

## ANNOTATED MINUTES

Tuesday, September 14, 1993 - 9:30 AM  
Multnomah County Courthouse, Room 602

### BOARD BRIEFINGS

- B-1 Discussion of Proposed Plan for Creating Family Service Centers. Presented by Chair Beverly Stein, Bill Farver and Norm Monroe.

INFORMATION SUBMITTED, PRESENTATION AND RESPONSE TO BOARD QUESTIONS BY CHAIR STEIN, BILL FARVER, CAROL WIRE AND MARY LI. DRAFT RESOLUTION SUBMITTED FOR BOARD CONSIDERATION ON SEPTEMBER 23, 1993.

- B-2 Update on Oregon Progress Board. Presented by Chair Beverly Stein and Duncan Wyse.

SLIDE PRESENTATION, EXPLANATION AND RESPONSE TO BOARD QUESTIONS BY CHAIR STEIN AND DUNCAN WYSE.

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Tuesday, September 14, 1993 - 1:30 PM  
Multnomah County Courthouse, Room 602

### PLANNING ITEMS

Chair Beverly Stein convened the meeting at 1:30 p.m., with Vice-Chair Gary Hansen, Commissioners Tanya Collier and Dan Saltzman present and Commissioner Sharron Kelley excused.

- P-1 CS 2-93/WRG 2-93 ORDER DISMISSING APPEAL in the Matter of the Appeal by Clarence Mullican and Alta Racine from a Hearings Officer's Decision Denying an Application for a Marina, in Planning Division Files CS 2-93 and WRG 2-93

PLANNER MARK HESS EXPLANATION REGARDING NECESSITY FOR ORDER DISMISSING APPEAL AND ACCEPTING DECISION IN ORDER TO START CLOCK FOR SIX MONTH WAITING PERIOD BEFORE ANOTHER APPLICATION MAY BE SUBMITTED. COMMISSIONER SALTZMAN MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF P-1. COUNSEL JOHN DuBAY CLARIFIED THAT TIMELINE BEGINS 10 DAYS AFTER DECISION IS FILED WITH CLERK. ORDER 93-308 UNANIMOUSLY APPROVED.

- P-2 DR 14-93/CU 5-91a Review the August 20, 1993 Appeal to the Planning and Zoning Hearings Officer of Two Planning Director Administrative Decisions in which the Hearings Officer Affirmed, Subject to a Condition, the Final Design Review Plan, and Affirmed the Determination of Substantial Development of a Non-Resource Dwelling Authorized by CU 5-91, for Property Located at 6125 NW THOMPSON ROAD. (A NOTICE OF REVIEW APPEALING DECISIONS HAS BEEN FILED.)

DECISION READ. MR. HESS REPORTED A NOTICE OF REVIEW APPEAL WAS FILED AND ADVISED OF RECOMMENDED HEARING DATE AND SCOPE OF REVIEW. COMMISSIONER COLLIER MOVED AND COMMISSIONER HANSEN SECONDED, THAT AN APPEAL HEARING BE SCHEDULED FOR 1:30 PM, OCTOBER 12, 1993, ON THE RECORD, WITH TESTIMONY LIMITED TO 15 MINUTES PER SIDE. COMMISSIONER COLLIER EXPLANATION IN SUPPORT OF HER REQUEST THAT HEARINGS OFFICER BE AVAILABLE AT HEARING. MOTION UNANIMOUSLY APPROVED.

There being no further business, the meeting was adjourned at 1:40 p.m.

OFFICE OF THE BOARD CLERK  
for MULTNOMAH COUNTY, OREGON

By DEBORAH L. BOUSTAD

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Thursday, September 16, 1993 - 9:00 AM  
Portland Building, 15th Floor Conference Room

**EXECUTIVE SESSION**

E-1 The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h) for the Purpose of Consulting with Counsel Concerning Current Litigation.

**RESCHEDULED FOR 9:00 AM, THURSDAY, SEPTEMBER 23, 1993.**

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Thursday, September 16, 1993 - 9:30 AM  
Multnomah County Courthouse, Room 602

**REGULAR MEETING**

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

**CONSENT CALENDAR**

UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, THE CONSENT CALENDAR (ITEMS C-1 THROUGH C-3) WAS UNANIMOUSLY APPROVED.

**SHERIFF'S OFFICE**

C-1 Application for Business Certificate as a Wrecker of Motor Vehicles with Recommendation for Approval, for GRESHAM LIGHT TRUCK PARTS, 28901 SE Dodge Park Boulevard, Gresham

- C-2 Application Renewal for Business Certificate as a Wrecker of Motor Vehicles with Recommendation for Approval, for R. S. DAVIS RECYCLING, INC., dba ORIENT AUTO PARTS, 28425 SE Orient Drive, Gresham

DEPARTMENT OF SOCIAL SERVICES

- C-3 RESOLUTION in the Matter of Authorizing Designees of the Mental Health Program Director to Direct a Peace Officer to Take an Allegedly Mentally Ill Person into Custody

RESOLUTION 93-309.

REGULAR AGENDA

NON-DEPARTMENTAL

- R-1 PROCLAMATION in the Matter of Proclaiming September 20 through October 29, 1993 as the Time for the CHARITABLE GIVING CAMPAIGN FOR MULTNOMAH COUNTY EMPLOYEES

PROCLAMATION READ. CAMPAIGN MANAGEMENT CHAIR KAREN MAYFIELD PRESENTATION AND INTRODUCTION OF COUNTY CAMPAIGN REPRESENTATIVES GLENN HARDING, KATHY WALLIKER, VIRGINIA BAUGH, THERESA SULLIVAN, ELLA SEELY, CHRIS JOHNSON, BONNIE TESCHNER, CHRIS CAMERON, IRENE KHAVARI AND PHIL CLIFFORD. MS. MAYFIELD INTRODUCED DON SKINNER OF ENVIRONMENTAL FEDERATION OF OREGON, GILLIAN HIBBS OF INTERNATIONAL SERVICE AGENCIES, JOHN COWLEY OF BLACK UNITED FUND OF OREGON, KAREN KEENEY AND JO DURAND OF EQUITY FOUNDATION AND JANET SIMON OF UNITED WAY OF COLUMBIA-WILLAMETTE. COMMISSIONER KELLEY COMMENTS REGARDING GENEROSITY OF COUNTY EMPLOYEES. UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, PROCLAMATION 93-310 UNANIMOUSLY APPROVED.

DEPARTMENT OF ENVIRONMENTAL SERVICES

- R-2 Second Reading and Possible Adoption of an ORDINANCE Amending Multnomah County Code Chapter 9.30 [Increasing Plumbing Permit Fees to be Consistent with Fees Adopted by the City of Portland]

PROPOSED ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. HEARING HELD, NO ONE WISHED TO TESTIFY. UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER KELLEY, ORDINANCE 775 UNANIMOUSLY APPROVED.

- R-3 PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the City of Portland, Bureau of Parks and Recreation, for a Public Purpose

HEARING HELD, NO ONE WISHED TO TESTIFY. UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY

**COMMISSIONER KELLEY, ORDER 93-311 UNANIMOUSLY APPROVED.**

- R-4 PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the City of Portland, Department of Public Works, for a Public Purpose**

**HEARING HELD, NO ONE WISHED TO TESTIFY. UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER KELLEY, ORDER 93-312 UNANIMOUSLY APPROVED.**

**DEPARTMENT OF SOCIAL SERVICES**

- R-5 Ratification of Intergovernmental Agreement Contract 103604 Between Multnomah County, Mental Health, Youth, and Family Services Division's Office of Child and Adolescent Mental Health, and Portland Public School District No. 1, for the Purpose of Conveying \$400,000 in Partners Project Funds to the School District to Provide Five Behavior Management Specialist Positions in the Special Education Department, for the Period August 15, 1993 through June 30, 1994**

**DSS DIRECTOR GARY NAKAO EXPLANATION AND INTRODUCTION OF PARTNERS PROJECT MANAGER ELLEEN DECK. COMMISSIONER KELLEY MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-5. DR. NAKAO AND MS. DECK EXPLANATION IN RESPONSE TO BOARD QUESTIONS. R-5 UNANIMOUSLY APPROVED.**

- R-6 Continued Second Reading and Possible Adoption of an ORDINANCE Amending Multnomah County Code 8.90 Pertaining to the Licensing of Adult Care Homes**

**PROPOSED ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-6. VICE-CHAIR HANSEN INTRODUCED PROPOSED AMENDMENT TO PAGE 1, SECTION II. TESTIMONY IN SUPPORT OF PROPOSED ORDINANCE FROM KURT ENGELSTAD, KATHY WALKER, PETER MOLDOVAN, DEANNA GWIN, BRENDA COLLINS, ORNAHEE FARRIS, JANET ABILA, JIM GARRETT, KAREN ALTERBERG, RAMONA CRET, CECIL POSEY, ANNIE LUPE AND ERIKA COVACIU. TESTIMONY IN OPPOSITION TO PROPOSED RATE INCREASE FROM JEAN PROCTOR, RICK DAVISON, SANDI ROGERS, DAVE FOSTER AND MICHAEL VERNON. ASD DIRECTOR JIM McCONNELL AND ADULT CARE HOME PROGRAM MANAGER STEVE BALOG RESPONSE TO CITIZEN AND BOARD QUESTIONS. COMMISSIONER HANSEN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF AMENDMENT TO PAGE 1, SECTION II. BOARD DISCUSSION AND COMMENTS. AMENDMENT FAILED WITH COMMISSIONERS KELLEY AND HANSEN VOTING AYE AND COMMISSIONERS COLLIER AND STEIN VOTING NO. VICE-CHAIR HANSEN COMMENTS IN OPPOSITION TO PROPOSED ORDINANCE. CHAIR STEIN REPORTED GARY BLACKMER WILL BE CONDUCTING A PROGRAM AUDIT AND SUGGESTED THE BOARD REVISIT THE MATTER**

THEREAFTER. ORDINANCE 775 APPROVED, WITH COMMISSIONERS KELLEY, COLLIER AND STEIN VOTING AYE AND COMMISSIONER HANSEN VOTING NO.

NON-DEPARTMENTAL  
MANAGEMENT SUPPORT

- R-7 Budget Modification NOND #3 Requesting Approval of a Job Reclassification from an Office Assistant 2 to a Senior Office Assistant within the Purchasing Division Budget

COMMISSIONER HANSEN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-7. PURCHASING MANAGER LILLIE WALKER EXPLANATION AND RESPONSE TO QUESTIONS OF COMMISSIONER COLLIER. R-7 UNANIMOUSLY APPROVED.

- R-8 Ratification of Intergovernmental Agreement Contract 500174 Between Multnomah County and the State of Alaska, Division of General Services and Supply, to Allow Alaska's Contract with Government Computer Sales for the Purchase of Micro Computer Systems and Peripherals to be Used by Multnomah County in Accordance with the State of Alaska Bid #13440

UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER KELLEY, R-8 WAS UNANIMOUSLY APPROVED.

PUBLIC COMMENT

- R-9 Opportunity for Public Comment on Non-Agenda Matters. Testimony Limited to Three Minutes Per Person.

DEPARTMENT OF ENVIRONMENTAL SERVICES

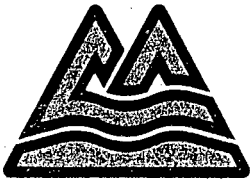
- R-10 PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the Northeast Community Development Corporation for Low Income Housing [to be Used in the Nehemiah Housing Opportunity Program]

BOARD DISCUSSION. UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER KELLEY, IT WAS UNANIMOUSLY APPROVED THAT R-10 BE CONTINUED TO THURSDAY, SEPTEMBER 23, 1993.

There being no further business, the meeting was adjourned at 11:00 a.m.

OFFICE OF THE BOARD CLERK  
for MULTNOMAH COUNTY, OREGON

By Deborah C. Bogstad



# MULTNOMAH COUNTY OREGON

OFFICE OF THE BOARD CLERK  
SUITE 1510, PORTLAND BUILDING  
1120 S.W. FIFTH AVENUE  
PORTLAND, OREGON 97204

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
CLERK'S OFFICE •	248-3277 •	248-5222

## AGENDA

### MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

#### FOR THE WEEK OF

SEPTEMBER 13 - 17, 1993

Tuesday, September 14, 1993 - 9:30 AM - Board Briefings. . .Page 2

Tuesday, September 14, 1993 - 1:30 PM - Planning Items . . .Page 2

Thursday, September 16, 1993 - 9:00 AM - Executive Session .Page 2

Thursday, September 16, 1993 - 9:30 AM - Regular Meeting . .Page 3

Thursday Meetings of the Multnomah County Board of Commissioners are taped and can be seen at the following times:

Thursday, 10:00 PM, Channel 11 for East and West side subscribers

Thursday, 10:00 PM, Channel 49 for Columbia Cable (Vancouver) subscribers

Friday, 6:00 PM, Channel 22 for Paragon Cable (Multnomah East) subscribers

Saturday 12:00 PM, Channel 21 for East Portland and East County subscribers

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.

Tuesday, September 14, 1993 - 9:30 AM

Multnomah County Courthouse, Room 602

BOARD BRIEFINGS

- B-1 Discussion of Proposed Plan for Creating Family Service Centers. Presented by Chair Beverly Stein, Bill Farver and Norm Monroe. 9:30 AM TIME CERTAIN, ONE HOUR REQUESTED.
- B-2 Update on Oregon Progress Board. Presented by Chair Beverly Stein and Duncan Wyse. 10:30 AM TIME CERTAIN, ONE HOUR REQUESTED.

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Tuesday, September 14, 1993 - 1:30 PM

Multnomah County Courthouse, Room 602

PLANNING ITEMS

- P-1 CS 2-93/WRG 2-93 ORDER DISMISSING APPEAL in the Matter of the Appeal by Clarence Mullican and Alta Racine from a Hearings Officer's Decision Denying an Application for a Marina, in Planning Division Files CS 2-93 and WRG 2-93
- P-2 DR 14-93/CU 5-91a Review the August 20, 1993 Appeal to the Planning and Zoning Hearings Officer of Two Planning Director Administrative Decisions in which the Hearings Officer Affirmed, Subject to a Condition, the Final Design Review Plan, and Affirmed the Determination of Substantial Development of a Non-Resource Dwelling Authorized by CU 5-91, for Property Located at 6125 NW THOMPSON ROAD. (A NOTICE OF REVIEW APPEALING DECISIONS HAS BEEN FILED.)

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Thursday, September 16, 1993 - 9:00 AM

Portland Building, 15th Floor Conference Room

EXECUTIVE SESSION

- E-1 The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h) for the Purpose of Consulting with Counsel Concerning Current Litigation. 9:00 AM TIME CERTAIN, 15 MINUTES REQUESTED.

Thursday, September 16, 1993 - 9:30 AM

Multnomah County Courthouse, Room 602

REGULAR MEETING

CONSENT CALENDAR

SHERIFF'S OFFICE

- C-1 Application for Business Certificate as a Wrecker of Motor Vehicles with Recommendation for Approval, for GRESHAM LIGHT TRUCK PARTS, 28901 SE Dodge Park Boulevard, Gresham
- C-2 Application Renewal for Business Certificate as a Wrecker of Motor Vehicles with Recommendation for Approval, for R. S. DAVIS RECYCLING, INC., dba ORIENT AUTO PARTS, 28425 SE Orient Drive, Gresham

DEPARTMENT OF SOCIAL SERVICES

- C-3 RESOLUTION in the Matter of Authorizing Designees of the Mental Health Program Director to Direct a Peace Officer to Take an Allegedly Mentally Ill Person into Custody

REGULAR AGENDA

NON-DEPARTMENTAL

- R-1 PROCLAMATION in the Matter of Proclaiming September 20 through October 29, 1993 as the Time for the CHARITABLE GIVING CAMPAIGN FOR MULTNOMAH COUNTY EMPLOYEES (9:30 AM TIME CERTAIN, 10 MINUTES REQUESTED)

DEPARTMENT OF ENVIRONMENTAL SERVICES

- R-2 Second Reading and Possible Adoption of an ORDINANCE Amending Multnomah County Code Chapter 9.30 [Increasing Plumbing Permit Fees to be Consistent with Fees Adopted by the City of Portland]
- R-3 PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the City of Portland, Bureau of Parks and Recreation, for a Public Purpose
- R-4 PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the City of Portland, Department of Public Works, for a Public Purpose

DEPARTMENT OF SOCIAL SERVICES

- R-5 Ratification of Intergovernmental Agreement Contract 103604 Between Multnomah County, Mental Health, Youth, and Family Services Division's Office of Child and Adolescent Mental Health, and Portland Public School District No. 1, for the Purpose of Conveying \$400,000 in Partners Project Funds to the School District to Provide Five Behavior Management



*Specialist Positions in the Special Education Department,  
for the Period August 15, 1993 through June 30, 1994*

- R-6     Continued Second Reading and Possible Adoption of an  
ORDINANCE Amending Multnomah County Code 8.90 Pertaining to  
the Licensing of Adult Care Homes

NON-DEPARTMENTAL  
MANAGEMENT SUPPORT

- R-7     Budget Modification NOND #3 Requesting Approval of a Job  
Reclassification from an Office Assistant 2 to a Senior  
Office Assistant within the Purchasing Division Budget
- R-8     Ratification of Intergovernmental Agreement Contract 500174  
Between Multnomah County and the State of Alaska, Division  
of General Services and Supply, to Allow Alaska's Contract  
with Government Computer Sales for the Purchase of Micro  
Computer Systems and Peripherals to be Used by Multnomah  
County in Accordance with the State of Alaska Bid #13440

PUBLIC COMMENT

- R-9     Opportunity for Public Comment on Non-Agenda Matters.  
Testimony Limited to Three Minutes Per Person.



# MULTNOMAH COUNTY OREGON

OFFICE OF THE BOARD CLERK  
SUITE 1510, PORTLAND BUILDING  
1120 S.W. FIFTH AVENUE  
PORTLAND, OREGON 97204

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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
CLERK'S OFFICE •	248-3277	• 248-5222

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## SUPPLEMENTAL AGENDA

*Thursday, September 16, 1993 - 9:30 AM*

*Multnomah County Courthouse, Room 602*

## REGULAR MEETING

### DEPARTMENT OF ENVIRONMENTAL SERVICES

R-10    *PUBLIC HEARING and Consideration of an ORDER in the Matter of the Transfer of Tax Foreclosed Property to the Northeast Community Development Corporation for Low Income Housing [to be Used in the Nehemiah Housing Opportunity Program]*

0266C/43/db  
9/10/93

AN EQUAL OPPORTUNITY EMPLOYER

SHARRON KELLEY  
Multnomah County Commissioner  
District 4



Portland Building  
1120 S.W. Fifth Avenue, Suite 1500  
Portland, Oregon 97204  
(503) 248-5213

MEMORANDUM

TO: Clerk of the Board  
Board of County Commissioners

FROM: Sharron Kelley SK

RE: Early Departure from Board Meeting

DATE: September 8, 1993

I will be departing early from the Board meeting on September 14, 1993, for a prior scheduled speaking engagement at the Gresham Chamber.

EXCUSED from 1:30pm  
meeting

1701L-20

1993 SEP - 8 PM 4:22  
MULTNOMAH COUNTY  
OREGON

Meeting Date: SEP 14 1993

Agenda No.: P-1

(Above space for Clerk's Office Use)

AGENDA PLACEMENT FORM  
(For Non-Budgetary Items)

SUBJECT: Appeal of CS 2-93 and WRG 2-93 (Mullican's Marina)

BCC Informal \_\_\_\_\_ BCC Formal xxx Sept. 14, 1993  
(date) (date)

DEPARTMENT D.E.S. P DIVISION Planning and Development

CONTACT Mark Hess TELEPHONE 248-3043/x2597

PERSON(S) MAKING PRESENTATION Mark Hess

ACTION REQUESTED:

☐ INFORMATIONAL ONLY ☐ POLICY DIRECTION ☒ APPROVAL

ESTIMATED TIME NEEDED ON BOARD AGENDA: 5 Minutes

CHECK IF YOU REQUIRE OFFICIAL WRITTEN NOTICE OF ACTION TAKEN: \_\_\_\_\_

BRIEF SUMMARY (include statement of rationale for action requested, as well as personnel and fiscal/budgetary impacts, if applicable):

Order dismissing the appeal and affirming the Hearings Officer Decision of June 10, 1993.

*9/14/93 copies to Mark Hess & Sharon Cowley*

(If space is inadequate, please use other side)

SIGNATURES:

ELECTED OFFICIAL \_\_\_\_\_

Or

DEPARTMENT MANAGER *pc Betty Whillien*

(All accompanying documents must have required signatures)

BOARD OF  
COUNTY COMMISSIONERS  
1993 SEP - 7 PM 4:42  
MULTNOMAH COUNTY  
OREGON



# MULTNOMAH COUNTY OREGON

DIVISION OF PLANNING & DEVELOPMENT/2115 S.E. MORRISON/PORTLAND, OREGON 97214

## DIVISION OF PLANNING AND DEVELOPMENT

### Board Planning Packet Check List

File No. CS 2-93/WRG 2-93

☒ Agenda Placement Sheet

No. of Pages 1

☒ Case Summary Sheet

No. of Pages 1

☒ Previously Distributed

1

☐ Notice of Review

No. of Pages \_\_\_\_\_

\*(Maybe distributed at Board Meeting)

☒ Previously Distributed

\_\_\_\_\_

☐ Decision

No. of Pages \_\_\_\_\_

(Hearings Officer/Planning Commission)

☒ Previously Distributed

\_\_\_\_\_

\*Duplicate materials will be provided upon request.  
Please call 2610.



CASE NAME Appeal of Mullican's Marina Proposal

NUMBER CS 2-93; WRG 2-93;

## 1. Applicant Name/Address

Clarence Mullican and Alta Racine  
17622 NW St. Helens Road  
Portland, Oregon 97231

## 2. Action Requested by applicant

## ACTION REQUESTED OF BOARD

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

Applicants (appellants) have withdrawn their appeal (Notice of Review) regarding a proposed marina in Multnomah Channel. County Counsel has drafted an order which affirms the Hearing Officer decisions dated June 10, 1993 which denied Community Service (CS) and Willamette River Greenway (WRG) permits requested for the proposed marina.

## 3. Planning Staff Recommendation

APPROVAL, WITH CONDITIONS

## 4. Hearings Officer Decision:

DENY

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

The Hearings Officer reviewed evidence and information received after the Planning Staff report was prepared and was persuaded that all approval criteria could not be satisfied.

## ISSUES

(who raised them?)

- a. Private and Public Uses of the River Surface; Extent and types of recreation oriented development planned on Multnomah Channel, etc. [Opponents included: the Sauvie Island Conservancy, State Parks Dept., County Parks Division, & Friends Of Retaining Channel Environment (FORCE)]

Do any of these issues have policy implications? Explain.

Appellants have withdrawn the Notice of Review.

O'DONNELL, RAMIS, CREW & CORRIGAN

JEFF H. BACHRACH  
MARK L. BUSCH  
CHARLES E. CORRIGAN\*  
STEPHEN F. CREW  
G. FRANK HAMMOND\*  
BARBARA A. JACOBSON\*  
KAREN E. JONES\*\*  
WILLIAM A. MONAHAN  
NANCY B. MURRAY  
MARK P. O'DONNELL  
TIMOTHY V. RAMIS  
WILLIAM J. STALNAKER  
TY K. WYMAN

ATTORNEYS AT LAW  
BALLOW & WRIGHT BUILDING  
1727 N.W. Hoyt Street  
Portland, Oregon 97209

TELEPHONE: (503) 222-4402  
FAX: (503) 243-2944

PLEASE REPLY TO PORTLAND OFFICE

CLACKAMAS COUNTY OFFICE  
181 N. Grant, Suite 202  
Canby, Oregon 97013  
(503) 266-1149

JAMES M. COLEMAN  
Special Counsel

August 31, 1993

\*ALSO ADMITTED TO PRACTICE IN WASHINGTON  
\*\*ALSO ADMITTED TO PRACTICE IN WASHINGTON AND TEXAS

Mr. Scott Pemble  
Multnomah County Planning Director  
Division of Planning and Development  
2115 SE Morrison Street  
Portland, OR 97214

RECEIVED

SEP 02 1993

Multnomah County  
Zoning Division

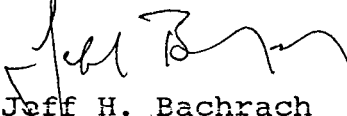
Re: Planning Director Memorandum of August 24, 1993

Dear Scott:

Perhaps in an effort to again accommodate the anti-everything crowd, your memorandum of August 24 characterizes the withdrawal of the Mullican Marina appeal as a "request" and provides that the opposition folks will have an opportunity to "contest appellants' request to withdraw."

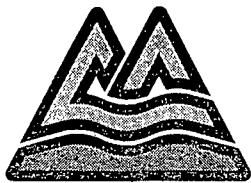
As I am sure the County Council's Office would concur, an appellant always has the right to drop an appeal and when that happens, the case is over. The Board does not have jurisdiction to hold a hearing because there is nothing to hold a hearing about.

Very truly yours,

  
Jeff H. Bachrach

JHB/cjs

cc: Mr. Clarence Mullican (w/enclosure)  
Mr. John DuBay, Esq.



# MULTNOMAH COUNTY OREGON

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

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

## MEMORANDUM

To: Board of County Commissioners and Interested Parties  
From: R. Scott Pemble, Planning Director  
Date: August 24, 1993  
Subject: REQUEST TO WITHDRAW APPEAL of the proposed "Mullican Marina"  
File Nos.: CS 2-93, WRG 2-93

Appellants' representative, Jeff H. Bachrach, requests that the *Notice of Review* (appeal) of the Mullican Marina applications be considered withdrawn for reasons detailed in an August 20, 1993 letter received by the Planning Division on August 23, 1993.

The appeal pertains to the June 10, 1993 Hearings Officer decisions which denied a marina proposed in Multnomah Channel under applications CS 2-93 and WRG 2-93. On August 10, 1993, the Board of County Commissioners rescheduled the appeal hearing to September 14, 1993 at 1:30 p.m.; notices were mailed to the parties on August 20, 1993.

If none of the parties contests appellants' request to withdraw, the Board may enter an order dismissing the appeal and affirming the Hearings Officer decisions at their meeting on September 14, 1993.

If you have questions on this matter, please call Mark Hess @ 248-3043.

cc: John DuBay

*Mailed 35 Notices*  
*8-24-93*  
*M.B.*



O'DONNELL, RAMIS, CREW & CORRIGAN

JEFF H. BACHRACH  
MARK L. BUSCH  
CHARLES E. CORRIGAN\*  
STEPHEN F. CREW  
G. FRANK HAMMOND\*  
BARBARA A. JACOBSON\*  
KAREN E. JONES\*\*  
WILLIAM A. MONAHAN  
NANCY B. MURRAY  
MARK P. O'DONNELL  
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TELEPHONE: (503) 222-4402  
FAX: (503) 243-2944

PLEASE REPLY TO PORTLAND OFFICE

CLACKAMAS COUNTY OFFICE  
181 N. Grant, Suite 202  
Canby, Oregon 97013  
(503) 266-1149

JAMES M. COLEMAN  
Special Counsel

August 20, 1993

\*ALSO ADMITTED TO PRACTICE IN WASHINGTON  
\*\*ALSO ADMITTED TO PRACTICE IN WASHINGTON AND TEXAS

Mr. Scott Pemble  
Multnomah County Planning Director  
Division of Planning and Development  
2115 SE Morrison Street  
Portland, OR 97214

Re: Mullican Marina Application  
File No: ✓ CS 2-93 and WRG 2-93

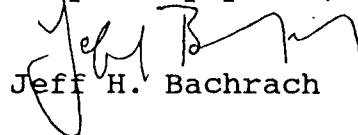
Dear Scott:

Consistent with standard protocol followed in every jurisdiction in the metropolitan area - including both those city and county governments this office appears before and the five municipalities for which we serve as city attorney - my clients, their consultants, supporters and I assumed we would be granted our request for additional time to prepare and present a thorough application. Apparently you and other staff members thought standard protocol would be followed because the county sent out notices stating the hearing would be held on September 28.

