ANNOTATED MINUTES

Monday, September 9, 1996 - 3:00 PM
United Way Boardroom, Third Floor
619 SW 11th Avenue, Portland

MCCF/BCC JOINT MEETING

Multnomah Commission on Children and Families Vice-Chair Mark Rosenbaum convened the meeting at 3:25 p.m., with Barbara Friesen, Gary Hansen, Janet Kreitzmeier, Sharron Kelley, Muriel Goldman, Leslie Haines, Dianne Iverson, Dan Saltzman, Luther Sturtevant, Lee Coleman, Sharon McCluskey, Pauline Anderson, Susan Small, Jim Clay, Carol Wire, Chris Tebben, Norm Maves, Mary Li, Sonya Fischer, Gloria Musquiz, Rey España, Robert Trachtenberg, Pamela Wev, Susan Brady, Mindy Poetsch, Bonnie Hobson, Chiquita Rollins, Cornetta Smith, Vernon Baker, Wendy Byers, Carol Ford, Jean Wagner, Miltie Vega-Lloyd, John Hutzler, Carol Turner, Wanda Silverman, Jan Wallinda and Tom Darby present.

JM-1 The Multnomah Commission on Children and Families and the Multnomah County Board of Commissioners Will Conduct a Joint Meeting Focusing on Multnomah County Priorities for Children and Families to Discuss Benchmarks. Presented by Carol Wire and Invited Others.

CAROL WIRE, JIM CLAY AND CHRIS TEBBEN PRESENTATION AND RESPONSE TO QUESTIONS AND DISCUSSION WITH PARTICIPANTS BARBARA FRIESEN, GARY HANSEN, JANET KREITZMEIER, SHARRON KELLEY, MURIEL GOLDMAN, LESLIE HAINES, DIANNE IVERSON, DAN SALTZMAN, LUTHER STURTEVANT, LEE COLEMAN, SHARON MCCLUSKEY, PAULINE ANDERSON, SUSAN SMALLNEED, NORM MAVES, MARY LI, SONYA FISCHER, GLORIA MUZGUIZ, REY ESPAÑA, ROBERT TRACHTENBERG, PAMELA WEV, SUSAN BRADY, MINDY POETSCH, BONNIE HOBSON, CHIQUITA ROLLINS, CORNETTA SMITH, VERNON BAKER, WENDY BYERS, CAROL FORD, JEAN WAGNER, MILTIE VEGA-LLOYD, JOHN HUTZLER, CAROL TURNER, WANDA SILVERMAN, JAN WALLINDA AND TOM DARBY.

The meeting recessed at 4:35 p.m. and reconvened at 4:55 p.m.

UPON CONSENSUS, VICE-CHAIR ROSENBAUM DIRECTED STAFF TO RETURN WEDNESDAY WITH FOLLOW UP INFORMATION, INCLUDING MINIMUM STANDARDS FOR WEIGHING, PROPOSED CRITERIA 2 AND 3; TO SOME DEGREE, PROPOSED CRITERIA 1, 4 AND 5; AND PROVIDING DEFINITIONS FOR "WE" AND "COMPELLING" FROM PROPOSED CRITERIA.

There being no further business, the meeting was adjourned at 6:00 p.m.

Tuesday, September 10, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

LAND USE PLANNING MEETING

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

P-1 CU 1-96, HV 1-96, SEC 1-96 **DECISION FROM AUGUST 13, 1996 DE NOVO HEARING** in the Matter of an Appeal of the Hearings Officer Decision Regarding a Conditional Use Permit to Allow a Dwelling Not Related to Forest Management on Property Located at 3130 NW FOREST LANE, PORTLAND.

COUNTY COUNSEL SANDRA DUFFY EXPLAINED PROCESS, ADVISING THAT FOLLOWING THE CLOSE OF THE DE NOVO HEARING, TWO POST-HEARING BRIEFS WERE SUBMITTED, AS WELL AS A MEMO FROM COUNTY COUNSEL. PLANNER BOB HALL EXPLANATION IN RESPONSE TO A QUESTION OF COMMISSIONER COLLIER. COMMISSIONER HANSEN MOVED, SECONDED BY COMMISSIONER COLLIER, TO UPHOLD THE HEARINGS OFFICER DECISION. COMMISSIONER HANSEN ASKED THAT THE ORDER BE PREPARED TO INCLUDE A LEGAL RESPONSE TO THE BOARD INTERPRETATION

REGARDING OWNERSHIP. FOLLOWING DISCUSSION AND AT THE SUGGESTION OF MS. DUFFY, BOARD CONSENSUS TO INCLUDE WORDING IN THE ORDER THAT IT IS NOT WITHIN THE BOARD'S SCOPE OF REVIEW TO DETERMINE STATE OR FEDERAL CONSTITUTIONALITY ISSUES. AT THE SUGGESTION OF MR. HALL, BOARD CONSENSUS TO INCLUDE CORRECTION TO HEARINGS OFFICER DECISION, IN THE LAST PARAGRAPH ON PAGE THREE, CITING ORDINANCE 643 INSTEAD OF ORDINANCE 786, AND CHANGING THE WORD "REQUEST" TO "REQUIREMENT". MOTION AFFIRMING THE JUNE 14, 1996 HEARINGS OFFICER DECISION SUBJECT TO CERTAIN MODIFICATIONS AND ADDITIONAL FINDINGS WAS UNANIMOUSLY APPROVED. STAFF TO PREPARE FINAL ORDER FOR BOARD APPROVAL ON THE NEXT AVAILABLE CONSENT CALENDAR. (ORDER 96-163 ADOPTED SEPTEMBER 19, 1996.)

There being no further business, the meeting was adjourned at 9:45 a.m.

Wednesday, September 11, 1996 - 3:00 PM
United Way Boardroom, Third Floor
619 SW 11th Avenue, Portland

MCCF/BCC JOINT MEETING

Multnomah Commission on Children and Families Vice-Chair Mark Rosenbaum convened the meeting at 3:20 p.m., with Carol Wire, Jim Clay, Chris Tebben, Barbara Friesen, Lee Coleman, Jim Sanger, Luther Sturtevant, Dan Saltzman, Dianne Iverson, Steve Fulmer, Samuel Henry, Sharron Kelley, Cornetta Smith, Tom Darby, Mary Li, Linda Doyle, Gloria Musquiz, Karen Belsey, Susan Smallreed, Sonya Fischer, Judy McGuire, Robert Trachtenberg, John Hutzler, Bonnie Hobson, Judy McGavin, Mike Delman, Carol Ford, Wendy Byers, Bonnie Rosatti, Linda Jaramillo, Pamela Wev, Rey España, Meganne Steele, Leslie Haines, Connie Carley, Miltie Vega-Lloyd, Sharon McCluskey, Beverly Stein, Gary Hansen, Muriel Goldman and Chiquita Rollins.

JM-2 The Multnomah Commission on Children and Families and the Multnomah County Board of Commissioners Will Conduct a Joint Meeting Focusing on Multnomah County Priorities for Children and Families to Discuss Benchmarks. Presented by Carol Wire and Invited Others.

CAROL WIRE, CAROL FORD AND CHRIS TEBBEN PRESENTATION AND RESPONSE TO QUESTIONS AND DISCUSSION. FOLLOWING DISCUSSION AND UPON MOTION OF SAMUEL HENRY, SECONDED BY DAN SALTZMAN, THE PROPOSED CRITERIA WAS UNANIMOUSLY APPROVED.

The meeting was recessed at 5:15 p.m. and reconvened at 5:40 p.m.

CONTINUED COMMENTS AND DISCUSSION WITH PARTICIPANTS MARK ROSENBAUM, STEVE FULMER, MURIEL GOLDMAN, CORNETTA SMITH, BEVERLY STEIN, LEE COLEMAN, SHARRON KELLEY, CHIQUITA ROLLINS, SHARON MCCLUSKEY, LESLIE HAINES, JIM CLAY, CAROL WIRE, KAREN BELSEY, LINDA JARAMILLO, MARY LI, SAMUEL HENRY, PAMELA WEV, MILTIE VEGA-LLOYD, GLORIA MUZGUIZ, GARY HANSEN AND REY ESPAÑA..

There being no further business, the meeting was adjourned at 6:25 p.m.

Thursday, September 12, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

Chair Beverly Stein convened the meeting at 9:33 a.m., with Vice-Chair Dan Saltzman, Commissioners Sharron Kelley, Gary Hansen and Tanya Collier present.

CONSENT CALENDAR

UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER HANSEN, THE

CONSENT CALENDAR (ITEMS C-1 THROUGH C-3) WAS UNANIMOUSLY APPROVED.

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-1 TP 3-96 Reporting the Hearings Officer's Decision Regarding an Appeal of the Administrative Decision to Deny a Temporary Permit that would Increase the Number of Dwellings Allowed in a Rural Residential District

C-2 NSA 8-96 Reporting the Hearings Officer's Decision Regarding a Request for Columbia River Gorge National Scenic Area Approval to Construct Additional Sleeping and Meeting Facilities at the Menucha Retreat and Conference Center

DISTRICT ATTORNEY'S OFFICE

C-3 Intergovernmental Agreement 500167 with Tri-Met Providing Funding for 1 FTE Deputy DA in the Tri-Met Neighborhood Based Prosecution Office

REGULAR AGENDA

PUBLIC COMMENT

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

NO ONE WISHED TO COMMENT.

NON-DEPARTMENTAL

R-2 Employee Recognition of MERRIE ZIADY, Multnomah County Health Benefits Manager

BILL FARVER, CHRIS JOHNSON, BILL HOOPER, NANCY MCCOY, WENDY HAUSOTTER AND BECKY STEWARD PRESENTATION IN HONOR OF MERRIE ZIADY. MERRIE ZIADY COMMENTS IN RESPONSE.

R-3 PROCLAMATION Proclaiming September 18, 1996 to be WHITE ROSE DAY in Multnomah County, Oregon

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-3. JACK BOAS EXPLANATION. PROCLAMATION READ. BOARD COMMENTS IN SUPPORT. PROCLAMATION 96-160 UNANIMOUSLY APPROVED.

R-4 PROCLAMATION Proclaiming the Month of September, 1996 as TREATMENT WORKS! Month

COMMISSIONER KELLEY MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-4. COMMISSIONER KELLEY AND JEAN BUCCIARELLI EXPLANATION. PROCLAMATION READ. BOARD COMMENTS IN SUPPORT. PROCLAMATION 96-161 UNANIMOUSLY APPROVED.

R-5 RESOLUTION Adopting an Insert for the 1996 Property Tax Statements Explaining the Senior Tax Deferral Program and Real Market Value Determinations

UPON MOTION OF COMMISSIONER SALTZMAN, SECONDED BY COMMISSIONER KELLEY, R-5 WAS UNANIMOUSLY POSTPONED INDEFINITELY.

DEPARTMENT OF SUPPORT SERVICES

R-6 RESOLUTION Recognizing September 16-20, 1996 as NATIONAL PAYROLL WEEK in Multnomah County, Oregon

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-6. MINDY HARRIS EXPLANATION. RESOLUTION READ. PAYROLL STAFF AND OTHER PROGRAMMING STAFF ACKNOWLEDGED AND RECOGNIZED. MS. HARRIS RESPONSE TO BOARD QUESTIONS. RESOLUTION 96-162 UNANIMOUSLY APPROVED.

There being no further business, the meeting was adjourned at 10:04 a.m.

Thursday, September 12, 1996 - 3:00 PM
United Way Boardroom, Third Floor
619 SW 11th Avenue, Portland

MCCF/BCC JOINT MEETING

JM-3 The Multnomah Commission on Children and Families and the Multnomah County Board of Commissioners Will Conduct a Joint Meeting Focusing on Multnomah County Priorities for Children and Families to Discuss Benchmarks. Presented by Carol Wire and Invited Others.

MEETING CANCELLED.

BOARD CLERK FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

MULTNOMAH COUNTY OREGON

OFFICE OF THE BOARD CLERK
SUITE 1510, PORTLAND BUILDING
1120 SW FIFTH AVENUE
PORTLAND, OREGON 97204
CLERK'S OFFICE ▪ 248-3277 ▪ 248-5222
FAX ▪ (503) 248-5262

BOARD OF COUNTY COMMISSIONERS

BEVERLY STEIN ▪	CHAIR	▪248-3308
DAN SALTZMAN ▪	DISTRICT 1	▪ 248-5220
GARY HANSEN ▪	DISTRICT 2	▪248-5219
TANYA COLLIER ▪	DISTRICT 3	▪248-5217
SHARRON KELLEY ▪	DISTRICT 4	▪248-5213

AGENDA

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

FOR THE WEEK OF

SEPTEMBER 9, 1996 - SEPTEMBER 13, 1996

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

Thursday, 9:30 AM, (LIVE) Channel 30
Friday, 10:00 PM, Channel 30
Sunday, 1:00 PM, Channel 30
Produced through Multnomah Community Television

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

AN EQUAL OPPORTUNITY EMPLOYER

Monday, September 9, 1996 - 3:00 PM
United Way Boardroom, Third Floor
619 SW 11th Avenue, Portland

MCCF/BCC JOINT MEETING

JM-1 *The Multnomah Commission on Children and Families and the Multnomah County Board of Commissioners Will Conduct a Joint Meeting Focusing on Multnomah County Priorities for Children and Families to Discuss Benchmarks. Presented by Carol Wire and Invited Others. 3 HOURS REQUESTED.*

Tuesday, September 10, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

LAND USE PLANNING MEETING

P-1 *CU 1-96, HV 1-96, SEC 1-96* ***DECISION FROM AUGUST 13, 1996 DE NOVO HEARING*** *in the Matter of an Appeal of the Hearings Officer Decision Regarding a Conditional Use Permit to Allow a Dwelling Not Related to Forest Management on Property Located at 3130 NW FOREST LANE, PORTLAND.*

Wednesday, September 11, 1996 - 3:00 PM
United Way Boardroom, Third Floor
619 SW 11th Avenue, Portland

MCCF/BCC JOINT MEETING

JM-2 *The Multnomah Commission on Children and Families and the Multnomah County Board of Commissioners Will Conduct a Joint Meeting Focusing on Multnomah County Priorities for Children and Families to Discuss Benchmarks. Presented by Carol Wire and Invited Others. 3 HOURS REQUESTED.*

