ANNOTATED MINUTES

Tuesday, August 13, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

LAND USE PLANNING MEETING

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

P-1 CU 1-96, HV 1-96, SEC 1-96 **DE NOVO HEARING** Regarding Appeal of Hearings Officer Decision DENYING Request for a Conditional Use Permit for a Single Family Residence Not Related to Forest Management, Lot Size and Setback Variances, and a Significant Environmental Concern Permit in the Commercial Forest Use CFU-80 and SEC-h Wildlife Habitat Zones Located at 3130 NW FOREST LANE, PORTLAND. Testimony Limited to 15 Minutes Per Side.

CHAIR STEIN EXPLAINED QUASI-JUDICIAL PROCESS. AT CHAIR STEIN'S REQUEST FOR DISCLOSURE, NO EX PARTE CONTACTS WERE REPORTED. AT CHAIR STEIN'S REQUEST FOR CHALLENGES AND/OR OBJECTIONS, NONE WERE OFFERED. PLANNER BOB HALL PRESENTED CASE HISTORY AND RESPONDED TO BOARD QUESTIONS. HEARINGS OFFICER PHIL GRILLO PRESENTED CONDITIONS, FINDINGS OF FACT AND CRITERIA USED IN DETERMINATION TO DENY APPLICATION. APPLICANT'S ATTORNEY DAVID HUNNICUTT SUBMITTED MEMORANDUM IN SUPPORT OF APPLICATION WITH LETTERS FROM RAYMOND LUTHY, FRANK WALKER, AE ASSOCIATES, AND ROBERT BOWSER AND PRESENTED TESTIMONY IN SUPPORT OF REVERSAL OF THE HEARINGS OFFICER DECISION, ADVISING DENIAL OF THE APPLICATION EFFECTS A TAKING OF APPLICANT'S PROPERTY. APPLICANT'S ATTORNEY MICHAEL ROBINSON TESTIFIED IN SUPPORT OF REVERSAL AND RESPONDED TO A

PROCEDURAL MATTER RAISED BY OPPONENT ARNOLD ROCHLIN. ARNOLD ROCHLIN TESTIFIED IN OPPOSITION TO APPLICANT'S REQUEST, IN RESPONSE TO APPLICANT'S TESTIMONY, AND IN SUPPORT OF HEARINGS OFFICER DECISION DENYING APPLICATION. DAVID HUNNICUTT RESPONDED TO QUESTIONS OF FARM USE AND OWNERSHIP. IN RESPONSE TO CHAIR STEIN'S REQUEST FOR CONTINUANCE OR OBJECTION TO HEARING, MR. ROCHLIN REQUESTED THAT THE RECORD BE KEPT OPEN FOR 7 DAYS IN ORDER TO RESPOND TO WRITTEN MATERIALS SUBMITTED TODAY. MR. HALL AND MR. ROBINSON DISCUSSION IN RESPONSE TO MR. ROCHLIN'S REQUEST AND BOARD QUESTIONS REGARDING SCHEDULING. MR. GRILLO RESPONSE TO BOARD QUESTIONS REGARDING OWNERSHIP ISSUE, FOREST USE AND FINDINGS ON OTHER GROUNDS. MR. ROBINSON RESPONSE TO BOARD QUESTIONS REGARDING APPLICANT'S INTENTION TO DEVELOP. IN RESPONSE TO CHAIR STEIN'S REQUEST FOR OBJECTION TO HEARING, NONE WERE OFFERED. HEARING CLOSED. FOLLOWING DISCUSSION, BOARD CONSENSUS TO CONTINUE THE DECISION UNTIL THE THURSDAY, SEPTEMBER 10, 1996 BOARD MEETING.

The planning meeting was adjourned at 10:25 a.m. and the briefing was convened at 10:30 a.m.

Tuesday, August 13, 1996 - 10:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

BOARD BRIEFING

B-1 Discussion and Request for Policy Direction Regarding County Position on Proposed Property Tax Exemption Program for Transit Oriented Mixed Use and Residential Development. Presented by Rey España and Mike Saba.