Considering the property would remain undeveloped and unused while we were preparing the application, it seemed those opponents advocating preservation of the status quo would have no reasonable basis for objecting to our request.

Land use and politics being what they are, the county commission ruled my clients must prepare and present the application two weeks earlier than planned. In good faith, we cannot meet that new deadline. Therefore, please consider the appeal withdrawn.

Very truly yours,

  
Jeff H. Bachrach

JHB/cjs

cc: Clarence Mullican  
Alta Racine  
Zane and Sonja Holmes  
Pat Eudaly  
Martin Schott  
Mark Hess

RECEIVED  
AUG 23 1993

Multnomah County  
Zoning Division

BOARD OF  
COUNTY COMMISSIONERS

1993 AUG 16 AM 8:37

MULTINOMAH COUNTY  
OREGON

August 11, 1993

Arnold Rochlin  
P.O. Box 83645-0645  
Portland, OR 97283  
(503) 289-2657

Multnomah County,  
Board of Commissioners  
1120 SW Fifth Ave., 15th fl.  
Portland, OR 97204

Re: CS 2-93 WRG 2-93 Denial of Community Service Designation for Marina  
Hearing: September 14, 1993

Dear Commissioner,

At the hearing yesterday, Mr. Bachrach offered to have evidence in support of the application in the file 10 days before the hearing on September 14th. The offer was not generous. The law requires that the evidence be filed at least 20 days before the hearing:

"All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public at the time notice provided in subsection (3) of this section is provided." (ORS 197.763(4)(a)."

ORS 197.763(3)(f) requires notice 20 days before the hearing (as Mr. Pemble observed yesterday). The County implements these provisions in MCC 11.15.8220(A)(10) and .8220(C).

I wrote to the Planning Director with a copy to Mr. Bachrach (faxed and mailed to both today). I asked Mr. Pemble to confirm to Mr. Bachrach that he is expected to have his evidence in by August 25th. I am afraid that Mr. Bachrach will claim that absence of a reply to his unilateral announcement of a 10 day cut off implies tacit consent of the Board and the parties. I did not reply because the issue was not before the Board. I certainly did not consent.

I don't want another procedural wrangle that could require another continuance, but I can't control it. Mr. Bachrach will either comply with the law or he won't.

This letter has been sent to all members of the Board.

Yours,



cc: Planning Director  
Clerk of the Board  
Jeff H. Bachrach

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON

In the Matter of the Appeal by Clarence  
Mullican and Alta Racine from a  
Hearing's Officers Decision denying an  
application for a marina, in Planning  
Division files CS 2-93 and WRG 2-93

ORDER 93-308  
Dismissing  
Appeal

This matter is before the Board of County Commissioners at  
the scheduled time and place for hearing on the appeal by  
Clarence Mullican and Alta Racine after the Board approved a  
continuance of the hearing previously scheduled for August 10,  
1993.

By letter to the Planning Director, dated August 20, 1993,  
the Appellants advised the Director of their intent to withdraw  
the appeal.

After considering the appellant's request to withdraw the  
appeal and other relevant information, it is

ORDERED:

The appeal by Clarence Mullican and Alta Racine in CS 2-93  
and WRG 2-93 is hereby dismissed, and the decision of the  
Hearings Officer dated June 10, 1993, is affirmed.

ADOPTED this 14th day of September, 1993.



Multnomah County, Oregon

By Beverly Stein  
Beverly Stein, Chair

Laurence Kressel for  
Laurence Kressel, County Counsel  
of Multnomah County, Oregon

09/03/93:1

MEETING DATE: August 10, 1993

AGENDA NO: P-3

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: CS 2-93/WRG 2-93 Public Hearing - DeNovo

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING: Date Requested: August 10, 1993

Amount of Time Needed: 1 hour

DEPARTMENT: DES DIVISION: Planning

CONTACT: Sharon Cowley TELEPHONE #: 2610  
BLDG/ROOM #: 412/109

PERSON(S) MAKING PRESENTATION: Mark Hess

ACTION REQUESTED:

[ ] INFORMATIONAL ONLY [ ] POLICY DIRECTION [ ] APPROVAL [ ] OTHER xx DENIAL

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

CS 2-93/WRG 2-93 Review the Planning Commission Decision of June 10, 1993, denying request for a proposed marina with docks and two float-planes moored in Multnomah Channel, including a request for a Willamette River Greenway permit, all for property at 19495 NW St. Helens Road.

Appellant requests postponement of this item to September 28, 1993

SIGNATURES REQUIRED:

ELECTED OFFICIAL:

OR

DEPARTMENT MANAGER:

Betsy Williams

BOARD OF  
COUNTY COMMISSIONERS  
1993 AUG - 5 PM 12:53  
MULTNOMAH COUNTY  
OREGON

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

Any Questions: Call the Office of the Board Clerk 248-3277/248-5222

0516C/63

6/93

August 10, 1993

Arnold Rochlin  
P.O. Box 83645-0645  
Portland, OR 97283  
(503) 289-2657

Multnomah County  
Board of Commissioners  
1021 SW 4th Ave  
Portland, OR 97204

Re: CS 2-93 WRG 2-93 Denial of Community Service Designation for Marina  
Hearing: August 10, 1993

The Hearings Officer's decision is legally unassailable. The applicant's hope is that you won't understand the issues. I rely on your understanding and answer the arguments in his June 21st memorandum filed with the notice of review.

He claims that application of the requirement of .7015(A) that the proposal be "consistent with the character of the area" is novel. The proposal is in the middle of a 3 mile stretch of the Multnomah Channel that's free of shoreline development. It would have a harmful effect on the character of the area for a half mile in each direction. The applicant says there is a tradition of treating the whole channel as "the area" and that, if anything similar is found in the the 20 mile channel, then the proposal must be consistent. You have had no such policy; it would be absurd. The Hearings Officer thoroughly documents his reason for using a half mile. It's the significant impact area, primarily for scenic values, but also for fish and wildlife and river recreation. This three mile stretch is different from developed parts of the channel and the regulations require recognition of the differences.

The application does not comply with the requirement of .7015(B) that the development "will not adversely affect natural resources". The applicant says that the Hearings Officer's decision of non-compliance created policy. The burden of proof of compliance with all criteria is on the applicant (.8230(D)). But he complains that the decision is "speculation about possible adverse consequences". This is a trick, an attempt to switch the burden of proof in your minds. What he calls speculation, is the Hearings Officer's recognition of the applicant's lack of evidence in the face of substantial evidence of non-compliance. The Hearings Officer found that there would be degradation of scenic values, of fish habitat, of a migration route of anadromous fish, of recreational values other than boat moorage, of bird habitat, etc. The proposal fails to preserve natural and scenic areas as required by .6372(H). It violates Comprehensive Plan Policy 16 which requires protection of natural resources, including scenic resources, fish habitat, and wetlands and water areas. The applicant picks out minor points, e.g. possible fuel spills, and says they don't justify denial. Of course they don't; not by themselves. The decision identifies them as minor, but does not ignore them. Only the applicant makes a big issue of them. The serious scenic and habitat issues force the denial. There can be no absolute proof of harm until it happens. But this proceeding exists to prevent that. Unless you are convinced by the applicant's evidence that this development probably won't harm the scenic values or fish habitat, etc., denial is required.

The Comprehensive Plan ranks a marina as a "minor regional" community service facility. Policy 31G requires public transit within 1/4 mile of a minor regional community service facility. There is no public transit. The requirement is not met. The Plan allows some forbearance in applying policies 24 through 31, but you would have to decide how much to forbear (e.g. another 1/4 mile) and why. For now, it says what it says.

The most egregious mis-representation of the applicant is when he says: "The Hearings Officer determined that all undeveloped property along the river constitutes a 'significant scenic area'" (p.5). That determination was made by this Board when it adopted the Comprehensive Plan. The location is designated as a protected wetland in the Plan, as a protected area in the Willamette Greenway, as a Goal 5 scenic resource and as an SEC zone. If the regulations don't protect a site like this, what do they protect? The applicant would have you believe that the decision implies that no marina could be allowed in a scenic area. It does not. The Hearings Officer observes what's obvious, that the 3 mile undeveloped stretch would be harmed. The regulations guide development in a scenic area to where it has already occurred and where it doesn't destroy the protected resource. The logic of the applicant leads to a policy that any use already existing in the 20 mile channel is allowed anywhere until the channel is solid development. The code doesn't say that and the statewide land use goals wouldn't allow it.

MCC .6372(M) and .6376 protect wetlands. For this proceeding, you are obliged to follow the definition of .6376: "*Significant Wetlands* consist of those areas designated as *Significant* [in] the supporting documentation of the Comprehensive Framework Plan." (original italic) The site includes wetland by that definition. The map on page 4 of the Staff Report shows the parking lot abutting wetland boundaries on the north and southwest. But MCC .6376(B) requires a 50 foot buffer.

Policy 37 requires proof that the site qualifies for DEQ approved on site sewage disposal. A septic system is impossible because the water table is within 12 inches of the surface. The applicant did not provide evidence that he meets the requirements for a permanent disposal permit. A proposal is not proof, and Policy 37 expressly requires a finding of compliance before your decision. The applicant proposes a gravelled road and parking lot to avoid run off problems by absorbing the water. Gravel is worse than concrete. Policy 37 requires adequate storm run off facilities. There are none at all.

The applicant must prove compliance with every one of the regulations. For reasons given by the Hearings Officer, Staff and witnesses, the application should be denied for failure to comply with MCC .7015(A), (B), (F) and (G)<sup>1</sup>, .6372(B), (G), (H), (I), (J), (M), (O), and (S), .6376(B) and Comprehensive Plan Policies 2, 13, 15, 16, 31 and 37.



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<sup>1</sup> The Hearings Officer made some errors in identifying the code outline designations of some regulations. However the text accurately quotes the relevant text of the regulations and the intent of the decision is easily followed. Where the decision refers to .7015 (A)(1), (A)(2), etc. the code designation is .7015(A), .7015(B), etc. Where the decision refers to .2132(A)(1), the reference is to .7020(A)(1). This testimony uses the correct designations.

August 10, 1993

Arnold Rochlin  
P.O. Box 83645-0645  
Portland, OR 97283  
(503) 289-2657

Multnomah County  
Board of Commissioners  
1021 SW 4th Ave  
Portland, OR 97204

Re: CS 2-93 WRG 2-93 Denial of Community Service Designation for Marina  
Hearing: August 10, 1993

## **Corrections to Findings in Decision & Staff Report**

If the Board should use findings of the Hearings Officer or Staff to support its decision, some errors need to be corrected.

The June 10, 1993 Decision and July 29, 1993 Staff Report contain identical errors in designation of Zoning Code sections. The following corrections are intended to correct the errors without changing any meaning or favoring any party. Page numbers and outline designations are the same in both the Decision and Report:

Page 8, IV A: Change MCC 11.15.2132(A)(1) to 11.15.7020(A)(1)

Pages 8 through 13, IV B 1 through 7: Change references to MCC 11.15.7015(A)(1) through (A)(7) to 11.15.7015(A), (B), (C), (D), (E), (F) and (G), respectively.

References to the actual content of the regulations are correct in the Decision and Report.



BCC -

# O'DONNELL, RAMIS, CREW & CORRIGAN

JEFF H. BACHRACH  
MARK L. BUSCH  
CHARLES E. CORRIGAN\*  
STEPHEN F. CREW  
G. FRANK HAMMOND\*  
BARBARA A. JACOBSON\*  
KAREN E. JONES\*\*  
WILLIAM A. MONAHAN  
NANCY B. MURRAY  
MARK P. O'DONNELL  
TIMOTHY V. RAMIS  
WILLIAM J. STALNAKER  
TY K. WYMAN

ATTORNEYS AT LAW  
BALLOW & WRIGHT BUILDING  
1727 N.W. Hoyt Street  
Portland, Oregon 97209

TELEPHONE: (503) 222-4402  
FAX: (503) 243-2944

PLEASE REPLY TO PORTLAND OFFICE

CLACKAMAS COUNTY OFFICE  
181 N. Grant, Suite 202  
Canby, Oregon 97013  
(503) 266-1149

JAMES M. COLEMAN  
Special Counsel

August 6, 1993

\*ALSO ADMITTED TO PRACTICE IN WASHINGTON  
\*\*ALSO ADMITTED TO PRACTICE IN WASHINGTON AND TEXAS

The Board of County Commissioners  
Multnomah County  
1120 SW Fifth Avenue  
Portland, Oregon 97204

Scott Pemble  
Multnomah County Planning Director  
Division of Planning & Development  
2115 SE Morrison Street  
Portland, Oregon 97204

Re: August 10 Board Hearing  
Mullican Marina Application  
File No: CS 2-93 and WRG 2-93

Dear Chairman Miggins, Commissioners and Mr. Pemble:

I apologize for sending this letter on behalf of the applicants, Clarence Mullican and Alta Racine, so soon before the hearing on Tuesday, August 10. However, I have received in the last four days three different, contradictory and legally improper public notices regarding the hearing. As the attorney for the applicants, I find myself completely confused as to what process the county is pursuing and what is to be discussed at Tuesday's hearing.

At this point, the only outcome that is fair to the parties and legally supportable is to have the full public hearing on the marina application on September 28 at 1:30 p.m., which is what the county staff originally agreed to and announced to the public almost three weeks ago.

To help everyone understand what has happened, allow me to briefly provide a summary of recent events:

1. On July 20, Sharon Cowley, the Administrative Assistant to the County Commission, told my office it would not be any problem to have the August 10 hearing postponed until September. She requested a letter asking for the postponement, which she received.
2. On July 23, Mr. Pemble informed me that, from a procedural standpoint, the technically correct approach would be to open the scheduled hearing on August 10, not

1993 AUG 10 PM 1:44  
CLACKAMAS COUNTY  
BOARD OF  
COUNTY COMMISSIONERS  
OREGON



The Board of County Commissioners  
August 6, 1993  
Page 2

take any testimony, and then continue it to September 28 at 1:30 p.m. He said he supports the rescheduling. He agreed that it made sense for a number of reasons. Some of the reasons include:

- Some of the applicants' consultants were not available on August 10 and a number of other people interested in the application said they would be on vacation on that date.
  - Postponing the hearing would enable the applicants to get all their material to the staff, the commissioners and the public well in advance of the hearing date.
  - It would be more convenient for all parties to have the hearing in Portland, rather than in Corbett.
  - Giving applicants adequate time to prepare a thorough application is in all parties' best interest.
3. On July 27, the county sent the first public notice, which stated: "The Planning Staff will recommend to the Board of County Commissioners at their August 10, 1993 meeting, that this hearing be continued to September 28, 1993 at 1:30 p.m." People were informed that it was not necessary to attend the August 10 hearing.
  4. On August 2, the county received a letter objecting to continuing the hearing until September 28. I would note that the letter was from an individual who had not previously participated in this case. Furthermore, the letter is misleading in that it includes incorrect legal citations and mischaracterizes the reasons why the county agreed to reschedule the hearing.
  5. On August 4, I received an unusual public notice from the county entitled "Addendum To Notice Mailed July 27, 1993." This notice conveyed a different message than the earlier notice. It stated that on August 10, the County Commissioners may hold a full public hearing and take testimony on the marina application. The notice went on to state that this hearing would be "on the

The Board of County Commissioners  
August 6, 1993  
Page 3

record." That is a surprising reversal of the Board's previous decision to hold a de novo hearing.

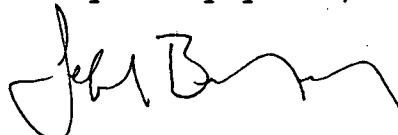
My office was further informed that the hearings officer would appear before the Board to explain his earlier decision. The County Code states that a "De Novo Hearing means a hearing by the Board as if the action had not been heard by the hearings officer and as if no decision had been rendered." MCC 11.15.8270(F).

6. On August 5, I received a third public notice, which indicated a full evidentiary hearing would in fact be held on August 10 at 1:30 p.m. Enclosed with this third notice, sent five days before the hearing, was the information about the marina application that the county is required by state law and MCC 11.15.8220 to send at least 10 days before a full hearing is held.

I am sure that my clients and I are not the only ones confused as to what is going on with this case. I will attend the hearing on Tuesday in hopes that some certainty can be given to all parties.

Our intent is to provide the County Commission, staff and the public with as thorough an application as possible and make it available as far before the hearing on September 28 as possible, so that this Board's final decision is based upon a full and fair review. It is difficult to understand how any party will be prejudiced by having the hearing continued until September 28 as originally announced. Any other resolution to the confusion engendered by the county's improper notices will substantially prejudice my clients' ability to make a full and fair presentation to this Board.

Very truly yours,



Jeff H. Bachrach

JHB/cjs  
cc: Clarence Mullican  
Alta Racine  
Pat Eudaly



# MULTNOMAH COUNTY OREGON

DIVISION OF PLANNING & DEVELOPMENT/2115 S.E. MORRISON/PORTLAND, OREGON 97214

## DIVISION OF PLANNING AND DEVELOPMENT

### Board Planning Packet Check List

File No. CS2-93  
WRP2-93

☒ Agenda Placement Sheet      No. of Pages 1

☒ Case Summary Sheet      No. of Pages 1  
☐ Previously Distributed \_\_\_\_\_

☐ Notice of Review      No. of Pages 9

\*(Maybe distributed at Board Meeting)

☒ Previously Distributed 6/22/93

☐ Decision      No. of Pages 25

(Hearings Officer/Planning Commission)

☒ Previously Distributed 6/22/93

\*Duplicate materials will be provided upon request.  
Please call 2610.



# MULTNOMAH COUNTY OREGON

DIVISION OF PLANNING & DEVELOPMENT/2115 SE MORRISON/PORTLAND, OREGON 97214

## DIVISION OF PLANNING AND DEVELOPMENT

### Board Planning Packet Check List

File No. CS2-93  
WRH 2-93

#### I. Materials Distributed to the Board

- ☒ Agenda Placement Sheet ( / Pages)
- ☒ Case Summary Sheet ( / Pages)
- ☒ Notice of Review Application ( 9 Pages)
- ☒ Decision ( 25 Pages)  
(Hearings Officer/Planning Commission)

#### II. Materials Available Upon Request

- ☒ Minutes ( 8 Pages)
- ☐ Transcript ( Pages)
- ☐ Applicant's Application and Submittals ( 40 Pages)
- ☐ Case Correspondence ( Letters)
- ☒ Slides ( 10 Slides)
- ☒ Exhibits/Maps ( 28 Exhibits)  
( Maps)
- ☐ Other Materials ( )



CASE NAME Appeal of Mullican's Marina Proposal

NUMBER CS 2-93; WRG 2-93;

## 1. Applicant Name/Address

Clarence Mullican and Alta Racine  
17622 NW St. Helens Road  
Portland, Oregon 97231

## 2. Action Requested by applicant

## ACTION REQUESTED OF BOARD

- ☒ Affirm Plan.Com./Hearings Officer  
☐ Hearing/Rehearing  
☐ Scope of Review  
☐ On the record  
☒ De Novo  
☐ New Information allowed

Applicants (appellants) request a Board review of the Hearing Officer decision to DENY Community Service (CS) and Willamette River Greenway (WRG) permits requested for a proposed boat marina with the parking area on land, and slips for 50 boats and two float planes moored in Multnomah Channel. The site is zoned MUA-20/FF/WRG. The request includes a Willamette River Greenway (WRG) Permit for new uses and structures in the Greenway.

## 3. Planning Staff Recommendation

APPROVAL, WITH CONDITIONS

## 4. Hearings Officer Decision:

DENY

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

The Hearings Officer reviewed evidence and information received after the Planning Staff report was prepared and was persuaded that all approval criteria could not be satisfied.

## ISSUES

(who raised them?)

- a. Private and Public Uses of the River Surface; Extent and types of recreation oriented development planned on Multnomah Channel, etc. [Opponents included: the Sauvie Island Conservancy, State Parks Dept., County Parks Division, & Friends Of Retaining Channel Environment (FORCE)]

Do any of these issues have policy implications? Explain.

Appellants argue that the decision has policy implications. In the written decision, the Hearings Officer explains how existing Plan policies and Zoning Code criteria were applied to the information in the record and that this evaluation led to the DENIAL of the CS and WRG requests. Staff does not concur with appellants that 'new policies' have been established by the Hearings Officer. Rather, the Hearings Officer applied existing policy and code to reach his conclusions.



## Notice of Public Hearing Board of County Commissioners

Multnomah County  
Board of County Commissioners

1021 SW 4th Avenue  
Portland, Oregon 97204

The Board of County Commissioners will hear the following item on the date and at the time and place indicated below. The exact time may be later depending on the agenda schedule. The hearing will be conducted pursuant to the Board of Commissioners' *Rules of Procedure* (enclosed). Interested parties will have opportunity to appear and testify at the hearing. Failure to raise an issue in person, or by letter, or failure to provide sufficient specificity to allow the Board an opportunity to respond to the issue precludes appeal to LUBA on that issue. The Board of Commissioner's Decision on the item may be announced at the hearing, or upon continuance to a time certain.

All materials submitted in the record are available for inspection and review prior to the hearing, and copies may be purchased at reasonable cost. For further information, call the Clerk of the Board at 248-3277 or the Planning Division at 248-3043.

Board of County Commissioners Members:

Hank Miggins, Acting Chair - Tanya Collier - Gary Hansen - Sharron Kelly - Dan Saltzman

---

**Date:** 08/10/93      **Time:** 1:30 p.m.      **Place:** 35800 East Crown Point Highway  
Corbett School District Multiple Purpose Building

---

A continuance has been requested by the appellant, represented by Jeff Bachrach of the law firm of O'Donnell, Ramis, Crew and Corrigan, to continue this hearing to September 28, 1993.

Reasons for this request are that the appellant's witnesses will not be available on August 10, 1993 and that a hearing location in the City of Portland rather than in Corbett would better enable all interested parties to attend the scheduled hearing.

The Planning Staff will recommend to the Board of County Commissioners, at their August 10, 1993 meeting, that this hearing be continued to September 28, 1993 at 1:30 p.m.

If you have questions, please call the Planning and Development Offices at 248-3043.

**CS 2-93    Public Hearing - On The Record**  
**WRG 2-93**

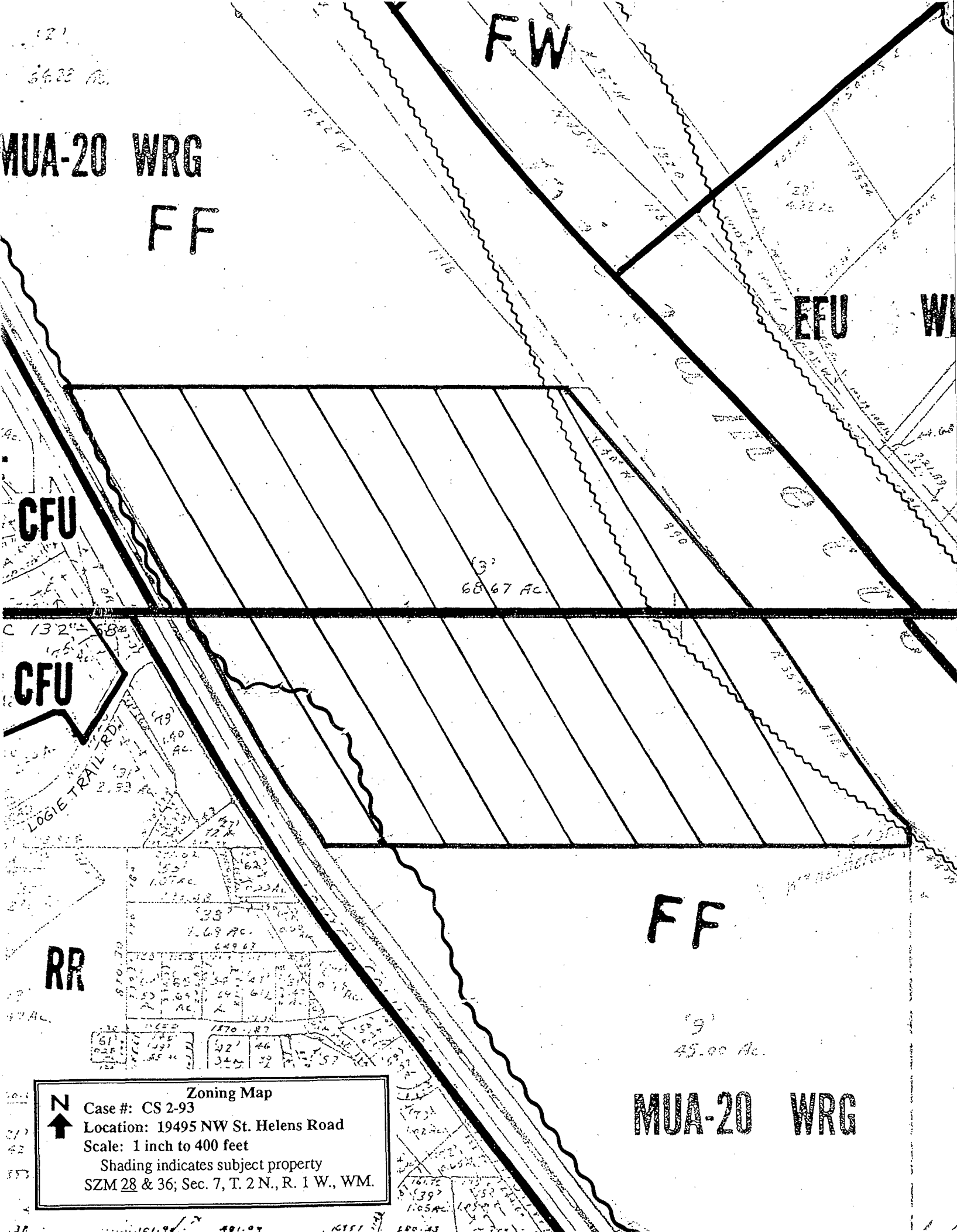
Review the Planning Commission Decision of June 10, 1993, **denying** request for change in zone designation from MUA-20, FF, WRG to MUA-20, FF, WRG, C-C, community service, to allow a proposed marina with docks and two float-planes moored in Multnomah Channel, including a request for a Willamette River Greenway permit for new uses and structures within the WRG boundary., **all for property located at 19495 NW St. Helens Road.**

**This item has been appealed by the applicant.**

**Scope of Review -** On the Record

**Oral Argument:** Each side will have 20 minutes to present oral argument to the Board.

**CS 2-93/WRG 2-93**



MUA-20 WRG

FF

FW

EFU

WM

CFU

CFU

RR

FF

MUA-20

WRG



**Zoning Map**

Case #: CS 2-93

Location: 19495 NW St. Helens Road

Scale: 1 inch to 400 feet

Shading indicates subject property  
SZM 28 & 36; Sec. 7, T. 2 N., R. 1 W., WM.

