ANNOTATED MINUTES

Tuesday, July 15, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

LAND USE PLANNING HEARING

Chair Beverly Stein convened the meeting at 9:30 a.m., with Commissioners Sharron Kelley, Tanya Collier and Dan Saltzman present, and Vice-Chair Gary Hansen excused.

P-1 SEC 3-97 DE NOVO HEARING, TESTIMONY LIMITED TO 20 MINUTES PER SIDE on the Hearings Officer Decision Approving a Significant Environmental Concern Permit for a Single Family Dwelling on Property in a Wildlife Habitat Area and Located on Tax Lot 1, Lot 7 and a Portion of Lot 8, SHOPPE ACRES, Section 5, T1N, R1W

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 CHUCK BEASLEY PRESENTED CASE HISTORY AND RESPONDED TO BOARD QUESTIONS. HEARINGS OFFICER DENIECE WON PRESENTED CONDITIONS, FINDINGS OF FACT AND CRITERIA USED IN DETERMINATION AND RESPONDED TO BOARD QUESTIONS. CHRIS FOSTER AND ARNOLD ROCHLIN TESTIMONY AND RESPONSE TO BOARD QUESTIONS. JACK ORCHARD AND JOHN REIMANN TESTIMONY AND RESPONSE TO BOARD QUESTIONS. MR. ROCHLIN, MR. ORCHARD, MR. REIMANN AND MR. BEASLEY COMMENTS AND RESPONSE TO TESTIMONY AND BOARD QUESTIONS. COUNTY COUNSEL LAURIE CRAGHEAD EXPLANATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. COMMISSIONER COLLIER MOVED AND

COMMISSIONER SALTZMAN SECONDED, TO OVERTURN THE HEARINGS OFFICER DECISION. FOLLOWING DISCUSSION WITH MS. CRAGHEAD AND MR. BEASLEY, BOARD CONSENSUS. UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER SALTZMAN, THE HEARINGS OFFICER DECISION WAS OVERTURNED, WITH COMMISSIONERS COLLIER, SALTZMAN AND STEIN VOTING AYE, AND COMMISSIONER KELLEY VOTING NO.

P-2 PLA 2-97 DE NOVO HEARING, TESTIMONY LIMITED TO 20 MINUTES PER SIDE on the Hearings Officer Decision Regarding Denial of an Appeal of the Planning Director's Decision Which Found that the Application for a Lot Line Adjustment Did Not Meet All of the Approval Criteria, for Property Located at 14007 NW SKYLINE BOULEVARD, PORTLAND

UPON REQUEST OF CHAIR STEIN AND MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER SALTZMAN, IT WAS UNANIMOUSLY APPROVED TO RESCHEDULE PLA 2-97 TO 10:30 AM, TUESDAY, SEPTEMBER 16, 1997. CHAIR STEIN ADVISED APPELLANT'S ATTORNEY HAS PROVIDED WRITTEN WAIVER OF THE 150 DAY CLOCK.

CHAIR STEIN REOPENED THE MEETING TO COMPLETE THE PROCEDURAL PROCESS OF THE SEC 3-97 DE NOVO HEARING. IN RESPONSE TO CHAIR STEIN'S REQUEST FOR CONTINUANCE OR OBJECTION TO THE HEARING, NONE WERE OFFERED. 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 11:30 a.m.

Wednesday, July 16, 1997 - 6:00 PM
Sauvie Island School District #19 Gymnasium
14445 NW Charlton Road, Portland

LAND USE PLANNING HEARING

Chair Beverly Stein convened the meeting at 6:10 p.m., with Commissioners Sharron Kelley, Tanya Collier and Dan Saltzman present, and Vice-Chair Gary Hansen excused.

P-3 First Reading of an ORDINANCE Adopting the Sauvie Island/Multnomah Channel Rural Area Plan, a Portion of the Multnomah County Comprehensive Framework Plan

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. CHAIR STEIN EXPLAINED PROCESS FOR HEARING. LAURIE CRAGHEAD EXPLANATION AND RESPONSE TO QUESTION OF COMMISSIONER KELLEY. COMMISSIONER SALTZMAN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF FIRST READING. JANE HART, JULIE CLEVELAND, GINGER CURTIS, DONNA MATRAZZO, BILL CASSELMAN, JAN HAMER, BETSY CHARLTON POWELL, AND SHIRLEY LARSON TESTIMONY. MS. CRAGHEAD AND PLANNER GORDON HOWARD RESPONSE TO TESTIMONY, BOARD QUESTIONS AND DISCUSSION. UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER SALTZMAN, AMENDMENTS TO POLICIES 15, 17, 20, 33, 38 AND 39 WERE UNANIMOUSLY APPROVED. STAFF TO PREPARE SPECIFIC LANGUAGE BEFORE SECOND READING. UPON MOTION OF COMMISSIONER SALTZMAN, SECONDED BY COMMISSIONER KELLEY, IT WAS UNANIMOUSLY APPROVED THAT THE CELL TOWER ISSUE BE POSTPONED UNTIL A POLICY IS DEVELOPED. COMMISSIONER SALTZMAN TO DISCUSS HAPPY ROCK ISSUE WITH SANDRA DUFFY BEFORE OFFERING AN AMENDMENT. COMMISSIONER SALTZMAN COMMENTS IN SUPPORT OF

PROCESS. FIRST READING UNANIMOUSLY APPROVED, AS AMENDED. SECOND READING <u>THURSDAY, AUGUST 7, 1997</u>.

There being no further business, the meeting was adjourned at 7:26 p.m.

Thursday, July 17, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

REGULAR MEETING

Chair Beverly Stein convened the meeting at 9:30 a.m., with Commissioners Sharron Kelley, Tanya Collier and Dan Saltzman present, and Vice-Chair Gary Hansen excused.

PUBLIC COMMENT

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

CHAIR STEIN AND THE BOARD WELCOMED ROBERT HUGHLEY AND ST. ANDREWS SUMMER DAY CAMP STUDENTS. MR. HUGHLEY THANKED THE BOARD FOR THE DONATED COUNTY SURPLUS COMPUTERS USED AT THE CHURCH FOR JOB SKILL DEVELOPMENT.

DEPARTMENT OF SUPPORT SERVICES

R-2 Presentation of Employee Service Awards Honoring 23 Multnomah County Employees with 5 to 25 Years of Service

WITH THE ASSISTANCE OF SHERY STUMP AND LARRY BARTASAVICH, THE BOARD GREETED, ACKNOWLEDGED AND PRESENTED 5 YEAR AWARDS TO MEHRAN NABAVI, JULIE RAMOS AND JUDY ROBISON OF DFCS; SHIRLEY MOFFET OF DA; NOREEN GRANNEMAN AND SCOTT ROSENBERGER OF DES; GAIL FOSTER OF DSS;

AND NICOLE MITCHELTREE OF DLS; 10 YEAR AWARDS TO CHERYL MORGAN OF ASD; MICHELE GARDNER AND ROBERT LILLY OF DES; ELLEN ULLRICK OF DSS; GLORIA MAIER, AND JULIA STONE AND ALANDRIA TAYLOR OF DJACJ; 15 YEAR AWARDS TO MARCIA GARTRELL OF DCFS; AND KEVIN BOWERS OF DJACJ; 20 YEAR AWARDS TO JAN THOMPSON AND DON WINKLEY OF DSS; AND 25 YEAR AWARDS TO SHERRY WILLMSCHEN OF ASD; KATHLEEN GRAHAM OF DA; AND CATHEY KRAMER OF DES.

CONSENT CALENDAR

AT THE REQUEST OF COMMISSIONER COLLIER AND UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, CONSENT CALENDAR ITEMS C-1 AND C-3 THROUGH C-5 WERE UNANIMOUSLY APPROVED.

NON-DEPARTMENTAL

C-1 Re-appointments of Suzanne Bader, Beverly Stein, Dan Saltzman and Gussie McRobert to the MULTNOMAH COUNTY COMMUNITY ACTION COMMISSION

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-3 ORDER Authorizing Execution of Real Estate Purchase and Sale Agreement for the Sale of Certain Foreclosed Real Property to Teresita M. Duffy and Timothy Ray

ORDER 97-147.

C-4 ORDER Authorizing Execution of Real Estate Purchase and Sale Agreement for the Sale of Certain Foreclosed Real Property to Penny L. Shepperd and Michelle A. Shepperd

ORDER 97-148.

DISTRICT ATTORNEY'S OFFICE

C-5 Budget Modification DA 1 Appropriating Additional $13,596 VOCA Grant Funds for 2 .50 FTE Victim Advocates for the 1997/98 Fiscal Year

REGULAR AGENDA

SHERIFF'S OFFICE

C-2 Package Store Liquor License Renewal for ROCKY POINTE MARINA, LLC, 23586 NW ST HELENS HWY, PORTLAND

AT COMMISSIONER COLLIER'S REQUEST, THE LIQUOR LICENSE RENEWAL WAS CONTINUED TO THE REGULAR AGENDA ON THURSDAY, JULY 24, 1997.

NON-DEPARTMENTAL

R-3 First Reading of an ORDINANCE Relating to County Organization; Creating a Department of County Counsel

UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER KELLEY, R-3 WAS UNANIMOUSLY POSTPONED INDEFINITELY. COMMISSIONER COLLIER ADVISED SHE WILL SUBMIT A DIFFERENT ORDINANCE FOR FIRST READING ON THURSDAY, AUGUST 21, 1997

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-4 ORDER Setting a Hearing Date to Consider Surrendering Jurisdiction to the City of Portland All County Roads Annexed to the City Effective June 30, 1996

COMMISSIONER KELLEY MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF R-4. BOB THOMAS EXPLANATION AND RESPONSE TO BOARD QUESTIONS. ORDER 97-149 UNANIMOUSLY APPROVED.

There being no further business, the regular meeting was adjourned and the briefing convened at 9:50 a.m.

Thursday, July 17, 1997 - 10:00 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

BOARD POLICY DISCUSSION

B-1 Policy Discussion About a Budget Policy to Encourage Departments to Save Money by Allowing Them to Use the Under-spending in the Next Year. Presented by Dan Saltzman, Bill Farver and Dave Warren.

COMMISSIONER DAN SALTZMAN AND WING-KIR CHUNG, PORTLAND COMMUNITY COLLEGE DIRECTOR OF FINANCIAL SERVICES PRESENTATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. DAVE WARREN AND BILL FARVER COMMENTS AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION.

There being no further business, the meeting was adjourned at 10:40 a.m.

BOARD CLERK FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

MULTNOMAH COUNTY OREGON

BOARD CLERK
OFFICE OF BEVERLY STEIN, COUNTY CHAIR
1120 SW FIFTH AVENUE, SUITE 1515
PORTLAND, OREGON 97204-1914
TELEPHONE • (503) 248-3277
FAX • (503) 248-3013

BOARD OF COUNTY COMMISSIONERS

BEVERLY STEIN •	CHAIR	•248-3308
DAN SALTZMAN •	DISTRICT 1	• 248-522O
GARY HANSEN •	DISTRICT 2	•248-5219
TANYA COLLIER •	DISTRICT 3	•248-5217
SHARRON KELLEY •	DISTRICT 4	•248-5213

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

AGENDA

FOR THE WEEK OF

JULY 14, 1997 - JULY 18, 1997

Thursday Meetings of the Multnomah County Board of Commissioners are *cable-cast* 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 BOARD CLERK AT (503) 248-3277, OR MULTNOMAH COUNTY TDD PHONE (503) 248-5040, FOR INFORMATION ON AVAILABLE SERVICES AND ACCESSIBILITY.

AN EQUAL OPPORTUNITY EMPLOYER

Tuesday, July 15, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

LAND USE PLANNING HEARING

P-1 SEC 3-97 DE NOVO HEARING, TESTIMONY LIMITED TO 20 MINUTES PER SIDE on the Hearings Officer Decision Approving a Significant Environmental Concern Permit for a Single Family Dwelling on Property in a Wildlife Habitat Area and Located on Tax Lot 1, Lot 7 and a Portion of Lot 8, SHOPPE ACRES, Section 5, T1N, R1W. ONE HOUR REQUESTED.

P-2 PLA 2-97 DE NOVO HEARING, TESTIMONY LIMITED TO 20 MINUTES PER SIDE on the Hearings Officer Decision Regarding Denial of an Appeal of the Planning Director's Decision Which Found that the Application for a Lot Line Adjustment Did Not Meet All of the Approval Criteria, for Property Located at 14007 NW SKYLINE BOULEVARD, PORTLAND. ONE HOUR REQUESTED.

Wednesday, July 16, 1997 - 6:00 PM
Sauvie Island School District #19 Gymnasium
14445 NW Charlton Road, Portland

LAND USE PLANNING HEARING

P-3 First Reading of an ORDINANCE Adopting the Sauvie Island/Multnomah Channel Rural Area Plan, a Portion of the Multnomah County Comprehensive Framework Plan

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Thursday, July 17, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

REGULAR MEETING

CONSENT CALENDAR

NON-DEPARTMENTAL

C-1 Re-appointments of Suzanne Bader, Beverly Stein, Dan Saltzman and Gussie McRobert to the MULTNOMAH COUNTY COMMUNITY ACTION COMMISSION

SHERIFF'S OFFICE

C-2 Package Store Liquor License Renewal for ROCKY POINTE MARINA, LLC, 23586 NW ST HELENS HWY, PORTLAND

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-3 ORDER Authorizing Execution of Real Estate Purchase and Sale Agreement for the Sale of Certain Foreclosed Real Property to Teresita M. Duffy and Timothy Ray

C-4 ORDER Authorizing Execution of Real Estate Purchase and Sale Agreement for the Sale of Certain Foreclosed Real Property to Penny L. Shepperd and Michelle A. Shepperd

DISTRICT ATTORNEY'S OFFICE

C-5 Budget Modification DA 1 Appropriating Additional $13,596 VOCA Grant Funds for 2 .50 FTE Victim Advocates for the 1997/98 Fiscal Year

REGULAR AGENDA

PUBLIC COMMENT

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

DEPARTMENT OF SUPPORT SERVICES

R-2 Presentation of Employee Service Awards Honoring 23 Multnomah County Employees with 5 to 25 Years of Service

NON-DEPARTMENTAL

R-3 First Reading of an ORDINANCE Relating to County Organization; Creating a Department of County Counsel - (Continued from May 22, 1997) - PLEASE NOTE: COMMISSIONER TANYA COLLIER WILL REQUEST A MOTION TO POSTPONE THIS ITEM INDEFINITELY AND WILL SUBMIT A DIFFERENT ORDINANCE FOR FIRST READING ON THURSDAY, AUGUST 21, 1997

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-4 ORDER Setting a Hearing Date to Consider Surrendering Jurisdiction to the City of Portland All County Roads Annexed to the City Effective June 30, 1996

Thursday, July 17, 1997 - 10:00 AM
(OR IMMEDIATELY FOLLOWING REGULAR MEETING)
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

BOARD POLICY DISCUSSION

B-1 Policy Discussion About a Budget Policy to Encourage Departments to Save Money by Allowing Them to Use the Under-spending in the Next Year. Presented by Dan Saltzman, Bill Farver and Dave Warren. 20 MINUTES REQUESTED.

GARY HANSEN
Multnomah County Commissioner
District 2

1120 S.W. Fifth Avenue, Suite 1500
Portland, Oregon 97204
(503) 248-5219

MEMORANDUM

TO: CHAIR, BEVERLY STEIN
COMMISSIONER SHARRON KELLEY
COMMISSIONER DAN SALTZMAN
COMMISSIONER TANYA COLLIER
CLERK OF THE BOARD, DEB BOGSTAD

FROM: JUANA ARREDONDO

SUBJECT: LEAVE OF ABSENCE FROM BOARD MEETING

DATE: JULY 1, 1997

CC: COMMISSIONER HANSEN'S OFFICE

Commissioner Hansen will unable to attend any of the Board meetings for the week of July 9th-18th 1997, He will be out of the office attending the annual NACO "98" Conference in Baltimore MD.

Meeting Date: JUL 15 1997
Agenda No: P-1
Est. Start Time: 9:30 AM

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: DeNovo Hearing regarding the Hearings Officer's decision on SEC 3-97.

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

REGULAR MEETING Date Requested: July 15, 1997
Amt. of Time Needed: 1 hour

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

PERSON(S) MAKING PRESENTATION: Stuart Farmer

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

DeNovo Hearing on the Hearings Officer's decision regarding an approval of a Significant Environmental Concern Permit in a Wildlife Habitat area for a single family dwelling.

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: KB Lowell K Nicholas

BOARD OF COUNTY COMMISSIONERS
'97 JUL -8 PM 4:57
MULTNOMAH COUNTY
OREGON

MULTNOMAH COUNTY

BOARD HEARING OF JULY 15, 1997

TIME 9:30am

CASE NAME: Randy Robinson **NUMBER:** SEC 3-97

Action Requested of Board

- ☐ Affirm Hearings Officer Dec.
- ☒ Hearing/Rehearing

Scope of Review

- ☐ On the record
- ☒ De Novo
- ☐ New information allowed

1. **Applicant Name/Address**

   Randy S. Robinson
   4650 N.W. Kaiser Rd.
   Portland, OR 97229

   Appellant:
   Arnold Rochlin
   P.O. Box 83645
   Portland, OR 97283-0645

2. **Action Requested by Applicant** Approval of a proposed single family dwelling site under the provisions of the Significant Environmental Concern (SEC) ordinance for areas designated as Wildlife Habitat. Use of the property for a dwelling was previously approved under PRE 26-90.

3. **Planning Staff Recommendation**

   Approval with conditions.

4. **Hearings Officer Decision**

   Affirms the Planning Director's decision, and finds that a determination that the dwelling will be inconjunction with an existing farm use should be made at a future time prior to issuance of the Building Permit. This determination is a land use decision and would require property owner notification and an opportunity for appeal.

5. **If recommendation and decision are different, why?**

   The Planning Director's decision does not raise the subject of whether it is necessary to determine that a farm use exists prior to issuance of a Building Permit, but is confined to the criteria applicable to an SEC permit.

ISSUES
(who raised them?)

6. **The following issues were raised:**

   Case was heard by the Hearings Officer on appeal of the administrative SEC approval. Appellants, Arnold Rochlin and Chris Foster raised the following issues:

   Issue: Validity of the farm dwelling approval.

   Appellants: The County cannot approve an SEC permit without first finding that the proposed dwelling is a lawful use. The 1990 farm dwelling approval was never implemented and has

therefore been abandoned, notwithstanding that the code in effect at the time did not limit how long the approval remains valid. The regulations for farm dwellings have substantially changed since the 1990 farm dwelling approval and it should be subject to the new regulations. The farm dwelling does not meet the new regulations, and is therefore unlawful.

Hearings Officer: The SEC ordinance does not require consideration of the prior approval for the dwelling use, it only requires a determination that the dwelling meets the locational or design criteria of the SEC overlay zone. The case law indicates that unconditional approvals remain in effect unless a change in law specifically requires them to be reevaluated. The county should make a determination that the land is currently employed for farm use prior to issuance of the Building Permit.

Staff: Concurs with the Hearings Officer.

Issue: Change of the dwelling location.

Appellants: The change in the location of the proposed farm dwelling is significant, and constitutes an amendment to the PRE 26-90 farm management plan, however no application for amendment was submitted. The SEC permit cannot be approved because of the unapproved dwelling location change.

Hearings Officer: The code appears to not contain procedures for modification of the farm dwelling approvals, and does not require precise implementation of the farm management plan. The change in the dwelling location is not significant to the farm use proposed for the property.

Staff: Concurs with the Hearings Officer. Nothing in the farm management plan for PRE 26-90 discusses how the proposed farm dwelling location relates to farm management of the property. The dwelling location is only shown on the map. The dwelling location approved in the SEC permit is arguably better both in terms of farm management, and the SEC criteria.

7. Do any of these issues have policy implications? Explain:

The portion of the Order of the Hearings Officer which pertains to a separate land use decision regarding an existing farm use will require an additional procedure during Building Permit review. This would set a precedent for the limited number of properties that received PRE farm management plan approvals and which are not developed. These decisions would be processed as discretionary land use decisions, and appeal of these decisions is a possibility. The additional processing required will increase administrative costs to the extent that application fees do not cover actual cost.

MULTNOMAH COUNTY

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

NOTICE OF REVIEW

1. Name: Rochlin (Last), _____ (Middle), Arnold (First)
2. Address: PO Box 83645 (Street or Box), Portland (City), OR 97283 (State and Zip Code)
3. Telephone: (503) 289-2657
4. If serving as a representative of other persons, list their names and addresses:
   Christopher Foster
   (in addition to myself)
5. What is the decision you wish reviewed (*e.g.*, denial of a zone change, approval of a subdivision, *etc.*)?
   Approval of SEC 3-97
6. The decision was announced by the ~~Planning Commission~~ Hearings Officer on June 2, 1997 and was mailed to parties on June 5, 1997.
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
   see attachment.

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

See attachment

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

(a) [X] On the Record

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

(c) [ ] *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*.

Signed: Arnold Rochlin Date: June 13, 1997

For Staff Use Only

Fee:

Notice of Review = $500.00
Transcription Fee:
Length of Hearing 500.00 x $3.50/minute = $ _____

Total Fee = $ 500.00

Received by: _____ Date: 6/13/97 Case No SEC 3-97

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283

ATTACHMENT TO NOTICE OF REVIEW FOR SEC 3-97, SIGNED 6/13/97

7. *On what grounds do you claim status as a party pursuant to MCC 11.15.8225?*

Christopher Foster and Arnold Rochlin appeared before the county hearings officer on this matter, in writing and in person at the public hearing on May 21, 1997, and were allowed standing as parties. A notice of review may be filed by a party. MCC 11.15.8260(1), 11.15.6416(B).

We would be aggrieved if a dwelling were approved in a farm zone without correct application of land use policies and regulations. We are concerned with correct interpretation and application of land use laws and regulations in this region. We are concerned that land use permits be issued fairly, and without practices that unlawfully favor development of some property over other property similarly zoned and situated. We have expended considerable effort on behalf of those concerns through participation in legislative and quasi-judicial land use matters and in other ways, over several years. I chair the Forest Park Neighborhood Association Land Use Committee and am active in land use affairs of the Friends of Forest Park, of which I am an officer and director. In furtherance of my concerns, I am a member of 1000 Friends of Oregon, Audubon Society of Portland and the Oregon Natural Resources Council. Mr. Foster is has also been an active member of organizations promoting correct implementation of land use laws and policies. I own property on the west side of the county, in the City of Portland, but near county farm and forest zones, and an incorrect decision would adversely affect enjoyment of my property. Mr. Foster owns property in a rural residential area of unincorporated Multnomah County, not far from the site that is the subject of the contested application. We have an interest in preserving farm and forest lands as provided by state and county laws, regulations, goals and policies.

We have been participants, not merely to offer information, such as would be offered by an expert witness, but to advance our philosophical and practical interests in the outcome and in hope of avoiding aggrievement by a final decision harmful to those interests.

League of Women Voters v. Coos County, 15 LUBA 447 (1987) supports the contention that dissatisfaction with an adverse decision would constitute aggrievement. "Aggrievement" in the MCC is a term intended to correspond in meaning to the language of former and current provisions of ORS Chapters 197 and 215 and must be interpreted to mean the same as it does in the statutes. *Joseph v. Lane County*, 18 Or LUBA 41, 51 (1989).

8. *Grounds for Reversal of Decision*

A. The decision is in error for failing to hold that lawfulness of the proposed use is is a prerequisite to approval of an SEC permit, and for approving the application even though lawfulness of the use was not established. Though the decision appears to hold that the proposed dwelling is not lawful, or that lawfulness is doubtful, it wrongly concludes that the SEC permit may nevertheless issue. While the application is for an SEC permit only, and not for a general permit to allow an EFU dwelling, a prerequisite to approval of <u>any</u> permit is that the use it would enable is otherwise lawfully established or permitted. That threshold requirement is unmet, leaving the county without authority to issue an SEC permit. The decision recognizes the problem, but addresses the requirement inadequately,

postponing resolution and relying on only a prospect of determination of lawfulness, if and when a building permit is applied for.

The decision is in error in not concluding that the PRE 26-90 dwelling permit approved in 1990 determined only that the dwelling and farm plan proposed at that time appeared to comply with the applicable standards and criteria of that time. It was not, and could not be, an assurance that the proposed use would remain lawful and permitted for all eternity, in the face of changed laws, rules and regulations.

The 1990 PRE 26-90 approval cannot alone establish a right to a dwelling in 1997. But the decision wrongly relied that one-time approval on to justify current approval of the SEC permit. County zoning regulations and Oregon Administrative Rules and Oregon Revised Statutes, on which authorization of a dwelling was based in PRE 26-90, have been substantially changed in a manner that precludes any assumption or facial determination that the use is allowable under current laws and regulations. In fact, the proposed dwelling would not satisfy the requirements of OAR division 660-33 and other state and county standards for an EFU dwelling as proposed here. The PRE 26-90 permit, and the MCC at the time of its approval, included no provision of a definite duration of time for the permit that could be interpreted as enabling the right to implement it to survive changes in law that would otherwise prohibit the use. And the record does not indicate establishment of an alternate right to the use by either vesting or non-conforming use standards. The application should have been denied because no means were identified by which the right to this development, which has become unlawful, could be lawfully preserved, and there are none. There is only the implausible argument that the complete absence of any duration provision in PRE 26-90 is implied assurance of infinite duration.

B. The decision is in error in holding that the changes of the proposal described by the applicant, from the specific dwelling and farm plans approved in PRE 26-90, are not significant. In fact, the changes are substantial, and even if the PRE 26-90 permit could otherwise continue to allow a dwelling 7 years after issuance, it did not, and does not permit a dwelling at the location on the property for which an SEC permit was requested, a location about 400 feet from the site approved in PRE 26-90. The SEC permit should have been denied because the siting and design proposed is substantially different from the specific proposal approved in PRE 26-90, and there was no concurrent application for amendment of PRE 26-90.

C. The decision is in error for not concluding that, in the guise of seeking only an SEC permit to implement the PRE 26-90 permit, the applicant is actually seeking approval of a different dwelling plan and revised farming plan. Approval of the SEC proposal is improperly an approval of a different farm dwelling proposal, without determining compliance with the county EFU zone regulations or state statutes and administrative rules.

Grounds are more extensively stated in the attached May 12, 1997 letter from Rochlin to the hearings officer and May 20, 1997 letter from Foster to the hearings officer, which are part of the county record of this case.

AR

May 12, 1997

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
289-2657

Land Use Hearings Officer
c/o Planning Division
2115 SE Morrison St.
Portland, OR 97214

Re. SEC 3-97 Dwelling in EFU Zone—Appeal of Administrative Decision

The following comments are on behalf of myself as an individual, and as the Development Committee Chair of the Forest Park Neighborhood Association.

LAWFULNESS OF USE IS A THRESHOLD REQUIREMENT OF AN SEC PERMIT

A prerequisite to issuance of an SEC permit, is that it pertains to a lawful and permitted use. Appellants contend the EFU zone dwelling for which this SEC permit is requested is not lawfully permitted. The Planning Director (Director) argues lawfulness of the dwelling is not properly at issue in this proceeding. The Director says: "... this application is not a 'use' decision, but is to evaluate the location and design of the proposed development for consistency with the SEC ordinance." (Decision, p.4) LUBA decided the same issue in ***Marquam Farms Corporation v. Multnomah County***, __ Or LUBA __ (LUBA No. 95-254 12/05/96), *Aff'd* __ Or App __ (CA A95801 4/16/97). Discussing the Third Assignment of Error, LUBA said:

> "Respondents argue that the 1994 hearings officer had no authority to consider the legality of intervenors' use because the issue before him was limited to design review. * * *
>
> "Whether the applicant has established the county's authority to review an application is a threshold determination relevant to all land use applications. Necessarily, before a hearings body can determine the merits of a design review application, that body must first determine whether the applicant has established the legal use upon which the design review is based." (emphasis added)

The SEC application in this case relates to the proposed dwelling, exactly as the design review in ***Marquam Farms*** relates to a dog kennel. If it is not established that there is a lawful right to a dwelling, the SEC permit cannot be approved. In her decision in CU 7-96/SEC 33-96, the hearings officer denied the SEC permit only because "... a dwelling on the lot will not be considered a permitted use." (4/28/97, page 31.) That there was concurrent denial of the CU application in that case, does not alter the principle; an ancillary permit can be approved only for a lawful use.

PRE 26-90 NO LONGER CONTROLS

The Director argues alternatively that the dwelling is lawful under authority of a 1990 approval in PRE 26-90. The Director approved that permit, but the use was not implemented. The argument implies that a Director's PRE approval is forever. But the Director's authority does not include exempting land from prospective county or state regulation of uses. Without commitment that could establish vesting in a dwelling, state

law and administrative rules and county regulations have substantially changed, making the once approved use unlawful and the permit without continuing effect.

There is no provision for expiration of a permit in the PRE 26-90 decision or in the MCC regulations to which it was originally subject. But that does not mean the PRE approval continues to authorize a dwelling. The one certain meaning of absence of an expiration provision is that there is no assured minimum duration of the permit. Generally, conduct having been allowed by a permit having no expiration date, continues to be allowed unless and until it is made unlawful by statute or regulation. For example, a manufacturing plant originally allowed on liberal terms, might be prevented from operating without establishing compliance with new emission standards. ORS 215.130 provides an exception for land use, allowing a lawfully established use to continue at the level of intensity continuously maintained since before adoption of an otherwise restrictive regulation. This exception, expressed in the statute and partially implemented in MCC .8805-10 and .7605-40, affords no help to the applicant.

Case law and statutes establish that a use not in conformity with law may not be allowed unless it was lawfully established before effectiveness of a restrictive law, or there was vesting by sufficient commitment to implementing the use as determined by judicially defined considerations. It is vesting that can establish a right to a non-conforming use. ***Clackamas Co. v. Holmes***, 265 Or 193, 196-97, 508 P2d 190 (1973). None of the Holmes factors for vesting by commitment are satisfied. There is no evidence of <u>any</u> expenditure, much less expenditure of a substantial part of the total dwelling cost, before the applicable laws and regulations were changed. Cost of the land itself, and other costs not exclusively for the particular use, such as property taxes on the land, are not to be considered. ***Union Oil Co. v. Board of co. Comm. of Clark Co.***, 81 Or App 1, 724 P2d 341 (1986). Even if a use could be established by mere issuance of the PRE 26-90 approval, the use could continue only at the intensity and scope in effect at the time of adoption of the restrictive regulations. ***Sabin v. Clackamas County***, 20 OR LUBA 23 (1990). In ***Polk County v. Martin***, 292 Or 69, 76, 636 P2d 952 (1981), the court said: "The nature and extent of the prior lawful use determines the boundaries of permissible continued use after the passage of the [restrictive] zoning ordinance." But the evidence puts the nature and extent in the instant case at <u>nothing and zero</u>. See also ***Spurgin v. Josephine County***, 28 Or LUBA 383, 390 (1994). In ***Schoonover v. Klamath County***, 16 Or LUBA 846, 849 (1988), LUBA said: "* * * statutory prohibitions against retroactive land use regulations protect uses that exist on the date the regulations are adopted, not uses that could have been, but were not initiated." As in ***Polk County v. Martin*** , ***supra at 75,*** where "The outcome therefore turns on whether the defendant's land, at the time the zoning ordinance was enacted, was then being lawfully used for the production of rock", the outcome here turns on whether the subject land was lawfully used for a dwelling when new laws and regulations restricted the use.

The director offers no apt argument to the contrary on the vesting/non-conforming use issue. Applicability of county non-conforming use regulations in MCC .7605-40 and .8805-10, and of ORS 215.130 is dismissed with an observation that the "the farm dwelling does not fit very well under nonconforming ordinance and statutory requirements." A more particular observation is "Dwellings continue to be allowed in the EFU zone, and the dwelling has not been built and then abandoned." One point seems to be that the statutory and regulatory provisions that non-conforming use rights lapse if a use has been discontinued, are not applicable here because what was never started can't be stopped. The implied argument is, since ORS 215.130 does not expressly disallow uses

never established, the statute must intend that such uses are allowed. (The point that "dwellings continue to be allowed in the EFU zone" is discussed after the others.)

The Director's observations on non-conforming use derive from misunderstanding the meaning and purpose of the non-conforming use laws. They are not exceptions and limitations to a fundamental right to persist in a use no longer lawful. Rather, they define limited exceptions to laws that would otherwise restrict a use. The argument, that "the farm dwelling does not fit very well under nonconforming ordinance and statutory requirements" does not help the applicant's case. It means only that in the applicant's situation, the non-conforming use provisions cannot prevent application of otherwise restrictive law. The restrictions are fully applicable, and there must be a determination of lawfulness of the dwelling under currently applicable standards and criteria and procedures, as a prerequisite to approval of the SEC application.[1]

The Director's alternative argument, that there is no "abandoned" use, implies non-conforming use law is applicable, and its provision excluding interrupted or abandoned uses from protection, does not apply because the house wasn't built, and a use not established cannot be discontinued. The argument is ineffective because non-conforming use law doesn't apply, and if it did, the argument unnecessarily attributes absurdity to the law. If the applicant had built a house in 1990, and use was discontinued (for two years under MCC .8805(B)), there would be "a period of interruption or abandonment" under ORS 215.130(7) and there would be no right under PRE 26-90 to resume habitation of the house. If the applicant had not completed the house, but had spent $1,000 leveling the ground for it (for the sake of argument sufficient to vest) and discontinued work for two years, there would be no right to finish the dwelling under PRE 26-90. But the Director argues that by assiduous avoidance of commitment for six years, the right to build a dwelling under PRE 26-90 is permanently preserved. This theory, that serious effort to establish a use yields transitory vesting, but eternal vesting is achieved only by no effort at all, derives from the same misunderstanding as the first argument. That is, that the right to continue a non-conforming use is fundamental law, and that anything not expressly disallowed by non-conforming use provisions must be presumed to be allowed. As stated above, the reverse is true; non-conforming use rights are limited exceptions to basic law. Unless a use qualifies for the protection of those exceptions, it is subject to the restrictions of law that would ordinarily apply. It is not plausible that the statutes were intended to give more protection to contemplation of a use than to implementation. An interpretation attributing an unsensible meaning, can be favored only if unambiguously expressed in the statute or if there is not a sensible alternative. The provisions that protect otherwise unlawful uses are exceptions to otherwise applicable law. The limits of ORS 215.130 are limits to exceptions. For it to be significant that there is no applicable exception to the non-conforming use privilege, there would have to be a protected non-conforming use. But the purportedly protected use is non-existent. To be non-conforming, it must have once existed. But if it did once exist, and doesn't now, it must have been discontinued and

[1] The county defines "Non-Conforming Use" as "A use to which a building or land was put at the time this Chapter [Zoning Code] became effective and which does not conform with the use regulations of the district within in which it is located." Under the most literal meaning, only uses established before zoning in the 1950's can be protected by MCC .8805-10. A possible interpretation is that "at the time" includes dates of adoption of code amendments. Similarly, MCC .7605-40 protects only uses established in conformance with MCC 11.15 prior to July 26, 1979. But because non-conforming use rights are express statutory exceptions to otherwise applicable restrictions, county provisions cannot give more or less protection than provided by ORS 215.130. (Counties can reasonably define unspecific terms of the statute, such as "abandonment" and "interruption".)

cannot be a protected non-conforming use. The muddle vanishes on understanding that non-conforming use law protects only vested uses, and not bare permits. That is the understanding of the all the authorities cited at page 2 above.

