

ANNOTATED MINUTES

*Monday, May 9, 1994 - 10:00 AM
Multnomah County Courthouse, Room 602*

BUDGET WORK SESSION

- WS-1** *Citizen Budget Advisory Committee Recommendations, Board and Staff Discussion and Review of the 1994-95 AGING SERVICES DIVISION Budget.*

JIM McCONNELL, KATHY GILLETTE AND WILLIE HARPER PRESENTATIONS AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. STAFF TO RESPOND TO FOLLOW UP INFORMATION REQUESTS.

*Monday, May 9, 1994 - 11:30 AM
Multnomah County Courthouse, Room 602*

BUDGET HEARING

Chair Beverly Stein convened the hearing at 11:30 a.m., with Vice-Chair Tanya Collier, Commissioners Sharron Kelley, Gary Hansen and Dan Saltzman present.

- BH-1** *PUBLIC HEARING on the 1994-95 AGING SERVICES DIVISION Budget. Testimony Limited to 3 Minutes Per Person.*

BILL GORDON TESTIMONY IN SUPPORT OF PROPOSED BUDGET AND ADD PACKAGES.

There being no further public testimony, the hearing was adjourned at 11:35 a.m.

*Monday, May 9, 1994 - 1:30 PM
Multnomah County Courthouse, Room 602*

BUDGET WORK SESSION

- WS-2** *Citizen Budget Advisory Committee Recommendations, Board and Staff Discussion and Review of the 1994-95 JUVENILE JUSTICE DIVISION Budget.*

HAL OGBURN, DWAYNE McNANNAY, MURIEL GOLDMAN, NAN WALLER AND BILL FOGARTY PRESENTATIONS AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. STAFF TO RESPOND TO FOLLOW UP INFORMATION REQUESTS.

*Monday, May 9, 1994 - 3:00 PM
Multnomah County Courthouse, Room 602*

BUDGET HEARING

Chair Beverly Stein convened the hearing at 3:00 p.m, with Vice-Chair Tanya Collier,

Commissioners Sharron Kelley, Gary Hansen and Dan Saltzman present.

**BH-2 PUBLIC HEARING on the 1994-95 JUVENILE JUSTICE DIVISION Budget.
Testimony Limited to 3 Minutes Per Person.**

PETER SERRELL, NORMAN RUPP, PAM PATTON, GARY McCLELLAN, TIMOTHY TRAVIS, SANDRA DIXON, GAIL MEYER, BOB BERNSTEIN, LYNNE COX AND APHISETH VILALAY TESTIMONY IN SUPPORT OF FUNDING FOR VARIOUS JJD PROGRAMS AND RESPONSE TO BOARD QUESTIONS.

There being no further public testimony, the hearing was adjourned at 3:41 p.m.

*Monday, May 9, 1994 - 3:30 PM
Multnomah County Courthouse, Room 602*

BUDGET WORK SESSION

WS-3 Citizen Budget Advisory Committee Recommendations, Board and Staff Discussion and Review of the 1994-95 DISTRICT ATTORNEY'S OFFICE Budget.

MICHAEL SCHRUNK AND SARA LAMB PRESENTATIONS AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. STAFF TO RESPOND TO FOLLOW UP INFORMATION REQUESTS.

*Monday, May 9, 1994 - 4:30 PM
Multnomah County Courthouse, Room 602*

BUDGET HEARING

Vice-Chair Tanya Collier convened the hearing at 4:15 p.m., with Commissioners Sharron Kelley and Dan Saltzman present, and Commissioner Gary Hansen and Chair Beverly Stein excused.

**BH-3 PUBLIC HEARING on the 1994-95 DISTRICT ATTORNEY'S OFFICE Budget.
Testimony Limited to 3 Minutes Per Person.**

NINA CANFIELD, BOB FREDRIKSON, MELISSA DELANEY AND KATHERINE ANDERSON TESTIMONY IN SUPPORT OF FUNDING FOR NEIGHBORHOOD DA PROGRAM.

There being no further public testimony, the hearing was adjourned at 4:25 p.m.

*Tuesday, May 10, 1994 - 9:00 AM
Multnomah County Courthouse, Room 602*

BUDGET WORK SESSION

WS-4 Citizen Budget Advisory Committee Recommendations, Board and Staff Discussion and

Review of the 1994-95 MULTNOMAH COUNTY SHERIFF'S OFFICE Budget.

BILL FARVER PRESENTATION OF CHAIR'S PROPOSED LAW ENFORCEMENT PLAN AND RESPONSE TO BOARD QUESTIONS. BOB SKIPPER, DAN GARDNER, LARRY AAB AND JOHN SCHWEITZER PRESENTATIONS AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. LAURA HARRYMAN, SHAUN COLDWELL AND JOHN BUNNELL RESPONSE TO BOARD QUESTIONS. STAFF TO RESPOND TO FOLLOW UP INFORMATION REQUESTS.

*Tuesday, May 10, 1994 - 11:30 AM
Multnomah County Courthouse, Room 602*

BUDGET HEARING

Chair Beverly Stein convened the hearing at 11:27 a.m., with Vice-Chair Tanya Collier, Commissioners Sharron Kelley, Gary Hansen and Dan Saltzman present.

BH-4 PUBLIC HEARING on the 1994-95 MULTNOMAH COUNTY SHERIFF'S OFFICE Budget. Testimony Limited to 3 Minutes Per Person.

GUSSIE McROBERT, PAUL LORENZINI, SHARON McCORMACK, CARLOS RIVERA, ALLANYA GUENTHER, STEVE MOSKOWITZ, DAN HANDELMAN AND NAN STARK TESTIMONY IN SUPPORT OF CHAIR'S MCSO BUDGET PROPOSAL. JONATHON ADAMS, JACK ADAMS, BOB SKIPPER, BILL STEWART, FRANK GEARHART, DENISE FUGATE, TOM CROPPER, FRANK CLEYS, ARDEN BALLOU, PAUL THALHOFER, BRENT COLLIER AND SALLY LUCERO TESTIMONY IN OPPOSITION TO CHAIR'S MCSO BUDGET PROPOSAL.

There being no further public testimony, the hearing was adjourned at 12:25 p.m.

*Tuesday, May 10, 1994 - 1:30 PM
Multnomah County Courthouse, Room 602*

BOARD BRIEFING

B-1 Report on the Oregon Economic Development Draft Regional Strategies Application for Multnomah and Washington Counties Presented by Regional Board Co-Chairs Patricia Scruggs and Jack Orchard.

PATRICIA SCRUGGS, JACK ORCHARD, JIM HARPER, EVA PARSONS AND DARRELL SIMS PRESENTATION AND RESPONSE TO BOARD QUESTIONS. MR. ORCHARD INTRODUCED AND ACKNOWLEDGED STAFF SUPPORT OF STEVE GOEBEL, ELIZABETH GOEBEL AND LISA NISENFELD. CHAIR STAFF TO SUBMIT RESOLUTION FOR BOARD CONSIDERATION AND APPROVAL ON MAY 24, 1994.

PLANNING ITEMS

Chair Beverly Stein convened the meeting at 2:00 p.m., with Vice-Chair Tanya Collier, Commissioners Sharron Kelley, Gary Hansen and Dan Saltzman present.

- P-1 **CU 4-94/**
 HV 1-94 Review the April 11, 1994 Hearings Officer Decision DENYING Conditional Use Request for a Single Family Residence Not Related to Forest Management and DENYING Request for a Major Side Yard Setback Variance, for Property Located at 20021 NW MORGAN ROAD, PORTLAND.

DECISION READ, NO APPEAL FILED, DECISION STANDS.

- P-2 **PRE 12-93** Review the April 18, 1994 Hearings Officer Decision, REVERSING Administrative Decision, and DENYING Entire Application for a Single Family Residence in Conjunction with Farm Use in the EFU Zone, for Property Located at 100 NE LUCAS ROAD, PORTLAND.

DECISION READ, NO APPEAL FILED, DECISION STANDS.

- P-3 **FD 1-94** PUBLIC HEARING, DE NOVO, 20 MINUTES PER SIDE, in the Matter of an Appeal of the March 1, 1994 Hearings Officer Decision DENYING a Request for a 4.5 Foot Height Variance to the Finished Floor Elevation for a Proposed Single Family Residence on Property within the Flood Hazard District, for Property Located at 11930 SE LIEBE STREET, PORTLAND.

BOB HALL REPORTED THAT APPLICANT'S ATTORNEY WAS NOT NOTIFIED OF TODAY'S HEARING DATE IN A TIMELY MANNER AND HAS REQUESTED A SET OVER DUE TO A SCHEDULING CONFLICT. FOLLOWING DISCUSSION AND UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, IT WAS UNANIMOUSLY APPROVED THAT THE HEARING FOR FD 1-94 BE CONTINUED TO 1:30 PM, TUESDAY, MAY 24, 1994. IN RESPONSE TO BOARD DISCUSSION AND REQUEST, HEARINGS OFFICER ROBERT LIBERTY ADVISED HE WOULD PRESENT HIS DECISION AT THE MAY 24 HEARING.

- P-4 **FD 3-94** PUBLIC HEARING, DE NOVO, 20 MINUTES PER SIDE, in the Matter of an Appeal of the March 1, 1994 Hearings Officer Decision DENYING a Request for a 4.5 Foot Height Variance to the Finished Floor Elevation for a Proposed Single Family Residence on Property within the Flood Hazard District, for Property Located at 11950 SE LIEBE STREET, PORTLAND.

UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER HANSEN, IT WAS UNANIMOUSLY APPROVED THAT THE HEARING FOR FD 3-94 BE CONTINUED TO 1:30 PM, TUESDAY, MAY 24, 1994. IN RESPONSE TO A QUESTION OF

COMMISSIONER KELLEY, SCOTT PEMBLE EXPLAINED THE BOARD MAY COMBINE THE HEARINGS FOR FD 1-94 AND FD 3-94 UPON APPLICANT'S AGREEMENT.

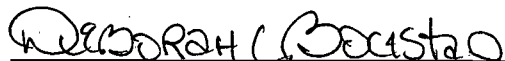
P-5 RESOLUTION in the Matter of Designating June 13, 1994, August 16, 1994 and August 30, 1994 as Meeting Days to Deliberate Land Use Planning Issues

COMMISSIONER HANSEN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF P-5. MR. PEMBLE EXPLANATION AND RESPONSE TO BOARD QUESTIONS. FOLLOWING BOARD DISCUSSION, COMMISSIONERS HANSEN AND KELLEY WITHDREW THEIR MOTION AND SECOND. BOARD DIRECTED MR. PEMBLE TO CHECK BOARD CALENDARS FOR POSSIBLE SCHEDULING CONFLICTS AND SUBMIT REVISED RESOLUTION FOR UNANIMOUS CONSENT CONSIDERATION ON THURSDAY, MAY 12, 1994.

MR. PEMBLE, SHARON TIMKO AND BOARD DISCUSSION CONCERNING PROPOSED SITE VISITS TO ANGELL BROTHERS AND HOWARD CANYON QUARRIES. CHAIR STEIN AND VICE-CHAIR COLLIER EXPRESSED INTEREST IN VISITING SITES.

There being no further business, the meeting was adjourned at 2:29 p.m.

**OFFICE OF THE BOARD CLERK
for MULTNOMAH COUNTY, OREGON**


Deborah L. Bogstad

**Wednesday, May 11, 1994 - 1:30 PM
Multnomah County Courthouse, Room 602**

BUDGET HEARING

Chair Beverly Stein convened the meeting at 1:36 p.m., with Vice-Chair Tanya Collier, Commissioners Sharron Kelley, Gary Hansen and Dan Saltzman present.

BH-5 PUBLIC HEARING on the 1994-95 AGING SERVICES DIVISION and JUVENILE JUSTICE DIVISION Budgets. Testimony Limited to 3 Minutes Per Person.

KATHLEEN GOLDSTEIN TESTIMONY IN SUPPORT OF FUNDING FOR ASD PUBLIC GUARDIAN PROGRAM. SID LEZAK, BETSY AMES, MARK ANDERSON, HAL HART AND DAVID FUKS TESTIMONY IN SUPPORT OF FUNDING FOR JJD VORP PROGRAM.

There being no further business, the meeting was adjourned at 2:13 p.m.

Thursday, May 12, 1994 - 9:30 AM
Multnomah County Courthouse, Room 602

REGULAR MEETING

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

UPON MOTION OF COMMISSIONER SALTZMAN, SECONDED BY COMMISSIONER KELLEY, ITEM C-1 WAS UNANIMOUSLY MOVED FROM THE CONSENT CALENDAR TO THE REGULAR AGENDA.

CONSENT CALENDAR

UPON MOTION OF COMMISSIONER HANSEN, SECONDED BY COMMISSIONER KELLEY, THE CONSENT CALENDAR (ITEMS C-2 THROUGH C-6) WAS UNANIMOUSLY APPROVED.