7

(2)

64.28 Ac.

[illegible]

Proposed  
Language

'3'  
68.67 Ac

NE 131.  
Wm Weatherbee

N  
↑

CS 2-93







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

**STAFF REPORT**

This Report consists of Findings of Fact, and Conclusions

**JULY 29, 1993**

**CS 2-93,  
WRG 2-93**

**Community Service Use Request  
Willamette River Greenway Permit**

**Sectional Zoning Map #11**

**I. SUMMARY**

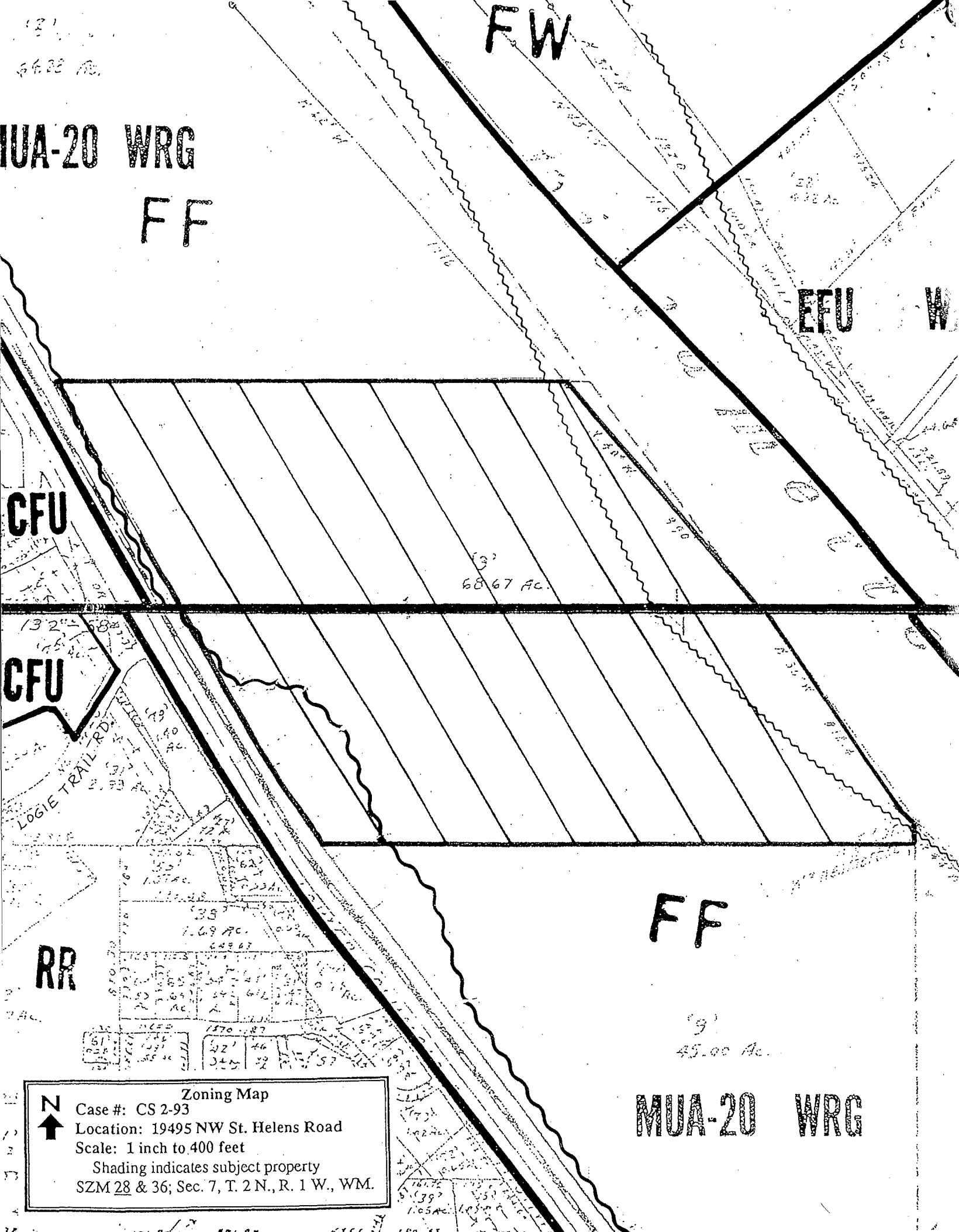
The applicant requests approval of a Community Service designation and Willamette River Greenway permit for a marina and associated development. The site is on the west bank of the Willamette River channel about 3 miles north of the Sauvie Island Bridge. It contains 68 acres and has 1800 feet of shoreline. An acre or two and about 450 feet of shoreline will be directly affected by the marina. The marina will contain one dock with slips for 50 sailboats, one dock with garages for two seaplanes, a boat ramp, and a gravel parking lot. Access will be provided by a gravel road from St. Helens Highway (US 30) following the route of an existing dirt road. The road crosses wetlands, and there are wetlands between the parking lot and the shoreline, but the parking lot itself is outside of delineated wetlands.

The main issues in the case are whether the marina: (a) is consistent with the character of the area; (b) will adversely affect natural resources; (c) will create hazardous conditions; (d) will comply with Willamette River Greenway standards; and (e) will comply with Comprehensive Plan policies 13 (Air and Water Quality and Noise Level), 15 (Significant Environmental Concern), 16 (Natural Resources), 31 (Community Facilities and Uses) and 39 (Parks and Recreation Planning).

Hearings officer Larry Epstein held public hearings to consider the request on April 5 and 26, 1993, and held open the record until May 6, 1993 to receive more written evidence. The hearings officer found that the proposal does or can comply with some approval criteria, but it does not comply with or the applicant did not bear the burden of proving it complies with certain other criteria; therefore, the Planning Staff recommends the Board deny the request.

<b>Location:</b>	19495 NW St. Helens Highway (US 30)
<b>Property Description:</b>	Tax Lot '3' Section 7, 2N-1W, 1991 Assessor's Map
<b>Site size:</b>	68.67 acres
<b>Owner:</b>	Zane and Sonja Holmes, 19333 NW St. Helens Road, 97231
<b>Applicant:</b>	Clarence Mullican and Alta Racine 17622 NW St. Helens Road, 97231
<b>Plan Designation:</b>	Multiple Use Agriculture
<b>Zoning:</b>	MUA-20 (Multiple Use Agriculture); WRG (Willamette River Greenway); and FH (Flood Hazard)
<b>Recommended Decision:</b>	<u>DENY</u> , based on the following Findings and Conclusions.

1993 AUG -1 PM 3:27  
MULTNOMAH COUNTY  
OREGON



MUA-20 WRG  
FF

CFU

CFU

RR

FF

EFU

W

MUA-20 WRG



Zoning Map

Case #: CS 2-93

Location: 19495 NW St. Helens Road

Scale: 1 inch to 400 feet

Shading indicates subject property

SZM 28 & 36; Sec. 7, T. 2 N., R. 1 W., WM.

CS 2-93

[illegible]



## **II. FINDINGS OF BASIC FACTS**

### **A. Existing and proposed use of the site.**

1. The applicant requests approval of a Community Service designation and Willamette River Greenway Permit for a marina and associated development. The marina site is on the west bank of the Willamette River channel (the "Channel") about 3 miles north of the Sauvie Island Bridge. The site contains 68 acres and has 1800 feet of shoreline. It is about 1600 feet from the shoreline to the west edge of the site. Only an acre or two of the site and about 450 feet of shoreline will be directly affected by the proposed use. Based on the United States Corps of Engineers (USCOE) application, the marina will be developed without filling or dredging in the Channel. In addition to supporting structures, such as dolphins and pilings, the marina will contain the following improvements:

a. A double-loaded dock with slips for 50 sailboats. The applicant agreed at the initial hearings to limit use of this part of the marina to sailboats. The dock is about 300 feet long. It would be about 35 feet from the shoreline and would extend about 115 feet into the Channel. A ramp would connect it to the shore at the south end.

b. Further south is a boat ramp with access by means of a 20-foot drive to an upland parking lot about 180 feet from the shoreline. The applicant proposed to allow public access to this boat ramp (for a fee), rather than restricting its use to lessors of slips in the marina. The applicant anticipates 20 to 35 boats per day would use the ramp during summer and fishing season. Few would use the ramp in winter. It is not clear from the record whether the applicant will improve the boat ramp more than it is now. Note: Staff received reports that gravel has been placed on the ramp area in late July without permit approvals. The Zoning Violation officer notified the owners by letter August 5, 1993.

c. Further south will be a second single-loaded dock with garages for two seaplanes. The dock will be about 100 feet long. It would be about 35 feet from the shoreline and would extend about 110 feet into the Channel. A ramp would connect it to the shore at the north end.

2. About 180 feet from the shoreline, the applicant will develop a 170-foot x 120-foot gravel parking lot for about 35 spaces for vehicles and boat trailers. Access will be provided by a 20-foot gravel road from St. Helens Highway (US 30) following the route of an existing dirt road. The road crosses wetlands, and there are wetlands between the parking lot and the shoreline, but the parking lot itself is outside of delineated wetlands.

3. The marina would not accommodate non-sail motorboats or floating homes, and occupancy of sailboats as dwellings would be prohibited by lease.

4. Based on testimony from several witnesses before the Hearings Officer, the site was used as part of a logging activity. Logs were stored, sorted and made into rafts

and booms to be floated downstream approximately where the marina is proposed. The boat ramp was used in conjunction with that activity.

5. The 68-acre site now is largely used for cattle grazing. The applicant will keep cattle away from the area to be used for the marina and parking lot if it is approved.

6. A BPA power line crosses the site from due north to south about 400 to 500 feet from the Multnomah Channel. The proposed use will not affect the power line.

## **B. Site Conditions and Vicinity Information.**

### **1. Surrounding land uses.**

a. West of the 68-acre site is the Astoria branch of the Burlington North Railroad (BNRR) line. Further west is St. Helens Highway (U.S. Route 30). Further west is Cornelius Pass Road and the Tualatin Mountains.

b. North and south of the 68-acre site are large parcels used for cattle grazing. There is not substantial development along the Multnomah Channel shoreline north of the site for a distance of about two miles, where there are several marinas and moorages in the Rocky Point area. There is a boat landing (Hadley's Landing) on the east bank of the Channel about one mile south of the site. There is a small marina on the west bank of the Channel about one mile south of the site that is being vacated, based on the testimony. There are houseboat moorages on the east and west banks of the Multnomah Channel about two to three miles south of the site.

c. East of the site is the Multnomah Channel. The Channel is 600 to 800 feet wide at the site. On Sauvie Island across the Channel from the subject site are the Wapato Access Greenway State Park and Virginia Lake. There is a pedestrian path along the shoreline and around the lake.

### **2. Floodplain and wetlands.**

a. The area east of the US 30, including the subject site, is the 100-year floodplain for the Multnomah Channel. However due to channel dredging and diking, the site is rarely flooded by high water from the Channel, based on Applicant's Exhibit 2. The west bank of the Channel is nearly vertical at the site, rising about 15 feet above the ordinary water line.

b. Soils on the site are Rafton and Sauvie silt loams, both of which are hydric, poorly drained, sloped less than 2%, and have a water table within 12 inches of the surface. In the area of the site between the power line and the Channel, ACSG, Inc. identified two upland wetland areas, one containing about 0.2 acres and the other containing 1.1 acres (which extends further west). See Applicant's Exhibit 2. The Channel is a wetland, too. The marina will be built on the Channel. The parking lot will be built outside of the delineated wetlands. The access road crosses wetlands to the west.

### **3. Access.**

a. The site has vehicular access to St. Helens Highway (U.S. Route 30) at a point south of the intersection of Cornelius Pass Road via a gravel/dirt driveway that extends at an angle down the slope adjoining the highway and across an at-grade crossing of the BNRR tracks. The crossing is not improved with emergency signals or gates. It is a private crossing, as defined by the BNRR and Oregon Public Utility Commission (OPUC) although there is no gate or other improvement to prevent general public access.

b. Based on Petitioner's Exhibits 7 and 8, the private crossing cannot be used by the general public unless a public crossing is approved by the OPUC and BNRR improved as deemed necessary. Planning Staff assumes the general public would have access to the site, based on the applicant's plan to allow general public access to the boat ramp. Both agencies have expressed opposition to or concern about such a crossing. However no application has been filed for approval of such a crossing; therefore, no final decision has been made about whether to allow the crossing. The OPUC could conclude that the crossing is private if access is limited by a locked gate.

### **4. Comprehensive Plan Map designation and zoning.**

a. The site is designated Multiple Use Agriculture and Willamette River Greenway on the Comprehensive Framework Plan Map.

b. Based on Sectional Zoning Map 11, the site is zoned MUA-20 (Multiple Use Agriculture - 20 acre minimum lot size); WRG (Willamette River Greenway), and FF (Flood Fringe) or FW (Flood Way).

c. Land on the west side of the Channel have Plan Map designations and zoning like the subject site. Land on the east side of the Channel are designated Agriculture and zoned EFU, Exclusive Farm Use, as well as WRG and FF or FW.

### **5. Utilities and facilities.**

a. The site is not served by public water or sewer, and the applicant does not propose to extend them to the site. The record is unclear about what potable water service and sanitary facilities will be provided. They are not identified on the site plan. The applicant indicates that a dry water line will be extended to the Channel to provide water for fire protection. The application states that the applicant will provide a subsurface sanitation system, but the applicant's testimony was that a chemical toilet will be provided. There is no evidence in the record that an on-site septic system is likely to be approved.

b. The site is in the Scappoose Rural Fire Protection District. The District Fire Chief advised the County that the District does not object to the proposal, provided the applicant provides a dry hydrant and standpipe system and the access road has an all weather surface at least 20 feet wide and at least 13½ feet of vertical clearance. See Miscellaneous Exhibit 3.



### **III. HEARING AND RECORD**

Hearings Officer Larry Epstein received testimony at the public hearings about this application on April 5 and 26, 1993. The hearings officer held open the public record until May 6 to receive additional written evidence. A record of that testimony and evidence is included herein as Exhibit A (Parties of Record), Exhibit B (Taped Proceedings), and Exhibit C (Written Testimony). Exhibit C is further divided into Applicant's Exhibits, Petitioner's Exhibits, and Miscellaneous Exhibits. These exhibits are filed at the Multnomah County Department of Environmental Services, Planning Division.

### **IV. APPLICABLE LAW & RESPONSIVE FINDINGS**

#### **A. Compliance with MCC 11.15.2100 (MUF zone).**

MCC 11.15.2132(A)(1) allows a "boat moorage, marina or boathouse moorage" and a conditional use in the MUA-20 zone, subject to the community service use standards in MCC 11.15.7015. Therefore, the proposed use is permitted in the zone if it complies with the community service use standards.

#### **B. Compliance with MCC 11.15.7015 (Community services).**

1. MCC 11.15.7015(A)(1) requires the County to find that a community service will be "*consistent with the character of the area*" to approve such a use.

a. The parties dispute whether the use is consistent with the character of the area. How the dispute is resolved depends on how the terms "area" and "consistent" in MCC 11.15.7015(A)(1) are construed.

(1) The applicants argue that the use is consistent with the character of the area. They would construe the word "area" in this case to include land at least two miles north and south of the site. Within those areas are boat moorages, and boats traverse the Channel that adjoins the site.

(2) Chris Foster (among others) argued that the use is not consistent with the character of the area. He would construe the word "area" to mean "in the immediate vicinity" or "not more than 1/2 mile or so from the site." There are no marinas within 1/2 mile or so from the site, and that area is characterized exclusively by natural resource uses involving little riverbank development. If "consistent" is construed to mean "the same as" and if "area" is construed as argued by Mr. Foster, then the proposed marina would be inconsistent with the undeveloped and natural character of the area.

b. The hearings officer found and Planning Staff recommends that "consistency with the character of the area" is inherently a vague and subjective standard. It must be construed to be applied.

c. The hearings officer found and Planning Staff recommends that the

definition of "area" should vary as a function of the impact of the proposed use. If the use has an impact over a large area, then that large area should be considered for purposes of determining the consistency of the character of the use. If the proposed use has an impact on a small area, then that smaller area should be considered.

d. In this case, the Planning Staff recommends the Board construe the word "area" to include land within roughly 1/2 mile or so from the site, because that is the area within which the proposed use will have a perceptible effect. Beyond that distance, the impact of the use will not be perceptible, because it will not be visually obtrusive, and because boats from the marina will be indistinguishable from boats from off-site.

e. There was relatively little discussion by the parties to the prior hearing of what is needed to show that the use is "consistent" with the character of the area.

(1) The hearings officer found and the Planning Staff recommends that the character of the area is a mix of natural resources, (*i.e.*, undeveloped vegetated Channel banks and agricultural or open space uplands) and river traffic (*i.e.*, power and sail boats). Although both elements are relevant, the predominant character is a natural resource area.

(2) The hearings officer found and the Planning Staff recommends that the proposed use is not "consistent" with the character of the area as defined above, because the proposed use is not similar to other natural resource uses in that area, and because it would conflict with those resources by introducing more structures, activity, and other effects into an area that now is not subject to such activity or effects. River traffic differs in character from a moorage. River traffic is moving and transitory and leaves no long-term evidence of use. A marina is inherently a storage activity; it requires substantial structures and other evidence of use. It concentrates its effects in a small area, unlike river traffic. Notwithstanding these differences, boat storage probably would be consistent with the character of the area if that character was defined only by boat traffic. However, given the natural resource character of the area and the difference in character between boat traffic and boat storage, the hearings officer found and the Planning Staff recommends that the proposed use is not consistent with the character of the area.

2. MCC 11.15.7015(A)(2) requires the County to find that a community service use "*will not adversely affect natural resources*" to approve such a use.

a. The parties dispute whether the use will adversely affect natural resources.

(1) The applicant argues that the development will not have an adverse effect on any natural resources, and will enhance access to a natural resource (*i.e.*, the Channel).

(2) County planning staff concede the proposed use could have

some adverse effects. Staff previously cited an ODFW comment out of context to justify allowing the marina. However, in context, the ODFW comment is at best a grudging acquiescence in having marinas, if at all, on only one side of the Channel. Staff observes that the marina will not affect vegetation on and adjoining the shoreline of most of the site and will not result in development of wetlands (other than the Channel itself and traffic to the boat ramp). The hearings officer found and the Planning Staff recommends that the proposal will not adversely affect vegetation or wetlands on the site.

(3) Several witnesses argued the proposed development will adversely affect the natural resources on the site. Mr. Foster correctly noted that the Multnomah Channel is recognized by the County as having significant natural resource values. He and others argued that the site is in the middle of a long stretch of undeveloped land along the Channel, enhancing its value for natural resource purposes. See Respondent's Exhibits 1 and 14 and attachments. Ms. Matrazzo argued that bald eagles, peregrine falcons, and other species of birds use the area for nesting and foraging, and the activity associated with the marina will deter use of the area for birds. See Respondent's Exhibits 2 and 11 and attachments. The Channel is a year-round migration corridor for anadromous salmonids. The marina will obstruct migrating fish and provide cover for competing species. See Respondent's Exhibit 13 and attachments.

(4) Several witnesses argued the proposed marina will make it easier to site other marinas in the now-undeveloped stretch of the Channel, because the proposed marina, if approved and developed, would become part of the character of the area. Although it would not require approval of other marinas, it would increase the likelihood other marinas would be approved, creating a cumulative effect on natural resources that cannot be addressed on a case-by-case basis. See, e.g., Respondent's Exhibits 11 and 17 and attachments. The hearings officer and Planning Staff agrees. Approval of the proposed marina would increase the potential for approval of other Channel-oriented development in the vicinity that would have a greater cumulative effect on habitat than that of the proposed marina alone.

(5) Respondents argued the proposed use would cause other specific adverse impacts on natural resources, as follows. Although those effects can be mitigated through conditions of approval, as discussed more below, the Planning Staff finds that they can still occur, and their individual and cumulative effective could be adverse to natural resources. Given the potential for and significance of these effects, Staff concludes the applicant has not met the burden of proof that the use will not adversely affect natural resources.

(a) Adverse effects on water quality would be caused if sanitary waste is discharged from boats at the site. The potential for this effect can be reduced by prohibiting floating homes and prohibiting occupancy of boats as dwellings and by requiring approved toilet facilities on the site. Illegal dumping of sanitary waste can occur, but it is not reasonably likely to occur at a frequency or scale that would significantly adversely affect natural resources.

(b) Adverse effects on water quality would be caused if

fuel from boats is discharged into the Channel. The potential for this effect can be reduced by prohibiting fueling facilities at the moorage and by minimizing fuel needs of boats moored at the facility, (*i.e.*, by allowing only sailboats which presumably use less fuel than motorboats). There is no way to prevent some impacts due to the use of fuel in boats. To an extent, such impacts already occur from boating traffic in the Channel. The proposed use would increase and concentrate such effects in a small area.

(c) Adverse effects on water quality, habitat quality and visual character could be caused by trash thrown from the site. The potential for this effect can be reduced by providing trash receptacles on the site. Littering may still occur. To an extent, such impacts already occur from boating traffic in the Channel. The proposed use would concentrate effects in a small area.

(d) Adverse effects on vegetation could be caused by fire. The presence of more people and machines increases the potential for fire hazards. The potential for this effect can be reduced by providing fire protection facilities recommended by the Fire District, by prohibiting boat construction or repairs on the site, and by prohibiting floating homes or occupancy of boats as dwellings. Fire can occur, but by reducing its potential and providing for fire flows, there is little likelihood the proposed use will adversely affect natural resources due to fire.

(e) Adverse effects on fish and wildlife habitat could be caused by all of the preceding and by the increased level of activity at the site generally. The moorage would disrupt existing wildlife travel routes and could disrupt the value of the area for resting, nesting, and other specific wildlife activities on and near the site. The potential for these effects can be reduced by the preceding mitigation measures and by limiting use of the site to sailboats that have relatively less noise and fuel impacts (than motorboats), by restricting marina development to the west side of the Channel (thereby minimizing the impact on the more significant wildlife habitat on the east side of the Channel), by not filling or dredging in the Channel, by minimizing lighting on the site, by keeping out of the wetlands, by retaining shoreline vegetation, by subjecting the proposal to review by ODSL and USCOE, and complying with other conditions of approval necessary to address impacts of the use. However, the moorage will inevitably and adversely affect the value of the site for fish and wildlife habitat.

3. MCC 11.15.7015(A)(3) requires the County to find that a community service use ***“will not conflict with farm or forest uses in the area”*** to approve such a use. There was no dispute about compliance with this criterion. The site is used for agriculture and, with the exception of the acre or two used for the parking lot, it will continue to be so used. Given the size of the site, the loss of one or two acres of grazing land is not significant. Cattle can continue to graze on almost all of the site if the use is approved. Staff concurs that the proposal's effects on farm or forest uses are insignificant — primarily due to physical barriers between the site and nearby farm or forest uses, and the non-farm/non-forest uses existing on immediately adjacent lands to the northwest and south-east. To the southwest, a railroad, a 5-lane highway, and steep slopes separates the subject site from nearby commercial forest lands. To the northeast, Multnomah Channel, a

flood control dike, and Sauvie Island Road all separate the site from the nearest commercial farming operations on Sauvie Island. The channel is approximately 700-feet wide at this point. The proposed use will not conflict with farm or forest uses in the area.

4. MCC 11.15.7015(A)(4) requires the County to find a community service use *"will not require public services other than those existing or programmed for the area"* to approve such a use.

a. The hearings officer found that term "public services" is vague. The Staff construes that term to include public sanitary and storm sewers and potable water systems, roads, and emergency services.

b. The applicant argues the moorage will take care of its own water, sanitary waste and fire protection. Therefore, it will not create a need for those services to be provided by public agencies.

c. County staff conclude the application does not show whether existing or proposed services will be adequate. The record does not show that ODEQ has approved a subsurface sanitation system for the site or use of portable toilet facilities. The record does not show adequate private water will be available. If the use is approved, staff recommends that these issues be addressed by means of conditions of approval. Conditions of approval can be used to ensure that adequate private facilities are designed and approved before the moorage is permitted to be developed. Therefore, the proposal complies with this criterion.

5. MCC 11.15.7015(A)(5) requires the County to find that a community service use *"will be located outside a big game winter wildlife habitat"* to approve such a use.

a. The site of the proposed use is not identified as a big game winter wildlife habitat by the Comprehensive Plan or ODFW. Therefore, the use complies with this criterion.

6. MCC 11.15.7015(A)(6) requires the County to find that a community service use *"will not create hazardous conditions"* to approve such a use.

a. The parties dispute whether the proposed moorage will create hazardous conditions.

(1) The applicant argues the moorage will not cause hazardous conditions, but provides no probative evidence to support that conclusion.

(2) If approved, conditions should limit the riverward extension of the marina to that which is characteristic of the west bank moorages. This would provide additional open navigation area and thereby minimize potential boating hazards from the project. Planning staff also notes the potential for a hazardous condition at the BNRR

crossing. The crossing now is unimproved. It could be improved with a locked gate to restrict the number of people exposed to the hazard or with signal lights and other measures to alert drivers to the presence of a train on the tracks. Subject to such a condition, County staff conclude the BNRR crossing will not be hazardous.

(3) Several witnesses argued the BNRR crossing and proximity of the crossing to St. Helens Highway will create a hazardous condition. See Respondent's Exhibits 2, 7 and 8.

(a) Based on the letters from BNRR and OPUC, the hearings officer found that the crossing can be safe if appropriate improvements are made or access is restricted by a locked gate between St. Helens Highway and the tracks.

(b) The record does not contain sufficient detail about the nature of the access from St. Helens Highway to the site to determine whether there is a sufficient distance between the highway and the tracks for stacking of vehicles and trailers that must wait for a train to pass. However, if the use is approved, Staff recommends that a condition of approval can require the applicant to provide sufficient stacking space for vehicles and trailers before development is permitted. If such stacking space is provided, then the proximity of the tracks to St. Helens Highway will not create a hazardous condition.

(4) Several witnesses argued that the moorage would create a hazardous condition, because it will be located in an area of the Channel that is already congested by river traffic and in one of the few areas where water skiers can use the Channel without obstructions. See Respondent's Exhibits 3, 5, 6, 14, 15, and 17.

(a) By decreasing the unobstructed width of the Channel by 25%, the moorage will increase the potential for accidents by increasing congestion. By concentrating additional boat traffic in one area, the moorage will exacerbate congestion and will increase the potential for conflicts with water skiers in that stretch of the Channel. These facts suggest the proposed use will create or aggravate congestion and conflicts. However, whether that results in a hazard is unclear.

(b) In the absence of more probative evidence regarding this issue, the hearings officer found the applicant has not met the burden of proving that the moorage will not cause hazardous conditions for river traffic and water skiers. Staff finds the record insufficient to determine whether the presence of the moorage would create a hazardous condition for river traffic and water skiers.

7. MCC 11.15.7015(A)(7) requires the County to find that a community service use *"will satisfy the applicable policies of the Comprehensive Plan"* to approve such a use. In this case, the applicable policies are Policy 2 (Off-Site Effects), Policy 10 (Multiple Use Agriculture), Policy 13 (Air and Water Quality and Noise Level), Policy 14 (Development Limitations), Policy 15 (Willamette River Greenway), Policy 16 (Natural Resources), Policy 31 (Community Facilities and Uses), Policy 37 (Utilities), Policy 38 (Facilities), and Policy 39 (Parks and Recreation Planning). Those policies are addressed

in the following section of the staff report.

**C. Compliance with applicable Comprehensive Plan policies.**

1. Policy 2 (Off-Site Effects) provides:

*The County's policy is to apply conditions to its approval of land use actions where it is necessary to:*

*A. Protect the public from potentially deleterious effects of the proposed use, or*

*B. Fulfill the need for public service demands created by the proposed use.*

a. There was dispute whether the proposed use will cause deleterious conditions and whether conditions of approval will sufficiently protect the public from effects that may occur.

b. The applicant argued the use will not have deleterious effects. County staff do not initially dispute the applicant's statement. Respondents generally argue the use will have deleterious effects on natural resources and river traffic safety.

c. The hearings officer found the use will have deleterious effects on natural resources. Whether or not it causes a hazard, it will increase congestion and reduce the navigable width of the waterway. These effects can be reduced by imposing conditions of approval, but they cannot be eliminated.

d. Whether conditions of approval would be sufficient to "protect the public" is unclear. The policy is vague about how much to protect the public. It is not clear whether the policy prohibits all deleterious effects or merely their mitigation. The hearings officer and Planning Staff construes the policy to require that deleterious effects be mitigated so that they are not reasonably likely to occur or will not be significantly adverse if they do occur.

e. The hearings officer found that conditions of approval will not prevent deleterious effects on natural resources or river traffic from occurring or prevent them from being significantly adverse. Therefore, Staff concludes the proposal does not comply with this policy.

2. Policy 10 (Multiple Use Agriculture) provides that certain lands are to be designated for Multiple Use Agriculture, and further:

*It is the County's policy, in recognition of the necessity to protect adjacent Exclusive Farm Use areas, is to restrict Multiple Use Agricultural uses to those compatible with Exclusive Farm Use areas.*

a. The Planning Staff finds the proposed use complies with this policy,

based on findings regarding MCC 11.15.7015(A)(3).

