Sauvie Island School District

WATER DISTRICT Private Well

FIRE DISTRICT Sauvie Island Volunteer Fire Department

DRAINAGE DISTRICT Sauvie Island Drainage District

SERVICE DISTRICT (PUBLIC SEWER) None

OTHER None

PUBLIC UTILITIES

ELECTRICITY Portland General Electric

NATURAL GAS None

TELEPHONE U.S. West Communications

OTHER None

PUBLIC TRANSIT (TRI MET)

NEAREST BUS ROUTE AND STOP Linnton #17 Stops at the foot of the Sauvie Island Bridge.

[redacted] INTERESTED AGENCIES (SPECIFY)

None

FOR STAFF USE ONLY

NOTICE OF APPLICATION REQUIRED

YES	NO

THE FOLLOWING PEOPLE, AS REQUESTED BY THE APPLICANT, SHALL BE NOTIFIED OF EACH HEARING. E.G., ATTORNEY, SURVEYOR)

NAME N/A

STREET

CITY STATE ZIP

NAME N/A

STREET

CITY STATE ZIP

[redacted] N/A

STREET

CITY STATE ZIP

NOTICE	STAFF REPORT	DECISION	NOTICE OF REVIEW

3/27/95

ERAL APPLICATION FORM

DEPT. OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
LAND DEVELOPMENT SECTION

2115 S.E. MORRISON ST.
PORTLAND, OREGON 97214
(503) 248-3043

MULTNOMAH COUNTY

PROPERTY ADDRESS 23200 NW Reeder Road, Portland, Oregon 97231

LEGAL DESCRIPTION Please see attached Deed with the legal description

SITE SIZE 9.4 Acres on Sauvie Island, Oregon

PROPERTY OWNER/DEED HOLDER Elden E. Persinger and Marguerette F. Persinger

ADDRESS 23200 NW Reeder Road, Portland, OR 97231 PHONE 621-3249

CITY Portland, OR ZIP 97231

APPLICANT Tim Schillereff

ADDRESS 7218 N Wayland Avenue PHONE 289-4854

CITY Portland, OR ZIP 97203

TO BE COMPLETED BY APPLICANT ONLY IN THE PRESENCE OF A NOTARY PUBLIC

STATE OF OREGON
COUNTY OF MULTNOMAH

I, Tim Schillereff

BEING FIRST DULY SWORN, DEPOSE AND SAY THAT I AM (ONE OF) THE APPLICANT(S) IN THE FOREGOING APPLICATION AND THAT THE SAME IS TRUE AS I VERILY BELIEVE.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24th DAY OF Feb 1989

NOTARY Melodie Allen

MY COMMISSION EXPIRES 11-2-90

2-24-89

GENERAL DESCRIPTION OF APPLICATION: (To Be Filled In By Applicant and Reviewed by Staff)

FOR STAFF USE ONLY

CASE NUMBER:

ASSOCIATED CASES:

INTERNAL PROCESSING

ACCEPTED FOR PRE-APP.:

BY:

PRE-APP.:

DATE AND TIME:

ACCEPTED FOR DECISION:

BY:

HEARING DATE:

DECISION FILED:

DECISIONS/S.R. BY:

ACCEPTED FOR APPEAL:

BY:

DATE OF HEARING:

DESCRIPTION

COMP. PLAN DESIG.:

COMMUNITY:

ZONING DISTRICT:

ZONING MAP NO.:

QUARTER SECTION NO.:

GREGORY WINTEROWD

Greg Winterowd is the owner of *Winterowd Planning Services* and brings 20 years of local, regional and state level land use planning and project management experience to the firm. Mr. Winterowd has broad experience in conducting planning and natural resource management studies, and in managing projects through local and state land use regulatory processes. Mr. Winterowd's understanding of local, regional, state and private planning issues provides needed perspective, balance and depth to planning and regulatory programs affecting natural resources.

Mr. Winterowd served as Planning Director for the City of Springfield, Oregon (1983-89), Plan Review Specialist and Field Manager for the Oregon Department of Land Conservation and Development (1979-83), Associate Planner for the City of Ashland, Oregon (1977-78), Market Analyst with Pederson and Associates (1975-76) and Interne with the Oregon State Housing Division and the Lane Council of Governments (1974-75).

In addition to professional practice, Mr. Winterowd has served as a Board member of the Oregon Chapter of the American Planning Association and as Legislative Liaison and Vice-President of the Oregon City Planning Director's Association. He has been a guest lecturer at the University of Oregon, Southern Oregon State College, and Portland State University. He has also presented and written articles for regional, state and national planning conferences and publications.

Mr. Winterowd's consulting practice includes managing planning studies for private and government clients, and assisting government agencies and developers in meeting local, state and federal regulatory and planning requirements. Mr. Winterowd's areas of expertise include housing, economic development, urban growth management, zoning administration, environmental planning and coordination, historic preservation and project management.

EDUCATION

Master of Urban and Regional Planning, University for Oregon
(HUD Fellowship Recipient; Intern and Legislative Newsletter Editor, Oregon State Housing Division; Intern, Lane Council of Governments)
Master of Political Studies, Queen's University, Canada
(Graduate Teaching Fellow)
Bachelor of Arts, University of Minnesota
(*Phi Beta Kappa*, Undergraduate Research Assistant)
Exchange Student, Manchester University, U.K.

SELECTED PROJECT EXPERIENCE

Private Planning Consultant

As a land use consultant, Mr. Winterowd has prepared development applications and planning studies that involve economic development, housing, growth management and environmental concerns. Representative samples include:

* *West Hills Significant Wildlife Habitat Area Study.* Greg Winterowd served as project manager for this study, which was conducted to meet LCDC periodic review requirements for a highly controversial rural area northwest of Forest Park. The study provided detailed "significance" findings for the 20,000 acre West Hills Wildlife Habitat Area, and included site-specific mapping of the resource site and impact areas. Based on an analysis of Multnomah County's existing regulatory framework, conflicting uses and ESEE consequences were analyzed. Program recommendations were proposed. Detailed AutoCAD mapping was provided by Geo Graphic Image.

* *Lake Oswego ESEE Analysis of Wetlands, Stream Corridors and Tree Groves.* Greg Winterowd is project manager for this study, which is based on inventory information provided by Fishman Environmental Services. WPS is working closely with Lake Oswego planning staff in developing significance and impact area criteria, refining inventory information, conducting conflicting use and ESEE analyses for each natural resource site, and making program recommendations. Geo Graphic Image is providing several iteration of site-specific mapping on AutoCAD for each natural resource site.

* *City of Ridgefield, Washington Comprehensive Plan.* Mr. Winterowd is working with Clark County and State of Washington planners in preparing the City's comprehensive plan in compliance with the Growth Management Act. Among the critical issues facing Ridgefield is conservation of two thousand acres of stream corridors and wetlands. Mr. Winterowd has developed an innovative Open Space Management Plan, including site-specific mapping and policies.

* *City of Hillsboro Goal 5 Natural Resource Analysis and Implementation Program.* The Hillsboro Natural Resources Inventory was originally prepared by Esther Lev, Bruce Newhouse and Dick Brainerd, and was updated by Dr. Martin Schott. Mr. Winterowd worked with Dr. Schott to conduct detailed conflicting use and ESEE analyses of some 45 natural resource sites, including stream corridors and wetlands. They also developed a program to achieve the purposes of Statewide Planning Goal 5, including draft natural resource management policies, a citizen involvement program and a natural resources management zoning district.

* *North Clackamas County Urban Area Wetland Inventory and Goal 5 Assessment.* This wetland resource study is mostly completed, and includes extensive inventory work conducted by Scientific Resources, Inc. Mr. Winterowd worked with the County and SRI to develop criteria for determining significance and impact areas. Mr. Winterowd was solely responsible for developing the County's ESEE Analysis methodology, and for drafting a series of generic, or supplemental ESEE analyses addressing categories of conflicting uses. Working with Planner Lynn Putnam, he was responsible for developing the format and data necessary for site specific ESEE analyses for some 40 wetland resource sites. This project received extensive review by DLCD (Frank Flynn), DSL (Emily Roth) and other groups on the County's technical advisory committee, and was well-received.

* *City of Troutdale ESEE Methodology and Stream Corridor Regulations.* Mr. Winterowd has completed a detailed ESEE methodology statement for the City, as well as draft standards for management of hillsides and floodplains associated with Beaver and Arata Creeks, and with the west bank of the Sandy River.

* *Oregon Department of Land Conservation and Development Urban Growth Management Study.* This 1990 study analyzed the effectiveness of the growth management programs of four case study areas in Oregon, and was managed by with ECO Northwest of Eugene. LCDC used many of the recommendations in this study in developing administrative rules for managing growth in and around urban growth boundaries. Mr. Winterowd presented the results of this study at the League of Oregon Cities and other forums.

* *City of Springfield Industrial Lands Study.* Funded by an EDA grant, this study analyzed the development capability of six industrial sites in Springfield, and was conducted in association with The Mitchell Nelson Group of Portland and Fishman Environmental Services. The study involved natural resource inventories and conflict resolution, and made specific recommendations for resolution of site development issues.

* *Clear Lake Watershed Land Use Study.* This study analyzed potential land use impacts based on existing plan designations and zoning, and suggests plan and code amendments to minimize adverse impacts, consistent with the Oregon Statewide Planning Goals and other state regulations. Later work included detailed analyses of nutrient-loading from various types of land use, and recommended mitigation measures to minimize sedimentation to the area's principal drinking water supply.

* *AmberGlen Business Park.* Prepared findings for the 217-acre (1.3 million square foot) AmberGlen Business Park in Hillsboro, Oregon. This project involved wetlands, stream corridors and upland natural resource mitigation. Mr. Winterowd worked directly with Dr. Schott in preparing natural resource mitigation plans and findings. The project was approved by the City.

* *Eugene-Springfield Urban Growth Boundary Amendment.* This industrial lands amendment to the Eugene-Springfield urban growth boundary included a detailed Goal 5 analysis and management of a 30-acre wetland mitigation plan. The project was approved by the Cities of Eugene and Springfield, and Lane County.

PRIOR PLANNING EXPERIENCE

Planning Director, City of Springfield (1984-89)

As chief planner for the City, Mr. Winterowd made frequent public presentations. He routinely facilitated citizens' groups, planning commissions, special tasks forces and elected officials in goal-setting and in reaching consensus on controversial issues. As Springfield's Planning Director, Mr. Winterowd managed the City's economic development, comprehensive planning, code administration and building divisions. Mr. Winterowd was personally responsible for directing the City's urban renewal and annexation planning efforts.

While at the City, Mr. Winterowd worked directly with Environmental Consultant Esther Lev, and Principal Planner Bruce Newhouse in managing Springfield's participation in the Eugene-Springfield Natural Resources Study. He also developed detailed Goal 5 findings for the City's tree preservation and hillside protection ordinances. He also prepared Goal 5 findings and historic district standards for the Washburne Historic District, which has National Register status.

Plan Reviewer and Field Representative, Department of Land Conservation and Development (1979-84)

Mr. Winterowd was responsible for developing and implementing agency policy on economic development, transportation, housing and urbanization issues and drafted the LCDC's Statewide and Metropolitan Housing administrative rules. As plan reviewer and field manager, he participated in interpretations of Statewide Planning Goal 5 (Natural Resources) in an urban context, and in the Goal 5 rule-making process. Mr. Winterowd served as lead reviewer for many of the state's larger cities and urban counties, including the cities of Portland, Beaverton, Hillsboro, Gresham, Lake Oswego, Oregon City, Gladstone, Eugene-Springfield, Corvallis, Albany, and Clackamas and Multnomah Counties.

Associate Planner, City of Ashland (1977-78)

Mr. Winterowd was responsible for zoning administration in Ashland, Oregon during a period of intense development pressure, where he helped to implement the Baker and Fasano court decisions on a practical basis. He also participated in public facilities and transportation planning, including issues related to Ashland's Airport. He helped to prepare the National Register nominations for the Carter House and the Mark Antony Hotel, conducted preliminary investigations later used in the Railroad District National Register nomination, and prepared the urban growth boundary amendment for the Ashland Hills Motor Inn.

Consultant/Market Analyst, Pederson & Associates (1975-76)

Mr. Winterowd prepared commercial and residential market analyses, and worked with a team of professionals in real estate development. He also assisted in "packaging" federally-assisted housing projects, preparing grant applications and project budget proposals, and advising firms on local and State regulatory processes. He prepared the National Register nomination for the Palace Hotel as part of a successful rehabilitation project.

Sauvie Island Kennel Supplemental Land Use Report

APPLICANT: **Tim and Angela Schillereff**
represented by
Winterowd Planning Services (*WPS*)

REQUEST: **Approval of:**
(1) a conditional use permit to allow expansion of an existing dog kennel in the EFU zone (MCC 11.15.7120(A)); or, in the alternative,
(2) alteration of a nonconforming use to allow remodeling and expansion of the capacity of the existing dog kennel.

DATE: **Wednesday, August 16, 1995**

PURPOSE

This supplemental report serves two principal purposes: first, it reinforces the Schillereffs' position that 1990 land use actions by the Multnomah County planning staff and the Multnomah County Planning Commission validated the conditional use status of the existing 50-dog kennel operation; and second, it addresses two comprehensive plan policies that were not addressed in the Schillereffs' February 23, 1995 land use application.

I. CONTINUATION OF A LAWFUL CONDITIONAL USE

The applicant presently holds a lawful conditional use approval for a 50 dog kennel on their property. The Planning Commission confirmed conditional use status upon the applicant's kennel as a result of the November 6, 1990 Planning Commission hearing on the Watchman's residence. (No. CU 23-90.)

Hearings Officer Decision: DR 9-94

OTHER MEANS ARE AVAILABLE TO VERIFY THE LAWFUL USE.
Although the Hearings Officer held that although he found the kennel use discontinued from 1962 until 1964, his decision to deny Design Review was "without prejudice." Specifically, the Hearings Officer said that if the Schillereffs were able to obtain a conditional use permit "or otherwise establish the use as a lawful use", his decision in DR 9-94 should in no way prejudice such an action. (DR 9-94 at p. 7.) The decision expressly left open the possibility of alternative means of validating the use. Such a door exists and

has been open since 1990. Moreover, the statement that the use was unlawful was dicta and not binding on this, or any other, case.

CU No. 23-90 IS A FINAL DECISION

CU No. 23-90 was heard by the Planning Commission on November 6, 1990. The applicants request the Hearings officer to take official notice of the file in these proceedings. The Commission reviewed and approved a conditional use permit application from the Schillereffs to place a watchman's residence next to the kennel area. In reviewing DR 9-94, the Hearings Officer properly found that because CU No. 23-90 was not appealed beyond the Planning Commission "it is therefore a final decision" not subject to collateral attack. (DR 9-94 at p.8.) In fact, the Hearings Officer acknowledged that he lacked "... authority in this proceeding..." to determine the validity of CU 23-90. (See, staff report, CU 4-95, at page 10.) Therefore, the findings and conclusion of CU 23-90 are fully in effect today.

<u>What CU 23-90 Established.</u>

CU 23-90 WAS APPROVED.

CU 23-90 represents the Schillereffs application to establish a conditional use for a watchman's residence on the kennel property. Their application was approved, subject to conditions. The Schillereffs have met all applicable conditions, one of which is continuation and licensing of the primary use -- the existing kennel. (CU 23-90 Decision, 11/6/90 at page 6.)

UNDERLYING LEGALITY OF THE KENNEL USE.

At the November 6th, 1990 public hearing before the Planning Commission, an opponent, Mr. John Maring, rose in opposition to the application. Among other things,[1] Mr. Maring raised the issue as to whether the underlying kennel use was a lawful non-conforming use. (Planning Commission Hearing, November 6, 1990, Tape Side A.) At the close of public testimony, members of the Commission raised that very issue.[2] The staff answer is very instructive.

OPERATION OF MCZO 11.15.2028

Staff reported that there had been discussion amongst the staff and between staff and County Counsel as to whether the underlying use was a non-conforming use or a

---

[1] For example, Mr. Maring volunteered an opinion as to the value of the Schillereffs' property as high value farm land. "There is no farm there. They could never farm. There is no potential for farming." (Testimony of Mr. Maring, November 6, 1990 Planning Commission hearing on CU 23-90, Side A.) He also stated at that time that he was not opposed to the use, only the placement of the residence.

[2] "Its been raised, the issue was this is a legally established use. How do you react to that?"(Question from Commissioner Fry to Planning staff, November 6, 1990 Planning Commission Hearing tape, Side B.)

conditional use. County Counsel advised and staff adopted as its position that MCZO 11.15.2028(B) operated to elevate the kennel, a lawful pre-existing use, to conditional use status.[3] Four years later, in DR 9-94, the Hearings Officer reached a different conclusion about the legal effect of MCZO 11.15.2028(B). However, as the Hearings Officer pointed out in DR 9-94, the findings and decisions of the Planning Commission in CU 23-90 were never appealed and are final.

CONDITIONAL USE IS NOT TERMINATED

Once the underlying use was lawfully established as a conditional use, the staff concluded, on advice of counsel, that the conditional use could not be terminated as a result of discontinuance.[4] It was the staff's final opinion, as reflected in the staff report and public testimony and adopted by the Planning Commission , that the kennel was a "well established operation". (CU Decision 23-90 at page 8.) In fact, both staff and Mr. Maring agreed that the kennel was established some time during the 1950s. (11/6/90 Hearing Tape, Side A.) Whether the use was intermittent or continuous was immaterial once the validity of the use was established. And once so established, the use could not be discontinued by operation of the code.

STAFF "DETERMINED" THE KENNEL USE TO BE A CONDITIONAL USE

In a dialogue between Planner Mark Hess and Commissioner Fry, the question of whether this kennel use was an acknowledged conditional use was plainly raised and resolved.[5] County Planner Hess expressly DETERMINED the kennel use to be a conditional use. The operation of MCZO 11.15.2028 elevated the kennel use to conditional use status without the requirement of individualized hearings. Just like lawfully pre-existing churches in a residential zone, kennels in EFU zones are capable of the umbrella protection offered by section 2028. Once so established the use status runs indefinitely.

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[3] "At that conference [the pre-application conference], there was the interpretation of the pre-existing or non-conforming use exemptions for EFU which says that uses that are now called conditional in EFU, but which were non-conforming before are conforming conditional uses. And,[I] have an opinion from my County Counsel which tells me that a conditional use once its been established, by way of constructing a building or whatever, that that use continues forever. And so one of the staff members, Mr. Hall, who is my superior, took that interpretation. I took a different interpretation, and his prevailed." (Colloquoy of staff planner Mark Hess, Hearing Tape, Side B.)

[4] Question: "Are you saying to us then that your planning code does not include a termination of conditional use for lack of use?" Answer by Planner Hess: "That's Correct." Question: "Okay." Answer: "If a conditional use is abandoned, it can be resurrected any number of years later and so that's where the difference of opinion was on the staff as to which one applied in this instance." (Testimony of Mark Hess and Planning Commission member, Hearing Tape, 11/6/90, Side B.)

[5] Commissioner Fry: "So basically, your finding is that this is established as a conditional use, not a non-conforming use ..". Hess: "Correct." Fry: "...and the only reason there hasn't been a hearing is that when it was originally established there was no requirement for a hearing?" Hess: "That's right." Fry: "Okay, that, in my mind, solves that problem." (11/6/90 Hearing, Tape Side B.)

COMMISSION ADOPTS STAFF REPORT

The Commission adopted this report and analysis of the lawful conforming status of the Schillereffs' kennel and moved to adopt the staff report and unanimously approved CU 23-90. (CU 23-90, 11/5/90 minutes at page 4.) The decision to approve CU 23-90 on the basis of the staff report was never challenged, and is therefore final. The staff and Commission could have elected to interpret MCZO 11.15.2028 in the same manner as the Hearings Officer did four years later in DR 4-94. Based upon the best evidence available, they chose to classify the kennel use as a conditional use. They found the kennel use was "well established"; that the watchman's residence was consistent with the character of the land; that the kennel was an existing conditional use that does not adversely affect surrounding natural resources. (CU 23-90 Decision at pages 8-10.)

Conclusions

The conclusions are inescapably clear. The opinion in DR 9-94 acknowledged that other avenues may exist for establishing a valid underlying conditional use. CU 23-90 is such an avenue. In approving a conditional use permit for the watchman's residence the Planning Commission addressed the issue of the validity of the underlying use. Based upon advise of counsel and a staff finding that the underlying was a conditional use, the Commission adopted the staff report and approved CU 23-90. The effect of these actions is to approve the kennel as a conditional use -- the validity of which was not challenged.

II. COMPREHENSIVE PLAN POLICIES

The Division of Planning & Development's August 16, 1995 staff report identifies two comprehensive plan policies that were not addressed in the Schillereffs' February 23, 1995 submission: Policy 22 - Energy Conservation and Policy 40 - Development Regulations.

Comprehensive Plan **Policy 22** (Energy Conservation) states:

> *The County's policy is to promote the conservation of energy and to use energy resources in a more efficient manner. In addition, it is the policy of Multnomah County to reduce dependency on non-renewable energy resources and to support greater utilization of renewable energy resources. 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 use 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 development and use of renewable energy resources.*

Response: The proposed kennel expansion satisfies Policy 22 for the following reasons:

- Sauvie Island is readily accessible to the Portland metropolitan area and meets an urban need for canine boarding and training. The proximity of the kennel to a major population center reduces vehicle miles traveled when compared with other rural alternatives.
- The design of the kennel itself will reduce energy consumption, because the new kennel will be enclosed from the elements and better insulated.
- The increased intensity of development at this location means that more dogs can be boarded and trained in the same area, thus increasing efficiency of land use.
- The improved parking lot design will minimize backing and maneuvering of vehicles, thus decreasing energy consumption.

Comprehensive Plan **Policy 40** (Development Requirements) reads:

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.

Response: The kennel is across the Reeder Road from Sturgeon Lake Wildlife Refuge and Sauvie Island is a well-known bicycle excursion area. However, dog owners typically bring their animals to Sauvie Island Kennel for boarding or training by car or truck, and not by bicycle or on foot. Therefore, it is inappropriate to require areas for bicycle parking or to require pedestrian and bicycle paths. The Schillereffs are providing landscaping consistent with code standards. Benches are not appropriate in this situation because clients typically do not spend time out-of-doors when dropping off dogs for boarding.

WPS Memorandum

TO: **Multnomah County Hearings Officer**
FROM: Greg Winterowd & Eric Eisemann
SUBJECT: The Meaning of the Term "Conditional Use" as Applied in **MCC 11.15.2028.B**
DATE: Wednesday, August 23, 1995

* * * * * * * * * * * *

I. Introduction

This memorandum analyzes the term "conditional use permit" and explains why the Schillereffs' 50-run dog kennel is a legally established and conforming conditional use within the meaning of **MCC 11.15.2208.** We provide additional evidence demonstrating that the dog kennel has been operated continuously since its legal establishment in 1954. We also suggest possible conditions of approval for the Hearings Officer's consideration. This memorandum is a compilation of separate work completed by Mr. Eisemann and Mr. Winterowd during the last week. We ask the Hearings Officer's indulgence for unavoidable redundancies.

II. A Reiteration of What CU 23-90 Established

As documented in *Winterowd Planning Services'* August 16, 1995 *Supplemental Report* and in our oral testimony, the Planning Commission's 1990 decision to approve the accessory night watchman's facility expressly validated the conforming conditional use status of the primary dog kennel use. The Planning Commission determined that the legally established[1] primary conditional use (the dog kennel) was "conforming," and granted a conditional use permit for the change in use (i.e., the watchman's residence). Their decision agreed with staff's reading of MCC 11.15.2028.B.

III. Hearings Officer's Question

This memorandum addresses a question asked repeatedly at the August 16, 1995 Sauvie Island Kennels public hearing by the Hearings Officer. For example, the Hearings Officer asked Mr. Sullivan:

> *Tell me why you think you can have a conditional use that is lawful but not permitted?*

[1] The Planning Commission did not address the question of whether the kennel use had continued since it began in 1954; they relied instead on staff's view that MCC .2028 rendered the kennel a conforming conditional use.

The answer to the question raised by the Hearings Officer lies in how the courts and the County have defined the terms "conditional use" and "permit".

IV. Alternative Meanings of the Term "Conditional Use" as Applied to MCC .2028

In Anderson v. Peden, the Oregon Supreme Court observed that the term "conditional use" has at least three different meanings. Anderson v. Peden, 284 Or 313, 316, 587 P2d 59 (1978). As Judge Lindy observed, the meaning of the term depends upon the context in which the term is employed in the local regulations and practice. *First,* a specified use is permitted whenever certain conditions exist or are satisfied. *Second*, the term might mean that the use may be permitted subject to special conditions attached to a permit. *Third*, the term might refer to a process which allows a governing body to allow discretionary decisions on certain uses.

The Multnomah County Code uses the term "conditional use" in each of the three possible ways at various points within the code. With so many lawful interpretations of the term "conditional use" it is not surprising that a reasonable person might have difficulty deciding which meaning to apply in this specific case.

Meaning 1: Specified Use -- Mandatory.
The specified use is not subject to discretionary approval. If certain conditions are present or if certain conditions are satisfied, the governing body must allow the use. A test as to whether this type of conditional use exists might be stated as: (1) Is the use specified; if so, (2) is the use subject to identified objective criteria; and, if so, (3) does the use in question satisfy these two requirements?

An example of this first type of conditional use is found in MCC 11.15.2028(B). In an EFU zone, certain uses are exempted from nonconforming use code provisions. MCC 11.15.2028(B).

> *Conditional uses listed in subpart MCC. 2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC. 8804, provided, however, that any change of use shall be subject to approval pursuant to the provisions of MCC. 2012.* (MCC .2028.B)

In applying the present facts to a reasonable test, we ask:

Q.#1 Is the use specified?

A. Yes. "Conditional uses listed in MCC .2012..". Dog kennels are listed as conditional uses in MCC 11.15.2012.B.11.

Q.#2 Is the use subject to identified criteria?

A. Yes, the use must have been legally established prior to August 14, 1980.

Q.#3 Do the facts show that the dog kennel was a lawful nonconforming use prior to August 14, 1980?

A. Yes. The evidence in the record in DR 9-94 and in this case establish an unbroken chain of use. Even if the chain is found to be broken, there is no dispute that the use was lawfully established prior to August 14, 1980.

Q.#4 Are there any procedures specified for acknowledging the use as a conditional use?

A. Yes, the use "...shall be *deemed* conforming and not subject to the provisions of MCC. 8804..." MCC .2028(B). (emphasis added.) The County does not specify any set of procedures for this operation to occur, merely that specified criteria be met. In fact, the record from CU #23-90 clearly shows that staff and County Counsel believed that the facts satisfied MCC 2028(B) and that there was no additional County procedural requirement to be met to create a conditional use for the kennel property.

MCC .2028.B does not require a discretionary review process such as an administrative review or a public hearing except in one instance. The only reference to a public hearing in MCC 2028.B is to subject changes of use to the review procedures of MCC .2012, the conditional use process in EFU zones. This is consistent with the hearing requirement for changed uses found in MCC 11.15.7110.D. The kennel property never changed use. For nearly 40 years the property was used as a dog kennel, either a commercial kennel or a private kennel.

Staff's conclusion was that the dog kennel was a conforming conditional use which was not subject to a hearings process because *"...the code did not require a hearing."* (CU #23-90 Hearing Tape, Side B.) Even as late as the staff report for DR 9-94, staff was operating under the assumption that the kennel was a "conforming conditional use".

MCC .2028.B is precisely the type of "conditional use" the Supreme Court acknowledged in Anderson v. Peden. It is a use that must be allowed if certain conditions exist or are satisfied.

Meaning 2: Permit Subject to Conditions -- Discretionary.
This is the meaning which many people focus on -- a physical permit. County code requires that *"A conditional use permit shall be obtained for each conditional use approved, before development of the use."* MCC 11.15.7130. Actual conditions which must be met for conditional uses in an EFU zone are listed in MCC 115.15.7120 and MCC 7122.

Tim and Angela Schillereff have a conditional use permit under this definition -- CU 23-90 issued for the change in use, i.e., the watchman's residence. However, even under this interpretation of the term, it is important to remember that the Planning Commission, in granting the permit for the watchman's residence, approved the underlying kennel use. (See, affidavits of Commissioners Fry and Douglas and 11/6/90 Hearing Tape, side B.)

Meaning 3: A Process -- Discretionary.
The County code defines "Conditional Use" as" *A use which may be permitted by the Approval Authority following Action proceedings, upon findings by the authority that the approval criteria have been met or will be met upon satisfaction of conditions of approval."* MCC 11.15.0010. An "Action" is a *"...proceeding in which the legal rights, duties or privileges of specific parties are determined only after a hearing in which such parties are entitled to appear and be heard, including requests for ... (C) Conditional Uses...".* MCC 11.15.8205. Actions require a pre-application conference, adequate notice, a staff report, a hearing, written findings of fact and conclusions; and a decision on the merits. MCC 11.15.8215 - 8240.

CU 23-90, the request for a watchman's residence is an example of the conditional use process within the context of this third meaning. CU #23-90 could not have been granted without first establishing the legal rights of the underlying use. That is what staff did administratively when it applied MCC .2028.B to the underlying use to elevate the kennel to a conforming conditional use.

The opponents rely upon the argument that a "conditional use" is a physical permit that goes through the "conditional use" process. They rely upon the second and third recognized definitions. Anderson v. Peden shows us that there is another meaning of the term "conditional use". It is that first meaning which the staff and Planning Commission relied upon in order to find that the underlying kennel use is a conforming conditional use.

V. Land Use Planning Context of MCC .2028.B

The simple answer to the Hearings Officer's question is that no permit of any kind is required to legitimize the pre-existing dog kennel use, because dog kennels are listed as a conditional use in the EFU zone and the kennel use was legally established prior to it being listed as a conditional use. MCC .2028.B[2] specifically exempts pre-existing listed conditional uses from applying for a conditional use permit, or from showing that they have been used continuously since they were first legally established.

Consider the list of conditional uses in Multnomah County's EFU zone.[3] Imagine the administrative quagmire that would result if every rural dwelling, every church, every school, every park and every playground had to document that it had been legally established and continuously used in order to exist or expand. Worse yet, imagine the untenable situation a rural homeowner would face if required to demonstrate that her single family residence had received conditional use approval in order to be deemed a "conforming use," when no conditional use permit was required when the house first was constructed. Multnomah County foresaw this bureaucratic morass when it exempted pre-existing conditional uses -- such as rural houses, churches, parks, transmission lines and dog kennels -- from both of these onerous processes, provided they were legally established at some point prior to August 14, 1980.

In my experience,[4] it is not uncommon for local zoning codes[5] to recognize the validity of pre-existing, listed conditional uses. Despite the term "conditional use

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[2] ***11.15.2028 Exemptions from Non-Conforming Use Provisions***

(B) Conditional uses listed in subpart MCC .2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC .8804 [actually MCC .8805, non-conforming use provisions], *provided, however, that any change in use shall be subject to approval pursuant to the provisions of MCC .2012* [this section lists conditional uses and states that they are subject to the provisions of MCC .7005 to .7030]. (Emphasis Added.)

[3] MCC .2012 Conditional Uses lists public or private schools, churches, utility facilities, geothermal exploration, private parks and preserves, golf courses, solid waste disposal sites, road widening and reconstruction, mining operations, non-farm dwellings and horse training and boarding as "conditional uses."

[4] Attached is a copy of Mr. Winterowd's professional planning qualifications to address the meaning and application of MCC 11.15.2028 in the context of **CU 4-95 & MC 1-95, #23.** Also attached is a copy of similar provisions of the Clackamas County Zoning Code, which demonstrate that Multnomah County is not alone in recognizing the validity of pre-existing, listed (as opposed to "permitted") conditional uses -- and exempting such "conforming" conditional uses from meeting non-conforming use requirements.

[5] For example, Clackamas County Zoning Ordinance (CCZO) Section 1203 "Conditional Uses" requires a conditional use permit for expansion of a conditional use, but no "permit" *per se* is required to recognize the legitimacy of a pre-existing conditional use. CCZO 1203.01 allows conditional uses subject to compliance all CCZO requirements and satisfaction of conditional use approval criteria listed in the same section. In this regard, the CCZO mirrors MCC .7005. CCZO 1203.02 also recognizes the validity of all pre-existing, listed conditional uses and requires a new conditional use when they are altered or expanded:

permit," there need not be a "permit" *per se.* Rather, the term "conditional use" may refer to a discretionary use that may (or may not) be authorized if conditions mitigate identified impacts. If the use is already there, no "permit" is required for the use to continue because there are no new impacts resulting from the use. However, conditional use approval is normally required for the use to change or expand.

For example, a church in a residential zone may be left alone by zoning officials until there is a proposal to expand its floor area or parking lot, or to change the use itself (e.g., to turn the old church into a dance studio or apartments). The church need not prove that it has been in continuous operation or that it has a conditional use permit to continue functioning as a church.[6] Consider another common conditional use -- a non-farm dwelling in an EFU zone. Although new non-farm dwellings require conditional use approval, existing dwellings on small rural lots in EFU zones typically are allowed to add a bedroom without a public hearing for a conditional use permit or expansion of a non-conforming use. In both of these cases, the conforming conditional uses may be permitted to function as if they were permitted uses, at least until they seek to expand or change their listed conditional use.

VI. Additional Reasoning

MCC .7105 **Purposes** states that:

> *Conditional uses as specified in a district or described herein, because of public convenience, necessary, unique nature, or their effect on the Comprehensive Plan, may be permitted as specified in the district* ***or*** *described herein, provided that any such conditional use would not be detrimental to the adjoining properties or to the purpose and intent of the Comprehensive Plan.* (Emphasis added.)

1203.02 The Hearings Officer may approve an alteration and/or expansion of a use which predates the code, and is allowed as a conditional use in the zone, if the conditional use criteria under Section 1203.01 can be met.

This ordinance provision was added in 1992. Thus, the hearings officer need not approve the conditional use itself, only its expansion.

[6] Clackamas County goes further than this and allows non-conforming churches not listed in the underlying zoning district to expand, subject to meeting conditional use criteria. CCZO 313.06(D) reads:

> *Any church which was legally established prior to July 14, 1980, may be altered or expanded subject to Hearings Officer review, pursuant to Section 1300.* [Administrative Process] *Approval shall not be granted unless the applicant demonstrates that all of the following conditions are met:*
>
> *A. The use shall not extend beyond the property which was under the ownership of, or occupied by the preexisting church, and associated facilities prior to July 14, 1980.*
>
> *B. The proposed altered or expanded church satisfies conditions B-E under 1203.01.* [conditional use approval criteria]

Multnomah County's EFU district permits listed conditional uses if they were legally established prior to August 17, 1980. It "permits" them without a public hearing to recognize their "conforming" status. Unless a change in use is proposed, a pre-existing, listed conditional use is in effect a "permitted" use.

MCC .7130 **Conditional Use Permit** reads:

> *A conditional use permit shall be obtained for each conditional use approved, before development of the use. The permit shall specify any conditions and restrictions imposed by the approval authority or Board of County Commissioners, in addition to those specifically set forth in this Chapter.* (Emphasis added.)

This section is consistent with MCC .2028.B. By definition, a pre-existing listed conditional use is *already* developed. It makes no sense (i.e., no public purpose would be served) to require a conditional use permit for a use that is already developed and "conforming."

The Planning Commission's 1990 decision recognized the validity of the dog kennel by approving an accessory use to the dog kennel. The Planning Commission agreed with its staff that MCC .2028.B recognized the *listed conditional use as a conforming use because it was legally established prior to 1980.* They determined that no additional land use review was required for the dog kennel. It was the change in use (i.e., the night watchman's facility) that triggered the need for a public hearing and conditional use review. As noted in our August 16 Supplemental Report, the 1990 Planning Commission approved the night watchman's residence as an "accessory use" defined in MCC .2014. They determined that the proposed accessory use constituted a change in use, and approved a conditional use permit in accordance with MCC .7105.D. **We note that it is impossible to have an accessory use without an approved primary use.**[7]

[7] MCC .2014 defines accessory uses as "uses or structures incidental and accessory to the uses permitted under MCC .2008 through .2012." Note that MCC .2012 is the conditional use section; therefore, the only way the Planning Commission could have approved an accessory use is to have first recognized the dog kennel, which is a use listed in MCC .2012, Conditional Uses.

VII. The 1994 Hearings Officer's Decision Cannot Overturn Established Policy as Applied to an Approved and Conforming Conditional Use

The 1994 Hearings Officer's decision renders MCC .2208 meaningless and contradicted well-established staff and Planning Commission policy.[8] That policy was applied to the kennel and watchman's facilities in the 1990 Sauvie Island Kennel conditional use decision -- when the issue was not before the Hearings Officer. The original owners of the dog kennel could not possibly have applied for and received conditional use approval when they legally established the use in 1954, because a conditional use permit was not required at that time. Following a public hearing in 1990, the Planning Commission found that MCC .2028 authorized Sauvie Island Kennel as a conforming conditional use, and approved an accessory use (i.e., a change in use) through the conditional use process. The Planning Commission specifically recognized Sauvie Island Kennel as a "well established use" and a "conforming conditional use," thereby exempting it from meeting non-conforming use requirements.

The 1994 Hearings Officer's decision illogically requires Sauvie Island Kennel to meet non-conforming use requirements, and directly contradicts the clear meaning of MCC .2208 and the Planning Commission's prior (1990) decision. Although the Hearings Officer (in 1994) was not precluded from reaching a different decision in a different situation regarding the kennel expansion (because he felt a written permit was required), he was precluded from taking away conditional uses (both the primary kennel and the accessory watchman's residence) approved by the Planning Commission in 1990.

VIII. Additional Evidence Documenting Continuing Use of the Legally Established Dog Kennel

The following table represents a synopsis of affidavits, letters, and history found in the record for both DR 9-94 and the present application. The table demonstrates that there has been **no discontinuance** of the dog kennel from its creation until the present. Although the number of dogs living or boarded at the kennel varied over time, there have never been fewer than four adult dogs over the age of six months present in any given year.

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[8] When questioned, Senior Planner Bob Hall observed that County staff had approved expansions of several conforming conditional uses in the past, based on administrative interpretation of MCC .2208. He said that no records were kept of these determinations because they followed established policy. That is, no further review process was required. (Personal Communication, Bob Hall, August 21, 1995).

In DR 9-94, Hearings Officer Grillo erred in relying almost exclusively upon four County nonconforming use cards to show that the applicants failed to meet their burden of proving continuous use. In a recent conversation with County Planner Bob Hall, Mr. Hall disclosed that the County has made infrequent and sporadic use of those cards. The cards were filled out by building inspectors whenever they happened to be in the area of the kennel property. The County never had a program of regular review of nonconforming use. Those cards were never intended, nor were they used by staff, to prove the existence or nonexistence of a nonconforming use.

Time Period	Number of Dogs	Source of Information
1950s - present	unknown, but continuously used as a kennel	George Douglas, a Planning Commissioner in 1990.
1952 - present	unknown, but continuously used as a kennel	C. Dondo (in 1967)
1954 - present	unknown, but continuously used as a kennel	Red Persinger (in 1967)
late 1950s - 1969	unknown, but kennel usually full; at least four dogs always boarded	Mildred Meifert, who's son owned kennel from 1969 to 1973, remembers Evelyn Blitz's tenure as kennel owner.
1958 - 1969	at least 25, continuously	Pat Baggett remembers Evelyn Blitz had at least 25 dogs continuously in the kennels.
1958 - 1967	unknown, but in continous use	George Cashdollar (in 1967)
1961-1965	about 50	Norman Crowe says Evelyn Blitz operated a kennel with about 50 dogs, the kennel's capacity.
1964 - present	continuous use as a kennel	Norman Crowe says kennel in continous use during these years.
1969	about 50	Norman Crowe remembering Myron Meifert's operating the kennel.
1969 - 1973	10 kennels open; at least four dogs	Mildred Meifert describing kennel operation during Pein's ownership.
1969 - 1973	at least six	Pat Baggett remembers the Peins had at least six dog continuously boarded.
1969 - 1973	owner's three dogs; boarded friends' dogs; at least four dogs	Marguerite Persinger
1970 - 1973	owner's three dogs and Red's two dogs; at least five dogs	Red Persinger (in 1994)
1973 - 1989	owner's three dogs; boarded friends' dogs; at least four dogs	Mildred Meifert
1973 - 1989	owner's three dogs; boarded friends' dogs; at least four to six dogs	Marguerite Persinger
1973 - 1989	between three and ten	Pat Baggett remembers the Persingers always had several dogs boarded.

IX. Suggested Conditions of Approval

The Schillereffs' February 23, 1995 Land Use Request lists in detail the Schillereffs' proposed program to mitigate identified impacts of the dog kennel on neighboring properties. Significantly, the Schillereffs have heard nothing from opponents Marquam Farms in response to their proposed mitigation program. The Schillereffs reiterate that they will gladly implement any reasonable conditions of approval to mitigate potential impacts identified as a result of this land use review process. The Schillereffs' intent has always been to resolve conflicts through open communication, sound facility management, and on-site improvements where justified.

The Schillereffs offer to abide by the following conditions if deemed necessary by the Hearings Officer:

1. Each dog shall be confined within a fenced/walled kennel run consistent with County Animal Control standards.
2. When boarded dogs are exercised, they shall remain on a leash at all times and shall not be permitted to roam free.
3. Kennel structures, including kennel runs, the office and the grooming area, shall be designed as proposed on the site plan to keep all of the dogs within a single, walled and roofed structure. A 100' solid wall shall be maintained for the full length of the kennel along the shared access with Marquam Farms, to minimize noise impacts from barking dogs. The kennel roof shall be insulated, thus reducing noise transmission to and from the kennel.
4. The parking lot and driveway shall be designed so that patrons' vehicles will not be visible to dogs as they drive past the kennel. The parking lot shall be provided with wheel stops and signs to ensure that customer vehicles are parked in an orderly fashion.
5. The perimeter chain link fence shall be fitted with vinyl slats to minimize visibility from inside the kennel to the driveway and Marquam farms.
6. The mature birch trees and landscaping inside the courtyard will be retained, as will the mature trees to the west of the existing huts.
7. The kennel capacity shall not exceed 75 dogs.
8. Lighting shall be designed so as not to shine directly on the Marquam Farms hunting area.
9. New landscaping and fencing shall be installed as proposed to enhance the appearance of the kennel.
10. All applicable County drainage regulations shall be met in the design and construction of the proposed kennel expansion.

WPS Memorandum

TO: **Mr. Gary Adamson, Multnomah County Hearings Officer**
FROM: Eric Eisemann
SUBJECT: **Schillereff. CU 4-95 & MC 1-95, #23**
DATE: August 23, 1995

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Please enter the following information into the public record for the above mentioned application.

MCC 11.15.2028 is not a completely anomalous code provision. Similar language is found in the MCC for zoning districts other than EFU. See, for example:

CU	11.15.2070
AG F-2	11.15.2180
MUA-20	11.15.2150
MUF	11.15.2190
RR	11.15.2230
RC	11.15.2270

Each of these code sections exempts listed conditional uses from nonconfoming use provisions of the code. The County has established a pattern for deeming nonconforming uses to be conforming conditional uses.

For example, on Sauvie Island, the Sauvie Island School, located in a MUA zone, was rebuilt through a building permit and design review process, not a conditional use process, by application of 11.15.2150. The prior nonconforming use, listed as a conditional use, was deemed to be a conforming conditional use by staff interpretation of the code. No conditional use hearing was required and no physical permit was issued.

The application of a parallel code section to the Sauvie Island School is evidence that the actions of the Planning Commission, staff and County Counsel in CU 23-90 are part of a larger pattern of County practice. CU 23-90 was not an anomaly - it was accepted lawful practice.

Thank you.

Land Use and Resource Planning • Growth Management • Site Development
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COPY

BEFORE THE MULTNOMAH COUNTY HEARINGS OFFICER

IN THE MATTER OF THE APPLICATION OF TIM AND ANGELA SCHILLEREFF FOR CONDITIONAL USE, OR, ALTERNATIVELY, FOR THE EXPANSION OF A NON-CONFORMING USE. FILE NOS. CU4-95, MC-95	)))))))	APPLICANTS' SUPPLEMENTAL MEMORANDUM

This memorandum addresses the alternative bases for the grant of the two requested permits for changes to the existing Sauvie Island dog kennel requested by Tim and Angela Schillereff, enabling them to update and expand their facility and provide improvements to reduce noise to nearby parcels. The improvements would allow the Schillereffs to change their 1950s facility in to a modern facility with the highest standards of dog care.

I. INTRODUCTION

The background of these applications is well known by now. The Schillereffs' predecessors in title had a kennel on the site since the early 1950s, though the intensity of that use had fluctuated over time. Since they began their own operations in 1989, the Schillereffs have applied for three discretionary land use permits and have received two approvals. The Schillereffs had previously discussed the need for various permits with the Multnomah County Planning Staff and were prepared to file a conditional use permit application. They were told by the staff that, under MCC 11.15.2028 (discussed below) they did not need to apply for a conditional use permit, as their existing use was already recognized. They then made the two discretionary applications discussed below, i.e., (1) design review for some changes to their 50-unit kennel facility and (2) for an accessory watchman's residence in conjunction with the same. The underlying predicate for both applications, shared by the applicants and staff alike, was that the underlying use was recognized by MCC 11.15.2028. Had there been any doubt at the time of these applications in 1990, the Schillereffs would have applied for, and received, a conditional use permit.

As indicated above, the two permits approved were requested in 1990 and consisted of a design review to remodel the kennel and a watchman's residence. The second request was a conditional use permit application and was approved by the Multnomah County Planning Commission. In each of these two cases, there was notice, an opportunity for a hearing (and, in the case of the conditional use permit, an actual hearing) and an opportunity to appeal. Relying on those permits, the Schillereffs proceeded to invest in, and build, their business.

The last requested permit, applied for in 1994, had the same predicates as the two pervious permits. The request received a favorable staff report, but was denied by the Hearings Officer, who interpreted MCC 11.15.2028 differently than staff, and which provides:

> Conditional uses listed in subpart MCC .2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC .8804, provided, however, that any change of use shall be subject to approval pursuant to the provisions of MCC .2012. (Emphasis supplied)

The County planning staff and County Counsel had, until the hearing, interpreted this provision to mean that, if there were a use lawfully established by August 14, 1980 which appeared on the list of conditional uses in MCC 11.15.2012, there was no need to apply for, or obtain, a conditional use permit through a separate proceeding, but that any change of that use would require a conditional use permit. Instead, the Hearings Officer read this section to say that, if the use were discontinued after a more restrictive land use regulation were imposed, the use was lost. The Hearings Officer denied the third application (a design review request to increase the number of kennels from 50 to 75), because he found there was no conditional use permit issued and there was a gap in the evidence with respect to the nonconforming use claim during the period 1962-1964. In dicta, the Hearings Officer made observations on the lawfulness of the kennel use. This decision was not appealed.

In the instant proceedings, the Schillereffs request conditional use approval of their kennel so they may have formal recognition of their operation by the County and a total of 75 kennel runs. Alternatively, they seek an alteration of their existing nonconforming use so as to accommodate the 75 runs. The alternative nature of the applications is necessitated by OAR 660-

33-120, which indicates that new kennels may not be located on high-value farmland; however, existing kennels may be enhanced or expanded, subject to other requirements of law. The Schillereffs have an existing kennel as provided under this section. If for any reason they do not meet this requirement, the Schillereffs have requested an alteration of their lawful nonconforming use.

II. THE CONDITIONAL USE REQUEST

As noted above, this request assumes the lawfulness of OAR 660-33-120 and that the existing operations are existing lawful nonconforming uses. The nonconforming use aspect is treated below. The applicant has addressed each of the applicable approval criteria for the conditional use in its application. The response to those criteria has been analyzed by the planning staff, who have advised the Hearings Officer that the standards have been met. The only reason for the recommendation of denial is the staff's view of the effect of the 1994 proceedings on this application and of the effect of OAR ch. 660, Div. 33.

The Schillereffs reiterate the point they made at the hearing regarding OAR ch. 660, Div. 33, i.e., that the Land Conservation and Development Commission cannot adopt rules in conflict with state statute, in this case ORS 215.283(2)(m). The legislature has entrusted the judgment as to the location of kennels to counties under the cited statute, rather than to the Commission. LCDC cannot substitute its judgment through rulemaking for that of the authorized local government to which such determinations are delegated. See McKnight v. LCDC, 74 Or App 627, 704 P2d 1153 (1985). As applied to this case, the cited rule provisions are not an obstacle to consideration of this conditional use.

Even if the cited rule were applicable, the Schillereffs contend they have an "existing" kennel within the meaning of that rule because of the permits issued in 1990 which allowed changes in the kennel and permitted an accessory watchman residence in conjunction with the kennel use. Further, as presented by Mr. Eisemann during the hearing, the Planning Commission during the 1990 proceedings adopted the staff view that MCC 11.15.2028 validates the underlying conditional use of a kennel as a part of the proceedings involving the watchman's

residence. As noted by the Hearings Officer during the 1994 proceedings, the 1990 permits are beyond challenge and have been acted upon through physical development. They thus form the core of an existing nonconforming use and may be the predicate of the changes to that existing use permitted by OAR 660-33-120.

III. THE APPLICATION OF MCC 11.15.2028

The Schillereffs contend that MCC 11.15.2028 allows their kennel use under the interpretation given it in all similar cases before the 1994 proceedings in this case, i.e., if a use listed as being conditionally allowed in the exclusive farm use zone were lawfully established before August 14, 1980, it was entitled to conditional use recognition. Unlike the situation in which development approval has been given and acted upon (as was the case in the 1990 permits), interpretations by the Hearings Officer do not have permanent effect and may be revisited by future Hearings Officers or the Board of Commissioners in other cases, there being no statute to the contrary.[1] In fact, LUBA has stated in Reeder v. Clackamas County, 20 Or LUBA 238, 242-245 (1990) in treating this point:

> B. Failure to Apply Prior Interpretation
>
> As the hearings officer points out in the above quoted portion of his decision, a hearings officer's decision in a prior case, involving different parties and different property, determined that plan policy 13.1(f) was satisfied where only 72% of the parcels in the relevant area were less than two acres. Petitioner contends that because the two decisions are so close in time, the hearings officer should be bound to apply the earlier interpretation of plan policy 13.1(f) and therefore approve his request for rezoning.
>
> Petitioner concedes the county is not bound by statute or ordinance to follow its own precedents in quasi-judicial decision making. However, petitioner contends it is well settled that federal administrative agencies must either interpret and apply the law consistently in quasi-judicial proceedings, or explain why they decide to depart from established precedents. See 4 Davis, Administrative Law Treatise 20:11 (1983), and

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[1] There is, in fact, a statute under the Oregon Administrative Procedures Act which deals with the consistency of contested case determinations with past determinations. ORS 183.482(8)(b)(B). However, even that statute allows revisiting of policy, so long as an explanation of departure from past interpretations be given.

cases cited therein. In Oregon, a similar requirement is imposed by statute on state administrative agencies. ORS 183.482(8)(b)(B). Petitioner suggests ORS 215.416(8) can be read to impose essentially the same requirement on county decision makers.

Citing our recent decision in Nelson v. Clackamas County, 19 Or LUBA 131 (1990), petitioner contends contemporaneous application of approval criteria should not produce different results where applicants are similarly situated. Petitioner contends the hearings officer went beyond his proper role as a quasi-judicial decision maker who, observing stare decisis, should interpret and apply the law in the same way in similarly situated, contemporaneous cases. Petitioner contends the hearings officer improperly assumed the role of a policy maker, and substituted one reasonable interpretation of policy 13.1(f) for another. Where the choice is simply between two reasonable and correct interpretations, petitioner contends the hearings officer should observe stare decisis and adhere to the interpretation applied in the August 1989 decision.

There are several problems with petitioner's arguments under this assignment of error. First, it is not clear that ORS 215.416(8) and (9) impose the same obligation to explain departures from prior precedent that is imposed on state and federal agencies. Even if the hearings officer were under such an obligation, the hearings officer in this case explained why he did not apply the same interpretation in this case that was applied in August 1989. He stated that the August 1989 interpretation of plan policy 13.1(f) was wrong, explaining that where 28 percent of the parcels in a given area are larger than two acres "virtually all" of the parcels are not less than two acres.

We have explained on several occasions that when this Board reviews land use decisions for compliance with relevant approval standards, it does not matter whether the challenged decision is consistent with prior decisions, if those prior decisions applied incorrect interpretations of the applicable approval standards. As we explained in Okeson v. Union County, 10 Or LUBA 1, 5 (1983) in rejecting petitioner's arguments that the county's decision in that case should be remanded for failure to follow prior decisions:

> "The issue here is whether [the challenged decision] meets all the applicable criteria based upon the facts in the record. There is no requirement local government actions must be consistent with past decisions, but only that a decision must be correct when made. Indeed, to require consistency for that sake alone would run the risk of perpetuating error. * * *."

See also BenjFran Development v. Metro Service Dist., 17 Or LUBA 30, 46-47 (1988); S & J Builders v. City of Tigard, 14 Or LUBA 708, 711-712 (1986).

We also reject petitioner's suggestion that the hearings officer improperly assumed the role of policy maker and chose between two reasonable and correct interpretations of plan policy 13.1(f). The hearings officer is clearly correct that the

construction of plan policy 13.1(f) applied in August 1989 was erroneous. Where 28 percent of the parcels in an area are in excess of two acres, it would be incorrect to conclude that "virtually all" of the parcels in the area are less than two acres. Similarly, the hearings officer's interpretation that policy 13.1(f) is not met in this case is also correct. Where 16 percent of the parcels in an area are in excess of two acres, it would be incorrect to conclude "virtually all" of the parcels are less than two acres.

In this case, the hearings officer simply refused to follow a prior erroneous construction of plan policy 13.1(f). In doing so he committed no error. We believe the hearings officer would have erred had he applied the prior construction of policy 13.1(f) which petitioner argues he should have applied in this case. See McCoy v. Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

The determination of the proper interpretation is also given by Oregon statutory law with respect to nonconforming uses, of which MCC 11.15.2028 is a species. ORS 215.130 states, in relevant part:

> (5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted to reasonably continue the use. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted.
>
> * * *
>
> (7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption. (emphasis supplied)

The determination as to continuation of a nonconforming use, as well as its alteration and resumption after a period of interruption and abandonment, is framed in the permissive ("may"), thus leaving the matter to local ordinances such as MCC 11.15.2028. This is distinguished from the use of mandatory ("shall") language such as that found in the last sentence of ORS 215.130(5), above. The question then moves away from whether the County had the authority to adopt MCC 11.15.2028 to the interpretation of this provision.

As indicated in the Winterowd memorandum submitted contemporaneously, the interpretation given this provision by staff and county counsel before the 1994 proceedings in this case was clear and consistent. The reading made by the Hearings Officer in the 1994 proceedings,

while expressing a different view, is clearly wrong and at odds with the wording of the provision itself and reads out of the section the very words it contains. The kennel use was present before August 14, 1990 and there is no provision relating to discontinuance with respect to these listed conditional uses in the EFU zone (unlike nonconforming uses in other zones in unincorporated Multnomah County which do not have a provision similar to MCC 11.15.2028 and in which the default provisions of a one year discontinuance may be effective).

Additionally, there is no magic in the term conditional use, which is a term of art, given many different meanings in different jurisdictions. This disparity in meaning is illustrated in Anderson v. Peden, 284 Or 313, 315-316, 587 P2d 59 (1978):

> The case presents a number of separate issues which we take up in order.
>
> 1. *The Deschutes County ordinance.* The first issue concerns the conditions under which Deschutes County allows a mobile home to be placed on land zoned 'A-1' under its zoning ordinance. We begin with the fact that neither these conditions nor the scope of respondents' discretion in granting or denying a permit follows simply from describing a particular type of structure or land use as a 'conditional use.' Zoning law is not common law but a branch of state and local legislation and administrative law, created by particular statutes, rules, charters, comprehensive plans, ordinances, and resolutions, and the criteria governing such matters as 'conditional uses' must be sought there rather than in cases from other cities, counties, or states. The court's first task is to interpret the Deschutes County ordinance. *See Clackamas County v. Dunham,* 282 Or 419, 579 P2d 223 (1978).
>
> Standing alone, the term 'conditional use' can convey quite different meanings. It could mean that the specified use is a permitted use whenever certain conditions exist or are satisfied. Or, second, it may mean that the use will be permitted subject to special conditions attached to the individual permit. Third, 'conditional use' historically has often been employed simply as a device to permit discretionary decisions on certain uses, without much attention to the meaning of 'conditional.' *See* 3 Anderson, American Law of Zoning (2d ed 1968) 147-148, §18.05. Rather than assuming that the term is a known word of art, it would be helpful if draftsmen would spell out what 'conditions' are meant; but the Deschutes County Zoning Ordinance, which contains an extensive list of definitions, does not include a definition of the term "conditional use.' * * *" (Footnotes omitted)

The Hearings Officer should give MCC 11.15.2028 the interpretation given by the staff and county counsel before the 1994 proceedings. Such an interpretation is consistent with the language of the text and the principle that zoning ordinances, being in derogation of the common

law, are to be construed in favor of the property owner. Lane County v. Heintz Const. Co., 228 Or 152, 158-159, 364 P2d 627 (1961). The Hearings Officer is free to make an independent interpretation and is not bound by some disembodied notion of res judicata not contained in statute or the county code and for which no citation of authority is provided.[2] Moreover, this interpretation was the predicate of the 1990 conditional use decision and, to the extent res judicata operates at all, it is fulfilled in the grant of the watchman's dwelling and subsequent development of the same.

III. ALTERATION OF A NONCONFORMING USE

Based on the same considerations as those underlying the Schillereffs' claim to be an "existing" kennel under OAR 660-33-120, the Schillereffs also contend that they are a lawful nonconforming use and may therefore apply for an alteration of that use. The existing kennel is based on permits issued by the County which have been acted upon and are beyond appeal. The application addresses the criteria for alteration of a nonconforming use.[3] The staff does not dispute the applicants' position, but, as with the conditional use alternative, relies upon its view of the effect of the 1994 proceedings. For the reasons set forth above, the Schillereffs contend they have an existing nonconforming use which is eligible for alteration. They further claim they have met the criteria for alteration and request approval on this alternative ground as well.

IV. CONCLUSION

Tim and Angela Schillereff have presented three alternative bases for the increase in the number of units which may be permitted at their existing kennel operation. The first is the interpretation of MCC 11.15.2028, by which they claim to have an existing conditional use for their operation and seek to add further units to the same. The second is their qualification as an

---

[2] A full discussion of issue preclusion was made by LUBA in Nelson v. Clackamas County, 19 Or LUBA 131, 136-140 (1990) and is excerpted as Exhibit A, attached hereto.

[3] The applicants have provided sufficient information to fill the evidentiary gap which troubled the hearings officer in 1994. Additionally, the applicants suggest that the baseline for adverse impacts in the neighborhood deals with the lawful agricultural uses in the area and would include neither the unpermitted duck club on the adjacent property, nor any nonconforming use. See, by analogy, Smith v. Washington County, 241 Or 380, 384-385, 406 P2d 545 (1965).

existing kennel operation, which entitles them to request conditional use permit approval notwithstanding OAR ch. 660, Div. 33, and their further contention that the conditional use permit should be granted under the county code.[4] The third basis assumes no conditional use exists or that the same cannot be expanded. In that event, the Schillereffs are entitled to alteration of their existing nonconforming use. We have also taken the liberty of proposing conditions of approval, which we have discussed with staff.

The Schillereffs request Hearings Officer approval of one or more of their alternative requests and appreciate the Hearings Officer's time and efforts in hearing this matter.

DATED this 23rd day of August, 1995.

Edward J. Sullivan, OSB 69167
of Attorneys for Applicants
Tim and Angela Schillereff

[4] A subset of this contention is that OAR ch. 660, Div. 33 cannot validly displace the legislative delegation to Multnomah County to determine the proper location of kennels under ORS 215.283(2)(m).

Nelson v. Clackamas County, 19 Or LUBA 131, 136-140 (1990) states as follows:

> Whether issue preclusion applies, i.e., whether the county's 1980 determination on the general unsuitability of Tax Lot 300 should have preclusive effect on the county's 1989 determination on the same issue, is a closer question.
>
> **[FOOTNOTE 6: In this instance, it is undisputed that general unsuitability of Tax Lot 300 was determined in the county's 1980 decision, and was essential to that decision. **]
>
> We are uncertain whether, as the county argues, its 1980 decision could not be given preclusive effect, preventing the county from making a different determination on the same issue in 1989, because the county was the "decision maker" in the 1980 and 1989 proceedings, rather than a "party."
>
> Both decisions of the Oregon appellate courts and the Restatement suggest that issue preclusion might apply to prevent an administrative agency from deciding an issue differently than it did in a previous decision. See Bowser v. Evans Products Co., 17 Or App 542, 522 P2d 1405 (1974) (award of medical services by Workers' Compensation Board precluded by earlier Board ruling that claimant had no permanent partial disability); Restatement § 83, comment h (recognizes that issue preclusion can generally be invoked against the government in adjudications before an administrative agency unless an exception applies).
>
> Although issue preclusion is generally invoked by a party against an opposing party appearing before an administrative tribunal, it is not clear whether the involvement in the agency adjudication of an opposing, non-agency party is essential to the application of the doctrine. For instance, the Restatement discusses the possibility that, where the same fact pattern presents itself in adjudications occurring before a state revenue agency over the course of time, issue preclusion could apply to prevent the state revenue agency from reaching a different determination concerning a taxpayer's tax liability than it had in a previous year. Restatement § 83, comment c.
>
> Furthermore, unlike a court in judicial adjudications, a local government has a more complex role in quasi-judicial land use adjudications before it than that of a neutral decision maker. For instance, although the local government must provide an unbiased decision maker (usually a hearings officer, planning commission or the governing body), local government staff members may present evidence to the decision maker and advocate positions regarding interpretation and application of approval criteria. Additionally, unlike a trial court, when local governments' decisions are appealed to this Board, the local governments are parties respondent and generally appear and defend their decisions. See League of Women Voters v. Coos County, 82 Or App 673, 679, 729 P2d 588 (1986) ("counties are always nominally, and are often in fact, adverse parties to the appellant in appeals to LUBA from their decisions").

However, even if issue preclusion could theoretically be applied to the county, even though it did not participate in the 1980 proceeding as a "party," an issue we need not and do not decide, we conclude it would be inappropriate to apply issue preclusion in this case. According to Restatement 83(1), quoted supra, giving preclusive effect to adjudicative determinations by an administrative tribunal is subject to the same general exceptions to the application of issue preclusion recognized by Restatement .§ 28, and to specific exceptions recognized by Restatement .§ 83(2)-(4). Of these exceptions, we find two have particular relevance to the situation presented in this case.

Restatement .§ 28(2) states that issue preclusion will not be applied where "[t]he issue is one of law and * * * a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws * * *." In explaining this exception, the Restatement provides in comment c:

> "In determining whether the applicable legal context has changed, or that applying preclusion would result in inequitable administration of the law, it is important to recognize that two concepts of equality are in competition with each other. One is the concept that the outcomes of similar legal disputes between the same parties at different points in time should not be disparate. The other is that the outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according to the same legal standards. Applying issue preclusion invokes the first of these concepts, treating temporally separated controversies the same way at the expense of applying different legal standards to persons similarly situated at the time of the second litigation. * * *
>
> "In deciding whether to apply issue preclusion, or instead to apply a subsequent emerging legal standard, the choice is between two forms of disparity in resolution of legal controversy. * * * [T]he essential problem is that there has been change in [interpretation of] the law but not the facts. * * * *In this connection it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of law.*" (Emphasis added.)

Land use regulations, like tax law, affect the general public. Furthermore, in Oregon, counties and cities are the units of government charged with administering the general body of land use law (i.e., comprehensive plans, land use regulations, statewide planning goals and relevant state statutes), and applying it to members of the public. Apparently, the county's interpretation of one element of that law, the general unsuitability standard for permitting nonfarm divisions and uses in the EFU-20 zone, has evolved during the period between its 1980 and 1989 decisions. Precluding the

county from applying its current interpretation of the general unsuitability standard in its 1989 decision would unjustifiably give petitioner a favored position in the current administration of that standard.

In addition, Restatement § 83(4) provides:

> "An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:

In comment h to this section, the Restatement states that the above quoted subsection

> "* * * recognizes that the legislation governing a particular statutory scheme may call for withholding preclusion where it would otherwise be applied. * * * The scheme of remedies may intend that the proceedings in an administrative tribunal be determinative only for the purposes of the controversy immediately before the agency. For example, the [statutory] scheme may contemplate that the agency proceedings be as expeditious as possible. * * * Thus, issue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in anticipation of its effect in another proceeding."

Oregon's statutory land use scheme places a great deal of importance on advance knowledge by the public of the standards and criteria to be applied in local government quasi-judicial adjudications, and on an expeditious conclusion to such proceedings. For example, ORS 215.416(8) and 227.173(1) require that county and city decisions on land development permits be based on "standards and criteria which shall be set forth in the [zoning or development] ordinance." ORS 197.763(3)(b) and (5)(a) require local governments to give notice before and at the commencement of quasi-judicial land use hearings which includes identifying the applicable criteria from the local government's plan and land use regulations. ORS 215.428(3) and 227.178(3) require that counties and cities take final action on applications for quasi-judicial land use permits and zone changes within 120 days after the application is filed and deemed complete.

In addition, we note that Oregon counties and cities generally permit an unsuccessful land use applicant to reapply for the denied development, albeit some require that a specified period of time have elapsed before such reapplication can be made. If a local government denial of land use approval had a preclusive effect, the applied for use could never be approved by the local government, unless applicable approval criteria providing the original basis for denial were amended.

In conclusion, we believe the system of local government land use adjudications established by state statute and local regulations places primary importance on

expeditious adjudications, contemporaneous application of the same approval criteria, as set out in comprehensive plans and land use regulations, to all similarly situated applicants and the ability of a local government tribunal to make an independent determination on the application of those approval criteria to the facts before it. This system is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding.

AFFIDAVIT OF PETER FINLEY FRY

STATE OF OREGON)
) ss.
County of Multnomah)

I, Peter Finley Fry, being first duly sworn, depose and say:

1. I am a resident of Multnomah County.

2. I was a member of the Multnomah County Planning Commission when the Schillereffs brought a conditional use request for a secondary residence to the Commission, and I was present at the Commission's public hearing on the issue on November 6, 1990. I have reviewed a portion of the transcript of that hearing and Commission deliberations.

3. At the Commission meeting, since an opponent to the conditional use permit, in his testimony, had raised the issue of the legality of the underlying use, I wanted to know whether the staff considered the underlying dog kennel use to be an existing conditional use or a non-conforming use. Staff stated that the kennel use was an existing conditional use by operation of the County code and that the County did not require a public hearing in order to elevate the kennel use to a conforming conditional use.

4. I accepted staff's oral explanation and voted to adopt the staff report and approve the requested conditional use for the watchman's residence. When I voted, it was my belief that the staff report was founded upon the fact that the underlying kennel use was a conforming conditional use by operation of County code. (Staff had admitted that it had sought the advice of County Counsel on the issue.) Therefore, I accepted the staff report and opinion as resolving the issue of the kennel's legality, and voted to approve the secondary conditional use for a conforming conditional use.

5. I am not offering an opinion as to whether, in retrospect, the staff analysis was correct. I am simply stating that at the time I voted to approve the conditional use permit of the

residence, I believed that the staff had found the underlying kennel use to be a conforming conditional use.

DATED this 23 day of August, 1995.

Peter Finley Fry

Subscribed and sworn to before me this 23rd day of August, 1995.

Notary Public for the State of Oregon
My Commission Expires: 12-20-95

OFFICIAL SEAL
JANET Z. DUNCAN
NOTARY PUBLIC-OREGON
COMMISSION NO. 010913
MY COMMISSION EXPIRES DEC. 20, 1995

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MULTNOMAH COUNTY OREGON

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING
AND DEVELOPMENT
2115 S.E. MORRISON STREET
PORTLAND, OREGON 97214
(503) 248-3043

MULTNOMAH COUNTY HEARINGS OFFICER DECISION

Attached please find a copy of the Hearings Officer's decision in the matter of CU 4–95 &MC 1 –95. A copy of the Hearings Officer's decision is being mailed to those persons entitled to be mailed notice under MCC 11.15.8220(C) and to other persons who have requested the same.

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed *Notice of Review* form and a fee of $500.00 plus a $3.50 per minute charge not to exceed $500.00 for a transcript of the initial hearings(s) [ref MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)]. Instructions and forms are available at the County Planning and Development Office located at 2115 SE Morrison Street, Portland, Oregon.

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

To appeal the Hearings Officer decision, a *Notice of Review* form and fee must be submitted to the County Planning Director. For further information call the Multnomah County Planning and Development Division at (503) 248-3043.

Signed by the Hearings Officer	September 15, 1995
Decision mailed to Parties	September 22, 1995
Decision submitted to Board Clerk	September 22, 1995
Last day to appeal decision	4:30 pm, October 2, 1995
Reported to the Board of County Commissioners:	1:30 pm, October 10, 1995

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

HEARINGS OFFICER DECISION

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

September 15, 1995

CU 4-95 and MC 1-95, #23
Conditional Use Request
(Conditional Use and Alteration of a Non-Conforming Use)

Applicant requests "conditional use approval, or, alternatively, an alteration of a non-conforming use, for a 75-dog kennel"

Location:	23200 N.W. Reeder Road
Legal:	Tax Lot 15 / Section 3, T2N, R1W
Pertinent Site Size:	9.41 acres
Applicant:	Tim & Angella Schillereff 23200 N.W. Reeder Road Portland, Oregon 97231
Property Owner:	<same as applicant>
Comprehensive Plan/Zoning:	Exclusive Farm Use/EFU

HEARINGS OFFICER DECISION:

Approved, with conditions set forth below, Applicant's request for conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50–dog kennel facilities to allow no more than 75 dogs, based upon the following "Findings" and "Conclusions" with respect to conditional use approval.

Alternatively, **Approved**, with conditions set forth below, Applicant's alternate request for the resumption and expansion of a non–conforming use, based upon the following "Findings" and "Conclusions" with respect to non–conforming use approval.

CONDITIONS OF APPROVAL:

1. Approval of the conditional use shall expire two years from the date of Board final order unless substantial construction has taken place in accordance with MCC 11.15.7110(C).

2. Prior to the commencement of any site development or the issuance of any building permit, Applicant shall comply with, and fulfill, applicable Design Review standards and criteria with respect to all construction, landscaping, fencing, paving, and all other improvements.

3. The kennel capacity shall not exceed 75 dogs.

TABLE OF CONTENTS

I. ANALYSIS OF THE PROPOSAL

A. PROPOSAL SUMMARY

On April 11, 1995, Tim and Angella Schillereff ("APPLICANT") filed an application worded as follows:

> "Applicants seek **[1]** conditional use approval, or, alternatively, **[2]** an alteration of a non–conforming use, for a 75–dog kennel. . . ." (Enumeration added.)

In a February 23, 1995, narrative, Applicant declared:

- "The [Applicant] seek[s] land use approval for a 75–dog kennel." (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION," at 3.)

- "The purpose of this application is to allow the ***expansion*** of the existing kennel operation on the property." (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION," at 4 [emphasis added].)

- "In this case, [Applicant is] applying to ***modify*** a 'conforming conditional use' [.]" (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION," at 13 [emphasis added].)

In an August 16, 1995, supplemental report, Applicant declared:

- "The applicant ***presently*** holds a lawful conditional use approval for a 50–dog kennel on their property." (August 16, 1995, "SAUVIE ISLAND KENNELS SUPPLEMENTAL LAND USE REPORT," at 1 [emphasis added].)

In an August 23, 1995, a supplemental memorandum Applicant declared:

- "In the instant proceedings, the [Applicant] request[s] conditional use approval of their kennel so they may have [1] formal recognition of their operation by the County ***and*** [2] a total of 75 kennel runs." ("APPLICANT'S SUPPLEMENTAL MEMORANDUM," at 2 [emphasis and enumeration added].)

Applicant's approval request raises a mind–numbing array of issues and questions, although the peculiar chronology of land use proceedings has contributed substantially to the complexity of the issues.

At the outset, I perceive some ambivalence in Applicant's descriptions of the scope of the conditional use approval request. The various descriptions could encompass:

- a request for conditional use approval for the expansion of the kennel facilities from 50 to 75 dogs, in which case Applicant would need to demonstrate a pre–existing conditional use — which, under the circumstances, could only derive from MCC 11.15.2028(B); *or*

- a request for pro forma conditional use approval of a 75–dog kennel facility employing only the conditional use criteria in MCC 11.15.7105, *et seq.*

- a combination of both of the above, *viz*, a request for conditional use approval for a long–standing use, upon which a further request to expand the conditional use would be based.

In any event, I assume from Applicant's detailed discussion of the various conditional use criteria and issues *in conjunction with* the non–conforming use criteria and issues, that Applicant anticipates the following chronology with respect to the substantive "use" issues:

- If I conclude that Applicant has a "conforming" conditional use pursuant to MCC 11.15.2028(B), and I conclude that any expansion or modification of an *existing* conditional use *does* require additional conditional use approval, then I must evaluate the current approval request

in order to determine whether Applicant fulfills the conditional use criteria with respect to the additional 25–dog capacity. [1]

- If I conclude that Applicant has a "conforming" conditional use pursuant to MCC 11.15.2028(B), and I conclude that any expansion or modification of an ***existing*** conditional use would ***not*** require additional conditional use approval, then I will make a declaration to that effect. In that event, I can go no further because the present application would comprise a request for conditional use approval that would be unnecessary under those circumstances; only Design Review approval would be required.

- If I conclude that Applicant lacks a "conforming" conditional use pursuant to MCC 11.15.2028(B), then I will need to determine whether Applicant can now seek conditional use approval for a pre–existing use that does indeed comprise a "listed" conditional use.

- If I conclude that, notwithstanding the use's status as a "listed" conditional use, Applicant does not or cannot fulfill all of the conditional use criteria, then I must determine whether Applicant possesses a valid, enduring non–conforming use.

- If I conclude that Applicant possesses a valid, enduring non–conforming use (by reason of continuity or vested right), then I must determine whether Applicant fulfills the criteria that control any alteration or expansion of that use.

---

1 As I explain in the discussion beginning at page 63, the conditional use provisions in MCC 11.15.7105, *et seq.*, do not plainly resolve whether an *expansion* of a use that might *already* be a conditional use (via a prior approval or via the "conforming" conditional use provisions in MCC 11.15.2028(B)) must *again* proceed with conditional use approval.

- If I conclude that Applicant does not possess a valid, enduring non–conforming use, then I must finally determine whether Applicant fulfills the criteria that control any resumption of such a use.[2]

B. Site And Vicinity Descriptions

Applicant maintains dog kennel facilities on Sauvie Island situated on roughly 9½ acres in an EFU district. Approximately six acres comprise horse pasture, and Applicant raises some horses. Although composed of agricultural land, the property presents farming difficulties arising from its shape, inadequate drainage, and limited access.

The property contains an existing 50–dog kennel, which Applicant has operated for approximately six years as "Sauvie Island Kennels." According to Applicant,

> "Sauvie Island Kennel[s] is considered by many to be one of the premiere [*sic*] boarding, training and breeding kennel operations in the Portland/Vancouver metropolitan area."

Nothing in the lengthy historical record seems to dispute that characterization.

Applicant seeks authority to upgrade the facility in order to house up to 75 dogs, and to replace the two older kennel buildings with one large building that would

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2 I conclude that, because MCC 11.15.8805(B) provides that a discontinued use may be "re–established" if it "conforms with the requirements of this code at the time of the proposed resumption," and because Applicant's kennel facilities do indeed qualify as a "conditional use" listed in MCC 11.15.2012(B)(11), I find nothing in the Zoning Ordinance that would preclude the "re–establishment" of a discontinued use via a request for conditional use approval under the peculiar circumstances of this case.

In fact, if Applicant fulfills the criteria for the belated recognition of a conditional use, the resumption issue disappears. On the other hand, if Applicant cannot, in the words of MCC 11.15.8805(B), prove "conform[ance] with the requirements of this code," and if those requirements now mandate the conditional use process (which indeed they do; *see* MCC 11.15.2012(B)), then the resumption similarly disappears.

incorporate state–of–the–art construction techniques and amenities for kennel operations. The new building would then be connected to an existing third building, resulting in a kennel facility of one continuous design, as opposed to disparate, unconnected units.

The property contains two residences: a kennel–related "watchman's" residence occupied by Applicant — which the County approved in 1990 (CU 23–90) — and an older residence occupied by Elden and Marguerite Persinger, the former owners. The Persingers purchased the property in 1973, and still reside there pursuant to an agreement between Applicant and themselves. Applicant entered into a lease/purchase agreement with the Persingers in 1989, and that agreement allows the Persingers to reside on the property for the remainder of their lives.

Surrounding properties comprise agricultural or open space uses. A duck hunting club (Marquam Farms) operates on a 39–acre parcel to the east and north of the subject property. To the west and south lie open fields and crop lands with scattered farm houses and accessory structures, plus a large dairy farm. The several–thousand–acre Sturgeon Lake Wildlife Refuge owned by the Oregon Department of Fish and Wildlife lies to the northwest, separated from both the subject property and N.W. Reeder Road by a grass–covered dike.

As least as of 1990, the island contained (and appears to still contain) two other active kennels.

C. Comprehensive Plan and Zoning Ordinance Considerations

The Comprehensive Plan designates the site as "Exclusive Farm Use," and it lies within an EFU zoning district.

D. LAND USE BACKGROUND / HISTORY

(1). GENERAL

The current kennel operation uses two of the original buildings that the original kennel owner (Wallace) constructed when kennel operations first began on Sauvie Island at this location in 1952. The existing kennel facility comprised the first such facility on Sauvie Island; at least three other kennels followed, two of which remain active.

At some point in the 1960s, the kennel facility became known as "Lake Tree Kennels." From the original "Wallace" operation, the kennel facility proceeded through a number of owners/operators in the 1960s and 1970s, which the record identifies (by last name of the owner/operator) as Blitz, Courtway, Eaton, Meifert, Pein, Persinger.

(2). 1989 PROCEEDINGS

In 1989, Applicant filed an application for a conditional use permit, apparently to remodel the dog kennel operations, but did not seek approval to increase the number of allowed dogs.

Applicant's cover letter to the County recited:

> "Please note that this request is pertaining to an ***existing*** kennel site, in other words, the buildings and structures are intact. However, ***permits have lapsed*** for over 15 years, therefore a new request is now being sent."

The application does not otherwise identify or describe what "permits" might have "lapsed."

Although the historical record suggests that at least two kinds of "permits" might apply (or have applied) to the kennel facilities (*viz*, land use permits and animal control permits for commercial kennel operations), I can find nothing in the record

from 1989 forward to confirm that Applicant understood or intended the reference to "permits" to mean ***land use*** permits. Indeed, no entity had ever issued a land use (*viz*, conditional use) permit before that time, thus the reference to "permits" in a technical sense could only have meant animal control permits. Applicant's February 23, 1995, application narrative confirms that the reference to "permits" in the 1989 application meant the permits necessary to operate "commercial" kennel facilities. ("SAUVIE ISLAND KENNELS LAND USE APPLICATION", February 23, 1995, at 5.)[3]

In any event, the County informed Applicant that it considered a conditional use permit to be unnecessary or not required at that juncture. No one questions this historical fact. On the front page of Applicant's narrative appears the following notation: "Not req'd per B. Hall Feb. '89." The County ultimately approved a proposed remodeling of the kennel facilities, and issued a corresponding building permit. No one appealed that decision.