REY ESPAÑA, MIKE SABA, HENRY MARCUS, BARRY CROOK, KRISTIN HERMAN, DAN STEFFEY AND TASHA HARMON PRESENTATIONS AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION.

Commissioner Hansen was excused at 11:45 a.m.

CHAIR STEIN DIRECTED COUNTY STAFF REY ESPAÑA AND BARRY CROOK TO WORK TOGETHER AND FOLLOW UP WITH ANOTHER BOARD BRIEFING.

There being no further business, the meeting was adjourned at 11:55 a.m.

Tuesday, August 13, 1996 - 1:00 - 4:00 PM
Office of the Mayor, Fifth Floor - International Conference Room
1400 SW Fifth Avenue, Portland

MULTNOMAH CITIES/COUNTY JOINT MEETING

Gussie McRobert convened the meeting at 1:00 p.m., with Beverly Stein, Dan Saltzman, Sharron Kelley, Tanya Collier, Don Robertson, Roger VonderHarr, Vera Katz, Gretchen Kafoury, Charlie Hales, Kay Durtschi, Mike Lindberg, Barbara Clark, Charles Rosenthal, Pamela Wev, Jeff Rogers, Marge Kafoury and Tim Grewe present, and Gary Hansen arriving at 1:45 p.m.

B-2 Elected Officials from the Cities of Portland, Fairview, Gresham, Troutdale and Wood Village, and the Multnomah County Board of Commissioners Will Meet to Discuss Topics Including Individual Critical Issues; 1996 Annual Benchmark Report; Potential Local Impacts of Ballot Measures; Emerging 1997 State Legislative Issues; Political Revisions to Resolution A Policy and Other Issues.

ELECTED OFFICIALS GUSSIE MCROBERT, ROGER VONDERHARR, BEVERLY STEIN, TANYA COLLIER, DAN SALTZMAN, SHARRON KELLEY, VERA KATZ, GRETCHEN KAFOURY, CHARLIE HALES, MIKE LINDBERG, DON ROBERTSON, GARY HANSEN AND BARBARA CLARK AND INVITED GUESTS KAY DURTSCHI, PAMELA WEV, JEFF ROGERS, MARGE KAFOURY, CHARLES ROSENTHAL, NINA REGOR

AND TIM GREWE PRESENTATIONS AND DISCUSSION. MAYORS TO SIGN JOINT LETTER GENERATED BY MAYOR KATZ BY OCTOBER 1, 1996 TO PORTLAND CHAMBER OF COMMERCE ASKING THEM TO COORDINATE A JOINT CHAMBERS OF COMMERCE INDEPENDENT ANALYSIS OF THE FINANCIAL IMPACTS OF CERTAIN BALLOT MEASURES. BUDGET STAFF TO ASSIST WITH APPLICABLE DATA. JURISDICTIONS TO PROVIDE LIST OF BALLOT MEASURES TO MAYOR KATZ BEFORE FRIDAY. EACH JURISDICTION TO HAVE THREE TOPIC IDEAS WITH RELATED BENCHMARKS TO FEED INTO THE CITIES/COUNTIES COORDINATING COMMITTEE (C-4); TOPICS INCLUDE INFORMATION TECHNOLOGY, CONSOLIDATION, RESOLUTION A, HOMELESS, TEEN PREGNANCIES HOUSING, WORK FORCE, SENIORS AND ANNEXATION. SCHEDULERS TO SCHEDULE A FOLLOW UP JOINT MEETING IN OCTOBER.

There being no further business, the meeting was adjourned at 3:40 p.m.

Thursday, August 15, 1996 - 9:30 AM
Multnomah County Courthouse, Room 602
1021 SW Fourth, Portland

REGULAR MEETING

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

CONSENT CALENDAR

UPON MOTION OF COMMISSIONER SALTZMAN, SECONDED BY COMMISSIONER COLLIER, THE CONSENT CALENDAR (ITEMS C-1 THROUGH C-2) WAS UNANIMOUSLY APPROVED.