3. Policy 13 (Air and Water Quality and Noise Levels) provides:

***It is the county's policy to require, prior to approval of a legislative or quasi-judicial action, a statement from the appropriate agency that all standards can be met with respect to air quality, water quality and noise levels.***

a. The applicant argued the proposed use will have very little effect on air and water quality and noise levels, because it will be limited to sailboats. County planning staff generally agree, subject to conditions to prohibit live-aboards, to require erosion control measures, and to obtain subsequent ODEQ approval of sanitation facilities. However, the proposal does not entirely comply with this policy, because the application does not include statements from the appropriate agency that all standards can be met with regard to air quality, water quality and noise levels. The policy requires the statements. Although the Staff agrees a sailboat moorage will not cause air quality impacts or significant noise, and that water quality effects from sanitary facilities can be addressed by ODEQ, the policy requires more than the sort of general discussion provided by the applicant and the conditions initially recommended by staff.

4. Policy 14 (Development Limitations) provides:

***The County's policy is to direct development & land form alterations away from areas with development limitations except upon a showing that design and construction techniques can mitigate any public harm or associated public cost, and mitigate any adverse effects to surrounding persons or properties.***

a. The proposal is subject to this policy, because the site is within the 100-year floodplain of the Multnomah Channel, based on the Staff's review of the Federal Emergency Management Agency (FEMA) map of the area [Community Panel # 410179 0040].

b. The proposed development will be situated entirely within the floodplain. Because the moorage itself will float, flooding will not adversely affect it. Staff assumes the moorage will be adequately secured to prevent it from causing off-site effects due to flooding. The upland portion of the moorage will not contain significant structures that could be adversely affected by flooding or could cause significant off-site effects due to flooding. Therefore, the proposal complies with this policy.

5. Policy 15 (Willamette River Greenway) provides it is the County Policy to:

***Protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River; [and to]***

***Protect identified Willamette River greenway areas by requiring special procedures for the review of certain types of development allowed in the base zone***



***that will insure the minimum impact on values identified in the various area.....***

a. By applying for approval of a Willamette River Greenway permit, the applicant complies with the procedural provisions of this policy.

b. By adversely affecting shoreline vegetation, detracting from the value of the habitat for endangered species, changing the visual character of the Channel in the vicinity of the site, and restricting access to the site to paying customers, the proposed use does not comply with the substantive provisions of this policy and the Factors for the Willamette River Greenway. To the extent the proposal enhances recreational access for users of the moorage, it complies with the substantive provisions of this policy.

6. Policy 16 (Natural Resources) provides it is the County's policy to:

***Protect natural resources, conserve open space, and to protect scenic and historic areas and sites.*** (Policy 16)

***Protect significant fish and wildlife habitat ...*** (Policy 16-D)

***Protect natural areas from incompatible development and to specifically limit those uses which would irreparably damage the natural area values of the site.*** (Policy 16-E)

***Conserve scenic resources and protect such areas from incompatible and conflicting land uses.*** (Policy 16-F)

***Protect ... those water areas, wetlands, watersheds, and groundwater resources having special public value...*** (Policy 16-G)

***Recognize significant historic resources ...*** (Policy 16-I)

***Protect cultural areas and archeological resources ...*** (Policy 16-J)

a. The Planning Staff finds that the long-range availability of fish and wildlife habitat will not be significantly limited or impaired by the proposal. Although the proposal will reduce the quality of the fish and wildlife habitat on the moorage site, it will not have a significant off-site effect on habitat values, and ample fish and wildlife habitat will remain in the vicinity if the use is approved.

b. The Planning Staff finds the long-range availability of natural areas will not be affected by the proposal, because of its relatively small scale, the retention of the majority of the site as undeveloped, and the availability of natural areas in the vicinity that will not be directly adversely affected by the proposed use.

c. The Planning Staff finds that scenic views will be adversely effected by the proposed use, because it will significantly change the existing natural visual char-

acter of the site and portions of the Channel from which the site can be viewed. Although the proposal directly affects a relatively small area, the proposal has a significant indirect off-site effect. Although much of the Channel would remain in a natural state on and off the site if the use is approved, the significance of the change in visual character caused by the proposed use makes the use inconsistent with this aspect of the policy.

d. The Planning Staff finds that the water resources and wetlands will not be adversely affected by the proposed use, because the upland wetlands will not be significantly affected by the proposal, and there are ample wetlands and water resources in the vicinity that would not be affected by the proposed use.

7. Policy 31 (Community Facilities and Uses) provides the County's policy is to:

***A. Support the siting and development of a full range of community facilities and services by supporting the location and scaling of community facilities and uses meeting the needs of the community and reinforcing community identity.***

***B. Encourage community facilities siting and expansion at locations reinforcing orderly and timely development and efficient provision of all public facilities and services...***

***E. Classify community facilities according to their function and scale of operations. A marina is classified as a minor regional facility.***

***F. Locate minor regional facilities on sites with an average slope of 6% or less.***

***G. Support the location of community facilities on existing transportation systems with volume capacities and modal mix splits available and appropriate to serve present and future scales of operation. A minor regional facility is required to have direct access to a collector street and no routing of traffic through local neighborhood streets and to have public transit available within 1/4 mile.***

***H. Restrict the siting of community facilities in locations where site access would cause dangerous intersections or traffic congestion...***

***I. Support community facilities siting and development at sites of a size and shape which allows for a site layout in a manner which maximizes user convenience, energy conservation, and pedestrian and bicycle access to and within the site...***

a. The Planning Staff finds the site is sloped less than 6% and has direct access to a street which is classified as a collector or greater (St. Helens Highway). The facility does not require public facilities and services other than those existing or pro-

grammed for the area; therefore it is not disorderly or untimely to allow the proposed use from this standpoint. The access drive from St. Helens Highway could be hazardous unless appropriate improvements are made to the railroad crossing and adequate distance is provided for stacking vehicles west of the crossing. Conditions of approval could require such measures. Because St. Helens Highway is a designated bicycle route, there is bicycle access to the site. The proposal does not have public transit within 1/4 mile; to that extent, it does not comply with this policy.

8. Policy 37 (Utilities) requires the county to find, prior to approval of a legislative or quasi-judicial action, that:

*A. The proposed use can be connected to a public sewer and water system, both of which have adequate capacity, or, to the extent such a system is not available, there is an adequate private water system and a private sanitation system approved by ODEQ*

*B. There is adequate capacity in the storm water system to handle the run-off; or the run-off can be handled on the site or adequate provisions can be made;*

*C. The run-off from the site will not adversely affect the water quality in adjacent streams, ponds or lakes or alter the drainage on adjoining lands.*

*D. There is an adequate energy supply to handle the needs of the proposal and the development level projected by the plan; and*

*E. Communications facilities are available.*

a. The Planning Staff finds that the proposal partially complies with this policy, but does not comply with all aspects of the policy. It does not comply with this policy, because:

(1) The application does not contain substantial evidence from which the Board could conclude that ODEQ will approve a sanitation system for the site; and

(2) The application contains no information about the private water system for the site.

b. Staff concludes the proposal complies with the following aspects of the policy:

(1) The hearings officer concluded that storm water run-off from the site will be accommodated and will not pollute the Channel, the wetlands, or other areas of the site, because no impervious surface will be created on the site, and storm water will be able to percolate naturally into the ground, cleansing the run-off before it enters surface water bodies on or adjoining the site.

(2) The application includes un rebutted statements that power and communications utilities are available to the site. Staff accepts those statements.

9. Policy 38 (Facilities) requires the county to find, prior to approval of a legislative or quasi-judicial action, that:

***A. The appropriate school district has had an opportunity to review and comment on the proposal.***

***B. There is adequate water pressure and flow for fire fighting purposes; and***

***C. The appropriate fire district has had an opportunity to review and comment on the proposal.***

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

a. Staff finds that the application complies with the policy with regard to fire services, because the Scappoose Rural Fire Protection District has reviewed the proposal and has recommended measures to ensure an adequate supply of water for fire protection purposes.

b. Staff finds that the appropriate school district has not had an opportunity to comment on the proposal. However, the hearings officer found and Staff concurs that the proposed use has no direct impact on schools; therefore, compliance with this aspect of the policy is not required.

c. The site is in the jurisdiction of the Multnomah County Sheriff's Department. There is no evidence the Sheriff reviewed or commented about the proposal. However, Staff assumes police services can be provided to the site.

10. Policy 39 (Parks and Recreation Planning) generally obligates the County to undertake certain open space and recreational planning. The only aspect of the policy directly relevant to the proposed use is one that requires the County to:

***Encourage the development of recreation opportunities by other public agencies and private entities.***

a. The parties disputed whether the proposed use complies with this policy. The applicant argued the proposal will create a recreational feature, thereby increasing recreational opportunities in the Channel. Other witnesses argue the proposal will increase only private recreational opportunities, because only people who pay for the right to use the marina and boat ramp will have access to the site; therefore, the proposal does not increase recreational opportunities for the general public.

b. Staff concludes the proposal complies with this policy, because it results in a recreational opportunity. The policy does not encourage only recreational

uses that are available to the general public; it encourages recreational opportunities. Although the facility will be private, it is a recreational use. It will facilitate access to the Channel by tenants of the moorage and users of the boat ramp. That fulfills the policy.

**D. Compliance with MCC 11.15.6372 (Willamette River Greenway).** New land uses in the Willamette River Greenway are required to comply with additional standards, listed below together with responsive findings.

***1. The maximum possible landscaped area, scenic and aesthetic enhancement, open space and vegetation shall be provided between any use and the river.***

a. Staff finds that the proposal can comply with this criterion, because the parking lot is situated 180 feet or more from the river, which is the maximum separation that can be provided without occupying wetlands, provided existing significant vegetation between the parking lot and shoreline is preserved and enhanced as deemed necessary in the site plan review process.

***2. Reasonable public access to and along the river shall be provided by appropriate legal means to the greatest possible degree...***

a. Staff finds that public access to the river will be provided by the access road to the marina. To the extent access to that road is restricted, such as by means of a locked gate, then it does not provide access for the general public. The most public access possible would be provided by not restricting access to the road. If the BNRR/OPUC allow the railroad crossing to be public, subject to the applicant making certain improvements, that would best fulfill this criterion.

b. The applicant does not propose public access along the river except on the docks. Such access could be provided. To that extent, the proposal is not consistent with this criterion.

c. The applicant proposes to make the boat ramp available to the general public for a fee. This will provide public access to and from the river where it does not exist now. That enhances access. The hearings officer found that the imposition of a fee for use of the boat ramp does not violate this criterion. The criterion requires reasonable public access. Access to a private facility is not unreasonable simply because a fee is charged.

***3. Developments shall be directed away from the river to the greatest possible degree...***

a. Staff finds that the marina and boat ramp must be directed to the river to enable it to function as planned. The parking lot complies with this criterion, because it is not directed toward the river.

b. Some witnesses argued the function of the marina, *i.e.*, to store boats,

could be fulfilled by dry land storage outside of or further upland in the Greenway. The hearings officer found that this criterion, to the extent that it is vague about what is the "greatest degree possible," should not be construed to require dry land storage of boats, because that would effectively prohibit moorages anywhere on the river, a result that is not reasonable given the uses permitted in the Greenway and the design-oriented nature of other applicable criteria for the Greenway.

***4. Agricultural lands shall be preserved and maintained for farm use.***

a. Staff finds the site is agricultural land, based on USDA SCS Soils Maps for Multnomah County. The proposal preserves all but an acre or two of the site for agriculture. Therefore, agricultural lands are preserved and maintained for agriculture.

***5. Recreational needs shall be satisfied by public and private means in a manner consistent with the carrying capacity of the land and with minimum conflicts with farm uses.***

a. Staff finds that the proposal satisfies a public demand for additional moorage space in a manner that does not exceed the carrying capacity of the land, given that the moorage will occupy a small percentage of the site and shoreline and will accommodate parking and other needs of the use on the site. The proposal does not conflict with farm uses, based on the finding for MCC 11.15.7015(A)(3).

***6. Significant fish and wildlife habitats shall be protected.***

a. Staff finds that the site contains significant fish and wildlife habitat. That habitat will not be protected, based on the finding in response to MCC 11.15.7015(A)(2).

***7. Significant natural and scenic areas and viewpoints and vistas shall be preserved.***

a. Staff finds that the shoreline of the site is a significant natural and scenic area that can be observed from the river and the east bank. The proposed moorage will not preserve that view; it will replace it with a view of the moorage. For that reason, Staff finds the proposal does not comply with this criterion.

***8. Maintenance of public safety and protection of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.***

a. Staff finds the proposal does not maintain public safety to the maximum extent practicable, based on the finding for MCC 11.15.7015(A)(6).

***9. The natural vegetation along the river, lakes, wetlands and streams shall be enhanced and protected to the maximum extent practicable to assure scenic quality, protection from erosion, screening of uses from the river and continuous riparian corridors.***

a. Staff finds the application is insufficient to show compliance with this criterion. The applicant does not describe or evaluate the significance of shoreline vegetation or wetland vegetation that could be affected by development of the parking lot or other features. Without more information, the Board cannot determine whether that vegetation will be preserved to the maximum extent practicable. There is nothing in the application to address erosion potential along the shoreline or at the boat ramp. There is no assessment of the impact of the project on the riparian corridor other than conclusory statements. In the absence of more complete information, the Board cannot conclude the proposal complies with this criterion.

***10. Areas of annual flooding, flood plains, water areas and wetland shall be preserved in their natural state to the maximum possible extent to protect the water retention, overflow and natural functions.***

a. Staff finds that the flood plain, water areas and wetland are preserved to the maximum possible extent without precluding development of the project, because the proposal affects a small percentage of the flood plain on the property, does not reduce the flood carrying capacity of the site and does not result in development of the upland wetlands.

***11. Significant wetlands shall be protected as provided in MCC 11.15.6376.***

a. Areas of significant wetlands are identified in Applicant's Exhibit 2. There is insufficient information in the application to determine whether those wetlands will be protected as provided in MCC 11.15.6376. Therefore, the Board cannot conclude the proposal complies with this criterion.

***12. Areas of ecological, scientific, historical or archeological significance shall be protected, preserved, restored, or enhanced to the maximum extent possible.***

a. The parties disputed whether the site contains archeological resources. The applicant testified that he has not found any evidence of such resources. An adjoining land owner testified he has found arrowheads and other Native American artifacts. There is no conclusive evidence in the record one way or the other. In the absence of such evidence, Staff cannot determine that the site does not contain archeological resources or that such resources are preserved to the maximum extent possible.

***13. Areas of erosion or potential erosion shall be protected from loss by appropriate means which are compatible with the character of the Greenway.***

a. The site is not subject to slope hazards, based on the County Slope Hazard Maps and SCS Soil Maps. However, the steep bank of the Channel could be subject to erosion during construction of the marina and, if vegetation on the bank is removed or damaged, after construction. The application does not include measures to address the potential for erosion. Therefore, the Board cannot conclude the proposal will comply with this criterion.

***14. The quality of the air, water and land resources in and adjacent to the Greenway shall be preserved in development, change of use or intensification of use of land designated WRG.***

a. Staff finds this criterion is ambiguous. It requires preservation while allowing change. The two concepts are hard to reconcile.

b. The proposal detracts from the existing natural character of the land and water by developing a portion of the shoreline and adjoining uplands. To that extent, it does preserve land and water quality.

c. However, to the extent the criterion allows development, the proposal is not reasonably likely to result in significant water quality effects (subject to conditions of approval) or to cause upland effects that will detract from the quality of the undeveloped portion of the site or surrounding land. To that extent, it does preserve land and water quality.

d. Given the inherent conflict in this criterion, Staff finds that the proposal does comply with this criterion by preserving land and water quality to the extent possible while allowing the project to be developed.

***15. A building setback line of 150 feet from the ordinary low water line of the Willamette River shall be provided in all rural and natural resource districts, except for ... buildings and structures in conjunction with a water-related or a water-dependent use.***

a. Staff finds that the structures associated with the proposed use (i.e., the docks and associated ramps and pilings) are water-related or water-dependent. The proposal does not result in other structures. Therefore, the proposal complies with this criterion.

***16. The applicable policies of the Comprehensive Plan are satisfied.***

a. Staff finds the proposal is consistent with Comprehensive Plan policies 10 (Multiple Use Agriculture), 14 (Development Limitations), 38 (Facilities), and 39 (Parks and Recreation Planning), based on finding IV.C.



b. Staff finds that the proposal is not consistent with or that the applicant has not met the burden of proving that the proposal is consistent with all aspects of Comprehensive Plan policies 2 (Off-Site Effects), 13 (Air and Water Quality and Noise Levels), 15 (Willamette River Greenway), 16 (Natural Resources), 31 (Community Facilities and Uses), and 37 (Utilities), based on finding IV.C. Therefore, the proposal does not comply with this criterion.

#### **E. Other alleged criteria.**

1. It was alleged in Respondent's Exhibit 2 that the application is subject to MCC 11.15.8230(D), which requires, among other things, that granting the request is in the public interest and that there is a public need for the proposal and that need is best met by changing the classification of the subject property as compared with other available properties.

2. Staff finds the preceding provisions from MCC 11.15.8230(D) do not apply to the proposal. The preface to that section reads as follows:

***The burden of proof is upon the person initiating an action. Unless otherwise provided in this Ordinance, that burden shall be to persuade that...*** [Emphasis added]

3. Staff finds that MCC 11.15.7015 contains specific standards for a Community Service designation and MCC 11.15.6372 contains specific standards for a Willamette River Greenway permit. Although the Ordinance does not expressly state that these are the exclusive approval criteria for these land use actions, Staff finds that it is implicit that the general purpose standards in MCC 11.15.8230(D) do not apply if there are other more specific standards in the Ordinance.

### **V. CONCLUSIONS AND RECOMMENDATION**

#### **A. Conclusions.**

1. Staff concludes that the applicant has met the burden of proving that the proposal complies with the following:

- a. MCC 11.15.7015(A)(3), (4), and (5), based on finding IV.B;
- b. Comprehensive Plan policies 10 (Multiple Use Agriculture), 14 (Development Limitations), 38 (Facilities), and 39 (Parks and Recreation Planning), based on finding IV.C; and
- c. MCC 11.15.6372(A), (C), (D), (F), (L), (P), and (Q), based on finding IV.D.

2. Staff concludes that the proposal does not comply with or that the applicant has not met the burden of proving that the proposal complies with all aspects of the following:

- a. MCC 11.15.7015(A)(1), (2), (6) and (7), based on finding IV.B;
- b. Comprehensive Plan policies 2 (Off-Site Effects), 13 (Air and Water Quality and Noise Levels), 15 (Willamette River Greenway), 16 (Natural Resources), 31 (Community Facilities and Uses), and 37 (Utilities), based on finding IV.C; and
- c. MCC 11.15.6372(B), (G), (H), (I), (J), (M), (N), (O), or (S), based on finding IV.D.

## **B. Recommendation**

In recognition of the findings and conclusions contained herein, and incorporating the other reports of affected agencies and public testimony and exhibits received in this matter, the Planning Staff recommends the Board DENY CS 2-93 and WRG 2-93.

## **APPEAL TO THE LAND USE BOARD OF APPEALS (LUBA)**

*Decisions of the Board of County Commissioners (Board) may be appealed to LUBA by any person or organization who appeared and testified at the hearing, or by those who submitted written testimony to the record. Failure to raise an issue by the close of the record at or following the final hearing, (in person or by letter), precludes appeal to the Land Use Board of Appeals (LUBA) on that issue. Failure to provide specificity on an issue sufficient for the Board to respond, precludes appeal to LUBA on that issue.*

*The Board hearing on this item is scheduled for 1:30 p.m. on Tuesday, August 10, 1993 at the Corbett Grade School (East Crowen Point Highway). For further information call the Multnomah County Planning and Development Division at 248-3043.*

August 2, 1993

Arnold Rochlin  
P.O. Box 83645-0645  
Portland, OR 97283  
(503) 289-2657

Multnomah County  
Board of Commissioners  
1120 SW 5th Ave., 15th fl.  
Portland, OR 97204

Re: CS 2-93 WRG 2-93 Denial of Community Service Designation for Marina  
Hearing: August 10, 1993

*Copy of letter addressed and delivered to individual members of the Board:*

The applicant requested that you delay the hearing from August 10th. MCC 11.15.8270(H) requires that the hearing be within 45 days of the date of the scope of review hearing which was on June 22nd.<sup>1</sup> While August 10th is the 49th day, the mistake can't be fixed, and the error was probably unintentional. To delay the hearing beyond the time limit on purpose would be an error far more grave than a mere slip up.

Citizens don't know what you'll do, so they have to prepare testimony, take time from work, and travel from the far west end of the county to the far east end. To make them appear twice for the convenience of the applicant's lawyer is unjust. Even if he has proof that, for reasons beyond his control, he really can't attend, there are other attorneys in his law firm, which handles many land use cases. It was the applicant's attorney who asked for a de novo hearing! He is not entitled to more time to prepare the case. He already has 4 days more than the 45 allowed. The rules, if observed, are fair to all. The applicant's lawyer should not be given favors at other's expense.

The decision in Rochlin v. Multnomah Co., \_\_ Or LUBA \_\_ (93-019, July 22, 1993) is an admonishment to the county to adhere to the time limits in the code.<sup>2</sup> This situation is different. If you choose to delay, a fair remedy seems impossible, so I would not appeal. But, the question before the Board is not what can you get away with, but what is the intent of the code? It may be that staff will find some loop-hole, but the intent is clear. A decision based on anything but respect for that intent with diminish respect for the process. You should deny the request for delay.

Sincerely yours,



**This testimony has been sent individually to the Chair and all Commissioners, and to the Clerk of the Board and Planning Director for entry into the case file. It is therefore not an ex parte contact.**

<sup>1</sup> 11.15.8270(H): "At the meeting at which the Scope of Review is determined pursuant to MCC .8270(A) and (B), the Board shall further determine the time and place for the review, which shall not be later than 45 days from the date of the Board determination."

<sup>2</sup> The challenged action in that case was taken in 1992, before Chair Miggins and Commissioners Collier and Salzman were on the Board. It involved an SEC zone on Balch Creek and a culvert/fill crossing installed when the permits allowed a bridge. The Board's decision after rehearing the case was reversed because the motion to rehear was made after the code deadline.

BOARD OF  
COUNTY COMMISSIONERS  
1993 AUG - 2 AM 11:26  
MULTNOMAH COUNTY  
OREGON

Denovo Hearing  
8-10-93 - 1:30pm  
20 min. Per Side

MEETING DATE: June 22, 1993

AGENDA NO: P-1

(Above Space for Board Clerk's Use ONLY)

**AGENDA PLACEMENT FORM**

SUBJECT: Hearings Officer Decision Review

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING: Date Requested: June 22, 1993

Amount of Time Needed: 2 Minutes

DEPARTMENT: DES DIVISION: Planning and Development

CONTACT: Sharon Cowley TELEPHONE #: 2610

BLDG/ROOM #: 412/109

PERSON(S) MAKING PRESENTATION: Planning Staff

**ACTION REQUESTED:**

☐ INFORMATIONAL ONLY ☐ POLICY DIRECTION ☐ APPROVAL ☒ DENIAL ☒ OTHER

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

CS 2-93/WRG 2-93 Review the Hearings Officer Decision of June 10, 1993, denying request for a change in zone designation from MUA-20, WRG, FH to MUA-20, WRG, FH, C-S, community service for property located at 19495 NW St. Helens Road

**SIGNATURES REQUIRED:**

ELECTED OFFICIAL:

OR

DEPARTMENT MANAGER: *BH Wallia*

**ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES**

Any Questions: Call the Office of the Board Clerk 248-3277/248-5222



# MULTNOMAH COUNTY OREGON

DIVISION OF PLANNING & DEVELOPMENT/2115 S.E. MORRISON/PORTLAND, OREGON 97214

## DIVISION OF PLANNING AND DEVELOPMENT

### Board Planning Packet Check List

File No. C52-93/WR 2-93

☒ Agenda Placement Sheet      No. of Pages 1

☐ Case Summary Sheet      No. of Pages \_\_\_\_\_

☐ Previously Distributed      \_\_\_\_\_

☐ Notice of Review      No. of Pages \_\_\_\_\_

\*(Maybe distributed at Board Meeting)

☐ Previously Distributed      \_\_\_\_\_

☒ Decision      No. of Pages 25

(Hearings Officer/Planning Commission)

☐ Previously Distributed      \_\_\_\_\_

\*Duplicate materials will be provided upon request.  
Please call 2610.



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

DECISION  
OF THE HEARINGS OFFICER  
This Decision consists of Findings of Fact, and Conclusions  
JUNE 10, 1993

CS 2-93,  
WRG 2-93

Community Service Use Request  
Willamette River Greenway Permit

Sectional Zoning Map #11

I. SUMMARY

The applicant requests approval of a Community Service designation and Willamette River Greenway permit for a marina and associated development. The site is on the west bank of the Willamette River channel about 3 miles north of the Sauvie Island Bridge. It contains 68 acres and has 1800 feet of shoreline. An acre or two and about 450 feet of shoreline will be directly affected by the marina. The marina will contain one dock with slips for 50 sailboats, one dock with garages for two seaplanes, a boat ramp, and a gravel parking lot. Access will be provided by a gravel road from St. Helens Highway (US 30) following the route of an existing dirt road. The road crosses wetlands, and there are wetlands between the parking lot and the shoreline, but the parking lot itself is outside of delineated wetlands.

The main issues in the case are whether the marina: (a) is consistent with the character of the area; (b) will adversely affect natural resources; (c) will create hazardous conditions; (d) will comply with Willamette River Greenway standards; and (e) will comply with Comprehensive Plan policies 13 (Air and Water Quality and Noise Level), 15 (Significant Environmental Concern), 16 (Natural Resources), 31 (Community Facilities and Uses) and 39 (Parks and Recreation Planning).

Hearings officer Larry Epstein held public hearings to consider the request on April 5 and 26, 1993, and held open the record until May 6, 1993 to receive more written evidence. The hearings officer finds that the proposal does or can comply with some approval criteria, but it does not comply with or the applicant did not bear the burden of proving it complies with certain other criteria; therefore, the hearings officer denies the request.