Thursday, September 12, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

CONSENT CALENDAR

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-1 *TP 3-96* *Reporting the Hearings Officer's Decision Regarding an Appeal of the Administrative Decision to Deny a Temporary Permit that would Increase the Number of Dwellings Allowed in a Rural Residential District*

C-2 *NSA 8-96* *Reporting the Hearings Officer's Decision Regarding a Request for Columbia River Gorge National Scenic Area Approval to Construct Additional Sleeping and Meeting Facilities at the Menucha Retreat and Conference Center*

DISTRICT ATTORNEY'S OFFICE

C-3 *Intergovernmental Agreement 500167 with Tri-Met Providing Funding for 1 FTE Deputy DA in the Tri-Met Neighborhood Based Prosecution Office*

REGULAR AGENDA

PUBLIC COMMENT

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

NON-DEPARTMENTAL

R-2 *Employee Recognition of MERRIE ZIADY, Multnomah County Health Benefits Manager*

R-3 *PROCLAMATION Proclaiming September 18, 1996 to be WHITE ROSE DAY in Multnomah County, Oregon*

R-4 *PROCLAMATION Proclaiming the Month of September, 1996 as TREATMENT WORKS! Month*

R-5 *RESOLUTION Adopting an Insert for the 1996 Property Tax Statements Explaining the Senior Tax Deferral Program and Real Market Value Determinations*

DEPARTMENT OF SUPPORT SERVICES

R-6 *RESOLUTION Recognizing September 16-20, 1996 as NATIONAL PAYROLL WEEK in Multnomah County, Oregon*

Thursday, September 12, 1996 - 3:00 PM
United Way Boardroom, Third Floor
619 SW 11th Avenue, Portland

MCCF/BCC JOINT MEETING

JM-3 *The Multnomah Commission on Children and Families and the Multnomah County Board of Commissioners Will Conduct a Joint Meeting Focusing on Multnomah County Priorities for Children and Families to Discuss Benchmarks. Presented by Carol Wire and Invited Others. 3 HOURS REQUESTED.*

Beverly Stein, Multnomah County Chair

Room 1515, Portland Building
1120 S.W. Fifth Avenue
Portland, Oregon 97204

Phone: (503) 248-3308
FAX: (503) 248-3093
E-Mail: MultChair@aol.com

M E M O R A N D U M

TO: Commissioner Sharron Kelley
Commissioner Tanya Collier
Commissioner Gary Hansen
Commissioner Dan Saltzman
Office of the Board Clerk

FROM: Lyne Martin

DATE: May 14 1996

RE: Beverly's Absence from Board meeting

Beverly will be unable to attend the scheduled Board meeting on Tuesday September 10. She will be out of town in Sacramento CA.

cc: Chair's Staff

SEP 10 1996

Meeting Date: ~~AUG 13 1996~~
Agenda No: ~~R-1~~ P-1
Est. Start Time: ~~9:30~~ 9:30

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: DeNovo Hearing in the Matter of an Appeal of Hearings Officer's decision on CU 1-96, HV 1-96 & SEC 1-96.

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

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

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

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

DeNovo Hearing in the Matter of an Appeal of Hearings Officer's regarding a Conditional Use Permit to allow a dwelling not related to forest management.

96 JUN 26 PM 2:48
MULTNOMAH COUNTY OREGON
BOARD OF COUNTY COMMISSIONERS

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: KB Larry F. Nicholas/mo

MULTNOMAH COUNTY OREGON

OFFICE OF COUNTY COUNSEL
1120 S.W. FIFTH AVENUE, SUITE 1530
P.O. BOX 849
PORTLAND, OREGON 97207-0849
(503) 248-3138
FAX 248-3377

MEMORANDUM

TO: Board of County Commissioners

From Sandra Duffy Sandy
Chief Assistant County Counsel

Date: September 5, 1996

Subject: Hackett Land Use Appeal

INTRODUCTION

This is a continuation of an appeal of Hearings Officer decisions on a conditional use request (CU-1-96), variances (HV 1-96) and significant environmental concern permit (SEC 1-96) by property owners William and June Hackett (Hackett). The application relates to two adjoining parcels. One has a dwelling on it. The applicants seek to build a dwelling on the adjoining lot. The Hearings Officer denied the application. On appeal, the applicants raise a number of issues, three of which I will address in this memorandum: (1) Are the adjoining properties in separate ownership? (This relates to a legal requirement to combine contiguous properties in the same ownership when applications for development of undersized lots is being considered.); (2) Is the H.O.'s denial of the application an unconstitutional "taking" of applicants' property?; and, (3) Does the SEC overlay preclude agricultural or forest uses?

OWNERSHIP

The two parcels in question are contiguous. The northerly parcel is 2.32 acres and the record owner is June W. Hackett. The southerly parcel is 1.71 acres and is owned by the Hackett family trust, with William D. and June W. Hackett, husband and wife, as trustees. In the CFU (Commercial Forest Use) zone, a dwelling is a conditional use on a "lot of record." A "lot of record" includes contiguous parcels of land which are held under the same ownership. MCC 11.15.2062(a)(3)(d). "Same ownership" is defined as "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." The question is whether a parcel owned by June Hackett and a contiguous parcel owned by the Hackett family trust are the "same ownership."

John DuBay and Larry Kressel crafted this portion of the Code. The intent was to cover close familial relationships in order to prevent more intense development of forest land.

Certainly, if a tenancy-in-common is included (which can be unrelated persons) a husband and wife trust is included.

The attorney for Oregonians in Action (OIA) has contended that because the IRS exempts trustees from inheritance obligations if one of the trustees dies, a trust cannot be considered "same ownership" as defined by MCC 11.15.2062(B)(3). The IRS is interpreting Federal Statutes and Internal Revenue Code provisions which are irrelevant to the County's interpretation of its Zoning Code.

Conclusion: The Board has the authority to interpret the definition of the term "same ownership" to include a family trust with a husband and wife as trustee to be the equivalent of the term "spouse" in the definition. This interpretation will be upheld on appeal as long as it is not "clearly wrong." This interpretation is very reasonable and will not be held to be "clearly wrong."

TAKINGS

The applicant asserts that the County's denial of an application for a dwelling on lot 78/106 (the vacant contiguous parcel) has left them with no viable economic use of that parcel. They assert that this is an unconstitutional "taking."

First, the County's scope of review does not include constitutional interpretations. ORS 215.416(8) (restricts local governments to basing approvals and denials of permit applications on standards and criteria set forth in the zoning ordinance of the county.) See also, Dodd v. Hood River County, 22 Or LUBA 711 (1992), aff'd 317 Or 172 (1993)

Second, there has been no taking. The applicants' taking argument is predicated on an assertion that government (county) regulations have denied the owner of all viable use of his/her property. This is factually inaccurate. The vacant land has a viable use in conjunction with the contiguous parcel. It contains a garage and well used in conjunction with the dwelling on the contiguous parcel. It also adds value to the dwelling parcel as excess land. As a separate parcel the parcel has value as either farm land or forest land. The parcel is presently host to deciduous trees that have, at least, value as firewood. There is evidence in the record of Soil Conservation Service ratings of the soil that show it is excellent for Douglas Fir cultivation.

Conclusion: While the zoning regulations which preclude the additional dwelling may diminish the value of the vacant parcel, it has not taken all viable use and economic value, thus, it is not a taking. See, Agins v. Tiburon, 447 U.S. 255 (1980).

SEC OVERLAY

After the last hearing Bob Hall was asked by Commissioner Collier whether the SEC overlay precluded agricultural use of the parcel. He correctly replied that MCC 11.15.6404(A) provides that the SEC overlay does not preclude any use allowed in the base zone (here, CFU). Additionally, FOREST uses are expressly exempted from all SEC requirements by MCC 11.15.6406 (A) & (B).

SD:bca

August 19, 1996

Forest Park Neighborhood Association
Development Committee

Arnold Rochlin, Chair
P.O. Box 83645
Portland, OR 97283-0645
289-2667

Board of County Commissioners
c/o Planning Division (hand delivered)

Re. **CU 1-96, HV 1-96, SEC 1-96**
Conditional Use, Variances and SEC Habitat Permits.

This testimony for myself and the Forest Park Neighborhood Association, responds to oral and written evidence offered by the applicant's counsel at the August 13th hearing.

SUMMARY

The applicant attempts to establish that if a dwelling is denied on lot 78/106, the owner would be unlawfully deprived of all viable economic use of the property. In fact almost nothing is added to the facts already in the record and counsel renews a plainly incorrect claim of separate ownership of adjoining lots. The applicant's legal argument and authorities are the usual citations for a "taking" claim. Their substance was known to the Hearings Officer and this opponent, and the cited cases are in fact more supportive of the position that the facts do not constitute an unlawful taking than of the applicant's claim that they do.

VIABLE ECONOMIC USE

The new evidence purports to show that the County's denial of a dwelling leaves no viable economic use[1] for lot 78/106 (the lot north of the family home on adjoining lot 77). But the new evidence is largely repetitious and omits key points.

Use in Conjunction: The applicant continues to consider uses for lot 78/106 only in isolation. As the Hearings Officer said, the law is unequivocal; land cannot lawfully be found unsuitable for a use such as forestry or farming, on grounds of size or amount of usable land, unless its potential is considered in conjunction with suitable nearby land. Under this principle, the courts have required consideration of all nearby land, whether owned by the applicant (lot 77) or by others. To even begin to establish a taking claim, the applicant must prove purchase, lease, cooperative production, or other use in conjunction, could not enable viable economic use. For various reasons, whether or not nearby land is currently on the market is not significant; the applicant might sell land or rights of use, as well as buy or rent, and property or rights of use may become available in the future. There can be no doubt that lot 77, which has the dwelling, can be used in conjunction with lot 78/106; it's happening now. Mrs. Hackett has "more than possessory interest" in both lots and the garage and well are on lot 78/106.

Farm Use: Legal precedent requires exhaustive consideration of uses allowed in the CFU Zone. The applicant has considered such uses incorrectly and selectively, offering only unlikely uses, such as a cemetery or transmission tower and ignoring the practical opportunities. Among the many CFU "Uses Permitted Outright" is .2048(C), "Farm use,

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[1] A significant point when considering economic use of land, is that on smaller parcels, one would not necessarily expect a family to make a living from farming or forestry or to even get a regular monetary return, but just to provide a useful purpose that has significant value. For example, on a tiny lot next to a lot with a dwelling, a child's play area might be reasonable economic use. On another lot, a yield of tens of thousands of dollars might be reasonable.

as defined in ORS 215.203". Testimony before the Hearings Officer pointed out examples, such as a Christmas tree farm or a horticultural nursery (215.203(2)(a)), both of which provide opportunity for intensive use of small acreage plots. The applicant has given no evidence that addresses the feasibility of these and other potential uses. Also, the whole range of home occupations and accessory structures allowed by .2054(C) is not properly considered.[2]

AE Associates Letter: In purporting to address uses allowed by ORS 215.203, the witness mistakenly addresses ORS 215.213. See page 2, AE Associates memorandum by engineer Robert C. Bowser, August 12, 1996. The list of uses beginning there is copied from ORS 215.213, which concerns only "counties that adopted marginal lands system prior to 1993" and has no bearing on this case. It is plain that Bowser bases conclusions on what he thinks is economically or socially suitable for the property which is beyond the scope of his engineering expertise. Bowser generally fails to disclose how his expertise justifies his conclusions. Even an expert's conclusions cannot be the basis for findings, unless they are supported by substantial evidence or by a credible claim that they are reached by application of generally accepted professional standards and practices. The Bowser testimony is of no value; no one claims mining or cemeteries are reasonable economic uses, and actual reasonable uses are not addressed.

SEC Overlay: There is no evidence in the record that small scale agricultural uses are not feasible on lot 78/106, or in conjunction with lot 77 or other land. But all agricultural uses were rejected in counsel David J. Hunnicutt's written and oral testimony. Answering the Forest Park Neighborhood Association April 30th letter which gave examples of lawful and feasible farm uses, he relies entirely on the mistaken claim that SEC regulations preclude agricultural use (page 4). As County Planner Bob Hall said in post-hearing E Mail on August 13th, farm uses as described in ORS 215.203, and forest uses, are expressly exempted from all SEC requirements by MCC .6406(A) & (B). Additionally, .6404(A) provides that no use allowed in the base zone (CFU) can be disallowed because of SEC regulations; only siting and design may be regulated to the extent that regulation does not make the use impractical. The applicant has presented no evidence whatever to support the claim that all farm uses are unsuitable, and it is too late now in this proceeding to offer new evidence on the issue. There was ample opportunity to respond when it was raised by the neighborhood association in April 30th written testimony (p.4). The applicant elected to ignore the issue in the May 7, 1996 response and chose to rely on SEC regulations.

UNCONSTITUTIONAL TAKING CLAIM

The Board may not approve an application based on any perceived conflict of its regulations with the state or US constitutions. The Board is expressly directed and limited by ORS 215.416(8), which provides in full:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole." (emphasis added)

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[2] The law does not allow a decision based on what uses might be personally suitable to the Hacketts, or preferred by them. With rare exceptions not relevant here, a land use decision is based on the circumstances of the land and the law concerning proposed uses, and may not be based on the personal characteristics or preferences of owners.

The standards and criteria on which the decision must be based are those in the MCC and Framework Plan that have been lawfully acknowledged, and which have not been otherwise held to be unlawful by LUBA or any court. The Hearings Officer made reasonable limited findings on some factual issues relating to the constitutional claim, but correctly refrained from making any ruling on constitutionality of the regulations in general, or of the consequence of applying them to this case. The Board should either make limited specific findings that the applicant has not proven there is no economic use if a second dwelling is denied (as the Hearings Officer did), or reject all constitutional claims as not relevant to its lawful scope of review. For good reason, the statute precludes you from rejecting your own code on constitutional grounds: individual members of a governing body may be qualified and have time to make sound determinations of constitutionality, but such capability is not a qualification for office or a likely criterion of the electorate. On the other hand, state law deems the Board to be particularly qualified to interpret and apply its own county code and comprehensive plan which is the lawful the basis for a land use decision.[3] LUBA has expressly ruled that a county need not consider constitutional claims. If a county supports a denial based on land use regulation, with a finding that there is not an unconstitutional taking, the finding is deemed unnecessary surplus, and cannot be a basis for reversal or remand by LUBA. Dodd v. Hood River County, 22 Or LUBA 711 724-725 (1992), Aff'd 317 Or 172, 855 P2d 608 (1993). However, were a permit to be approved on constitutional grounds, despite facts and regulations otherwise requiring denial, constitutional findings would be the basis of that decision and error in those findings would be reason for reversal.

