

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

In the Matter of Affirming the Hearing Officer)	FINAL ORDER
Decision for Land Use Planning Cases)	97- <u>213</u>
CS 3-97 and PLA 5-97 and adopting)	
Supplemental Findings.)	

WHEREAS, The record in this proceeding includes the record before the Hearings Officer, written submissions to the Hearings Officer not admitted by the Hearings Officer but deferred to a possible de novo appeal hearing, and written and oral material submitted to the Board prior to and at the Board hearings.

WHEREAS, The Board opened a de novo hearing on October 14, 1997 for an appeal of the Hearing Officer's decision for these cases and continued the hearing at appellants' request to October 28, 1997. At the continued hearing the Board received evidence, heard argument and made a tentative decision, subject to adoption of supplemental findings and an order. Supplemental Findings are adopted in support of the Board's decision and Order affirming the Hearings Officer's decision and denying this appeal, and

WHEREAS, The supplemental findings incorporate by reference the decision and findings of the Hearings Officer dated August 14, 1997. In the event of conflict, the supplemental findings control.

THEREFORE, IT IS HEREBY ORDERED that the Board affirms the decision of the Hearings Officer approving an application to modify a Community Service use approval and for a lot line adjustment, subject to the conditions imposed by the Hearings Officer. The Board denies the appeal from that decision and adopts the following supplemental findings which respond to the grounds for appeal set forth in a letter from the appellants' attorney dated September 5, 1997 attached to their Notice of Review and addressed below.

SUPPLEMENTAL FINDINGS

Grounds for Appeal

1. "The Hearings Officer mistakenly found compliance with Code § 11.15.2224(B) and Plan Policy 2."

Board Finding

There is no fixed minimum lot size for Community Service uses. Instead, MCC § 11.15.2224 sets forth minimum lot size criteria which must be satisfied for any proposed Community Service lot, whether greater than, equal to or lesser than the 5 acre lot size

specified for some purposes in the RR zone. The RR zone does not prescribe a “development” density limitation of 5 acres per development, as contended by appellants. This decision authorizes a 2.8 acre parcel with a Community Service use (Lot 31) and a 11.52 acre parcel (Lot 32). This decision determines that the 2.8 acre parcel satisfies the lot size criteria for the existing Community Service reservoir use. Lot 32 will be large enough to partition into two parcels greater than 5 acres each, each of which could support a single family dwelling, if all applicable requirements are satisfied. However, that fact is not directly relevant to this application.

The presence of a Community Service use on the Water District parcel does not prevent uses allowed by right in the RR district, subject to satisfying all applicable standards. Although the parcel prior to the lot line adjustment was less than 5 acres, assuming that it qualified as a lot of record, a single family dwelling primary use could have been approved on the parcel. After the lot line adjustment, it will no longer be a lot of record so that a lot size variance would be required before a dwelling could be approved. To further assure that there will be no future approval of a dwelling on the parcel without the consent of the County, the applicant offered and the Hearings Officer imposed a condition requiring recordation of a deed restriction preventing any non-reservoir related development of the parcel without the prior approval of the County.

As the Hearings Officer correctly concluded, it is not the reduction of size of Lot 31 that presents the possibility of a new dwelling on the property north of the appellants’ home. A dwelling has been and will continue to be permissible on that property, subject to satisfying all applicable standards.

The Board disagrees with appellants’ interpretation of the term “use” and agrees with the Hearing Officer’s interpretation of the term. The Hearings Officer did not find that Policy 2 is inapplicable. Instead, she found that no new use is proposed on the applicant’s property that could give rise to “deleterious effects”.

The Board understands that the appellants’ primary concern is with the potential for a new dwelling on the property immediately north of their house that will be transferred to Lot 32. The RR zone permits as a primary use a single family dwelling and imposes minimum yard setback dimensions of 10 to 30 feet. Plan Policy 2 does not require the County to impose greater setback limitations for a primary use allowed by right in the zone district. In the absence of evidence demonstrating impacts different from those of any other single family development in the zone district, it is likely that additional setback restrictions would be unenforceable or constitute an uncompensated taking of property. In any event, consideration of a modification of the setback requirements can only be evaluated in connection with a proposed use on the portion of the applicant’s property that will be transferred to Lot 32. No use is proposed on that property in this application.

At the hearing, the appellant testified about adverse impacts of the existing reservoir use created by trespassers on the shared access road and on the reservoir property. This evidence is arguably not within the grounds presented for appeal. However, the Board finds:

- a) Nothing in the approvals granted hereby could possibly increase such impacts, and

- b) Because the property closest to the appellants' house will be separated from the reservoir property and placed in private ownership it is likely that unpermitted public use will decrease, particularly if the property is developed and used as a residential site.
2. "The Hearings Officer mistakenly found that the application complied with MCC § 11.15.7015(A)."

Board Finding

Appellants' contest the Hearings Officer's finding that the proposal is consistent with the character of the area based upon the assertion discussed above that it permits development at a higher density than allowed in the RR district. This contention is fully addressed in the Hearings Officer's findings and in the supplemental findings in 1. above.

3. "The Hearings Officer mistakenly found that the application complied with MCC § 11.15.2224."

Board Finding

Appellants state that MCC § 11.15.2224 allows for a reduction in lot size below the 5 acre minimum. The Board disagrees with the appellants because MCC 11.15.2224 sets forth the criteria for establishing the minimum lot size for conditional uses on a case by case basis, without regard to the 5 acre provision, and could require greater than 5 acres in appropriate circumstances. Appellants state that the 1991 approval of the reservoir as a Community Service use created an overlay zone on the site. A Community Service use does not amend the zoning map and therefore does not create an overlay zone. MCC § 11.15.7010(G). The notation of a CS approval on the map is permitted for identification purposes.