NON-DEPARTMENTAL

C-1 Renewal of Intergovernmental Agreement 700025 with the State of Oregon Services to Children and Families, Providing Child Abuse Multidisciplinary Intervention (CAMI) Funding for 1 FTE Protective Services Worker Assigned to Child Abuse Investigations

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-2 Intergovernmental Agreement 105366 with the City of Portland, Clarifying Roles and Responsibilities for the Program Operations, Management, and Facilities Operations of the Singles Housing Assessment Center

REGULAR AGENDA

PUBLIC COMMENT

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

CHRISTINE HILLMER, JEFF MCMAHON AND SHERRY DAHLEN COMMENTED IN OPPOSITION TO PROPOSED NORTH PORTLAND HEALTH CENTER LOCATION. COMMISSIONER COLLIER COMMENTS IN RESPONSE. DIANNA ROBERTS COMMENTS REGARDING SEARCH WARRANT OF HER ADULT CARE HOME ON FRIDAY, AND SUBMITTAL OF CERTAIN DOCUMENTS REGARDING HER CASE, WHICH WERE NOT ACCEPTED BY THE HEARINGS OFFICER.

NON-DEPARTMENTAL

R-2 Board Decision and Consideration of an ORDER Regarding the Appeal of Dianna Roberts from the Hearings Officer Decision on an Adult Care Home License. **OPTION 1** Schedule a Hearing to Accept Evidence or Argument on this Appeal; OR **OPTION 2** Decide this Appeal on the Record that has Already Been Created. MCC Section 8.90.090 (J) and Section 890-90-450 of the Administrative Rules for Licensure of Adult Care Homes Give the Board Discretion to Follow Either Course.

ACTING BOARD COUNSEL PETE KASTING EXPLANATION OF PROCESS AND BOARD OPTIONS. ATTORNEY JIM HILLAS TESTIMONY IN

SUPPORT OF DIANNA ROBERTS' REQUEST FOR CONTINUANCE AND RESPONSE TO BOARD QUESTIONS. COUNTY COUNSEL KATIE GAETJENS TESTIMONY IN OPPOSITION TO REQUEST FOR CONTINUANCE. DIANNA ROBERTS AND LINDA SHELTON TESTIMONY IN SUPPORT OF CONTINUANCE. MS. GAETJENS OBJECTION. MR. KASTING EXPLANATION OF BOARD OPTIONS ON THIS CASE. UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER SALTZMAN, IT WAS UNANIMOUSLY APPROVED TO DECIDE THE CASE ON THE RECORD. UPON MOTION OF COMMISSIONER COLLIER, SECONDED BY COMMISSIONER SALTZMAN, THE HEARINGS OFFICER DECISION WAS UNANIMOUSLY AFFIRMED AND AT THE REQUST OF MR. KASTING, ORDER 96-137 WAS UNANIMOUSLY APPROVED.

DEPARTMENT OF HEALTH

R-3 NOTICE OF INTENT to Respond to a Program Announcement from the Centers for Disease Control and Prevention to Fund a Cooperative Agreement for the Development and Evaluation of HIV Prevention Programs for HIV Positive Men

COMMISSIONER COLLIER MOVED AND COMMISSIONER SALTZMAN SECONDED, APPROVAL OF R-3. JOHN DOUGHERTY EXPLANATION. NOTICE OF INTENT UNANIMOUSLY APPROVED.

DEPARTMENT OF SUPPORT SERVICES

R-4 RESOLUTION Repealing Resolutions 90-57 and 93-338 and Directing the Proceeds from the Sale of Unrestricted County Property to the Capital Improvement Fund and the Capital Acquisition Fund

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF R-4. BARRY CROOK AND DAVE BOYER