In reliance on the County's approval the Applicant then entered into a five–year lease/purchase agreement with the Persingers. The Applicant spent considerable sums remodeling the kennel facilities and began operations as "Sauvie Island Kennels."

(3). 1990 PROCEEDINGS

In 1990, Applicant (again) sought conditional use approval for additional remodeling of the kennel facilities, but (again) did not seek approval to increase the number of allowed dogs.

The County (again) informed Applicant that it considered a conditional use permit to be unnecessary under the circumstances. No one questions this historical fact. The County informed Applicant that it needed only to proceed with the Design

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3 A "kennel" need not qualify as a *commercial* operation. *See* MCC 11.15.0010 (definition of "kennel"). The hearings officer's decision in DR 4–94 recites that Applicant's reference to "lapsed" permits "demonstrates that the applicant either had knowledge or at least suspected that the prior kennel ***use*** had 'lapsed.'" (DECISION at 7 [emphasis added].) To the extent that the hearings officer's reference to "kennel use" meant "*commercial* kennel use," then the reference would be correct. To the extent that it meant "*non-conforming* kennel use," it would be an assumption not otherwise supported by the record.

Review process, and the County subsequently issued the desired remodeling permit in August, 1990, after the Applicant completed the requisite Design Review proceedings. (*See* DR 90–07–02.)

In the County's file in DR 90–07–02, there appears a copy of the page in the County's Zoning Ordinance that contained MCC 11.15.2028(B), which then (as now) provided, in pertinent part:

> "Conditional uses ***listed*** in subpart MCC [11.15].2012 ***legally established*** prior to August 14, 1980, ***shall be deemed conforming*** and not subject to the [non–conforming use] provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)[4]

On that same page, and directly adjacent to MCC 11.15.2028(B), there appears someone's handwritten notation — in red ink — that reads as follows:

> "The Persinger Kennel is therefore a Conforming CU — therefore does not expire per October 8, 1990, opinion from John DuBay [chief Assistant County Counsel for land use matters at the time]."

It seems reasonably apparent that the reference to "CU" in that handwritten passage presumably means "conditional use."

The record also contains Mr. DuBay's October 8, 1990, memorandum on the same subject, which declares, in pertinent part:

> "I agree with you that the zoning code provides no way to terminate CUPs[5] because of non[–]use where the permit sets no expiration date."

However, the historical record sheds no light on the question why Mr. DuBay's opinion *post–dates* the 1990 Design Review permit approval by two months. In

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[4] At the time (as now), "dog kennels" comprised a conditional use "listed" in MCC 11.15.2012(B)(11).

[5] Nothing in the memorandum suggests what the "P" stands for in the term "CUP." I have inferred from the remainder of the 1990 file that it likely stands for "Permit."

any event, the existence of a "conditional use" formed a condition precedent to Design Review. (*See* MCC 11.15.7820.)

Also in 1990, Applicant sought separate conditional use approval to expand kennel operations in order to construct or maintain a "watchman's residence" on the property, as an "accessory" use related to an existing conditional use, *viz*, the kennel facilities. (*See* CU 23–90.)

During a November, 1990, Planning Commission hearing on this particular request, a neighboring property owner (Marquam Farms) urged that the kennel facilities comprised an "illegal" operation because the facilities had apparently been "abandoned" in 1971. At that hearing, the Planning Commission wondered how (or whether) it could approve the watchman's residence if the underlying use was not legal or authorized. Staff at the hearing described the history of prior kennel approvals and opined that the County considered the kennel operation to be authorized as a "'conforming' conditional use" pursuant to MCC 11.15.2028(B).

The Planning Commission thereafter approved a conditional use permit for the watchman's residence in November, 1990, for all practical purposes interpreting MCC 11.15.2082(B) in a manner that rendered the existing kennel operations a "legally established" — and thus a "conforming" — use upon which the Planning Commission could then predicate the approval of an "accessory" use.

No one appealed that decision. The Applicant thereafter added a third building and a perimeter fence to the kennel facility, and constructed a watchman's residence.

(4). 1994 PROCEEDINGS

(a). Application / Initial Decision

In 1994, Applicant sought conditional use approval for an "expansion of an existing approved conditional use of the dog kennel." (Undated letter received by the

County with the application on 1–10–94.) Applicant sought to demolish two existing kennel buildings and replace them with one or more structures designed to house 75 dogs. At the time, Applicant housed up to 50 dogs.

The County (again) informed Applicant that it considered a conditional use permit to be unnecessary or not required. No one questions this historical fact. Staff apparently again contacted John DuBay about the matter, and Mr. DuBay reiterated his 1980 opinion, *viz*, the kennel comprised a

> "use that existed without limitation, could be expanded per MCC 11.15.2028(B), and that only Design Review with notice would be required." (10–6–94 memo from Bob Hall to Scott Pemble.)

The County thereafter informed Applicant that it needed only to proceed with the Design Review process. (*See* DR 4–94.)

In April, 1994, the County issued its "Administrative Decision" approving Applicant's Design Review Plan:

> ". . . [Applicant] propose[s] to demolish two exiting kennel buildings and replace them with one, larger structure, designed to house 55 adult dogs. An existing kennel building for 20 adult dogs would remain. The facility is licensed to board up to 50 dogs; the proposed expansion would increase the kennel size to 75 dogs. . . ." (April, 1994, ADMINISTRATIVE DECISION at 1.)

After Applicant received administrative Design Review Plan approval in April, 1994, but before anyone had appealed, Applicant exercised the purchase option on the property and bought it from the Persingers.

(b). Opponents' Appeal

A number of persons — who for convenience will simply be identified as "Marquam Farms" — then appealed the Planning Director's administrative Design Review approval. Marquam Farms urged, among other things, that:

- "The dog kennel . . . was not operated for one or more periods exceeding one year apiece[6] after the property on which the kennel is situated was zoned. Dog kennels have not been permitted uses on Applicants' property since zoning was applied. Accordingly, use of the dog kennel was 'interrupted' and 'abandoned' and its nonconforming use status no longer exists under both Oregon state law and the Multnomah County Code." (§ 1, "Grounds For Reversal," May 6, 1994, "NOTICE OF APPEAL" [emphasis added])

- "Assuming the dog kennel was a nonconforming use, . . . an application for Final Design Review Plan is the wrong way to seek its expansion or alteration. State law and the county code establish standards and procedures for alterations/expansions of nonconforming uses, none of which was sought, satisfied, or applied in DR 4–94." (§ 3, "Grounds For Reversal," May 6, 1994, "NOTICE OF APPEAL.")

The record contains nothing to suggest that Marquam Farms' NOTICE OF APPEAL itself specifically challenged the manner in which the County had previously interpreted MCC 11.15.2028(B) to allow the kennel facility as a conditional use. Indeed, the May, 1994, NOTICE OF APPEAL contained no mention of MCC 11.15.2028(B). Marquam Farms did, however, submit, a written memorandum dated July 27, 1994, that discussed MCC 11.15.2028(B) in detail. Ultimately, I find nothing in the record to suggest that the discrepancy between the issues raised within the NOTICE OF APPEAL itself and the appellants' written arguments made any difference to anyone in the course of the 1994 proceedings.

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6 Until 1990, the County's non-conforming use ordinance codified a *one–year* period for determining "abandonment" or "discontinuance" issues. The ordinance now codifies a two–year period. *See* MCC 11.15.8805(B).

(c). Planning Director's Interpretation of MCC 11.15.2028(B)

At a July, 1994, hearing on that appeal, the hearings officer concluded that he would first resolve the question whether the kennel operations comprised a lawful conditional use in the first place — a question that the Design Review process itself makes jurisdictional and thus determinative. (*See* MCC 11.15.7820 ["The provisions of MCC .7805 through .7865 shall apply to all ***conditional*** . . . uses in any district[.]" (Emphasis added.)].)

To foster the resolution of that question, the hearings officer requested an interpretation of MCC 11.15.2028(B) from the County. In a July 29, 1994, memorandum, the County's Planning Director interpreted MCC 11.15.2028(B) as follows:

> "[I]f the use was [1] ***legally established*** prior to August 14, 1980[,] ***and*** [2] was ***not abandoned or discontinued*** for any reason for more than one year . . ., then the provisions of § 2028[B] apply. . . ." (Emphasis and enumeration added.)

As so construed, the Planning Director appended the "abandoned"/"discontinued" phraseology to MCC 11.15.2028(B) and, in effect, added a condition that the ordinance provision does not make explicit. The Planning Director's interpretation would mean that a species of "'conforming' conditional use"[7] could lapse by reason of nonuse for a prescribed period of time.

Accordingly, the Planning Director further concluded that

> "[the kennel operation] ***was an established non[-]conforming use which lost its legal status in 1971*** because it was not used as a Kennel for more than one year . . . Therefore, it was ***not*** a legally established use as of August 14, 1980." (Emphasis added.)

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7 MCC 11.15.2028(B) makes a very plain connection between "conditional uses" and "conforming" uses. Thus, the phrase "'conforming' conditional use" succinctly describes the type of use that results from an application of that provision.

(d). Hearings Officer's Decision

In his August 19, 1994, decision (the "DECISION"), the hearings officer concluded that his authority to proceed with the Design Review appeal depended at the outset on the question whether the underlying use comprised a lawful "conditional" use:

> "The outcome of this turns on whether or not staff's interpretation of MCC 11.15.2028(B) is correct. If staff's interpretation of MCC 11.15.2028(B) is wrong, and if the use is not otherwise a lawful use in the EFU zone, then the Hearings Officer ***lacks authority to approve the Design Review request, unless or until the underlying kennel use receives appropriate land use approval*** to make it a lawful use in the zone." (DECISION at 3 [emphasis added].)

Although the hearings officer's decision does not specifically describe the Applicant's interpretation of MCC 11.15.2028(B), in a July 28, 1994, memorandum (denominated "APPLICANT'S BRIEF") Applicant interpreted that provision as follows:

> "Applicants believe that this provision means precisely what it says: if (1) a use such as a kennel is listed in MCC 11.15.2012; and (2) the use was legally established prior to August 14, 1980, it is as if the county gave the use a conditional use permit on the day it was established. The use is expressly deemed 'conforming,' and the right to continue the use is not lost by abandonment." (APPLICANT'S BRIEF at 1.)

Under that interpretation of MCC 11.15.2028(B), Applicant declared that "[t]here is no question of determining whether the use was continuously as a maintained 'nonconforming use'" (APPLICANT'S BRIEF at 1–2), distinguishing between the "lawful–*at–the–time–of*–zoning–enactment" provision in the non-conforming use pro-

vision in ORS 215.130(5)[8] and the "lawful-*at-some-prior-point*-in-time" language in MCC 11.15.2028(B).

Applicant also concluded that, if MCC 11.15.2028(B) were to be construed as requiring the existence of a conditional use *permit* in order to be "legally established," the provision would be superfluous. (APPLICANT'S BRIEF at 3–4.) Applicant did not, however, examine the question whether MCC 11.15.2028(B) itself might conflict with ORS 215.130(5) or the separate "nonfarm use" provisions in ORS 215.283.

Ultimately, the hearings officer concluded that "[11.15].2028(B) cannot be interpreted in the manner suggested by the applicant and the staff, without directly conflicting with ORS 215.283." (DECISION at 3.)[9] More specifically, he concluded that

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8 ORS 215.130(5) provides, in pertinent part:

> "The lawful use of any building, structure or land ***at the time of the enactment or amendment*** of any zoning ordinance or regulation may be continued. . . ." (Emphasis added.)

9 For reference, ORS 215.283 — which applies in counties that have *not* adopted "marginal lands" provisions (*cf.* ORS 215.213) — provides, in pertinent part:

> "* * * * *
>
> "(2) The following nonfarm uses ***may be established***, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *
>
> "(m) ***Dog kennels*** not described in subsection (1)(j) of this section." (Emphasis added.)

The legislature's 1995 amendments to ORS 215.283 via SB 834 (*see* 1995 Or Laws, ch 528, § 2) did not amend any portion of ORS 215.283 that has any bearing here.

". . . the only way that [MCC 11.15].2028(B) can be construed in such a way so as not to be in conflict with the statutory scheme [in ORS 215.283] is to interpret the ordinance to mean that **[1]** the kennel use must not only have been ***listed*** as a conditional use, but **[2]** it must have been ***legally established as such, prior to August 14, 1980*** (i.e., it must have ***actually obtained a conditional use permit***)." (DECISION at 4 [emphasis and enumeration added].)

Because no operator of the kennel facility had ever obtained a conditional use "permit" before August 14, 1980, the hearings officer concluded that "the applicant cannot take advantage of whatever benefit MCC 11.15.2028(B) might confer." (DECISION at 4.) The hearings officer did not, however, describe or examine what "benefit" .2028(B) *does* purport to confer.

The hearings officer separately concluded that an additional inquiry into the kennel's status in 1958 must be made in order to resolve the separate question whether the kennel operation nevertheless comprised a valid "non-conforming" use. He did not, however, explain why issues of non–conforming use bore any relationship to Design Review issues.[10]

". . . [T]he ***only way*** in which this particular kennel could have been lawful in 1958, when zoning came into effect, was if the use was a ***lawfully established non–conforming use*** [at that time]." (DECISION at 4 [emphasis added].)

The hearings officer rendered findings with respect to the following chronology:

- From 1952 to August, 1957, the "Wallace" kennel operated on the premises. (DECISION at 5.)

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10 As I read the Design Review provisions in MCC 11.15.7805, *et seq.*, neither the resumption nor the alteration of a non–conforming use *plainly* invokes Design Review. (*See* MCC 11.15.7820 [listing the kinds of uses].)

- From August, 1957, to December, 1962, the "Blitz" kennel operated on the premises. (*Id.*)

- There exists nothing in the record to determine what occurred during the period from December, 1962, to February, 1964. (*Id.*)

Because the County's zoning ordinance first applied to the property as of July 10, 1958, the kennel facilities became a valid non-conforming use on that date. (DECISION at 5.) However, because the hearings officer viewed the record as silent with respect to the period from December, 1962, to February, 1964, he concluded that there existed no "substantial evidence" of continuous kennel usage during that period. (DECISION at 6.)

The County's non-conforming use ordinance during that era declared that the cessation of a non-conforming use for more than one year constituted, in effect, an "abandonment" or "discontinuance" of the use. Thus, the hearings officer concluded that

> "the non–conforming use status of the kennel expired on or about January 1, 1964, one year and one day after the use was discontinued in December, 1962." (DECISION at 6.)

Therefore, a discontinued "use" could not be re–established as a legal use unless and until first it demonstrated compliance with the County's Zoning Ordinance in some other proceeding. (DECISION at 6.)

The hearings officer thus concluded that, as of August, 1994, the then–existing kennel use did *not* comprise a "lawful" use, and that the absence of a "lawful" use deprived him of any authority to sustain Design Review approval. (DECISION at 7–8.) But he also concluded that that determination was "without prejudice" to some subsequent determination that a kennel use would either be permitted or otherwise declared legal. (DECISION at 7.)

Thus, as compared and contrasted, the County and hearings officer construed MCC 11.15.2028(B) as follows:

PLANNING DIRECTOR'S INTERPRETATION	HEARINGS OFFICER'S INTERPRETATION	DR 4–94 APPELLANTS' INTERPRETATION
"Conditional uses listed in subpart MCC [11.15].2012 [that were] **[1]** ***legally established*** prior to August 14, 1980[,] ***and*** **[2]** ***not abandoned or discontinued for any reason for more than one year***, shall be deemed conforming and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)	"Conditional uses listed in subpart MCC [11.15].2012 [that were] **[1]** ***legally established*** prior to August 14, 1980[,] ***and*** **[2]*legally established as a 'listed' use prior to August 14, 1980, by obtaining a conditional use permit***, shall be deemed conforming and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)	"Conditional uses ***listed*** in subpart MCC [11.15].2012 ***before August 14, 1980***, [that were] ***legally established by virtue of a permit issued*** prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)

The County (via the Planning Director's interpretation), the opponents, and the hearings officer all added interpretive clauses to MCC 11.15.2028(B) that each viewed as implicit within the language in that provision.

Applicant attempted to appeal the hearings officer's decision, but the appeal apparently arrived sometime after the 4:30 p.m. deadline on that last day on which it could be filed. As a result, the County's denial of Applicant's 1994 Design Review application became final.

(5). 1995 PROCEEDINGS

After the adverse hearings officer's decision and the resultant denial of the 1994 Design Review application in DR 4–94, on April 11, 1995, Applicant filed another application, worded as follows:

> "Applicants seek conditional use approval, or, alternatively, an alteration of a non–conforming use, for a 75–dog kennel. . . ."

The matter came before me on August 16, 1995. Numerous proponents testified in favor of the application; no one testified in opposition at that hearing. I discuss the pertinent criteria and findings in detail *infra*.

II. PROCEDURAL ISSUES

By letter dated August 15, 1995, Marquam Farms Corporation — owner of adjacent property — submitted a letter that addressed five discrete subjects. Some of the subjects comprised preliminary procedural matters upon which I made rulings at the beginning of the August 16 hearing.

Marquam Farms' August 15, 1995, letter raised the following issues.

A. REQUEST FOR SETOVER OR CONTINUANCE

The attorneys for Marquam Farms requested either a setover or a continuance of the scheduled August 16 hearing. They requested a setover because of the unavailability of two of their attorneys on that date. Alternatively, they requested that I hold the record open for twenty–one days for purposes of making "any appropriate response."

Because:

- the request for the setover comprised a veritable last–minute request that, in my opinion, lacked a sufficient explanation why the request had not been made sooner,[11]

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11 For instance, I received the faxed letter at approximately 4:40 p.m. on August 15, the afternoon before the scheduled hearing. The fax had apparently been transmitted to me at 3:23 p.m. on that same date.

- the attorneys' unavailability did not otherwise prevent them from preparing and submitting written comments or arguments, and

- ORS 197.763(4)(b) grants no right to a continuance ***except*** under circumstances and conditions that did not exist as of the August 15 letter,[12]

I ruled during the August 16 hearing that there would be no setover under the circumstances.

However, ORS 197.763(6) does grant any "participant" — which, by virtue of its August 15, 1995, letter I deem Marquam Farms to be — the right to request that the record remain open for at least seven days.[13] I therefore ruled that the record would remain open according to the following schedule:

- on or before August 23 at 4:30 p.m., any proponent of the application would be allowed to offer any additional evidence or further materials in support of the proposal;

- on or before August 30 at 4:30 p.m., any opponent of the application would be allowed to offer evidence or further materials in opposition to the proposal; and

---

12 ORS 197.763(4)(b) provides, in pertinent part:

> ". . . If additional documents or evidence is provided in support of the application, any party shall be entitled to a continuance of the hearing. . . ."

Marquam Farms did not predicate its pre-hearing request for a setover on the presence of "additional documents or evidence."

13 ORS 197.763(6) provides, in pertinent part:

> "***Unless*** there is a continuance, if a participant so requests before the conclusion of the initial evidentiary hearing, the record shall remain open for at least seven days after the hearing. . . ." (Emphasis added.)

- on or before September 6 at 4:30 p.m., any proponent of the application would be allowed to offer any rebuttal evidence or materials directly related to any evidence or materials that an opponent had filed on or before the August 30 deadline.

Thus, Marquam Farms would have an additional 14 days beyond the August 16, 1995, hearing within which to offer additional evidence or materials.

B. CLARITY OR ADEQUACY OF NOTICE

Marquam Farms' August 15, 1995, letter also challenged the clarity or adequacy of the hearing notice, and requested that I "make a preliminary determination [at the August 16, 1995, hearing] regarding the scope of the ***application***." (Emphasis added.) I instead made a determination regarding the scope or adequacy of the *hearing notice*.

I perceive a substantive distinction between (1) a hearing notice that fails in some material fashion to adequately paraphrase or describe an application or the controlling criteria, and (2) a hearing notice that adequately paraphrases or summarizes an application that may itself contain some ambiguity. ORS 197.763(3) — incorporated by the general notice requirement in 215.416(5) — requires that the hearing notice:

> "(a) Explain the nature of the application and the proposed use or uses which could be authorized; [and]
>
> "(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

In its August 15, 1995, letter, Marquam Farms suggested that it was "not clear" whether the approval request comprised an approval to expand an allegedly lawful 50–dog kennel to a 75–dog kennel, or whether the request comprised an approval of a 75–dog kennel when no "lawful kennel use presently exists." It urged that the matter be re–noticed for hearing, although it offered no reason why anyone might be prejudiced if that did not occur.

I have cited Applicant's various characterizations of the pending conditional use request *supra* beginning at page 7. The County's hearing notice recited that

> "Applicant requests Conditional Use approval, or approval to alter a Non-Conforming Use, to expand the capacity of the existing dog kennel facility on this property from a maximum of 50 dogs to 75 dogs."

I concluded at the August 16 hearing that, notwithstanding some minimal degree of grammatical differences, the County's notice of hearing fairly paraphrased the substance of the application as required by ORS 197.763(3). Whether the ***application itself*** might have been more clearly articulated remains inconsequential for purposes of assessing the adequacy of the ***hearing notice***; the notice can scarcely be held to higher standards of clarity than the application.

Thus, as of the August 16, 1995, hearing I found the County's hearing notice to be neither fatally ambiguous nor prejudicial to any interested party, and I denied Marquam Farms' request that the hearing be re-noticed to cure any grammatical flaw (if any) that, in my opinion, did not and could not affect substantial rights of any interested party.

By a related letter dated September 6, 1995, Marquam Farms objected to my resolution of the "notice" issue during the August 16, 1995, hearing, complaining that I "ruled that matters ***outside*** of the notice permitted the scope of the hearing to include a new request for a conditional use for a 75 dog kennel." (Emphasis added.)[14]

Assuming that Marquam Farms' September 6, 1995, letter fulfills the criteria for post-hearing submittals that I established at the August 16, 1995, hearing, I cannot help but observe that:

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14 Neither Marquam Farms nor any other interested party appeared at the August 16, 1995, hearing to challenge, or otherwise inquire about, the adequacy of the hearing notice.

- The resolution of Marquam Farms' initial objection as to the clarity of the hearing notice can scarcely be resolved without a review of, and comparison with, the application and Applicant's phraseology. I thus conclude that Marquam Farms' request for clarification invited just such a comparison and, accordingly, that Marquam Farms invited reference to matters "outside" of the notice in order to ascertain whether the notice proved fatally ambiguous.

- Marquam Farms itself specifically cited the Applicant's "application form" in its August 15, 1995, letter, following which Marquam Farms remarked that "from ***this*** [*viz*, the application form] it is not clear" what Applicant's request comprises. I thus conclude that Marquam Farms *itself* initially cited "matters outside of the notice" as an indispensable component of its request that I interpret the clarity of the hearing notice.

- Neither in its August 15, 1995, letter nor its September 6, 1995, letter has Marquam Farms suggested any reason why it has been misled or confused by Applicant's most recent approval request. Because Marquam Farms had adequate time and opportunity to formulate some reason why, given its participation in DR 4–94, a re–worded notice would rectify some prejudicial misunderstanding, and because I cannot conceive that a reasonable person in Marquam Farms' position could be materially misled by the wording of the hearing notice, I conclude that the hearing notice did not prejudice Marquam Farms in such a manner that it could not effectively participate here.

- Marquam Farms' September 6, 1995, letter contradicts the August 15, 1995, letter in a manner that suggests the absence of any lingering uncertainty. The earlier letter maintains that "it is ***not clear*** whether the request is for approval to expand an allegedly lawful 50 dog kennel to a 75 dog kennel, or whether the request is for approval of a 75 dog kennel where no lawful kennel presently exist" (emphasis added), while the most recent letter declares that the hearing notice was "***clearly*** limited to expansion of a kennel from 50 to 75 dogs" (emphasis added). In other words, what was apparently "not clear" on August 15 had become "clear[]" by September 6. In that light, I conclude that Marquam Farms has relinquished the objection in its August 15 letter.

C. ISSUE AND CLAIM PRECLUSION

Marquam Farms also asserted in its August 15, 1995, letter that

> "[t]o the extent that the applicants rely on either an existing conditional use permit or an existing non–conforming use for a 50 dog kennel, both issue and claim preclusion (formerly commonly referred to as collateral estoppel and *res judicata*) prevent the County from reopening those issues to overturn the previous [August, 1994] decision of the Hearings Officer [in DR 4–94]."

Because that issue implicated substantive rather than procedural issues, I determined that those issues would be addressed on the merits within this decision.

D. PENDING LITIGATION

Marquam Farms also suggested in its August 15, 1995, letter that the pendency of certain litigation in Multnomah County Circuit Court should preempt the pending land use proceedings. Because Marquam Farms itself had initially challenged the kennel operations within the context of ***both*** the 1990 ***and*** 1994 County land use proceedings, I concluded that it had already accorded the land use process a priority status in its challenges to the kennel operations.

I therefore concluded that, not only would I not abate the pending land use proceedings pending the completion of litigation, but I believed the contrary result should obtain, *viz*, any pending litigation should await a final determination as to Applicant's quest for conditional use or non–conforming use status.

E. Precedential Impact Of OAR 660–33–120

Finally, Marquam Farms urged in its August 15, 1995, letter that, notwithstanding any merit to Applicant's proposal, the 1994 promulgation of OAR 660–33–120 would prohibit kennel facilities in any event.

Because I determined that this particular subject, like the subject of "issue and claim preclusion" mentioned above, implicated substantive rather than procedural issues, I would address it on the merits within this decision.

III. Applicable Criteria — Conditional Use

The following criteria apply to the proposed development:

A. Exclusive Farm Zone Uses [ORS 215.283]

As of Applicant's 1995 application, ORS 215.283 provided, in pertinent part:

"* * * * *

"(2) The following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:

"* * * * *

"(m) Dog kennels not described in subsection (1)(j) of this section."

The Applicant's kennel facilities comprise kennels "not described in subsection (1)(j)," *viz*, non–greyhound kennels.

The 1995 legislature's recent amendment to ORS 215.283 via SB 834 (*see* 1995 Or Laws, ch. 528, § 2) not only created an unrelated provision but could have no effect on the pending application in any event.

B. STANDARDS FOR APPROVAL OF EXCLUSIVE FARM ZONE USES [ORS 215.296]

ORS 215.296 provides, in pertinent part:

> **"(1) A use allowed under ORS . . . 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:**
>
> > **"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or**
> >
> > **"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.**
>
> **"* * * * ***
>
> **"(10) Nothing in this section shall prevent a local governing body approving a use allowed under ORS . . . 215.283(2) from establishing standards in addition to those set forth in subsection (1) of this section or from imposing conditions to insure conformance with such additional standards."**

C. LCDC "AGRICULTURAL LAND" ADMINISTRATIVE RULES [OAR 660-33-120/660-33-130]

In June, 1994, LCDC promulgated OAR 660-33-120, which provides, in pertinent part:

> **"The specific development and uses listed in the following table are permitted in the areas that qualify for the designation pursuant to this division. . . . The abbreviations used within the schedule shall have the following meanings:**
>
> **"A Use may be allowed. . . .**
>
> **"R Use may be approved, after required review. . . .**
>
> **"* Use not permitted.**
>
> **"# Numerical references for specific uses shown on the chart refer to the corresponding section of OAR 660-33-130. . . .**

HV Farm	All Other	USES
. . .	. . .	. . .
*18	R5	**Dog kennels."**

OAR 660-33-130, likewise effective in June, 1994, additionally provides, in pertinent part:

> **"The following standards apply to uses listed in OAR 660-33-120 where the corresponding section number is shown on the chart for a specific use under consideration. . . .**

"* * * * *

"(18) Existing facilities may be maintained, enhanced or expanded, subject to other requirements of law. . . ."

D. EFU CONDITIONAL USES [MCC 11.15.2012(B)]

MCC 11.15.2012(B) provides:

"The following uses may be permitted when approved by the Hearings Officer pursuant to the provisions of MCC .7015 to .7140:

"* * * * *

"(11) Dog kennels."

MCC 11.15.0010 defines "kennel" as

"[a]ny lot or premises on which four or more dogs, more than six months of age, are kept."

E. CONDITIONAL USE — GENERAL APPROVAL CRITERIA [MCC 11.15.7120(A)]

MCC 11.15.7120(A) — implicated via MCC 11.15.2012(B), above — sets forth general conditional use approval criteria:

"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,[15] the approval criteria listed in this section shall apply. In approving a Conditional Use listed in this section, the approval authority shall find that the proposal:

"(1) Is consistent with the character of the area;

"(2) Will not adversely affect natural resources;

"(3) Will not conflict with farm or forest uses in the area;

"(4) Will not require public services other than those existing or programmed for the area;

"(5) 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 will be acceptable;

"(6) Will not create hazardous conditions; and

"(7) Will satisfy the applicable policies of the Comprehensive Plan."

F. CONDITIONAL USE — SPECIFIC EFU APPROVAL CRITERIA [MCC 11.15.7122]

In addition to the general conditional use approval criteria in MCC 11.15.7120, MCC 11.15.7122 additionally provides:

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15 The "Exclusive Farm Use" provisions in MCC 11.15.2002–11.15.2030 do not contain separate approval criteria for conditional uses. MCC 11.15.2012(B) specifically cites the general approval criteria in MCC 11.15.7105–11.15.7140 as controlling.

"(A) In addition to the criteria of MCC .7120, an applicant for a Conditional Use listed in MCC .2102(B) must demonstrate that the use:

"(1) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

"(2) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

"* * * * *"

With one exception, this provision duplicates the language in ORS 215.296(1), quoted above; the ordinance renders the criteria in subparagraphs .7122(A)(1) and (2) *conjunctive*, while ORS 215.296 makes the counterpart provisions in subparagraphs (1)(a) and (b) *disjunctive*.

G. ANIMAL KEEPING — CONDITIONAL USE APPROVAL CRITERIA [MCC 11.15.7205–.7240]

In addition to all of the above conditional use criteria, MCC 11.15.7205–.7240 provide additional criteria.

MCC 11.15.7205 provides, in pertinent part:

"Dog kennels . . . may be permitted only upon the approval of the approval authority as a conditional use."

MCC 11.15.7210 provides:

> **"These uses shall be permitted only in the following areas and only where they will not conflict with the surrounding property uses:**
>
> **"(A) In CFU, F-2, MUA-20, MUF, and RR districts or those areas of similar low population density.**
>
> **"(B) C-3 or C-2 commercial districts.**
>
> **"(C) Manufacturing districts."**

MCC 11.15.7215 bears the caption **"Minimum Site Size Requirements"** and provides, in full:

> **"(A) Area: Two acres.**
>
> **"(B) Width: Two hundred fifty feet.**
>
> **"(C) Depth: Two hundred fifty feet."**

MCC 11.15.7220 provides:

> **"These uses shall be located no closer than one hundred feet to any lot line, in or adjacent to an *F*, *R*, or *A* district."**

MCC 11.15.7230 provides:

> **"(A) All kennels, runs or pens shall be constructed of masonry or such other opaque material as shall provide for cleanliness, ease of maintenance, and sound and noise control.**

"(B) All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered are the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and public facilities on nearby properties, and other similar factors.

"(C) The owner or operator of a use approved under this section shall maintain the premises in a clean, orderly and sanitary condition at all times.

. . .

"(D) A separate housing facility, pen or kennel space may be required for each dog over six months of age kept on the premises over twenty-four hours."

Finally, MCC 11.15.7240 provides an exemption for certain facilities:

"Animal facilities for which Animal Control Facility licenses were issued prior to October 31, 1985[,] shall be exempted from the provisions of MCC .7205-.7235 unless:

"(A) There is an increase in the number of animals in the facility, or

"(B) The use is discontinued for a period of more than two years."

H. COMPREHENSIVE PLAN PROVISIONS
[POLICIES 9, 13, 22, 37, 38, AND 40]

The Staff Report identifies Comprehensive Plan Policies 9, 13, 22, 37, 38, and 40 as applicable. (Staff Report at 5 and 11.) I will discuss the pertinent provisions of those policies *infra* in the "Findings" portion of the conditional use discussion.

IV. PRECLUSION ISSUES — CONDITIONAL USE

Before proceeding to the substantive "conditional use" issues, a labyrinthine array of preliminary issues that I broadly categorize as "preclusion" issues need to be addressed and resolved. With one exception, these comprise issues that could effectively derail Applicant's approval request *apart from* the question whether the request itself fulfills the pertinent conditional use or non-conforming use criteria in the Zoning Ordinance. Marquam Farms' August 15, 1995, letter raises some of these issues.

The lone exception comprises the question whether *Marquam Farms itself* ought to be precluded from raising challenges that it unsuccessfully asserted in 1990 but did not appeal at that time.

Thus, I need to traverse the bewildering land use history surrounding the kennel facilities and resolve the following key questions:

- Is the hearings officer's August, 1994, decision in DR 4–94 binding on Applicant, such that I am now precluded from revisiting many of the legal and factual issues that the parties debated in 1994?

- What, if any, precedential or preclusive weight ought I accord the County's sequential determinations in 1989 and 1990 that the kennel facilities did *not* require "conditional use" approval?

- What, if any, precedential or preclusive effect do the 1989 and 1990 *approvals* — as opposed to *denials* — have on subsequent proceedings involving the kennel facilities?

- What, if any, precedential or preclusive effect do I accord the fact that the Applicant successfully and appropriately obtained conditional use approval in 1990 — an approval now beyond challenge — for a "watchman's residence" as an accessory use to the kennel facilities?

- Is the current approval request sufficiently identical to the Design Review request in 4–94 that, all else aside, there exists no practical or logical reason to allow Applicant to plow the same furrow again?

- What, if any, precedential or preclusive effect do I accord the fact that Marquam Farms (1) *actively participated* in the 1990 proceedings in CU 23–90, (2) *raised* a "legality–of–use" issue in 1990 that later resurfaced in Marquam Farms' 1994 Design Review appeal, and (3) *opted to not appeal* the adverse resolution of the "legality–of–use" issue in 1990?

As I explain below, I conclude that none of the above procedural questions foreclose consideration of the merits of Applicant's current request for approval.

A. BECAUSE IT *DENIED* A REQUESTED APPROVAL, THE HEARINGS OFFICER'S 1994 DECISION DOES NOT PRECLUDE A RECONSIDERATION OF EITHER LEGAL OR FACTUAL "CONDITIONAL USE" ISSUES

Alone among the series of decisions and approvals that Applicant has sought and obtained since 1989, the hearings officer's 1994 decision in DR 4–94 *denied* a requested approval, *viz*, Design Review approval. The fact that that decision "granted" an *appeal* of Design Review approval neither cloaks nor alters the fact that, unlike the decisions in 1989 (building permit), DR 90–07–02 (design review), and CU 23–90 (conditional use), no rights vested by reason of any approval.

The County's Zoning Ordinance does not prohibit the resubmittal of an application that might have been the subject of an earlier denial. Unless accompanied by some affirmative adjudication of rights or interests, or unless made the subject of an appeal to the Land Use Board of Appeals (or beyond) in which a declaration as to the

existence or nonexistence of legal rights or interests occurs within that appellate context, the *denial* of a requested approval achieves nothing more the maintenance of the *status quo*.

Indeed, the hearings officer's 1994 decision concludes with the observation that

> ". . . ***if*** the applicant is able to obtain a conditional use permit or otherwise establish the use as a lawful use, this denial of Design Review ***should not prejudice such later action***, if any. Therefore, the applicant's request for Design Review is denied, ***without prejudice***." (August 19, 1994, DECISION at 7 [emphasis added].)

When the County later placed the hearings officer's decision on the Board's September 13, 1994, acknowledgment agenda, it retained and incorporated the "without prejudice" language.

I therefore conclude that, because of the circumstances (*viz*, a denial of a request for approval followed by a subsequent resubmittal of a different nature), and because neither statute nor ordinance requires that the prior *denial* of a land use application binds the applicant in future proceedings, I am, in effect, writing on a slate unfettered and unconfined by the 1994 hearings officer's decision. *See Furler v. Curry County*, 27 Or LUBA 497, 506 (1994); *Reeder v. Clackamas County*, 20 Or LUBA 238, 242–44 (1990); and *S & J Builders v. City of Tigard*, 14 Or LUBA 708, 711–12 (1986).

B. THERE EXISTS NO PURE "IDENTITY OF ISSUES" SUCH THAT "CLAIM PRECLUSION" OR "ISSUE PRECLUSION" MIGHT OTHERWISE APPLY

In its August 15, 1995, letter, Marquam Farms suggested that

> "both issue and claim preclusion (formerly commonly referred to as collateral estoppel and *res judicata*) prevent the County from reopening those issues to overturn the previous [August, 1994] decision of the Hearings Officer."

I conclude that, for three reasons, I am not bound by the hearings officer's legal conclusions in DR 4–94.

(1). "CLAIM PRECLUSION" AND "ISSUE PRECLUSION" SERVE NO PURPOSE IN THIS PARTICULAR PROCEEDING

The 1994 proceedings in DR 4–94 resulted in the ***denial*** of an approval request, leaving the ***status quo*** unaffected and vesting no rights. I can find no statute or provision in the County's Zoning Ordinance — and Marquam Farms cites none — that precludes the resubmittal of an approval request under the circumstances that accompany Applicant's request.

Given the fact that someone in Applicant's position can typically reapply for the same or similar approvals after a prescribed period of time, I can find no authority for imposing the litigation–derived doctrines urged by Marquam Farms, nor has anyone cited any. *See*, for instance, *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990) (recognizing this principle).

(2). WITHIN AN ADMINISTRATIVE CONTEXT, I CANNOT BESTOW *STARE DECISIS* STATUS UPON A PRIOR INTERPRETATION OF A LOCAL ENACTMENT THAT MISINTERPRETS THE ENACTMENT

As I discuss in detail ***infra*** beginning at page 50, I conclude that the hearings officer's decision in DR 4–94 misinterpreted .2028(B). In effect, that decision renders .2028(B) superfluous and devoid of purpose.

By holding that, before .2028(B) takes effect,

> "the kennel use must not only have been listed as a conditional use, but it must have been legally established as such, prior to August 14, 1980 (i.e. ***it must have actually obtained a conditional use permit***)" (August 19, 1994, DECISION at 4 [emphasis added]),

the 1994 decision rendered .2028(B) entirely unnecessary; if a use that might otherwise qualify as a ".2028(B)" use had "actually obtained a conditional use permit" in the first place, then the existing use would ***already*** be "conforming" and would benefit in no respect from a provision such as .2028(B).

Stated differently, because the primary effects of .2028(B) comprise (1) the announcement that the antecedent use "shall be deemed ***conforming***" as a *conditional* use, and (2) the declaration that the referent "conforming" conditional use "shall . . . not [be] subject to the [non–conforming use] provisions of MCC .880[5]," the drafters of .2028(B) could only have envisioned the creation or recognition of a species of "use" *other than* a conditional use for which a permit already existed. If not, then the drafters of .2028(B) simply recited the obvious.

Within the administrative context, until such time as LUBA or the courts adopt an interpretation of .2028(B) — and of all of the mirror–image provisions that I have catalogued in the footnote on page 51 — that *either* overturns the Planning Commission's implicit interpretation in the 1990 proceedings in CU 23–90 *or* conforms to the hearings officer's 1994 decision in DR 4–94, I cannot adhere to an interpretation of .2028(B) that effectively renders that provision mere surplusage and thus devoid of significance.

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(3). THE ISSUES IN DR 4–94 AND THIS PROCEEDING, AND THE MANNER IN WHICH THE ISSUES AROSE IN DR 4–94, DO NOT SQUARELY ALIGN

Even assuming for purposes of argument that concepts such as "issue preclusion" or "claim preclusion" might obtain in a land use proceeding on the basis of the proceeding's administrative characteristics (*see*, generally, *Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 355–59, ___ P2d ___ (1995); *Chavez v. Boise Cascade Corp.*, 307 Or 632, 635, 772 P2d 409 (1989); and *North Clackamas School Dist. v. White*, 305

Or 48, 52, 750 P2d 485, *modified on other grounds*, 305 Or 468, 752 P2d 1210 (1988)), I nevertheless conclude that, except for the fact that both the 1994 proceedings and this proceeding implicate a bewildering chronology and pose a veritable maze of intricate issues, the 1994 proceeding and this proceeding simply do not align. That flaw obliterates any preclusive effect with respect to the 1994 proceedings. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 104–05 incl. n. 4, 862 P2d 1293 (1993) (no "identity" of issues, no "issue preclusion"); *Douglas v. Multnomah County*, 18 Or LUBA 607, 612–13 (1990) ("similarity" of issues does not equal "identity" of issues for purposes of issue/claim preclusion).

Without tracking all of the various issues in the two proceedings that I view as divergent, I simply note that a major issue in Marquam Farms' successful appeal in DR 4–94 comprised the question whether, in the absence of the issuance of a *prior* permit for the kennel as a "conditional use," the hearings officer had the authority to proceed with Design Review approval. The current approval request raises, among many other issues, the question whether Applicant can *now* fulfill the County's conditional use criteria in the Zoning Ordinance.

Thus, I conclude that notions of "issue preclusion" or "claim preclusion" are inappropriate in land use proceedings of this nature (*viz*, a subsequent approval request on the heels of a previous *denial*). I further conclude that "issue preclusion" or "claim preclusion" — even if applicable to land use proceedings — will not derail Applicant's approval request under the circumstances.

Moreover, even if I am incorrect in my interpretation of MCC 11.15.2028(B), the proceedings in DR 4–94 would not preclude me from (1) considering the pending application as a request for a conditional use permit pursuant to MCC 11.15.7105, *et seq.*,[16] or (2) considering the pending application as a request for the resumption of a non–conforming use.

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16 If anything in the County's Zoning Ordinance purports to prohibit Applicant from seeking conditional use approval at this juncture pursuant to the criteria in MCC 11.15.7105, *et seq.*, I cannot find it, nor has anyone cited any such prohibition.

C. THE COUNTY'S SEQUENTIAL, UNIFORM DETERMINATIONS IN 1989 AND 1990 THAT APPLICANT'S KENNEL FACILITIES DID *NOT* REQUIRE "CONDITIONAL USE" APPROVAL CONNOTES IMPLICIT INTERPRETATIONS OF MCC 11.15.2028(B) IN A MANNER THAT LONG AGO RESOLVED THE ISSUE

One cannot examine the chronology underlying Applicant's land use efforts from 1989 to date and remain unaffected by both the persistence and uniformity of the County's determinations and the accompanying representations that Applicant needed no "conditional use" approval in order to maintain and operate the kennel facilities.

An historical tour of the County's cumulative interpretations of the Zoning Ordinance in 1990 alone serves to underscore the precedential impact of those interpretive efforts.

(1). 1990 CONDITIONAL USE PROCEEDINGS

When Applicant sought conditional use approval of a "watchman's residence" in 1990 in CU 23–90, MCC 11.15.2014(E) authorized "uses . . . incidental and accessory to ***the uses permitted under MCC .2008 through .2012***," and included, among other things, "[o]ther structures or uses customarily incidental to ***any use permitted or approved*** in this district."

Thus, it necessarily became a condition precedent to approval — whether implicit or otherwise — that the Planning Commission determine and conclude that there existed a dominant "use[] permitted under MCC .2008 through .2012" or "any [dominant] use permitted or approved" with the EFU district — *viz*, the kennel facilities themselves.

The Planning Commission appears to have done just that. The record contains the tape of the November 6, 1990, Planning Commission hearing, and the tape confirms the following events:

- The Planning Commission — apparently prodded to do so in some degree by Marquam Farms — inquired whether the underlying kennel use comprised the prerequisite legally–established conditional use, whether by permit or by virtue of MCC 11.15.2028(B).

- Staff informed the Planning Commission that it (staff) interpreted .2028(B) to render the kennel facilities a "'conforming' conditional use."

- Staff informed the Planning Commission that it (staff) interpreted .2028(B) to created a species of conditional use that, unlike a *non–*conforming use, could *not* be terminated by abandonment or discontinuance.

- Staff informed the Planning Commission that a ".2028(B)" conditional use did not require any conditional use approval via the conditional use process in MCC 11.15.7105, *et seq.*, because .2028(B) *itself* grants conditional use status.

Thus, the pivotal question appears to have percolated to the surface during the November 6, 1990, hearing in such an indelible manner that I must conclude that the Planning Commission (1) became fully cognizant of the issue and (2) necessarily — albeit impliedly — rendered an appealable interpretation of .2028(B) in the manner now advocated by Applicant.

I note that Marquam Farms' argument on the appeal in DR 4–94 mirrored that "implied–yet–indispensable" analysis. In the appeal in DR 4–94, Marquam Farms necessarily argued that the hearings officer lacked the authority to sustain the Planning Director's administrative Design Review approval because the Design Review mechanism requires, as an *implied* condition precedent, the pre–existence of either a "conditional" or "community" use (*see* MCC 11.15.7820) — which, according to Marquam Farms, did not actually exist. Although the Planning Director's administrative Design Review approval in DR 4–94 did not *expressly* find the pre–existence of the requisite "conditional" or "community" use, it *implicitly* made that finding. Marquam Farms then challenged that *implicit* finding, according it the same force and effect as an *explicit* finding.

(2). 1990 DESIGN REVIEW PROCEEDINGS

When the County informed Applicant in 1990 that it only needed Design Review approval for remodeling (*see* DR 90–07–02), the "FINAL DESIGN REVIEW" dated August 6, 1990, specifically incorporated a condition derived from MCC 11.15.7230, which, in turn, would not otherwise have applied at all ***unless*** the County had first determined that the requisite condition precedent in MCC 11.15.7820 — *viz*, a conditional use — existed.

Thus, it necessarily became a condition precedent to approval — whether implicit or otherwise — that the Planning Director determine and conclude that there existed the requisite "conditional use" approval, without which any Design Review approval would be for naught.

(3). THE COUNTY ITSELF HAS "INTERPRETED" MCC 11.15.2028(B) IN DISPOSITIVE FASHION

Although I agree in principle with the hearings officer's 1994 conclusion that local governments' generally ought not be bound by mistakes of law (August 19, 1994, DECISION at 7 and 8), I cannot so easily dismiss the County's consistent characterizations of Applicant's kennel facility — and the effect of the controlling ordinances — as mere "mistakes" or "staff" misinterpretations upon which the "County" inadvertently relied.

Rather, I view such consistent, *ad seriatim* opinions as the functional equivalent of an ***interpretation*** of the County's Zoning Ordinance upon which persons such as Applicant might rely, and with respect to which persons such as Marquam Farms and others remain bound until the Board itself adopts a contrary interpretation of .2028(B) or until LUBA or the courts undertake to do that.

The separate — and quite different — question whether independent appellate tribunals such as LUBA, the Court of Appeals, or the Supreme Court might similarly be bound by the County's uniform, historical interpretations of its land use enactments

in Applicant's 1989 and 1990 land use proceedings has no bearing here.[17] Even assuming for purposes of argument that there exists a difference between (1) a Board of County Commissioners' "acknowledgment" of a Planning Commission or hearings officer approval in the absence of an appeal to the Board,[18] and (2) a Board of County Commissioners' determination of an appeal in accordance with MCC 11.15.8270–.8280 (*see McKenzie v. Multnomah County*, 131 Or App 177, 179 n. 1, 884 P2d 868 (1994) [appeal to Board implicates the *Clark/Gage* criteria]), the question whether the County's prior unappealed staff and Planning Commission approvals in 1989 and 1990 ought to be accorded precedential status *within future County proceedings* as interpretations of a local enactment does not implicate the type of analysis that resulted in *Gage v. City of Portland*, and *Derry v. Douglas County*, *supra*. Had the 1989 and 1990 proceedings resulted in *denials*, my conclusion might be different.

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17 *Compare*, for instance, *Clark v. Jackson County*, 313 Or 508, 515–18, 836 P2d 710 (1992), and *Smith v. Clackamas County*, 313 Or 519, 524–28, 836 P2d 716 (1992) (LUBA and the courts shall generally defer to a local government's interpretations of land use enactments), *with Gage v. City of Portland*, 319 Or 308, 315–17, 877 P2d 1187 (1994) (LUBA and the courts owe no "deference" to interpretations of land use enactments by a hearings officer); and *Derry v. Douglas County*, 132 Or App 386, 389–90, 888 P2d 588 (1985) (LUBA and the courts owe no "deference" to interpretations of land use enactments by a Planning Commission).

18 MCC 11.15.8255 provides that

> "[t]he written decision of the Planning Commission or the Hearings Officer shall be submitted to the Clerk of the Board 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 meeting on planning and zoning matters for which notice can be given under the Charter."

The record reflects that the November 6, 1990, Planning Commission approval of CU 23–90 appeared on the Board of County Commissioners' November 27, 1990, "acknowledgment" agenda. The time for appealing the Planning Commission's decision expired on November 26, 1990; no one appealed

The record does not contain any similar Board consideration of any of the other 1989 or 1990 approvals. Although MCC 11.15.7865 and 11.15.8290 provide for an appeal to a hearings officer from the Planning Director's administrative Design Review approval, nothing in MCC 11.15.7805–.7870 appears to require the submittal of an *unappealed* approval to the Board in the manner otherwise required for Planning Commission or hearings officer decisions.

A local government need not specifically describe its decisions as "interpretive" of local enactments before persons such as Applicant can reasonably rely upon those decisions as reflective of approved constructions of those enactments. The more a local government consistently renders a particular interpretation of a local enactment within similar or identical circumstances, the less likely it becomes that the rest of us can look back and conclude that on each occasion the local government inadvertently made a "mistake of law," or that "staff" necessarily erred in misconstruing a provision.

Thus, when, as here, a local government — whether acting through staff, the Planning Commission, or a hearings officer — repeatedly interprets and implements its ordinances under circumstances in which interested parties (1) *could have* appealed those interpretations within the context of an *approval* but (2) elected to *not* appeal (*see* the following topic for more on that subject), I find it difficult to accept the argument that the consistency of the interpretations can never take the shape of an *interpretation*, but must remain relegated to a "mistake of law."

D. MARQUAM FARMS' FAILURE TO APPEAL THE 1990 DECISION THAT SPECIFICALLY REJECTED THE IDENTICAL "LEGALITY-OF-USE" ARGUMENT THAT IT NOW MAKES PRECLUDES IT FROM RELITIGATING THAT ISSUE

In Marquam Farms' September 6, 1995, letter, it objected to any consideration of conditional use or non-conforming use issues in *this* proceeding because "those contentions were fully aired and decided in the unappealed Hearings Officer decision in DR 4-94." The correlative question becomes whether, according to that same reasoning, Marquam Farms' current objections via its August 15, 1995, and September 16, 1995, letters likewise come too late.

As I explain beginning at page 44, *supra*, I view the Planning Commission's 1990 decision in CU 23-90 as conclusively — albeit implicitly — resolving the question whether the kennel facilities comprised a "conforming" conditional use pursuant to MCC 11.15.2028(B). The record reflects that Marquam Farms (1) actively participated in the 1990 proceedings, (2) raised a "legality-of-use" issue that later resurfaced in DR 4-94, and (3) elected to not appeal the adverse resolution of that issue in the 1990 proceedings.

In *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the Supreme Court recently rendered a poignant comment about belated efforts to raise issues in land use proceedings. With but a minor modification, that comment seems fitting here as well. Specifically, the Court championed the Court of Appeals' earlier observation that

> "'[a] party who did not raise an issue in an earlier proceeding because he chose not to participate in it should be as precluded from later raising the issue as a party who did participate but neglected to raise the issue.'" 313 Or at 153 n. 2, quoting from *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 527, 746 P2d 728 (1987).

Paraphrased only slightly, that comment from *Beck* might well read: "A party who did not *pursue* an issue that it had raised in an earlier proceeding because it chose not to *appeal* the underlying decision should be as precluded from later raising the issue as a party who *did appeal* the underlying decision but *neglected to raise the issue* in the appeal." As so paraphrased, that conclusion would not be a particularly novel proposition.

Indeed, in *Beck* the Supreme Court resolved the question whether, in a land use proceeding in which a party prevails on one or more issues but loses on one or more issues, that party might purposely refrain from pursuing an appeal with respect to the issues on which that party did not prevail, and then later appeal those same issues within the context of an appeal from a later decision. In land use proceedings, that scenario occurs (or used to occur) with some frequency: *viz*, an opponent of a proposed development appeals an underlying decision and wins some issues while losing others; content with a partial victory in round one, the opponent returns for round two; the opponent loses round two and appeals again. *Beck* makes it plain that the "lost" issues that the opponent chose to not pursue further in round one cannot form any part of an appeal of round two.[19]

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19 For reasons perhaps peculiar to the land use process, *Beck* would not apply to a land use *proponent* (*viz*, the applicant) when that proponent *fails* to obtain favorable approval and resubmits the same application after the passage of some prescribed period of time. In that event, *Beck* would also not preclude any *opponent* from raising issues in the later proceedings that had not been raised earlier. That scenario would allow, for instance, the parties to debate matters anew *vis-a-vis* the 1994 proceedings, but not the 1990 proceedings in CU 23-90.

Land use proceedings also frequently involve another scenario: an opponent of a proposed development raises a particular issue at the primary decision-making level but loses; rather than risk an unsuccessful appeal of the issue to the governing body (or higher), the opponent does not pursue any appellate resolution and simply allows the decision to become final. In 1990, Marquam Farms apparently did precisely that in CU 23-90. It (**1**) challenged the lawfulness of Applicant's kennel facilities (*see* tape of November 6, 1990, Planning Commission hearing), (**2**) received (or precipitated) a specific interpretation of MCC 11.15.2028(B) in response to that challenge, and, after the Planning Commission necessarily determined that the kennel facilities comprised what might be termed a ".2028(B) use," (**3**) elected to not pursue the matter further. It would not strain logic to apply *Beck*'s reasoning to that scenario as well.

Thus, I conclude that — to paraphrase Marquam Farms' September 6, 1995, letter — Marquam Farms' "contentions [about the legality of the kennel facilities] were fully aired and decided in the unappealed [Planning Commission] decision in [CU 90-23]." Marquam Farms' resurrection of issues that could have been appealed to the Board (or beyond) in 1990 comes too late. Unlike the hearings officer's rejection of the Applicant's arguments in DR 4-94, the Planning Commission's rejection of Marquam Farms' arguments in CU 23-90 was *not* "without prejudice." I again emphasize the distinction between proceedings resulting in *approvals* and proceedings resulting in *denials*.

V. DO THE KENNEL FACILITIES ALREADY COMPRISE A ".2028(B)" USE?

Before resolving the question whether Applicant has fulfilled the various "conditional use" criteria in MCC 11.15.7105, *et seq.*, another preliminary question must first be answered: Do the existing kennel facilities comprise what might be termed a "conforming" conditional use, or what might also be labeled a ".2028(B) use"?

If so, then Applicant need not attempt to obtain retroactive conditional use approval for the kennel facilities themselves. If not, then the conditional use process for an *expansion* of use will be for naught and Applicant instead must fulfill the criteria in MCC 11.15.7105, *et seq.*, as if it were establishing the use for the first time.

Unfortunately, the language in .2028(B) engenders an interpretive quagmire into which everyone involved with Applicant's various land use proceedings has fallen

at one time or another. Marquam Farms earlier branded .2082(B)'s interpretation difficulties a proverbial "tar baby," and I concur. (*See* Marquam Farms' July 27, 1994, Memorandum in DR 4–94, at 2.) Nevertheless, unlike Marquam Farms' plea in 1994 that .2028(B) be left alone, I conclude that .2028(B) — its "tar baby" characteristics notwithstanding — stands squarely in the center of the path toward a resolution of Applicant's approval request, and that I do not know what direction that path takes until I confront .2028(B) directly.

MCC 11.15.2028(B) provides that

> "[c]onditional uses ***listed*** in subpart MCC [11.15].2012 ***legally established*** prior to August 14, 1980, ***shall be deemed conforming*** and not subject to the provisions of MCC [11.15].8804 [*sic*; '.8805'] . . ." (Emphasis added.)

Virtually identical language appears in a host of provisions in the Zoning Ordinance.[20]

"Dog kennels" certainly comprise a conditional use presently "listed" in MCC 11.15.2012(B)(11),[21] and Applicant's facilities certainly comprise a "kennel" as defined in MCC 11.15.0010. Beyond those two certainties, everyone's understanding of what that language *means* and what it *does* seems to diverge.

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20 The same or similar language appears in, for example:

- MCC 11.15.2070(A) (CFU);
- MCC 11.15.2108 (F–2);
- MCC 11.15.2150 (MUA–20);
- MCC 11.15.2190 (MUF);
- MCC 11.15.2230 (RR);
- MCC 11.15.2270 (RC);
- MCC 11.15.2368 (UF–20 and UF–10);
- MCC 11.15.2488(A) (LR–40, LR–30, LR–20, LR–10, LR–7.5, LR–7, and LR–5);
- MCC 11.15.2718(A) (MR–4, MR–3, HR–2, and HR–1);
- MCC 11.15.5055 (LM, GM, HM);
- MCC 11.15.6062 (LF); and
- MCC 11.15.7040 (CS).

21 That "listing" apparently occurred in 1986. However, I do not perceive that fact to have any consequence with respect to the meaning or scope of .2028(B).

There exist two methods of interpreting .2028(B): either (1) parse its individual clauses in chronological order and construe each (*see* topics A and B, below), or (2) determine the most logical reason why the provision arose in the first place (*viz*, the goal or purpose underlying .2028(B)) and disregard linguistic imperfections along the way (*see* topic C, below).

As I discussed earlier in this decision, after reviewing and re-reviewing the hearings officer's 1994 decision in DR 4-94, I have (somewhat reluctantly) concluded that the 1994 decision simply misinterprets .2028(B). Notwithstanding all of the various arguments that might be advanced in favor of *stare decisis* with respect to hearings officers' decisions, I simply cannot follow an interpretation of .2028(B) that, in effect, renders that provision superfluous.

A. Do The Applicant's Kennels Comprise A "Listed Use" At All?

Applicant interprets .2028(B) to mean that the existing kennel facilities comprise a "conditional use listed" in MCC 11.15.2012, regardless of whether or not .2028(B) might implicitly confine those "listed" uses to those in effect on August 14, 1980. That interpretation in turn depends upon the conclusion that .2028(B) comprises an elastic provision that protects "listed" conditional uses that the County had not even "listed" as conditional uses within an EFU district as of August 14, 1980. In other words, .2028(B)'s reference to "listed" uses includes all conditional uses "listed" in MCC 11.15.2012 at any point in time from August 14, 1980, forward — until changed by amendatory legislation.

Conversely, Marquam Farms — which, by virtue of its August 15, 1995, letter has incorporated the debate from the 1994 proceedings in DR 4-94 — reads .2028(B) as necessarily meaning that Applicant's kennel facilities could not pass muster as a "listed" conditional use in the first place because the County had not even "listed" kennels as a conditional use in an EFU district as of August 14, 1980. In other words, Marquam Farms' interpretation renders .2028(B) a provision that recognizes no use "listed" after August 14, 1980 — in effect creating two classes of "listed" uses.

The parties bolster their respective interpretations by citing different historical enactments, but neither discusses those cited by the other. Marquam Farms says that "[d]og kennels were not added to the list of EFU-zone conditional uses (MCC

.2012) until the enactment of Ordinance No. 509 on ***May 17, 1986***." (July 27, 1994, Memorandum ["MARQUAM MEMORANDUM"] at 11, n. 2 [emphasis added].) But Applicant points out that "Multnomah County Ordinance No. 100, which went into effect on ***November 15, 1962***, provided in section 7.5401(A) . . . that kennels were a conditional use 'in F-2 districts or those areas of similar low population density.'" (Applicant's July 28, 1994, Brief ["APPLICANT'S BRIEF"] at 2 [emphasis added].)

Given that the "F-2" designation that attains significance in Applicant's argument comprised the predecessor of the current "EFU" designation (*see* Ordinance No. 148, § 3 [redesignating the "F-2" district as "EFU-38"]), the available chronology supplied by the parties leaves me somewhat baffled. To confuse matters further, when the County enacted Ordinance No. 148 in September, 1977, § 3.103.3 thereof established the predecessor of the conditional use provisions in current MCC 11.15.2012(B), but no longer mentioned "kennels" as a conditional use.

I conclude that the legislative chronology — assuming that it can be translated into a cogent proposition — has scant significance at this point. Notwithstanding the fact that kennels could not have comprised a "listed" conditional use until May 17, 1986, for purposes of .2028(B) Applicant's kennel *now* comprises a "[c]onditional use[] listed in subpart MCC [11.15].2012" if only because I would have to insert additional language or conditions into the provision, or surmise some non-explicit connotation, in order to disagree with Applicant's interpretation. My interpretation also renders .2028(B) an elastic provision that does not otherwise segregate conditional uses according to "listing" dates.

However, given the greater uncertainties with the remainder of the language in .2028(B) (below), I am not confident that this particular debate makes any difference.

B. WERE THE KENNELS "*LEGALLY ESTABLISHED* PRIOR TO AUGUST 14, 1980"?

As the Court of Appeals recently observed in *Von Lubken v. Hood River County*, 133 Or App 286, 288, ___ P2d ___ (1995), it is indeed possible to construct, operate, maintain, and otherwise "establish" a conditional use within an EFU district (a golf course) while proponents and opponents endure a five-year debate within LUBA and the Court of Appeals as to the legality and finality of the local government's ap-

proval in the first place. If ultimately successful, it would be equally possible for the parties in *Von Lubken* to urge at least two different dates upon which the use in question had been "legally established." Given that possibility, the question whether phrases such as "legally established" mean anything in particular cannot be answered with the ease suggested by Applicant and Marquam Farms.

(1). DOES THE TERM *"LEGALLY ESTABLISHED"* DIFFERENTIATE USES THAT WERE "*ILLEGALLY* ESTABLISHED"?

I approach the meaning of the term "legally established" by asking whether it purports to distinguish its converse. Can it be said that Applicant's kennel facilities represent a conditional use "***illegally*** established" prior to August 14, 1980? In other words, can there be an "illegal" ***conditional*** use? If not, then the differentiation in .2028(B) resulting from the term "legally" would be irrelevant insofar as it purported to draw a line between "legal" and "illegal" conditional uses.

Either the County employed the term "legally" for a particular reason, *viz*, in order to differentiate between "***legally***" established conditional uses and "***illegally***" established conditional uses, or it simply created a two-word phrase when one would have sufficed. Because I can think of no circumstances in which a particular use might be described as an "illegal" conditional use (as opposed to some other kind of use), I conclude that .2028(B) simply asks whether a particular had been "established" at its inception in a legal manner, and that the reference to "legally" does not signify other types of conditional use. Otherwise, the phrase "legally established" suggests that the converse exists, which, in the context of a conditional use, would yield an oxymoron.

However, I do not necessarily read the reference to "legally" out of .2028(B) altogether; rather, I interpret the term "legally" to refer to the ***origins*** of the use that .2028(B) then makes "conforming," regardless of whether that use comprised a "conditional" use when first established or something else. I conclude that Applicant's kennel facilities were long ago "established" in a legal manner, albeit not necessarily as a conditional use for which a permit had been given.

(2). DOES THE TERM *"LEGALLY ESTABLISHED"* NECESSARILY INCORPORATE NOTIONS OF "ABANDONMENT" OR "DISCONTINUANCE," AS THOUGH IT PERTAINED SOLELY TO PRE-EXISTING NON-CONFORMING USES?

Applicant — and staff as well in 1989 and 1990 — maintains that, as long as a "listed" conditional use has been "legally established" ***at any point prior to*** August 14, 1980, notions of "abandonment" or "discontinuance" become irrelevant. (APPLICANT'S BRIEF at 1-2.) Applicant reasons that the language in .2028(B)

> "differs markedly from the language for determining whether a use is a nonconforming use: 'lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation' (ORS 215.130(5))." (APPLICANT'S BRIEF at 2 [underscore in original].)

Marquam Farms, on the other hand, declares that .2028(B) comprises "a 'grandfather' clause; not a resurrection clause. It cannot be used to restore to life rights which were extinguished (for reasons unrelated to the Code amendments) before the effective date of MCC .2028(B)." (MARQUAM MEMORANDUM at 8.) It fears that .2028(B) would otherwise allow a resumption of various conflicting uses that had long since ceased to exist within an EFU district, although I suspect that the conflicting uses would no longer be "listed" among the conditional uses allowed in the district under MCC 11.15.2012, and thus could not be "resurrected" anyway.

Both arguments make sense, although for different reasons:

- Applicant focuses solely on a language differential that does indeed reflect a material deviation from the nonconforming use provisions in ORS 215.130(5), yet offers nothing to determine whether that differential might have been intended or merely inadvertent. Moreover, Applicant suggests no rationale why .2028(B) ought to be read to ignore or minimize the possibility of long-since-discontinued uses being brought back to life.

- Marquam Farms focuses solely on the prospect of a "crazy patchwork of historical uses" that .2028(B) might condone if continuity of use were not implicit in .2028(B)'s language, although, as I note above, it seems equally logical to assume that obviously contradictory uses would no longer comprise "[c]onditional uses ***listed*** in subpart MCC [11.15].2012 [.]"

There exists yet a third consideration that neither party mentions: To accept Marquam Farms' argument that the use in question must have been continuous until August 14, 1980 (which necessarily suggests a focus solely on non-conforming uses), the interpreter must be able to construct a rationale for the provision's existence in the first place; that is, what purpose does the provision serve if it achieves nothing more than a name change of pre–existing *non-conforming* uses to *"conforming"* uses and correlatively grants enhanced protection for those uses (*viz*, "not subject to the provisions of MCC .880[5]")? **None.**

In other words, in the interpretive scenario advocated by Marquam Farms, .2028(B) achieves *precisely* what Marquam Farms says it *cannot* achieve: it "***improves*** the status of a [non-conforming] use that, even before amendment of the code, was not consistent with zoning." (MARQUAM MEMORANDUM at 5 [emphasis in original].)

Put differently, if Marquam Farms is correct in its premise that .2028(B) can only apply to a pre–existing "legally established" non-conforming use, then I agree with the hearings officer's decision in DR 4–94 that ORS 215.130 prohibits the conversion of a non-conforming use to a "conforming conditional use," which, in turn, seems to strongly suggest that .2028(B) has as its target "use" something *other than* a "legally established" non-conforming use. In other words, *either* .2028(B) impermissibly conflicts with ORS 215.130 — in which case I must necessarily presume that the drafters of .2028(B) purposefully crafted an enactment that flouts state law — *or* it envisions the provision as implicating some other situation entirely — in which case it serves to explain why the language in .2028(B) cannot easily be reconciled with traditional notions of "non-conforming" uses or "conditional" uses.

Because Marquam Farms' interpretation does not yield a rationale that adequately explains the purpose for the provision in the first place, and because in the interpretive scenario advocated by Marquam Farms .2028(B) does *precisely* what Marquam Farms says it *cannot* do, I cannot accept it. Linguistics alone does not a law make. At least Applicant's contrary interpretation implies a purpose for the provision, *viz*, to render uses such as Applicant's kennel facilities a "conforming" conditional use as of the date it appears "listed" in MCC 11.15.2012.

I therefore conclude that .2028(B) does not necessarily operate solely on "non-conforming" uses. For that reason, I further conclude that, at least for purposes of this case, a literal reading of the language in .2028(B) does not plainly suggest that the phrase "legally established prior to August 14, 1980" means that the use must, in addition to having been "legally established" at some point in time, have been "legally established ***and continually maintained***" prior to August 14, 1980.

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(3). THERE EXISTS NO SUBSTANTIAL EVIDENCE OF "ABANDONMENT" OR "DISCONTINUANCE" IN ANY EVENT

Finally, as I explain in detail in the non–conforming use portion of this decision, I conclude that there exists no "substantial evidence" of "abandonment" or "discontinuance" of kennel facilities on the property since their establishment in the early 1950s. Thus, even if Marquam Farms' interpretation of .2028(B) proves correct and that provision requires a continuity of use until August 14, 1980, the debate becomes moot.

C. WHAT OVERALL PURPOSE DOES .2028(B) SERVE?

The other method of resolving the meaning or scope of .2028(B) rests upon a determination of the purpose for which the County might have enacted that language in the first place.

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(1). THE "LITERAL" APPROACH

Applicant suggests that .2028(B) means

> "precisely what it says: if (1) a use such as a kennel is listed in MCC 11.15.2012; and (2) the use was legally established prior to August 14, 1980, it is as if the county gave the use a conditional use permit ***on the day it was established***." (APPLICANT'S BRIEF at 1 [emphasis added].)

But Applicant does not identify what date the kennel facilities might be deemed to have "established." If there exists more than one possible date (and I can think of a couple), then the "literal" approach proves not very helpful.

It would be more correct from the "literal" perspective to declare that a "use" becomes a "conforming conditional use" (*viz*, a ".2028(B) use") on the *later* of (1) August 14, 1980, or (2) the date the "use" appears listed among the various conditional uses in MCC 11.15.2012.

Thus, because Applicant's "literal" interpretation implicates some uncertainty as to the timing component, I cannot accept it as conclusive.

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(2). THE "SAVING GRACE" APPROACH

Marquam Farms suggests that .2028(B) serves to protect a previously–authorized conditional use — *viz*, a use with a permit — from the various restrictions that otherwise burden *non*–conforming uses in the event that the County subsequently revamps its conditional use provisions in such a fashion that the previously–authorized conditional use becomes, in effect, a non–conforming use. (MARQUAM MEMORANDUM at 4 [preserving the use's right to be "expanded, enlarged, or intensified"].)

However, that interpretation does not explain .2028(B)'s explicit correlation to MCC 11.15.8805, which does *not* insulate any .2028(B) use from the "alteration" criteria in MCC 11.15.***8810***. In other words, the protection–of–use that assumes significance in Marquam Farms' hypothesis does not really exist.

Moreover, Marquam Farms' interpretation must also account for the possibility that, instead of merely restructuring the criteria under which a conditional use operates (as in the example on page 4 of its July, 1994, memorandum), the County might very well *eliminate* the use itself from among the list of conditional uses. In that event,

nothing about .2028(B) serves to explain why the County would want to protect ***unlisted*** conditional uses.

Finally, Marquam Farms' interpretation would appear to render .2028(B) duplicative of the "pre-existing use" provisions in MCC 11.15.7610 and .7615, which I find susceptible to the very interpretation that Marquam Farms offers as a justification for .2028(B), *viz*, protection of "delisted" uses:

> "A use ***conforming*** to the provisions of this Chapter prior to July 26, 1979, ***but not thereby listed*** in the applicable district as [1] a primary use, [2] a use permitted under prescribed conditions or [3] a conditional use, is subject to the provisions of MCC .7615 through .7640" MCC 11.15.7610 (emphasis and enumeration added).
>
> ". . . [E]xpansion, change in construction or enlargement of a use ***described in MCC .7610*** shall be permitted [.]" MCC 11.15.7615 (emphasis added).

See also MCC 11.15.7620 (allowing restoration of a ".7610" use) and 11.15.7625 (allowing a "change" of a ".7610" use).

(3). THE "SIGNIFICANCE-OF-THE-EXEMPTION-*VIS-A-VIS*-11.15.8805" APPROACH

No one discusses the significance of .2028(B) in terms of MCC 11.15.8805, which is, after all, specifically mentioned in .2028(B).

A dominant effect of MCC 11.15.2028(B) lies in its exemption from the nonconforming use criterion in MCC 11.15.8805. MCC 11.15.8805 sets forth three limitations:

- Any "restoration" or "replacement" shall be allowed only for prescribed reasons. (.8805(A).)

- Any "non–conforming structure or use" that suffers abandonment or discontinuance "for more than two years" cannot be resumed unless the "resumed use conforms with the requirements of this code at the time of the proposed resumption." (.8805(B).)

- Any "non–conforming structure or use may be maintained with ordinary care." (.8805(C).)

However, .2028(B) plainly leaves its referents subject to the "alteration" provisions in MCC 11.15.88***10***. Why?

Because .2028(B) contains an express reference to "conforming," and because MCC 11.15.8805(B) contains a correlative reference to a resumption of an abandoned or discontinued as long as the resumed use "conforms" with pertinent Zoning Code requirements, I find it logical to construe .2028(B) as establishing a presumption that any "resumed" use that, at the time of resumption, **(1)** comprises a use that appears "listed" in MCC 11.15.2012 ***and*** **(2)** had been "legally" established at any point prior to August 14, 1980, automatically "conforms with the requirements of this code at the time of the proposed resumption."

In other words, the use may very well have been "abandoned" or "discontinued," but its resumption shall be treated as the resumption of a ***conditional use*** instead of a non–conforming use. Any "alteration" of the use would, however, still be subject to MCC 11.15.8810.

Thus, when the County added "dog kennels" to its list of .2012(B) conditional uses in 1986, any question of "abandonment" or "discontinuance" became, in effect, a moot point as long as the use after 1986 did not comprise any "alteration" of use. That interpretation would accord a .2028(B) use the same treatment as would otherwise be afforded any other conditional use for which a permit had been granted but which might have been discontinued; as long as the use remains listed as an authorized conditional use within, for instance, MCC 11.15.2012, discontinuance has no impact or effect on a ***conditional*** use.

(4). THE "QUASI–CONDITIONAL USE" (OR "WHAT ELSE COULD IT MEAN?") APPROACH

Applicant also suggests that .2028(B) has as its intended purpose

> "to make the uses conforming if they are listed as conditional uses, regardless of whether they have actually obtained conditional use permits." (APPLICANT'S BRIEF at 3 [underscore in original].)

Under this interpretation, .2028(B) grants "quasi"–conditional use status to any use that, "but for" the absence of the required permit, ***would be*** a true (*viz*, allowed) "conditional" use. That interpretation of .2028(B) would not apply to just any "use," a fact that placates Marquam Farms' concern that .2028(B) would otherwise *enhance* or *improve* the status of a true non-conforming use.

An apparent flaw in this interpretation lies in the fact that, until a pre–existing use actually appears *listed* as a conditional use (in, for instance, MCC 11.15.2012), it could only be a non-conforming use, in which case it would not fulfill the "but for" test of the preceding paragraph until such time as it became a "listed" conditional use.

In response, Applicant correctly observes that, if .2028(B) does *not* achieve the suggested purpose (and if Marquam Farms' hypothesis proves correct), the only remaining category of uses to which .2028(B) might apply would be conditional uses for which a permit *already* existed, and that

> "interpreting MCC 11.15.2028(B) to apply only to uses covered by prior conditional use permits ***would essentially read the provision out of the code***. . . . [I]f a use is already covered by a conditional use permit, the right to continue that use is [***already***] governed by the permit and MCC 11.15.7105 to 11.15.7135." (APPLICANT'S BRIEF at 3–4.)

I agree.

MCC 11.15.2028(B) makes no sense — and becomes utterly superfluous — if it can only apply to conditional uses for which a prior permit has been granted. It ***only***

makes sense if it purports to apply to a use that, "but for" the absence of a conditional use permit, ***would be*** a true conditional use.

For that reason, I reject Marquam Farms' argument that .2028(B) only applies to conditional uses for which a prior permit has been issued. (*See* MARQUAM MEMORANDUM at 3–4 and 6–7.) If Applicant's kennel facilities ***had*** a conditional use permit, the debate about whether .2028(B) confers "quasi"–conditional use status would never occur.

Because I cannot construe .2028(B) to be superfluous and thus unnecessary, I am left with giving it the meaning that Applicant suggests: .2028(B) "makes the uses conforming [conditional uses] if they are listed as conditional uses [within MCC 11.15.2012], regardless of whether they have actually obtained conditional use permits." As so construed, .2028(B) alleviates a logical — if not legal — defect in the status of a use that had perhaps been non–conforming (or even a "delisted" conditional use) at some point in time, but later became a "listed" conditional use. After being "listed" as a conditional use, a pre–existing use — whether established by permit approval or otherwise — could scarcely be described as a "non–conforming" use. MCC 11.15.2028(B) resolves that conundrum.

(5). SUMMARY OF PROBABLE MEANINGS

None of the above outcome–based interpretations explain the meaning of .2028(B) with certainty. Unfortunately, the only alternatives comprise declarations that .2028(B): (1) has no discernible purpose, (2) runs afoul of ORS 215.130 in some unspecified fashion, or (3) remains hopelessly ambiguous. Because I conclude that none of those alternatives comprises the ***only*** reasonable alternative, I cannot in this case accept an alternative that would effectively obliterate a local enactment.

I therefore conclude that the most probable and reasonable meaning to be accorded .2028(B) is this: It purports to apply to a use that, but for the absence of a conditional use permit, ***would be*** a true conditional use. The resulting use comprises a "conforming" conditional use or what might be described as a ".2028(B)" use. Such a "conforming" conditional use may be curtailed or discontinued and resumed in the same manner as a true conditional use, unburdened by notions of "abandonment" or "discontinuance" normally associated with ***non***–conforming uses.

That interpretation also resolves a profound dilemma for a use that had, for example, been a non–conforming use and later became a "listed" conditional use. A pre–existing use that suddenly becomes a "listed" conditional use can scarcely be described as a "non–conforming" use.[22] MCC 11.15.2028(B) renders that species of use a "conforming" conditional use without the need to apply for a conditional use permit in order to maintain a use that, but for the absence of a permit, is ***already*** a conditional use.

VI. DOES THE CONDITIONAL USE PROCESS APPLY AT ALL TO AN *EXISTING* "CONDITIONAL USE"?

Applicant has proceeded upon the assumption that the modification and expansion of the kennel facilities would constitute an alteration or modification of an existing conditional use (*viz*, a ".2028(B) use") for which a conditional use permit would be necessary.

However, I find the Zoning Ordinance less than clear under the circumstances with respect to the following question: Must an applicant who ***already has*** a conditional use — via .2028(B) or otherwise — proceed with conditional use approval each time a change is sought with respect to components of the "use" apart from the "use" itself?

The following conditional use provisions within MCC 11.515.7105, *et seq.*, seem to suggest different results:

- MCC 11.15.7110(B) recites that the conditional use criteria control any "***modification***" of a conditional use, but otherwise provides no indication of what the term "modification" encompasses.

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22 MCC 11.15.0010's definition of "non–conforming use," for instance, describes a use "which does ***not*** conform with the use regulations of the district in which it is located." Obviously, a "non–conforming use" that suddenly attains a new status as a "listed" *conditional* use falls outside that definition. Even if the definition of "non–conforming use" said "***did*** not conform" instead of "***does*** not conform," it would defy logic or reason to describe a "listed"–but–never–formally–approved conditional use as a "nonconforming" use.

- MCC 11.15.7110(D) recites that "[a]ny ***change of use***" shall be subject to approval, but does not purport to define "change of use" as encompassing a change in the amount of activity associated with a listed "conditional" use, in other words, no change in "use."

- MCC 11.15.7110(D) also recites that "[a]ny . . . ***modification of limitations or conditions***" shall be subject to conditional use approval, but does not specify the source of any such "limitations or conditions" (*viz*, in a prior conditional use permit, or some other approval).

- MCC 11.15.7130 prescribes a conditional use permit "for each conditional use approved, ***before development*** of the use," but says nothing about the expansion of an existing conditional use that does not involve an altogether new "use." Applicant does not propose to "develop" a listed conditional use; "develop" presupposes previous nonexistence.

First of all, I do not construe the "before–development–of–the–use" language in MCC 11.15.7130 as requiring a conditional use permit in order to expand or modify components of an *existing* conditional "use" that has already been "developed."

Nor do I construe the "change–of–*use*" language in MCC 11.15.7110(D) as requiring a conditional use permit in order to expand or modify components of an *existing* conditional "use." Applicant proposes to retain the same "*use*," as identified within the conditional use provisions in MCC 11.15.2012(B)(11). By comparison, although the "'conforming' conditional use" provisions in MCC 11.15.2028 — as well as the host of similar provisions cited in the footnote at page 51 — require that any "change of use" must be governed by the applicable conditional use criteria (*see* .2028(B)), they then define "change of use" as meaning only a change "***from*** one conditional use listed in MCC 11.15.2012 ***to another*** such conditional use" (*see* .2028(C)). Applicant, however, proposes no change to another conditional use.