DEPARTMENT OF HEALTH

- C-2 *Ratification of Amendment No. 6 to Intergovernmental Agreement Contract 200724 Between Oregon Health Division and Multnomah County, Reflecting Increased Revenue for Various County Health Department Programs, for the Period July 1, 1993 through June 30, 1994*
- C-3 *Ratification of Intergovernmental Agreement Contract 200015 Between Oregon Health Division and Multnomah County, Providing Funds for Various County Health Department Programs, for the Period July 1, 1994 through June 30, 1995*

DEPARTMENT OF ENVIRONMENTAL SERVICES

- C-4 *ORDER in the Matter of the Execution of Deed D941003 Upon Complete Performance of a Contract to Gregory Grenon*

ORDER 94-85.

- C-5 *ORDER in the Matter of the Execution of Deed D941007 Upon Complete Performance of a Contract to Jeffrey Paul Fish*

ORDER 94-86.

AGING SERVICES DIVISION

- C-6 *Ratification of Amendment No. 1 to Intergovernmental Agreement Contract 103554 Between the City of Portland and Multnomah County, Increasing Funds to the City for the Operation of Aging Services, and Increasing Responsibilities of the Portland-Multnomah Commission on Aging, for the Period July 1, 1993 through June 30, 1994*

REGULAR AGENDA

NON-DEPARTMENTAL

- C-1 *In the Matter of the Appointments of Nancy Chase, Metro Parks; Jim Sjulín, Portland Parks; Les Wilkins, Gresham Parks; Valerie Lantz, Troutdale Parks; Katherine Burk, Board of County Commissioners; Sharon Timko, Board of County Commissioners; Jim Desmond, Trust for Public Land and Mike Houck, Urban Streams Council to the NEIGHBORHOOD GREENSPACES CONCEPT COMMITTEE*

COMMISSIONER HANSEN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF C-1. UPON MOTION OF COMMISSIONER SALTZMAN, SECONDED BY COMMISSIONER KELLEY, IT WAS UNANIMOUSLY APPROVED THAT RICHARD PAYNE, DEPARTMENT OF ENVIRONMENTAL SERVICES; AND WES RISHER, OFFICE OF NEIGHBORHOOD ASSOCIATIONS, BE INCLUDED IN THE LIST OF APPOINTMENTS TO THE NEIGHBORHOOD GREENSPACES CONCEPT COMMITTEE. APPOINTMENTS UNANIMOUSLY APPROVED, AS AMENDED.

SHERIFF'S OFFICE

- R-1 *PROCLAMATION in the Matter of Proclaiming May 9-15, 1994, as PEACE OFFICERS MEMORIAL WEEK in Multnomah County*
- R-2 *PROCLAMATION in the Matter of Proclaiming May 15, 1994, as PEACE OFFICERS MEMORIAL DAY in Multnomah County*

COMMISSIONER KELLEY MOVED AND COMMISSIONER SALTZMAN SECONDED, APPROVAL OF R-1 AND R-2. SHERIFF BOB SKIPPER READ PROCLAMATIONS. PROCLAMATIONS 94-87 AND 94-88 UNANIMOUSLY APPROVED.

COMMUNITY AND FAMILY SERVICES DIVISION

- R-3 *Ratification of Intergovernmental Agreement Contract 105054 Between Clackamas, Multnomah and Washington Counties, Providing the Basis for a Cooperative Working Relationship for the Purpose of Operating the New Regional Plan for Shared Acute Care Resources to Serve Patients in Psychiatric Crisis*

COMMISSIONER KELLEY MOVED AND COMMISSIONER SALTZMAN SECONDED, APPROVAL OF R-3. REX SURFACE EXPLANATION AND RESPONSE TO BOARD QUESTIONS. BOARD ACKNOWLEDGED STAFF EFFORTS. AGREEMENT UNANIMOUSLY APPROVED.

DEPARTMENT OF HEALTH

- R-4 *Ratification of Amendment No. 1 to Intergovernmental Agreement Contract 202114 Between Multnomah County and Portland Community College, Providing Clinical Learning Experiences for Portland Community College Medical Records Interns*

COMMISSIONER HANSEN MOVED AND COMMISSIONER

KELLEY SECONDED, APPROVAL OF R-4. BILLI ODEGAARD EXPLANATION. AGREEMENT APPROVED, WITH COMMISSIONERS KELLEY, COLLIER, HANSEN AND STEIN VOTING AYE, AND COMMISSIONER SALTZMAN ABSTAINING DUE TO HIS POSITION ON THE PCC BOARD OF DIRECTORS.

- R-5 *Request for Approval of a Notice of Intent to Apply for a \$1,470 Matching Grant from the Metropolitan Service District Funding Illegal Dumping Control and Clean-Up Activities to be Carried Out by the Vector Control Office of Environmental Health*

COMMISSIONER HANSEN MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF R-5. PETER DeCHANT EXPLANATION. NOTICE OF INTENT UNANIMOUSLY APPROVED.

AGING SERVICES DIVISION

- R-6 *Request for Approval of a Notice of Intent to Apply for a \$11,000 Grant from the State of Oregon Senior and Disabled Services Division, for a Pilot Project Providing Treatment and Motivational Counseling for a Minimum of Ten Alcohol and Drug Dependent Elderly Nursing Home Residents at Risk for Recurring Hospitalization and Institutionalization without Treatment, for the Period July 1, 1994 through June 30, 1995*

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-6. KATHY GILLETTE EXPLANATION. NOTICE OF INTENT UNANIMOUSLY APPROVED.

UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, CONSIDERATION OF THE FOLLOWING ITEM WAS UNANIMOUSLY APPROVED.

- UC-1 *RESOLUTION in the Matter of Designating June 13, 1994 and August 30, 1994 as Meeting Days to Deliberate Land Use Planning Issues*

UPON MOTION OF COMMISSIONER SALTZMAN, SECONDED BY COMMISSIONER COLLIER, RESOLUTION 94-89 WAS UNANIMOUSLY APPROVED.

PUBLIC COMMENT

- R-7 *Opportunity for Public Comment on Non-Agenda Matters. Testimony Limited to Three Minutes Per Person.*

ROBERT BUTLER TESTIMONY CONCERNING NEED FOR TAX REFORM ON SMALL BUSINESSES. COMMISSIONER SALTZMAN ADVISED HE WILL LOOK INTO THE BUSINESS INCOME TAX ISSUE.

There being no further business, the meeting was adjourned at 9:55 a.m.

OFFICE OF THE BOARD CLERK
for MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad
Deborah L. Bogstad

Thursday, May 12, 1994 - 10:00 AM
(or Immediately Following Regular Meeting)
Multnomah County Courthouse, Room 602

BUDGET WORK SESSION

WS-5 Board and Staff Discussion and Review of the 1994-95 COMMUNITY AND FAMILY SERVICES DIVISION Budget.

LOLENZO POE, SUSAN CLARK, KATHY TINKLE, NORMA JAEGER AND BILL THOMAS PRESENTATIONS AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION. STAFF TO RESPOND TO FOLLOW UP INFORMATION REQUESTS.

FOLLOWING BOARD DISCUSSION, DAVE WARREN DIRECTED TO COORDINATE SCHEDULE FOR BOARD WORK SESSIONS UPON STAFF COMPLETION OF FOLLOW UP INFORMATION REQUESTS. 8:30 AM, FRIDAY MAY 13, 1993 CFS WORK SESSION CANCELLED.

Thursday, May 12, 1994 - 11:15 AM
Multnomah County Courthouse, Room 602

EXECUTIVE SESSION

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

EXECUTIVE SESSION HELD.

Friday, May 13, 1994 - 8:30 AM
Multnomah County Courthouse, Room 602

BUDGET WORK SESSION

WS-6 Continued Board and Staff Discussion and Review of the 1994-95 COMMUNITY AND FAMILY SERVICES DIVISION Budget.

CANCELLED.

Friday, May 13, 1994 - 9:30 AM
Multnomah County Courthouse, Room 602

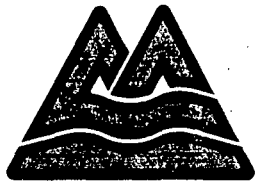
BUDGET HEARING

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

BH-6 PUBLIC HEARING on the 1994-95 DISTRICT ATTORNEY'S OFFICE and MULTNOMAH COUNTY SHERIFF'S OFFICE Budgets. Testimony Limited to 3 Minutes Per Person.

AT THE REQUEST OF MAYOR THALHOFER, CHAIR STEIN ALLOWED ELECTED OFFICIALS UP TO 10 MINUTES FOR TESTIMONY. PAUL THALHOFER, ROGER VONDERHARR, MEL HEDGPETH, DANIEL BALL, DICK STAGG, JOHN HARRINGTON, MICHAEL REESE, CAMERON VAUGHAN-TYLER, RUSSELL SPENCER, WAYNE McDONNELL, JOSEPH SHAFFER, DAVID RIPMA, KAREN LARSEN, SHIRLEY LARSON, JEAN FEARS, NANCY JONES-WRIGHT, JIM RODGERS, SUE GATES, COREY RIFE, MATT LARSON, MONIQUE BARNHART, FRED HOLEVAS, MINDY FUGATE, MAURA WHITE, CASSANDRA CURRY, LARRY ROBERTS, ARDEN BALLOU, KAREN ELLIS AND SUSAN FRANKS TESTIMONY IN OPPOSITION TO CHAIR'S MCSO BUDGET PROPOSAL. BALTAZAR ORTIZ AND HAROLD AMIDON TESTIMONY IN SUPPORT OF CHAIR'S MCSO BUDGET PROPOSAL. ROSANNE LEE TESTIMONY IN SUPPORT OF FUNDING FOR NEIGHBORHOOD DA PROGRAM.

There being no further business, the meeting was adjourned at 11:31 p.m.



MULTNOMAH COUNTY OREGON

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

BOARD OF COUNTY COMMISSIONERS
BEVERLY STEIN • CHAIR • 248-3308
DAN SALTZMAN • DISTRICT 1 • 248-5220
GARY HANSEN • DISTRICT 2 • 248-5219
TANYA COLLIER • DISTRICT 3 • 248-5217
SHARRON KELLEY • DISTRICT 4 • 248-5213
CLERK'S OFFICE • 248-3277 • 248-5222

AGENDA

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

MAY 9, 1994 - MAY 13, 1994

Monday, May 9, 1994 - 10:00 AM - ASD Budget Work Session	Page 2
Monday, May 9, 1994 - 11:30 AM - ASD Budget Hearing	Page 2
Monday, May 9, 1994 - 1:30 PM - JJD Budget Work Session	Page 2
Monday, May 9, 1994 - 3:00 PM - JJD Budget Hearing	Page 2
Monday, May 9, 1994 - 3:30 PM - DA Budget Work Session	Page 2
Monday, May 9, 1994 - 4:30 PM - DA Budget Hearing	Page 2
 Tuesday, May 10, 1994 - 9:00 AM - MCSO Budget Work Session	Page 3
Tuesday, May 10, 1994 - 11:30 AM - MCSO Budget Hearing	Page 3
Tuesday, May 10, 1994 - 1:30 PM - Board Briefing	Page 3
Tuesday, May 10, 1994 - 2:00 PM - Planning Items	Page 3
 Wednesday, May 11, 1994 - 1:30 PM - ASD/JJD Budget Hearing	Page 4
 Thursday, May 12, 1994 - 9:30 AM - Regular Meeting	Page 4
Thursday, May 12, 1994 - 10:00 AM - CFS Budget Work Session	Page 6
Thursday, May 12, 1994 - 11:15 AM - Executive Session	Page 6
 Friday, May 13, 1994 - 8:30 AM - CFS Budget Work Session	Page 6
Friday, May 13, 1994 - 9:30 AM - DA/MCSO Budget Hearing	Page 7

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

Thursday, 6:00 PM, Channel 30 - East County only

Friday, 10:00 PM, Channel 30

Saturday 12:30 PM, Channel 30

Sunday, 1:00 PM, Channel 30

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.

Monday, May 9, 1994 - 10:00 AM
Multnomah County Courthouse, Room 602

BUDGET WORK SESSION

WS-1 Citizen Budget Advisory Committee Recommendations, Board and Staff
Discussion and Review of the 1994-95 AGING SERVICES DIVISION Budget.

Monday, May 9, 1994 - 11:30 AM
Multnomah County Courthouse, Room 602

BUDGET HEARING

BH-1 PUBLIC HEARING on the 1994-95 AGING SERVICES DIVISION Budget.
Testimony Limited to 3 Minutes Per Person.

Monday, May 9, 1994 - 1:30 PM
Multnomah County Courthouse, Room 602

BUDGET WORK SESSION

WS-2 Citizen Budget Advisory Committee Recommendations, Board and Staff
Discussion and Review of the 1994-95 JUVENILE JUSTICE DIVISION
Budget.