The applicant has not shown the land unsuitable even for timber, the primary use in the zone. The "two experts" cited in the August 13th Hunnicutt memorandum, don't come close to establishing as claimed "that the subject parcel is incapable of growing timber of sufficient quality or quantity to enable the owner to make a profit from a commercial forest operation." (page 3)

The Walker letter, dated May 12, 1995, other than in date, is an exact duplicate of the Walker letter already in the application narrative appendix, that the Hearings Officer found insufficient to establish unsuitability for forestry use. As stated in my April 30th letter, Walker excessively qualifies conclusions about feasibility of forestry and wrongly relies on the value of the current trash growth rather than the excellent Douglas Fir potential as established in earlier testimony of both the neighborhood association and the applicant, based on Soil Conservation Service ratings. And, Walker considers lot 78/106 only in isolation and not in conjunction with lot 77 under same ownership, or other nearby properties. As stated above, uses requiring more space must be proven unfeasible in conjunction with nearby land before the subject land can be held unsuitable for those uses.

A new Walker document, titled "Timber Evaluation of Hackett Property", does nothing but more exactly evaluate the existing trash growth, never managed, and only naturally seeded, mainly with alders and maples, since the harvest, 25 to 35 years ago. Though the owner has benefited from a forest tax deferral for many years, Walker's evaluation of existing growth is no surprise to those aware of the condition of the property . But, because it is the potential of land, not value of the current use in its current condition, that determines available viable use, the new Walker testimony is not significant.

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[3] Occasionally the terms of an ordinance may prove ambiguous and subject to multiple interpretations. The Board can and must reject interpretations that would conflict with state law. Also, the Board may not deny substantial procedural rights granted by state law, such as the right to a hearing. And, if LUBA or a court has ruled a county regulation to be unlawful or unconstitutional, the Board must follow the ruling until the regulation is amended. None of these exceptions apply here.

The Luthy letter of August 9th, 1996, repeats the same contentions. All specifics relate to current or future value of the current crop. Value of a well planted and well managed crop is not considered, nor is use in conjunction with adjoining lot 77 or other nearby property. The Luthy letter adds no significant support to the claim of unsuitability for forestry.

The case is not ripe for a constitutional ruling. Federal and state case law (including cases cited by the applicant) is that, before LUBA or a court can consider a taking claim, an applicant must show that application was made and rejected for uses which are not demonstrably unlawful or unfeasible. If there are uses that are feasible but unlawful, possible variances must have been requested and rejected for the feasible uses.[4] The rationale for "ripeness" or "exhaustion of remedies" is sound. Both state and federal courts have held that it is impossible to know what value, if any, has been taken from a property, unless the owner has established what uses are and are not available. The applicant has applied for one variance, seeking to meet a minimal standard of ripeness (Joyce v. Multnomah County, 114 Or App 244 (1992)), but it can have no significance. The application was for a variance that must obviously be denied, and even if granted, would not have allowed a conditional use dwelling. The applicant asked for a lot size variance for an already existing lot. But the regulations barring the second dwelling are the one allowing a forest zone dwelling only on a lot of record, and the one defining a lot of record as an aggregation of adjoining substandard lots in same ownership. To meet the ripeness requirement, the variances sought must be prospectively available variances from the regulations that bar reasonable, and otherwise lawful, use of the land.

It is well established in law, that mere diminution of value, or loss of revenue, does not constitute a taking. Even zoning that precludes a use worth many times the value of the best remaining use is lawful and does not constitute a taking, providing only that the zoning restriction has a legitimate public purpose and there is lawful and reasonable remaining use. Compare Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) where use of air space over a historic building was denied, but leaving available ongoing use as a railroad station, to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) where the mining company was deprived of all use of the only property right in which it was vested, the right to sub-surface minerals. In Agins v. Tiburon, 447 U.S. 255 (1980) (cited by the applicant) the court held that downzoning of extremely high value suburban land from urban to rural density, did not constitute an unlawful taking. The key was that reasonable rural use remained. Denial of opportunity to make millions on suburban lots overlooking San Francisco Bay was no more than one of the normal ups and downs of holding land for investment or potential future development. The county has no duty and no authority, to assure that speculators will achieve as much success as they hoped for, or even that they won't suffer loss. Land speculation, i.e. investment for potentially profitable future sale or development, is called speculation, because it's speculative.

SAME OWNERSHIP

The applicant implicitly claims that form, and not substance of ownership is decisive. Mr. Hunnicutt's testimony made it apparent that counsel is thinking of ownership concepts unrelated to the law of this case. Title to the lot with the dwelling is held by a trust of which Mr. & Mrs. Hackett are trustees and beneficiaries. Title to adjoining lot 78/106 is held by Mrs. Hackett. In tax law and other matters the form of ownership may establish a crucial difference, but form alone cannot decide same ownership under .2062(B)(3). For

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[4] There is a rule of futility and reasonableness. The county may not require unending serial applications that would, by the procedural burden, effectively deny an applicant both reasonable use and reasonable remedy. And, the county may not require applications that obviously cannot be lawfully approved. And, application may not be required for uses proven to be unsuitable to the property.

the purpose of development in the CFU zone, same ownership is defined as only "more than possessory interest" held by the same person or spouses. It cannot be sensibly claimed that Mrs. Hackett and spouse do not hold more than possessory interest in lot 77 through the trust, and in lot 78/106 through Mrs. Hackett's direct title.

CONCLUSION

The Board should adopt the Hearings Officer's decision, amending findings to note that additional testimony on available uses and on witness qualifications, together with the other evidence in the whole record, is not sufficient to carry the burden of proving no viable economic use other than a second dwelling. Specifically, for example, the applicant failed to prove unfeasible uses expressly allowed in the zone, such as a nursery or Christmas tree farm, and other farm uses. (As stated at the hearing, findings should also be amended to address the ownership issue and to identify and/or quote the relevant findings of the Nance decision that the Hearings Officer intended to incorporate, but did not identify.)

This testimony concerns only issues addressed in the applicant's testimony submitted on August 13th. There was no significant issue or argument raised in answer to the Hearings Officer's decision on other issues, and therefore they are not addressed here.[5] No one can guarantee a court will not make a novel ruling, but based on legal precedent, even the cases cited by the applicant, LUBA and the courts cannot find a "taking" in the facts and law of this case.

copy: Michael J. Robinson
Sandra N. Duffy
Robert Hall

[5] Not addressing other issues is not abandonment of the issues. Under county procedure, all parties may rely on the record established before the Hearings Officer.

Deb,

Here is a copy of Mr. Hunnicutt's response to Mr. Rochlin's memo to the Board.

It should be noted that the Zoning Code reference cited in item #2 of Mr. Hunnicutt's memorandum was deleted by the Board on September 7, 1995 with the adoption of Ordinance #832. That wording is no longer contained within the Zoning Code. It was eliminated because a county can not regulate forest practices on Goal 4 Forest Lands. The Hackett property is identified as Goal 4 resource land. Consequently, the State's Forest Practices Act regulates forestry activities, not the Zoning Code.

Bob Hall

BEFORE THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

In the Matter of the Application of JUNE HACKETT for a conditional use permit for a non-forest dwelling.

No. CU 1-96

REBUTTAL MEMORANDUM

PURPOSE OF MEMORANDUM

This memorandum addresses issues raised by Arnold Rochlin in his letter dated August 19, 1996.

ISSUES RAISED

In his letter of August 19, 1996, Mr. Rochlin raises a number of challenges to the evidence (or lack thereof) proffered by the applicant in support of her claim that the denial of the conditional use permit for the siting of a non forest dwelling constitutes a taking. The applicant will address each of the issues raised by Mr. Rochlin in the order in which they were raised.

1. The applicant cannot base a claim for a taking on the subject parcel without considering its potential use in conjunction with suitable nearby land. Mr. Rochlin argues that the Commission cannot find the subject parcel to be found unsuitable for farm or forest use unless its potential is considered in conjunction with nearby suitable land. Although it is not clear, it appears that Mr. Rochlin is attempting to stretch this argument to cover potential uses on the subject parcel in addition to farm or forest uses, although his letter focuses nearly entirely upon the suitability of the subject parcel for farm or forest uses. The argument which Mr. Rochlin raises is based upon the former statutory standard for the siting of non-farm dwellings on land zoned for exclusive farm use, and is not directly applicable to the applicant's taking argument. Presumably, Mr. Rochlin is arguing that

because the applicant has not considered the ability to sell or lease the parcel to a farmer or commercial forester, she cannot prove lack of economic use of the property, one of the criterion for establishing a taking claim. Agins v. Tiburon, 447 U.S. 255 (1980). Regarding uses other than farm or forest uses, the applicant submitted a report from AE Associates indicating that there are no other uses on the subject parcel, and Mr. Rochlin admits that there are a number of uses technically allowed in the county's CFU zone that are clearly unreasonable. The applicant asks the Board to review the AE Associates report along with the conditional uses allowed in the CFU zone prior to rendering a decision. Upon review of the evidence submitted, it is clear that none of the conditional uses allowed by the CFU zoning provide the owner with an economic use of the parcel sufficient to defeat a taking claim, with the exception of a non-forest dwelling.

2. The applicant has not proven the inability of the parcel to be used for farm or forest uses. Mr. Rochlin argues that the applicant has not proven the subject parcel to be incapable of being used for farm or forest uses. As a result, according to Mr. Rochlin, the applicant has not shown lack of economic use on the subject parcel, and has not proven the denial of the non-forest dwelling would constitute a taking. Regarding the ability of the subject parcel to support a farm use, Mr. Rochlin assumes that the ability to farm the parcel is an outright permitted use which cannot be regulated by the county. This assumption is error. As the Board knows, the subject parcel is located within a §-h overlay zone. Under §11.15.6406(A) of the county's zoning code, farm uses are allowed in an §-h overlay zone without the need to obtain a permit. The substantial evidence in the record, however, shows that the subject parcel is covered with non-commercial timber and underbrush. In order to conduct a farm use on the subject parcel, the timber and underbrush will need to be removed. The removal of the timber is subject to the requirements of §11.15.6420(C), which states:

///

> "The harvesting of timber on lands designated SEC shall be conducted in a manner which will insure that natural, scenic, and watershed qualities will be maintained to the greatest extent practicable or will be restored within a brief period of time."

The foregoing section makes clear that the applicant, if allowed to remove the timber, must restore the area to its natural state within a brief period of time after the timber is removed. The restoration of the area is obviously incompatible with the maintenance of a farm operation on the subject parcel. Therefore, the applicant cannot conduct a farm use on the parcel, as the applicant will be unable to take action necessary to prepare the land for the potential farm use and would not be able to maintain the land for farm use even if allowed to remove the trees.

There is also substantial evidence in the record to support the applicant's claim that the parcel cannot be managed for a commercial forest operation. The letter submitted by Ray Luthy confirms that the property, "cannot be managed as a commercial forest land property". In addition, Mr. Luthy states that he does not believe that the landowner "will ever be able to make a profit from the sale of any timber from the subject parcel." Emphasis added. Mr. Luthy could not have been more clear in his statement. His qualifications as provided in his letter are unchallenged. As a result, there is substantial evidence in the record to show that the use of use of the parcel for a commercial forest operation is not an "economic use" sufficient to defeat a taking claim.

3. The Board should not directly address the taking claim raised by the applicant.

Mr. Rochlin argues that the Board should limit its analysis in this matter to an application of its code provisions and should ignore the Constitutional argument raised by the applicant. While the Board is not obliged to consider a taking claim, the Board is authorized to consider such a claim, and is encouraged to interpret its zoning code in a manner which comports with the Constitution, if there is more than one possible code interpretation. Larson v. Multnomah County, 25 Or LUBA 18 (1993), aff'd 121 Or App 119, opinion clarified and adhered to on reconsideration 123 Or App 300 (1993). The applicant has gone

to considerable time and expense to prepare the case in this matter. The applicant is a resident of this county. The applicant asks that the Board be responsive to the applicant and address the taking issue raised by the applicant.

Mr. Rochlin also claims that the applicant has not ripened her taking claim. This is error. The applicant has complied with the minimum requirements which the Oregon Court of Appeals held were necessary in the Larson case (see the Memorandum in Support of Application originally filed by the applicant). If the Board determines that the applicant must take further steps to ripen the claim, the Board should adopt findings detailing those activities, so that the applicant may have some idea as to how the claim should be ripened, and so the applicant can understand the cost of ripening in order to determine if the Board's requirements comport with the procedural due process requirements of the United States Constitution.

4. The applicant has an ownership interest in the adjacent parcel (tax lot 78). Mr. Rochlin argues that a parcel owned by a trust is in effect owned by its beneficiaries. This is not true. The fact remains that the applicant does not have any direct ownership interest in tax lot 78. Her ownership interest in tax lot 78 is no different than that of a shareholder in a corporation. For example, if Nike owned tax lot 78, and the applicant owned stock in Nike, would the Board hold that the parcels were under the same ownership? After all, according to Mr. Rochlin, the applicant would have "more than a possessory interest" in each parcel. That is exactly the argument which Mr. Rochlin wants you to accept. The same ownership definition in §11.15.2062(B)(3) of your code requires the applicant to have a "greater than possessory interest" in both parcels. The applicant has no ownership interest in tax lot 78.

CONCLUSION

There is substantial evidence in the record to support the applicant's argument that none of the conditional uses in the CFU zone are available to the applicant. In addition, as a result of the § provisions restricting the removal of the trees and underbrush currently on the

subject parcel, the applicant cannot make a farm use on the parcel. It is also impossible for the applicant to make a forest use on the subject parcel. Therefore, as a result of the county's zoning regulations, there is no "economic use" for the applicant to make on the subject parcel, and the applicants parcel has been "taken". The applicant urges the Board to exercise its authority, determine that the property has been taken, and authorize an approval of the non-forest dwelling to avoid further liability.