**Location:** 19495 NW St. Helens Highway (US 30)

**Property Description:** Tax Lot '3' Section 7, 2N-1W, 1991 Assessor's Map

**Site size:** 68.67 acres

**Owner:** Zane and Sonja Holmes, 19333 NW St. Helens Road, 97231

**Applicant:** Clarence Mullican and Alta Racine  
17622 NW St. Helens Road, 97231

**Plan Designation:** Multiple Use Agriculture

**Zoning:** MUA-20 (Multiple Use Agriculture); WRG (Willamette River Greenway); and FH (Flood Hazard)

**Decision:** Denied, based on the following Findings and Conclusions.

JA-20 WRG  
FF

FW

EFU W

CFU

CFU

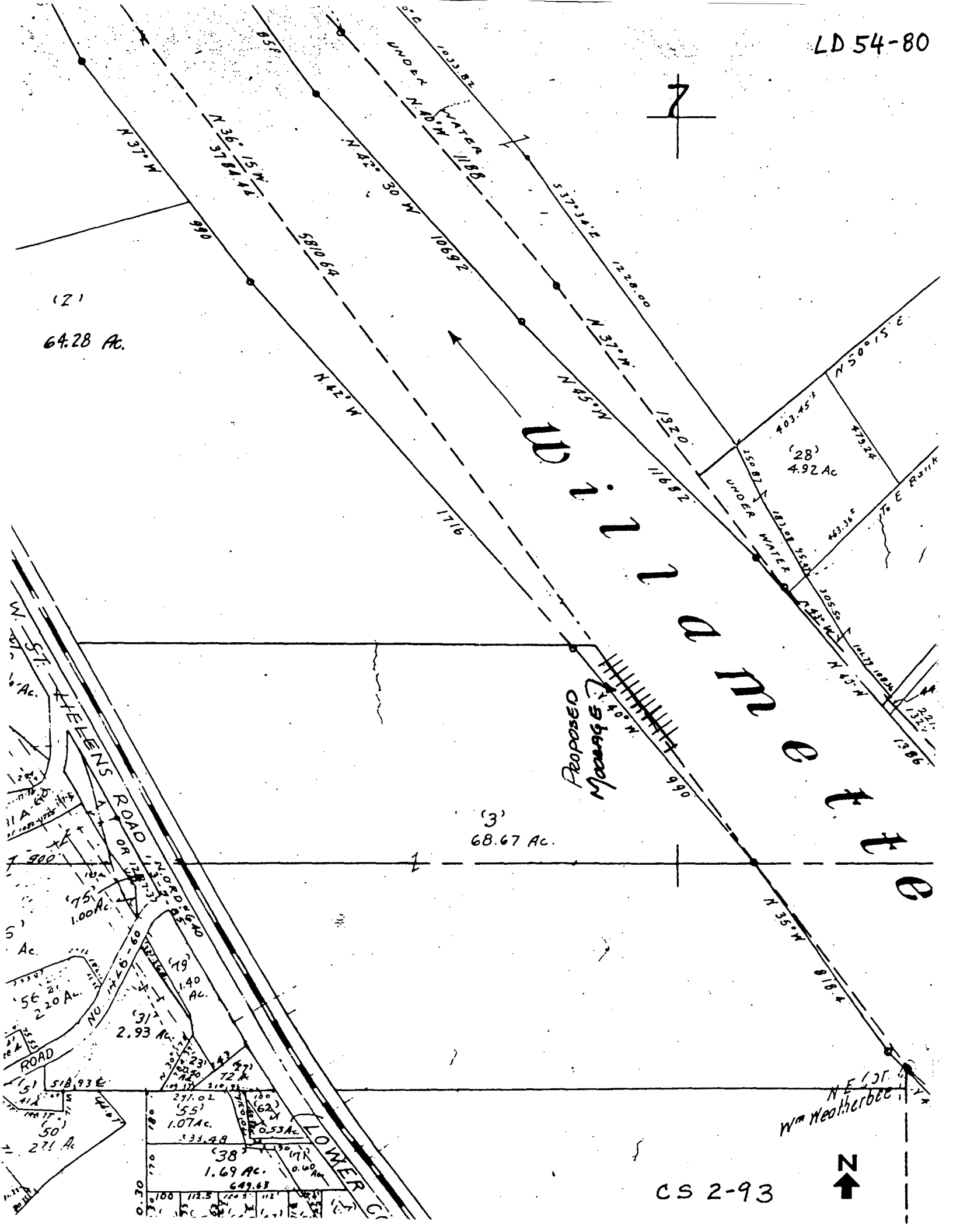
LOGIE TRAIL RD

RR

FF

MUA-20 WRG

**N**  
↑  
**Zoning Map**  
Case #: CS 2-93  
Location: 19495 NW St. Helens Road  
Scale: 1 inch to 400 feet  
Shading indicates subject property  
SZM 28 & 36; Sec. 7, T. 2 N., R. 1 W., WM.







## **II. FINDINGS OF BASIC FACTS**

### **A. Existing and proposed use of the site.**

1. The applicant requests approval of a Community Service designation and Willamette River Greenway Permit for a marina and associated development. The marina site is on the west bank of the Willamette River channel (the "Channel") about 3 miles north of the Sauvie Island Bridge. The site contains 68 acres and has 1800 feet of shoreline. It is about 1600 feet from the shoreline to the west edge of the site. Only an acre or two of the site and about 450 feet of shoreline will be directly affected by the proposed use. Based on the USCOE application, the marina will be developed without filling or dredging in the Channel. In addition to supporting structures, such as dolphins and pilings, the marina will contain the following improvements:

a. A double-loaded dock with slips for 50 sailboats. The applicant agreed to limit use of this part of the marina to sailboats. The dock is about 300 feet long. It would be about 35 feet from the shoreline and would extend about 115 feet into the Channel. A ramp would connect it to the shore at the south end.

b. Further south is a boat ramp with access by means of a 20-foot drive to an upland parking lot about 180 feet from the shoreline. The applicant proposed to allow public access to this boat ramp (for a fee), rather than restricting its use to lessors of slips in the marina. The applicant anticipates 20 to 35 boats per day would use the ramp during summer and fishing season. Few would use the ramp in winter. It is not clear from the record whether the applicant will improve the boat ramp more than it is now.

c. Further south will be a second single-loaded dock with garages for two seaplanes. The dock will be about 100 feet long. It would be about 35 feet from the shoreline and would extend about 110 feet into the Channel. A ramp would connect it to the shore at the north end.

2. About 180 feet from the shoreline, the applicant will develop a 170-foot x 120-foot gravel parking lot for about 35 spaces for vehicles and boat trailers. Access will be provided by a 20-foot gravel road from St. Helens Highway (US 30) following the route of an existing dirt road. The road crosses wetlands, and there are wetlands between the parking lot and the shoreline, but the parking lot itself is outside of delineated wetlands.

3. The marina would not accommodate non-sail motorboats or floating homes, and occupancy of sailboats as dwellings would be prohibited by lease.

4. Based on testimony from several witnesses, the site was used as part of a logging activity. Logs were stored, sorted and made into rafts and booms to be floated downstream approximately where the marina is proposed. The boat ramp was used in conjunction with that activity.

5. The 68-acre site now is largely used for cattle grazing. The applicant will

keep cattle away from the area to be used for the marina and parking lot if it is approved.

6. A BPA power line crosses the site from due north to south about 400 to 500 feet from the Multnomah Channel. The proposed use will not affect the power line.

## **B. Site Conditions and Vicinity Information.**

### **1. Surrounding land uses.**

a. West of the 68-acre site is the Astoria branch of the Burlington North Railroad (BNRR) line. Further west is St. Helens Highway (U.S. Route 30). Further west is Cornelius Pass Road and the Tualatin Mountains.

b. North and south of the 68-acre site are large parcels used for cattle grazing. There is not substantial development along the Multnomah Channel shoreline north of the site for a distance of about two miles, where there are several marinas and moorages in the Rocky Point area. There is a boat landing (Hadley's Landing) on the east bank of the Channel about  $\frac{1}{2}$ -mile south of the site. There is a small marina on the west bank of the Channel about one mile south of the site that is being vacated, based on the testimony. There are houseboat moorages on the east and west banks of the Multnomah Channel one to two miles south of the site.

c. East of the site is the Multnomah Channel. The Channel is 600 to 700 feet wide at the site. On Sauvie Island across the Channel from the subject site are the Wapato Access Greenway State Park and Virginia Lake. There is a pedestrian path along the shoreline and around the lake.

### **2. Floodplain and wetlands.**

a. The area east of the US 30, including the subject site, is the floodplain for the Multnomah Channel. However due to channel dredging and diking, the site is rarely flooded by high water from the Channel, based on Applicant's Exhibit 2. The west bank of the Channel is nearly vertical at the site, rising about 15 feet above the water line.

b. Soils on the site are Rafton and Sauvie silt loams, both of which are hydric, poorly drained, sloped less than 2%, and have a water table within 12 inches of the surface. In the area of the site between the power line and the Channel, ACSG, Inc. identified two upland wetland areas, one containing about 0.2 acres and the other containing 1.1 acres (which extends further west). See Applicant's Exhibit 2. The Channel is a wetland, too. The marina will be built on the Channel. The parking lot will be built outside of the delineated wetlands. The access road crosses wetlands to the west.

### **3. Access.**

a. The site has vehicular access to St. Helens Highway (U.S. Route 30) at

a point south of the intersection of Cornelius Pass Road via a gravel/dirt driveway that extends at an angle down the slope adjoining the highway and across an at-grade crossing of the BNRR tracks. The crossing is not improved with emergency signals or gates. It is a private crossing, as defined by the BNRR and Oregon Public Utility Commission (OPUC) although there is no gate or other improvement to prevent general public access.

b. Based on Petitioner's Exhibits 7 and 8, the private crossing cannot be used by the general public unless a public crossing is approved by the OPUC and BNRR improved as deemed necessary. The hearings officer assumes the general public would have access to the site, based on the applicant's plan to allow general public access to the boat ramp. Both agencies have expressed opposition to or concern about such a crossing. However no application has been filed for approval of such a crossing; therefore, no final decision has been made about whether to allow the crossing. The OPUC could conclude that the crossing is private if access is limited by a locked gate.

#### **4. Comprehensive Plan Map designation and zoning.**

a. The site is designated Multiple Use Agriculture and Willamette River Greenway on the Comprehensive Framework Plan Map.

b. Based on Sectional Zoning Map 11, the site is zoned MUA-20 (Multiple Use Agriculture - 20 acre minimum lot size); WRG (Willamette River Greenway), and FF (Flood Fringe) or FW (Flood Way).

c. Land on the west side of the Channel have Plan Map designations and zoning like the subject site. Land on the east side of the Channel are designated and zoned Exclusive Farm Use and EFU, respectively, as well as WRG and FF or FW.

#### **5. Utilities and facilities.**

a. The site is not served by public water or sewer, and the applicant does not propose to extend them to the site. The record is unclear about what potable water service and sanitary facilities will be provided. They are not identified on the site plan. The applicant indicates that a dry water line will be extended to the Channel to provide water for fire protection. The application states that the applicant will provide a subsurface sanitation system, but the applicant's testimony was that a chemical toilet will be provided. There is no evidence in the record that an on-site septic system is likely to be approved.

b. The site is in the Scappoose Rural Fire Protection District. The District Fire Chief advised the County that the District does not object to the proposal, provided the applicant provides a dry hydrant and standpipe system and the access road has an all weather surface at least 20 feet wide and at least 13½ feet of vertical clearance. See Miscellaneous Exhibit 3.

### **III. HEARING AND RECORD**

Hearings Officer Larry Epstein received testimony at the public hearings about

this application on April 5 and 26, 1993. The hearings officer held open the public record until May 6 to receive additional written evidence. A record of that testimony and evidence is included herein as Exhibit A (Parties of Record), Exhibit B (Taped Proceedings), and Exhibit C (Written Testimony). Exhibit C is further divided into Applicant's Exhibits, Petitioner's Exhibits, and Miscellaneous Exhibits. These exhibits are filed at the Multnomah County Department of Environmental Services.

#### **IV. APPLICABLE LAW & RESPONSIVE FINDINGS**

##### **A. Compliance with MCC 11.15.2100 (MUF zone).**

MCC 11.15.2132(A)(1) allows a "boat moorage, marina or boathouse moorage" and a conditional use in the MUA-20 zone, subject to the community service use standards in MCC 11.15.7015. Therefore, the proposed use is permitted in the zone if it complies with the community service use standards.

##### **B. Compliance with MCC 11.15.7015 (Community services).**

1. MCC 11.15.7015(A)(1) requires the County to find that a community service will be "*consistent with the character of the area*" to approve such a use.

a. The parties dispute whether the use is consistent with the character of the area. How the dispute is resolved depends on how the terms "area" and "consistent" in MCC 11.15.7015(A)(1) are construed.

(1) The applicant and County planning staff (among others) argue that the use is consistent with the character of the area. They would construe the word "area" in this case to include land at least two miles north and south of the site. Within that area are boat moorages, and boats traverse the Channel that adjoins the site. In support of its argument, County planning staff submitted an illustration of the Channel identifying moorage uses for several miles north and south of the site.

(2) Chris Foster (among others) argued that the use is not consistent with the character of the area. He would construe the word "area" to mean "in the immediate vicinity" or "not more than 1/2 mile or so from the site." There are no marinas within 1/2 mile or so from the site, and that area is characterized exclusively by natural resource uses involving little development. If "consistent" is construed to mean "the same as" and if "area" is construed as argued by Mr. Foster, then the proposed marina would be inconsistent with the undeveloped and natural character of the area.

b. The hearings officer finds that "consistency with the character of the area" is inherently a vague and subjective standard. It must be construed to be applied.

c. The hearings officer finds that the definition of "area" should vary as a function of the impact of the proposed use. If the use has an impact over a large area, then that large area should be considered for purposes of determining the consistency of

the character of the use. If the proposed use has an impact on a small area, then that area should be considered.

d. In this case, the hearings officer construes the word "area" to include land within roughly  $\frac{1}{2}$  mile or so from the site, because that is the area within which the proposed use will have a perceptible effect. Beyond that distance, the impact of the use will not be perceptible, because it will not be visually obtrusive, and because boats from the marina will be indistinguishable from boats from off-site.

e. There was relatively little discussion by the parties of what is needed to show that the use is "consistent" with the character of the area.

(1) The hearings officer finds that the character of the area is a mix of natural resources, (i.e., undeveloped vegetated Channel banks and agricultural or open space uplands) and river traffic (i.e., power and sail boats). Although both elements are relevant, the predominant character is a natural resource area.

(2) The hearings officer finds that the proposed use is not "consistent" with the character of the area as defined above, because the proposed use is not similar to other natural resource uses in that area, and because it would conflict with those resources by introducing more structures, activity, and other effects into an area that now is not subject to such activity or effects. River traffic differs in character from a moorage. River traffic is moving and transitory and leaves no long-term evidence of use. A marina is inherently a storage activity; it requires substantial structures and other evidence of use. It concentrates its effects in a small area, unlike river traffic. Notwithstanding these differences, boat storage probably would be consistent with the character of the area if that character was defined only by boat traffic. However, given the natural resource character of the area and the difference in character between boat traffic and boat storage, the hearings officer finds the proposed use is not consistent with the character of the area.

2. MCC 11.15.7015(A)(2) requires the County to find that a community service use "*will not adversely affect natural resources*" to approve such a use.

a. The parties dispute whether the use will adversely affect natural resources.

(1) The applicant argues that the development will not have an adverse effect on any natural resources, and will enhance access to a natural resource (i.e., the Channel).

(2) County planning staff concede the proposed use could have some adverse effects, although they do not discuss these effects much. They cite an ODFW comment out of context to justify allowing the marina. However, in context, the ODFW comment is at best a grudging acquiescence in having marinas, if at all, on only one side of the Channel. The staff correctly observe that the marina will not affect vegetation on and adjoining the shoreline of most of the site and will not result in develop-

ment of wetlands (other than the Channel itself and traffic to the boat ramp). The hearings officer finds that the proposal will not adversely affect vegetation or wetlands on the site.

(3) Several witnesses argue the proposed development will adversely affect the natural resources on the site. Mr. Foster correctly notes that the Multnomah Channel is recognized by the County as having significant natural resource values. He and others argue that the site is in the middle of a long stretch of undeveloped land along the Channel, enhancing its value for natural resource purposes. See Respondent's Exhibits 1 and 14 and attachments. Ms. Matrazzo argues that bald eagles, peregrine falcons, and other species of birds use the area for nesting and foraging, and the activity associated with the marina will deter use of the area for birds. See Respondent's Exhibits 2 and 11 and attachments. The Channel is a year-round migration corridor for anadromous salmonids. The marina will obstruct migrating fish and provide cover for competing species. See Respondent's Exhibit 13 and attachments.

(4) Several witnesses argued the proposed marina will make it easier to site other marinas in the now-undeveloped stretch of the Channel, because the proposed marina, if approved and developed, would become part of the character of the area. Although it would not require approval of other marinas, it would increase the likelihood other marinas would be approved, creating a cumulative effect on natural resources that cannot be addressed on a case-by-case basis. See, e.g., Respondent's Exhibits 11 and 17 and attachments. The hearings officer agrees. Approval of the proposed marina would increase the potential for approval of other Channel-oriented development in the vicinity that would have a greater cumulative effect on habitat than that of the proposed marina alone.

(5) Respondents argued the proposed use would cause other specific adverse impacts on natural resources, as follows. Although those effects can be mitigated through conditions of approval, as discussed more below, the hearings officer finds that they can still occur, and their individual and cumulative effective could be adverse to natural resources. Given the potential for and significance of these effects, the hearings officer concludes the applicant has not met the burden of proof that the use will not adversely affect natural resources.

(a) Adverse effects on water quality would be caused if sanitary waste is discharged from boats at the site. The potential for this effect can be reduced by prohibiting floating homes and prohibiting occupancy of boats as dwellings and by requiring approved toilet facilities on the site. Illegal dumping of sanitary waste can occur, but it is not reasonably likely to occur at a frequency or scale that would significantly adversely affect natural resources.

(b) Adverse effects on water quality would be caused if fuel from boats is discharged into the Channel. The potential for this effect can be reduced by prohibiting fueling facilities at the moorage and by minimizing fuel needs of boats moored at the facility, (i.e., by allowing only sailboats which presumably use less fuel than motorboats). There is no way to prevent some impacts due to the use of fuel in

boats. To an extent, such impacts already occur from boating traffic in the Channel. The proposed use would increase and concentrate such effects in a small area.

(c) Adverse effects on water quality, habitat quality and visual character could be caused by trash thrown from the site. The potential for this effect can be reduced by providing trash receptacles on the site. Littering may still occur. To an extent, such impacts already occur from boating traffic in the Channel. The proposed use would concentrate effects in a small area.

(d) Adverse effects on vegetation could be caused by fire. The presence of more people and machines increases the potential for fire hazards. The potential for this effect can be reduced by providing fire protection facilities recommended by the Fire District, by prohibiting boat construction or repairs on the site, and by prohibiting floating homes or occupancy of boats as dwellings. Fire can occur, but by reducing its potential and providing for fire flows, there is little likelihood the proposed use will adversely affect natural resources due to fire.

(e) Adverse effects on fish and wildlife habitat could be caused by all of the preceding and by the increased level of activity at the site generally. The moorage would disrupt existing wildlife travel routes and could disrupt the value of the area for resting, nesting, and other specific wildlife activities on and near the site. The potential for these effects can be reduced by the preceding mitigation measures and by limiting use of the site to sailboats that have relatively less noise and fuel impacts (than motorboats), by restricting marina development to the west side of the Channel (thereby minimizing the impact on the more significant wildlife habitat on the east side of the Channel), by not filling or dredging in the Channel, by minimizing lighting on the site, by keeping out of the wetlands, by retaining shoreline vegetation, by subjecting the proposal to review by ODSL and USCOE, and complying with other conditions of approval necessary to address impacts of the use. However, the moorage will inevitably and adversely affect the value of the site for fish and wildlife habitat.

3. MCC 11.15.7015(A)(3) requires the County to find that a community service use *"will not conflict with farm or forest uses in the area"* to approve such a use. There was no dispute about compliance with this criterion. The site is used for agriculture and, with the exception of the acre or two used for the parking lot, it will continue to be so used. Given the size of the site, the loss of one or two acres of grazing land is not significant. Cattle can continue to graze on almost all of the site if the use is approved. For those reasons, and incorporating by reference the finding in response to this criterion in the Staff Report, the hearings officer finds the proposed use will not conflict with farm or forest uses in the area.

4. MCC 11.15.7015(A)(4) requires the County to find a community service use *"will not require public services other than those existing or programmed for the area"* to approve such a use.



a. The hearings officer finds that term "public services" is vague. The hearings officer construes that term to include public sanitary and storm sewers and potable water systems, roads, and emergency services.

b. The applicant argues the moorage will take care of its own water, sanitary waste and fire protection. Therefore, it will not create a need for those services to be provided by public agencies.

c. County staff conclude the application does not show whether existing or proposed services will be adequate. The record does not show that ODEQ has approved a subsurface sanitation system for the site or use of portable toilet facilities. The record does not show adequate private water will be available. The staff recommend that these issues be addressed by means of conditions of approval.

d. The hearings officer concludes that the proposed moorage will not require public services if the moorage provides its own services. Conditions of approval can be used to ensure that adequate private facilities are designed and approved before the moorage is permitted to be developed. Therefore, the proposal complies with this criterion.

5. MCC 11.15.7015(A)(5) requires the County to find that a community service use "*will be located outside a big game winter wildlife habitat*" to approve such a use.

a. The site of the proposed use is not identified as a big game winter wildlife habitat by the Comprehensive Plan or ODFW. Therefore, the use complies with this criterion.

6. MCC 11.15.7015(A)(6) requires the County to find that a community service use "*will not create hazardous conditions*" to approve such a use.

a. The parties dispute whether the proposed moorage will create hazardous conditions.

(1) The applicant argues the moorage will not cause hazardous conditions, but provides no probative evidence to support that conclusion.

(2) County planning staff recognize that the marina may create hazardous conditions in the Channel. They conclude that, as long as the extension of the moorage into the Channel is restricted, an adequate navigable area will remain for river traffic. Therefore, the moorage will not be a hazard to that traffic, subject to conditions of approval. Planning staff also discuss the potential for a hazardous condition at the BNRR crossing. The crossing now is unimproved. It could be improved with a locked gate to restrict the number of people exposed to the hazard or with signal lights and other measures to alert drivers to the presence of a train on the tracks. Subject to such a condition, County staff conclude the BNRR crossing will not be hazardous.

(3) Several witnesses argued the BNRR crossing and proximity of

the crossing to St. Helens Highway will create a hazardous condition. See Respondent's Exhibits 2, 7 and 8.

(a) Based on the letters from BNRR and OPUC, the hearings officer finds that the crossing can be safe if appropriate improvements are made or access is restricted by a locked gate between St. Helens Highway and the tracks.

(b) The record does not contain sufficient detail about the nature of the access from St. Helens Highway to the site to determine whether there is a sufficient distance between the highway and the tracks for stacking of vehicles and trailers that must wait for a train to pass. However, the hearings officer finds that a condition of approval can require the applicant to provide sufficient stacking space for vehicles and trailers before development is permitted. If such stacking space is provided, then the proximity of the tracks to St. Helens Highway will not create a hazardous condition.

(4) Several witnesses argued that the moorage would create a hazardous condition, because it will be located in an area of the Channel that is already congested by river traffic and in one of the few areas where water skiers can use the Channel without obstructions. See Respondent's Exhibits 3, 5, 6, 14, 15, and 17.

(a) By decreasing the unobstructed width of the Channel by 25%, the moorage will increase the potential for accidents by increasing congestion. By concentrating additional boat traffic in one area, the moorage will exacerbate congestion and will increase the potential for conflicts with water skiers in that stretch of the Channel. These facts suggest the proposed use will create or aggravate congestion and conflicts. However, whether that results in a hazard is unclear.

(b) In the absence of more probative evidence regarding this issue, the hearings officer finds the applicant has not met the burden of proving that the moorage will not cause hazardous conditions for river traffic and water skiers. The hearings officer finds the record insufficient to determine whether the presence of the moorage would create a hazardous condition for river traffic and water skiers.

7. MCC 11.15.7015(A)(7) requires the County to find that a community service use "*will satisfy the applicable policies of the Comprehensive Plan*" to approve such a use. In this case, the applicable policies are Policy 2 (Off-Site Effects), Policy 10 (Multiple Use Agriculture), Policy 13 (Air and Water Quality and Noise Level), Policy 14 (Development Limitations), Policy 15 (Willamette River Greenway), Policy 16 (Natural Resources), Policy 31 (Community Facilities and Uses), Policy 37 (Utilities), Policy 38 (Facilities), and Policy 39 (Parks and Recreation Planning). Those policies are addressed in the following section of the final order.

### **C. Compliance with applicable Comprehensive Plan policies.**

#### **1. Policy 2 (Off-Site Effects) provides:**

*The County's policy is to apply conditions to its approval of land use actions*

where it is necessary to:

**A. Protect the public from potentially deleterious effects of the proposed use, or**

**B. Fulfill the need for public service demands created by the proposed use.**

a. There is a dispute whether the proposed use will cause deleterious conditions and whether conditions of approval will protect the public from effects that may occur.

b. The applicant argues the use will not have deleterious effects. County staff do not dispute the applicant's statement. Respondent generally argue the use will have deleterious effects on natural resources and river traffic safety.

c. The hearings officer finds the use will have deleterious effects on natural resources. Whether or not it causes a hazard, it will increase congestion and reduce the navigable width of the waterway. These effects can be reduced by imposing conditions of approval, but they cannot be eliminated.

d. Whether conditions of approval would be sufficient to "protect the public" is unclear. The policy is vague about how much to protect the public. It is not clear whether the policy prohibits all deleterious effects or merely their mitigation. The hearings officer construes the policy to require that deleterious effects be mitigated so that they are not reasonably likely to occur or will not be significantly adverse if they do occur.

e. The hearings officer finds that conditions of approval will not prevent deleterious effects on natural resources or river traffic from occurring or prevent them from being significantly adverse. Therefore, the proposal does not comply with this policy.

2. Policy 10 (Multiple Use Agriculture) provides that certain lands are to be designated for Multiple Use Agriculture, and further:

***It is the County's policy, in recognition of the necessity to protect adjacent Exclusive Farm Use areas, is to restrict Multiple Use Agricultural uses to those compatible with Exclusive Farm Use areas.***

a. The hearings officer finds the proposed use complies with this policy, based on findings regarding MCC 11.15.7015(A)(3).

3. Policy 13 (Air and Water Quality and Noise Levels) provides:

***It is the county's policy to require, prior to approval of a legislative or quasi-judicial action, a statement from the appropriate agency that all standards can be met with respect to air quality, water quality and noise levels.***

a. The applicant argued the proposed use will have very little effect on air and water quality and noise levels, because it will be limited to sailboats. County planning staff generally agree, subject to conditions to prohibit live-aboards, to require erosion control measures, and to obtain subsequent ODEQ approval of sanitation facilities.

b. The hearings officer finds the proposal does not comply with this policy, because the application does not include statements from the appropriate agency that all standards can be met with regard to air quality, water quality and noise levels. The policy requires the statements. Although the hearings officer agrees that a sailboat moorage will not cause air quality impacts or significant noise, and that water quality effects from sanitary facilities can be addressed by ODEQ, the policy requires more than the sort of general discussion provided by the applicant and the conditions recommended by staff.

4. Policy 14 (Development Limitations) provides:

***The County's policy is to direct development & land form alterations away from areas with development limitations except upon a showing that design and construction techniques can mitigate any public harm or associated public cost, and mitigate any adverse effects to surrounding persons or properties.***

a. The proposal is subject to this policy, because the site is within the 100-year floodplain of the Multnomah Channel, based on the Staff Report.

b. The proposed development will be situated entirely within the floodplain. Because the moorage itself will float, flooding will not adversely affect it. The hearings officer assumes the moorage will be adequately secured to prevent it from causing off-site effects due to flooding. The upland portion of the moorage will not contain significant structures that could be adversely affected by flooding or could cause significant off-site effects due to flooding. Therefore, the proposal complies with this policy.

5. Policy 15 (Willamette River Greenway) provides it is the County Policy to:

***Protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River; [and to]***

***Protect identified Willamette River greenway areas by requiring special procedures for the review of certain types of development allowed in the base zone that will insure the minimum impact on values identified in the various area.....***

a. By applying for approval of a Willamette River Greenway permit, the applicant complies with the procedural provisions of this policy.

b. By adversely affecting shoreline vegetation, detracting from the value of the habitat for endangered species, changing the visual character of the Channel in the vicinity of the site, and restricting access to the site to paying customers, the proposed use does not comply with the substantive provisions of this policy and the Factors for the Willamette River Greenway. To the extent the proposal enhances recreational access for users of the moorage, it complies with the substantive provisions of this policy.

6. Policy 16 (Natural Resources) provides it is the County's policy to:

***Protect natural resources, conserve open space, and to protect scenic and historic areas and sites.*** (Policy 16)

***Protect significant fish and wildlife habitat ...*** (Policy 16-D)

***Protect natural areas from incompatible development and to specifically limit those uses which would irreparably damage the natural area values of the site.*** (Policy 16-E)

***Conserve scenic resources and protect such areas from incompatible and conflicting land uses.*** (Policy 16-F)

***Protect ... those water areas, wetlands, watersheds, and groundwater resources having special public value...*** (Policy 16-G)

***Recognize significant historic resources ...*** (Policy 16-I)

***Protect cultural areas and archeological resources ...*** (Policy 16-J)

a. The hearings officer finds that the long-range availability of fish and wildlife habitat will not be significantly limited or impaired by the proposal. Although the proposal will reduce the quality of the fish and wildlife habitat on the moorage site, it will not have a significant off-site effect on habitat values, and ample fish and wildlife habitat will remain in the vicinity if the use is approved.

b. The hearings officer finds the long-range availability of natural areas will not be affected by the proposal, because of its relatively small scale, the retention of the majority of the site as undeveloped, and the availability of natural areas in the vicinity that will not be directly adversely affected by the proposed use.

c. The hearings officer finds that scenic views will be adversely effected by the proposed use, because it will significantly change the existing natural visual character of the site and portions of the Channel from which the site can be viewed. Although the proposal directly affects a relatively small area, the proposal has a significant indirect off-site effect. Although much of the Channel would remain in a natural state on and off the site if the use is approved, the significance of the change in visual character caused by the proposed use makes the use inconsistent with this aspect of the policy.

d. The hearings officer finds that the water resources and wetlands will not be adversely affected by the proposed use, because the upland wetlands will not be significantly affected by the proposal, and there are ample wetlands and water resources in the vicinity that would not be affected by the proposed use.