The Director's remaining point is "dwellings continue to be allowed in the EFU zone". It implies that, if dwellings are now allowed under some circumstances, then a dwelling once approved under any law or circumstances, cannot become unlawful or non-conforming. That is a broader claim of protection of uses pre-existing current standards, and one based on less authority, than what was rejected by LUBA in ***Marquam Farms Corporation v. Multnomah County***, *supra*. In that case, the hearings officer (1995) applied MCC 11.15.2028 to grant such a use (established before August 14, 1980) the right to continue, without regard to non-conforming use law, if it is listed in the MCC as a conditional use. The purported right was conferred without any process to establish if a use conforms to otherwise applicable county or state standards. LUBA rejected that application of MCC .2028 as inconsistent with state law and administrative rules that allow a use to be found to conform to law only by a lawful process of determining compliance with applicable standards.[2] LUBA's holding is that a dog kennel use, lawfully established before county zoning was in effect, and that was continued after the code was changed to list dog kennels as a conditional use, and which the county held to be a conforming use only by virtue of being so listed as a conditional use, is not thereby conforming. The implication for the instant case is that a 1990 dwelling permit cannot be presumed lawful because "dwelling" is listed as conditionally allowed in the district, when the state and county standards for permitting the use have been substantially changed. ***Marquam Farms Corporation v. Multnomah County***, *supra* (discussion of Fourth Assignment of Error).

A significant point the Director has not made is: if an unimplemented use is not allowed on enactment of a new restriction, then a permit could be useless the day after approval. And, if that were so, how can some permits have express time limits? The point is answerable. First, it is not clear that a county has authority to assure duration of a permit by a code provision or condition of approval. Even an express time duration may govern only as long as a use remains lawful. The only certain meaning of an express time limit is that an unimplemented permit will not extend beyond the stated time period. Second, and alternatively, it is not unreasonable to infer that issuance of a permit implies reasonable time for implementation or vesting.[3] A reasonable time can be provided by code, or judged by a decision maker and made a condition of a permit. Or a subsequent decision maker can determine the reasonable maximum time for vesting. It was never decided for the dwelling requested here, and is before a decision maker for the first time. Common sense and common knowledge indicate the time since the December 1990 permit approval far exceeds a reasonable allowance of one or two years. Compare it to the two years allowed for a conditional or community use (MCC 11.15.7010(C) or .7110(C)), or to the 18 months allowed for implementation of the approved plan in Conditions 7 and 8 of the subject SEC 3-97 decision. There having been no identified change of the facts relevant to this issue since December, 1990, the Director cannot claim that 18 months from today is reasonable, but six years from December, 1990, is not. It has not been demonstrated, and it is

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[2] LUBA cited the decision as being inconsistent with ORS 215.283 and .296 and OAR 660-33-120. But which laws were involved is not important. The principle is that the county cannot exempt a use from procedural or substantive requirements by putting the use on a list.

[3] An implied reasonable time to vest is a satisfactory interpretation. It accommodates ORS 215.428(3), under which a permit can be based on standards no longer in effect on the date of approval. Without implied reasonable duration, ORS 215.428(3) would not provide the intended benefit.

implausible, that the development proposal has a unique intrinsic quality that requires over three times what is allowed for a conditional use permit, to make just a substantial start.

In giving weight to the arguments, an important factor should be that "Generally, nonconforming uses are not favored because, by definition, they detract from the effectiveness of comprehensive land use regulation." ***Webber v. Clackamas County***, 42 Or App 151, 600 P2d 448 (1979), citing ***Clackamas Co. v. Port. City Temple***, 13 Or App 459, 462, 511 P2d 412, *rev den* (1973). The Director's arguments are contrary to that principle and are supported by no authority.

THE PROPOSAL IS SUBSTANTIALLY DIFFERENT FROM PRE 26-90

Even if PRE 26-90 were to continue to authorize the dwelling and farm plan approved in 1990, the applicant now seeks approval of a substantially different proposal. The dwelling site is nearly 400 feet east of the dwelling site approved in PRE 26-90. Plot Plan Figure 1 of the 1990 farm management plan (filed in SEC 3-97 record following 11/29/90 letter from David Passon to Frank Walker and 11/9/90 memo to "File Pre 26-90" from David Prescott) shows a 1 acre dwelling site in the corner of the property against the north and west boundaries. In the plan depicted in SEC 3-97 Exhibit 2.a., the dwelling area is moved 389 feet east. The distance is determined by scaling the version of Exhibit 2.a. published in the Director's decision. The 1300.9 foot long west boundary measures 6 11/16 inches, yielding a scale of 194.5 feet per inch. The west boundary of the dwelling area is 2 inches east of the west boundary of the property, or 389 feet. The new plan reduces the area available for the vineyard by taking a slice off the northeast corner. The Director's finding says the new site is 300 feet from the original, but does not document the source or accuracy of the figure. Decision, page 5-6. But even a 300 foot site change is hardly unimportant. (Compare to the 200 foot limit for relocation of a replacement dwelling in CFU section 11.15.2048(E)(1).)

Though the Director claims lawfulness of the use is not an issue, the SEC application requests substantial amendments to the PRE 26-90 dwelling location and requisite farm plan, which are approved by the SEC decision. The SEC process cannot approve the changes, and an SEC permit cannot be approved without the changes. They can be addressed only by a correct process with a descriptive notice. As said in the conclusion of PRE 26-90, that decision relied on a specific farm management plan, and on certification of only that plan by the Oregon State University Extension Service. Amendment of the farm plan, as well as the dwelling site, requires approval through an authorized process applying the current county and state criteria for an EFU dwelling. ***Gage v. City of Portland***, 24 Or LUBA 47, 49-50 (1992).

CURRENT STANDARDS RESTRICTING DWELLINGS IN THE EFU ZONE

County Standards

1993 statutes and 1994 OARs changed the criteria for an EFU dwelling since the MCC EFU section was last substantially changed. Under ***Blondeau v. Clackamas County***, 29 Or LUBA 115 (1995) and ***DeBates v. Yamhill County***, __ Or LUBA __, (LUBA No. 96-100 01/03/97) there is some doubt that all county standards for EFU dwellings that are more stringent than the state's, can be effective without re-enactment. Those cases do require re-enactment of some provisions protecting farmland, but ***Lindquist v. Clackamas County***, __ Or App __ 1997 WL 37402 (CA A95229, Jan. 29, 1997) suggests the contrary, particularly in note 4.

Significant county regulations stricter than state standards are: a dwelling not in conjunction with farm use must be on land generally unsuitable for farm use (11.15.2012(B)(3)(d)). A dwelling in conjunction must be necessary and accessory to the use (11.15.2010(A)(4)). The 1990 decision in PRE 26-90 does not include findings that either 11.15.2012(B)(3)(d) or .2010(A)(4) is satisfied. Apparently the standards became effective after the PRE 26-90 application date. The SEC decision implies .2012(B)(3)(d) is not satisfied. At page 6, item C, it says "The dwelling site is proposed for the northeast corner of the area used for farming." That dwelling site is nearly 400 feet from the site approved in PRE 26-90. There can be no SEC approval without a new dwelling application to establish compliance with the standards.

State Standards—Preliminary Matters

Concerning statutes and OARs that apply to the Willamette Valley, the valley is defined by a list of counties that includes Multnomah. ORS 215.010(5) and OAR 660-33-020(12).

Some standards apply according to soil classification. The applicant identifies nearly all the land, including the dwelling site, as sub-classes of Cascade Silt Loam. The PRE 26-90 decision, page 2, #3, also identifies the soil as Class III. OAR 660-33-020(8)(a) and (c)(A) provide that Cascade soils are Class III, high-value farmland in the Willamette Valley. "High-value" standards apply. Even if the soil ratings were changed, there would still have to be a new application for the dwelling use to establish compliance with all applicable regulations. The PRE 26-90 decision does not show compliance with OAR 660-135(1) through (6) or with any criteria for a dwelling on non high-value farmland.

State Standards for a Dwelling Customarily Provided in Conjunction with Farm Use

OAR 660-33-130(1) allows a dwelling if it complies with OAR 660-33-135. Neither the decision in PRE 26-90, nor the record establishes compliance with any part of OAR 660-33-135(7), except the subsection (b) requirement of no existing dwelling.

Concerning OAR 660-133-135(7)(a) and (c), there is no evidence of $80,000 gross income from farm products in the last 2 years, or any 3 of the last 5 years, excluding cost of livestock. And, of course, there is no evidence the dwelling will be occupied by persons who produced an $80,000 yield.[4] The farm plan of PRE 26-90 was not implemented, and now a new plan is proposed, with a new one acre homesite and new implementation dates. Nothing indicates even a prospective yield of $80,000, much less the required achieved yield. The amended plan cannot be approved by the Director's SEC review; it does not even address these criteria.

The dwelling use cannot be considered lawful without proven compliance with state and county standards for the proposal, whether or not in conjunction with farming, and whether or not on high value farmland. Compliance can be established only by the MCC process for the proposal, i.e. an application for a dwelling in conjunction with farm use.

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[4] The authority of LCDC's standards in OAR 660-33-135(7) for "dwellings * * * customarily provided in conjunction with farm use" allowed by ORS 215.283(1)(f), was upheld in ***Nichols v. Clackamas County***, __ Or App __ 1997 WL 37343 (CA A95064, Jan. 29, 1997). The court distinguished the case from ***Brentmar v. Jackson County***, 321 Or 481, 900 P2d 1030 (1995). In ***Brentmar***, the county added restrictions not intended by ORS 215.283(1). In ***Nichols*** LCDC implemented a restriction intended by the statute, by defining a critical term that has no standard meaning.

State Standards for a Dwelling Not in Conjunction With Farm Use

OAR 660-33-130(3)(a) requires for a dwelling not in conjunction with farm use, that the present owner has held the lot since January 1, 1985, or acquired it by inheritance from a person who owned it then, or is a person of listed degree of relationship to one who owned it then. Subsection (3)(a)(D) generally does not allow a lot of record dwelling on high-value farmland. There is no evidence that the ownership requirement is met, or that the land qualifies for an exception to the high-value rule. If the farm management plan is credible, the land cannot qualify under subsection (3)(c). It can't qualify under subsection (3)(d) because it's larger than 20 acres. It might arguably satisfy subsection (3)(e), but the MCC makes no provision for a dwelling under that rule, and predominant use of the land for forestry is not established. The farm management plan is evidence to the contrary.

To be allowed under OAR 660-33-130(4)(a) the soils must be predominantly Class IV to VIII. The evidence is that almost all of the soil on the property is Class III.

OAR 660-33-130(4)(b) allows a dwelling only on a lot created in accordance with OAR 660-33-100(11)(a) which in turn applies only to land consisting of at least 95% soils of Class VI to VIII.

Whether a dwelling does or does not qualify under these or any other provisions can be decided only by a proper procedure with a descriptive notice not given in this proceeding.

SEC CRITERIA

In general, the SEC criteria are undemanding. Even so, the Director's findings are inadequate. Consider the findings for 11.15.6420(B) requiring preservation of farm and forest land. They circle the issue, but cite no relevant evidence or reach a conclusion based on any evidence. What little substance there is, suggests that compliance is proved by staff's opinion that the current proposal is better in some respect than the 1990 proposal which must have been OK, since the former Director approved it. But the current Director says he can't find any discussion of the relevant issues in the 1990 decision![5] Further, the 1990 approval was not subject to this standard.

[5] The findings refer to the "original staff report" but must have intended the decision in PRE 26-90.

Relevant Considerations of the Primary Issue

Staff's premise is that the that the lack of an expiration date gives this permit immunity forever. Actually, its more logical the situation is the reverse. Under what authority and law does this unfulfilled and unvested permit last forever? The nature and structure of land use law in farm zones is to process, authorize, and allow uses by Statute and OAR. Explicitly, there is no assumption that something is okay or legal unless it is authorized or stated by State law. The Staff's assumption runs counter to principals and logic of closely related (but not directly applicable) areas of the law. In particular, the case law of "vesting", the former farm zone law on the "right to complete a dwelling" as implemented in MCC11.15.2030, and the conditioned rights granted existing uses under ORS 215.130, all support an alternate premise. That premise would be that unfulfilled and unvested use permits that do not have an expiration date have, at best, only a reasonable or logistically sufficient window of opportunity to get a project underway in the face of new law.

Mr. Rochlin cites a number of cases about the determination of "vesting" all of which cast doubt on the continuing validity of the permit in question, PRE-26-90. The 1990 County Code section (11.15.2030), although not applicable here, confirms the notion of vesting in the case of changing laws. Staff's position is that the Applicant has rights exceeding those of others who may have actually started construction at a time when the law was changing. Vesting determinations are undertaken because of pertinent changes in the law and expiration dates of original permits are not the issue. Staff's position is that the Applicant preserves his full rights forever provided that he never gets a building permit and never starts construction. If he had started construction, or when he does, he would obviously be subject to applicable law which sets out the conditions by which he may continue the construction or use. Our Applicant purportedly has rights exceeding those of a farm dwelling owner for a replacement dwelling under ORS 215.213 and/ or 215.130. In ORS 215.130 at (5), (6), and (7), conditional rights or exceptions are granted for the resumption of uses where current zoning ordinances or regulations law have changed. Resumption, after a period of discontinuance, without the application of new regulation is allowed only within certain time limits. While at first it might seem that PRE-26-90 falls under 215.130 (7) as an abandoned use, the case law Mr. Rochlin cites confirms that the use must have existed at least in part, to be offered the any time limit protections or window of immunity. In sum, many sections of the law indicate the Staff's assumption of validity and immunity forever is faulty.

Conclusion

So what happens to a permit which was issued one day with no expiration date and the very next day a new law not allowing the use becomes effective? There are apparently no hard and fast protections for uses which have not been established in some degree. I believe that we are left with a situation where we must determine what a reasonable or practical time is to act on the permit. In this case, one year, perhaps two is reasonable. Seven years is indefensible under the

limited authority granted to Counties by the State. The Staff's conclusion that permit is valid forever is illogical and has no legal foundation in State law. The DuBay memo offered as support for Staff's position does not address the broad issue presented here; Under what circumstance and how long does an unfulfilled permit endure?. While Mr. DuBay may have correctly answered the questions asked in solving a particular problem, they do not solve our issue.

Chris Foster

May 20th, 1997

Christopher H. Foster
15400 NW McNamee Rd.
Portland OR. 97231

Multnomah County Land Use Hearings Officer
2115 SE Morrison St.
Portland, Or. 97214

RE: SEC 3-97, NW Kaiser Rd.
Hearing Date: 5/21/97, 10:30 am

Introduction

With regards to this case, my concerns are much the same as stated by Mr. Rochlin in his written testimony. He seems to have struck an issue which has relevancy beyond this individual application and its time we settle the larger question which affects multiple cases. The question is this: How enduring is an unfulfilled and unvested land use permit when the permit includes no expiration date? Is it forever immune from new laws which would not allow the use? Can an the permit remain unfulfilled and unvested for 7, 20, or even 50 years, as the Staff purports, and still be valid despite changes in law?

Preliminary Issues

I question the validity of the underlying use permit PRE-26-90. Staff states in one instance, that the underlying permit can't be questioned in SEC proceedings. *Marquam Farms vs. Multnomah County* (LUBA 95-254. 12/5/96) is decisive in determining the validity of such a review at this Hearing. Therein, in the Third Assignment of Error, (affirmed by the Court of Appeals) LUBA concludes that there is a "... threshold determination *{of underlying use validity}* relevant to all land use applications ".

The subject property predominates in Cascade series soils which is a named " high value" farm soil in the 1993 OAR and Statutes. Entirely different rules than those of 1990 governing the establishment of dwellings, have been in effect for some time. A reasonable time to act on the permit has long since past. Its sufficiently clear that the conditions of the first approval (hence, no longer valid as Mr. Rochlin and I maintain) would not satisfy the new more rigorous rules. Mr. Rochlin also correctly questions whether the current proposal is distinct from PRE-26-90 in that dwelling location has changed.

HEARINGS OFFICER DECISION

BEFORE THE LAND USE HEARINGS OFFICER
OF MULTNOMAH COUNTY, OREGON

Regarding an appeal of an administrative approval of a Significant Environmental Concern review for Tax Lot 1, Lot 7 and a portion of Lot 8 Shoppe Acres, Section 5, T1N R1W	)	Case No SEC 3-97

I. SUMMARY OF THE REQUEST

The applicant proposes to construct a single family dwelling on the 29.93 acre lot according to the grading, drainage, and erosion control plan dated 2/24/97. Use of the subject lot for a dwelling "in conjunction with farm use" was approved in December of 1990, under PRE 26-90. The applicant has applied for approval under the County Significant Environmental Concern and Grading and Erosion Control permit requirements which became effective after the farm dwelling approval. On March 11, 1997, the Planning Director approved the application. The SEC permit approval was appealed by Arnold Rochlin (appellant).

The appeal was based on the assertion that the SEC criterion requires a permitted underlying use and the proposed dwelling would not satisfy the requirements for a dwelling on agricultural land in OAR division 660-33. The appellant maintains that the dwelling use that would be permitted by the SEC permit must be lawfully established or permitted. He argues the 1990 permitted use for the dwelling (PRE 26-90) is no longer valid because State law governing approval of dwellings on high value farmland was changed in 1994 when LCDC adopted OAR 660 Division 33, and that the proposed dwelling would not meet the criteria of the new rules. The opponent also argues that because the proposed location of the dwelling and driveway have changed from the locations approved in PRE 26-90 an amendment to PRE-90 is necessary, and that those amendments cannot be approved through the SEC permit process.

The property owner and the county staff believe that the 1990 prescribed use permit, PRE 26-90 continues to authorize the underlying land use of a dwelling in conjunction

with farm use because it contains no time limits. Thus, the issue in this appeal is whether OAR 660 Division 33 requirements apply to the farm dwelling use in review this application for a SEC permit.

The lot is on a northeast to southwest sloping hillside and abuts the north side of Kaiser Road. The dwelling site, as proposed in the SEC application, is approximately 120' south of the north property line. The driveway, as proposed in the SEC application, extends approximately 1200' feet north from Kaiser Road and rises approximately 86' from the road to the dwelling site. The proposed dwelling site is on a 13% slope, and utilizes retaining walls up to six feet in height to create parking and yard areas adjacent to the dwelling. The only other structure proposed is a small barn located south of the dwelling site. According to a November 29, 1990 PRE 26-90 application the property has three soil series as mapped in the Soil Survey of Multnomah County. The predominant soil series is Cascade Silt Loam. OAR 660-33-020(c)(A) defines Cascade soils as "high-value farmland." The dwelling site proposed in SEC 3-97 is composed of Cascade Silt Loam Soil.

The PRE 26-90 permit for the dwelling was based on a dwelling location on 1 acre at the extreme northwest corner of the tract, and a driveway running from near the southeast corner of the lot diagonally to the home site, no barn was proposed in PRE 26-90. The dwelling location under the SEC application proposes a building site approximately 400 feet east of the site approved in PRE 26-90 and a driveway running from the southeast corner of the site running due north to the dwelling site, with some curves. Thus, the driveway is located somewhat east of the location approved in PRE 26-90.

The decision to allow a dwelling on the parcel was made in PRE 26-90, a copy of which is included by the applicant under the "1990 Approval" section of Exhibit "2.b.". The dwelling was approved as a dwelling in conjunction with farm use under the provisions of the EFU zone in MCC 11.15.2010. This code section has no expiration requirement, and does not limit transfer to other owners. The PRE 26-90 approval was based on a proposed farm use to be undertaken after the approval. It was not based on existing farm use of the property.

The parcel is a lot of record. The property owner in 1990 was John Braestrup. The current owner is David M. and Sandra J. Herman. The current applicant is Randy S. Robinson. There is no evidence in the record that the applicant or the current owner is the "wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-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." OAR 660-33-130(3)(g). The SEC permit application contains an "updated" farm management plan which changes the details of the "Proposed Cattle Operations Component" and "Proposed Grape Production Component" from the farm management plan approved in 1990 in PRE 26-90. The site is located 1,320 feet west of the regional urban growth boundary and the City of Portland. There is no evidence in the record that any of the approved farm management plan has been implemented.

According to a March 10, 1997 letter from the property owner, the property has been farmed on contract b Bruce Bowe continuously for the last six years. In the last three years, Mr. Bowe has trenched and tiled the northern part of the field, disced, spayed, planted, and harvested oats over the last three years.

II. PUBLIC HEARING

A. Hearing

Hearings Officer Deniece Won held a duly noticed public hearing regarding the application on May 21, 1997.

B. Summary of Testimony and Evidence Presented

1. Chuck Beasley, County Planner, gave a summary of the staff report. The issue on appeal is that the appellant disagrees with the Director's findings and conclusions that the farm management approval remains in effect. He entered a letter into the record from the property owner, David Herman, Exhibit F1 and a May 21, 1997 letter from Arnold Rochlin, Exhibit F2.

The dwelling and farm management plan were approved under the EFU County ordinance that was effective February 1990 through April of 1997. This application was filed when those rules were effective. The LCDC farm dwelling administrative rules substantially change the criteria for farm dwellings. Those became effective in August 1993. The significant environmental concern ordinance which is the subject of the appealed administrative decision was adopted in September of 1995.

The staff believes that since there is no expiration date in the ordinance in effect at the time of the farm dwelling approval, the approval for the use of the property for the farm dwelling in conjunction with a farm use remains valid. The staff believes the letter from County Counsel, Exhibit C3, supports that conclusion. The letter talks about the relationship between administrative rule expiration date requirements and requirements for farm dwellings in the context of building permits but it has applicability here because the SEC decision is not a decision for a use but a decision for a citing evaluation.

2. Jack Orchard, attorney representing the applicant, Randy Robinson. He agreed with the narrow focus of the appeal. He argued that there is no ordinance authority supporting the appellant's argument that the 1990 approval has "somehow vanished." There is no code provision, no county practice and no mandate from LCDC that would indicate that the county approval has expired, lapsed, or become nonconforming. There is no substantive issue with respect to any SEC-h criteria. He said the parcel was approved in 1990 for a 1-acre home site with the balance of the property to be used in a combination of farm and forest uses. The plan that Mr. Robinson has submitted retains a 1-acre home site and leaves the forest uses exactly where they were in the 1990 plan. The plan meets the SEC-h requirements because it preserves the wildlife habitat area.

He said the one slight distinction between the Robinson plan and the farm plan approved in 1990 actually works to the benefit of agricultural use. The plan approved in 1990 would have the vineyards split slightly by the driveway. The house has been moved slightly to the east. It moves the driveway entirely outside the vineyard area. The applicant believes that there is a net increase in the vineyard area that would be devoted to farm use.

The exclusive focus of the appeal is whether there is an approved use for a dwelling in conjunction a farm/forest utilization of the 30-acre parcel. Mr. Orchard argued the answer is clearly yes. The issue is easily decided because there is no provision for expiration of the permit. There was only one appeal filed, that was by Mr. Rochlin. Mr. Rochlin is the only person that has standing to make argument today because no one else took advantage of the comment period as the staff was processing it.

3. Beasley. The notice of appeal indicates that Mr. Rochlin is also serving as a representative for Mr. Christopher Foster.

4. Arnold Rochlin, Forest Park Neighborhood Association. He said the county regulations do not limit the parties in a de novo hearing to only persons who file an appeal and the applicant. The farm dwelling permit was issued under certain county and state relations in 1990. There is no dispute that State administrative rules and statutes have substantially changed since that time to an extent that it is unarguable that there is doubt, at least, as to whether there is entitlement to a dwelling. Mr. Rochlin believes that there is no entitlement to a dwelling under either current state or county regulations. There is enough of a change that it is clear that the 1990 PRE approval did not justify a dwelling under the requirements that now exist. The law has changed and there is nothing that authorizes the use. There are nonconforming use laws which are exceptions that provide some relief to people that have already invested considerably in a use. Nonconforming use law does not provide protection to someone who has not even implemented a permit. We have a permit that was issued in 1990. We have a state law that was changed in 1993 that says that a dwelling in conjunction with farm use cannot be located on prime farmland.

Mr. Rochlin believes that under circumstances that require discretionary review to determine whether there is current qualification for a dwelling there can be no assumption that a 1990 permit remains in effect unless there is some law that says it remains in effect. He said there is no law, the only law close to that is the nonconforming use law, which the staff acknowledged does not apply here.

The other principal issue in the case is, even if it were correct that a never implemented permit endures, the proposal now is substantially different from the one approved. He argues that the movement of the dwelling 400 feet is very substantial. It's the equivalent of two downtown Portland city blocks and its twice the amount that is allowed in a forest zone for which a forest replacement dwelling. He testified that contrary to the applicant's statement, one of the drawings in the new application shows that the new dwelling site would reduce the size of the vineyard by a very small amount.

Mr. Rochlin addressed Mr. DuBay's memorandum and said that Mr. DuBay does not address any of the issues in Mr. Rochlin's May 21, 1997 letter. Mr. DuBay concludes that an application for a building permit is not generally a land use decision. Nobody argues with that. He does not deal directly with the issue in this appeal. Mr. DuBay cites the Tuality Lands Coalition v. Washington County case, which he relies on almost entirely, which has two holdings. One is about the building permit not being a land use decision subject to LUBA review. The other is that when a new application is filed for a land use (even if it's a sequential application necessary for a development part of which has already been approved), the regulations that apply are those that were in effect at the time of the filing of the new application. There is no issue here about that. The other case that he cites is Gage v. the City of Portland, which holds that when there is an amended application, which we have in this case, we have an amended farm plan and we have an amended plan for the location of the dwelling, then the determination as to that use approval is to be made under the current regulations, the regulations at the time the revised proposal is submitted.

5. Chris Foster, he considers himself a co-appellant with Mr. Rochlin. Nevertheless, he agrees with Mr. Rochlin that anyone can have a say at this hearing. He submitted a written testimony, Exhibit F3. The staff's premise is that the lack of an expiration date gives the farm dwelling permit immunity forever. He thinks there's an alternate premise in the law that a permit is not protected when there's no expiration date. The case law of vesting deals with what goes on when a person is committed to a development and to what degree they are, when a law changes. He pointed to cases cited by Mr. Rochlin about vested rights. There's another body of law, ORS 215.130, about what degree uses are protected when the law changes. In the 1990 Code there's a section about the right to complete a single family dwelling dealing with when a farm zone originally went in, they let people continue to build houses that were under construction. So, Mr. Foster concludes there are three sections of law that support his alternate premise. He hasn't seen anything that supports the assumption that the county staff has made, that it's immune forever. Mr. Foster argued that because no time limit on the permit is specifically spelled out, we are left with what is a reasonable time for someone to get something underway. He believes seven years is unreasonable. He agrees that there are no rules about what to do when there's no expiration date. However, he argues that unless state law allows the permit to continue indefinitely, it's not allowed. Mr. Foster believes the staff makes the alternate assumption, that if state law doesn't prohibit a permit to continue indefinitely it's OK. He believes if the permit doesn't have an expiration date it doesn't have any protection above and beyond what a normal person would consider reasonable. He believes that the assumption that someone could walk in 50 years later with a permit and say it's still valid despite changes in law is ridiculous and illogical. He argued that the vesting and nonconforming use laws, as Mr. Rochlin pointed out, don't protect the approved farm dwelling because nothing exists there.

6. Dave Herman, property owner. Mr. Herman said the neighbor immediately to the northwest, Bruce Bowe, and his family have farmed the property continuously since the early 1950's when it was incorporated into a dairy. That dairy involved what is now three parcels, approximately 60 acres. At the time Mr. Herman acquired the property

Mr. Bowe asked if he could continue the farming practices on the property. Mr. Herman said he agreed to continue the established practice of cropping the property because without having brought significant improvements to the property such as water and irrigation, raising livestock, as provided in the farm management plan, was going to be problematic. There are some opportunities to contain water during the winter season. He said the winters over the last three or four years have been sufficiently wet that maintaining livestock on that parcel has been problematic, especially in the upper area. Mr. Herman testified that Mr. Bowe has treated the quack grass, disced, maintained and expanded the drain tile, and planted and harvested oats. Mr. Herman testified that Mr. Bowe has done that on contract continuously since Mr. Herman purchased the property. This last year he was unable to get in and work the field in April the way he would like to because it was too wet. So, the oat fields were left. At this point there's insufficient soil moisture for the oats, in a unirrigated field like that, to get a stand this year. Mr. Herman said they agreed to attempt to manage the quack grass and take it out before it tops out so that it has some value for forage and then in the put in a fall/winter crop. It has been farmed, considering the value of that land, which is not extremely high, it is basically a clay soil. It's not a type I or type II high value farmland. He said there are really two choices for farming the area. One is to do the vineyard approach as in the farm plan. The other is to allow the quack grass to establish as a good pasture for grazing animals. He said the reason it hasn't been used as grazing pasture is that in the season when you'd graze you'd need water and trucking water up there is cost prohibitive given the value of cattle.

7. Lynn Chauncey, a neighbor, said she has lived there for 22 years. She knows from experience that it can take seven or eight years to get to a point where you can begin building. She said there are urban housing developments about mile and a half from them. To keep that from happening in our area we need to allow the small farmer to build on his property in order to farm. She said she owns 33 acres but there are people who have only 7 acres and some of them have Christmas trees, some of them have grapes. She argued that if a person isn't allowed to build and live on the property they cannot farm it adequately oversee it. She said she has watched the subject property be farmed for about 25 years for different types of hay. She thinks the opponents should put their energy toward changing the law if it's not correct by failing to have a time limit.

8. Rochlin. The farm plan calls for a vineyard and the raising of livestock neither of which have been implemented. Mr. Harmon testified that the land is not high value farm land. The record shows that it is Cascade silt loam which is by statute and regulation categorized as high value, class III farm land. He said that Ms. Chauncey said that it needed a dwelling to enable it to be farmed but at the same time she said that it has been farmed for the last 25 years without a dwelling. He asserted the right to appeal under 215.416(11)(a) which provides a right to a de novo hearing on administrative decisions. MCC .2225(a)(2) allows a person to demonstrate that he is aggrieved. Mr. Foster also has standing under ORS 215.416(11)(a).

9. Foster. He is here because this is a bigger issue affecting how the County does business. It affects other property too. He thinks the law should be implemented rigorously.

10. Orchard. He does not believe that Mr. Foster offered any comments during the comment period and therefore lacks standing to participate in this hearing. Mr. Orchard quoted Mr. Rochlin's May 12, 1997 letter which stated that there is no provision for expiration of a permit in the PRE 26-90 Decision or in the county code. He said Mr. Rochlin argues that the property owner must do something to preserve the permit approval. He has reforested the forest area. That is consistent with the farm management plan. There's nothing inconsistent between planting oats or another cover crop, and the farm plan.

Mr. Orchard said the farm plan is typically made operational in conjunction with establishing the dwelling use. Or in some cases, before the building permit for the dwelling unit is issued, there needs to be a demonstrated commitment to the farm plan (Clackamas County uses this standard). The parcel remains available for the uses identified on the farm management plan. The fact that the law has changed at the state level does not affect the farm dwelling approval that was granted for this property. The distinction between this situation and vesting is that there has been no action taken by the county or by state that has said permits of this type are invalid, expire, are nonconforming or are vested. There has been no action taken from the state on down. Here there is no proceeding under which the use can be reviewed. He believes that if you looked at the Code today, the farm dwelling use is allowable and still conforms to the criteria in the EFU zoning provisions. A dwelling in conjunction with a farm use is still allowed. There is no nonconformity because this use is a use is found within the EFU zone section of the county's code. There is no evidence that this permit is somehow invalidated. He argues the hearings officer lacks authority right to the dwelling that has been granted.

He said the difference between this case and the Kennel case cited by Mr. Rochlin is that the kennel never obtained a permit. The issue in this hearing is the SEC-h permit. The SEC-h designation and the dwelling unit have no conflict. The dwelling on the north side of the site does not come close to the habitat on the southeast side of the site. The previously approved use is preserved except as it would conflict with the SEC-h designation. The SEC review is limited to whether the locations of the improvements (the dwelling, driveway, vineyard, detention facility and fencing) conflict with the area the county subsequently mapped as a significant environmental concern. It's just like any other subsequently adopted regulation that would affect some use on your property, it doesn't defeat the use itself but it may regulate the use. Potentially the SEC-h would affect where you could locate the use on the property.

Mr. Orchard argued that if Mr. Herman had come into the county for a building permit in1990, it would have been issued. Mr. Robinson came to the County in 1997 and the rules relating, not to the use, but to where the use can occur, in the SEC code relating to the habitat areas now apply.

11. Beasley. With respect the issue of who can be a party, he doesn't know the answer. The Code section under Action Proceedings (MCC .8290) that authorizes an appeal of a decision by the Director provides that just the applicant can provide the notice of appeal, which is not consistent with the statute. MCC .82062(a) authorizes appeals of a decision of the planning commission or the hearings officer. Subsection (1) says that a notice of appeal can be received from a party. Parties are covered in MCC .8225. For a decision by the planning commission or hearings officer, you have to be entitled to notice, participate or demonstrate that you somehow would be aggrieved by the decision. It doesn't clearly tell us who can participate in this proceeding. There is a provision in ORS 197 or 215 who notice of an administrative decision has to be provided to and that might imply a full de novo hearing.

He said he agrees with Mr. Orchard concerning changes to the farm management plan. The SEC application is not a decision about whether a use should be allowed but how property gets developed. The only relevant issue is the code provides that a SEC permit can be approved for a permitted or allowed use. The farm management plan provisions don't speak to changes in the farm management plan, nor do they compel implementation of the farm management plan. The farm management plan has been applied by the County as a feasibility requirement rather than something the property owner was obligated to follow. The staff believes the PRE 26-90 approval was made in the context of a capability test of whether you could do some kind of commercial use and was the property suitable for that. Even if we talked about a change in a farm management plan as somehow opening up the farm dwelling use decision, he would argue that there is nothing significant about the changes because there is nothing in the previous record that talks about the location of the dwelling as important to the justification of farm management on the parcel. The only reference to the dwelling location is on the map.

About the issue of applying new rules when the law changes, the County Code does include expiration dates and processes for determining vesting where the County determined that was needed. In the new EFU zone, which was effective after April 1997, and the CFU zone, the County adopted a two-year limitation to discretionary land use approvals. The ordinance includes a limited effective date of permits for conditional uses and design review and variance approvals. The code never intended a time limit on these old farm management dwellings.