DATED this 27th day of August, 1996.

David J. Hunnicutt
OSB #92342
Of Attorneys for Applicant

HALL Robert N

From: HALL Robert N
Sent: Tuesday, August 13, 1996 2:13 PM
To: HALL Robert N; STEIN Beverly E; SALTZMAN Dan S; HANSEN Gary D; KELLEY Sharron E; COLLIER Tanya D
Cc: BUSSE Kathy A; DUFFY Sandra N; 'kayer@teleport.com'; 'mcrobinson@stoel.com'
Subject: RE: Effect of the SEC subdistrict on farm and forest uses (Hackett Appeal)

Addendum to Memo

While my previous memo was correct, the Code contains more specific exclusions of farm and forest uses from the SEC requirements. They are found in MCC 11.15.6406(A) & (B) which, respectively, exempt farm and forest uses from SEC permitting requirements. The SEC, therefore, in no way prevents farm or forest use of the Hackett property.

From: HALL Robert N
Sent: Tuesday, August 13, 1996 1:06 PM
To: STEIN Beverly E; SALTZMAN Dan S; HANSEN Gary D; KELLEY Sharron E; COLLIER Tanya D
Cc: BUSSE Kathy A; DUFFY Sandra N
Subject: Effect of the SEC subdistrict on farm and forest uses (Hackett Appeal)

I was asked by Commissioner Collier at the Hackett appeal hearing to respond to what effect the Significant Environmental Concern subdistricts have on preventing farm and forest uses. The answer is none. MCC 11.15.6408(E) stipulates:

"For Goal 5 resources designated "3C", the approval criteria shall be used to determine the most appropriate location, size and scope of the proposed development, in order to make the development compatible with the purposes of this section, but shall not be used to prohibit a use or be used to require removal or relocation of existing physical improvements to the property."

The Hackett property is designated SECh because of the identified Goal 5 wildlife habitat resource, which was designated "3C" by the West Hills Reconciliation Report, that is found on the property and surrounding area. The SECh, then, might be used to locate or limit a proposed farm or forest use; but can not be used to prohibit any of the uses authorized by the Commercial Forest Use (CFU-80) zoning district on the Hackett property.

MULTNOMAH COUNTY

BOARD HEARING OF July 9, 1996

TIME 9:30am

CASE NAME Hackett Conditional Use Request NUMBER CU 1–96, HV 1–96 & SEC 1–96

1. Applicant Name/Address

   June Hackett

   3130 NW Forest Lane

   Portland 97229

ACTION REQUESTED OF BOARD

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

2. Action Requested by Applicant

   Lot area variances of 78.17 acres and 77.67 acres from the 80 acre minimum lot size requirement of the Commercial Forest Use district [MCC 11.15.2058(A)] to "...create two individual Lots of Record out of an existing 4.03 acre Lot of Record." The southerly parcel would be 1.71 acres in size and 120.25 feet in width with an existing dwelling, and the northerly parcel would be 2.32 acres and 224.09 feet in width. Consequently, variances from the 200 foot side yard setbacks of the CFU–80 district [MCC 11.15.2058(C)] were also requested. Applicant further requested Conditional Use approval of a non-resource related single family residence on the northerly 2.23 acre parcel. The property is within an SEC_h overlay district which requires a Significant Environmental Concern (Habitat) permit for the proposed residence. The request also necessitated a variance from the 200 foot required front yard setback.

3. Planning Staff Recommendation

   Denial

4. Hearings Officer Decision:

   Denial

5. If recommendation and decision are different, why?

ISSUES

(who raised them?)

The applicant argued that the aggregation provisions for undersized lots of the Commercial Forest Use section of the Zoning Code denied her an economically viable use of her lot.

BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON

Regarding an application by June Hackett for a Conditional Use permit for a single family residence not related to forest management, lot size and set back variances, and a Significant Environmental Concern Permit in the Commercial Forest Use (CFU-80 and SEC-h Wildlife Habitat) zones located at 3130 Forest Lane in unincorporated Multnomah County, Oregon.	)	FINAL ORDER CU 1-96, HV 1-96, SEC 1-96 (Hackett)

I. FINDINGS

The Hearings Officer adopts and incorporates by reference the findings and conclusions set forth in the staff report (Exhibit 9), except to the extent expressly modified or supplemented below.

II. HEARING AND RECORD

A public hearing was held concerning this matter on April 16, 1996. The written record was left open until May 7, 1996.

The following exhibits were received and made part of the record by the Hearings Officer.

1. Applicant's Submittal
2. April 4, 1996 Bargain and Sale deed from William D. Hackett and June Welby Hackett, Trustees of the Hackett Family Trust to June Welby Hackett for Tax Lot '106', Section 25, TIN, R1W.
3. Warranty deeds of November 30, 1967 and October 22, 1981 transferring property to William D. Hackett and Donna D. Hackett, and William D. Hackett, respectively.
4. Assessment & Taxation data regarding Tax Lot '50', Section 30, TIN, R1E.
5. Assessment & Taxation data for all properties within the identified surrounding areas.
6. Table of lot sizes for all properties within the identified surrounding area.

7. Application by William D. Hackett for Designation of Land as Forest Land dated March 11, 1988 and letter of qualification from Neil Galash to William D. Hackett dated June 2, 1988.
8. Certification of Private On-Site Sewage Disposal dated 2/14/96 signed by Michael Ebeling of the Environmental Soils Section of the City of Portland Bureau of Buildings.
9. Staff Report
10. Letters from Atkinson (2) to Grillo (3/18/96)
11. Letter from Robinson to staff (3/20/96)
12. Letter from Forest Park Neighborhood Association to Hearings Officer (3/18/96)
13. Letter from staff to Hackett (1/12/96)
14. Letter from Robinson to staff (4/23/96)
15. Letter from Forest Park Neighborhood Association to Hearings Officer (4/30/96)
16. Letter from Robinson to staff (5/7/96)

III. DISCUSSION

The applicant, June Hackett, has requested the following development permits:

1. A conditional use permit to allow a dwelling not related to forest management.

2. A lot size variance of 78.17 and 77.67 acres from the 80 acre minimum lot size requirement to create two individual lots of record containing 1.83 acres (Tax Lot 77) and 2.33 acres (Tax Lot 78), otherwise known as Tax Lot 108.

3. A setback variance from the required 200 foot side and front yard setbacks.

4. A significant environmental concern (habitat) permit.

Supplemental findings for these permits are set out below:

Lot Size Variances

Staff maintains that a Lot of Record cannot be created by a quasi-judicial action. They indicate that Lots of Record are created through a legislative action that defines circumstances by which properties qualify as Lots of Record (Staff Report at page 9).

The applicant in this case is seeking two Major Variances for lot size, one of 97.1 percent and one of 97.9 percent, in order to create two separate Lots of Record. Furthermore, the applicant disagrees with the County's interpretation of MCC 11.15.2062(A)(2) concerning the County's lot aggregation requirement as it applies to Lots

77 and 78. The applicant has requested that the Hearings Officer render such an interpretation because:

> "If the variance is granted in conjunction with a determination that the sale of the lot to June Hackett "disaggregates" Tax Lot 106 from Lot 77, the applicant could receive an approval for a conditional use permit, assuming other applicable approval criteria were satisfied." Page 3, April 23 letter from Mike Robinson (Note: Tax Lot 106 is otherwise known as Tax Lot 78).

The Hearings Officer finds that the County's act of defining a Lot of Record is a legislative action. However, if a proper request for a determination of whether or not a particular set of facts meets the County's Lot of Record definition is made, such a determination would be a quasi-judicial action.

Here, the applicant is seeking a lot size variance as a method of seeking relief from the legislative definition of a Lot of Record. The Hearings Officer has previously ruled that an applicant cannot lawfully request a lot size variance in order to avoid the deaggregation requirements that have been legislatively adopted by the County. (See Nance.) Furthermore, the question of whether or not the applicant could obtain alternative relief by selling one or more of the lots is not properly before the Hearings Officer. The Hearings Officer agrees with Mr. Rochlin in that such a request is a request for an advisory opinion. Although the Hearings Officer conceivably has broad authority under MCC 11.15.8115(I), the question of whether or not a building permit is possible for Tax Lot 106 (78), if it is sold to a third party, requires the application of then existing law to speculative facts. The Hearings Officer elects not to extend his quasi-judicial authority in that sort of a request. It should be noted however, that the code provides a process for hearing, acting upon and appealing an administrative interpretation of the Planning Director. See 11.115.8115(E). However, such an appeal is not presently before the Hearings Officer.

With regard to the substantive issue presented by the lot size variance request, the Hearings Officer agrees with staff that the applicant has not identified any circumstances or conditions that have changed in the vicinity of the district since the Board's previous final order in 93-359 was issued that would change the conclusions reached by the Board at that time. Since this criteria is not met, the lot size variances cannot be granted.

As noted above, Mr. Rochlin has properly pointed out that in this case, as in the Nance case, the applicant is seeking relief not only from the lot size request of the code, but also from the provisions of Ordinance 786, which requires these lots to be aggregated. The Hearings Officer finds that unless specific exceptions already exist for disaggregation, the Hearings Officer is not authorized to create such an exemption to the quasi-judicial process. The Hearings Officer therefore adopts and incorporates the relevant reasoning in Nance, by reference here.

In summary, even if a variance were available to deaggregate these parcels, or if the parcels were somehow not subject to aggregation, the applicant has not satisfied the relevant variance approval criteria and therefore the variance must be denied.

Takings Claim

The applicant argues that the aggregation provision in the code "takes" the applicant's property by denying her an economically viable use of her lot. Further, the applicant indicates that these permit applications are necessary to obtain the local government's final determination as to how local regulations will be applied to her property.

The Hearings Officer finds that although the applicant has raised the takings issue and in making these permit requests, is in the process of exhausting her administrative remedies, unless or until the Board issues a final determination on these permits, the applicant's takings claim is not yet ripe for review. For these reasons then, the Hearings Officer finds that it would be premature for the Hearings Officer to rule on the applicant's takings claim.

To the extent that the Board may be called upon to rule on the takings claim on appeal, the Hearings Officer nonetheless finds as follows:

1. The written testimony of Mr. Watson indicates that in his opinion as a real estate broker, the property "has no value" for commercial processing of forest products because the market for these uses requires good access to highway and rail connections in proximity to forest products.

2. The staff report indicates that the site has been used for growing timber and the applicant, in taking forest deferral, has so affirmed this forest use with the County.

3. Mr. Watson has not considered the value of Lot 78 in conjunction with Lot 77. The value to the owner of an adjoining lot is relevant to the economic value of the property.

4. The applicant has not provided substantial evidence in the record that the property, either alone or in conjunction with adjoining properties, lacks any economically viable use as a result of the County's existing land use regulations.

5. The property is presently zoned CFU-80 (SEC). Neither Mr. Watson, nor any other witnesses have reviewed all of the permitted or conditional uses under the applicable zoning section. Therefore, the applicant has not provided substantial evidence that there is no economically viable use of the property by the current zoning restrictions. Mr. Watson reviewed code sections

11.15.7020 and 11.15.2172, which are not relevant to the current zoning of the site.

6. The evidence in the record indicates that the SCS soil classification for the site is suitable for growing Douglas fir. The fact that the existing trees on the site are of poor quality does not rebut the other information in the record which clearly indicates that the site can support timber production. However, the ability of the site to be economically logged is uncertain based upon the evidence in the record. Although Mr. Walker, an urban planner and geographer, asserts that "most of the property is too steep to be logged by Cat", it is clear that in the past, the site has been logged. Whether or not the site was or can be logged in an economically viable manner is simply not clear based upon the evidence in the record. Furthermore, since Mr. Walker is not qualified as a forester, his written opinion is not considered by the Hearings Officer to be expert testimony and instead should be regarded as lay opinion and thereby subject to less weight.

7. Overall, the applicant has not provided substantial evidence in the whole record that applicable zoning restrictions eliminate any viable economic use for the property.

IV. CONCLUSION

Based upon the above findings and discussion, the Hearings Officer concludes that CU 1-96, HV 1-96, SEC 1-96 should be denied because they do not and cannot meet the applicable approval criteria.

V. DECISION

CU 1-96, HV 1-96, SEC 1-96 are hereby **Denied.**

It is so ordered this 14th day of June, 1996.

Phillip E. Grillo
Hearings Officer
Multnomah County

STOEL RIVES LLP
ATTORNEYS

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2300
PORTLAND, OREGON 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet: www.stoel.com

June 21, 1996

MICHAEL C. ROBINSON
Direct Dial
(503) 294-9194
email mcrobinson@stoel.com

VIA MESSENGER

Multnomah County Department of Environmental Services
Transportation and Land Use Planning Division
2115 SE Morrison Street
Portland, OR 97214

Re: **Appeal of CU 1-96, HV 1-96 and SEC 1-96**

To Whom It May Concern:

This office represents the applicant, June Hackett. Please find enclosed a completed and signed Notice of Review form containing the information required by MCC 11.15.8260(B)(1)-(4) and a check in the amount of $300 pursuant to MCC 11.15.8260(C). Please provide me with a copy of the tapes of the April 16, 1996 public hearing before the Hearings Officer. Please provide me with notice of the date of the hearing before the Board of County Commissioners. Finally, please provide me with notice of the time and date at which the Board will consider my request pursuant to MCC 11.15.8270(E) for a scope of review on the record plus additional testimony and evidence as I wish to be present.

Very truly yours,

Michael C. Robinson

Michael C. Robinson

MCR:ipc
Enclosures
cc (w/encl.): Mr. and Mrs. William D. Hackett
Ms. Dorothy Cofield

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: HACKETT , , JUNE
   Last *Middle* *First*
2. Address: 3130 NW Forest Lane , Portland , OR 97229
   Street or Box *City* *State and Zip Code*
3. Telephone: (503) 292 - 5508
4. If serving as a representative of other persons, list their names and addresses:

   N/A

5. What is the decision you wish reviewed (*e.g.*, denial of a zone change, approval of a subdivision, *etc.*)?
   CU 1-96, HV 1-96 and SEC 1-95
6. The decision was announced by the Planning Commission on June 14, 1996
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
   Pursuant to MCC 11.15.8225(A)(1), June Hackett was the applicant and was represented before the Hearings Officer by her attorney, Michael C. Robinson. June Hackett, as the applicant, was entitled to notice of decision pursuant to MCC 11.15.8220(C)(1).