The reference to "limitations or conditions" in MCC 11.15.7110(D) seemed, upon an initial reading, to be broad enough to include the August 6, 1990, "FINAL DESIGN REVIEW" approval for "50 Dogs" and the accompanying comment in the August 6, 1990, "NOTICE OF PLANNING DIRECTOR DECISION" in 90–07–02 that "no additional dogs are authorized by this permit." However, I note that the phrase "limitations or conditions" initially appears in the first sentence in MCC 11.15.7110(D) ***only in connection with a conditional use permit.*** Thus, the identical reference in the second sentence of MCC 11.15.7110(D) to a "modification" of those same "limitations or condi-

tions" relates back to the first sentence simply as a matter of internal consistency, which, in turn, suggests that "limitations or conditions" contained in, for instance, a Design Review approval would *not* trigger the conditional use approval process. I therefore interpret MCC 11.15.7110(D)'s reference to "limitations or conditions" to mean *only* those "limitations or conditions" that appear in a prior *conditional use permit*; no other interpretation would make grammatical or contextual sense, especially in a two–sentence provision.

I therefore conclude that, because the "conditions" in the 1990 Design Review approval did not occur within the context of a conditional use permit (as the first sentence of MCC 11.15.7110(D) otherwise suggests), Applicant's request to increase the kennel capacity from 50 to 75 dogs does *not* implicate a prior "limitation[] or condition[]" as to the amount of dogs allowed, and therefore does *not* require conditional use approval for that increase — as long as Applicant at least has an existing conditional use, via the "'conforming' conditional use" provisions in .2028(B) or otherwise.

VII. FINDINGS — CONDITIONAL USE

In the event that I am incorrect in my interpretation of .2028(B), or am incorrect in my conclusion that nothing about DR 4–94 has any preclusive effect under the circumstances, or am incorrect in my conclusion that nothing in MCC 11.15.7105, *et seq.*, requires a conditional use permit in this particular case, I have considered all of the pertinent conditional use criteria as well.

Because of the peculiar — if not unique — circumstances of this approval request, I have considered the conditional use criteria for two purposes. *First*, I have considered and resolved the question whether Applicant fulfills the conditional use criteria with respect to the existing kennel facilities as if those facilities did not yet exist. *Second*, I have considered and resolved the question whether Applicant fulfills the conditional use criteria with respect to an *expansion* of kennel capacity.

The distinction between the two purposes that I describe in the preceding paragraph appear minimal in the context of the differences between the existing 50–dog kennel facilities and the proposed 75–dog kennel facilities. However, from a procedural perspective the distinction proves significant. A 45–year–old "use" that comprises a "listed–but–unapproved" conditional use ought to be accorded conditional use

status, if it is to attain any status at all. Furthermore, as I read the non-conforming use language in MCC 11.15.8805(B),[23] any *resumption* of what might otherwise be a "discontinued" non-conforming use would necessarily utilize the conditional use criteria if, as here, that use comprised a "listed" conditional use within the zoning district. I can think of no other criteria within the meaning of MCC 11.15.8805(B) that would control the resumption of such a non-conforming use under the circumstances.

Thus, as I observed earlier, because MCC 11.15.8805(B) provides that a discontinued use may be "re-established" if it "conforms with the requirements of this code at the time of the proposed resumption," and because Applicant's kennel facilities do indeed qualify as a "conditional use" listed in MCC 11.15.2012(B)(11), I find nothing in the Zoning Ordinance that would preclude the "re-establishment" of a discontinued use via a request for conditional use approval under the peculiar circumstances of this case. If Applicant fulfills the criteria for the belated recognition of a conditional use, the resumption issue actually disappears. On the other hand, if Applicant cannot, in the words of MCC 11.15.8805(B), prove "conform[ance] with the requirements of this code," and if those requirements now mandate the conditional use process, then the resumption issue similarly disappears.

A. ORS 215.283

ORS 215.283(2) provides, in pertinent part, that

> "[t]he following nonfarm uses may be established, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use subject to ORS 215.296:
>
> "* * * * *

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23 MCC 11.15.8805(B) provides, in pertinent part:

> "If a non-conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re-established ***unless the resumed use conforms with the requirements of this code*** at the time of the proposed resumption." (Emphasis added.)

"(m) Dog kennels not described in subsection (1)(j) of this section."

I find that ORS 215.283(2)(m) describes Applicant's kennel facilities.

B. ORS 215.296 / MCC 11.15.7122

ORS 215.296 provides, in pertinent part:

"(1) A use allowed under ORS . . . 215.283(2) may be approved only where the local governing body or its designee finds that the use will not:

"(a) Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; ***or***

"(b) Significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use." (Emphasis added.)

MCC 11.15.7122 similarly provides:

"(A) In addition to the criteria of MCC .7120, an applicant for a Conditional Use listed in MCC .2102(B) must demonstrate that the use:

"(1) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; ***and***

"(2) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use." (Emphasis added.)

The County's conjunctive provision represents a permissible narrowing of the approval criteria in ORS 215.296(1). *See* ORS 215.296(10).

(1). "Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use"

"Erring on the side of conservatism," Applicant has identified an "impact" area comprising a 1,500-foot area surrounding the kennels. The only "impact" identified in the record would be the noise generated by the barking of the dogs. Applicant's noise study reflects that

- Within the kennel itself, the noise generated by the dogs' barking could approach (or slightly exceed) that comparable to "a jet flying overhead."
- Thirty feet outside the kennel, at the Marquam Farms property line, the noise generated by the dogs slightly exceeded the ambient noise level at that particular location.
- Five hundred feet from the kennel, the noise generated by the dogs almost paralleled the ambient noise level at that particular location, and measured less than the noise generated by geese flying overhead.
- 1,500 from the kennel, Applicant predicts any kennel-generated noise to be "marginally audible."

Applicant identifies but one commercial farming operation within the 1,500 "impact area": the Vetsch dairy farm. Nothing in the Zoning Ordinance defines "surrounding" or "adjacent." I conclude that, under the circumstances and for purposes of this, Applicant's chosen "impact area" adequately determines the extent of the "surrounding lands" that MCC 11.15.7122(A)(1) requires the Applicant to address.

The record contains no evidence of "forest practices" on surrounding lands "devoted" to a "forest use." Accordingly, the "forest" component of this criterion could

not possibly apply, and I find that the kennel facilities could not force any "significant" change in accepted forest practices on surrounding lands devoted to forest use.

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(2). "Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use"

The record identifies the Vetsch dairy as the only farming operation on "surrounding" land, as I have applied that term for purposes of this case in the previous section.

Because, as I noted in the previous section, Mr. and Mrs. Vetsch submitted a letter dated August 11, 1995, in which they laud the existing kennel operations and urge approval of Applicant's proposal, I conclude that any suggestion that an expanding kennel operation would increase the cost of dairy operations would be incongruous with that letter. I thus find that the kennel facilities will not "significantly" increase the cost of accepted farming practices on surrounding lands devoted to farm use.

The record contains no evidence of "forest practices" on surrounding lands "devoted" to a "forest use." Accordingly, the "forest" component of this criterion could not possibly apply, and I find that the kennel facilities could not "significantly" increase the cost of accepted forest practices on surrounding lands devoted to forest use.

C. OAR 660-33-120/ 660-33-130

(1). OAR 660-33-120 AND 660-33-130 EXPRESSLY ALLOW "EXISTING" KENNEL USES TO CONTINUE, AND TO BE "MAINTAINED, ENHANCED OR EXPANDED"

In June, 1994, LCDC promulgated OAR 660-33-120 and 660-33-130, the pertinent text of which appears beginning on page 32, *supra*. Those rules declare two things:

- According to OAR 660–33–120, dog kennels comprise a "use not permitted" within an EFU district comprised of "high–value farmland."

- According to OAR 660–33–130, "***[e]xisting*** facilities [located within 'high–value farmland'] may be maintained, enhanced or expanded[.]"

Staff reports that Applicant's kennel facilities comprise "high–value farmland," and Applicant does not suggest otherwise.

Because (1) OAR 660–33–130 specifically declares that "***[e]xisting*** facilities may be maintained, enhanced or expanded," and (2) neither OAR 660–33–120 nor OAR 660–33–120 mentions, infers, or intimates some unspoken meaning for the term "existing," I conclude that Applicant's kennel facilities comprise an "existing" use for purposes of OAR 660–33–120 and 660–33–130. I do not, in other words, subscribe to the metaphysical anomaly that Applicant's kennel facilities can described as the *converse* of "existing."

Furthermore, because neither OAR 660–33–120 nor OAR 660–33–130 purports to make distinctions between conditional uses and non–conforming uses, and because OAR 660–33–120 in particular appears concerned with the establishment of ***new*** uses that heretofore have never previously existed in any form, I additionally conclude that OAR 660–33–120 and 660–33–130 expressly allow Applicant's kennel facilities to continue, and to be "maintained, enhanced or expanded[.]"

Staff concluded that OAR 660–33–120/660–33–130 would alone prevent any approval of Applicant's request. (STAFF REPORT at 10 ["OAR 660–33–110 [*sic*] does not allow dog kennels on High Value Farmland."].) Yet OAR 660–33–130 ***specifically allows*** dog kennels, as long as they comprise "existing" kennels. Staff did not suggest or conclude that Applicant's kennels comprise something ***other than*** "existing" kennels, nor, as I read OAR 660–33–130, could it.

Thus, I conclude that neither OAR 660–33–120 nor 660–33–130 have any preclusive effect under the peculiar circumstances of this case. Rather, they prohibit only the development of ***new*** uses that, by obvious implication, never previously existed. This interpretation also allows the rules to co–exist with state law (*see* the following topic).

(2). TO THE EXTENT THAT OAR 660–33–120 AND 660–33–130 DIFFER WITH STATE LAW, STATE LAW CONTROLS

Applicant also asserts that OAR 660–33–120 and 660–33–130 clash with state law. In the event that I am incorrect in my conclusion that neither of those rules purports to preclude the continued operation or expansion of "existing" kennel facilities, I will address that alternative challenge to the preclusive effect of those rules.

The discussion in this topic assumes that OAR 660–33–120 and 660–33–130 together ban any local government approval of kennel facilities that lack any prior approval. Because of the unusual circumstances surrounding Applicant's approval request, I need to further assume that those rules also prohibit any attempt to obtain local government approval for ***either*** (1) a conditional use that has existed for many years but which never obtained a conditional use permit, ***or*** (2) the resumption of a non–conforming use by the fulfillment of the requisite standards, per MCC 11.15.8805(B).

ORS 215.283(2) provides in pertinent part:

> "The following nonfarm uses ***may be established***, subject to the approval of the governing body or its designate in any area zoned for exclusive farm use . . .:
>
> "* * * * *
>
> "(m) ***Dog kennels*** not described in subsection (1)(j) of this section." (Emphasis added.)

Applicant's kennel facilities comprise those described — and allowed with County approval — by ORS 215.283(2)(m). [The County has reproduced the provisions of ORS 215.283(2)(m) within MCC 11.15.2012(B)(11).]

I will assume for purposes of this discussion that the rules would preclude local governments from granting conditional use (or other) permits to any kennel operations even in instances in which, as here, a local government ordinance allows (1) "conforming" conditional uses with respect to which permits have not been granted, and (2) the resumption of non–conforming uses by the fulfillment of prescribed standards. If so, then ORS 215.283(2)(m) and OAR 660–33–120/ 660–33–130 run head-

long into each other; the former allows kennels to be approved in EFU districts, while the latter does not.

Staff concluded that OAR 660–33–120/660–33–130 would alone prevent any approval of Applicant's request. (STAFF REPORT at 10.) Staff did not, however, examine the impact of ORS 215.283(2)(m), except to report that

- the County's present Zoning Ordinance mirrors ORS 215.283(2)(m) but has not yet been amended to incorporate OAR 660–33–120/660–33–130, and

- County Counsel had advised staff that "until the [Zoning Ordinance] is amended to include the OAR provisions, the OAR provisions must be considered in the review of any application for proposed uses within the Exclusive Farm District." (STAFF REPORT at 10.)

LCDC's promulgation of OAR 660–33–120/660–33–130 has rendered staff's task more difficult that it ought to be, and puts staff in the position of asserting the preclusive effect of administrative rules that, in my opinion, conflict with a higher authority: state law. Because of the hierarchy of land use laws, staff cannot simply ignore OAR 660–33–120/660–33–130, notwithstanding the apparent conflict between uses that state law plainly allow in ORS 215.283 and uses that OAR 660–33–120/660–33–130 purport to prohibit.

I conclude that LCDC lacks the authority to enact an administrative rule that purports to delimit or extinguish the types and availability of uses otherwise allowed by statute. No state agency has the authority to diminish statutory rights by administrative fiat. *See Cook v. Workers' Compensation Department*, 306 Or 134, 138–39, 758 P2d 854 (1988), and *Miller v. Employment Division*, 290 Or 285, 289, 620 P2d 1377 (1980); *see also Fisher Broadcasting, Inc. v. Dept. of Rev.*, 321 Or 341, 355–59, ___ P2d ___ (1995) (state agency cannot create an administrative rule at odds with statute). Although the 1995 legislature had the opportunity to amend ORS 215.283 to recognize the limitations in OAR 660–33–120/660–33–130, and in fact did amend ORS 215.283 in a manner not relevant here (*see* 1995 Or Laws, ch. 528, § 2 [amending subsection (1)]), it nevertheless left subsection (2) intact.

Just as LCDC lacks the authority to alter the various Goals by promulgating conflicting administrative rules (*see 1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 399–402, 752 P2d 271 (1988)), and just as LCDC similarly lacks the authority to acknowledge a local government's comprehensive plan in a fashion that would alter

any of the various Goals (*see 1000 Friends of Oregon v. LCDC (Lane Co., supra*, 305 Or at 396–97; and *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 369, 703 P2d 207 (1985)), LCDC's authority does not extend to the promulgation of administrative rules that purport to modify statutes.

If the question were instead whether LCDC might require local governments to "'enact more restrictive ***criteria*** than ORS 215.283 imposes ***for permitting the uses described*** in that statute'" (*see Brentmar v. Jackson County*, 130 Or App 438, 441, 882 P2d 1117 (1994), *review allowed* 320 Or 453 (1994); *see also Kenagy v. Benton County*, 112 Or App 17, 20 n. 2, 826 P2d 1047 (1992), and *Von Lubken v. Hood River County*, 104 Or App 683, 687, 803 P2d 750 (1990), *adhered to on reconsideration* 106 Or App 226, 806 P2d 727, *rev den* 311 OR 349 (1991)), the issue would disappear. I would analogize from the discussions in *Brentmar*, *Kenagy*, and *Von Lubken*, *supra*, that LCDC might well be able to promulgate "restrictive criteria." But OAR 660–33–120/660–33–130 together do not purport to merely implement "more restrictive criteria" for "permitting" the statutory uses; they purport to *eliminate* the uses altogether.

D. MCC 11.15.2012(B)

MCC 11.15.2012(B) requires the fulfillment of the conditional use criteria in MCC 11.15.7015–.7140 for the development of "dog kennels," among other listed conditional uses. Applicant's facilities comprise a "kennel" as defined in MCC 11.15.0010.

Applicant has specifically addressed the conditional use criteria in MCC 11.15.7015–.7140 in the approval request. I discuss those criteria in the following section.

E. MCC 11.15.7120(A)

(1). "CONSISTENT WITH THE CHARACTER OF THE AREA"

Sauvie Island encompasses a combination of agricultural and rural/recreational uses, the latter of which include private hunting facilities and kennels. Dog kennels have historically been a part of Sauvie Island for almost half a century, and at least two long-standing kennels remain active on the island.

Applicant's kennel facilities both serve and exemplify the island's rural/recreational uses, and serve as a logical place to board and train hunting dogs, which, in turn, have long been used for hunting on the island. Some farmers maintain "duck ponds" on their property as a private hunting reserve, and dog kennels function as a natural adjunct to that sort of activity. The other dog kennels have in the past maintained hunting facilities in conjunction with, and in direct proximity to, the kennel operations. Some members of Marquam Farms board and train their dogs at Applicant's kennel facilities.

Applicant has documented abundant and, with the exception of Marquam Farms, seemingly unanimous support among Sauvie Island residents and others who actively participate in various activities on the island. No one else suggests that a dog kennel would be significantly inconsistent with the area's agricultural and rural/recreational attributes. Indeed, two other active kennels have co-existed with island uses for quite some time.

In prior years, Marquam Farms has voiced concern about the impact that the dogs might have on its hunting facilities,[24] and has also raised a number of complaints about historical difficulties concerning the noise generated by dogs barking at night and Applicant's observation of property boundaries and other problems associated with the close proximity of the kennels. As I read the record, it seems that, of all

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[24] Marquam Farms has participated in this proceeding only via its August 15, 1995, and September 6, 1995, letters. The August letter suggested that the proceedings in DR 4-94 ought to preclude the necessity for further hearings. Although Marquam Farms asserted in DR 4-94 that Applicant's dog kennels would adversely impact its hunting operations, it has not specifically reincorporated or raised that issue here. I will, however, treat Marquam Farms' August 15, 1995, letter liberally and proceed as if Marquam Farms had actually voiced the same compatibility issues once again.

the hunting operations on the island, Marquam Farms seemingly stands alone in its complaints about potential adverse impacts and conflicts caused by Applicant's kennel facilities (or, for that matter, nay other kennel facilities on the island). I also observe that most of the complaints arose in recent years after Applicant successfully obtained various land use approvals in 1989 and 1990 (twice). In any event, I do not find that those sorts of complaints have much bearing on the question whether the kennel facilities remain consistent with the character of the area.

Finally, the record offers a number of observations by people who purport to be knowledgeable about hunting in general — and about Marquam Farms' hunting operation in particular — who conclude that any adverse effects suffered by Marquam Farms over the years resulted only from what can be summarized as "overhunting," rather than the presence of dog kennels on adjacent property. Not only has no other proprietor of a private hunting facility voiced similar complaints of an inherent conflict with kennels, but both of the other kennel operators maintain duck hunting facilities on the same property — without any apparent problem.

Applicant contends that more dogs will not necessarily translate into more noise. Applicant proposes improvements to the kennel facilities (*viz*, soundproofing, enclosed runs, wall along shared access, redesigned parking lot) which have been designed specifically to reduce and minimize noise generated by barking dogs. Applicant's noise test results seem to confirm that, even without the improvements, the noise levels at different points on the property do not vastly exceed other environmental noise levels.

I find that kennel facilities have long been a part of the Sauvie Island environment, form a natural adjunct to the hunting activities on the island, and conform to the agricultural and rural/recreational activities on the island. I therefore find, in addition, that Applicant's kennel facilities will be, and have long been, consistent with the character of the area.

(2). "WILL NOT ADVERSELY AFFECT NATURAL RESOURCES"

The property contains no inventoried natural resource site, and the closest such resource site would be the Sturgeon Lake Wildlife Refuge across Reeder Road. However, because Applicant does not allow dogs to run loose on the property, and

because Applicant's property is fenced in any event, I find it improbable that the kennel facilities could have any impact on the Sturgeon Lake wildlife refuge, let alone "adversely affect" it.

I therefore find that the kennel facilities will not adversely affect any natural resources.

(3). "WILL NOT CONFLICT WITH FARM OR FOREST USES IN THE AREA"

Because MCC 11.15.7122(A) prescribes more extensive criteria for the operation of Applicant's dog kennels in the EFU district, and because I have already found that the kennel facilities fulfill the criteria in MCC 11.15.7122(A), *supra*, I further find, based upon the discussion and findings in connection with .7122(A), that Applicant's kennel facilities will not conflict with farm uses in the area.

No "forest" uses exist in the area, thus I also find that Applicant's kennel facilities cannot conflict with forest uses in the area.

(4). "WILL NOT REQUIRE PUBLIC SERVICES OTHER THAN THOSE EXISTING OR PROGRAMMED FOR THE AREA"

Applicant proposes nothing that will require additional public services, and the service provider forms in the record confirm that existing services will be adequate.

I therefore find that Applicant's kennel facilities will not require public services other than those existing or programmed for the area.

(5). "WILL BE LOCATED OUTSIDE A BIG GAME WINTER HABITAT AREA"

No big game winter habitat area exists on or near the property. I therefore find that Applicant's kennel facilities will be located, and has long been located, outside a big game winter habitat area.

(6). "WILL NOT CREATE HAZARDOUS CONDITIONS"

Dogs themselves do not comprise "hazardous conditions," and nothing else about Applicant's kennel facilities create the likelihood of generating any such conditions. All dog owners must present proof of current vaccinations before admittance to the kennel. The dogs remain kenneled and do not run at–large. Applicant processes all waste material on–site according to prescribed DEQ criteria.

I therefore find that Applicant's kennel facilities will not create hazardous conditions.

(7). "WILL SATISFY THE APPLICABLE POLICIES OF THE COMPREHENSIVE PLAN"

I address this particular criterion separately below. Because I conclude that Applicant's kennel facilities fulfill pertinent plan policies, I therefore find for purposes of this criterion that the facilities will, and do, satisfy the applicable policies of the comprehensive plan.

F. MCC 11.15.7205–.7240

(1). Location Requirements

Applicant's kennel facilities will be located within an area of "low population density" similar to that in districts such as F–2 — the district's zoning designation prior to the EFU–38 redesignation. Sauvie Island has long represented an area of historically low population density.

I therefore find that Applicant's kennel facilities fulfill the locational requirements in .7210(A).

(2). Minimum Site Size Requirements

The site comprises more than nine acres, and the drawings depict a width ranging from 333 feet in the rear of the property to more than 900 feet along Reeder Road, and a depth ranging from 390 feet to 1,800 feet.

I therefore find that Applicant's kennel facilities, both existing and as expanded, fulfill the minimum site size requirements in .7215.

(3). Minimum Setback Requirements

The property does not lie in or adjacent to an F, R, or A district. Thus, the one–hundred–foot minimum setback requirements in .7220 do not apply.

(4). OTHER REQUIREMENTS

Applicant has constructed the kennels, runs, and pens of concrete block, with chain–link fencing dividers and concrete floors. The roofing is opaque. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(A).

Applicant proposes to remodel the existing kennel facilities within a single, continuous, enclosed building, which will provide "optimal sound control" and thus minimize the noise impact on adjacent and surrounding properties. The dogs will be able to move from the individual pens without entering the open courtyard. They will also have their view of neighboring activities obstructed, which, in turn, will reduce barking. The trees and landscaping surrounding the existing kennel facilities will be retained, as will the trees and landscaping within the courtyard. Prevailing winds from the northwest will carry sounds and smells toward the open land to the southeast of the kennel facilities. The nearest residence lies 1,000 feet distant. Although Marquam Farms has in the past lodged complaints about the noise of barking dogs, I note that, not only did the kennel facilities apparently *precede* the hunting operations on Marquam Farms' property, but Applicant proposes to design and construct any expansion so as to do precisely what .7230 requires, *viz*, "minimize" — as opposed to eliminate — adverse impacts. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(B).

Twice daily, Applicant disinfects the dog areas, feeding pans, water pails, and public areas. Applicant also inspects each dog twice daily. Multnomah County Animal Control regularly inspects the kennel facilities. Testimony from others reflects that Applicant maintains a well–respected, highly–professional kennel operation of considerable quality. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(C).

Applicant's proposal will allow all dogs at the kennel facilities to be kept in separate housing facilities. I therefore find that Applicant's kennel facilities fulfill the requirements of .7230(D).

Although .7240 allows an exemption from .7205–.7235 for kennels "for which Animal Control Facility licenses were issued prior to October 31, 1985," Applicant does not suggest — and the record does not otherwise confirm — that the exemption provision applies.

G. COMPREHENSIVE PLAN PROVISIONS

(1). POLICY 9 — AGRICULTURAL LAND

Policy 9 ("Agricultural Land") recites, among other things, that it serves to

> "restrict the use of these [agricultural] lands to exclusive agricultural and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural lands from inappropriate and incompatible development."

Although Policy 9 does not require specific findings, I find that Applicant's kennel facilities comprise an "other use[], consistent with state law," within the meaning of Policy 9. The kennel facilities will not inhibit or impede the use of any agricultural land, nor will they withdraw any land from agricultural use.

(2). POLICY 13 — AIR, WATER AND NOISE QUALITY

Policy 13 ("Air, Water and Noise Quality") requires, prior to approval,

> "a statement from the appropriate agency that all standards can be met with respect to air quality, water quality, and noise levels. . . ."

The kennel facilities create no air emissions, and all waste products from the facilities are handled on-site in an approved septic system. Thus, the kennel operations will have no adverse impact on "healthful air quality levels in the regional airshed" or "healthful ground and surface water resources."

Finally, I find that Applicant's kennel facilities will, as designed, either "prevent or reduce excessive sound levels," while simultaneously balancing the needs of adjacent and surrounding properties. For instance:

- Applicant proposes to construct a solid wall for the full length of the kennel along the shared access with the Marquam Farms property. The dogs will be unable to see vehicles as they drive past on the shared driveway, which, in turn, will reduce the dogs' propensity to bark at passing cars *etc.*

- Applicant proposes to completely cover the kennels with an insulated roof, in contrast to the partial exposure that currently exists. The insulated roof will reduce noise transmission from within the kennel.

- Applicant proposes to redesign the manner in which dogs will be moved from one building to another for grooming, bathing, and exercise; these activities are currently visible and audible to dogs in the kennel, which, in turn, causes them to bark.

- Applicant proposes to redesign the parking area, allowing owners to exit their vehicles and pick up dogs out of sight of the dogs, which, in turn, will eliminate one cause of barking.

(3). POLICY 22 — ENERGY CONSERVATION

Policy 22 ("Energy Conservation") provides that

> "[t]he County shall require a finding prior to the approval of . . . quasijudicial 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 [*sic*; 'climatic'] conditions to advantage.

"E. Finally, the County will allow greater flexibility in the development and use of renewable energy resources."

I have duly "considered" each of the designated criteria, and I conclude that only "A" applies under the circumstances. Applicant has designed the proposed kennel facilities to reduce energy consumption, because the new kennel structures will be enclosed from the elements and insulated.

(4). POLICY 37 — UTILITIES

Policy 37 ("Utilities") requires a pre–approval finding that the water, sanitation, drainage and communication facilities are available as follows:

"WATER AND DISPOSAL SYSTEM

"A. The proposed use can be connected to a public sewer and water system, both or 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 on the site; or

"D. There is an adequate private water system, and a public sewer with adequate capacity.

"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.

"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 has an adequate private water supply system and the kennel facilities have an existing, adequate and approved septic system. I find that Applicant's kennel facilities fulfill paragraph "D" of this Policy, which renders "A," "B," and "C" moot.

Applicant handles all storm water runoff on–site, and does not come in contact with any waste material generated by the kennel operations; all runoff from kennel floors goes directly into the septic system. I find that Applicant's kennel facilities fulfill paragraphs "F" and "G" of this Policy, which renders "E" moot.

The existing electrical and telephone service appears adequate to continue to handle the kennel's needs, even after an expansion. I find that Applicant's kennel facilities fulfill paragraphs "H" and "I" of this Policy.

(5). POLICY 38 — FACILITIES

Policy 38 ("Facilities") requires a pre-approval finding 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 comments [*sic*] on the proposal.

"POLICE PROTECTION

"D. The proposal can receive adequate police protection in accordance with the standards of the jurisdiction providing police protection."

The various service provider forms confirm that Applicant's kennel facilities will be adequately served by water for firefighting purposes and by the Sheriff for police protection. The school district will have an opportunity to comment on Applicant's proposal. I find that Applicant's kennel facilities fulfill paragraphs "A" through "D" of this Policy.

(6). POLICY 40 — DEVELOPMENT REQUIREMENTS

Policy 40 ("Development Requirements") requires a pre-approval finding 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."

I conclude that none of these criteria are "appropriate" because they have no application to the specific proposal.

VIII. CONCLUSIONS — CONDITIONAL USE

With respect to the conditional use issues, I conclude as follows:

- Nothing about the hearings officer's decision in DR 4–94 precludes me from considering and resolving the various conditional use issues raised in this 1995 approval request.

- Marquam Farms' failure to appeal the Planning Commission's 1990 *approval* in CU 23–90, in which the Planning Commission addressed and rejected the "legality–of–use" issues that Marquam Farms has now raised in both the 1994 and 1995 proceedings, and in which the Planning Commission interpreted MCC 11.15.2028(B) in a manner adverse to Marquam Farms, precludes Marquam Farms from now revisiting the interpretive question.

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- The County's sequential interpretations and consistent applications of MCC 11.15.2028(B) in the 1989 and 1990 proceedings — each of which *approved* proposals and thus vested certain rights — constitutes implicit interpretations of MCC 11.15.2028(B) which I accord deference, notwithstanding the fact that no party appealed those interpretations to the Board.

- Applicant's kennel facilities already comprise a "'conforming' conditional use" pursuant to MCC 11.15.2028(B). That provision purports to apply to a "listed" conditional use that, but for the absence of a conditional use permit, would be an approved conditional use. Any other reading or interpretation of .2028(B) either requires that additional language be added to it or renders it superfluous and of no purpose.

- Unless otherwise the subject of "limitations or conditions" imposed by a prior conditional use approval, nothing in the conditional use provisions in MCC 11.15.7105, *et seq.*, plainly requires that an applicant must seek additional conditional use approval in order to modify or alter components of an existing conditional use that do not otherwise comprise any change in the "use" itself.

- Alternatively, Applicant has fulfilled all of the applicable conditional use criteria in MCC 11.15.7105, *et seq.*, MCC 11.15.7122, MCC 11.15.7205, *et seq.*, and the pertinent Comprehensive Plan policies with respect to both of the following: (1) the initial establishment of a conditional use approval for a dog kennel, and (2) the expansion of an existing conditional use — whether arising from .2028(B) or from the previous clause — to allow an increase from a 50–dog kennel facility to a 75–dog kennel facility.

- Nothing in OAR 660–33–120 or 660–33–130 precludes or prohibits conditional use approval for an "existing" kennel under the circumstances. If those rules did purport to do so, they would clash with ORS 215.283, which allows the establishment of dog kennels in EFU districts.

IX. PRECLUSION ISSUE — NON–CONFORMING USE

As I discussed earlier in the conditional use part of this decision, Marquam Farms' August 15, 1995, letter urged, among other things, that the hearings officer's August 19, 1994, decision in DR 4–94 precludes any revisitation of issues already examined in that decision. Among other things, the hearings officer addressed the non–conforming use issue in some detail, and discerned a gap in kennel use between December, 1962, and February, 1964. (DECISION at 6.)

Thus, I need to resolve the question whether the hearings officer's August, 1994, decision binds Applicant, such that I an now precluded from revisiting the evidentiary and legal arguments that the parties debated in 1994 with respect to the non–conforming use issues.

I conclude that:

- because of the specified conditions precedent to the Design Review mechanism in the Zoning Ordinance, the hearings officer lacked the authority in DR 4–94 to venture beyond the question whether the kennel facilities comprised a "conditional use" at that time.

- the only evidentiary "gap" in the record comprises an unexplained gap in the County's intermittent inspection records, a flaw that renders those records something considerably less than "substantial evidence" of the sort described in, for instance, *1000 Friends of Oregon v. LCDC (Lane Co.)*, 305 Or 384, 402–04, 752 P2d 271 (1988), and *Younger v. City of Portland*, 305 Or 346, 356–57, 752 P2d 262 (1988).

- because the decision in DR 4–94 resulted in the *denial* of an approval request, that denial attains no preclusive effect for the same reasons discussed in the conditional use portion of this decision, beginning at page 39, *supra*.

A. THE HEARINGS OFFICER LACKED THE AUTHORITY TO PROCEED BEYOND THE JURISDICTIONAL QUESTION IN THE DESIGN REVIEW PROCEEDINGS IN DR 4–94, AND TO DETERMINE NON–CONFORMING USE ISSUES

Because DR 4–94 comprised a "Design Review" proceeding prescribed by MCC 11.15.7805, *et seq.*, the only non–substantive, procedural question that could be raised in any appeal from the Planning Director's administrative decision would comprise the inquiry whether Applicant fulfilled the condition precedent to Design Review in MCC 11.15.7820:

> "The provisions of MCC .7805 through .7865 shall apply to all [1] ***conditional*** and [2] ***community service*** uses in any district ***and to*** [3] [a list of seven categories of other uses not pertinent here]." (MCC 11.15.7820 [emphasis and enumeration added].)

All other issues would necessarily implicate the *substantive* Design Review criteria.

At the outset of his opinion, the hearings officer addressed the "jurisdictional" question whether he

> "lacks authority to approve this Design Review request, unless or until the underlying kennel use receives appropriate land use approval to make it a lawful use in the zone." (DECISION at 3.)

Because Design Review would, by its terms, apply to, among other things, a *"conditional"* use and not necessarily to a *"non-conforming"* use (*see* MCC 11.15.7820),[25] the hearings officer's inquiry would necessarily entail the question whether Applicant's kennel facilities comprised the former use. Although the hearings officer in DR 4–94 indeed answered that question (DECISION at 3–4), he also answered

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[25] If there exist any other portions of the Zoning Ordinance that subjects non–conforming uses to Design Review, no one has cited it.

the separate question whether the kennel facilities comprised a non–conforming use. (DECISION at 4–6.)

As I noted earlier in the discussion of that decision, the hearings officer did not explain why or how issues of non–conforming use attained significance once he made the determination that there existed no underlying conditional use for purposes of Design Review. However, as I read and construe MCC 11.15.7805, *et seq.*, the hearings officer did not have the jurisdictional authority under MCC 11.15.7820 to make that sort of determination within the context of an appeal from the Planning Director's administrative Design Review determination, and the parties themselves could not grant him that authority.

Applicant raised this "jurisdictional" issue at the August 16, 1995, hearing in the context of whether the hearings officer's opinion comprised *dictum* on the issue of non-conforming use. I agree with Applicant that the hearings officer's decision in 4–94 purports to resolve factual and legal issues with respect the question of non-conforming use that nothing in MCC 11.15.7805, *et seq.*, gives him the authority to decide.

I thus conclude that the portion of the hearings officer's decision in DR 4–94 that purported to resolve questions of fact with respect to non-conforming use could not be binding. As surplusage, the non–conforming use discussion in DR 4–94 does not preclude a revisitation of that issue. *See Reeves v. Washington County*, 24 Or LUBA 483, 493 (1993).

B. THERE EXISTS NO EVIDENTIARY GAP IN KENNEL USAGE

I have independently examined the record with respect to the chronology of kennel usage. I conclude that reality differs from the findings in the decision in DR 4–94.

The record in this case (which includes all earlier land use proceedings) documents that the kennel facilities proceeded through a number of owner/operators: Wallace, Blitz, Courtway, Eaton, Meifert, Pein, Persinger, and now the Schillereffs. Unfortunately, at this late date the documentation of kennel operations proves somewhat skimpy. The record yields different methods of determining whether kennel operations have been continuous since the Wallace operations began in 1952.

A number of opponents testified in similar affidavits in the proceedings in DR 4–94 that: (1) they never saw any "recognizable" kennel structures on the property before 1990, (2) they never perceived any kennel use on the property before 1990, and (3) they never saw more than one dog on the property until 1990. Marquam Farms also offered excerpts from County records that, according to them, do not reflect descriptions of the existence or degree of kennel usage during the following time periods:

- December, 1962, to February, 1964;
- February, 1965, to October, 1965;
- October, 1966, to September, 1967; and
- 1971 to the present.

Marquam Farms relies upon County inspection reports in 1967 and 1969 that contain the following:

Date Of Record	Information In Various Labeled Blanks In Record
10–18–67	"Zone": F–2 "Non–conforming": "Approved" "Owner": Meifert ("Lake Tree Kennels") "Occupant": Meifert "Date Established": "Moved in 9–5–67" "Use": Dog kennel Additional information: ♦ Use "limited to 50 dogs" ♦ "Occupant" from 10–65 to 10–66: "Eaton," who maintained "15 to 20 dogs" ♦ "Occupant" from 2–64 to 2–65: "Courtway," who maintained four to five dogs ♦ "Occupant" from 8–57 to 12–62: "Blitz," who maintained "up to 50 dogs" ♦ Occupant before Blitz: "Wallace," who maintained kennels "for about 5 yrs" before Blitz
1–28–69	"Zone": F–2 "Non–conforming": Left blank "Owner": Pein ("Lake Tree Kennels") "Occupant": Meifert "Date Established": Nothing helpful "Use": Dog kennel

Additional Information:

- contains the following notation:

"8–4–71 Kennel gone all of 71 – 2 dogs in 1970"

Thus, the County's two reports do *not* account for the following time periods:

- December, 1962, to February, 1964
- February, 1965, to October, 1965
- October, 1966, to September, 1967
- October, 1967, to January, 1969
- January, 1969, to date

The question becomes whether I can surmise from the record that the County's two inspection reports are themselves so complete and inherently trustworthy that I might conclude that any "gaps" in kennel operations can be inferred from corresponding "gaps" in the reports. If there were any evidence in the record that might shed some light on the frequency of the inspection reports or the methodology underlying the facts detailed in the reports, I might be able to conclude that the reports themselves comprise a complete and accurate chronology. However, there exists no such confirming evidence. For example, nothing in the record allows me to conclude that the two inspection reports purport to account for *all* of the time periods for which the reports themselves reflect a gap. The extremely intermittent characteristics of the proffered inspection reports irretrievably deprives them of any reliability for time periods not mentioned.

Thus, although I conclude that the County's various inspection reports comprise "substantial evidence" as to the existence of kennel operations during the *reported* times, I find that they do *not* comprise "substantial evidence" sufficient for me to infer that there existed no kennel operations during "gap" times.

Applicant, on the other hand, relies upon an unbroken chain of owners/operators, each of whom maintained some level of kennel operations:

- **Wallace**, beginning in 1952 and ending with the transfer to Blitz in 1957;
- **Blitz**, beginning in 1957 and ending with the transfer to Meifert in 1966;

- **Meifert**, beginning in 1966 and ending with the transfer to the Peins in 1970;
- **Peins**, beginning in 1970 and ending with the transfer to the Persingers in 1973;
- **Persingers**, beginning in 1973 and ending with the transfer to the Schillereffs in 1989;
- **Schillereffs** beginning in 1989 and continuing to date.

All of the listed owners/operators maintained *some* degree of kennel operations.

In addition, the record contains:

- a November 27, 1967, letter from Elden Persinger received by the Planning Commission on December 1, 1967 (for unknown purposes) that declares that "I have known the Lake Tree Kennels to have been in [the] business of boarding & training dogs ***since the year of 1954*** . . .";

- a November 27, 1967, letter from C. Dondo received by the Planning Commission on December 1, 1967 (again for unknown purposes), that declares that Lake Tree Kennels "have been in the business of boarding and training dogs ***since the year of 1952***."

- an affidavit dated August 23, 1995, from George Douglas, who has resided on Sauvie Island for nearly 50 years, and who "particularly remember[s] Mrs. Blitz who operated a kennel there from the late 1950s until she sold the property to Myron Meifert [in 1966]. During that time there were always many dogs at the kennel."

- an affidavit dated August 23, 1995, from Timothy Schillereff who recites that, as a youngster, he occasionally visited the kennel operations maintained by the Persingers — to whom he is related — and that he recalls "there were always dogs in the kennels," numbering more than four and up to at least ten.

- an affidavit dated August 23, 1995, from Norman Crowe, who began working on Sauvie Island in the early 1950s and who has lived there since 1964, who recites that he particularly remembers the Blitz kennel operations during the early and mid–1960s, which he describes as "always operating at capacity or near capacity – – in the neighborhood of 50 dogs," and who further recites that he has traveled the island roads regularly since 1964 and "cannot recall a time when there were not barking dogs in the kennel every years."

- an affidavit dated August 23, 1995, from Mildred Meifert — mother of previous kennel operator Myron Meifert — who has resided on Sauvie Island for over thirty years and who recites that she, too, recalls the Blitz kennel operations from the late 1950s until the transfer to her son in 1969, and that the property continuously maintained kennel operations with at least four and often more dogs, and, in addition, she recalls the Pein kennel operations during the early 1970s, which maintained at least 10 kennel runs and consistently boarded dogs.

- an affidavit dated August 23, 1995, from Marguerite Persinger, who owned the kennel operation with her husband from 1973 to 1989, who recites that the maintained no fewer than "four to six adult dogs living or boarded on our property each year from 1973 until the time we sold the property and kennel," and who further recites that she annually visited the Pein kennel operations from 1970 to 1973 and recalls no fewer than four — and sometimes more — dogs at the kennel facilities during those years.

- an affidavit dated July 27, 1994, from Elden Persinger, who owned the kennel facilities from 1973 to 1989, and who recites that he knew the Peins and their kennel operations during the early 1970s and that the Peins routinely kenneled no fewer than four or five dogs, and who further recites that from 1973 to 1989 the Persinger kennel operation "regularly cared for 4–5 dogs at the kennel."

- a letter dated August 22, 1995, from Pat Baggett who regularly visited the Blitz kennel operations and who recites that every time she visited the Blitz kennels those facilities "always had 25 dogs or so in the kennels," and who further recites that the Peins "never shut done [*sic*] the kennel" when they owned it in the early 1970s and that the Peins routinely kenneled at least six dogs, and who finally recites that the Persinger kennel operations "always had between 3 to 10 dogs in their kennels" each time she visited them during their ownership from 1973 to 1989.

Finally, Mr. and Mrs. Persinger testified at the August 16, 1995, hearing that some degree of kennel operations had been present throughout the 1950s and 1960s, and in particular in the early 1960s during a period that the 1994 hearings officer's decision in DR 4–94 identifies as lacking in evidence. Although neither the Persingers nor the Peins maintained what the record describes as "commercial" kennels,[26] both owners maintained their own dogs in the kennel facilities and "regularly" boarded other dogs for friends or acquaintances. I note that the recent testimony mirrors Mr. Persinger's November, 1967, letter that I describe just above.

Thus, the apparent gaps (or "discontinuances") from December, 1962, to February, 1964, from February, 1965, to October, 1965, and from October, 1966, to September, 1967, that Marquam Farms infers from the County's 1967 and 1969 inspection records disappear Indeed, the two 1967 letters described above eliminated those gaps as a matter of record within the proceedings in DR 4–94, but the hearings officer made no mention of that.

I find, therefore, that:

- Nothing upon which Marquam Farms relies for this issue comprises "substantial evidence" in the sense that I deem it sufficiently reliable or complete to conclude that all "gaps" in the County's inspection records necessarily mean that no kennel facilities existed during those "gaps."

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26 Nothing in the County's definition of "kennel" refers to "commercial" facilities; rather, "kennel" comprises "[a]ny lot or premises on which ***four or more dogs, more than six months of age, are kept***." (MCC 11.15.0010 [emphasis added].)

- Although less satisfactory than other means of demonstrating continuity of use, the unbroken succession of owners/operators from 1952 to date — each of whom operated and maintained kennel facilities of some sort — coupled with the absence of affirmative evidence that any of those same individuals subsequently discontinued or abandoned the very facilities that each was known for maintaining, comprises "substantial evidence" that *some* degree of kennel operations has persisted unabated from 1952 forward.

- The November, 1967, letters to the Planning Commission, ***supra***, which attest to continued kennel use from 1952 and 1954, respectively, through 1967 — thus plugging the evidentiary gap cited in the 1994 hearings officer's decision — coupled with Mr. Persinger's recent testimony 28 years later that kennel operations have always been present to some extent, comprise "substantial evidence" that kennel operations endured continuously, and certainly during the "gap" periods that Marquam Farms has urged.

- The proliferation of 1995 affidavits from people who have lived or worked on the island for a number of years, and who were each personally familiar with various owners from the 1950s forward, comprise "substantial evidence" that kennel operations in an amount consistent with the definition of "kennel" in MCC 11.15.0010 endured without abatement or discontinuance from the 1950s to now. The fact that not all of the owners/operators maintained what might be described as "commercial" kennel facilities remains, as the hearings officer also noted in DR 4–94, entirely beside the point.

I thus reject Marquam Farms' assertions that no recognizable kennel facilities existed, or could be seen, on the property until approximately 1989 or 1990. Given the proliferation of non–partisan testimony in the record about the existence of *some* degree of kennel operations on the property from 1952 forward, I simply cannot accept declarations that there existed no kennel operations on the property before 1989 or 1990. If the intent of the various Marquam Farms affidavits is to comment on the existence and location of particular buildings or structures, as opposed to the presence of kennel operations, that would be altogether different matter, but it would also be entirely irrelevant to the question.

C. BECAUSE IT *DENIED* A REQUESTED APPROVAL, THE HEARINGS OFFICER'S 1994 DECISION DOES NOT PRECLUDE A RECONSIDERATION OF EITHER LEGAL OR FACTUAL "NON-CONFORMING USE" ISSUES

As I discussed earlier, the hearings officer's 1994 decision in 4-94 ***denied*** a requested approval, *viz*, Design Review approval. No rights vested, and the ***denial*** of the requested approval in 1994 achieved nothing more the maintenance of the ***status quo***.

The County's Zoning Ordinance does not prohibit the resubmittal of an application that might have been the subject of an earlier denial. Indeed, the hearings officer's 1994 decision concludes with the observation that

> ". . . ***if*** the applicant is able to . . . establish the use as a lawful use, this denial of Design Review ***should not prejudice such later action***, if any. Therefore, the applicant's request for Design Review is denied, ***without prejudice***." (August 19, 1994, DECISION at 7 [emphasis added].)

I therefore conclude that, because of the peculiar circumstances (*viz*, a denial of a request for approval followed by a subsequent resubmittal of a different nature), and because neither statute nor ordinance requires that the prior ***denial*** of a land use application bind the applicant in future proceedings, I am not bound by the non-conforming use aspects of the hearings officer's decision in DR 4-94. *See Furler v. Curry County*, *supra*, 27 Or LUBA at 506; *Reeder v. Clackamas County*, *supra*, 20 Or LUBA at 242-44; and *S & J Builders v. City of Tigard*, *supra*, 14 Or LUBA at 711-12.

D. "CLAIM PRECLUSION" AND "ISSUE PRECLUSION" SERVE NO PURPOSE WITHIN THIS PROCEEDING

The 1994 proceedings in DR 4-94 resulted in the ***denial*** of an approval request, leaving the *status quo* unaffected and vesting no rights. I can find no statute or provision in the County's Zoning Ordinance — and Marquam Farms cites none — that

precludes the resubmittal of an approval request under the circumstances that accompany Applicant's request.

Given the fact that someone in Applicant's position can typically reapply for the same or similar approvals after a prescribed period of time, I can find no authority for imposing the litigation–derived doctrines urged by Marquam Farms, nor has anyone cited any. *See*, for instance, *Nelson v. Clackamas County*, *supra*, 19 Or LUBA at 140 (recognizing this principle).

X. APPLICABLE CRITERIA — NON-CONFORMING USE

A. ALTERATION / RESUMPTION OF A NON–CONFORMING USE [ORS 215.130]

ORS 215.130 provides, in pertinent part:

"* * * * *

> **"(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted to reasonably continue the use. . . .**
>
> "* * * * *
>
> **"(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.**
>
> "* * * * *
>
> **"(9) As used in this section, 'alteration' of a nonconforming use includes:**

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

B. OAR 660–33–120 AND 660–33–130

The provisions of OAR 660–33–120 and 660–33–130 appear beginning at page 32, *supra*.

C. RESTORATION, REPLACEMENT, OR ABANDONMENT OF A NON–CONFORMING USE
[MCC 11.15.8805]

MCC 11.15.8805 provides, in pertinent part:

"* * * * *

"(B) If a non–conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re–established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption.

D. ALTERATION OF A NON-CONFORMING USE [MCC 11.15.8810]

MCC 11.15.8810 provides, in pertinent part:

"* * * * *

"(C) An alteration as defined in [ORS 215.130(9)] may be permitted to reasonably continue the use.

"* * * * *

"(E) An alteration of a non-conforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent than the current use, considering:

"(1) The character and history of the use and of development in the surrounding area;

"(2) The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line;

"(3) The comparative numbers and kinds of vehicular trips to the site;

"(4) The comparative amount and nature of outside storage, loading and parking;

"(5) The comparative visual appearance;

"(6) The comparative hours of operation;

"(7) The comparative effect on existing vegetation;

"(8) The comparative effect on water drainage;

D. ALTERATION OF A NON-CONFORMING USE [MCC 11.15.8810]

MCC 11.15.8810 provides, in pertinent part:

"* * * * *

"(C) An alteration as defined in [ORS 215.130(9)] may be permitted to reasonably continue the use.

"* * * * *

"(E) An alteration of a non-conforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent than the current use, considering:

"(1) The character and history of the use and of development in the surrounding area;

"(2) The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line;

"(3) The comparative numbers and kinds of vehicular trips to the site;

"(4) The comparative amount and nature of outside storage, loading and parking;

"(5) The comparative visual appearance;

"(6) The comparative hours of operation;

"(7) The comparative effect on existing vegetation;

"(8) The comparative effect on water drainage;

"(9) **The degree of service or other benefit to the area; and**

"(10) **Other factors which tend to reduce conflicts or incompatibility with the character or needs of the area."**

E. VESTED RIGHT

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

- the *substantiality* of expenditures, which the courts sometimes (but do not necessarily) measure by a "ratio" test that compares expenditures actually to the total projected cost of a project (265 Or at 197);
- the *good faith* of the landowner (265 Or at 198);
- whether the landowner had *actual notice* of any proposed zoning changes before commencing development or spending funds (265 Or at 198);
- the *type of expenditures*, that is, whether the expenditures were directly, but not necessarily exclusively, related to the proposed development (265 Or at 198);
- the *kind of project*, that is, its desirability in terms of meeting the existing or proposed needs of the area (265 Or at 198);[27]

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

- the *location of the project*, that is, the extent to which the project might be ideally suited for the site (265 Or at 198);

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

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

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

XI. FINDINGS — NON-CONFORMING USE

A. OAR 660–33–120 AND 660–33–130

As I discuss in detail *supra* beginning at page 32, OAR 660–33–130(18) specifically provides that "[e]xisting facilities may be maintained, enhanced, or expanded, subject to other requirements of law."

By getting to this point, I have already determined that Applicant's kennel facilities comprise an "existing" use, the alteration of which remains unimpacted by OAR 660–33–120 or 660–33–130. Any other conclusion would run afoul of ORS 215.130(7), which specifically allows the resumption of an non–conforming use if it "conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption."

B. MCC 11.15.8810

(1). "A change in the use of no greater adverse impact on the neighborhood"

Although Applicant proposes to expand the capacity of the kennel facilities from 50 to 75 dogs, Applicant correlatively proposes a redesign of the kennel facilities so that noise levels will be reduced from current levels.

I therefore find that the increased kennel capacity will have no greater adverse impact on the neighborhood, and that the evidence suggests a lesser impact.

(2). "A change in the structure or physical improvements of no greater adverse impact on the neighborhood"

Although Applicant proposes to expand the capacity of the kennel facilities from 50 to 75 dogs, Applicant correlatively proposes a redesign of the kennel facilities so that all of the kennel structures will be consolidated within one larger facility. As I understand Applicant's proposal, the new facility will effectively replace, rather than add to, the existing facilities.

I therefore find that the redesigned kennel facilities will have no greater adverse impact on the neighborhood, and that the evidence suggests a lesser impact than the existing configuration.

(3). "The character and history of the use and of development in the surrounding area"

Both the character and history of the kennel facilities, and other pertinent locational information, appears in detail earlier in this decision. It would serve no purpose to repeat it here.

Based upon that information, I find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the character and history of the use and of development in the surrounding area. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area, such that the term "lesser negative extent" has any significance here.

(4). "The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line"

I have discussed the noise issue earlier in the context of the EFU approval criteria and the Comprehensive Plan Policy 13, and it would serve no purpose to repeat those discussions here.

I find that issues pertaining to "dust," "fumes," "glare," or "smoke" have no material bearing on Applicant's proposal. Based upon a prior discussion of the manner in which Applicant disposes of waste on-site, I find that issues pertaining to "odor" have been effectively negated altogether.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area, such that the term "lesser negative extent" has any significance here.

(5). "The comparative numbers and kinds of vehicular trips to the site"

Concededly, Applicant's proposal might result in a 50% increase in vehicular trips to the kennel facilities. Applicant projects the average daily trips to be 6.3 in 1995, 7.5 in 1996, and 8.4 in 1997.

However, given the projected trip data and the historical data with respect to the average number of daily trips in the past three years (*viz*, 4.2 in 1992, 5.1 in 1993, and 5.6 in 1994), and also given the fact that there exists an inverse relationship between the peak kennel season (March through September) and peak hunting season (October through January), I find that, with respect to the surrounding area, the vehicular traffic will be almost *de minimis*, and that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative numbers and kinds of vehicular trips to the site.

Finally (and alternatively), I also interpret MCC 11.15.8810(E) to depict something *other than* a conjunctive list of mandatory requirements, each of which must be fulfilled. I instead construe the listed factors to represent guidelines in determining whether, when considered *as a whole*, the proposal will "affect the surrounding area to a lesser negative extent than the current use." One of more of the listed factors may, under that interpretation, indeed have a greater impact than previously. *See*, by analogy, *Union Oil Co. v. Board of Co. Comm. of Clack. Co.*, 81 Or App 1, 5–6, 724 P2d 341 (1986) (nine "vested rights" criteria not to be treated as independently or singularly dispositive).

(6). "The comparative amount and nature of outside storage, loading and parking"

Applicant maintains no outdoor storage, and has no plans to do so in the future.

Because Applicant proposes to redesign the parking area in such a manner as to reduce, for example, the barking that results when the dogs see the arrival of cars and the congestion associated with customers' automobiles in the office area, I find that the redesign parking area will reduce noise and congestion associated with customer traffic.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative amount and nature of outside storage, loading, and parking. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area, such that the term "lesser negative extent" has any significance here.

(7). "The comparative visual appearance"

The redesigned, state–of–the–art kennel building will improve upon the long–standing quonset hut facilities. The parking area will be redesigned, and Applicant proposes new landscaping and fencing.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative visual appearance.

(8). "The comparative hours of operation"

Although Applicant's hours of operation will not change, this criterion has no significant bearing on uses in the surrounding area.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative hours of operation, because I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

(9). "The comparative effect on existing vegetation"

Applicant will provide some new landscaping, which will also benefit the adjacent Marquam Farms to some extent.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative effect on existing vegetation. Indeed, I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

(10). "The comparative effect on water drainage"

Impervious surface area will increase because of the enclosed kennel. However, because Applicant handles all water drainage on-site, I find that there will be no increase in off-site water drainage.

I also find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the comparative effect on

water drainage, because I further find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place, such that the term "lesser negative extent" has any significance here.

Finally (and alternatively), I also interpret MCC 11.15.8810(E) to depict something *other than* a conjunctive list of mandatory requirements, each of which must be fulfilled. I instead construe the listed factors to represent guidelines in determining whether, when considered *as a whole*, the proposal will "affect the surrounding area to a lesser negative extent than the current use." One of more of the listed factors may, under that interpretation, indeed have a greater impact than previously.

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(11). "The degree of service or other benefit to the area"

Applicant envisions that the degree of service and benefit to the island and its users will actually increase. Because I find that neither the existing facilities nor their proposed expansion constitutes a "negative" impact on the surrounding area in the first place with respect to the degree of service or other benefit to the area, I conclude that the term "lesser negative extent" has no significance here.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to the degree of service or other benefit to the area.

Finally (and alternatively), I also interpret MCC 11.15.8810(E) to depict something *other than* a conjunctive list of mandatory requirements, each of which must be fulfilled. I instead construe the listed factors to represent guidelines in determining whether, when considered *as a whole*, the proposal will "affect the surrounding area to a lesser negative extent than the current use." One of more of the listed factors may, under that interpretation, indeed have a greater impact than previously.

(12). "Other factors which tend to reduce conflicts or incompatibility with the character or needs of the area"

Other than Marquam Farms, no one has voiced any objection to the existing kennel operations or to any proposed expansion. Marquam Farms has historically confined the bulk of its objections to noise issues, all of which will be diminished and minimized by any redesign of the kennel operations. I discern no other material factors in the record that have given rise to "conflicts or incompatibility with the character or needs of the area.

I therefore find that the proposed alteration will "affect the surrounding area to a lesser negative extent than the current use" with respect to "other factors."

C. VESTED RIGHT

Applicant additionally asserts a "vested right to the nonconforming use." (February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION" at 11.) This particular argument only has relevance as a "last resort" argument, that is, if Applicant can fulfill neither the conditional use criteria nor the non–conforming use that I have discussed above. Thus, everything in this particular discussion assumes that Applicant has exhausted all other means of establishing the right to continue the operation of the kennel facilities.

There exists a pivotal differentiation between

- a right to continue development that, when complete, will result in a non–conforming use, according to the criteria in *Clackamas Co. v. Holmes*, 265 Or 193, 197–201, 508 P2d 190 (1973) (discussing the factors underlying a "vested" right to continue and finish a development and actually *begin* a use), and

- a right to resume a use that may have been abandoned or discontinued after having been in place for some period of time. *See*, for instance, the discussion in ***Polk County v. Martin***, 292 Or 69, 636 P2d 952 (1981).

In *Polk County v. Martin*, the Court described the seminal "vested rights" decision in *Clackamas Co. v. Holmes* as

> "concern[ing] the degree of development which must exist ***before an owner of partially developed property can be said to have established a 'lawful use' of property*** under the statutes, so as to use the property as intended even though the use would not be permitted under the zoning law ***which became effective while the property was being improved.***" *Polk County v. Martin, supra*, 292 Or at 80 (emphasis added).

I can find no authority for the proposition that a discontinued non-conforming use — and by using the term "discontinued" I infer nothing contrary to the findings and conclusions that I have already reached in this decision — can be resurrected under the circumstances here by using "vested right" as a vehicle. Even assuming that Applicant may have spent substantial sums to purchase and remodel the kennel facilities, that factor would only be pertinent if, after Applicant had begun making those expenditures, the County had downzoned the property in such a manner that kennels were no longer allowed. That is not what has happened. Indeed, one of the *Holmes* factors requires an inquiry into whether the proponent "had notice of any proposed zoning or amendatory zoning before starting his improvements[.]" 265 Or at 198. Applicant's 1994 approval request did not get derailed because of any mid-stream zoning; instead, it became untracked just as effectively as if LUBA, the Court of Appeals, or the Supreme Court had rendered the ruling that the hearings officer instead rendered in DR 4-94.

Thus, I reject the argument that Applicant has a "vested right to complete the work sanctioned by DR 90-07-02 and CU 23-90." (*See* Applicant's February 23, 1995, "SAUVIE ISLAND KENNELS LAND USE APPLICATION" at 11.) Even assuming for purposes of argument that Applicant has not yet completed the "work sanctioned" by DR 90-07-02 and CU 23-90, that "work" would not result in the ***creation*** of a "use" in the manner envisioned by *Clackamas Co. v. Holmes*; the "use" itself evolved long ago.

XII. CONCLUSIONS — NON-CONFORMING USE

As an alternative to my conclusions in the conditional use portion of this decision, I conclude as follows:

- Nothing about the hearings officer's decision in DR 4–94 precludes me from considering and resolving the various non–conforming use issues raised in this 1995 approval request.

- Applicant has demonstrated to a reasonable, objective certainty that the kennel facilities have been in continuous operation as a "kennel" defined in MCC 11.15.0010 since at least 1952, and that, despite fluctuations in what might be described as "commercial" usage, nevertheless has endured without any abandonment or discontinuance since that time.

- Nothing in OAR 660–33–120 or 660–33–130 precludes or prohibits the resumption of a non–conforming use with respect to an "existing" kennel under the unique circumstances of this case. If those rules did purport to do so, they would clash with ORS 215.130(7), which allows the resumption of a use in conformity with local government enactments.

- Applicant has fulfilled the criteria in MCC 11.15.8810 with respect to the "alteration" of a non–conforming use.

- Alternatively, Applicant has fulfilled the criteria mentioned in MCC 11.5.8805(B) — which, under the circumstances of this proceeding, I find to be the conditional use criteria discussed earlier in this decision — with respect to the "resumption" of any discontinued non–conforming use.

DATED this 15th day of September, 1995.

BARRY L. ADAMSON, Hearings Officer

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 Findings of Fact and Conclusions

August 16, 1995

CU 4-95 & MC 1-95, #23 **Conditional Use Request** **Line 2**
(Conditional Use & Alteration of a Non-Conforming Use)

Applicant requests expansion of existing Conditional Use approval, or approval to alter a Non-Conforming Use, to expand the capacity of the existing dog kennel facility on this property from a maximum of 50 dogs to 75 dogs.

Location: 23200 NW Reeder Road

Legal: Tax Lot '15', Section 3, T2N, R1W, 1991 Assessor's Map

Site Size: 37.58 acres'

Size Requested: 9.41 acres

Property Owner: Tim & Angella Schillereff
23200 NW Reeder Road
Portland, OR 97231

Applicant: Same

Comprehensive Plan: Exclusive Farm Use

Present Zoning: EFU

Recommended Hearings Officer **Deny**, Conditional Use and alteration of a Non-Conforming Use, to continue dog kennel use of this property, based on the following findings and conclusion.

Staff Contact:
Bob Hall

FINDINGS OF FACT:

I. Applicant's Proposal:

Applicant requests expansion of existing Conditional Use approval, or approval to alter a Non-Conforming Use, to expand the capacity of the existing dog kennel facility on this property from a maximum of 50 dogs to 75 dogs.

II. Ordinance Considerations for Conditional Use Request:

(A) Applicable Oregon Administrative Rules:

OAR 660, Division 33 establishes requirements for agricultural land as defined by Oregon Statewide planning goal #3. Many of those requirements are not yet included in the Multnomah County Zoning Code; therefore, must be considered in addition to the county zoning code requirements. The section applicable to this request is OAR 660–33–110 which sets the requirements for uses on agricultural lands. Dog kennels are listed under the Commercial section of the list of allowed uses. When a dog kennel is proposed to be located on High Value Farmland, the following standards apply:

(1) OAR 660–33-110 does not allow new dog kennels.

(2) OAR 660–33-130(18) allows, "Existing facilities may be maintained, enhanced or expanded, subject to other requirements of law."

(B) Applicable Comprehensive Plan Policies:

Comprehensive Framework Plan Policies 9, 13, 22, 37, 38, and 40.

(C) Zoning Code Ordinance Requirements: (MCC 11.15.7120)

In approving a Conditional Use, the Hearings Officer shall find that the proposal:

(1) Is consistent with the character of the area;

(2) Will not adversely affect natural resources;

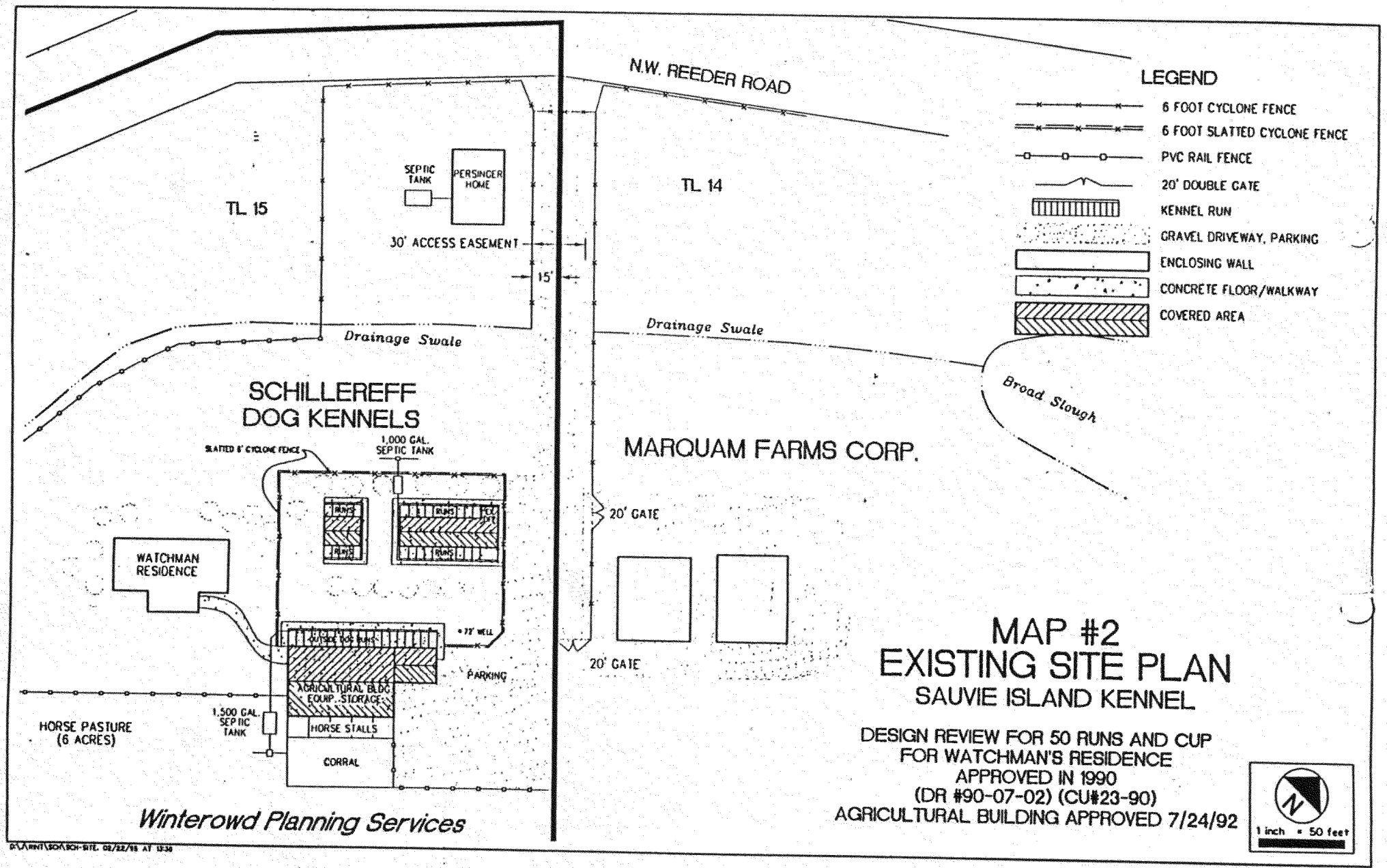
(3) Will not conflict with farm or forest uses in the area;

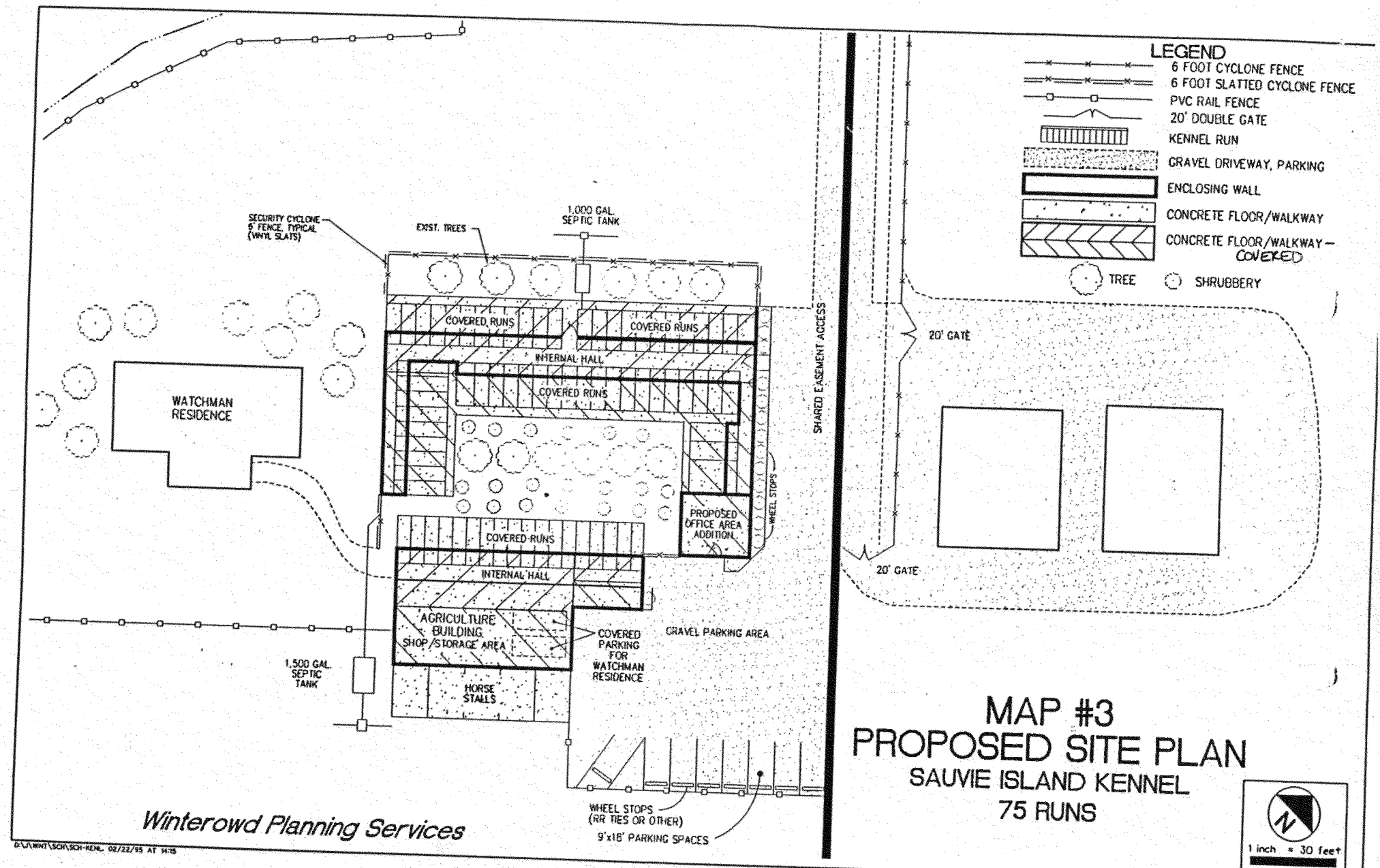
(4) Will not require public services other than those existing or programmed for the area;

(5) 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 will be acceptable;

(6) Will not create hazardous conditions; and

(7) Will satisfy the applicable policies of the Comprehensive Plan.

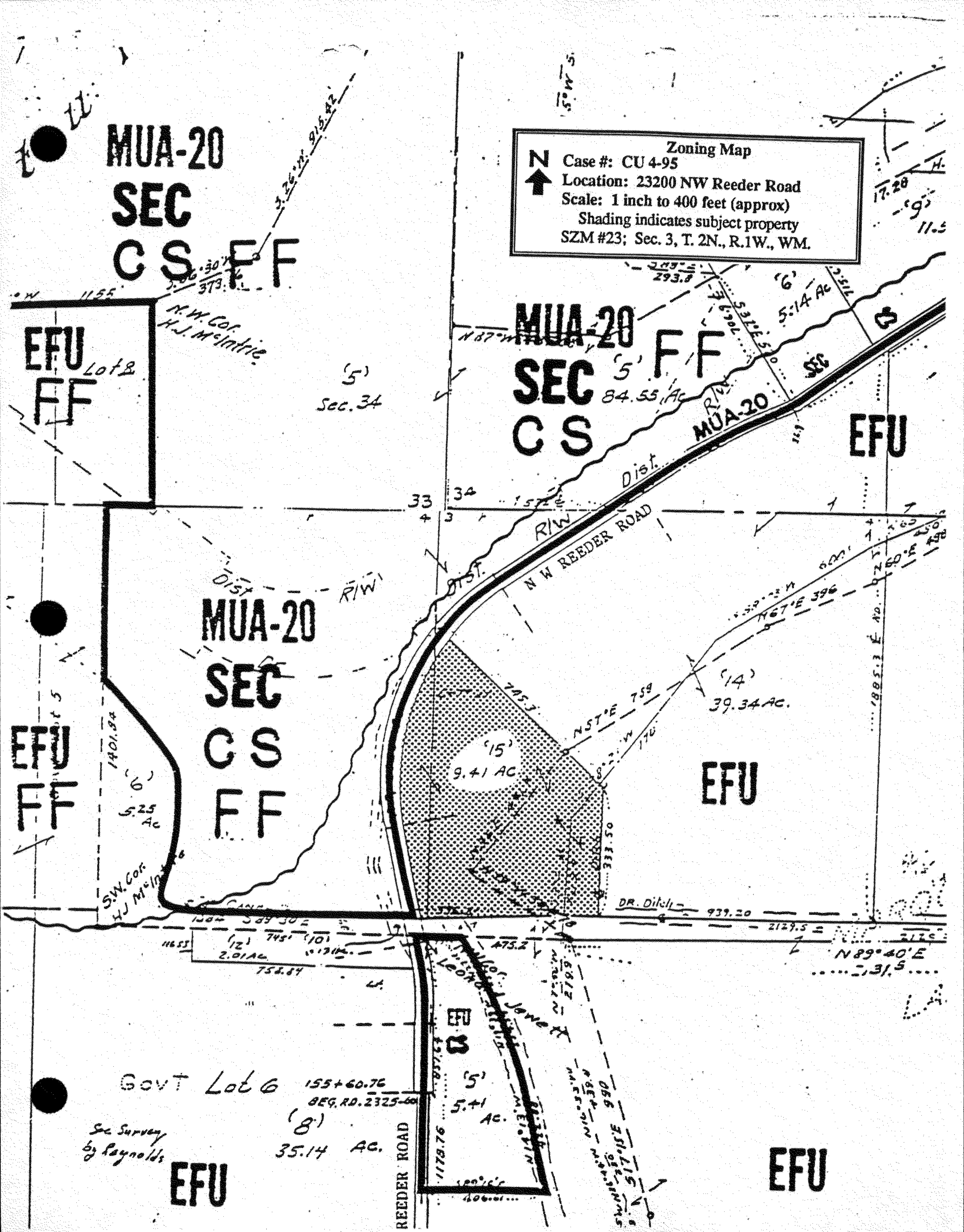

N.W. REEDER ROAD
TL 15
TL 14
SEPTIC TANK
PERSINGER HOME
30' ACCESS EASEMENT
15'
Drainage Swale
Drainage Swale
Broad Slough
SCHILLEREFF
DOG KENNELS
MARQUAM FARMS CORP.
SLATTED 6' CYCLONE FENCE
1,000 GAL. SEPTIC TANK
RUNS
RUNS
RUNS
RUNS
WATCHMAN RESIDENCE
OUTSIDE DOG RUNS
72' WELL
PARKING
AGRICULTURAL BLDG EQUIP. STORAGE
HORSE STALLS
CORRAL
1,500 GAL. SEPTIC TANK
HORSE PASTURE (6 ACRES)
20' GATE
20' GATE
LEGEND
6 FOOT CYCLONE FENCE
6 FOOT SLATTED CYCLONE FENCE
PVC RAIL FENCE
20' DOUBLE GATE
KENNEL RUN
GRAVEL DRIVEWAY, PARKING
ENCLOSING WALL
CONCRETE FLOOR/WALKWAY
COVERED AREA
Winterowd Planning Services
P:\ARNT\SOA\SCH-SITE. 02/22/93 AT 13:30
MAP #2
EXISTING SITE PLAN
SAUVIE ISLAND KENNEL
DESIGN REVIEW FOR 50 RUNS AND CUP
FOR WATCHMAN'S RESIDENCE
APPROVED IN 1990
(DR #90-07-02) (CU#23-90)
AGRICULTURAL BUILDING APPROVED 7/24/92
N
1 inch = 50 feet



MAP #3
PROPOSED SITE PLAN
SAUVIE ISLAND KENNEL
75 RUNS

Winterowd Planning Services

D:\J\WINT\SOI\SOI-KENL 02/22/95 AT 14:15


Zoning Map
N
Case #: CU 4-95
Location: 23200 NW Reeder Road
Scale: 1 inch to 400 feet (approx)
Shading indicates subject property
SZM #23; Sec. 3, T. 2N., R.1W., WM.
MUA-20
SEC
CS
FF
EFU
EFU
FF
MUA-20
SEC
CS
FF
MUA-20
SEC
CS
FF
EFU
FF
EFU
EFU
EFU
EFU
N W REEDER ROAD
REEDER ROAD
Govt Lot 6

(D) Exclusive Farm Use Conditional Use Approval Criteria (MCC 11.15.7122)

(1) In addition to the criteria of MCC .7120, an applicant for a Conditional Use listed in MCC .2012(B) must demonstrate that the use:

(a) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

(b) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

(2) For the purposes of this subsection surrounding lands devoted to farm or forest use shall not include:

(a) Parcels with a single family residence approved under MCC .2012(B)(3);

(b) Exception areas; or

(c) Lands within the Urban Growth Boundary.

(3) Any conditions placed on a conditional use approved under this subsection shall be clear and objective.

(E) Location Requirements (MCC 11.15.7210)

These uses shall be permitted only in the following areas and only where they will not conflict with the surrounding property uses:

(1) In CFU, F-2, MUA-20, MUF, and RR districts or those areas of similar low population density.

(2) C-3 or C-2 commercial districts.

(3) Manufacturing districts.

(F) Minimum Site Size Requirements (MCC 11.15.7215)

(1) Area: Two acres.

(2) Width: Two hundred fifty feet.

(3) Depth: Two hundred fifty feet.

(G) Minimum Setback Requirements (MCC 11.15.7220)

These uses shall be located no closer than one hundred feet to any lot line, in or adjacent to an F, R, or A district.

(H) **11.15.7230 Other Requirements** (MCC 11.15.7230)

(1) All kennels, runs or pens shall be constructed of masonry or such other opaque material as shall provide for cleanliness, ease of maintenance, and sound and noise control.

(2) All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered are the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and public facilities on nearby properties, and other similar factors.

(3) The owner or operator of a use approved under this section shall maintain the premises in a clean, orderly and sanitary condition at all times. No garbage, offal, feces, or other waste material shall be allowed to accumulate on the premises. The premises shall be maintained in such a manner that they will not provide a breeding place for insects, vermin or rodents.

(4) A separate housing facility, pen or kennel space may be required for each dog over six months of age kept on the premises over twenty-four hours.

(I) **11.15.7235 Other Approvals** (MCC 11.15.7235)

The approval authority may request the advice of the County Dog Control Officer, officials of humane societies, and veterinarians before approving an application hereunder.

III. Ordinance Criteria for Alteration of a Non-Conforming

(A) **11.15.8810 Alteration of a Non-Conforming Use** (MCC 11.15.8810)

(1) Alteration of a non-conforming use includes:

(a) A change in the use of no greater adverse impact on the neighborhood.

(b) A change in the structure or physical improvements of no greater impact to the neighborhood.

(2) Alteration of a non-conforming use shall be permitted when necessary to comply with any lawful requirement for alteration in the use.

(3) An alteration as defined in (A) above may be permitted to reasonably continue the use.

(4) A proposal for an alteration under (C) above shall be considered a contested case and a hearing conducted under the provisions of MCC .8205 – .8295 using the standards of (E) below.

(5) An alteration of a non-conforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent than the current use, considering:

(a) The character and history of the use and of development in the surrounding area;

(b) The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line;

(c) The comparative numbers and kinds of vehicular trips to the site;

(d) The comparative amount and nature of outside storage, loading and parking;

(e) The comparative visual appearance;

(f) The comparative hours of operation;

(g) The comparative effect on existing vegetation;

(h) The comparative effect on water drainage;

(i) The degree of service or other benefit to the area; and

(j) Other factors which tend to reduce conflicts or incompatibility with the character or needs of the area.

IV. Prior History:

The county has taken several actions in the past with respect to a dog kennel use on this property. The following is a summary of those actions:

(A) In February, 1989, a Conditional Use application was presented to the division by Tim Schillereff for interior improvements of a dog kennel. Notes in the file indicate that conditional use approval was not required for such improvements, reference MCC 11.15.2028(B)(& (C).