EXPLANATION AND RESPONSE TO BOARD QUESTIONS. JERE RETZER AND JOHN ALLAND TESTIMONY IN SUPPORT OF ASH CREEK AMENDMENT. JUDITH FROM THE CITY OF PORTLAND TESTIMONY IN SUPPORT OF AMENDMENTS AND RESPONSE TO BOARD QUESTIONS REGARDING TIER 1 GREENSPACE AND THE CITY'S EFFORTS TO OBTAIN FEDERAL GRANT FUNDING. KAY DURTSCHI TESTIMONY IN SUPPORT OF AMENDMENT. COMMISSIONER SALTZMAN MOVED, SECONDED BY COMMISSIONER COLLIER, TO AMEND THE SECOND FURTHER RESOLVED ON PAGE 2 BY ADDING THE FOLLOWING LANGUAGE: "A ONE-TIME ONLY $20,000 DISBURSEMENT BE MADE TO JOIN AND COMPLETE THE EFFORTS MADE BY METRO AND THE CITY OF PORTLAND PARKS DEPARTMENT TO PURCHASE THE TAYLOR WOODS PROPERTY WHICH INCLUDES THE HEADWATERS OF ASH CREEK, A TRIBUTARY OF FANNO CREEK IN PORTLAND'S CRESTWOOD NEIGHBORHOOD AND AN IMPORTANT PARCEL RECOGNIZED IN THE FANNO CREEK GREENWAY AND TRYON CREEK LINKAGE REFINEMENT PLANS;" MOTION UNANIMOUSLY APPROVED. COMMISSIONER COLLIER MOVED, SECONDED BY COMMISSIONER SALTZMAN, TO ADDITIONALLY AMEND THE SECOND FURTHER RESOLVED ON PAGE 2 BY ADDING THE FOLLOWING LANGUAGE: "AND A ONE-TIME ONLY $100,000 DISBURSEMENT BE MADE TOWARDS ACQUISITION OF OPEN SPACE PROPERTIES DESIGNATED BY METRO AS TIER 1-B, EAST BUTTES AND INCLUDING ROCKY, KELLY, POWELL, AND MT. SCOTT/CLATSOP BUTTES IN PARTNERSHIP WITH METRO AND THE CITY OF PORTLAND TO PRESERVE THESE IMPORTANT PROPERTIES AND ENHANCE THE LIVABILITY OF MULTNOMAH COUNTY IN THE FUTURE." AMENDMENT UNANIMOUSLY APPROVED. RESOLUTION 96-138 UNANIMOUSLY APPROVED, AS AMENDED. MR. CROOK ADVISED A BUDGET MODIFICATION WILL BE SUBMITTED

FOR BOARD APPROVAL IN THE NEAR FUTURE. COMMISSIONER SALTZMAN COMMENTS IN SUPPORT.

There being no further business, the meeting was adjourned at 10:24 a.m.

OFFICE OF THE BOARD CLERK
FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

Deborah L. Bogstad

ANNOTATED MINUTES

Tuesday, August 13, 1996 - 9:30 AM
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NON-DEPARTMENTAL

C-1 Renewal of Intergovernmental Agreement 700025 with the State of Oregon Services to Children and Families, Providing Child Abuse Multidisciplinary Intervention (CAMI) Funding for 1 FTE Protective Services Worker Assigned to Child Abuse Investigations

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-2 Intergovernmental Agreement 105366 with the City of Portland, Clarifying Roles and Responsibilities for the Program Operations, Management, and Facilities Operations of the Singles Housing Assessment Center

REGULAR AGENDA

PUBLIC COMMENT

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

CHRISTINE HILLMER, JEFF MCMAHON AND SHERRY DAHLEN COMMENTED IN OPPOSITION TO PROPOSED NORTH PORTLAND HEALTH CENTER LOCATION. COMMISSIONER COLLIER COMMENTS IN RESPONSE. DIANNA ROBERTS COMMENTS REGARDING SEARCH WARRANT OF HER ADULT CARE HOME ON FRIDAY, AND SUBMITTAL OF CERTAIN DOCUMENTS REGARDING HER CASE, WHICH WERE NOT ACCEPTED BY THE HEARINGS OFFICER.

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R-2 Board Decision and Consideration of an ORDER Regarding the Appeal of Dianna Roberts from the Hearings Officer Decision on an Adult Care Home License. **OPTION 1** Schedule a Hearing to Accept Evidence or Argument on this Appeal; OR **OPTION 2** Decide this Appeal on the Record that has Already Been Created. MCC Section 8.90.090 (J) and Section 890-90-450 of the Administrative Rules for Licensure of Adult Care Homes Give the Board Discretion to Follow Either Course.