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

(1) The Hearings Officer erred by determining that he did not have the authority to grant the lot size variances or that the approval criteria for the variances was not satisfied. (2) The Hearings Officer erred by not finding a taking of the lot of record. (3) The Hearings Officer's decision did not address the criteria for approval for SEC 1-96.

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

(a) [ ] On the Record

(b) [x] 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*.

Pursuant to MCC 11.15.8270(E)(1), petitioner asks the Board to hear the matter on the record plus additional testimony and evidence regarding the takings issue. The Board should hear additional testimony or other evidence in light of the Hearings Officer's determination because until that determination such evidence could not have reasonably been presented. There is no prejudice to parties by allowing an on the record plus additional testimony and evidence review. As noted above, need for additional evidence was not apparent prior to the Hearings Officer's determination. There can be no surprise to opposing parties as the opposing party is well aware of this basis for the application. Finally, evidence offered will be competent, relevant and material to the issue of whether a taking has occurred.

Signed: M.C. Robinson Date: 6.21.96

For Staff Use Only

Fee:

~~Notice of Review = $500.00~~ 300.00

~~Transcription Fee:~~

~~Length of Hearing _____ x $3.50/minute = $~~ $5.00/tape 48 hr turnaround

Total Fee = $ _____

Received by: _____ Date: _____ Case No. _____

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	Name:	Sender's Direct Dial:
FROM:	**Michael C. Robinson**	**(503) 294-9194**

Client:	25769	Matter:	1

DATE: July 3, 1996

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July 3, 1996

MICHAEL C. ROBINSON
Direct Dial
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email mcrobinson@stoel.com

Mr. Stuart Farmer
Administrative Analyst Senior
Multnomah County Planning Department
2115 SE Morrison
Portland, OR 97214

Re: Appeal by June Hackett

Dear Mr. Farmer:

I represent the applicant, June Hackett. I have requested that the Board of County Commissioners continue to a date certain of August 13, 1996 at 9:30 a.m. the appeal hearing presently scheduled for July 9, 1996 at 9:30 a.m. I explained that I have an oral argument at the Land Use Board of Appeals at 9:00 a.m. on July 9 and cannot avoid this conflict. I have discussed this matter previously with my client and she agrees to waive the 120-day provision in ORS 215.416(3) through August 13 contingent upon the county continuing the hearing until August 13 and granting a de novo review as I have requested.

Enclosed is a check in the amount of $200 as payment for the applicable fee.

Thank you very much for your assistance.

Very Truly Yours,

Michael C. Robinson

Michael C. Robinson

MCR:lxh
enclosure
cc: Mr. and Mrs. William D. Hackett

PDX1A-38850.1 25769-1

August 5, 1996

Forest Park Neighborhood Association

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

Board of County Commissioners
c/o Planning Division
2115 SE Morrison St.
Portland, OR 97214

Re. **CU 1-96, HV 1-96, SEC 1-96—Hearing 8/13/96**
Conditional Use, Variances and SEC Habitat Permits

SUMMARY

The subject property consists of adjoining lots that total about 4 acres in the 80 acre CFU zone. Title in one lot, the site of the family dwelling, is held be the Hackett Family Trust, of which trustees are William and June Hackett. Title in the other lot, site of the well serving the home and of part of the garage, is held by June Hackett, spouse of William Hackett. Permits are requested to build a dwelling on that lot, which would result in two dwellings on adjoining substandard lots. The Hearings Officer's decision implicitly finds that the two lots are in the same ownership and finds that the lots comprise a single lot of record on which the code allows only the one dwelling already in place. The code provisions most relevant to the situation are:

11.15.2052(A): "A dwelling not related to forest management may be allowed subject to the following:
(1) The lot shall meet the lot of record standards of MCC .2062(A) and (B) ..."

11.15.2062(A): "For the purposes of this district, a Lot of Record is:

(1) A parcel of land:
* * * * *
(c) Which satisfies the minimum lot size requirements of MCC .2058, or

(2) A parcel of land [which]:
* * * * *
(c) Does not meet the minimum lot size requirements of MCC .2058; and
(d) Which is not contiguous to another substandard parcel or parcels under the same ownership, or

(3) A group of contiguous parcels of land:
* * * * *
(c) Which individually do not meet the minimum lot size requirements of MCC 2058, but, when considered in combination, comply as nearly as possible with a minimum lot size of nineteen acres, without creating any new lot line; and
(d) Which are held under the same ownership."

11.15.2062(B)(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."

Discussion here concerns the following issues:

Ownership: The applicant wrongly asserts that properties described as tax lots 77 and 78/106[1] are not in same ownership.

Aggregation of Adjoining Lots: The applicant wrongly claims that under the MCC, the lots are not required to be aggregated into a single "lot of record" for the purpose of considering qualification for a dwelling on lot 78/106, in addition to the existing dwelling on lot 77.

Entitlement to Variance from Lot Size Requirement: The applicant wrongly claims that there are circumstances justifying a reduction from the 80 acre standard lot size to only 2 acres and that a consequence of such a variance would be elimination of the requirement of aggregating adjoining lots of less than 19 acres for the purpose of determining qualification for a dwelling.

Unconstitutional Taking Claim: The applicant wrongly claims that if the MCC operates to preclude a second dwelling, it amounts to a taking of property without just compensation.

OWNERSHIP

The applicant makes a bare claim that because title to the adjoining lots is vested separately in the "Hackett Family Trust" and June Hackett, respectively, they are in separate ownership. The applicant has not disputed prior testimony, that control, ownership, and beneficiary and remainder interests in the Hackett Family Trust, the purported owner of lot 77, is in the hands of William and June Hackett, husband and wife, persons within the degree of relationship defined as same ownership by 11.15.2062(B)(3). The applicant does not dispute ownership and control of, and interest in, the trust by the Hacketts, but argues only that a trust is a separate ownership not contemplated by MCC .2062(B)(3). For the purpose of the regulation, ownership of an ownership, is ownership. To establish separate ownership, the applicant must provide conclusive documentary evidence that all control, all ownership and all beneficiary and other interest in the instruments of title or actual ownership of both of the lots do not lie within the degree of relationship designated in .2062(B)(3). The burden of proof is on the applicant, and there is no proof whatever of separate ownership. All documentary evidence in the record is to the contrary:

1. On a deed changing title of lot 78/106 to June Hackett, William and June Hackett signed as trustees of the Hackett Family Trust created June 15, 1993. (Exhibit 2 of the March 20, 1996 Staff Report)

2. The same deed, signed before a notary on April 4, 1995, provides "The true and actual consideration paid for this transfer stated in terms of dollars is $0.00."

The Hacketts could not sign as trustees if they did not control the trust, and, if the entity is a genuine trust, they could not transfer its assets to one of themselves for other than fair market value, unless they are its only owners and beneficiaries. This evidence, and the unavoidable implication of the applicant's failure to offer evidence, or even a claim, that the

[1] When deeded in 1981, this property was identified as tax lot 78. In 1985, the Hacketts combined lots 77 and 78 for assessment purposes into tax lot 77. In 1993, when the Hacketts filed applications similar to the instant applications, the property was, for convenience, referred to as lots 77 and 78. Title in the properties was later changed to the "Hackett Family Trust. In 1995, title of what had been lot 78 was changed to Mrs. Hackett and the tax assessor designated it lot 106. Much of the testimony of the applicant and others refers to the property as either lot 78 or lot 106, or both. To minimize confusion, the property is referred to herein as lot "78/106".

trust is not owned by June Hackett and her husband plainly indicate same ownership of the adjoining lots through common possessory interest.

The applicant cannot rely on what kind of entity the trust is. MCC .2062(B)(3), referring to "possessory interest", plainly contemplates that the substance of ownership, and not the instrument, determines whether or not ownership is the same. Discussion of partnerships and such is exemplary of entities such as corporations, joint ventures, and trusts. For the purpose of applying MCC .2062(A) and (B), ownership of an instrument of ownership is ownership.

Because the applicant has not shown different ownership, only one dwelling, the existing one, can be permitted on what the county calls a "lot of record" or what the state calls a "tract". (ORS 215.705(1)(b) and .750(4)(d))

AGGREGATION OF ADJOINING LOTS

If the applicant could be granted lot size variances and, if a variance could be granted from the provision of MCC 11.15.2052(A)(1) requiring that the property satisfy the definition of a lot of record to qualify for a dwelling, then a second dwelling would not be prohibited.

A lot of record is defined in MCC .2062(A) as a lawfully created lot: that meets minimum size standards, or that is of substandard size, but not contiguous to another substandard lot in the same ownership, or a group of contiguous substandard lots in the same ownership. There is no contention that the lots are not substandard and contiguous. Barring issuance of variances which, at least arguably would allow dwellings on the lots notwithstanding the regulations, approval of a dwelling would depend on acceptance of at least the applicant's unsupportable claim of separate ownership.

Aside from a constitutional claim, the applicant makes some other arguments which may be easily rejected.

The applicant claims an unlawful lack of notice of the zone change in 1980 which provided for aggregation of adjoining lots: The same claim was made in the 1993 application and was rejected by the hearings officer and the Board. The applicant filed an appeal of that decision with LUBA which was dismissed for failure of counsel (not Mr. Robinson) to file a brief by the deadline. Hackett *v. Multnomah county*, 26 Or LUBA 551 (1994) As the code change was a legislative matter, there is no right of appeal to the Board. There is, at most, a right to petition the Board to consider repeal of the code change, an action that could not lawfully affect this proceeding. Even if by failure of notice the applicant was deprived of a hearing on the zone change, the opportunity to appeal to LUBA expired 21 days after the applicant became aware of the change and the opportunity was certainly lost with the dismissal of *Hackett v. Multnomah County*. The issue of notice of the legislative zone change is dead.

The applicant claims it is unfair to apply the aggregation requirement because the property was acquired before it was imposed: When convenient, the applicant claims to have acquired the property in 1978 (Narrative, p.26, line 11). When convenient for another purpose, the claim is that it was acquired by Mrs. Hackett in 1995 by purchase for zero dollars from the Hackett Family Trust (Narrative, p.5, line 14). If the applicant truly acquired the property in 1995, then the claim of unfairness fails on its face. But even if it were conceded to be unfair, the applicant cites no approval criterion that invokes his/her issue of fairness, and there is none. What is actually fair, is even handed application of the regulations, application no different from how the regulations are imposed on the whole neighborhood and everywhere in the CFU zone.

The applicant claims the county is wrong to consider substandard lots once aggregated to be always aggregated. The county has interpreted its regulations to mean that an aggregation of lots defined as a lot of record remains a lot of record, however ownership is changed. But even if the county's position were arguable, the applicant attacks an irrelevant straw man. Here, the lots comprising the lot of record are currently in the same ownership.

VARIANCES

The issue is generally well covered by staff and the hearings officer. However, the most specific standard for a variance is not directly addressed. MCC11.15.8505(A) provides:

> "The Approval Authority may permit and authorize a variance from the requirements of this Chapter only when there are practical difficulties in the application of the Chapter."

It is well established by judicial authorities that "practical difficulties" are difficulties inherent in the condition of the land and never include the burden that reasonably follows from ordinary compliance with a lawful requirement. Because there is no claim of difficulty or hardship other than the burden of aggregation itself, exactly as intended by the code, a variance cannot be allowed.

The Hearings Officer, at page 3, refers to and incorporates into his findings "the relevant reasoning in Nance", HV 23-95, a case involving a similar variance request and decided by the same hearings officer. But the decision does not identify or describe "the relevant reasoning". I believe it is found in the portion of the Nance decision quoted to the hearings officer in my testimony of March 18, 1996. The following is from that testimony, and, to avoid uncertainly on appeal, of what constitutes the Boards findings, the Board is requested to expressly incorporate the specific quotation from Nance into its findings.

Variance Cannot be Granted as a Matter of Law

Legal issues in this case are the same as in HV 23-95 (*Nance*), in which the hearings officer's decision was issued on January 22, 1996. In *Nance*, the applicants, at different times acquired contiguous substandard lots. Though there are differences, .2848, applicable in the R-30 district, required aggregation of lots in *Nance*, with substantially the same effect as .2062(A)(3) has in this case. A factual difference is that in *Nance*, there is an existing dwelling on each of the two lots (presumably lawfully built). Here, there is only one dwelling on one lot. A claim by *Nance* that the second dwelling was a special circumstance was disallowed, leaving the cases much the same.

A variance cannot be lawfully granted. The following is quoted from the decision in HV 23-95 and is largely applicable here. (All emphasis is in the original):

> "1. A variance cannot be used as a substitute for a zoning amendment.
>
> "Variances serve a limited function. In Oregon, a variance has traditionally been considered to be an escape valve to allow property owners relief from the requirements of a zoning code standard when those standards make the land completely unusable or usable only with extraordinary effort. Erickson v. City of Portland, 9 Or. App. 256, 261, 496 P.2d 726 (1972). The traditional view is that variances should be approved only in extraordinary circumstances. A liberal policy of granting proper variances can undermine the goals of the comprehensive plan. Erickson v. City of Portland, 9 Or.

App. at 262 (quoting Ronald M. Shapiro, The Zoning Variance Power - Constructive in Theory, Destructive in Practice, 29 MD L Rev. 3,10 (1969)).

"Under this approach, it has generally been held that a variance cannot be used as a substitute for a zoning text amendment or to alleviate an oversight in the ordinance. See Lovell v. Planning Commission of City of Independence, 37 Or. App. 3, 7, 586 P.2d 99 (1978). See also, Inn, Home for Boys v. City Council of Portland, 16 Or. App. 497, 519 P.2d 390 (1974), Hood River Valley Residence Committee, Inc., v. Hood River, 15 Or. LUBA 37, 40 (1986) and Smith v. Baker, 6 Or. LUBA 42 (1982). See generally, 3 E.C. Yokley, Zoning law and Practice, § 21-9 at 342-351(4th ed. 1978) and 3 Anderson, American Law of Zoning, § 20.72 and 20.04 (3rd ed. 1986).