Monday, May 9, 1994 - 3:00 PM
Multnomah County Courthouse, Room 602

BUDGET HEARING

BH-2 PUBLIC HEARING on the 1994-95 JUVENILE JUSTICE DIVISION Budget.
Testimony Limited to 3 Minutes Per Person.

Monday, May 9, 1994 - 3:30 PM
Multnomah County Courthouse, Room 602

BUDGET WORK SESSION

WS-3 Citizen Budget Advisory Committee Recommendations, Board and Staff
Discussion and Review of the 1994-95 DISTRICT ATTORNEY'S OFFICE
Budget.

Monday, May 9, 1994 - 4:30 PM
Multnomah County Courthouse, Room 602

BUDGET HEARING

BH-3 ***PUBLIC HEARING on the 1994-95 DISTRICT ATTORNEY'S OFFICE Budget. Testimony Limited to 3 Minutes Per Person.***

*Tuesday, May 10, 1994 - 9:00 AM
Multnomah County Courthouse, Room 602*

BUDGET WORK SESSION

WS-4 ***Citizen Budget Advisory Committee Recommendations, Board and Staff Discussion and Review of the 1994-95 MULTNOMAH COUNTY SHERIFF'S OFFICE Budget.***

*Tuesday, May 10, 1994 - 11:30 AM
Multnomah County Courthouse, Room 602*

BUDGET HEARING

BH-4 ***PUBLIC HEARING on the 1994-95 MULTNOMAH COUNTY SHERIFF'S OFFICE Budget. Testimony Limited to 3 Minutes Per Person.***

*Tuesday, May 10, 1994 - 1:30 PM
Multnomah County Courthouse, Room 602*

BOARD BRIEFING

B-1 ***Report on the Oregon Economic Development Draft Regional Strategies Application for Multnomah and Washington Counties Presented by Regional Board Co-Chairs Patricia Scruggs and Jack Orchard.***

*Tuesday, May 10, 1994 - 2:00 PM
Multnomah County Courthouse, Room 602*

PLANNING ITEMS

P-1 **CU 4-94/**
HV 1-94 ***Review the April 11, 1994 Hearings Officer Decision DENYING Conditional Use Request for a Single Family Residence Not Related to Forest Management and DENYING Request for a Major Side Yard Setback Variance, for Property Located at 20021 NW MORGAN ROAD, PORTLAND.***

P-2 **PRE 12-93** ***Review the April 18, 1994 Hearings Officer Decision, REVERSING Administrative Decision, and DENYING Entire Application for a Single Family Residence in Conjunction with Farm Use in the EFU Zone, for Property Located at 100 NE LUCAS ROAD, PORTLAND.***

- P-3 FD 1-94 PUBLIC HEARING, DE NOVO, 20 MINUTES PER SIDE, in the Matter of an Appeal of the March 1, 1994 Hearings Officer Decision DENYING a Request for a 4.5 Foot Height Variance to the Finished Floor Elevation for a Proposed Single Family Residence on Property within the Flood Hazard District, for Property Located at 11930 SE LIEBE STREET, PORTLAND.
- P-4 FD 3-94 PUBLIC HEARING, DE NOVO, 20 MINUTES PER SIDE, in the Matter of an Appeal of the March 1, 1994 Hearings Officer Decision DENYING a Request for a 4.5 Foot Height Variance to the Finished Floor Elevation for a Proposed Single Family Residence on Property within the Flood Hazard District, for Property Located at 11950 SE LIEBE STREET, PORTLAND.
- P-5 RESOLUTION in the Matter of Designating June 13, 1994, August 16, 1994 and August 30, 1994 as Meeting Days to Deliberate Land Use Planning Issues
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Wednesday, May 11, 1994 - 1:30 PM
Multnomah County Courthouse, Room 602

BUDGET HEARING

- BH-5 PUBLIC HEARING on the 1994-95 AGING SERVICES DIVISION and JUVENILE JUSTICE DIVISION Budgets. Testimony Limited to 3 Minutes Per Person.
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Thursday, May 12, 1994 - 9:30 AM
Multnomah County Courthouse, Room 602

REGULAR MEETING

CONSENT CALENDAR

NON-DEPARTMENTAL

- C-1 In the Matter of the Appointments of Nancy Chase, Metro Parks; Jim Sjulín, Portland Parks; Les Wilkins, Gresham Parks; Valerie Lantz, Troutdale Parks; Katherine Burk, Board of County Commissioners; Sharon Timko, Board of County Commissioners; Jim Desmond, Trust for Public Land and Mike Houck, Urban Streams Council to the NEIGHBORHOOD GREENSPACES CONCEPT COMMITTEE

DEPARTMENT OF HEALTH

- C-2 Ratification of Amendment No. 6 to Intergovernmental Agreement Contract 200724 Between Oregon Health Division and Multnomah County, Reflecting

Increased Revenue for Various County Health Department Programs, for the Period July 1, 1993 through June 30, 1994

- C-3 *Ratification of Intergovernmental Agreement Contract 200015 Between Oregon Health Division and Multnomah County, Providing Funds for Various County Health Department Programs, for the Period July 1, 1994 through June 30, 1995*

DEPARTMENT OF ENVIRONMENTAL SERVICES

- C-4 *ORDER in the Matter of the Execution of Deed D941003 Upon Complete Performance of a Contract to Gregory Grenon*
- C-5 *ORDER in the Matter of the Execution of Deed D941007 Upon Complete Performance of a Contract to Jeffrey Paul Fish*

AGING SERVICES DIVISION

- C-6 *Ratification of Amendment No. 1 to Intergovernmental Agreement Contract 103554 Between the City of Portland and Multnomah County, Increasing Funds to the City for the Operation of Aging Services, and Increasing Responsibilities of the Portland-Multnomah Commission on Aging, for the Period July 1, 1993 through June 30, 1994*

REGULAR AGENDA

SHERIFF'S OFFICE

- R-1 *PROCLAMATION in the Matter of Proclaiming May 9-15, 1994, as PEACE OFFICERS MEMORIAL WEEK in Multnomah County*
- R-2 *PROCLAMATION in the Matter of Proclaiming May 15, 1994, as PEACE OFFICERS MEMORIAL DAY in Multnomah County*

COMMUNITY AND FAMILY SERVICES DIVISION

- R-3 *Ratification of Intergovernmental Agreement Contract 105054 Between Clackamas, Multnomah and Washington Counties, Providing the Basis for a Cooperative Working Relationship for the Purpose of Operating the New Regional Plan for Shared Acute Care Resources to Serve Patients in Psychiatric Crisis*

DEPARTMENT OF HEALTH

- R-4 *Ratification of Amendment No. 1 to Intergovernmental Agreement Contract 202114 Between Multnomah County and Portland Community College, Providing Clinical Learning Experiences for Portland Community College Medical Records Interns*

- R-5 *Request for Approval of a Notice of Intent to Apply for a \$1,470 Matching Grant from the Metropolitan Service District Funding Illegal Dumping Control and Clean-Up Activities to be Carried Out by the Vector Control Office of Environmental Health*

AGING SERVICES DIVISION

- R-6 *Request for Approval of a Notice of Intent to Apply for a \$11,000 Grant from the State of Oregon Senior and Disabled Services Division, for a Pilot Project Providing Treatment and Motivational Counseling for a Minimum of Ten Alcohol and Drug Dependent Elderly Nursing Home Residents at Risk for Recurring Hospitalization and Institutionalization without Treatment, for the Period July 1, 1994 through June 30, 1995*

PUBLIC COMMENT

- R-7 *Opportunity for Public Comment on Non-Agenda Matters. Testimony Limited to Three Minutes Per Person.*
-

*Thursday, May 12, 1994 - 10:00 AM
(or Immediately Following Regular Meeting)
Multnomah County Courthouse, Room 602*

BUDGET WORK SESSION

- WS-5 *Board and Staff Discussion and Review of the 1994-95 COMMUNITY AND FAMILY SERVICES DIVISION Budget.*
-

*Thursday, May 12, 1994 - 11:15 AM
Multnomah County Courthouse, Room 602*

EXECUTIVE SESSION

- E-1 *The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660 (1)(h) for Consultation with Legal Counsel Concerning Current Litigation (11:15 AM TIME CERTAIN, 30 MINUTES REQUESTED)*
-

*Friday, May 13, 1994 - 8:30 AM
Multnomah County Courthouse, Room 602*

BUDGET WORK SESSION

- WS-6 *Continued Board and Staff Discussion and Review of the 1994-95 COMMUNITY AND FAMILY SERVICES DIVISION Budget.*

*Friday, May 13, 1994 - 9:30 AM
Multnomah County Courthouse, Room 602*

BUDGET HEARING

***BH-6 PUBLIC HEARING on the 1994-95 DISTRICT ATTORNEY'S OFFICE and
MULTNOMAH COUNTY SHERIFF'S OFFICE Budgets. Testimony Limited
to 3 Minutes Per Person.***

MULTNOMAH COUNTY BUDGET MEETING SCHEDULE

(May 5, 1994 Revision)

<i>Community & Family Services Division (CFS) Work Session</i>	<i>5/3/94</i>	<i>9:00-11:30 am - Board Room +</i>
<i><u>CFS Public Testimony</u></i>	<i><u>5/3/94</u></i>	<i><u>11:30-12:00 pm - Board Room</u></i>
<i>Health Department (HD) Work Session</i>	<i>5/4/94</i>	<i>9:00-11:30 am - Board Room</i>
<i><u>HD Public Testimony</u></i>	<i><u>5/4/94</u></i>	<i><u>11:30-12:00 pm - Board Room</u></i>
<i><u>*CFS/HD Public Testimony</u></i>	<i><u>5/4/94</u></i>	<i><u>1:30-4:30 pm - Board Room</u></i>
<i><u>Budget 101 Orientation</u></i>	<i><u>5/4/94</u></i>	<i><u>6:00-7:00 pm - Central Library</u></i>
<i><u>Public Hearing/Budget</u></i>	<i><u>5/4/94</u></i>	<i><u>7:00-8:00 pm - Central Library</u></i>
		<i><u>Auditorium, 801 SW 10th, Portland</u></i>
<i>Aging Services Division (ASD) Work Session</i>	<i>5/9/94</i>	<i>10:00-11:30 am - Board Room</i>
<i><u>ASD Public Testimony</u></i>	<i><u>5/9/95</u></i>	<i><u>11:30-12:00 pm - Board Room</u></i>
<i>Juvenile Justice Division (JJD) Work Session</i>	<i>5/9/94</i>	<i>1:30-3:00 pm - Board Room</i>
<i><u>JJD Public Testimony</u></i>	<i><u>5/9/94</u></i>	<i><u>3:00-3:30 pm - Board Room</u></i>
<i>District Attorney (DA) Work Session</i>	<i>5/9/94</i>	<i>3:30-4:30 pm - Board Room</i>
<i><u>DA Public Testimony</u></i>	<i><u>5/9/94</u></i>	<i><u>4:30-5:00 pm - Board Room</u></i>
<i>Multnomah County Sheriff's Office (MCSO) Work Session</i>	<i>5/10/94</i>	<i>9:00-11:30 am - Board Room</i>
<i><u>MCSO Public Testimony</u></i>	<i><u>5/10/94</u></i>	<i><u>11:30-12:00 pm - Board Room</u></i>
<i><u>*ASD/JJD Public Testimony</u></i>	<i><u>5/11/94</u></i>	<i><u>1:30-3:00 pm - Board Room</u></i>
<i>Community & Family Services Division (CFS) Work Session</i>	<i>5/12/94</i>	<i>10:00-11:00 am - Board Room</i>
<i>Community & Family Services Division (CFS) Work Session</i>	<i>5/13/94</i>	<i>8:30-9:30 am - Board Room</i>
<i><u>*DA/MCSO Public Testimony</u></i>	<i><u>5/13/94</u></i>	<i><u>9:30-12:00 pm - Board Room</u></i>
<i>Department of Environmental Services (DES) Work Session</i>	<i>5/23/94</i>	<i>9:00-11:30 am - Board Room</i>
<i><u>DES Public Testimony</u></i>	<i><u>5/23/94</u></i>	<i><u>11:30-12:00 pm - Board Room</u></i>

MULTNOMAH COUNTY BUDGET MEETING SCHEDULE - continued
(May 5, 1994 Revision)