III. ANALYSIS

The appellant states that a prerequisite to the issuance of a SEC permit, is that it pertains to a lawful and permitted use. The appellant cites Marquam Farms Corporation v. Multnomah County, ___ Or LUBA ___ (LUBA Bo. 95-254 September 5, 1996), Aff'd ___ Or App ___ (CA A95801 March 16, 1997) in support of this proposition. Discussing the Third Assignment of Error, LUBA said:

"Respondents argue that the 1994 hearings officer had no authority to consider the legality of intervenors' use because the issue before him was limited to design review. * * *

"Whether the applicant has established the county's authority to review an application is a threshold determination relevant to all land use applications. Necessarily, before a hearings body can determine the merits of a design review application, that body must first determine whether the applicant has established the legal use upon which the design review is based."

The appellants contend that the farm dwelling for which this SEC permit is requested is not lawfully permitted. The appellants contend that the Planning Director (Director) argues that lawfulness of farm dwelling is not properly at issue in this proceeding. The Director says: ". . . this application is not a 'use' decision, but is to evaluate the location and design of the proposed development for consistency with the SEC ordinance." Generally speaking a use is lawful if: (1) it is outright allowed and no further discretionary permits need to be issued, (2) a valid permit has been issued, (3) it is a nonconforming use, or (4) it is a vested right. I understand the Director to say that this application is not a use decision because a use decision has already been made with the approval of PRE 26-90. The SEC permit pertains to a use that has a valid permit.

If the farm dwelling authorized by PRE 26-90 remains consistent with state law, the appellant's argument necessarily fails. If the farm dwelling does not comply with the current law then the question is whether the farm dwelling must comply with current law or remains permitted by the approval of PRE 26-90.

A. Is the Farm Dwelling Consistent with State Law?

ORS 215.283 authorizes uses which may be established as of right in exclusive farm use zones in non marginal lands counties. Subsection 215.283(1)(f) authorizes "dwellings and other buildings customarily provided in conjunction with farm use. In 1990, when the PRE 26-90 dwelling in conjunction with farm use was approved, the County Code allowed a residence in an agricultural zone on a lot of record, if such residence was "customarily provided in conjunction with an existing use" and if conducted according to an approved farm management plan. LCDC had previously adopted rules to implement ORS 215.283(1)(f), which permitted dwellings "customarily provided in conjunction with farm use" to be located in EFU-zoned land in non marginal land counties. LCDC's rules permitted such dwellings only if the "day-to-day activities" on the land were "principally directed to the farm use of the land." OAR 660-05-030(4). The subject parcel was a lot of record and the county found the farm management plan criteria were satisfied, so the dwelling in conjunction with farm use was approved in 1990.

In 1992, LCDC amended Goal 3 and created three new classes of agricultural land: "high value farmlands," "important farmlands," and "small-scale resource lands," and

called for varying levels of regulation as to the uses allowed in each of the three categories. Before the rules became effective, the 1993 legislature enacted House Bill 3661 which abolished two of the three agricultural land categories created by LCDC's 1992 rules and recognized only the high-value farmland category. ORS 215.304(1); ORS 215.710. The legislature declared invalid any LCDC rules that are inconsistent with ORS 215.213, as amended. ORS 215.304(3).

Following the enactment of HB 3661, LCDC amended Goal 3 once again. OAR 660-15-000(3). The rule deleted reference to small-scale resource lands and important farmland, while retaining the high-value farmland classification. LCDC also adopted OAR 660 division 33 purporting to implement ORS 215 and goal 3, containing criteria for dwellings "customarily provided in conjunction" with farm use in ORS 215. The rule provides criteria for determining when such dwellings may be allowed and these criteria supplement County EFU provisions. The 1994 rules permit counties to allow in EFU zones the uses described in ORS 215.213 or ORS 215.283 (marginal or non marginal lands counties respectively), but only if the land is not classified as high-value farmland. OAR 660-33-120. Land classified as high value farm land is subject to additional, more stringent regulation, or, in some cases, outright prohibition.

In the Willamette Valley, tracts composed predominantly of Cascade soils are identified as high value farmland. 660-33-020(8)(c)(A). OAR 660 Division 33 includes a table of uses that may be allowed in high value and other farm lands and it specifies which subsection of OAR 660-33-130, the minimum standards, apply to each listed use. Uses on high-value farmland are limited to those specified by rule. OAR 660-33-090. The minimum standards applicable to dwellings in conjunction with farm use are:

(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;

If the underlying dwelling is subject to existing criteria, it would not be approvable because the lot was not acquired by the present owner prior to January 1, 1985 or by devise or intestate succession from a person who acquired the lot prior to January 1, 1985. Also, as discussed next, the proposal does not meet the meet the requirements of OAR 660-33-135. Finally, the lot is within three miles of the regional urban growth boundary and no exception has been taken.

A dwelling on farmland may be considered "customarily provided in conjunction with farm use" if it meets the requirements in OAR 660-33-135. OAR 660-33-130(1). The rule provides:

(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.

There is no evidence in the record that the lot has produced at least $80,000 in gross annual income from the sale of farm products in the last two years or three of the last five years. Also, the evidence indicates the person who will occupy the residence (Mr. Robinson) is not the person producing the commodities which grossed the income (Mr. Bowe).

The Supreme Court concluded in Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1990), that the subsection (1) provisions of both ORS 215.213 and 215.283 establish "uses as of right," 321 Or at 496, that are not subject to additional county regulations, while subsection (2) of the statutes authorize conditional uses that the counties may regulate in ways that go beyond the statutes.

In January 1996 the Appeals Court decided Lane County v. LCDC, 138 Or App 635, modified on reconsideration, 140 Or App 368 (1996). The court of appeals held that LCDC rules concerning the extent to which certain uses may be restricted in high value farmland in marginal land counties were invalid, because the rules prohibited uses that were expressly allowed by ORS 215.213 (applying to marginal lands counties). The Lane County decision invalidates, as they pertain to marginal lands counties, OAR 660-33-130(18), OAR 660-33-135(7), and portions of OAR 660-33-120. The court of appeals invalided the rule which defines "customarily provided in conjunction with farm use" for purposes of establishing a dwelling under ORS 215.213(1), authorizing farm dwellings in marginal land counties, as requiring $80,000 of income from the sale of farm products in the previous two years. The court found that the rule created an income criterion for the establishment of a dwelling in conjunction with farmland that was four times more stringent than the $20,000 requirement set forth in the applicable statute.

In January 1996, after Lane County was decided, the appeals court reviewed Clackamas County's denial of a farm dwelling authorized by ORS 215.283(1)(f) to determine whether OAR 660-33-135(7) conflicts with ORS 215.283(1)(f), authorizing farm dwellings in non marginal land counties. Nichols v. Clackamas County, 146 Or App 25. The court agreed with LUBA that the statutory term "customarily provided in conjunction with farm use" is a delegative term which LCDC has authority to refine and adopt supplements to the standard in ORS 215.283(1)(f). LUBA concluded and the court agreed that:

> "OAR 660-33-135(7)(a) specifically requires that a property be currently employed for the farm use, as defined in ORS 215.203.' ORS 215.203(2)(a) limits 'farm use' to 'the current employment of land for the primary purpose of obtaining a profit in money.'
>
> "The $80,000 standard, which the Court of Appeals found [in Lane County] conflicts with ORS 215.213(2)(b), is not inconsistent with ORS 215.283(1)(f). It helps to clarify the level of required farm activity for farm dwellings. It 'refines the statutory tests and promotes the general statutory policy of restricting farm dwellings to those which are connected with farm use.' The county acted properly in applying OAR 660-33-135(7)." (Footnote and citation omitted.)

Thus, the rules adopted by LCDC for nonfarm dwellings in marginal lands counties have been upheld. Again, if the underlying dwelling is subject to the criteria in OAR 660-33-130 and OAR 660-33-135 it would not be approvable. The central issue is whether those criteria apply or whether the underlying dwelling has a valid use permit.

B. Does the Farm Dwelling Have a Valid Use Permit?

The permit application under consideration here is the SEC application. There is no debate that current laws apply to that application. The appellants, however, argue that MCC 11.15.6404(A) requires the farm dwelling to also meet current laws. MCC 11.15.6404(A) provides:

> All uses permitted under the provisions of the underlying district are permitted on lands designated SEC; provided, however, that the location and design of any use, or change or alteration of a use, except as provided in MCC .6406, shall be subject to an SEC permit. (Emphasis added).
>
> A decision on an application for an SEC permit shall be based upon findings of consistency with the purposes of the SEC district and with the applicable criteria for approval specified in MCC .6420 through .6428.

The criteria for approval of a SEC Permit are factors to be considered, they are not factors which control the use of the land. The provision quoted specifically states that all uses permitted in the EFU district are permitted in SEC areas. There is nothing in the language of the County Code which suggests that the previously approved prescribed use permit for the farm dwelling needs to be reevaluated because it subsequently became subject to the SEC requirements.

The appellant also makes some arguments based on nonconforming use concepts which are not well taken. For nonconforming use provisions to apply the use must first be established. In nonconforming uses a use is first established and then the law changes which does not allow the use. Nonconforming use provisions protect uses in existence at the time of a change in law. ORS 215.130(5) and (6) state:

> "(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 . . .
>
> (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."

The abandonment concept in subsection (7) relates to uses described in subsection (5). As pertinent here, the required law use relates to a structure existing at the time of a change in regulations. Here, no dwelling use was ever established. Therefore, the nonconforming use provisions of ORS 215.130 do not apply to this farm use dwelling approval.

The appellant argues that because the permitted use has not vested it is now disallowed by OAR 660 Division 33. A person vests a land use right when the use is permitted or

allowed but not fully established before the law changes, but a substantial commitment to the use has been made. Here, there is no evidence that any commitment to the farm dwelling has been made.

In 1990 the property owner obtained approval to establish a farm dwelling on the property. In 1994 LCDC adopted OAR 660 Division 33 which disallows a farm dwelling on the property. Before the rule was adopted, the property owner had neither established the farm dwelling use nor made a substantial commitment to the use. The fact that the County's approval of the farm dwelling contained no time limit is not relevant. The County granted approval for a use that was authorized by the State. The State later adopted a new rule that no longer would authorize the use. Thus, it would appear the right to the dwelling did not vest and would have been lost when the state rules changed.

However, ORS 215.428(3) somewhat changes the rules of vested rights. It provides that "[a]pproval or denial of the [permit] application shall be based upon standards and criteria that were applicable at the time the application was first submitted." As I discuss below, it appears from case law that unconditional land use approvals remain valid unless some local or state regulation specifically causes them to be reevaluated in a subsequent land use decision.

In Tuality Lands Coalition v. Washington County, 22 Or LUBA 319 (1991) a property owner received approval for a "special use approval and conceptual development review" application for an asphalt batch plant in 1988. The application was a first step in a sequence of needed approvals for the development. At the time of the first approval, the land was zoned Land Extensive Industrial (MAE). In October 1990 the property was rezoned to FD-10. While the MAE zone allowed asphalt batch plants, the FD-10 zone did not. In December 1990 the owner filed an application for a Development Review for an Asphalt Batch Plant. The second application contained different features than were approved in the first 1989 development approval decision. The 1990 Development Review application was approved on January 7, 1991. On February 13, 1991, an application for a "commercial Building Permit" for the batch plant foundation was filed. The 1990 Development Review and 1991 building permit approvals were appealed. The issue before LUBA was whether under ORS 215.428(3), the standards in effect at the time a 1989 development application was submitted governed approval of the 1991 Development Review application and building permit. ORS 197.015(10)(b)(A) provides that land use decisions over which LUBA has jurisdiction do not include a decision of a local government "[w]hich is made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment[.]"

LUBA held that the building permit approval was not subject to review because no discretion was required. LUBA found that the county, when it decided the Development Review application, was required to determine whether the MAE zone, which governed the 1989 development approval decision, also governed the second development application filed in 1990, after the property was rezoned to FD-10:

"* * * the county exercised factual and legal judgment in interpreting and applying ORS 215.428(3) to the second development application. There is no dispute that the second development application was filed after the MAE zone had been replaced by the FD-10 zone. Relevant standards applicable to the approval of the second development application require the county to determine the proposal's consistency with the comprehensive plan and to determine that the proposed use is allowed by the underlying zone. The uncertainty concerning whether the MAE or FD-10 zone standards govern the second development application makes the county's approval of the second development application not subject to the exception to our jurisdiction established by ORS 197.015(10)(b)(A)."

LUBA next considered whether Under ORS 215.428(3), the standards in effect at the time the 1989 development application was submitted govern approval of the second development application, which was submitted in 1990. LUBA stated:

"ORS 215.428(3) require[s] the county to apply the standards in effect at the time a development application is first submitted, to that development application. However, there is nothing in ORS 215.428(3) which requires the county to apply the standards in effect at the time one application is submitted to a distinct and subsequent application. For purposes of ORS 215.428(3), the question is whether the second development application was a separate and distinct application from the application submitted [previously]. Tuality Lands Coalition, *supra* at 329.

LUBA found that the second development application was an "application" as that term is used in ORS 215.428(3), and that the list of uses allowed in the FD-10 zone are "standards and criteria" as those terms are used by ORS 215.428(3). LUBA held that the approval standards in effect at the time the second development application was submitted were the applicable approval standards governing the second development application stating that "development approval can only be granted for uses which are permitted in the zoning district." The new zoning district was applicable because it contained criteria applicable to the development review decision.

The case under appeal here involves a "separate and distinct" application from the farm dwelling application. The criteria applicable to the SEC permit require the application of discretion. They are not clear and objective standards. Unlike Tuality Lands Coalition, none of the SEC criteria requires the County to determine whether the previously permitted use is allowed by the underlying zone. The SEC criteria require only that the county finds that there is a permitted use.

The property owners in Marquam Farms Corporation, v. Multnomah County used their land for kennel use in the 1950's when the county enacted zoning legislation disallowing the kennel use. After the zoning enactment the extent and continuity of kennel use varied. For 15 to 20 years before 1989 there was no commercial use of the kennel. The County Code in section .2028 defined a kennel as a facility for four or more dogs. The County's code provided that conditional uses listed in the Code that were legally established before 1980 "shall be deemed conforming" and not subject to the code

provision prohibiting the resumption of a nonconforming use that has been discontinued or abandoned. In 1986 the permissible conditional uses listed was amended to include kennels. In 1990 the County approved design review, "remodeling a kennel for 50 dogs," and a conditional use permit for a watchman's residence. In 1993 LCDC adopted OAR 660 Division 33 which makes it impermissible to establish new kennel uses on high-value farmland and allows counties to issue kennel-related permits only in connection with existing facilities. In 1994 the property owner applied for design review approval and to increase the kennel's use from 50 to 75 dogs. The hearings officer concluded he could not approve the request because the applicants could not demonstrate that the underlying 50-dog use was authorized either by a "valid conditional use permit" or as a "valid, nonconforming use existing in 1980, which could become a 'conforming conditional use' under section .2028." In 1995 the property owner applied to Multnomah County for three alternate applications to increase the use from its ostensible existing level of 50 dogs to 75: (1) a new conditional use permit, (2) an expansion of an existing conditional use, and (3) expansion of a nonconforming use.

LUBA held and the court agreed that the county's interpretation of its own conditional use legislation, under which it granted the initial permit, was inconsistent with OAR 660-33-120 and OAR 660-33-130, and was therefore reversible under ORS 197.829(1)(d). The court addressed whether there was a valid nonconforming use and held that the county's decision on the nonconforming use issue did not satisfy ORS 215.130 which addresses nonconforming uses and applied directly to the land use decision. The Court lastly addressed whether under code section .2028 there was a valid conditional use. ORS 215.296(1) permits counties to approve uses under ORS 215.283(2) "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."

The court agreed with LUBA's conclusion that the county's decision violated that state statute by interpreting and applying section 2028(B) in a way that allows a use subject to ORS 215.283(2) to achieve permitted status without being tested against the standards that ORS 215.296(1) requires it to satisfy. The court considered whether the county's 1990 design review for the 50-dog facility and its permit for the watchman's residence explicitly or implicitly interpreted section 2028(B) creating a form of "issue preclusion" therefore bared its reconsideration. The court agreed with LUBA that the county made no section 2028(B) interpretation in 1990.

Unlike Marquam which involved an application for a permit that was disallowed by OAR 660-33-120 and OAR 660-33-135, this application does not directly involve a request for initial approval for the farm dwelling. Also, unlike Marquam Farms this application does not involve a nonconforming use. Neither Tuality Lands Coalition nor Marquam

Farms require that the current lawfulness of an approved use be considered in connection with this application.

The court's exploration of issue preclusion in Marquam Farms indicates that a permit lawfully granted cannot be collaterally attacked in a subsequent application. McKay Creek Valley Assoc. v. Washington County, 24 Or LUBA 187 (1992), *aff'd*, 118 Or App 543, *rev. denied*, 317 Or 272 (1993) further supports the concept that a lawfully granted permit cannot be challenged in a subsequent application. In McKay Creek Valley Assoc. LUBA held that where a parcel was created by deed, at a time when the local government interpreted its partitioning regulations to be inapplicable to parcels created in that manner, the local government may subsequently determine that a permit application complies with a code requirement that a proposed use be on a "parcel," without reexamining the applicability of its partitioning regulations when the parcel was created. McKay Creek Valley Assoc. involved a decision approving a dwelling in conjunction with farm use on a parcel created during a time when the under the county's interpretation, the partitioning requirements and procedures of its code and ORS 92 did not apply to property bisected by a public road. Opponents of the farm dwelling approval argued that the parcel was not eligible for the farm dwelling because it was not a legally created lot. Citing Stefansky v. Grant County, 12 Or LUBA 91, 96 (1984) LUBA stated:

> "Ordinarily, we would not consider it appropriate, in reviewing approval of a conditional use permit, to take up claims concerning prior actions related to the property. Generally, our review function is limited to consideration of the approval criteria applied by the decisionmaker to the permit under appeal. * * * " *Id* at 192.

LUBA found that none of the relevant code provisions specifically requires a determination that a lot or parcel was "legally" created. LUBA reasoned that unless the underlying legality of the lot or parcel had to be considered, prior actions creating a lot or parcel are not subject to collateral attack in a subsequent land use proceeding. LUBA found that prior cases on the question:

> "stand for the proposition that under a local standard requiring that a lot or parcel be shown to have been legally or properly created, it must be established that, at the time the lot or parcel was created, any local government approvals required at that time were given. * * * Such a local standard does not require a complete reexamination of compliance with every approval standard that may have applied at the time the lot or parcel was created." *Id* at 192.

At the time the parcel was recorded, recording a deed for that property was sufficient to create a "parcel," and no additional county partitioning approval was required. LUBA therefore upheld the county's determination that the lot was created as a separate parcel by deed.

On review the appeals court identified the issue as not whether the "property *is* a lawfully created lot or parcel, but whether that question must be *considered* in connection with *this* application. The court pointed out that:

"LUBA drew a distinction here between prior government approvals and the substantive correctness of those approvals, and indicated that the existence of the former could be re-explored in connection with subsequent applications, while the latter question could not be." McKay Creek Valley Ass'n v. Washington County, 118 Or App 543, 848 P2d, 624, 626

The appeals court agreed that the legality of the parcel did not have to be determined in consideration of the farm dwelling approval. In the case under appela, htere is similarly no substantive requirement that the farm dwelling use must be evaluated in the SEC review. I conclude that the dwelling use has been determined and cannot be reconsidered now.

C. Must a New Prescribed Use Permit be Obtained if A Farm Management Plan is Amended?

The SEC permit application contains a revised farm management plan and changes the dwelling and driveway locations from where they were shown on the PRE 26-90 application. The appellant argues that these revisions and changes follow no procedure and impliedly constitutes a new application for a dwelling in conjunction with farm use (for which no application has been made). I take the appellant's argument to be that although a use permit has been approved the use underlying this SEC permit is a different, unapproved use. I find no Code procedures that apply to modifications of prescribed use permits. Nor does the Code require that the farm management plan be precisely implemented. I also was unable to locate, nor was I directed to, any case law holding that a new permit must be obtained when an approved farm management plan is amended. I agree with the County staff that the changes are not significant and were made to best meet the SEC-h requirements.

D. Can a Building Permit be Issued Without Any Further Discretionary Review?

However, before a building permit may be issued, the county needs to determine that the land is currently employed for the primary purpose of obtaining a profit in money through agricultural activity. OAR 660-33-135(7) provides that on 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 fire years;

The rule in effect when PRE 26-90 was approved also required that the property be "currently employed for farm use." In applying the "customarily provided in conjunction with farm use" standard under the old Goal 3 rule, the courts held that a county could not approve a dwelling in conjunction with a proposed farm use that does not yet exist

on the property. In Forster v. Polk County, 115 Or App 475, 481, 839 P2d 241 (1992) the court of appeals reviewed the denial of a farm dwelling by Polk County under former Goal 3 and OAR requirements that did not specify the level of farm activity that must precede the approval or construction of a dwelling. The court held that some level of actual farm use must exist, but the farm plan need not be "fully implemented" nor the parcel be "wholly devoted" to farm use. This was true even when there was currently farm use of the property, but the applicant requested the dwelling in conjunction with a proposed farm use. Hayes v. Deschutes County, 23 Or LUBA 91, at 97-99 (1992); Elliott v. Jackson County, 23 Or LUBA 257, 263 (1992).

LUBA said that a county may approve a dwelling in conjunction with a proposed farm use described in a farm management plan,

> "so long as the county (1) determines the level of farm use proposed by the farm management plan satisfies [the goal 3 rule], and (2) ensures through conditions that the farm dwelling cannot actually be built until after the county determines that the farm management plan has been carried out." Citing Miles v. Clackamas County, 18 Or LUBA 428, 439 (1989) (accessory farm dwelling). Accord; Elliott v. Jackson County, *supra*.

Multnomah County Planning Director's Decision on PRE 26-90 contains no condition prohibiting construction of the dwelling until after the county determines that the farm management plan has been carried out.

In Forster, LUBA found that Polk County's farm dwelling approval did not ensure that the farm dwelling could not be built until after the county determined the farm management plan has been carried out. The decision allowed a building permit for the dwelling to be issued when only a portion of the management plan was implemented. LUBA reasoned that the partial implementation of the farm management did not meet the necessary level of "current employment" for farm use. LUBA held that the county's decision exceeded its authority under ORS 215.283(1)(f) and the implementing OAR.

On review, the court of appeals noted that ORS 215.283(1)(f) and the OAR that explicates that statute, as well as the county ordinance, were directly applicable to the county's decision. The old OAR like the current OAR required that the property be "currently employed for farm use." The court noted that this rule "makes some actual current farm use of the property a prerequisite to permitting a farm dwelling on it under ORS 215.283(1)(f). The court also found that the "text and history of the rule reveal that, in adopting it, LCDC rejected LUBA's decision in Matteo v. Polk County, 14 Or LUBA 67 (1985), which had held that a parcel must be wholly devoted to farm use in order to qualify for a farm dwelling." Forster v. Polk County, *supra*, 115 Or App at 243. The old OAR did not provide a set formula for determining the amount of actual farm use that must precede the approval or construction of a dwelling. The court rejected LUBA's "complete implementation" of the farm management plan standard. The court held that "the rule does not require the full establishment of all planned farm uses in all cases as a

condition precedent to the building of a primary farm dwelling on any EFU parcel." Id. At 244.

Unlike the old rule under which the above case was decided, Ii note that the current OAR, 660-33-135(7) does contain a standard to determine the amount of actual farm use that must precede the approval or construction of a dwelling - at least $80,000 in gross annual income from the sale of farm products in the last two years or three of the last five years. However, i do not decide that the current standard would be applicable when a determination needs to be made about whether a requested building permit meets the "currently employed for farm use" standard. I do believe, however, that when that determination is made it will require the exercise of factual and legal judgment and therefore, be a discretionary decision. ORS 215.28391)(f) authorizes a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel "currently employed for farm use as defined in ORS 215.203." Land is not in farm use unless the "day-to-day activities" on the subject land are "principally directed to the farm use of the land." These statutory standards are certainly not clear and objective.

When compliance with a standard or condition requires the exercise of discretion, the county must provide notice and opportunity for a hearing before approving the building permit. McKay Creek Valley Assoc. V. Washington County, 24 Or LUBA 187, 198 (1992), *aff'd*, 118 Or App 543, *rev. denied*, 317 Or 272 (1993). In McKay Creek Valley Assoc. LUBA found that "Washington County erred by concluding that compliance with the farm management plan is a ministerial decision that may be validated by the planning director."

The county approved the subject farm dwelling as a dwelling in conjunction with "a woodlot capable of producing an average over the growth cycle of $10,000 in gross annual income" under CDC 430 37 2A(2)(c)which parallels ORS 215.213(2)(b)(B). The challenged decision included the following condition:

> "Prior to Final Approval and Issuance of a Building Permit, the Applicant Shall:
>
> "1. Upon implementation of the farm management plan, provide documentation from a qualified expert (such as an Extension Agent) that the Christmas trees are planted in an acceptable manner (i.e. that at least five acres of Douglas fir seedlings are planted at typical densities of 1500 per acre and are likely to survive as a producing crop). This documentation shall be obtained within two years of preliminary approval for the dwelling and shall constitute final approval of the farm management plan. * * *

The condition itself does not state what procedures the county will use for final approval of the farm management plan. However, the county's findings provided that "[t]he review and approval of the documentary evidence [required by the above quoted condition] by the Planning Director is a ministerial decision made under clear and objective standards and does not involve the exercise of significant factual or legal judgment. No public notice and hearing are required." LUBA stated:

"In McKay Creek Valley Assoc. v. Washington County, 18 Or LUBA 71, 81 (1989), we held that county decisions approving dwellings in conjunction with farm use under what is now CDC 430-37.2A(2)(b) (dwellings on a lot or parcel planted in perennials capable of producing $10,000 or more in average gross annual income) are "discretionary" and, therefore, permits as defined by ORS 215.402(4). For similar reasons, a county decision approving a dwelling on a lot or parcel that is a woodlot capable of producing $10,000 or more in average gross annual income under CDC 430-37.2A(2)(c) is also "discretionary" and a "permit," as defined by statute. ORS 215.416(3), (5) and (11) require that a decision on an application for a "permit" be made only after notice and a hearing or an opportunity to request a hearing through a local appeal.

A local government may, by imposing conditions or otherwise, defer a final determination concerning compliance with an applicable permit approval standard to a later stage. However, if the decision to be made at the later stage is itself discretionary, the approval process for the later stage must provide the statutorily-required notice and opportunity for hearing, even though the local code may not require such notice and hearing in other circumstances. Citing Rhyne v. Multnomah County, 23 Or LUBA 442, 448 (1992); Headley v. Jackson County, 19 Or LUBA 109, 114 n 9 (1990); Holland v. Lane County, 16 Or LUBA 583, 596 (1988).

In this case, the county's findings state that its determination of compliance with CDC 430-37.2A(2)(c) is dependent upon intervenors planting five acres of Douglas fir seedlings "in an acceptable manner (i.e. the trees are planted at typical densities and are likely to survive as a producing crop)." Record 104. Similarly, the condition imposed requires that the five acres of seedlings be "planted at typical densities of 1500 per acre and * * * likely to survive as a producing crop." Record 2. We agree with petitioner that the determination of whether the planted seedlings "are likely to survive as a producing crop" involves discretion. Therefore, the county's procedure for granting final approval to the implementation of intervenors' farm management plan, prior to issuing a building permit, must include notice to interested parties and a hearing or opportunity to request a hearing.

According to the McKay Creek Assoc. Opinion, which was effective when the County approved PRE 26-90, the County had a choice to either: (1) require the farm use the dwelling would be in conjunction with actually exist; or (2) condition the decision to require that the amount of farm use actually exist at the time the building permit is issued. In PRE 26-90 the County followed neither of these choices. The farm use the dwelling would be in conjunction with was the vineyard and cattle use identified in the farm management plan proposed to be undertaken in the future. The use did not, and does not actually exist. Although the farm plan need not be fully implemented a determination needs to be made that the land is in farm use as defined in ORS 215.203 before a building permit is issued.

The County's failure to follow the course it should have in approving PRE 26-90 creates a dilemma now. One possible course would be to determine that the farm dwelling use was illegally granted for failure to comply with ORS 215.283(1)(f) as interpreted by the OAR and LUBA's Mackay Creek Assoc. Opinion. As discussed whether that decision can be collaterally attacked in this application is doubtful. A second course would be to imply a condition of approval into PRE 26-90 that before a building permit is issued the County must determine that the necessary amount of farm use that the dwelling is in conjunction with has been established. This second course is problematical because the amount of farm use the property owner needs to establish before a building permit is issued was not defined.

Nonetheless, this course seems the only way that compliance wiith ORS 215.283(1)(f) can be assured. Although it is true that a building permit is generally subject to clear and objective standards, and therefore, is nondiscretionary, ORS 197.015(10)(b)(A) recognizes that some building permits may be "land use decisions" because they are not issued under "clear and objective land use standards." That statute and McKay Creek Valley Assoc. Show that not all building permit issuance decisions are non-discretionary.

E. Who Are Parties that May Participate in the Hearing?

The Code section under Action Proceedings (MCC .8290) that authorizes an appeal of a decision by the Director provides that just the applicant can provide the notice of appeal, which is not consistent with the statute. Parties are covered in MCC .8225. To be a party for a decision by the planning commission or hearings officer, a person has to be entitled to notice, or demonstrate that he/she somehow would be aggrieved by the decision. The County Code does not specify who could participate in this proceeding.

ORS 215.416(11)(a) provides that notice must be given on appeal of an administrative decision to "persons who would have 'had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision.' Also notice needs to be given as required by ORS 197.763 or 197.195, whichever is applicable.'" ORS 196.195 applies to limited land use decisions and is not applicable here. ORS 215.763(a)(2)(C) provides that notice needs to be given to property owners within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone. Subsection 197.763(b) provides that notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site. Chris Foster is an officer of the Forest Park Neighborhood Association, recognized by the County. The appeal was filed by Arnold Rochlin. There was no indication that the appeal was filed on behalf of others. In the comments filed during the comment period, Arnold Rochlin filed a comment on behalf of himself personally and as "development chair" of the Forest Park Neighborhood association and representing Christopher Foster.

Although the requirements limit who can appeal an administrative decision in an appeal of an administrative decision, there appear to be no limits in the County Code or State

law on who may participate in the appeal hearing. The notice of the appeal hearing stated that in the appealed public hearing "all interested parties may appear and testify." As the parties who may participate is unclear in the Code and ORS 215 the hearings officer allowed all who wished to participate to do so. During the hearing the hearings, the hearings officer indicated that if upon further deliberation concerning who could be legal parties to the hearing she would exclude from her consideration comments made by any parties who should be excluded from participation. Upon that deliberation the hearings officer concludes that she was not precluded by either the county code or state statute from allowing the participation of any of the participants.

IV. ORDER

Significant Environmental Concern Permit No. 3-97, based on a farm dwelling in conjunction with a farm use approved in PRE 26-90 is approved, based on the conditions in the Director's decision. This approval is not based on any determination that the farm use dwelling approved in PRE 26-90 meets the criteria of ORS 215.283(1)(f) that there is currently established farm use to an extent that justifies issuance of building permit. It is the belief of the hearings officer that when a building permit is issued, the County will need to determine that the requirements of ORS 215.283(1)(f) are met.

Dated this 2nd day of June 1997

Deniece Won

Deniece Won, Attorney at Law
Hearings Officer

DEPARTMENT OF ENVIRONMENTAL SERVICES
TRANSPORTATION AND LAND USE PLANNING DIVISION
2115 SE MORRISON STREET
PORTLAND, OREGON 97214-2865
(503) 248-3043 FAX: (503) 248-3389

DECISION OF THE PLANNING DIRECTOR

SIGNIFICANT ENVIRONMENTAL CONCERN PERMIT
Case File No.: SEC 3-97;
March 11, 1997

What: The applicants requested approval of a proposed single family dwelling site under the provisions of the Significant Environmental Concern (SEC) ordinance for areas designated as Wildlife Habitat. Use of the property for a dwelling was previously approved under PRE 26-90.

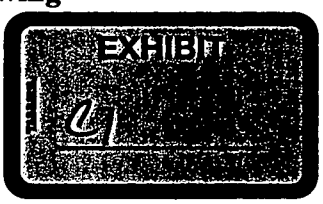
Where: The subject property is located at:
9430 NW Kaiser Road
T1N, R1W, Section 5, TL. 1, Shoppe Acres Lot 7 and a portion of Lot 8.

Property Owner: David and Sandra J. Herman
P.O. Box 25482
Portland, OR 97298

Applicant: Randy S. Robinson
4650 NW Kaiser Road
Portland, OR 97229

Zoning: EFU, Exclusive Farm Use; SEC-h, Significant Environmental Concern for Wildlife Habitat.

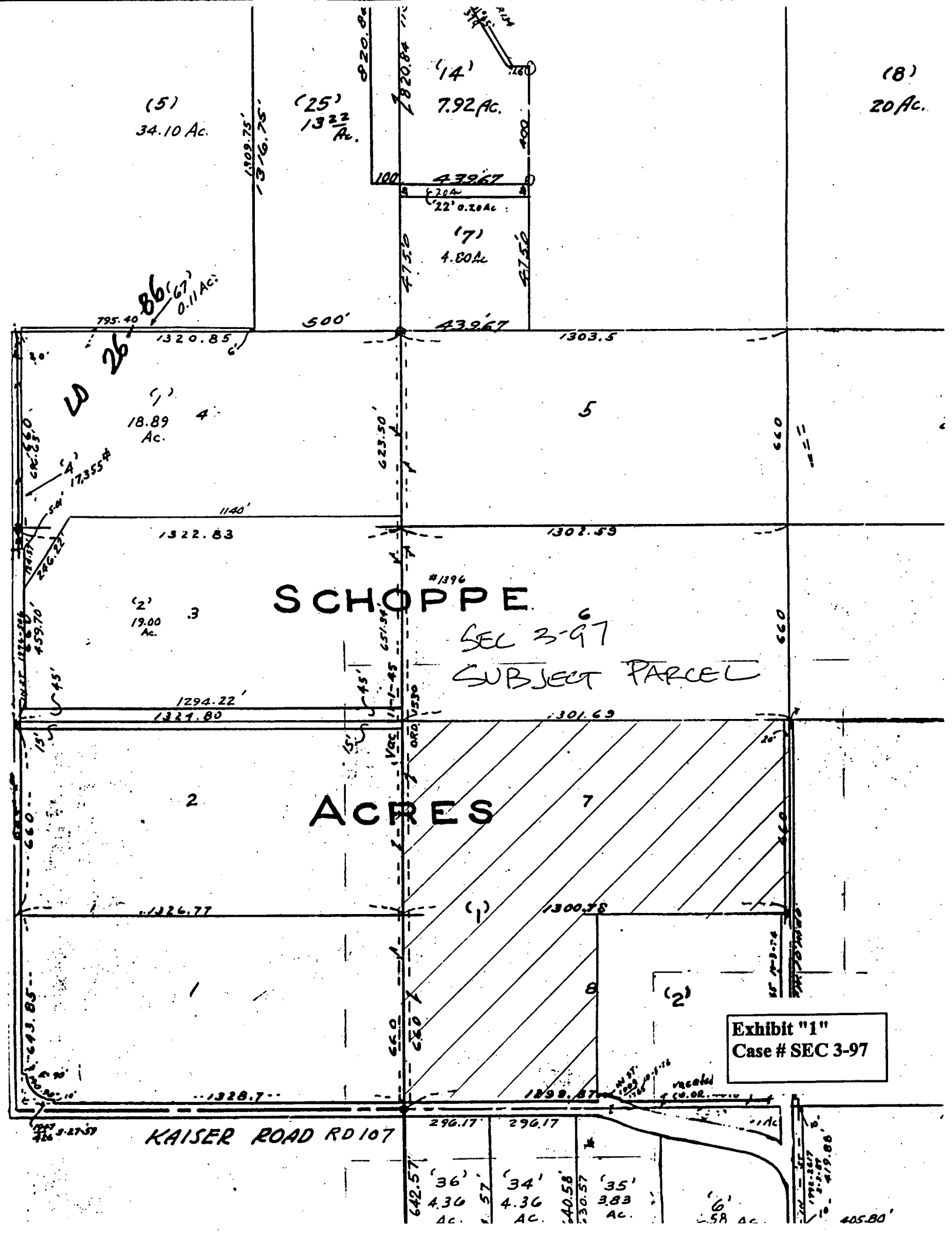
Decision: Approve, subject to the conditions below, the Significant Environmental Concern Permit for the proposed dwelling plan, based on the following findings and conclusions.