The Board finds the following:

- a) MCC § 11.15.2224 establishes minimum lot sizes for conditional uses listed in MCC § 11.15.2212;
- b) A Community Service use is a conditional use listed in MCC § 11.15.2212;
- c) Nothing in MCC 11.15.2212 or .2224 require Community Service uses to receive an additional Conditional Use permit because Community Services are conditional uses;
- d) Community Service uses listed in MCC 11.15.2212(A) are processed and approved pursuant to MCC 11.15.7005 to .7041 (Community Service) while the conditional uses listed in MCC 11.15.2212(B) are processed and approved pursuant to MCC 11.15.7105 to .7140 (Conditional Uses);
- e) The reservoir received Community Service use approval in 1991 but did not receive a conditional use permit; and

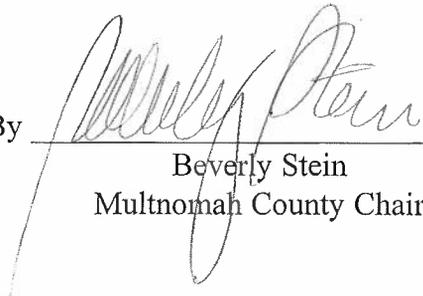
4. "The Hearings Officer mistakenly found compliance with Code § 11.15.2218(C) regarding maximum structure height."

Board Finding

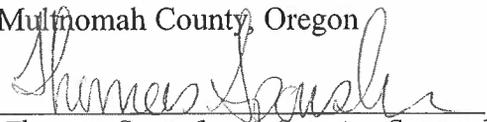
The Board concurs with the conclusion of the Hearings Officer that if the reservoir structure was constructed in violation of its approval and code requirements, then the appropriate remedy is a zoning enforcement action. Nothing connected with this application would change the affect of a height violation on appellants' property, if any violation exists. However, the Board also agrees with the Hearings Officer that the applicant has demonstrated that the reservoir satisfies the height limitation requirements of the zone. The appellants have presented no evidence refuting the applicant's evidence of compliance.

Dated this 18th day of December, 1997.



By 
Beverly Stein
Multnomah County Chair

Reviewed: Sandra N. Duffy
Chief Assistant County Counsel
for Multnomah County, Oregon

by 
Thomas Sponsler, County Counsel



MULTNOMAH COUNTY

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Transportation and Land Use Planning Division
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DECISION OF HEARINGS OFFICER

Case File: CS 3-97 and PLA 5-97

Hearing Date: July 16, 1997

Hearings Officer: Liz Fancher

WHAT: Modification of prior Community Service approval to reduce the size of the Tualatin Valley Water District reservoir property from 4.88 acres to 2.8 acres (CS 3-97) and add the remainder of the property to the adjacent property to the north in a property line adjustment request (PLA 5-97). Approval of the property line adjustment would increase the area of the lot to the north from 9.48 acres to 11.52 acres.

PROPERTY LOCATION: Address: 4280 NW North Road
(CS 3-97): Lot 32, Bonny Slope Subdivision, Tax Acct. # R 09060-2440
(PLA 5-97): Lot 31, Bonny Slope Subdivision, Tax Acct. # R 09060-2420
Lot 32, Bonny Slope Subdivision, Tax Acct. # R 09060-2440

WHO: *Applicant:* Tualatin Valley Water District
Post Office Box 745
Beaverton, OR 97075

Lot 32, Bonny Slope
Property Owner: Tualatin Valley Water District
Post Office Box 745
Beaverton, OR 97075

Lot 31, Bonny Slope
Property Owner: Wayne and Mona West
Post Office Box 482
Beavercreek, OR 97004

ZONING DISTRICT: Rural Residential (RR), Community Service (CS)

Hearings Officer Decision: Approve, subject to compliance with specific conditions, the proposal to modify prior Community Service approval to reduce the size of the Tualatin Valley Water District reservoir property from 4.88 acres to 2.8 acres (CS 3-97) and add the remainder of the property to the adjacent property to the north in a property line adjustment request (PLA 5-97). Approval of the property line adjustment would in-

crease the area of the lot to the north from 9.48 acres to 11.52 acres, all based on the findings and conclusions, contained herein.

CONDITIONS:

1. The applicant shall file the deed restrictions proposed by the Applicant in this application, to restrict future development on proposed Tract 1 (the water district property). The restrictions shall be approved as to form by the County Counsel's Office and recorded by the applicant in the deed records of the County Clerk's Office.
2. The applicant shall complete the process described in the *Applicant's and Surveyor's Instructions for Finishing a Lot Line Adjustment*.

FORMAT OF DECISION

The Hearings Officer has used the staff report prepared for this application as a starting point for writing this decision. The staff report and this decision reference the statements made by the applicant and adopt those findings as findings in support of this decision, except where noted otherwise in this decision. The sections which begin with the designation "FINDINGS" contain the findings of the Hearings Officer that are added to the findings provided by the applicant. In the event of conflict, the findings of the Hearings Officer control.

RECORD OBJECTION BY OPPONENTS

On July 30, 1997 new evidence and legal argument was submitted into the record by Lawrence R. Derr on behalf of Wayne West, the owner of Tax Lot 31. On July 30, 1997, the record was closed to all parties except for the applicant. Mr. West is not the applicant in this matter. As a result, the information submitted by Mr. Derr is not admissible and is rejected by the Hearings Officer. Mr. Derr requested that the Hearings Officer reopen the record and admit this evidence. I decline to do so as reopening the record would delay the processing of this land use application. If this decision is appealed, Mr. Derr may enter his comments into the record at that time.

On July 30, 1997, the Hearings Officer received new evidence and legal arguments from Kevin Hanway, on behalf of the applicant. The Hearings Officer is required by ORS 197.763 (6)(e) to accept written argument from the applicant to and through July 30, 1997. The Hearings Officer is not, however, allowed to accept new evidence from the applicant. The materials submitted by Mr. Hanway include legal argument and new evidence. As the Hearings Officer found from her review of the evidence, excluding Mr. Hanway's final submittals, that approval of this application was warranted, she did not consider any part of Mr. Hanway's July 30, 1997 documents in making her decision of this matter. The documents submitted by Mr. Hanway are, however, properly part of the record in this matter.

DESCRIPTION OF PROPOSAL, SITE AND VICINITY:

1. ***Applicant's Description of Proposal:*** "Tualatin Valley Water District (Applicant) is a water district serving over 135,000 residents of Washington County. Applicant is the owner of Tax Lot 32, on which it has located a reservoir. The concrete reservoir, with a capacity of 3 million gallons, is partially buried. Applicant proposes a property line adjustment to sever two acres (tract 2) of surplus property from the rear portion of its lot and a

small area (tract 2A) at the northwest corner of the reservoir site. Those areas would be transferred to the owner of Tax Lot 31. Because Tax Lot 31 could, after the adjustment, potentially qualify to partition its lot, this property line adjustment application must be handled as a conditional use. No development or partition is planned at this time by the water district or the owner of Lot 31.”