(B) On March 2, 1990, zoning approval was issued for a building permit for interior remodeling.

(C) On August 6, 1990, a Design Review decision was issued for a new kennel building and site improvements.

(D) On November 6, 1990, the Planning Commission gave Conditional Use approval for a watchman's trailer in association with the kennel use.

(E) On December 12, 1990, a Design Review decision was issued for placement of a watchman's residence on the property.

(F) On July 24, 1992, an Exempt Farm Structure request for a horse barn was approved.

(G) On January 10, 1994, a Conditional Use application for expansion of the kennel from 50 to 75 dogs was filed with the division.

(H) On February 2, 1994, a Pre-Application Conference was conducted on the request. Design Review was determined to be the only action necessary.

(I) On April 27, 1994, a Design Review Decision (DR 4–94) was issued for the proposed expansion.

(J) On May 6, 1994, an appeal of the above decision was filed with the Division.

(K) On July 20 and August 3 1994, Hearings Officer Phil Grillo conducted hearings regarding the appeal of the Design Review decision. Mr. Grillo issued his written decision to approve the appeal, thereby, denying the requested expansion on August 19, 1994 (see Appendix A for entire DR 4–94 decision).

(L) On September 13, 1994, the Hearings Officer decision was reported to the Board of County Commissioners. No appeals were filed in a timely manner and the Board did not take the case up on their own motion. That decision became on that same date.

V. Site and Vicinity Characteristics:

The applicant's submittal incorporated in this report as appendix B contains a detailed description of the site and surrounding area on page 12. Staff concurs with that description.

VI. Compliance With Ordinance Considerations:

Appendix B includes the applicant's detailed discussion of compliance with ordinance criteria. Pages 13 through 25 address the Conditional Use approval criteria, while pages 26 through 31 address criteria for alteration of a Non-Conforming Use.

(A) Conditional Use

The applicant asserts on page 4 that, "The kennel is permitted for 50 dogs (see DR 90–07–02)." The Hearings Officer, however, in the decision on DR 4–94 concluded that:

> "Because the Hearings Officer finds that the kennel use is currently not a lawful use in the zone, the appeal of Marquam Farms Inc. is granted, and the Administrative Decision granting Final Design Review in DR 4–94, is reversed. Because the use has been found to be unlawful at the present time, a request for Design Review for such a use cannot be granted. However, if the applicant is able to obtain a conditional use permit or otherwise establish the use as a lawful use, this denial of Design Review should not prejudice such later action, if any. Therefore, the applicant's request for Design Review is denied, without prejudice..."

That conclusion was based on the Hearing Officer's findings on pages 3 and 4 of the decision which indicate that, even though the county issued a Design Review approval for the kennel in DR 90–07–02, the county did not issue a conditional use permit for the kennel operation itself. That finding concludes that the kennel, "...cannot be considered to have been a lawful use in the EFU zone..."

The applicant's assertion, then, that DR 90–07–02 approved kennel use of the property for 50

dogs is incorrect. The Hearing Officer considered the impact of that decision in the decision of DR 4–94 and determined that the kennel was unlawful.

The applicant also asserts that the Planning Commission action to approve a Conditional Use request for a watchman's residence in association with a kennel validated the kennel as an existing Conditional Use (CU 23–90). The Hearings Officer, in the decision on DR 4–94, found that he lacked "...authority in this proceeding to determine whether or not the 1990 conditional use permit for the watchman's residence (CU 23–90) is still valid."

The latest action, therefore, taken by the county is one of determining that the use is unlawful and that it must be approved in its entirety as a Conditional Use. Therefore, unless the Hearing's Officer decision on DR 4–94 is invalidated, or it is determined that the Planning Commission decision on CU 23–90 is valid, this application must be considered as a request to legally establish dog kennel use of the property. Therefore, the following Conditional Use criteria apply:

(1) OAR Considerations for Establishment of a Dog Kennel

Note: References to "the submittal" refer to the applicant's submittal contained in Appendix B.

According to the US Department of Agriculture Soil Conservation Service *Soil Survey of Multnomah County, Oregon* the soils comprising this site are Moag silty clay loam, protected IIIw; Rafton silt loam, protected IIIw; and Sauvie silt loam, protected IIw. All three are classified as High Value Farmland based on a list provided the county by the Department of Land Conservation and Development. OAR 660–33-110 does not allow dog kennels on High Value Farmland.

Footnote #2 on page 12 of Appendix B states that OAR 660–33-110 is in direct contradiction with ORS 215.283(2)(m) which allows that the governing body of the county may approve a dog kennel use on property designated Exclusive Farm Use. County Code reflects the provisions of the ORS, but the Code has not yet been amended to incorporate the provisions of the OAR. County Counsel advises that, until the Code is amended to include the OAR provisions, the OAR provisions must be considered in the review of any application for proposed uses within the Exclusive Farm Use district.

That same footnote concludes that the OAR provides a method of modifying soil classifications on individual sites. The application, however, provides no evidence that the Soil Conservation Service classification of the soils on this property may be in error.

Staff Conclusion:

The soils of this property are High Value Farmland. OAR 660–33-110 does not allow dog kennels on High Value Farmland. This application does not satisfy the initial approval criteria for Conditional Use approval of a dog kennel within an Exclusive Farm Use district on soils designated as High Value Farmland.

County Counsel has previously advised that failure to satisfy any one applicable approval criteria is sufficient grounds for denial of an application. The applicant has not demonstrated

compliance with the OAR requirements necessary for Conditional Use approval of a dog kennel on Exclusive Farm Use property. That is sufficient grounds for a denial of the Conditional Use request.

(B) Alternative Conditional Use Considerations

If it is determined that the kennel has been legally established as a Conditional Use, the following criteria apply:

(1) OAR Considerations for Expansion of an Existing Dog Kennel Facility

OAR 660–33-110 allows existing facilities to be "...maintained, enhanced, or expanded, subject to other requirements of law." If previously legally established as as a Conditional Use, an expanded kennel operation could be considered, subject to compliance with the applicable Conditional Use approval criteria.

(2) Comprehensive Plan Policies

(a) Policy 9 — Agricultural Land

A kennel use is allowed by both state and county law, and Staff concurs with the applicant's discussion on page 19 of the submittal that the expanded kennel use would not take any land out of agricultural production.

(b) Policy 13 — Air, Water and Noise Quality

The Rose City Sound study contained in Appendix E of the submittal, coupled with the response to Policy #13 on page 19 and the discussion of item B on pages 26 through 28, demonstrate that an expanded kennel operation would satisfy this Plan policy.

(c) Policy 22 — Energy Conservation

The applicant provides no response to this Plan policy.

(d) Policies 37 and 38 — Utilities and Facilities

Service provider forms contained in the original application, together with responses in the submittal on page 20, demonstrate compliance with this policy.

(e) Policy 40 — Development Requirements

The applicant provides no response to this Plan policy.

(3) General Conditional Use Criteria (MCC 11.15.7120)

(a) Consistency with the Character of the Area

The surrounding area is agricultural, game preserve, and extremely low density residential. Approximately one-half of the existing facility has been in place for nearly forty-three years. The current facility has the outward appearance of an agricultural building complex. That appearance will not change with the proposed expansion.

The applicant cites two other commercial kennel operations (Charlton Kennels–100 dogs and Minoggie Kennels–50) that exist on Sauvie Island. Both of those operations are located in areas of higher residential density than is this facility. An expansion of this facility to accommodate 75 dogs within the existing footprint would be consistent with the character of the area and comparable to other commercial kennel operations on Sauvie Island.

(b) Affect on natural resources

Staff concurs with the submittal that there are no inventoried natural resources that would be adversely impact by an expanded facility.

(c) Conflict with farm or forest uses in the area

There are no forest uses in the area. The existing facility has operated without conflict with surrounding farm uses. The design of the expanded facility with its covered runs and walled perimeter would serve to minimize any potential future conflicts with surrounding farm uses.

(d) Will not require public services other than those existing or programmed for the area;

Service provider forms contained in the original application, together with responses in the submittal on page 18, demonstrate that this standard is satisfied.

(5) Located outside a big game winter habitat area

The property is not within a big game winter habitat area.

(e) Hazardous conditions

There are no hazardous conditions identified that would result from expansion of this facility.

(f) Will satisfy the applicable policies of the Comprehensive Plan.

With the exception of Policies 22 and 40, the applicant has demonstrated that an expanded facility could comply with the applicable Plan policies.

(4) Exclusive Farm Use Conditional Use Criteria (MCC 11.15.7122)

(a) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use.

The applicant has identified a 1,500 foot surrounding area as the area of potential impact. There is only one agricultural use and no forest uses within that area. That agricultural use, a dairy, currently operates without any reported impact on the dairy operation. An expansion within the existing footprint should similarly have no impact; consequently, force no change in the dairy operation.

(b) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

If the expanded facility would not force a change on the dairy operation, it will not increase the cost of that farm operation.

(5) Location Requirements (MCC 11.15.7210)

The submittal demonstrates that an expanded facility would satisfy these requirements.

(6) Minimum Site Size Requirements (MCC 11.15.7215)

The submittal demonstrates that an expanded facility would satisfy these requirements.

(7) Minimum Setback Requirements (MCC 11.15.7220)

The submittal demonstrates that an expanded facility would satisfy these requirements.

(8) Other Requirements (MCC 11.15.7230)

The submittal demonstrates that an expanded facility would satisfy these requirements.

(9) Other Approvals (MCC 11.15.7235)

Staff concurs with the submittal.

(B) Alteration of a Non-Conforming Use

The applicant has alternatively applied for alteration of a nonconforming use. The Hearing Officer decision in the matter of DR 4–94 considered the nonconforming status of the kennel use of this property. He concluded:

"In conclusion, the Hearings Officer finds that although the kennel was lawfully established prior to the enactment of zoning in 1958, and therefore became a lawful non-conforming use on July 10, 1958, the kennel lost its non-conforming use status on or about January 1, 1964, because the applicant has not provided substantial evidence that the site was being used as a kennel during the period from December 1962 through February 1964. Because there is a lack of substantial evidence in the record concerning the continued operation of kennel during this period of time, the Hearings Officer concludes that the then applicable one year period of discontinuance ran, and

the kennel's non-conforming use rights therefore expired on or about January 1, 1964. Once the kennel lost its non-conforming use rights, it could no longer expand through the Design Review process, because the use itself was no longer lawful. As a result of the determination that the kennel use is not presently lawful, the Hearings Officer concludes that he does not have authority to grant Design Review for this use at this time."

On page 10 of the applicant's submittal, it is indicated that, "The former lawful use may be revived and made lawful once again under certain circumstances." The remainder of that page provides a discussion of previous county actions that are alleged to have constituted a reestablishment of the nonconforming kennel use. That information, however, was considered in the decision on DR 4–94, and it was concluded that the kennel had lost its nonconforming status.

Staff Conclusion:

The applicant requests approval to alter a nonconforming use. It has been previously determined by county action that the kennel lost its nonconforming status on or about January 1, 1964. Since the kennel is not a recognized nonconforming use, the request for alteration of a non-conforming use must be denied. MCC 11.15.8805 through .8810 contains no provisions for reestablishment of a nonconforming use.

(C) Other Considerations

On pages 11 and 12 of the submittal, the applicant presents evidence that the dog kennel has a vested right to operate. The Zoning Code, however, contains no criteria on which to evaluate a vested right claim. Staff can make no conclusion regarding the vested right issue.

CONCLUSION:

The applicant has not carried the burden necessary for obtaining expansion of an existing Conditional Use approval because it has not been demonstrated that the kennel use of the property has ever been legally established. Further, a new kennel use can not be approved because the use would be located on high-value soils contrary to OAR 660–33–110. The request to alter a Nonconforming Use to continue dog kennel use of this property.must similarly be denied because the kennel has been found to have lost its status.

This Staff Report and recommendation was available on August 11, 1995 five days before the August 16, 1995 public hearing scheduled before a County Hearings Officer. The Hearings Officer may announce a decision on the item (1) at the close of the hearing; (2) upon continuance to a date and time certain; or (3) after the close of the record following the hearing.

A written decision is usually mailed to all parties and filed with the Clerk of the Board within ten days of the decision by the Hearings Officer.

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings OFfice decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of $300.00 plus a $3.50 – per–minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)] Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street (in Portland) or you may call 248-3043.

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.

APPENDIX A

BOARD DECISION IN DR 4–94

Department of Environmental Services
Division of Planning and Development
2115 S.E. Morrison Street
Portland, Oregon 97214 (503) 248-3043

DECISION
OF THE HEARINGS OFFICER

This decision consists of Findings and Conclusions

August 19, 1994

Concerning an appeal by Marquam Farms Corporation from an Administrative Decision, approving final design review for an expansion of the Sauvie Island Kennel, operated by the applicants, Tim and Angela Schillereff.

DR 4-94 Appeal of An Administrative Decision

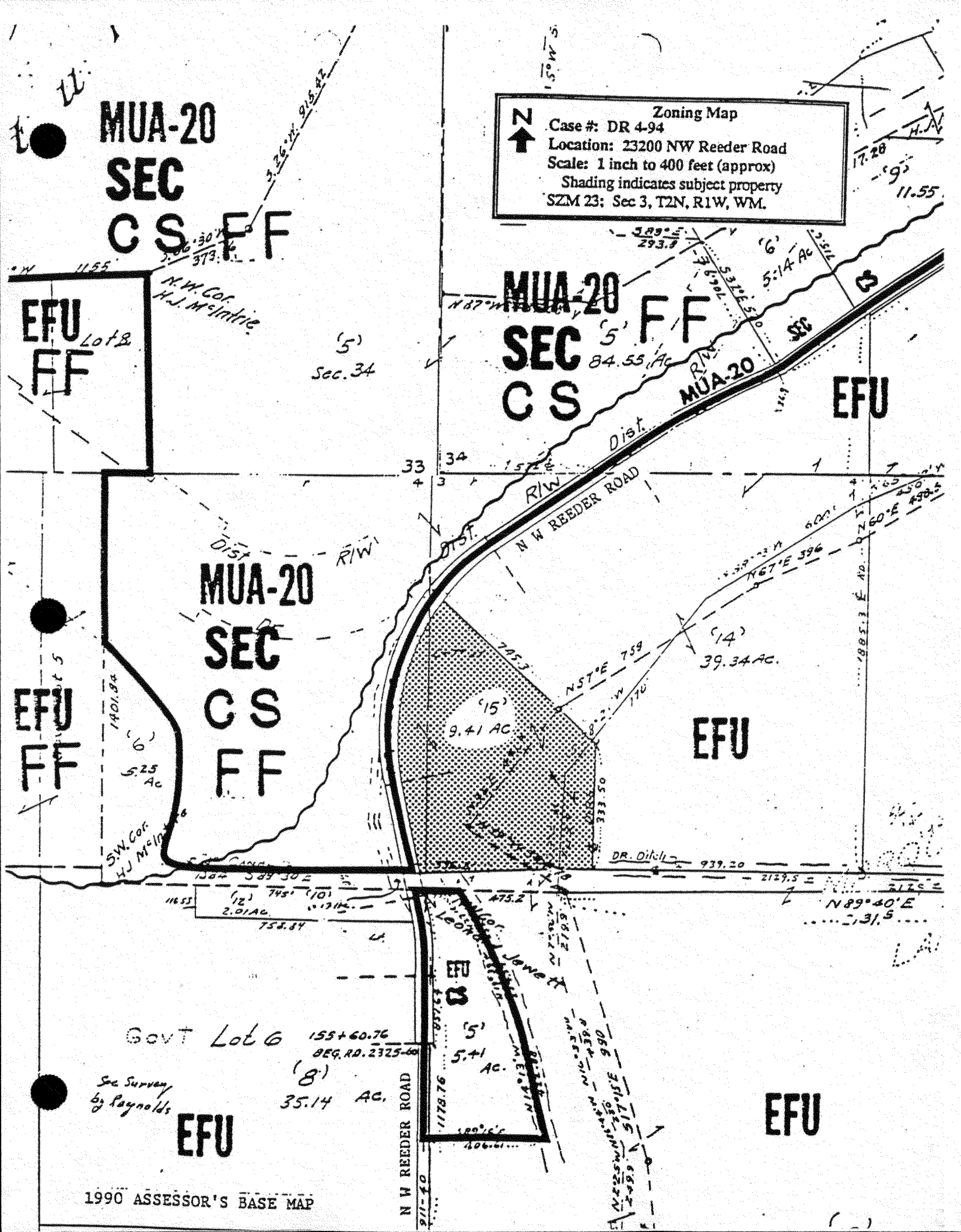
Location:	23200 NW Reeder Road
Legal:	Tax Lot '15', Section 3,2N-1W, 1990 Assessor's Map
Site Size:	9.41 acres
Property Owner:	EE and MF Persinger 23200 NW Reeder Road, 97231
Applicant:	Tim and Angela Schillereff 23202 NW Reeder Road Portland, Oregon 97231
Comprehensive Plan:	Agricultural Land
Present Zoning:	EFU, Exclusive Farm Use District
Hearings Officer Decision:	**Marquam Farm's Inc.'s appeal of the Administrative Decision approving Final Design Review in DR 4-94 is Granted. The Applicant's request for Final Design Review is Denied without Prejudice.**

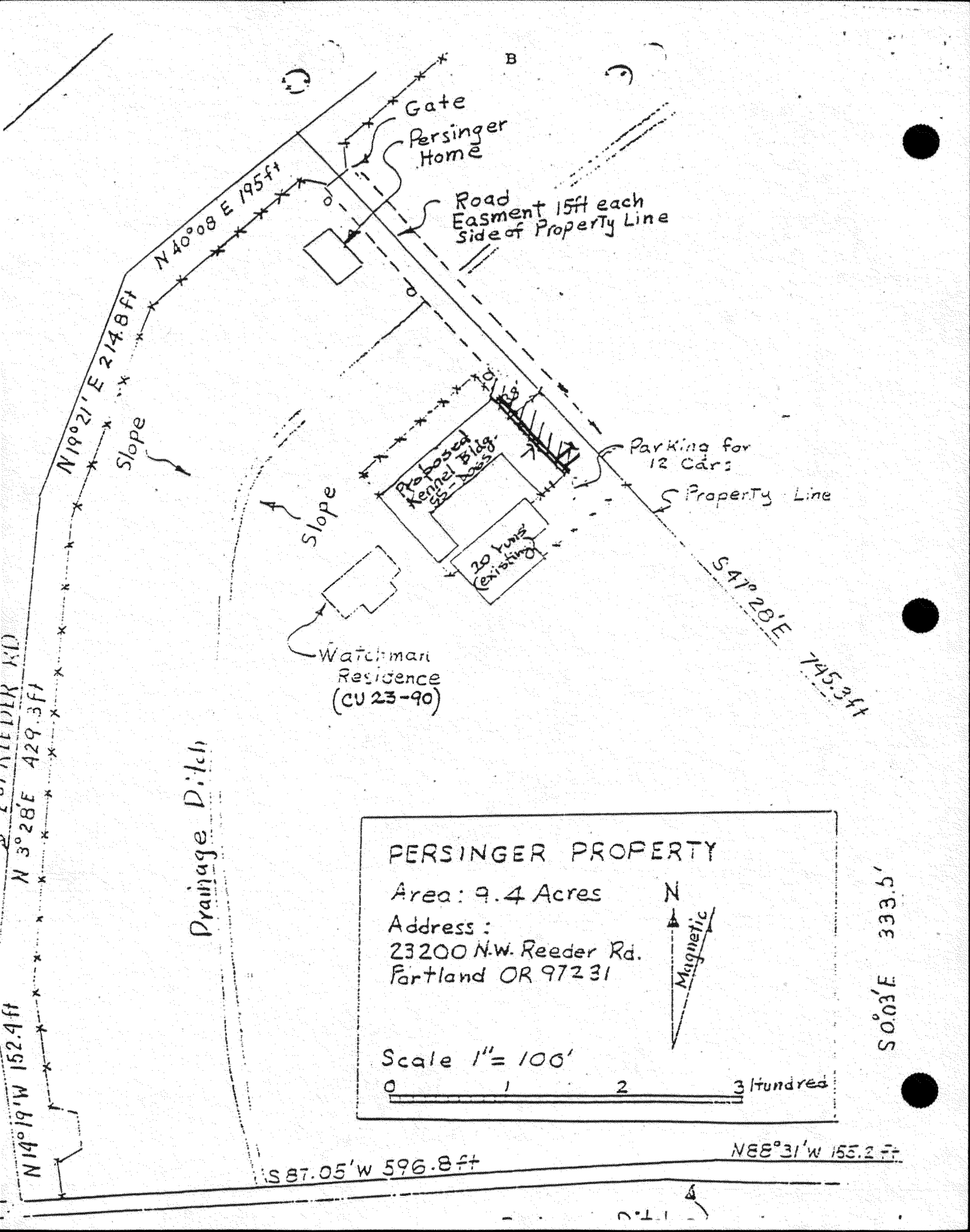
FINDINGS AND CONCLUSIONS

A. BACKGROUND

1. Applicant's Proposal:

The applicants, Tim and Angela Schillereff, operators of the Sauvie Island Kennels since 1989, request approval to demolish two existing kennel buildings and replace them with one, larger structure, designed to house 55 dogs. The other existing kennel structure would remain and would house up to 20 dogs. Overall, the applicant is requesting an expansion of the kennel from its existing license parameter of 50 dogs, to up to 75 dogs.


Zoning Map
Case #: DR 4-94
Location: 23200 NW Reeder Road
Scale: 1 inch to 400 feet (approx)
Shading indicates subject property
SZM 23: Sec 3, T2N, R1W, WM.
MUA-20
SEC
C S
F F
EFU
Lot 8
F F
(5)
Sec. 34
N.W. Cor. H.J. McIntire
MUA-20
SEC
84.55 Ac
C S
F F
(5)
(6)
5.14 Ac
MUA-20
EFU
R/W
Dist.
N W REEDER ROAD
33
34
MUA-20
SEC
C S
F F
EFU
F F
(6)
5.25 Ac
S.W. Cor. H.J. McIntire
(15)
9.41 AC
(14)
39.34 Ac.
EFU
DR. Ditch
939.20
N89°40'E
(12)
2.01 Ac.
(10)
475.2
EFU
C S
(5)
5.41 Ac.
Govt Lot 6
155+60.76
BEG. RD. 2325.60
(8)
35.14 Ac.
See Survey by Reynolds
EFU
EFU
1990 ASSESSOR'S BASE MAP
N W REEDER ROAD


B
Gate
Persinger Home
Road Easment 15ft each Side of Property Line
N 40°08 E 195ft
N 19°21' E 214.8ft
Slope
Slope
Proposed Kennel Bldg. 55-Dogs
20 Runs (existing)
Parking for 12 Cars
Property Line
S 47° 20' E 745.34ft
Watchman Residence (CU 23-90)
Drainage Ditch
N 3°28'E 429.3ft
N 14°19'W 152.4ft
S 87.05'W 596.8ft
N 88°31'W 155.2ft
S 0.03'E 333.5'
PERSINGER PROPERTY
Area: 9.4 Acres
Address:
23200 N.W. Reeder Rd.
Portland OR 97231
N
Magnetic
Scale 1" = 100'
0 1 2 3 Hundred

2. **Site and Vicinity Characteristics:**

The 9.41 acre site is located in an EFU district on Sauvie Island. The property fronts on NW Reeder Road. Surrounding properties are primarily agricultural or open space in character.

The Sturgeon Lake Wildlife Refuge property lies to the northwest, across Reeder Road. This refuge is owned by the Oregon Department of Fish and Wildlife. The refuge is several thousand acres in size and serves as an important stop on the Pacific Flyway. It is also the home to many species of animals, and serves as an important local and regional recreational and open space resource.

Properties to the south and southwest contain agricultural uses with scattered farm houses and barns.

A duck hunting club operates on a 39-acre parcel east and north of the kennel site. The duck hunting club is owned by the appellant corporation, Marquam Farms Corp..

3. Land Use History

On August 6, 1990, the Planning Director approved Final Design Review (DR 90-07-02), authorizing remodeling plans for an existing 50-dog kennel.

On November 6, 1990, the Planning Commission approved a conditional use request for a watchman's residence for the dog kennel.

Both of the above mentioned approvals were issued to the present applicants, Tim and Angela Schillereff.

On or about January 10, 1994, the Schillereff's submitted a letter to the county planning department requesting a conditional use permit to expand and remodel the existing kennel. This request was consistent with a previous request made by Tim Schillereff in his February 24, 1989, letter to the county where he requested a conditional use permit for the kennel. It is of some note that Mr. Schillereff in his February 24, 1989 letter stated that:

> "Please note that this request is pertaining to an existing kennel site, in other words, the buildings and structures are intact. However, the permits have lapsed for over 15 years, therefore a new request is now being sent."

In both 1989, and in 1994, the county advised the Schillereff's that a conditional use permit would not be necessary, and that the respective expansions could be accomplished through design review. In the file pertaining to DR 90-07-02 (the initial remodel for 50 dogs), a notation appears beside a copy of code section 11.15.2028, indicating that pursuant to this section "The Persinger Kennel is therefore a conforming CU [conditional use] therefore (sic) does not expire per October 8, 1990 opinion from John DuBay.". Also, in the file pertaining to this case (DR-4-94), it is apparent that the county based its administrative decision to approve the kennel expansion through Design Review (as opposed to through a conditional use process as originally requested by the applicant) on staff's legal interpretation that MCC 11.15.2028 (B) results in the kennel being a "pre-existing

conforming conditional use, permitted to continue in the EFU District, and which may expand on its original lot without a CU hearing." (See staff report and notice of public hearing for DR 4-94).

The outcome of this case turns on whether or not staff's interpretation of MCC 11.15.2028 (B), is correct. If staff's interpretation of MCC 11.15.2028 (B) is wrong, and if the use is not otherwise a lawful use in the EFU zone, then the Hearings Officer lacks authority to approve this Design Review request, unless or until the underlying kennel use receives appropriate land use approval to make it a lawful use in the zone. See MCC 11.15.2006.

4 . Relevant Approval Criteria

Design review is governed by the criteria in MCC 11.15.7850.

MCC 11.15.2008 lists the uses permitted in the EFU zone. Dog kennels are not permitted uses in the EFU zone. The statutory corollary to this code provision is ORS 215.283(1). This statutory provision guides the county's ability to interpret its own ordinance with regard to its EFU provisions. The county cannot interpret its ordinance in a manner that provides less protection to EFU lands, or in a way that allows other uses outright in the EFU zone which are not listed in the statute.

MCC 11.15.2010 lists the relevant conditional uses permitted by the county in its EFU zone. Dog kennels are listed as conditional uses in this zone. The statutory corollary to this code provision is ORS 215.283(2).

MCC 11.15.0010 defines a kennel as follows: "Kennel-Any lot or premises on which four or more dogs, more than six months of age, are kept.".

MCC 11.15.2028 lists the exemptions from Non-conforming Use Provisions.

MCC 11.15.8805 and .8810 are the county's existing non-conforming use provisions. The statutory corollary to these provisions are found in ORS 215.130.

B. ANALYSIS

1. Lawfulness of the Existing Kennel

a. Status Under MCC 11.15.2028(B)

As noted above, the staff and the applicant have argued that MCC 11.15.2028(B) should be interpreted to mean that so long as the dog kennel was listed as conditional use in subpart .2012 prior to August 14, 1980, and since the kennel was lawfully established by any means, prior to the enactment of zoning in the county, then, under .2028(B), the kennel becomes a lawful permitted use in the EFU zone. The appellant disagrees with the applicant's and staff's interpretations. The applicant's interpretation is set out in the their various submissions.

The Hearings Officer finds that .2028(B) cannot be interpreted in the manner suggested by the applicant and the staff, without directly conflicting with ORS 215.283. Under the statutory scheme,

permitted uses and conditional uses are a static list. After 1958, when zoning was first applied in this area of the county, kennels were never allowed as outright permitted uses. Kennels were listed as conditional uses in the agricultural zone, but this particular kennel never received a conditional use permit. Therefore, the only way in which this particular kennel could have been lawful in 1958, when zoning came into effect, was if the use was a lawfully established non-conforming use.

The state statute that governs non-conforming uses does not permit a use that may have been a lawful non-conforming use to become an outright permitted use, simply because it was listed by the county as a conditional use prior to some arbitrary date. Under the statutory scheme, the only way a non-conforming use can expand is to satisfy the provisions of ORS 215.130, and any other relevant county ordinances not in conflict with the statutory scheme. Under the statutory scheme, in EFU zones, non-conforming uses never become conforming uses, unless the local ordinances and the state statutes governing exclusive farm uses are both amended to allow such uses outright, or unless both the local ordinance and the statute eventually list such uses a conditional uses, and if the governing body of the county, or its designate, actually issues an approval for such a use. Therefore, the only way that .2028(B) can be construed in such a way so as not to be in conflict with the statutory scheme, is to interpret the ordinance to mean that the kennel use must not only have been listed as a conditional use, but it must have been legally established as such, prior to August 14, 1980 (i.e. it must have actually obtained a conditional use permit).

In this case, the county issued Design Review approval for the kennel in 1990. However, the county did not issue a conditional use permit for the kennel operation itself. Since the county did not issue a conditional use permit for the kennel prior to August 14, 1980, the applicant cannot take advantage of whatever benefit MCC 11.15.2028(B) might confer. Therefore, the kennel did not become a lawful use pursuant to .2028(B), because it never received a conditional use permit. Under the statutory scheme, MCC.2028(B) cannot be read in such a way so as to elevate a non-conforming use to a permitted use in the EFU zone. The fact that the use was listed as a conditional use prior to August 14, 1990, is irrelevant under the statutory scheme, because the use did not actually obtain a conditional use permit. Therefore, since the kennel has never passed muster under the statutory scheme, which ultimately governs all uses permitted in exclusive farm use zones, it cannot be considered to have been a lawful use in the EFU zone, unless it was lawfully established as a non-conforming use, and if its status as such was maintained over time.

b . Non-Conforming Use Status

A considerable amount of evidence was received concerning the non-conforming use status of the kennel. Before the factual findings on this issue are discussed, the applicable law needs to be set out.

In Oregon, non-conforming uses are governed by state statutes and by local ordinances. ORS 215.130 provides that a "lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance may be continued." That same statute provides that a non-conforming use "may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of the zoning ordinances or regulations applicable at the time of the proposed resumption." MCC 11.15.8805(B) currently provides that: "If a non-conforming use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption.".

The proponent of non-conforming use status has the burden of proving both that the use was "lawfully established", and must also establish the level or scope of the use that existed at the time the use became non-conforming. See Warner v Clackamas County, 25 Or LUBA 82 (1993). The code defines a "kennel" as "any lot or premises on which four or more dogs, more than six months of age, are kept." Therefore, in order to be a "kennel", four or more adult dogs must be kept on the site. If less than four adult dogs are kept, for the "discontinuance" period, the non-conforming use expires.

As noted above, a non-conforming use can be lost if it is discontinued for the "discontinuance" period. Also, a partial discontinuance can occur during the life of the non-conforming use. In such a situation, "factors such as intermittency and infrequency are relevant to the scope of the [nonconforming] use, not its existence." See Warner v. Clackamas County, 111 Or. App. 11, 824 P2d 423 (1992). See Also Rhine v. City of Portland, 120 Or. App. 308, P2d 874 (1993).

Based upon all the evidence and testimony in the record the Hearings Officer makes the following findings with regard to the status of the kennel as a non-conforming use:

1. County records indicate that from 1952 to August 1957, Roy Wallace had a kennel on the site. From August 1957 to December 1962, Evelyn Blitz operated the kennel, then known as Marquam Lake Kennel.

2. On April 19, 1955, the county enacted its first zoning ordinance. The ordinance was applied to the Northwest portion of the county, including this site, on July 10, 1958.

3. On July 10, 1958, the county placed this site in its F-2 zoning district. F-2 zoning did not permit kennels as allowed uses.

4. The kennel was lawfully established prior to July 10, 1958, when the county's first zoning code was amended. It was lawfully established because prior to July 10, 1958, the county did not restrict the use of this property. Prior to July 10, 1958, the county did not require zoning or other land use permits to be issued for the kennel. Therefore, the evidence in the record demonstrates that the Marquam Lake Kennel, operated by Evelyn Blitz became a lawful non-conforming use on July 10, 1958.

5. The level of the use that existed on July 10, 1958, is difficult to precisely determine. The best evidence is a county record which indicates that between August 1957 and December 1962, the use consisted of a "commercial kennel [of] up to 50 dogs-boarding breeding and training.....". This county record is corroborated by other evidence in the record, particularly the "Brief history of Sauvie Island Kennels" (history"), submitted by the applicant. This history is particularly helpful in that it describes the level and type of improvements constructed by the original owner, Roy Wallace, which were still in existence on July 10, 1958, when Mrs. Blitz operated the kennel. In short, the best evidence indicates that on July 10, 1958, the kennel consisted of a set of refurbished Army buildings which were moved to the site and located on concrete pads. Outside dogs runs were constructed with concrete bases, and a sloped drainage system connected the runs to a drainage system. A set of chain link fence dividers separated individual dog runs. The kennel operation was in active commercial use between 1952 and 1962, during the tenure of Mr. Wallace, and later, Mrs. Blitz. The best evidence indicates that on July 10, 1958, the active commercial operation housed up to 50 dogs. (Note: The code definition of the term "kennel" does not require that any commercial

activity occur. It merely requires that 5 or more dogs, aged six months or older, be kept on the premises. The Hearings Officer's reference to commercial activity is merely a reflection of what the evidence indicated.)

6. Between December, 1962, when Blitz operated the kennel, and February 1964, when Courtway operated the kennel, there is no information in the record concerning the existence and scope of the use. The county record is silent during this period. The applicant in their "history", does not mention the Courtway operation, and their discussion of Blitz's use of the property during this time period in the early 1960's is vague, and conclusory at best. During this period of time, the applicant's "history" is not based on any direct knowledge. The Persinger affidavit does not include this time period and is therefore of no help either. This lack of evidence does not meet the legal standard for "substantial evidence". Therefore, the Hearings Officer concludes that between December 1962 and February 1964, the applicant has not carried its burden of proof regarding the continued operation of the kennel.

7. Since the applicant has not provided substantial evidence in the record that the kennel use was maintained between the time period mentioned above, (December 1962 through February 1964), the Hearings Officer cannot find the kennel was in operation during that time (i.e. that 4 or more adult dogs were kept on the site). Therefore, the Hearings Officer must conclude that the kennel use, as that term is defined by the code, was discontinued between December 1962 and February 1964.

8. On November 15, 1962, the county adopted a new zoning ordinance (Ordinance #100). Section 8.23 of the 1962 code provided that: "If a non-conforming use is abandoned or discontinued for any reason for more than one year, it shall not be re-established unless specifically approved by the Planning Commission.". In other words, the "discontinuance" period in 1962 was 1 year, rather than 2 years as it is now. Therefore, under the then applicable law, since the non-conforming kennel use was discontinued for more than one year, (from December 1962 to February 1964), the non-conforming status of the kennel expired. Specifically, the non-conforming use status of the kennel expired on or about January 1, 1964, one year and one day after the use was discontinued in December of 1962.

9. Since the Hearings Officer finds that the non-conforming status of the kennel expired on or about January 1, 1964, the subsequent history of the kennel is not material. Under the law that was applicable in 1964, once a non-conforming use expires, either by discontinuation or abandonment, the use could not re-establish its non-conforming status, unless specifically approved by the Planning Commission. See MCC 8.23 (circa 1962). Under the current county code, once a non-conforming use is abandoned or discontinued, the use cannot be re-established unless the resumed use conforms with the requirements of the code at the time of the resumption. See MCC 11.15.8805(B).

2. Estoppel

In the Applicant's brief, submitted July 27, 1994, the Schillereff's raise the affirmative defense of estoppel. The defense of estoppel seeks to prevent a party, in this case the county and the appellant, from re-raising an issue that was previously decided in a different case involving the same parties. The applicable law with regard to the estoppel defense in land use proceedings is set out in Schoppert v. Clackamas County 23 Or LUBA 138 (1992), and Clackamas County v. Emmert, 14 Or App 493, 513 P2d 532 (1973). In those cases, it was established that in order for the petitioner to

establish estoppel, the petitioner must show (1) the county made a false representation with knowledge of the facts, (2) petitioner was ignorant of the truth, (3) the county intended that petitioner act upon the false representation, and (4) petitioner in fact acted upon the false representation.

The Hearings Officer finds the applicant's have not met their burden of proof concerning the estoppel defense. Based upon the evidence in the record, the only misrepresentation made by the county was a mistake of law, not fact. The fact that certain members of the planning staff advised the applicant and the Planning Commission that they considered the kennel to be a "conforming conditional use" under MCC 11.15.2028, and that the applicant and Planning Commission relied on this mistake, does not amount to the type of false factual representation required to establish estoppel. In short, mistake of the law is no defense. See Coos County v. State of Oregon, 303 Or 173, 743 P2d 1348 (1987).

Furthermore, the evidence in the record demonstrates that the applicant's themselves, on more than one occasion, doubted the continuing legality of the prior kennel use. The record shows that the applicants initially requested a conditional use permit for the remodelling and expansion of the kennel in both 1989 and in 1994. The 1989 request was accompanied by a February 24, 1989 letter from Mr. Schillereff, which stated:

> "Enclosed you will find the following request for a conditional use permit for a dog kennel on Sauvie Island, Oregon.
>
> "Please note that his request is pertaining to an existing kennel site, in other words, the buildings and structures are intact. However, the permits have lapsed for over 15 years, therefore a new request is now being sent."

This letter of February 24, 1989 demonstrates that the applicant either had knowledge or at least suspected that the prior kennel use had "lapsed". Therefore, the second element of the estoppel defense has not been met because the evidence indicates that applicant was not ignorant of the law. Furthermore, even if the second element of the defense had been met, the misrepresentation that was made by the county was as mistake of law, not a factual misrepresentation. Estoppel cannot be established based upon a mistake of law; the misrepresentation must be one of an existing material fact. The applicant has not demonstrated that the county made a misrepresentation of an existing material fact. Therefore, the estoppel defense has not been established.

C. CONCLUSION

Because the Hearings Officer finds that the kennel use is currently not a lawful use in the zone, the appeal of Marquam Farms Inc. is granted, and the Administrative Decision granting Final Design Review in DR 4-94, is reversed. Because the use has been found to be unlawful at the present time, a request for Design Review for such a use cannot be granted. However, if the applicant is able to obtain a conditional use permit or otherwise establish the use as a lawful use, this denial of Design Review should not prejudice such later action, if any. Therefore, the applicant's request for Design Review is denied, without prejudice.

The Hearings Officer expressly declines to reach any of the other issues raised by the appellant in their May 6, 1994 Notice of Appeal. Specifically, the Hearings Officer lacks authority to determine whether the use is a public nuisance, or whether the 1990 permit for the watchman's

residence was obtained by fraud. Also, the Hearings Officer lacks authority in this proceeding to determine whether or not the 1990 conditional use permit for the watchman's residence (CU 23-90) is still valid. CU 23-90 was not appealed beyond the planning commission and it is therefore a final decision, which cannot be collaterally attacked in this proceeding. Depending upon the final outcome of this particular case, the County may chose to examine the continued validity of CU 23-90, in a separate appropriate action.

As to the defense of estoppel, the mistaken legal interpretation provided by the county staff to the applicant does not, upon careful examination of the law and the facts, rise to the kind of mistake that results in a successful estoppel defense against the county in this case. Furthermore, the evidence indicates that as early as 1989, when the applicant was initially seeking county permits for the kennel remodelling and expansion, Mr. Schillereff stated that he believed that a conditional use permit would be required because whatever other rights may have existed for the kennel use had previously lapsed. It should be noted that even if Mr. Schillereff had not made this statement in his 1989 letter concerning the need for a conditional use permit and the "lapse" of the prior use, the estoppel defense still could not have been maintained against the county, based upon the theory that the county took prior action based upon a mistake in law. Estoppel will not lie against a local government based upon a mistake of law, because the county has a continuing obligation to the public to apply the law correctly.

In conclusion, the Hearings Officer finds that although the kennel was lawfully established prior to the enactment of zoning in 1958, and therefore became a lawful non-conforming use on July 10, 1958, the kennel lost its non-conforming use status on or about January 1, 1964, because the applicant has not provided substantial evidence that the site was being used as a kennel during the period from December 1962 through February 1964. Because there is a lack of substantial evidence in the record concerning the continued operation of kennel during this period of time, the Hearings Officer concludes that the then applicable one year period of discontinuance ran, and the kennel's non-conforming use rights therefore expired on or about January 1, 1964. Once the kennel lost its non-conforming use rights, it could no longer expand through the Design Review process, because the use itself was no longer lawful. As a result of the determination that the kennel use is not presently lawful, the Hearings Officer concludes that he does not have authority to grant Design Review for this use at this time.

D. DECISION

The appeal of the Administrative Decision approving Final Design Review for DR-4-94 is granted. The applicant's request for Final Design Review is denied, without prejudice.

It is so Ordered this 19th day of August, 1994.

Phillip E. Grillo
Hearings Officer

In the matter of DR 4-94:

Signed by the Hearings Officer: August 1994
[date]

Decision mailed to parties: September 1, 1994
[date]

Submitted to Clerk of the Board: September 2, 1994
[date]

Last day to Appeal to the Board: 4:30, Monday, September 12, 1994

Decision Reported to the Board 1:30 p.m., Tuesday, September 13, 1994
[date]

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of $300.00 plus a $3.50-per-minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)] Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street (in Portland).

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

APPENDIX B

APPLICANT'S SUBMITTAL FOR CU 4–95 & MC 1–95

TABLE OF CONTENTS

I. INTRODUCTION

Dog kennels have been recognized as an appropriate use in Multnomah County's agricultural zones since the County first implemented rural zoning in 1958. The reasons are straightforward. Kennels belong in the country, not in an urban residential setting. Where dogs are properly controlled (*i.e.*, prevented from chasing or frightening livestock), there is no evidence that kennels interfere with accepted agricultural practices. Kennels, however, sometimes cause noise problems for adjacent rural residential neighbors, which is a principal reason for requiring conditional use review. (See, for example, MCC 11.15.7230.D.2.) In this case, there are no nearby residential neighbors and there are no adverse impacts on surrounding agricultural operations. This is true because the Schillereffs are experienced kennel operators.

Sauvie Island Kennels is located on the site of the first kennel established on Sauvie Island, and currently uses two of the original buildings in its operations. Sauvie Island Kennel has operated commercially on this property for more than five years, boarding, breeding and training dogs with full knowledge of our neighbors and with repeated approvals from Multnomah County staff and the Planning Commission:

- March 1989, Administrative approval for kennel interior remodeling;
- August 1990, Administrative Design Review approval for new kennel building;
- November 1990, Planning Commission approval of a Conditional Use Permit of Watchman's Residence; and
- December 1990 Administrative Design Review Approval for Watchman's Residence.

Unfortunately, in September 1994, after relying once again upon the advise of County staff, the Schillereffs lost an appeal of Design Review approval to expand the existing kennel, in that case. Contrary to the Hearings Officer's opinion, and for reasons included in subsections C and D below, the kennel is a legitimate land use -- either a conforming conditional use or a lawful nonconforming use.

This kennel is considered by many to be one of the premier boarding, training and breeding kennels in the Portland/Vancouver metropolitan area. The Schillereffs seek land use approval for a 75-dog kennel. They wish to replace the two older kennel huts with one modern building which would then be connected to a third existing building. In effect the kennel would be one continuous design, not three disparate units. The operating footprint, however, would remain unchanged.

The single kennel design will realize several economies of scale. First and foremost, the dogs would be housed in a state of the art kennel with radiant heating and cooling in the concrete floor. Second, heating, cooling, maintenance, lighting, plumbing and telephone services would be consolidated and would operate more efficiently with less energy costs. Third, dog care in one building will be easier and will result in less disruption (barking) to the neighborhood.

The new kennel design, because it is totally covered, will protect the animals from the elements. The dogs will be healthier, happier and quieter. Because the kennel will be totally covered, and because the Schillereffs propose to incorporate a solid masonry wall into the new design, there will be greater sound buffering then the current three unit design provides.

A. NATURE OF THE APPLICATION

The purpose of this application is to allow the expansion of the existing kennel operation on the property. The kennel is permitted for 50 dogs (see DR 90-07-02). The Schillereffs would like to remodel and expand the kennel to accommodate up to 75 dogs.

Sauvie Island Kennel is widely recognized for the high level of canine care provided. (See Attachment D.) However, Sauvie Island Kennel was originally constructed in the 1950s, and would benefit from remodeling based on modern kennel design standards. With design improvements and proposed noise and site buffers, impacts on neighboring properties (especially Marquam Farms to the northeast) will decrease.

As indicated in subsection B below, and despite the best intentions of County planning staff, Sauvie Island Kennel has had an unusually difficult time in acquiring necessary land use permits. Sauvie Island Kennels has been victimized by changes in state land use rules, interpretative disparities among County officials, and a singularly disagreeable neighbor.

Because the regulatory situation is uncertain, the Schillereffs are applying -- simultaneously and alternatively -- for *both* a conditional use permit and an alteration of a nonconforming use.

The goal of each process is the same: expansion and improvement of an existing kennel, consistent with the intent and purpose of Statewide Planning Goal 3 (Agricultural Lands) and the Multnomah County Comprehensive Plan and Zoning Code. The proposal is consistent with the intent of Goal 3 because no additional agricultural land will be converted to non-farm use, and the kennel will not adversely affect commercial agricultural enterprises in the area. The proposal is consistent with the MCCP and the EFU zone, because Sauvie's Island is a logical place to operate and expand a kennel, the kennel provides useful services to County residents, and the improved design will decrease impacts on surrounding properties.

B. PLANNING HISTORY

A kennel, either commercial or private, has operated on the property since 1952. The County code defines a kennel as: "Any lot or premises on which four or more dogs, more than six months of age, are kept." MCC 11.15.0010 Definitions.

The County first applied zoning to this property (Farm-2) on July 10, 1958. It is not disputed that as of that date the kennel use was a lawful nonconforming use. The County currently defines a nonconforming use as:

A use to which a building or land was put at the time this chapter became effective and which does not conform with the use regulations of the district in which is located. MCC 11.15.0010 Definitions.

1. 1994 Design Review: DR 9-94.

In 1994, the Schillereffs made a Design Review application to expand a dog kennel use from 50 dogs to 75 dogs. Multnomah County DR 9-94. The Schillereffs selected the Design Review path because, consistent with its previous statement, County Staff informed Tim and Angela that a conditional use permit was not required, only Design Review. In a contested case hearing which resulted from that application, the Hearings Officer first addressed the question of whether the underlying use, the kennel, was a lawful use in an EFU zone as contended by the County and the property owners - the Schillereffs.

The Hearings Officer found that the kennel use was an earlier lawful nonconforming use. However, when challenged to prove whether the use had discontinued, the applicants failed to meet their burden of proof, by substantial evidence in the record at that time, that the kennel was maintained for the statutory period. Therefore, the Hearings Officer determined that the nonconforming use status of the kennel expired on or about January 1, 1964. His decision does not foreclose the option of lawfully resuming the nonconforming use under statute and County code.

2. 1989 Building Permit for Remodeling Kennel

On February 24, 1989, the Schillereffs applied for a conditional use permit, pursuant to MCC 11.15.2028(B)(C), to expand a dog kennel already in existence on their property. In his letter to the Division of Planning and Development, Mr. Schillereff stated:

Please note that this request is pertaining to an existing kennel site, in other words, the building and structures are intact. However, the permits have lapsed for over 15 years, therefore a new request is now being sent.

Mr. Schillereff specifically advised the County that the kennel site was intact and that he was seeking permission to continue the use of the site as a commercial kennel. In recognition of the need for permits for commercial operation, he noted that permits had lapsed for over 15 years. Permits are not required for a non-commercial dog kennel, and there would have been no need for a permit to operate a private kennel for the previous 15 years. Here, the Schillereffs were merely attempting to resume commercial kennel operations and believed that a conditional use permit was the preferred method of doing so.

Mr. Schillereff, because he was informed by the County that a conditional use permit was not necessary, deferred to the County staff. On March 2, 1989, the County issued zoning approval for remodeling the existing kennel and issued a building permit for that purpose. In reliance on the County's permit approval and determination that a conditional use permit was not

required, the Schillereffs entered into five year lease purchase with the owners, remodeled the kennel and began commercial operation.

At that time, there was no allegation that the County action was unlawful and no appeal of the County administrative decision was filed. Nor was any notice of intent to appeal filed with LUBA within 21 days of when a party knew, or should have known, of the decision. ORS 197.130 (3)to(5). Consequently, that decision is not subject to review. MCC 11.15.8290(D)(1)(2).

3: DR #90-07-02: Kennel Remodel

In 1990, the Schillereffs requested a conditional use permit for additional remodeling of the kennel (to add a new kennel building without increasing the number of dogs). County Planner Robert Hall informed them that a conditional use permit was not required, that design review would suffice.

Subsequently, on July 13, 1990, the Schillereffs submitted drawings and design plans for remodeling a kennel for 50 dogs. DR #90-07-02. On August 6, 1990, County planner Mark Hess reviewed the final design plans and found them conforming with MCC 11.15.7805 to .7865 with conditions.

Notice of the County's decision was mailed to 5 persons on August 6th, 1990. The notice stated that, "The Planning Director has approved remodeling plans for an existing 50 dog kennel, no additional dogs are authorized by this permit."

The Planning Director's decision became final ten days later on August 16, 1990. No appeal was filed pursuant to MCC 11.15.8290(A). Nor was any notice of intent to appeal filed with LUBA within 21 days of when a party knew, or should have known, of the decision. ORS 197.130 (3)to(5). Consequently, that decision is not subject to review. MCC 11.15.8290(D)(1)(2).

4. CU #23-90: Watchman's Residence

In 1990, the Schillereffs also requested a Conditional Use permit to place a Watchman's Residence, a manufactured home, on the property. CU #23-90. Conditional use permits in EFU zones are governed by MCC 11.15.2012. Dog kennels, as of the 1986 code amendments, are allowed as a conditional use in an EFU zones. MCC 11.15.2012(B)(11). Structures which are *customarily* accessory to a dog kennel may be permitted when they are found to satisfy conditional use approval found at MCC 11.15.7105 to .7140. MCC 11.15.2014(E) *emphasis added.*

The County Planning Commission, in an decision issued on November 6, 1990, found that watchman's residences are customarily provided in conjunction with kennel operations. The Commission found that the proposed watchman's residence was not inconsistent with nearby

agricultural lands, wildlife conservation lands, or rural residential areas. The Commission further found the proposed development would negligibly effect farm or forest uses in the area. Since the residence is customarily provided for kennel uses, the Commission found that the watchman's residence was consistent with County plan policies: 9, Agricultural Lands; 13, Air, Water & Noise Quality; or 14, Development limitations (flooding).

The Commission concluded that the "watchman's residence for the existing kennel satisfied Conditional Use approval criteria."

At the Planning Commission's public hearing for the conditional use permit, John Maring appeared for Marquam Farm and argued that the kennel had been abandoned in 1971. During the discussion that followed, a Commissioner observed that the Planning Commission could not approve a watchman's residence as an accessory use for the kennel if the underlying kennel was illegal. County staff responded that the County considered the use to be a conditional use rather than a nonconforming use. County counsel provided an interpretation that conditional uses do not lapse or expire. The Planning Commission accepted County counsel's and staff's interpretation and unanimously approved the conditional use permit for the watchman's residence, based on the staff report.

The Commission's decision at page 8 specifically stated that:

> *A watchman residence to oversee the security and well-being of all the kennel animals and the kennel buildings and equipment is an accessory use to the well-established kennel operation. Therefore, such an expansion would be consistent with the character of the land.*

Moreover, the Commission's decision at page 10 described the kennel as an "existing conditional use":

> *The Comprehensive Plan wishes to maintain the agricultural uses or conditional uses in the EFU areas as permitted in ORS 215.213. The watchman residence would exist to better facilitate the existing conditional use, our dog kennel, and would not adversely affect the natural resources in the surrounding areas.*

(See tape of Multnomah County Planning Commission, November 6, 1990, side B.)

The action to approve the conditional use request for the watchman's residence also validated the existing conditional use -- the dog kennel which provided the justification for the watchman's residence in the first place. This decision was properly noticed and filed with the Clerk of the County Board. No appeal was filed. Nor was any notice of intent to appeal filed with LUBA within 21 days of when a party knew, or should have known, of the decision. ORS 197.130 (3)to(5). On November 27, 1990, the decision to grant a conditional use permit associated with an existing kennel became final and is not subject to appeal.

C. LEGAL FOUNDATION

1. Conforming Conditional Use

As noted above, in the spring of 1990, the Schillereffs applied for a conditional use permit to remodel the existing 50 dog kennel. County staff argued that Design Review, not a conditional use permit was all that was required.

The County file for that application, DR 90-07-02, reveals that staff looked to MCC 11.15.2028(B)(C), "Exemptions form Nonconforming Use Provisions" for guidance. MCC 11.15.2028(B)-(C), at that time, and currently, reads:

> *Conditional uses listed in subpart MCC.2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC.8804, provided, however, that any change of use shall be subject to approval pursuant to the provisions of MCC.2012.* MCC .2028(B).
>
> *The term "Change of use", as used in this Section, means change from one conditional use listed in MCC.2012. to another such conditional use.* MCC .2028.

The staff notes regarding these two sections state:

> *The Persinger Kennel is therefore a Conforming CU - therefore does not expire per October 8, 1990 opinion of John DuBay.*

Staff interpretation is perfectly logical. MCC 11.15.2012.(B)(11), added to the County code in 1986, allowed dog kennels in EFU zones as conditional uses. The Persinger/Schillereff kennel could trace its beginnings to 1952. Although a conditional use permit had never been formally issued for that kennel, MCC.2028(B) operated to elevate the kennel to conforming conditional use status because the kennel was legally established prior to August 14, 1980.

Prior to that time, as long as the owner or operator of the existing kennel did not seek to change or expand the kennel use there would have been no reason to seek a conditional use permit for the kennel. The use would have been a lawful nonconforming use. Because MCC.2012(B)(11) listed dog kennels as conditional uses in EFU zones, and because the kennel was legally established prior to August 14, 1980, the County staff had every right to make an administrative decision that the Schillereffs 1990 Conditional Use application for kennel remodeling, not expansion, merely required Design Review. MCC 2028(B), by operation, "deemed" the kennel conforming and not subject to MCC .8804 the nonconforming use section of the code.

Conditional use approval might be required for expansion of the kennel, not simple remodeling. This is true for kennels as it is true for single family homes (farm dwellings) in farm zones [MCC.2028(A)] or for churches which predate a zoning in a residential neighborhood. Only

when the applicant seeks to change or expand the underlying use must the applicant seek a conditional use permit.

The finding of the County for DR 90-07-02 specifically limited the kennel use to the existing 50 dog size. The logic is consistent with a decision to require Design Review, not a new conditional use permit, for a remodel of a "deemed" conforming conditional use. In fact, when the Schillereffs applied for, and received, a conditional use permit to add a secondary residence to the property, the Planning Commission found that the underlying kennel was a "well established operation." CU 23-90, p.8.

The County properly noticed this Administrative decision. No one filed an appeal pursuant to MCC 11.15.8290(A). Consequently, DR 90-07-02 is not subject to review. MCC 11.15.8290(D)(1)(2).

In DR 9-94, the Hearings Officer erred by re-visiting the question of whether the underlying kennel use was a lawful use. MCC 11.15.8290(D)(1)(2) takes review of an Administrative decision, such as Design Review, out of the jurisdiction of the Hearings Officer once the decision becomes final. The Hearings Officer had no authority to decide whether MCC .2028(B) exempted the kennel from MCC.8804, nonconforming use[1]. That decision was made administratively under DR 90-07-02 four years earlier. It was a final, non-reviewable decision.

2. The Subject Property is a Lawful Nonconforming Use

If the County does not agree that the kennel is a conforming conditional use, it should find that the kennel was re-established as a nonconforming use as a result of County actions in 1989 and 1990.

(a). ***A Discontinued Nonconforming Use May Lawfully Resume***

The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. ORS 215.130(5). The County defines nonconforming use as:

> *A use to which a building or land was put at the time this chapter became effective and which does not conform with the use regulations of the district in which is located.* MCC 11.15.0010 Definitions.

In the case of the Schillereffs' property, the Hearings Officer found that, due to a lack of sufficient evidence that the use had continued, the kennel's lawful nonconforming use discontinued on or about January 1, 1964. DR 9-94, at 6. (The burden of proof is on the one asserting that the use has not been discontinued.)

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[1] MCC.8804 does not exist. From the language of MCC.2028(B), it is clear that this section of the code references MCC.8805, the nonconforming use section.

The County code is clear, the right to a nonconforming use may be lost through discontinued use. However, a use once lost is not necessarily lost forever. The former lawful use may be revived and made lawful once again under certain circumstances. The Schillereffs' resumption of a lawful use is a case in point as to how such a use may be revived.

(b). ***The Schillereffs' Nonconforming Use was Lawfully Resumed after 1989.***

The Hearings Officer found that the kennel, once a lawful nonconforming use, was discontinued on or about January 1, 1964. DR 9-94, at page 6. That decision does not bar the Schillereffs from reestablishing the nonconforming kennel use. The Schillereffs contend that the nonconforming kennel use was lawfully reestablished, with full knowledge and approval by the County.

The Schillereffs attempted to resume the lawful nonconforming use beginning in 1989. From 1989 through 1990, the Schillereffs applied for and received three discretionary permits from the County. Each permit is a binding, non-appealable decision, and supports the argument that the County recognized that the property was being put to lawful nonconforming use.

In the **first** instance, the 1989 building permit, Tim & Angela Schillereff, in applying for a CUP, were attempting to lawfully resume kennel use in conformance with county zoning ordinances and regulations then in existence.

A CUP would be necessary to expand an existing nonconforming use or a conditional use. Since expansion of the use was not at issue, the County only required Design Review and a building permit. Had the County not believed that the Schillereffs were resuming the earlier nonconforming use, it could not have lawfully issued a building permit for an unlawful use.

The Schillereffs placed the County on notice that they were attempting to resume a commercial use for which permits had lapsed. No appeal was filed and the decision to grant a permit based upon an admitted existing use became final.

In the **second** instance, the 1990 Design Review approval for remodeling the existing kennel, the Planning Director "...approved remodeling plans for an existing 50 dog kennel...". Adequate notice was mailed on 06 August 1990 and no appeal was filed. The County could not approve the Design Review permit unless the underlying use was lawful. This is exactly the same conclusion the Hearing Officer reached in DR 9-94..

Initially, the Schillereffs again applied for a conditional use permit to remodel the kennel facilities. In the file for DR 90-07-02, County Planner Robert Hall noted that a conditional use permit was not required. The use was either a conforming conditional use already, or the County recognized that the earlier nonconforming use was re-established in accordance with existing regulations. Mark Hess, County Planner, reviewed the final design plans and found them conforming with MCC 11.15.7805 to .7865 with conditions. Neither the county nor the state require any other action to lawfully resume a Nonconforming use.

DR 90-07-02 was properly noticed and no appeal was filed. Indeed, later that year , John Maring (representing Marquam Farms at the hearing for the conditional use permit for the watchman's residence) stated that Marquam Farms was aware of the Schillereffs' work to develop the kennel and intentionally said nothing until the watchman's residence was later proposed. (Tape of Planning Commission Hearing, November 6, 1990, Side B.) The validity of the former permits was not before the Hearings Officer and anything he said relating to those permits was dicta.

Finally, in the **third** action, the County approved a conditional use permit for a watchman's residence for the underlying kennel use. The County expressly found that the residence was in conformity with the underlying use and that the residence was not in conflict with any of the enumerated County's plan policies or regulations. During the public hearing on the CUP, a representative from Marquam Farms alleged that the kennel's nonconforming use status had been discontinued in 1971. After full discussion of this and other issues, the Planning Commission adopted the Staff Report, including Conditions of Approval and Findings of Fact and Conclusions, and unanimously approved CU 23-90.

The decision was properly noticed, there was ample public discussion as to the merits of the applications and the lawfulness of the underlying use. The County could not approve a CUP for the watchman's residence unless either: the underlying use was a conforming conditional use; or the kennel's nonconforming use status remained valid or had been resumed after a period of discontinuance. That decision has never been challenged.

3. *The Schillereffs have a Vested Right to the Nonconforming Use*

> *In some circumstances, a vested right may exist to use and develop property under previously existing land use regulations even though subsequently adopted land use regulations prohibit such use or development.* DLCD v. Benton County, 17 Or LUBA 49, 55 (1994), citing Clackamas County v. Holmes, 508 P2d 190, 265 Or 193 (1973).

The determination of vested rights must be done by a case-by-case determination. 1000 Friends of Oregon v. LCDC, 78 Or App 270, 276, 717 P2d 149 (1986).

In looking to establish a vested right one looks to a variety of factors, among the most important being the good faith expenditures made by the property owner in developing his or her property. See, Polk County v. Martin, 292 Or 69, 81 N7, 636 P2d 952 (1981). Once a vested right is established, the owner may complete the improvements in a manner which is consistent with the nonconforming use. DLCD v. Curry County, 19 Or LUBA 249, 254 (1990).

Since 1989, the Schillereffs have spent in excess of $100,000 beyond the purchase price of the land to in reliance upon County permits: building permits, remodeling permits, and placing a watchman's residence upon the kennel property. They have a vested right to complete the

work sanctioned by DR 90-07-02 and CU 23-90. They have a further vested right to maintain the kennel property as a re-established nonconforming use kennel for 50 dogs.

D. SITE CHARACTERISTICS

The 9.4 acre site (Tax Lot 15) is relatively flat and irregularly shaped. Approximately 6 acres of the Schillereffs' property is a horse pasture. (Attachment A, Vicinity Map #1.) The site is comprised of agricultural land[2] but is difficult to farm due to its shape, inadequate drainage and limited access. With only 6 acres of tillable property (the remainder is already occupied by structures or by a drainage swale), the property is too small for row crops.[3] The structures on the site (a single family residence[4], a kennel watchman's residence, two kennel buildings, horse stalls and an equipment building) are located at the northeast end of the property. Horses are raised on the site. A small pigeon house is located at the southwest corner of the site, near Reeder Road. A small pond on the site attracts water fowl and, like several neighboring properties, the Schillereff's property is used as a hunting preserve. Drainage ditches or swales are located on three sides of the property. The site is accessed via Reeder Road, from a common access easement and driveway shared with Marquam Farms, a hunting club. (See Attachment B, Existing Site Plan, Map #2.)

Marquam Farms, a hunting club, adjoins the Schillereffs' property to the northeast. Feed grains are produced on the property as food for ducks and geese.[5] The western property line follows the curvature of NW Reeder Road, which was constructed between a drainage swale on the Schillereff property and the "Big Dike" which protects Sauvie Island from the floodwater of Sturgeon Lake. Approximately 800 feet to the southwest are two single family homes and a duck pond (Tax Lots 12 and 18, owned by the Rays). A large dairy farm (Vetsch) is located south of the Schillereffs' property. However, as noted above, this farming operation is separated from the Schillereffs by a large drainage canal, which is covered with blackberry bramble on both sides.

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[2] At the pre-initiation conference, opponents argued that OAR 660.33.120(3) prohibits dog kennels on "high value farmland" and that Multnomah County recognizes Moag Silty Clay Loam (protected), Sauvie Silt Clay Loam (protected) and Rafton Silt Loam (protected), as "high value farmland." The Schillereffs believe that the rule does not apply in their case, because the County recognized their dog kennel as valid conditional use in previous proceedings. The Schillereffs note that Division 33's prohibition of dog kennels on high value farm land directly contradicts ORS 215.283(2)(m), which explicitly allows dog kennels as a conditional use in the EFU zone. Moreover, the County's existing regulations are consistent with ORS 215.283, but not Division 33. Finally, Division 33 provides a method of modifying soils classifications on individual sites.

[3] Personal communication with Dave Kunkel, who farms several properties on Sauvie's Island, including Marquam Farms. Mr. Kunkel also noted that property is separated from the dairy/grazing operation to the southeast by an irrigation canal, which is impossible to cross with farm machinery.

[4] The watchman's residence for the kennel is occupied by the Schillereffs. An older residence located nearer to Reeder Road, is occupied by Tim's great uncle and aunt, Eldon and Marguerite Persinger. The Persingers hold a life estate in the older home.

[5] Several years ago, Mr. Kunkel used to turn his tractor around on the Schillereff property, and tilled the ground in the process. However, the site has not produced a commercial agricultural crop within recent history.

II. CONDITIONAL USE APPROVAL CRITERIA

The following criteria apply to approval of a new or modified conditional use permit. In this case, the Schillereffs are applying to modify a "conforming conditional use," based on the justification provided in Section I of this report.

A. The proposed use is consistent with the character of the area.

Response: Sauvie Island is characterized by a combination of agricultural operations, recreational uses (including hunting clubs), sale of agricultural products at roadside stands, and kennels. In addition to the Sauvie Island Kennel, which is permitted to board up to 50 dogs, there currently are two other commercial kennels[5] on Sauvie Island.

Sauvie Island is a logical place to board and train hunting dogs, because hunting dogs are used extensively for bird hunting on the island, and Sauvie Island is close to the Portland metropolitan area. Many farmers also maintain "duck ponds" for private hunting purposes, to that hunting is a major source of income for island residents. All three kennels have adjacent hunt clubs and agricultural operations.

Both Charlton Kennels and Minoggie Kennels conduct their operations *on the same property* as their respective duck clubs, within sight of duck ponds and duck hunters' blinds. Thus, dog kennels and hunting clubs are considered complementary uses on Sauvie Island. It is common for hunting club members to use the training and boarding services of kennels on the island.

Successive kennel operations have existed in relative harmony on what is now the Schillereff property since about 1952. (See "A Brief History of Sauvie Island Kennels," Attachment F.) As evidenced in Attachment F, most neighboring farmers and hunting club owners support the continued operation of Sauvie Island Kennel at its present location. Ironically, several members of Marquam Farms hunt club use the boarding and training services of Sauvie Island Kennel.

The 1,500-foot impact area (Attachment A), like most of Sauvie Island, is a combination of farming operations, publicly-owned recreational land, and hunting clubs.

Northwest: The Sturgeon Lake Wildlife Refuge lies across Reeder Road to the northwest is owned and managed by the Oregon Department of Fish & Wildlife. The refuge area has public access, and is used frequently for hunting and hiking purposes. Both user groups often bring dogs. The kennel will have no adverse impacts on the recreational use or wildlife management functions of the refuge, because dogs are not permitted to run free and noise from the kennel is buffered effectively by Reeder Road and the "Big Dike" separating the refuge from Reeder Road.

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[5] Charlton Kennels is permitted to board 100 dogs; Minoggie Kennels is permitted to board 50 dogs.

Northeast: Marquam Farms hunt club lies to the northeast. Realistically, the only property which may now be adversely affected by the kennel is the hunting club. This 39-acre club occupies the old Marquam Lake bed which was drained when the island was reclaimed for agricultural purposes. Marquam Farms currently produces feed grains to attract migratory foul. Marquam Farms contracts with Dave Kunkel, a Sauvie Island farmer, to prepare and plant the land. Large tractors are used in the spring and fall. Duck and goose hunting occurs on the site during hunting season, which usually runs from October through January of each year. The hunt club has approximately 30 members. During the hunting season, hunters often arrive early in the morning, which, under present conditions, often causes the dogs to bark.

Marquam Farms shares a common access easement and gravel driveway with Sauvie Island Kennel. When hunters get out of their cars to open the first of two gates to access the parking area, Sauvie Island Kennel dogs can see and hear them, and naturally, they bark. The proposal is to redesign the kennel such that the dogs cannot see or readily hear hunters as they arrive, and such that noise from barking dogs is greatly diminished. Thus, despite the increased number of dogs, noise impacts on the hunting club will be reduced. The means of *reducing* noise impacts on Marquam Farms is addressed in greater deal in Section VI of this report, under nonconforming use criteria. Suffice to note here that the noise from three barking dogs (which are permitted outright), if tethered outside without a sound barrier, would exceed the noise from 75 dogs behind a covered block wall.

A barn has existed on the Marquam Farms property for many years, and has served as a meeting place (or clubhouse) and storage area for hunt club members. A "machine shed" was approved in February of 1993, the south wall of which is approximately 65 feet from the north wall of the existing (and proposed) kennel. This "exempt farm structure" was approve as a "machine shed" on February 12, 1993. By the terms of the permit, the use of the farm structure cannot include "a structure which accommodates more than 10 people assembled for more than 12 hours a week," or "a place used by the public." Thus, the "machine shed" provides an excellent noise buffer between the hunting club lands and the clubhouse.

Kennels, hunting clubs and agricultural uses have existed harmoniously together on Sauvie Island for many years. The other two kennels have all these three uses on the same property. With measures to ensure proper handling of dogs, maintenance of kennel facilities, and noise reduction, this criterion can be met.

B. The proposed use will not adversely affect natural resources.

Response: No inventoried natural resource site exists on the property. The Sturgeon Lake wildlife refuge is located across Reeder Road. This refuge has public access and a public parking lot, with trails. The kennel will have no adverse impact on the refuge. Dogs are not permitted to leave the fenced boundary of the Schillereff property, except when leased and under the care of a trained handler.

This criterion is met because the kennel would cause no adverse impacts on natural resources.

C. The proposed use will not conflict with farm or forest uses in the area.

Response: There are no forest uses in the area. There are agricultural uses, as indicated on Map #2, the Vicinity Map. The Vicinity Map shows a 1,500 foot impact area has been established. (See Section III of this report for the justification for the impact area.)

Potential conflicts with farm uses include the following:

- Dogs running free, and frightening or attacking livestock.

As noted above, dogs are not permitted to run free. The Schillereffs are experienced dog handlers, and have taken several steps to ensure against dogs escaping from their facility, including:

- Each dog will be confined to a fenced/walled kennel run, which meets the latest design standards for safety and comfort of dogs.
- The kennel area has an additional fence/wall around its entire perimeter, in case a dog "escapes" during feeding or exercise.
- When boarded dogs are exercised, they remain on a leash at all times. They are not permitted to roam free.
- Training of dogs occurs only in the confined pasture area, which is fully fenced and separated from neighboring properties by a blackberry covered drainage canal.

There is no history of dogs roaming free or causing damage to livestock in the area. As documented in Attachment D, neighboring farmers support this application, and testify to the quality and maintenance practices of Sauvie Island Kennels.

- Barking dogs within the kennel disturbing livestock or disturbing the sleep of farmers living in the area.

The letters in Attachment D demonstrate that neighbors within the impact area support this application.

There is no evidence to indicate that barking dogs within the kennel building disturb livestock in the area. For example, the Vetsch family owns and operates a dairy farm adjacent to, and south of, the Schillereff property. According to the Rose City Sound study (November 2, 1990), the ambient noise level at the south property line (shared with the Vetsches and approximately 500 feet from the kennel) was 42 db. When dogs are "excited" and barking in the kennel, the noise level currently increases only 6 decibels, to 48 db. The decibel level would decrease even more on the other side of the drainage canal, because noise would be buffered by blackberry brambles, trees and distance. With proposed improvements to the kennel (walls and roof cover), the noise level at the south property line is likely to decrease to ambient levels. Since noise events from jet aircraft (82 db) and wild geese (53 db) are

common in this area of Sauvie Island, barking dog noise currently have no impact on this livestock operation.

The closest residences to Sauvie Island Kennel are owned by the Ray family (Map #1, Tax Lots 12 and 8), and are located 800 to 1,000 feet away from the kennel itself. The houses are separated from the kennel by an earthen dike and NW Reeder Road. The Ray family provided letters in support of this application, indicating that they do not find noise from barking dogs to be a problem. Moreover, upon completion of new walls and an insulated kennel roof, noise from barking dogs within the kennel will be considerably less than passing vehicles on Reeder Road, noise from aircraft, or noise from flocks of geese overhead.

Impact on Marquam Farms

MCC 11.15.2012(A)(5) lists "hunting preserves" as a conditional use in the EFU zone.[6] Some Marquam Farms members have stated that barking dogs at Sauvie Island Kennel disturb their access to the hunting preserve, and disturb wildlife (ducks and geese). The existing dog kennel design, coupled with self-imposed design decisions made by Marquam Farms, contribute to these problems.

The supposed "conflict" between hunting on the Marquam Farms property (Tax Lot 14) and the dog kennel on the Schillereffs' property (Tax Lot 15) is recent. During the 1950s, 1960s, 1970s and 1980s, there were no conflicts between hunting on what is now the Marquam Farms property and kennel use on what is now the Schillereff property. Contributing factors to the supposed conflict are generally extraneous to land use issues before the County.

In 1993 (after the kennel had been operating for three years), Marquam Farms (a) constructed a new "machine shed" between the existing club house and the shared gravel driveway, and (b) constructed a cyclone fence and gate, which required club members to get out of their vehicles, open the gate, and get back into their vehicles before entering the Marquam Farms parking lot. Prior to fence construction, members could drive directly past the kennel to the hunting club parking lot, which usually did not excite the dogs. The 1993 design decision directly increased noise from barking dogs, who routinely become excited by human activity within site and sound (50 feet) of the kennel.

One solution to this self-imposed problem would be for the hunting club to provide an automatic gate opener for members for the gate closest to NW Reeder Road, which would eliminate the need to get in and out of vehicles. Moreover, use of the gate closest to Reeder Road which decrease disturbance to the existing dog kennel, which is currently separated from the northwest gate by a solid wall.

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[6] Note: meeting buildings associated with clubs require CS zoning, which does not apply to the Marquam Farms property.

According to the 1990 Rose City Sound study, ambient noise at driveway property line separating Marquam Farms from the Schillereffs' property is 53 decibels. This contrasts with 68 decibels when excited dogs are barking. (See Attachment E.) However, the current design (Map #2), with its exposed dog runs, means that noise from excited barking dogs is only partially mitigated effectively (from 85 db to 68 db). However, contrary to the protestations of Marquam Farms, it is not axiomatic that more dogs will result in more noise. As a result of proposed improvements to the kennel and parking lot design (walls, insulated roofing, out-of-site and sound parking area), noise impacts to Marquam Farms -- even with 25 more dogs -- will decrease.

Based on a comparison of Maps #2 (Existing Site Plan) and #3 (Proposed Site Plan), the proposed design improvements to Sauvie Island Kennel further reduce potential noise impacts for the following reasons:

- The proposed design includes a 100' solid wall for the full length of the kennel along the shared access. The boarded dogs will not be able to see vehicles as they drive past on the shared driveway. Noise from vehicles and people will be effectively blocked by the wall, thus greatly reducing barking incidents, and greatly reducing the noise impacts from barking when it does occur.

- The proposed design will completely cover the kennels, which currently are partially exposed. The roof will be insulated, thus reducing noise transmission to and from the kennel. As a result, dogs will bark less frequently, and noise from barking will decrease substantially.

- The proposed parking lot design will also result in reduced barking impacts on Marquam Farms. The current design requires dogs to be moved from one building to another for grooming, bathing and exercise. These activities are visible and audible to dogs in the kennel, which causes the dogs to bark. In contrast, the new design keeps all of the dogs within a single, walled and roofed structure. This design not only results in less frequent barking, but also buffers sound from barking dogs to Marquam Farms.

- Finally, the proposed design allows dog owners to park, get out of their vehicles, and pick up their animals without causing dogs to bark. As mentioned above, patrons' vehicles will not be visible to dogs as they drive past the kennel. The parking lot itself will be invisible to dogs. Noise from vehicle access and parking activities will be greatly reduced because the kennel will be walled and covered.

In summary, with the proposed improvements, noise impacts to Marquam Farms from barking dogs will decrease significantly, both in terms of duration and decibel level.[7]

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[7] It is informative to compare potential noise impacts from an enclosed dog kennel with those of a permitted outright use -- three adult dogs plus an unlimited number of puppies under the age of 6 months. It is not uncommon for rural residential property owners to own several dogs, and to keep these dogs outside on a

Finally, Marquam Farms has complained that kennel patrons occasionally block the shared access driveway, which inconveniences club members. Aside from the fact the club members also inconvenience kennel patrons and the Schillereffs for the same reason, the new parking design will eliminate this problem for club members. The new kennel circulation and parking lot design (a) includes signs directing kennel patrons where to park and (b) clearly identifies the office area, so that patrons will not stop temporarily in the driveway as they look for the kennel office.[8]

D. The proposed use will not require public services other than those existing or programmed for the area.

Response: Services are essentially the same as they were for the previous design review applications. Any changes which come to light will be updated. Utilities and facilities provided are consistent with comprehensive plan policies 37 and 38. The proposal public services other than those already provided.

E. The proposed use will be located outside big game winter habitat area.

Response: This criterion is not applicable.

F. The proposed use will not create hazardous conditions.

Response: The kennel operation does not involve the use of hazardous materials or substances. All dog owners must present proof of current vaccinations before they are admitted to the kennel, thus assuring against the spread of disease. Dogs are confined within the kennel area and all waste material is processed on-site according to DEQ regulations.

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permanent basis (perhaps tethered or fenced, perhaps not). Often times, outdoor dogs bark and chase vehicles as they approach the property line. In such a situation, members of the hunting club could expect to be barked at by three adult dogs and an unlimited number of puppies. Unlike the kennel, there would be no sound buffer. The dogs might be able to run along the fence line, parallel to the driveway, barking the entire time. The dogs might even come up to the fence and growl at hunting club members as they got out of their vehicles to open the gate. The dogs would be much more likely to escape beyond the property line, because they probably would not be handled by trained people and they most certainly would not be enclosed in professionally designed dog runs. In such a situation -- again, allowed outright under County zoning -- the impact on the hunting club (and surrounding agricultural uses) would be much greater than for a properly managed, enclosed kennel. Moreover, enforcement of dog impacts from rural residential owners is much more difficult (and costly to the County taxpayer) than enforcement of rules governing kennel operations. Kennel operators must be insured and bonded, which is not the case for rural residential dwellers. In short, the potential impacts from outdoor dogs in a single family residence are greater than for a well-managed, enclosed kennel, even with 75 dogs.

[8] Office functions are currently found in two locations on the site, and kennels themselves are located in three separate structures.

The subject property is protected from flooding by a dike structure (the "Big Dike") maintained by the US Army Corps of Engineers. The site is not designated as a flood hazard area by Multnomah County.

Other possible hazardous conditions are runaway dogs and traffic. As noted above, the Schillereffs have already taken steps to ensure that dogs do not run at large. The Schillereffs currently maintain the gravel driveway which serves both the dog kennel and Marquam Farms hunting club members. The new parking lot design will reduce driveway congestion and provides ample space for kennel patron parking.

G. The proposed use and project design will satisfy the applicable policies of the Comprehensive Plan.

The following listed policies appear to be applicable to this application.

Comprehensive Plan Policy 9 (Agricultural Land Area) states:

The County's policy is to restrict the use of (exclusive agricultural) lands to exclusive agriculture and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural lands from inappropriate and incompatible development.

The kennel satisfies this policy because, as described elsewhere in this application, the kennel is not compatible with the agricultural use of surrounding lands, or even the agricultural use (pasture) of the remainder of the 9.4 acre parcel. The kennel takes no agricultural land out of production. The kennel facilities have existed for many years, and the design for the 75-dog kennel will not take up any more space than is committed to the existing kennel structures and operations.

Comprehensive Plan Policy 13 (Air, Water and Noise Quality) states Multnomah County's policy to:

Maintain healthful air quality levels in the regional airshed; to maintain healthful ground and surface water resources; and to prevent or reduce excessive sound levels while balancing social and economic needs in Multnomah County.