I. CONDITIONS OF APPROVAL

1. The applicant shall obtain a Grading and Erosion Control Permit prior to excavation or grading, and prior to Building Permit approval for the new dwelling.

2. The applicant shall obtain a Driveway Approach Permit prior to Building Permit approval for the dwelling.


(5)
34.10 Ac.
(25)
13.22 Ac.
820.84'
(14)
7.92 Ac.
(8)
20 Ac.
1309.75'
1316.75'
100
439.67'
400
±2.0 Ac.
22' 0.20 Ac.
(7)
4.80 Ac.
475.0'
475.0'
(67)
0.11 Ac.
795.40'
500'
439.67'
1320.85'
1303.5'
D 26'
(1)
18.89 Ac.
4
5
623.50'
660'
(A)
17,355 ft²
1140'
1322.83'
1302.59'
246.22'
459.70'
#1396
SCHOPPE
(2)
19.00 Ac.
3
6
SEC 3-97
SUBJECT PARCEL
651.54'
660'
45'
45'
1294.22'
1321.80'
11-1-45
V530
301.69'
15'
15'
Vac
ORD.
20'
2
ACRES
7
660'
660'
1326.77'
(1)
1300.78'
1
8
(2)
643.85'
660'
660'
1328.7'
1898.87'
Exhibit "1"
Case # SEC 3-97
KAISER ROAD RD107
296.17'
296.17'
642.57'
(36)
4.36 Ac.
(34)
4.36 Ac.
40.58'
30.57'
(35)
3.83 Ac.
(6)
.58 Ac.
419.86'
405.80'

1W 5

MAP 91

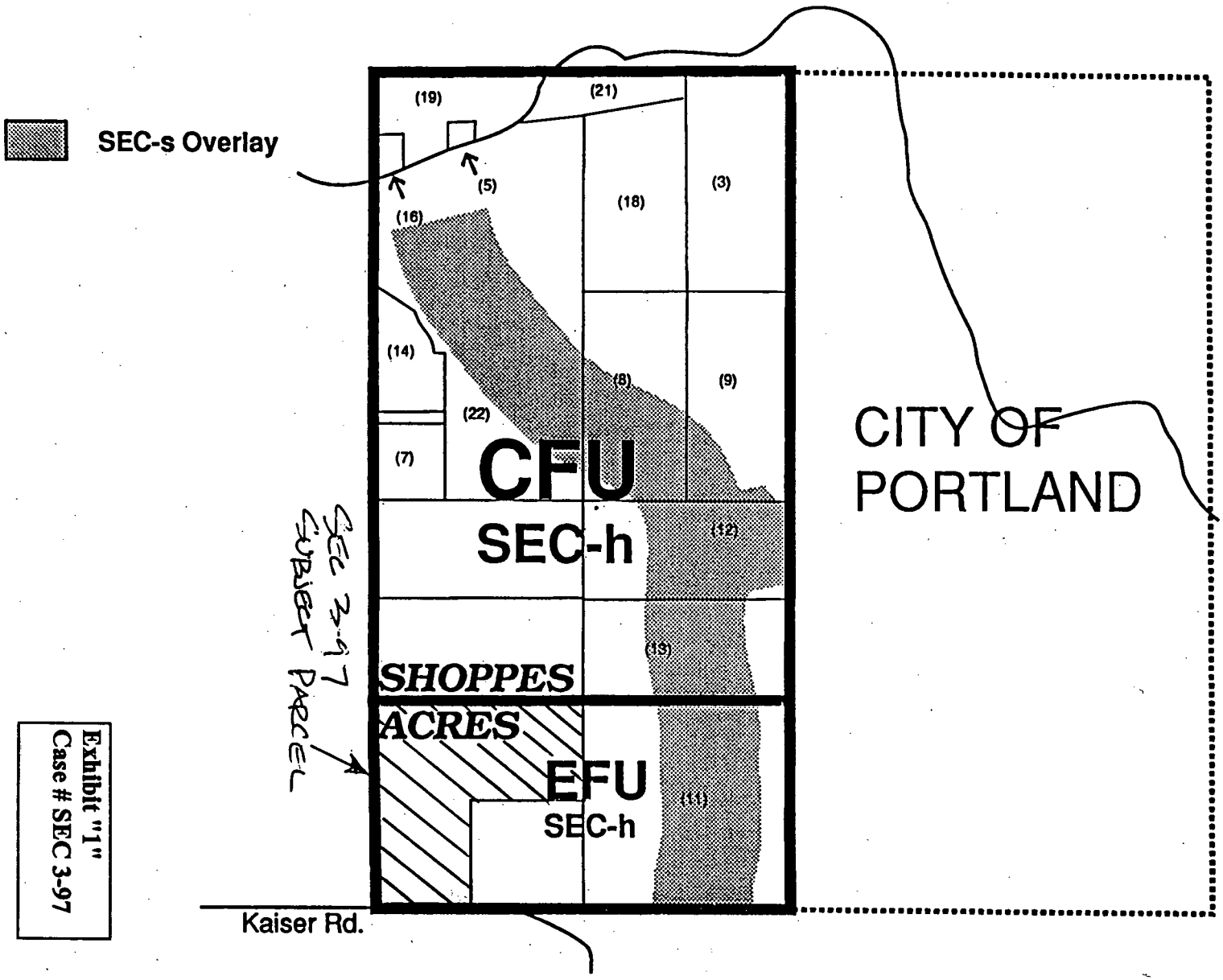


Exhibit "1"
Case # SEC 3-97

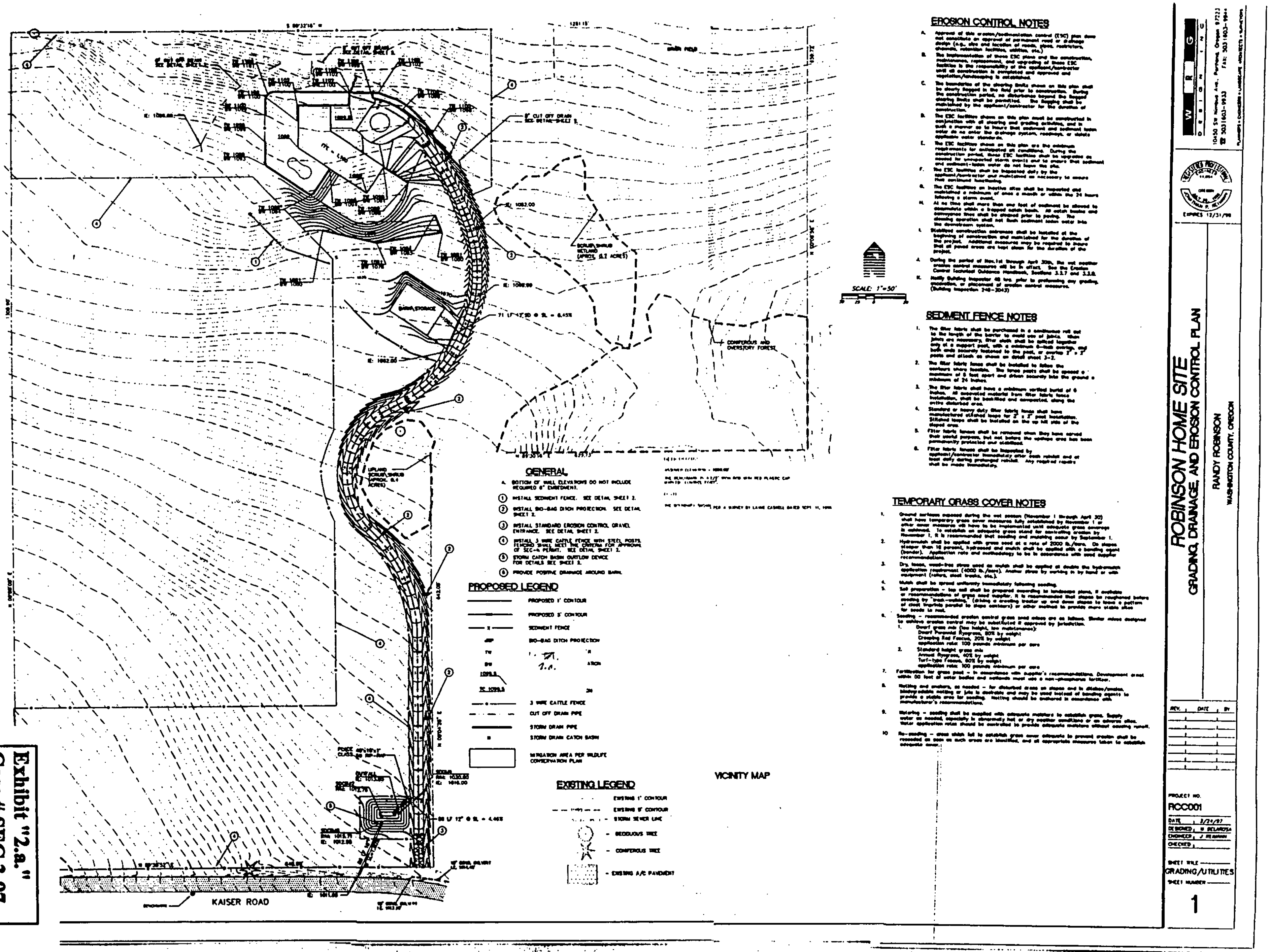
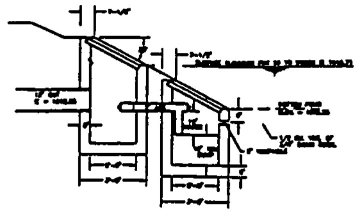
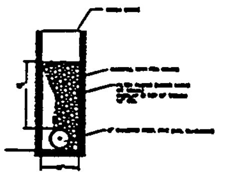


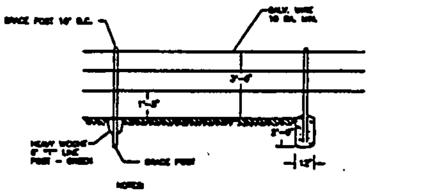
Exhibit "2.a."
Case # SEC 3-97



STORM CATCH BASIN OUTFLOW DEVICE DETAIL

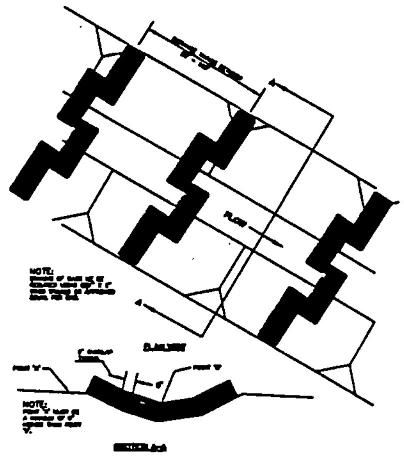


PERFORATED SUB DRAIN TRENCH

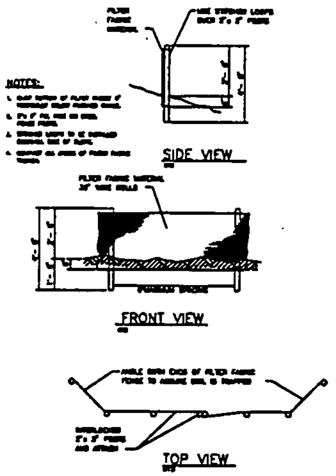


NOTES:
1. ALL GALVANIZED HARDWARE INCLUDING NUTS, WASHERS & CONNECTORS ETC.

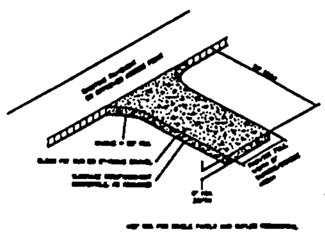
3 WIRE CATTLE FENCE



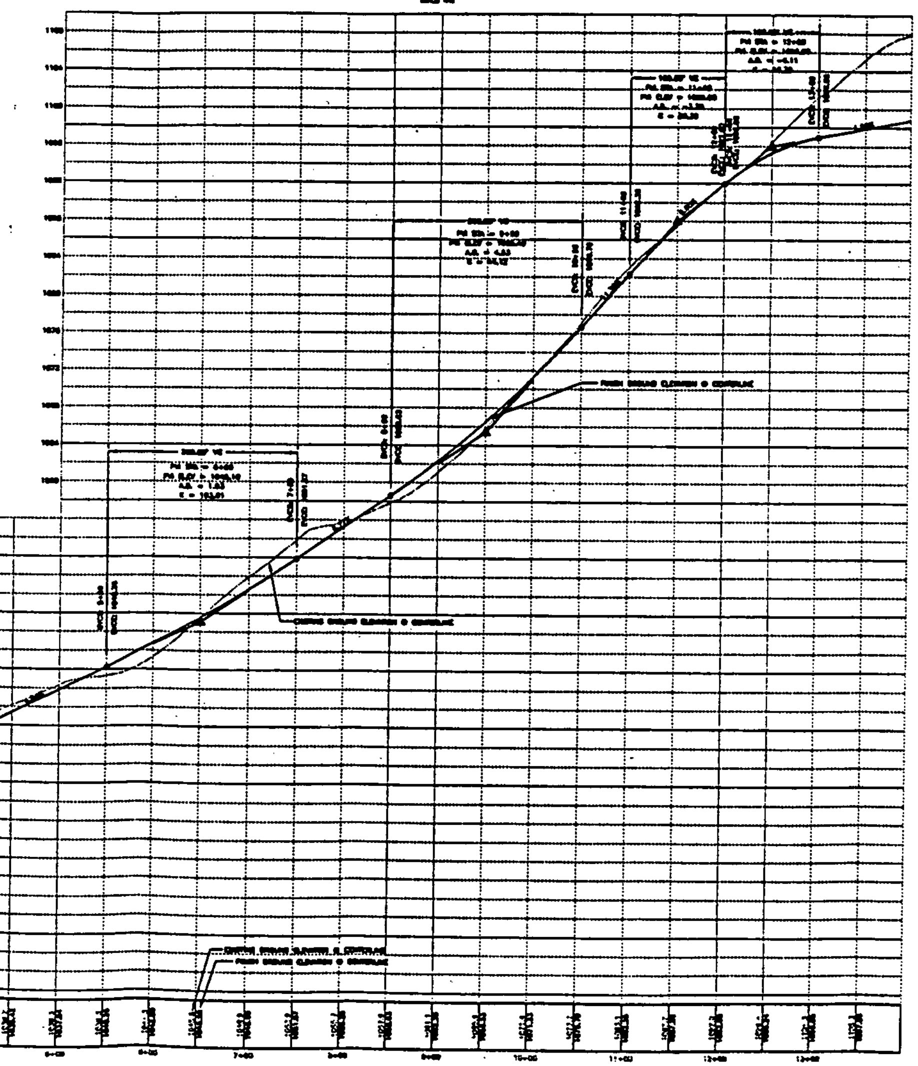
BIO-BAG DITCH PROTECTION



SEDIMENT FENCE



GRAVEL CONSTRUCTION ENTRANCE



ROBINSON HOME SITE
DRIVEWAY PROFILE

RANDY ROBINSON
WASHINGTON COUNTY, OREGON

PROJECT NO.
RCC001

SHEET TITLE
PROFILE

SHEET NUMBER
2

3. The development area for the dwelling shall be shown on the final site plan and be one acre or less, not including the area needed to construct the barn or the minimum accessway required for fire safety purposes.

4. Evidence of an approved water source shall be submitted to the Planning Office prior to Building Permit zoning approval.

5. The nuisance plants listed in the Exhibit "4" shall not be planted on the property and shall be removed from cleared areas of the property. In addition, if fencing is installed, it must comply with the provisions of MCC.6426(B)(6).

6. Connect the area between the driveway and the wetland, and between the .4 acre scrub-shrub island and forest land on the property to the east by reforestation and replanting the area with native species to re-establish continuity with the bloc of forest land to the east.

7. Except as otherwise specified in the above conditions, this approval is based on the applicants' submitted testimony, site plan, and findings contained in the Staff Report. The applicant shall be responsible for implementing the development plan as presented and approved.

8. This approval will become void 18 months from the date this decision becomes final unless these conditions of approval are met. The decision will become final on March 21, 1997 unless an appeal is filed by no later than 4:30 pm on that date.

For questions about Conditions of Approval and Building Permit Sign-off, contact Chuck Beasley, at 248-3043.

II. BACKGROUND AND DESCRIPTION OF PROPOSAL SITE AND VICINITY CHARACTERISTICS

The applicant proposes to construct a new single family dwelling on the approximately 30 acre parcel according to the grading, drainage, and erosion control plan dated 2/24/97. Use of the subject parcel for a dwelling in conjunction with farm use was approved in December of 1990, under PRE 26-90. The applicant has filed for approval of the dwelling site under the Significant Environmental Concern and Grading and Erosion Control permit requirements which became effective after the farm dwelling approval Copies of the Tax Assessor's map and the zoning map which show the subject parcel are included as Exhibit "1." of this report. The applicant has submitted an original and revised statement of justification and supporting documentation, and the site plan referenced above in support of the application. The site plan is included as Exhibit "2.a." and is attached to this report. The original bound submittal is included as Exhibit "2.b.", and the revised material is included as Exhibit "2.c.". These last two items are in the casefile of the decision.

The parcel is on a northeast to southwest sloping hillside and abuts the north side of Kaiser Road. The dwelling site is approximately 120' south of the north property line.. The

driveway extends approximately 1200' feet north from Kaiser Road and rises approximately 86' from the road to the dwelling site. The proposed dwelling site is on a 13% slope, and utilizes retaining walls up to six feet in height to create parking and yard areas adjacent to the dwelling. The only other structure proposed is a small barn located south of the dwelling site.

III. APPLICABLE CRITERIA

1. MCC 11.15.2016 Dimensional Requirements contains the setback requirements for dwellings in the EFU zone.

2. MCC 11.15.6400 through 6428 contains the criteria for application of the Significant Environmental Concern (SEC) Zone. The sections which contain the majority of the criteria applicable to the request are those which contain the application requirements under MCC .6408, the general SEC criteria of MCC.6420, and the criteria for areas designated as wildlife habitat in MCC .6426. These criteria are addressed in part IV. of this report.

3. Comprehensive Framework Plan Policies: 13, 22, 37, 38, and 40, apply to all quasi-judicial decisions in the county. In addition, Policy 14 Developmental Limitations, applies to the property due to a high seasonal water table on portions of the property.

IV. ANALYSIS

A. Exclusive Farm Use Zone:

11.15.2216 Dimensional Requirements

(C) Minimum Yard Dimensions - Feet

Front	Side	Street Side	Rear
30	10	30	30

Maximum Structure Height – 35 feet

Findings: The proposed dwelling location as shown on the site plan in Exhibit "2.a." is approximately 120' from the closest property line, which is the rear (north) lot line. The structure height is not indicated on the plan, however the height requirement will be considered during the Building Permit review.

Conclusion: The proposed structure location exceeds the minimum setbacks of the EFU zone. Structure height will be evaluated during Building Permit review.

B. Significant Environmental Concern SEC:

11.15.6404 Uses-SEC Permit Required:

(A) All uses permitted under the provisions of the underlying district are permitted on lands designated SEC; provided, however, the location and design of any use, or change or alteration of a use, except as provided in MCC .6406, shall be subject to an SEC permit.

Findings: The decision to allow a dwelling on the parcel was made in PRE 26-90, a copy of which is included by the applicant under the "1990 Approval" section of Exhibit "2.b.". The dwelling was approved as a dwelling inconjunction with farm use under the provisions of the EFU zone in MCC 11.15.2010. This code section has no expiration requirement, and does not limit transfer to other owners.

Staff received two letters concerning the dwelling approval, and these are included as Exhibit "3." of this report. The March 6, 1997 letter from Friends of Forest Park Development Committee Chair, Arnold Rochlin, maintains that PRE 26-90 is no longer in effect because the farm management plan submitted to comply with MCC .2010 (4) and (5) has not been implemented, and the dwelling has therefore been abandoned pursuant to ORS 215.130 (5) through (7). He also cites MCC 11.15.7620 and .8805, code provisions which pertain to nonconforming uses, to support the conclusion that the dwelling has been abandoned. Staff notes that the farm dwelling does not fit very well under nonconforming ordinance and statutory requirements. Dwellings continue to be allowed in the EFU zone, and the dwelling has not been built and then abandoned. MCC .7620 applies to uses established prior to 7/26/79, and is therefore not applicable. Further, this application is not a "use" decision, but is to evaluate the location and design of the proposed development for consistency with the SEC ordinance.

The second letter in Exhibit "3" is from the current property owner, Mr. Herman, who responds to the letter from Mr. Rochlin. Mr. Herman maintains that farm use of the property has been on-going for at least the last six years, and has therefore not been abandoned.

Conclusion: The SEC application should not require re-approval of PRE 26-90 because that decision approved the use of the property for a dwelling under code provisions which do not require that the approval should expire after a certain amount of time passes. In addition, the dwelling is not a nonconforming use under the zoning code, and is therefore not subject to "abandonment" requirements. Staff concludes that the dwelling remains permitted and must therefore comply with the application and other requirements for an SEC permit.

11.15.6408 - Application for SEC Permit:
An application for an SEC permit for a use or for the change or alteration of an existing use on lands designated SEC, shall address the applicable criteria for approval, under MCC .6420 through .6428, and shall be filed as follows:

(C) An application for an SEC permit shall include the following:

(1) A written description of the proposed development and how it complies with the applicable approval criteria of MCC .6420 through .6426.

(2) A map of the property showing: (a) parcel boundaries and size, (b) location and size of existing structures, (c) topography, (d) landform changes, (e) description of existing vegetation and proposed landscaping, (f) plan of existing and proposed roads and driveways.

Findings: The applicant has submitted a written description and a detailed grading, drainage, and erosion control plan of the property. These are included as Exhibits "2.a.", "2.b.", and "2.c." of this report, and provide all of the information required under this section.

Conclusion: The application requirements are met with the information submitted.

11.15.6420 Criteria for Approval of SEC Permit:
The SEC designation shall apply to those significant natural resources, natural areas, wilderness areas, cultural areas, and wild and scenic waterways that are designated SEC on the Multnomah County sectional maps. Any proposed activity or use requiring an SEC permit shall be subject to the following: The criteria below are the general approval criteria for all SEC areas. Specific criteria related to the designation of the property in the wildlife habitat area is addressed in the following section.

(A) The maximum possible landscaped area, scenic and aesthetic enhancement, open space or vegetation shall be provided between any use and a river, stream, lake, or floodwater storage area.

Findings: The applicant notes and staff agrees that the proposed dwelling is not near any of the areas described in this criterion.

(B) Agricultural land and forest land shall be preserved and maintained for farm and forest use.

Findings: The applicant refers to the 1990 farm management plan dwelling location as evidence to show that this criterion is met. Staff notes that the 1990 plan shows the dwelling site in the northwest corner of the property, while the currently proposed dwelling site is in the north-center of the parcel. However, staff is unable to locate any

findings in the original staff report or discussion in the farm management plan which evaluate the 1990 dwelling site relative to how agricultural and forest land is used on the parcel. The change from the old plan moves the dwelling site approximately 300' to the east, thus shortening the driveway somewhat and reducing the amount of land dedicated to future vineyard somewhat. The soil type, slope, relationship to proposed farm uses and to adjacent forest land, and the distance from Kaiser Road otherwise remain substantially the same.

(C) A building, structure, or use shall be located on a lot in a manner which will balance functional considerations and costs with the need to preserve and protect areas of environmental significance.

Findings: The area of environmental significance in this application is wildlife habitat associated with forest land and other openspace areas which are not farmed. The applicant points out that the dwelling is proposed for an area outside of the forested area and of the vineyard indicated in the 1990 farm management plan. Comparison of the site plan in Exhibit "2.a." and an aerial photograph of the site which is included in Exhibit "2.c." confirm the relationship between historic forested land and managed farmland. The dwelling site is proposed for the northeast corner of the area used for farming.

(D) Recreational needs shall be satisfied by public and private means in a manner consistent with the carrying capacity of the land and with minimum conflict with areas of environmental significance.

Findings: Private recreational needs on site are provided by space within and adjacent to the dwelling according to the applicant. No public recreational needs are identified in the area.

(E) The protection of the public safety and of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.

Findings: The primary public safety issue in the application is the driveway access from the parcel to Kaiser Road. The applicant has designed an access point with a relationship to the right-of-way that is similar to adjacent existing driveways, suggesting that a Driveway Approach Permit is approvable at the proposed location. The applicant lists security features proposed including fencing with gates, home security system, and perimeter lighting.

(F) Significant fish and wildlife habitats shall be protected.

Findings: No significant fish habitat is identified on or adjacent to the site. As noted in the findings under (C) above, the significant wildlife habitat for this application is associated with forest land and other openspace areas which are not farmed. Farm use is not subject to an SEC permit as indicated in MCC .6406. The applicant has

included a wildlife conservation plan in Exhibit "2.b." which identifies important habitat areas as the forest land, wetland, and scrub-shrub areas in the northeast portion of the property. The wildlife biologist recommends avoidance of the wetland, and exclusion of livestock from the forest land. A follow up letter from the biologist dated 2/20/97 and included in Exhibit "2.c." indicates that the site plan avoids all significant habitat areas. The site plan in Exhibit "2.a." shows the fenced portion of the property as not including the forest land, and the driveway relocated to avoid the small scrub-shrub area along the east property line. The applicant also states in the 2/24/97 letter that the timber harvest area in the northeast portion of the property has been replanted consistent with forest practices administrative rules as outlined in the 10/9/95 letter from the Oregon Department of Forestry. These letters are included as part of Exhibit "2.c." of this report.

(G) The natural vegetation along rivers, lakes, wetlands and streams shall be protected and enhanced to the maximum extent practicable to assure scenic quality and protection from erosion, and continuous riparian corridors.

Findings: The property contains a small wetland which is mapped on the site plan in the northeast portion of the site, and no rivers, lakes, or streams are on site. The mapped wetland area corresponds to the appearance of the feature on the 1986 aerial photograph, and on the aerial photograph taken after the 8 acres were harvested in February of 1995. Both photographs show that the wetland area and adjacent forest vegetation forms the edge of the farm management area on the property. In addition, the .4 acre scrub-shrub area along the east property line has historically not been farmed. The wildlife conservation plan and follow up letter indicate that the location of the proposed driveway will have no effect on the hydrology of the wetland, and the relocation of the driveway avoids loss of the .4 acre scrub-shrub habitat.

This criterion requires enhancement of vegetation associated with the listed water features to assure scenic quality, erosion control, and continuity of habitat associated with riparian corridors.
The applicant has applied for a Grading and Erosion Control Permit for development of the property and will be required to comply with the applicable standards therein. The only potential erosion which could impact the wetland would be the road and ditch; although they remain at least 40' from the wetland according to the applicant and are excluded as impacting the wetland in the conservation plan report. Some measure of habitat improvement could be achieved by extending reforestation or establishment of scrub-shrub areas to fill in the area between the driveway and the wetland area, and to connect the .4 acre scrub-shrub island to the forest area on the property.

(H) Archaeological areas shall be preserved for their historic, scientific, and cultural value and protected from vandalism or unauthorized entry.

Findings: No archaeological areas are identified.

(I) Areas of annual flooding, floodplains, water areas, and wetlands shall be retained in their natural state to the maximum possible extent to preserve water quality and protect water retention, overflow, and natural functions.

Findings: Retention of the wetland area identified on the property is discussed in the findings under G. above. The conservation plan concludes that the setback and elevation/location of the driveway should result in no impact to the natural functions of the wetland.

(J) Areas of erosion or potential erosion shall be protected from loss by appropriate means. Appropriate means shall be based on current Best Management Practices and may include restriction on timing of soil disturbing activities.

Findings: The applicant has applied for a Grading and Erosion Control Permit in order to minimize and protect development areas from erosion.

(K) The quality of the air, water, and land resources and ambient noise levels in areas classified SEC shall be preserved in the development and use of such areas.

Findings: The portions of this criterion applicable to the proposed residential use are preservation of water and land resources. Water quality is to be addressed through the stormwater and erosion control measures required under the Grading and Erosion Control Permit. Water quality is also addressed by construction of a septic system which meets Department of Environmental Quality rules. Land resources quality will be addressed through a Grading and Erosion Control permit.

(L) The design, bulk, construction materials, color and lighting of buildings, structures and signs shall be compatible with the character and visual quality of areas of significant environmental concern.

Findings: The character and visual quality of the landscape in which the parcel is located can be described as rolling hills with agricultural fields, dwelling sites, and patches and edges of forest land. The site plan shows the dwelling location near the edge of forest land at the end of a long driveway above Kaiser Road. Many of the newer dwellings in the area are relatively large and set back from the road at the end of long driveways. Other than the perspective drawing on the front of Exhibit "2.b.", and the building "footprint" on the site plan, no details of the dwelling are included in the application The applicant notes that the features of the proposed dwelling will be consistent with other rural homesites in the area.

(M) An area generally recognized as fragile or endangered plant habitat or which is valued for specific vegetative features, or which has an identified need for protection of the natural vegetation, shall be retained in a natural state to the maximum extent possible.

Findings: The subject property does not contain any recognized fragile areas or endangered habitat. The applicant points out that the natural resource areas of the site are not proposed for development, and that domestic uses will be separated from wildlife habitat, which is retained.

(N) The applicable policies of the Comprehensive Plan shall be satisfied.

Findings: The applicable comp plan policies are Comprehensive Framework Plan Policies: 13, 22, 37, 38, and 40, which apply to all quasi-judicial decisions in the county. In addition, Policy 14 Developmental Limitations applies to the northern portion and development area. These policies are shown to be satisfied by the findings and conclusions included in part C. of this report.

Conclusion: Staff finds that the criteria under (A), (C), (D), (H), and (M) above are either satisfied by the location of the development area away from the subject resources, or the resource does not exist on the site. The farmland protection criterion under (B) is satisfied by the proposed dwelling location in the northeast corner of the farm area, an improvement over the location indicated in the 1990 farm management plan. The criterion for protection of public safety will be satisfied by the applicant obtaining a Driveway Approach Permit as a condition of approval. The criteria of (F), (G), and (I) are satisfied by avoidance of the wetland and .4 acre scrub-shrub island, and by implementation of a condition of approval which requires additional reforestation to fill in the area between the road and wetland, and to connect the island to forest land to the east. The criteria related to water quality and erosion impacts under (J) and (K) will be met when the requirements for a Grading and Erosion Control Permit are satisfied. The dwelling site at the edge of forest land, coupled with the bulk of the dwelling which is similar to other dwellings in the area, allow a conclusion that the proposed dwelling is compatible with the character of the area criterion in (L). The consistency with applicable comprehensive plan policies as required under (N) is demonstrated in section C. of this report.

11.15.6426 Criteria for Approval of SEC-h Permit Wildlife Habitat

(A) In addition to the information required by MCC .6408(C), an application for development in an area designated SEC-h shall include an area map showing all properties which are adjacent to or entirely or partially within 200 feet of the proposed development, with the following information, when such information can be gathered without tresspass:

(1) Location of all existing forested areas (including areas cleared pursuant to an approved forest management plan) and non-forested "cleared" areas; For the purposes of this section, a forested area is defined as an area that has at least 75% crown closure, or 80 square feet of basal area per acre, of trees 11 inches DBH and larger, or an area which is being reforested

pursuant to Forest Practice Rules of the Oregon Department of Forestry. A non-forested "cleared" area is defined as an area which does not meet the description of a forested area and which is not being reforested pursuant to a forest management plan.

(2) Location of existing and proposed structures;

(3) Location and width of existing and proposed public roads, private access roads, driveways, and service corridors on the subject parcel and within 200 feet of the subject parcel's boundaries on all adjacent parcels;

(4) Existing and proposed type and location of all fencing on the subject property and on adjacent properties and on properties entirely or partially within 200 feet of the subject property;

Findings: The applicant provides the additional information required on the Land Use Map 3, and Aerial Photo Map 4., both of which are included in Exhibit "2.c."

Conclusion: Staff concludes that the applicant's submittals satisfy the requirements of this section.

(B) Development Standards:

(1) Where a parcel contains any non-forested "cleared" areas, development shall only occur in these areas, except as necessary to provide access and to meet minimum clearance standards for fire safety.

(2) Development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developable portion of the site.

(3) The access road/driveway and service corridor serving the development shall not exceed 500 feet in length.

(4) The access road/driveway shall be located within 100 feet of the property boundary if adjacent property has an access road or driveway within 200 feet of the property boundary.

(5) The development shall be within 300 feet of the property boundary if adjacent property has structures and developed areas within 200 feet of the property boundary.

(6) Fencing within a required setback from a public road shall meet the following criteria: (The fencing standards are located in MCC .6426(B)(6) of the ordinance.)

(7) The following nuisance plants shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property. (The nuisance plant list is located in MCC .6426(B)(7) of the ordinance.)

Findings: The plans and aerial photograph submitted by the applicant show the development areas of dwelling site and road within areas previously cleared and managed for farm use. The proposed dwelling site is however, beyond the limits

of (2) and (3) as evidenced by the approximately 1200' long driveway leading to the dwelling site from Kaiser Road.

The driveway to the adjacent dwelling on the east side of the subject parcel ranges from approximately 20' to 100' of the property line according to aerial photographs. The proposed driveway follows the east property line and meets this standard on the south portion of the property, and does not meet it on the north part.