FINDINGS: The applicant is required to obtain approval of a modification of its previously issued conditional use permit for a community service use because the applicant is modifying the approved lot size of its property. The size of a parcel in a community service zone is determined during conditional review based upon the application of subjective factors. The current parcel size for the Tualatin Valley Water District property was accepted by the County as appropriate in 1986 and 1991 by the County’s approval of CS-3-86 and CS-3-86a.

Approval of the lot line adjustment is required by MCC 11.45.115. Whether the lot line adjustment results in creating a parcel which could potentially qualify for a partition appears to be irrelevant to whether a person is required to file for County land use approval of the adjustment.

2. Applicant’s Description of Site and Vicinity: “The site is located on the east side of NW North Road, near where that road becomes NW East Road. The site is primarily covered with dense brushy growth and small trees. The land slopes generally to the west, with elevations ranging from approximately 950 feet at the northeast corner to approximately 670 feet at the southwest corner. The reservoir was constructed with its base at an elevation of approximately 775, rising to a maximum elevation of approximately 820 feet. The reservoir area is fenced.

Surrounding properties to the north, west and south are in the Bonny Slope subdivision. This 1923 plat divided the area into roughly 5-acre tracts. The area is characterized by steep terrain, with brush or forest cover. Many of the lots have single family homes; however, most of the Bonny Slope lots immediately adjacent to the subject site remain vacant. A house is located on the lot immediately to the south of the subject site.

Lands to the east are within the City of Portland. These areas are generally upslope from the reservoir site. They are primarily wooded, undeveloped hillsides, and are designated for low density residential uses.”

ZONING CODE (MCC 11.15) APPROVAL CRITERIA:

1. DIMENSIONAL REQUIREMENTS:

RURAL RESIDENTIAL DISTRICT (MCC 11.15.2218 Dimensional Requirements):

(A) Except as provided in MCC .2220, .2222, .2224, and .7720, the minimum lot size shall be five acres.
* * *

(B) Minimum Yard Dimensions
* * *

Rear 30 Minimum Front Lot Line Length - 50 feet

COMMUNITY SERVICE OVERLAY (MCC 11.15.7025 Restrictions)

A building or use approved under MCC .7020 through .7030 shall meet the following requirements:

- (A) **Minimum yards in EFU, CFU, F-2, MUA-20, MUF, RR, . . . and R-10 Districts:**
- (1) **Front Yards shall be 30 feet.**
 - (2) **Side Yards for one-story buildings shall be 20 feet; for two story buildings, 25 feet.**
 - (3) **Rear yards shall be as required in the district.**

Applicant's Response:

"The location of existing reservoir exceeds all yard requirements. No new improvements are proposed. No minimum lot size is specified for community service uses. Applicant has no plans to expand storage capacity at this site. No improvements are located on or proposed on the portions of the parcel proposed for adjustment and transfer to Lot 31."

2. LOT AREA REQUIREMENTS (MCC 11.15.2224 Lot Sizes for Conditional Uses):

The minimum lot size for a conditional use permitted pursuant to MCC .2212, except (B)(8) thereof, shall be based upon:

- (A) **The site size needs of the proposed use;**

Applicant's Response:

"Applicant has constructed a 3 million gallon concrete water reservoir on the site. The reservoir occupies the western portion of the site, approximately 510 feet from the current rear lot line. After the proposed adjustment, the reservoir will be 130 feet from the adjusted rear lot line, which is more than an adequate setback to accommodate any activities related to the reservoir. This site was selected because it provided the elevation needed to provide adequate gravity-feed service from the reservoir to its service territory. Applicant does not have plans for expansion of the existing reservoir, or any additional reservoirs, making the eastern portion of the lot superfluous for its needs. The adjusted portions of the site would become part of Lot 31, which already exceeds the minimum lot area for this district."

- (B) **The nature of the proposed use in relation to the impacts on nearby properties; and**

Applicant's Response:

"No changes are proposed in the use of applicant's property. The reservoir is an unmanned reservoir operation which has no significant impacts on nearby properties. Trips to and from the site are limited to occasional inspection and maintenance by district employees. Potential drainage impacts have been addressed through the construction of drainage ditches, perimeter drains, and an overflow dissipation basin. Tract 2A has been located to assure that the dissipation structure is not affected by any improvements made for access to Lot 31. Potential visual impacts from the use have been minimized by placing the reservoir partially underground. No use is proposed for Lot 31. The portions of Lot 32 transferred to Lot 31 would revert to the RR District designation."

FINDINGS: The Hearings Officer agrees that the nature of the community service use is not being changed by this application. The change requested will bring private property ownership closer to the east side of the re-

servior but the person impacted by that change is one of the two owners who have agreed to the boundary line adjustment.

(C) Consideration of the purposes of this district (MCC 11.15.2202 Purposes):

The purposes of the Rural Residential District are to provide areas for residential use for those persons who desire rural living environments; to provide standards for rural land use and development consistent with desired rural character, the capability of the land and natural resources; to manage the extension of public services; to provide for public review of non-residential use proposals and to balance the public's interest in the management of community growth with the protection of individual property rights through review procedures and flexible standards.

Applicant's Response:

"The existing reservoir is one of the uses permitted in the Community Service overlay zone ("other public utility buildings")."

3. Community Service Approval Standards: (MCC 11.15.7015 Approval Criteria):

In approving a Community Service use, the approval authority shall find that the proposal meets the following approval criteria, except for transmission towers, which shall meet the approval criteria of MCC .7035, and except for regional sanitary landfills which shall comply with MCC .7045 through .7070.

(A) Is consistent with the character of the area;

Applicant's Response:

"The character of this area has not changed since the previous conditional use approval. This is a rural residential neighborhood. The Bonny Slope subdivision consists generally of 5-acre tracts. To the east are wooded undeveloped hillsides designated for low density residential uses. Applicant's reservoir was developed in compliance with the conditions of the earlier approval, which were imposed to minimize visual and drainage impacts on the neighborhood. No changes are proposed to applicant's use on the site. The portions of the site to be transferred to Lot 31 will revert to the RR designation, to preserve its current character."