Department of Community		
Corrections (DCC) Work Session	5/23/94	1:30-4:30 pm - Board Room
<u>DCC Public Testimony</u>	<u>5/23/94</u>	<u>4:30-5:00 pm - Board Room</u>
 DES & Management Support		
Services (MSS) Work Session	5/24/94	9:00-11:30 am - Board Room
<u>DES/MSS Public Testimony</u>	<u>5/24/94</u>	<u>11:30-12:00 pm - Board Room</u>
 Department of Library		
Services (DLS) Work Session	5/31/94	9:00-11:30 am - Board Room
 <u>DLS Public Testimony</u>	<u>5/31/94</u>	<u>11:30-12:00 pm - Board Room</u>
<u>*DLS/DES/DCC Public Testimony</u>	<u>5/31/94</u>	<u>1:30-4:30 pm - Board Room</u>
 Independent Agencies & Other	6/1/94	9:00-11:30 am - Board Room
Government Support Work Session		
<u>Ind/Other Public Testimony</u>	<u>6/1/94</u>	<u>11:30-12:00 pm - Board Room</u>
 <u>Public Hearing/Budget</u>	<u>6/1/94</u>	<u>7:00-9:00 pm - Council Chambers, Gresham City Hall, 1333 NW Eastman Parkway, Gresham</u>
 General Work Session	6/7/94	9:30-12:00 pm - Board Room
<u>Public Hearing/Budget</u>	<u>6/7/94</u>	<u>7:00-9:00 pm - Board Room</u>
 General Work Session	6/8/94	9:30-12:00 pm - Board Room
 General Work Session	6/14/94	9:30-12:00 pm - Board Room
General Work Session	6/15/94	9:30-12:00 pm - Board Room
 <u>Public Hearing/Adopt Budget</u>	<u>6/16/94</u>	<u>9:30-12:00 pm - Board Room</u>

(* Denotes Additional Public Testimony As Needed)

+ Board Room Address:

Multnomah County Courthouse, Room 602
1021 SW Fourth Avenue, Portland, Oregon 97204

Contact the Office of the Board Clerk, 248-3277 or 248-5222
for Further Information

Meeting Date: MAY 10 1994

Agenda No.: B-1

(Above Space for Board Clerk's Use *ONLY*)

AGENDA PLACEMENT FORM

SUBJECT: Oregon Economic Development: Regional Strategies Program

BOARD BRIEFING: Date Requested: May 10, 1994
Amount of Time Needed: 30 minutes

*130-200 Time
CERTAIN*

REGULAR MEETING: Date Requested: _____
Amount of Time Needed: _____

DEPARTMENT: Chair's Office

DIVISION: _____

CONTACT: Sharon Timko

TELEPHONE: 248-3960

BLDG/ROOM: 106/1410

PERSON(S) MAKING PRESENTATION: Patricia Scruggs and Jack Orchard

ACTION REQUESTED:

☒ INFORMATIONAL ONLY ☐ POLICY DIRECTION ☐ APPROVAL ☐ OTHER

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

The co-chairs of the Regional Board, Patricia Scruggs and Jack Orchard, will present the draft Regional Strategy report. Prior to submitting the Regional Strategy to the State, the Multnomah County Board of Commissioners must adopt the strategy. The strategy must be submitted to the Oregon Economic Development Department by June 1, 1994. A resolution adopting the Regional Strategy will be presented to the Board at the May 26, 1994 Board meeting. This Board briefing will provide an opportunity to review and comment on the draft Regional Strategy.

SIGNATURES REQUIRED:

ELECTED OFFICIAL: Beverly Stein

OR

DEPARTMENT MANAGER: _____

MULTNOMAH COUNTY
OREGON
1994 MAY -3 AM 10:34
BOARD OF
COUNTY COMMISSIONERS

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

Any Questions? Call the Office of the Board Clerk at 248-3277 or 248-5222.

DRAFT
4/29/94

Regional Strategies Application

Multnomah and Washington Counties

(Draft 4/28/94)

**Regional Strategies Application
Multnomah and Washington Counties**

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Regional Strategies Application Multnomah and Washington Counties (Draft 4/28/94)

I. Process Overview and Future Action Plan

In February 1994, a Board of 10 private citizens from Multnomah and Washington Counties was selected by the Metro Region to participate in the Regional Strategies Program as defined by the State of Oregon. This Board conducted the following meetings to facilitate the process of arriving at the regional strategy included in this application:

Date	Time	Meeting Purpose
2/4/94	3:00pm - 5:00pm	Board Orientation, State Vision, Legal Issues, Workplan Development.
2/18/94	12:00pm - 5:00pm	Metro Region Overview, Review of Existing Regional Visions/Activities, Regional Vision & Goals Development, Industry Selection Criteria Development, Selection of Industries to Make Presentations to Board.
2/25/94	2:00pm - 5:00pm	Presentations by Biotechnology and Software Industry Associations and interested parties.
3/4/94	2:00pm - 5:00pm	Presentations by High Technology, Metals, Agriculture, and Aerospace Industries and interested parties.
3/10/94	2:00pm - 5:00pm	Presentations by Environmental Services, Film & Video, and Tourism Industry Associations and interested parties.
3/18/94	2:00pm - 5:00pm	Overview of OEDD Benchmarking/Performance Measurement Information, Board Selection of Biotechnology, High Technology and Metals Industries, Process Discussion to Develop Initial Strategies and Action Plans with Partners.
3/28/94	6:00pm - 9:00pm	Biotechnology Strategy Development with Oregon Biotechnology Association, Industry Firms, Educational Partners and Interested Parties
3/30/94	2:00pm - 5:00pm	High Technology Strategy Development with American Electronic Association, Industry Firms, Educational Partners and Interested Parties
4/4/94	6:00pm - 9:00pm	Metals Industry Strategy Development with Metals Industry Associations, Industry Firms, Educational Partners and Interested Parties
4/8/94	2:00pm - 5:00pm	Board Review of Strategy Development Process, Refinement of Strategic Direction and Funding Allocations for Selected Industries.
4/26/94	2:00pm - 5:00pm	Board Review of Draft Strategy Document, Further Refinement of Strategic Direction and Funding Allocations for Selected Industries.

The following Regional Strategies Application is the result of these activities to date. Meeting minutes and source documentation for statistics used in this application reside at the Portland Development Commission. Public review and adoption by the county commissioners took place during May. It is important to note that the timing of this process has been compressed during this biennium and has resulted in significant time constraints on all parties involved in the development of strategies and action plans identified in the following document.

In order to facilitate the mandated June 1 submission to the State of Oregon, broad based strategies and action plans have been identified and estimated funding levels were allocated. These funding levels are subject to change as projects within the identified action plans are finalized. Throughout this summer, sub-committees will work with partners from each industry to develop final funding allocations and selection of projects targeted for October, when the Strategic Plan is approved.

Regional Strategies Application
Multnomah and Washington Counties
(Draft 4/28/94)

II. Executive Summary

Three key industries were selected by the Metro Regional Strategies Board to participate in the Regional Strategies Program as defined by the State of Oregon. Selected industries are Biotechnology, High Technology and Metals. A Board of 10 private citizens from Multnomah and Washington Counties developed a vision statement and identified program goals and industry selection criteria. The Metro Region's vision is: *To Promote A Diverse and Sustainable Economy*. Strategies for industry development over a six year planning horizon were identified and two year action plans were developed in cooperation with representatives of private industry, educational institutions, industry associations, local government and economic development institutions.

III. Strategy Context

A. Regional Organization

The Metro Region strategy was developed and is being submitted to the State of Oregon as a required exercise of the Regional Strategies Program. Our planning process has been led by a Board comprised of 10 private citizens.

Five Citizens were appointed by Multnomah County:

Name	Telephone	Title/Position	Company
Jim Harper	241-7506	Human Resource Director	Wacker Siltronic
Eva Parsons	274-6175	Director of People Development	Cellular One
Patricia Scruggs	246-6148	Consultant	
Darrell Simms	823-7203	Bureau of Environmental Services	City of Portland
Paul Warr-King	762-3018	Vice President	Key Bank

Five Citizens were appointed by Washington County:

Name	Telephone	Title/Position	Company
Betty Atteberry	645-4410	Executive Director	Sunset Corridor Assn.
Lyle Chadwick	643-5953	Certified Public Accountant	
Joyce Frank	648-2757	Branch Manager	Kelly Temporary Services
Jack Orchard	228-2525	Attorney	Ball, Janik & Novak
Morgan Pope	628-3562	Consultant	MDP Associates

Assisting the Board were individuals from various local governments, economic development agencies and industry associations. These participants have been identified in Appendix A. Considerable time and energy has been invested in making the Metro Regional strategy a dynamic and useful tool for regional economic development. The Board thanks each participant for their valuable contributions to the regional community.

B. Link to the State Strategic Plan and Benchmarks

The Metro Region supports the State's vision, Oregon Benchmarks, by targeting the following:

- A. Value-Added Products, Global Business:** Economic opportunities are critical for the Metro Region's unemployed, under employed and underrepresented workers. Value added products in biotechnology, high technology and metals production/fabrication offer regional economic growth and development opportunities. Education and training is necessary for regional workforce participants to achieve international standards and achieve global competitiveness in all industry sectors.
- B. Diverse and Productive Industry:** The Metro Region will concentrate on boosting total payroll, per worker payroll, per worker value-added manufacturing, and percentage employment in value-added manufacturing in selected industries.
- C. Build a Superior, World Class Workforce:** Workforce development activities will receive particular emphasis in the form of education and training in addition to awareness programs for workforce opportunities in identified industries.
- D. Public Infrastructure Investment:** Real per capita outlays for facilities.

C. Integration of Other Planning Efforts

A thorough review of all state and regional planning efforts was conducted by the Board and staff in order to assure consistency of strategic direction and avoid duplication of efforts. This review included: Oregon Shines, Oregon Benchmarks, Oregon Values & Beliefs, Portland Future Focus Strategic Plan, Prosperous Portland, Metro 2040, Washington County Economic Development, State and Regional Workforce Quality Committees, and other local government planning efforts.

IV. Regional Economic Assessment

A. Analysis of the Key Industries

The Metro Region has the most diverse economy in the state. All Oregon State key industries participate to some extent in the region's economy:

- | | | |
|-------------------------|------------------|--------------------|
| •Aerospace | •Fisheries | •Plastics |
| •Agriculture | •Forest Products | •Producer Services |
| •Biotechnology | •High Technology | •Software |
| •Environmental Services | •Metals | •Tourism |
| •Film & Video | | |

Employment statistics have been assembled by the State of Oregon Employment Department for 1992 covered employment in the Metro Region :

Metro Region Industry Employment

1.3%	Agriculture
4.0%	Construction
7.4%	Finance, Insurance, Real Estate
13.2%	Government
15.9%	Manufacturing
26.5%	Services
25.5%	Trade
6.3%	Transportation

The services industry group accounts for the most jobs in the Metro Region:

Metro Region Employment in Service Industries

24.0%	Business Services
4.6%	Education Services
26.3%	Health Services
8.1%	Hotel/Amusements/Museums
9.0%	Personal/Repair
12.7%	Professional/Legal
8.4%	Social Services
6.9%	Other Services

Employment in the trade sector is dominated by restaurants/bars and wholesaling:

Metro Region Employment in Trade Industries

7.1%	Auto Sales and Service
4.4%	Apparel and Accessories
24.1%	Eating/Drinking
9.2%	Food Stores
8.5%	General Merchandise
13.6%	Miscellaneous & Other Retail
33.0%	Wholesale

The manufacturing sector is the third largest employment group, accounting for approximately 16% of total employment:

Metro Region Manufacturing Employment

8.5%	Food Products
23.8%	Instruments/Electronics
10.5%	Machinery
14.0%	Metals
9.6%	Printing/Publishing
10.7%	Transportation Equipment
11.3%	Other Durables
11.7%	Other Non-Durables

Primary industries employment is different for Multnomah and Washington Counties. Of the top ten industries in Multnomah County, five are service industries and only one is in manufacturing. In Washington County, three of the top ten industries are service, while three are in manufacturing. Multnomah County has a much higher concentration of employment in finance, insurance, real estate, transportation, communication and utilities industries. Additionally, Multnomah County has almost twice the concentration of government employment than Washington County given the presence of several federal governmental agencies.

Washington County has a higher concentration of employment in "goods producing" industries - agriculture, construction, and manufacturing in addition to employment in wholesale firms. Manufacturing related employment accounts for over one-fourth of total Washington County employment as compared to 13% for Multnomah County and 17% for the state. Of particular importance to Washington County is high-technology manufacturing employment. In terms of recent industry growth, Washington County has surpassed both Multnomah County and the state in every sector of the economy.

The Metro Region's employment base has a high proportion of white collar jobs - executive, administrative, managerial, professional and specialty occupations, technicians, sales and administrative support. When compared to state employment statistics, the region is under-represented in its proportion of what has traditionally been considered blue collar employment - operators/fabricators, transportation/material movers, laborers, precision product, craftsman and repair.

Given the region's industrial mix, generally larger sized firms, relatively higher cost of living and concentration of white collar employment, a higher proportion of the work force is employed in more skilled, higher paying industries than the state as a whole:

Metro Region Average Annual Payroll by Business Sector

Business Sector	Average Annual Payroll	Average as a % of Oregon's
Total (all ownership & industry types)	\$26,762	114%
Wholesale Trade	\$33,892	111%
Manufacturing	\$33,595	113%
Transp./Comm./Utilities	\$32,417	107%
Construction	\$31,619	113%
Finance/Insurance/Real Estate	\$30,037	111%
Government	\$29,934	112%
Services	\$23,732	114%
Agriculture	\$20,353	142%
Retail Sales	\$15,200	109%

Within the region, Washington County has higher average salaries in manufacturing, wholesale & retail trade and the service sector. Multnomah County has higher average payrolls in finance, insurance, real estate, government, transportation, communication, utilities and construction.