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DEPARTMENT OF HEALTH

R-3 NOTICE OF INTENT to Respond to a Program Announcement from the Centers for Disease Control and Prevention to Fund a Cooperative Agreement for the Development and Evaluation of HIV Prevention Programs for HIV Positive Men

COMMISSIONER COLLIER MOVED AND COMMISSIONER SALTZMAN SECONDED, APPROVAL OF R-3. JOHN DOUGHERTY EXPLANATION. NOTICE OF INTENT UNANIMOUSLY APPROVED.

DEPARTMENT OF SUPPORT SERVICES

R-4 RESOLUTION Repealing Resolutions 90-57 and 93-338 and Directing the Proceeds from the Sale of Unrestricted County Property to the Capital Improvement Fund and the Capital Acquisition Fund

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER COLLIER SECONDED, APPROVAL OF R-4. BARRY CROOK AND DAVE BOYER

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FOR BOARD APPROVAL IN THE NEAR FUTURE. COMMISSIONER SALTZMAN COMMENTS IN SUPPORT.

There being no further business, the meeting was adjourned at 10:24 a.m.

OFFICE OF THE BOARD CLERK
FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

Deborah L. Bogstad

MULTNOMAH COUNTY OREGON

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

BOARD OF COUNTY COMMISSIONERS

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

AGENDA

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS FOR THE WEEK OF

AUGUST 12, 1996 - AUGUST 16, 1996

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

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

Produced through Multnomah Community Television

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

AN EQUAL OPPORTUNITY EMPLOYER

Tuesday, August 13, 1996 - 9:30 AM
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REGULAR MEETING

CONSENT CALENDAR

NON-DEPARTMENTAL

C-1 *Renewal of Intergovernmental Agreement 700025 with the State of Oregon Services to Children and Families, Providing Child Abuse Multidisciplinary Intervention (CAMI) Funding for 1 FTE Protective Services Worker Assigned to Child Abuse Investigations*

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-2 *Intergovernmental Agreement 105366 with the City of Portland, Clarifying Roles and Responsibilities for the Program Operations, Management, and Facilities Operations of the Singles Housing Assessment Center*

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Agreement for the Development and Evaluation of HIV Prevention Programs for HIV Positive Men

DEPARTMENT OF SUPPORT SERVICES

R-4 *RESOLUTION Repealing Resolutions 90-57 and 93-338 and Directing the Proceeds from the Sale of Unrestricted County Property to the Capital Improvement Fund and the Capital Acquisition Fund*

#1

PLEASE PRINT LEGIBLY!

MEETING DATE 8/13/96

NAME DAVID J. HUNNICUTT

ADDRESS P.O. BOX 230637

STREET

TIGARD OR 97217

CITY ***ZIP***

I WISH TO SPEAK ON AGENDA ITEM NO. 1

SUPPORT X ***OPPOSE*** _____

SUBMIT TO BOARD CLERK

#2

PLEASE PRINT LEGIBLY!

MEETING DATE 8.13.96

NAME MICHAEL C. ROBINSON

ADDRESS 900 SW 5th, SUITE 2300
STREET

PORTLAND OR 97204-1268
CITY ***ZIP***

I WISH TO SPEAK ON AGENDA ITEM NO. P-1

SUPPORT THE APPEAL ***OPPOSE*** _____

SUBMIT TO BOARD CLERK

#3

PLEASE PRINT LEGIBLY!

MEETING DATE 11/13/96

NAME Arnold Rochlin

ADDRESS PO Box 83645

STREET

Portland 97283

CITY ***ZIP***

I WISH TO SPEAK ON AGENDA ITEM NO. P-1

SUPPORT _____ ***OPPOSE*** X

SUBMIT TO BOARD CLERK

Meeting Date: AUG 1 3 1996
Agenda No: P-1
Est. Start Time: 9:30

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

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

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

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

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

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

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

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

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: KB Larry F. Nicholas/mo

MULTNOMAH COUNTY

BOARD HEARING OF July 9, 1996

TIME 9:30am

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

1. Applicant Name/Address

   June Hackett

   3130 NW Forest Lane

   Portland 97229

ACTION REQUESTED OF BOARD

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

2. Action Requested by Applicant

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

3. Planning Staff Recommendation

   Denial

4. Hearings Officer Decision:

   Denial

5. If recommendation and decision are different, why?

ISSUES

(who raised them?)