7. Policy 31 (Community Facilities and Uses) provides the County's policy is to:

***A. Support the siting and development of a full range of community facilities and services by supporting the location and scaling of community facilities and uses meeting the needs of the community and reinforcing community identity.***

***B. Encourage community facilities siting and expansion at locations reinforcing orderly and timely development and efficient provision of all public facilities and services...***

***E. Classify community facilities according to their function and scale of operations. A marina is classified as a minor regional facility.***

***F. Locate minor regional facilities on sites with an average slope of 6% or less.***

***G. Support the location of community facilities on existing transportation systems with volume capacities and modal mix splits available and appropriate to serve present and future scales of operation. A minor regional facility is required to have direct access to a collector street and no routing of traffic through local neighborhood streets and to have public transit available within 1/4 mile.***

***H. Restrict the siting of community facilities in locations where site access would cause dangerous intersections or traffic congestion...***

***I. Support community facilities siting and development at sites of a size and shape which allows for a site layout in a manner which maximizes user convenience, energy conservation, and pedestrian and bicycle access to and within the site...***

a. The hearings officer finds the site is sloped less than 6% and has direct access to a street which is classified as a collector or greater (St. Helens Highway). The facility does not require public facilities and services other than those existing or programmed for the area; therefore it is not disorderly or untimely to allow the proposed use from this standpoint. The access drive from St. Helens Highway could be hazardous unless appropriate improvements are made to the railroad crossing and adequate distance is provided for stacking vehicles west of the crossing. Conditions of approval could require such measures. Because St. Helens Highway is a designated bicycle route, there is bicycle access to the site. The proposal does not have public transit within 1/4 mile; to

that extent, it does not comply with this policy.

8. Policy 37 (Utilities) requires the county to find, prior to approval of a legislative or quasi-judicial action, that:

*A. The proposed use can be connected to a public sewer and water system, both of which have adequate capacity, or, to the extent such a system is not available, there is an adequate private water system and a private sanitation system approved by ODEQ*

*B. There is adequate capacity in the storm water system to handle the run-off; or the run-off can be handled on the site or adequate provisions can be made;*

*C. The run-off from the site will not adversely affect the water quality in adjacent streams, ponds or lakes or alter the drainage on adjoining lands.*

*D. There is an adequate energy supply to handle the needs of the proposal and the development level projected by the plan; and*

*E. Communications facilities are available.*

a. The hearings officer finds that the proposal partially complies with this policy, but does not comply with all aspects of the policy. It does not comply with this policy, because:

(1) The application does not contain substantial evidence from which the hearings officer could conclude that ODEQ will approve a sanitation system for the site; and

(2) The application contains no information about the private water system for the site.

b. The hearings officer concludes the proposal complies with the following aspects of the policy:

(1) The hearings officer concludes that storm water run-off from the site will be accommodated and will not pollute the Channel, the wetlands, or other areas of the site, because no impervious surface will be created on the site, and storm water will be able to percolate naturally into the ground, cleansing the run-off before it enters surface water bodies on or adjoining the site.

(2) The application includes unrebutted statements that power and communications utilities are available to the site. The hearings officer accepts those statements.

9. Policy 38 (Facilities) requires the county to find, prior to approval of a legislative or quasi-judicial action, that:

***A. The appropriate school district has had an opportunity to review and comment on the proposal.***

***B. There is adequate water pressure and flow for fire fighting purposes; and***

***C. The appropriate fire district has had an opportunity to review and comment on the proposal.***

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

a. The hearings officer finds that the application complies with the policy with regard to fire services, because the Scappoose Rural Fire Protection District has reviewed the proposal and has recommended measures to ensure an adequate supply of water for fire protection purposes.

b. The hearings officer finds that the appropriate school district has not had an opportunity to comment on the proposal. However, the hearings officer finds the proposed use has no direct impact on schools; therefore, compliance with this aspect of the policy is not required.

c. The site is in the jurisdiction of the Multnomah County Sheriff's Department. There is no evidence the Sheriff reviewed or commented about the proposal. However, the hearings officer assumes police services can be provided to the site.

10. Policy 39 (Parks and Recreation Planning) generally obligates the County to undertake certain open space and recreational planning. The only aspect of the policy directly relevant to the proposed use is one that requires the County to:

***Encourage the development of recreation opportunities by other public agencies and private entities.***

a. The parties dispute whether the proposed use complies with this policy. The applicant and County planning staff argue the proposal will create a recreational feature, thereby increasing recreational opportunities in the Channel. Other witnesses argue the proposal will increase only private recreational opportunities, because only people who pay for the right to use the marina and boat ramp will have access to the site; therefore, the proposal does not increase recreational opportunities for the general public.

b. The hearings officer concludes the proposal complies with this policy, because it results in a recreational opportunity. The policy does not encourage only recreational uses that are available to the general public; it encourages recreational opportunities. Although the facility will be private, it is a recreational use. It will facilitate access to the Channel by tenants of the moorage and users of the boat ramp. That fulfills the policy.



**D. Compliance with MCC 11.15.6372 (Willamette River Greenway).** New land uses in the Willamette River Greenway are required to comply with additional standards, listed below together with responsive findings.

***1. The maximum possible landscaped area, scenic and aesthetic enhancement, open space and vegetation shall be provided between any use and the river.***

a. The hearings officer finds that the proposal can comply with this criterion, because the parking lot is situated 180 feet or more from the river, which is the maximum separation that can be provided without occupying wetlands, provided existing significant vegetation between the parking lot and shoreline is preserved and enhanced as deemed necessary in the site plan review process.

***2. Reasonable public access to and along the river shall be provided by appropriate legal means to the greatest possible degree...***

a. The hearings officer finds that public access to the river will be provided by the access road to the marina. To the extent access to that road is restricted, such as by means of a locked gate, then it does not provide access for the general public. The most public access possible would be provided by not restricting access to the road. If the BNR/OPUC allow the railroad crossing to be public, subject to the applicant making certain improvements, that would best fulfill this criterion.

b. The applicant does not propose public access along the river except on the docks. Such access could be provided. To that extent, the proposal is not consistent with this criterion.

c. The applicant proposes to make the boat ramp available to the general public for a fee. This will provide public access to and from the river where it does not exist now. That enhances access. The hearings officer finds that the imposition of a fee for use of the boat ramp does not violate this criterion. The criterion requires reasonable public access. Access to a private facility is not unreasonable simply because a fee is charged.

***3. Developments shall be directed away from the river to the greatest possible degree...***

a. The hearings officer finds that the marina and boat ramp must be directed to the river to enable it to function as planned. The parking lot complies with this criterion, because it is not directed toward the river.

b. Some witnesses argued the function of the marina, i.e., to store boats, could be fulfilled by dry land storage outside of or further upland in the Greenway. The hearings officer finds that this criterion, to the extent that it is vague about what is the "greatest degree possible," should not be construed to require dry land storage of boats, because that would effectively prohibit moorages anywhere on the river, a result that is

not reasonable given the uses permitted in the Greenway and the design-oriented nature of other applicable criteria for the Greenway.

***4. Agricultural lands shall be preserved and maintained for farm use.***

a. The hearings officer finds the site is agricultural land, based on USDA SCS Soils Maps for Multnomah County. The proposal preserves all but an acre or two of the site for agriculture. Therefore, agricultural lands are preserved and maintained for agriculture.

***5. Recreational needs shall be satisfied by public and private means in a manner consistent with the carrying capacity of the land and with minimum conflicts with farm uses.***

a. The hearings officer finds that the proposal satisfies a public demand for additional moorage space in a manner that does not exceed the carrying capacity of the land, given that the moorage will occupy a small percentage of the site and shoreline and will accommodate parking and other needs of the use on the site. The proposal does not conflict with farm uses, based on the finding for MCC 11.15.7015(A)(3).

***6. Significant fish and wildlife habitats shall be protected.***

a. The hearings officer finds that the site contains significant fish and wildlife habitat. That habitat will not be protected, based on the finding in response to MCC 11.15.7015(A)(2).

***7. Significant natural and scenic areas and viewpoints and vistas shall be preserved.***

a. The hearings officer finds that the shoreline of the site is a significant natural and scenic area that can be observed from the river and the east bank. The proposed moorage will not preserve that view; it will replace it with a view of the moorage. For that reason, the hearings officer finds the proposal does not comply with this criterion.

***8. Maintenance of public safety and protection of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.***

a. The hearings officer finds the proposal does not maintain public safety to the maximum extent practicable, based on the finding for MCC 11.15.7015(A)(6).

***9. The natural vegetation along the river, lakes, wetlands and streams shall be enhanced and protected to the maximum extent practicable to assure scenic***

*quality, protection from erosion, screening of uses from the river and continuous riparian corridors.*

a. The hearings officer finds the application is insufficient to show compliance with this criterion. The applicant does not describe or evaluate the significance of shoreline vegetation or wetland vegetation that could be affected by development of the parking lot or other features. Without more information, the hearings officer cannot determine whether that vegetation will be preserved to the maximum extent practicable. There is nothing in the application to address erosion potential along the shoreline or at the boat ramp. There is no assessment of the impact of the project on the riparian corridor other than conclusory statements. In the absence of more complete information, the hearings officer cannot conclude the proposal complies with this criterion.

***10. Areas of annual flooding, flood plains, water areas and wetland shall be preserved in their natural state to the maximum possible extent to protect the water retention, overflow and natural functions.***

a. The hearings officer finds that the flood plain, water areas and wetland are preserved to the maximum possible extent without precluding development of the project, because the proposal affects a small percentage of the flood plain on the property, does not reduce the flood carrying capacity of the site and does not result in development of the upland wetlands.

***11. Significant wetlands shall be protected as provided in MCC 11.15.6376.***

a. Areas of significant wetlands are identified in Applicant's Exhibit 2. There is insufficient information in the application to determine whether those wetlands will be protected as provided in MCC 11.15.6376. Therefore, the hearings officer cannot conclude the proposal complies with this criterion.

***12. Areas of ecological, scientific, historical or archeological significance shall be protected, preserved, restored, or enhanced to the maximum extent possible.***

a. The parties dispute whether the site contains archeological resources. The applicant testified that he has not found any evidence of such resources. An adjoining land owner testified he has found arrowheads and other Native American artifacts. There is no conclusive evidence in the record one way or the other. In the absence of such evidence, the hearings officer cannot determine that the site does not contain archeological resources or that such resources are preserved to the maximum extent possible.

***13. Areas of erosion or potential erosion shall be protected from loss by appropriate means which are compatible with the character of the Greenway.***

a. The site is not subject to slope hazards, based on the County Slope Hazard Maps and SCS Soil Maps. However, the steep bank of the Channel could be subject to erosion during construction of the marina and, if vegetation on the bank is removed or damaged, after construction. The application does not include measures to address the potential for erosion. Therefore, the hearings officer cannot conclude the proposal will comply with this criterion.

***14. The quality of the air, water and land resources in and adjacent to the Greenway shall be preserved in development, change of use or intensification of use of land designated WRG.***

a. The hearings officer finds this criterion is ambiguous. It requires preservation while allowing change. The two concepts are hard to reconcile.

b. The proposal detracts from the existing natural character of the land and water by developing a portion of the shoreline and adjoining uplands. To that extent, it does preserve land and water quality.

c. However, to the extent the criterion allows development, the proposal is not reasonably likely to result in significant water quality effects (subject to conditions of approval) or to cause upland effects that will detract from the quality of the undeveloped portion of the site or surrounding land. To that extent, it does preserve land and water quality.

d. Given the inherent conflict in this criterion, the hearings officer finds that the proposal does comply with this criterion by preserving land and water quality to the extent possible while allowing the project to be developed.

***15. A building setback line of 150 feet from the ordinary low water line of the Willamette River shall be provided in all rural and natural resource districts, except for ... buildings and structures in conjunction with a water-related or a water-dependent use.***

a. The hearings officer finds that the structures associated with the proposed use (i.e., the docks and associated ramps and pilings) are water-related or water-dependent. The proposal does not result in other structures. Therefore, the proposal complies with this criterion.

***16. The applicable policies of the Comprehensive Plan are satisfied.***

a. The hearings officer finds the proposal is consistent with Comprehensive Plan policies 10 (Multiple Use Agriculture), 14 (Development Limitations), 38 (Facilities), and 39 (Parks and Recreation Planning), based on finding IV.C.

b. The hearings officer finds that the proposal is not consistent with or that the applicant has not met the burden of proving that the proposal is consistent with all aspects of Comprehensive Plan policies 2 (Off-Site Effects), 13 (Air and Water Quality and Noise Levels), 15 (Willamette River Greenway), 16 (Natural Resources), 31 (Community Facilities and Uses), and 37 (Utilities), based on finding IV.C. Therefore, the proposal does not comply with this criterion.

#### **E. Other alleged criteria.**

1. It was alleged in Respondent's Exhibit 2 that the application is subject to MCC 11.15.8230(D), which requires, among other things, that granting the request is in the public interest and that there is a public need for the proposal and that need is best met by changing the classification of the subject property as compared with other available properties.

2. The hearings officer finds the preceding provisions from MCC 11.15.8230(D) do not apply to the proposal. The preface to that section reads as follows:

*The burden of proof is upon the person initiating an action. Unless otherwise provided in this Ordinance, that burden shall be to persuade that... [Emphasis added]*

3. The hearings officer finds that MCC 11.15.7015 contains specific standards for a Community Service designation and MCC 11.15.6372 contains specific standards for a Willamette River Greenway permit. Although the Ordinance does not expressly state that these are the exclusive approval criteria for these land use actions, the hearings officer finds that it is implicit that the general purpose standards in MCC 11.15.8230(D) do not apply if there are other more specific standards in the Ordinance.

### **V. CONCLUSIONS AND DECISION**

#### **A. Conclusions.**

1. The hearings officer concludes that the applicant has met the burden of proving that the proposal complies with the following:

a. MCC 11.15.7015(A)(3), (4), and (5), based on finding IV.B;

b. Comprehensive Plan policies 10 (Multiple Use Agriculture), 14 (Development Limitations), 38 (Facilities), and 39 (Parks and Recreation Planning), based on finding IV.C; and

c. MCC 11.15.6372(A), (C), (D), (F), (L), (P), and (Q), based on finding IV.D.

2. The hearings officer concludes that the proposal does not comply with or that the applicant has not met the burden of proving that the proposal complies with all aspects of the following:

- a. MCC 11.15.7015(A)(1), (2), (6) and (7), based on finding IV.B;
- b. Comprehensive Plan policies 2 (Off-Site Effects), 13 (Air and Water Quality and Noise Levels), 15 (Willamette River Greenway), 16 (Natural Resources), 31 (Community Facilities and Uses), and 37 (Utilities), based on finding IV.C; and
- c. MCC 11.15.6372(B), (G), (H), (I), (J), (M), (N), (O), or (S), based on finding IV.D.

#### B. Decision.

In recognition of the findings and conclusions contained herein, and incorporating the Staff Report and other reports of affected agencies and public testimony and exhibits received in this matter, the hearings officer hereby denies CS 2-93 and WRG 2-93 (Mullican).

Signed June 10, 1993.

By Larry Epstein, pc  
Larry Epstein, AICP  
Multnomah County Hearings Officer

APPEAL TO THE BOARD OF COUNTY COMMISSIONERS

*Decisions of the Hearings Officer may be appealed to the Board of County Commissioners (Board) by any person or organization who appeared and testified at the hearing, or by those who submitted written testimony to the record. Appeals must be filed within ten days after the Hearings Officer decision is submitted to the Clerk of the Board [ref. MCC 11.15.8260(A)(1)]. The appeal fee is \$300.00 plus a \$3.50-per-minute charge for a transcript of the initial hearing(s) [ref. MCC 11.15.9020(B)]. "Notice of Review" forms and instructions are available at the Planning and Development Office at 2115 SE Morrison Street (In Portland).*

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

*The Hearings Officer Decision on this item is scheduled for the Board of County Commissioners review at 1:30 p.m. on Tuesday, June 22, 1993 in Room 602 of the Multnomah County Courthouse. To appeal the Hearings Officer decision, a "Notice of Review" form and fee must be submitted to the County Planning Director on or before 4:30 pm. on Monday, June 21, 1993. For further information call the Multnomah County Planning and Development Division at 248-3043.*

MEETING DATE: SEP 14 1993

AGENDA NO: P-2

(Above Space for Board Clerk's Use ONLY)

**AGENDA PLACEMENT FORM**

SUBJECT: DR 14-93 and CU 5-91a Hearings Officer Decisions

BOARD BRIEFING Date Requested: \_\_\_\_\_

Amount of Time Needed: \_\_\_\_\_

REGULAR MEETING: Date Requested: September 14, 1993

Amount of Time Needed: 10 minutes

DEPARTMENT: D.E.S. DIVISION: Planning and Development

CONTACT: Mark Hess TELEPHONE #: 248-3043  
BLDG/ROOM #: 412/106

PERSON(S) MAKING PRESENTATION: Mark Hess

**ACTION REQUESTED:**

☐ INFORMATIONAL ONLY ☐ POLICY DIRECTION ☒ APPROVAL ☐ OTHER

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

Reporting the Decisions of the Hearings Officer in the matter of DR 14-93 and CU 5-91a regarding the non-resource dwelling proposed by Dan McKenzie at 6125 NW Thompson Road.

**SIGNATURES REQUIRED:**

ELECTED OFFICIAL: \_\_\_\_\_

OR

DEPARTMENT MANAGER: Betsy Wallian

**ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES**

Any Questions: Call the Office of the Board Clerk 248-3277/248-5222

BOARD OF  
COUNTY COMMISSIONERS  
1993 SEP - 7 PM 4:49  
MULTNOMAH COUNTY  
OREGON



CV 5-91a  
PR 14-93  
Filing #500  
See last page  
5 file  
notice of  
review  
#27/93  
#3/93  
4:30pm  
JD



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

7771 11 500.00  
855 7771 9/30/93 500.00

NOTICE OF REVIEW

1. Name: <sup>AR</sup> Arnold Rochlin, Arnold
2. Address: <sup>Last</sup> P.O. Box 83645, <sup>Middle</sup> Portland, <sup>First</sup> OR 97283-0645  
Street or Box City State and Zip Code
3. Telephone: (503) 289-2657
4. If serving as a representative of other persons, list their names and addresses:  
Forest Park Neighborhood Association
5. What is the decision you wish reviewed (e.g., denial of a zone change, approval of a subdivision, etc.)?  
Extension of CV permit - CV 5-91a and Final Design Review approval - PR 14-93
6. The decision was announced by the <sup>(mailed) Hearings Officer</sup> Planning Commission on August 25, 1993  
and was submitted to the clerk of the board August 26, 1993.
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?  
See page 1 of attachment.

CLERK OF  
COUNTY COMMISSIONERS  
1993 SEP -9 PM 1:31  
MULTNOMAH COUNTY  
OREGON

Please file the original form

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

See pages 1 + 2 of attachment

9. Scope of Review (Check One):

(a) ☒ On the Record

(b) ☐ On the Record plus Additional Testimony and Evidence

(c) ☐ De Novo (i.e., Full Rehearing)

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

Signed: Arnold Rocklin

Date: 9/7/93

**For Staff Use Only**

Fee:

Notice of Review = \$300.00

Transcription Fee:

Length of Hearing 100 min x \$3.50/minute = \$ 420.00

Total Fee = \$ 500.00

Received by: Sharon P. Gentry

Date: 9/7/93

Case No. DL 14-93  
C45-9/a

CU 5-91a & DR 14-93 - ATTACHMENT TO NOTICE OF REVIEW 9/7/93

7. Status as a party: The Forest Park Neighborhood Association appeared before the Hearings Officer on July 19, 1993, represented by Arnold Rochlin and submitted written testimony to the Hearings Officer on various dates. It is an entity entitled to notice pursuant to ORS 197.763(2)(b) and therefore entitled to notice under MCC 11.15.220(c).

8. Grounds for Reversal: The Hearings Officer made the following errors in the decision:

I. CU 5-91a - Extension of Conditional Use Permit (CU)

- a. Did not base determination of the time limit for requesting a CU extension on the date of the "Board Order" (11.15.7110(C) and (C)(3)(a). Alternatively, relying on the date the Planning Commission decision granting CU 5-91 became final, the Hearings Officer's wrongly used a date other than the date of submission of the decision to the Clerk of the Board as recorded on the decision itself.
- b. Accepted Final Design Review approval of other than the total project and, Final Design Review Approval was erroneous (11.15.7110)(C)(3)(b)(i).
- c. Counted costs of work done not under permit toward the 10% standard (11.15.7110)(C)(3)(b)(ii).
- d. Estimated the total cost of the project, in part, on guesses without foundation in substantial evidence (11.15.7110)(C)(3)(b)(ii).

II. DR 14-93 - Final Design Review Approval

- a. Approved a design review plan that did not include a bridge required by CU 5-91 and ancillary permits SEC 6-91 and HDP 4-91.
- b. Approved a design review plan which could not have adequately complied with approval criteria because it omitted features explicitly mandated by 11.15.7830(C) and (D)(1, 2, 3 & 4), (E)(2, 4, 5, 6 & 7), (F)(4, 5, 10 & 11) and (G)(1 & 2).
- c. Found compliance with 11.15.7850 (A)(1)(a, b & c) and (A)(2, 6, 7 & 8) without substantial evidence in the record in support of the conclusions.
- d. Relied on evidence not in the record, identified as exhibit 28 in the decision.
- e. Relied on a model to make findings and reach conclusions on the specific character of the design when the creator of the model had testified that it was a general representation of the proposal as conceived in 1991, and did not conform to actual site dimensions, number, design or placement of structures, or number and location of trees.
- f. Accepted oral statements of the applicant during the hearing as constituting a required and otherwise absent part of the plan addressing 11.15.7850(8). This violates requirements of 11.15.7815, 11.15.7830(A, E & F), and the implied requirement of 11.7840.

III. Concerning CU 5-91a and DR 14-93

- a. Concluded that the Hearings Officer lacked authority to apply procedural requirements of ORS 215.416(11) to this proceeding.

AR 9/7/93

- b. Improperly admitted plan revisions and supplements through the day of the hearing. The hearing should have been restricted to consideration of the Design Review Plan and CU 5-91 extension request as earlier submitted by the applicant for consideration by the Director.



**MULTNOMAH COUNTY OREGON**

DIVISION OF PLANNING & DEVELOPMENT / 2115 SE MORRISON / PORTLAND, OREGON 97214

**DIVISION OF PLANNING AND DEVELOPMENT**

**Board Planning Packet Check List**

File No. DR 14-93/CU 5-91a

☒ Agenda Placement Sheet

No. of Pages 1

☒ Case Summary Sheet

No. of Pages 1

☐ Previously Distributed

☐ Notice of Review \*

No. of Pages 22 (11 backed)

\*(Maybe distributed at Board Meeting)

☐ Previously Distributed

☒ Decision

No. of Pages 22 (11 backed)

(Hearings Officer/Planning Commission)

☐ Previously Distributed

\*Duplicate materials will be provided upon request.  
Please call 2610.



## MULTNOMAH COUNTY OREGON

DIVISION OF PLANNING & DEVELOPMENT / 2115 S.E. MORRISON / PORTLAND, OREGON 97214

### DIVISION OF PLANNING AND DEVELOPMENT

#### Board Planning Packet Check List

File No. DR 14-93/CU 5-91a

#### I. Materials Distributed to the Board

- ☒ Agenda Placement Sheet ( / Pages)
- ☒ Case Summary Sheet ( / Pages)
- ☐ Notice of Review Application ( Pages)
- ☒ Decision ( 22 Pages)  
(Hearings Officer/Planning Commission)

#### II. Materials Available Upon Request

- ☒ Minutes ( Pages)
- ☐ Transcript ( Pages)
- ☒ Applicant's Application and Submittals ( Pages)
- ☒ Case Correspondence ( Letters)
- ☒ Slides ( Slides)
- ☒ Exhibits/Maps ( Exhibits)  
( Maps)
- ☒ Other Materials ( Model of Site )



BOARD HEARING OF September 14, 1993

TIME 01:30 p.m.

CASE NAME Appeal of a Final Design Review Plan  
Appeal of a Determination of Substantial Development

NUMBER DR 14-93; CU 5-91a

1. Applicant Name/Address

Dan McKenzie (represented by Steven Abel)  
6125 NW Thompson Road Portland, Oregon 97210

APPELLANTS:

Forest Park Neighborhood Association  
(represented by Arnold Rochlin)

2. Action Requested by applicant

Approval to place a Single Family Residence on a 3-acre property  
located within the Balch Creek Basin.

3. Planning Staff Recommendation

APPROVED by the Planning Director

4. Hearings Officer Decision:

AFFIRM Planning Director; DENY the Appeal

5. If recommendation and decision are different, why? (not applicable)

**ISSUES**

(who raised them?)

These decisions concern an appeal to the Hearings Officer of two administrative decisions by the Planning Director. The decision in DR 14-93 approved a Final Design Review Plan for a non-resource dwelling allowed by conditional use permit (CU 5-91) in a forest zone. The The decision in CU 5-91a determined that the applicant had undertaken substantial construction and development within two years from approval of the conditional use (CU) permit. This allows the applicant to complete the dwelling on the site.

[issue raised by appellants]

Do any of these issues have policy implications? Explain.

The case is complicated by prior county decisions for a Hillside Development Permit (HDP 4-91 and 4-91a) and a Significant Environmental Concern permit (SEC 6-91 and 6-91a) for a driveway crossing of Balch Creek near the Thompson Road frontage of the property and by a recent LUBA opinion reversing SEC 6-91a and HDP 4-91a.

**ACTION REQUESTED OF BOARD**

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



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

HEARINGS OFFICER DECISIONS  
AUGUST 20, 1993

DR 14-93 Appeal of a *Final Design Review Plan*  
CU 5-91a Appeal of a *Determination of Substantial Development*

I. SUMMARY

Location: 6125 NW Thompson Road Site Size 3.00 Acres

Tax Roll Description: Tax Lot '1' of Lot 37, Mountain View Park Addition #1

Owner/Applicant: Dan McKenzie (represented by Steven Abel)  
6125 NW Thompson Road Portland, Oregon 97210

Appellant: Forest Park Neighborhood Association  
(represented by Arnold Rochlin)

Zoning District: CFU (formerly MUF-19; Multiple Use Forest District)

HEARINGS OFFICER  
DECISIONS:

DR 14-93: AFFIRM, SUBJECT TO A CONDITION, the *Final Design Review Plan*;

CU 5-91a: AFFIRM, the *Determination of Substantial Development* of a non-resource dwelling authorized by CU 5-91, and all based on the following Findings and Conclusions.

These decisions concern an appeal to the Hearings Officer of two administrative decisions by the Planning Director. The decision in DR 14-93 approved a Final Design Review Plan for a non-resource dwelling allowed by conditional use permit (CU 5-91) in a forest zone. See Multnomah County Code 11.15.7800, *et sec.*<sup>1</sup> for the design review regulations. The decision in CU 5-91a determined that the applicant had undertaken substantial construction and development within two years from approval of the conditional use (CU) permit. See MCC 11.15.7110(C). This allows the applicant to complete the dwelling on the site.

The case is complicated by prior county decisions for a Hillside Development Permit (HDP 4-91 and 4-91a) and a Significant Environmental Concern permit (SEC 6-91 and 6-91a) for a driveway crossing of Balch Creek near the Thompson Road frontage of the property and by a recent LUBA opinion reversing SEC 6-91a and HDP 4-91a.