FINDING: Both lots involved in this application are zoned RR at this time. Approval of an amendment to the community service approval will remove the portion of the Tualatin Valley lot which is being added to the adjoining property from the area of the lot which has been approved for a community service conditional use. Approval of the change in size of the lot will not have any impact upon the question of whether the community service use is consistent with the character of the area.

(B) Will not adversely affect natural resources;

Applicant's Response:

“Applicant's reservoir was developed in compliance with the conditions and design review procedures of the earlier approval, which required preservation of natural features to the maximum extent practical. No new development is proposed for the property.”

FINDINGS: The modification of the lot size will not change the impact that the community service use will have upon natural resources as the operation will remain the same.

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

Applicant's Response:

“Properties in this area are not used for or designated for agricultural or forest use.”

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

Applicant's Response:

“No public service needs are created by this request as no new development is proposed.”

(E) Will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife or that agency has certified that the impacts will be acceptable;

Applicant's Response:

“This site is not identified as a big game habitat area in the Comprehensive Plan or by the Oregon Department of Fish and Wildlife.”

(F) Will not create hazardous conditions; and

Applicant's Response:

“The reservoir was constructed in compliance with the Hillside Development and Erosion Control Permit. The slope below the reservoir appears to be stable. Tract 2A allows an adequate buffer between the dissipation structure on Lot 31 and potential driveway improvements on Lot 31 to prevent any undercutting of the drainage improvements. No new development is proposed for either property.”

FINDINGS: The approval of this application will not increase the risk of flooding posed by the reservoir as the land being transferred to the adjoining property owner is located uphill from the reservoir.

(G) Will satisfy the applicable policies of the Comprehensive Plan.

Applicant's Response:

“The following policies of the Comprehensive Plan are applicable to this request: Policy 2 - Off-site Effects; Policy 13 - Air, Water and Noise Quality; Policy 14 - Development Limitations; Policy 22 - Energy Conservation; Policy 37 - Utilities; Policy 38 -Facilities. They are addressed below.”

FINDINGS: The Hearings Officer's findings regarding the applicability of Plan policies are discussed below.

(H) Will satisfy such other applicable criteria as are stated in this Section.

Applicant's Response:

“This section does not contain any other applicable approval criteria.”

Staff Comment: “The other applicable criteria in the CS Section of the code are the yard (setback) restrictions in the preceding MCC 11.15.7025(A) and the required off-street parking standards in MCC 11.15.7025(E).”

COMPREHENSIVE FRAMEWORK PLAN POLICIES:

1. POLICY NO. 2, OFF-SITE EFFECTS.

THE COUNTY'S POLICY IS TO APPLY CONDITIONS TO ITS APPROVAL OF LAND USE ACTIONS WHERE IT IS NECESSARY TO:

- A. PROTECT THE PUBLIC FROM THE POTENTIALLY DELETERIOUS EFFECTS OF THE PROPOSED USE; OR
- B. FULFILL THE NEED FOR PUBLIC SERVICE DEMANDS CREATED BY THE PROPOSED USE.

Applicant's Response:

“The reservoir was constructed in compliance with the plans submitted pursuant to earlier approvals to mitigate or avoid potential off-site effects. No new development is proposed.

No development is proposed for Lot 31. Although the additional area resulting from the property line adjustment would result in sufficient area to site 2 residences, that could not occur without a partition, which would be subject to review and imposition of conditions by the county.”

FINDINGS: The change in the lot size will not change the use of the Tualatin Valley property in any way. Further, the reduction in the size of the lot will not change the potentially deleterious effects of the reservoir use approved in 1986 and 1991 because the portion of the lot which is being transferred to the Wests is located uphill from the reservoir where it would not be harmed by a sudden or slow loss of water from the reservoir. The impact of the use on views in the area will remain the same before and after the lot reduction because any home placed in the new area of the West lot would be located further from the reservoir than would a home that is placed on the existing West lot, just north of the reservoir and within 10' of the southern boundary of the West property.

2. POLICY NO. 13, AIR, WATER AND NOISE QUALITY.

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

Applicant's Response:

“The reservoir was constructed in compliance with the design review and hillside protection conditions imposed with the earlier approval. No new development is proposed. Future development on the expanded Lot 31 would be subject to conditions imposed under its building permit, or during its land division process, if a partition is proposed.”

3. POLICY NO. 14, DEVELOPMENTAL LIMITATIONS.

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

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

Applicant's Response:

"The reservoir was constructed in compliance with the design review and hillside protection conditions imposed with the earlier approval. No new development is proposed. Future development on the expanded Lot 31 would be subject to conditions imposed under its building permit, or during its land division process, if a partition is proposed."

4. POLICY NO. 22, ENERGY CONSERVATION.

Applicant's Response:

"The reservoir is a very low level energy user. No new development or energy consuming uses are proposed."

FINDING: The Hearings Officer has considered the factors listed in Policy No. 22 when rendering this decision.

5. POLICY NO. 31 COMMUNITY FACILITIES AND USES

Applicant's Response:

"Items A, B, C and D. This site was selected as a reservoir location because its elevation allows Applicant to provide gravity-fed water service to a large portion of its service territory. Maintaining this reservoir site will support the location and scaling of community facilities meeting the needs of the community identified for urban density development inside the urban growth boundary and urban reserves. After the proposed lot line adjustment the remaining site will continue to be capable of serving the water supply needs of this area."

"Items E and F. Water storage is classified as a Community Service Foundation facility. The plan policy specifies the applicable limitations on slopes where such facilities may be located. The slope of this site exceeds the applicable slope limitation for this class of use, and applicant supported its original application for construction of the reservoir with engineering data demonstrating that the associated development limitations could be mitigated. The reservoir was constructed in accordance

with the engineered plans. The proposed lot line adjustment will not affect that engineered slope, and Applicant has proposed conditions to prohibit any non-water related improvements on its retained property.”