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

BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON

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

I. FINDINGS

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

II. HEARING AND RECORD

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

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

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

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

III. DISCUSSION

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

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

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

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

4. A significant environmental concern (habitat) permit.

Supplemental findings for these permits are set out below:

Lot Size Variances

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

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

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

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

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

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

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

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

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

Takings Claim

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

V. DECISION

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

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

Phillip E. Grillo
Hearings Officer
Multnomah County

STOEL RIVES LLP
ATTORNEYS

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

June 21, 1996

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

VIA MESSENGER

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

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

To Whom It May Concern:

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

Very truly yours,

Michael C. Robinson

Michael C. Robinson

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

MULTNOMAH COUNTY

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

NOTICE OF REVIEW

1. Name: HACKETT , , JUNE
   Last *Middle* *First*
2. Address: 3130 NW Forest Lane , Portland , OR 97229
   Street or Box *City* *State and Zip Code*
3. Telephone: (503) 292 - 5508
4. If serving as a representative of other persons, list their names and addresses:
   N/A
5. What is the decision you wish reviewed (*e.g.*, denial of a zone change, approval of a subdivision, *etc.*)?
   CU 1-96, HV 1-96 and SEC 1-95
6. The decision was announced by the Planning Commission on June 14, 1996
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
   Pursuant to MCC 11.15.8225(A)(1), June Hackett was the applicant and was represented before the Hearings Officer by her attorney, Michael C. Robinson. June Hackett, as the applicant, was entitled to notice of decision pursuant to MCC 11.15.8220(C)(1).

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

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

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

(a) [ ] On the Record

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

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

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

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

Signed: M.C. Robinson Date: 6.21.96

For Staff Use Only

Fee:

~~Notice of Review = $500.00~~ 300.00

~~Transcription Fee:~~

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

Total Fee = $ _____

Received by: _____ Date: _____ Case No. _____

STOEL RIVES LLP

ATTORNEYS

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2300
PORTLAND, OREGON 97204-1268
Telephone (503) 224-3380
Fax (503) 220-2480

	Name:	Fax No.	Company/Firm:	Office No.
TO:	**Debbie Bogstad**	**248-5256** 5262		

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

Client:	25769	Matter:	1

DATE: July 3, 1996

No. Of Pages (including this cover): 2

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COMMENTS: See attached.

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July 3, 1996

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

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

Re: Appeal by June Hackett

Dear Mr. Farmer:

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

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

Thank you very much for your assistance.

Very Truly Yours,

Michael C. Robinson

Michael C. Robinson

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

August 5, 1996

Forest Park Neighborhood Association

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

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

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

SUMMARY

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

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

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

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

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

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

11.15.2062(B)(3): "*Same Ownership* refers to parcels in which greater than possessory interests are held by the same person or persons, spouse, minor age child, single partnership or business entity, separately or in tenancy in common."

Discussion here concerns the following issues:

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

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

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

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

OWNERSHIP

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

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

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

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

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

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

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

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

AGGREGATION OF ADJOINING LOTS

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

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

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

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

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

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

VARIANCES

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

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

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

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

Variance Cannot be Granted as a Matter of Law

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

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

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

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

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

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

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

* * * * *[2]