B. Inventory of Resources

Multnomah and Washington Counties have many resources as a major metropolitan area including:

- **Growing Population and Labor Force**
 - Metro Region population: 963,500 (15% growth by the year 2000)
 - Metro Region civilian labor force: 525,700 (20% growth by the year 2000)
 - The rate of unemployment is lower than in most of the state
- **Diversified and Stable Economy**
 - Broad manufacturing and service sector base
 - Excellent location for worldwide manufacturing
 - The largest economic region in the state
- **Superior Transportation Connections**
 - Integrated highway, rail and marine facilities
 - Terminus of three transcontinental railroads
 - World class seaport - 110 miles inland from Pacific Ocean
 - Expanding national and international air service

B. Inventory of Resources (Continued)

- **Regional Financial and Service Center**
 - Portland metro area is the nation's 27th largest metropolitan area
 - The service sector is the fastest growing segment
 - Developed urban area 30 miles in diameter
- **Educated and Productive Workforce**
 - Region's workforce is the largest in the state
 - There are significant training institutions in the region
 - The workforce is the most diverse in Oregon
 - Education levels are higher than the state average
 - Comprehensive training programs
- **Abundant Energy and Water Resources**
 - Diversified supply/stable rates
 - Rates are among the lowest in the nation
 - Resources adequate to meet long-term future needs
 - Quality service providers
- **Excellent Living Environment**
 - Quality of education
 - Affordable living
 - Natural beauty
 - Cultural excellence
 - Superior quality of life

C. Identification of Resource Gaps and Opportunities

The Metro region also has resource gaps and opportunities:

- **Growing Population and Labor Force**
 - From 1980 to 1990, the population of Multnomah County grew 8.4% (adjusted for annexations) while Washington County grew 27%
 - The numbers and pockets of unemployed are the largest in the state
 - The supply of labor is growing faster than new jobs are being created
 - Unemployment and discouragement is greater in some minority groups than in the general population
 - Wages continue to decline
 - 85% of workers needed for the new technologies and sophisticated jobs are already working: limited number of **skilled** workers in unemployment pool
- **Educated and Productive Workforce**
 - Employers are concerned about the skill levels of new & existing workers
 - Training is not widely available for current entry level workers (SCANS report)
 - New workforce entrants have skill levels below what employers need and expect
 - Measure 5 impact on public education concerns employers expectations
 - The 27% drop-out rate for youth in North/Northeast Portland and high crime rate for the area demand a specific planned approach to stimulate economic development for the area.

C. Identification of Resource Gaps and Opportunities (Continued)

• Unsettled Tax Environment

- Current Oregon State tax structure viewed as not sustainable
- Employers concerned about future tax burden on business
- Impact of Measure 5 on infrastructure and education viewed negatively

• Disparate Economic Development

- Between 1980 and 1990, the region's per capita income increased by 49% while Portland's per capita income increased by only 27%
- In 1980, Portland's wages were 9%-22% higher than those of the region
By 1990, Portland's wages were 2% higher in manufacturing and 5% lower in the service sector. Higher paying jobs continue to locate outside the city
- In 1980, Portland's unemployment rate was 17% higher than the region's
By 1990, the gap had widened to 32%
- In 1980, Northeast Portland's unemployment rate was 29% higher than the region's. By 1990, the gap had increased to 113%
- The ethnic minority population in North/Northeast Portland is 42.3% as compared to 8% for the Portland/Vancouver metro area
- Unemployment rates are higher for ethnic minority groups:

Unemployment Rates in Metro Region

(Region Total: 5.4% March 1993)

	Multnomah County	Washington County
African Americans	12.7%	8.0%
Native Americans	12.2%	11.1%
Hispanics	7.7%	6.5%
Asians/Pacific Islanders	5.8%	3.7%

V. Industry Selection

A. Selection Rationale

The vision statement selected by Metro Region's Board is: *To Promote A Diverse and Sustainable Economy*. Components of this vision are as follows:

Jobs/Employment

- Equitable Distribution - Geographical/Socio-Economic
- Value Added
- Economically Self-Sufficient (Family Wage)
- Tied to Business Needs/Opportunities
- Attract/Expand/Maintain Jobs

Training/Retraining/Education

- Sustainable/Self Perpetuating
- Available to All People
- Improve K-Career, Community College & Higher Ed
- Impact Existing Residents
- Balance Between Availability & Jobs

Livability

- Environmental Quality Maintained
- Widespread Prosperity
- Support Social & Physical Infrastructure

Economy

- Diverse Based on Knowledge & Skills
- Global
- Attract/Expand/Maintain Business
- Investment
- Stable and Predictable Taxes & Regulatory Environment

Consistent with the region's vision, the Board developed the following list of long-term goals which also served as selection criteria for the Metro Region's three key industries:

- Goal #1 - Create and retain jobs that lead to economic self-sufficiency.
- Goal #2 - Continuously develop, educate and train workforce.
- Goal #3 - Link jobs to all region residents.
- Goal #4 - Build regional public and private wealth and economic capacity.
- Goal #5 - Positively affect low income communities.
- Goal #6 - Enhance quality of life.
- Goal #7 - Provide full-range of job opportunities.
- Goal #8 - Link business needs with educational system.
- Goal #9 - Create entrepreneurial opportunities.
- Goal #10 - Link private, educational, general governmental sectors to economic agenda.
- Goal #11 - Attract, expand, retain companies and jobs within key industries.
- Goal #12 - Equitable distribution of jobs (geographic and socio-economic).

All 13 of Oregon State's key industries were invited to make presentations to the Metro Regional Strategies Board. These presentations were to be made in person and were to address the previously stated selection criteria. The following nine industry groups responded by making presentations to the Board:

- Aerospace
- Agriculture
- Biotechnology
- Environmental Services
- Film & Video
- High Technology
- Metals
- Software
- Tourism

Independent evaluation of each of these industry groups led the Board to select **Biotechnology, High Technology and Metals** as the targeted industries for this strategy. This assessment was based upon a review of the Board's long-range goals and an evaluation by the Board of the opportunities each industry has to accomplish these stated goals.

The Metro Region has determined that the following economic components are critical to the success of all industries in the region:

- **Education and Training**
- **Business Infrastructure Development**
- **Marketing and Recruitment**
- **Management and Technical Assistance**

B. Barriers to Industry Development

Group discussions with industry businesses, industry associations and regional community representatives revealed the following barriers to industry development within the Metro Region:

- Availability of properly educated and skilled workers
- Improvement in labor force work behavior expectations
- Infrastructure needs: wet labs, new business incubators
- Accessibility of management and technical assistance
- Effective marketing and recruitment programs

C. Link to Regional Vision and Long-Term Goals

Linkage to the Metro Region's vision and long-term goals is accomplished by providing the means to overcome stated barriers to development in the biotechnology, high technology and metals industries. Job creation, workforce education, training and development, economic self-sufficiency, regional wealth and economic capacity, and other regional goals are linked directly to the vision of a diverse and sustainable economy.

From the Metro Regional Strategies Board's discussions with key industries, there are serious concerns regarding skill levels within the available workforce at all levels of employment from entry level to postgraduate scientists and technicians. Required entry level skills are much higher than they have ever been. The linkage between available workforce skills, job creation and economic development is clear. While specific needs are required by different key industry sectors, much of the required skills are similar across the region's selected key industries.

A key concept in the region's strategy for economic development is the need to focus on workforce education, training and development in all selected industries. While this is one of several strategic components, it is considered to be the critical success factor toward sustainable economic development for the region. A core concept is that change needs to occur in workforce education from K-12 through community colleges and four-year colleges and universities. This change has to be driven by the educators themselves and therefore, the education workforce needs to be developed in order to enact change in the preparation of the labor force.

Work-based learning experiences will be developed through partnerships between education and private industry to introduce a real, functional school-to-work component into the educational system. Work-based learning will tie directly to education reform in the state of Oregon by connecting with CAM (Certificate of Advanced Mastery) development. Standards will be developed and used by education and industry to define what it takes to be successful in school and in the world of work.

Initiatives in this area of workforce education, training and development tie directly to the \$335,000 in Workforce Quality Committee funds dedicated to school-to-work in the Metro Region (Region 2), strengthens the region in its efforts to receive a significant portion of the \$8 million which Oregon may receive from the School To Work Opportunities Act, and strengthens the proposed application to the Federal Government for \$5-800,000 in additional direct funding.

Additionally, the need for change will require the key industries to become more knowledgeable of the education process, the educational delivery systems, and how they can assist that process both in the schools and in the work place. Linking the key industries to schools, work-based learning, skills development and adult retraining are all components of education, training and workforce development embraced by the Metro Region Board for all three selected industries.

Additional linkage to the region's vision and goals is provided by infrastructure development, marketing and recruitment, and management/technical assistance in the biotechnology and high technology industry sectors. These initiatives are industry specific and will be addressed in the biotechnology and high technology industry strategies.

Infrastructure requirements for industry development include business incubators, laboratories and resource/development centers. During the early stages of commercialization, biotechnology incubators and other shared facilities can provide business expertise, access to expensive equipment, and networks of managerial and technical resources often otherwise unobtainable by small start-up companies. Infrastructure needed to support the high technology industry can also assist software development through accessibility to various hardware formats and operating system platforms in a high technology resource/development center.

Marketing and recruitment are components of the region's economic development plan for the biotechnology and high technology industry sectors. Recruitment of out-of-state firms by advancing the Metro Region's reputation as a biotechnology and high technology center strengthens the employment base, builds economic capacity and grows recognized clusters within these industry sectors which create additional growth opportunities.

Management and technical assistance requirements vary by industry sector. The environmental biotechnology industry segment needs assistance developing a contract procurement center. The high

technology industry needs funding for an industry benchmarking program and performance measurement system to evaluate competitiveness for long-term growth and development.

D. Industry, Public and Educational Partnerships

Biotechnology Industry Partnerships

- Oregon Biotechnology Association
- Oregon Biotechnology Foundation
- Oregon Environmental Technology Association
- Oregon Health Sciences University
- Oregon Graduate Institute
- Industry Partners (companies within industry)

High Technology Industry Partnerships

- American Electronics Association
- Lintner Center for Advanced Education
- Oregon Graduate Institute
- Oregon Center for Advanced Technology Education
- Software Association of Oregon
- Industry Partners (companies within industry)

Metals Industry Partnerships

- Oregon Metals Industry Council
- Oregon Precision Metal Fabricators Association
- Oregon Advanced Technology Consortium
- Industry Partners (companies within industry)

Educational Partnerships

- Mt. Hood Community College
- Mt. Hood Regional Consortium (Vocational/Technical Education)
- National School to Work Opportunities Act
- Oregon Business Council - Education Subcommittee
- Portland State University
- Portland Community College
- Portland Area Vocational Technical Education Consortium
- Region 2 Workforce Quality Committee

E. Analysis of the Foundation of Industry Resources

Biotechnology Industry Resources

- Industry is highly dependent on access to high-level research facilities and programs. Companies usually emerge as an outgrowth of scientific discoveries in academic research labs around the country.
 - Technology Transfer Opportunities:
 - Advanced Science & Technology Institute
 - Oregon Health Sciences University
 - Oregon Graduate Institute
 - Oregon Regional Primate Research Center
 - Good Samaritan Hospital's Dow Neurological Sciences Institute
 - Emanuel Hospital
 - Portland State University
 - Veteran's Administration Hospital
- Industry requires highly skilled and technically trained employees
 - Community College and specialized training of lab technicians
- Biotechnology Industry is in its infancy but substantial growth is expected
 - The world market for biotechnology derived products is expected to grow at an annual compound rate of 25%, from \$6 billion in 1992 to around \$60 billion by the year 2000.
- Emerging cluster of biotechnology companies in the region aids industry recognition as a center for future industry growth.
- Biotechnology applications are well suited for Oregon:
 - Forest products, agriculture, aquaculture, bioremediation, and environmental services are areas where existing Oregon industries can develop and utilize biotechnology applications. Applying biotechnology to established Oregon industries can provide those industries with a competitive edge in the market.

High Technology Industry Resources

- Industry requires highly skilled and technically trained employees
 - Education from K-12, community college, and four year colleges and universities is critical success factor for sustainable high technology industry growth. Additional specialized/technical training needed.
 - Trend is away from positions performing tedious jobs and moving toward positions involving higher level tasks that require greater training.
- Large regional high technology industry base is expected to enjoy moderate growth over the next decade.
 - Growth opportunities exist in electronic design automation, parallel computing, pen-based and notebook computers, multi-media, networking, color printers/plotters and other output devices, optical scanning, compact disc-read only memory (CD-ROM), and flat panel displays.
- Regional industry success due to geographic location, proximity and penetration of international markets.
 - The greater Portland metropolitan area has the second largest concentration of Japanese semiconductor-related companies in the U.S. (after the San Francisco Bay area).