"In this case, the evidence indicates that the applicant is seeking relief from provisions of Multnomah County Ordinance 786 enacted in 1994, which generally requires a group of contiguous parcels held under the same ownership on March 10, 1994 or later to be aggregated for purposes of determining whether or not such a parcel or parcels meets the definition of a lot. In other words, the ordinance effects a merger of substandard lots for zoning purposes.

"The Hearings Officer has reviewed the text of Ordinance 786 and finds that neither the ordinance nor its codified equivalent expressly exempts parcels with homes already existing on them from the merger provisions of the ordinance. The Hearings Officer also finds that unless such a specific exemption already exists, the Hearings Officer is not authorized to create such an exemption through the quasi-judicial variance process. Rather, if the applicant wishes to create an exemption for developed lots such as this one, the applicant should seek an amendment to Ordinance 786 to allow for such an exception. The quasi-judicial variance process cannot lawfully be used as a substitute for a zoning text amendment.

* * * * *2

"3. The need for the variance must arise from conditions inherent in the land.

"In Oregon, the general rule is that the subject hardship must arise out of conditions inherent in the land that distinguish it from other land in the general vicinity. See Godfrey v. Marion County, 3 Or. LUBA 5 (1981), Erickson v. City of Portland, 9 Or. App. 256, 496 P.2d 726 (1972), Lovell v. Planning Commission of City of Independence, 37 Or. App. 3, 7, 586 P.2d 99 (1978), Standard Supply Co. v. Portland, 1 Or. LUBA 259 (1980)

"The Hearings Officer finds that this standard is implicitly included in MCC 11.15.8505(A)(1) and therefore will be applied within the context of that ordinance provision. As pointed out below, the Hearings Officer finds that this standard has not been met given the facts of this case.

"4. Variance requests should relate to dimensional or quantitative zoning standards.

"The Multnomah County Zoning Code does not expressly mention what sorts of zoning standards the Hearings Officer may grant a variance from. However, the

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2 Omitted paragraphs concern self-imposition of hardship by the applicant's purchase of an adjoining lot after the ordinance requiring aggregation became effective.

Hearings Officer finds that it is clear from the manner in which the zoning code distinguishes between Major and Minor Variances, that both types of variances are aimed at 'applicable dimensional requirements.' Compare MCC 11.15.8515(A) and (B).

"The planning staff, on page 1 of its staff report, has characterized the applicant's request as a variance from the 30,000 square foot minimum lot size requirements of the R-30 Zoning District. The Hearings Officer disagrees with staff's characterization.

"The Hearings Officer specifically finds that, the applicant is seeking relief from the new definition of the term 'lot', enacted by Ordinance 786, now codified at MCC 11.15.2848(A)(3)(a)-(d), which require parcels that do not individually meet minimum lot size requirements and which are held under the same ownership on or after March 10, 1994 to be considered 'in combination' for purposes of the definition of a 'lot' as contained in MCC 11.15.2848. Accordingly, the Hearings Officer concludes that the applicant is seeking a variance from the code's definition of a 'lot', rather than seeking a variation from any dimensional or qualitative [quantitative ?] zone standard. The Hearings Officer's conclusion in this regard is supported by the fact that if the applicant were to seek a variance from the minimum lot size requirements in MCC 11.15.2844, he would be prevented in doing so because of the provisions in MCC 11.15.2848. Therefore, it is ultimately the definitions set forth in MCC 11.15.2848 which the applicant must seek a variance from. Since the provisions in this section are not dimensional or qualitative [quantitative?] in nature, no variance is available." (Final Order HV 23-95, January 22, 1996, p. 2-5.)

In the instant case, the variance requested is also not actually a variance from the 80 acre lot size standard of .2058(A), as characterized by the applicant and staff, but would be a variance from either the requirement of .2052(A)(1) that the site of a proposed dwelling satisfy the lot of record standards of .2062(A) and (B), or from the definitions of lot of record in .2062(A). When .2062(A)(1)-(3) are all considered, the site can qualify for a dwelling only as a lot of record as defined in sub-section (3) which necessitates aggregation of substandard lots of less than 19 acres. If a lot size variance were granted it would not cause either lot to be enlarged to 19 acres, and it would not change the fact that, lot size variance or not, the substandard lots are required to be aggregated to a single lot of record. As the lot of record already contains one dwelling, by provisions of ORS 215.705-.750, another cannot be allowed. (This argument assumes that the lots are in one ownership. The question of ownership is addressed [above].) This is the same sort of regulation that was at issue in *Nance*, from which a variance cannot be allowed.

UNCONSTITUTIONAL TAKING CLAIM

The applicant has made clear that this proceeding is expected to be a step to challenging constitutionality of a denial at LUBA and the courts. Under ORS 215.416(8), the county's decision must be based on the applicable regulations and not on whether or not the regulations are constitutional.

A the Hearings Officer found, the Board should find the applicant has not shown there is no reasonable economic use of lot 78/106 other than for a second dwelling. The applicant has not considered reasonable uses. Some uses purportedly considered are rejected without serious analysis and actual consideration. Use of lot 78/106 is wrongly considered only in isolation, without required consideration of use together with other land. In the March 20th staff report, clear and convincing information was presented that the site has been used for growing timber, and the applicant has so affirmed to the County Assessor. (p. 19) The applicant has given no answer.

The applicant has provided only superficial and incomplete evidence of economic use available for the property. Unlikely uses such as raising swine and establishing dog kennels are rejected, but common and practical uses are not even discussed. Sensible examples, in addition to growing timber, are christmas tree farm, truck farm or horticultural nursery. ORS 215.203. Even now, the subject property is put to important beneficial use: The well and part of the garage are on lot 78/106, and the lot provides a buffer for the house which would otherwise be in violation of the minimum setback requirement. Certainly the value of the two adjoining lots is much more than either one alone. In fact, value to the owner of an adjoining lot is the one exception to the low value given to what he calls "an undevelopable property" by the applicant's witness, John Watson, June 24, 1993, page 4 (certified to be currently valid by Watson's July 28, 1995 letter). The subject lot is not undevelopable. As stated above, some development already lawfully exists on lot 78/106. Other valuable potential of the lot, such as for private recreational uses, gardens and space for maintaining seclusion, must also be considered.

The applicant's arguments rely mainly on the Watson letter. Mr. Watson relies in part for his conclusion that "many of these uses [which he holds to be not reasonably practical] require an additional structure which the county prohibits." He is wrong. MCC .2054(D) expressly allows structures customarily "accessory or incidental to any use permitted or approved in this [CFU] district". Mr. Watson also errs in believing the property to be "surrounded on three sides by single family residences". That conflicts with the applicant's own evidence: "The site is bordered on the east by Forest Park, the north by an undeveloped parcel, on the south by two parcels, each developed with a single family residence and on the rest by Forest Lane." (Narrative, page 7) Watson also wrongly relies on the size of the property for determining unsuitability for the uses he addresses, without considering use in conjunction with nearby land. (Letter, page 7) Land cannot be determined to be unsuitable for uses, based on size, unless it is established that it could not be suitable if used in conjunction with other land. The applicant must consider not only the land in same or close ownership, but all other nearby land. *Nelson v. Benton County*, 23 Or LUBA 392, *Aff'd* 115 Or App 453 (1992). As several of Mr. Watson's premises are wrong, his conclusions cannot reasonably be credited.[3]

Another of the applicant's witnesses, Frank Walker, also wrongly relies on size of the property for determining unsuitability for growing timber. (June 1, 1995 letter, page 2) Mr. Walker does not indicate what part of the property is unsuitable for reasons other than size. He says the property has "exceedingly steep slopes", and "some of the slopes exceeded 70%". But, we are not informed of what the acceptable slope is for timber growing, and on what authority. Nor are we told whether the 70% slopes occupy 1% or 99% of the property. "The majority", unquantified, is said to be "exceedingly steep", whatever that means. Implicitly, less than that majority has slopes of 70%. His statements of unsuitability are qualified, e.g. "too steep to be logged by a cat". (But it is an undisputed fact that the property has been logged in the past.) Mr. Walker judges the suitability for timber by the value of the current crop, which has been mismanaged. That is established by Walker's statement:

> "The timber on the property is predominantly 25-35 year old maple and alder. At total of seven scattered conifer trees were counted on the entire 2.33 acres. Virtually every tree in this stand has some sort of defect, such as butt swerve, windthrown tops, excessive taper and kerf. The conifer trees are very poor in quality, and their best potential is for firewood." (Letter, p. 1)

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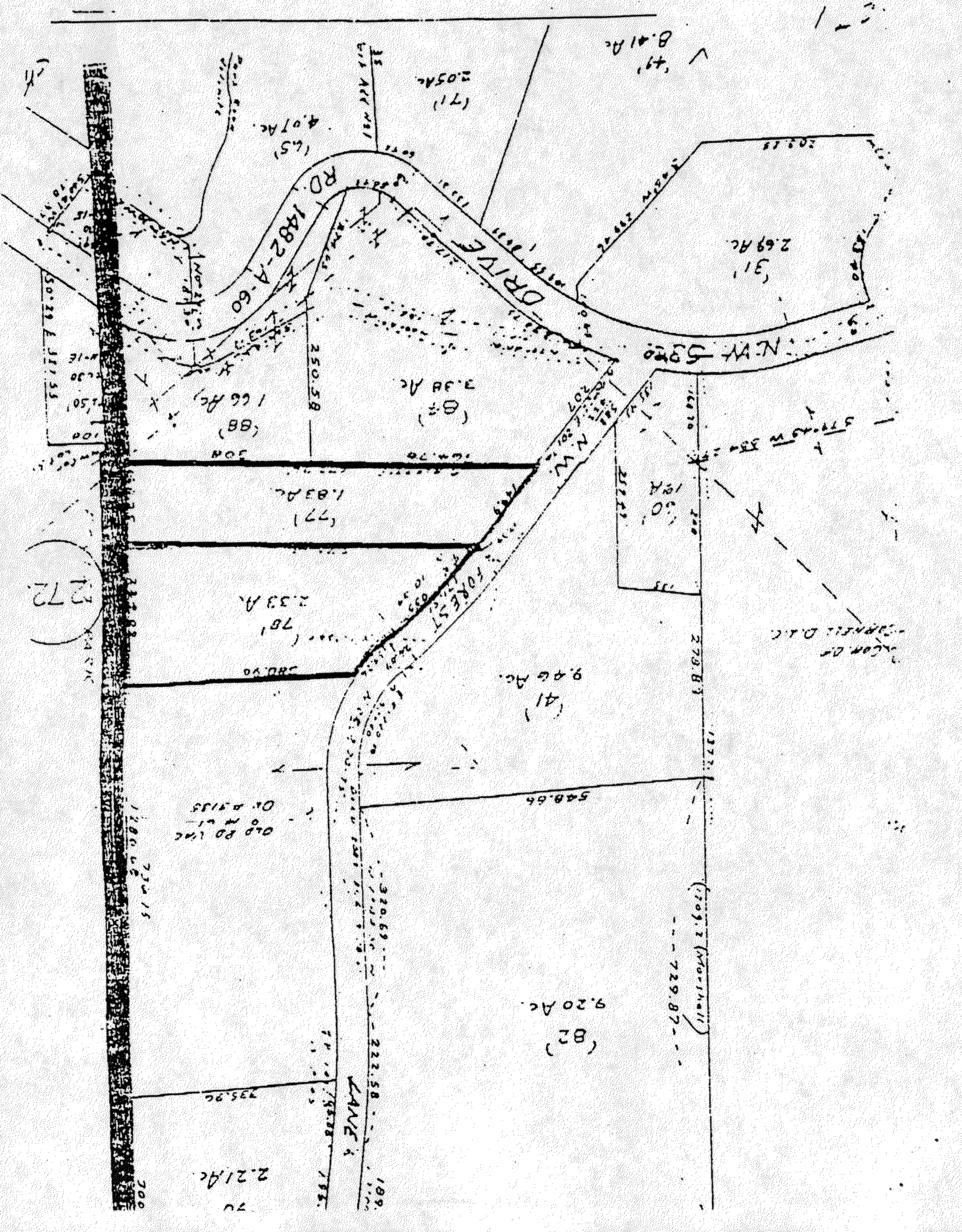
[3] Mr. Watson also opines, without basis in fact or explanation, that the City of Portland, by maintaining a park next door, is causing some compensable injury to the Hacketts.

This witness implies the site was cut 25 to 35 years ago. The Hacketts bought the lot in 1978 when the trees were little more than saplings. Though a forest deferral was received, low value and poorly formed trees were not replaced with commercially viable varieties. And, replacement would normally be followed by removal of poorly growing or unhealthy trees. Under these circumstances, documented by the applicant's own witness, the current value of the current trash growth cannot be used to determine the land is not suitable for timber. Conspicuously absent from Walker's letter is any discussion of the potential productivity. The applicant's narrative addresses that at pages 7-9, relying on Soil Conservation Service data. But the narrative holds the site to be suitable for Douglas Fir! Taking a soil index figure of 149, one below the mean for the area (145-155), the applicant estimates a capability of producing "55,020 board feet of merchantable timber from a fully stocked stand of 80 year old trees".[4] A soil index of 149 is considered excellent, and the applicant does not explain how this evidence supports a conclusion that this forest zoned property is unsuitable for timber. Nothing is said of cash value. In *Dodd v. Hood River County*, *supra* at 731-732, LUBA held even a $10,000 20 year return on a forest zone property of 40 acres, 10 times the size of the applicant's holding, does not establish unsuitability for forest use. Nor did that level of return support a claim of taking without just compensation, when the applicant's preferred use, a dwelling, was denied.

There can be no plausible claim of an unconstitutional taking by regulation. There is obvious and substantial current use of lots 77 and 78/106 together and there are other potential significant uses of the lots.

Arnold Rochlin

[4] The applicant does not say that the 55,020 board feet is a per acre figure, but that is the meaning in the Soil Conservation Service report from which the applicant takes the figure. For lot 78 alone, the figure must be multiplied by 2.32 acres, yielding over 127,000 board feet. Allowing a half acre for the house on lot 77, another 67,000 board feet could be grown on the remaining 1.21 acres of that lot, for a total of nearly 200,000 board feet. The calculation method used by the Soil Conservation service is based on a good planting, but with little other care over the growth cycle. Substantially higher quality and quantity can be achieved by intensive management.