“Items G and H. The reservoir does not generate traffic which create dangerous intersections or traffic congestion, nor does it generate truck traffic through neighborhood streets. Applicant's employees make occasional visits to the site by automobile or pickup truck for monitoring and maintenance. No change in the level of traffic visiting this site will occur as the result of the proposed lot line adjustment.”

“Item I. Applicant's 10-year capital improvement plan does not include any additional water-delivery structures on this site, and Applicant does not anticipate the need for any new reservoirs there at any time in the future. The remaining site will adequately accommodate the existing reservoir, and the structure is located in a way which maximizes the Applicant's convenience and access.”

- J. PROMOTE COMPATIBLE DEVELOPMENT AND MINIMIZE ADVERSE IMPACTS OF SITE DEVELOPMENT ON ADJACENT PROPERTIES AND THE COMMUNITY THROUGH THE APPLICATION OF DESIGN REVIEW STANDARDS CODIFIED IN MCC 11.05.7805-11.05.7865.

Applicant's Response:

“Item J. The existing reservoir was approved through all applicable design review standards. The only property which might potentially be impacted by the proposed lot line adjustment is Lot 31. The West's, owners of Lot 31, have consented to the proposed adjustment.”

- K. PROVIDE FOR THE SITING AND EXPANSION OF COMMUNITY FACILITIES IN A MANNER WHICH ACCORDS WITH THE OTHER APPLICABLE POLICIES OF THIS PLAN.

Applicant's Response:

“Item K. Compliance with other applicable comprehensive plan policies is addressed elsewhere in this application.”

6. POLICY NO. 37, UTILITIES.

THE COUNTY'S POLICY IS TO REQUIRE A FINDING PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:

WATER AND DISPOSAL SYSTEM

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

- C. THERE IS AN ADEQUATE PRIVATE WATER SYSTEM, AND THE OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ) WILL APPROVE A SUBSURFACE SEWAGE DISPOSAL SYSTEM; OR
- D. THERE IS AN ADEQUATE PRIVATE WATER SYSTEM, AND A PUBLIC SEWER WITH ADEQUATE CAPACITY.
- 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.
- H. THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND
- I. COMMUNICATIONS FACILITIES ARE AVAILABLE.

Applicant's Response:

“No changes are proposed in the reservoir use. It was constructed with the required water, energy and communications utilities. No sewage disposal is required. The storm drainage system and slope treatments were constructed in compliance with the conditions of the earlier approval.

Future development on the expanded Lot 31 would be subject to conditions imposed under its building permit, or during its land division process, if a partition is proposed.”

7. POLICY NO. 38, FACILITIES.

THE COUNTY'S POLICY IS TO REQUIRE A FINDING PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASI-JUDICIAL ACTION THAT:

SCHOOL

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

FIRE PROTECTION

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

POLICE PROTECTION

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

Applicant's Response:

“All applicable service providers have been contacted regarding this application. (The county sanitarian was not contacted as no sewage disposal facilities are needed to serve this unmanned site.) No impact is created on the ability of these providers to serve the site as no new development is proposed. Applicant's records do not indicate that there have been any calls to police or fire service providers in relation to this use.”

PROPERTY LINE ADJUSTMENT APPROVAL CRITERIA FROM THE LAND DIVISION CODE (MCC 11.45):

MCC 11.45.115 Property Line Adjustment (Lot Line Adjustment):

A property line adjustment is the relocation of a common property line between two abutting properties. (A)The Planning Director may approve a property line adjustment between two properties, in either the Urban Area or the Rural Area, where an additional lot or parcel is not created and where the existing lot or parcel reduced in size by the adjustment is not reduced below the minimum lot size established by the applicable zoning designation.

[The minimum lot size for the proposed lot containing the Community Service Use is that lot size as determined in an “action proceeding” by a hearing authority under the preceding provisions of MCC 11.15.2224 Lot Sizes for Conditional Uses.]

Applicant's Response:

“The applicable standards are in MCC 11.15.2224, and are addressed in this application.”

(C) Property line adjustments approved under subsections (A) and (B) above shall meet the following additional standards:

**(1) No additional lot or parcel shall be created from any parcel by the property line adjustment;
and**

Applicant's Response:

“The proposed property line adjustment will not result in the creation of an additional lot or parcel. Applicant will retain ownership of the western portion of the property where the reservoir is located. The areas included in the proposed adjustment will become part of the lot to the north, increasing its area to approximately 11.44 acres.

Planning staff has expressed concern that the ordinance would permit Applicant, after the lot line adjustment, to construct a dwelling unit on its retained property. Such a result would be in violation of this subsection of the code, as it would permit the construction of 3 residences (1 on applicant's site, and 2 on the adjusted Lot 31), where currently only 2 are allowed (one residence on each lot, based solely on the area of each lot).

For a number of reasons, Applicant's lot would not be buildable after the lot line adjustment. There will not be adequate depth from the rear of the existing reservoir to the adjusted rear lot line to place a residence.

The slope above the reservoir was already excavated to partially bury the reservoir. There will be only

about 20' between the top of the cut and the new rear lot line. It would not be safe to alter the engineered slope to place a residence in that area; that slope is a rise of 63' over an 80' run (79 % slope). Increasing that slope or placing pilings in that slope creates the potential of making the slope unstable.

In addition, the remaining property below the reservoir is not a buildable site. Much of that area is occupied by a water main and a storm drain line. The vacant portion below the reservoir is very steep, with a 75' rise over 165' run (45 % slope).

Applicant proposes a condition be placed on approval of this application requiring Applicant to record restrictions in favor of Multnomah County which would prohibit the construction of any improvements, other than water-related structures, on Applicant's remaining property. Proposed language for this condition and the deed restriction are attached as Exhibit 1A. Under these restrictions, no residence could be built on Applicant's property. The restrictions could be never be changed without the County's consent. The owner of Lot 31 may later seek approval for a second residence on his adjusted lot, but that would return the number of residences permitted on these two lots to 2, no more than are permitted now.

[Applicant's Proposed] **CONDITIONS OF APPROVAL**

As a condition of approval, Applicant shall execute and record a Declaration of Covenants, Conditions and Restrictions in the Real Property Records of Multnomah County, Oregon, attached hereto and incorporated by reference. The Declaration shall state that the only structures that will be allowed on Applicant's remaining property will be the reservoir, piping and related water facilities, and that non-water related facilities shall not be constructed thereon without the express written consent of the Planning Director of Multnomah County, Oregon, which consent shall be recorded in the Multnomah County Real Property Records."