The requirement in (5) applies due to the location of the dwelling on the parcel adjacent to the east within 200' of the east property line of the subject parcel. The proposed dwelling site meets this standard because it is located within 120' of the north property line.

Proposed fencing within 30' of Kaiser Road meets the standards of MCC .6426(B)(6) as noted on Sheet 2 of the Grading, Drainage, and Erosion Control Plan. The applicant states in the narrative in Exhibit "2.c." that none of nuisance plants listed in the ordinance will be planted on the property, and that existing listed plants will be removed.

Conclusion: The purpose of the driveway standards is to protect wildlife habitat areas from unnecessary encroachment from development. In this case, the proposed driveway location does not meet the requirements of (2) and (3) because of the dwelling location chosen. The applicant is therefore required to comply with the standards of MCC .6426 C., and these provisions are addressed below. The provisions of this section which pertain to fencing are met on implementation of the plans dated 2/19/97. The nuisance plant provisions can be met be imposition of conditions of approval.

(C) Wildlife Conservation Plan. An applicant shall propose a wildlife conservation plan if one of the two situations exist.

(1) The applicant cannot meet the development standards of Section (B) because of physical characteristics unique to the property. The applicant must show that the wildlife conservation plan results in the minimum departure from the standards required in order to allow the use; or

(2) The applicant can meet the development standards of Section (B), but demonstrates that the alternative conservation measures exceed the standards of Section B and will result in the proposed development having less detrimental impact on forested wildlife habitat than the standards in Section B.

(3) The wildlife conservation plan must demonstrate the following:

(a) That measures are included in order to reduce impacts to forested areas to the minimum necessary to serve the proposed development by restricting the amount of clearance and length/width of cleared areas and disturbing the least amount of forest canopy cover.

(b) That any newly cleared area associated with the development is not greater than one acre, excluding from this total the area of the minimum necessary accessway required for fire safety purposes.

(c) That no fencing will be built and existing fencing will be removed outside of areas cleared for the site development except for existing cleared areas used for agricultural purposes.

(d) That revegetation of existing cleared areas on the property at a 2:1 ratio with newly cleared areas occurs if such cleared areas exist on the property.

(e) That revegetation and enhancement of disturbed stream riparian areas occurs along drainages and streams located on the property occurs.

Findings: The applicant's response in the revised narrative in Exhibit "2.c." does not demonstrate that physical characteristics unique to the property preclude a dwelling location which could be served by driveway lengths which meet the standards in (B). The site plan shows an adequate building area adjacent to Kaiser Road.

Subsection (2) above provides an expanded dwelling location choice. Staff interprets the subsection (2) alternative as being met when all of the standards of subsection (3) are satisfied. Comparison of the site plan and aerial photographs of the property show that no loss of forested areas will occur in order to site the dwelling in the proposed location. The area cleared for the development is indicated in the Site Work Report submitted for the Grading and Erosion Control Permit as approximately 47,400 square feet, nearly 4,000 square feet larger than the one acre allowed. This area can be reduced to meet the one acre standard. The only proposed fencing on the property is indicated on the site plan, and will enclose existing cleared areas used for agricultural purposes. Revegetation of cleared areas between the driveway and forest land to the east is a condition of approval of this decision.

Conclusion: The findings above indicate that the applicant has chosen to locate the dwelling much further from the road than could occur in compliance with the standards of section (B). In this circumstance, the alternative dwelling location can be allowed when the disturbed area is held to one acre or less, forest vegetation is maintained, revegetation occurs, and fencing not needed for farm managment is minimized. All of these requirements either are met or can be met with a condition of approval that requires reduction of the development area associated with the dwelling to one acre or less.

C. Comprehensive Framework Plan Policies: 13, 14, 22, 37, 38, and 40.

(1) Policy 13, Air, Water and Noise Quality. MULTNOMAH COUNTY, ... SUPPORTS EFFORTS TO IMPROVE AIR AND WATER QUALITY AND TO

REDUCE NOISE LEVELS. ... FURTHERMORE, IT IS THE COUNTY'S POLICY TO REQUIRE, PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION, A STATEMENT FROM THE APPROPRIATE AGENCY THAT ALL STANDARDS CAN BE MET WITH RESPECT TO AIR QUALITY, WATER QUALITY, AND NOISE LEVELS.

Findings: The only applicable element under this policy is water quality. The applicant has submitted a Certificate of Private On-Site Sewage Disposal and Site Evaluation Report to satisfy this requirement. Soil erosion and water quality issues associated with surface runoff will be addressed through a Grading and Erosion Control Permit.

(2) **Policy 14, Developmental Limitations**. THE COUNTY'S POLICY IS TO DIRECT DEVELOPMENT AND LAND FORM ALTERATIONS AWAY FROM AREAS WITH DEVELOPMENT LIMITATIONS EXCEPT UPON A SHOWING THAT DESIGN AND CONSTRUCTION TECHNIQUES CAN MITIGATE ANY PUBLIC HARM OR ASSOCIATED PUBLIC COST, AND MITIGATE ANY ADVERSE EFFECTS TO SURROUNDING PERSONS OR PROPERTIES. DEVELOPMENT LIMITATIONS AREAS ARE THOSE WHICH HAVE ANY OF THE FOLLOWING CHARACTERISTICS:

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

Findings: The development limitations of the property are related to the policy elements in D., and E. The applicant states that these limitations and adverse effects to surrounding properties are mitigated by construction of a septic system drainfield consistent with the Site Evaluation Report, and by development of the property consistent with the Grading and Erosion Control requirements.

(4) **Policy 22, Energy Conservation.** 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 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 CONDITIONS TO ADVANTAGE.
E. FINALLY, THE COUNTY WILL ALLOW GREATER FLEXIBILITY IN THE DEVELOPMENT AND USE OF RENEWABLE ENERGY RESOURCES.

Findings: The dwelling will comply with the State and County building codes for energy conservation. Other elements of this policy generally do not apply to this request due to the fact that the request area is on rural land.

(3) **Policy 37, Utilities:** THE COUNTY'S POLICY IS TO REQUIRE A FINDING PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:

Water and Disposal System

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

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.

FURTHERMORE, THE COUNTY'S POLICY IS TO CONTINUE COOPERATION WITH THE DEPARTMENT OF ENVIRONMENTAL QUALITY, FOR THE DEVELOPMENT AND IMPLEMENTATION OF A GROUNDWATER QUALITY PLAN TO MEET THE NEEDS OF THE COUNTY.

Findings: The applicable policies under this element are C. private water and sewer capacity, and stormwater/drainage under F. and G. No domestic water system information has been submitted, and water is proposed to be provided from a well on the property which has not as yet been drilled. The applicant has submitted a completed service provider form for the septic system indicating that a system can be constructed to meet DEQ requirements. it is adequate for a four bedroom dwelling, and states that the new private water system provides adequate flow for residential needs. Stormwater and drainage will be contained on-site, and the proposed systems are required to meet the Grading and Erosion Control Permit standards. The applicant has applied for the Grading and Erosion Control Permit.

(4) **Policy 38, Facilities:** THE COUNTY'S POLICY IS TO REQUIRE A FINDING PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:

School

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

Fire Protection

B. THERE IS ADEQUATE WATER PRESSURE AND FLOW FOR FIRE FIGHTING PURPOSES; AND
C. THE APPROPRIATE FIRE DISTRICT HAS HAD AN OPPORTUNITY TO REVIEW AND COMMENTS ON THE PROPOSAL.

Police Protection

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

Findings: The applicant has submitted the service provider forms from the school district and by the County Sheriff, indicating adequate service. The Tualatin Valley Fire district response letter states that a Fire and Life Safety Plan Review has been conducted, and the plans have been reviewed and approved.

(5) Policy 40, Development Requirements: THE COUNTY'S POLICY IS TO ENCOURAGE A CONNECTED PARK AND RECREATION SYSTEM AND TO PROVIDE FOR SMALL PRIVATE RECREATION AREAS BY REQUIRING A FINDING PRIOR TO APPROVAL OF LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:

A. PEDESTRIAN AND BICYCLE PATH CONNECTIONS TO PARKS, RECREATION AREAS AND COMMUNITY FACILITIES WILL BE DEDICATED WHERE APPROPRIATE AND WHERE DESIGNATED IN THE BICYCLE CORRIDOR CAPITAL IMPROVEMENTS PROGRAM AND MAP.
B. LANDSCAPED AREAS WITH BENCHES WILL BE PROVIDED IN COMMERCIAL, INDUSTRIAL AND MULTIPLE FAMILY DEVELOPMENTS, WHERE APPROPRIATE.
C. AREAS FOR BICYCLE PARKING FACILITIES WILL BE REQUIRED IN DEVELOPMENT PROPOSALS, WHERE APPROPRIATE.

Findings: No public facilities are planned for the subject property or area.

Conclusion: The applicable Comprehensive Framework Plan Policies addressed above relate primarily to the impacts of proposed development on services and the environment. The findings indicate, and staff concludes, that the applicant has demonstrated that these policies are or can be satisfied with the exception of adequate water supply. This element can be satisfied by a condition of approval which requires demonstration that an adequate water supply exists prior to issue of the Building Permit. Mitigation of any adverse affects from erosion or stormwater on public and private property can occur through the Grading and Erosion Control Permit.

V. CONCLUSION

Staff concludes that the applicant has demonstrated substantial compliance with all ordinance requirements, or that compliance can be achieved when the conditions of approval in section I of this report are met.

VI. EXHIBITS

1. Assessor's and Zoning Maps

2. Applicant's submittals.
   a. Grading, Drainage, and Erosion Control Plan dated 2/24/97, and Driveway Profile Plan dated 2/19/97.
   b. Bound application submittal dated 12/26/96 (not attached).
   c. Revised narrative, aerial photo (Map 4) and Land Use Map 3, and letters dated; 2/24/97, 2/20/97, 2/26/97, and 3/4/97 (not attached).

3. Letter responses from A. Rochlin dated 3/6/97, and from D. Herman dated 3/7/97.

4. SEC Nuisance plants list.

In the matter of : SEC 3-97
Multnomah County Department of Environmental Services
Transportation and Land Use Planning Division

By : Chuck Beasley
Chuck Beasley, *Planner*
For: Kathy Busse, *Planning Director*

This decision was filed with the Director of the Department of Environmental Services on March 11, 1997.

NOTICE

State law requires a public notice (by mail) to nearby property owners and to any recognized Neighborhood Association of a Planning Director decision which applies discretionary or subjective standards or criteria to land use or development permit applications. The notice must describe the method to challenge the staff decision; and, if appealed, the County must hold a public hearing to consider the merits of the application. ORS 197.763, ORS 215.416(11)

The Administrative Decision(s) detailed above will become final unless an appeal is filed within the 10-day appeal period which starts the day after the notice is mailed. If the 10th day falls on Saturday, Sunday, or a legal holiday, the appeal period extends through the next full business-day. If an appeal is filed, a public hearing will be scheduled before a County Hearings Officer pursuant to Multnomah County Code section 11.15.8290 and in compliance with ORS 197.763. To file, complete an Appeal of Administrative Decision form , and submit to the County Planning Division Office, together with a $100.00 fee and supplemental written materials (as needed) stating the specific grounds, approval criteria, or standards on which the appeal is based. To review the application file(s), obtain appeal forms, or other instruction, call the Multnomah County Planning Division at (503) 248-3043, or visit our offices at 2115 SE Morrison Street, Portland, Oregon, 97214 [hours: 8:30 a.m. – 4:30 p.m.; M—F].
The appeal period ends March 21, 1997 at 4:30 p.m.

David M. Herman
Attorney at Law

1628 NW EVERETT STREET
PORTLAND, OREGON 97209-2109

WRITERS DIRECT NUMBER: (503) 228-3308
FACSIMILE (503) 226-3557

ADMITTED IN
OREGON AND WASHINGTON

March 7, 1997

VIA FACSIMILE: (503)248-3389

Mr. Charles Beasley
Multnomah County Department of Environmental Services
2115 S.E. Morrison Street
Portland, Oregon 97214

Re: SEC 30-97

We are replying to Arnold Rocklin's letter of March 6, 1997.

In the fifth paragraph of Mr. Rochlin's letter, he observes that the PRE 26-90 approval has been abandoned for over six years. At the time SEC 3-97 was applied for, the underlying issue of a dwelling in conjunction with farm uses, addressed in PRE 26-90 were valid. The fact that there are more issues to be addressed in the currently applicable regulations do not invalidate the approval of the issues addressed in the PRE 26-90, including the preservation of farmland.

The observation that the application implicitly admits there is no existing farm use to which the dwelling would be in conjunction is incorrect. The property has been contract farmed by Bruce Bowe (the neighbor to the west) continuously for the last six years. In the last three years, Mr. Bowe has trenched and tiled the northern part of the field, disked, sprayed, planted, and harvested oats over the last three years. We think these activities probably meet the definition of farming.

The authority cited by Mr. Rochlin to support his conclusion that the approval of the issues addressed PRE 26-90 have been lost because of interruption or abandonment by the permit holder, do not seem to apply to PRE 26-90.

Yours very truly,

David Herman

March 6, 1997

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
289-2657

Chuck Beasley
2115 SE Morrison St.
Portland, OR 97214

Re. **SEC 3-97 Dwelling in EFU zone**

The following comments are on behalf of myself as an individual, and as the Development Committee Chair of the Forest Park Neighborhood Association.

An SEC permit cannot be approved because there is no valid authorization for the proposed use, a dwelling in the EFU zone.

The notice implies presumption that an approval of a dwelling in PRE 26-90, in December, 1990, continues to enable construction of a dwelling, providing only there is compliance with the siting and design standards of the SEC section of MCC Chapter 11.15. We believe the presumption is wrong.

The plan approved in 1990 was never implemented. As indicated by the applicant's own evidence, neither of the 1990 farm plans for cattle raising or a vineyard, were ever implemented; not even the first stages. The so-called "updated" plan does nothing but repeat promises virtually identical to those made in 1990, and change the implementation schedule to 1997 and subsequent.

Even if the PRE 26-90 approval were correct, it can no longer govern. The use approved, a dwelling in conjunction with the farm uses described in the application, has been abandoned for over 6 years. Under currently applicable regulations, which include the MCC EFU Chapter, and provisions of ORS 215.705 which have not yet been implemented by the County, the use could not be approved as a use under prescribed conditions. I understand the property is not owned by the same person that owned it before January 1, 1985. The application implicitly admits there is no existing farm use to which the dwelling would be in conjunction. While the dwelling could not be allowed as a use under prescribed conditions, a dwelling is arguably allowed by MCC 11.15.2012(B)(3), providing it doesn't conflict with any statute. That provision is for a conditional use. If a dwelling is not now lawfully allowed to be established by the authority of PRE 20-90, then MCC 11.15.6408(B) would come into effect, requiring concurrent processing of a conditional use application for a dwelling under .2012(B)(3).

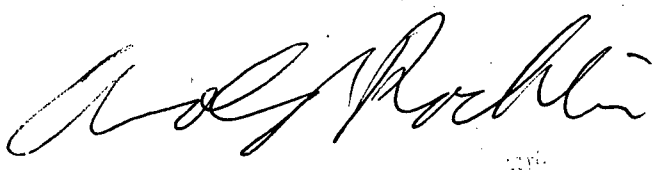
SEC regulation 11.15.6420(B) requires preservation of farmland. It is doubtful that the standard can be met unless there is compliance with other current state and county regulations intended to preserve farmland.

There is no existing authority allowing a dwelling to be built. ORS 215.130(5) to (7) provide for continuation and modification of a use lawfully approved under prior regulations, but not allowable under currently applicable regulations. But they disallow the use after "interruption or abandonment". A failure to take the first step toward building a house or implementing the farm plan upon which approval was based, is unarguably

Exhibit "3"
Case # SEC 3-97

interruption or abandonment. See also 11.15.7620 and .8805(B) which consider interruption of two years as precluding the use.

The notice of the pending decision does not identify the statutes and OARs that are directly applicable to the decision because the county has not implemented them in its regulations. Without excluding others, OAR 660-33-130 and 33-135, including subsections, have seemingly applicable provisions with which the proposed dwelling has not been shown to comply, or cannot comply.



MCC 11.15.6426(B) Nuisance plants in SEC h areas.

"(7) The following nuisance plants shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property."

Scientific Name

Chelidonium majus	Lythrum salicaria
Cirsium arvense	Myriophyllum spicatum
Cirsium vulgare	Phalaris arundinacea
Clematis ligusticifolia	Poa annua
Clematis vitalba	Polygonum coccineum
Conium maculatum	Polygonum convolvulus
Convolvulus arvensis	Polygonum sachalinense
Convolvulus nyctagineus	Prunus laurocerasus
Convolvulus seppium	Rhus diversiloba
Cortaderia selloana	Rubusdiscolor
Crataegus sp. except C. douglasii	Rubus laciniatus
Cytisus scoparius	Senecio jacobaea
Daucus carota	Solanum dulcamara
Elodea densa	Solanum nigrum
Equisetum arvense	Solanum sarrachoides
Equisetum telemateia	Taraxacum otficinale
Erodium cicutarium	Ultricularia vuigaris
Geranium roberianum	Utica dioica
Hedera helix (English Ivy)	Vinca major
Hypericum perforatum	Vinca minor
Ilex aquafolium	Xanthium spinoseum
Laburnum watereri	various genera
Lemna minor	
Loentodon autumnalis	

Exhibit "4"
Case # SEC 3-97

COUNTY COUNSEL ISSUES OUTLINE

DENOVO HEARING

for

SEC 3-97

OF NOTE: The land is classified high value farm land.
The use approved in PRE 26-90 for a proposed farm use is not an existing use.

	Issue	Appellant	Applicant	Hearings Officer	Staff	Recommendation
1.	Is the PRE 26-90 approval of a dwelling in conjunction with a farm use still valid?	No, the applicant has not establish a vested right in a non-conforming use because the dwelling was not built before the laws changed. Additionally, no time limit in the permit merely means no guaranteed minimum duration. County should at least establish what is reasonable. Non-	Yes, PRE 26-90 continues to authorize the underlying land use because it contains to limits. Have to have a public hearing and notice to change the duration now.	Yes, use decided without limitation.	Yes, indefinite means indefinite. EFU code did no include expiration date for PRE dwelling approval.	See Chart 2.

		conforming use statutes are analogous, although not applicable.				

2.	Is a valid dwelling approval (per OAR 660, Div. 33, 8/93) a prerequisite to SEC and GEC permit approvals?	Yes, Marquam Farms says that it's an underlying determination for all permits.	No.	No, it's not a part of the process until the BCC decides the underlying validity @ the building permit stage which will then be a discretionary decision. Will then have to determine if property employed for primary purpose for which originally applied.. Nothing in the code requires such a determination @ the SEC stage. McKay Creek says underlying use can't be considered if issue is an issue of correctness.	No, under Tuality Lands. SEC permit is not a decision re: whether the use is allowed. SEC permit determines where and how dwelling site is developed. SEC ordinance approval criteria do not require a finding on the validity of the underlying use.	Yes, Tuality Lands is not on point & doesn't address the issues in this case. .6404(A) says all uses permitted are subject to SEC permits in an SEC overlay area. Presupposes the need for a determination on the validity of underlying use. McKay Creek is not on point. This case does not concern the original validity of the permit just current validity. Marquam Farms says determination of legal use underlies all application reviews.

3.	Do the changes to the dwelling plan (site location; driveway location) require a formal amendment to the PRE 26-90 approval? Can those amendments occur through the SEC process?	Yes, the changes are significant. They are more than those allowed for a replacement dwelling. No, and the SEC permit cannot be approved without the changes	No amendment needed. In fact, new siting actually benefits farming & wildlife.	No amendment needed. Nothing in code requires strict adherence to Forest Management Plan (FMP) & no code that need new permit to amend FMP.	No amendment needed. Changes are minor.	Yes, nothing in code says that applicant doesn't need to adhere to the plan and the changes are more than allowed in other situations. No, changes are to the underlying use so SEC permit inappropriate vehicle through which to make the changes.
4.	Does farm use undertaken pursuant to PRE approval vest dwelling?	No, current farming contract is not what was approved in original FMP.	No statement.	No statement.	No statement.	No, use approval is for the dwelling. Farm use is just one of the criteria application has to meet. Farming can be done w/o dwelling as has been done for 25 years.

DENOVO HEARING

for

SEC 3-97

COUNTY COUNSEL CHART 2

Does the BCC want to give a "vested right" status to old land use decisions which have not been acted upon when the land use laws of the State and/or County have changed?

OPTIONS:

	Option	Pro Argument	Con Argument
1.	Interpret the code so as to vest permits with no time line regardless of whether the permit has been acted upon within the current statutory 2-yr. time frame.	Applicants have not acted upon their permits believing that no time limitation in the permit or in the code at the time of the permit meant they had an indefinite amount of time within which to exercise their use rights. Some lots have been bought and sold with the assumption that the permit was still valid. Individual property owners did not receive mailings when the statutes and code provisions were changed. Staff has approved other projects with older permits based upon a previous County Counsel opinion that the County was bound by the criteria	Indefinite is an unreasonable time for people to think they have a right to a use on their property. Everyone owning and/or buying property should know that land use laws change. Allowing applicants to act on unused permits well after the statutes and codes were changed opens the door for applicants who have permits (e.g. from the 1970's) for uses which are now considered incompatible with a resource zone (e.g. a golf course) to still receive subsequent related permits (e.g. building and SEC). Not acting upon the permit does not even

		at the time of the original permit.	vest the applicant with non-conforming status. Notice of the changes in the statutes and the code to require action within a 2 yr. period were publicized. No one has a right to rely on what County staff, or any one else, tells a third person. The County can always correct previous decisions that it later finds to be incorrect or contrary to current policy. This interpretation will most likely be appealed to LUBA by the appellant. Gives more protection to those who have done nothing than to those who have non-conforming uses.
2.	Interpret the code so as to declare invalid permits which were not acted upon within the 2-yr. time frame required in current statutes and codes.	Same arguments as #1. Con Arguments. Additionally, several permits for uses now considered inconsistent with resource land exist which have the indefinite time frame. This interpretation assures those permits will not	Same arguments as #2 Pro Arguments. This interpretation will most likely be appealed to LUBA by the applicant.

		interfere with current planning policy. This interpretation is consistent with Marquam Farms which says that, before a decision on a subsequent permit, the hearings body "must first determine whether the applicant has established the legal use upon which the design review is based."	
3.	Allow this applicant to proceed with his application, but amend the code to say that any application approved prior to the changes in the land use laws must be acted upon within 2 years of the date of the enactment of the amended code.	Allows this applicant and others in similar situations time within which to act upon their previous expectations.	This interpretation might also be appealed by the appellant. The County will have a 2 year time period in which the holders of those older permits will likely rush to the planning office in order to start their projects and receive a vested right to their use. Thus, the County will likely end up with uses such as a golf course in an EFU zone or non-forest related dwellings in the CFU zone which do not meet the current criteria for placement.

DENOVO HEARING

for

SEC 3-97

COUNTY COUNSEL CHART 2

Does the BCC want to give a "vested right" status to old land use decisions which have not been acted upon when the land use laws of the State and/or County have changed?

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Original

July 15, 1997

Arnold Rochlin
P.O. Box 83645
Portland, OR 97283-0645
289-2657

Board of County Commissioners

Re. **SEC 3-97 Appeal of Approval of a Dwelling in the EFU Zone**

The Planning Director asserts that a determination over 6 years ago, that a farm dwelling was lawful then, remains valid forever, despite changes of law that would require denial today. PRE 26-90 approved a 1 acre dwelling site in the northwest corner of the property. The current SEC application is for a 1 acre site 400 feet east of the 1990 site. No one disputes that development was never commenced, and therefore no right was established under non-conforming use law.

The old permit is dead, and there is no lawful authority for the proposed EFU dwelling for which the SEC permit would approve siting and design.

The issues on appeal form a triangle.

At the apex is whether or not lawful authority for a farm dwelling, is even a proper consideration in deciding an SEC application. The Planning Director says it is not. The hearings officer also says no, but with the critical qualification that no building permit can issue without a public hearing on at least one element of the lawfulness of the EFU dwelling. On a nearly identical question involving a Multnomah County design review, LUBA held that determination of legality of the primary use is not only permissible, but is a necessary element of approving or denying an ancillary application.

Even if you agree with the Planning Director, you must decide how to implement the hearings officer's conclusion that one element of legality of the dwelling must be determined before a building permit can be approved. That issue will be covered last.

If you agree with the appellants, that lawful authority for the dwelling is a prerequisite for approval of the SEC permit, then there are two issues at the base corners of the triangle. To approve the permit, you must hold for the applicant <u>on both</u>. First, does the 1990 approval have eternal duration, regardless of 1993 and subsequent changes of law and regulation that disallow the proposal? Second, even if the approval could last forever, does it encompass today's proposal, which is for a 1 acre dwelling site 400 feet from the one approved and for an amended farm plan?

A more detailed analysis of the issues is in the May 12th and 20th memoranda from Mr. Foster and me to the hearings officer. (They were attached to the Notice of Review, and should be in your packets.)

<u>LAWFULNESS OF USE IS A THRESHOLD REQUIREMENT OF AN SEC PERMIT</u>

LUBA decided virtually the same issue in ***Marquam Farms Corporation v. Multnomah County***. Regarding a claim that a hearings officer denying a design review application had no right to address lawfulness of a kennel, for which the design review was requested, LUBA said:

"Whether the applicant has established the county's authority to review an application is a threshold determination relevant to all land use applications. Necessarily, before a hearings body can determine the merits of a design review application, that body must first determine whether the applicant has established the legal use upon which the design review is based." (emphasis added)

The SEC application in this case relates to the proposed dwelling, as the design review in ***Marquam Farms*** relates to a dog kennel. The hearings officer agrees that a right to a dwelling is not completely established. We disagree over whether that prevents approval of the SEC permit. The hearings officer said determination of the right to a dwelling can be deferred until application for a building permit.

PRE 26-90 NO LONGER CONTROLS

The Planning Director argues that PRE 26-90 remains in effect forever, because it has no expiration date. But the Director has no authority to exempt land from changes of law. The only certain meaning of absence of an expiration provision is the permit was not assured a definite duration. Normally, conduct allowed by a permit with no expiration date, continues to be allowed unless and until it is made unlawful by statute or regulation. ORS 215.130 provides an exception for land use, allowing a use that has been lawfully established to continue. But, as LUBA said in ***Schoonover v. Klamath County***: "* * * statutory prohibitions against retroactive land use regulations protect uses that exist on the date the regulations are adopted, not uses that could have been, but were not initiated." The use here is only a proposal; it was never initiated.

No one has cited any law that can freeze the permit, and there is none. PRE 26-90 gave the former owner only a determination that a proposal was then lawful, and implied a reasonable minimum time to act on the permit. For comparison, 2 years are allowed to commence development under a conditional use permit.

There is no basic right to persist in a use no longer lawful. If that weren't true, non-conforming use law would be inane redundancy. In fact, non-conforming use law defines limited exceptions to laws that would otherwise restrict a use. Under the non-conforming use law, if a house burns, and the owners can't rebuild for a year, there is no right to rebuild without a new use permit. If an owner spent $20,000 on a foundation 6 years ago, and wanted to resume building, there is no preserved right to finish. But the decision implies, that by assiduous avoidance of all effort to implement the 1990 permit, the owner obtained eternal duration. There are no findings giving any basis in law or reason for that conclusion, and there is none. There is no duration provision in the old permit, or in the code under which it was issued. There is no protected non-conforming use.

THE PROPOSAL IS SUBSTANTIALLY DIFFERENT FROM PRE 26-90

Even if PRE 26-90 could still authorize the dwelling and farm plan it approved, the SEC application is for a different proposal. A new farm plan would replace the unimplemented 1990 plan. The new 1 acre dwelling site is 400 feet east of the one approved. The hearings officer finds the changes unimportant. We are concerned with permanent removal from the agricultural base, of an amount of land equal to the Portland Building block. The 400 foot site shift is twice the length of that block. How far is significant? Does it have to go to the next county? The decision finds the new farm plan and dwelling location are better. But the argument makes the case for the appellants by agreeing the site change is

significant. What the significance is, and how it affects approvability of the proposal, must be tested under the standards and procedures applicable to approval of an EFU dwelling.

The last paragraph of PRE 26-90 says the decision relied on a specific farm management plan, and on certification of only that plan by the OSU Extension. A permit amendment is requested in the guise of an SEC application. The changes can be addressed only by a correct process and current approval criteria. ***Gage v. City of Portland.***

CURRENT STANDARDS RESTRICTING DWELLINGS IN THE EFU ZONE

OAR 660-33-020(8)(a) and (c)(A) define Cascade Silt Loam as high-value farmland in the Willamette Valley, which, by statute, includes Multnomah County . It is not disputed that the proposed dwelling site is Cascade Silt Loam.

For a farm dwelling on high-value farmland, OAR 660-033-135(7)(a) and (c) require the applicant to prove there was $80,000 gross income from farm products in the last 2 years, or any 3 of the last 5 years, and that the dwelling will be occupied by the persons who produced the qualifying yield. There is no evidence of compliance. The old farm plan was never implemented, and a new plan is before you. Nothing indicates even a prospective yield of $80,000, much less the required achieved yield.

For various reasons not relevant here, the site cannot qualify for a non-farm dwelling.[1]

HEARING REQUIRED FOR BUILDING PERMIT

The hearings officer rejected the appellants' general claim that lawfulness of the proposed dwelling must be determined. But she concluded that there must be such a determination regarding implementation of the farm plan, made in a quasi-judicial public hearing process, before a building permit can be issued. (decision, pages 18-22). In her one-paragraph "order" on page 23, she re-affirms that a building permit cannot issue without such a determination. But there is no enforcing condition.

If the Board upholds the hearings officer, it must add the missing condition to be consistent with the decision's findings and conclusions. The "Order" on page 23 would be more defensible if amended as follows (bold type is new text):

> Significant Environmental Concern Permit No. 3-97 based on a farm dwelling in conjunction with a farm use approved in PRE 26-90 is approved, based on the conditions in the Director's decision**, and on the additional condition stated below**. This approval is not based on any determination that the farm use dwelling approved in PRE 26-90 meets the criteria of ORS 215.283(1)(f) **or other statutes and state administrative rules applicable to a permit for a farm dwelling in the EFU zone**. ~~It is the belief of the hearings officer that when a building permit is issued, the County will need to determine that the requirements of ORS 215.283(1)(f) are met.~~
>
> **CONDITION: Before a building permit can be approved, the County must determine that the proposed dwelling is in compliance with ORS 215.283(1)(f) and OAR 660-33-135(7)(a) and (7)(c). The determination must be made in a process that satisfies the requirements for approval or denial of a "permit", as defined in ORS 215.402.**

[1] For example, OAR 660-33-130(3)(a) requires ownership by the same person or a qualified successor since January 1, 1985. Subsection (3)(a)(D) does not allow a lot of record dwelling on high-value farmland.

If you agree with the amendment in principle, you must agree on the language now, and the final order must be signed today. The urgency is because we're past the 120 day limit. The hearing before the hearings officer was scheduled 68 days after we filed our appeal of the Director's decision. That was too late to allow this appeal to be concluded within the 120 days while meeting the county's 20 day notice requirement. The order must be signed before anyone gets to court, unless the applicant agrees to allow you more time.

If you sustain the appeal and deny the application, you can have an order immediately prepared, incorporating appellants' memoranda as findings and conclusions. Alternatively, if it takes more time, I believe a circuit court judge can be convinced that approval would be unlawful in substance.

FULL CASE CITATIONS

Marquam Farms Corporation v. Multnomah County, __ Or LUBA __ (LUBA No. 95-254 12/05/96), *Aff'd* __ Or App __ (CA A95801 4/16/97)

Schoonover v. Klamath County, 16 Or LUBA 846, 849 (1988)

Gage v. City of Portland, 24 Or LUBA 47, 49-50 (1992)

David M. Herman
Attorney at Law

1628 NW EVERETT STREET
PORTLAND, OREGON 97209-2109

WRITERS DIRECT NUMBER: (503) 228-3308
FACSIMILE (503) 226-3557

ADMITTED IN
OREGON AND WASHINGTON

July 15, 1997

Honorable Beverly Stein
Chair
Multnomah County Commission
1120 S.W. 5th, Room 1515
Portland, Oregon 97204

via fax: (503)248-3093

Re: Hearing on July 15, 1997 regarding SEC 3-97.

Dear Chair Stein and Commission:

We were distressed to learn of the apparent direction taken by the commission regarding SEC 3-97 and PRE 26-90. I understand that Mr. Jack Orchard did an excellent job of presenting the facts and law regarding the land use application. I also understand that the apparent direction of the commission's discussion was to reject SEC 3-97, and quietly terminate PRE 26-90.

There are many problems with this approach. Rejection of SEC 3-97 will be against the great weight of legal authority. Multnomah County Planning and Development staff and the hearings officer have prepared very thoughtful and complete analysis of the issues involved and a review of their work may be instructive. Not only would a pocket termination of PRE 26-90 be against the great weight of legal authority, such an action most probably would ultimately be found to be a violation of our due process property rights, and such an action would also set a new standard for reliability of information disseminated by the agents Multnomah County. I personally visited the Multnomah County Planning and Development office prior to acquiring the subject property, and at least semi-annually since that time have visited the office to review and confirm the status of the land use regulations regarding the subject parcel. On each visit, with the exception of one about six months ago when the staff was not able to locate the file, the planning staff has confirmed that PRE 26-90 remained valid and in force. Of course this information came as no surprise to me given the fact that a review of the applicable land use law and decision PRE 26-90 could not lead to another result.

Absent a redefinition of due process and a general pronouncement that at least in land use matters, Multnomah County apparently now reserves the right to summarily terminate

the beneficial property rights we respectfully request that the Multnomah County Commission approve SEC 3-97. If it is the considered judgment of the Multnomah County Commission to revisit the matter of the open PREs, then this properly should be a matter to be addressed in a hearing where the required notice and comment opportunities will be satisfied.

As we understand that the record in the July 15, 1997 hearing was not closed, we request that this letter be included in evidence.

Very truly yours,

David Herman

David M. Herman

Meeting Date: JUL 15 1997
Agenda No: P-2
Est. Start Time: 10:30 AM

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: DeNovo hearing regarding the Hearings Officer's decision on PLA 2-97.

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

REGULAR MEETING Date Requested: July 15, 1997
Amt. of Time Needed: 1 Hour

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

PERSON(S) MAKING PRESENTATION: Joan Chambers / Robert Hall

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

A DeNovo hearing of the Hearings Officer's decision regarding an denial of an appeal of the Planning Director's decision on case PLA 2-97.

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: KB Lou E. Nicholas

BOARD OF COUNTY COMMISSIONERS
97 JUL -9 PM 12:04
MULTNOMAH COUNTY OREGON

MULTNOMAH COUNTY

BOARD HEARING OF July 15, 1997

TIME 10:30 am

CASE NAME: Appeal of Denial on a Lot Line Adjustment **NUMBER:** PLA 2-97

Action Requested of Board

☐ Affirm Hearings Officer Dec.