The proposed kennel design is consistent with this policy. The kennel operations create no air emissions. All waste and fecal matter from the kennel is handled in on-site septic systems. Finally, although barking is inevitable at a kennel or anywhere there is a dog, the facility is separated from the nearest residence on another property by approximately 800 feet and the facility is designed to enclose the kennels (including roofing over all portions of the kennels) so as to reduce disruptions that lead to barking and to buffer and minimize noise impact on surrounding properties. The kennel provides a valuable service to dog owners, and the rural setting results in fewer conflicts with surrounding uses and a much better environment for kennel services such as dog training.

Comprehensive Plan Policy 37 (Utilities) is satisfied because there is an adequate private water system (private well) and the facility has an existing, adequate and approved septic system. In addition, stormwater runoff can be handled on-site, and there is no potential for adverse impact on water quality (stormwater runoff will not come into contact with fecal matter from the kennel; the kennels will be covered, and any water running off of the kennel floors is directed t the septic system). Finally, there is adequate existing electrical and phone service to the property.

Comprehensive Plan Policy 38 (Facilities) is satisfied because the appropriate school district will have the opportunity to comment on the proposal; there is adequate existing fire protection; and the use can (and already does) receive adequate protection from the Multnomah County Sheriff's Department.

H. The proposed use and project design will satisfy such other applicable approval criteria as are stated in this section.

MCC 11.15.7210 sets forth specific design criteria and standards for approval of dog kennels. Those standards are listed below, along with the Schillereffs' response demonstrating compliance with this section.

1. Location Requirements (MCC 11.15.7210)
These use shall be permitted only in the following areas and only where they will not conflict with surrounding property uses:

(a) In CFU, F-2, MUA-20, MUF and RR districts or those areas of similar low population.

Response: The Schillereffs property is located in an EFU zone on Sauvie Island. It is surrounded by other EFU and MUA-20 uses. Each of these zones requires "low population densities". Dog kennels are specifically listed as a conditional use in the EFU zone. (MCC 11.15.2012(B)(11)).

2. Minimum Site Requirements (MCC 11.15.7215)
(a) Area: Two Acres

Response: The site in question is approximately 9.4 acres.

(b) Width: Two hundred fifty feet.

Response: The width of the site ranges from 333 feet at the rear of the property line to over 900 feet along Reeder Road.

(c) Depth: Two hundred fifty feet.

Response: Property depths range from 390 feet to 1,800 feet. (See Attachment A, Vicinity Map).

3. **Minimum Setback Requirements (MCC 11.15.7220)**
   These uses shall be located no closer than one hundred feet to any lot line, in or adjacent to an F, R or A district.

Response: The property is in an EFU zone, therefore the standard is not applicable. The new kennel structure will be 33 feet from the nearest lot line in conformance with other setback requirements.

4. **Other Requirements (MCC 11.15.7230)(A)**
   All kennels, runs or pens shall be constructed of masonry or such other opaque material as shall provide for cleanliness, ease of maintenance and noise control.

Response: The kennels, runs and pens are constructed of concrete block, with chain link fencing dividers and concrete floor. The roofing is opaque. All materials were selected to provide for ease of maintenance, and will provide excellent sound and noise control. The perimeter chain link fence with vinyl slats provides adequate security. It also provides additional sound and noise control.

5. ***All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered are the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and other public facilities on nearby properties, and other similar factors.***

Response: The new building, which encloses the kennel and runs will provide optimal sound control. This design will minimize adverse impacts to neighboring residential and non-residential properties. The new design will be a substantial improvement in several respects. First, one-large building will replace the quonset huts and will incorporate the third building, creating one continuous design unit. Dogs can then be taken from their individual pens without ever entering the open courtyard, thereby minimizing noise disruptions. Enclosing the kennels and roofing the runs will also help to eliminate noise since the dogs will no longer be able to witness any activities on the adjacent Marquam Farms property.
Second, mature birch trees and landscaping inside the courtyard will be retained, as will the mature trees to the west of the existing huts. The dogs will be more relaxed and quiet under such a setting.

Third, the new design will consolidate the kennel parking and office in one location. Therefore, the kennel complex will appear more cohesive and of a unified design to those viewing it from nearby properties.

The prevailing winds here are from the Northwest. Sounds and smells will generally be carried by these prevailing winds to the open lands lying southeasterly of the kennel. The nearest residence to the south of the kennel is 1,000 feet away. (See, Attachment "A", Vicinity Map.) In a radius of 1,500 feet around the existing kennel there are only three residences (excluding the subject property). (See, Attachment "A", Vicinity Map.)

6. ***The owner or operator of as use approved under this section shall maintain the premises in a clean, orderly and sanitary condition at all times. No garbage, offal, feces, or other waste material shall be allowed to accumulate on the premises. The premises shall be maintained in such a manner that they will not provide a breeding place for insects, vermin or rodents.***

Response: The Schillereffs have adopted a standard operating procedure from which they rarely, if ever, deviate. That is one reasons why their kennel is held in such high regard and is increasing in demand. Twice daily they disinfect the dog areas, feeding pans, water pails and public areas. Each dog is inspected and observed in the daytime and at night. The kennels are regularly inspected by officers of the Multnomah County Animal Control, and a animal facility permit has been obtained for kennel operation. The kennel has and continues to receive the highest ratings from the inspecting officers and from the County.

The Schillereffs are the owners and operators of the kennel. They live on the property, and manage their business in a professional manner. They board all breeds of dogs. They breed English Pointers and English Setters, and they train dogs for hunting and for obedience. They are dog owners themselves, and compete in licensed field trials and hunting tests. Tim Schillereff is an AKC Licensed Judge and a professional handler of pointer dogs.

Angela Schillereff is a professional dog handler, an apprentice judge and a professional groomer of all breeds. Both the Schillereffs have devoted their personal and professional lives to working with and caring for dogs.

7. ***A separate housing facility, pen or kennel space may be required for each dog over six months of age kept on the premises over 24 hours.***

Response: The permit request is for a maximum of 75 dogs. The new kennel design will allow 75 dogs to be kept in separate housing facilities.

8 **Other Approvals (MCC 11.15.7235)**
The approval authority may request the advice of the County Dog Control Officer, official of humane societies, and veterinarians before approving an application hereunder.

Response: The Schillereffs have not been advised of the need for review by any other body. However, because they are professional dog kennel operators they are not adverse to subjecting themselves to review by other professional dog care organizations or agencies.

III. STATUTORY EXCLUSIVE FARM USE CONDITIONAL USE CRITERIA

A. IMPACT AREA

The Oregon Legislature recognized the value of siting dog kennels in the county, away from concentrations of people, when it authorized counties to approve kennels as an "alternative use" on agricultural land. (ORS 215.283(2)) As with other alternative uses on EFU land, ORS 215.296 requires each county to review these alternative uses for impacts on agricultural land and practices, and to require conditions where necessary to mitigate impacts.

In determining an appropriate agricultural "impact area," the principal factor considered was noise from barking dogs. Because dogs are restrained on-site, there are no other probable impacts on agricultural land. There are no forest uses within the impact area.

In November of 1990, Rose City Sound took decibel readings at three locations on the property, with the following results:

TABLE III.A
NOISE IMPACTS FROM BARKING DOGS[9]

Location	Ambient Decibel Level	Excited Barking Decibel Level
Inside Kennel	64 db	85 db
Northeast Property Line adjacent to kennel	53 db	68 db
South Property Line	42 db	48 db

Inside the kennel, the sound of excited barking dogs is comparable to a jet flying overhead, at 85 decibels. Thirty feet northeast of the kennel, at the property line shared with Marquam Farms, the sound of excited barking dogs had already decreased dramatically to 68 decibels. At the south property line located approximately 500 feet from the kennel, the sound of excited barking dogs was only slightly louder (48 decibels) than the ambient noise level (42 decibels). The 48 db reading was roughly comparable to honking geese flying overhead, measured at 53 decibels.

The Schillereffs do not have sound pressure measurements at a distance greater than 500 feet. Erring on the side of conservatism, the proposed impact area shown on Attachment A (Vicinity Map #1) is 1,500 feet. At this distance, under current conditions, excited barking dogs may

[9] Outside the kennel, passing jets and wild geese (frequent occurrences over Sauvie Island) were measured at 82 db and 53 db, respectively.

be marginally audible. At a distance of greater than 1,500 feet, it is doubtful that noise from the kennel would be audible.

B. WILL NOT FORCE A SIGNIFICANT CHANGE IN ACCEPTED FARM AND FOREST PRACTICES ON SURROUNDING LANDS DEVOTED TO FARM AND FOREST USE.

Response: As noted in Section II of this report, dog kennels have existed harmoniously with agricultural uses on Sauvie Island since the 1950s. In fact, the two other dog kennels on the island are located *on the same property* as farming operations and hunting preserves. The dog kennel would have no adverse impacts on livestock in the area. The Schillereffs raise several horses on their property, without ill-effect from the dog kennel.

In this situation, there is only one commercial farming operation within the designated 1,500 foot impact area. The northern boundary of the Vetsch dairy farm is separated from the dog kennel by approximately 500 feet *in addition to* an irrigation/drainage channel with dense blackberry bramble on both sides. As indicated above, intermittent noise from excited barking dogs will have no adverse impact on grazing dairy cattle, because this sound will be quieter at the property line than migrating geese. Because the Schillereffs confine the dogs to the kennel except when dogs are on a leash, there is little likelihood of dogs "escaping" from the site and chasing cattle. In any case, the Vetsches have not complained of loose dogs during the five years that Sauvie Island Kennel as operated on the Schillereffs' property.

The existing kennel design results in the sound of excited, barking dogs being audible at the north property line of the Vetsch dairy farm. However, with proposed design changes, and recognizing the noise buffering affect of the blackberry brambles adjacent to the drainage channel, it is doubtful whether there will be any measurable sound impacts on the dairy farm.

Although "Marquam Farms" is not a commercial farming operation (because harvested crops are not sold commercially), impacts on the hunting preserve are addressed elsewhere this report. Marquam Farms is fenced (6 foot cyclone) for the full length of its border with Sauvie Island Kennel, thus preventing dogs from entering the property in the unlikely event one should get loose.

With proposed design improvements, potential farming operations (row crops, dairy operations, grains, berries, nursery crops and orchards) will be further protected from potential adverse impacts.

This criterion is met.

C. WILL NOT SIGNIFICANTLY INCREASE THE COST OF ACCEPTED FARM OR FOREST PRACTICES ON SURROUNDING LANDS DEVOTED TO FARM OR FOREST USE.

Response: Typical farming practices on Sauvie Island include row crops, dairy operations, grains, berries, nursery crops and orchards. Because the dogs will be restrained on-site, inside of a kennel, the costs of these activities will not increase as a result of approval of a 75-dog kennel, or continuance of the existing 50-dog kennel use.

Sauvie Island Kennel has been in business since 1989. Since opening, there have been no reported instances of dogs under the Schillereffs' care causing damage to crops or livestock on Sauvie Island.

With the updated kennel design, noise from the kennel will decrease, and the remote possibility of "escaped" dogs will be even less.

For these reasons, the continuance and expansion (to 75 dogs) of Sauvie Island Kennel will not increase the cost of accepted farm or forest practices within the impact area, or on Sauvie Island. This criterion is met.

IV. ALTERATION OF A NONCONFORMING USE (MCC 11.15.8810.E)

An alteration of a nonconforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent that the current use, considering:

A. THE CHARACTER AND HISTORY OF THE USE AND OF DEVELOPMENT IN THE SURROUNDING AREA.

Response: The character and history of the use and surrounding area are addressed in Section I of this report. A commercial dog kennel was established on the property in 1952, using relocated quonset huts. The commercial kennel use was re-established in 1990, and has operated as a 50-dog kennel since that time.

The surrounding area is sparsely developed (only 3 residences within a quarter mile), and in this sense is an ideal location for a dog kennel. The kennel operation complements recreational use of the island for hunting, since hunting dogs are boarded and trained at Sauvie Island Kennel. For example, several members of the Marquam Farms hunting club have voiced their support for continuance, renovation and expansion of the kennel operation.

The nearest residence is approximately 800 feet from the kennel, separated by Reeder Road and a 15 foot dike. With proposed kennel improvements (insulated roof, walls, parking and circulation), it is doubtful whether barking dogs will be audible at this distance. Most neighbors support continuance and expansion of the existing kennel use of the property, as evidenced in Attachment D. At 500' from the existing kennel (which lacks the proposed noise buffering improvements), the sound of excited dogs barking is quieter than the commonly heard sound of geese flying overhead.

There is only one commercial farming operation within a 1,500 foot radius which defines the "impact area." This dairy operation has not been adversely affected by this, or by other dog kennels on the property in the past. With proposed improvements to the kennel, the likelihood of adverse impacts on the dairy farm is further reduced.

The only identified conflict between the proposed 75-dog kennel and neighboring land uses is with Marquam Farms. A 6 foot cyclone fences ensures that no dogs can get on to the Marquam Farms property. These impacts are addressed, and mitigation measures proposed, in the following subsections.

B. THE COMPARABLE DEGREE OF NOISE, VIBRATION, DUST, ODOR, FUMES, GLARE OR SMOKE DETECTABLE AT THE PROPERTY LINE.

1. Noise According to the 1990 Rose City Sound study, ambient noise at driveway property line separating Marquam Farms from the Schillereffs' property is 53 decibels. This contrasts with 68 decibels when excited dogs are barking. (See Attachment E.) However, the

current design (Map #2), with its exposed dog runs, means that noise from excited barking dogs is only partially mitigated effectively (from 85 db to 68 db). However, contrary to the protestations of Marquam Farms, it is not axiomatic that more dogs will not result in more noise. As a result of proposed improvements to the kennel and parking lot design (walls, insulated roofing, out-of-site and sound parking area), noise impacts to Marquam Farms -- even with 25 more dogs -- will decrease.

Based on a comparison of Maps #2 (Existing Site Plan) and #3 (Proposed Site Plan), the proposed design improvements to Sauvie Island Kennel further reduce potential noise impacts for the following reasons:

- The proposed design includes a 100' solid wall for the full length of the kennel along the shared access. The boarded dogs will not be able to see vehicles as they drive past on the shared driveway. Noise from vehicles and people will be effectively blocked by the wall, thus greatly reducing barking incidents, and greatly reducing the noise impacts from barking when it does occur.

- The proposed design will completely cover the kennels, which currently are partially exposed. The roof will be insulated, thus reducing noise transmission to and from the kennel. As a result, dogs will bark less frequently, and noise from barking will decrease substantially.

- The proposed parking lot design will also result in reduced barking impacts on Marquam Farms. The current design requires dogs to be moved from one building to another for grooming, bathing and exercise. These activities are visible and audible to dogs in the kennel, which causes the dogs to bark. In contrast, the new design keeps all of the dogs within a single, walled and roofed structure. This design not only results in less frequent barking, but also buffers sound from barking dogs to Marquam Farms.

- Finally, the proposed design allows dog owners to park, get out of their vehicles, and pick up their animals without causing dogs to bark. As mentioned above, patrons' vehicles will not be visible to dogs as they drive past the kennel. The parking lot itself will be invisible to dogs. Noise from vehicle access and parking activities will be greatly reduced because the kennel will be walled and covered.

In summary, with the proposed improvements, noise impacts to Marquam Farms from barking dogs will decrease significantly, both in terms of duration and decibel level.

Barking dogs are not unique to kennels. As noted earlier, it is informative to compare potential noise impacts from an enclosed dog kennel with those of a permitted outright use -- three adult dogs plus an unlimited number of puppies under the age of 6 months. It is not uncommon for rural residential property owners to own several dogs, and to keep these dogs outside on a permanent basis (perhaps tethered or fenced, perhaps not). Often times, outdoor dogs bark and chase vehicles as they approach the property line. In such a situation, members of the hunting

club could expect to be barked at by three adult dogs and an unlimited number of puppies. Unlike the kennel, there would be no sound buffer. The dogs might be able to run along the fence line, parallel to the driveway, barking the entire time. The dogs might even come up to the fence and growl at hunting club members as they got out of their vehicles to open the gate. The dogs would be much more likely to escape beyond the property line, because they probably would not be handled by trained people and they most certainly would not be enclosed in professionally designed dog runs. In such a situation -- again, allowed outright under County zoning -- the impact on the hunting club (and surrounding agricultural uses) would be much greater than for a properly managed, enclosed kennel. Moreover, enforcement of dog impacts from rural residential owners is much more difficult (and costly to the County taxpayer) than enforcement of rules governing kennel operations. Kennel operators must be insured and bonded, which is not the case for rural residential dwellers. In short, the potential impacts from outdoor dogs in a single family residence are greater than for a well-managed, enclosed kennel, even with 75 dogs.

2. Vibration Neither the existing kennel nor the proposed expanded kennel will have adverse vibration impacts detectable at the property line.

3. Dust There will be some dust from customer and employee vehicles using the gravel driveway. However, the amount of dust is considerably less than would be expected from normal agricultural operations associated with row crops on Sauvie Island.

This driveway is maintained now by the Schillereffs. During the summer months, the Schillereffs would consider a condition of approval requiring periodic watering of the driveway, if deemed necessary by the approval authority.

4. Odor Sauvie Island Kennel is well-maintained and clean. Waste materials from dogs are flushed into the on-site sewage disposal system on a daily basis. Kennel runs are cleaned daily. For these reasons, there are no detectable odors at the property line.

5. Glare There are no off-site impacts from lighting for the kennel.

6. Smoke The kennel produces no smoke.

C. THE COMPARATIVE AMOUNT AND NATURE OF OUTDOOR STORAGE, LOADING AND PARKING.

Response: There is no outdoor storage associated with the kennel now, nor will there be in the future.

The existing gravel parking lot is syphoned to accommodate the parking needs of proposed (75-dog) kennel customers and employees, as evidenced by the Planning Director's 1994 design review approval. Fourteen off-street spaces are provided (4 customer parallel spaces adjacent to the northeast wall of the kennel, 8 customer spaces adjacent to the storage building

and 2 employee spaces inside the storage building). These spaces are located so that they are invisible to dogs inside the kennel building, to minimize barking as customers come and go to pick up their dogs. Sauvie Island Kennel does not attract a large number of vehicles. Mrs. Schillereff has maintained a customer log since the business opened. The average daily customer visits from 1992-1994 are described in Table IV.C.

TABLE IV.C
AVERAGE DAILY CUSTOMER VISITS TO SAUVIE ISLAND KENNEL
(1992-1994)

	1992	1993	1994
January	1.7	2.7	4.6
February	2.4	2.9	4.9
March	5.0	5.0	6.5
April	3.2	3.8	4.8
May	4.2	5.3	5.1
June	5.3	5.8	6.1
July	5.9	7.6	7.3
August	5.5	7.2	7.4
September	4.8	6.2	5.5
October	3.4	4.0	4.5
November	4.7	4.9	4.7
December	5.2	5.5	5.3
DAILY AVERAGE	4.2	5.1	5.6

This relatively small number of customer visits represents a daily average of 8.4 vehicle trips in 1992, 10.2 vehicle trips in 1993 and 11.2 vehicle trips in 1994. This is not heavy traffic, nor does it represent a significant impact on Marquam Farms. Moreover, there is an inverse relationship between the hunting season (October through January) and peak kennel season (March through September). Except for the Thanksgiving and December holiday week-ends, the kennels least busy months (October, November, December, January and February) correspond with the hunting season, when there is the traffic presumably is greatest at Marquam Farms hunting club.

The proposal is to increase the capacity of Sauvie Island Kennel by 50 percent. Assuming that this translates directly to a 50 percent increase in customer visits, the annual daily averages would look something like this:

	1995	1996	1997
Customer Visits:			
Projected Daily Average	6.3	7.5	8.4

The increase in customers will generate a relatively few additional vehicle trips. More importantly, the customer traffic which does come to the kennel will be better managed. One of Marquam Farms principal complaints regarding the kennel is that its customers block the driveway serving both properties. With the new parking lot design, this problem will go away, because: (a) there will be one central office (rather than two); (b) signs will direct customers where to park and to avoid blocking the driveway; and (c) parking spaces will be clearly marked with wheel stops. Each customer will be advised to park in designated spaces and to avoid blocking the driveway.

The new parking lot design will also discourage dogs behind the kennel walls from barking. Under existing conditions, dogs can see and hear customers and hunting club members coming and going from their respective facilities. The new design ensures that cars are parked out of sight and sound from dogs inside the kennel. The new design also ensures that hunting club members (who must get in and out of their vehicles to open the hunting club gates) are invisible to the dogs, because of the proposed wall separating the driveway from the kennel runs. Finally, even if dogs do bark occasionally, the sound from their barking will be muffled by walls and insulated roofs enclosing the kennel runs.

D. THE COMPARATIVE VISUAL APPEARANCE.

Response: Visually, the dog kennel will look much better, for the following reasons:

- The old quonset huts will be replaced with a new, state-of-the art building.
- The parking lot will be provided with wheel stops and signs to ensure that customer vehicles are parked in an orderly fashion.
- New landscaping and fencing are proposed, which will enhance the appearance of the kennel.

E. THE COMPARATIVE HOURS OF OPERATION.

Response: The hours of operation will not change from existing conditions.

F. THE COMPARATIVE EFFECT ON EXISTING VEGETATION.

Response: As shown on Attachment C, existing vegetation will be maintained and new landscaping provided. Marquam Farms will directly benefit from landscaping separating the parallel parking area from the northeast wall of the new kennel building.

G. THE COMPARATIVE EFFECT ON WATER DRAINAGE.

Response: Impervious surface area will increase slightly because the kennel will be completely covered. The site is reasonably well-drained with (a) drainage ditches maintained

by the Sauvie Island Drainage District, and (b) drainage tiles installed in the swale between the Persinger residence and the kennel. The Schillereffs will comply with all applicable County drainage regulations. There are no known wetlands on the property.

H. THE DEGREE OF SERVICE OR OTHER BENEFIT TO THE AREA.

Response: The public will benefit substantially from the high quality services provided by Sauvie Island Kennel. As noted in previous applications, Sauvie Island is readily accessible to a large Portland metropolitan area, and meets a demonstrated public need for accountable dog boarding and care. The kennel's location near hunting areas is convenient for hunting dog owners, and may reduce vehicle miles travelled due to combined, dog-related trips (hunting, training and boarding).

Sauvie Island Kennel, like the other two commercial kennels on the island, is compatible with the agricultural and recreational uses which predominate on Sauvie Island. Because the kennel is well-managed by experienced and knowledgeable dog handlers, Sauvie Island Kennel provides a needed service without adversely affecting agricultural or recreational uses in the vicinity.

I. OTHER FACTORS WHICH TEND TO REDUCE CONFLICTS OR INCOMPATIBILITY WITH THE CHARACTER OR NEEDS OF THE AREA.

Response: As noted repeatedly in this application, there are no significant conflicts between the kennel use and agricultural or recreational uses within the impact area.

The only possible exception is Marquam Farms hunting club, which shares a common driveway with the Schillereffs and the Persingers. As demonstrated in Sections II and III of this application, the state-of-the art design of the reconstructed kennel will significantly reduce impacts from barking dogs inside the kennel and from parked vehicles which have (in the past) occasionally blocked the common driveway.

The Schillereffs would gladly implement any reasonable conditions of approval to mitigate other impacts that are defined as a result of this land use review process. The Schillereffs' intent has always been to resolve conflicts through open communication, sound facility management, and on-site improvements where justified.

LAW OFFICES OF
JOSSELSON, POTTER & ROBERTS
53 S.W. YAMHILL STREET
PORTLAND, OREGON 97204

TELEPHONE (503) 228-1455
FACSIMILE (503) 228-0171

August 15, 1995

Via Telecopier 635-1108
(and by messenger)

Barry Adamson
County Hearings Officer
2115 SE Morrison Street
Portland, Oregon 97214

Re: Tim & Angela Schillereff
CU 4-95 and MC 1-95

Dear Mr. Adamson:

Frank Josselson and I represent Marquam Farms Corporation, owner of property adjacent to the property that is the subject of the above-referenced application. The application is presently scheduled for a hearing before you tomorrow, August 16. It was reset from a July date, apparently at the request of the applicant.

Request for Setover or Continuance

Both Mr. Josselson and myself will be out of town tomorrow and unable to attend the hearing to represent our client. Our request to the applicant through Ed Sullivan to set the hearing over to a date when everyone can attend was rejected. Mr. Hall advised us that he could not change the hearing date except upon the request of the applicant. Consequently, we request that you set the matter over until the next available hearing date. If you do so at the hearing tomorrow, it would not be necessary for the County to provide additional notice.

If you do not set the hearing over, we request that at the conclusion of the hearing you hold the record open for twenty-one days. This will allow us time on behalf of our client to obtain a transcript of the hearing and make any appropriate response.

LAWRENCE R. DERR
OF COUNSEL

Possible Defective Notice

The notice of the hearing requests conditional use approval, or approval for expansion of a non-conforming use, to expand an existing kennel from 50 dogs to 75 dogs. The application form requests conditional use approval or alteration of a non-conforming use for a 75 dog kennel. From this it is not clear whether the request is for approval to expand an allegedly lawful 50 dog kennel to a 75 dog kennel, or whether the request is for approval of a 75 dog kennel where no lawful kennel use presently exists. The issues and proof involved in either case are substantially different. The notice is inadequate to support a request for initial approval of a 75 dog kennel. Consequently, we request that you make a preliminary determination regarding the scope of the application. If you determine that the application includes a request for initial approval of a 75 dog kennel, then we submit that the hearing must be set over and new notice given with an adequate description.

Issue and Claim Preclusion

On August 19, 1994, a County Hearings Officer issued a final order in a proceeding involving the same applicants and opponent and the same property in response to an appeal by Marquam Farms Corporation of an administrative decision allowing expansion of a 50 dog kennel to a 75 dog kennel through a design review proceeding. The file number is DR 4-94. In that final order, the Hearings Officer found that no conditional use permit exists for a kennel on the property and that there is no non-conforming use for a kennel on the property. The final order was not appealed within the permitted time.

To the extent that the applicants rely on either an existing conditional use permit or an existing non-conforming use for a 50 dog kennel, both issue and claim preclusion (formerly commonly referred to as collateral estoppel and *res judicata*) prevent the County from reopening those issues to overturn the previous decision of the Hearings Officer.

Pending Litigation

Marquam Farms Corporation is the plaintiff in a pending Multnomah County Circuit Court proceeding against the applicants seeking an injunction against the unlawful kennel use on the property. (Case No. 9506-04198) The proceeding was brought in reliance on the final determination of the Hearings Officer described above. This application should be held in abeyance pending a determination of the court as to the legality of the existing kennel use.

High Value Farmland

If the application includes a request for conditional use approval of a 75 dog kennel where no present right to a kennel exists, and if that request is heard in spite of the faulty notice, collateral estoppel, *res judicata* and the pending litigation, the application cannot be approved because OAR 660-33-120(3) prohibits new kennels on high value farmland. The applicants do not dispute that the subject property is high value farmland.

Very truly yours,

Lawrence R. Derr

Lawrence R. Derr

LRD:lb

cc: Edward Sullivan (via fax and mail)
Marquam Farms Corporation

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE MORRISON STREET
PORTLAND, OREGON 97214 (503) 248-3043

NOTICE OF REVIEW

1. Name: MARQUAM FARMS, INC. , ,
   Last *Middle* *First*
2. Address: 53 S.W. Yamhill St., , Portland , OR 97204
   Street or Box *City* *State and Zip Code*
3. Telephone: (503) 228 - 1455
4. If serving as a representative of other persons, list their names and addresses:

5. What is the decision you wish reviewed (*e.g.*, denial of a zone change, approval of a subdivision, *etc.*)?
   Conditional use approval and alternatively, approval of a nonconforming use for a 73 dog kennel
6. The decision was announced by the Planning Commission on Hearings Officer Sept. 15, 1995
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
   See attached Notice of Review

8. Grounds for Reversal of Decision (*use additional sheets if necessary*):

See attached Notice of Review

9. Scope of Review *(Check One)*:

(a) [ ] On the Record

(b) [ ] On the Record plus Additional Testimony and Evidence

(c) [X] *De Novo* (*i.e.*, Full Rehearing)

10. **If you checked 9(b) or (c), you must use this space to present the grounds on which you base your request to introduce new evidence** (Use additional sheets if necessary). For further explanation, see handout entitled *Appeal Procedure*.

See attached Notice of Review

Signed: _____ Date: Oct. 2, 1995

Attorney for MarquamFarms, Inc.

For Staff Use Only

Fee:

Notice of Review = $300.00

Transcription Fee:

Length of Hearing _____ x $3.50/minute = $ _____

Total Fee = $ _____

Received by: _____ Date: _____ Case No. _____

TO: MULTNOMAH COUNTY PLANNING DIRECTOR

NOTICE OF REVIEW

I. DECISION

This is a Notice of Review from a Hearings Officer Decision in Files CU 4-95 and MC 1-95, #23 issued September 15, 1995 on the application of Tim and Angella Schillereff.

II. STATEMENT OF INTEREST

The party giving this Notice of Review is Marquam Farms, Inc. Marquam Farms, Inc. is the owner of property adjacent to the applicants' property and is adversely affected and aggrieved by the decision which permits the continuation and expansion of an unlawful dog kennel. Marquam Farms, Inc. appeared in the Hearings Officer proceeding through written correspondence from its attorney.

III. GROUNDS FOR REVIEW

The Hearings Officer acted unlawfully, exceeded his jurisdiction and erred in the following respects:

1. Refusing to grant a setover or continuance of the August 16 hearing. Neither of Marquam Farms, Inc.'s attorneys could attend the August 16 hearing. The hearing was moved to August 16 from its original July 19 date at the request of the applicants and the applicants refused Marquam Farms, Inc.'s request for a further setover.

2. Allowing testimony on and approving an original conditional use permit for a 75 dog kennel when the hearing notice and the written application both refer to a request to expand an approved conditional use from a 50 dog kennel to a 75 dog kennel.

3. Refusing to continue the hearing and order a corrected notice consistent with the expanded scope of the hearing described in 2. above.

4. Overruling the most recent previous, final County decision and order (DR 4-94), dated August 19, 1994, made after exhaustive briefing and argument by experienced land use law firms, that found that the applicants have neither an approved conditional use for a kennel nor a lawfully preexisting nonconforming use for a kennel, with no intervening change of law, ordinance, policy, facts, or circumstances.

5. Overruling the most recent previous, final County

decision and order (DR 4-94) that found that MCC 11.15.2028(B) cannot be lawfully interpreted to create a permanent conditional use status for any use that was in existence but was not lawfully approved on the date that the zoning ordinance added that category of use to the conditional use list, with no intervening change of law, ordinance, policy, facts, or circumstances.

6. Holding that MCC 11.15.2028(B) grants the kennel use a super conditional use status under which it can expand without limit or conditional use review and under which it can resume after a period of abandonment without conditional use review.

7. Holding that the Planning Commission determined in 1990 that the kennel use has a permanent conditional use status under MCC 11.15.2028(B) and that the decision in DR 4-94 to the contrary is unenforceable.

8. Holding that the requirement for conditional use approval for a modification of an approved conditional use applies only to a modification of conditions of approval, and since the kennel has no conditional use permit and therefore no conditions of approval, there is no requirement for a conditional use review to approve a kennel expansion.

9. Holding that the kennel proposal satisfies the conditional use approval criteria including all statutory, state administrative rule, comprehensive plan and zoning criteria, for both a new 75 dog kennel and for an existing 50 dog kennel expanding to 75 dogs.

10. Holding that OAR 660-33-120 and 66-33-130 which prohibit new kennels on high value farm land are unlawful and unenforceable enactments of LCDC.

11. Holding that the provisions of OAR 660-33-120 and 66-33-130 that allow existing kennels on high value farm land to continue and expand apply without regard to whether the kennel is lawfully existing.

12. Overruling the most recent previous, final County decision (DR 4-94) that found that the kennel is not a lawfully preexisting nonconforming use and holding that it does have that status as a 50 dog kennel.

13. Holding that the proposal satisfies the approval criteria for a nonconforming use expansion of a 50 dog kennel to a 75 dog kennel.

14. Holding that the proposal satisfies the approval criteria for resumption of a discontinued nonconforming use.

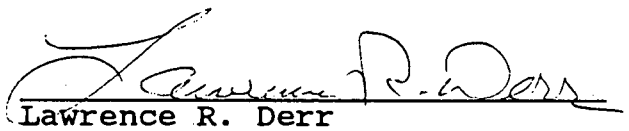
15. Repeatedly violating the binding and applicable principles of res judicata, collateral estoppel, claim preclusiosn and issue preclusion.

IV. DE NOVO REVIEW

Marquam Farms, Inc. requests that the Board of Commissioners hear this review de novo. Conducting a de novo review with an adequate notice reciting the scope of the application under review is the only way to cure the existing notice defect. De novo review will afford Marquam Farms, Inc. the opportunity to be present and address the applicants' witnesses that it was denied by refusal to continue the previous hearing. De novo review will afford the Department of Land Conservation and Development an opportunity to appear and discuss with the Commissioners the enforceability of LCDC's administrative rules.

The entire record of both the latest August 16 hearing as well as the prior files described in the Hearings Officer's Decision are available and should be a part of this record. De novo review will not involve introduction of extensive new evidence. It will afford the Commissioners an opportunity to fully review a complicated record and proceeding uncumbered by arguments as to the scope of the proceeding below. There will be no surprise or prejudice to any party. The factual and legal issues are fully established and known to all of the parties.

DATED: October 2, 1995



Lawrence R. Derr
Attorney for Marquam Farms, Inc.

Meeting Date: _____

Agenda No: _____

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Reporting of Hearings Officers decision in the matter of CU 4-95 & MC 1-95.

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING Date Requested: October 10, 1995

Amount of Time Needed: 5 minutes

DEPARTMENT: DES DIVISION: Planning

CONTACT: Bob Hall TELEPHONE: 248-3043
BLDG /ROOM:412/Plan

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED

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

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

Reporting of Multnomah County Hearings Officer decision in the matter of CU 4-95 & MC 1-95. A request by Tim & Angella Schillereff for a conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approve alternate request for the resumption and expansion of a non-conforming use on Sauvie Island located at 23200 NW Reeder Road in unincorporated Multnomah County, Oregon.

Hearings Officer approved both requests.

SIGNATURES REQUIRED:

Elected Official: _____

OR

Department Manager: Betsy Williams

MULTNOMAH COUNTY

BOARD HEARING OF October 10, 1995

TIME 1:30pm

CASE NAME Schillereff Dog Kennel

NUMBER CU 4-95 & MC 1-95

1. Applicant Name/Address

Tim & Angella Schillereff
23200 NW Reeder Road
Portland 97231

ACTION REQUESTED OF BOARD

- [x] Affirm Plan.Com./Hear.Of
- [ ] Hearing/Rehearing
- [ ] Scope of Review
  - [ ] On the record
  - [ ] De Novo
  - [ ] New Information allowed

2. Action Requested by Applicant

Conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approve alternate request for the resumption and expansion of a non-conforming use.

3. Planning Staff Recommendation

Denial

4. Hearings Officer Decision:

Approval

5. If recommendation and decision are different, why?

Evidence provided at the hearing that was not available at the time of the writing of the Staff Report which convinced the Hearing Officer that the kennel had been in continuous operation since its establishment in 1952.

ISSUES

(who raised them?)

All testimony at the hearing was in support of the application. Counsel for a neighboring property owner submitted written testimony regarding:

a. Possible defective notice,

b. Issue and claim preclusion based on a prior county denial of Design Review for the kennel,

c. Pending litigation between his client and the applicant, and

d. The location of the kennel on high-value farmland.

Hearing Officer considered and rejected each of these issues in his decision.

Do any of these issues have policy implications? Explain.

No

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
Multnomah County Hearings Officer

Minutes of August 16, 1995

Hearings Officer: Barry Adamson

Staff: Glasser - Hall - Manning

Hearings Procedure:

Hearings Officer Barry Adamson called the hearing to order at 9:45 a.m. on Wednesday, August 16, 1995, at 2115 SE Morrison Street, Room 111. He explained the hearing procedure and rules of the hearing.

Item 1. CU 6-95 / HV 15-95 / WRG 4-95 1700 NW St Helens Road (9:45 a.m., Tape 1 A & B)
Lester Browning, 7338 N. Knowles Avenue, Portland, Or 97217
Conditional Use Permit for a 28-unit mini-storage.
Variance to the front yard setback requirements of the Rural Center zoning district.
Willamette River Greenway Permit approval.

Barry Adamson stated he had not received any new correspondence for the record, has not talked with anyone, he has reviewed the Staff Report, but has not visited the site.

Barry Manning summarized the Staff Report and showed slides of the area. Staff recommended approval of all three permits for the Mini-Storage unit with 9 conditions of approval.

PUBLIC TESTIMONY: Applicant: No comment

Opposition:

Glen Dilnik, 17130 NW St Helens Road, Portland 97231

- Owns lots 20 thru 23 adjacent to applicant.
- Concerned about drainage which is directed toward his property.
- His drainfield for septic system is right at the edge of applicant's property line.
- Concerned about the amount of fill dirt, storage of chemicals and spillage, lights shining in his windows and the amount of traffic the storage unit will generate.

TAPE 1 - SIDE 2 (10:30 A.M.)

Mike Gordon, 17130 NW St Helens Road, Portland 97231

- Land before slope was approximately 85% slope.
- Concerned about sloping trench.
- Thinks 10:00 p.m. is too late for storage unit to be open.
- Vehicle lights will be about their window height of their home.

PUBLIC COMMENT CLOSED

APPLICANT REBUTTAL:

Lester Browning

- Drainage can be addressed in the Design Review for roof and surface.
- Fill was done over a period of years, in layers, with no cracks to date.
- Will have an on-site manager to help control chemicals.
- Lighting will be addressed in Design Review.
- ODOT recommended no parking in front of property.
- Business hours would be 7 a.m. to 7 p.m.
- Turn around and soaking trench will be addressed in Design Review.

Staff - Fill is subject to Grading & Erosion Control or Hillside Development Permit.

RECORD CLOSED (10:55 a.m.)

Hearings Officer will have a Written Decision within 10 days of this hearing.

Item 2. CU 4-95 / MC 1-95 23200 NW Reeder Road, Portland, 97231 (11:00 a.m. - Tape 1B)
Tim & Angela Schillereff, 23200 NW Reeder Road, Portland, Or 97231
Conditional Use approval or approval to alter a Non-Conforming Use, to expand the capacity of the existing dog kennel facility on this property from a maximum of 50 dogs to 75 dogs.

Hearings Officer, Barry Adamson explained the hearing procedure and rules of the hearing. He stated he has received one letter from the opponent, has not talked with anyone regarding this hearing, he has reviewed the Staff Report, but has not visited the site.

Bob Hall summarized the Staff Report and showed slides of the area. Staff recommends to deny the Conditional Use approval or approval to alter a Non-Conforming Use, to continue dog kennel use of this property, based on the fingings and conclusion of the Staff Report.

Barry Adamson entered into record a letter from opponent, Lawrence Derr of Josselson, Potter & Roberts, requesting a continuation of the hearing by Marquam Farms.

HO Adamson denied the request for continuance.
Record will be held open for 7 days.
Proponents will have until August 23, 1995 - 4:30 p.m. to submit new material.
Opponents will have until August 30, 1995 - 4:30 p.m. to submit or review new material.
Proponents will have until September 6, 1995 - 4:30 to file any rebuttal.
Deny Marquam Farms request to set over hearing because of faulty notice.

(Tape 2 side A) (11:20 a.m.)

OAR 660.33.120 (3) precluding kennels on high value land. This is a substantive issue not a procedural issue.

PUBLIC TESTIMONY

Proponent: **Ed Sullivan, Attorney,** Attorney for Tim & Angela Schillereff
111 SW Fifth Avenue, Suite 3200, Portland, Or 97204
Summarized the history and status of the kennel, Conditional Use Permits and finding thru the years, siting Staff Reports and Staff testimony and Planning Commission ruling.

Fred Granata, 700 SW Taylor Street, Suite 201, Portland
Represented the applicants in 1990 hearing for the watchmans residence. Summarized the case and issues as he remembered them.

Peter Davis, Veterinarian, 14213 NW Charlton Road, Portland
Watched kennel from Tim and Angela's beginning, and has always had a quality and first class kennel. Feels this is an appropriate use of land, and this is not affecting the the duck hunting. Poor management and 7 days a week hunting impacts the wildlife, not the kennel.

Tape 3 (12:05 p.m.)

Kent Meyer, Resident, 19544 NW Sauvie Island Road, Portland
He is not a personal friend of the Schillereff's or the family, just a resident. Marquam Farms hunts their lakes 7 days a week. He read a letter to Multnomah County Plannin supporting the kennel expansion.

Bruce Cavallero, 12408 NW Alderview Drive, Portland
Supports Schillereff's kennel - it has been there a long time. Also a duck hunter and doesn't see a lack of wildlife.

Doug Johnston, 4508 NW 127th Street, Vancouver 98685
Customer and friend of Schillereff's. Lack of proof for 1 year, after 33 years does not seem reasonable to deny permit. Supports the kennel.

Patty Larson, 17929 NW St Helens Road, Portland
Close personal friends and also customer. Question of vested interest? Tax records only require 7 years,so why must so much proof required for kennels? Asset to Sauvies Island. Has been a business for 6 years with the Counties blessings and thinks it is the Counties responsibility to help find a workable solution.

Myron Meifert, 52745 E Honeyman Road, Scappoose
Owned kennels in 1966, and was active business. Previously owned by Evelyn Blitz and before a guy named Scotty. Kennel is grandfathered and all that was required was a sign. Paul Reeder was Attorney. Kennel was sold to Henry Pine. No problems with wildlife at that time.

Linda Reeder-Burns, 23815 NW Reeder Road, Portland
Grandfather duck hunted since early 1900's. Neighbors of applicant, and does not hear dogs barking. The applicants take in stray animals left by recreators until owners found. Marquam Farms has mismanaged and abused their duckhunting.

Angela and Tim Schillereff, Owners of kennel
Feels they are right. Have over 100 signatures in support. They train Marquam Farm people's dogs. Entered letters as Exhibit.

Eldon Persinger, 23200 NW Reeder Road, Portland
Gave a history of the kennel as he could remember dating back to late 50's and early 60's. Cortway was dog trainer. Size of kennels approx 32.

Margerite Persinger, 23200 NW Reeder Road, Portland
Her husband hunted the duck club since '48 or '50. Evelyn Blitz ran kennel Myron bought kennel from Blitz. She saw kennels - 32 dogs. Mr.Pine bought kennel from Mr. Dondo. It was Lake Tree Kennel or Lone Tree Kennel.

5 Minute Break

Eldon Persinger
Roy Wallace built kennel and rented it out. Built in 1950. Kennel was full in '62.

Eric Eisemann, Winterowd Planning, 700 N Hayden Island Dr, # 385, Portland
CU 23-90 and DR 4-94 have a direct bearing on this case. Summarized the CU 23-90 hearing (from taped session of CU 23-90). Staff Report was based upon their understanding and interpretation of County Counsel. Staff Report was adopted.

Greg Winterowd, Winterowd Planning, 700 N Hayden Island Dr. # 385, Portland
President of Winterowd Planning Services, has done planning in Oregon for 20 years, Planning Director for 6 years and has worked for LCDC reviewing plans and in his private practice for 4 years. He summarized the laws that related to this case. No impact on wildlife from the kennels, the impact is from Marquam Farms and overuse of hunting.

Tape 4
1:48 p.m.

OPPOSITION - NONE

Hearing closed at 1:55 p.m.
Opponents have until August 30, 1995, to respond.
Proponents have until September 6, 1995, to respond to opponents submittals.

Written decision within 10 from September 6, 1995.

HEARINGS OFFICER HEARING

AUGUST 16, 1995

Case: **CU 4-95 / MC 1-95**

Sign In Sheet
Please include zip code

Name: Angela + Tim Schilleff	Address: 23200 NW Reeder Rd, Pfld. OR
Name: E.E. & M.F. Persinger	Address: 23200 NW Reeder Rd, Pfld, OR
Name: Ed Sullivan	Address: 111 SW 5th Ave Suite 3200 PDX 97204
Name: Eric Eisemann	Address: 700 N Hayden Is. #200 PDX
Name: Doug Tobiason	Address: 4545 NW 17th Vancouver WA 98665
Name: Lynn D Tripp	Address: 27662 NW Sauvie Is Rd Portland
Name: Leo Rozell	Address: 3701 N.E. 122 Ave. - Pfld OR 97230
Name: Irene Rozell	Address: 3701 N.E. 122 Ave Pfld OR 97230
Name: Kathye Larson	Address: 17929 NW St Helens Rd 97231
Name: Robert Luiker	Address: 13755 N W Charlton RD 97231
Name: KENT MEYER	Address: 19544 NW Sauvie Is Rd - Pd 97231
Name: BRUCE CAVALLERO	Address: 12408 N.W. ALDERVIEW DR. PORTLAND 97231
Name: LINDA BURNS	Address: 23815 NW Reeder Rd Portland OR 97231
Name: MYRON WEIFERT	Address: 52715 E Honeyman Rd Scappoose OR 97056
Name: GREG WINTERROWD	Address: 700 N Hayden Island Dr Portland 97217
Name:	Address:
Name:	Address:
Name:	Address:

Meeting Date: November 28, 1995

Agenda No: _____

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Appeal of Hearings Officers decision in the matter of CU 4-95 & MC 1-95.

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING Date Requested: November 28, 1995

Amount of Time Needed: 20 minutes per side

DEPARTMENT: DES DIVISION: Planning

CONTACT: Bob Hall TELEPHONE: 248-3043
BLDG /ROOM:412/Plan

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED

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

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

Appeal of Multnomah County Hearings Officer decision approving CU 4-95 & MC 1-95. A request by Tim & Angella Schillereff for a conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approving alternate request for the resumption and expansion of a non-conforming use on Sauvie Island located at 23200 NW Reeder Road in unincorporated Multnomah County, Oregon.

Hearings Officer approved both requests.

SIGNATURES REQUIRED:

Elected Official: _____

OR

Department Manager: KB Betsy Williams/mom

MULTNOMAH COUNTY

BOARD HEARING OF November 28, 1995

TIME 1:30pm

CASE NAME Schillereff Dog Kennel

NUMBER CU 4–95 & MC 1–95

1. Applicant Name/Address

Tim & Angella Schillereff
23200 NW Reeder Road
Portland 97231

ACTION REQUESTED OF BOARD

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

2. Action Requested by Applicant

Conditional use approval to (1) operate and maintain a dog kennel facility in an EFU district, and (2) expand the existing 50 dog kennel facilities to allow no more than 75 dogs; and. alternatively, approve alternate request for the resumption and expansion of a non-conforming use.

3. Planning Staff Recommendation

Denial

4. Hearings Officer Decision:

Approval

5. If recommendation and decision are different, why?

Evidence provided at the hearing that was not available at the time of the writing of the Staff Report which convinced the Hearing Officer that the kennel had been in continuous operation since its establishment in 1952.

ISSUES

(who raised them?)

All testimony at the hearing was in support of the application. Counsel for a neighboring property owner submitted written testimony regarding:

a. Possible defective notice,

b. Issue and claim preclusion based on a prior county denial of Design Review for the kennel,

c. Pending litigation between his client and the applicant, and

d. The location of the kennel on high-value farmland.

The Hearing Officer considered and rejected each of these issues in his decision.

Do any of these issues have policy implications? Explain.

No

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE Morrison Street
Portland, Oregon 97214 (503) 248-3043

NOTICE OF A PUBLIC HEARING

This notice concerns a public hearing scheduled to consider the land use case cited and described below:

Case File:	**CU 4–95 & MC 1–95**
Scheduled Before:	**Board of County Commissioners**
Hearing Date, Time, & Place:	**November 28, 1995; at 1:30 p.m.** **Multnomah County Court House, Room 602** **1021 SW 4th Avenue, Portland, Oregon 97204**
Scope of Review:	***De Novo***
Time Allowed for Testimony:	**20 minutes per side including rebuttal**

Action: Appeal of Hearings Officer approval of a Conditional Use and approval to alter a Non-Conforming Use, to expand the capacity of the existing dog kennel facility on this property from a maximum of 50 dogs to 75 dogs.

Location of the Proposal:	23200 NW Reeder Road
Legal Description of Property:	Tax Lot '15', Section 3, T2N, R1W. (see attached map)
Plan Designation:	Exclusive Farm Use
Zoning District:	EFU, Exclusive Farm Use
Site Size:	9.41 acres
Property Owner:	Tim & Angela Schillereff 23200 NW Reeder Road Portland 97231
Appellant:	Marquam Farms, Inc. 23406 – 23414 NW Reeder Road Portland 97231

This Building is Wheel-Chair Accessible.
Multnomah County TDD Line - 248-5040

Notice
Staff Responsible: Bob Hall

*Notice mailed*_____
CU 4-95/MC 1-95

Public Participation and Hearing Process: Application materials are available for inspection at the Planning Division office 20 days prior to the hearing, at no cost. Copies may be purchased for 30-cents per page. For further information on this case, call 48-3043.

To comment on this proposal, you may write to or call the Planning Division or attend and speak at the hearing. **All interested parties may appear and testify or submit written comment to the Board of County Commissioners.** All comments should address the approval criteria applicable to the request (outlined below). The hearing procedure will follow the Board of County Commissioners *Rules of Procedure* (enclosed) and will be explained at the hearing.

The Board's decision on the item may be announced at the close of the hearing, or upon continuance to a date and time certain. A written decision will be mailed to the participants and filed with the Clerk of the Board of County Commissioners usually within ten days of the announcement. The decision of the Board of County Commissioners may be appealed to the State Land Use Board of Appeals (LUBA) by either the applicant or other hearing participants

Failure to raise an issue in person, or by letter, or failure to provide sufficient specificity to allow the Board of County Commissioners an opportunity to respond to the issue precludes subsequent appeal to the State Land Use Board of Appeals on that issue.

APPROVAL CRITERIA

The Board must find that the proposal meets the following Comprehensive Plan Policy and Zoning Code approval criteria.

CONDITIONAL USE APPROVAL CRITERIA

Applicable Oregon Administrative Rule Requirements

OAR 660, Division 33 establishes requirements for agricultural land as defined by Oregon Statewide planning goal #3. Many of those requirements are not yet included in the Multnomah County Zoning Code; therefore, must be considered in addition to the county zoning code requirements. The section applicable to this request is OAR 660–33–110 which sets the requirements for uses on agricultural lands. Dog kennels are listed under the Commercial section of the list of allowed uses. When a dog kennel is proposed to be located on High Value Farmland, the following standards apply:

(1) OAR 660–33-110 does not allow new dog kennels.

(2) OAR 660–33-130(18) allows, "Existing facilities may be maintained, enhanced or expanded, subject to other requirements of law."

Applicable Comprehensive Plan Policies:

Comprehensive Framework Plan Policies 9, 13, 22, 37, 38, and 40.

Zoning Code/Subdivision Ordinance Ordinance Requirements:

In approving a Conditional Use, the Hearings Officer shall find that the proposal:

(1) Is consistent with the character of the area;

(2) Will not adversely affect natural resources;

(3) Will not conflict with farm or forest uses in the area;

(4) Will not require public services other than those existing or programmed for the area;

(5) 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 will be acceptable;

(6) Will not create hazardous conditions; and

(7) Will satisfy the applicable policies of the Comprehensive Plan.

Exclusive Farm Use Conditional Use Approval Criteria

(A) In addition to the criteria of MCC .7120, an applicant for a Conditional Use listed in MCC .2012(B) must demonstrate that the use:

(1) Will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

(2) Will not significantly increase the cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

(B) For the purposes of this subsection surrounding lands devoted to farm or forest use shall not include:

(1) Parcels with a single family residence approved under MCC .2012(B)(3);

(2) Exception areas; or

(3) Lands within the Urban Growth Boundary.

(C) Any conditions placed on a conditional use approved under this subsection shall be clear and objective.

Location Requirements

These uses shall be permitted only in the following areas and only where they will not conflict with the surrounding property uses:

(A) In CFU, F-2, MUA-20, MUF, and RR districts or those areas of similar low population density.

(B) C-3 or C-2 commercial districts.

(C) Manufacturing districts.

Minimum Site Size Requirements

(A) Area: Two acres.

(B) Width: Two hundred fifty feet.

(C) Depth: Two hundred fifty feet.

Minimum Setback Requirements

These uses shall be located no closer than one hundred feet to any lot line, in or adjacent to an *F*, *R*, or *A* district.

11.15.7230 Other Requirements

(A) All kennels, runs or pens shall be constructed of masonry or such other opaque material as shall provide for cleanliness, ease of maintenance, and sound and noise control.

(B) All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered are the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and public facilities on nearby properties, and other similar factors.

(C) The owner or operator of a use approved under this section shall maintain the premises in a clean, orderly and sanitary condition at all times. No garbage, offal, feces, or other waste material shall be allowed to accumulate on the premises. The premises shall be maintained in such a manner that they will not provide a breeding place for insects, vermin or rodents.

(D) A separate housing facility, pen or kennel space may be required for each dog over six months of age kept on the premises over twenty-four hours.

11.15.7235 Other Approvals

The approval authority may request the advice of the County Dog Control Officer, officials of humane societies, and veterinarians before approving an application hereunder.

11.15.8810 Alteration of a Non-Conforming Use

(A) Alteration of a non-conforming use includes:

(1) A change in the use of no greater adverse impact on the neighborhood.

(2) A change in the structure or physical improvements of no greater impact to the neighborhood.

(B) Alteration of a non-conforming use shall be permitted when necessary to comply with any lawful requirement for alteration in the use.

(C) An alteration as defined in (A) above may be permitted to reasonably continue the use.

(D) A proposal for an alteration under (C) above shall be considered a contested case and a hearing conducted under the provisions of MCC .8205 – .8295 using the standards of (E) below.

(E) An alteration of a non-conforming use may be permitted if the alteration will affect the surrounding area to a lesser negative extent than the current use, considering:

(1) The character and history of the use and of development in the surrounding area;

(2) The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line;

(3) The comparative numbers and kinds of vehicular trips to the site;

(4) The comparative amount and nature of outside storage, loading and parking;

(5) The comparative visual appearance;

(6) The comparative hours of operation;

(7) The comparative effect on existing vegetation;

(8) The comparative effect on water drainage;

(9) The degree of service or other benefit to the area; and

(10) Other factors which tend to reduce conflicts or incompatibility with the character or needs of the area.

PROCEEDINGS BEFORE MULTNOMAH COUNTY HEARINGS OFFICER
AUGUST 16, 1995

HEARINGS OFFICER

Okay, we took a five minute break. Does anybody in the room notice somebody who was here that should be here that has not returned from the break yet? Do we need to wait any longer? Okay. A couple of general matters first. My name is Barry Adamson. I'm the Hearings Officer for today. I've been determining whether or not the applicable Multnomah County . . . Provisions and Comprehensive Plan criteria apply to the applications that are before the County today. I am going to determine whether or not the applicants met the burden of demonstrating compliance with any of the pertinent criteria.

My procedures are . . . tend to fluctuate with the nature of the proceeding and the time that we have. First of all I going to have to tell you that the criteria to the matters to the County are set forth in the Staff Report. The staff report for today's proceedings are I believe in the back of the room. The pertinent criteria from the Zoning Ordinance and the Comprehensive Plan are listed in there. What I'm going to do generally is turn matters over to the staff, after I'm done with my spiel here, for a short presentation and a summary of the application. Following staff I'm going to allow the proponents to offer anything additional into the record. I'm not going to have set times for doing that, but I would ask the proponent take into account his rebuttal time. Following the proponent's comments or additional testimony I going to allow the opponents a fairly equal amount of time to state their views, following which the proponent is going to have a chance for rebuttal. I would caution you that I am fairly familiar with the staff reports in these matters. I would ask if you are going to comment on things not to be repetitive of what has already been in writing in the particular application. When you give your testimony, is that what you're going to give, testimony today, I'll ask you to try and remember. I'll help you if you forget to say who you are and where you live and what your relationship is to the application, what particular issue or issues you want to talk about. Be specific. I want to have people address the particular criteria that are pertinent to the application. And I will remind you of the raise it or waive it rule. If you don't mention it today it's going to be too late. So you will, anybody who wants to say something today will have an opportunity to do that.

The next matter on the agenda is CU 4-95/MC 1-95. It's a conditional use request. It's an alternative request, either a conditional use or an alteration of a non-conforming use. The applicant is Tim and Angela Schillereff. I will tell you that, I'm reading my notes here, I have received one letter, which I will get to in a minute. I got that yesterday, in terms of ex parte contact. That was from an opponent. I have not received anything from the proponent of any other late information pertaining to this. I have read the staff report and I'm familiar with this case. I happened to actually be here last July and sat through that hearing. I have not visited the site. With that in mind I think I'll turn it over to staff now for a description.

MR. HALL

I have some slides of the property, would you like to see them?

This is their property, excuse me sir is that in your way? This is the property located at 23200 NW. Reeder Road. This is looking northeasterly along the Reeder Road frontage. The little small sign that you see there is the sign for the kennel. The County car there is parked in the parking lot next to the dike that surrounds a portion of Sturgeon Lake. The area, all that area north of the end of Sturgeon Lake area, is a game preserve. The applicants' property is located to the right.

This is looking in the opposite direction, along Sauvie Island Road, showing the rural character of the surrounding area. I believe you can see there are just portions of the two residences that are closest to the subject property. They are located, I think, the nearest one is about a thousand feet from the kennel operation.

This was taken from up on the dike itself. The house that you see there to the left, that white house, is the house of the owner of the property. You can see here between the trees there on the right where you can see a portion of another home, and that is a building that was approved in 1990 as a watchman's residence. I'm not sure whether it was 1990 or 1993, I have to look in the book, anyway it was approved as a watchman's residence in conjunction with the kennel operation. The kennel operation itself is located almost in the center of the photo, as you can see it's obscured by the existing vegetation there.

There is a closer up view of the owners residence on the property. Again, this looks easterly and you can see the rural nature of the surrounding area. This is a better view of the watchman's residence. The kennel operation in this case is located to the left in that grove of trees.

This is looking directly into the kennel operation from Sauvie Island Road. As you can see, it's totally fenced with cyclone fence with slats, and again the vegetation virtually obscures what you see from at least this portion of Sauvie Island Road, Reeder Road.

This was taken from the dike across the road again looking into a common access, a common driveway that is shared between the kennel operation and the duck hunting club that's located on the left side of the driveway. The building you see there is a building that was approved as an agricultural accessory building to the duck hunting operation.

Here, we're going down the driveway into the property, again the building I mentioned is located to the left. You can see some of the fences surrounding the kennel there to the right. And here is where the driveway splits off and those are the gates to the duck hunting club.

Here you are looking right into a portion, the central portion of the kennel operation. It's hard to see but there are two Quonset type structures that have existed on the property since the early 50's and have been used for kennel purposes.

Again the duck hunting club road to the east of this property, the ... building I mentioned, and the building to the left of that is the clubhouse for the hunting club.

Here we're looking more into the kennel, again the cyclone slatting obscuring the view from the surrounding area. This is taken of the southerly portion of the property, of the parking lot for the kennel operation. The small portion of the building on the right is the office. The larger portion in the center, that's the highest peak area. It is a kennel addition that was done in 1990, and the lean-to portion of the building is an ag exempt structure that was approved for storage of agricultural equipment.

This is looking in the opposite direction from that parking area, again showing the...limited development and the agricultural character of the surrounding area.

Here we're looking into the kennel. This is a portion of the newer portion. You can see the dog run, and the landscaped interior of the kennel operation.

This is looking the other way into that same portion of the kennel.

This slide was taken on the southwest portion of the property, along Sauvie Island Road. The white house is the owner's house that I mentioned. You can see a portion of the caretakers residence and the newer portion of the kennel. From all outward appearances it looks like an agricultural building associated with many other similar agricultural uses on Sauvie Island. And that's it.

As you mentioned this request involves, actually, two requests. That's an expansion of an existing conditional use and an alteration of a non-conforming use. The staff report relied heavily on the most recent County decision in this matter which is DR 4-94. And with respect to the conditional use portion of the request, that decision found the dog kennel use of this property was not a legal use. Therefore we cannot consider this as an expansion of an existing conditional use, and we evaluated it as a new conditional use for a seventy-five dog kennel.

And the first consideration in a new conditional use on exclusive farm use property is the Oregon Administrative Rule regarding high value soils. The soils of this property are of high value. That rule would not allow new dog kennels on high value soil, so therefore we found no way that we could approve this expansion of this...

With respect to the alteration of a non conforming use, that same decision in DR 4-94 found that this use has lost its non-conforming status... Therefore, since we have no existing non-conforming use at least in the light of that decision, you can find that we have no use to alter it...

So the staff report concludes with respect to both items, that they would deny the request for the expansion of the non-conforming use and the request for the alteration of...and that the alteration of the non-conforming use also be denied.

I'll be glad to answer any questions.

HEARINGS OFFICER

I don't have any for now. I did receive late yesterday, again by fax at 4:30, a letter from the opponents, an opponent, asking me to do certain things. What I'm going to do briefly is, this is his letter,...I'll wait until copies are made.

While the copies are being made I can run through in effect what the gist of the letter is. It requests that I do certain things . . . that the Hearings Officer, some of which are procedural and some of which are substantive . . . only to the appropriate ruling. The first request, the first item in the letter is a request for a set over or a continuance. Mr. Josselson and Mr. Derr, on behalf of Marquam Farms Corporation have asked that I continue this matter until next months calendar, the reason being that they are both out of town. As I say I got this at 4:30 yesterday. I'm not terribly fond of late last minute requests like this for continuances that particularly when there is no what I call application-related reason why the continuance should occur, everybody knows what this decision is all about. There is no statutory right for a continuance under these circumstances, except where ORS 197.763 sub part 4B might apply, but I find that extension doesn't apply in this case to grant the right to a continuance made prior to the time that statue might otherwise result in a continuance. And the letter that I received, doesn't refer, for example, to any new evidence that was received late that might otherwise necessitate a continuance, so I'm going to deny the request for a continuance, but go ahead with the matter today.

The second portion of that initial request is for a, that I hold the record open for twenty-one days. ORS 197.763, sub 6 does say that if a participant requests the record be, remain open, before the hearing today, that this request shall be honored and the record shall remain open for seven days, at least seven days. What I'm going to do is this, in light of this situation to try and be as fair about this as possible under the circumstances. I'm not going to grant the continuance but I am going to say that the proponents are going to have until a week from today, until August 23rd at 4:30, to file anything further in support of the application. The opponents will have until August 30th at 4:30 to file anything further that they want. And then the proponents will have until September 6th at 4:30 to file any rebuttal to whatever the opponents file on August 30th. I anticipate that the rebuttal will be, if any, will be limited solely to whatever the opponents file by August 30th.

The second portion of the letter raises the possibility of a defective notice that the County sent out regarding this hearing. I've read the notice, I've read the one page April 11th application and I've read the February 23rd, what I call long form application, and I find that although there is a bit of an ambiguity there, that there is nothing substantive that is wrong with the notice. The April 11th, I believe, the one page application says the applicants seek a conditional use approval or alternatively an alteration of a non-conforming use for a seventy-five dog kennel. There is a February 23rd long form application submitted by the proponent

which says the application is to allow for expansion of the existing kennel operations, and in turn the notice that the County sent out recites that the applicant requests conditional use approval or approval for alter a non-conforming use to expand capacity at the existing dog kennel facility on this property from a maximum of fifty dogs to seventy-five dogs. Marquam Farms suggested it's not clear whether the request is for approval to expand a lawful 50 dog kennel to 75 dog kennel, or whether the request is for an approval in the first place of a 75 dog kennel where no lawful kennel use presently exists.

First of all I'm going to, I find that the notice was not ambiguous in light of the application materials submitted by the applicant. And particularly in light of the historical events in this case but the notice clearly paraphrases and summarizes the application materials submitted by the applicant. And I also find that, given the ruling last August I believe it was, by Mr. Grillo, which staff summarized a moment ago, there is no reasonable person who can comprehend this application that's predicated on a permitted conditional use. . . .necessarily implies this...original application, I shouldn't say original, an application to recognize it as a conditional use and get it permitted.

I'm going to deny Marquam Farm's request that we set this matter over and put new notice out.

The letter next raises an issue which, and legally...labeled "claim preclusion". In effect, the Marquam Farms says that the August '94 Hearings Officer decision renders this entire proceeding moot, or else dictates a result in this proceeding. My ruling is that's a substantive issue, it's not procedural. I'll deal with that in the decision that I'm going to make. That doesn't really raise a procedural question for now.

The next item mentioned in the letter is the issue of some pending litigation. Apparently there is a pending Multnomah County Circuit Court proceeding against the applicants. They've requested an injunction against an unlawful kennel use. I find that the, oh and Marquam Farms asks that I simply abate or stay this proceeding until that circuit court matter is determined. I don't know the contents of that lawsuit, I just know from what is said here it involves a request for an injunction. I don't know its status, but I do know this, based upon what I see in the file, the opponents themselves, Marquam Farms first objected to the lawfulness of this use in a land use proceeding, particularly the proceeding that took place last summer. And I concluded that they initially objected to the contents of the County proceedings and therefore these proceedings shall continue and in my estimation shall take priority.

I also quite frankly don't understand the relationship between the request for a ...perceived here to be a request here that the use be given a lawful, that it be ... a lawful use. I'm going to deny the request that I stay this matter pending the outcome of the Circuit Court matter.

The final matter mentioned in the letter I got yesterday speaks of the provisions of Oregon Administrative Rule 660-32-120 part 3, which staff summarized a moment ago as precluding

kennels on high value farm land. That raises a substantive issue, not a procedural issue. I'll deal with that in my decision. I'm not going to make any ruling on that particular issue today.

With those procedural issues out of the way, I going to open it up to the proponents who basically will tell us why we are here again.

MR. SULLIVAN

Good morning Mr. Adamson. My name is Ed Sullivan, my office address is 111 S.W. 5th, Suite 3200, Portland, 97204, and today I'm representing the applicants, Tim and Angela Schillereff. Tim and Angela have, for the last six years run the Sauvie Island kennel, and seek to expand and modernize their operations. As you know from reviewing the staff report and the file in this matter, there has been a long-standing dog kennel on this site owned and operated by Tim and Angela and before that, their relatives the Persingers. However the level of operations on this site has fluctuated since zoning was first applied to Sauvie Island in 1958.

In 1989, when Tim and Angela used the same property and the same buildings for a kennel, they set about making improvements and went to the County to see what they needed to do. They approached the planning staff and sought a conditional use permit for their operations. They even brought in a conditional use permit application filled out. County planning staff told Tim and Angela that no conditional use permit was necessary, that their situation came under Multnomah County Code 11.15.2028, sub b and c, which both the planning staff and County Counsel said meant that conditional uses listed in the EFU zone which existed before August 14, 1980 shall be deemed conforming and therefore do not require conditional use approval. On that advice, Tim and Angela did not file their conditional use permit. Instead, and again as advised by the staff, they sought and received design review approval for the structural improvements necessary to bring their kennels into operation. They also received a conditional use permit later that same year for their home as a watchman's residence in conjunction with the kennel use. During these 1990 proceedings the issue of the status of the kennel was raised and disposed of by the Multnomah County Planning Commission, which relied upon both the staff report and staff testimony that a conditional use permit was not needed.

You will hear from both Fred Granata, who represented the Schillereffs during those proceedings and from Eric Eisemann who reviewed the record and has excerpted portions of the record on those points.

HEARINGS OFFICER

I'm going to jump in here while we're . . .

MR. SULLIVAN

Sure.

HEARINGS OFFICER

. . .going through...

MR. SULLIVAN

That's okay.

HEARINGS OFFICER

You said that the status was determined in 1990, was it?

MR. SULLIVAN

Yes.

HEARINGS OFFICER

Okay, you said the status was determined. What in your estimation comprises "status"?

MR. SULLIVAN

You will hear testimony that the Planning Commission in adopting the staff report determined that this was a conditional use, by virtue of the then staff interpretation which was raised to a Planning Commission interpretation of 11.15.2028, sub b and c.

HEARINGS OFFICER

A kennel was determined . . .

MR. SULLIVAN

Yes. Without applying for it, by that interpretation and by the adoption of that interpretation by the Planning Commission, it received the status. We are as a prophylactic measure applying for a conditional use permit in any event. We are also asserting to you that not only do we have non-conforming status, but we also have a conditional use by virtue of those previous proceedings.

HEARINGS OFFICER

Okay, in 1990's particular proceedings, I believe there was a couple of them, maybe more.

MR. SULLIVAN

There were two.

HEARINGS OFFICER

Okay. One was a design review.

MR. SULLIVAN

Yes.

HEARINGS OFFICER

And the other was a conditional use for a watchman's house.

MR. SULLIVAN

That's correct. And I believe this occurred during the design review portion.

HEARINGS OFFICER

Okay.

MR. SULLIVAN

And you will get specific excerpts from the record in Mr. Eisemann's testimony today.

HEARINGS OFFICER

Okay. Fine, now what's your position on whether or not the lawfulness of the conditional use is something on which findings need to be made in the design review process? That's a long question, do you understand what I'm saying?

MR. SULLIVAN

Yes. Let me try to respond to it by saying that in both the design review processes, the 90 and the 94, there were findings made. Those findings are inconsistent. The first said that there was a conditional use there, and a lawful use there. The second, Mr.Grillo's said there was not.

HEARINGS OFFICER

Okay, the first that you're referring to, the design review.

MR. SULLIVAN

The 1990 design review.

HEARINGS OFFICER

Design review proceedings.

MR. SULLIVAN

That's correct.

HEARINGS OFFICER

Which you say, I just want to make sure I understand ...

MR. SULLIVAN

Sure. That's fine.

HEARINGS OFFICER

What I understand you to say is that the design review proceedings from the 1990, even though conditional use was not necessarily applied for.

MR. SULLIVAN

Was not applied for. That's correct.

HEARINGS OFFICER

Not applying for it. It simply assumes to exist.

MR. SULLIVAN

That is correct. And the Planning Commission did make that determination.

HEARINGS OFFICER

Okay. Can they make that determination...

MR. SULLIVAN

Well, no more than Mr. Grillo could have is my first response. And the second response is, if it is a necessary predicate to get to the design review, then they made that determination. And they made it not in the sense that there was a conditional use permit applied for, but by the operation and the interpretation of 11.15.2028, which said that any conditional use listed in the EFU zone which existed before August 14, 1980 is therefore deemed conforming. Staff said that makes it a conditional use. That was the basis for our not applying in the first place.

HEARINGS OFFICER

Okay, now what do you do with, I understand what you're saying,

MR. SULLIVAN

Sure.

HEARINGS OFFICER

How do you deal with Mr. Grillo's...within weeks of the appellant stage that the ordinance you just cited,

MR. SULLIVAN

Yes.

HEARINGS OFFICER

. . .is a use which is permitted, not just listed use.

MR. SULLIVAN

Right. I guess there are a couple of answers and I will probably repeat myself when I get to that portion in my remarks.

HEARINGS OFFICER

I'm sorry for interrupting.

MR. SULLIVAN

No, that's all right. That's all right and, as the spirit moves you, you ought to interrupt me.

HEARINGS OFFICER

I will.

MR. SULLIVAN

The first answer is that Mr. Grillo didn't need to reach that. He could have reached this by saying there was no conditional use permit that has been granted formally by the County, therefore it's impossible for me to deal with the design review. And he could have let that go there. He made some unfortunate ...remarks about the lawfulness of the use which weren't necessary, and which were incorrect in our view.

HEARINGS OFFICER

Would you agree that he found, I've read this decision a number of times . . .

MR. SULLIVAN

Yes, as have I.

HEARINGS OFFICER

I agree I guess with the result because...as of last August no permitted conditional use.

MR. SULLIVAN

That is correct.

HEARINGS OFFICER

And you see that as, tell me why you think this has a conditional use is lawful but not permitted.

MR. SULLIVAN

For two reasons. One is because of the staff's view that was adopted by the Planning Commission during the 1990 proceeding. And the second one is because of the applications which we are making now predicated upon two unappealed decisions, both made in 1990, which establish our non-conforming use and vested right.

HEARINGS OFFICER

Why did Mr. Grillo's decision protect those arguments?

MR. SULLIVAN

It was unfortunate. I think you could read Grillo's decision, except in one place where I think he needed a ..., to say I'm not deciding the validity of the underlying permits, but because I don't have a conditional use granted here, I can't use that as the operative predicate to go for additions to that use, via the design review process.

HEARINGS OFFICER

Okay. Mr. Grillo upheld the 1990 conditional use for the watchman's residence ... in limbo ...connected to... Would you say that.

MR. SULLIVAN

That both unappealed decisions are live decisions for lawful uses.

HEARINGS OFFICER

1990

MR. SULLIVAN

That is correct. And form the basis for our request for an expansion of the non conforming use. That's one of our alternative bases. For asking for the conditional use, we make it on two other bases. One is that the staff and Planning Commission indicated in 1990 that this was a lawful conditional use. I may disagree with that review and that ruling now, by the benefit of hindsight, but that was unappealed as well in 1990. And the second basis for asking for the conditional use is that we can now apply for a new conditional use, notwithstanding the high value crop, because we have some responses to that. But if all else fails we're asking you to grant us a new conditional use permit. So what we've tried to do is to get all of our bases covered in this application tonight.

HEARINGS OFFICER

Do you agree or disagree with...to some part...

MR. SULLIVAN

If 11.15.2028 did not exist, I would agree with it.

HEARINGS OFFICER

Did not exist.

MR. SULLIVAN

Right. That's the one that says that if it was there on August 14, 1980 and is listed as a conditional use in the EFU zone, it shall be deemed conforming. Let me try to respond a little further on that, Mr. Hearings Officer. Besides the usual stuff that, restrictions on land use being in derogation of common law and have to be construed strictly, and there is no limitation which says if there was a lapse in that provision then you'd lose whatever status you had.

HEARINGS OFFICER

I'm not sure I'm following you.

MR. SULLIVAN

Okay.

HEARINGS OFFICER

Maybe, I'm going to jump back here.

MR. SULLIVAN

Go ahead.

HEARINGS OFFICER

Mr. Grillo's, this decision I've read a number of times...I'm not sure I agree or fully disagree with everything he says but I think I'm bound by, I think I find his ...conclusion to be correct. How he got there ...

MR. SULLIVAN

I'm doing . . ...

HEARINGS OFFICER

He found that, assuming that if there is no conditional use,...non conforming use issue, he said that assuming you had that non conforming use ,there was that evidentiary gap that compelled me to conclude that the use discontinued, and I think it was 64.

MR. SULLIVAN

That's correct.

HEARINGS OFFICER

Okay. Tell me how, or tell me if, you're trying to leap beyond his findings.

MR. SULLIVAN

I am.

HEARINGS OFFICER

Okay. Tell me how.

MR. SULLIVAN

All right. For a couple of reasons. First of all, the words of the ordinance provision that I just read you does not provide for gaps. It says if it was there in 1980 it's deemed conforming.

HEARINGS OFFICER

Now he also interpreted this provision to mean this is not just listed, but permitted.

MR. SULLIVAN

And I take a stricter view of that which says that it is in the list of uses which are referred to in 2028 as a conditional use, as did staff.

HEARINGS OFFICER

I understand. I may agree with that interpretation, but it's sort of moot because -- tell me why I'm not bound.

MR. SULLIVAN

Because you're not bound by..., this is Administrative law.

HEARINGS OFFICER

Well tell me why...Mr. Grillo's decision, you're relying on a number of instances that are prior,...begins in 1990 that you say weren't appealed or ...

MR. SULLIVAN

Yes.

HEARINGS OFFICER

Well I'm saying that, by that same token, Mr. Grillo's decision unfortunately didn't make it through the appellate process, why doesn't that bind everybody by the same token that the 1990 proceedings would bind everybody.

MR. SULLIVAN

A couple of reasons. The first one is that Mr. Grillo did not have lawfully before him the issue of the underlying validity of the use.

HEARINGS OFFICER

Well now, he had design review procedures.

MR. SULLIVAN

Right.

HEARINGS OFFICER

An appeal from an administrative decision.

MR. SULLIVAN

Correct.

HEARINGS OFFICER

Is it not a precondition to design review that a conditional use be ...

MR. SULLIVAN

No. It could be a non-conforming use, and it could be allowed under this ordinance provision. See what Mr. Grillo did not do is to say that either of the 1990 approvals were invalid. He didn't have to reach that. But he did say that the use was unlawful, which was unfortunate and was dicta and was not necessary to decide that case.

HEARINGS OFFICER

Okay we sort of got to where we are now by my question about the non-conforming use and why I'm not bound by the finding of facts, you say, you disagree with his determination that there was an evidentiary gap in the proceedings...

MR. SULLIVAN

I do not disagree.

HEARINGS OFFICER

Okay, so there was an evidentiary gap that showed that up until 1964, it may have been a non-conforming use, but that because of that gap it discontinues. Do you agree or disagree that the use, assuming it's non-conforming use, discontinues.

MR. SULLIVAN

Except for 2028, I do.

HEARINGS OFFICER

So except for 11.15.2028 (b), (c) . . .

MR. SULLIVAN

C talks about changing uses.

HEARINGS OFFICER

Okay. That the use discontinued and therefore falls under the pertinent provisions of ORS Chapter 215.

MR. SULLIVAN

Yes. I'm also saying that by the grant of these two permits in 1990, of which may or may not under Mr. Grillo's view may have been mistaken, and Mr. Grillo would have redecided. However they were lawfully issued and unappealed. They formed the core of our vested right and our nonconforming use. And that is one of the two applications we are making. Which is to alter a non-conforming use. The other one is the conditional use. We have two bases for that, one is on the ordinance provision that we've just been discussing, 2028 . . .

HEARINGS OFFICER

Okay, let's talk about that issue.

MR. SULLIVAN

Sure.

HEARINGS OFFICER

I'm assuming that you read this ordinance as everybody except Mr. Grillo and Marquam Farms did last year. And you're telling me that I can revisit that notwithstanding the fact that there was a final decision which was not appealed.

MR. SULLIVAN

Yes.

HEARINGS OFFICER

Your authority for me doing that is simply

MR. SULLIVAN

...authority..., I would say that an administrative law, unlike our familiar court made law that we deal with, we are not bound by the normal principles...Just as the County

HEARINGS OFFICER

By the same token however . . .

MR. SULLIVAN

All right, go ahead.

HEARINGS OFFICER

Doesn't that cut against your argument that the 1990 proceedings bind everybody. You're saying in the 1990 proceedings even though didn't result in a permit, recognized it a conditional use and there was an opportunity to appeal and nobody did.

MR. SULLIVAN

There's a big difference between the 1990 proceedings, because permits were issued and can't be revisited. Now the County can change its mind on how the code applies to later proceedings, and that's what they are doing. And if there were ....Mr. Grillo would have been bound by the 1990 proceedings.

HEARINGS OFFICER

I understood Mr. Grillo's decision, he stated there was no permitted conditional use.

MR. SULLIVAN

And that is correct. And the argument was that it was done by operation of law. That's what the staff said, that's what County Counsel said.

HEARINGS OFFICER

Can that happen? Can you have a conditional use, which in the confines of the County's scheme requires a permit, and yet have a lawful use that was never permitted?

MR. SULLIVAN

I don't know whether it can happen, but that's what the County did.

HEARINGS OFFICER

...local government right from wrong, my question is does that bind everybody...

MR. SULLIVAN

It binds you if you don't appeal.

HEARINGS OFFICER

We're back to this binds you if you don't appeal.

MR. SULLIVAN

That's right.

HEARINGS OFFICER

On the permits

MR. SULLIVAN

They weren't appealed. We got the permits. The permits are lawful.

HEARINGS OFFICER

So you distinguish between the decision to grant permits and a non appeal from that decision binds people, but a non appeal from Mr. Grillo's decision which denied the permits. How come?