In the written appeal regarding DR 14-93, the appellant alleged principally: (1) that the Final Design Review Plan did not contain required information; (2) that the decision approving the

<sup>1</sup> A section in Multnomah County Code Chapter 11.15 is hereafter abbreviated as MCC .xxxx consistent with the citation format in the chapter.



plan was inadequate and consisted of mere assertions; and (3) that the design review plan violates an earlier county decision, because it does not use a bridge to cross Balch Creek.

In the written appeal regarding the determination of substantial development for CU 5-91, the appellant alleged principally: (1) that the application was not timely filed and, therefore, cannot be approved; (2) that findings necessary for approval of the application could not be made; and (3) that the determination is not supported by substantial evidence in the record.

Hearings Officer Larry Epstein held a public hearing to receive testimony and evidence regarding the appeals on July 19, 1993 and held open the public record until August 2, 1993 to receive additional written testimony and evidence. The appellant and applicant presented additional written arguments after the hearing before the record closed.

The hearings officer also held open the record to receive a copy of a final order by the Land Use Board of Appeals (LUBA) in the matter of an appeal of a Board of Commissioners decision allowing the applicant to use a culvert and fill to cross Balch Creek (SEC 6-91a and HDP 4-91a). LUBA reversed the Board on procedural grounds. The LUBA decision reinstated prior county decisions (SEC 6-91 and HDP 4-91) requiring the applicant to use a bridge to cross the creek.

The appeal raises the following major procedural issues: (1) whether design review applies to the application; (2) whether a party other than the applicant has a right to appeal a design review decision; (3) whether the standard of review for the appeal is substantial evidence or *de novo*; (4) the scope of appeal (what issues can be raised in the appeal); (5) the effect of a LUBA decision about related county decisions rendered after the public hearing in this case; and (6) the impact of the timing of the planning director decision and decision notices.

The appeal raises the following substantive issues regarding design review: (1) whether a design review application can be approved if it does not contain all the information required for such a plan; (2) whether the site plan offered by the applicant complies with applicable design review approval criteria; and (3) whether the design review decision is consistent with other county actions.

The appeal raises the following substantive issues regarding the determination of substantial construction and development for the conditional use permit: (1) whether the request for the determination was timely filed; (2) whether there was a final design review decision before (or when) the request was approved; and (3) whether the evidence supports a conclusion that the applicant undertook substantial construction and development.

The hearings officer finds the final design review plan does not provide for a bridge. That is inconsistent with the conditions of approval of the prior county decisions regarding SEC 6-91 and HDP 4-91 which were reinstated by the LUBA decision. The design review plan should be affirmed subject to a condition that requires amendment of the design review plan to conform to SEC 6-91 and HDP 4-91 or their amendments. The hearings officer also finds that the applicant undertook substantial construction and development in conjunction with the conditional use permit before the permit expired consistent with MCC .7110(C). Therefore, the hearings officer affirms that determination by the planning director.

## **II. PROCEDURAL ISSUES**

### **A. Applicability of design review.**

1. County planner Mark Hess briefly argued at the hearing on July 19 that the conditional use permit in question should not be subject to the requirements of MCC .7800, *et seq.* (Design Review), based on comprehensive plan policies 12 and 19. He drew a distinction between two kinds of conditional uses: those specified as such in a given zone and those allowed in any district. He argued that where a conditional use is listed as such in a given zone subject to specific design standards, then design review should not apply, because the more use-specific design standards supplant the more general design review standards. Based on that rationale, he argued the conditional use permit in question would not be subject to design review.

2. The hearings officer recognizes that it has been the county's general practice not to subject to design review non-forest dwellings allowed as conditional uses. Although the hearings officer finds merit in the practice as a matter of policy, the hearings officer also finds MCC .7820 clear on its face. It provides that design review "shall apply to all conditional ... uses in any district" (emphasis added). Therefore, despite the merits of not applying design review to a conditional use that already is subject to use-specific design standards in the zone, the hearings officer finds that CU 5-91 is subject to design review by the plain meaning of the code and by the lack of any conflict or ambiguity in the code that warrants a conclusion to the contrary, notwithstanding county practice. If the county wants to waive design review for certain conditional uses, then it should amend MCC 11.15 to say so clearly.

### **B. Appellant's standing to appeal design review decision.**

1. The applicant alleged that the appellant cannot appeal a design review decision, because MCC .8290(A) does not authorize anyone but the applicant for a design review decision to appeal that decision.<sup>2</sup> See pp. 6-7 of Exhibit 22. The appellant addressed the issue of standing at pp. 5-6 of Exhibit 25.

2. The hearings officer finds that MCC .7865 authorizes a decision in a final design review plan to be appealed to the hearings officer.<sup>3</sup> It does not restrict who may file the appeal. Therefore, the design review decision is a "matter made appealable by this Section" of the code. The appellant in both cases is the Forest Park Neighborhood Association, based on the Notice of Appeal. Mr. Rochlin is the representative of that organization and has standing as a "party" as defined by MCC .8225.

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<sup>2</sup> MCC 11.15.8290(A) provides:

*A decision made by the Planning Director on an administrative matter made appealable under this Section by ordinance provision, shall be final at the close of business on the tenth calendar day following the filing of the written Decision, Findings and Conclusions with the Director of the Department of Environmental Services, unless prior thereto, the applicant files a Notice of Appeal with the Department, under subsections (B) and (C).*

<sup>3</sup> MCC 11.15.7865 provides:

*A decision on a final design review plan may be appealed to the Hearings Officer in the manner provided in MCC .8290 and .8295.*

### C. Standard of review.

1. The applicant argues the standard for review in this case is whether the planning director's decision is supported by substantial evidence in the record. See p. 7 of Exhibit 22. However the argument is not based on any reference to the code or other law.

2. The hearings officer notes that MCC .8295 provides that, generally, appeals to the hearings officer or to the Board of Commissioners are to be conducted according to the provisions of MCC .8239 through .8290. Scope of review is addressed in MCC .8270. It provides for *de novo* review if "additional testimony or evidence could not reasonably have been presented" in the action that preceded the appeal, in addition to other considerations.<sup>4</sup> See MCC .8270(E).

3. The hearings officer finds that the appeal of the decisions under review should be *de novo*, because the appellant had no opportunity to present any testimony or evidence regarding the two applications in this case before the planning director made his decisions; that lack of opportunity substantially prejudiced the appellant by impeding his participation; and the evidence offered by the appellant is generally competent, relevant and material (whether or not the hearings officer finds it is sufficient to prevail). Therefore, the hearings officer will except new evidence into the record and will conduct a *de novo* review.

4. MCC .8295(B) provides that MCC .8290(D) and (E) do not apply to an appeal filed under MCC .8230(A). MCC .8230(D) states that the burden of proof is on the person initiating the action. If MCC .8230(D) does not apply to the appeal, pursuant to MCC .8295(B), then it could be construed to waive the burden of proof regarding the decisions that are the subject of the appeal. However, the hearings officer finds that such a result is not consistent with the *de novo* character of the appeal hearing. MCC .8295(B) should not be construed to waive the burden of proof.

a. The burden of proof is to show that the applications comply with the applicable standards in the county code based on the evidence in the whole record to the extent the appellant has raised compliance with those standards as issues in the Notice of Appeal. See "Scope of Appeal."

b. It is not enough to show simply that the planning director's decision is supported by substantial evidence in the record before the appeal, because the planning director was not able to consider the evidence offered by the appellant. The "burden of coming forward" may shift from one party to another as first the applicant and then the appellant make a *prima facie* case about an issue, but the applicant bears the "burden of proof" throughout. The appeal hearing is the first opportunity the appellant has to address the challenged applications. Until a final decision has been rendered and appeals of that decision have been resolved in the applicant's favor, the burden of proof has not been met.

c. The hearings officer finds that MCC .8295(B) is ambiguous. It is not clear whether the Board intended to shift or waive the burden of proof on an appeal of an administrative decision to the hearings officer. The situation may be different in an appeal

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<sup>4</sup> MCC 11.15.8270(F) defines "de novo" hearing as follows:

[A] hearing by the [approval authority] as if the action had not been heard by the [inferior approval authority], and as if no decision has been rendered, except that all testimony, evidence and other material received by the [inferior approval authority] shall be included in the record.

to the Board of Commissioners after a duly noticed public hearing on the merits before an inferior approval authority, because evidence on both sides of an issue could be presented before the decision by the inferior approval authority. However, given the procedural posture of this case, the hearings officer construes MCC .8295(B) to waive MCC .8230(D) and (E), but not to waive the burden of proof.

5. The appellant argues that the appeal is being brought under Oregon statutes (ORS 215.416(11)) in addition to county law, and argues that, where the county code and state law differ about such issues as the standard of review and scope of appeal, the hearings officer should resolve that difference by reference to state law. See, e.g., pp. 1-2 of Exhibit 19. However, the hearings officer does not have jurisdiction to construe or apply state statutes. The hearings officer cannot bend the county code to comply with his understanding of state law even if the hearings officer agrees with the appellant about what the county and state laws say. If the county code violates state law, the Board of Commissioners is the authority responsible for changing it. If the appellant believes provisions of the county code violate state law, then he will have to pursue that appeal in another forum.

#### **D. Scope of appeal.**

1. The applicant argues the issues subject to the appeal are limited to the issues cited specifically in the written appeal. The applicant argues a blanket objection, such as a challenge to compliance with all requirements and criteria, is not sufficiently specific to raise anything on appeal. See p. 1 of Exhibit 22.

2. The hearings officer finds that MCC 11.15.8295(A) limits the appeal to the grounds relied on for the appeal in the Notice of Appeal.<sup>5</sup> General objections are not sufficient to raise an issue on appeal. However, given the *de novo* character of the hearing, additional evidence could be introduced to make the grounds stated in the Notice of Appeal more specific. Such evidence was introduced. See, e.g., pp. 5-6 of Exhibit 19.

#### **E. Impact of the LUBA decision.**

1. The record includes a final order by the Land Use Board of Appeals ("LUBA") in the matter of *Rochlin v. Multnomah County, et al*, LUBA No. 93-019 (July 22, 1993). In its final order, LUBA reversed two decisions by the Board of Commissioners ("BCC").

a. In one decision, the BCC found that a Significant Environmental Concern ("SEC") permit was not necessary to allow a driveway to cross Balch Creek (SEC 6-91). In a second decision, the BCC approved a modification to a Hillside Development permit ("HDP") to allow a culvert instead of a bridge to cross Balch Creek (HDP 4-91a).

b. The BCC's decisions were made after rehearing by the BCC pursuant to MCC .8280(D), which allows a rehearing if granted within 10 days after the BCC files its final order. LUBA found the BCC did not grant the rehearing within the 10-day period. Therefore, LUBA concluded the BCC never had jurisdiction to rehear the case and reversed the decisions made after the rehearing. LUBA did not otherwise address the merits of the appealed decisions.

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<sup>5</sup> MCC 11.15.8295(A) provides:

*A hearing before the Hearings Officer on a matter appealed under MCC .8290(A) shall be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal.*

2. The hearings officer finds that the LUBA decision effectively reinstates the administrative decision approving HDP 4-91, (see pp. 537-543 of Exhibit 1), SEC 6-91, (see pp. 528-534 of Exhibit 1), and the conditions of approval of those decisions requiring the applicant to use a bridge to cross Balch Creek. Although the hearings officer assumes the applicant could apply to modify those permits, the hearings officer must make his decision based on the facts in the record. The design review plan does not provide for the bridge. It violates the decisions noted above.

3. The appellant argued that the LUBA decision requires the hearings officer to conclude that the applicant could not have complied with the approval criteria for a determination of substantial construction and development, because one of those criteria (MCC .7110(C)(3)(b)(i)) requires that a final design review plan has been approved for the total project, and the final design review plan in this case did not include a bridge that is necessary for the project following the LUBA decision. See Exhibit 25.

a. The hearings officer finds that MCC .7110(C)(3)(b)(i) does not contemplate the circumstances of this case, i.e., that a final design review plan is approved based on the permits issued for development shown on the plan, but those permits are voided by a LUBA decision while the final design review plan decision is under appeal.

b. The hearings officer assumes county officials are obligated to act on the basis of the decisions of the governing body of the county. At the time the planning director approved the design review plan, it complied with applicable permits as determined by the BCC.<sup>6</sup> The hearings officer finds there was a Final Design Review approval under MCC .7845 when the planning director made his decision that the applicant complied with MCC .7110(C)(3)(b)(i), assuming such decisions can be made concurrently. The parties agreed the decisions could be made concurrently.

c. That leaves the question of whether the LUBA decision requires the hearings officer to find the application cannot comply with MCC .7110(C)(3)(b)(i), because, now, a final decision review plan cannot be approved if it does not show the bridge required by CU 5-91 and SEC 6-91.

(i) Because the county code is ambiguous, the hearings officer must construe it. The hearings officer is guided by the purpose of the provision in question (i.e., MCC .7110(C)). That provision allows completion of development authorized by a conditional use permit without limiting the time for completion if the permittee has undertaken substantial construction and development within two years after the permit is approved. To find that substantial construction and development has occurred, the planning director must find (1) that the county has approved a final design review plan for the total project and (2) the applicant has spent a certain percentage of funds for the project.

(ii) The hearings officer finds that the purpose of requiring a conditional use permit to be implemented within two years is to ensure that conditions have not changed sufficient to warrant a new review. The purpose of requiring a final design review plan to be approved before recognizing an applicant has undertaken substantial construction and development is to ensure that development authorized by the permit can proceed. Submission of an approved design review plan and expenditure of funds to develop the site consistent with that plan or other permits is evidence of a diligent effort to implement the conditional use permit. The BCC determined as a matter of policy that, as

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<sup>6</sup> The appellant also argues that the design review plan violated a condition of approval of the decision in the matter of CU 5-91. That issue is addressed in finding III.C. It does not involve the LUBA decision.

long as such an effort is made, then, even though conditions could change subsequently, the applicant has made a sufficient effort to vest his rights to complete a project. The plan submitted by the applicant was consistent with the applicable permits as determined by the county at the time. The hearings officer finds that fulfilled MCC .7110(3)(b)(i).

(iii) The hearings officer concludes that the fact that the LUBA decision requires the plan to be changed should not change the fact that the applicant applied for and received approval of a final design review plan. Negating approval of the determination of significant construction and development because of the LUBA decision would not serve the purpose of MCC .7110(3). It would disregard the diligent effort the applicant made to implement the conditional use permit, and, thereby, it would derogate the purpose of MCC .7110(3) to allow completion of a conditional use permit if a diligent effort is made to implement the conditional use in a timely manner.

#### **F. Timing of notice and decision.**

1. The applicant filed the design review application with the county on March 25, 1993. The applicant filed the application for a determination of substantial construction and development with the county on March 26, 1993. The planning director mailed notice of the administrative decision on May 7. The date of the administrative decision was May 26.

2. The appellant argues the planning director violated MCC .7110(C)(3)(b), because the director did not issue a decision regarding the determination of substantial construction and development within 20 days. See pp. 8-9 of Exhibit 19 and p. 2 of Exhibit 21. The appellant is correct. Coincidentally, the hearings officer notes the planning director also violated MCC .7845(C), because the director did not issue a final design review decision within 10 days after the design review application. However, neither of these violations gives rise to an action by the appellant. Neither is a land use decision; rather, they are land use indecisions. Neither of these violations prejudiced the appellant; they may have prejudiced the appellant.

3. The appellant argues the planning director considered evidence that it cannot be shown was in the record when the May 7 notice was mailed or when the May 26 decision was filed. Whether or not that claim is correct, the hearings officer finds that any prejudice created thereby is remedied by the *de novo* nature of this appeal proceeding. Any evidence relevant to the matter and in the record was available to all parties during the course of the proceedings and could be challenged by competent evidence to the contrary.

### **III. MERITS OF THE APPEAL OF DR 14-93**

#### **A. Contents of the design review plan.**

1. The appellant argues the design review plan does not include all of the information listed by MCC .7830(D)-(G), and, therefore, the plan cannot be approved. See, e.g., pp. 3-5 of Exhibit 19 and pp. 1-2 of Exhibit 24. The applicant argues that all of the information listed in MCC .7830(D)-(G) is not required, and that adequate evidence is available regarding issues that are relevant to the design review standards and criteria.

2. The hearings officer agrees with the applicant. Although MCC .7830(D)-(G) require certain information to be provided in or with a design review plan, those sections do not constitute approval criteria or standards; they list information requirements. Failure to submit required information is not fatal to an application if the information that is submitted is sufficient to show that the plan complies with the applicable approval criteria and standards in the code.

## **B. Compliance with design review plan approval criteria and standards.**

1. In the written appeal, the appellant challenges the adequacy of the findings for the design review decision generally, but does not cite any specific standard that the design review plan violates. More specific citations are provided at pp. 5-6 of Exhibit 19. The appellant also argues the findings are mere assertions and information in the record is insufficient to substantiate findings of compliance with the design review standards.

2. The hearings officer finds that, in general, the findings adopted by the planning director in support of DR 14-93 are not mere assertions and are supported in the record. Many of the design review standards are ambiguous, highly subjective and conceptual in nature. Reasonable people can disagree about compliance with these standards, and no amount of evidence may be available to resolve such disputes with certainty. Substantial evidence to support findings addressing these standards consists generally of the design review plan application (which includes proposed development on the site and structures on adjoining property and topography); the aerial photograph and photographs of the site by county staff; the records in the matter of HDP 4-91 and 4-91a, SEC 6-91 and 6-91a, and CU 5-91; the model of the site; permits issued by other agencies; and architectural drawings, a foundation plan, and building elevations. The design review criteria are in MCC .7850. The hearings officer incorporates and adopts by reference the findings of the planning director in the May 26 administrative decision regarding DR 14-93 in response to those criteria. The hearings officer also adopts the following findings.

3. Regarding the relation of the design review plan to the environment (MCC .7850(A)(1)(a)),<sup>7</sup> the appellant argued there is no plan for the structures other than siting, and the director's decision is not justified. See p. 5 of Exhibit 19.

a. The hearings officer disagrees. The record includes sample home plans, a foundation plan and elevations. See Exhibits 15 and 28. The information about the size and shape of a dwelling, its location on the site, the distance to other dwellings, and the topography and forest cover is sufficient to warrant a finding that the design review plan relates harmoniously to the natural environment, e.g., by minimizing removal of trees, subsequent grading, and views of the proposed building. The lack of a specific house design is not fatal to the application where, as here, the general nature of the kind of home that will be placed on the site is described. Whether the home is a colonial or a tudor style in appearance will not affect the harmony in the relationship between the home and the site given the size of the site, its topography and vegetation, and the setbacks proposed given existing building locations in the area.

b. The appellant argued that window and door locations are needed to make a necessary finding under this criterion. The hearings officer disagrees. The size of the site and surrounding lots and the distance between existing and proposed structures in this case are such that the locations of doors and windows in the proposed home will not make an appreciable difference in the relationship of the home to the environment.

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<sup>7</sup> MCC .7850(A)(1)(a) provides:

*The elements of the design review plan shall relate harmoniously to the natural environment and existing buildings and structures having a visual relationship with the site.*

4. Regarding MCC .7850(A)(1)(b),<sup>8</sup> there is little energy conservation or climatic information in the design review plan. But the applicant proposes to install a manufactured home that would be subject to energy conservation requirements. That promotes energy conservation. A home is not a significant noise producer, and the evidence about land uses in the vicinity (including the aerial photo) is sufficient to show that there are not significant noise sources in the vicinity. A home will not have a significant air quality impact, and the area is not subject to extraordinary air quality problems, based on the site inspection. The location of the home on the site minimizes exposure to adverse climatic conditions by using existing vegetation and topography to shield the homesite from at least two directions, based on the model of the site introduced at the hearing.

5. Regarding MCC .7850(A)(1)(c),<sup>9</sup> the appellant argued the planning director is wrong, and "the absence of required design elements is conclusive evidence the standard was not met." See p. 5 of Exhibit 19. However, the hearings officer finds the design review plan, the model of the site, and the photos of the site show proposed structures and other development and existing conditions sufficient to address this standard.

a. The proposed dwelling and accessory structure will be effective and efficient as such based on compliance with applicable building codes. The proposed access road provides access to the structures by a direct route, so that it, too, is efficient and effective given its intended purpose. The non-structural nature of the drive makes it of negligible visual impact. The placement of the structures within vegetated areas and preservation of vegetation outside of areas to be developed minimizes their impact on views and warrants a conclusion that the site will be attractive.

b. The drive and structures are inter-related and the development is orderly in that the drive leads to the structures and vice versa without meandering unnecessarily. There is spatial variety on the site, consisting of structures, forest and understory vegetation, and a drive that winds through them. From one area of the site to another, the relationship of structures, forest and earth varies. At all times, the major visual feature is the forested topography which dwarfs the road, structures and humans. The proposed development has a human scale in the forested topography, because the proposed structures are one story in height and are not crowded into substantial bulk or mass.

6. Regarding MCC .7850(2),<sup>10</sup> the appellant argues appropriate opportunities for privacy are not provided, because 200-foot setbacks are not provided. The appellant argues the plan does not promote safety, because there is no evidence the applicant will provide 30-foot fire breaks, maintain a water supply for fire fighting, or be as close as possible to Thompson Road.

<sup>8</sup> MCC .7850(A)(1)(b) provides:

*The elements of the design review plan should promote energy conservation and provide protection from adverse climatic conditions, noise, and air pollution.*

<sup>9</sup> MCC .7850(A)(1)(c) provides:

*Each element of the design review plan shall effectively, efficiently, and attractively serve its function. the elements shall be on a human scale, inter-related, and shall provide spatial variety and order.*

<sup>10</sup> MCC .7850(2) provides:

*The design review plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transitions from public to private spaces.*



a. The hearings officer finds the design review plan provides appropriate opportunities for privacy, because the proposed dwelling is not visible from other dwellings in the vicinity due to the forested topography of the site and surrounding area. Because the dwelling is not visible from off-site, it provides privacy to the residents of the site and protects the privacy of residents of homes in the vicinity. The failure of the applicant to provide 200-foot setbacks does not necessarily mean the plan does not provide for privacy. Planting vegetation between the existing home to the south and the proposed home on the site will protect privacy. See condition of approval 5.

b. The hearings officer finds the design review plan provides for a safe environment by providing 30-foot fire breaks. The fire breaks are identified in sufficient detail on the plan to count as such. Ultimate compliance with the fire break standard can be verified as part of the building permit inspection process. The environment also is safe in that the applicant will provide a driveway improved to the extent required by the law. This ensures emergency vehicle access can be provided to the dwelling and to the area between the dwelling and Thompson Road, including the well in that area. By providing access to the well, the applicant provides access to a water supply system for fire fighting purposes. The fact that the dwelling is situated more than 30 feet from Thompson Road does not make the dwelling unsafe, because adequate vehicular access is provided to the dwelling. Additional safety is provided by condition of approval 4.

7. MCC .7850(3) is not relevant to the application, because the dwelling is not proposed to be used for handicapped housing. There is no dispute about this issue.

8. Regarding MCC .7850(4),<sup>11</sup> the appellant argues the planning director failed to make the requisite finding, and the application does not contain sufficient information to warrant that finding.

a. The hearings officer finds that the design review plan and conditions of approval 1 through 4 are sufficient to show that the applicant will preserve existing vegetation and grades to the maximum practical extent, because less than 10 percent of the site will be affected by the proposed development, and the remainder of the grades and vegetation on the site will be preserved in its existing condition. Development constraints on the site include its topography and vegetation and limits on where a septic drainfield and alternative drainfield are approved. The applicant proposes to place the structures to minimize grading and removal of trees, although the relatively even tree-cover on most of the developable area of the site necessitates removal of some trees. It is not practical to preserve more of the existing vegetation and grades, because it would preclude development of the site as otherwise permitted by the conditional use permit (CU 5-91).

9. Regarding MCC .7850(5), the hearings officer finds the planning director's finding adequacy addresses this issue. The appellant did not dispute the finding regarding this issue.

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<sup>11</sup> MCC .7850(4) provides:

*The landscape and existing grade shall be preserved to the maximum practical degree, considering development constraints and suitability of the landscape or grade to serve their functions...*

10. Regarding MCC .7850(6),<sup>12</sup> the appellant argues the applicant's drainage plan is inadequate. However, the hearings officer finds that the applicant's proposed surface drainage plan will not adversely affect neighboring properties or streets, because:

a. The applicant will collect storm water and direct it to existing storm water drainageways using rip rap to prevent erosion at discharge points. By using existing drainage channels, the applicant prevents adverse storm water effects in areas where such effects do not already occur. By protecting discharge points, the applicant prevents adverse effects due to erosion and sedimentation. By using a detention system recommended by the planning director, (see conditions of approval 6 of the planning director's decision), the potential for erosion and adverse off-site effects is further reduced.

b. The impervious area of the site will be very small compared to the remaining permeable area. Therefore, the volume of storm water run-off will be so small that its off-site effects, if any, will be insignificant.

c. Compliance with this criterion can be assured during the building permit inspection process through implementation of condition of approval 6 of the planning director's decision.

11. Regarding MCC .7850(7),<sup>13</sup> the appellant argues the planning director failed to address the impact of the dwelling on Forest Park. However the hearings officer finds the site development is buffered and screened by existing vegetation and topography to minimize adverse impacts on the site and neighboring properties, including Forest Park. The location of the structures on the west side of a ridge that climbs to the east helps isolate the structures from the park by topography. The preservation of a roughly 60-foot forested area east of the garage as a buffer helps minimize the adverse impacts on the park.

12. Regarding MCC .7850(8),<sup>14</sup> the appellant argues the planning director failed to make the requisite finding. The hearings officer finds that the design review plan does not identify proposed utilities. However, during the hearing in this matter, the applicant testified that utilities will be installed underground in or adjoining the proposed driveway. Therefore, MCC .7850(8) does not apply. To the extent it does apply, the hearings officer finds that installation of utilities below ground in or adjoining the driveway will minimize adverse impacts on the site and neighboring properties, because the utilities will not be visible, and grading and excavation for the utilities can be combined with grading and excavation of the driveway, thereby minimizing effects on the land.

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<sup>12</sup> MCC .7850(6) provides:

*Surface drainage systems shall be designed so as not to adversely affect neighboring properties or streets.*

<sup>13</sup> MCC .7850(7) provides:

*Areas, structures and facilities for storage, machinery, equipment, services (mail, refuse, utility wires, and the like), loading and parking and similar accessory areas and structures shall be designed, located, buffered or screened to minimize adverse impacts on the site and neighboring properties.*

<sup>14</sup> MCC .7850(8) provides:

*All utility installation above ground shall be located so as to minimize adverse impacts on the site and neighboring properties.*

13. Regarding compliance with the minimum design standards of MCC .7855, the appellant argues the planning director's findings are wrong. But, other than disputing the reference in the planning director's decision to SEC 6-91a and HDP 4-91a, the appellant does not show in any specific way how the planning director's findings regarding this issue are wrong as a matter of fact. The hearings officer finds the design review plan complies with MCC .7855, because:

a. A condition of approval of the planning director's decision requires a deck, porch or patio containing at least 48 square feet to comply with the private area standard, and there is ample area on the site to provide this space.

b. The proposed detached garage provides convenient areas for storage of bulky items. The garage is fully enclosed.

c. More than 15 percent of the site consists of native vegetation. That vegetation will be retained. See condition of approval 1 of the planning director's decision. It fulfills the requirements for on-site landscaping. All areas of the site that are not being developed or retained in existing vegetation will be landscaped, based on proposed revegetation plans and condition of approval 2 of the planning director's decision.

d. The remaining findings of the planning director's decision are sufficient to address this criterion. MCC .7855(6) does not apply, because no overhead lines are proposed or exist that would be affected by the proposed development.

### **C. Compliance with conditions of approval.**

1. The appellant argued that CU 5-91 continues to require a bridge to be used regardless of HDP 4-91a and SEC 6-91a, because CU 5-91 incorporates by reference SEC 6-91, which required a bridge. CU 5-91 was not amended to refer to SEC 6-91a. Therefore, the final design review plan approved by the planning director violates that decision. See particularly pp. 2-4 of Exhibit 19. Although the LUBA opinion regarding SEC 6-91a and HDP 4-91a may make the issue moot, to provide as complete a decision as possible, the hearings officer addresses this issue based on the circumstances when the planning director made his decision.