- Existing regional cluster of high technology companies is large and sustainable. A critical mass of companies (industry food chain):
 - 1,700+ high-technology firms statewide (85% in Portland Metro area)
 - World class companies in many sectors (computers, semiconductors, software, instruments)
 - Enabling the high technology industry, the software industry in Oregon is mostly technical and applications oriented, not consumer-based.

Metals Industry Resources

- Oregon has a critical mass of specialty metals firms with unique technology.
 - Precision Castparts (structural investment castings), ESCO (steel castings, plate, bar and coil), TiLine and ORMET (titanium), VARICAST and Teledyne Wah Chang (primary zirconium and hafnium mill products).

The Metro Region has a significant share of these firms. Segments of the metals industry producing value-added products are experiencing growth.
- A strong metals industry is essential to other industries (i.e., transportation equipment, aerospace and high technology). The industry outlook for firms that can enter niche markets and add value to its products is excellent.
- Increased skill requirements in the metals industry are due to greater use of computerized and electronic equipment but jobs are readily available to high school graduates who have basic skills in reading, writing, math and comprehension.
 - Metal industry participants in the region have developed effective education and training programs in partnership with local community colleges to meet the need for skill upgrades and entry level training.
- Growth in the metals industry requires a skilled and educated work force, ability to comply with tightening environmental laws, low-cost electric power availability, transportation access with favorable rates, and considerable capital investment in modern equipment and facilities.
- Oregon metals firms generate over 90% of sales revenue from outside markets, but are predominantly locally owned.

VI. Biotechnology Industry Strategy

A. Industry Analysis (SWOT)

In conjunction with representatives of private industry, educational institutions, industry associations, local government and economic development institutions, the Board has determined that the following elements are "missing-links" or areas in need of improvement for the biotechnology industry in the Metro Region:

1. Education, training and workforce development initiatives must be supported.
2. Business infrastructure requirements within industry need to be addressed.
3. Marketing and recruitment efforts need to be assisted.
4. Managerial and technical assistance needs to be provided.

B. Long-Term Industry Benchmarks and Indicators

1. An increase in the number of biotechnology companies and jobs within the Metro Region.
2. Strong linkages between the biotechnology and environmental service industries (i.e., environmental biotechnology).
3. Focused educational initiatives in biotechnology and environmental biotechnology.
4. Availability of adequate business infrastructure resources within biotechnology industry to assist start-up companies and growing biotechnology businesses.
5. Managerial and technical assistance programs available to facilitate industry growth and development.
6. Industry recognition of the Metro Region's reputation as a biotechnology center.

C. Prioritized list of activities to be addressed

- Activity #1.** Advance biotechnology/environmental biotechnology training and education programs for students, educators, and workforce participants. Increase the information flow about biotechnology and environmental biotechnology to schools and industry.
- Activity #2.** Create a biotechnology business incubator and environmental biotechnology resource and development center within the Metro Region. Provide linkage to available contract procurement resources.
- Activity #3.** Develop effective marketing and recruitment capabilities to attract well regarded out-of-state firms.
- Activity #4.** Create business development and growth programs for emerging biotechnology companies which include information resources and management/financial counseling at critical stages of development.

VII. High Technology Industry Strategy

A. Industry Analysis (SWOT)

In conjunction with representatives of private industry, educational institutions, industry associations, local government and economic development institutions, the Board has determined that the following elements are "missing-links" or areas in need of improvement for the high technology industry in the Metro Region:

1. Education, training and workforce development initiatives must be supported.
2. Business infrastructure requirements within industry need to be addressed.
3. Marketing and recruitment efforts need to be assisted.
4. Managerial assistance needs to be provided to smaller firms and developing segments within the industry.

B. Long-Term Industry Benchmarks and Indicators

1. Strong linkages between the high technology industry and educational system providing integration of industry needs into educational curriculum in K-12, community colleges and four year college and universities.
2. Availability of adequate business infrastructure resources within high technology industry to assist start-up companies and growing high technology businesses.
3. Continued industry recognition of the Metro Region's reputation as a leading high technology center.
4. Management and technical assistance programs available for start-up companies, smaller businesses and industry support initiatives.
5. Sustain existing industry employment levels in the region and attract new job growth through industry development.

C. Prioritized list of activities to be addressed

- Activity #1.** Link educational system curriculum to high technology industry requirements. Provide high technology training and education programs for students, educators, and workforce participants.
- Activity #2.** Fund the development of an industry benchmarking program and performance measurement system.
- Activity #3.** Create a software/hardware laboratory for testing compatibility of software applications with various hardware/operating systems.
- Activity #4.** Fund a Multimedia market study for industry development within the Metro Region.
- Activity #5.** Improve and develop effective marketing and recruitment capabilities to attract well regarded out-of-state firms.
- Activity #6.** Create business development and growth programs for emerging high technology companies which include information resources and management/financial counseling at critical stages of development.

VIII. Metals Industry Strategy

A. Industry Analysis (SWOT)

In conjunction with representatives of private industry, educational institutions, industry associations, local government and economic development institutions, the Board has determined that the following elements are "missing-links" or areas in need of improvement for the metals industry in the Metro Region:

1. Education, training and workforce development initiatives must be supported.
2. Managerial and technical assistance needs to be provided.

B. Long-Term Industry Benchmarks and Indicators

1. Strong linkages between the metals industry and educational system to provide integration of industry needs into educational curriculum in K-12, community colleges and four year college and universities.
2. Increase jobs in the metals industry and attract qualified and motivated workforce participation.
3. Availability of technical and management assistance programs for smaller businesses within the industry.

C. Prioritized list of activities to be addressed

Activity #1. Link educational system curriculum to metals industry requirements. Provide metals industry training and education programs for students, educators, and workforce participants.

Activity #2. Increase the information flow about opportunities in the metals industry to students in the region's schools.

Activity #3. Create business development and growth programs for emerging metals companies which include information resources and management/financial counseling at critical stages of development.

Activity #4. Assist metals industry in providing permanent placement of workers within industry companies in the Metro Region.

IX. Link to Regional Vision, Goals and Industry Barriers

Linkages of specific activities to identified industry barriers are made as follows:

Industry Barriers Linkage	Biotechnology Industry Activities*	High Technology Industry Activities*	Metals Industry Activities*
Availability of properly educated and skilled workers	#1	#1	#1, #2, #4
Improvement in labor force work behavior expectations	#1	#1	#1, #2
Infrastructure needs: wet labs, new business incubators	#2	#3	-
Accessibility of management and technical assistance	#4	#2, #4, #6	#3
Effective marketing and recruitment programs	#3	#5	-

* Activities indicated by number - see industry strategies for specific details for each activity.

Linkages of activities to long term economic development goals developed by the Metro Region Board are made in each industry by varying degree as follows:

Regional Strategies Goals Linkage		Biotechnology Industry	High Technology Industry	High Technology Industry
Goal #1	Create and retain jobs that lead to economic self-sufficiency.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #2	Continuously develop, educate and train workforce.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #3	Link jobs to all region residents	<i>Moderate Degree</i>	<i>Moderate Degree</i>	<i>High Degree</i>
Goal #4	Build regional public and private wealth and economic capacity.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #5	Positively affect low income communities.	<i>Moderate Degree</i>	<i>Moderate Degree</i>	<i>High Degree</i>
Goal #6	Enhance quality of life.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #7	Provide full-range of job opportunities.	<i>Moderate Degree</i>	<i>Moderate Degree</i>	<i>High Degree</i>
Goal #8	Link business needs with educational system.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #9	Create entrepreneurial opportunities.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #10	Link private, education, government sectors to economic agenda.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #11	Attract, expand, retain companies and jobs within key industries.	<i>High Degree</i>	<i>High Degree</i>	<i>High Degree</i>
Goal #12	Equitable distribution of jobs (geographic and socio-economic).	<i>Moderate Degree</i>	<i>Moderate Degree</i>	<i>High Degree</i>

X. Two Year Action Plan

A. Biotechnology Industry Activities

Activity #1. Link educational system curriculum to industry requirements. Provide biotechnology, environmental biotechnology training and education programs for students, educators, and workforce participants. Increase the information flow about biotechnology and environmental biotechnology industry opportunities to schools and industry.

Timeframe: This project will be implemented starting in December 1995 with measurable results by September 1996.

10/94-12/94 Solicit industry involvement in program development

1/95-12/95 Develop specific training and education programs

12/95-9/96 Implement programs with schools and industry

Estimated Cost: Included in Cross-Industry Strategy Funding

Potential Funding Partners:

Oregon Biotechnology Association

Oregon Biotechnology Association member companies

Oregon Environmental Technology Association

Region 2 Workforce Quality Committee

Link To Oregon Benchmarks:

Build a Superior, World Class Workforce

Value-Added Products, Global Business

Diverse and Productive Industry

Link to Long-term Goals: #2, #3, #5, #6, #8, #10, #12

Performance Measure (by 9/96):

- Involve a minimum of two biotechnology companies and two environmental services companies in the creation of training and education programs for students, educators, and workforce participants
- Employ teachers in biotechnology and environmental biotechnology industry summer internships.

Activity #2. Create a biotechnology business incubator and environmental biotechnology resource and development center within the Metro Region. Provide linkage to available contract procurement resources.

Timeframe: This project will be completed by April 1996.

10/94-3/95 Solicit industry involvement in incubator design

10/94-3/95 Solicit industry involvement in providing additional funding

4/95-7/95 Identify site location

8/95-3/96 Prepare site for incubator start-up

4/96 Incubator start-up

Estimated Cost: \$250,000

Potential Funding Partners:

Oregon Biotechnology Association

Oregon Biotechnology Association member companies

Biotechnology Industry Activities (Activity #2 - Continued)

Link To Oregon Benchmarks:

Public Infrastructure Investment
Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #7, #9, #11

Performance Measure:

- Start-up incubator on time and within budget
- Attract at least two start-up businesses by 4/96 opening date
- 20 jobs for will be created by companies in incubator by 9/96

Activity #3. Develop effective marketing and recruitment capabilities to attract well regarded out-of-state firms.

Timeframe: This project will be completed by July 1995 with measurable results by September 1996.

10/94-6/95	Develop marketing and recruitment tools (i.e., trade show booth, literature, brochures, etc.).
7/95-9/96	Attend industry trade shows, deliver marketing materials to well regarded out-of-state companies.

Estimated Cost: Included in Cross-Industry Strategy Funding

Potential Funding Partners:

Oregon Biotechnology Association and member companies.

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #6, #7, #11

Performance Measure (by 9/96):

- Attend one national or regional trade show
- Obtain at least two bona fide leads on well regarded biotechnology companies interested in locating in the Metro Region

Activity #4. Create business development and growth programs for emerging biotechnology companies which include information resources and management/financial counseling at critical stages of development.

Timeframe: This project will be implemented by December 1995 with measurable results by September 1996.

10/94-12/95	Solicit industry involvement in program development
1/95-12/95	Develop specific development and growth programs
12/95-9/96	Implement programs

Estimated Cost: Included in Cross-Industry Strategy Funding

Potential Funding Partners:

Oregon Biotechnology Association and member companies.

Biotechnology Industry Activities (Activity #4 - Continued)

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #6, #7, #9, #10, #11

Performance Measure:

- Involve a minimum of two biotechnology companies in the creation of business development and growth programs.
- Survey of five companies in this industry will be made to evaluate program by 9/96

B. High Technology Industry Activities

Activity #1. Link educational system curriculum to industry requirements. Provide training and education programs for students, educators, and workforce. Increase the information flow about high technology industry opportunities to schools and industry.

Timeframe: This project will be implemented starting in December 1995 with measurable results by September 1996.

10/94-12/94 Solicit industry involvement in program development
1/95-12/95 Develop specific training and education programs
12/95-9/96 Implement programs with schools and industry

Estimated Cost: Included in Cross-Industry Strategy Funding

Potential Funding Partners:

American Electronics Association
American Electronics Association member companies
Region 2 Workforce Quality Committee

Link To Oregon Benchmarks:

Build a Superior, World Class Workforce
Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #2, #3, #5, #6, #8, #10, #12

Performance Measure (by 9/96):

- Involve a minimum of two high technology companies in the creation of training and education programs for students, educators, and workforce.
- Employ teachers in high technology industry summer internships.

Activity #2. Fund the development of an industry benchmarking program and performance measurement system.

Timeframe: This is an ongoing project currently in process. The development of high technology industry benchmarks and performance measurement is a continual process over the two-year action plan period.

Estimated Cost: \$25,000 (see Multi-Regional Opportunities for additional funding)

Potential Funding Partners:

American Electronics Association
American Electronics Association member companies
Software Association of Oregon

High Technology Industry Activities (Activity #2 - Continued)

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #10, #11

Performance Measure (by 9/96):

- Benchmarking to include participating industry companies
- Survey of ten companies will be made to evaluate program

Activity #3. Create software/hardware laboratory for testing compatibility of different software applications with various hardware/operating system platforms.