MR. SULLIVAN

We can't have the design review under the lights of the 94 appeal. That's why we've come back and asked for a conditional use and the alternative . . .

HEARINGS OFFICER

I perceived your application and I , in light of the objections that were raised yesterday...the notice, I've read the application a number of times. It's reasonably clear to me that the application presumes there is no permitted conditional use and that your application is to get permit for a conditional use, which presupposes that there is no conditional use. Is that a fair reading?

MR. SULLIVAN

We're also saying in these proceedings that we believe that the 1990 proceedings were correct. We made those observations in our long form as a conditional use.

HEARINGS OFFICER

I understand that. I'm just sort of hearing my, I want to make sure I understand this, because one of the questions is, and I have made a ruling, a procedural ruling that the notice was not ambiguous, but I did that based upon my reading that the application is in essence for a conditional use for a seventy-five dog kennel, as opposed to an expansion of an illegal permitted use. Now that's the way I read the application. Do you disagree with my reading?

MR. SULLIVAN

We have made two alternative applications.

HEARINGS OFFICER

Right. One for non-conforming ...

MR. SULLIVAN

Okay. And the other is for a conditional use permit. We are also suggesting to you that as part of the non-conforming use, we have to rely upon proceedings that occurred in 1990, and the lawfulness of the permits that were issued at that time. And the reliance and the interpretation . . .

HEARINGS OFFICER

That's the question. Were those permits, were the design review permits lawful at the time?

MR. SULLIVAN

Yes, if they weren't appealed. Whether they were right or wrong, they are final. And that distinguishes this from the 1994 proceeding where Mr. Grillo or the County continue to change their institutional mind on the interpretation of policies.

HEARINGS OFFICER

Okay. Let me make a note on that. Okay, so the proceedings in '94, you distinguished that they denied approved permit, a lack of appeal does not

MR. SULLIVAN

I said there was no permit issued as a result of it, which would vest the right.

HEARINGS OFFICER

[Request of staff for location of previous decisions]

MR. SULLIVAN

No, no, not at all. I would like and I know Mr. Hall brought them to make sure that the 1990 proceedings, the two of them, are part of this record, including the tapes of the proceedings.

HEARINGS OFFICER

I have a tape.

MR. SULLIVAN

Okay, is that all there would be?

MALE

Yes.

MR. SULLIVAN

Okay, then that tape be made part of this proceeding as well.

As I mentioned between 1990 and '94, Tim and Angela continued to build their business and make improvements on their property in relying and consistent with the 1990 approvals. In 1994 using the same process that staff advised Tim and Angela to use previously, they requested design review approval to add another twenty-five units to their kennel. Staff

recommended approval, but by this time the Hearings Officer denied the use interpreting MCC11.15.2028 b and c in a different way, a way in our view, not justified by it's language, to say that any break in the use for more than a year causes the conditional use to be lost. Because of that break the Hearings Officer said that design review is not the appropriate vehicle for the improvements that Tim and Angela sought. The Hearings Officer did...[comment] on the lawfulness of the underlying use, an issue which was not before him, except in the context of the design review application. That dicta was unfortunate as the Hearings Officer could have left that issue alone and said that the failure to have a written conditional use or to show the non-conformity was the problem, and that a mere request for design review approval in the absence of those permits, could not be granted without one of those other requests, either for a conditional use or a non-conforming use determination being granted.

However the Hearings Officer did say in another part of his decision that he was not authorized to nor did he make any legal observations in the 1990 approvals. Now the Staff, in its report in this case, relies upon the last of the decisions, the 1994 Hearings Officer determination in making its recommendation. Staff appears to say that the dicta in that decision, and the adoption of limitations on uses on some farm land by OAR 615, Chapter 33 was dispositive of both these applications. However the Hearings Officer did say that the door was open for him being convinced otherwise. We don't believe that the Hearings Officers decision is correct for a number of reasons. We would make a number of observations in the context of this case.

First of all as we've discussed in some length today, we believe the two 1990 approvals are beyond appeal and can not be collateral attacked. We believe that those approvals provide the bases for a lawful non-conforming use of vested right for the existing kennel and its improvements.

HEARINGS OFFICER

So you believe...vested right...

MR. SULLIVAN

No.

HEARINGS OFFICER

How could he ...

MR. SULLIVAN

He didn't make an observation on it. I'm not saying that. I'm saying this is our position, these are vested.

HEARINGS OFFICER

I understood you, going through now your version, I think that's in the 1994 decision.

MR. SULLIVAN

All right, and I'll be more careful in saying that you did not make an observation on the vested right status. We note for this case that no new kennel may be established in high value farm land; however expansion of existing kennels may be approved. And that's the basis for our expansion of non-conforming use. We believe that with the Conditions of Approval suggested by the applicant the . . . particularly those relating to noise barriers . . . the impact of the use on neighboring properties would be reduced.

We also believe that the baseline for calculating impacts on the neighborhood relates solely to lawful uses. The principle, and we believe the only objector, and I don't believe they are present here today, in the neighborhood, is a duck club next door, which we believe has unlawful structures and uses on its site. The structure that was applied for, that you saw in Mr. Hall's picture, was taken out as an agricultural barn. It's not being used for that. There is no conditional use for any sort of private recreational facility.

HEARINGS OFFICER

Are you talking about the duck club?

MR. SULLIVAN

That's correct.

HEARINGS OFFICER

Does that have anything to do with...

MR. SULLIVAN

It does when you have to look at its effect on uses in the neighborhood under 215.130 sub 6 through 9.

HEARINGS OFFICER

Okay.

MR. SULLIVAN

Staff finds that, with the exception of two peripheral policies, which we have since addressed in a supplemental report which you'll hear from Mr. Winterowd, that Tim and Angela meet the County's Conditional Use Permit standards and can convert their non-conforming use into a conforming use.

We also suggest to you that the conflict between OAR 660 Chapter 33, and ORS 215 283 Sub 2(m) is apparent. The statues allow the uses, the OARs do not. We believe that LCDC cannot override the legislature's clear determination that it is for counties and not LCDC to decide on the location of non farm uses in EFU zones.

Now, I've switched our presentation around. There are a number of people here who have come a long way and beyond those of us who are paid to be here want to be able to speak.

HEARINGS OFFICER

Hold on. Hold on. Something has been rattling around in my head.

MR. SULLIVAN

Go ahead.

HEARINGS OFFICER

You say, as a general matter, if there is a denial of a permit and there is no appeal and no ...effect, what then would prevent an applicant such as yourself, from the day after Mr. Grillo denied the permit to apply again... Okay, is it your position that you can reapply the day after ...

MR. SULLIVAN

Unless there is...

HEARINGS OFFICER

So there has to be appropriate issues and your exclusive remedy is to appeal.

MR. SULLIVAN

Or putting a six month or a one year provision against reapplication...

HEARINGS OFFICER

So you can't read then anything out of the fact that your client tried to appeal.

MR. SULLIVAN

I would rather it hadn't happened.

HEARINGS OFFICER

Well, it's unfortunate.

MR. SULLIVAN

That's right

HEARINGS OFFICER

Those...happen.

MR. SULLIVAN

And that's why we're here.

HEARINGS OFFICER

I just want to understand, because what you're telling me is that if a permit is granted everybody has to appeal or that's it. But you're telling me on the other hand that if the permit is denied, you can just reapply the next day as though it's a new day.

MR. SULLIVAN

I'm saying that because once a permit grants and is acted upon, it receives a different status regardless of the rightness or wrongness of the interpretation of the law. On the other hand, if it's denied, there is no vested right. The County retains its ability to redetermine its policy.

HEARINGS OFFICER

...follow that argument. You're going to have to give me ...

MR. SULLIVAN

I'll do some research. You'll get something from us by the time that you decide. As I've said, the Schillereffs and Mr. Winterowd, Mr. Eisemann and myself will wait until the end for any further comments. I would like to have folks in the area testify. That's a little bit out of order.

HEARINGS OFFICER

One more thing.

MR. SULLIVAN

Yes.

HEARINGS OFFICER

...out of order, but we're here.

MR. SULLIVAN

Sure.

HEARINGS OFFICER

You started telling me reasons why Mr. Grillo's decision was wrong....And what I've got written down is that the 1990 permits bind everybody and we missed that fact. What else about his decision is analytically...

MR. SULLIVAN

I think we did, as I said before, I don't think we needed to reach the issue of the design review on anything except the fact that there was no written conditional use permit, and no non-conforming use proved in those proceedings. It didn't need to say that the underlying use was unlawful.

HEARINGS OFFICER

So he only needed to...

MR. SULLIVAN

A predicate, an operative predicate for the design review which was an underlying permit. Now he could also be running the law on the interpretation of 2028, and I've suggested that here. But there are three different

HEARINGS OFFICER

So he didn't, you're saying he didn't need to say it was unlawful.

MR. SULLIVAN

That's correct.

HEARINGS OFFICER

But that doesn't, but the fact that he did, according to your thesis, an appeal doesn't bind anybody.

MR. SULLIVAN

Correct.

HEARINGS OFFICER

Okay, I'm done upsetting you.

MR. SULLIVAN

Thank you very much. No that's all right. And whatever rebuttal time we'll make some observations on the Derr letter which I received this morning.

HEARINGS OFFICER

Okay. Anybody else in favor here?

FRED GRANATA

My name is Fred Granata, spelled G R A N A T A. My address is 700 S.W. Taylor, Suite 401, Portland, Oregon. I represented the applicant in 1993 [sic] concerning the watchman's house. Excuse me, I've got something caught in my throat. I don't know why.

In any case there, I can't add a lot to what has already been said without being duplicative. I can only say that the matter of the use of the property, the conditional use, the prior to 1964 use was thoroughly discussed by Marquam Farms who occupied most of the time at the hearing. And it's not a matter of first impression with them, either in the last hearing before Mr. Grillo or currently. And that's thoroughly hashed out and discussed. And that interpretation as stated in the report was the one adopted at that hearing and on which the eventual decision was predicated

HEARINGS OFFICER

There were two 1990 proceedings.

MR. GRANATA

I only one went to hearing, if I recall.

HEARINGS OFFICER

Okay, in the staff report, I'm looking on page three of the staff report . . .

MR. GRANATA

Mine was the one concerning the watchman's residence.

HEARINGS OFFICER

That would have been the conditional use.

MR. GRANATA

Yes. I believe that was the only one that went to hearing, but I'm not familiar with the other one.

HEARINGS OFFICER

Okay, I guess I've got that file here on that. What I'm interested in, I guess, from you would be something that's not, something that I can't read in there.

MR. GRANATA

Yes.

HEARINGS OFFICER

As opposed to your historical recollection or interpretation.

MR. GRANATA

I'll do my best from five years back.

HEARINGS OFFICER

Go ahead. Let me understand the, the conditional use proceeding in 1990, and I've read the '90 and '94 files but you know, they're sitting here and I ... Other than the watchman's residence, what sort of, was the question of the lawfulness of kennels themselves even debated or was it just the . . .

MR. GRANATA

Yes, it was debated.

HEARINGS OFFICER

It was debated ...

MR. GRANATA

And the report I believe was first . . .

HEARINGS OFFICER

Is that the hearing in which one of the Planning Commission members said is this a lawful use?

MR. GRANATA

In the first place, they described the history of the applicants application, going back to 1990, or '89, when they first filed a request for a conditional use, and how they explained that one was not needed because of their interpretation of the pertinent section cited by Mr. Sullivan, that this use existed previously and . . .

HEARINGS OFFICER

Okay. In your involvement did anybody raise the question, where is the permit for the kennel?

MR. GRANATA

I don't recall.

HEARINGS OFFICER

That was a . . .

MR. GRANATA

You mean the permit, by that . . .

HEARINGS OFFICER

It seems to me . . .

MR. GRANATA

Do you mean a building permit? What permit are you . . .

HEARINGS OFFICER

The conditional use permit for the kennel. If there is, if you've got a proceeding, I believe in 1990 . . .

MR. GRANATA

I believe the kennel was constructed before the zoning even existed.

HEARINGS OFFICER

But did the question come up about where is the permit?

MR. GRANATA

I don't think so, but I must say I don't recall.

HEARINGS OFFICER

Okay.

MR. GRANATA

Going back on my recollection, I don't think, the question was not propounded to me in any case.

HEARINGS OFFICER

Okay.

MR. GRANATA

So unless you have further questions . . .

HEARINGS OFFICER

Well I don't really. To me, that seems to be the beginning of when you were involved...

MR. GRANATA

Yes.

HEARINGS OFFICER

... The question is, was the... conditional use essentially given that everybody assumed the permits were issued. Or was it something that nobody thought about which to me is significantly different issue. If nobody thought about it . .

MR. GRANATA

It was thought about in terms of the historical use of this property.

HEARINGS OFFICER

I understand your testimony. Do you know of the order . . .

MR. GRANATA

And interpretation of the order.

HEARINGS OFFICER

...

MR. GRANATA

Certainly it was, the issue as such, the interpretation was part of a larger debatable issue brought out by Mr. Maring as I recall.

HEARINGS OFFICER

Did you assume those were valid conditional use permits...

MR. GRANATA

I assumed when I entered the hearing, yes sir.

HEARINGS OFFICER

And why was that?

MR. GRANATA

Because the issue was not joined at that time. No one was challenging us in respect of the validity of the use. We were concerned primarily with things such as design review. And the issue was then raised at the hearing for the first time, in my memory. And I had to familiarize myself with it as I was sitting there.

HEARINGS OFFICER

Okay.

MR. GRANATA

Thanks.

HEARINGS OFFICER

Thank you.

MR. GRANATA

And I believe ...my staff if I recall, explaining why this was a . . .

HEARINGS OFFICER

I remember something came up.

MR. GRANATA

I don't think Mr. Maring of Marquam Farms raised the issue, which is a rather sophisticated one, I believe it came up through staff.

HEARINGS OFFICER

That's what I recall. Thank you. Anybody else wish to speak? Now's your chance. You're speaking in favor now, is that what you're doing?

MR. DAVIS

Yes.

HEARINGS OFFICER

Let me remind you that I'm very familiar with the staff report and my cautionary reminder at the onset, so what I'd like you to do is to very specifically to, we've got sort of procedural substantive issues here.

MR. DAVIS

Okay.

HEARINGS OFFICER

If you're going to speak on substantive issues, the criteria issues, be very specific as to what criteria. If it's procedural issues be as specific as you can about that, too.

MR. DAVIS

Procedural issues I wouldn't attempt to get into. My name is Peter Davis. I'm a veterinarian, a Sauvie Island resident. I would like to speak as a resident.

HEARINGS OFFICER

Okay. What's your address?

MR. DAVIS

14213 NW. Charleton Road. I speak as an Island resident and as a person concerned with, very concerned with land use and development. As a small animal veterinarian boarding facility, as a wildlife rehabilitator and as a duck hunter, I have watched this kennel from the beginning.

HEARINGS OFFICER

Beginning when?

MR. DAVIS

From the beginning of Tim and Angela Schillereffs' involvement. I have been extremely impressed with animal service, but the quality of the service and the quality of the care. With the way this, as you can see that picture, the way this facility fits into the surrounding landscape, and in fact pretty well disappears into the surrounding landscape. It's a very small portion of land and is scarcely visible. And I know that the surrounding neighbors, except for the...noise, this sort of thing. The quality of the facility, as far as any regulations are concerned, they have always been first class. My association, as far as medical care and this sort of thing, Angela has always been first class. The opinion that I get from my clients who go there, everybody is extremely satisfied with the continued operation of the facility.

As a general philosophy I am extremely opposed to development or expansion. It's not an agricultural.use. I find that this is really an appropriate use of the existing use on the

property. As a duck hunter and wildlife rehabilitator that the concern that this would somehow effectively surround a duck club, ... number of times during the duck season, have been able to look out the window of the kennel and see a flock of geese within shotgun range of the building... Dogs barking notwithstanding, vehicles coming and going, whatever, the geese are easily within the shotgun range of the facility and they are not bothered in the least. A duck club that hunts its property seven days out of the week, week in and week out during the duck season...because they never allow the birds to...and after a while those birds are going to show up there. If the duck hunting is being impacted, it's not being impacted by the presence of the kennel. It's being impacted by, really more than anything, the duck hunter.

HEARINGS OFFICER

Do you work for the other kennels in the area?

MR. DAVIS

Yes. Tim and Angela's business has taken off astronomically compared to anything you would have expected. And the quality of their care is as good or better as any I've ever...

HEARINGS OFFICER

Okay. Thank you.

KENT MEYER

My name is Kent Meyer, I live at 19544 NW. Sauvie Island Road, Portland Oregon.

HEARINGS OFFICER

Is it Kent or Ken?

MR. MEYER

Kent. K E N T. M E Y E R. My property is probably seven miles from where Sauvie Island Kennel is.

[end of side one tape 2]

[side two is blank through the end]

tape three

MALE

As I said, I'm not a personal friend of either Tim or Angela Schillereffs or either of their families. I know them both. Tim Schillereff went to school with one of my sons, that's the reason I know him. I know of the kennel because he worked, prior to owning his own kennel, he worked for one of the kennels on the Island where I used to board one of our pet dogs. And I knew Tim was there and I heard that Tim had started a kennel some seven or eight years ago, and I was sort of proud. Because I think whenever a young person ventures out to give up the weekly paycheck in pursuit of the American dream. I think they deserve some credit.

I've written a letter which I'd like to read and then make several comments if that would be permissible.

HEARINGS OFFICER

Sure.

MR. MEYER

It's to Multnomah County Planning Commission, regarding the case. Dear Sir, Please use this letter as my recommendation for the approval of the above application to increase the size of Sauvie Island Kennels. Tim and Angela Schillereff have operated Sauvie Island Kennels for the past eight years, and a kennel has been on the property since the early 1950's. Marquam Lake Farms, which owns the property adjacent to Sauvie Island Kennel, is opposing the expansion and operation of the kennel. This group is composed of lawyers, doctors, professionals and businessmen who do not reside on Sauvie Island. Their only connection to Sauvie Island is they operate a duck and goose hunting club. Marquam Lake Farms hunt their lake every day of this hunting season. This type of operation of a duck and goose club will ruin a duck lake in a very short time. I'm personally familiar with the owners of six duck lakes and duck clubs on Sauvie Island and none of those individuals who allow those who hunt their lake or rent their lake, hunt more than two to three days per week. Even the Oregon State Fish and Wildlife only allows hunting on their land three days per week. Marquam Lake Farms apparently has no regard for the proper wildlife management. Their only aim appears to be to kill as many ducks and geese as quickly as they can, and then when their lakes are hunted out, look for someone else to blame.

Our family has resided on Sauvie Island for 36 years. We own collectively 163 acres. For all of these thirty six years we have rented a portion of our property to Mr. Ed Minoggie, who operates Minoggie Kennels and has the capacity to board and train approximately 60 to 70 dogs. On our 163 acres we have two lakes, the largest encompasses approximately two and a half acres. We do not hunt ducks or geese on this lake, as it is located in the front of our property and is used primarily for scenic value. However, this lake is located approximately 150 to 175 feet from Minoggie Kennels. At any time during the winter, fall or part of the spring season there are from fifty to two hundred wild ducks or geese on the lakes and surrounding area. In addition there are ten to twelve deer that continuously feed and move around our lake, our neighbors property, into the Wapito Park across the road. The operation

of a dog kennel in no way effects the wildlife close by. I would urge your support of the application to enlarge the kennel.

HEARINGS OFFICER

And would you leave that.

MR. MEYER

There it is.

HEARINGS OFFICER

Okay.

MR. MEYER

I think what bothers me more than anything else, and it may not be legally right, is we've got Marquam Lake farms that's owned by, I find in here in the application, thirty people. They are trying to stop the Schillereffs out of business.

HEARINGS OFFICER

Now wait a minute, let's be specific on the criteria here because otherwise it's just going to . .

MR. MEYER

Okay, I understand. But that's what they are trying to do. They are trying to put them out of business by appeals. I'm a small businessman. I started my own business fifteen years ago. I know what it take to do it. I know the seventeen, eighteen hour days. I know all the problems of meeting the payroll and doing all the things that the Schillereffs have to do. And they have the Marquam Lake Farms after them. They are filing law suits on them, they are appealing all and anything they can to drive them out of business because they are trying to blame that the dogs bother their duck hunting. And I think it's unfair and I don't know whether you can consider that, I'm not saying that you have to consider that. But I think it's a travesty with what's being done. Because if somebody decides to come after me and my business and wants to do it bad enough and put up the money, they can drive me out of business just with legal fees, and a hundred dollars here for this assessment, and so much for each page of transcript, and on and on and on. And they'll run you right out of business. And that's what they are trying to do. I think it's a real shame. The Schillereffs have been there for a long time. There has been a kennel there for as long as I can remember. There's kennels all over the Island, I can think of at least five people that have kennels right now, and another five who train dogs on their property for sale to private individuals.

HEARINGS OFFICER

I understand what you're saying, let me just tell you that I'm, I'm not telling you I'm not sympathetic but I'm not sure ...

MR. MEYER

Sure.

HEARINGS OFFICER

Because regardless of what Marquam Farms has done, it's the Hearings Officers decision of last August that has sort of gotten us to this point.

MR. MEYER

Sure.

HEARINGS OFFICER

So the decision and not so much, the Hearings Officer might not have agreed with Marquam Farms, we might not be saying all this,

MR. MEYER

I understand.

HEARINGS OFFICER

It's not going to affect me.

MR. MEYER

I understand. Okay. I do think it's very important that being as much as Sauvie Island Kennels has been there, and very honestly I have to tell you this is the first time I've seen this application and read through it, thirty-one pages very quickly this morning, but it just appears that if you want to be fair about something, you have to take into consideration that they were there. What's gone on with the County I don't know, cause you hear all kinds of stories. But I actually feel that they should be there and my main concern was to be here today to tell you that we do have a kennel on our property and have had, it's been there for forty-one years, and it absolutely does not bother the wildlife. There is no, we have geese and ducks on our lake all year round.

HEARINGS OFFICER

Don't tell us your kennel's not permitted.

MR. MEYER

It's not my kennel, I don't own the kennel, thank God, I just own the property. Okay? Thank you very much.

BRUCE CAVELLRO

I'm Bruce Cabbellero. I live at 12408 NW Alderview, that's off of Highway 30, close to Sauvie Island. I sent you a letter.

HEARINGS OFFICER

Is it dated September 1st...?

MR. CAVELLERO

Yes and . . .

HEARINGS OFFICER

Hold on a second... staff report, I said in the onset I haven't received anything, and I hadn't directly. This is, however there is a letter from you, it's already in the file here. Just so everybody knows. Okay.

MR. CAVELLERO

Well, what I wanted to say, I'm friends with Angela and Tim. I've used their facilities also and I feel that for as long as I can remember there has been a, it seems to me there was a kennel on this site. We need facilities like this, and this seems to be a good location because it already exists. And I feel that should really be taken into consideration. And also I'm a duck hunter, I've hunted Sauvie Island and Scappoose for quite a few years and I have hunted in Scappoose with an adjacent property to Brown's Kennels and I have not ever noticed any problem with the wildlife or waterfowl coming in because of dogs barking and being in the kennel there. Also I have, I hunt in the vicinity, and have hunted in the vicinity of Schillereffs kennels and I don't feel that is a legitimate concern of noise of animals contributing to bad hunting on the adjacent property.

Basically I think the County should, I would like to see the County take into consideration that there has been kennel there and it has been existing, and to look at it on that in your decision on this permit.

HEARINGS OFFICER

Okay.

MR. CAVELLERO

Thank you.

HEARINGS OFFICER

Thank you.

DOUG JOHNSTON

Hello.

HEARINGS OFFICER

Hi.

MR. JOHNSTON

I'm Doug Johnston. I'm a customer and a friend of Sauvie Island Kennels. I am president of the Cascade Hunter Club and since I need to pay my bills, I'm also the Director of General Services for Clark County.

HEARINGS OFFICER

What is your address.

MR. JOHNSTON

My address is 4508 NW. 127th Street, Vancouver Washington. After listening to Mr. Sullivan and yourself thread your way through the ORS's and the code and the administrative code, I don't want to get into any depth there. However one of the reasons I, this application seems to be denied is a lack of proof for a one year period, after thirty-three years of continuous use on the non-conforming, based on the DR94-4. Granted the Multnomah County Code ORS, requires the burden of proof to fall on the applicants, but given the preponderance of documentation that was provided over thirty three years continuous use, failure to find documentation for one year back in 1962, I feel is an unreasonable demand on the part of the County.

HEARINGS OFFICER

Were you...early 60's?

MR. JOHNSTON

No I was not.

HEARINGS OFFICER

Unfortunately it's, you're free to say what you want now within certain limits. But I want it to be helpful and fruitful...It wasn't my decision last year, there was an evidentiary gap there and I don't...now

MR. JOHNSTON

No.

HEARINGS OFFICER

Okay.

MR. JOHNSTON

I feel though that the evidentiary gap, that long ago and that short of period is an unreasonable demand.

Secondly, given the history of Multnomah County's actions, based on the actions I've seen, my...across the river. I think I'd be very hesitant to exercise my right to be wrong at this point. I think the Board of Commissioners would support that.

And finally, and in a more philosophical approach, and I'll try to be brief, Sauvie Island and kennels of their type support responsible pet ownership. This is a stated goal of the Multnomah County Commissioners, it obviously helps them reduce costs for animal control, keeps the livability of Portland in a better light. Sauvie Island Kennels are part of the solution, not part of the problem. Portland needs more facilities like this. And I would hope, given the reasonableness of all three of these items, that you as a hearing examiner would feel that you have the latitude to use that reasonableness, as I believe the Board would, in finding in favor of the Schillereffs. Thanks for listening.

HEARINGS OFFICER

Thank you for your comments. Anybody else in favor, now is the time, it's an open mike.

PATTY LARSEN

My name is Patty Larsen, I live at 17929 NW. St. Helens Road. I am close personal friends with the Persingers. I consider Tim and Angela friends and I use their dog kennel. I have kind of a statement but I also have some observations that came to me while you were discussing all of the legalities of this case. And since this is my one chance to say it, I want to say it.

HEARINGS OFFICER

Okay.

MS. LARSEN

I'm just outraged that a nearly impossible burden of proof for the past life of the kennel is required by the applicant, when income tax records that could prove use are only required to be kept seven years, that many of the owners who could speak for the operations are deceased and that the applicable law...

HEARINGS OFFICER

Did you use the . . .

MS. LARSEN

No, I used . . .

(laughter)

Okay, again, how there can be any question of whether the Schillereffs have a vested interest in this property is beyond me. Even according to retirement plan laws, three years is a limit of time for necessary, to be given a vested interest. By relying on the County's interest they have put a lot money, not to mention their sweat effort into their place. And besides that, they have been damaged by their reliance on the County's decision. Nobody knows better than I do the mental and emotional damage that comes from a case like this. They have been damaged.

And in addition, speak to the noise. Last year Mr. Persinger was in the hospital and I spent the night with Mrs. Persinger, we were up most of the night. We slept some of the night. The dogs did not bark continuously and they didn't keep it up all night. And when I go to pick up my dog, yes, the dogs bark, when we walk out there Tim blows his whistle and addresses the dogs and they are quiet. They are well mannered even though they are not all his dogs. Okay.

This kennel is an asset to the Portland community, it's clean, it's attractive. It's located in an area that does not interfere with nearby home owners. It's used by many, many people as a community resource. Although I live in a rural area and I have a place for my dog, but I have

a dog that requires medical attention two times a day. If I want to go anywhere overnight, I have to make special arrangements for this dog. And I know that when I take my dog to Angela that my dog receives the best care possible. She wouldn't survive in a small box at a veterinarians because her medical condition requires her to be able to move around in a large dog run like the kennels have.

Further, the Schillereffs have been an asset to the Sauvie Island community. They take part in community activities and neighborhood organizations. I feel, and you should be charged to work with, Multnomah County needs to work with the Schillereffs to come up with a workable solution to allow them to continue in a service business that is needed and wanted, in a place that's been their home and their workplace with the Countys blessings, for six years. Thank you.

HEARINGS OFFICER

Any other proponents, anybody wishing to speak in favor?

MR. MEIFERT

My name is Myron Meifert.

HEARINGS OFFICER

How do you spell the last name?

MR. MEIFERT

M E I F E R T. I live at 52745 Honeyman Road in Scappoose Oregon. I used to own that kennel in 1966...grandfather...and before me, Evelyn Blitz had dogs and operated it. And before her, I'm not sure of the dates but, a guy named Scotty owned it. . . .

HEARINGS OFFICER

Okay, so you owned it in '66 you say?

MR. MEIFERT

Later part of '66 for 2 or 3 years, yeah...

HEARINGS OFFICER
You owned it as an active kennel?

MR. MEIFFERT
Yes.

HEARINGS OFFICER
How Many dogs did you run?

MR. MEIFFERT
Up to about 50.

HEARINGS OFFICER

Because of the ownership, what I'm interested in details about the status of the kennel in the '60s.

MR. MEIFERT

It was grandfathered, it wasn't required for a particular license. The only license was for a sign on the road.

HEARINGS OFFICER

Who told you that?

MR. MEIFERT

My attorney, Paul Reeder. That was all that was required.

HEARINGS OFFICER

So you went to the County?

MR. MEIFERT
That was all that was requried was for a sign.

HEARINGS OFFICER

So you have a permit for a sign? For what year?

MR. MEIFERT

That was '66 or '67, something like that.

HEARINGS OFFICER

How long did you own it?

MR. MEIFERT

I'm not sure exactly, about 3 years.

HEARINGS OFFICER

So you sold the kennel?

MR. MEIFERT
to ...in about 1969. Something like that.

HEARINGS OFFICER

Did you own the real property too? Or did you just operate the kennels?

MR. MEIFERT

No, I owned the property...

HEARINGS OFFICER

Okay, I just wanted to break in and get that.

MR. MEIFERT

Well that was mainly what I wanted to say, the kennel was operated, it was operated prior to me by Evelyn Blitz. Like I say a guy named Scotty ran it before her. It was built by Roy Wallace and another gentleman out on Deer Island.

HEARINGS OFFICER

I'm listening to you as I do this.... say what you want.

MR. MEIFERT

That's basically it, and as far as my working relationship, I had a good relationship with the neighbors who had the duck club at that time... So that's it.

HEARINGS OFFICER

Okay, thank you.

LINDA REEDER BURNS

My name is Linda Reeder Burns. I currently reside at 23815 NW. ...Road. I have lived on the island all of my life, my family is the Reeder family. My grandfather has duck hunting clubs on Hershey Lake and Sauvie Island Lake since the early 1900s. I grew up around duck hunting and duck hunting management. At that time my grandfather was very conservationist and even though he was a hunter we only allowed people to hunt Monday. Wednesday and Friday, or Saturday, Sunday and Wednesday at that time. Because of bird management.

HEARINGS OFFICER

Where do you live?

MS. FERN

I now live about half a mile from Tim and Angela. I know them as neighbors because we're friends because of living next to them. They are responsible and courteous neighbors. They are responsive to anything that does happen at the kennel. Unless the wind is blowing just right on a quiet day I do not hear the dogs barking. If they do it is for a very limited period of time.

And one point that should be made in their behalf, as far as being part of the community and very involved in the community, is they play an asset and a role that they are across from that wildlife area parking lot that you showed in the slides. People are coming to Sauvie Island by the thousands, every year. It is encouraged by Portland and Multnomah County for people to recreate out on Sauvies Island. In doing so they bring animals to Sauvie Island, and all of us who reside out there currently find stray animals at our doorstep on many occasion. Tim and Angie having the kennel in the location that they are provide an asset to all of us who find animals, as well as those who lose animals, to be able to contact them to find their ...dog or to find a home for the animal. Tim and Angie will shelter those animals to make sure that those animals are not out on the wildlife that you noticed in that parking lot scene. Right across from it there is the lake and the wildlife area, and should those animals run wild...a lot more harm to the wildlife than what Marquam Farms is saying the dog kennel will do.

My husband is also a hunter and he hunts across the street from where Marquam Farms is. We observe their mismanagement and hunting seven days a week. It does upset the birds in their flying place but it does not affect them from the dog kennel. It is a direct result of shooting at birds seven days a week. When they are not allowed to lay in the fields, or not allowed to eat, and anytime you keep chasing them out of somewhere they are not going to return. So it's more poor management on the duck lake part, than any distraction that a dog kennel has in this area.

HEARINGS OFFICER

Thank you. Anybody else speaking in favor?

TIM SCHILLEREFF

I'm Angela Schillereff. This is my husband Tim. Also Elden and Marguerette Persinger are here.

ANGELA SCHILLEREFF

It's hard for me to understand this, I'm sorry (crying).

HEARINGS OFFICER

It's hard for me too.

MS. SCHILLEREFF

I have a stack of stuff here. I feel that there has to be something in here that says we're right.

HEARINGS OFFICER

Well we, the posture of it now is that you're applying for recognition on the conditional use. There are certain County requirements that apply to conditional uses. And if, there is the criteria which apply and I'm sure that you can document the criteria that apply. There is the procedural stuff that you may not be able to alter now, but that's something Mr. Sullivan and I can work out. So what I would focus on if I were you is what you need to do to convince me that the current criteria are fulfilled.

MS. SCHILLEREFF

I can address anything you want me to in the capacity that I have the knowledge to answer.

HEARINGS OFFICER

Well it's not so much what I want you to relate, I've read, I've read the application...I've read the staff report. If you want to add something to that, clarify something that you think is a little fuzzy, this is the time.

MS. SCHILLEREFF

I came prepared to talk about impacts because . . .

HEARINGS OFFICER

Okay.

MS. SCHILLEREFF

But I don't know if I need to. What I want to say, and I have with me here as part of the pile, Tim and I feel like some of the previous speakers have as part of the community. And we want to give back what they've given to us. And I've gone around, I can't physically talk to everybody, a lot of people are on vacation, a lot of people work during the day. And I physically went around the Island and I got over a hundred signatures from people and not one person opposed us. I never heard anyone say we were bad. (crying)

HEARINGS OFFICER

Okay, I'll . . .

MS. SCHILLEREFF

What I'm trying to say is

HEARINGS OFFICER

I'll put these in the record as exhibits.

MS. SCHILLEREFF

Those are all people that live and own property on the Island. I didn't, I could have had all my customers sign, the people that come from town or Vancouver, or from all parts of the State. Our business does not only affect the local community that we live in, but we have clients that fly their dogs to us for my husbands expertise, from Canada, from California and Arizona and all parts of the country. We're trying to do something good, we're not trying to hurt people, and the only person that has ever given us a single bit of grief is ...Marquam Farms. We want to work with people, we don't want to hurt people and . . .

TIM SCHILLEREFF

If I could just interject. I want you to understand that I don't know exactly how many houses there are out on Sauvie Island but getting over a hundred signatures in the week's time that you had, there is probably only like two hundred, two hundred and fifty houses on the Island, and like she's said we haven't had any objection to it. And I also want you to understand that I do train a lot of Marquam Farms...dogs. I've trained them for years, I know a lot of the guys in the club and I don't have any personal problem with any of the guys at the club. I don't know why we are where we are today. I just don't understand. We've complied with everything we've done up there, we've gotten permits for, we've applied for them and now we're the fall guy. And I just don't know how much longer we have to keep fighting. Obviously it has taken a toll on my life.

MS. SCHILLEREFF

All I can say is that everything that we've tried to do for all the properties concerned, we've tried to do everything right...permit, we talked to Bob and Mark Hess and staff here has been so cooperative, and they say this is what you need to do. Give us a hoop. We'll jump through the hoop. That's what we've been trying to do. Now there's no hoops, and we're still trying to jump. And that's why we're trying to do whatever we need to do, because we have everything on line, that's our life there. We did a lot of the work ourselves, we didn't hire people to build the buildings, we built them.

MR. SCHILLEREFF

One other thing that I'd like to say too, Myron Meifert, my uncle who spoke earlier, he knows the history of the kennel as well as anybody, how much do we have to dig up? Myron mentioned that there was a Scotty, the guy that operated the kennel. Nobody is for certain on those dates, okay Scott, this man is probably deceased. How could anybody you know, dig up this evidence. We're, apparently we were supposed to have the burden of proof, how is that? I'm not even as old as that. I can't come up with that kind of evidence. I mean, where do you draw the line? Do you understand what I'm saying?

HEARINGS OFFICER

Oh, I understand what you're saying. A lot of it is sort of water under the bridge. But you know, I will, I'll let you tell me anything you can about, for what it's worth, I'll let you tell me anything you can about the, what occurred in the 60's, early 60's, mid 60's

MR. SCHILLEREFF

All I know is . . .

HEARINGS OFFICER

Go ahead and do it. I'm not representing that I can do a lot with that at this point. That's something I'm going to decide. You know this is your chance so go ahead and tell me anything you know about this.

MS. SCHILLEREFF

I want you to read this letter from . . .

MR. SCHILLEREFF

No you go ahead. But again, you know, I wasn't even alive at that time but I do know that this Scotty person before Evelyn Blitz got the kennel, Evelyn Blitz owned it from Blitz

Weinhard. Okay, before that time I can't give you dates on it, like I said I wasn't around, but before that time Scotty had operated it and I had heard that he had bulldogs out there. Throughout this time I've had customers come out to the kennel and give me little bits and pieces of history. I don't even know these people who dragged them in here.

MS. SCHILLEREFF

I not sure, a concern I have is that you said you received no letters but then you recall receiving a letter from Mr. Cavellero.

HEARINGS OFFICER

No. What I received . . .

MS. SCHILLEREFF

Or was that in the record?

HEARINGS OFFICER

Okay, here's, it is, I'll explain exactly what happened. I got faxed to me yesterday one letter which I went over at the beginning of the hearing.

MS. SCHILLEREFF

Right.

HEARINGS OFFICER

I have the County's file here, and as I'm sitting here looking through it there is...file, there is a letter from a Mr. Rodney ..., dated the 12th...Mr. Cavellero dated the 13th, and there is a letter from a Jim Charlton dated the 12th. It's addressed to me here and I never received it until I got the file. So that's...then I looked at the dates and I was concerned that it post dated the date that the staff report was available. And they do, so I think what I'm going to do, there appears to be three. I guess these are already in the file. What...that was my only comment there, as I open the file up here they are there on top...I should like to tell you...

MS. SCHILLEREFF

Right.

HEARINGS OFFICER

I didn't know they were here until today.

MS. SCHILLEREFF

Well, there are more letters that we hand carried here. And one of the letters I'd like to read is from our next door neighbor, Evy Vetsch. Her and her husband, Richard and Evelyn Vetsch own and operate Vetsch Dairy. And I'll just read their letter real briefly. They've been on the Island a long time and they could tell you a lot of history. She says, "We are owners and operators of Vetsch Dairy located just south of the Schillereffs kennel and the Marquam Farms Corporate Duck Club. The duck club, and the duck club has been at this location since 1949. In the 1950's the dog kennels were built and established by Peter Alphort, (it's A L P H O R T). And the first manager that we can remember was a Scotchman by the name of Mr. Rose. Later Mr. Blitz purchased the property and also operated a dog kennel. Since that time it's always been known as the kennels and operated as such. The Marquam Farms duck club owners knew the kennel was there when they bought their property. We can see no reason that the Schillereffs use of their property as a kennel be terminated and forced to give up the means of making a living. The new plans for the kennel sound like it will make even less of an impact on the ducks, geese and neighbors. Certainly much less than the Marquam Farms duck club does with their trap shooting and wildlife hunting all year long. We recommend that the Planning Commission approve the Schillereffs' property as a non-conforming use as a kennel. As farmers the only option we can see for the use of this small acreage and the use of their present buildings as an exclusive farm use would be to operate a pig farm. In our opinion a good place to board dogs is needed much more. Very sincerely, Richard and Evelyn Vetsch."

Our planner has the original and you can see this is a copy.

HEARINGS OFFICER

It's just one page?

MS. SCHILLEREFF

Yes, it's just one page. They have a wealth of information because they've been living on the Island since the late 1940's. And operating that dairy. And I would feel that if they had a lot of concerns about a kennel that they would be opposed to it. And they are wholeheartedly for us. They know Tim and I are good people just trying to do a good thing. Do you have another one? Oh, okay, there is other letters in the record too that illustrate the fact that we have a lot of people that enjoy the kennel and enjoy wildlife and enjoy duck hunting on the Island. And see it as complimentary uses, and that's the only reason we're talking about duck hunting so much is because that's the only rational we can see that Marquam would oppose us.

MR. SCHILLEREFF

That's why we are sitting here today is because of pressure from the duck club, people who don't even live on Sauvie Island.

HEARINGS OFFICER

While I've got you here let me ask you this. You no doubt read the Hearings Officers decision last August and there was a core finding in there that, there was nothing basically, there was a void between December of '62 and February of '64, so that's just a little bit over a year period.

MS. SCHILLEREFF

I was going to say I don't understand

HEARINGS OFFICER

Well, what if anything can you tell me about that period of time? I mean he didn't, he didn't find that it wasn't used as a kennel. What he, what he concluded was that there was nothing in the record that said what was going on there.

MS. SCHILLEREFF

Right. What that whole basis was, was on this sheet of paper that was hand-written from the County that talksed about the different uses. Tax uses, it was actually the assessors record and present status, and it was talking about the different uses. And there were different owners, and not all of them were even noted as such. I don't know how often, I'm not a, my business is dogs, not talking legal things.

HEARINGS OFFICER

Dogs are easier.

MS. SCHILLEREFF

Yeah.

HEARINGS OFFICER

That's for sure.

MS. SCHILLEREFF

And they love you.

MR. SCHILLEREFF

Could I just ask one thing? What is it . . .

HEARINGS OFFICER

You're not going to tell me the white mice joke are you?

MR. SCHILLEREFF

What is it that we're looking for? Are we looking for, are the kennels there or who operated them? Is that what you're looking for? Because those kennels had to be there for a reason. I mean they were used.

HEARINGS OFFICER

Tell me about that.

MR. SCHILLEREFF

There were kennels there in 1989 when I got there. Those kennels, it's obvious that they have been there since the '50s, by the year of the building.

MS. SCHILLEREFF

If you could see the buildings you'd see the older section are the original buildings.

MR. SCHILLEREFF

We have neighbors who say that they were there. I don't know what else we have to . . .

HEARINGS OFFICER

Well, the law is sort of goofy about this, but what it requires is, for a non-conforming use, I'm sure Mr. Sullivan can explain this to you in depth, ad nauseum. One of the issues last year was, even assuming there was no permitted conditional use, if it's been there since time began it can stay there, under certain circumstances. But, what happens is up to, I've got the record and I'm assuming what you've got in your hand is part of that record, but between December '62 when the Blitz operated the kennel and February '64 when Cortway (Pein) operated the kennel, there is no information in the record concerning the existence and scope of the use. And then he said the County record is silent during this period. So it's not that somebody is saying it wasn't there.

MS. SCHILLEREFF

Right.

HEARINGS OFFICER

What we're saying is we don't know. But the law requires that we account for that period in order to say

MS. SCHILLEREFF

Who is to say if during that period of time the kennels weren't be remodeled, but there were dogs there. Just because there is no record and the people are dead that, the record I show here, Mrs. Blitz is dead and the next occupant was Cortway, they are both deceased. We can't ask them, well who was in between you and how many animals did they have there. And I don't know that this would really help anyway because then Myron Meifert came after them, and he's documented in here as such too. And everything was made out here. It shows that they have the run and he bought it from Evelyn Blitz and he was limited to fifty dogs, and the type of the buildings is a corrugated metal building.

HEARINGS OFFICER

Okay what figure are your reading from?

MS. SCHILLEREFF

This is what County staff gave us.

HEARINGS OFFICER

May I have a copy of that?

MS. SCHILLEREFF

You have a copy of this. That's my copy.

HEARINGS OFFICER

County staff gave this to you?

MS. SCHILLEREFF

Yes.

HEARINGS OFFICER

Do you know whether this was part of an earlier record in last years proceedings?

MS. SCHILLEREFF

I don't know.

MR. SCHILLEREFF

I saw the one when I originally came down to apply for the conditional use permit. That is what the County showed me.

MS. SCHILLEREFF

But it's handwritten all at the same time.

HEARINGS OFFICER

Well, okay, for what it's worth I'm, is this your only copy?

MS. SCHILLEREFF

Yes.

HEARINGS OFFICER

Well I want to make it an exhibit. Cxan we get a copy of that.

MS. SCHILLEREFF

All I'm trying to say is see that's someone's handwriting from ledger cards, I don't know how, I don't know how County, I mean that's the County's business how they keep track of things. But if it was transcribed from one card to another card that's an explanation why there is a gap. Maybe the cards stuck together and he didn't write it down. Maybe it was remodeled. Everyone's dead at, I wasn't even born yet.

HEARINGS OFFICER

Unfortunately the law doesn't deal with maybes very well.

MR. SCHILLEREFF

How can the law account for these people saying that the kennel wasn't there. How can they account for that? That's really all we have to go on.

HEARINGS OFFICER

That's what I'm looking for. What I'm looking for is somebody to tell me that between December '62 and February '64, there was a kennel there in operation in roughly the same format as it was before and immediately after those times.

MS. SCHILLEREFF

Well I guess the hard part I have is trying to, you're saying that there is a gap here, but then we introduced someone here that was here after that gap and it was a proven use. He could tell you that he had the use there, and it's documented there on that same sheet, the paper I gave you.

HEARINGS OFFICER

I understand what you're telling me. What I'm telling you

MS. SCHILLEREFF

But why wasn't he, then why wasn't that use discontinued when he was there? You see, if that gap was a problem why wasn't that addressed back in '66 when Mr. Meifert got there?

HEARINGS OFFICER

Well, nobody raised it until last year. Now, in any event, we're getting, what will be extremely helpful to me is

MS. SCHILLEREFF

I guess the bottom line for me if I could, the one thing that I can relay for my husband and I, we've put our blood, sweat and tears into that place. Everything that we've ever wanted to do, it's kind of been our dream to have our own business and to be successful at that and I found we were.

MR. SCHILLEREFF

I just want to say one more thing, probably if anybody does know about the existence of that kennel it would be my uncle Red, and his 90th birthday is tomorrow. I really don't want to put him into this. And we did the same thing, when we were under Mr. Grillo and I felt that our decision swayed on that. I don't feel it's right to put him into this. This is stressful.

HEARINGS OFFICER

Well, the decision is yours and I am really interested in what happened in that time period, and all I can tell you, when it says, when this decision says the record is

MR. SCHILLEREFF
Well he was there, he knows that. That's all he, nobody is going to give you a record.

HEARINGS OFFICER

Maybe we ought to finish it off with this comment.

MR. SCHILLEREFF

Okay.

HEARINGS OFFICER

When he says the record is silent during this period, I can't do anything except be bound by that silence. I can't add anything. I can't surmise anything so if it's a mystery to you why we can't leap that chasm, it's just that I can't do it. And Mr. Grillo couldn't do it. And we've come to that point and if there is nothing there, there is nothing in the record. And that's sort of, that's the problem we've got. And that's why I'm interested in hearing if there is, you know, somebody can say, yeah, there was a kennel in operation during that time, it's only about a year period.

MR. SCHILLEREFF

That's all you're looking for him to say is that there was a kennel in operation during that time.

HEARINGS OFFICER

Well, somebody to say it. There is nothing, so far nobody has said anything.

MR. SCHILLEREFF

Okay, I'll sit with my uncle then and he'll talk about it. You'll have to speak loud if you have a question, he's real hard of hearing.

HEARINGS OFFICER

Okay. Can you give us your name?

MR. SCHILLEREFF

Tell them your name and your address.

MR. PERSINGER

Elden D. Persinger, 23200 NW Reeder Road.

HEARINGS OFFICER

What I'll do is, given the circumstances, you can ask him the pertinent question okay, rather than him having to deal with me. So you know what the pertinent questions are. If I have any questions I'll jump in.

MR. SCHILLEREFF

What they want to know is the history of the kennels. Were there always dogs in the kennels. And from what year did the kennel start?

MR. PERSINGER

Theres been dogs there, 3, 4, 5, dogs all the time.

HEARINGS OFFICER

When did you? What I would like to find out is his relationship with the kennels, when.

MR. SCHILLEREFF

How were you associated with the kennel, did you know these people that operated the kennel. Did you know the Scotchman?

MR. PERSINGER
Yes.

HEARINGS OFFICER

What time period?

MR. SCHILLEREFF

What, do you have any idea what year that was. Like '50, '55? Do you have any recollection of the year.

MR. PERSINGER

Not at that time

MR. SCHILLEREFF

Did you know Roy Wallace?

MR. PERSINGER

I met him.

MR. SCHILLEREFF

You farmed the property for him, is that what you did?

HEARINGS OFFICER

Okay, what would be really helpful is if he can recall what was going on in the early '60's, specifically '62 to '64.

MR. SCHILLEREFF

Do you remember when Blitz had the kennel? Do you remember Evelyn Blitz?

MR. PERSINGER

Yes.

MR. SCHILLEREFF

And the years that she was there, like from '62 to '64. Was that when she was there?

MR. PERSINGER

Longer than that.

HEARINGS OFFICER

Miss Blitz owned the kennel, she ran the kennel before 1962?

[end of tape three side one]

How many dogs were out there in the 50's or 60's?

MR. SCHILLEREFF

How many dogs would you say were out there in the late fifties, early sixties?

MR. PERSINGER

It was full.

HEARINGS OFFICER

What does that mean?

MR. SCHILLEREFF

At that time there was 32 kennels out there, they are the ones that made it...

HEARINGS OFFICER

32 kennel in the period of the 60's?

MR. SCHILLEREFF

There was 32 kennels in what years? What year was that?

MR. PERSINGER

I don't remember.

HEARINGS OFFICER

Does he know who Cortway (Pein) is?

MR. SCHILLEREFF

Did you know who Cortway (Pein) was? Bull dog guy?

MR. PERSINGER

He was a dog trainer.

HEARINGS OFFICER

I missed that, what did he say?

MR. SCHILLEREFFS

He was a dog trainer.

HEARINGS OFFICER

Was he familiar with Cortway (Pein)? Was it Mr. Pein...I was just looking at the decision, who was Pein, who is Pein . . .

MR. SCHILLEREFF

Do you know what Pein was, was it a person or? I don't.

HEARINGS OFFICER

Ask him if he remembers any transition in ownership between Blitz and Pein.

MR. SCHILLEREFF

Do you know any change at all in ownership between Blitz and Courtway?

MR. PERSINGER

...

MR. SCHILLEREFF

I'm not sure he understands.

HEARINGS OFFICER

I'm just interested in his recollection of the early 60's. Unfortunately you know, I can't make it any more specific.

MR. SCHILLEREFF

He's the bull dog guy.

MR. PERSINGER

Oh yeah...

MR. SCHILLEREFF

That's the Scotchman.

MR. PERSINGER

I was there during hunting season, see, I shot where Marquam Farms is now. For, well Pein had it, Dondo had it. It was built in '50. The barn in '50.

MR. SCHILLEREFF

Dondo was the adjoining neighbor.

HEARINGS OFFICER

Okay, was he hunting there in the '60's?

MR. SCHILLEREFF

Yes he just said he had hunted it since the 50s.

HEARINGS OFFICER

From what period?

MR. PERSINGER

Till about . . .

MR. SCHILLEREFF

He has an honorary membership, supposedly for life, from Marquam Farms, because of the works he's done for them.

HEARINGS OFFICER

But was he hunting there in the '60's?

MR. SCHILLEREFF

Yes. I know that for a fact.

MR. PERSINGER

Yes.

HEARINGS OFFICER

I need to know if he remembers a kennel being there in the early sixties.

MR. PERSINGER

Yes.

HEARINGS OFFICER

And what size?

MR. PERSINGER

I remember it when...

MR. SCHILLEREFF

What size was the kennel there?

MR. PERSINGER

It was as large as it is now.

MR. SCHILLEREFF

So, thirty-two kennels.

MR. PERSHINGER

That's right. When it started, let's see, he had I think about...show dogs...

HEARINGS OFFICER

Okay, well that's somewhat helpful. If you can get more specific fine, if not thats what we can do.

MR. SCHILLEREFF

Well I really don't know what else he can say.

HEARINGS OFFICER

Yeah.

MR. SCHILLEREFF

Because he's saying he saw it.

HEARINGS OFFICER

I know it's a long time ago.

MR. SCHILLEREFF

What year did you start hunting the duck club? Do you remember that?

FEMALE

About 1948.

MR. SCHILLEREFF

Okay, were you out there all the years, from 1948 until now duck hunting?

FEMALE

Yes.

HEARINGS OFFICER

Now wait, we want your name in the record.

MARGUERETTE PERSINGER

I'm Marguerette Persinger. Same address as Elden.

HEARINGS OFFICER

Okay. Well have a seat here. Why don't you pull the microphone over. Tell me what you know about the period between December '62 and February '64, and I know you probably can't remember those exact times.

MRS. PERSINGER

I know he hunted, and I took care of the moorage while he was hunting. I remember it well.

HEARINGS OFFICER

In those years? Is it that you can remember that time span or was this some time ago?

MRS. PERSINGER

He bought the moorage in 1948 and I don't know if he started hunting in '48 or '50, but he hunted every year after that. And not only that, he took care of the duck club, he took care of the land, he saw that it was tilled, it was planted.

HEARINGS OFFICER

Okay, were you ever in a position where you saw the kennel?

MRS. PERSINGER

Oh yeah, I saw the kennels.

HEARINGS OFFICER

Did you see them? You tell me who Blitz was.

MRS. PERSINGER

Well, Evelyn Blitz, I remember when she was running the kennel and she wasn't too happy about duck hunters being around there. She didn't particularly like to have Red hunting over there, but he hunted just the same.

HEARINGS OFFICER

Okay, now tell me who Pein is.

MRS. PERSINGER

I don't know that.

HEARINGS OFFICER

As you're coming to the time when Blitz ceased to operate the kennel.

MRS. PERSINGER

Well she sold it to, Myron bought it from Blitz I think.

HEARINGS OFFICER

When was that?

MRS. PERSINGER

When was it?

MALE

19... Courtway was the scotchman...

MRS. PERSINGER

Yeah, well I heard about it.

MALE

...

HEARINGS OFFICER

Okay, I guess what's helpful to me is did you see the kennels in this critical time period between December '62 and February '64?

MRS. PERSINGER

I certainly did.

HEARINGS OFFICER

How many were there? How many dogs would it hold?

MRS. PERSINGER

Well I didn't count them. I didn't know at the time but they tell me was 32.

HEARINGS OFFICER

Who told you it was 32?

MRS. PERSINGER

Myron.

HEARINGS OFFICER

So you saw the kennels.

MRS. PERSINGER

Yes.

HEARINGS OFFICER

And it wasn't because you were using them, it was because you were assisting duck hunters.

MRS. PERSINGER

Because Red was hunting there and he enjoyed the hunting and I was over there from time to time and after Pein* bought it from Dondo I was over there a lot.

HEARINGS OFFICER

Okay. Well unless you can be more specific, and I understand...so that's all I'm interested in. If that's it, that's it and that's fine.

MRS. PERSINGER

Well, the kennels were there in '62.

HEARINGS OFFICER

You saw them there.

MRS. PERSINGER

They were there much before that.

HEARINGS OFFICER

Well, all right, everybody agrees on that.

MRS. PERSINGER

And they were called Lone Tree Kennel. Lake Tree Kennel or Lone Tree Kennel, something like that.

HEARINGS OFFICER

Okay, well thank you. We're going to take about a fifteen minute break here. It's five till one on that clock. Let's reconvene at ten after.

[Recess]

Okay, we're back on record. Could I get the spelling of your last name while you're here?

MRS. PERSINGER

P E R SINGER. S I N G E R.

HEARINGS OFFICER

Oh, I did it right okay. Okay we're back on the record. Mrs. Persinger do you have any additional comments that

MRS. PERSINGER

Yeah, I think there is a couple of points that I want to make clear. One is, did you know the Scotchman?

MR. PERSINGER

Yes.

MRS. PERSINGER

Okay, tell him about him.

HEARINGS OFFICER

Tell me who the Scotchman is.

MRS. PERSINGER

He wanted to know when it was that you knew him, he said I was there when the Scotchman got pinched for hunting on the reserve...find out.

HEARINGS OFFICER

Who is the Scotchman?

MR. PERSINGER

He's the owner, the owner of the kennel. Either owner or he leased. Maybe he leased.

MRS. PERSINGER

Right. He want's his last name. Did you ever hear his last name?

MR. PERSINGER

No, oh wait a minute.

MRS. PERSINGER

Was it Pein?

MR. HALL

Could staff interfere? You have a letter in your file from... who indicates the Scots last name was Rose.

HEARINGS OFFICER

Oh, okay. That's one of the exhibits...

MR. SCHILLEREFF

One thing that I might say is I've never in all the time that I've been there I've heard a lot of different people...I never heard of Courtway or whatever... I've never heard of that. And the other thing is two, that kind of conflicted here is that it looks, it appears to us that Evelyn Blitz ran that kennel between '62 and '64, the time in question, not the Scotsman. Roy Wallace built that kennel, but he never did operate the kennel. Roy Wallace's kennel was out on Deer Island. And from the time Roy Wallace built that kennel he leased it to the Scotsman, but that was not in the time in question. Evelyn Blitz ran that kennel during that time. Is that right?

MR. PERSINGER

Right.

MR. SCHILLEREFF

So I don't . . .

HEARINGS OFFICER

Was that during the early '60's?

MR. SCHILLEREFF

During, yes . . .

MR. PERSINGER

There was another guy, I don't know what his name was, before Evelyn.

HEARINGS OFFICER

Well, we may have a problem between ownership and operation.

MR. SCHILLEREFF

Yeah, and that's true too because there may have been people running the kennel, although people may have owned it, there may have been different people running it. There is no way to find that out.

HEARINGS OFFICER

Okay, so what's the significance of the Scotsman? Why is he significant?

MR. SCHILLEREFF

The Scotsman is the one who originally ran that kennel from day one. Roy Wallace built it. Roy Wallace put it there.

HEARINGS OFFICER

Well the Scotsman ran it until . . .

MR. SCHILLEREFF

He rented the kennel and ran it until probably I would say 1960. Now that's a guess, but the time in question Evelyn Blitz ran it, between 1962 and '64.

MR. PERSINGER

...

MR. SCHILLEREFF

Well between the time in question.

MR. PERSINGER

Oh, yeah.

HEARINGS OFFICER

That's sort of repetitive for what the prior record seems to show... there's a fourteen month gap That's why I am. I know its really hard at this late date.

MR. SCHILLEREFF

Right.

MRS. PERSINGER

I want to ask him one more question.

HEARINGS OFFICER

Okay.

MRS. PERSINGER

All the time that you were hunting there, the kennel was there, were there dogs in the kennel?

MR. PERSINGER

Not the first year.

MR. SCHILLEREFF

You were there.

MR. PERSINGER

Yeah, I was there, 1950.

MR. SCHILLEREFF

Right.

MRS. PERSINGER

Were you there?

MR. SCHILLEREFF

The kennel was put there in about '54.

MR. PERSINGER

...built the barn in 1950, a pole shed.

HEARINGS OFFICER

Okay, so I understand that the kennels were always there.

MR. PERSINGER

The kennel was there then if I'm not . . .

HEARINGS OFFICER

But when did you last hunt there?

MR. PERSINGER

...

MR. SCHILLEREFF

When did you last hunt there?

MR. PERSINGER

About five years ago.

HEARINGS OFFICER

Five years ago?

MR. PERSINGER

When Marquam Farms traded men, they traded me too.

MRS. PERSINGER

And then their hunting went down hill and they blamed it on the dog kennel. But all the people that know, know the reason they had good hunting was because Red run the farm for them.

MR. PERSINGER

Well, here's the thing. I hunted down there when the Scotchman was there, and there was another young fellow had that, well I never got his name.

MR. SCHILLEREFF

That was probably just an operator, not the owner. The Scotsman is the one that owned the ...kennel.

MR. PERSINGER

Well...

HEARINGS OFFICER

Well, I don't want to cut you off but I think we sort of beat this one to death here.

MRS. PERSINGER

One more thing. He wanted to know if the kennel was there in '62, was there dogs in the kennel, was somebody running the dogs...

MR. PERSINGER

It was full...

HEARINGS OFFICER

Okay, thank you.

ERIC EISEMANN

Good afternoon.

HEARINGS OFFICER

Hi. Good afternoon. It is after noon.

ERIC EISEMANN

My name is Eric Eisemann. I work for Winterowd Planning Services.

HEARINGS OFFICER

How do you spell your last name?

MR. EISEMANN

My last name is spelled E I S E M A N N . I work for Winterowd Planning Services, 700 N. Hayden Island Drive. Suite number 385, Portland, 97217.

What I'd like to address is something that we touched on at the very beginning of the hearing. And I'd like to focus my comments very narrowly on that. And what I would like to try to accomplish for you is to show you and for the record that conditional use permit 23-90 and its relationship to the Hearings Officers decision, in DR 9-94, have a direct bearing on this case. And that they do provide an avenue to solve this case favorably for Tim and Angela Schillereff.

In DR 9-94 the Hearings Officer denied design review, and again this is not a design review application that is before us, this is a conditional use. It's a different type of an animal. But he denied design review without prejudice. And specifically the Hearings Officer said that if the Schillereffs were able to obtain a conditional use permit or otherwise establish the use as a lawful use, his decision in 9-94 should no way prejudice such an action. And that's found on page seven of the Hearings Officers decision.

HEARINGS OFFICER

Okay.

MR. EISEMANN

In addition, staff in its report on page ten, also indicates that if it is determined that the Planning Commission decision in CU 23-90 is valid, then we can consider this as a legally established dog kennel.

HEARINGS OFFICER

Where are you on page ten?

MR. EISEMANN

I'm on the second full paragraph, the sentence that begins: Therefore, unless the Hearings Officers decision in DR 4-94 is validated or it is determined that the Planning Commissions decision on CU 23-90 is valid, this application must be considered as requested...

What I'd like to do is demonstrate that in CU 23-90 the validity was established by looking at the record. By looking at the actual testimony. I've reviewed the tapes very carefully. I'd like to present some of the relevant sections of that here for your information.

As the Hearings Officer said in application DR 4-94. The Commission reviewed and approved, excuse me, let me back up. The Commission reviewed and approved a conditional use permit for the Schillereffs' application to place a watchman's residence next to the kennel area. In reviewing DR 4-94 the Hearings Officer properly found that because CU 23-90 was not appealed beyond the Planning Commission, in quote, is therefore a final decision, not subject to collateral attack. That's on page 8 of the Hearings Officers opinion. In fact, the Hearings Officer lacked, acknowledged that he, quote, lacked authority in this proceeding to determine the validity of 23-90. Again, this is the Hearings Officers decision DR 4-94 page 10. Therefore, the conclusions by the Hearings Officers admission in 1994 of 23-90 are fully in effect today.

Now what did 23-90 accomplish? And that's why we need to look at the testimony that was established. 23-90 represents the Schillereffs' application to establish a conditional use for a watchman's residence on the kennel property. Their application was approved in 1990, subject to conditions. Tim and Angela have met all of the applicable conditions, one of which is continuation and licensing of the primary use, the kennel. Now at the 1990 hearing, for Conditional Use 23-90, the public hearing before the Planning Commission, an opponent to that application, the Conditional Use application for the watchman's residence, Mr. John Maring, who identified himself as representing Marquam Farms, rose in opposition to the application. At that hearing in 1990, among other things, Mr. Maring raised the issue as to whether the underlying kennel use was a lawful non-conforming use. That's on Side A of the tapes of that hearing. In fact, what Mr. Maring did suggest, and he did raise at that time, is why there had never been a hearing on the underlying use of the property.

HEARINGS OFFICER

Who asked that?

MR. EISEMANN

Mr. Maring asked that question on side A of the tape. The staff at the end of the tapes on side B, after the record was closed and during the discussion of the Commissioners, the staff answered that question, why was there not a hearing on the underlying use? The answer, which I'll tell you in a moment, is that there wasn't a requirement for one, because of operation of .2028. So at the close of the public testimony . . .

HEARINGS OFFICER

Were you there?

MR. EISEMANN

No, I was not. Like I said, I reviewed the tapes.

HEARINGS OFFICER

You've listened to the tapes. Does anybody mention the word permit?

MR. EISEMANN

No.

HEARINGS OFFICER

That strikes me as odd. that no one said: Where is the permit?

MR. EISEMANN

Mr. Maring did say why hasn't anybody held a hearing on the underlying use.

HEARINGS OFFICER

And the response was?

MR. EISEMANN

Well, I can jump ahead, but the response, to quote staff from that hearing is that: there hasn't been a hearing, Commissioner Fry asked of staff, and the only reason there hasn't been a hearing on Mr. Maring question, is that when it was originally established, meaning the kennel, there was no requirement for a hearing? Staff Planner Hess. That's right there is no requirement for a hearing.

Okay, I'd like to take a little bit more time and just talk about that staff answer, because I find it fairly illuminating.

HEARINGS OFFICER

Now, what if staff were wrong?

MR. EISEMANN

Because the Commission adopted the Staff Report, adopted staff findings, closed the hearing. The hearing was reported to the Board and was acknowledged and was never appealed.

HEARINGS OFFICER

Did the Commission make a finding that there was a lawfully established Conditional Use or was it just an assumption?

MR. EISEMANN

I can't answer that. Commissioner Fry, questioning Mark Hess, the Planner, at that meeting at the close of public testimony

HEARINGS OFFICER

Well now, hold, okay. Again, I interrupt you only because I'll do that as things occur to me...Did the findings talk about it, because as we all know, at least land use lawyers and appellate lawyers, that what was said preceeding a decision doesn't really impact the resulting decision if there is a conflict or something is said and left out of a written decision...so I want to know what's in the written decision that deals with what we are talking about.

MR. EISEMANN

I have to answer that in two ways.

HEARINGS OFFICER

Okay.

MR. EISEMANN

The staff report, as staff testified at the hearing, was based upon their understanding of the County Code at that time, and the representation by the County Counsel as to what the effect of .2028 was. The staff then wrote its report based upon their understanding. The Commission then adopted staffs report. The second part of the answer to your question is that Commissioner Fry asked this question, quote, So basically, he's talking to Mr. Mark Hess, quote, basically your finding is that this is established as a conditional use, not a non-conforming use. End quote. Hess interrupted, That's correct. Staff testified, in effect that their report which underlies this whole issue, is based upon their assumption that there is a conditional use established on this property. The Commission then went on, later on, to adopt the staff report and the underlying in what I view assumptions on that report.

HEARINGS OFFICER

All right.

EISEMANN

Just to sort of, we've gotten to the highlight that I wanted to make, but I'll just finish up real briefly on this. Staff reported, this is the history of that decision, which is also on the tape. Staff reported that there had been discussion amongst the staff and between the staff and counsel as to whether the underlying use was a non-conforming use or a conditional use. Staff reported in the record that County Counsel advised and staff adopted as its position that .2028(b) operated to elevate the kennel, a lawful prior pre existing use, to a conforming conditional use status. Quote from Mr. Hess is that: At that conference, the pre-application conference, there was the interpretation of the pre-existing non-conforming use exemptions with EFU, which said that uses that are now called conditional in EFU, excuse me ...which says that uses that are now called conditional in EFU but which were non-conforming before are now conforming conditional uses. And I, insert now Mark Hess saying, have an opinion from my County Counsel which tells me that a conditional use, once it's been established by way of construction or building or whatever, that that use continues forever. And, so one of the staff members, Mr. Hall, who is my superior, took that interpretation. I took a different interpretation and he prevailed. End of quote. Again Mr. Hess is outlying the basis for his staff report.

Four years later in DR 4-94, Hearings Officer Grillo reached a different conclusion as to the legal effect of .2028(b), but that was as to a different application all together, an application for a design review, not an application for a conditional use permit. So once the underlying use was lawfullyestablished as a conditional use the staff concluded on advice of the counsel, the conditions of that use, the conditional use could not be terminated as a result of this continuance.

HEARINGS OFFICER

You know for me to accept that argument, I have to accept the proposition that you can have a lawfully, in the language of 2028(b) a legally established conditional use doesnt require a permit...

MR. EISEMANN

That was the opinion at the time.

HEARINGS OFFICER

Now tell me how you can do that. How can you have a legally established conditional use with no permit when the ordinances plainly require you to have a permit to have a conditional use?

MR. EISEMANN

The answer to that is in the words of staff planner at the time, Mark Hess. Because Commissioner, I think it was Commissioner Fry again was asking this question, why, in response to Mr. Maring's question, why wasn't there a hearing on this thing, getting to your point, where is the permit. And the quote is, from planner Hess, is that, well excuse me, Commissioner Fry says, quote, And the only reason that there hasn't been a hearing, is that when it was originally established there was no requirement for a permit. And the answer is yes, that's correct. The reason is that Mark Hess is relying upon an interpretation of County Counsel of .2028(b) that says that a conditional use can be deemed a conforming conditional use. And that there there is no process in the County Code for procedure. There's no procedure that has been set up for that to happen.

HEARINGS OFFICER

Let me ask you this, and tell me if its outside your real or comfort level here, let's assume that in 1958 there is a club, I can't remember the exact date...on a particular day, yesterday, I'm running a kennel, today the County passes a zoning ordinance that makes kennels a conditional use, do I have a legally established use today even though I haven't applied for a permit.

MR. EISEMANN

I think there's a parallel in .2028(b) right now and that is if because you're hypothetical doesn't establish a process, it simply says we deem it by operation of the statue...to be a conditional use, therefore it is.

HEARINGS OFFICER

Okay, well the only logical impediment to that argument that I can see at some point in the future is that, if the County adopts a Zoning Ordinance in 1958 that says kennels are a conditional use, regardless of where they are, and if on that day I have a kennel that's been there and it's of course a type of permitted conditional use, but I don't have a permit for it, you say I don't need a permit on today zoning occurs... if its a legally established conditional use today, without a permit that I would never need to get a permit. That's the logical extension of what you're saying and that's the problem. So tell me why I shouldn't be concerned with it.

MR. EISEMANN

I think it was a good observation on your part and it's parallel to exactly what the Planning Commission members were wrestling with on November 6th, 1990. Listen to the tape. There is a question from a Planning Commission member, and I don't know the name,...I suspect it was Commissioner Smith, I'm not sure, which raised the question, Isn't there a way for us to

determine this ...conditional use if it discontinues. Isn't there some other way we can get a handle on this if what you're saying is true. And staffs response was that: We thought about that, right now there is no way but we're looking into the possibility of amending the County Code, when they do that I think someone said within the next year to address that problem but at present there is no mechanism.

HEARINGS OFFICER

You said these discussions all took place in the tape of the 1990 hearing?

MR. EISEMANN

That's correct. On my tape recorder, I would encourage you to look at side B, tape length 375 to 500. Well, it's my point

HEARINGS OFFICER

Did anybody transcribe that tape?

MR. EISEMANN

I did, for my own use.

MR. HALL

I've got the tape.

HEARINGS OFFICER

Okay. ...

MR. EISEMANN

No, that's fine. That's okay. So again, back to the question that you were just asking me, and we seem to be cracking kernels again, it was the staff's opinion, in the final opinion that was reflected in the staff report in the public testimony and adopted by the Planning Commission that the kennel was quote, A well established operation. That's on page 8 of the CU decision of 1990. In fact, both staff and Mr. Maring agreed at that hearing that the kennels, although they agreed in separate conversations, that the kennel was established some time during the 1950's. That's on side A. Whether the use was intermittent or continuous was immaterial once the validity of the use was established, per the advice of County Counsel. And so once established, the use could not be discontinued by operation of law. As I said earlier Commissioner Fry raised the question explicitly, which had been introduced by Mr. Maring from Marquam Farms, about the illegality of the underlying use. And again, let me

remind to, Mr. Fry, Commissioner Fry's comment or question was, quote, So basically, according to Mark Hess, your finding is that this is established as a conditional use, not a non-conforming use. Mark Hess, correct. Fry, and the only reason that there hasn't been a hearing is that when it was originally established there was no requirement for a hearing? Hess: correct. Fry: okay, that in my mind solves the problem. End of quote. Side B, about 400 on the tape.

HEARINGS OFFICER

Okay, well I'm going to have to listen to this tape but I understand you to put most of your eggs in a basket . . . or remains valid. And what I hear you saying is if that decision is valid and all this is sort of academic.

MR. EISEMANN

Yes, in some ways that's what I'm saying. I'm saying 23-90 is valid. Hearings Officer Grillo acknowledges that, because he said that he did not have the authority to overturn that. And in fact he did not.

HEARINGS OFFICER

Okay. 23-90 did not seek conditional use designation for the kennel.

MR. EISEMANN

Initially the application was filed for a conditional use permit. Staff, for a underlying conditional use, staff turned and said because you're trying to expand a well established underlying use, you don't want to go for a conditional use application. And, in fact that's what they did. Staff then interpreted 2028(b) to say that it had been deemed a conforming use. That's what Mark Hess based his staff report upon, and that report was adopted by the Planning Commission, and that finding...Therefore an answer to your question is yes all of those things are true. What we're trying to do though is to show that Hearings Officer Grillo and staff are both recognizing that there is a way to solve this problem. If there is a way, one of the ways is to establish that the non-conforming use was not discontinued, and I believe that the person or persons have done that now at this hearing. The second way is to show that there is another lawful use, 23-90 establishes the use lawful. And, that use runs indefinitely. So from our point of view, in approving the conditional use permit for the watchman's residence, the Planning Commission addressed the issue of validity that was raised by the opponent and decided that issue once and for all. And, therefore that has not been challenged, we now have a way to establish a permitted use.

HEARINGS OFFICER

I understand all that. Staggering.

MR. EISEMANN

Staggering. Thank you.

HEARINGS OFFICER

Thank you.

GREG WINTEROWD

My name is Greg Winterowd. I am the President of Winterowd Planning Services. I have a great deal to do with these staff reports, with the application sent in to you. Our address in 700 N. Hayden Island Drive, Portland, 97217.

I'd like to take a moment to qualify myself. For the record I have been planning in Oregon for twenty years. I've been Planning Director for six years. I worked at LCDC reviewing plans for five years. I've been in private practice for about four years now. I worked the City of Ashland also. I have processed and prepared hundreds of conditional use permits in my life and while at the State of Oregon and in my private practice I've reviewed virtually every code in the State of Oregon.

What the County did, I'd like to first begin to amplify what Ed has talked about. What the County is clearly trying to do in adding a section deals with basically legitimizing pre-existing conditional uses. If they wanted to avoid exactly the kind of procedure that we're going through today, having to go through and ask people what they remember twenty years ago, because it's at best a torturous process. They wanted to legitimize a whole series of pre-existing conditional uses without having to go through a new conditional use permit. An example that comes readily to mind is churches. Churches are universally allowed in low density residential, medium density residential zones, agricultural zones as conditional uses.

HEARINGS OFFICER

Okay. Let's stop right here. I understand that you are of the opinion that .2028(b), when it talks about listed uses so long as a conditional use is listed they don't have to get a permit for it?

MR. WINTEROWD

Exactly. And that's an unusual provision, but also a provision that I wrote into a code for a city in the State of Washington, this year, exactly to deal with this problem. With all respect to the County I wrote it more artfully, because there is a contradictory section, says you got to go get a permit, for what that means.

HEARINGS OFFICER

There's a section in here...

MR. WINTEROWD

That's right. And so, and I think LUBA has looked . . .

HEARINGS OFFICER

How do you read those two together?

MR. WINTEROWD

When they contradict, that's unfortunate.

HEARINGS OFFICER

...maybe they are read together.

MR. WINTEROWD

If they are read together, one says you have to go through the permit process that you've talked about, the other says you don't. The other says you just exist and that's fine, as if you were a permitted outright use. If they don't conflict in your mind that's great. Let's say they do conflict in your mind, you still have the authority to say we have conflicting provisions. We can interpret them in a way that

HEARINGS OFFICER

It's this word legally that gets me. Conditional uses versus legal uses. If it's been established...to get to where you want to go, and I'm not saying...legally...

MR. WINTEROWD

If I may . . .

HEARINGS OFFICER

What's your view. . . legally...

MR. WINTEROWD

Legally, at the time this kennel was established in the early '50's, it was legally established. What the provision .2028 gets rid of, is it gets rid of the requirement to show that it was used continuously. It takes us completely out of the realm of non-conforming use law, that's what its specific intent was to do.

HEARINGS OFFICER

...

MR. WINTEROWD

Because I've written ordinances like that and I've also talked with Bob Hall.

HEARINGS OFFICER

I say that semi-seriously.

MR. WINTEROWD

I say that as someone who has looked at a lot of codes over the years, and why else would it be there? And also the meaning of it, the only possible meaning it can have is that it gives you automatic legal status for previously existing uses that are listed as conditional uses. Take an analogy, permitted outright uses, the Code changes. In the old days they site a church as a conditional use, they change the code and make it a permitted use.

HEARINGS OFFICER

I understand what you're saying. I understand both sides of the argument totally. It's just . .

MR. WINTEROWD

The question in my mind, what else could it be?

HEARINGS OFFICER

...

MR. WINTEROWD

Which means it would have no effect at all. It would be absolutely meaningless. You created a null step with this interpretation. And we're not arguing that interpretation of '94, but we are arguing it in 1990. Do you see what I'm saying, why I said a null step.

HEARINGS OFFICER

Well yeah.

MR. WINTEROWD

Okay. So to me this is again using

HEARINGS OFFICER

Hearings Officers would like to feel their decisions have some finality.

MR. WINTEROWD

And, in that sense too...we've talked a lot about this. If somehow the effect of Grillo's, Hearings Officer Grillo's decision had some lasting judicial effect, then clearly by the same terms that...might apply to Grillo's. It certainly applied in 1990...Commission. But you can't have it both ways. You can't say that my decision is final in 1994, but the 1990 decision which clearly addresses the same issues, same...as Mr. Maring objected.

HEARINGS OFFICER

Well I think Mr. Grillo's decision said that the watchman's residence is not salable.

MR. WINTEROWD

Yes. And I would argue this one through planning logic, which is not law, but how can you possibly

HEARINGS OFFICER

They are unrelated you know.

MR. WINTEROWD

I won't argue that point, but how could you possibly have an accessory use when there is no primary use. That's basic planning.

HEARINGS OFFICER

I know. I understand that...

MR. WINTEROWD

So it seems, we'll leave that issue where it sits.

Now what I'd like to do is spend some time addressing impacts which were...law. What I'd like to do is hand to you something that's already in the record, it's in the application. Just a map of the existing plans and the opposed plans. The application was put together with the Schillereffs with the clear intention of minimizing or to the point of insignificance, any possible impact on any neighborhood.

We did, as required by law, create an impact area based on possible sounds and we have documentation on how far sound from the kennel, dogs barking... how far away it is. We drew the impact line based on that. We surveyed every surrounding property, crops grown, the agricultural methods as required by law. As the record shows the people who actually do farm in the area, all not some, but all support this application. Barking dogs has no adverse impact on surrounding property. We've established that the Schillereffs are excellent managers of dog kennels, the dogs don't escape to chase somebody's chickens or cows. They are retained in the facility. We established that contrary, and I emphasize contrary to what the Marings were arguing, is that this kennel has no adverse effect, in fact on their hunting operation. And that's why we had, that was the only argument that they really had, was somehow we're putting them out of business by having a dog kennel. And yet expert after expert, veterinarian, hunters, managers of other dog kennels on the island say the dogs don't scare away the ducks. What scares away the ducks is overuse of the facility.