FINDINGS: The Hearings Officer will impose the suggested condition of approval because the applicant has offered to impose such a restriction on its property.

- (2) Owners of both properties involved in the property line adjustment shall consent in writing to the proposed adjustment and record a conveyance or conveyances conforming to the approved property line adjustment; and**

Applicant's Response:

"Applicant and the owners of Lot 31 (the adjacent property to the north), have submitted, with this application, written consent to the proposed property line adjustment."

- (3) The adjusted properties shall meet all dimensional requirements in the underlying zoning district designation except for lot area.**

Applicant's Response:

"The tentative plan map shows the location of improvements on applicant's property, demonstrating that lot dimension and setback standards are met. Applicant's property will be 2.8 acres after the property line adjustment. Minimum lot sizes in the Rural Residential zone for community service uses are subject to a conditional use process. Those standards are addressed elsewhere in this application.

Lot 31 does not have any improvements. After the adjustment Lot 31 will continue to comply with all of the dimensional and area requirements of the RR zone."

- (4) **The right-of-way width between the front line of each adjusted property and the centerline of any adjacent County road shall comply with the applicable provisions of the Street Standards Ordinance as determined by the County Engineer.**

Applicant's Response:

“The adjustment at the northwest corner of applicant's lot (Tract 2A) will improve access to tax lot 31. The proposed adjustment does not increase the potential traffic impacts from the lots.”

OPPONENTS' OBJECTIONS

The Hearings Officer makes the following findings of fact and conclusions of law regarding the objections raised by the opponents, Vijay and Anne Shankar. The Shankars own land which adjoins the Tualatin Valley property. The portion of the Tualatin Valley property which will be added to the West property also adjoins the Shankars' side lot line.

Shankars: The Hearings Officer should prohibit development of the land which is being added to the West lot under the authority of Comprehensive Plan Policy 2. This prohibition is required by MCC 11.15.2224 (B).

Hearings Officer: The Hearings Officer finds that residential development within ten feet of a property boundary is allowed by the Rural Residential District, the district in which the subject properties lie and in which the Shankars invested. That policy allows the Hearings Officer to protect the public from potentially deleterious effects *of a proposed use* but no use approval is being requested in the lot line proceeding. The modification of the conditional use approval for the reservoir does not increase the impact of the *reservoir use* upon the Shankars so may not be imposed as a condition of the modified conditional use approval of the community service use. Instead, the use which is of concern to the Shankars is the future development division and development of the West property with two homes, uses allowed in the Rural Residential zone under prescribed conditions. Whether a 10' setback meets the Hearings Officer's idea of what is or is not appropriate in a rural area is not important where, as here, the County has determined that such setbacks are appropriate for all properties in the RR zone. Further, the Hearings Officer views the request as a “no build” easement, an interest in land, and has grave doubts that the exaction requested by the Shankars would “pass muster” under the Dolan test.

MCC 11.15.2224 (B), likewise, does not compel the Hearings Officer to prohibit development of two acres of the enlarged West property. That code section requires the Hearings Officer to look at the size of the Tualatin Valley tract, not the West tract. The fact that the Tualatin Valley lot will be smaller than it was in the past does not change the nature of the use of the Tualatin Valley tract. The new West lot is not governed by MCC .2224 (B) as no conditional use is being considered proposed for that lot at this time and MCC .2224 (B) is an approval criterion for conditional uses and their lots.

Shankars: The Applicant needs to obtain conditional use approval in order to obtain approval for a lot that is smaller than five acres in size.

Hearings Officer: The Hearings Officer requested that Planning Division staff submit copies of the records of the prior conditional use approvals for the Tualatin Valley property into the record. Those records establish that the community service use that exists on the Tualatin Valley property was approved as a conditional use. The

application filed in this case is a request to modify the conditional use approval of this community service use. A community service use is listed as a conditional use allowed in the Rural Residential zone. MCC 11.15.2212(A). The community service use on the Tualatin Valley property was permitted under the authority of that code section. As such, the lot size provisions of MCC 11.15.2224 apply to the Tualatin Valley property and authorize the reduction in size requested by the District.

Shankars: The Applicant must prove that the Tualatin Valley reservoir complies with the height limitations of the Rural Residential zone.

Hearings Officer: The Hearings Officer reviewed the approval criteria for community service uses because the Applicant is requesting to modify the size of the lot. That change may affect the factual assumptions which led to the approval of the original conditional use approval of the community service use. Whether the reservoir does or does not comply with the height limitations of the Rural Residential zone is not relevant to a determination of whether the lot size of the Tualatin Valley property may be modified. The height of the structure is one factor to be considered in determining the proper size of the District's lot but the applicant need not demonstrate compliance with each and every zoning district restriction which applies to its reservoir as a precondition of modifying the size of its lot. If the reservoir violates the height limits of RR zone, the Shankars may take action to compel compliance with that limit by filing a legal action against the District or requesting the County to take enforcement action against the District. Further, the average height of the reservoir is used to determine compliance with MCC 11.15.2218(C) per MCC 11.15.0010. The record indicates that the average height of the reservoir is 35' or less.

Shankars: The proposal is not consistent with the character of the area because it reduces an existing developed lot below the five-acre minimum and allows development at a higher density than exists or is permitted.

Hearings Officer: The Rural Residential zone provides a flexible lot size for most conditional uses, not a five acre minimum lot size. The five acre minimum lot size applies to permitted and residential uses, including residential PUD developments. It does not apply to other conditional uses. As such, the existence of one community service conditional use and two dwellings in a 14 acre area does not conflict with what is allowed in the Rural Residential zone and is consistent with the planned character of the area. The code sections cited by the Shankars, MCC 15.2224 (1) and 11.15.7015 (A) apply to the Tualatin Valley property only and its conditional use, not to the lot line adjustment application. The Shankars concerns are all directed to the land which is being added to the West property and impacts that flow from uses allowed in the Rural Residential zone, not from a community service use. As such, they do not form a basis for denial of the modification request.