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

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

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

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

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

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

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

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

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

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

UNCONSTITUTIONAL TAKING CLAIM

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

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

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

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

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

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

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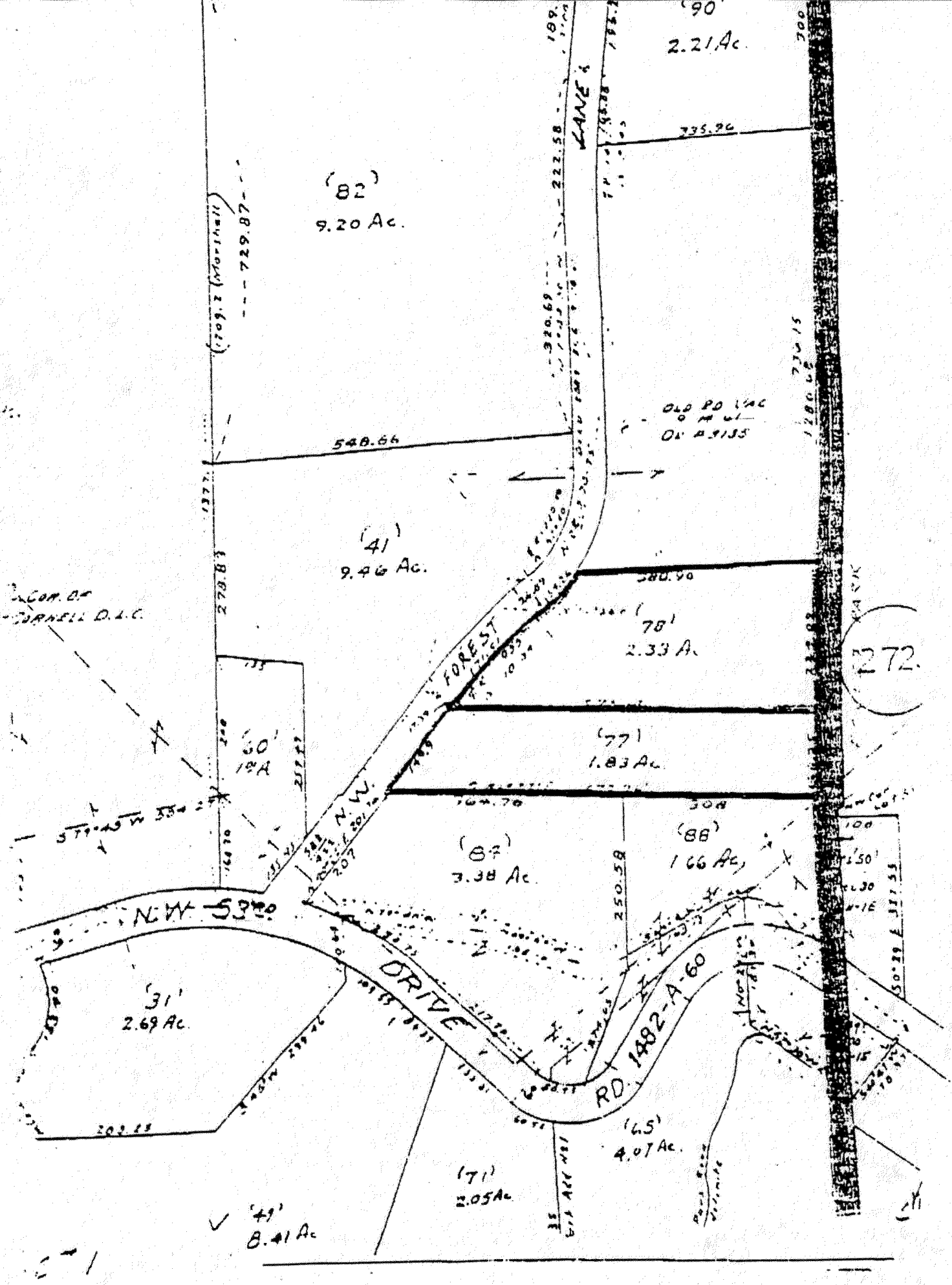
[3] Mr. Watson also opines, without basis in fact or explanation, that the City of Portland, by maintaining a park next door, is causing some compensable injury to the Hacketts.

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

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

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


(90)
2.21 Ac.
LANE
735.96
(82)
9.20 Ac.
729.87
548.66
OLD RD 1/4AC
(41)
9.46 Ac.
380.90
(78)
2.33 Ac.
272
FOREST
(77)
1.83 Ac.
(60)
1.2 A
(87)
3.38 Ac.
(88)
1.66 Ac.
250.58
N.W. 53rd
DRIVE
RD. 1482-A-60
(31)
2.69 Ac.
(45)
4.07 Ac.
(71)
2.05 Ac.
(49)
8.41 Ac.