If you look for specific design improvements that we're making to the kennel, where once there was open areas that faced to the East, Southeast toward the Marring property there are no open spaces. There is now a ...closed solid wall separating the dogs from the, look at the proposed site plan. The solid wall separating where the dogs are maintained and held from the adjoining property. There is also, they are more covered by roofs, the facility will be integrated so you don't have to take dogs in and out of one side to another, so that dogs are not exposed to sights and sounds that might cause them to bark. The 75 dogs versus 50 dogs, which I think has been more than mitigated, that increase, by the fact that when people drive into the facility, that's when dogs bark. If the dogs cannot see the people driving in and don't watch them getting out their cars, they are much more likely to bark. And this is based on Tim's and Angela's comments to me, and I believe that they know what they are talking about. The tree cover is all being retained. Additional landscaping is being installed so that the use is virtually invisible from the outside. The parking lot is being arranged in a manner that means the people don't have to stop, get out of their car, ask what's going on, park,...two opportunities. Now the dogs will bark, now they'll be directed to where to go, they'll have plenty of back up space. There will be one single entrance to the facility which minimizes dogs contact with people which is what causes them to bark. Everything that we have done in this facility we believe minimizes the impacts on the Marquam operation. And we believe there are no impacts on agricultural lands.

It's chiefly interesting that we are not proposing to take one square foot of agricultural land out of production to make this operation work. It is simply redesigning the project on where it is currently built. The irony is that the administrative rule that the Marquams relied so heavily

on, that says you can't do a new conditional use, which we don't believe we need a new conditional use. That Administrative Rule is intended to preserve agricultural land, this use has no impact on agricultural land, not a square foot of agricultural land. I'd also note that the record of 1990, Mr. Maring in his testimony said the land couldn't be farmed. I think they are clearly talking out of both sides of their mouths, when you're talking about preservation of ag land and the added impact of this on preservation of ag land which will have no impact. And everyone here has acknowledged that today including the staff report.

We went through every policy in the Comprehensive Plan.

HEARINGS OFFICER

Okay, hold on a second. On that point, on page eleven of the staff report, there are two...pages 22 and 40 that said the applicant provided no . . .

end of tape three

What you are saying on that...page 4 of the supplemental report...

MR. WINTEROWD

They are only marginally applicable in my judgment. They didn't apply in staffs...We also note for the record that for every conditional use standard, staff agrees...analysis and believes that we adequately addressed the criteria. In particular, there are no adverse effects on agriculture, we are minimizing or reducing impacts on surrounding properties. And that this use is very valuable to the County...especially. For example, if you don't have kennels in Sauvie Island, in the country, close to UGB where people live, where do you have them? You either have them farther out or you have them in areas that are much more likely to adversely effect the people who live around them. So we think that...applicable approval criteria.

HEARINGS OFFICER

Let me ask you this. Non-conforming use issues, assuming that you...

MR. WINTEROWD

Okay, ORS 215.130(7) Any use described in subsection 5, which is non-conforming use, may not be resumed after a period of interruption. What Phil Grillo said was there must be a period of interruption. You can't call it... you can't call it anything else. Unless the resumed use conforms with the requirements of the Zoning Ordinances or regulations applicable at the time of the resumption.

HEARINGS OFFICER

Can you in your opinion revive a lost non-conforming use...

MR. WINTEROWD

Normally, no.

HEARINGS OFFICER

Can you issue a permit?

MR. WINTEROWD

Normally you would have to pick some form of County authorization to do so, which in our position in 1990 we had repeated County authorizations that basically said this use now exists in some form or another. Normally you'd have to go through a special process which we're attempting to do now to clarify the issue, to show that you resumed your non-conforming use...

HEARINGS OFFICER

Can you ever resume I guess a non-conforming use or doesn't it really have to become something else?

MR. WINTEROWD

We argue I think two... One is certainly did not resumenon-conforming use or as a previously approved conditional use...

HEARINGS OFFICER

I'll agree with you there. Okay. Anything else?

MR. WINTEROWD

We did, in this proposal address criteria in the code...expansion of an existing non-conforming use which are different from those for a conditional use. And we believe that we have demonstrated well, and no evidence exists to my knowledge which contraverts our testimony that...also. They basically say do we have no greater impact on expansion on surrounding properties...Does the Hearings Officer have any questions about any of the facts we presented?

HEARINGS OFFICER

Nothing comes to mind...

MR. SULLIVAN

...

HEARINGS OFFICER

Okay, anybody want to speak in opposition? Well I guess we don't need any rebuttal then. I have not received since the new information has come in, any request from anyone to continue the matter. I'm not going to for that reason. The hearing will be closed according to the time frame that I set up in the outset. I'm going to give the proponents until next Wednesday to submit anything further. I'm going to permit the opponents two weeks to respond to both matters submitted today and anything within the next week and then proponents will have until I believe it will be September 6th, three weeks from today to respond to whatever the opponents submit. I really don't want to see anything new, last minute stuff nobody thought of, and I will have a written decision within ten days from September 6th.

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE MORRISON STREET
PORTLAND, OREGON 97214 (503) 248-3043

Decision

This Report consists of a Recommended Decision, Findings of Fact, and Conclusions

November 6, 1990

CU 23-90, #22 and #23 **Conditional Use Request**
(Watchman's Residence for Dog Kennel)

Applicant requests conditional use approval to add a watchman's residence to an existing dog kennel. Tim and Angela Schillereff (the kennel operators) request approval to place an 1800 square foot manufactured house on the site in order to oversee the security and well-being of the dogs housed in the kennel and provide security for the kennel buildings and equipment.

Location: 23200 NW Reeder Road.

Legal: Tax Lot '15', Section 3, 2N-1W, 1990 Assessor's Map

Site Size: 9.41 Acres

Size Requested: Same

_____ Notices
8 Decision Notices
mailed on 11-14-90
by M.B

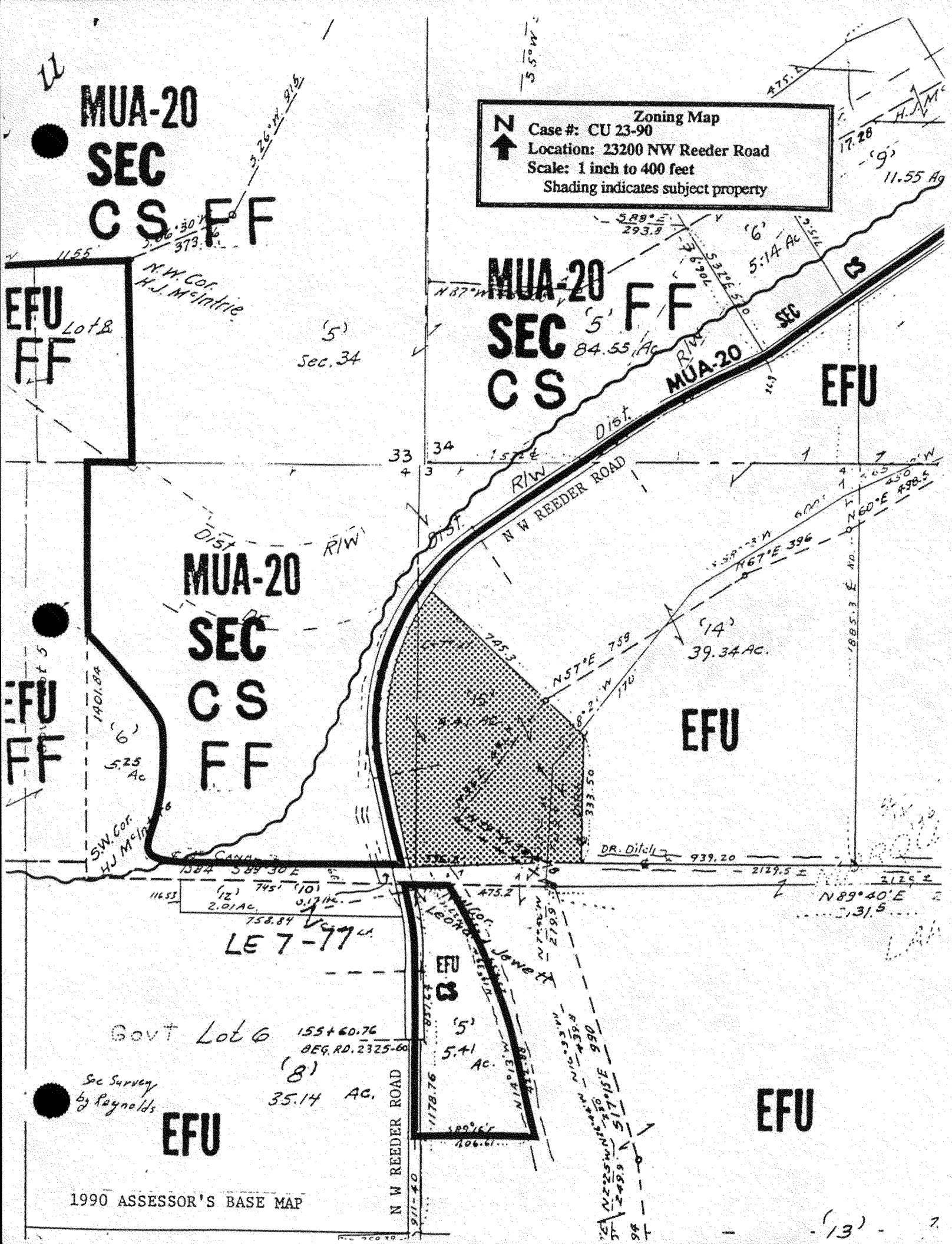
Property Owner: EE and MF Persinger
23200 NW Reeder Road, 97231

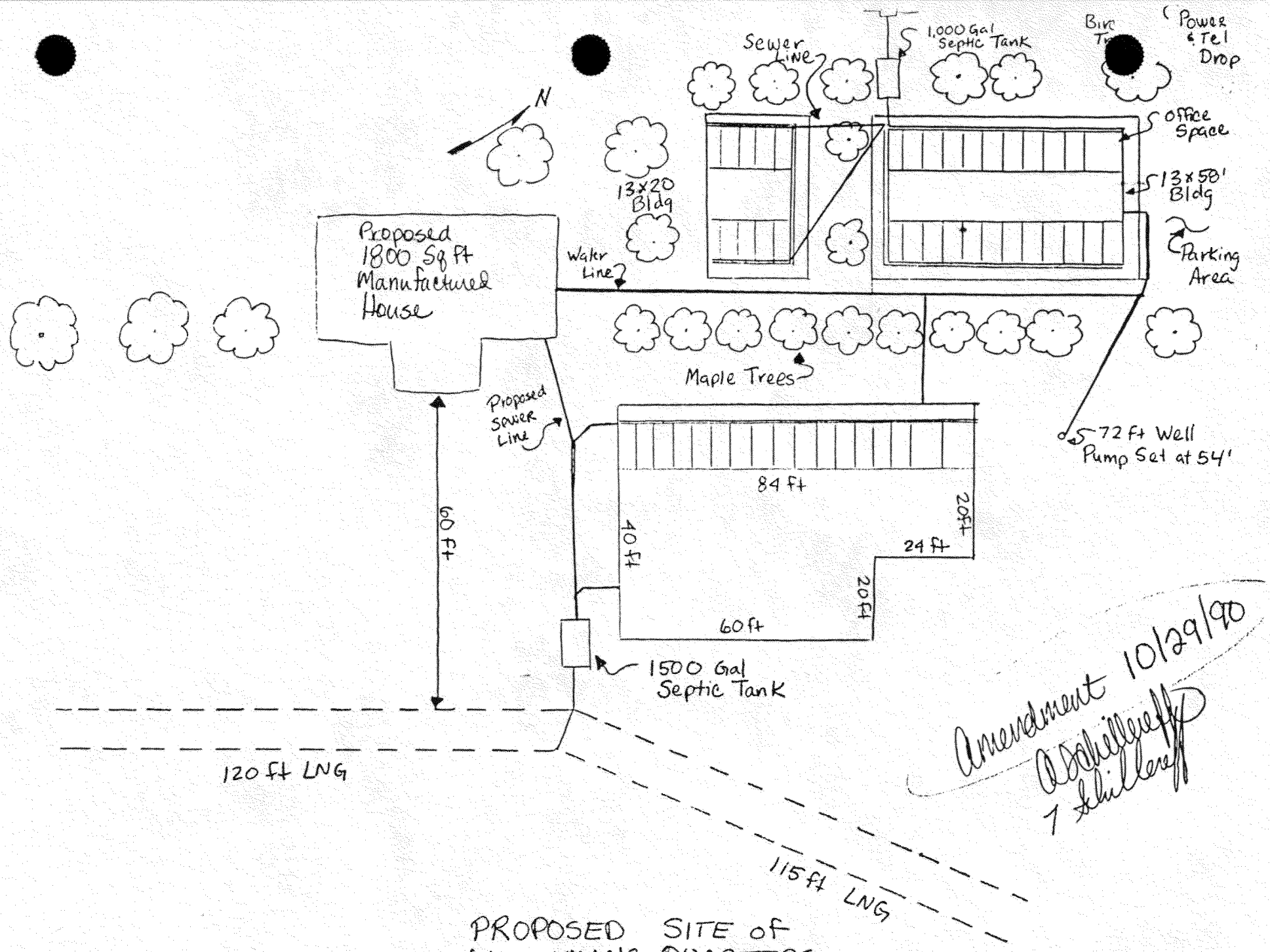
Applicant: Tim and Angela Schillereff
18149 NW Sauvie Island Road, 97231

Comprehensive Plan: Exclusive Farm Use

Present Zoning: EFU, Exclusive Farm Use District

PLANNING COMMISSION DECISION: **Approve, subject to conditions,** the requested watchman's residence based on the following Findings and Conclusions.


Zoning Map
Case #: CU 23-90
Location: 23200 NW Reeder Road
Scale: 1 inch to 400 feet
Shading indicates subject property
N
MUA-20
SEC
C S
F F
EFU
Lot 8
FF
MUA-20
SEC
C S
F F
EFU
MUA-20
SEC
C S
F F
EFU
EFU
EFU
EFU
EFU
N.W. Cor. H.J. McIntire
S.W. Cor. HJ McIntire
Sec. 34
33
34
NW REEDER ROAD
R/W
Dist.
MUA-20
SEC
(5)
84.55 Ac
(6)
5.14 Ac
(9)
11.55 Ac
(14)
39.34 Ac.
(6)
5.25 Ac
(12)
2.01 Ac.
(10)
0.13 Ac.
(8)
35.14 Ac.
(5)
5.41 Ac.
Govt Lot 6
155+60.76
BEG. RD. 2325-60
LE 7-77
See Survey by Reynolds
1990 ASSESSOR'S BASE MAP



PROPOSED SITE of
WATCHMANS QUARTERS
Scale 1" = 30'-0"

CU 23-90

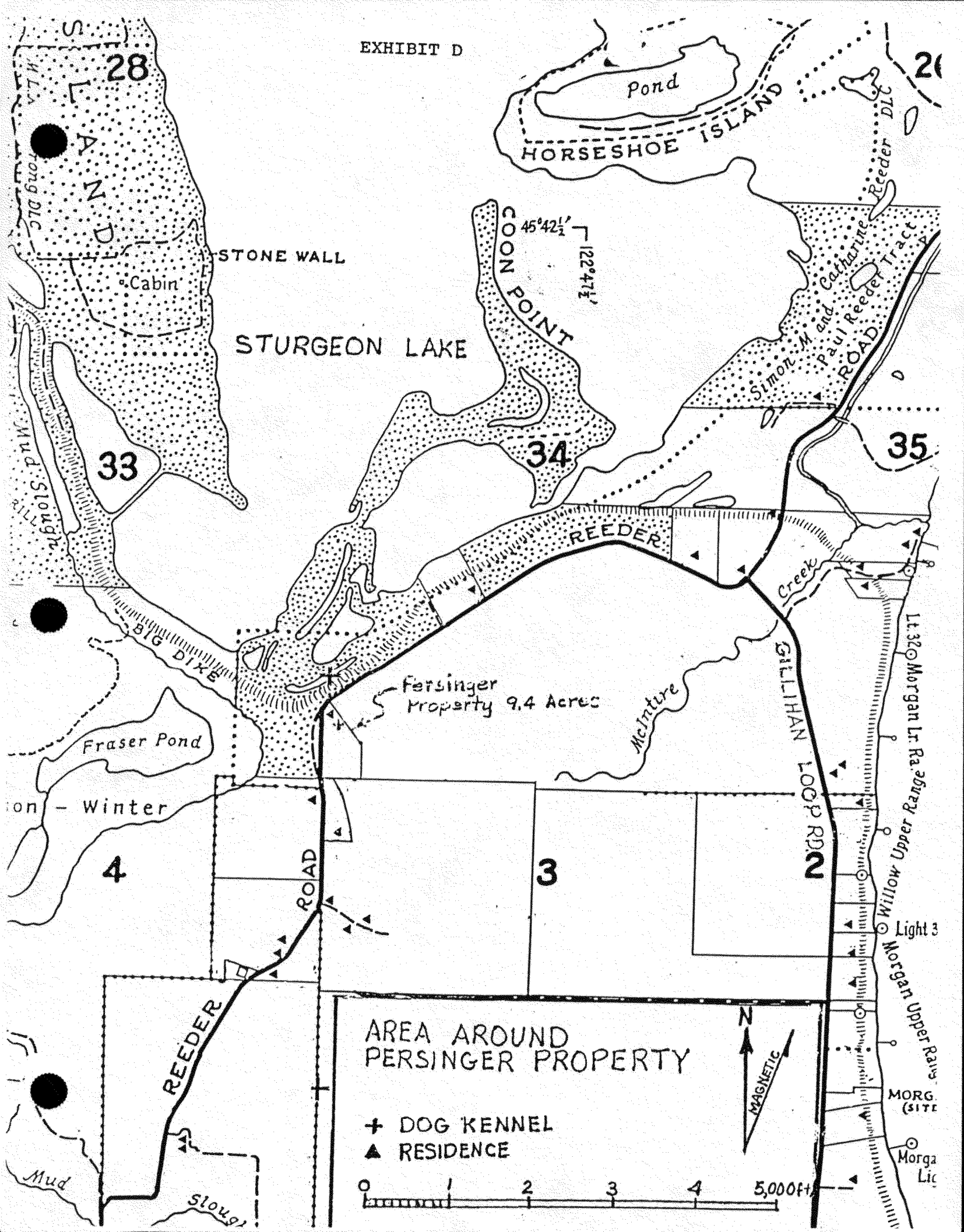
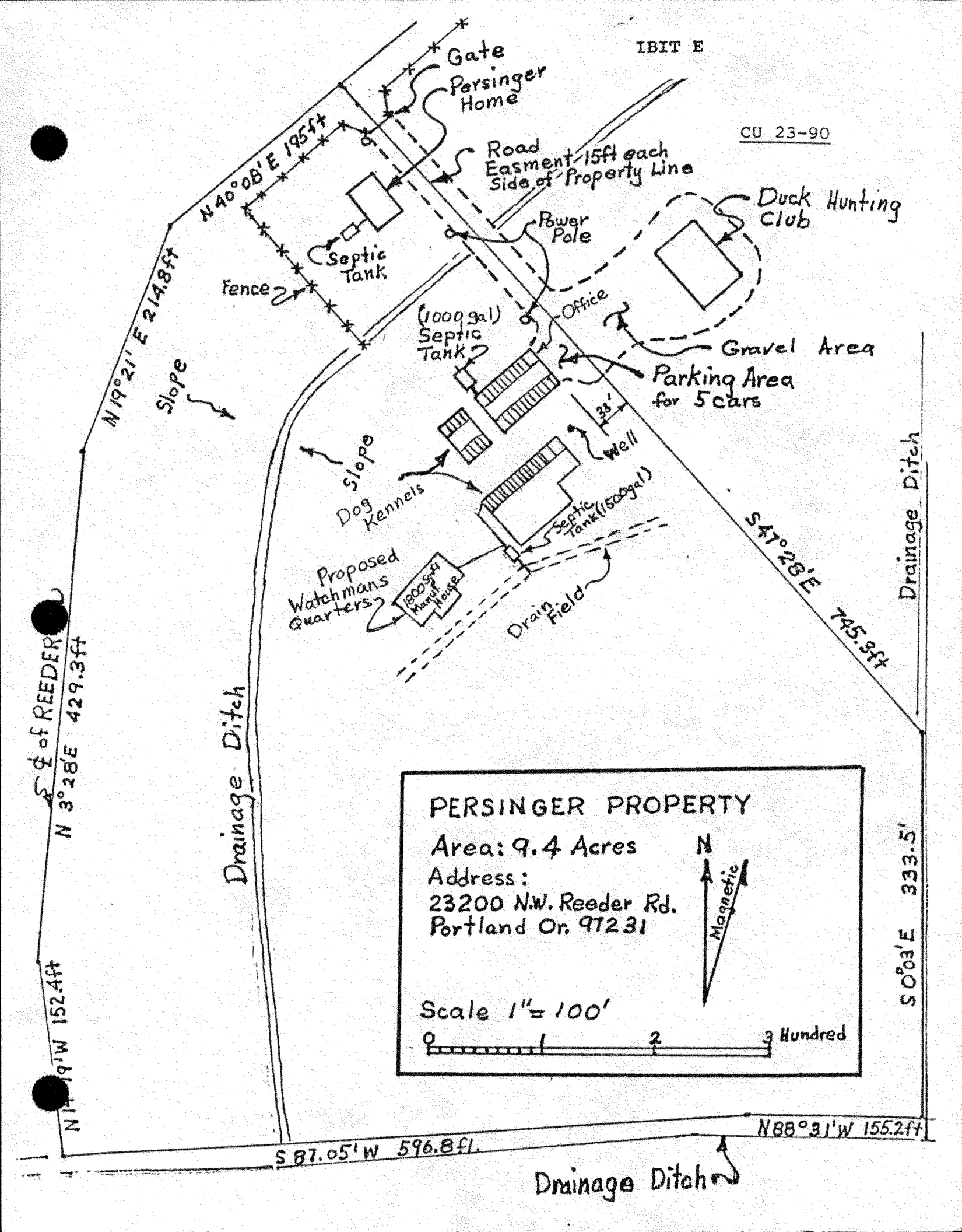


EXHIBIT D
28
ISLAND
Pond
HORSESHOE ISLAND
Reeder DLC
Long DLC
STONE WALL
Cabin
COON POINT
45°42½'
122°47½'
STURGEON LAKE
Simon M and Paul Reeder Tract
Catharine
ROAD
33
34
35
Mud Slough
REEDER
Creek
BIG DIKE
Persinger Property 9.4 Acres
McIntire
GILLIHAN LOOP RD.
Lt 32 Morgan Lr Range
Fraser Pond
on - Winter
4
ROAD
3
2
Willow Upper Range
Light 3
Morgan Upper Rang
REEDER
AREA AROUND PERSINGER PROPERTY
N
MAGNETIC
DOG KENNEL
RESIDENCE
0 1 2 3 4 5,000 Ft.
Mud
Slough

IBIT E

CU 23-90



Conditions of App. /al

1. Obtain Design Review approval prior to issuance of a placement permit for the new house. Complete Design Review requirements prior to occupancy of the house.

2. Obtain permits and install the subsurface disposal system prior to occupancy of the residence.

3. This approval terminates — and one of the two residences shall be removed from the property — if the property ceases to be licensed and used as a kennel, or within six (6) months after the Persingers' life estate interests cease, whichever occurs first.

4. The watchman's residence shall be placed as shown on the applicant's revised site plan, dated October 29, 1990.

Findings of Fact:

1. Proposal Summary:

The applicant requests permission to add a watchman's residence to an existing kennel facility at 23200 NW Reeder Road. The house would be an 1800 square foot manufactured home. Applicant provides the following description of the request.

"Detailed Request Description:

The use of this watchman residence will be of the nature of overseeing the security and well-being of the kennel operation during and after business hours. Since we are a breeding, boarding and training kennel, we feel the use is necessary for three reasons:

First, as a professional breeder of English Pointers, we plan in our breeding program to have three litters of pups a year. With a watchman residence nearby we could check on our litters and dogs throughout the day and night. For example, last October, one of our pregnant brood bitches was having severe labor difficulties, requiring us to be with her throughout her delivery. Having the watchman residence close by the whelping areas would enable us to keep an eye on such things.

Second, as a professional boarding kennel, we receive pets of all sizes and all ages for our care. Some require medication, and even medical attention during their stay with us. Thus, the watchman residence would allow us to oversee the boarding operation in the best manner possible.

Third, as a ,essional trainer, we frequently take tl. aining dogs and their owners to outside training grounds in the course of their learning. For example, in training retrievers one must teach the dog to swim and to retrieve from the water. We have brought our dogs down to the West End game management area to work in the lakes and ponds there. Therefore, when the trainer is gone training during business hours, the watchman would oversee the kennel operation (answer the phone, help customers, care of animals, clean their pens, and maintain the security of the premises.)"

2. Site and Vicinity Information:

The 9.41 acre site is within an EFU district on Sauvie Island. The property fronts onto NW Reeder Road. The "Sauvie Island Kennels" facility license authorizes boarding of up to 50 dogs; this request (for the residence) would not increase the capacity of the kennel. An existing residence on the site was built in 1942. It houses Mr. and Mrs. Persinger, the property owners since 1973. The Schillereffs –the kennel owner/operators – are leasing the property, with an option to purchase. The lease/option contract provides that Mr. or Mrs. Persinger may reside in the existing house for the rest of their lives.

Surrounding properties are primarily agricultural or natural in character. A duck hunting club operates on a 39-acre property east and north of the Persinger's site. The club site contains a barn and a small parking area. Most of the duck club's site is open crop land with some wetland/riparian wooded areas in low areas and along drainageways.

Properties to the south and southwest are generally flat, open field and crop lands with scattered farm houses and barns. A few large trees are located near the houses and along stream bank–riparian corridors.

The Sturgeon Lake Wildlife Refuge property to the northwest (across Reeder Road) is owned by the Oregon Department of Fish and Wildlife. The refuge is a several thousand acre natural area characterized by wetlands, a large shallow lake, and riparian woods. A grass covered dike separates the refuge from Reeder Road and the subject site.

3. Zoning and Comprehensive Plan Designations.

The plan designation of the site is Agriculture. The zoning is EFU, Exclusive Farm Use.

4. Ordinance Considerations:

Conditional uses allowed in EFU areas are specified in MCC 11.15.2012. Subsection (B)(11) specifies ***"Dog Kennels"***, and MCC .2014(E) provides for structures or uses *customarily* accessory to a dog kennel. Such uses may be permitted when found to satisfy *Conditional Use Approval Criteria* in MCC .7105 – .7640.

Applicant requ , that the Commission determine a v hman's residence is a customarily provided accessory use for a kennel.

*"We feel the watchman residence is of the nature in which its' **'uses or structures incidental and accessory to the uses permitted under MCC .2012 (B)(ll).'** Cited from the Exclusive Farm Use section page 3-5. With the provision (E) **'Other structures or uses customarily incidental to any use permitted or approved in this district'** allowing for a structure such as a watchman residence to be permitted in this manner."*

The following section presents findings regarding the proposed Conditional Use; the applicable standard is in ***bold italics***, applicant's responses are presented first in *italics*, followed by staff comments.

A. Conditional Use Criteria (MCC .7120)

A(1) Is consistent with the character of the area;

"A watchman residence to oversee the security and well-being of all the kennel animals and the kennel buildings and equipment is an accessory use to the well-established kennel operation. Therefore such an expansion would be consistent with the character of the land.

In looking at a few of the other kennel operations on and around Sauvie Island, you can see that they too, have a watchman residence for the business. Here is a list of several:

On Sauvie Island-

Blackthorn Kennels- now inactive, yet had a watchman residence when it was an active kennel operation.
Charlton Kennels- active with a watchman res.
Minoggie Kennels- active with a watchman res.

Outside Sauvie Island-

Green Acres Kennels- active with a watchman res.
Meifert Kennels- active with a watchman res.
Rock Creek Kennels- active with a watchman res.
Twin Willows Kennels- active with several watchman residences.

You can see the need is consistent throughout the Portland area, not only for Sauvie Island.

The following describes similar uses on the adjacent properties:

The area adjacent to the northeast is owned and operated by Marquam Farms, Inc., a multi-partner hunting club, used exclusively for the hunting of ducks and geese during the waterfowl season, and the maintenance of such. (Please see Exhibit C and D.) Both the duck hunting club and the kennel operations would benefit from a watchman's residence to oversee the security of the properties and buildings. This would be a compatible use to the duck club.

The area adjacent to the northwest is owned and operated by the Oregon Department of Fish and Wildlife. It is part of the Sturgeon Lake wildlife refuge area on Sauvie Island. (Please see Exhibit C.)

The area adjacent to the south is rural farmland, the property line is bounded by a drainage ditch. Our neighbors to the south operate a dairy farm and also maintain several watchman residences to oversee their operations. Therefore this would be a compatible use as well."

Staff Comment: Applicant's above findings demonstrate that watchman's residences are *customarily* provided in conjunction with kennel operations. The addition of a watchman's house to an existing kennel is not inconsistent with nearby agricultural lands, wildlife conservation lands, or rural residential uses.

A(2) Will not adversely affect natural resources;

"There are no unforeseen adverse affects on the natural resources."

Staff Comment: Condition #2 requires installation of a subsurface disposal system for the new residence. This will insure against any potential adverse effects to water quality. No other natural resource effects from the watchman's residence have been identified.

A(3) Will not conflict with farm or forest uses in the area;

"The use is consistent with the farm and forest uses in the area and thereby will not conflict. The watchman residence is an accessory use to the established kennel operation."

Staff Comment: Staff concurs that the proposal's effects on farm or forest uses in the area are negligible.

A(4) Will not require public services other than those existing or programmed for the area;

"Current p. .c services such as electricity, telepho ınd etc... are already programmed."

Staff Comments:

a. **Water Supply.**
The site is supplied water through a private well.

b. **Sewage Disposal.**
Sewage would be disposed through an on-site septic system. Condition #2 requires installation of a sub-surface disposal system for the house.

A(5) 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 will be acceptable;

Staff Comment: The site is not identified as a big game habitat area in the Comprehensive Plan or by the Oregon Department of Fish and Wildlife.

A(6) Will not create hazardous conditions;

"There are no unforeseen hazardous conditions."

Staff Comment: This and surrounding properties on this part of Sauvie Island are protected from flood hazards by a dike structure maintained by the U.S. Army Corps of Engineers. The site is not designated a Flood Hazard or Flood Fringe area by the County.

A(7) Will satisfy the applicable policies of the Comprehensive Plan.

The following policies of the County's Comprehensive Plan are found applicable to this request: Policy 9 (Agricultural Lands), Policy 13 (Air, Water and Noise Quality), Policy 14 (Development Limitations).

a. **Policy 9 – Agricultural Lands.**

"The Comprehensive Plan wishes to maintain the agricultural uses or conditional uses in the EFU areas as permitted in ORS 215.213. The watchman residence would exist to better facilitate the existing conditional use, our dog kennel, and would not adversely affect the natural resources in the surrounding areas."

Staff Comment: Based on findings above in finding 4.-A(1)], a watchman's residence is a customarily provided accessory use to a dog kennel. Kennels

are allowed as within agricultural areas. Therefore, the proposal does not conflict with this policy.

b. Policy 13 – Air, Water, and Noise Quality.

The expansion of the conditional use to include a watchman's residence will not adversely affect the air or water quality, and will reduce the noise levels in the surrounding area by:

1. *The placement of the watchman residence on the site as to reduce the noise level disruptions from the kennel, acting as a buffer.*

2. *Further adding more landscaping and trees surrounding the watchman residence to lessen noise generation to levels compatible with surrounding land uses.*

3. *Perimeter fencing with the additional vinyl slats and more landscaping in the immediate kennel courtyard would also lessen noise generation.*

4. *Pertaining water and air quality, there are no unforeseen affects from the expansion to include a watchman residence.*

Staff Comment: Policy 13 seeks to minimize negative air, water and noise quality impacts from new developments. It states that *"...If the proposed use is a noise generator, the following shall be incorporated into the site plan:*

1. *Building placement on the site in an area having minimal noise level disruptions,*
2. *Landscaping or other techniques to lessen noise generation to levels compatible with surrounding land uses.*
3. *Insulation or other construction techniques to lower interior noise levels in noise-impacted areas."*

The placement of a watchman's residence would not likely generate significant noise increases; however, the proposal responds to this criteria by placing the watchman's residence southwest of the "kennel court", where it would block the existing noise generating use (barking dogs). The house location helps shield the closest neighboring residences from the kennel. The closest houses are approximately 500-feet southwest and 600-feet south of the proposed watchman's house. This policy is also addressed through Design Review requirements (Condition #1). Design Review typically requires landscape plantings to buffer noise generating uses from neighboring residences.

b. Policy 14 - Development Limitations.

"There are no unforeseen developmental limitations for this proposed watchman residence. (ie; Slopes do not exceed 20%, nor is there a potential for soil erosion on this site.)"

Staff Comments: Staff concurs. Reference comments above in finding 4.-A(6) regarding flood hazards.

Conclusions:

1. The proposed watchman's residence for the existing kennel satisfies Conditional Use approval criteria.

2. Conditions of approval are imposed to assure compliance with applicable Design Review provisions, and with sub-surface system requirements for the new residence.

Signed November 6, 1990

Richard Leonard

By Richard Leonard, Chairman

Filed With the Clerk of the Board on November 15, 1990

Appeal to the Board of County Commissioners

Any person who appears and testifies at the Planning Commission hearing, or who submits written testimony in accord with the requirements on the prior Notice, and objects to their recommended decision, may file a Notice of Review with the Planning Director on or **before 4:30 PM. on Monday, November 26 1990** on the required Notice of Review Form which is available at the Planning and Development Office at 2115 SE Morrison Street.

*The Decision on this item will be reported to the Board of County Commissioners for review at 9:30 a.m. on **Tuesday, November 27, 1990** in Room 602 of the Multnomah County Courthouse. For further information call the Multnomah County Planning and Development Division at 248-3043.*

G
1990 DESIGN REVIEW
(KENNEL ADDITION)

REQUEST FOR A CONDITIONAL USE PERMIT

Reference
MCC 11.15.2028
B and C

DR 90-04-02

ed; and

(c) Which satisfies the minimum lot size requirements of MCC .2016, or

(2) A parcel of land:

(a) For which a deed or other instrument creating the parcel was recorded with the Department of General Services, or was in recordable form prior to February 20, 1990;

(b) Which satisfied all applicable laws when the parcel was created;

(c) Does not meet the minimum lot size requirements of MCC .2016; and

(d) Which is not contiguous to another substandard parcel or parcels under the same ownership, or

(3) A group of contiguous parcels of land:

(a) For which deeds or other instruments creating the parcels were recorded with the Department of General Services, or were in recordable form prior to February 20, 1990;

(b) Which satisfied all applicable laws when the parcels were created;

(c) Which individually do not meet the minimum lot size requirements of MCC .2016, but, when considered in combination, comply as nearly as possible with a minimum lot size of nineteen acres, without creating any new lot line; and

(d) Which are held under the same ownership.

(B) For the purposes of this subsection:

(1) *Contiguous* refers to parcels of land which have any common boundary, excepting a single point, and shall include, but not be limited to, parcels separated only by an alley, street or other right-of-way;

(2) *Substandard Parcel* refers to a parcel which does not satisfy the minimum lot size requirements of MCC .2016; and

(3) *Same Ownership* refers to parcels in which greater than possessory interests are held by the same person or persons, spouse, minor age child, single partnership or business entity, separately or in tenancy in common.

(C) A Lot of Record which has less than the front lot line minimums required may be occupied by any permitted or approved use when in compliance with the other requirements of this district.

[Amended 1990, Ord. 643 § 2]

11.15.2020 Lot Size for Conditional Uses

(A) The minimum lot size for a conditional use permitted pursuant to MCC .2012(A) and (B)(2) shall be based upon:

(1) The site size needs of the proposed use;

(2) The nature of the proposed use in relation to its impact on nearby properties; and

(3) Consideration of the purposes of this district.

(B) Except as otherwise provided by MCC .2018, no sale or conveyance of any portion of a lot, for other than a public purpose, shall leave a structure on the remainder of the lot with less than the minimum lot or yard requirements or result in a lot with less than the area or width requirements of this district.

11.15.2022 Off-Street Parking and Loading

Off-street parking and loading shall be as required by MCC .6100 through .6148.

11.15.2024 Signs.

Signs, pursuant to the provisions of MCC 11.15.7902-.7982. *[Amended 1986, Ord 543 § 2]*

11.15.2026 Access

Any lot in this district shall abut a street, or shall

have other access determined by the Hearings Officer to be safe and convenient for pedestrians and for passenger and emergency vehicles.

11.15.2028 Exemptions from Non-Conforming Use Provisions

(A) A single family dwelling not in conjunction with farm use, legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC .8805.

(B) Conditional uses listed in subpart MCC .2012 legally established prior to August 14, 1980, shall be deemed conforming and not subject to the provisions of MCC .8804, provided, however, that any change of use shall be subject to approval pursuant to the provisions of MCC .2012.

(C) The term "change of use", as used in this Section means the change from one conditional use listed in MCC .2012 to another such conditional use.

The Persinger Kennel is therefore a Conforming CU - therefore does not expire per October 8, 1990 opinion from John DuBay.

11.15.2030 Right To Complete Single Family Dwelling

A single family dwelling, uncompleted prior to August 14, 1980, but which meets the tests stated in this subsection, may be completed although not listed as a primary use in this district.

(A) Actual construction shall have commenced prior to February 20, 1990, under a sanitation, building or other development permit applicable to the lot. "Actual construction" means:

(1) Placement of construction materials in a permanent position;

(2) Site excavation or grading;

(3) Demolition or removal of an existing structure;

(4) The value of purchased building materials; or

(5) Installation of water, sanitation or power systems.

(B) Actual construction shall not include:

(1) The cost of plan preparation; or

(2) The value of the land.

(C) The value of actual construction commenced prior to February 20, 1990 shall be $1,000 or more, for each $20,000 of the total estimated value of the proposed improvements as calculated under the Uniform Building Code.

[Amended 1990, Ord. 643 § 2]

DR 90-077-02.

PL-2

MEMORANDUM

TO: Mark Hess
Planning

FROM: John L. DuBay
Chief Assistant
County Counsel

DATE: October 8, 1990

SUBJECT: CUP termination

I agree with you that the zoning code provides no way to terminate CUPs because of non use where the permit sets no expiration date.

However, nothing prevents an amendment to the zoning code to establish a procedure to terminate permits not being used for the permitted use, even permits issued before the amendment. MCC 11.15.7135(A) could be amended to add "non-use for the permitted purpose for ___ months" to the list of reasons for termination. Alternatively, a new provision could be added to establish a shorter termination period than provided in .7135.

DR 90-07-02

ACCT. NUMBER R-97103-0150 L/C 049 REQUEST BY

NAME PERSINGER,ELDEN E & PROP 23200 NW REEDER RD
MARGUERETTE F PORTLAND,OR 97231
YR-AQ 73 BK/PG 0906/1445 ---------- STATUS ----------
ADR 23200 NW REEDER RD PARTIAL REAPPRAISAL - APPR
PORTLAND, OREGON 97231 YR APPR 84 VCHR # ACTION 828072
MAP 32N1W CENSUS TRACT 071.00 VCHR # DIVISION
ANNEX SID TAT RES DEF CANCEL 081182
---------- LEGAL DESCRIPTION ----------
ADD SECTION 03 2 N 1 W LOT BLOCK
TL# 15 9.41 ACRES
---------- LAND AND IMPROVEMENT CHARACTERISTICS --- *** 07/10/89 ***
RATIO CODE 546 6 APPR DISTRICT AREA 9.41 A ZONING EFU
CLASS 4 ONE STORY W/ BSMT % IMP GOOD NEIGHBORHOOD 230
USE DWG SGL YR BUILT 1942 BDRMS 3 STORIES 1.0
LIVING AREA 816 ARCH RESIDENCE CONS

BUILDING PERMIT 09:39:16 03/02/8
CENSUS DATA
TH81

E OF WORK:
NC ALT X TEN IMP REPAIR ADD CONV DEMO TEMP FILL MOVE
OWNER PRIVATE X GOVERNMENT/PUBLIC
LAND USE COUNT MAP 3-2N-2 ZONE EFU COMP PLAN EFU SITE SIZE 409899 SF
USE BEFORE PERMIT (FOR USE CATEGORIES PRESS PF12)
USE CODE 510
IF CONV THEN CURRENT # OF RES UNITS OR NON-RESIDENTIAL SQ.FT.
USE AFTER PERMIT RESIDENTIAL RESIDENTIAL/NON-RESIDENTIAL
USE CODE 510 CHANGE IN UNITS CHANGE IN SQ. FT.
USE CODE CHANGE IN UNITS CHANGE IN SQ. FT.
PREVIOUS LAND USE CASES
CU VZ
REQUIRED LAND USE APPROVALS
ZONING COMMENTS: THE DOG KENNEL USE AND STRUCTURES PRE-DATE THE ZONING ORDIN
ANCE; THE USE IS A CONFORMING CONDITIONAL USE WHICH MAY BE REMODELED A
S PROPOSED; LIMITED TO 50 DOGS MAX; DR IS WAIVED DUE TO MINOR NATURE
PF1 PERMIT APPL PF4 APPLICATION MENU PF6 FEE CODE MENU PF8 CAVEATS PF16 TA
PF3 SUPPLEMENT PF5 ASSIGN PLAN CHECK PF7 APPROVALS PF9 NOTES PRMTA002

T.C. '15' Section 3-2N-1W

BUILDING PERMIT APPLICATION 09:39:46 03/02/89
TH81
STR NO 23200 DIR NW NAME REEDER TYPE RD BLDG FLR -
BETWEEN AND
LOT BLK ADDITION
TAX LOT 015 SECTION 03 TOWN/RANGE 971 OCCUP GRP
TAX ACCT R971030150 CONST TYPE
MAP 3-2N-2 ZONE EFU COMP PLAN EFU FIRE EXT DETECTION
JOB NAME UNINCORPORATED MULTNOMAH COUNTY Y
DESCRIPTION #2W REMODEL EXISTING DOG KENNEL BUILDING.ADD RUNS.INTERIOR PARTITI
ONS.ETC.
PRELIM MEETING WITH
PLANS SPECS CALCS SOILS RPTS
ADDITIONAL PERMITS REQUIRED FOR PLUM ELEC MECH
OWNER ELDEN PERSINGER DATE 03/02/89
OWNR ADDR 23200 NW REEDER RD CITY.ST PORTLAND, OREGON ZIP 97231
BUILDER LIC #
APPLICANT TIM SCHILLEREFF PHONE 289-4854
APPL ADDR CITY.ST ZIP
PF2 CENSUS DATA PF4 APPLICATION MENU PF6 FEE CODE MENU PF8 CAVEATS PF16 TAX
PF3 SUPPLEMENT PF5 ASSIGN PLAN CHECK PF7 APPROVALS PF9 NOTES PRMTA001

GENERAL APPLICATION FORM

DEPT. OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
LAND DEVELOPMENT SECTION

2115 S.E. MORRISON ST.
PORTLAND, OREGON 97214
(503) 248-3043

MULTNOMAH COUNTY

PROPERTY ADDRESS: 23200 NW Reeder Road, Portland, Oregon 97231

LEGAL DESCRIPTION: Please see attached Deed with the legal description.
Tax Lot 15, 9.41 Ac, NW¼ Sec 03, T2N, R1W

SITE SIZE: 9.41 Acres on Sauvie Island, Oregon

PROPERTY OWNER/DEED HOLDER: Elden E. Persinger and Margurette F. Persinger
ADDRESS: 23200 NW Reeder Rd, Portland PHONE: 621-3249
CITY: Portland, OR ZIP: 97231

APPLICANT: Tim and Angela Schillereff 621-3204 (w)
ADDRESS: 18149 NW Sauvie Island Road PHONE: 6213646
CITY: Portland, OR ZIP: 97231

TO BE COMPLETED BY APPLICANT ONLY IN THE PRESENCE OF A NOTARY PUBLIC

STATE OF OREGON
COUNTY OF MULTNOMAH

I, Angela Schillereff

EACH BEING FIRST DULY SWORN, DEPOSE AND SAY THAT I AM (ONE OF) THE APPLICANT(S) IN THE FOREGOING APPLICATION AND THAT THE SAME IS TRUE AS I VERILY BELIEVE.

Angela Schillereff

SUBSCRIBED AND SWORN TO BEFORE ME THIS 19th DAY OF September, 1990

NOTARY Judy R Green

MY COMMISSION EXPIRES 8-28-92

GENERAL DESCRIPTION OF APPLICATION: (To Be Filled In By Applicant and Reviewed by Staff)

Expand existing kennel to include a watchmans residence.

FOR STAFF USE ONLY

CASE NUMBER: CU-23-90

ASSOCIATED CASES: DR-90-07-02

INTERNAL PROCESSING

ACCEPTED FOR PRE-APP.: 21 SEP 90
BY: Chris G Ewen
PRE-APP.: PA 40-90
DATE AND TIME: 27 SEP 90, 10:40A

ACCEPTED FOR DECISION: 9/28/90
BY: M. Hess
HEARING DATE: 11/5/90
DECISION FILED:
DECISIONS/S.R. BY:

ACCEPTED FOR APPEAL:
BY:
DATE OF HEARING:

DESCRIPTION

COMP. PLAN DESIG.: Rural
COMMUNITY: Sauvie Isl
ZONING DISTRICT: EFU
ZONING MAP NO.: 22 & 23
QUARTER SECTION NO.: N/A

MULTNOMAH COUNTY OREGON

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING
AND DEVELOPMENT
2115 S.E. MORRISON STREET
PORTLAND, OREGON 97214
(503) 248-3043

Notice of Planning Director Decision

Design Review Case No. 90-07-02

August 6, 1990

The Planning Director has approved **remodeling plans for an existing 50-dog kennel ; no additional dogs are authorized by this permit.** The kennel is located at 23200 NW Reeder Road.

You have received notice of this decision because our records indicate you own property near the project site.

The approved plans include relocating some of the dog runs to an existing pole building on the property. Conditions of approval have been imposed regarding landscaping and saving existing trees, and requiring sight obscurring fencing around the dog runs.

This decision will become effective ten days from the above date, unless an appeal is filed. An appeal requires a $150.00 fee and must state the specific legal grounds on which it is based. Contact the County Planning Division at 248-3043 if you have questions regarding the project design or to obtain appeal forms or information.

5 Notices Mailed
8-06-90
M.B

MULTNOMAH COUNTY OREGON

DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING
AND DEVELOPMENT
2115 S.E. MORRISON STREET
PORTLAND, OREGON 97214
(503) 248-3043

Tim Schillereff
23200 NW Reeder Road
Gresham, Oregon 97030

FINAL DESIGN REVIEW

Decision Date: August 6, 1990 **Design Review #90-07-02**

Reviewer: Mark R. Hess **Date Plans Received: July 13, 1990**

The final design plans submitted for **remodeling a Kennel for 50 Dogs** have been reviewed. The following applies to your plans:

DESIGN REVIEW COMPLETED WITH CONDITIONS

Based on review of submitted drawings, site visits by staff and analysis of applicable criteria, the final Design Review plans conform with the Design Review provisions of MCC .7805-.7865 if the following conditions are applied:

1. Construct building and install site improvements and landscaping as illustrated and specified on approved plans dated 8/6/90.

2. Landscaping and site improvements shall be completed and approved by Design Review Staff prior to occupancy or final approvals for the remodeled kennel facilities.

3. Disturbed areas associated with construction shall be replanted.

4. Retain the existing Birch trees north and west of the kennels and between the new pole building and the existing kennels.

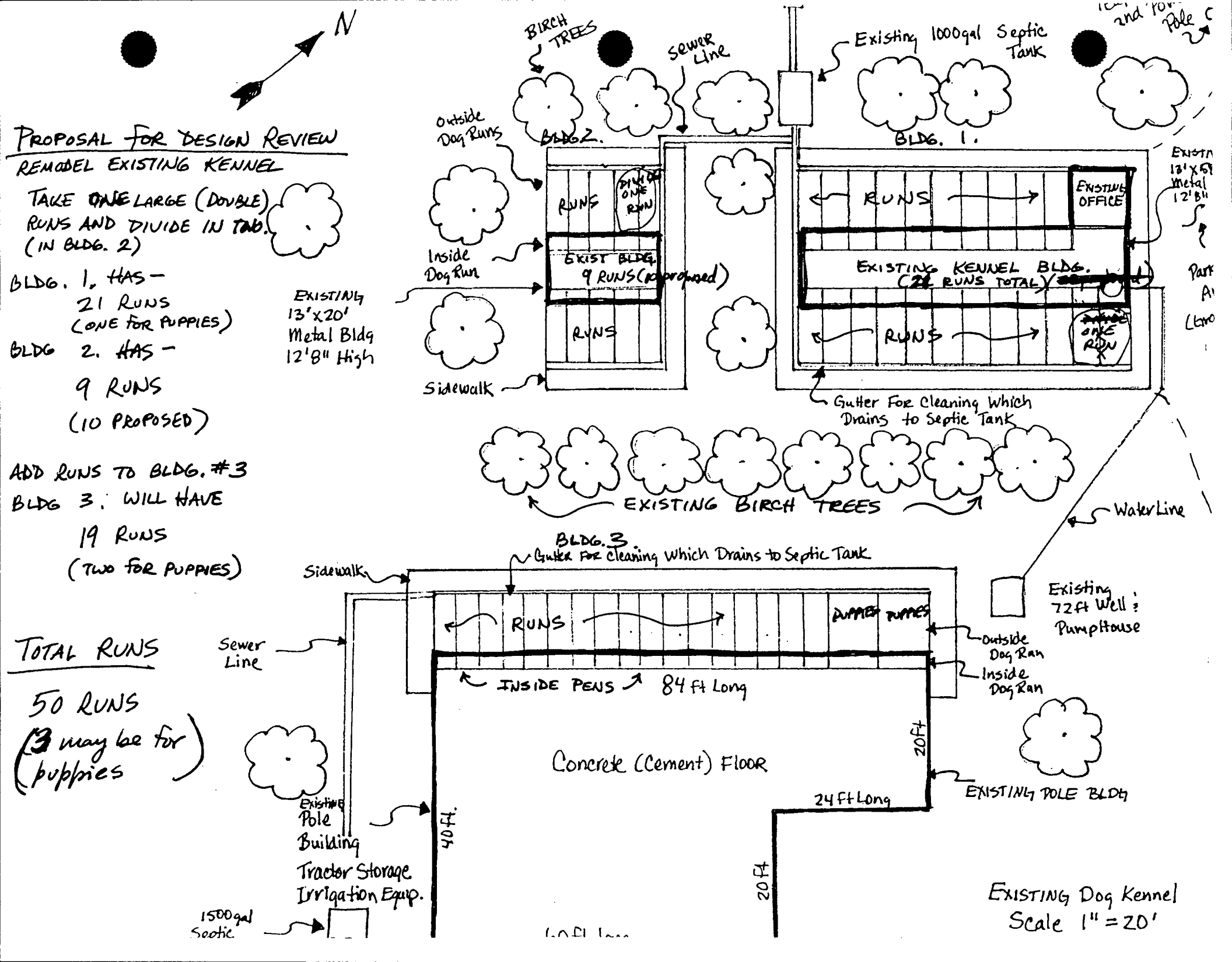
5. The perimeter fencing for all the runs shall include vinyl or aluminum slats (slats are not required between runs) or other approved means to meet the *"...constructed of...opaque material"* requirement of MCC 11.15.7230(B).

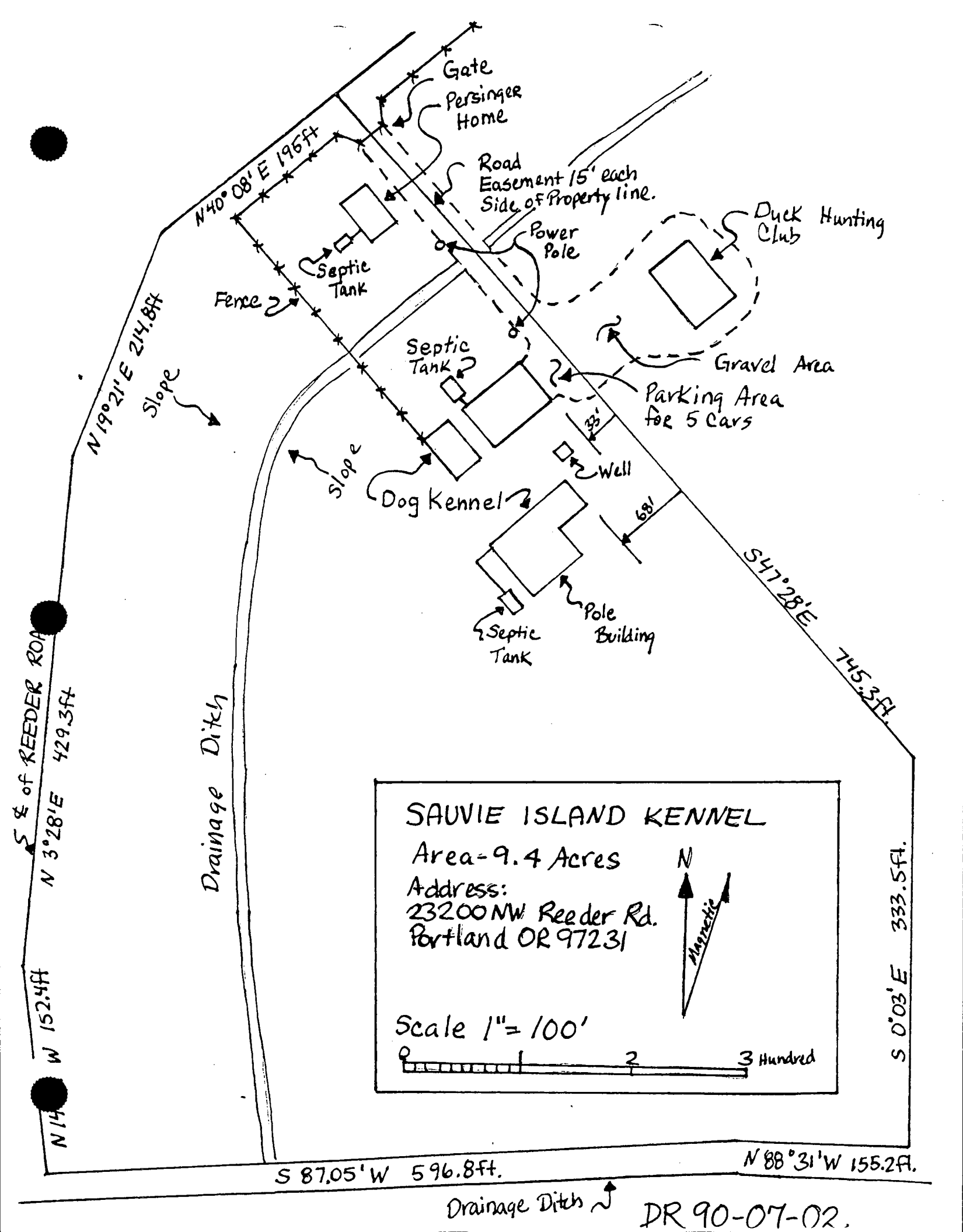
IN THE MATTER OF DR 90-07-02

MULTNOMAH COUNTY DIVISION OF PLANNING AND DEVELOPMENT

Mark R. Hess, Planner

This decision shall become final in 10 days (August 16, 1990) unless an appeal of the decision if filed pursuant to MCC 11.15.8290. An appeal requires a $150.00 fee and must state the specific legal grounds on which it is based. Contact the County Planning Division at 248-3043 for appeal forms and information.


N
PROPOSAL FOR DESIGN REVIEW
REMODEL EXISTING KENNEL
TAKE ONE LARGE (DOUBLE) RUNS AND DIVIDE IN TWO. (IN BLDG. 2)
BLDG. 1. HAS –
21 RUNS
(ONE FOR PUPPIES)
BLDG 2. HAS –
9 RUNS
(10 PROPOSED)
ADD RUNS TO BLDG. #3
BLDG 3. WILL HAVE
19 RUNS
(TWO FOR PUPPIES)
TOTAL RUNS
50 RUNS
(3 may be for puppies)
EXISTING 13'x20' Metal Bldg 12'8" High
BIRCH TREES
Sewer Line
Existing 1000gal Septic Tank
Outside Dog Runs
BLDG 2.
BLDG. 1.
RUNS
DIVIDED ONE RUN
Inside Dog Run
EXIST BLDG. 9 RUNS (proposed)
EXISTING OFFICE
EXISTING KENNEL BLDG. 22 RUNS TOTAL
Sidewalk
Gutter For Cleaning Which Drains to Septic Tank
EXISTING BIRCH TREES
Water Line
BLDG. 3
Gutter For Cleaning Which Drains to Septic Tank
Sidewalk
PUPPIES PUPPIES
Existing 72ft Well & Pumphouse
Outside Dog Run
Inside Dog Run
INSIDE PENS 84 ft Long
Sewer Line
20Ft
Concrete (Cement) Floor
EXISTING POLE BLDG
24 Ft Long
40 ft.
20 Ft
Existing Pole Building
Tractor Storage
Irrigation Equip.
1500gal Septic
EXISTING Dog Kennel
Scale 1" = 20'


Gate
Persinger Home
Road Easement 15' each Side of Property line.
N 40° 08' E 196ft
Septic Tank
Fence
Power Pole
Duck Hunting Club
Septic Tank
Gravel Area
Parking Area for 5 Cars
N 19° 21' E 214.8ft
Slope
Slope
Well
Dog Kennel
68'
Septic Tank
Pole Building
S 47° 28' E
745.3ft.
S ℄ of REEDER ROAD
N 3° 28' E 429.3ft
Drainage Ditch
W 152.4ft
N 14
S 0° 03' E 333.5ft.
S 87.05' W 596.8ft.
N 88° 31' W 155.2ft.
Drainage Ditch
SAUVIE ISLAND KENNEL
Area-9.4 Acres
Address:
23200 NW Reeder Rd.
Portland OR 97231
N
Magnetic
Scale 1" = 100'
0
1
2
3 Hundred

DR 90-07-02.

DESIGN REVIEW APPLICATION

Department of Environmental Services
Division of Planning and Development
2115 S.E. Morrison St.
Portland, Oregon 97214

(503) 248-3043

MULTNOMAH COUNTY

Property Location & Description

Street Address 23200 NW Reeder rd
Legal Description Dog Kennel (comercial)
Community Sauvie Island
Zoning EFU
Site Size 9.4 acres

Property Owner

Name Elden E. Persinger
Address 23200 NW Reeder rd.
Phone 503 621-3249
Owner's Authorization

Contact Person

Name Tim Schillerdff
Address 23200 NW Reeder rd.
Phone 503 621-3204

Project Description

Project Title Commercial Dog Kennel
Proposed Use Boarding & training dogs
Square Footage Of Landscaping
Square Footage of Landscaping in Parking Lot(s)

If Residential

Number of Units
Number of Units with Three or more Bedrooms
Square Footage of Useable Outdoor Space
Square Footage of Private Outdoor Space

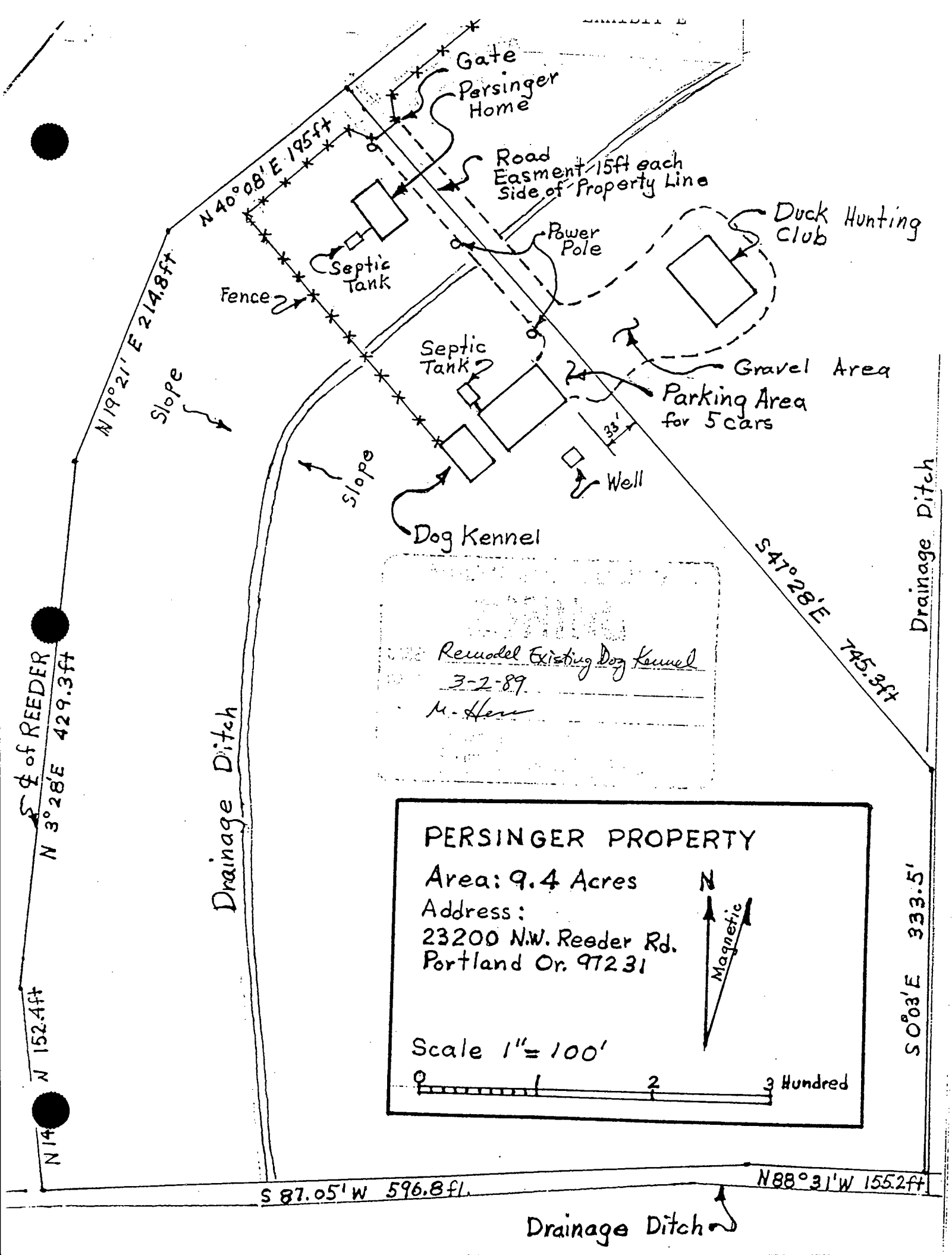
Staff Use Only

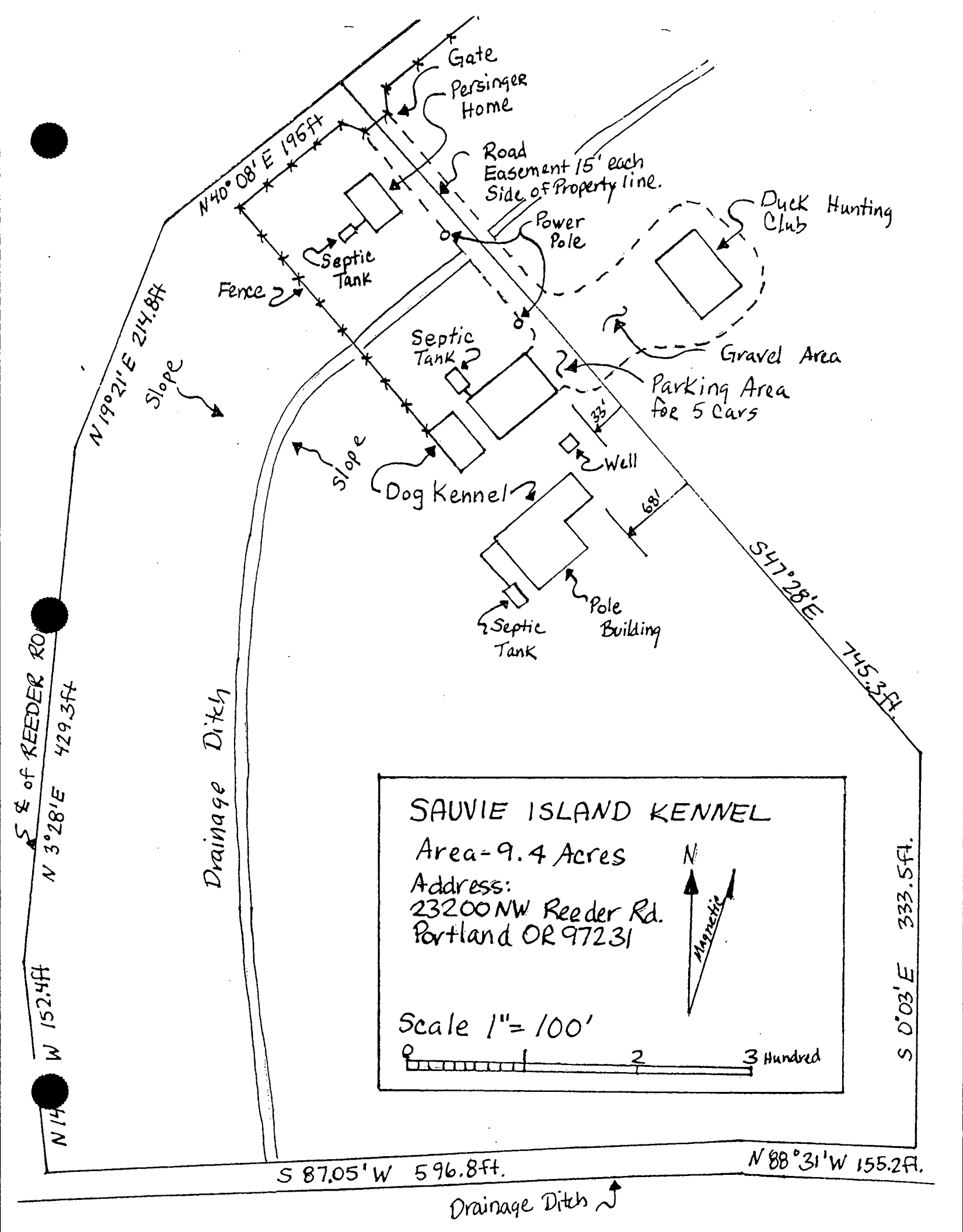
Design Review # 90-07-02

Fee $75.00

Accepted
Date 7/13/90
By M. Herr

Associated Cases


Gate
Persinger Home
Road Easment 15ft each Side of Property Line
N 40°08'E 195ft
N 19°21'E 214.8ft
Septic Tank
Fence
Power Pole
Duck Hunting Club
Septic Tank
Gravel Area
Parking Area for 5 cars
33'
Slope
Slope
Well
Dog Kennel
Drainage Ditch
Drainage Ditch
S47°28'E 745.3ft
℄ of REEDER
N 3°28'E 429.3ft
N 152.4ft
N14
S 87.05'W 596.8ft
N88°31'W 1552ft
S0°03'E 333.5'
Remodel Existing Dog Kennel
3-2-89
M. Hess
PERSINGER PROPERTY
Area: 9.4 Acres
Address:
23200 N.W. Reeder Rd.
Portland Or. 97231
N
Magnetic
Scale 1" = 100'
0
1
2
3 Hundred


Gate
Persinger Home
Road Easement 15' each Side of Property line.
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Septic Tank
Fence
N 19°21' E 214.8ft
Septic Tank
Gravel Area
Parking Area for 5 Cars
Slope
35'
Slope
Well
Dog Kennel
68'
S47°28'E
745.3ft.
Pole Building
Septic Tank
S & of REEDER RD
N 3°28'E 429.3ft
Drainage Ditch
W 152.4ft
N 14
S 87.05' W 596.8ft.
N 88°31'W 155.2ft.
S 0°03'E 333.5ft.
Drainage Ditch
SAUVIE ISLAND KENNEL
Area-9.4 Acres
Address:
23200 NW Reeder Rd.
Portland OR 97231
N
Magnetic
Scale 1"= 100'
0
1
2
3 Hundred

EXHIBIT B

February 24, 1989

Tim Schillereff
7218 N Wayland Avenue
Portland, OR 97203

Dear Tim,

We, the owners of said property in Exhibit A, street address known as 23200 NW Reeder Road, do hereby authorize you, Tim Schillereff dba Sauvie Island Dog School, to apply for a conditional use permit for the dog kennel located on our property.

With the approval of such a permit, we authorize you to perform such actions necessary for the operation of the business of a dog kennel, in addition to your current business, Sauvie Island Dog School.

Sincerely,

Elden E Persinger
Elden E. Persinger

Marguerette F Persinger
Marguerette F. Persinger

I concur with the above authorization.

Tim Schillereff
Tim Schillereff, dba Sauvie Island Dog School

DR 90-07-02

CU 23-90

ST. JOHNS VETERINARY CLINIC
4818 N. LOMBARD
PORTLAND, OR 97203
503-289-4996

November 5, 1990

TO WHOM THIS MAY CONCERN:

I WOULD LIKE TO GO ON RECORD AS FAVORING A DECISION ALLOWING TIM AND ANGELA SCHILLEREFF TO BUILD A HOME ADJACENT TO THEIR SAUVIE ISLAND KENNEL. AS A RULE, I AM NOT IN FAVOR OF MORE HOUSING ON SAUVIE ISLAND, SINCE ADDING HOUSES ENHANCES NEITHER THE RURAL NATURE OF THE ISLAND NOR THE WILDLIFE HABITAT. HOWEVER, IN THIS CASE, A HOUSE SHOULD FIT IN WELL WITH THE EXISTING BOARDING AND DOG TRAINING FACILITY.

THERE ARE SEVERAL BENEFITS GAINED BY HAVING THE OWNERS LIVE ADJACENT TO THE KENNEL. IT WILL ALLOW THEM TO MORE CLOSELY MONITOR THE ANIMALS AT THEIR FACILITY. BARKING DOGS CAN BE CHECKED ON, NOISE PROBLEMS CONTROLLED, MEDICAL EMERGENCIES ATTENDED TO, ETC. IT IS MY OPINION THAT THE ANIMALS WILL BENEFIT THROUGH CLOSER OBSERVATION AND MORE IMMEDIATE ATTENTION TO ANY MEDICAL PROBLEMS IF THE OWNERS LIVE AT THE FACILITY. THIS WILL ALSO ALLOW THEM TO BETTER MONITOR AND CONTROL ANY BARKING OR OTHER NOISE PROBLEMS THAT OCCUR, WHICH SHOULD PLEASE THE ADJACENT NEIGHBORS.

FOR ALL OF THE ABOVE REASONS I AM IN FAVOR OF ALLOWING TIM AND ANGELA SCHILLEREFF TO BUILD A HOME ADJACENT TO SAUVIE ISLAND KENNEL. I SAY THIS BOTH AS A VETERINARIAN CONCERNED ABOUT THE CARE GIVEN TO ANIMALS AT THEIR KENNEL, AND AS AN ISLAND RESIDENT CONCERNED ABOUT MAINTAINING THE QUALITY OF OUR SAUVIE ISLAND LIFE.

SINCERELY,

PETER D. DAVIS D.V.M.

Department of Environmental Services
Division of Planning and Development
2115 S.E. Morrison Street
Portland, Oregon 97214 (503) 248-3043

DECISION
OF THE HEARINGS OFFICER

This decision consists of Findings and Conclusions

August 19, 1994

Concerning an appeal by Marquam Farms Corporation from an Administrative Decision, approving final design review for an expansion of the Sauvie Island Kennel, operated by the applicants, Tim and Angela Schillereff.

DR 4-94 Appeal of An Administrative Decision

Location: 23200 NW Reeder Road

Legal: Tax Lot '15', Section 3,2N-1W, 1990 Assessor's Map

Site Size: 9.41 acres

Property Owner: EE and MF Persinger
23200 NW Reeder Road, 97231

Applicant: Tim and Angela Schillereff
23202 NW Reeder Road
Portland, Oregon 97231

Comprehensive Plan: Agricultural Land

Present Zoning: EFU, Exclusive Farm Use District

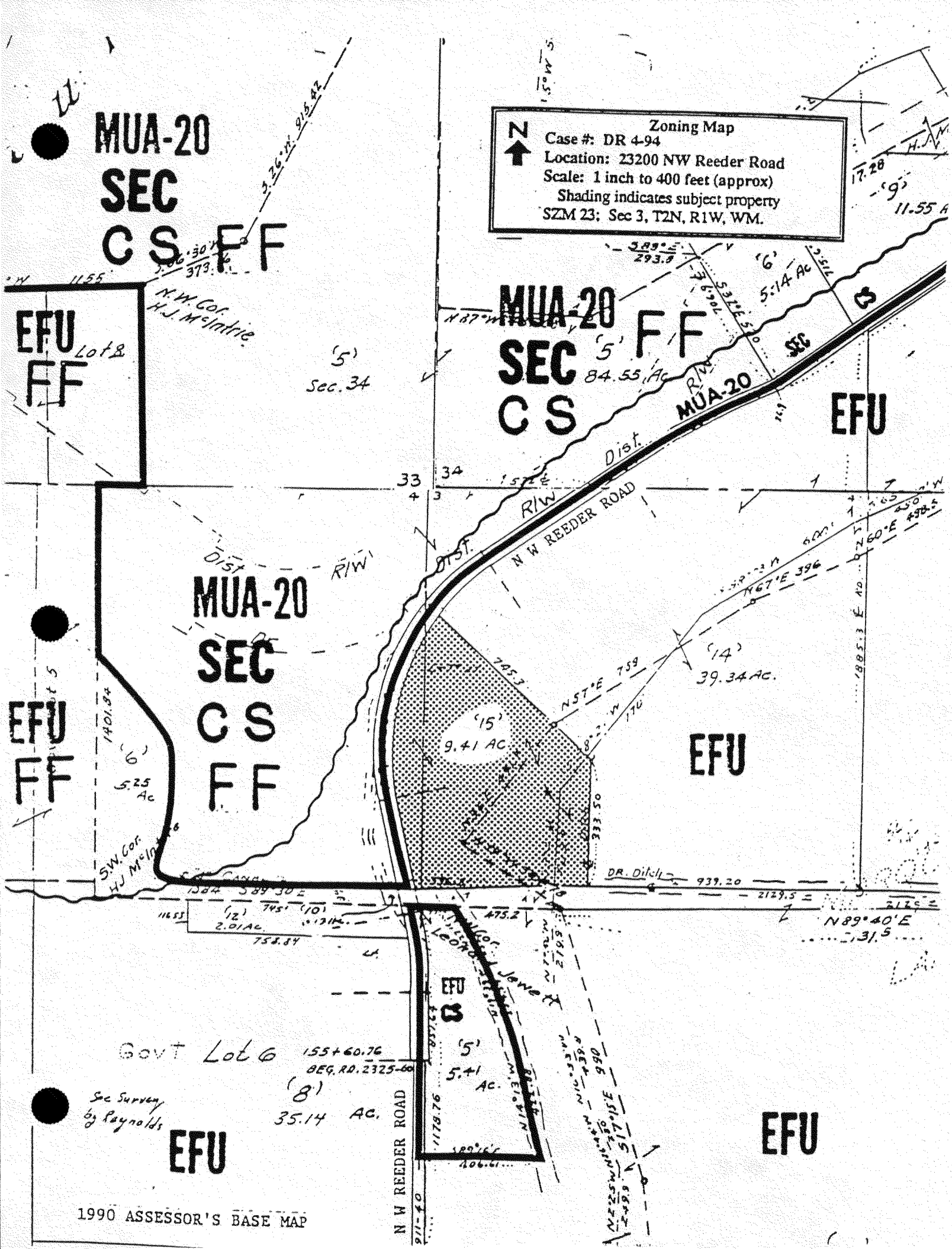
Hearings Officer Decision: **Marquam Farm's Inc.'s appeal of the Administrative Decision approving Final Design Review in DR 4-94 is Granted. The Applicant's request for Final Design Review is Denied without Prejudice.**

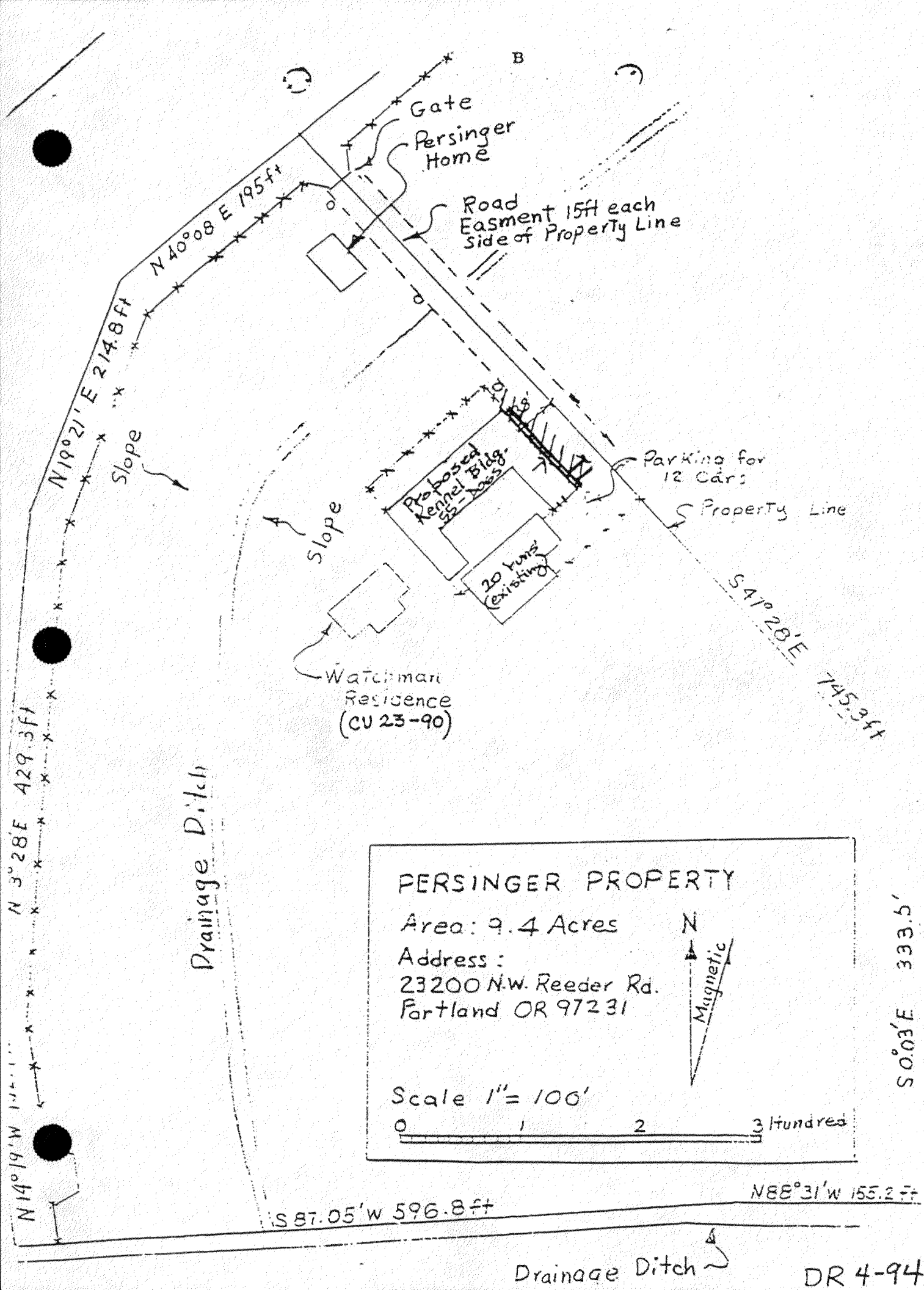
FINDINGS AND CONCLUSIONS

A. BACKGROUND

1. Applicant's Proposal:

The applicants, Tim and Angela Schillereff, operators of the Sauvie Island Kennels since 1989, request approval to demolish two existing kennel buildings and replace them with one, larger structure, designed to house 55 dogs. The other existing kennel structure would remain and would house up to 20 dogs. Overall, the applicant is requesting an expansion of the kennel from its existing license parameter of 50 dogs, to up to 75 dogs.