RD 1482-A-60
DRIVE
N.W. 53rd
N.W.
FOREST
LANE
(45) 4.07 Ac.
(71) 2.05 Ac.
(49) 8.41 Ac.
(31) 2.69 Ac.
(88) 1.66 Ac.
(87) 3.38 Ac.
(77) 1.83 Ac.
(78) 2.33 A.
(41) 9.46 Ac.
(82) 9.20 Ac.
2.21 Ac.
250.58
548.66
278.83
320.69
222.58
735.96
729.87
(1709.2 Marshall)
Old Rd Line
272

BEFORE THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

In the Matter of the Application of JUNE HACKETT for a conditional use permit for a non-forest dwelling.

No. CU 1-96

MEMORANDUM IN SUPPORT OF APPLICATION

FACTS

The applicant is the owner of real property located in Multnomah County, Oregon and described as Tax Lot 106, Section 25, T1N, R1W. The applicant has applied for a conditional use permit to construct a non-forest dwelling on the subject parcel, pursuant to MCC 11.15.2052. The subject parcel is zoned for commercial forest uses (CFU) and is also burdened with a significant environmental concern (SEC) overlay zone. The applicant has also applied for variances from the requirements of MCC 11.15.2052(A)(2), which requires a minimum setback of 200 feet to adjacent property lines from the proposed dwelling, and MCC 11.15.2058(A) regarding minimum lot sizes. The Multnomah County Hearings Officer held a hearing regarding the aforementioned applications and denied the applications. A timely appeal followed. Based upon approval of this Board, this hearing is de novo.

ISSUE PRESENTED

1. Does a denial of the applicant's application for a conditional use permit constitute a taking under the Fifth Amendment of the United States Constitution or Article I, Section 18 of the Oregon Constitution?

ARGUMENT

1. Denial of the application for a non-forest dwelling effects a taking of the applicant's property in violation of the Fifth Amendment of the United States

Constitution. The Takings Clause of the Fifth Amendment of the United States Constitution provides: "(N)or shall private property be taken for public use, without just compensation." The applicant believes that the denial of her non-forest dwelling application based upon various provisions of the Multnomah County Code (MCC) deprives the applicant of economically beneficial uses of the property, and thus constitutes a taking under the Takings Clause.

The Takings Clause has been interpreted on many occasions by the United States Supreme Court. Despite the substantial volume of case law, the Court's analysis of the Takings Clause remains difficult to understand and apply. Nevertheless, in analyzing a takings claim under the Fifth Amendment, the Board must apply the cases from the Supreme Court and apply them accordingly.

The United States Supreme Court has developed a two prong test to determine whether the application of a regulation (such as the regulations contained in the CFU section of the MCC) to deny a landowner from making certain uses of her land constitutes a taking under the Fifth Amendment. In Agins v. Tiburon, 447 U.S. 255 (1980), the Court held that, "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." The Oregon Supreme Court recognizes and applies the Agins test in resolving Fifth Amendment issues. See Cope v. City of Cannon Beach, 317 Or 339 (1993). The applicant believes that the application of the particular CFU zoning provisions applied by the Hearings Officer to deny the dwelling application deprive the applicant of economically viable use of her land. The applicant, however, is not challenging the propriety of the establishment of CFU zones, nor is she arguing that the government cannot create laws which restrict a landowner's right to the use of her property. The applicant is arguing, however, that the denial of her application constitutes a taking, and the Board must therefore determine whether to continue to enforce the regulations at issue in this matter

and pay the applicant compensation, or amend or grant variances from the regulations to avoid a taking. This argument is in l ine with the United States Supreme Court's traditional takings analysis. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

The determination of whether the enforcement of a regulation to a particular application constitutes a taking raises issues of both fact and law. Unfortunately, the United States Supreme Court has not provided a test for determining whether a regulation "denies an owner economically viable use of his land," the second prong of the Agins test. The Court has held that regulations which deprive the owner of all economically viable use of her property are takings per se. Lucas v. South Carolina Coastal Council, 505 U.S. ___ (1992). The Court has also discussed, without deciding, whether a landowner who has not suffered a total dimunition in the value of her parcel is entitled to recover for a taking. Lucas at ___ n. 7. Neither the United States Supreme Court nor the Oregon Supreme Court have held that the owner must be deprived of all economically viable uses of her property in order to claim a taking. The determination of whether a regulation which does not deprive an owner of all economically viable uses of her property constitutes a taking will be decided in the future, but has not been decided to date.

In this case, the applicant believes the CFU and SEC zoning restrictions prevent her from making any viable economic uses of her property. While there are a number of uses permitted in the CFU zone, the location, size, and topography of the subject parcel make each of the allowed uses economically unfeasible. For example, the primary use in the CFU zone, as implied by its name, is commercial forestry. The applicant has submitted letters from two experts, each of whom state that the subject parcel is incapable of growing timber of sufficient quality or quantity to enable the owner to make a profit from a commercial forest operation. See letters from Ray Luthy, Frank Walker. Another permitted use in the CFU zone is farm uses as defined in ORS 215.203. It has been suggested that the

landowner may be able to make an economically viable use of the subject parcel by maintaining some type of farm use. See Forest Park Neighborhood Association letter dated Aprill 30, 1996. This ignores the fact that the subject parcel is encumbered by a SEC overlay zone, which requires a permit to remove the scrub trees currently located on the subject site. In order to put the parcel to farm use, the applicant would be forced to remove the trees, which shade nearly the entire parcel, and the underlying vegetation on the subject parcel. In order to obtain the SEC permit to remove the trees, the applicant would have to comply with the requirements of MCC 11.15.6420(C), which requires that the removal of trees be consistent with the maintenance of the natural, scenic, and watershed qualities, or that the applicant restore the area within a brief period of time after removing the trees. Given the location of the parcel adjacent to Forest Park and the vegetation currently on the parcel, the removal of the timber to make a farm use on the subject parcel will change the quality of the subject parcel, and will therefore not be allowed under applicable SEC criteria. By their nature, none of the other permitted uses in the CFU zone will generate any income to the applicant. While there are also a number of conditional uses allowed in the CFU zone, none of the uses is compatible with the designation of the area as significant wildlife habitat. One can hardly imagine the subject parcel being used for a campground or cemetery, both of which will significantly increase the public use of the parcel, as being compatible with the maintenance of the area for wildlife habitat. Nor does a landfill, television tower, utility plant, weigh station, or stripmine seem to be compatible with wildlife. The only use which is compatible with the overall land uses in the area is a forest dwelling. The Hearings Officer denied this use, however. If the applicant cannot make an economically viable use of the subject parcel as a result of the CFU and SEC regulations, the county has taken her property, and must either provide her with compensation for the dimunition in value or rescind or modify the regulations.

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2. Denial of the application for a non-forest dwelling effects a taking of the applicant's property in violation of Article I, Section 18 of the Oregon Constitution.

Article I, Section 18 of the Oregon Constitution provides in part: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation." While the Oregon courts analyze takings claims under Article I, Section 18 and the Fifth Amendment in similar fashion, the criteria for each is not identical. Suess Builders Co. v. City of Beaverton, 294 Or 254 (1982). The Oregon Supreme Court has held that a taking under Article I, Section 18 does not occur unless the owner is deprived of all substantial beneficial use of his property. Fifth Ave. Corp. v. Washington County, 282 Or 591 (1978). While there is no set formula for determining whether a landowner is deprived of all substantial beneficial use of their property (see Dodd v. Hood River County, 317 Or 172 (1993)), the application of the factors set forth in the preceding section show that the current CFU and SEC zoning on the subject parcel deprive the applicant of any economically viable or substantially beneficial use of the property, and therefore constitute a taking.

3. The takings claims are ripe. One of the parties in these proceedings may argue that the Board should not make a determination on the takings issue as the applicant has not "ripened" her takings claim. The ripeness principle requires an applicant to pursue alternative uses or methods for achieving the desired use before the reviewing body (in this case the Board) has jurisdiction to make a decision on a takings claim. Larson v. Multnomah County, 121 Or App 119, opinion clarified and adhered to on reconsideration, 123 Or App 300 (1993). In this case, the applicant is pursuing alternative methods for obtaining the approval of the non forest dwelling through the use of the variance procedures requested. The ripeness requirement has thus been met.

If the Board determines that the ripeness requirement has not been met, the applicant believes that a requirement that the applicant submit applications for all of the conditional

uses allowed in the CFU zone would violate the applicant's procedural due process rights under the Fourteenth Amendment of the United States Constitution. It is possible to interpret current Oregon case law in a manner which would require the applicant to apply for every conditional use application allowed in the CFU zone and for zone changes from the CFU zone into other less restrictive zones. This requirement would be financially impossible for the applicant or nearly any other landowner. If the Board is faced with an argument that the takings claims cannot be considered on ripeness grounds, the Board must decide what steps are necessary to ripen a claim, and whether the applicant's procedural due process rights would be violated by having to complete those steps.

CONCLUSION

The applicant cannot make any other viable economic uses on the subject parcel other than the siting of a non-forest dwelling. The denial by the Board of that right would constitute a taking under the United States and Oregon constitutions. Based upon the foregoing, the Board should reverse the decision of the Hearings Officer and approve the applications.

DATED this 13th day of August, 1996.

David J. Hunnicutt
OSB #92342
Attorney for Applicant

Raymond M. Luthy
4220 S.E. Henderson
Portland, Oregon 97206

Mr. David J. Hunnicutt
Oregonians In Action Legal Center
P.O. Box 230637
Tigard Oregon 97281

August 9, 1996

Re: June Hackett Land Use Application CU 1-96,HV 1-96, SEC 1-96

Dear Mr. Hunnicutt,

Pursuant to your request, I conducted a site analysis of the property owned by June Hackett and described as Tax Lot 106, Section 25, T1N,R1W, Multnomah County, Oregon. The purpose of my visit to the subject parcel was to determine if the subject parcel could be used for commercial forest operations which would yield an economic benefit to the landowner. The subject parcel is a steeply sloped parcel lying East of Forest Lane. The parcel is bordered by residential development to the North, South, and West, and by Forest Park to the East. There are currently very few merchantable trees on the subject parcel. While there are a limited number of fir trees, there are not enough trees to be marketable, nor are the trees of sufficient quality to entice a logging company. The landowner would not be able to employ a logger to remove the trees, and would lose money trying to harvest and market the trees herself. There are also a limited number of alder and maple trees on the property, but not in a large enough quantity to be marketable.At the present time there would be no positive return to the landowner if the trees could be harvested. Furthermore, I do not believe there will be a value for the trees in the future. I do not believe that the landowner will ever be able to make a profit from the sale of any timber from the subject parcel.

My opinion is based upon my site visit to the subject parcel and my experience in the timber industry. I have been professionally involved in the forest management and timber industry for over 40 years. I graduated from Oregon State University in 1951 with a BS Degree in Forest Management. My work experience includes employment with Federal agencies, ie US Forest Service, Department if the Interior, and private companies. I was Timberlands Manager for Publishers Paper Co. for over 20 years and was responsible for the management ov over 300,000 acres of forest land in Oregon, Washington, and California. Also I've had over 10 years of management experience in pulp and paper mills and sawmills. Since retirement in 1991 I have been managing my 80 acre tree farm in Clackamas County. The tree farm is being managed to grow and harvest commercial tree species for the forest products industry.

In summary, given the very small parcel size, the steep terrain, urban setting and constraints it is my opinion that the subject property cannot be managed as a commercial forest land property. You may submit this letter into the record of the above entitled matter.

Very truly yours,
Raymond M. Luthy,
Raymond M. Luthy
Forest Industry Consultant

FRANK WALKER & ASSOCIATES
37708 Kings Valley Highway
Philomath, Oregon 97370
(503) 838-1846

August 2, 1996

Dave Hunnicutt
P.O. 230637
Tigard, Oregon 97281

Dear Dave:

I am providing this letter pursuant to your request for additional information regarding my credentials for conducting a commercial timber evaluation of the Hackett property. I am enclosing the previous description of my credentials in case you do not have a copy.

I have a strong background in estimating timber value based on harvestings I have conducted on my own properties in northwestern Oregon. In the last 14 months I have harvested over 225,000 board feet of timber from three forested properties I own in Polk, Benton, and Lane Counties. I currently own 128 acres of property and exactly half of that total is in managed timber. I am always aware of price fluctuations for domestic and export timber and also track prices for pulp and sawlogs. I am able to estimate standing timber volumes with the same degree of accuracy as seasoned timber cruisers. I learned to conduct forestry management through the Small Woodlands Association and learned timber estimating through a closely held professional relationship with Yamhill Environmental Services and Hampton Lumber.

I believe my knowledge of the Oregon Forest Practices Act and the practical application of the rules and regulations through forest management plans provides me with enough knowledge to integrate commercial forest management with land use procedures. I believe my assessment of the Hackett property is accurate and maintain my position that the site is not viable for commercial timber production. I have attached an updated analysis for your review.

Please contact me if you have any questions.

Sincerely yours,

Frank D. Walker
Land Planning and Development Consultant

enc.

TIMBER EVALUATION OF HACKETT PROPERTY

8/2/96

Background

On March 2, 1993 Mike Robinson of O'Donnell, Ramis, Crew, and Corrigan requested a letter from Frank Walker and Associates stating the timber on the Hackett property was of no commercial value. A field investigation of the site was subsequently conducted and the findings were prepared.

Methodology

A standard timber cruise of this property was not warranted at the time of the investigation because the property is too small and too devoid of harvestable tree species to justify such an investigation. The field investigation of the site was conducted by walking all perimeter boundaries and crisscrossing the property three times north to south.

A handcounter was utilized to determine the number of conifer trees since they are considerably more valuable than hardwoods such as maple and alder. The age of the alder and maple was based upon an examination of spacing, diameter at breast height, size and spacing of crowns, and from aerial photograph data obtained from the ASCS and the SCS. The volume of timber was determined from utilizing revised Scribner Log Volume Tables authorized by the Columbia River Log Scale and Grading Bureau.