Hearing/Rehearing

Scope of Review

☐ On the record

☑ De Novo

New information allowed

1. Applicant Name/Address

Fred Bender
20285 NW Cornell Road
Hillsboro, OR 97124

2. Action Requested by Applicant

Applicant appealed the Planning Director's Decision of PLA 2-97 for a Lot Line Adjustment between two contiguous properties in the Exclusive Farm Use zoning district.

3. Planning Staff Recommendation

Staff recommended that the Hearings Officer uphold the Planning Director's Decision of PLA 2-97.

4. Hearings Officer Decision

The Hearings Officer found that the applicant had not met all of the approval criteria for a lot line adjustment between two contiguous properties in the Exclusive Farm Use zoning district.

5. If recommendation and decision are different, why?

None

ISSUES
(who raised them?)

6. The following issues were raised:

The applicant appealed the Planning Director's decision based on three issues. The approval of the proposed Lot Line Adjustment would increase the permitted number of dwellings above that otherwise allowed in the zoning district; the issue of whether a deed or other instrument creating Parcel 2 recorded with the Department of General Services or in "recordable" form prior to February 20, 1990; and whether the properties in question under the "same ownership".

7. Do any of these issues have policy implications? Explain: None identified at this time.

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

NOTICE OF REVIEW

1. Name: Bachrach (Last), H. (Middle), Jeff (First)
2. Address: 1727 NW Hoyt Street (Street or Box), Portland (City), OR 97209 (State and Zip Code)
3. Telephone: (503) 222 - 4402
4. If serving as a representative of other persons, list their names and addresses:
   Of attorneys for applicant/appellant, Fred H. Bender, 20285 NW Amberwood Drive, Hillsboro, OR 97124
5. What is the decision you wish reviewed (*e.g.*, denial of a zone change, approval of a subdivision, *etc.*)?
   Hearing Officer's denial of PLA 2-97 property line adjustment.
6. The decision was announced by the Planning Commission on July 1, 1997
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
   See attached legal memorandum.

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

See attached legal memorandum.

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

(a) [XX] On the Record

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

(c) [ ] *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*.

Signed: _____ Date: July 10, 1997

For Staff Use Only

Fee:

Notice of Review - $500.00

Transcription Fee:

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

Total Fee = $_____

Received by: _____ Date: _____ Case No. _____

BEFORE THE BOARD OF COMMISSIONERS
FOR THE COUNTY OF MULTNOMAH

In Re: THE APPLICATION OF FRED H. BENDER	)	File No. PLA 2-97
	)	
	)	APPEAL OF PLANNING DIRECTOR'S
	)	DECISION

I. BACKGROUND

The requested property line adjustment affects the following parcels, both of which are designated Exclusive Farm Use:

> Tax Lot 36 (3.07 acres) owned by Nancy Olsson[1].
>
> Parcel 2 of Partition Plat 1990-43, consisting of Tax Lots 1 (14.08 acres) and 2 (9.75 acres) owned by Western States Development Corp. (Referred to herein as "Parcel 2.")

The proposed lot line adjustment would result in a new Adjusted Tax Lot 36 (12.82 acres), consisting of Tax Lot 36 combined with Tax Lot 2 of Parcel 2; Tax Lot 1 of Parcel 2 would remain as the sole lot comprising Parcel 2 of Partition Plat 1990-43. Exhibit 2.

The following facts about the parcel at issue are not in dispute:

Tax Lot 36 is vacant. It was created some time prior to 1937, and thus the Planning Director deemed it to have been a lawfully created lot that satisfied applicable laws when it was created. At 3.07 acres in size, Tax Lot 36 does not meet the current minimum parcel size of 80 acres in the EFU district; so it is a "substandard parcel" pursuant to MCC 11.15.2018(A)(2)(c) and (d).

Parcel 2 was created as part of a three-lot minor partition approved by the county in 1989 (file number LD25-89). Exhibit 3. Parcel 2 is divided by Skyline Boulevard. Tax Lot 2 of Parcel 2 is on the west side of the road and its northern border is adjacent to Tax Lot 36. It is a vacant and unused

---

[1] On February 28, 1997, the date the application was submitted, the Applicant/Owner of Tax Lot 36 was Fred H. Bender. Nancy Olsson has subsequently completed the purchase of Tax Lot 36. The new property deed, and Ms. Olsson's affidavit authorizing Fred Bender to continue as the applicant/appellant, are attached hereto as Exhibits 7 and 8.

parcel. Tax Lot 1 is on the other side of Skyline Boulevard.

Concurrent with the 1989 land division, Western States applied for, and the county approved, the siting of a dwelling in conjunction with a farm management plan on Parcel 2 (PRE-24-89) (Exhibit 4) as well as on the other two lots created by the partition. The farm management plan approved for Parcel 2 calls for siting the house and planting five acres of Christmas trees on the east side of Skyline Boulevard (Tax Lot 1 of Parcel 2). There is currently an approved mobile home on Tax Lot 1. Thus, the requested lot line adjustment would not affect the approved farm management plan and dwelling site on Tax Lot 1 because the application would combine Tax Lot 2 of Parcel 2 with Tax Lot 36. The 1989 land division did not include Tax Lot 36.

II. APPROVAL CRITERIA

The approval criteria in effect when the application was submitted in February of this year are found at MCC 11.15.2017 and .2018 of the EFU Chapter. The new version of the EFU Code Chapter that took effect April 6, 1997, is not applicable to this application. Unless otherwise indicated, all references to the county code will be to the version (adopted June 1995) that the Planning Director correctly applied to this application.

The relevant approval criteria are set out below:

11.15.2018 Lot of Record.

(A) For the purposes of this district, a Lot of Record is:

* * *

(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

* * *

(B) For the purposes of this subsection:

* * *

* * *

(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.

III. ASSIGNMENT OF ERROR

Subsection .2018(A)(2)(a) is satisfied because the land division approval (LD25-89) issued by the county on October 25, 1989 is the instrument in recordable form that created Parcel 2.

The Hearings Officer found that the application does not satisfy MCC 11.15.2018(A)(2)(a) based on the conclusion that "[t]he tentative plan approved by LD 25-89 did not constitute acceptance of the partition plat." Exhibit 1, p. 7.

The Hearings Officer misapplied subsection .2018(A)(2)(a). The Hearings Officer focused on the requirements for the recording of a final plat. The second part of that subsection, however, where it states " . . . or is in recordable form prior to February 20, 1990," clearly creates an alternative point in the process, other than the final recording of the plat, for establishing that a parcel was created prior to the deadline date.

The Hearings Officer's decision does not recognize the distinction between the two alternative

approaches allowed by the plain language of the subsection. Her finding does nothing more than conclude the subsection is violated because a final plat was not recorded, or approved by the county surveyor by February 20, 1990. It is a clearly wrong interpretation to ignore the disjunctive 'or' in subsection .2018(A)(2)(a), thereby making the recordable form provision the same as the actual recording provision in the first part of the subsection. "Recordable form" must mean something different than the actual recording of the final plat.

It is more consistent with both the county code and state law to interpret the recordable form provision as being satisfied with the issuance of the final land use decision approving the creation of the three parcels. That was the reading of subsection .2018(A)(2)(a) offered by the planning staff in an informal opinion issued to Western States Development Corp. in a letter dated February 7, 1992. Exhibit 5. That letter states: "Tax lot 36 and Parcel 2 are contiguous and were both created before February 20, 1990." The Hearings Officer's decision offers no explanation as to why the county is retreating from its prior position.

The issuance of LD 25-89 by the county in October, 1989, satisfies the plain language of the code because, consistent with state law, it is a recordable instrument under ORS Chapter 205 and, pursuant to ORS Chapter 92, it grants a vested right to record the final partition plat. ORS 205.130 (1) and (2) provide that counties shall record any "properly acknowledged or proved . . . interests affecting the title to real property." An approved tentative plat for a land division is a property right that runs with the land. Preliminary plats are recordable as interests affecting title to real property. Some jurisdictions require that final land use decisions, such as those approving preliminary or tentative plats, must be recorded. Portland Zoning Code Section 33.730.120, for example, calls for the recording of final land use decisions (which is different than the subsequent administrative decision to approve the final plat). Exhibit 6. Moreover, the fact that LD 25-89 was a document in

recordable form is further demonstrated by the fact that the Planning Director did have it recorded with the county's Department of Environmental Services. Exhibit 5, page 13.

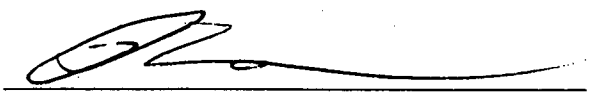
Although ORS 92.040(1) refers to land division approvals such as LD 25-89 as "the tentative plan for the proposed subdivision or partition," the statute and case law make clear that such approvals are anything but "tentative"; rather, they create a binding obligation that requires local jurisdictions to allow the creation of the approved lots or parcels:

> " . . . approval of the tentative plan is binding on the city under ORS 92.040 and there is nothing in ORS 92.010 to 92.160 which would prevent the subdivider from proceeding with construction. The filing and recording of the final plat is only necessary to enable the subdivider to sell the property.
>
> * * *
>
> ORS 92.040 provides that approval 'shall be binding upon the city or county for the purpose of the preparation of the [final] plat or map.' The apparent intent of this provision is to enable the subdivider to proceed with his project, including not only the preparatory steps to filing a final plat, but actual construction, with the assurance the city cannot later change its mind."

Bienz v. City of Dayton, 29 Or App 761, 769, 566 P2d 904 (1977). *See also, Commonwealth Properties, Inc. v. Washington County*, 35 Or App 387, 582 P2d 1391 (1978).

The Hearings Officer's determination that LD 25-89 does not satisfy subsection .2018(A)(2)(a) is at odds with the binding legal obligation imposed on the county when it approved the partition. LD 25-89 is an instrument in recordable form that creates a vested right for the property owner (and any subsequent owners) to take all steps necessary to implement the creation of the approved parcels.

Respectfully Submitted,



D. Daniel Chandler, OSB #90153
Of Attorneys for Applicant

MULTNOMAH COUNTY OREGON

DEPARTMENT OF ENVIRONMENTAL SERVICES
TRANSPORTATION & LAND USE PLANNING DIVISION
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 PLA 2-97. 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 [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 , 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 248-3043

Signed by the Hearings Officer:	**July 1, 1997**
Decision Mailed to Parties:	**July 1, 1997**
Decision Submitted to Board Clerk:	**July 1, 1997**
Last day to Appeal Decision:	**July 10, 1997**
Reported to Board of County Commissioners:	**July 10, 1997**

BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON
FINAL ORDER

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

July 1, 1997

PLA 2-97 Appeal of an Administrative Decision which found that the application for a lot line adjustment did not meet all of the approval criteria.

Property Location: 14007 NW Skyline Boulevard

Property Description: Tax Lot 36, Section 25, T2N, R2W, and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2)

Property Owner:

Tax Lot 36, Section 25, T2N, R2W:
Fred Bender (at time of application)
20285 NW Cornell Road
Hillsboro, OR 97124

Tax Lot 36, Section 25, T2N, R2W:
Nancy Olsson (at time of hearing)
20285 NW Amberwood Drive
Hillsboro, OR 97124

Parcel 2, Partition Plat 1990-43
(consisting of Tax Lots 1 & 2)
Western States Development Corp.
20285 NW Cornell Road
Hillsboro, OR 97124

Applicant:

Fred Bender
20285 NW Cornell Road
Hillsboro, OR 97124

Zoning Designation: Exclusive Farm Use - EFU

Hearings Officer Decision:

Deny appeal and affirm administrative decision, which found that the applicant had not met all of the approval criteria for a lot line adjustment between two contiguous properties in the Exclusive Farm Use zoning district, which properties were identified as Tax Lot 36, Section 25, T2N, R2W, and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2), based on the following findings and conclusions.

PROCEDURAL ISSUES

1. IMPARTIALITY OF THE HEARINGS OFFICER

A. No ex parte contacts. I did not have any ex parte contacts prior to the hearing of this matter. I did not make a site visit.

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

BURDEN OF PROOF

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

SCOPE OF APPEAL

The hearing before the Hearings Officer on a matter appealed shall be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal. The appellant's Notice of Appeal stating the grounds for the appeal of the administrative decision is attached hereto as Exhibit "A" and is incorporated by this reference herein. The specific grounds raised by the applicant will be discussed in the body of this decision.

FACTS

1. APPLICANT'S PROPOSAL

The applicant requests approval of a Lot Line Adjustment between two contiguous properties in the Exclusive Farm Use zoning district, identified as Tax Lot 36, Section 25, T2N, R2W (3.07 acres) and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2) (23.83 acres). At the time of the application, Tax Lot 36 is in the ownership of Fred H. Bender and Parcel 2 was owned by Western States

Development Corp. On June 11, 1997 Fred Bender conveyed his interest in Tax Lot 36 to Nancy Olsson.

2. SITE AND VICINITY INFORMATION

The subject property is located at 14007 NE Skyline Boulevard, in the Exclusive Farm Use zone. The site plan is attached hereto as Exhibit "B", and incorporated by this reference herein.

3. TESTIMONY AND EVIDENCE PRESENTED

A. During and prior to the hearing the exhibits which are listed on the attached Exhibit "C", which is incorporated by this reference herein, were received by the Hearings Officer.

B. Bob Hall testified for the County, summarizing the history of the application and the Administrative Decision and subsequent appeal therefrom.

C. Jeff H. Bachrach, an attorney, submitted oral and written testimony and a legal memorandum in support of the appeal.

D. Ronald E. Sprague, Co-Trustee of the Frederick T. King Trust, testified and presented written evidence that Frederick T. King Trust owned a parcel which was adjacent to Tax Lot 2 of Parcel 2, on Partition Plat 1990-43, and that the adjacent parcel (Lot 24) had the interest in a 16 foot wide roadway easement, the centerline of which was the northern boundary of Tax Lot 2 on Parcel 2. Mr. Sprague wanted to make sure that the County was aware of the easement and that the Partition Plat map 1990-43, dated 1/26/90, failed to show the easement.

ISSUES ON APPEAL

1. **Would approval of the proposed Lot Line Adjustment increase the permitted number of dwellings above that otherwise allowed in the zoning district?**

2. **Was a deed or other instrument creating Parcel 2 recorded with the Department of General Services or in "recordable" form prior to February 20, 1990?**

3. **Are the properties in question under the "same ownership"?**

STANDARDS AND CRITERIA
ANALYSIS AND FINDINGS OF FACT

This is an appeal relating to an Administrative Decision concerning an application for a Lot Line Adjustment. Multnomah County Planner Bob Hall prepared a written decision which discussed relevant criteria and facts, some of which will not be addressed in this opinion. The appeal is related to specific issues raised by the appellant. Those issues and findings which were addressed in the Administrative Decision, but have not been challenged on appeal, are incorporated by this reference herein.

1. **Would approval of the proposed Lot Line Adjustment increase the permitted number of dwellings above that otherwise allowed in the zoning district?**

Findings:

During the appeal hearing Senior Planner Robert Hall indicated that the applicant had not demonstrated that the permitted number of dwellings would not be increased above that otherwise allowed in the district, because the applicant had not addressed the economic test relative to dwellings in conjunction with farm use pursuant to Oregon Administrative Rule 660-33-135.

Mr. Bachrach, the attorney who filed the appeal, indicated during the hearing that he did not feel that the staff had clearly articulated in the staff decision that this criteria was in fact a basis for denial. Mr. Bachrach correctly pointed out that the staff conclusion listed two basis for denial, one of which was that there were no deeds or other instruments creating Parcel 2 of Partition Plat 1990-43, recorded or in recordable form prior to February 20, 1990, and secondly, that Parcel 2 and Tax Lot 36 were in the same ownership. The conclusion does not site the above criteria as a grounds for denial.

During the hearing we took a short recess, during which I reviewed the standards set forth in OAR 660-33-135. Upon resuming the hearing, I indicated that I felt the applicant had in fact met the criteria set forth above. The standard in question does not reference OAR 660-33-135. I do not find OAR 660-33-135 to be applicable in this situation. OAR 660-33-135 relates to dwellings in conjunction with farm use on parcels of at least 160 acres in size. Since the criteria in question relates to lot line adjustments between "lots of record", which by definition do not meet the minimum lot size requirements of the EFU zone, OAR 660-33-135 is not applicable.

The applicant has indicated that there is a dwelling on Parcel 2 that has been in place before the approval of Partition Plat 1990-43. In addition, Parcel 2 has been approved for a farm dwelling under a farm management plan. The proposed adjustment will not affect the farm management plan and related dwelling approval because all of the farm

area that was the basis of the approval remains in the adjusted Parcel 2. There is no dwelling on Tax Lot 36 and application has not been made for a dwelling.

Accordingly, I find that the proposed lot line adjustment will not increase the permitted number of dwellings above that otherwise allowed in this zoning district. The applicant has met this criteria.

2. **Was a deed or other instrument creating Parcel 2 recorded with the Department of General Services or in "recordable" form prior to February 20, 1990?**

MCC 11.15.2018 Lot of Record.

(A) For the purposes of this district, a Lot of Record is:

. . .

(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;

Findings:

Tentative approval of the proposed partition plat that created Parcel 2 of Partition Plat 1990-43 was granted by the Planning Director on October 15, 1989. However, as recognized by ORS 92.040, that tentative approval did not constitute final acceptance by the county of the partition plan which actually created the parcel.

> ORS 92.040 provides in relevant part, ". . . Approval of the tentative plan shall not constitute final acceptance of the plat of the proposed subdivision or partition for recording; however, approval by a city or county of such tentative plan shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition."

Approval of a tentative plan does not constitute final acceptance of a partition plat. If the plat which is later submitted does not comply with the tentative plan approval, the County can require revisions to the proposed plat. If the proposed plat is not submitted within the time frame for approval, the County would have to reject the proposed plat.

It is during the tentative plan stage that discretionary decisions regarding parcel configuration and size are made. Applicants are given the opportunity to submit tentative plans for conceptual approval prior to incurring the cost of substantial engineering and/or survey work inherent in plat approval. Conditions are added to the tentative plan approval which must be met prior to acceptance of the final plat.

MCC 11.45.750 (1990 version) stipulated that plats were not final until recorded. The document that became Partition Plat 1990-43 was submitted for review to the County Surveyor on July 2, 1990. The County Surveyor approved the document on July 17, 1990, and the partition plat was recorded July 19, 1990. The instrument creating Parcel 2 of Partition Plat 1990-43, therefore, was not recorded prior to February 20, 1990.

The appellant argues that the land division approval in October 1989 was an "instrument creating" Parcel 2 in a sufficiently "recordable form" so as to satisfy subsection .2018(A)(2)(a). The question thus becomes when is an instrument creating a parcel in recordable form.

The appellant argues that the staff decision LD 25-89 could have been recorded, yet cited no authority for that assertion. The act of recording a document generally has no effect unless the recordation is specifically required or authorized by statute. In this instance, the relevant statutes are the subdivision and partition laws set forth in ORS Chapter 92. It is the provisions of ORS Chapter 92 that determine when a partition plat is in "recordable form". It is the partition plat, not the conditional tentative plan approval, that "created" the parcels.

In order for a partition plat to be "recordable", the plat must have been surveyed. ORS 92.050. That statute also requires that the survey and plat of the partition be made by a registered professional land surveyor. This section also sets forth technical requirements regarding the details to be set forth on the plat and requires that locations and descriptions of all monuments be set forth on the plat.

The plat must have a surveyor's certificate, together with the seal and signature of the surveyor having surveyed the land represented on the plat, to the effect that the surveyor has correctly surveyed and marked the proper monuments, the lands as represented. ORS 92.070.

In addition, pursuant to ORS 92.075, in order to partition any property, the declarant shall include, on the face of the partition plat, a declaration, taken before a notary public or other person authorized by law to administer oaths, stating that declarant has caused the partition plat to be prepared and the property partitioned in accordance with the provisions of ORS Chapter 92. That dedication/declaration on Partition Plat 1990-43 was not signed until March 15, 1990.

ORS 92.100 provides that before any partition plat can be recorded, a partition plat must be approved by the County Surveyor before it is recorded. The surveyor reviews the plat to determine if the requirements of ORS Chapter 92 for recording the plat have been met. Without the signature of the County Surveyor, the partition plat cannot be recorded, according to the subdivision laws. Thus, prior to the affixing of the signature by the County Surveyor on the partition plat, the partition plat is not in "recordable form".

The tentative plan approved by LD 25-89 did not constitute acceptance of the partition plat, nor was it an instrument in recordable form which created a parcel. The tentative plan had not been surveyed and did not contain any legal descriptions for the proposed parcels. LD 25-89 was simply a land use approval which authorized the next step of a two-step process. However, at any point in that process, if the applicant had failed to meet any of the conditions or submit the partition plat in accordance with the requirements of the tentative plan, that partition plat would not have been accepted. The conditional tentative plan approval was not a recordable document which created a parcel.

A review of Partition Plat 1990-43 indicates that the partition plat was not in recordable form until July 17, 1990, the date on which the Multnomah County Surveyor affixed his signature to the partition plat.

Accordingly, while it is clear that Tax Lot 36 was a lot of record as of February 20, 1990, I find that Parcel 2 of Partition Plat 1990-43 was not a legal lot of record as of February 20, 1990. The applicant has failed to meet this approval criteria.

3. Are the properties in question under the "same ownership"?

Findings:

Both Tax Lot 36, Section 25, T2N, R2W and Parcel 2 Partition Plat 1990-43 are legally created lots and are discrete units of land as recognized by ORS 92.017. Tax Lot 36, Section 25, T2N, R2W was not required to be included in Partition Plat 1990-43 due to its discrete nature, not its ownership.

The Planning staff determined that Tax Lot 36, Section 25, T2N, R2W and Parcel 2, Partition Plat 1990-43 were not separate Lots of Record as defined in MCC 11.15.2018, because they are in the same ownership.

Fred H. Bender (20285 NW Cornell, Hillsboro, OR 9712) is registered with the Oregon Secretary of State Corporation Commission as the president of Western States Development Corporation (registration #210665-19). Staff also found that Western States Development Corporation owns Tax Lots 1 & 2 of Parcel 2, Partition Plat 1990-43 and Fred H. Bender owns Tax Lot 36, Section 25, T2N, R2W.

In order to qualify as a lot of record, a parcel of land cannot be contiguous to another substandard parcel or parcels under the same ownership. MCC 11.15.2018.

MCC 11.15.2018(B)(3) provides:

> "(3) *Same ownership* refers to parcels of which greater than possessory interests are held by the same person or persons, spouse, minor aged child, single partnership, or business entity separately or in tenancy in common."

The definition of same ownership requires several things. The ownership must be of greater than possessory interest. The interest must be held by the same person or persons, spouse, minor aged child, single partnership, or business entity separately or in tenancy in common. Thus, if an individual owned property with a spouse or a child or in partnership, separately or as tenants in common, you would have the "same ownership". However, where an individual owns one parcel of property and a corporation, a separate and distinct legal entity, owns another piece of property, the two parcels are not in the "same ownership".

Staff has indicated that the Board of County Commissioners has previously found *same ownership* as defined by MCC 11.15.2062(B)(3) to include a family trust with a husband and wife as trustee to be the equivalent of the term spouse in the same definition. Therefore, the Board required a parcel owned by an individual to be combined with contiguous property controlled by a trust, of which one of the trustees was the individual's spouse. 11.15.2018(B)(3) is identical in wording to that of MCC 11.15.2062(B)(3).

However, a family trust is significantly different than a corporation. A family trust is generally used as an estate planning device to transfer property to a future generation without the necessity of going through probate. The individual establishing the trust or the trustor often retains a possessory interest in the property transferred during his or her life.

That is a different situation from corporate ownership of an asset. As the appellant points out in their Memorandum in Support of Appeal, staff's interpretation is contrary to ORS Chapter 60, which recognizes that a corporation is a distinct and separate entity from its individual owners. Accordingly, I find that the properties are not in the same ownership.

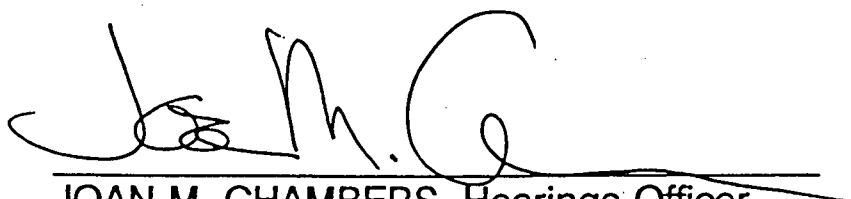
Since I find that the properties, as of the date of the application, were not in the same ownership, I will not rule on the effect of the purported transfer of the property to Nancy Olsson on June 11, 1997. Accordingly, I will not discuss the practical or legal effect of the applicant's effort to convey Tax Lot 36 during the pendency of this application.

Accordingly, I find that the two parcels in question were not in the "same ownership" within the meaning and context of MCC 11.15.2018.

CONCLUSION

I find that Parcel 2 was not a lot of record as of February 20, 1990 on the grounds and for the reasons that the instrument (i.e., partition plat) which created Parcel 2, was neither recorded nor in "recordable form" as of February 20, 1990. Therefore, I affirm the Planning Director's decision denying a request for a property line adjustment between Tax Lot 36, Section 25, T2N, R2W, and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2). The appeal is denied and the Planning Director's decision denying the request for the property line adjustment is affirmed, as discussed herein.

IT IS SO ORDERED, this 1st day of July, 1997.



JOAN M. CHAMBERS, Hearings Officer

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

MULTNOMAH COUNTY

NOTICE OF APPEAL
ADMINISTRATIVE DECISION

BANK OF AMERIC
FOR DEPOSIT ONL
ACCT#261350000
MULTNOMAH COUNT

1. Name: Bachrach (Last), H. (Middle), Jeff (First)
2. Address: 1727 NW Hoyt Street (Street or Box), Portland (City), OR 97209 (State and Zip Code)
3. Telephone: (503) 222 - 4402
4. If serving as a representative of other persons, list their names and addresses:
   Of attorneys for applicant/appellant, Fred H. Bender.
5. What is the decision you wish reviewed (*e.g.*, denial of a minor variance, approval of a Greenway Permit, *etc.*)?
   Planning Director's denial of PLA 2-97 property line adjustment.
6. Date the decision was filed with the Director of the Department of Environmental Services: May 1, 1997
7. Describe specific grounds relied on for reversal or modification of the decision.
   (*use additional sheets if necessary*)
   See attached notice of appeal.

Signed: Jeff Bachrach Date: May 12, 1997

Staff Use Only

EXHIBIT A Page 1 of 3

Notice of Appeal Fee = $300.00

Received by: _____ Date: _____ Case No. _____

97 MAY 12 PM 3:42
COUNTY
PLANNING SECTION

BEFORE THE MULTNOMAH COUNTY LAND USE HEARINGS OFFICER

Appeal of Planning Director's Denial of Application of Fred H. Bender for a Lot Line Adjustment.	))))	No. PLA 2-97 Notice of Appeal (Specific Grounds for Reversal)

Pursuant to MCC 11.15.8290(B)(3), this memorandum is submitted on behalf of the applicant/appellant to set out the specific grounds relied on to request reversal of the Planning Director's decision. The decision being appealed denied the requested lot line adjustment based on the following two findings:

1. Parcel 2 of Partition Plat 1990-43 is not a lot of record because there was not "a deed or other instrument creating the parcel ... in recordable form prior to February 20, 1990." MCC 11.15.2018(A)(2)(a).
2. The two parcels at issue are under the "same ownership," as that term is applied by the MCC 11.15.2018(B)(3) and 11.15.2018(A)(2)(d).

The two findings summarized above are based on incorrect interpretations and applications of the applicable county provisions and state law. Therefore, the Planning Director's decision should be reversed.

More specifically, the decision's interpretation of MCC 11.15.2018(A)(2)(a) is incorrect as a matter of law; it is contrary to both prior county actions and ORS Chapter 92, Chapter 205 and case law thereunder. Moreover, the decision's conclusion regarding the lot of record status of Parcel 2 is based, in part, on the mistaken assumption that the future siting of a dwelling on Parcel 2 is subject to the requirements of OAR 660-33-35. That is incorrect. OAR 660-33-35 is

not applicable because Parcel 2 has a vested right to site a dwelling pursuant to the farm management plan that was approved by the county's decision in PRE 24-89, September 14, 1989.

The conclusion that the two parcels are in the same ownership is based on an incorrect interpretation and application of the county code. Moreover, the county's interpretation and application of the code's "same ownership" provision violates ORS Chapter 60 and common law protections afforded to corporations.

The appellant intends to submit a more detailed legal memorandum to the hearings officer in advance of the hearing.

DATED this 12th day of May, 1997.

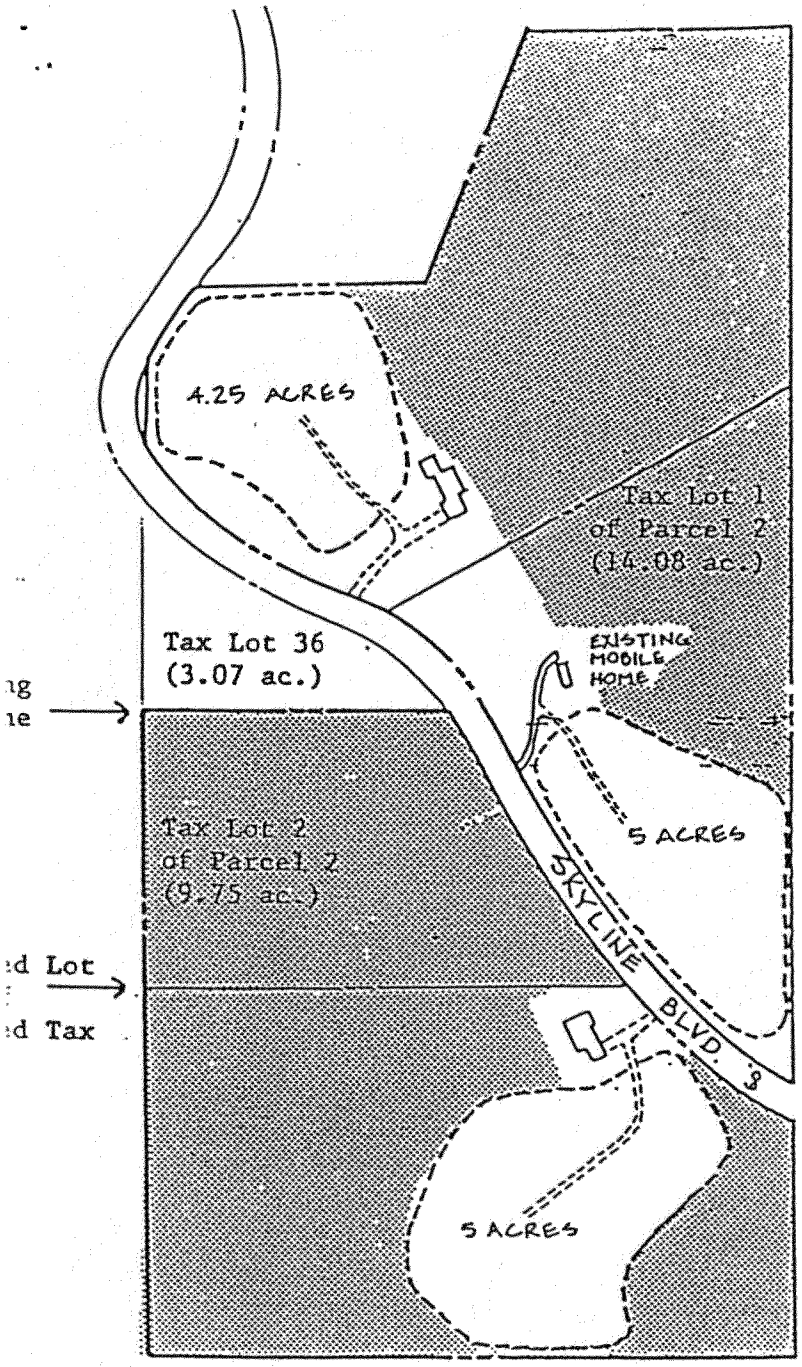
Respectfully submitted,

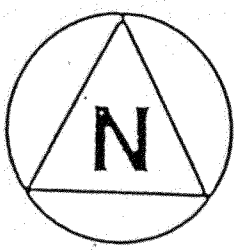
O'DONNELL RAMIS CREW
CORRIGAN & BACHRACH

By: _____
Jeff H. Bachrach, OSB #84402
Of Attorneys for Applicant/Appellant,
Fred H. Bender

jhb\western\lot36\Appeal.P01

EXHIBIT A Page 3 of 3





SCALE: 1" = 400'
APRIL 22, 1989

LEGEND

- XMAS TREES
- FOREST & BRUSH
- EXISTING ROAD
- PROPOSED ROAD
- HOMESITE

SITE PLAN

FOR:
WESTERN STATES DEVELOPMENT CORP.
20285 N.W. CORNELL ROAD
HILLSBORO, OREGON 97124
PHONE: 645-5544

TAX LOTS 13 & 30

PLANNING RESOURCES, INC.
Land Use & Site Planning Services
3681 S.W. Carman Drive
Lake Oswego, Oregon 97035
(503) 636-5422

EXHIBIT R Page 1 of 1

List of Exhibits
PLA 2-97

"A" Applicant's Submittals

A1 General Application form (2 pages)
A2 Application for EFU Lot Line Adjustment
A3 Property Owner Consent Form
A4 Application Checklist with post it note from Alan young
A5 A & T printout and ownership map (2 pages)
A6 Applicant's narrative dated February 28, 1997 with maps (6 pages)
A7 Craven v. Jackson County (submitted by applicant)
A8 Parsons v. Clackamas County (submitted by applicant)
A9 Letter from Will Selzer
A10 Revised narrative and cover letter from Jeff Bachrack (9 pages)
A11 Legal Memorandum in Support of Appeal

"B" Notification Information

B1 Decision of Planning Director for PLA 2-97
B2

"C" Multnomah County Items

C1 Excerpts from ORS Chapter 92 (5 pages)
C2 A & T deed history for properties with cover note from Barry Benson (15 pages)
C3 Recorded copy of Partition Plat 1990-43
C4 Copy of recorded easement across the northerly portion of that portion of Parcel 2 west of Skyline Blvd., submitted by Ron Sprague on 6/3/97 (7 pages)

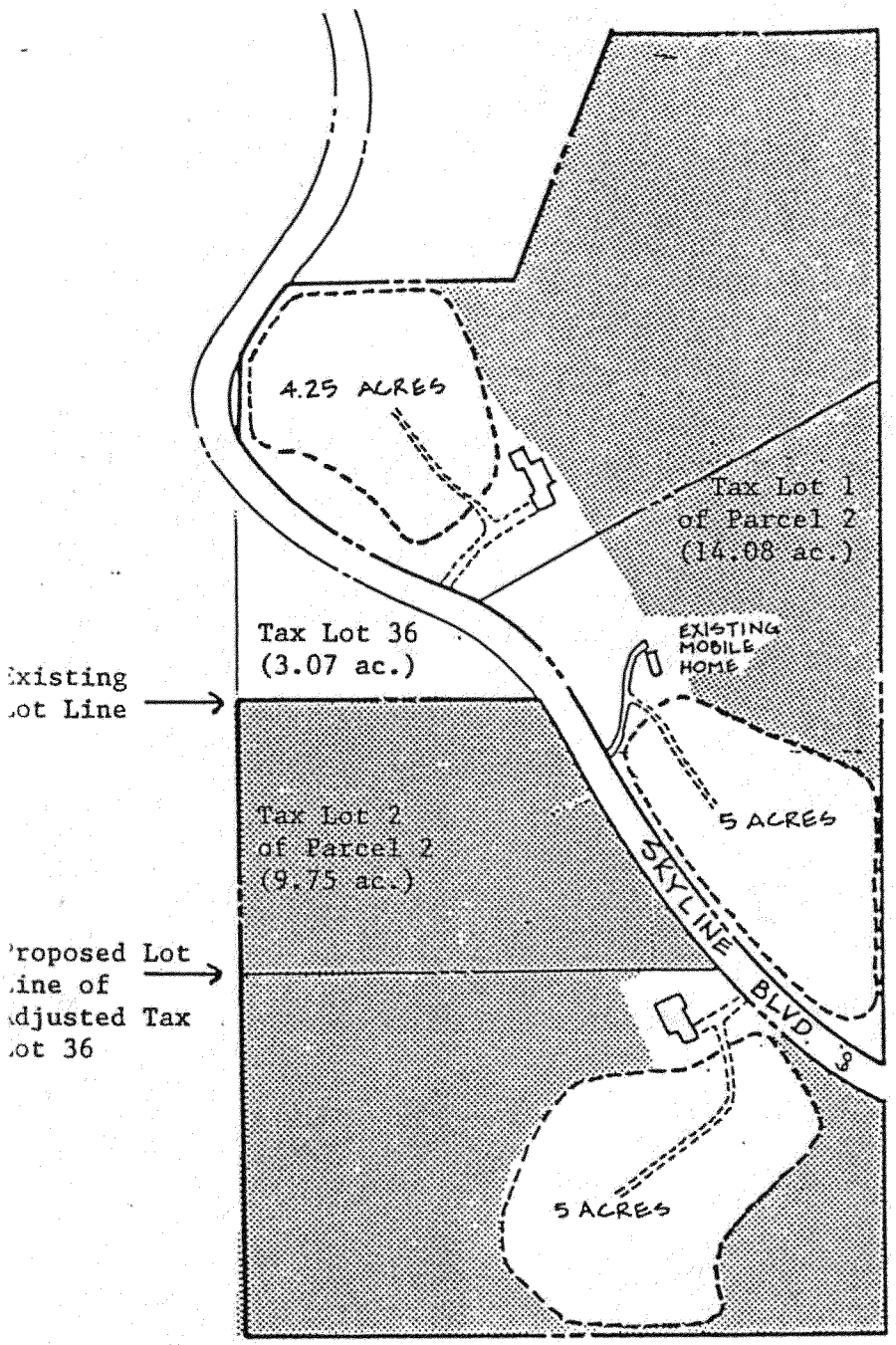
"D" Appeal Material

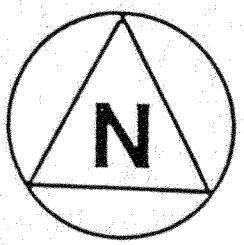
D1 Notice of Appeal with narrative and cover letter from Jeff Bachrach
D2 Affidavit of Posting

"E" Documents Submitted at 6/18/97 Public Hearing

E1 Letter and attachments from Ron Sprague

EXHIBIT C Page 1 of 1





SCALE: 1" = 400'
APRIL 22, 1989

LEGEND

- XMAS TREES
- FOREST & BRUSH
- EXISTING ROAD
- PROPOSED ROAD
- HOMESITE

SITE PLAN

FOR:
WESTERN STATES DEVELOPMENT CORP.
20285 N.W. CORNELL ROAD
HILLSBORO, OREGON 97124
PHONE: 645-5544

TAX LOTS 13 & 30
SECTION 25, T2N, R2W, W.M.