Zoning Map
Case #: DR 4-94
Location: 23200 NW Reeder Road
Scale: 1 inch to 400 feet (approx)
Shading indicates subject property
SZM 23; Sec 3, T2N, R1W, WM.
MUA-20
SEC
C S
F F
EFU
MUA-20
SEC
C S
F F
MUA-20
SEC
C S
F F
EFU
EFU
EFU
EFU
EFU
EFU
NW REEDER ROAD
MUA-20
R/W
Dist.
Govt Lot 6
1990 ASSESSOR'S BASE MAP


B
Gate
Persinger Home
Road Easment 15ft each Side of Property Line
N 40°08 E 195ft
N 19°21' E 214.8ft
Slope
Slope
Proposed Kennel Bldg. 55-Does
Parking for 12 Cars
Property Line
20 runs (existing)
S 41° 28' E 745.34ft
Watchman Residence (CU 23-90)
Drainage Ditch
N 3°28'E 429.3ft
N 14°19'W
S 87.05'W 596.8ft
N88°31'W 155.2 ft
S 0.03'E 333.5'
Drainage Ditch
PERSINGER PROPERTY
Area: 9.4 Acres
Address:
23200 N.W. Reeder Rd.
Portland OR 97231
N
Magnetic
Scale 1" = 100'
0 1 2 3 Hundred

DR 4-94

2. Site and Vicinity Characteristics:

The 9.41 acre site is located in an EFU district on Sauvie Island. The property fronts on NW Reeder Road. Surrounding properties are primarily agricultural or open space in character.

The Sturgeon Lake Wildlife Refuge property lies to the northwest, across Reeder Road. This refuge is owned by the Oregon Department of Fish and Wildlife. The refuge is several thousand acres in size and serves as an important stop on the Pacific Flyway. It is also the home to many species of animals, and serves as an important local and regional recreational and open space resource.

Properties to the south and southwest contain agricultural uses with scattered farm houses and barns.

A duck hunting club operates on a 39-acre parcel east and north of the kennel site. The duck hunting club is owned by the appellant corporation, Marquam Farms Corp..

3. Land Use History

On August 6, 1990, the Planning Director approved Final Design Review (DR 90-07-02), authorizing remodeling plans for an existing 50-dog kennel.

On November 6, 1990, the Planning Commission approved a conditional use request for a watchman's residence for the dog kennel.

Both of the above mentioned approvals were issued to the present applicants, Tim and Angela Schillereff.

On or about January 10, 1994, the Schillereff's submitted a letter to the county planning department requesting a conditional use permit to expand and remodel the existing kennel. This request was consistent with a previous request made by Tim Schillereff in his February 24, 1989, letter to the county where he requested a conditional use permit for the kennel. It is of some note that Mr. Schillereff in his February 24, 1989 letter stated that:

> "Please note that this request is pertaining to an existing kennel site, in other words, the buildings and structures are intact. However, the permits have lapsed for over 15 years, therefore a new request is now being sent."

In both 1989, and in 1994, the county advised the Schillereff's that a conditional use permit would not be necessary, and that the respective expansions could be accomplished through design review. In the file pertaining to DR 90-07-02 (the initial remodel for 50 dogs), a notation appears beside a copy of code section 11.15.2028, indicating that pursuant to this section "The Persinger Kennel is therefore a conforming CU [conditional use] therefore (sic) does not expire per October 8, 1990 opinion from John DuBay.". Also, in the file pertaining to this case (DR-4-94), it is apparent that the county based its administrative decision to approve the kennel expansion through Design Review (as opposed to through a conditional use process as originally requested by the applicant) on staff's legal interpretation that MCC 11.15.2028 (B) results in the kennel being a "pre-existing

conforming conditional use, permitted to continue in the EFU District, and which may expand on its original lot without a CU hearing." (See staff report and notice of public hearing for DR 4-94).

The outcome of this case turns on whether or not staff's interpretation of MCC 11.15.2028 (B), is correct. If staff's interpretation of MCC 11.15.2028 (B) is wrong, and if the use is not otherwise a lawful use in the EFU zone, then the Hearings Officer lacks authority to approve this Design Review request, unless or until the underlying kennel use receives appropriate land use approval to make it a lawful use in the zone. See MCC 11.15.2006.

4 . Relevant Approval Criteria

Design review is governed by the criteria in MCC 11.15.7850.

MCC 11.15.2008 lists the uses permitted in the EFU zone. Dog kennels are not permitted uses in the EFU zone. The statutory corollary to this code provision is ORS 215.283(1). This statutory provision guides the county's ability to interpret its own ordinance with regard to its EFU provisions. The county cannot interpret its ordinance in a manner that provides less protection to EFU lands, or in a way that allows other uses outright in the EFU zone which are not listed in the statute.

MCC 11.15.2010 lists the relevant conditional uses permitted by the county in its EFU zone. Dog kennels are listed as conditional uses in this zone. The statutory corollary to this code provision is ORS 215.283(2).

MCC 11.15.0010 defines a kennel as follows: "**Kennel**-Any lot or premises on which four or more dogs, more than six months of age, are kept.".

MCC 11.15.2028 lists the exemptions from Non-conforming Use Provisions.

MCC 11.15.8805 and .8810 are the county's existing non-conforming use provisions. The statutory corollary to these provisions are found in ORS 215.130.

B. ANALYSIS

1. Lawfulness of the Existing Kennel

a. Status Under MCC 11.15.2028(B)

As noted above, the staff and the applicant have argued that MCC 11.15.2028(B) should be interpreted to mean that so long as the dog kennel was <u>listed</u> as conditional use in subpart .2012 prior to August 14, 1980, and since the kennel was lawfully established by any means, prior to the enactment of zoning in the county, then, under .2028(B), the kennel becomes a lawful permitted use in the EFU zone. The appellant disagrees with the applicant's and staff's interpretations. The applicant's interpretation is set out in the their various submissions.

The Hearings Officer finds that .2028(B) cannot be interpreted in the manner suggested by the applicant and the staff, without directly conflicting with ORS 215.283. Under the statutory scheme,

permitted uses and conditional uses are a static list. After 1958, when zoning was first applied in this area of the county, kennels were never allowed as outright permitted uses. Kennels were listed as conditional uses in the agricultural zone, but this particular kennel never received a conditional use permit. Therefore, the only way in which this particular kennel could have been lawful in 1958, when zoning came into effect, was if the use was a lawfully established non-conforming use.

The state statute that governs non-conforming uses does not permit a use that may have been a lawful non-conforming use to become an outright permitted use, simply because it was listed by the county as a conditional use prior to some arbitrary date. Under the statutory scheme, the only way a non-conforming use can expand is to satisfy the provisions of ORS 215.130, and any other relevant county ordinances not in conflict with the statutory scheme. Under the statutory scheme, in EFU zones, non-conforming uses never become conforming uses, unless the local ordinances and the state statutes governing exclusive farm uses are both amended to allow such uses outright, or unless both the local ordinance and the statute eventually list such uses a conditional uses, and if the governing body of the county, or its designate, actually issues an approval for such a use. Therefore, the only way that .2028(B) can be construed in such a way so as not to be in conflict with the statutory scheme, is to interpret the ordinance to mean that the kennel use must not only have been listed as a conditional use, but it must have been legally established as such, prior to August 14, 1980 (i.e. it must have actually obtained a conditional use permit).

In this case, the county issued Design Review approval for the kennel in 1990. However, the county did not issue a conditional use permit for the kennel operation itself. Since the county did not issue a conditional use permit for the kennel prior to August 14, 1980, the applicant cannot take advantage of whatever benefit MCC 11.15.2028(B) might confer. Therefore, the kennel did not become a lawful use pursuant to .2028(B), because it never received a conditional use permit. Under the statutory scheme, MCC.2028(B) cannot be read in such a way so as to elevate a non-conforming use to a permitted use in the EFU zone. The fact that the use was listed as a conditional use prior to August 14, 1990, is irrelevant under the statutory scheme, because the use did not actually obtain a conditional use permit. Therefore, since the kennel has never passed muster under the statutory scheme, which ultimately governs all uses permitted in exclusive farm use zones, it cannot be considered to have been a lawful use in the EFU zone, unless it was lawfully established as a non-conforming use, and if its status as such was maintained over time.

b . Non-Conforming Use Status

A considerable amount of evidence was received concerning the non-conforming use status of the kennel. Before the factual findings on this issue are discussed, the applicable law needs to be set out.

In Oregon, non-conforming uses are governed by state statutes and by local ordinances. ORS 215.130 provides that a "lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance may be continued." That same statute provides that a non-conforming use "may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of the zoning ordinances or regulations applicable at the time of the proposed resumption." MCC 11.15.8805(B) currently provides that: "If a non-conforming use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption.".

The proponent of non-conforming use status has the burden of proving both that the use was "lawfully established", and must also establish the level or scope of the use that existed at the time the use became non-conforming. See Warner v Clackamas County, 25 Or LUBA 82 (1993). The code defines a "kennel" as "any lot or premises on which four or more dogs, more than six months of age, are kept." Therefore, in order to be a "kennel", four or more adult dogs must be kept on the site. If less than four adult dogs are kept, for the "discontinuance" period, the non-conforming use expires.

As noted above, a non-conforming use can be lost if it is discontinued for the "discontinuance" period. Also, a partial discontinuance can occur during the life of the non-conforming use. In such a situation, "factors such as intermittency and infrequency are relevant to the scope of the [nonconforming] use, not its existence." See Warner v. Clackamas County, 111 Or. App. 11, 824 P2d 423 (1992). See Also Rhine v. City of Portland, 120 Or. App. 308, P2d 874 (1993).

Based upon all the evidence and testimony in the record the Hearings Officer makes the following findings with regard to the status of the kennel as a non-conforming use:

1. County records indicate that from 1952 to August 1957, Roy Wallace had a kennel on the site. From August 1957 to December 1962, Evelyn Blitz operated the kennel, then known as Marquam Lake Kennel.

2. On April 19, 1955, the county enacted its first zoning ordinance. The ordinance was applied to the Northwest portion of the county, including this site, on July 10, 1958.

3. On July 10, 1958, the county placed this site in its F-2 zoning district. F-2 zoning did not permit kennels as allowed uses.

4. The kennel was lawfully established prior to July 10, 1958, when the county's first zoning code was amended. It was lawfully established because prior to July 10, 1958, the county did not restrict the use of this property. Prior to July 10, 1958, the county did not require zoning or other land use permits to be issued for the kennel. Therefore, the evidence in the record demonstrates that the Marquam Lake Kennel, operated by Evelyn Blitz became a lawful non-conforming use on July 10, 1958.

5. The level of the use that existed on July 10, 1958, is difficult to precisely determine. The best evidence is a county record which indicates that between August 1957 and December 1962, the use consisted of a "commercial kennel [of] up to 50 dogs-boarding breeding and training.....". This county record is corroborated by other evidence in the record, particularly the "Brief history of Sauvie Island Kennels" (history"), submitted by the applicant. This history is particularly helpful in that it describes the level and type of improvements constructed by the original owner, Roy Wallace, which were still in existence on July 10, 1958, when Mrs. Blitz operated the kennel. In short, the best evidence indicates that on July 10, 1958, the kennel consisted of a set of refurbished Army buildings which were moved to the site and located on concrete pads. Outside dogs runs were constructed with concrete bases, and a sloped drainage system connected the runs to a drainage system. A set of chain link fence dividers separated individual dog runs. The kennel operation was in active commercial use between 1952 and 1962, during the tenure of Mr. Wallace, and later, Mrs. Blitz. The best evidence indicates that on July 10, 1958, the active commercial operation housed up to 50 dogs. (Note: The code definition of the term "kennel" does not require that any commercial

activity occur. It merely requires that 5 or more dogs, aged six months or older, be kept on the premises. The Hearings Officer's reference to commercial activity is merely a reflection of what the evidence indicated.)

6. Between December, 1962, when Blitz operated the kennel, and February 1964, when Courtway operated the kennel, there is no information in the record concerning the existence and scope of the use. The county record is silent during this period. The applicant in their "history", does not mention the Courtway operation, and their discussion of Blitz's use of the property during this time period in the early 1960's is vague, and conclusory at best. During this period of time, the applicant's "history" is not based on any direct knowledge. The Persinger affidavit does not include this time period and is therefore of no help either. This lack of evidence does not meet the legal standard for "substantial evidence". Therefore, the Hearings Officer concludes that between December 1962 and February 1964, the applicant has not carried its burden of proof regarding the continued operation of the kennel.

7. Since the applicant has not provided substantial evidence in the record that the kennel use was maintained between the time period mentioned above, (December 1962 through February 1964), the Hearings Officer cannot find the kennel was in operation during that time (i.e. that 4 or more adult dogs were kept on the site). Therefore, the Hearings Officer must conclude that the kennel use, as that term is defined by the code, was discontinued between December 1962 and February 1964.

8. On November 15, 1962, the county adopted a new zoning ordinance (Ordinance #100). Section 8.23 of the 1962 code provided that: "If a non-conforming use is abandoned or discontinued for any reason for more than one year, it shall not be re-established unless specifically approved by the Planning Commission.". In other words, the "discontinuance" period in 1962 was 1 year, rather than 2 years as it is now. Therefore, under the then applicable law, since the non-conforming kennel use was discontinued for more than one year, (from December 1962 to February 1964), the non-conforming status of the kennel expired. Specifically, the non-conforming use status of the kennel expired on or about January 1, 1964, one year and one day after the use was discontinued in December of 1962.

9. Since the Hearings Officer finds that the non-conforming status of the kennel expired on or about January 1, 1964, the subsequent history of the kennel is not material. Under the law that was applicable in 1964, once a non-conforming use expires, either by discontinuation or abandonment, the use could not re-establish its non-conforming status, unless specifically approved by the Planning Commission. See MCC 8.23 (circa 1962). Under the current county code, once a non-conforming use is abandoned or discontinued, the use cannot be re-established unless the resumed use conforms with the requirements of the code at the time of the resumption. See MCC 11.15.8805(B).

2. Estoppel

In the Applicant's brief, submitted July 27, 1994, the Schillereff's raise the affirmative defense of estoppel. The defense of estoppel seeks to prevent a party, in this case the county and the appellant, from re-raising an issue that was previously decided in a different case involving the same parties. The applicable law with regard to the estoppel defense in land use proceedings is set out in Schoppert v. Clackamas County 23 Or LUBA 138 (1992), and Clackamas County v. Emmert, 14 Or App 493, 513 P2d 532 (1973). In those cases, it was established that in order for the petitioner to

establish estoppel, the petitioner must show (1) the county made a false representation with knowledge of the facts, (2) petitioner was ignorant of the truth, (3) the county intended that petitioner act upon the false representation, and (4) petitioner in fact acted upon the false representation.

The Hearings Officer finds the applicant's have not met their burden of proof concerning the estoppel defense. Based upon the evidence in the record, the only misrepresentation made by the county was a mistake of law, not fact. The fact that certain members of the planning staff advised the applicant and the Planning Commission that they considered the kennel to be a "conforming conditional use" under MCC 11.15.2028, and that the applicant and Planning Commission relied on this mistake, does not amount to the type of false factual representation required to establish estoppel. In short, mistake of the law is no defense. See Coos County v. State of Oregon, 303 Or 173, 743 P2d 1348 (1987).

Furthermore, the evidence in the record demonstrates that the applicant's themselves, on more than one occasion, doubted the continuing legality of the prior kennel use. The record shows that the applicants initially requested a conditional use permit for the remodelling and expansion of the kennel in both 1989 and in 1994. The 1989 request was accompanied by a February 24, 1989 letter from Mr. Schillereff, which stated:

> "Enclosed you will find the following request for a conditional use permit for a dog kennel on Sauvie Island, Oregon.
>
> "Please note that his request is pertaining to an existing kennel site, in other words, the buildings and structures are intact. However, the permits have lapsed for over 15 years, therefore a new request is now being sent."

This letter of February 24, 1989 demonstrates that the applicant either had knowledge or at least suspected that the prior kennel use had "lapsed". Therefore, the second element of the estoppel defense has not been met because the evidence indicates that applicant was not ignorant of the law. Furthermore, even if the second element of the defense had been met, the misrepresentation that was made by the county was as mistake of law, not a factual misrepresentation. Estoppel cannot be established based upon a mistake of law; the misrepresentation must be one of an existing material fact. The applicant has not demonstrated that the county made a misrepresentation of an existing material fact. Therefore, the estoppel defense has not been established.

C. CONCLUSION

Because the Hearings Officer finds that the kennel use is currently not a lawful use in the zone, the appeal of Marquam Farms Inc. is granted, and the Administrative Decision granting Final Design Review in DR 4-94, is reversed. Because the use has been found to be unlawful at the present time, a request for Design Review for such a use cannot be granted. However, if the applicant is able to obtain a conditional use permit or otherwise establish the use as a lawful use, this denial of Design Review should not prejudice such later action, if any. Therefore, the applicant's request for Design Review is denied, without prejudice.

The Hearings Officer expressly declines to reach any of the other issues raised by the appellant in their May 6, 1994 Notice of Appeal. Specifically, the Hearings Officer lacks authority to determine whether the use is a public nuisance, or whether the 1990 permit for the watchman's

residence was obtained by fraud. Also, the Hearings Officer lacks authority in this proceeding to determine whether or not the 1990 conditional use permit for the watchman's residence (CU 23-90) is still valid. CU 23-90 was not appealed beyond the planning commission and it is therefore a final decision, which cannot be collaterally attacked in this proceeding. Depending upon the final outcome of this particular case, the County may chose to examine the continued validity of CU 23-90, in a separate appropriate action.

As to the defense of estoppel, the mistaken legal interpretation provided by the county staff to the applicant does not, upon careful examination of the law and the facts, rise to the kind of mistake that results in a successful estoppel defense against the county in this case. Furthermore, the evidence indicates that as early as 1989, when the applicant was initially seeking county permits for the kennel remodelling and expansion, Mr. Schillereff stated that he believed that a conditional use permit would be required because whatever other rights may have existed for the kennel use had previously lapsed. It should be noted that even if Mr. Schillereff had not made this statement in his 1989 letter concerning the need for a conditional use permit and the "lapse" of the prior use, the estoppel defense still could not have been maintained against the county, based upon the theory that the county took prior action based upon a mistake in law. Estoppel will not lie against a local government based upon a mistake of law, because the county has a continuing obligation to the public to apply the law correctly.

In conclusion, the Hearings Officer finds that although the kennel was lawfully established prior to the enactment of zoning in 1958, and therefore became a lawful non-conforming use on July 10, 1958, the kennel lost its non-conforming use status on or about January 1, 1964, because the applicant has not provided substantial evidence that the site was being used as a kennel during the period from December 1962 through February 1964. Because there is a lack of substantial evidence in the record concerning the continued operation of kennel during this period of time, the Hearings Officer concludes that the then applicable one year period of discontinuance ran, and the kennel's non-conforming use rights therefore expired on or about January 1, 1964. Once the kennel lost its non-conforming use rights, it could no longer expand through the Design Review process, because the use itself was no longer lawful. As a result of the determination that the kennel use is not presently lawful, the Hearings Officer concludes that he does not have authority to grant Design Review for this use at this time.

D. DECISION

The appeal of the Administrative Decision approving Final Design Review for DR-4-94 is granted. The applicant's request for Final Design Review is denied, without prejudice.

It is so Ordered this 19th day of August, 1994.

Phillip E. Grillo
Hearings Officer

In the matter of DR 4-94:

Signed by the Hearings Officer: August 1994
[date]

Decision mailed to parties: September 1, 1994
[date]

Submitted to Clerk of the Board: September 2, 1994
[date]

Last day to Appeal to the Board: 4:30, Monday, September 12, 1994

Decision Reportred to the Board 1:30 p.m., Tuesday, September 13, 1994
[date]

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of $300.00 plus a $3.50-per-minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)] Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street (in Portland).

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

I
LETTERS AND PETITIONS OF SUPPORT

Sauvie Island Grange

Number 840

August 15, 1995

Barry Adamson
County Hearings Officer
Multnomah County
2115 SE Morrison St, Room 111
Portland, OR 97214

RE: Conditional use approval for Sauvie Island Kennels (Tim and Angela Schillereff) 23200 NW Reeder Rd.

Dear Sir,

I am writing this letter on behalf of the Sauvie Island Grange #840 consisting of 363 members. We the members of Sauvie Island Grange are in support of the dog kennel expansion at 23200 NW Reeder Road. Tim and Angela Schillereff are active members of the community and have proven to Sauvie Island residents and grange members to be responsible neighbors and business owners.

Tim and Angela have invested much of themselves in their business and not just monetarily. They have continuously made improvements to the property since they took over in 1989. These improvements were made with future investment in mind and at that time with the approval of the county. We feel that these prior approvals be given the consideration they deserve. If the county can years later change zoning, or change their minds as to the decisions they have made in the past on zoning, we all could be at your mercy. It is a real shame that good honest people such as the Schillereffs have had to go through this ordeal due to inconsistency on the County's part.

Sauvie Island currently has three kennels operating on Sauvie Island. One of them just received permits to remodel his kennel. All of these kennels have been on the island for over 35 years. They are well respected by the dog industry as well as island residents. All of these kennels are located by duck clubs, however how can it be that only the Schillereff's kennel will harm the wildlife?

Tim and Angela's expansion should be considered a positive attempt on their part to eliminate any sound that may come from the dogs barking. By having new insulated buildings and covered runs the sound and noise reduction to the neighborhood would be significant. There kennel is already well maintained and clean however, the remodel can only improve the quality of service that the Schillereff's provide to the dogs and their owners some of which are members of the Marquam Lake Duck Club.

We the members of the Sauvie Island Grange hope that you will support Tim and Angela in their expansion. This is clearly not a new kennel and the time period that is missing in 1962 is insignificant to everyone other than Marquam Farms and the county. Unfortunately for the Schillereff's some of the islands older pioneer residents who could help provide the missing information have passed away in the past year. We as a grange recommend that you visit the sight to see the commitment that the Schillereff's have made to Sauvie Island and their business.

Fraternally yours,

Linda Burns

Linda Burns
Secretary,
Sauvie Island Grange #840

August 15, 1995

Barry Adamson
County Hearings Officer
Multnomah County
2115 SE Morrison St., Room 111
Portland, OR 97214

Dear Sir,

I am writing to you regarding the expansion request for Tim and Angela Schillereff dba Sauvie Island Kennels.

Our home is located 1/2 mile Northwest of the kennel. We have lived here for four years, however we have both lived on the Island for over 30 years. We have enjoyed being neighbors with Tim and Angela. They are extremely considerate and conscientious neighbors as well as business owners. They are well liked and respected in the community.

Having lived on the island for the majority of our lives, we have been aware of the kennel's existence the whole time. That property has always been referred to as the "kennel". When Tim and Angela purchased the kennel, the improvements were noticeable immediately. They were done first rate with much thought and effort on their part. The improvements continue to this day. This clearly shows the dedication and responsibility to their business and their long term goals.

When the Schillereff's shared with us their plans to remodel/expand we were excited for them. Their new business had surely gotten of on the right foot and they were expecting only the best to come. They were continuing in their efforts to improve the facility and conditions for the dogs while taking in the neighbors and the dog barking situation. We seldom hear the dogs barking at present except occasionally when the wind conditions are just right and a disturbance at the kennel sets off the dogs. Angela shared with us that the way the expansion is designed the dogs would be shielded from being able to see the parking lot and visitors. This is sometimes the cause of the disturbance and eliminating their view as well as constructing more sound proof buildings with covered runs could only improve the noise conditions for their neighbors.

Many residents and visitors to the island rely on the support the kennel gives to help lost dogs and owners find one another. Hundreds of thousand of people visit Sauvie Island each year. Many of these people bring their pets with them to the island. On many occasions these pets are either left or lost. Stray dogs roaming the wilderness are is a major concern of the duck club. Tim and Angela's dogs do not escape and in the event this could happen their dogs are well trained. Lost dogs with no supervision are a potential problem to the wildlife. Tim and Angela have in the past taken these strays dogs in hoping to reunite them with their owners. They provide a resource for Island residents as well as lost pet owners. They should be commended for their efforts to help anyone or any living thing that is in need of their help.

I hope that you will find in favor of the expansion and give them the Conditional Use approval they require to continue with their business. Tim and Angela are good people who run a good business and definitely know how to be good neighbors.

Sincerely,

Linda Reeder Burns

Linda Reeder-Burns
23815 NW Reeder Road
Portland, OR 97231

EXHIBIT 2

August 15, 1995

Multnomah County Planning Division
Department of Environmental Services
2115 S.E. Morrison St.
Portland, Or 97214

Regarding: Case CU 4-95 and MC 1-95
Sauvie Island Kennels, Tim and Angela Shillereff

Dear Sirs,

Please use this letter as my recommendation for the approval of the above application to increase the size of Sauvie Island Kennels.

Tim and Angela Shillereff have operated Sauvie Island Kennels for the past eight years and a kennel has been on the property since the early 1950's. Marquam Lake Farms (which owns the property adjacent to Sauvie Island Kennels) is opposing the expansion and operation of the kennel. This group is composed of lawyers, doctors, professionals and businessmen who DO NOT reside on Sauvie Island. Their only connection to Sauvie Island is to operate a Duck and Goose hunting club. Marquam Lake Farms hunt the lake every day of the hunting season. This type of operation of a Duck and Goose club will ruin a duck lake in a very short time.

I am personally familiar with the owners of six duck clubs and duck lakes on Sauvie Island and none of those individuals will allow those who hunt their lakes or rent their lakes, to hunt ducks and geese more than 2 to 3 days per week. Even the Oregon State Fish & Wildlife only allows hunting on their land 3 days per week. Marquam Lake Farms apparently has no regard for proper wildlife management. Their only aim appears to be to kill as many ducks and geese as quickly as possible and then when their lakes are "hunted out" to look for someone else to blame.

Our family has resided on Sauvie Island for the last 36 years. We own 163 acres. For all of these 36 years, we have rented a portion of our property to Mr. Ed Minoggie who has operated Minoggie Kennels which has the capacity to board and train 60 to 70 dogs. On our 163 acres we have 2 lakes, the largest encompasses approximately 2 1/2 acres. We do not hunt ducks or geese on this lake as it is located in the front part of our property and is used for scenic value. However, it is located approximately 150' to 175' from the Minoggie Kennels. At any time during the fall, winter and part of

the spring seasons, there are from 25 to 200 wild ducks or geese on the lake and surrounding area. In addition, there are 10 to 12 deer that continuously feed and move around our lake, our neighbors property into the Wopato Park across the road. The operation of the dog kennel in no way effects the wildlife close by.

I urge you to support the application to enlarge the kennel operation of Sauvie Island Kennel.

Sincerely,

Kent Meyer
19544 N.W. Suavie Island Rd.
Portland, Oregon 97231

EXHIBIT 3

SAUVIE ISLAND KENNEL PETITION

Petition No. _____

WE, THE UNDERSIGNED, LIVE OR OWN PROPERTY ON SAUVIE ISLAND. BY SIGNING THIS PETITION, WE EXPRESS OUR SUPPORT FOR TIM AND ANGELA SCHILLEREFFS' PROPOSAL TO EXPAND SAUVIE ISLAND KENNEL AS SHOWN ON THE ATTACHED SITE PLAN. THE REMODELED KENNEL WILL REDUCE NOISE IMPACTS TO SURROUNDING PROPERTIES. WE URGE THE COUNTY TO APPROVE THE SCHILLEREFFS' LAND USE APPLICATION.

SAUVIE ISLAND KENNEL HAS BEEN A WELCOME PART OF SAUVIE ISLAND SINCE THE 1950'S. WE BELIEVE THAT EXPANSION OF THE KENNEL AS PROPOSED WILL HAVE NO ADVERSE IMPACTS ON SURROUNDING PROPERTIES OR THE ISLAND'S RECREATIONAL OR AGRICULTURAL ECONOMY. QUITE THE CONTRARY. BECAUSE SAUVIE ISLAND KENNEL SPECIALIZES IN THE BOARDING AND TRAINING OF HUNTING DOGS, WE BELIEVE THAT THE KENNEL COMPLEMENTS HUNTING ACTIVITIES.

WE SPECIFICALLY REJECT THE NOTION THAT EXPANSION OF SAUVIE ISLAND KENNEL SOMEHOW WOULD HARM HUNTING ON NEIGHBORING PROPERTIES. THE KENNEL OPERATED AT THIS SITE FOR YEARS WITHOUT CAUSING PROBLEMS FOR DUCK AND GEESE HUNTERS. TWO OTHER KENNELS ON THE ISLAND OPERATE HUNT CLUBS ON THE SAME PROPERTY. THE MINIMAL INCREASE IN TRAFFIC THAT WOULD RESULT FROM KENNEL EXPANSION IS SMALL IN COMPARISON WITH THE AMOUNT OF RECREATIONAL TRAFFIC THE ISLAND EXPERIENCES ON A DAILY BASIS.

	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Elinor D Oday	Elinor D. Oday	13831 NW Cornelius Pass Rd	8/14/95
2.	Karen M Larsen	Karen M Larsen	15727 NW Gillihan Rd	8/14/95
3.	Dean A Meyer	Dean A Meyer	19544 NW SI Rd	8/14/95
4.	Robert Wiley Jr.	Robert Wiley Jr.	13835 NW Charlton Rd	8/14/95
5.	Karlyn Jane Brunner	Karlyn Jane Brunner	14214 N.W. Charlton Rd	Port. 97231
6	Marguerite E. Persinger	Elston E. Persinger	23200 NW Reeder Rd	Portland 97231
7.				
8.				
9.				
10.				

SAUVIE ISLAND KENNEL PETITION

Petition No. ____

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Gail Murray	Gail Murray	17236 NW Lucy Reeder Rd.	8-14-95
2.	MARY Anne Wolfe	Mary Anne Wolfe	14037 NW Gillihan Rd	
3.	Zilpha Allison	Zilpha Allison	33801 NW Reeder Rd	
4.	Millie Lerch	Millie Lerch	22205 NW Gillihan Rd	8-14-95
5.	Anita M. Bender	Anita M. Bender	19757 N.W. Jamie Ln. Rd.	
6.				
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SAUVIE ISLAND KENNEL PETITION

Petition No. _____

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Betty Brown	Betty E. Brown	18655 N.W. Sauvie Rd.	8-13-95
2.	James B Vann	James B Vann	21005 NW Sauvie Island Rd	
3.	ROBERT C. HICKMAN	Robert C. Hickman	17414 N.W. Lucy Reeder Rd	
4.	RONALD J. MURPHY	Rona J Murphy	17236 nw lucy Reeder	8-14-95
5.	Pamela J Hansen	Pamela J Hansen	17235 NW Lucy Reeder	8-14-95
6.	Donna T. Churchill	Donna T. Churchill	17345 N.W. Lucy Reeder	8-14-95
7.	Christine Hoffart	Christine Hoffart	17335 NW Lucy Reeder	8-14-95
8.	RICHARD L PARKER	Richard L Parker	18520 NW Sauvie Island Rd	8/14/95
	JIM BOYER		17235 NW LUCY REEDER RD	8-14-9
10.	Marilyn Parker	Marilyn Parker	18520 N. W SAUVIE ISLAND RD	8/14/95

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	MARY A. DOUGLAS	Mary A. Douglas	15105 N.W. Sauvies Is. Rd. PORTLAND, Or. 97231	8/8/95
2.	GEORGE E. DOUGLAS	George E. Douglas	15105 N.W. Sauvies Island Portland, Or. 97231	8/8/95
3.	TERRY M. HOFFART	Terry M Hoffart	17335 NW Lucy Reeder Rd	8/9/95
4.	LESLIE J DOUGLAS	Leslie J Douglas	12954 NW HOWELL	8-9-95
5.	Dorothy J Rick	DOROTHY J RICK	18319 N.W. Reeder	8/14-95
6.	Leonard L. SMITH	Leonard L Smith	18319 NW Reeder Rd	8/14/95
7.	(Lawrence) LARRY LARSON	Laurena Larson	18325 NW Reeder Rd	8/14/95
8.	SHIRLEY C. LARSON	Shirley C. Larson	18325 NW Reeder Rd	8/14/95
9.	~~Robert W Wiley Jr~~	Robert W Wiley	P.O. Box 408 Oceanside, Or.	97134
10.	Louis F Larsen	LOUIS F LARSEN	15557 NW Gillihan Rd	8/14/95

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Rita Jean Fears	Rita J Fears	18143 NW Reeder	8/9/95
2.	Clyde D. Fears	Clyde D. Fears	18143 NW Reeder Rd	8/9/95
3.	Dale Johnston	Dale Johnston	19941 NW Reeder	8-9-95
4.	DONALD I ANDERSON	Donald I Anderson	22005 NW Gillihan	8/9/95
5.	Kathleen M ANDERSON	Kathleen M Anderson	22005 NW Gillihan	8/9/95
6.	Linda M Reeder Burns	Linda Reeder Burns	23815 NW Reeder Rd	8/9/95
7.	RYAN W BURNS	Ryan W Burns	23815 NW Reeder Rd	8/9/95
8.	GAINOR RIKER	Gainor Riker	14019 N.W. Gillihan Rd	8/9/95
9.	JOE DREILING	Joe Dreiling	14019 N.W. Gillihan Rd	8/9/95
10.	NORMAN SHARP	Norman Sharp	20230 NW. Sauvie Is. Rd.	8-14-95

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Gordon K Wolfe MARY ANNE WOLFE		14037 NW GILLIHAN	8-9-95
2.	Mary Anne Wolfe		14037 NW Gillihan	8-9-95
3.	Robert T. Walton	RICHARD T. WALTON	15910 N.W. Gillihan Road	8.9.95
4.	LYNNE M. BARNE	Lynne M. Barne	16140 N.W Gillihan	8-9-95
5.	JANICE K. REEDER	Janice K. Reeder	26214 NW Reeder Rd	8-9-95
6.	ROBERT J. REICH	Robert J. Reich	26048 NW. REEDER RD.	8-9-95
7.	JAMES E. Reeder	James E. Reeder	26214 N.W. Reeder Rd	8-9-95
8.	MARIE L. COLASURDO	Marie L. Colasurdo	26504 NW Reeder Rd	8-9-95
9.	A. J. Colasurdo	A. J. Colasurdo	26504- NW Reeder Rd	8-9-95
10.	JOHN. BRUNNER	John Brunner	14214 NW Gillihan Rd Port 97231	8-14-95

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Rebecca Brush	Rebecca Brush	26610 N.W. Reeder	8/9/95
2.	TROY C. BRUSH	TROY C. BRUSH	26610 NW REEDER	8/9/95
3.	John M. HANSELMAN	John M Hanselman	27731 N.W. Reeder Rd.	8-9-95
4.	P Hanselman	P Hanselman	27731 NW Reeder	8/9/95
5.	Evelyn S. Vetsch	Evelyn S. Vetsch	22670 NW Reeder Road	Aug. 10/95
6.	Richard W Vetsch	Richard W Vetsch	22670 NW Reeder Rd	
7.	Robert R. Vetsch	Robert R. Vetsch	22700 NW Reeder Rd	
8.	Don J Posvar	Don J Posvar	22656 NW Reeder Rd	
9.	Christeen A Sagen	Christeen A Sagen	19430 NW Reeder Rd	
10.	Gerry P Alland	Gerry P. Alland	19521 NW Reeder Rd	

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	JOHN STEVENS	John Stevens	15942 NW. Lucy Reeder Rd.	8-8-95
2.	GRETCHEN STEVENS	Gretchen Stevens	15942 N.W. Lucy Reeder Rd	8-8-95
3.	Margaret Stevens	Margaret Stevens	15700 N.W. Lucy Reeder Rd.	8-8-95
4.	David Fazio	David A Fazio	16415 N.W. Lucy Reeder Rd	8-8-95
5.	Kristi FAZIO	Kristi Fazio	16415 NW Lucy Reeder Rd	8-8-95
6.	Cynthia L Sharp	Cynthia L Sharp	18230 NW Sauvie Island Rd.	8-8-95
7.	Patricia Jean Todd	Patricia Jean Todd	1836 NE Grand Ave	8-8-95
8.	GERALD SCHILLEREFF (Reeder)	Gerald Schilleriff (Reeder)	18200 N.W. Sauvie Island RD.	8.8.95
9.	Jan A Charlton	Jan A Charlton	13825 N.W. Charlton Rd	8-9-95
10.	ELEANOR CHARLTON	Eleanor Charlton	13825 N.W. Charlton	Rd 8-9-95

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Anne K. JONES	Anne K. Jones	15140 N.W. Burlington Ct.	8/8/95
2.	LESLIE FORKNER	Leslie A. Forkner	19240 NW Gillihan	8/8/95
3.	Jim Regan	JIM REGAN	15120 N.W. BURLINGTON CT	8/8/95
4.	Beverly Berger	Beverly Berger	15115 NW Burlington Ct	
5.	LORA CRESWICK	Lora L Creswick	15203 NW Burlington Ct	8-9-95
6.	Polly C.F. Holbrook	Polly Hollbrook	15200 NW Burlington CT	8-9-95 97231
7.	VIRGINIA M. LAMMERS	Virginia M. Lammers	18600 N.W. Sauvie Isl. Rd.	97231
8.	JOHN W BEZLEY	John W. Bezley	18640 N.W. SAUVIE IS	97231
9.	GREGORY GRAETTER	Gregory K Graetter	20905 N.W. SAUVIE IS	97231
10.	Erma Dufour	Erma Dufour	18830 NW Sauvie	97231

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
1.	Kari D Eggen	Kari Eggen	16525 NW Gillihan Rd	8/15/95
2.	Sarah Meredith	Sarah Meredith	16144 NW Gillihan	8/15/95
3.	Kendra Lisignoli	KENDRA LISIGNOLI	16453 NW Gillihan	8-15-95
4.	Robert M. Schick	Robert M. Schick	16205 N.W. Gillihan	8-1
5.	MATT LISIGNOLI	Matt Lisignoli	16453 NW Gillihan	
6.	Bob Eggen	Bob Eggen	16525 N.W. Gillihan Rd	
7.	Mark B Tate	Mark B Tate	27174 NW Reeder Rd	
8.	James Raynor	James Raynor	16530 NW Gillihan Rd	
9.	Sheila Raynor	Sheila Raynor	16530 NW Gillihan	8-15-95
10.	Mary Houle	Mary Houle	16600 NW gillihan	8-15-95
11.	John M Houle	John Houle	16600 N.W. gillihan	8-15-95

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	PRINTED NAME	SIGNATURE	ADDRESS	DATE
				8-14-95
1	ELIZABETH B ANDERSON	Elizabeth B Anderson	21445 NW Gillihan	97231
2.	Helen Cholick	Helen Cholick	27338 N.W Sauvie Island	Sauvie Is. Rd. Or. 97231
3.	DIANE KUNKEL	Diane Kunkel	20801 NW RECORD	81595
4.			18210 NW SAUVIE ISLAND RD	8-15-95
5.	June Parker	June Parker	18015 N.W Sauvie Is Rd.	
6.	Dale R. Burger	Dale R. Burger	18105 NW. Reeder Rd.	
7.	Bonnie L. Burger	Bonnie Burger	18105 NW Reeder Rd.	81595
8.	Gikki A Gragg	Gikki Gragg	19818 NW Sauvie Is Rd Portland OR	97231
9.	Dennis Grande	Dennis Grande	13743 N.W. Charlton Rd	
10.	Nancy Grande	Nancy Grande	13743 NW Charlton Rd.	97231

EXHIBIT
7

August 14, 1995

Scott Peneble, Planning Director
Multnomah County Planning and Development
2115 SE Morrison
Portland, OR 97214

Dear Mr. Peneble:

This is a letter in support of the expansion of Sauvie Island Kennels.

My wife and I are active in the sport of dogs. I am a Veterinarian by occupation, but I enjoy training dogs for competitive field trials and for hunting. My wife is a certified American Kennel Club conformation judge. Together, we have been breeding, raising, showing and trialing Brittanys for over 15 years.

We started out just showing dogs, but over the years realized the importance of the duality of the Brittany and decided to become involved in the trialing of dogs. After using a professional handler for several years, I finally became involved personally with the handling of my own dogs. I have placed an Amateur Field Championship on our primary stud dog, but only through the knowledge and support of Tim Schillereff. I have spent many weekends with Tim training dogs and can personally attest that Tim knows how to train dogs and to make them happy to perform at their best.

We have been using Sauvie Island Kennels for nearly 3 years. We usually have at least one dog being boarded and under Tim's training for 6 months each year. When we travel on vacation for 2 weeks each summer, we have no concern in leaving our entire kennel of 8-10 dogs with the Schillereff's. The kennel is well-managed and we have recommended several others on the quality of care the dogs receive while being boarded.

I have arrived at the kennels several times early in the mornings to train with Tim on the Island. When you drive up, some of the dogs bark, but the ducks and geese in the pasture ignore the dogs barking. Birds are smart and realize that the dogs barking is not a threat. However, overhunting an area, as is done on the adjacent property, soon makes the birds wise and causes them to look for some place else to rest and graze. If there are complaints of reduced numbers of birds, it is not due to barking dogs.

Sauvie Island Kennels has been around since the 1950's and since the Schillereff's have taken management, the kennel is a first class operation. Multnomah and adjacent counties need good quality kennel care. The population of the tri-county area is growing rapidly and with the human influx is also a dog population. People need to have some place to board their dogs and feel secure that their "family members" will be treated with great care. We drive from Benton county to board our dogs at this facility.

Sauvie Island Kennels should be allowed not only to continue to operate, but should be allowed to expand their facilities to accommodate the potential growth in the area. The Schillereff's land use request should be approved.

Sincerely,

H. N. Engel, DVM, PhD
Professor
College of Veterinary Medicine
Oregon State University
Corvallis, OR 97331

Vetsch Dairy
22670 N.W. Reeder Road
Aug. 1995

EXHIBIT 8

To the Multnomah Co Planning Commission
Regarding Case File CU 4-95 MC 1-95, #23

Dear Multnomah Co Commissioners,

We are owners and operators of Vetsch Dairy located just South of the Schillereff's Kennels and the Marquam Farms Corp. Duck Club and have been at this location since 1949. In the 1950's the dog kennels were built and established by Peter Alphort and the first manager that we can remember was a Scotchman by the name of Mr. Rose. Later Evelyn Blitz purchased the property and also operated a dog kennel. Since that time it has always been known as the dog kennels and operated as such off and on.

The Marquam Farms Duck Club owners knew the kennel was there when they bought their property. We can see no reason that the Schillereff's use of their property as a kennel be terminated and forced to give up their means of making a living. The new plans for the kennel sound like it will make even less of an impact on the ducks, geese and neighbors. Certainly, much less than the Marquam Farms Duck Club does with their Trap shooting and wildlife hunting all year long.

We recommend that the planning commission approve the Schillereff's property as a non conforming use as a kennel. As farmers the only option we can see for use of this small acreage and the use of the present buildings as exclusive farm use would be to operate a pig farm. In our opinion a good place to board dogs is needed much more.

Sincerely,

Richard W + Evelyn Vetsch
22670 NW Reeder Rd. Portland, Oregon 97231

EXHIBIT 9

8/95

To Multnomah County Planning and Development,

We represent the largest farm market on Sauvie Island, the Pumpkin Patch, and we farm about 2.5 miles from Sauvie Island Kennels. The Pumpkin Patch grows about fourty different crops on 400 acres here in the island.

We find it necessary for you to understand how incomprehensible it is to think that the use of dog kennels are incompatible with agricultural uses. For years, animals have been raised for personal as well as business purposes here on the island, right along side the agricultural practices that take place year around. Together, these two ventures have made good use of and have conserved the land for decades.

Just as it would be absurd to farm in the city, it, too, is absurd to think that dog kennels don't belong in the "country" on Sauvie Island. There is no better place for either than here on the island.

In consideration that the kennel has operated since the 1950's without problems, why should its requests not be granted when it in fact does no harm to Multnomah County's stated policy of agricultural land preservation? The Schillereff's daily preserve the land on which they live. They are good people, great neighbors, and concerned about the environment. Their proposed changes to the kennels prove this.

In light of the above information, we here at the Pumpkin Patch on Sauvie Island urge the county to approve the Schillereff's request.

Sincerely,
Kari Egger

partner and co-owner
of the Pumpkin Patch

EXHIBIT
10

The Charlton Kennels and Far

SAUVIES ISLAND
13825 N.W. CHARLTON ROAD
PORTLAND, OREGON 97231
TELEPHONE (503) 621-3675

August 12, 1995

Mr. Barry Adamson
Department of Environmental Services
Division of Planning and Development
2115 S. E. Morrison Street
Portland, Oregon 97214

Dear Mr. Adamson:

Re: Case File CU 4-95 & MC 1-95
Applicants, Tim and Angela Schilleroff

We have managed a 64-run dog boarding facility here on our family farm for the past 29 years. We own approximately 150 acres and for three generations have operated one of the most, if not the most successful duck hunting clubs on Sauvie Island. We find absolutely no conflict between our kennel operation and duck hunting.

Marquam Lake Farms shoots almost every day of the season and any wildlife manager will tell you that you cannot put that much pressure on waterfowl and expect decent hunting. Most of the private clubs in our area hunt only two and one half days a week, Wednesday, Saturday until noon and Sunday. Speaking for three generations of duck club owners, it takes only about three years to ruin a good hunting lake by overshooting it and four to five years to bring it back.

While the Sauvie Island Kennel is a competitor, they are also our neighbors and friends who run a good operation. Therefore, I recommend they be allowed to increase their capacity from 50 to 75 runs.

Sincerely,

Jim Charlton

EXHIBIT 11

MULTNOMAH COUNTY ANIMAL CONTROL
1700 W. Columbia River Hwy.
Troutdale, OR 97060

248-3066

FACILITY LICENSE NO. 108 Expires: 8/98 Fee: $300.00

Number of Cats _____ Number of Dogs 45/50 Number of Exotics _____

Business Name Sauvie Island Kennel Phone _____

Name of Owner Tim/Angela Schillereff Phone 621-3204

Address 23200 N.W. Reeder Rd City Portland Zip 97231

CONDITION OF APPROVAL:

David R. Flagler, DIRECTOR

Ordinance No. 8.10.110(G) states this license must be conspicuously displayed on the facility premises.

A/C-103, Rev. 6/94

EXHIBIT 4

ALDO ROSSI
3701 NE 122nd Avenue
Portland, OR 97230

August 12, 1995

Mr. Scott Premble
Planning Director
Multnomah County Planning & Development Commission
2115 SE Morrison Street
Portland, OR 97214

Subject: **SAUVIE ISLAND KENNELS**

Dear Mr. Premble:

For many years, I have been a duck hunter on Sauvie Island. I belong to Jim Charlton's Duck Club and in the past have boarded my dogs at Charlton Kennels located on the same piece of property. In those past years, Tim Schillereff was a dog-trainer for Jim Charlton and trained my hunting dogs for me.

Since Tim Schillereff now has his own kennel, I continue to take my dogs for training and boarding to Tim's kennel, which is known as ***Sauvie Island Kennels***. I understand there is a question regarding whether a kennel and a duck club are compatible and you also question the existence of ***Sauvie Island Kennels***.

I do not understand why Jim Charlton is able to make a good living with both a kennel and hunting club on his place side by side for 50 years and you should question the existence of ***Sauvie Island Kennels*** because of Marquam Farms Duck Club. What is the difference?

Tim Schillereff is a quiet, hard-working, very polite and respectful gentleman. He minds his own business and only wants to make a living at something he does so well. I am a 75-year old businessman and feel a person with Tim Schillereff's integrity should not be denied doing a job he does so successfully. I also understand Tim trains hunting dogs for some of the members of Marquam Farms, such as my friend, Eric Hoffman.

Please read this letter into your records and give it some consideration. We urge you to APPROVE the Schillereff land use application coming up on Wednesday, August 16, 1995.

Respectfully,

Aldo Rossi

Aldo Rossi

RECEIVED
AUG 14 1995
Multnomah County
Records Section

August 13, 1995

ATTN: BARRY ADAMSON, HEARINGS OFFICER
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE MORRISON ST
PORTLAND OR 97214

Re: Land Use Request by Tim & Angela Schillereff; Sauvie Island Kennel, 23200 NW Reeder Rd., Portland, OR

Dear Mr. Adamson:

My name is Bruce Cavallero. I am 43 years old and have lived in Linnton all of my life. Linnton is approximately 2 miles from Sauvie Island and I've spent a great deal of time on Sauvie Island. I've duck hunted on the Island since I was 11 years old. For 10 years I also hunted in Scapoose around the old Brown Kennel on Dike Road, and found that the dogs kenneled there never disrupted my hunting in any way. Even though their barking was quite audible, it never prevented the ducks from working into the duck lake. I've also hunted at Vetch's Dairy which borders the Sauvie Island Kennel. The dogs boarded there never impacted my hunting at all. I currently hunt across the road from the Sauvie Island Kennel, at the R.W. Burns property, and have never experienced any problems with noise from the kennel disturbing or otherwise deterring the ducks from coming in.

Tim and Angela run an excellent kennel. I have boarded and had my dog trained at their kennel. I feel it would be very beneficial to the area for them to expand. Angela and Tim are very hard-working people and are a great asset to the community. I feel that any complaints about noise from their kennel interfering with duck hunting is unwarranted and just plain absurd. Sauvie Island is a place for dog kennels as well as duck hunting. As long as I can remember, there have always been three dog kennels on Sauvie Island: Minogue, Charleton, and Sauvie Island. My family owns the Linnton Feed Store and when I worked at the store I delivered lots of feed all over the Island so I'm well aware of its history.

I feel that the expansion of the Sauvie Island Kennel would be of benefit to everyone in the community as well as for anyone else who would wish to board their dog at a clean, well-run establishment operated by caring, competent people. I urge that the Schillereff's land use request be approved.

Sincerely,

Bruce Cavallero

Bruce Cavallero
12408 NW Alderview Dr.
Portland, OR 97231
286-5989

Multi-Services, Inc.

providing a complete range of services
to commercial and residential buildings

5200 s.w. macadam ave., suite 160 • portland • or 97201 222-7073

February 23, 1995

Mr. Scott Premble
Multnomah County Planning Director
Division of Planning and Development
2115 S.E. Morrison
Portland, OR 97214

Dear Mr. Premble:

I am writing to you regarding Sauvie Island Kennels located at 23200 N.W. Reeder Road on Sauvie Island. I understand that Marquam Farms has taken issue with not only the proposed expansion of the kennels but the kennel as it exists. I am and have been a member of the Marquam Farms Corporation for the past eight years and an active duck hunter on the island for thirty years. Quite honestly I do not understand what the problem is. This particular piece of property has been used as a dog kennel off and on for many years. I have used the existing kennel for training my hunting dogs and boarding them during the hunting season. My family enjoys our trips out to our duck club even during the off-season, as they enjoy seeing the dogs at the kennel and Tim and Angela are very generous to us.

I personally appreciate the fact that I have a place to train and board my dogs right next to my duck hunting club. I know of several members of Marquam Farms that have had their dogs trained there and boarded there. The two uses compliment each other and I for one appreciate it.

Tim and Angela have worked very hard to make their kennels one of the best in Oregon and have been successful in operating a top class kennel. I know there are members of Marquam Farms who take issue with the kennel's existence, but I wanted you to know that there are also members who appreciate having this amenity available to us.

If you wish any further information, feel free to contact me.

Sincerely,

David L. Stephens
President

DLS:lglfs

DOCUMENTATION OF SAUVIE ISLAND KENNEL'S NONCONFORMING USE

Time Period	Number of Dogs	Source of Information
1953-1955	50-60	Neil Rose, whose father Donald Rose helped build the kennel and ran it for two years.
1953-1955	50-60	May Louise Rose, who assisted her husband in operating the kennel for two years and who lived on the property during that time.
1953-1955	50-60	Dr. Joseph McFarland, friend of Neil Rose since 1953 and Sauvie Island resident.
1955 - present	always been 3, 4, 5 dogs	Red Persinger (in 1995)
1950s - present	unknown, but continuously used as a kennel	George Douglas, a Planning Commissioner in 1990.
1952 - present	unknown, but continuously used as a kennel	C. Dondo (in 1967)
1954 - present	unknown, but continuously used as a kennel	Red Persinger (in 1967)
late 1950s - 1969	unknown, but kennel usually full; at least four dogs always boarded	Mildred Meifert, whose son owned kennel from 1969 to 1973, remembers Evelyn Blitz's tenure as kennel owner.
1958 - 1969	at least 25, continuously	Pat Baggett remembers Evelyn Blitz had at least 25 dogs continuously in the kennels.
1958 - 1967	unknown, but in continous use	George Cashdollar (in 1967)
1961-1965	about 50	Norman Crowe says Evelyn Blitz operated a kennel with about 50 dogs, the kennel's capacity.
1964 - present	continuous use as a kennel	Norman Crowe says kennel in continous use during these years.
1966 - 1969	continuous use, about 50	Myron Meifert
1968 - 1976	unknown, but always several dogs present	Mairi Holman, daughter of Donald Rose (the kennel's first operator) and former island resident.
1969	about 50	Norman Crowe remembering Myron Meifert's operating the kennel.
1969 - 1973	10 kennels open; at least four dogs	Mildred Meifert describing kennel operation during Pein's ownership.
1969 - 1973	at least six	Pat Baggett remembers the Peins had at least six dog continuously boarded.
1969 - 1973	owner's three dogs; boarded friends' dogs; at least four dogs	Marguerite Persinger
1970 - 1973	owner's three dogs and Red's two dogs; at least five dogs	Red Persinger (in 1984)
1973 - 1989	owner's three dogs; boarded friends' dogs; at least four dogs	Mildred Meifert
1973 - 1989	owner's three dogs; boarded friends' dogs; at least four to six dogs	Marguerite Persinger
1973 - 1989	between three and ten	Pat Baggett remembers the Persingers always had several dogs boarded.

Peter Allport, owner (1)
of Norm Thompson. Inc
purchased this property -
in 1954 / [redacted] - I believe
he purchased it from the
couple who had the
Ranch farm to the immediate
East, They were Italian
But I cannot recall the
name. My father Donald
Rose assisted Allport
in building the kennels
and in positioning the
"Weights House" in position
this was done in the
Spring of 1954, My dad
Could rented the property
from Allport, we moved
in may of 1954, I was
in the Jr. High School

Mr. & Mrs. Dono →

Ed's Mary's House →

in Hillsboro, & my brother drove me there each Morning until June and graduation. I then attended Sequoia High School, my Sister Mari Holmon attended Sequoia Island School until the Summer of 1955, when we moved to Toledo, Washington. My father purchased property there, about then I sold the property to someone else - I do not recall who - But I do know the kennel was here prior to May, 1954 -

Allport deal in the early/mid 50ties -
Hudson Mark Allport is/was a Stock broker in Portland -

Dr. Joseph McFarland who resides in Vancouver can attest to these facts

Neil Rose -
10517 NE 50th Ave
Vancouver -
360-694-7321
office PDX 223-1061 -

Mairi Holman -

May Rose (my mother 86 yrs old)
360-573-2449

Main → no e here

His mom → wife of Donald Rose)

AFFIDAVIT OF GEORGE DOUGLAS

STATE OF OREGON)
) ss.
County of Multnomah)

I, George Douglas, being first duly sworn, depose and say:

1. I have been a resident of Sauvie Island for nearly 50 years and am very familiar with many of the people, families and businesses which have been on the Island during my time here. I am acquainted with Tim and Angela Schillereff. I am neither a business associate nor a close family member of theirs.

2. I personally remember there was a dog kennel on the Schillereff's property well back into the 1950's. I believe the kennel has been in continuous use since the 1950s. I particularly remember Mrs. Blitz who operated a kennel there from the late 1950's until she sold the property to Myron Meifert. During that time there were always many dogs at the kennel.

3. I served as a member of the Multnomah County Planning Commission. I was a member of the Commission and was present at the public hearing on November 6, 1990 when CU 23-90 was brought before the County Planning Commission. I voted in favor of the Schillereffs' request for conditional use approval.

4. When I voted to approve the conditional use permit for the watchman's residence in 1990, my intention was that the permit would be good for both the residence and the dog kennel from then on. I thought the conditional use permit for the residence would validate the dog kennel as well. I thought we were approving a residence and that we were laying to rest any

future concerns about the legality of the kennel. I was certain, in 1990, that I was voting to create a permanent right to a dog kennel.

DATED this 23 day of August, 1995.

George Douglas

George Douglas

Subscribed and sworn to before me this 23 day of August, 1995.

Notary Public for the State of Oregon
My Commission Expires: 1/16/97

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OFFICIAL SEAL
SUZANNE TINKER
NOTARY PUBLIC - OREGON
COMMISSION NO.019989
MY COMMISSION EXPIRES JAN. 16, 1997

To whom it may concern:

I know that the Lake Tree Kennels, of Rt 1, Box 120B on Sauvie Island, Portland Oregon have been in the business of boarding and training dogs since the year of 1952.

Yours truly,
C Rovelo
Rt 1 Box 113BB

Nov 27, 1967

To whom it may Concern:

I have known the Lake Inn Kennels to have been in business, of Boarding & training dogs since the year of 1954 located at Rt 1 Box 120B on Sauvie Island, Portland Oregon 97231

Yours Truly,

Elden E Persinger
Rt 1 Box 70 Portland, Oregon

AFFIDAVIT OF ELDEN E. PERSINGER

State of Oregon)
) ss:
County of Multnomah)

I, Elden E. Persinger, being first duly sworn, depose and say:

1. My wife, Marguerite Persinger, and I owned the Sauvie Island Kennel property from 1973 until recently, when we sold it to Tim and Angela Schillereff. From 1970 to 1973, the place was owned by Henry and Irene Pein, both now deceased. They purchased the kennel from Myron Meifert. They also owned some of the adjoining property currently owned by Marquam Farms Corporation.

2. I knew Henry and Irene Pein while they owned the kennel; in fact, my wife and I often spent weekends on the place with the Peins. At the time, I owned and operated Red's Moorage at the foot of the Sauvie Island Bridge (it is now known as Larson's Moorage).

3. Myron Meifert had operated the kennel commercially as Lake Tree Kennels. The Peins did not operate the kennel commercially, but they kept their own three dogs (Sam, Betsy and Pat) on the place. In addition, as favors for their friends, they boarded dogs without charging any money. Marguerite and I had three dogs (Duke, Toby and Charlie). We kept Charlie at the moorage. The Peins regularly boarded Duke and Toby in the kennels on their place. Therefore, just considering our dogs and theirs, the Peins kept four to five dogs on the place on a regular basis during the years they owned it.

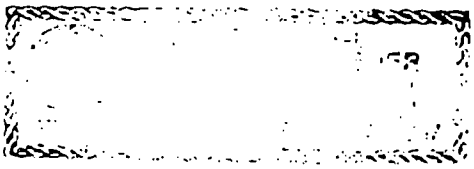
4. Henry preceded his wife in death. Irene Pein sold the property to us in early 1973. We sold Red's Moorage and brought all three of our dogs with us to the kennel property. We also kept dogs for friends and relatives at no charge. Our friend, Bill Warrington, and his son Michael boarded their dogs, which they named for brands of beer (for example, Oly and Henry) for weeks or even months at a time, generally during the summer, but also at other times of the year. We never charged the Warringtons, but they did give us another dog, Bud, who still lives with us.

5. In addition, Frank Meifert, a relative of mine, frequently left his dogs (Tuck and Mitzi) with us. He had several dogs name Tuck over the years. In other words, although we never operated the kennel commercially, we did operate the kennel continuously for our own dogs and as a courtesy to friends and relatives from 1973 until my great-nephew Tim Schillereff and his wife Angela took over operation of the kennel. We regularly cared for 4-5 dogs at the kennel.

Elden E. Persinger

Elden E. Persinger

Sworn to and subscribed before me on this 27th day of July, 1994.



Janice K Reeder

Notary Public for Oregon

My Commission Expires: May 2, 1997

AFFIDAVIT OF TIMOTHY SCHILLEREFF

STATE OF OREGON)
)ss.
County of Multnomah)

I, Timothy Schillereff, being first duly sworn, depose and say:

My first memories of the property that Angela and I now operate Sauvie Island Kennels on is in the year 1973. My great-uncle Elden Persinger aka Red Persinger owned the kennel property. My grandfather and I would come and visit Uncle Red and train dogs together during the off times of hunting season. This occurred every year until my grandfather's death in 1992.

When the kennels were owned by the Persingers, there were always dogs in the kennels. In addition to Uncle Red's dogs, there were always 3-10 other dogs, not counting the litters of puppies. I remember looking at the litter of puppies, and trying to pick the best one for our friends.

I also remember the summer trapshoots in which 75-100 people would attend, all their family and friends. These occurred during the years that the Persingers owned the property. I recall the bird dogs barking at the shooting and Uncle Red would quiet them down.

In the winter monthes, I would come visit Uncle Red and Aunt Marguerette at the kennels and ride snowmobiles on the property. On these occasions I saw many dogs, 3-7, in addition to Uncle Red's dogs in the kennels, usually dogs owned by their friends who were out of town.

As long as I can remember, there have been dogs in the kennel. In fact, in the late 1970's and early 1980's the Marquam Lake duck club was managed by Bill Warrenton, who boarded several of his dogs, and his son's dogs in the kennel while he was in Canada for the summer. I still board Bill Warrenton's dogs today. He owns a black Lab currently, and his son has a Brittany in which we take care of when they go out of town.

Timothy Schillereff

Timothy Schillereff

Sworn to and subscribed before me on this 23 day of August, 1995.

Suzanne Tinker

Notary Public for Oregon

OFFICIAL SEAL
SUZANNE TINKER
NOTARY PUBLIC - OREGON
COMMISSION NO.019989
MY COMMIS[illegible]YPIRES JAN. 16, 1997

AFFIDAVIT OF NORMAN CROWE

STATE OF OREGON)
) ss.
County of Multnomah)

I, Norman Crowe, being first duly sworn, depose and say:

1. I have been a resident of Sauvie Island since 1964. Prior to that time I worked on the Island training dogs for Mr. Norm Brown from the early 1950s until 1961 when Mr. Brown ended his kennel operation.

2. I remember Eva Blitz owned a commercial dog kennel on the property now owned by Tim and Angela Schillereff. Mr. Brown would regularly send his overflow boarders to Eva Blitz' for boarding. That was common practice among all the kennel operators on the Island.

3. In 1961 I bought a miniature poodle from Eva Blitz. I took the poodle to Eve's several times a year for grooming up until the poodle died in 1965. During the times I visited Eva Blitz's kennel, the kennel was always operating at capacity or near capacity -- in the neighborhood of 50 dogs.

4. I remember the kennel owned by Myron Meifert always operated at near capacity of about 50 dogs.

5. After Meifert sold the property, I recall the Peins and Persingers as owners of the land and kennel. I travel the island roads regularly and am very familiar with that property. Since 1964 through the present, I cannot recall a time when there were not barking dogs in the kennel every year. To the best of my knowledge, not a year has gone by when there were not four or

more dogs boarding in the kennel the entire time I have been on the island. During the past 40 or so years, I cannot recall a time when there were not dogs boarding or living at that kennel.

DATED this 23 day of August, 1995.

Norman Crowe

Subscribed and sworn to before me this 23 day of August, 1995.

Notary Public for the State of Oregon
My Commission Expires: 1/16/97

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OFFICIAL SEAL
SUZANNE TINKER
NOTARY PUBLIC - OREGON
COMMISSION NO.019989
MY COMMISSION EXPIRES JAN. 16, 1997

AFFIDAVIT OF MILDRED MEIFERT

STATE OF OREGON)
) ss.
County of Multnomah)

I, Mildred Meifert, being first duly sworn, depose and say:

1. I have been a resident of Sauvie Island for nearly ~~50~~ 31 years and am familiar with the Sauvie Island Kennel, having observed the land regularly and frequently for the last 45 years.

2. I remember that Eva Blitz once owned the property now owned by Tim and Angela Schillereff. Eva Blitz owned the property and operated a dog kennel on the property from the late 1950s until she sold the land and kennel to my son, Myron Meifert in 1969.

3. I remember that from the late 1950s through approximately 1969, the property was continuously operated as a commercial dog kennel. The commercial dog kennel was operated by either Eva Blitz or a tenant of Eva Blitz.

4. During most of the commercial kennel period the kennel runs were often full. I cannot recall any time during that period when there were fewer than four adult dogs boarded at the kennel.

5. I am personal friends of Red and Marguerite Persinger and have visited them on their property many times. I recall that between the time Myron Meifert sold the property until the Persingers bought the property, approximately 1969 to 1973, the land was owned by the Pein family. The Peins also owned the neighboring property now held by the Marquam Duck Club. The Peins left at least 10 kennel runs open and occasionally boarded dogs. I believe that Red Persinger sometimes kept his dogs there during hunting season. I do not recall a single year during that period when there were not at least four dogs staying on the property.

6. I recall that from the time Red Persinger bought the property in 1973 until 1989, the Persingers had three of their own dogs on the property and often boarded other dogs in the

kennels as personal favors to their friends. I remember that the Persingers always had four or more dogs staying in the kennels at some point each and every year even though they were not operating a commercial kennel.

DATED this 23 day of August, 1995.

Mildred Meifert

Subscribed and sworn to before me this 23 day of August, 1995.

Notary Public for the State of Oregon
My Commission Expires: 1/16/97

OFFICIAL SEAL
SUZANNE TINKER
NOTARY PUBLIC - OREGON
COMMISSION NO.012909
MY COMMISSION EXPIRES JAN. 16, 1997

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AFFIDAVIT OF MARGUERITE PERSINGER

STATE OF OREGON)
) ss.
County of Multnomah)

I, Marguerite Persinger, being first duly sworn, depose and say:

1. My husband Eldon "Red" Persinger, and I owned Sauvie Island Kennel from 1973 until recently when we sold it to Tim and Angela Schillereff.

2. My husband and I kept three dogs on our own on that property the entire time we lived there. In addition, every year we kept other dogs on the property as favors to hunters and friends, such as Bill Warrenton. Bill Warrenton owned two to three dogs.

3. At a minimum there were always four to six adult dogs living or boarded on our property each year from 1973 until the time we sold the property and kennel.

4. Prior to purchasing our property in 1973, my husband and I visited the property and kennel when it was owned by the Peins. We visited the Peins every year they owned that kennel property. The Peins owned three dogs. In addition to their dogs, the Peins commonly kept dogs owned by hunters each and every year. I cannot recall a year when there were not at least four or more adult dogs living or boarding on the Pein's property.

Dated this 23 day of August, 1995.

Marguerite Persinger
Marguerite Persinger

Subscribed and sworn to before me this 23 day of August, 1995.

Suzanne Tinker
Notary Public for the State of Oregon
My Commission Expires: 1/16/97

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OFFICIAL SEAL
SUZANNE TINKER
NOTARY PUBLIC - OREGON
COMMISSION NO.019989
MY COMMISSION EXPIRES JAN. 16, 1997

August 22, 1995

Mr. Robert Hall
Multnomah County Planning Department
2115 SE Morrison St.
Portland, OR 97214

RE: Schillereff case: CU 4-96 & MC1-95,23

Dear Mr. Hall:

My name is Mrs. Pat Baggett. I reside at 18120 NW Sauvie Island Road. I have personal knowledge of the following facts:

1. I first met Evelyn Blitz in 1946 when she was married to Bill Blitz. I remember when Evelyn Blitz moved to the property now owned by Tim and Angella Schillereff. My mother and father were dog trainers, and I remember going to the opening of Evelyn's Blitz's kennel. That was about 1958.

2. I remember that Evelyn used to hold social gatherings (picnics, holiday parties, etc.) on her property every year she owned the land, including when she leased the kennel operation to others. I attended these events every year, from the time Evelyn Blitz bought the property until the time she sold the property to Myron Meifert.

3. Every time I visited the property when Evelyn Blitz owned it, she always had 25 dogs or so in the kennels.

4. I recall the Peins ownership of the property and kennel. At the time I thought they were running dogs on the old Blitz place and on the place now owned by the Duck Club. The Peins always let hunters use the old Blitz place. I visited the Peins several times every year they lived on the Blitz place. The Peins never ever shut done the kennel. There were always at least 6 dogs in those kennels every year they owned the Blitz place.

5. I know Red & Marguerite Persinger very well. I have visited them on their property every year since they bought their land from the Peins in 1973. Every year since they owned the property I attended a picnic, turkey shoot or other social events on their land. Red and Marguerite always had between 3 to 10 dogs in their kennels every time I visited them. I can not remember a time when they did not have several dogs in the kennels.

Please enter this letter into the public record.

Thank you.

Respectfully,

Pat Baggett

Pat Baggett

AFFIDAVIT OF ELDEN E. PERSINGER

State of Oregon)
) ss:
County of Multnomah)

I, Elden E. Persinger, being first duly sworn, depose and say:

1. My wife, Marguerite Persinger, and I owned the Sauvie Island Kennel property from 1973 until recently, when we sold it to Tim and Angela Schillereff. From 1970 to 1973, the place was owned by Henry and Irene Pein, both now deceased. They purchased the kennel from Myron Meifert. They also owned some of the adjoining property currently owned by Marquam Farms Corporation.

2. I knew Henry and Irene Pein while they owned the kennel; in fact, my wife and I often spent weekends on the place with the Peins. At the time, I owned and operated Red's Moorage at the foot of the Sauvie Island Bridge (it is now known as Larson's Moorage).

3. Myron Meifert had operated the kennel commercially as Lake Tree Kennels. The Peins did not operate the kennel commercially, but they kept their own three dogs (Sam, Betsy and Pat) on the place. In addition, as favors for their friends, they boarded dogs without charging any money. Marguerite and I had three dogs (Duke, Toby and Charlie). We kept Charlie at the moorage. The Peins regularly boarded Duke and Toby in the kennels on their place. Therefore, just considering our dogs and theirs, the Peins kept four to five dogs on the place on a regular basis during the years they owned it.

4. Henry preceded his wife in death. Irene Pein sold the property to us in early 1973. We sold Red's Moorage and brought all three of our dogs with us to the kennel property. We also kept dogs for friends and relatives at no charge. Our friend, Bill Warrington, and his son Michael boarded their dogs, which they named for brands of beer (for example, Oly and Henry) for weeks or even months at a time, generally during the summer, but also at other times of the year. We never charged the Warringtons, but they did give us another dog, Bud, who still lives with us.

5. In addition, Frank Meifert, a relative of mine, frequently left his dogs (Tuck and Mitzi) with us. He had several dogs name Tuck over the years. In other words, although we never operated the kennel commercially, we did operate the kennel continuously for our own dogs and as a courtesy to friends and relatives from 1973 until my great-nephew Tim Schillereff and his wife Angela took over operation of the kennel. We regularly cared for 4-5 dogs at the kennel.

Elden E. Persinger

Elden E. Persinger

Sworn to and subscribed before me on this 27th day of July, 1994.

Janice K. Reeder

Notary Public for Oregon

My Commission Expires: May 2, 1997

To whom it may concern:

I know that the Lake Tree Kennels, of Rt 1, Box 120B on Sauvie Island, Portland Oregon have been in the business of boarding and training dogs since the year of 1952.

Yours truly,
C Lovelo
Rt 1 Box 113BB

Nov 27, 1967

To whom it may Concern:

I have known the Lake Ire Kennels to have been in business; of Boarding & training dogs. since the year of 1954 located at Rt 1 Box 120B on Sauvies Island, Portland Oregon 97231

Yours Truly,

Elden E Persinger
Rt 1 Box 70 Portland, Oregon

November 28, 1967

To whom it may concern:

I have known the Lake Tree Kennels to have been in business, of boarding and training dogs, prior to 1958 located at Rt 1 Box 1201 on Sauvies Island, Portland Oregon 97231.

Yours truly,

George Cashdollar
Gillihan Rd.

PREVIOUS USE

Notes

MAP

Date From FEB-64 to FEB 65

Occupant COURTWAY

Description of Use HAD DOGS - LEASED ON BASIS IT BE A COMMERCIAL KENNELL - ENG. BULLDOGS - BRED OWN STOCK - 4 TO 5 ADULTS & 8 OR 10 PUPPIES ALMOST OF TIME

Description of ~~Equipment~~ BLDGS: SAME AS NOW NOT USED AS AN LEASE

Number of Employees NONE

Description of Signs NONE

PREVIOUS USE

Notes

MAP

Date From AUG 1957 to DEC 1962

Occupant EVELYN T. BLITZ

Description of Use COMMERCIAL KENNELL UP TO 50 DOGS - BOARDING, BREEDING & TRAINING. BOUGHT AS KENNELL - BLDGS WERE HERE

Description of Equipment SAME BLDG BOUGHT FROM ROY WALLACE, WHO HAD RENTED IT OUT TO BREEDERS FOR ABOUT 5 YRS (±)

Number of Employees ?

Description of Signs MARQUEE LOOK KENNELLS - SIZE & NUMBER UNKNOWN, 4' SIGN ON BASEMENT STORE

DATE 10-18-67 ZONE F-2 NON-CONFORMING APPROVED

ASSESSOR'S RECORD

Date Built HOUSE 1942

Addition 12'x58' 1954 KENNELS 12'x20' - 1955

Personal ~~Prop.~~ (~~List Equipment~~ and Dates)

(ACTUAL 12'x20', 12'x58')

Assumed Name

Permit

~~PREVIOUS USE~~

Notes 2 OR 3 PER RUN BUT MORE LIKELY ONE

MAP

PRESENT STATUS LAKE CREEK KENNELS

Location REEDER RD. RT 1 BX 120B

Date Established MOVED IN 9-5-67

Owner MEIFERT, MYRON JR

Address SAME

Occupant MEIFERT

Use BOARDING & BREEDING DOGS

Description of Use 30 RUNS IN 60' BLDG 356' @ 4 CL FENCE
10 RUNS IN 25' BLDG - 5' WIDE 160' @ 4 CL FENCE
BOUGHT FROM EVELYN BLITZ
LIMITED TO 50 DOGS

Description of Buildings and Equipment CORRUGATED METAL 60'X15'(I) 25'X15'I

Number of Employees NONE

Description of Signs ONE SIGN 18"X18" (ILLEG)

THEY OWN 3 DOGS

Date From ~~1957~~ Oct 65 To Oct 1966

Occupant VICTOR EATON - RENTERS

Description of Use 15 TO 20 DOGS

Description of Equipment BLDGS SAME

Number of Employees NONE

Description of Signs SAME AS PRESENT

MARRIED IN 1962 - LIVED FROM 5 BUYS

DATE 1-28-69 ZONE R-2 NON-CONFORMING R-97103-0150

ASSESSOR'S RECORD

Date Built

Addition

Personal Prop. (List Equipment and Dates)

Assumed Name

PREVIOUS USE

Notes

PRESENT STATUS LAKE TREE KENNELS

Location REEDER RD RT 1 BX 120 E

Date Established SEE ATTACHED

Owner HENRY H. PEIN (PEIN INV. CO

Address

Occupant MEIFFERT, MYRON

Use DOG KENNEL

Description of Use PEIN BOUGHT FROM MEIFFERT. MEIFFERT HAS BEEN TRAINING & BOARDING DOGS

Description of Buildings and Equipment SEE ATTACH

Number of Employees NONE

Description of Signs NONE

Permit 8.4.71 KENNEL ZONE ALL OF 71-2 DOGS IN 1970

Date From To

Occupant

Description of Use

8.4.71 HARRY PEIN NOW OWNS THIS & TC & W 39.34 A ± TC 15-3-2N-2W - HAS TENANT WHO HAS BA FOR WATCHMAN

Description of Equipment Board of Adjustment - Approval

Number of Employees

Description of Signs

MAP

Exhibit #13

RC: 1 Box 120 B Reeder Rd. LL: 15-3-2W

AFFIDAVIT OF NEIL ROSE

State of Washington)
) ss:
County of Clark)

I, Neil Rose, being first duly sworn, depose and say:

1. I believe that Peter Alport, one time owner of Norm Thompson, Inc., purchased the property now known as Sauvie Island Kennel in 1953.

2. I remember my father, Donald Rose, helped Mr. Alport build the original dog kennels on the property and place the older "heights home" in position during May 1953. My father leased the property from Mr. Alport and we moved into the "heights home" in May of 1953.

3. My father operated the kennel for two years. We had between 50 and 60 dogs present at all times, including Labradors, pointers, short hairs, springer spaniels, and Chesapeake Bay retrievers. I was a student in junior high and high school during those years, and clearly remember these events. My family remained on the property until the summer of 1955, when we moved off the island.

4. When we moved from the island, my father turned the kennel operation over to Roy Wallace, who ran it for several years and kept about as many dogs as my father did.

5. I have visited the island every year since my family moved away. As long as I was in school, I returned to the island to visit friends. I am a pilot, and I used to fly over the island and especially enjoyed flying over the kennel where I used to live. When my two sons were younger, I took them to the island to fish and bird watch. During my visits I have stopped to observe the kennel, and there have always been at least several dogs there.

Neil Rose

Sworn to and subscribed before me on the 21st day of November, 1995.

Notary Public for Washington

My Commission Expires 10-1-99

AFFIDAVIT OF MAY LOUISA ROSE

State of Washington)
) ss:
County of Clark)

I, May Louisa Rose, being first duly sworn, depose and say:

1. I believe that Peter Alport, one time owner of Norm Thompson, Inc., purchased the property now known as Sauvie Island Kennel in 1953.

2. I remember my husband, Donald Rose, helped Mr. Alport build the original dog kennels on the property and place the older "heights home" in position during May 1953. My husband leased the property from Mr. Alport and we moved into the "heights home" in May of 1953. Red and Marguerite Persinger now live in this house.

3. My husband operated the kennel for two years, and I helped him out sometimes. We had between 50 and 60 dogs present at all times, including Labradors, pointers, short hairs, springer spaniels, and Chesapeake Bay retrievers. My family remained on the property until the summer of 1955, when we moved off the island.

4. When we moved from the island, my husband turned the kennel over to another operator, who ran it for several years and kept about as many dogs as my husband did.

May L. Rose.
May Louisa Rose

Sworn to and subscribed before me on the 21 day of November, 1995.

Judy L Norris
Notary Public for Washington

My Commission Expires 10-1-99

AFFIDAVIT OF MAIRI HOLMAN

State of Oregon)
) ss:
County of Multnomah)

I, Mairi Holman, being first duly sworn, depose and say:

1. I believe that Peter Alport, one time owner of Norm Thompson, Inc., purchased the property now known as Sauvie Island Kennel in 1953.

2. I remember my father, Donald Rose, helped Mr. Alport build the original dog kennels and place the house on the property during May 1953. My father leased the property from Mr. Alport and we moved into the residence in May of 1953.

3. My father operated the kennel for two years. My family lived on the property until the summer of 1955, when we moved off the island.

4. Since that time, I have visited the island on numerous occasions. When my children were young, during the years 1968 to 1976, we visited several times a year because my family enjoyed Sunday drives to the island. We always went by the kennel, because I used to live there. I remember that during those years there were always dogs in the kennel, jumping up against the fence, and that the kennel sign was always in place.

5. On my other visits to the island over the years, I have always gone by the kennel, and there have always been several dogs there.

Mairi Holman

Mairi Holman

Sworn to and subscribed before me on the 21st day of November, 1995.

Janet M. Johnson

Notary Public for Oregon

My Commission Expires 8/16/96.

OFFICIAL SEAL
JANET M. JOHNSON
NOTARY PUBLIC-OREGON
COMMISSION NO 017571
MY COMMISSION EXPIRES AUG 16, 1996