Findings

The number of conifer trees was easily determined by counting. Only seven cedar trees of merchantable size were located on the entire site. The cedar trees have a combined volume of approximately 750 board feet. The cedars are widely scattered and some are on slopes that exceed 50%. The cost to benefit ratio for removing the cedar trees would be very high due to steep slopes and the type of equipment that would have to be brought to the site to retrieve them. The value excluding logging costs would be approximately $450.00.

Virtually all of the remaining merchantable trees on the site are alder and maple. These trees could only be sold as fiber since they are too defective to be utilized for saw logs. The estimated weight of the alder and maple would not likely exceed 40 tons. The current price of wood chips for fiber production ranges from $23 to $28 dollars per ton. The maximum value excluding logging costs would be approximately $1,000 dollars

(assuming $25 per ton).

The cost of logging this site would exceed the revenues generated particularly since the site would have to be logged utilizing a high lead or tower. The cost of transporting and setting up the tower would nearly exceed the revenues generated. A move-in fee for a tower is a minimum of $1,000 dollars. The costs for cutting, skidding, loading, hauling, severance taxes, harvest taxes, and reforestation would exceed the value of the timber removed.

The following list of costs can be compared to projected revenue:

- Move-in for high lead tower	$1,000.00
- Falling and Bucking (@ $15 per hour)	240.00
- Skidding logs to landing(@ $20 p.h.)	320.00
- Hauling ($55.00 per hour)	485.00
- Reforestation	135.00
- Taxes (.003%)	45.00
TOTAL PROJECTED COST OF LOGGING	$2,225.00

FRANK D. WALKER

13500 Monmouth Highway
Monmouth, Oregon 97361

(503) 838-1846

EDUCATION:

1977 — Master of Arts Degree in Urban Planning
Southern Illinois University
Edwardsville, Illinois

1973 — Bachelor of Science Degree in Physical Geography
Southern Illinois University
Edwardsville, Illinois

Major courses studied: Soils, Geology, Cartography, Plant Geography

EMPLOYMENT HISTORY:

April 1980 to present — Land Planning and Development Consultant, Frank Walker & Associates, Monmouth, Oregon.

Perform broad range of consulting services for individuals, private companies, corporations, counties and municipalities.

Have successfully completed over 200 land use applications in Oregon and Washington including Forest Management Plans, Farm Management Plans, Conditional Use Permits, Partitionings, Variances Comprehensive Plan Amendments, Zone Changes, Planned Unit Developments and Subdivisions. Approval rate currently stands at 93 percent.

August 1980 to June 1981 — Instructor, Western Oregon State College, Monmouth, Oregon.

Taught upper level geography courses in land use planning, economics and manufacturing.

August 1977 to April 1980 — Urban Planner, Community Development Department, City of Salem, Oregon.

Developed portions of the Salem Area Comprehensive Plan relating to riverfront development.

November 1975 to August 1977 — Regional Planner, Southwestern Illinois Metropolitan and Regional Planning Commission

Program Planner for 208 Federal Water Quality program.

September 1972 to November 1975 — Conservation Technician, U.S.D.A. Soil Conservation Service, Madison County Soil and Water Conservation District, Edwardsville, Illinois.

Worked extensively with agricultural growers and processors in developing conservation programs and strategies. Extensive field time mapping soils for farm and woodland management. Worked with team of surveyors and engineers in designing conservation structures .

AFFILIATIONS:

Past Member of the Oregon Small Woodlands Association.

Member of The Association of American Geographers.

Member of The American Planning Association.

SUMMARY:

Have worked extensively with the Oregon State University Extension Service, Oregon Department of Forestry, consulting foresters and commercial timber appraisers in the development of over 60 forest management plans. Actively manages 54 acres of commercial forest land in Polk County, Oregon.

FRANK WALKER & ASSOCIATES

13500 Monmouth Highway
Monmouth, Oregon 97361

(503) 838-1846

May 12, 1995

Mike Robinson
O'Donnell, Ramis, Crew & Corrigan
Attorneys at Law
1727 N.W. Hoyt St.
Portland, OR 97209

Re: Hackett Timber Appraisal

Dear Mike:

On Friday, March 26, 1993, I visited the Hackett property at 3130 Northwest Forest Lane in Portland, Oregon. The subject property is approximately 2.33 acres and has approximately 230 feet of frontage on Forest Lane. I walked the entire site to determine the commercial value of the timber on the property.

The timber on the property is predominantly 25 to 35-year-old maple and alder. A total of seven scattered conifer trees were counted on the entire 2.33 acres. Virtually every tree in this stand has some sort of defect, such as butt swerve, windthrown tops, excessive taper and kerf. The conifer trees are very poor in quality, and their best potential is for use as firewood.

No commercial timber company would consider purchasing this property for forest management because of the following factors:

- The majority of the property has exceedingly steep slopes. I utilized a Suunto clinometer to measure various slopes on the property, and some of the slopes exceeded 70%.

- Most of the property is too steep to be logged by a cat.

- The property is too small to be considered for a high lead or cable logging operation.

- The value of the timber is not great enough to warrant

any type of a commercial harvest other than for fire-wood.

The best use of the timber on this property is for watershed protection, slope protection, aesthetics, wildlife, and buffering between different uses.

In my opinion, the best plan for this property is to utilize the relatively level road frontage area for a rural residence. The remainder of the property is simply too steep for agriculture, commercial timber production, or residential use. In over ten years of preparing farm and forest management plans I have never encountered a situation where a 2.3-acre parcel would be considered a viable farm or forest unit. In most jurisdictions at least 10 acres is required in order for a property to be considered viable for a commercial farm or forest unit. This parcel is clearly not suitable for commercial forest use.

I have attached a copy of my credentials for your review. If you have any questions or comments regarding my evaluation, please feel free to contact me.

Sincerely yours,

Frank D. Walker
Land Planning & Development Consultant

FDW/jw

Enc.

AE ASSOCIATES, INC.
Engineering Design • Project & Construction Management
BUILDING AND SPECIAL INSPECTIONS

August 12, 1996

Oregonians in Action
Suite 200
8255 SW Hunziker Road
Tigard, Oregon 97223

Attention: Brian Solodky

Subject: Land Use Analysis-Multnomah County Tax Lot 106
(NW Forest Lane, 450 feet north of NW 53rd Drive)

Dear Mr. Solodky:

At your request we undertook a site study and potential use assignment for tax lot 106, adjacent to and just north of tax lot 77. Tax lot 77 has a house on it and it's residential development appears to be 20-30 years old. Lot 106 has no development at all and appears to have been logged of native Douglas Fir trees 50-80 years ago.

This report summarizes our observations plus geological characteristics and applies these physical attributes to the potential zoning uses as Commercial Forest Use (per County 11.15.2046, supplied to us).

Observations

The subject lot is relatively flat on the west side adjoining NW Forest Lane for about 100 feet and then begins to slope significantly to east and north. The central lot section has slopes of up to 60 percent with some indicated slippage in small, local areas.

Tree population is moderate and predominately Red Alder and "scrub" trees/bushes. There are few Douglas Fir and Cedar trees on the property; these appeared to be 50-70 years old.

2920 S.W. Luradel Lane • Portland, Oregon 97219 • FAX (503) 246-8234
Portland (503) 977-3622 • Vancouver (360) 253-4318 • Mobile (503) 784-3443

Note: Photos at the end of this report show typical foliage on the site. Some photos were taken in the direction of the central sloped area but these do not demonstrate the sloping very well.

Soils are Goble Silt Loams with typical dark brown silt loam surface and upper subsoil to about 37 inches deep. The lower subsoil is a yellowish-brown mottled fragipan with bedrock (basalt) 5-7 feet below the surface. In the higher sloped areas topsoil may be effected by erosion and have reduced depth to bedrock. We did not see any bedrock outcroppings. Permeability is moderate above the fragipan and typically has a seasonable perched water table.

Potential Uses

A listing of potential uses was transmitted to us by the Client and we were asked to consider the feasibility of these applications.

Agriculture-per ORS 215.203

Public or private schools: Given the location and topography it is unlikely that school use would be feasible.

Churches and cemeteries: Given the location and topography it is unlikely that church and/ or related cemetery use would be feasible. Not only would slope be a deterrent but depth to bedrock would restrict excavation.

Propagation or harvest of a forest product: The land currently does not contain any significant amount of merchantable forest products.

Utility facilities: Transmission towers could be feasibly located on this property if the slope and depth to bedrock was taken into account. However this would be an expensive, unusual application for such a use.

A dwelling: A dwelling could feasibly be built on this property if depth to bedrock were taken into account and appropriate drainage added. Note that paragraph 215.203 has certain restrictions to dwelling occupancy.

Nonresidential buildings: An outbuilding could be built on this land, particularly on the far west end.

Geothermal resource production: This is not a likely use for this property due to the lack of local geothermal activity.

Mineral resource production: This is not a likely use for this property due to the lack of local commercial minerals.

Mining

Mining is not a likely use (as noted above) due to the lack of resource.

Sanitary Landfill

A sanitary landfill is not considered a feasible use due to the proximity to Forest Park, lack of adequate roads serving the area, volume available for filling and the potential of contamination of surroundings (including odors and noise).

Transmission Towers

As noted above this is feasible if the slope and depth to bedrock was taken into account. However this would be an expensive, unusual application for such a use.

Water facilities

Installation of a water tank is physically feasible on the land but highly unlikely due to more suitable land being available in the vicinity. A tank facility would need extensive fill and compacting work, translating to an expensive project.

Fire Station

A fire station installation is highly unlikely due to the location and size of flat land available. The demand for a fire station in this area is not obviously very strong.

Park/Campground

The lot is not feasible as a campground because, in my opinion, the lack of adequate flat land and pleasing amenities needed by a campground. Park use is also limited by the topography plus the proximity to a highly desirable facility, Portland's Forest Park.

Fishery/Wildlife Resource

This use is logically infeasible due to the lack of water and wildlife. We reviewed the property for significant signs of deer and other wildlife without success.

Cemetery

As noted earlier, given the location and topography it is unlikely that a cemetery use would be feasible. Not only would slope be a deterrent but depth to bedrock would restrict excavation and on-site access would be a problem.

Aviation or Navigation Aid

The lot could be used for such a purpose but this would depend on the type of facility and demand for it at this location. The topography would add to construction cost if located on the higher slopes. My opinion is that the demand for such a facility on this land is very small.

Overall Feasibility Assessment

It is difficult to disregard a practical evaluation from a feasibility opinion when considering this property. While this assignment was specific in it's scope of what "could feasibly" be located on this land none of the uses considered feasible above, except a residence or other building use, are considered "reasonable". For almost all "potentially" feasible uses this evaluator would question "why" such a use would consider this site.

The potentially feasible uses, from above, based on the physical location and topography, are:

A Residence or Outbuilding

Transmission Tower

Water Facility

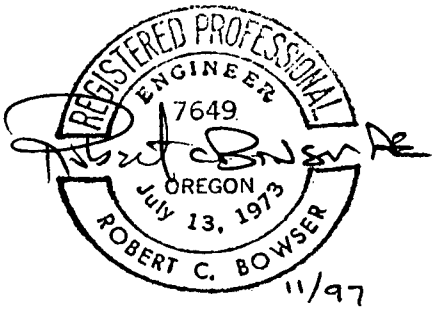
Aviation or Navigation Aid

Only a residence, given the location, topography, amenities and demand for facilities, appears reasonable to this evaluator as a practical and reasonable use for this property.

Please call me at 503-977-3622 if there are any questions on the content or conclusions of this report. Thank you for the opportunity to be of service.

Very truly yours,

Robert C. Bowser, P.E.



[Amended 1982, Ord. 329 § 5; 1983, Ord. 378 § 5; 1991 Ord. 688 § 3; and 1995, Ord. 821 § III]

11.15.9005 Payment

All fees are payable at the time of application.

11.15.9010 Action Proceedings

(A)	Change of zone classification	
	(1) Rural, Urban Future and Urban Low and Medium Density Residential:	$1,460.00
(B)	Planned Developments	1,760.00
(C)	Community Service	
	(1) Regional Sanitary Landfill	[see MCC .7060(B)]
	(2) All Others	1,460.00
(D)	Conditional Use	1,460.00
(E)	Appeal of administrative decision by Planning Director (Refundable if appellant prevails at initial or subsequent appeal hearing)	100.00
(F)	Variance	480.00
(G)	Modification of conditions on a prior contested case requiring a rehearing	Full fee for Action
(H)	Lots of Exception	680.00
(I)	Other contested cases	500.00
(J)	Zoning code interpretation by the Planning Commission	400.00

11.15.9015 Administrative Actions

(A)	Health hardship permit	$150.00
	Health hardship permit renewal	75.00
(B)	Land Use permit	75.00
(C)	Non-hearing variance	220.00
(D)	Use Under Prescribed Conditions	220.00
(E)	Exceptions	100.00
(F)	Administrative decision by Planning Director	220.00
(G)	Willamette River Greenway Permit	540.00

(H)	Significant Environmental Concern Permit	540.00
(I)	Administrative modification of conditions established in prior contested cases	150.00
(J)	Hillside Development Permit	400.00
(K)	Grading and Erosion Control Permit	300.00

The fee for multiple concurrent administrative actions, including Design Review, shall be the highest fee of the individual applications, plus ½ the fee of each additional application.

11.15.9020 Miscellaneous Charges

(A)	Notice Sign	5.00
(B)	Notice of Review	500.00
	Transcript cost per minute of hearing time	3.50
(C)	Records and reports (per page)	.30
(D)	Pre-Initiation Conference	270.00
(E)	Flood Plain Review (one and two family dwellings)	25.00
(F)	Flood Plain Review (all other uses)	50.00

11.15.9025 Design Review

(A) Project Value

$0 – $4,999	1,570.00
$50,000 and greater	

Project value shall be determined in accordance with the Uniform Building Code, or as otherwise determined by the Director.

(B) Staff time required for Design Review revisions submitted after a permit is issued shall be $80.00/hour. Minimum charge – one-half hour.

(C) For Design Review of on-premise advertising signs:

Single Sign	$25.00

11.15.9027 *[Added 1984, Ord. 441 § 2 and Deleted 1995, Ord. 821 § III]*