Timeframe: This project will be completed by April 1996.

10/94-3/95 Solicit industry involvement in design of laboratory
4/95-7/95 Identify site location
8/95-3/96 Prepare site for start-up
4/96 Start-up

Estimated Cost: \$135,000

Potential Funding Partners:

American Electronics Association
American Electronics Association member companies
Software Association of Oregon

Link To Oregon Benchmarks:

Public Infrastructure Investment
Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #7, #9, #11

Performance Measure:

- Start-up laboratory on time and within budget
- Laboratory to be used by at least ten area companies by 9/96

Activity #4. Fund a Multimedia market study for industry development within the Metro Region.

Timeframe: This project will be completed by September 1996.

10/94-3/95 Solicit industry involvement in design market study
4/95-5/95 Identify research firm to conduct study
6/95-8/96 Conduct market study
9/96 Publish study results and recommend future action

Estimated Cost: \$50,000

Potential Funding Partners:

American Electronics Association
American Electronics Association member companies
Software Association of Oregon
Oregon Film & Video Office

High Technology Industry Activities (Activity #4 - Continued)

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #7, #9, #11

Performance Measure:

- Include representation from high technology, software and film & video industries in the design, implementation, and evaluation of study results.
- Complete market study on time and within budget.

Activity #5. Develop effective marketing and recruitment capabilities to attract well regarded out-of-state firms.

Timeframe: This project will be completed by July 1995 with measurable results by September 1996.

10/94-6/95	Develop marketing and recruitment tools (i.e., trade show booth, literature, brochures, etc.).
7/95-9/96	Attend industry trade shows, deliver marketing materials to well regarded out-of-state companies.

Estimated Cost: Included in Cross-Industry Strategy Funding

Potential Funding Partners:

Metro Region High Technology Companies
American Electronics Association
Software Association of Oregon

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #6, #7, #11

Performance Measure (by 9/96):

- Attend one national or regional trade show
- Obtain at least two bona fide leads on well regarded high technology companies interested in locating in the Metro Region

Activity #6. Create business development and growth programs for emerging high technology companies which include information resources and management/financial counseling at critical stages of development.

Timeframe: This project will be implemented by December 1995 with measurable results by September 1996.

10/94-12/95	Solicit industry involvement in program development
1/95-12/95	Develop specific development and growth programs
12/95-9/96	Implement programs

Estimated Cost: Included in Cross-Industry Strategy Funding

High Technology Industry Activities (Activity #6 - Continued)

Potential Funding Partners:

Metro Region High Technology Companies
American Electronics Association
Software Association of Oregon

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #6, #7, #9, #10, #11

Performance Measure:

- Involve a minimum of two high technology companies in the creation of business development and growth programs.
- Survey of five companies in this industry will be made to evaluate program by 9/96

C. Metals Industry Activities

Activity #1. Link educational system curriculum to metals industry requirements.

Provide metals industry training and education programs for students, educators, and workforce participants.

Timeframe: This project will be implemented starting in December 1995 with measurable results by September 1996.

10/94-12/94 Solicit industry involvement in program development
1/95-12/95 Develop specific training and education programs
12/95-9/96 Implement programs with schools and industry

Estimated Cost: Included in Cross-Industry Strategy Funding

Potential Funding Partners:

Oregon Metals Industry Council
Oregon Precision Metal Fabricators Association
Oregon Advanced Technology Consortium
Region 2 Workforce Quality Committee
Industry Partners (companies within industry)

Link To Oregon Benchmarks:

Build a Superior, World Class Workforce
Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #2, #3, #5, #6, #8, #10, #12

Performance Measure (by 9/96):

- Involve a minimum of two metals industry companies in the creation of training and education programs for students, educators, and workforce.
- Employ teachers in metals industry summer internships to link curriculum development to industry needs/opportunities, create industry understanding, and bring the message of availability of family wage jobs to students as an acceptable career choice.

Metals Industry Activities (Continued)

Activity #2. Increase the information flow about opportunities in the metals industry to students in the region's schools.

Timeframe: This project will be implemented starting in December 1995 with measurable results by September 1996.

10/94-12/94 Solicit industry involvement in program development

1/95-12/95 Develop specific training and education programs

12/95-9/96 Implement programs with schools and industry

Estimated Cost: \$100,000

Potential Funding Partners:

Oregon Metals Industry Council

Oregon Precision Metal Fabricators Association

Oregon Advanced Technology Consortium

Region 2 Workforce Quality Committee

Industry Partners (companies within industry)

Link To Oregon Benchmarks:

Build a Superior, World Class Workforce

Value-Added Products, Global Business

Diverse and Productive Industry

Link to Long-term Goals: #2, #3, #5, #6, #7, #8, #10, #11, #12

Performance Measure:

- Involve a minimum of two metals industry companies in the creation of information programs for students, educators, and workforce.
- Develop coalition of metals industry associations to provide input into educational needs and program development.
- Disseminate information to twelve area schools by 12/96.
- Increase the availability of a sufficiently skilled and interested work force pool from which to hire.

Activity #3. Create business development and growth programs for emerging metals companies which include information resources and management/financial counseling at critical stages of development.

Timeframe: This project will be implemented by December 1995 with measurable results by September 1996.

10/94-12/95 Solicit industry involvement in program development

1/95-12/95 Develop development and growth programs

12/95-9/96 Implement programs

Estimated Cost: Included in Cross-Industry Strategy Funding

Potential Funding Partners:

Oregon Metals Industry Council

Oregon Precision Metal Fabricators Association

Industry Partners (companies within industry)

Metals Industry Activities (Activity #3 - Continued)

Link To Oregon Benchmarks:

Value-Added Products, Global Business

Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #6, #7, #9, #10, #11

Performance Measure:

- Involve a minimum of two metals companies in the creation of business development and growth programs.
- Survey of five companies in this industry will be made to evaluate program by 9/96

Activity #4. Assist metals industry in providing permanent placement of workers within industry companies in the Metro Region.

Timeframe: This project will be implemented by January 1995 with measurable results by June 1995.

10/94-12/94 Solicit industry involvement in program development
1/95 - Implement programs

Estimated Cost: \$30,000

Potential Funding Partners:

Oregon Metals Industry Council

Oregon Precision Metal Fabricators Association

Industry Partners (companies within industry)

Link To Oregon Benchmarks:

Value-Added Products, Global Business

Diverse and Productive Industry

Link to Long-term Goals: #1, #2, #3, #5, #6, #7, #11, #12

Performance Measure:

- Currently, there are several hundred metals related jobs in the region. Successful implementation of this program should eliminate this large backlog of unfilled jobs.
- Hire minorities and economically disadvantaged workers to fill existing and new positions within the metals industry.

D. Cross-Industry Opportunities

Activity #1. Education and Training Initiatives

Link educational system curriculum to biotechnology, high technology and metals industry requirements. Provide training and education programs for students, educators, and workforce participants. Increase the information flow about biotechnology, high technology, and metals industry opportunities to schools and industry.

Timeframe: This project will be implemented starting in December 1995 with measurable results by September 1996.

10/94-12/94 Solicit industry involvement in program development

1/95-12/95 Develop specific training and education programs

12/95-9/96 Implement programs with schools and industry

Estimated Cost: \$325,000

Potential Funding Partners:

American Electronics Association

Oregon Biotechnology Association

Oregon Environmental Technology Association

Oregon Metals Industry Council

Oregon Precision Metal Fabricators Association

Oregon Advanced Technology Consortium

Region 2 Workforce Quality Committee

Software Association of Oregon

Industry Partners (companies within industries)

Link To Oregon Benchmarks:

Build a Superior, World Class Workforce

Value-Added Products, Global Business

Diverse and Productive Industry

Link to Long-term Goals: #2, #3, #5, #6, #8, #10, #12

Performance Measure (by 9/96):

- Involve a minimum of two industry companies from each industry segment (biotechnology, high technology, metals) in the creation of training and education programs for students, educators, and workforce.
- Employ teachers in each industry (biotechnology, high technology, metals) using summer internships to link curriculum development to industry needs/opportunities, and create industry understanding.

Activity #2. Business Development and Growth Initiatives

Create business development and growth programs for emerging biotechnology, high technology, and metals companies which include information resources and management/financial counseling at critical stages of development.

10/94-12/94 Solicit industry involvement in program development

1/95-12/95 Develop specific development and growth programs

12/95-9/96 Implement programs

Estimated Cost: \$200,000

Cross-Industry Opportunities - Activity #2 (Continued)

Potential Funding Partners:

American Electronics Association
Oregon Biotechnology Association
Oregon Environmental Technology Association
Oregon Metals Industry Council
Oregon Precision Metal Fabricators Association
Oregon Advanced Technology Consortium
Region 2 Workforce Quality Committee
Software Association of Oregon
Industry Partners (companies within industries)

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #6, #7, #9, #10, #11

Performance Measure:

- ◆ Involve at least two companies from each of the three key industries selected by the Metro Region Board to participate in the development of resources and programs to be included in this project.
- ◆ Survey five companies from each key industry once the program is operational for six months to determine usage characteristics and program effectiveness.

Activity #3. Marketing and Recruitment Initiatives

Improve and develop effective marketing and recruitment capabilities to attract well regarded out-of-state firms.

Timeframe: This project will be completed by July 1995 with measurable results by September 1996.

10/94-6/95	Develop marketing and recruitment tools (i.e., trade show booth, literature, brochures, etc.).
7/95-9/96	Attend industry trade shows, deliver marketing materials to well regarded out-of-state companies.

Estimated Cost: \$200,000

Potential Funding Partners:

Local Industry Partners
Industry Associations

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #6, #7, #11

Performance Measure (by 9/96):

- Attend at least one national or regional biotechnology trade show and at least one national or regional high technology trade show
- Obtain at least two bona fide leads on well regarded biotechnology and high technology companies interested in locating in the Metro Region

Cross-Industry Opportunities (Continued)

Activity #4. Electronic Equipment Repair Training Initiative

Biotechnology, high technology and metals industry firms are increasingly reliant on electronic equipment. This initiative will provide training programs for the development of local repair technicians to facilitate the continued operation of this critical equipment on a timely basis.

Timeframe: This project will be completed by December 1995 with measurable results by September 1996.

10/94-12/94 Solicit industry involvement in program development
1/95-12/95 Develop specific training and education programs
12/95-9/96 Implement programs

Estimated Cost: \$70,000

Potential Funding Partners:

Local Industry Partners
Industry Associations

Link To Oregon Benchmarks:

Build a Superior, World Class Workforce
Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #2, #4, #7, #8, #10, #11

Performance Measure (by 9/96):

- Involve a minimum of two industry companies from each industry segment (biotechnology, high technology, metals) in the creation of these programs.

XI. Multi-Regional Opportunities

In partnership with the Benton, Lane, Lincoln, Linn Region and the Mid-Valley Region, the Metro Region would like to pursue multi-regional funding for continued development of the high technology industry benchmarking program and performance measurement system. Initial seed money for this project is included in High Technology Activity #3.

Timeframe: This is an ongoing project currently in process. The development of high technology industry benchmarks and performance measurement is a continual process over the two-year action plan period.

Estimated Cost: \$75,000 (see High Technology Industry Activity #2 for additional Metro Region funding for this project)

Potential Funding Partners:

American Electronics Association (and member companies)
Software Association of Oregon (and member companies)

Link To Oregon Benchmarks:

Value-Added Products, Global Business
Diverse and Productive Industry

Link to Long-term Goals: #1, #4, #10, #11

Performance Measure (by 9/96):

- Benchmarking to include participating industry companies
- Survey of ten companies will be made to evaluate program

Appendix A - Participants in Metro Region Process

Aerospace Industry Participants

Paul Meyerhoff

Aerospace Industry Association of Oregon

Agriculture Industry Participants

Eric Azariah
Cathi McLain
Ray Steinfeld

Oregon Department of Agriculture
Oregon Department of Agriculture
Steinfeld Pickles Company

Biotechnology Industry Participants

Barbara Anderman
David Clark
Dean Kruse
Dr. Nanette Newell
Richard Polley
Richard Sessions
Dr. George Weber

Oregon Biotechnology Association
Perkins Coie
Portland Community College
Oregon Biotechnology Association
Klarquist, Sparkman - Attorneys at Law
Vollum Institute, OHSU
Wesman Foods, Inc.

Environmental Services Industry Participants

Bill Snyder
Andy Sloop

Oregon Environmental Technology Association
Metro Regional Services

Film & Video Industry Participants

David Woolson

Oregon Film & Video Office

High Technology Industry Participants

Mike Bosworth
Jim Craven
Charmagne Ehrenhaus
Bob French
Jim Hurd
Ken Maddox
Bruce Shafer

OrCad, Inc.
American Electronics Association
Lintner Center
Intel
Planar Systems, Inc.
Software Association of Oregon
PC-Kwik, Inc.