2. The hearings officer finds the result urged by the appellant would be inconsistent with and conflict with the BCC's action. The hearings officer construes the BCC's decisions in SEC 6-91a and HDP 4-91a to allow the applicant to use a culvert and fill to cross the creek rather than a bridge. The conditions of approval of CU 5-91 do not provide to the contrary.

a. The only mention of a bridge in the conditions of approval of the final order regarding CU 5-91 reads as follows:

*Any activity within 100 feet of the creek, including but not limited to the bridge and/or driveway, which exposes soil or disturbs the ground surface on the site between October 1 and June 14 is prohibited --- unless required for emergency repairs.*

b. That condition does not require the applicant to use a bridge to reach the house authorized by the permit. The condition is intended to address potential soil erosion by limiting when soil can be disturbed near the creek. The condition uses the term "and/or" to refer to the activity that could be associated with such disturbance, but does not purport to limit the means of crossing the creek. That issue is addressed by SEC 6-91 and HDP 4-

91. The decision in CU 5-91 authorizes a non-forest dwelling. The creek crossing is not the subject of that decision per se and is not material to the approval criteria for a non-forest dwelling as a conditional use. It is material to the SEC and HDP decisions only.

c. The hearings officer acknowledges that condition of approval 3 of the decision in CU 5-91 requires compliance with SEC 6-91. However, the hearings officer finds that amending SEC 6-91 does not violate or require amendment of the condition of approval of CU 5-91. The condition of approval does not purport to prohibit such an amendment. It reflects an intention to coordinate permits for the development on the site. SEC 6-91a amended SEC 6-91. They deal with the same property. The subscript "a" simply reflects another administrative action regarding the same permit. Given the purpose for which SEC 6-91 is referenced in CU 5-91, it is consistent with CU 5-91 to require the conditional use to comply with whatever version of SEC 6-91 is effective when application is made for development authorized by the conditional use permit.

3. The design review decision is inconsistent with the permits reinstated by the LUBA decision, because it does not provide for a bridge to cross the creek. A condition of approval is warranted requiring the design review plan to be amended to be consistent with those permits (or their subsequent amendments) before the design review plan is approved in final form to conform the design review plan to the now-applicable permits (SEC 6-91 and HDP 4-91). This is effectively a remand of the design review decision to the planning director for a limited purpose. MCC .8280(A) does not provide for a remand per se; it does authorize conditions of approval to be imposed on appeal. The result is the same.

#### **IV. MERITS OF THE APPEAL OF CU 5-91a**

##### **A. Applicable standard.**

1. MCC .7110(C) provides as follows in relevant part:

*[T]he approval of a Conditional Use shall expire two years from the date of issuance of the Board Order in the matter, or two years from the date of final resolution of subsequent appeals, unless...*

*(3) The Planning Director determines that substantial construction or development has taken place. That determination shall be processed as follows:*

*(a) Application shall be made on appropriate forms and filed with the Director at least 30 days prior to the expiration date.*

*(b) The Director shall issue a written decision on the application within 20 days of filing. That decision shall be based on findings that:*

*(i) Final Design review approval has been granted under MCC .7845 on the total project; and*

*(ii) At least ten percent of the dollar cost of the total project value has been expended for construction or development authorized under a sanitation, building or other*

*development permit. Project value shall be as determined by MCC .9025(A) or .9027(A)...*

**B. Timing of the application: compliance with MCC .7110(C)(3)(a).**

1. There is a dispute about how to construe MCC .7110(C)(3). The dispute follows from the fact that the Board of Commissioners did not issue a "Board Order" in the matter of CU 5-91. Therefore there is no date of issuance of such an order from which to measure the expiration of the permit. The BCC does not issue a written order when acknowledging a decision that has not been appealed. Therefore, the use of the term "Board Order" in MCC .7110(C)(3) is ambiguous and must be construed. Part of the appeal of CU 5-91a turns on how the term is construed.

2. The appellant argues a Board Order was issued on April 23, 1991, when the BCC orally acknowledged the planning commission decision regarding CU 5-91. Therefore, the permit would expire April 23, 1993, and the applicant must have applied for the determination under MCC .7110(C) by March 24, 1993 to comply with MCC .7110(C)(3)(a). He did not do so; therefore, the application should have been denied. See pp. 6-7 of Exhibit 19, the annotated minutes of the BCC meeting of April 23, 1991 attached to Exhibit 19, and pp. 3-4 of Exhibit 24.

3. The applicant argues that a decision by the BCC is not final for 10 days after the decision, findings and conclusions have been filed with the Clerk of the Board. Therefore, assuming the oral acknowledgment of the BCC of April 23 was a Board Order, then it would not be a final order until May 3, 1991. Therefore, the permit would not expire until May 3, 1993 and the application for a determination could be filed before April 3, 1993. Alternatively, the applicant argues in support of the county staff interpretation. See pp. 2-5 of Exhibit 18.

4. County staff take a different approach. They focus on the issue of when the planning commission decision in CU 5-91 became a final order, reasoning that the purpose for referencing a "Board Order" in MCC .7011(C)(3) is to ensure that the expiration date for a permit reflects the final possible action by the county regarding the permit, i.e., a decision on appeal to the BCC. See pp. 9-10 of Exhibit 13.

a. Where no appeal is filed, the final county action is the decision of the planning commission. (The hearings officer notes that MCC .8255 requires notice of decisions to be included on the next BCC agenda for zoning matters, but does not require any specific action by the BCC regarding decisions that are not appealed.)

b. The planning commission decision in CU 5-91 is final at the close of business on the tenth day following submittal of the written decision to the Clerk of the Board unless an appeal is filed or the BCC issues an order for review. Staff note further that the planning commission decision was signed April 1, 1991, bears a statement that the decision was filed with Clerk on April 11, 1991, and was date-stamped as received by the Clerk of the Board on April 16, 1991.

c. Staff note that the term "submittal" is not defined by the code and is ambiguous. It is not clear from the plain meaning of the term whether it is intended to mean mailed or received. County staff conclude it should be construed to mean received, because only after receipt can the Clerk do anything with the decision. The applicant also argues for this construction of "submittal" noting the date stamp makes receipt a reliable date, and that the county uses the term "mailed notice" elsewhere in the code when it wants

to have mailing be sufficient to fulfill procedural requirements. Assuming this interpretation is adopted, then:

(i) The planning commission decision became final on April 26, ten days after the Clerk received it.

(ii) The permit expires on April 27, 1993.

(iii) To comply with MCC .7110(C)(3)(a), an application for a determination would have to be filed by March 27, 1993.

5. Given the ambiguity regarding MCC .7110(C)(3)(a), the hearings officer is swayed by the arguments of county staff and the applicant that the term "Board Order" should be construed to mean "the final order of the most superior county approval authority to address the merits of a proposed conditional use permit." This best reflects the legislative intent that a permit expire two years after it is approved. It is not approved until the county issues a final order. The most superior county approval authority to issue a final order in CU 5-91 was the planning commission. Their decision was final 10 days after submitted to the Clerk.

6. Given the ambiguity regarding the term "submittal", the hearings officer finds that it should be construed to mean "received", because:

a. The code does not expressly provide that mailing is sufficient for submittal in this context, as it does in other instances where that is the case.

b. It is more consistent with the purpose for submitting the decision to the Clerk than "mailed". The hearings officer finds that the purpose for providing a 10-day period between the date the decision is submitted and the date it becomes final is to ensure that all interested parties have an adequate opportunity to receive and review the decision and to determine whether to file a Notice of Appeal, and to ensure that the BCC members have ample time to determine whether to file a Board Order for Review. Until the Clerk actually receives the decision, the Clerk cannot distribute it. Therefore, the 10-day time should not begin to run until the Clerk actually receives the decision.

7. The hearings officer finds that the oral BCC acknowledgment on April 23 is not a Board Order, because it was not memorialized in any written form. All contested case decisions are required to be in writing and signed by the approval authority to protect all parties to a case and facilitate judicial review. Nowhere does MCC 11.15 provide for a decision to be made without a written decision containing findings and conclusions. In the absence of a written decision or an appeal of that decision by a party or BCC member, the reporting of a decision to the BCC and their subsequent acknowledgment of the decision is just that --- a report and acknowledgment of that report. It does not affect the permit decision. BCC acknowledgment of an unappealed decision is not required by MCC .8255 nor given any weight or meaning by another provision of MCC 11.15.

### **C. Adequacy of findings.**

1. The appellant argued the planning director could not find that the application complied with MCC .7110(C)(3)(b)(i), because the design review decision did not comply with conditions of approval of SEC 6-91 and CU 5-91. See pp. 7-8 of Exhibit 19 and pp. 4-5 of Exhibit 24.

a. The hearings officer largely addressed this issue in findings II.E.3 and III.D. In summary, the hearings officer found that the BCC decisions in SEC 6-91a and HDP 4-91a authorized the applicant to cross the creek using a culvert and fill instead of a bridge, and that action was consistent with the final order in CU 5-91. The hearings officer also found that the relevant date for determining whether the planning director's decision was correct is the date that decision was made: May 26. As of that date, SEC 6-91a and HDP 4-91a applied, notwithstanding their appeal to LUBA by the appellant in this case. There was no stay of the BCC decisions.

b. The hearings officer finds that final design review approval was granted under MCC .7845 on the total project as it existed and was approved at that time. LUBA's opinion has since effectively reinstated the decisions in SEC 6-91 and HDP 4-91. Therefore, the design review plan is no longer consistent with the applicable permits, and should be remanded for proceedings consistent with this decision. However, when the planning director made the determination, there was a final design review plan that complied with applicable permits and standards. That is the appropriate reference time for compliance with MCC .7110(C)(3)(b)(i), because that is when the decision being appealed was made. The subsequent LUBA decision should not void the design review decision for purposes of compliance with MCC .7110(C)(3)(b)(i), because it is not clearly required by the Code, and it would conflict with the purpose of MCC .7110(C)(3) generally.

2. The appellant argued the evidence is insufficient to sustain a finding that the applicant complied with MCC .7110(C)(3)(b)(ii). See p. 8 of Exhibit 19 and p. 2 of Exhibit 21.

a. The appellant argues there is no substantial evidence of the total cost of the project from which the 10% could be calculated, because the applicant has not purchased or contracted to purchase a specific home model of manufactured home.

(i) County staff concede at p. 10 of Exhibit 13 that the application does not include such evidence. However, the staff have computed a cost for the project based on MCC .9025(A), which requires cost to be determined in accordance with the Uniform Building Code or as otherwise determined by the Director.

(ii) The UBC does not have a value for manufactured dwellings, so the county staff considered the cost per square foot of typical manufactured homes based on reported sales costs and on sample manufactured homes displayed at the Manufactured Home Show. The planning director determined that the manufactured home for the site would cost about \$50,000, reflecting a "high-end" 1200 square foot manufactured home.

(iii) The hearings officer finds there is substantial evidence in the record to support that part of the determination, and the planning director was reasonable and rational in arriving at that figure. It is not necessary for the applicant to have purchased or contracted to purchase the dwelling in question, provided there is sufficient information in the record from which the planning director can determine what such a home is reasonably likely to cost.

(b) The planning director used this \$50,000 figure as the total cost for the project. The appellant argues that the total project includes costs for things other than the manufactured home, including the garage, well, septic system, driveway, and bridge, and that the planning director's decision did not consider these costs. The hearings officer agrees. The planning director erred by failing to consider costs for improvements other than the manufactured home when determining the total value of the project.

(i) The application for the determination includes the following receipts for work regarding the proposed project.

Building permit application	\$ 29.25
Work by Oleson & Oleson re: sanitation permit	\$ 8110.00
Road & culvert work by Medoff under HDP 4-91a	\$ 2844.20
Cost of culvert	\$ 1443.20
Road work by Frank Stone	\$ 1580.00
Boundary survey work by G & L Surveying	\$ 1500.00
Geotechnical services	\$ <u>410.20</u>
Total expenditures	\$ 15,916.85

(ii) These expenses are part of the cost of the total project. They should be added to the \$50,000 building cost figure, raising the cost of the project to about \$66,000.

(iii) Also added to the cost of the project should be the value of the garage, the well, utilities, building site preparation, and the driveway from the home to Thompson Road. There is not substantial evidence in the record about the cost of these features of the project, but reasonable estimates of expenses can be drawn from the proposal. The hearings officer estimates the garage would cost about \$20,000 (864 square feet x \$25/sq. ft); the well would cost not more than \$4000; and utility, site preparation and road work would cost not more than \$10,000, bringing the total project cost to about \$100,000.

(iv) If the total project cost is less than about \$160,000, then the applicant has spent more than 10% of the total project cost, based on the expenditures listed above. Therefore, based on those estimates and expenditures, the applicant complies with MCC .7110(C)(3)(b)(ii). Even if the estimates in the preceding paragraph are off by as much as 60%, the applicant complies with MCC .7110(C)(3)(b)(ii). Given such a large margin for error, the hearings officer concludes that the planning director's determination regarding this section was correct, notwithstanding the error identified above.

(c) The appellant also argues the expenses associated with the culvert and fill work under HDP 4-91a should not be counted, because that development was not consistent with CU 5-91 and SEC 6-91. However, the hearings officer concludes the appellant's argument is in error. That development was consistent with the BCC decision in HDP 4-91a and SEC 6-91a. When the planning director made his decision about substantial construction and development, those were the relevant permits for evaluating the expenses in question. If the expenses counted then, they count now notwithstanding the subsequent LUBA decision. See findings ILE.3, III.D, and IV.C.

(d) The appellant also argues the expenditures are not sufficiently documented, but the hearings officer finds that the receipts on their face reflect a sufficient relationship to permits and/or development on the site to be sufficiently documented except the receipt from Mr. Stone, which bears no relationship to the project on its face. Given the unrebutted representation by the applicant, the substantial grading that has occurred for the road on the site, and the lack of attribution of costs for that work to another contractor, the hearings officer finds it is reasonable to conclude that the expenses claimed by Mr. Stone are related to the development of the driveway.

(e) The appellant argues the expenditures do not count toward MCC .7110(C)(3)(b)(ii), because they were made before approval of the design review plan, and MCC .7815 prohibits development before approval of the plan.



(i) The hearings officer finds MCC .7110(C)(3)(b)(ii) and .MCC .7815 conflict. The former anticipates that certain development can occur before a final design review plan is approved. The later does not. Therefore, the hearings officer must construe them.

(ii) The hearings officer finds that MCC .7110(C)(3)(b)(ii) is the more specific provision as it relates to the issue at hand. The cost of development consistent with that section should count toward the ten percent figure notwithstanding such development might not be permitted under MCC .7815 until a final design review plan is approved. The hearings officer finds such a result is more consistent with the scheme in MCC .7110(C) and recognizes that other permits have authorized development on the site (HDP 4-91 and 4-91a, SEC 6-91 and 6-91a, and sanitation permits) notwithstanding the lack of design review approval.

## **V. CONCLUSIONS AND DECISION**

### **A. Conclusions.**

1. The hearings officer concludes the application in question is subject to design review; the appellant has standing to appeal the design review decision in this case; the standard of review is *de novo*; the scope of appeal is limited to the issues cited specifically in the written appeal; the LUBA decision effectively reinstates HDP 4-91 and SEC 6-91 but does not void the prior design review approval or determination of substantial construction and development; and that errors regarding the timing of notice and the decision are remedied by the *de novo* character of the appeal proceeding, based on finding III.

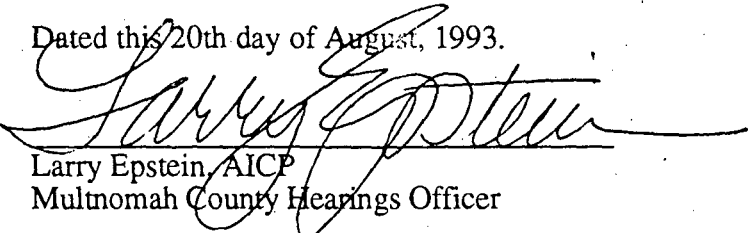
2. The hearings officer concludes the final design review plan should be approved, based on finding III, because it complies with the applicable provisions of MCC .7850 and .7855, subject to a condition of approval that requires the plan to be amended to be consistent with HDP 4-91 and SEC 6-91 or their subsequent amendment.

3. The hearings officer concludes the determination of substantial construction and development should be approved, based on finding IV, because it complies with the applicable provisions of MCC .7110(C).

### **B. Decision.**

In recognition of the findings and conclusions contained herein, and incorporating the public testimony and exhibits received in this matter, the hearings officer hereby denies the appeal and approves DR 14-93a, subject to a condition that the applicant amend the plan to conform with SEC 6-91 and HDP 4-91 or with their subsequent amendment (or with reinstatement of SEC 6-91a and HDP 4-91a by appellate courts), and denies the appeal and approves the planning director's determination in the matter of CU 5-91a.

Dated this 20th day of August, 1993.

  
Larry Epstein, AICP  
Multnomah County Hearings Officer

**CONTENTS OF EXHIBIT C  
WRITTEN EVIDENCE IN THE RECORD  
FOR DR 14-93a/CU 5-91a**

<u>Exhibit</u>	<u>Description</u>
1	Final Order and record in the matter of LUBA File No. 93-019 (2 bound volumes for HDP 4-91a and 2 bound volumes for SEC 6-91a); particularly pp. 35-37, 497-515, 528-534, 537-543, 672-682, and 732-737 of the record cited by the applicant
2	Road approach permit application dated April 9, 1991 with notations
3	Building permit computer printout dated October 5, 1992 with letter dated October 2, 1992 from Dan McKenzie to Mark Hess with site plan
4	Seven receipts for expenses incurred by applicant in conjunction with dwelling
5	Building permit application and inspection record
6	Application by Dan McKenzie received March 25, 1993 for design review approval
7	Application by Dan McKenzie received March 26, 1993 for determination that substantial development occurred
8	Letter dated April 6, 1993 from Arnold Rochlin to R. Scott Pemble
9	Letter dated April 19, 1993 from Michael Ebling to Dan McKenzie
10	Letter dated May 5, 1993 from Dan McKenzie to R. Scott Pemble
11	Notice of administrative decision with certification of mailing dated May 7, 1993
12	Notice of appeal of DR 14-93 and CU 5-91 by Arnold Rochlin for Forest Park Neighborhood Association received May 17, 1993
13	Administrative decision and certification of mailing dated May 26, 1993
14	Building permit computer printout dated May 25, 1993
15	Sample plans and costs for manufactured homes and Vol. 29, No. 2 of "Manufactured Homes" magazine
16	Copy of published notice for July 19, 1993 hearing
17	Notice of July 19 hearing and certification of mailing dated June 29, 1993
18	Memorandum dated July 12, 1993 from Mark Hess to hearings officer
19	Letter dated July 12, 1993 from Arnold Rochlin to hearings officer with exhibits
20	Letter dated July 16, 1993 from Margaret Mahoney to Arnold Rochlin
21	Letter dated July 19, 1993 from Arnold Rochlin to hearings officer
22	Applicant's hearing memorandum dated July 19, 1993 from Steven Abel
23	Letter dated July 26, 1993 from Steven Abel to hearings officer
24	Letter dated July 26, 1993 from Arnold Rochlin to hearings officer
25	Letter dated August 2, 1993 from Arnold Rochlin to hearings officer
26	Three-dimensional model of the site by the applicant
27	Photographic slides of the site by the planning division
28	Zoning approval map, architectural drawings, foundation plan and elevations

In the matter of DR 14-93 and CU 5-91a, an appeal of administrative decisions:

Signed by the Hearings Officer: August 20, 1993  
[date]

Decision mailed to parties: August 25, 1993  
[date]

Submitted to Clerk of the Board: August 26, 1993  
[date]

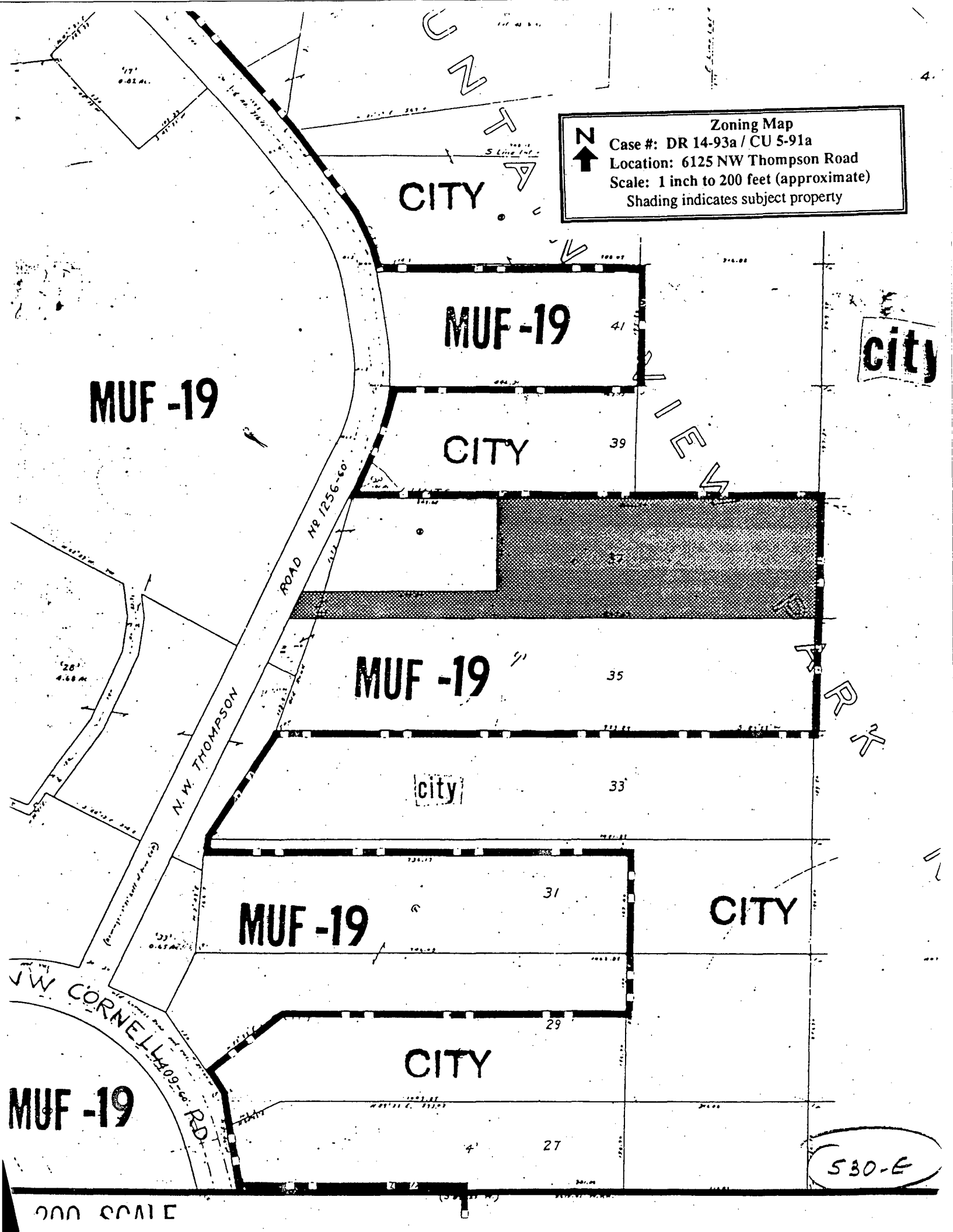
Last day to Appeal to the Board: September 7, 1993  
[date]

### **Appeal to the Board of County Commissioners**

*The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of \$300.00 plus a \$3.50-per-minute charge for a transcript of the initial hearing(s). [ref. MCC 11.15:8260(A)(1) and MCC 11.15.9020(B)] Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street (in Portland).*

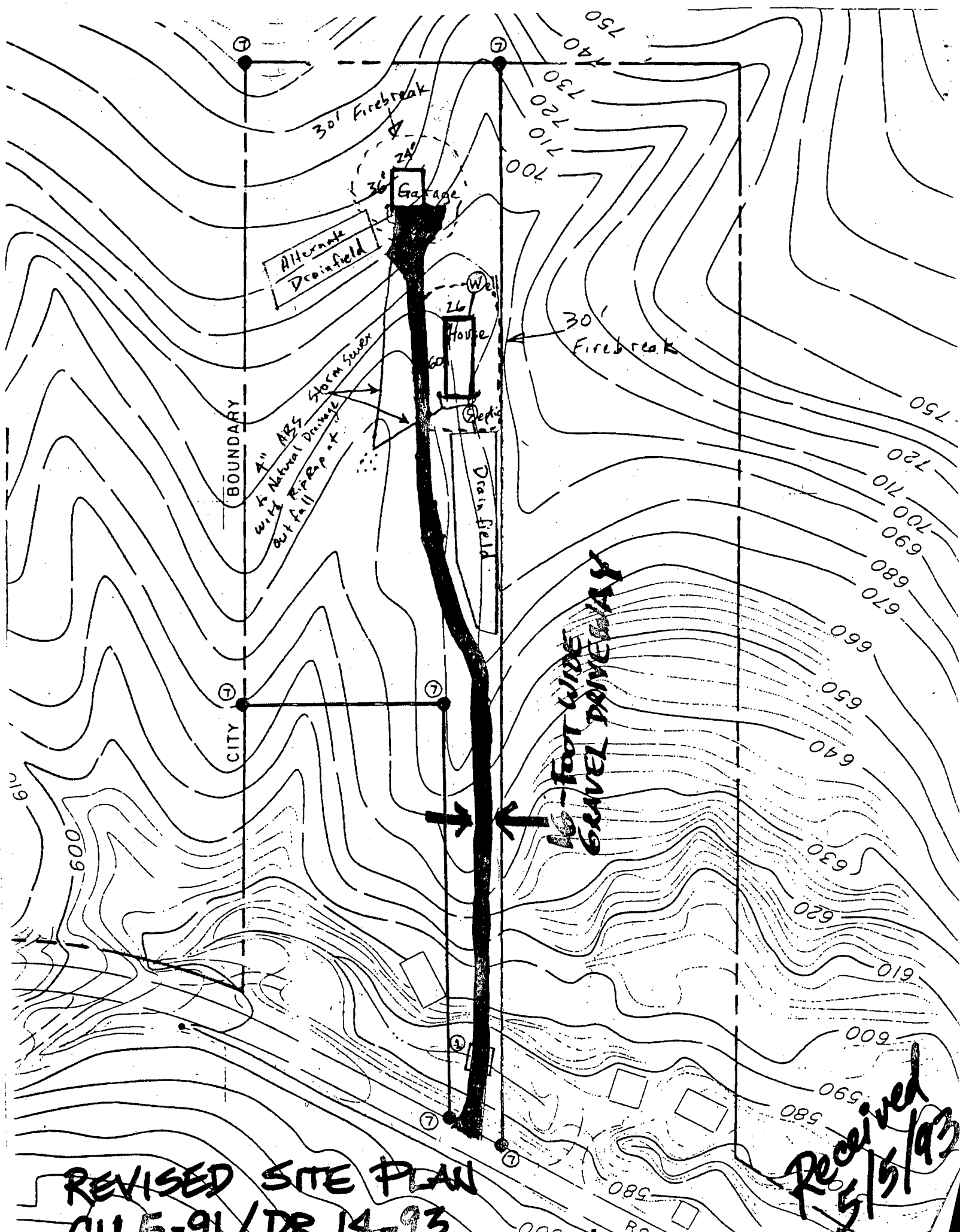
*Failure to raise an issue by the close of the record at or following the final hearing, (in person or by letter), precludes appeal to the Land Use Board of Appeals (LUBA) on that issue. Failure to provide specificity on an issue sufficient for the Board to respond, precludes appeal to LUBA on that issue.*

**Zoning Map**  
Case #: DR 14-93a / CU 5-91a  
Location: 6125 NW Thompson Road  
Scale: 1 inch to 200 feet (approximate)  
Shading indicates subject property



200 SCALE

530-E



REVISED SITE PLAN

111 E-91 / DR 14-93

Received  
5/5/93