Shankars: The proposal may adversely affect natural resources and violate MCC 11.15.7015(B).

Hearings Officer: The quoted code section applies to review of the community service use, not to lot line adjustment and to the land which is being added to the West property. As the evidence in the record shows that the smaller size of the Tualatin Valley property will not cause the community service use (the reservoir) to adversely affect natural resources, no violation of MCC 11.15.7015 (B) can be found to exist.

Shankars: The application fails to demonstrate compliance with Plan Policy 14.

Hearings Officer: The Hearings Officer finds that Policy 14 is a policy which directs the County to take action and does not serve as an approval criterion for land use applications. This policy is implemented by the County's land use regulations, including its design review process and by the application of large lot sizes in areas which are subject to developmental limitations due to factors listed in Policy No. 14. Any development which occurs on the subject property will be subject to the regulations which the County has adopted to effectuate the direction provided by Policy 14.

Shankars: The existing reservoir is not one of the uses permitted in the community service overlay zone because it is not a public building and, therefore, violates MCC 11.15.2212.

Hearings Officer: MCC 11.15.2212 lists community service uses under the provisions of MCC 11.15.7005 through .7041 as conditional uses. MCC 11.15.7020(A)(6) lists a government building *or use* as a community service use. There is no question that the reservoir is a governmental use as it is a reservoir owned by a governmental entity which stores water to enable the governmental entity to perform its governmental function of supplying water to residents of its district.

DATED THIS 14TH DAY OF AUGUST, 1997.



LIZ FANCHER, Hearings Officer

Appeal to the Board of County Commissioners:

The Hearings Officer's 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" for and a fee of \$500.00 plus a \$3.50 - per- minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15.8260(A)(1) and MCC 11.15.9020(B)] Instructions and forms are available at the County Planning Office at 2115 SE Morrison Street (in Portland) or you may call 248-3043, for additional instructions.

CS 3-97 & PLA 5-97 LIST OF EXHIBITS

"A" - Applicant Submittals:

- A 1 - General Application Form
- A 2 - Applicant's Response to Approval Criteria, 7 pages
- A 3 - Addendum to Applicant's Submittal, 4 pages
- A 4 - Service Provider forms: sewer, water, fire, school, and police
- A 5 - Vicinity and Site plans, 5 pages
- A 6 - Property Owner Consent Form, 2 pages

"B" - Notification Information:

- B 1 - Notice of Public Hearing
- B 2 - Affidavit of Posting

"C" - Multnomah County Items:

- C 1 - Staff Report

"D" - Pre-Hearing Submittals

- D 1 - Letter from Anne & Vijay Shankar

"E" - Documents Submitted at 7/16/97 Public Hearing:

- E 1 - Record of CS 3-86-a (1991 Community Service application & approval)
- E 2 - Record of CS 3-86 (1986 Community Service application & approval)

"F" - Documents Submitted after 7/16/97 Public Hearing:

- F 1 - July 23, 1997 letter from Ty K. Wyman
- F 2 - July 30, 1997 letter from Kevin Hanway & Applicant's Rebuttal (w/ exhibits)
- F 3 - August 5, 1997 letter from Ty K. Wyman

"G" - Documents Rejected by the Hearings Officer

- G1 - July 30, 1997 letter from Lawrence Derr

BOGLE & GATES P.L.L.C.

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73033/00001

September 5, 1997

VIA HAND DELIVERY

Ms. Kathy Busse
Planning Director
Multnomah County Planning Department
2115 SE Morrison
Portland, OR 97214

Re: County Case File No. CS 3-97 and PLA 5-97

Dear Ms. Busse:

This firm represents Vijay and Anne Shankar in the above-referenced matter. This letter constitutes the Shankars' Notice of Review, pursuant to Multnomah County Code (MCC) § 11.15.8260, of the Hearings Officer's decision approving the application.

The Tualatin Valley Water District (TVWD) asks the County to approve a substandard lot in the Rural Residential (RR) zone in order to facilitate expansion of an adjacent lot for more intense development. Specifically, TVWD seeks modification of the Community Service overlay zone designation on its 5-acre reservoir site to allow the same development on 3 acres. The severed portion would then be sold to an adjacent property owner to give him a partitionable lot. As abutting property owners, the Shankars are concerned about the intensity of development in this rural area. The question presented is whether the County Code supports density increases in the RR zone, or whether it protects those who seek to protect in the area's rural nature.

As an initial matter, the Shankars wish the Board to know that they have met with the Applicant's representative, Kevin Hanway, and continue to believe that they can reach agreement with the Applicant on a condition approval to the application which would address the Shankars' concerns. However, until such an agreement is reached, this appeal must be pursued.

MULTNOMAH COUNTY
PLANNING SECTION

97 SEP -5 PM 2:31

RECEIVED

MCC 11.15.8260(B): A Notice of Review shall contain:

(1) An identification of the decision sought to be reviewed, including the date of such decision;

The decision sought to be reviewed is CS 3-97 and PLA 5-97, which was signed by the Hearings Officer on August 14, 1997.

(2) A statement of the interest of the person giving the Notice of Review;

The Shankars own the southerly abutting lot to the project site. They appeared, through this office and in person, at the July 16, 1997 hearing before the Hearings Officer, in opposition to the application. They also submitted, through this office, a letter (dated July 23, 1997) into the record, further setting forth their opposition.

(3) The specific grounds relied upon for review; and

The grounds for this appeal are as follows:

1) The Hearings Officer mistakenly found compliance with Code § 11.15.2224(B) and Plan Policy 2.

Code § 11.15.2224(B) requires that the minimum lot size for the reservoir use be based on "the nature of the proposed use in relation to the impacts on nearby properties."

The Hearings Officer found that the nature of the proposed use does not change with this application, and therefore neither does its impact on adjacent properties. This turns a blind eye to the importance of the density of development. Development on five acres is fundamentally different than development on three acres because it is more dense. This application will allow development at a density greater than the RR five-acre lot size minimum, i.e. 3 separate developments on 14 acres.

The Shankars abut the reservoir property to the south. The lot size of the reservoir was critical to their decision to buy their home, and remains very important to them. A reservoir on five acres fits within they can live with. But a reservoir on three acres will allow development within 10 feet of the Shankars' property in this *rural* zone. The area has very low ambient noise, significantly increasing the impact of any noise on nearby homes. The area is also characterized by pristine views, which should not be interrupted by such close development.