PLANNING RESOURCES, INC.
Land Use & Site Planning Services
3681 S.W. Carman Drive
Lake Oswego, Oregon 97035
(503) 636-5422

MULTNOMAH COUNTY OREGON

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

TYPE III LAND DIVISION — TENTATIVE PLAN DECISION

LD 25-89

October 25, 1989

Location: 13855 N.W. Skyline Boulevard

Legal Description: Tax Lots 13 and 30, Section 25 T 2N R 2W

Legal Owner: Manifold Business and Investments, Inc.
7315 S.E. 82nd Avenue
Portland, Oregon 97266

Applicant: Western States Development Corp.
20265 N.W.Cornell Road
Hillsboro, Oregon 97124

DECISION: The Tentative Plan for the Type III Land Division requested, a minor partition resulting in three parcels is hereby **approved** in accordance with the provisions of MCC 11.1345.400.

Conditions of Approval:

1. Within one year of the date of this decision, deliver the final partition map and other required attachments to the Planning and Development Division of the Department of Environmental Services in accordance with MCC 11.145.710. The enclosed Summary Instruction Sheet contains detailed information regarding the final partition map and the remaining steps for completing the land division.

2. Prior to recording the final partition map, complete a Statement of Water Rights in accordance with the provisions of Senate Bill 142 as adopted by the 1987 Oregon Legislature (instructions enclosed). Please contact the State Water Resources Department at 378-3066 for additional information.

3. Prior to recording the final partition map, comply with the following Engineering Services Division requirements:

   A. Commit to participate in future improvements in N.W. Skyline Boulevard through deed restrictions. Contact Ike Azar at 248-5050 for additional information.

4. In conjunction with issuance of building permits for either parcel construct on-site water retention and/or control facilities adequate to insure that surface runoff volume after development is no greater than that before development per MCC 11.45.600. Plans for the retention and/or control facilities shall be subject to approval by the County Engineer with respect to potential surface runoff on the adjoining public right-of-way.

5. Prior to issuance of building permits for either parcel apply for and obtain a Land Feasibility Study confirming the ability to use on-site sewage disposal system on the parcel for which the building permit is sought.

6. Endorsement of the final partition map shall occur only after the approval of the following "Use Under Prescribed Conditions" cases under MCC 11.15.2010(C)(2): PRE 23-89, PRE 24-89 and PRE 25-89.

7. Prior to endorsement of the final partition map, provide evidence that water in sufficient amounts and pressure will be available to serve a residence on any parcel. Evidence that a private well in feasible may consist of:

   A. Written testimonials from drillers of successful wells in the area, or

   B. Data from the Department of Water Resources in Salem (378-3066), regarding private wells in the immediate area, that would substantiate the likelihood of a successful well being drilled on the property.

8. Prior to endorsement of the final partition map, the applicant shall apply for and obtain approval of annexation of the subject property to the boundaries of Multnomah County Rural Fire Protection District No. 20.

Findings of Fact:

1. Applicant's Proposal: The applicant proposes to divide two parcels containing about 66.6 acres into two smaller lots. Parcels 1 is vacant and contains about 21.1 acres. Parcels 2 has a mobile home on it and contains about 24 acres. Parcels 3 is vacant and contains about 21.5 acres. Christmas tree farms are proposed on each parcel. As required by the Zoning Ordinance, the applicant has requested approval of a "use under prescribed conditions" for each of the proposed 20-acre parcels under cases PRE 23-89, PRE 24-89 and PRE 25-89. The applicant states that a residence on each parcel "is likely in the third year of each Christmas tree farm's operation."

2. Site Conditions and Vicinity Information: Site conditions as shown on the Tentative Plan Map area as follows:

   A. The site is on the westerly side of N.W. Skyline Boulevard about 1 1/4 miles from the intersection of N.W. Cornelius Pass Road.

   B. Future Street Improvements (N.W. Skyline Boulevard): N.W. Skyline Boulevard is not fully improved to county standards at this time. The County Engineer has determined that in order to comply with the provisions of MCC 11.60 (The Street Standards Ordinance) it will be necessary for the owner to commit to participate in future improvements to N.W. Skyline Boulevard through deed restrictions as a condition of approval.

3. Land Division Ordinance Considerations (MCC 11.45):

   A. The proposed land division is classified as a Type III because it is *a minor partition which will result in one or more parcels with a depth to width ratio exceeding 2.5 to 1* [MCC 11.45.100(D)]. Parcel 2 has a depth to width ration of 3.1 to 1.

   B. MCC 11.45.390 lists the approval criteria for a Type III Land Division. The approval authority must find that:

(1) *The Tentative Plan is in accordance with:*

a) *the applicable elements of the Comprehensive Plan;*

b) *the applicable Statewide Planning Goals adopted by the Land Conservation and Development commission, until the Comprehensive Plan is acknowledged to be in compliance with said Goals under ORS Chapter 197; and*

c) *the applicable elements of the Regional Plan adopted under ORS Chapter 197.*[MCC 11.45.230(A)].

(2) *Approval will permit development of the remainder of the property under the same ownership, if any, or of adjoining land or of access thereto, in accordance with this and other applicable ordinances.* [MCC 11.45.230(B)].

(3) *The tentative plan complies with the applicable provisions, including the purposes and intent of* [the Land Division] *chapter.*[MCC 11.45.230(C)].

(4) *. . . and that the tentative plan complies with the Zoning Ordinance.* (MCC 11.45.390).

C In response to the above approval criteria for a Type II Land Division, the following findings are given:

(1) Comprehensive Plan: Finding 4 indicates that the proposal is in accord with the applicable policies of the Comprehensive Plan. The Multnomah County Comprehensive Plan has been found to be in compliance with Statewide Goals and the Regional Plan by the State Land Conservation and Development Commission. For these reasons, the proposed land division complies with MCC 11.45.230(A).

(2) Development of Property:

Applicant's Response: *"This proposal does not affect access to or development of adjoining property. All three parcels have sufficient frontage on Skyline Boulevard to provide a safe route for access to the property. All three parcels have sufficient land to make commercial tree*

farms feasible on each. All three parcels have suitable dwelling sites. The applicant will address this issue in more detail when it is time to seek approval for a dwelling in conjunction with the farm use."

Staff Comment: After approval of the proposed land division. Parcels 1,2 and 3 will contain 21.1, 25 and 21.5 acres, respectively. No further division of any parcel will be possible under the EFU zoning because 19 acres is the smallest parcel size allowed under MCC 11.15.2010(C)(2). Approval of the land division will not affect the development of or access to adjoining land. For these reasons, the proposed land division complies with MCC 11.45.230(B).

(3) Purposes and Intent of Land Division Ordinance: Finding 5 indicates that the land division complies with the purposes and intent of the Land Division Ordinance.

(4) Zoning Ordinance: Finding 6 indicates that the tentative plan complies with the Zoning Ordinance, subject to approval of cases PRE 23-89, PRE 24-89 and PRE 25-89.

4. Applicable Comprehensive Plan Policies: The following Comprehensive Plan Policies are applicable to the proposed land division. The proposal satisfies those policies for the following reasons:

A. Policy No. 9 - Agricultural Lands: This policy states in part that *"[t]he county's policy is to restrict the use of [EFU-zoned] lands to exclusive agriculture and other uses, consistent with state law, recognizing that the intent is to preserve the best agricultural land from inappropriate and incompatible development."* In order to create the proposed 20-acre parcels in the EFU zone the applicant must obtain approval of a "use under prescribed conditions" for all three parcels pursuant to MCC 11.15.2010(C)(3). Obtaining such approval requires, among other things, the preparation of a farm management plan. The plan must be certified by a person with agricultural expertise as being *"appropriate for the continuation of the existing commercial agricultural enterprise within the area."* [MCC 11.15.2010(C)3(c)]. As stated in Finding 1 the applicant has requested such approval under cases PRE 23-89, PRE 24-89

and PRE 25-89. Subject to approval of those cases and for the reasons stated in Finding 6, the proposal satisfies Policy No. 9.

B. Policy No. 13, Air, Water, and Noise Quality:

Applicant's Response: "This proposal will not affect the air and water quality of the Skyline Boulevard area. There will be minimum motor vehicle traffic associated with the occasional site visits required for planting, tending, and harvesting the trees. The traffic generated by 2 dwellings 3 years into the plan is also minimal. The main sound associated with the tree farms will be at harvest, if motorized chain saws are used. But the sound of chain saws is common in rural Oregon, and, in this case, the impact would be mitigated by 2 factors: (1) the trees will be 3 inches to 4 inches thick at the base and will cut quickly, and (2) the slope of the land and the distance from neighboring dwellings will reduce the effective sound levels."

Staff Comment: Obtaining a Land Feasibility Study from the County Sanitarian for any parcel is a condition of approval. For this reason and for the reasons stated by the applicant, the proposal complies with this policy.

C Policy No. 14 - Development Limitations: This policy considers development limitation areas as those (a) with slopes exceeding 20 percent; (b) with severe soil erosion potential; (c) within the 100-year flood plain; (d) with a high seasonal water table within 0-24 inches of the surface for three or more weeks of the year; (e) with a fragipan or other impervious layer less than 20 inches from the surface, or (f) subject to slumping, earth slides or movement. The Land Division Ordinance also addresses these same factors under the section titled "Land Suitability" (MCC 11.45.460). Below is the applicant's response to MCC 11.45.460.

Applicant's Response:

"Slopes Exceeding 20%

The Soil Conversation Service survey grades soils according to slope, with the pertinent breakdown being 8%-15% for a "C" rating.

All of the projected tree farm activity will be on Cascade silt loam soil grades 7C (8%-15% slope). Prudent Christmas tree planting avoids slopes in excess of 15%. Christmas tree consultant Bernard Douglass has walked this site and determined that it is feasible to plant Noble fir on the 7C area of the property. The 3 lots created by this partition would each have sufficient gently sloping terrain to support the proposed Christmas tree farm and dwelling on each lot.

Portions of all three lots have slopes of greater than 15% (See soils map) The Christmas tree plantings will be on the 7C soils adjacent to Skyline Boulevard on all three parcels. The lesser slopes allow intensive tree care and provide good access to and from the highway. The farms will avoid the steeper portions of the property.

Severe Soil Erosion

The areas cleared for hay farming have the least slope and, therefore, the least potential for erosion problems. That is where the Christmas trees will be planted. Cleared land that is not used for tree farms will remain in grass or be reforested. Surface water follows natural drainage swales or Skyline Boulevard ditches.

There is some slope exceeding 30% in the northwest corner of Parcel 1. This area will remain in long-term timber production and will not be cultivated.

The steepest land is a hindrance to most activity and does limit the acreage on the parcel that is suitable for farming. However, this limitation does not render the overall parcel unsuitable for agricultural use and will not prevent implementation of the Farm Management Plan.

Within the 100-Year Flood Plain

The property is near the top of Skyline Ridge, several hundred feet above the elevation of Rock Creek to the west. No 100-year flood plain exists on the site.

High Seasonal Water Table (0"-24")

The main concern with a high water table is the potential for killing the plants with too much water. Noble fir will not tolerate wet ground. According to the SCS soil tables, the water table on Cascade silt loam soils ranges from 18 inches to 30 inches below the surface over the winter. In general, the property is well drained because of the overall slope to the west and south.

Cascade soil is rated by the SCS as acceptable for growing fir trees; with a Douglas fir site index of 150-165--about average for growing long-term commercial sized trees. The Noble fir plantings described in the Farm Management Plan will be preceded by ground preparation that will locate wet areas to avoid in planting, if there are any. There is no indication that this land is unsuitable or incapable of being made suitable for supporting this proposed farm use.

Fragipan (Less Than 30" from Surface)

The main concern in this standard is that root systems cannot penetrate into the fragipan. According to the SCS soil survey, there is a slowly permeable fragipan at a depth of 20 inches to 30 inches in the Cascade soils that dominate this parcel. This is a marginally acceptable rooting depth for Douglas fir trees in a commercial forest. The site is also suitable for the proposed Noble fir seedlings, when grown to the 6' or 7' Christmas tree height.

This is marginal land for any farm use, but Christmas trees are traditionally grown on marginal farm land. The fragipan depth limitation does not make this land unsuitable for the proposed farm use.

Stability

The vicinity is generally stable. There are many dwellings on similar soils along Skyline Boulevard in both directions from this property. The cleared fields on the gentler slopes on top of the ridge are stable. The steeper portions of the area are generally forested. There is no instability that would make this parcel unsuitable for the proposed farm uses."

Staff Comment: For the reasons stated by the applicant, the proposal complies with Policy.14 and MCC 11.45.460.

D. Policy No. 15 - Areas of Significant Environmental Concern: The subject property is not in an area designated as an "Area of Significant Environmental Concern" by Multnomah County.

E. Policy No. 37 - Utilities: Water will be provided to future residences on each parcel from private wells in accordance with Condition 7.. Obtaining a Land Feasibilty Study from the County Sanitarian regarding the use of on-site sanitation on each parcel is a condition of approval.

F. Policy No. 38 - Facilities: The property is located in the Portland School District, which can accommodate student enrollment from future houses on the subject property. Although the site adjoins land inside Multnomah County Fire District #20, County Assessment and Taxation records show the site itself as not being taxed by the district. Annexation of the site to the district is a condition of approval. Police protection is provided by the Multnomah County Sheriff's Office. Subject to annexation to Fire District #20, the proposal complies with Policy 38.

5. Purpose and Intent of Land Division Ordinance.

A. MCC 11.45.015 states that the Land Division Ordinance..."*is adopted for the purposes of protecting property values, furthering the health, safety and general welfare of the people of Multnomah County, implementing the Statewide Planning Goals and the Comprehensive Plan adopted under Oregon Revised Statutes, Chapters 197 and 215, and providing classifications and uniform standards for the division of land and the installation of related improvements in the unincorporated area of Multnomah County.*" The proposed land division satisfies the purpose of the Land Division Ordinance for the following reasons:

(1) Subject to approval of cases PRE 23-89, PRE 24-89 and PRE 25-89, the size and shape of the proposed parcels will accommodate proposed uses and development in a

manner that is consistent with the character of the area, and will thereby protect property values.

(2) Finding 4.E indicates that a private well will provide water for future houses on each parcel. A condition of approval assures that adequate provision will be made for on-site sewage disposal on each parcel. Finding 4.F indicates that fire protection is available to the site, subject to annexation to Multnomah County Fire District #20. Finding 4.F also indicates that police protection is available to the site. For these reasons, the proposal further the health, safety, and general welfare of the people of Multnomah County.

(3) Finding 4 indicates that the proposed land division complies with the applicable elements of the Comprehensive Plan. Since the Comprehensive Plan has been found to be in compliance with Statewide Planning Goals by the State Land Conservation and Development Commission as stated in Finding 3.C, the proposed land division complies with the Statewide Planning Goals.

(4) The proposal meets the purpose of *"providing classifications and uniform standards for the division of land and the installation of related improvements"* because the proposal is classified as a Type III Land Division and meets the approval criteria for Type III Land Divisions as stated in Findings 3, 4, and 5. The conditions of approval assure the installation of appropriate improvements in conjunction with the proposed land division.

B. MCC 11.45.020 states that the intent of the Land Decision Ordinance is to..."*minimize street congestion, secure safety from fire, flood, geologic hazards, pollution and other dangers, provide for adequate light and air, prevent the overcrowding of land and facilitate adequate provisions for transportation, water supply, sewage disposal, drainage, education, recreation and other public services and facilities.*" The proposal complies with the intent of the Land Division Ordinance for the following reasons:

(1) The proposal minimizes street congestion because commitment to future improvements to the abutting road

will be required through deed restrictions as a condition of approval ~~in~~ accordance with the Street Standards Ordinance, as stated in Finding 2.

(2) As stated in Finding 4.F, public fire protection will be available to the site subject to annexation to Fire District #20. As stated in Finding 4.C, there are no development limitations that would preclude development of the subject property as proposed. The additional new houses will not significantly increase air pollution levels. For these reasons, the proposal secures safety from fire, flood, geologic hazard, and pollution.

(3) Subject to approval of cases PRE 23-89, PRE 24-89 and PRE 25-89, the proposal meets the area and dimensional standards of the EFU zoning district as explained in Finding 6 and thereby provides for adequate light and air and prevents the overcrowding of land.

(4) Road issues are addressed in Findings 2. Water supply and sewage disposal are addressed in Finding 4.E. Storm drainage is addressed in Condition 4. Education, fire protection and police service are addressed in finding 4.F. Based on the above Findings, the proposed land division facilitates adequate provision for transportation, water supply, sewage disposal, drainage, education, and other public services and facilities.

5. Zoning Ordinance Considerations: The applicable Zoning Ordinance criteria (MCC 11.15) are as follows:

A. The site is zoned EFU, Exclusive Farm, Use District.

B. The following minimum area and dimensional standards apply per MCC 11.15.2016:

(1) The minimum lot size shall be 38 acres, including one-half of the road right-of-way adjacent to the parcel being created, except that, pursuant to MCC 11.15.2010(C), the lot size may be as small as 19 acres when the lot is created under the Land Division Ordinance in conjunction with an approved Farm Management Plan. Parcels 1, 2 and 3 are being proposed under the provisions of the

Land Division Ordinance and, as shown on the Tentative Plan Map, contain 21.1, 25 and 21.5 acres, respectively. The applicant has submitted Farm Management Plans under cases PRE 23-89, PRE 24-89 and PRE 25-89 for Parcels 1, 2 and 3, respectively. Pursuant to Condition 6, endorsement of the final partition map for this land division will occur only after final approval of PRE 23-89, PRE 24-89 and PRE 25-89.

(2) The minimum front lot line length shall be 50 feet. As shown on the Tentative Plan Map, both parcels exceed this requirement.

(3) The minimum yard setbacks are 30 feet front, 10 feet side, and 30 feet rear. As shown on the Tentative Plan Map, the residence on Parcel 2 exceeds all yard requirements and there is adequate area on Parcels 1 and 3 for a future residence on each of those parcels to meet all yard requirements.

Conclusions:

1. Based on Finding 4, the proposed land division satisfies the applicable elements of the Comprehensive Plan.

2 Based on Findings 3 through 5 the proposed land division satisfies the approval criteria for Type III land divisions.

3. Based on Finding 6, the proposed land division complies with the zoning ordinance, subject to approval of cases PRE 23-89, PRE 24-89 and PRE 25-89.

IN THE MATTER OF LD 25-89

MULTNOMAH COUNTY, OREGON
DIVISION OF PLANNING AND DEVELOPMENT

By David H. Prescott
David H. Prescott, Planner

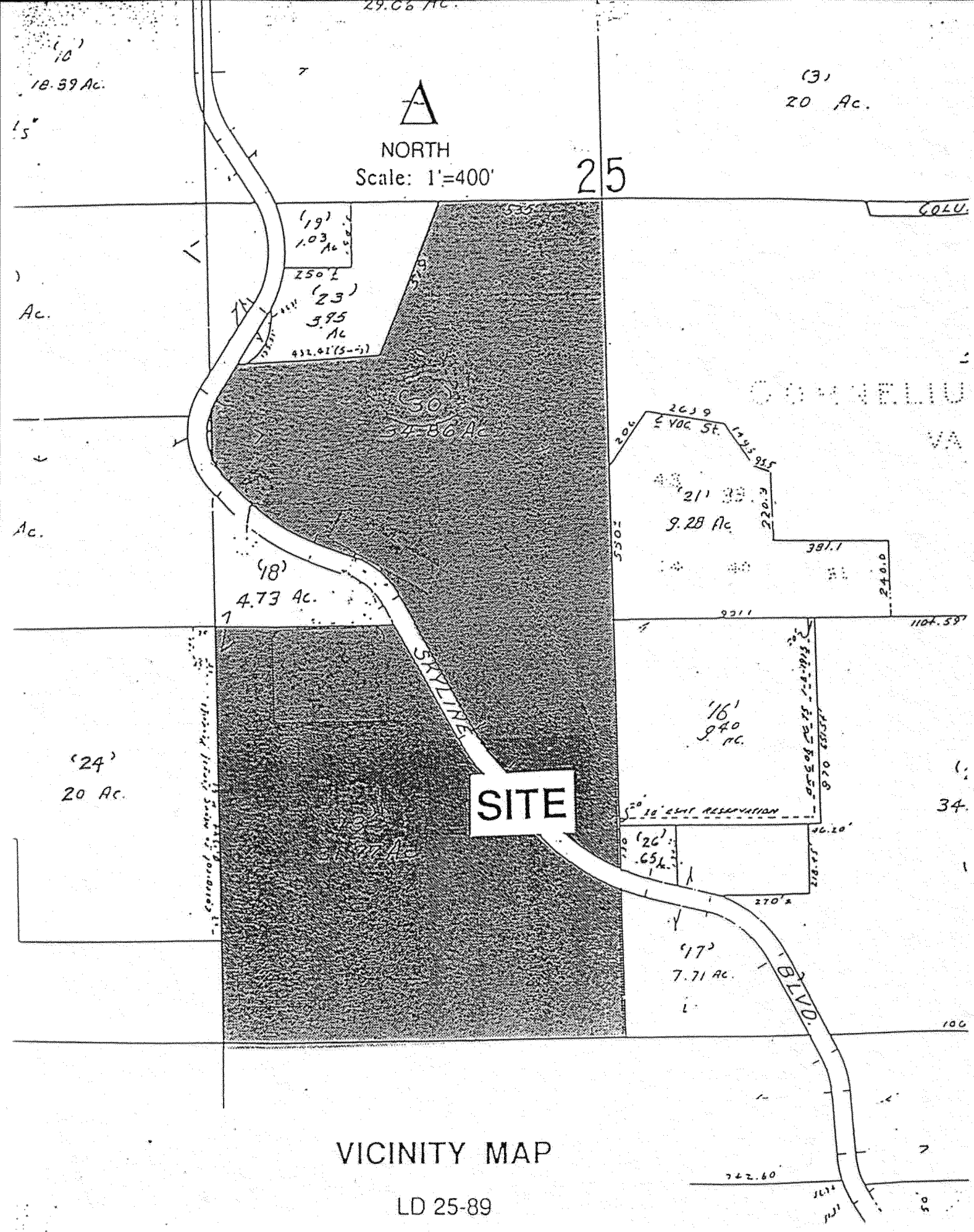
For: Director, Planning & Development

This decision filed with the Director of the Department of Environmental Services on October 25, 1989.

cc: Ike Azar, Engineering Services
Phil Crawford/Mike Ebeling, Sanitarians
John Dorst, Right-of-Way Use Permits
Dick Howard, Engineering Services

DP:mb

NOTICE: This decision may be appealed within ten (10) days under the provisions of MCC 11.45.3880(C).



VICINITY MAP

LD 25-89

13855 N.W. Skyline Boulevard

September 14, 1989

PLANNING DIRECTOR DECISION IN THE MATTER OF PRE 24-89

PROPERTY LOCATION: 13855 NW Skyline Blvd.

LEGAL DESCRIPTION: Parcel '2' of LD 25-89

PROPERTY OWNER: R. Lenske & Manifold Business and Investment
7315 SE 82nd Avenue
Portland 97266

APPLICANT: Western States Development Corporation
20285 NW Cornell Road
Hillsboro 97124

DECISION: APPROVE a resource-related, single family residence on a 21.5 acre lot in the Exclusive Farm Use District, subject to a condition, based on the following findings and conclusions.

CONDITION:

This decision shall become effective ten days following the date of notification of surrounding residents, unless appealed under MCC 11.15.2010(C) (5) .

FINDINGS OF FACT:

1. Applicant's Proposal: Applicant requests approval of a single-family residence in conjunction with a proposed farming operation on this property.

2. Ordinance Considerations: Subsection 11.15.2010(C) authorizes the Planning Director to approve a residence in conjunction with a farm use when it is found that the proposal is:

   A. Located on a lot created under MCC 11.45, Land Divisions, after August 14, 1980, with a lot size less than 76 acres, but not less than 38 acres on Sauvie Island or less than 38 acres but not less than 19 acres elsewhere in the EFU district; and

   B. Conducted according to a farm management plan containing the following elements:

(1) A writt esc ion of a five-year developmen u n. igement plan which describes the proposed cropping or livestock pattern by type, location and area size and which may include forestry as an incidental use;

(2) Soil test or Soil Conservation Service OR-1 soils field sheet data which demonstrate the land suitability for each proposed crop or pasturage use;

(3) Certification by the Oregon State University Extension Service, or by person or group having similar agricultural expertise, that the production acreage and the farm management plan are appropriate for the continuation of the existing commercial agricultural enterprise within the area. For the purposes of this chapter appropriate for the continuation of the existing commercial agricultural enterprise within the area means:

(a) That the proposed farm use and production acreage are similar to the existing commercial farm uses and production acreages in the vicinity, or

(b) In the event the proposed farm use is different than the existing farm uses in the vicinity, that the production acreage and the farm management plan are reasonably designed to promote agricultural utilization of the land equal to or greater than that in the vicinity. Agricultural utilization means an intended profit-making commercial enterprise which will employ accepted farming practices to produce agricultural products for entry into the conventional agricultural markets.

(4) A description of the primary uses on nearby properties, including lot size, topography, soil types, management practices and supporting services, and a statement of the ways the proposal will be compatible with them.

(5) *Exception.* A written description of the farm management program on that parcel as a separate management unit for the preceding five years may be substituted for subsections (a), (b) and (c) above.

3. Site and Vicinity Characteristics: This property is located on the east side of Skyline Blvd. approximately $^3/_4$ south of its intersection with NW Rock Creek Road. The property varies in slope from nearly level to over thrity degrees, and has been used for various agricultural purposes for a number of years. Soils of this and the majority of the surrounding property are Cascade silt loam, plus areas of Delina and Goble silt loam. Those soils have an Agricultural Capability Class of III.

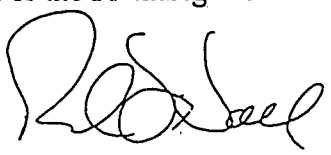
Properties in the surrounding area range in size from less than one to over 80 acres. The majority of the properties are utilized for various forms of agricultureranging from pasture to nursery stock.

4. Proposed Management Plan: The applicant has submitted a proposed management plan for a Christmas tree operation. That plan has been reviewed by Bernard Douglas of Douglas Tree Farm who has 25 years of experience in the Christmas tree business. He indicates that the proposed operation is similar to existing nursery operations in the vicinity

CONCLUSIONS:

1. The applicant has satisfied the approval criteria for a farm-related, single-family residence in the Exclusive Farm Use District through the submission of a proposed five-year management plan which has been certified by Bernard Douglas of Douglas Tree Farm.

For the Planning Director



Robert N. Hall Senior Planner

NOTICE: A Decision of the Planning Director on an application for a Use Under Prescribed Conditions may be appealed by the applicant to the Hearings authority in the manner provided in MCC 11.15.8290 through .8295.

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
GLADYS McCOY • CHAIR OF THE BOARD
PAULINE ANDERSON • DISTRICT 1 COMMISSIONER
GARY HANSEN • DISTRICT 2 COMMISSIONER
RICK BAUMAN • DISTRICT 3 COMMISSIONER
SHARRON KELLEY • DISTRICT 4 COMMISSIONER

February 7, 1992

Kevin Bender, Vice President
Western States Development Corp.
20285 NW Cornell Road
Hillsboro, Oregon 97124

RE: **Lot of Record Status**
Tax Lot 36, Sec. 25, 2N 2W and Parcel 2, Partition Plat 1990-43
(NW Skyline Boulevard)

Dear Mr. Bender:

This is regarding our telephone conversation of Thursday, February 6, 1992 concerning the status of Tax Lot 36, Section 25, T 2N, R 2W (Tax Lot 36). After you spoke with Mark Hess of our staff on Monday, February 3, 1992, you wanted to know whether Tax Lot 36 could stand by itself as a buildable parcel. After reviewing the Zoning Ordinance, I have concluded that Tax Lot 36 cannot stand by itself as a buildable parcel but is aggregated with Parcel 2 of Partition Plat 1990-43 (Parcel 2). The reasons for this conclusion are as follows:

1. Tax Lot 36 and Parcel 2 are both zoned EFU Exclusive Farm Use.

2. Tax Lot 36 and Parcel 2 are contiguous and were both created before February 20, 1990; thus the two properties fall within the provisions of MCC 11.15.2018(A)(3)(a).

3. Tax Lot 36 and Parcel 2 satisfied all applicable requirements when they were created; thus the two properties fall within the provisions of MCC 11.15.2018(A)(3)(b).

4. Tax Lot 36 by itself does not meet the EFU minimum lot size requirement of 38 acres, but when Tax Lot 36 is combined with Parcel 2, the combined acreage exceeds nineteen acres and fall within the provisions of MCC 11.15.2018(A)(3)(c).

5. Tax Lot 36 and Parcel 2 are both held under the same ownership; thus the two properties fall within the provisions of MCC 11.15.2018(A)(3)(d)..

If you have any questions please call me at 248-3043.