BEFORE THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

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

No. CU 1-96

MEMORANDUM IN SUPPORT OF APPLICATION

FACTS

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

ISSUE PRESENTED

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

ARGUMENT

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

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

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

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

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

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

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

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

///

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

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

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

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

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

CONCLUSION

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

DATED this 13th day of August, 1996.

David J. Hunnicutt
OSB #92342
Attorney for Applicant

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

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

August 9, 1996

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

Dear Mr. Hunnicutt,

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

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

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

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

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

August 2, 1996

Dave Hunnicutt
P.O. 230637
Tigard, Oregon 97281

Dear Dave:

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

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

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

Please contact me if you have any questions.

Sincerely yours,

Frank D. Walker
Land Planning and Development Consultant

enc.

TIMBER EVALUATION OF HACKETT PROPERTY

8/2/96

Background

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

Methodology

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

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

Findings

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

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

(assuming $25 per ton).

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

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

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

FRANK D. WALKER

13500 Monmouth Highway
Monmouth, Oregon 97361

(503) 838-1846

EDUCATION:

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

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

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

EMPLOYMENT HISTORY:

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

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

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

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

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

August 1977 to April 1980	Urban Planner, Community Development Department, City of Salem, Oregon.
	Developed portions of the Salem Area Comprehensive Plan relating to riverfront development.
November 1975 to August 1977	Regional Planner, Southwestern Illinois Metropolitan and Regional Planning Commission
	Program Planner for 208 Federal Water Quality program.
September 1972 to November 1975	Conservation Technician, U.S.D.A. Soil Conservation Service, Madison County Soil and Water Conservation District, Edwardsville, Illinois.
	Worked extensively with agricultural growers and processors in developing conservation programs and strategies. Extensive field time mapping soils for farm and woodland management. Worked with team of surveyors and engineers in designing conservation structures .

AFFILIATIONS:

Past Member of the Oregon Small Woodlands Association.

Member of The Association of American Geographers.

Member of The American Planning Association.

SUMMARY:

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

FRANK WALKER & ASSOCIATES

13500 Monmouth Highway
Monmouth, Oregon 97361

(503) 838-1846

May 12, 1995

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

Re: Hackett Timber Appraisal

Dear Mike:

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

Frank D. Walker

Frank D. Walker
Land Planning & Development Consultant

FDW/jw

Enc.

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

August 12, 1996

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

Attention: Brian Solodky

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

Dear Mr. Solodky:

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

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

Observations

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

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

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

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

Potential Uses

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

Agriculture-per ORS 215.203

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

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

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

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

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

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

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

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

Mining

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

Sanitary Landfill

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

Transmission Towers

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

Water facilities

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

Fire Station

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

Park/Campground

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

Fishery/Wildlife Resource

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

Cemetery

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

Aviation or Navigation Aid

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

Overall Feasibility Assessment

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

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

A Residence or Outbuilding

Transmission Tower

Water Facility

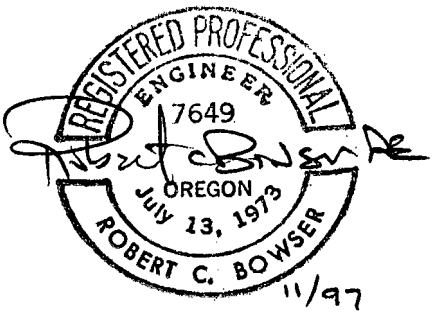
Aviation or Navigation Aid

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

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

Very truly yours,

Robert C. Bowser, P.E.



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

11.15.9005 Payment

All fees are payable at the time of application.

11.15.9010 Action Proceedings

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

11.15.9015 Administrative Actions

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

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

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

11.15.9020 Miscellaneous Charges

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

11.15.9025 Design Review

(A) Project Value

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

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

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

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

Single Sign	$25.00

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