The negative impact on the Shankars of allowing the reservoir use on a substandard lot dictates that the application be denied.

Plan Policy 2 states that "the County's policy is to apply conditions to its approval of land use actions where it is necessary to: (a) protect the public from the potentially deleterious effects of the proposed use." This application requests approval of a Community Service overlay designation on a reduced lot size.

The Shankars voiced concerns about the effect of reducing the TVWD lot by two acres. They suggested that a condition on the approval of this application would resolve their concerns. Specifically, they asked that the application be conditioned that no development take place on the severed two acre area in question.

The Hearings Officer concludes that Policy 2 does not support such a condition because the application does not request approval of a "use" per se. This conclusion fails to recognize that 1) the application is for a use designation (CS), and 2) this Plan policy is an applicable criterion. Obviously, if this application did not involve a proposed use, Policy 2 would not apply.

The Board can alleviate the Shankars' concern and uphold their investment expectation by placing a fairly simple condition on its approval. Specifically, the Shankars suggest that any approval be conditioned to assure that there will be no physical development of the 2 acres which are the subject of the Lot Line Adjustment request. Such a condition is fully supportable under Plan Policy No. 2, Off-Site Effects, which specifically provides for the use of conditions to protect neighbors from off-site impacts. Such a condition would not preclude a future partition of the expanded Lot 31, nor its eventual development with two homes. It would simply assure that no development would take place within what the Shankars had understood to be a buffer area. Without such a condition, the application fails to show compliance with Code § 11.15.2224(B) and Plan Policy No. 2.

The proposed use is a reservoir on a substandard lot. The Board has the authority to condition any approval of this application to protect adjacent property owners. It should use that authority.

2) The Hearings Officer mistakenly found that the application complied with MCC § 11.15.7015(A).

This provision requires the proposal to be "consistent with the character of the area". The proposal is not consistent with the character of the area because it reduces an existing developed lot below the five-acre minimum, and will allow development at a higher density than exists or is permitted, *i.e.* three developments on 14 acres. Furthermore, the Shankars bought this property specifically because of the rural environment assured by the RR district, an environment which is jeopardized by this application.

3) The Hearings Officer mistakenly found that the application complied with MCC 11.15.2224.

The Applicant requested relief from the five-acre lot size minimum of the Rural Residential (RR) zone, pursuant to Code § 11.15.2224, "Lot Sizes for Conditional Uses." Code § 11.15.2224 allows reduction of the size of a lot below the minimum only for conditional uses "permitted pursuant to Code § 11.15.2212."

Code § 11.15.2212, meanwhile, merely lists conditional uses which "may be permitted" subject to a hearing process. One of those uses which can be permitted as a conditional use is a Community Service Use. Therefore, to fall within 11.15.2224 applies only to lots which have received a Conditional Use permit pursuant to 11.15.2212. The Applicant has not received a Conditional Use permit, and therefore cannot get approval of a reduced lot size under Code § 11.15.2224.

The Hearings Officer concluded that the "records of prior conditional use approvals for the Tualatin Valley property . . . establish that the community service use that exists on the Tualatin Valley property was approved as a conditional use." In fact, the TVWD did not receive a conditional use permit to develop its property.

TVWD received approval of CS 3-86a in 1991. The decision says that it "changes the zone designation from RR to RR/CS." Therefore, the 1991 approval placed an overlay zone on the site. A Conditional Use permit is not an overlay zone. Furthermore, the decision in CS 3-86a considered only MCC § 11.15.7015, which are the criteria for placement of a Community Service zone. A Conditional Use permit, on the other hand, is evaluated under the criteria of MCC § 11.15.7105, *not* § 11.15.7015.

The simple fact is that since nothing in the record indicates that a Conditional Use permit has been obtained, the Applicant cannot obtain approval of a substandard lot under Code § 11.15.2224.

4) The Hearings Officer mistakenly found compliance with Code § 11.15.2218(C) regarding maximum structure height.

The maximum allowed structure height in the RR zone, per MCC § 11.15.2218(I) is 35 feet. The staff report itself indicates that the reservoir is at least 45' from base to top. The Applicant's rebuttal on this issue was that compliance could be assumed from the prior Design Review approval. However, no specific contrary measurement of the height of the structure was presented. Instead, the Applicant claimed that compliance could be assumed from the prior Design Review approval. However, the Applicant is required to establish compliance with this Code section as part of this approval process. The structure is not old enough to be a "grandfathered" non-conforming use. To the contrary, if the structure exceeds the maximum height for the zone, then it is currently illegal and needs a variance. Certainly, no modification of the prior CS permit approval can be approved with this nonconformity.

The Hearings Officer found that the 35-foot maximum structure height in the RR zone does not apply. This finding is curious given that MCC 11.15.2218 was listed as an applicable criterion in the notice, and was addressed in both the application and the staff report. Clearly, in order to obtain a new and different approval of the CS overlay on a smaller area of land, all criteria must be addressed.

In the alternative, the Hearings Officer finds that Code § 11.15.0010 requires measurement of the average height of the structure, and that the average height is less than 35 feet. To the contrary, nothing in MCC § 11.15.0010 on "building height" even discusses average height. Instead, a reference grade point is determined. Nothing in the record establishes that this reference grade brings the height of the structure down to 35 feet.

(4) If de novo review or review by additional testimony and other evidence is requested, a statement relating the request to the factors listed in MCC .8270(E).

The Shankars do not request de novo review, nor that additional evidence be added to the record. The Shankars do ask for the opportunity to discuss the impacts of this project directly with the Board.

A completed County Notice of Review form and a check from the Shankars for the \$500 filing fee is enclosed. It is my understanding (via telephone conversation of September 4, 1997 between Carol Lockhart of this officer and JoAnn of your office) that there is no additional deposit for the transcript. Thank you for your assistance in processing this appeal.

Very truly yours,

BOGLE & GATES P.L.L.C.



Ty K. Wyman

Enclosures

cc: Vijay & Anne Shankar
Kevin Hanway, Tualatin Valley Water District
Larry Derr, Esq.