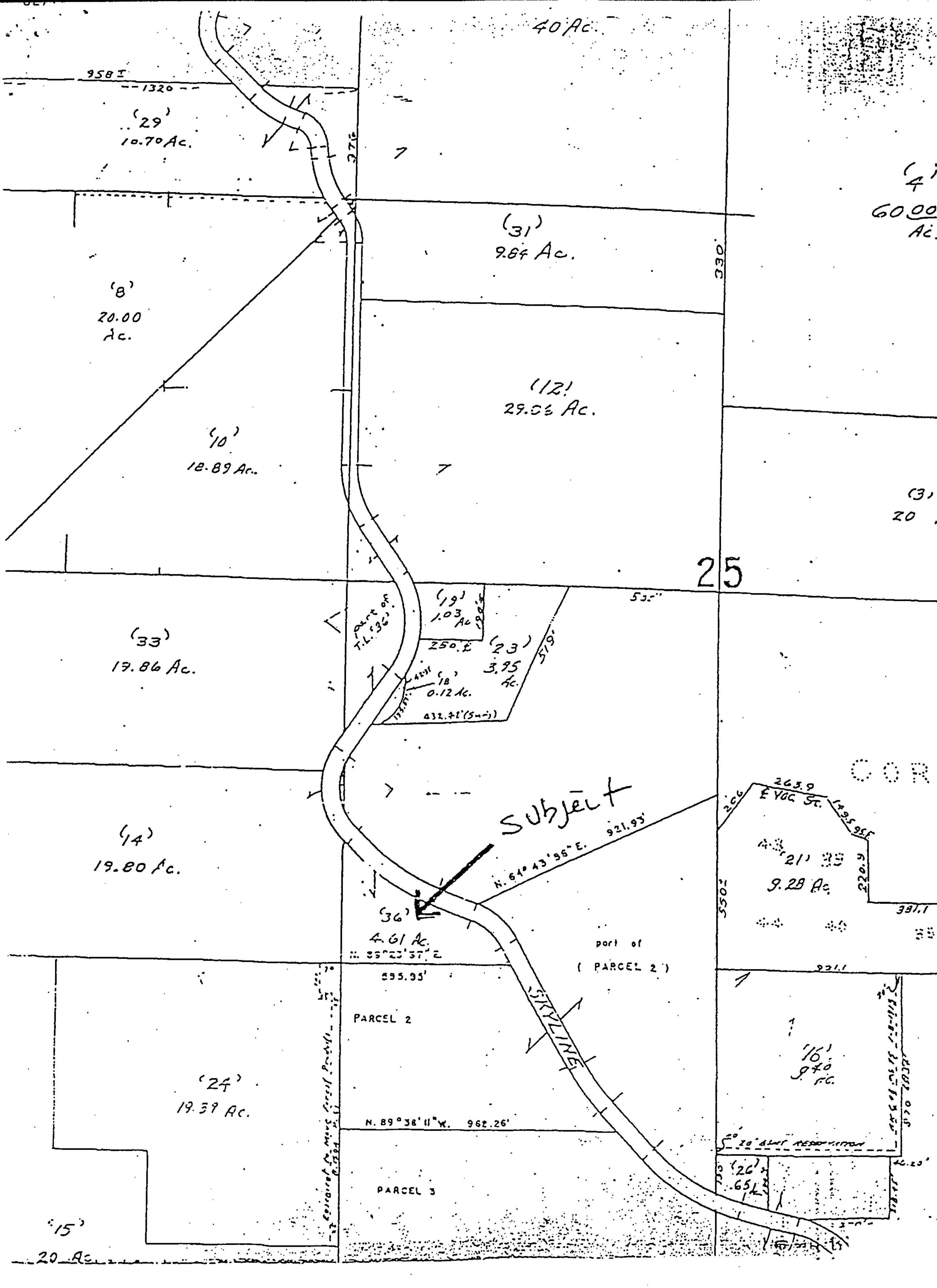
Sincerely,

David H. Prescott

David H. Prescott, AICP
Planner

cc: Mark Hess
R. Scott Pemble

File: LD 25-89a


40 Ac.
958 ±
1320
(29)
10.70 Ac.
(4)
60.00 Ac.
(31)
9.64 Ac.
330
(8)
20.00 Ac.
(12)
29.03 Ac.
(10)
18.89 Ac.
(3)
20
25
(19)
1.03 Ac
part of T.L. 36
(33)
19.86 Ac.
250. ±
(23)
3.95 Ac.
519'
(18)
0.12 Ac.
432.71'
COR
263.9
E YOC St.
Subject
921.93'
N. 64° 43' 36" E.
(14)
19.80 Ac.
(21)
9.28 Ac.
220.9
550
331.1
(36)
4.61 Ac.
N. 89°23'37" E
595.93'
part of (PARCEL 2)
SKYLINE
PARCEL 2
(16)
9.70 Ac.
(24)
19.39 Ac.
N. 89°38'11" W. 962.26'
20' ESMT RESERVATION
(26)
.65
PARCEL 3
(15)
20 Ac.

C. Hearing record. Written minutes must be prepared as required by ORS 192.650. A record of all public hearings must be made and retained in written or electronic form for at least 3 years. If a case is appealed beyond the jurisdiction of the City, the record must be retained until the final disposition of the case. Verbatim transcripts will not be produced unless requested and paid for as provided by Chapter 33.750, Fees.

33.730.110 Ex Parte Contact

A. Private contacts. Prior to rendering a decision, a member of a review body may not communicate, directly or indirectly, with any person interested in the outcome. Should such communication occur, at the beginning of the hearing the member of the review body must:

1. Enter into the record the substance of the written or oral communication; and

2. Publicly announce the content of the communication and provide any person an opportunity to rebut the substance of the contact.

B. Bureau of Planning contact. The Director and Bureau of Planning staff may communicate with applicants, owners, their representatives, citizens, City agencies and other public and private organizations as part of the processing of land use applications.

After the Final Decision

33.730.120 Recording an Approval

To record a final decision for approval, the applicant pays the recording fee to the City Auditor. The City Auditor, in turn, records the final decision in the appropriate county records. The decision must be recorded before the approved use is permitted, any permits are issued, or any changes to the Comprehensive Plan Map or Zoning Map are made.

33.730.130 Expiration of an Approval

(Amended by Ord. No. 165376, effective 5/29/92.)

A. Expiration of unused land use approvals issued prior to 1979. All unused land use approvals issued prior to 1979, except for zoning map or Comprehensive Plan map amendments, where the proposed development is not constructed or where a subdivision or partition is not recorded, are void.

B. When approved decisions become void. All land use approvals, except for zoning map or Comprehensive Plan map amendments, become void under any of the following circumstances.

1. If within 3 years of the date of the final decision a building permit has not been issued; or

2. If within 3 years of the date of the final decision the approved activity has not commenced or, in situations involving only the creation of lots, the land division has not been recorded.

Fred H. Bender
20285 NW Amberwood Drive
Hillsboro, OR 97124
Grantor's Name and Address

Nancy Olsson
20285 NW Amberwood Drive
Hillsboro, OR 97124
Grantee's Name and Address

After recording, return to (Name, Address, Zip):
Nancy Olsson
20285 NW Amberwood Drive
Hillsboro, OR 97124

Until requested otherwise, send all tax statements to (Name, Address, Zip):
Nancy Olsson
20285 NW Amberwood Drive
Hillsboro, OR 97124

SPACE RESERVED FOR RECORDER'S USE

STATE OF OREGON, County of _____ } ss.
I certify that the within instrument was received for record on the ____ day of _____, 19____, at _____ o'clock ____M., and recorded in book/reel/volume No. _____ on page _____ and/or as fee/file/instrument/microfilm/reception No. _____, Records of said County.
Witness my hand and seal of County affixed:

NAME TITLE

By _____, Deputy.

BARGAIN AND SALE DEED

KNOW ALL BY THESE PRESENTS that FRED H. BENDER hereinafter called grantor, for the consideration hereinafter stated, does hereby grant, bargain, sell and convey unto NANCY M. OLSSON hereinafter called grantee, and unto grantee's heirs, successors and assigns, all of that certain real property, with the tenements, hereditaments and appurtenances thereunto belonging or in any way appertaining, situated in Multnomah County, State of Oregon, described as follows, to-wit:

All that portion of the Norhteast Quarter of the Southwest Quarter of Section Twenty-five in Township 2 North, Range 2 West, of the Willamette Meridian, Multnomah County, Oregon, lying and being west of Skyline Boulevard, which is Road No. 1295-C-60' being about 3.07 acres and referred to as Tax Lot 36; and all appurtenances, attachments, easements, fixtures and improvements of every description on or pertaining to said real property.

612 Recording
97087814

(IF SPACE INSUFFICIENT, CONTINUE DESCRIPTION ON REVERSE)

To Have and to Hold the same unto grantee and grantee's heirs, successors and assigns forever.

The true and actual consideration paid for this transfer, stated in terms of dollars, is $ zero ... ① However, the actual consideration consists of or includes other property or value given or promised which is ☐ part of the ☐ the whole (indicate which) consideration.① (The sentence between the symbols ①, if not applicable, should be deleted. See ORS 93.030.)

In construing this deed, where the context so requires, the singular includes the plural, and all grammatical changes shall be made so that this deed shall apply equally to corporations and to individuals.

IN WITNESS WHEREOF, the grantor has executed this instrument this 11th day of June, 1997; if grantor is a corporation, it has caused its name to be signed and its seal, if any, affixed by an officer or other person duly authorized to do so by order of its board of directors.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

Fred H. Bender

STATE OF OREGON, County of Washington) ss.
This instrument was acknowledged before me on June 11th 1997.
by Fred H. Bender
This instrument was acknowledged before me on _____, 19____,
by _____
as _____
of _____

OFFICIAL SEAL
NANCY M. OLSSON
NOTARY PUBLIC - OREGON
COMMISSION NO. 028742
MY COMMISSION EXPIRES OCT. 12, 1997

Nancy M. Olsson
Notary Public for Oregon
My commission expires 10/12/97

BEFORE THE MULTNOMAH COUNTY LAND USE HEARINGS OFFICER

Appeal of Planning Director's Denial of Application of Fred H. Bender for a Lot Line Adjustment) No. PLA 2-97) Affidavit of Nancy Olsson

STATE OF OREGON)
) ss
County of Washington)

I, Nancy Olsson, being first duly sworn do depose and say that:

1. I am the sole fee simple owner of Tax Lot 36, Section 25, T2N, R2W.

2. For valuable consideration, I acquired Tax Lot 36 from Fred Bender.

3. I am not the spouse, child or any other family relation to Fred Bender or to Kevin Bender, Vice President of Western States Development Corp.

4. I am not a partner in any legally constituted partnership nor a member/owner of any legally constituted business entity.

5. Fred Bender and any of his designated representatives or agents are hereby authorized to act on my behalf, as owner of Tax Lot 36, in appealing to all appropriate forums the decision of the Multnomah County Planning Director in file number PLA 2-97.

DATED this 11 day of June, 1997.

Nancy M. Olsson
Nancy Olsson

STATE OF OREGON)
) ss
County of Washington)

Subscribed and sworn to before me this 11 day of June, 1997.

Mildred L. Lewis
NOTARY PUBLIC FOR OREGON
My Commission Expires: May 19, 2001

OFFICIAL SEAL
MILDRED L LEWIS
NOTARY PUBLIC-OREGON
COMMISSION NO. 301339
MY COMMISSION EXPIRES MAY 19, 2001

BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON
FINAL ORDER

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

July 1, 1997

PLA 2-97 Appeal of an Administrative Decision which found that the application for a lot line adjustment did not meet all of the approval criteria.

Property Location: 14007 NW Skyline Boulevard

Property Description: Tax Lot 36, Section 25, T2N, R2W, and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2)

Property Owner:

Tax Lot 36, Section 25, T2N, R2W:
Fred Bender (at time of application)
20285 NW Cornell Road
Hillsboro, OR 97124

Tax Lot 36, Section 25, T2N, R2W:
Nancy Olsson (at time of hearing)
20285 NW Amberwood Drive
Hillsboro, OR 97124

Parcel 2, Partition Plat 1990-43
(consisting of Tax Lots 1 & 2)
Western States Development Corp.
20285 NW Cornell Road
Hillsboro, OR 97124

Applicant:

Fred Bender
20285 NW Cornell Road
Hillsboro, OR 97124

Zoning Designation: Exclusive Farm Use - EFU

Hearings Officer Decision:

Deny appeal and affirm administrative decision, which found that the applicant had not met all of the approval criteria for a lot line adjustment between two contiguous properties in the Exclusive Farm Use zoning district, which properties were identified as Tax Lot 36, Section 25, T2N, R2W, and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2), based on the following findings and conclusions.

PROCEDURAL ISSUES

1. IMPARTIALITY OF THE HEARINGS OFFICER

A. No ex parte contacts. I did not have any ex parte contacts prior to the hearing of this matter. I did not make a site visit.

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

BURDEN OF PROOF

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

SCOPE OF APPEAL

The hearing before the Hearings Officer on a matter appealed shall be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal. The appellant's Notice of Appeal stating the grounds for the appeal of the administrative decision is attached hereto as Exhibit "A" and is incorporated by this reference herein. The specific grounds raised by the applicant will be discussed in the body of this decision.

FACTS

1. APPLICANT'S PROPOSAL

The applicant requests approval of a Lot Line Adjustment between two contiguous properties in the Exclusive Farm Use zoning district, identified as Tax Lot 36, Section 25, T2N, R2W (3.07 acres) and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2) (23.83 acres). At the time of the application, Tax Lot 36 is in the ownership of Fred H. Bender and Parcel 2 was owned by Western States

Development Corp. On June 11, 1997 Fred Bender conveyed his interest in Tax Lot 36 to Nancy Olsson.

2. SITE AND VICINITY INFORMATION

The subject property is located at 14007 NE Skyline Boulevard, in the Exclusive Farm Use zone. The site plan is attached hereto as Exhibit "B", and incorporated by this reference herein.

3. TESTIMONY AND EVIDENCE PRESENTED

A. During and prior to the hearing the exhibits which are listed on the attached Exhibit "C", which is incorporated by this reference herein, were received by the Hearings Officer.

B. Bob Hall testified for the County, summarizing the history of the application and the Administrative Decision and subsequent appeal therefrom.

C. Jeff H. Bachrach, an attorney, submitted oral and written testimony and a legal memorandum in support of the appeal.

D. Ronald E. Sprague, Co-Trustee of the Frederick T. King Trust, testified and presented written evidence that Frederick T. King Trust owned a parcel which was adjacent to Tax Lot 2 of Parcel 2, on Partition Plat 1990-43, and that the adjacent parcel (Lot 24) had the interest in a 16 foot wide roadway easement, the centerline of which was the northern boundary of Tax Lot 2 on Parcel 2. Mr. Sprague wanted to make sure that the County was aware of the easement and that the Partition Plat map 1990-43, dated 1/26/90, failed to show the easement.

ISSUES ON APPEAL

1. **Would approval of the proposed Lot Line Adjustment increase the permitted number of dwellings above that otherwise allowed in the zoning district?**

2. **Was a deed or other instrument creating Parcel 2 recorded with the Department of General Services or in "recordable" form prior to February 20, 1990?**

3. **Are the properties in question under the "same ownership"?**

STANDARDS AND CRITERIA
ANALYSIS AND FINDINGS OF FACT

This is an appeal relating to an Administrative Decision concerning an application for a Lot Line Adjustment. Multnomah County Planner Bob Hall prepared a written decision which discussed relevant criteria and facts, some of which will not be addressed in this opinion. The appeal is related to specific issues raised by the appellant. Those issues and findings which were addressed in the Administrative Decision, but have not been challenged on appeal, are incorporated by this reference herein.

1. **Would approval of the proposed Lot Line Adjustment increase the permitted number of dwellings above that otherwise allowed in the zoning district?**

Findings:

During the appeal hearing Senior Planner Robert Hall indicated that the applicant had not demonstrated that the permitted number of dwellings would not be increased above that otherwise allowed in the district, because the applicant had not addressed the economic test relative to dwellings in conjunction with farm use pursuant to Oregon Administrative Rule 660-33-135.

Mr. Bachrach, the attorney who filed the appeal, indicated during the hearing that he did not feel that the staff had clearly articulated in the staff decision that this criteria was in fact a basis for denial. Mr. Bachrach correctly pointed out that the staff conclusion listed two basis for denial, one of which was that there were no deeds or other instruments creating Parcel 2 of Partition Plat 1990-43, recorded or in recordable form prior to February 20, 1990, and secondly, that Parcel 2 and Tax Lot 36 were in the same ownership. The conclusion does not site the above criteria as a grounds for denial.

During the hearing we took a short recess, during which I reviewed the standards set forth in OAR 660-33-135. Upon resuming the hearing, I indicated that I felt the applicant had in fact met the criteria set forth above. The standard in question does not reference OAR 660-33-135. I do not find OAR 660-33-135 to be applicable in this situation. OAR 660-33-135 relates to dwellings in conjunction with farm use on parcels of at least 160 acres in size. Since the criteria in question relates to lot line adjustments between "lots of record", which by definition do not meet the minimum lot size requirements of the EFU zone, OAR 660-33-135 is not applicable.

The applicant has indicated that there is a dwelling on Parcel 2 that has been in place before the approval of Partition Plat 1990-43. In addition, Parcel 2 has been approved for a farm dwelling under a farm management plan. The proposed adjustment will not affect the farm management plan and related dwelling approval because all of the farm

area that was the basis of the approval remains in the adjusted Parcel 2. There is no dwelling on Tax Lot 36 and application has not been made for a dwelling.

Accordingly, I find that the proposed lot line adjustment will not increase the permitted number of dwellings above that otherwise allowed in this zoning district. The applicant has met this criteria.

2. **Was a deed or other instrument creating Parcel 2 recorded with the Department of General Services or in "recordable" form prior to February 20, 1990?**

MCC 11.15.2018 Lot of Record.

(A) For the purposes of this district, a Lot of Record is:

. . .

(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;

Findings:

Tentative approval of the proposed partition plat that created Parcel 2 of Partition Plat 1990-43 was granted by the Planning Director on October 15, 1989. However, as recognized by ORS 92.040, that tentative approval did not constitute final acceptance by the county of the partition plan which actually created the parcel.

> ORS 92.040 provides in relevant part, ". . . Approval of the tentative plan shall not constitute final acceptance of the plat of the proposed subdivision or partition for recording; however, approval by a city or county of such tentative plan shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition."

Approval of a tentative plan does not constitute final acceptance of a partition plat. If the plat which is later submitted does not comply with the tentative plan approval, the County can require revisions to the proposed plat. If the proposed plat is not submitted within the time frame for approval, the County would have to reject the proposed plat.

It is during the tentative plan stage that discretionary decisions regarding parcel configuration and size are made. Applicants are given the opportunity to submit tentative plans for conceptual approval prior to incurring the cost of substantial engineering and/or survey work inherent in plat approval. Conditions are added to the tentative plan approval which must be met prior to acceptance of the final plat.

MCC 11.45.750 (1990 version) stipulated that plats were not final until recorded. The document that became Partition Plat 1990-43 was submitted for review to the County Surveyor on July 2, 1990. The County Surveyor approved the document on July 17, 1990, and the partition plat was recorded July 19, 1990. The instrument creating Parcel 2 of Partition Plat 1990-43, therefore, was not recorded prior to February 20, 1990.

The appellant argues that the land division approval in October 1989 was an "instrument creating" Parcel 2 in a sufficiently "recordable form" so as to satisfy subsection .2018(A)(2)(a). The question thus becomes when is an instrument creating a parcel in recordable form.

The appellant argues that the staff decision LD 25-89 could have been recorded, yet cited no authority for that assertion. The act of recording a document generally has no effect unless the recordation is specifically required or authorized by statute. In this instance, the relevant statutes are the subdivision and partition laws set forth in ORS Chapter 92. It is the provisions of ORS Chapter 92 that determine when a partition plat is in "recordable form". It is the partition plat, not the conditional tentative plan approval, that "created" the parcels.

In order for a partition plat to be "recordable", the plat must have been surveyed. ORS 92.050. That statute also requires that the survey and plat of the partition be made by a registered professional land surveyor. This section also sets forth technical requirements regarding the details to be set forth on the plat and requires that locations and descriptions of all monuments be set forth on the plat.

The plat must have a surveyor's certificate, together with the seal and signature of the surveyor having surveyed the land represented on the plat, to the effect that the surveyor has correctly surveyed and marked the proper monuments, the lands as represented. ORS 92.070.

In addition, pursuant to ORS 92.075, in order to partition any property, the declarant shall include, on the face of the partition plat, a declaration, taken before a notary public or other person authorized by law to administer oaths, stating that declarant has caused the partition plat to be prepared and the property partitioned in accordance with the provisions of ORS Chapter 92. That dedication/declaration on Partition Plat 1990-43 was not signed until March 15, 1990.

ORS 92.100 provides that before any partition plat can be recorded, a partition plat must be approved by the County Surveyor before it is recorded. The surveyor reviews the plat to determine if the requirements of ORS Chapter 92 for recording the plat have been met. Without the signature of the County Surveyor, the partition plat cannot be recorded, according to the subdivision laws. Thus, prior to the affixing of the signature by the County Surveyor on the partition plat, the partition plat is not in "recordable form".

The tentative plan approved by LD 25-89 did not constitute acceptance of the partition plat, nor was it an instrument in recordable form which created a parcel. The tentative plan had not been surveyed and did not contain any legal descriptions for the proposed parcels. LD 25-89 was simply a land use approval which authorized the next step of a two-step process. However, at any point in that process, if the applicant had failed to meet any of the conditions or submit the partition plat in accordance with the requirements of the tentative plan, that partition plat would not have been accepted. The conditional tentative plan approval was not a recordable document which created a parcel.

A review of Partition Plat 1990-43 indicates that the partition plat was not in recordable form until July 17, 1990, the date on which the Multnomah County Surveyor affixed his signature to the partition plat.

Accordingly, while it is clear that Tax Lot 36 was a lot of record as of February 20, 1990, I find that Parcel 2 of Partition Plat 1990-43 was not a legal lot of record as of February 20, 1990. The applicant has failed to meet this approval criteria.

3. Are the properties in question under the "same ownership"?

Findings:

Both Tax Lot 36, Section 25, T2N, R2W and Parcel 2 Partition Plat 1990-43 are legally created lots and are discrete units of land as recognized by ORS 92.017. Tax Lot 36, Section 25, T2N, R2W was not required to be included in Partition Plat 1990-43 due to its discrete nature, not its ownership.

The Planning staff determined that Tax Lot 36, Section 25, T2N, R2W and Parcel 2, Partition Plat 1990-43 were not separate Lots of Record as defined in MCC 11.15.2018, because they are in the same ownership.

Fred H. Bender (20285 NW Cornell, Hillsboro, OR 9712) is registered with the Oregon Secretary of State Corporation Commission as the president of Western States Development Corporation (registration #210665-19). Staff also found that Western States Development Corporation owns Tax Lots 1 & 2 of Parcel 2, Partition Plat 1990-43 and Fred H. Bender owns Tax Lot 36, Section 25, T2N, R2W.

In order to qualify as a lot of record, a parcel of land cannot be contiguous to another substandard parcel or parcels under the same ownership. MCC 11.15.2018.

MCC 11.15.2018(B)(3) provides:

> "(3) *Same ownership* refers to parcels of which greater than possessory interests are held by the same person or persons, spouse, minor aged child, single partnership, or business entity separately or in tenancy in common."

The definition of same ownership requires several things. The ownership must be of greater than possessory interest. The interest must be held by the same person or persons, spouse, minor aged child, single partnership, or business entity separately or in tenancy in common. Thus, if an individual owned property with a spouse or a child or in partnership, separately or as tenants in common, you would have the "same ownership". However, where an individual owns one parcel of property and a corporation, a separate and distinct legal entity, owns another piece of property, the two parcels are not in the "same ownership".

Staff has indicated that the Board of County Commissioners has previously found *same ownership* as defined by MCC 11.15.2062(B)(3) to include a family trust with a husband and wife as trustee to be the equivalent of the term spouse in the same definition. Therefore, the Board required a parcel owned by an individual to be combined with contiguous property controlled by a trust, of which one of the trustees was the individual's spouse. 11.15.2018(B)(3) is identical in wording to that of MCC 11.15.2062(B)(3).

However, a family trust is significantly different than a corporation. A family trust is generally used as an estate planning device to transfer property to a future generation without the necessity of going through probate. The individual establishing the trust or the trustor often retains a possessory interest in the property transferred during his or her life.

That is a different situation from corporate ownership of an asset. As the appellant points out in their Memorandum in Support of Appeal, staff's interpretation is contrary to ORS Chapter 60, which recognizes that a corporation is a distinct and separate entity from its individual owners. Accordingly, I find that the properties are not in the same ownership.

Since I find that the properties, as of the date of the application, were not in the same ownership, I will not rule on the effect of the purported transfer of the property to Nancy Olsson on June 11, 1997. Accordingly, I will not discuss the practical or legal effect of the applicant's effort to convey Tax Lot 36 during the pendency of this application.

Accordingly, I find that the two parcels in question were not in the "same ownership" within the meaning and context of MCC 11.15.2018.

CONCLUSION

I find that Parcel 2 was not a lot of record as of February 20, 1990 on the grounds and for the reasons that the instrument (i.e., partition plat) which created Parcel 2, was neither recorded nor in "recordable form" as of February 20, 1990. Therefore, I affirm the Planning Director's decision denying a request for a property line adjustment between Tax Lot 36, Section 25, T2N, R2W, and Parcel 2, Partition Plat 1990-43 (consisting of Tax Lots 1 & 2). The appeal is denied and the Planning Director's decision denying the request for the property line adjustment is affirmed, as discussed herein.

IT IS SO ORDERED, this 1st day of July, 1997.

JOAN M. CHAMBERS, Hearings Officer

MULTNOMAH COUNTY

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

NOTICE OF APPEAL
ADMINISTRATIVE DECISION

1. Name: Bachrach (Last), H. (Middle), Jeff (First)
2. Address: 1727 NW Hoyt Street (Street or Box), Portland (City), OR 97209 (State and Zip Code)
3. Telephone: (503) 222 - 4402
4. If serving as a representative of other persons, list their names and addresses:
   Of attorneys for applicant/appellant, Fred H. Bender.
5. What is the decision you wish reviewed (*e.g.*, denial of a minor variance, approval of a Greenway Permit, *etc.*)?
   Planning Director's denial of PLA 2-97 property line adjustment.
6. Date the decision was filed with the Director of the Department of Environmental Services: May 1, 19 97
7. Describe specific grounds relied on for reversal or modification of the decision. (*use additional sheets if necessary*)
   See attached notice of appeal.

Signed: [signature] Date: May 12, 1997

Staff Use Only

Notice of Appeal Fee = $300.00

EXHIBIT A Page 1 of 3

Received by: Date: Case No.

97 MAY 12 PM 3:42 RECEIVED
COUNTY PLANNING SECTION

BEFORE THE MULTNOMAH COUNTY LAND USE HEARINGS OFFICER

Appeal of Planning Director's Denial of Application of Fred H. Bender for a Lot Line Adjustment.	))))	No. PLA 2-97 Notice of Appeal (Specific Grounds for Reversal)

Pursuant to MCC 11.15.8290(B)(3), this memorandum is submitted on behalf of the applicant/appellant to set out the specific grounds relied on to request reversal of the Planning Director's decision. The decision being appealed denied the requested lot line adjustment based on the following two findings:

1. Parcel 2 of Partition Plat 1990-43 is not a lot of record because there was not "a deed or other instrument creating the parcel ... in recordable form prior to February 20, 1990." MCC 11.15.2018(A)(2)(a).

2. The two parcels at issue are under the "same ownership," as that term is applied by the MCC 11.15.2018(B)(3) and 11.15.2018(A)(2)(d).

The two findings summarized above are based on incorrect interpretations and applications of the applicable county provisions and state law. Therefore, the Planning Director's decision should be reversed.

More specifically, the decision's interpretation of MCC 11.15.2018(A)(2)(a) is incorrect as a matter of law; it is contrary to both prior county actions and ORS Chapter 92, Chapter 205 and case law thereunder. Moreover, the decision's conclusion regarding the lot of record status of Parcel 2 is based, in part, on the mistaken assumption that the future siting of a dwelling on Parcel 2 is subject to the requirements of OAR 660-33-35. That is incorrect. OAR 660-33-35 is

not applicable because Parcel 2 has a vested right to site a dwelling pursuant to the farm management plan that was approved by the county's decision in PRE 24-89, September 14, 1989.

The conclusion that the two parcels are in the same ownership is based on an incorrect interpretation and application of the county code. Moreover, the county's interpretation and application of the code's "same ownership" provision violates ORS Chapter 60 and common law protections afforded to corporations.

The appellant intends to submit a more detailed legal memorandum to the hearings officer in advance of the hearing.

DATED this 12th day of May, 1997.

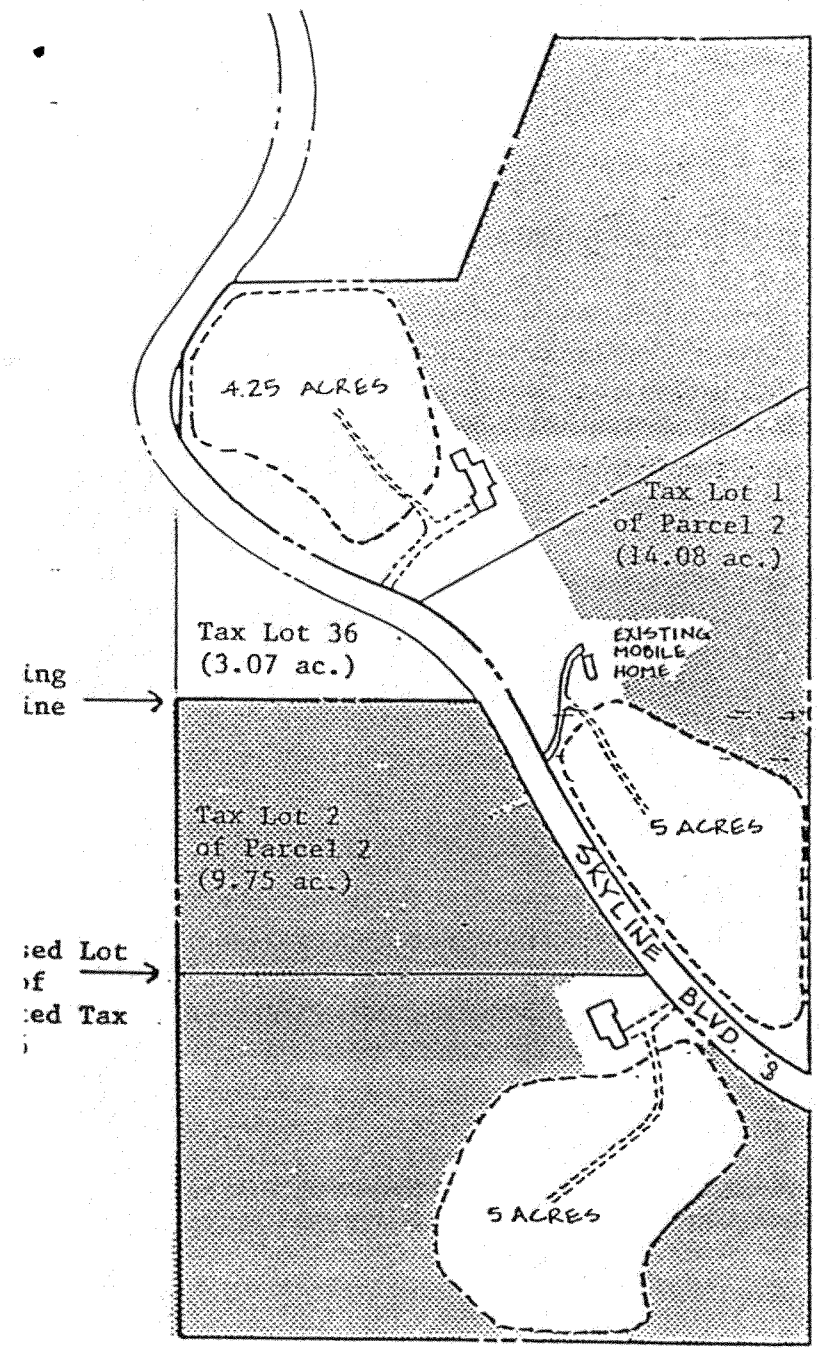
Respectfully submitted,

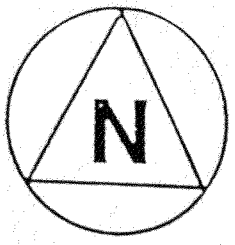
O'DONNELL RAMIS CREW
CORRIGAN & BACHRACH

By: _____
Jeff H. Bachrach, OSB #84402
Of Attorneys for Applicant/Appellant,
Fred H. Bender

jhb\western\lot36\Appeal.P01

EXHIBIT, A Page, 3 of 3





SCALE: 1" = 400'
APRIL 22, 1989

LEGEND

- XMAS TREES
- FOREST & BRUSH
- EXISTING ROAD
- PROPOSED ROAD
- HOMESITE

SITE PLAN

OR:
WESTERN STATES DEVELOPMENT CORP.
20285 N.W. CORNELL ROAD
HILLSBORO, OREGON 97124
PHONE: 645-5544

TAX LOTS 13 & 30
SECTION 25, T2N, R2W, W.M.

PLANNING RESOURCES, INC.
Land Use & Site Planning Services
3681 S.W. Carman Drive
Lake Oswego, Oregon 97035
(503) 636-5422

EXHIBIT B Page 1 of 1

List of Exhibits
PLA 2-97

"A" Applicant's Submittals

A1 General Application form (2 pages)
A2 Application for EFU Lot Line Adjustment
A3 Property Owner Consent Form
A4 Application Checklist with post it note from Alan young
A5 A & T printout and ownership map (2 pages)
A6 Applicant's narrative dated February 28, 1997 with maps (6 pages)
A7 Craven v. Jackson County (submitted by applicant)
A8 Parsons v. Clackamas County (submitted by applicant)
A9 Letter from Will Selzer
A10 Revised narrative and cover letter from Jeff Bachrack (9 pages)
A11 Legal Memorandum in Support of Appeal

"B" Notification Information

B1 Decision of Planning Director for PLA 2-97
B2

"C" Multnomah County Items

C1 Excerpts from ORS Chapter 92 (5 pages)
C2 A & T deed history for properties with cover note from Barry Benson (15 pages)
C3 Recorded copy of Partition Plat 1990-43
C4 Copy of recorded easement across the northerly portion of that portion of Parcel 2 west of Skyline Blvd., submitted by Ron Sprague on 6/3/97 (7 pages)

"D" Appeal Material

D1 Notice of Appeal with narrative and cover letter from Jeff Bachrach
D2 Affidavit of Posting

"E" Documents Submitted at 6/18/97 Public Hearing

E1 Letter and attachments from Ron Sprague

EXHIBIT C Page 1 of 1

O'DONNELL RAMIS CREW CORRIGAN & BACHRACH

JEFF H. BACHRACH
PAMELA J. BERRY
MARK L. BUSCH
D. DANIEL CHANDLER ++
DOMINIC G. COLLETTA**
CHARLES E. CORRIGAN*
STEPHEN P. CREW
MARTIN C. DOLAN
PAUL C. EISNER
GARY F. FIRESTONE*
WILLIAM E. GAAR
G. FRANK HAMMOND*
KENNETH D. HELM
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PLEASE REPLY TO PORTLAND OFFICE

CLACKAMAS COUNTY OFFICE
181 N. Grant, Suite 202
Canby, Oregon 97013
TELEPHONE: (503) 266-1149

VANCOUVER, WASHINGTON OFFICE
First Independent Plaza
1220 Main Street, Suite 431
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JAMES M. COLEMAN
SUSAN J. WIDDER
SPECIAL COUNSEL

* ALSO ADMITTED TO PRACTICE IN WASHINGTON
** ALSO ADMITTED TO PRACTICE IN CALIFORNIA
++ ALSO ADMITTED TO PRACTICE IN WASHINGTON AND MONTANA

July 14, 1997

Mr. Stuart Farmer, Senior Administrative Analyst
Multnomah County Transportation and
Land Use Planning Division
2115 S.E. Morrison , Room 109
Portland, OR 97214

Re: Postponement of Appeal Hearing on PLA 2-97

Dear Mr. Farmer:

This firm represents the applicant Fred H. Bender in PLA 2-97. With this letter we are requesting a postponement of the appeal hearing scheduled for July 15, 1997.

The applicant agrees to stay the 120-day clock on this application until a new hearing date set no later than September 16, 1997.

Please inform the Board of this request. Thank you.

Sincerely,

G. William Selzer
Legal Assistant

cc: Jeff H. Bachrach
Fred H. Bender