Metals Industry Participants

Kathleen Curtis Dotten
Dan Ten Eyck
Warren Rosenfeld
John Seaver
Vicki Tagliafico
Howard Werth

Oregon Metals Industry Council
Reynolds Metals
Calbag Metals
Oregon Precision Metal Fabricators Association
Oregon Steel
Gunderson

Software Industry Participants

Ken Maddox
Bruce Shafer

Software Association of Oregon
PC-Kwik, Inc.

Tourism Industry Participants

Court Carrier
Carol Clark
Gene Leo
Cletus Moore

Mt. Hood Community College
Washington County Visitors Association
Portland Oregon Visitors Association
Urban League

Appendix A - Participants in Metro Region Process- (Continued)

Other Participants

Robert Alexander	Forest Grove/Cornelius
Mark Clemmons	Portland Development Commission
Elaine Cogan	Cogan, Owens, Cogan Consultants
Marcia Douglas	Portland City Schools
Jerry Gillham	City of Gresham
Elizabeth Goebel	City of Portland
Steven Goebel	City of Portland
Marcy Jacobs	Oregon Economic Development Department
David Lawrence	City of Hillsboro
Anne Mulroney	City of Beaverton
Betty Mills	Gresham Chamber of Commerce
Lisa Nisenfeld	Portland Development Commission
Janet Young	Tualatin

MEETING DATE: May 10, 1994

AGENDA NO: P-1

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: CU 4-94/HV 1-94 Hearings Officer Decisions

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING: Date Requested: May 10, 1994

Amount of Time Needed: 2 Minutes

DEPARTMENT: DES DIVISION: Planning

CONTACT: R. Scott Pemble TELEPHONE #: 3182

BLDG/ROOM #: 412/103

PERSON(S) MAKING PRESENTATION: Planning Staff

ACTION REQUESTED:

[] INFORMATIONAL ONLY [] POLICY DIRECTION [] APPROVAL (x) DENIAL [] OTHER

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

CU 4-94/HV 1-94 Review the April 11, 1994 Hearings Officer Decision, denying conditional use request for a single family residence not related to forest management and denying request for a side yard setback variance, all for property located at 20021 NW Morgan Road.

SIGNATURES REQUIRED:

ELECTED OFFICIAL:

OR

DEPARTMENT MANAGER:

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

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



BOARD HEARING OF May 10, 1994

CASE NAME: Johnson

TIME: 1:30 pm

Conditional Use Request and Variance

NUMBER: CU 4-94, HV 1-94

1. Applicant Name/Address:

Sven and Carol Johnson
3301 SW Huber Street
Portland, OR 97219

2. Action Requested by applicant:

Conditional use approval for a single family residence not related to forest management in the CFU district and variance to 200 foot setback requirement.

ACTION REQUESTED OF BOARD

- ☒ Affirm Hearings Officer
- ☐ Hearing
 - ☐ Scope of Review
 - ☐ On the record
 - ☐ De Novo
 - ☐ New Information allowed

3. Staff Report Recommendation: Approve, subject to conditions

4. Hearings Officer Decision: Denied

5. If recommendation and decision are different, why?

The Hearings Officer found that: 1) the property was not legally created; 2) there was insufficient information to show that water quality could be protected and that the site could be served by a septic system; and 3) evidence was not provided to show that the site was either outside a big game habitat area or ODFW had certified that the impacts of the dwelling will be acceptable.

ISSUES

1. *Was the property legally created?* Code criteria require that the property be a lot of record "which satisfied all applicable laws when the parcel was created." The subject property is a portion of a larger parcel which was divided in 1965-72. The division did not comply with county subdivision regulations in effect at the time, and did not comply with state statutes regarding a private road dividing and providing access to the lots in the subdivision. Despite substantial correspondence between the former property owner who subdivided the property and the county, the former property owner did not receive the required Planning Commission approval.
2. *Should the county's approval of homes on other lots within this subdivision influence whether the subject property should be recognized as a legally created lot?* Previous zoning (F-2 and MUF-20 prior to 1982) allowed a single family dwelling on a lot. No application for planning approval was required and code language did not specify that the lot be legally created. Consequently, building permits were obtained for the other lots in the subdivision. Code requirements have subsequently changed, and the Johnson's application must be considered under the requirements in effect at the time of application.



DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE Morrison Street
Portland, Oregon 97214 (503) 248-3043

HEARINGS OFFICER DECISION

This Decision consists of Findings of Fact and Conclusions.

April 11, 1994

CU 4-94, HV 1-94

Conditional Use Request Plus Variance Request

Proposed Action(s) and Use(s): Conditional Use for a single family residence not related to forest management and **Variance** to setback requirements.

Location of the Proposal: 20021 NW Morgan Road

Legal Description of Property: Tax lot '30', Section 12, T2N, R2W (see attached map)

Plan Designation(s): Commercial Forest Use

Zoning District(s): CFU, Commercial Forest Use

Site Size: 5.48 acres

Applicant(s): Sven and Carol Johnson
3301 SW Huber St.
Portland, OR 97219

Property Owner(s) Same

Decision: Deny conditional use request for a single family residence not related to forest management and deny request for a major side yard setback variance, based on the following Findings and Conclusions.



Zoning Map

Case #: CU 4-94; HV 1-94

Location: 20021 NW Morgan Road

Scale: 1 inch to 1000 feet (approx)

Shading indicates subject property

SZM 27; SW 1/4 Sec 12, T2N, R2W, WM.

CFU

12

RIVE ROAD

RR

TRACT

CFU

4

13

3

(10) 2.50 Ac.	(14) 5.00 Ac.	(17) 5.00 Ac.	(12) 5.00 Ac.
(18) 2.50 Ac.	RR		
(16) 5.00 Ac.			
(13) 5.00 Ac.	(9) 5.00 Ac.	(11) 5.00 Ac.	(15) 5.00 Ac.

10' 9.55 Ac

(33)
9.89 Ac

(32)
6.11 Ac

(31)
5.00 Ac

(23)
6.86 Ac

(20)
3.05 Ac

(27)
10.00 Ac

(38)
30.00 Ac

48 AC

48 AC.

48 AC.

19

20

(19)
6.18 Ac

(12)
3.00 Ac

(14)
3.00 Ac

(16)
3.00 Ac

(18)
3.00 Ac

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(90)
3.00 Ac

(92)
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(94)
3.00 Ac

(96)
3.00 Ac

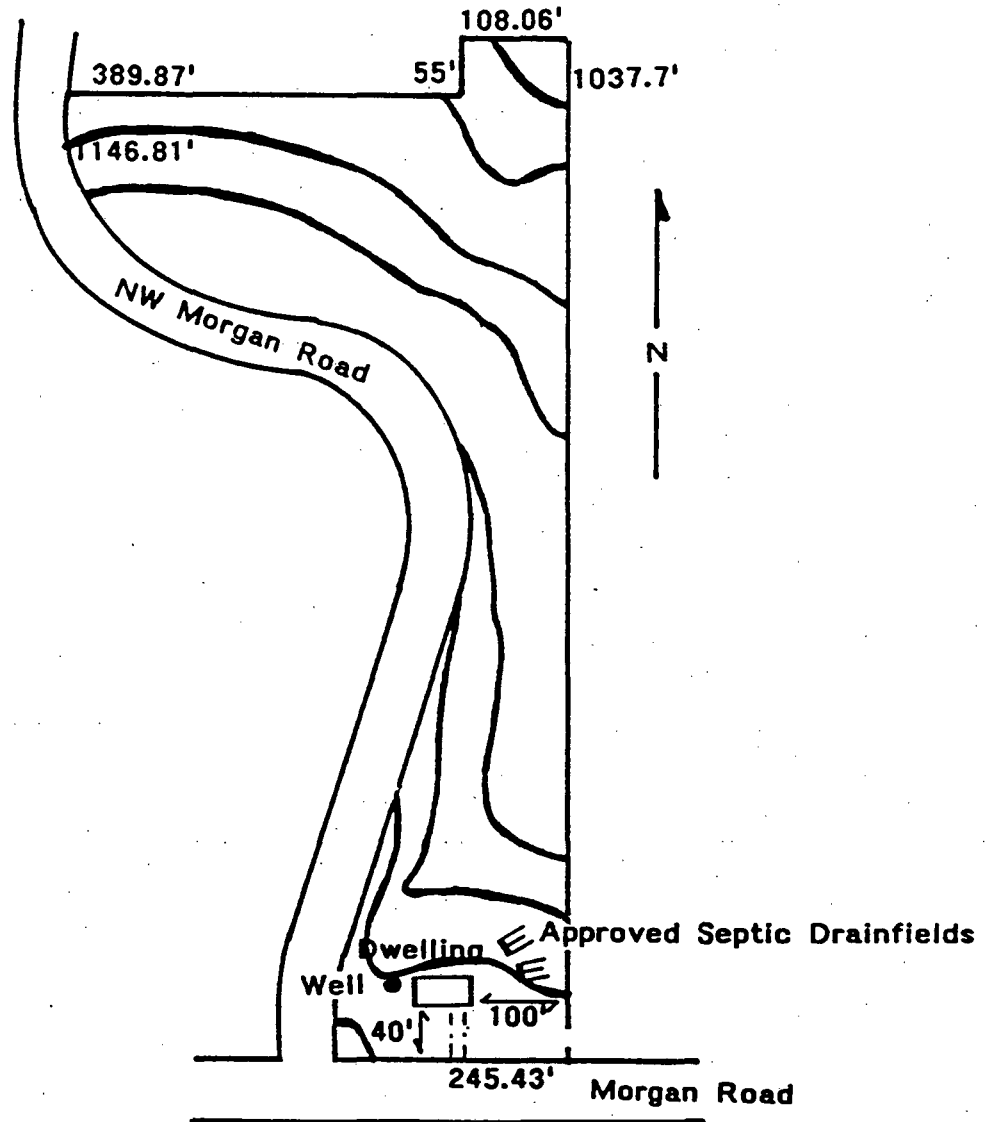
(98)
3.00 Ac

(100)
3.00 Ac

FIGURE 4

PLOT PLAN

T2N, R2W, SEC. 12, TAX LOT 30



SCALE: 1" = 200'

II. PARTIES, AGENTS AND WITNESSES TO THE PROCEEDING

A. Parties

The persons, agencies and organizations who submitted written or oral testimony in this proceeding on their own behalf are parties to the proceedings. MCC 11.15.8225(A)(1). These persons were:

1. Applicants/Landowners

Sven & Carol Johnson, 3301 SW Huber St., Portland, Oregon 97219

2. Other Persons Supporting The Application

None.

3. Persons Opposed To The Application

Arnold Rochlin, PO Box 83645, Portland, Oregon 97283 (Appeared in person and through written testimony)

Virginia Casey, _____ Morgan Road, Portland, Oregon 97231 (Appeared by letter dated February 28, 1994)

Terry Vollertsen, 19711 NW Morgan Road, Portland, Oregon 97231 (Appeared by letter dated January 31, 1994)

4. Determination Of Party Status

MCC 11.15.8225 provides, in pertinent part:

(A) *The following persons only are parties, and shall be entitled either themselves or through their representatives or through their representatives or counsel, to make an appearance of record at a hearing before the approval authority and to seek review by the Board and the courts;*

* * * * *

(2) *Other persons who demonstrate to the approval authority at its hearing, under the Rules of Procedure, that they could be aggrieved or have interests adversely affected by the decision.*

Lamb v. Lane County, 70 Or App 364, 689 P2d 1049 (1984) stands for the proposition that the County cannot impose stricter standing requirements than the Legislature has established for LUBA.¹ Standing to appeal a "land use decision" to LUBA requires only participation at the local level and filing of a notice of intent to appeal; potential parties are not required to demonstrate either "adverse affect" or "aggrievement." ORS 197.830(2).

Even assuming the County has the authority to impose a requirement of "adverse affect" or "aggrievment", because opponents Casey and Vollertsen, live close to the applicants' property, use Morgan Road and the proposed septic drainfield may affect their water supply, they meet the minimal tests for being "adversely affected" as those terms were interpreted by LUBA under the former statute governing standing. See e.g. *Prentice v. Clackamas County*, 9 Or LUBA 813 (1983) (within sight and sound of subject property); *Perkins v. Rajneeshpuram*, 10 Or LUBA 88 (1984)(increased traffic); *McNulty v. Lake Oswego*, 14 Or LUBA 366 (1986)(aesthetic interest in the subject area).

Opponent Arnold Rochlin has been involved in many County proceedings. He meets the test for being "aggrieved" under *League of Women Voters v. Coos County*, 76 Or App 705, 712 P2d 111 (1985)².

¹ *Although the issue here is not whether Lamb has standing to appeal to LUBA under section 4(3) [the predecessor to former ORS 197.830(3)] but is whether Lamb has standing to appeal to the Board [of County Commissioners] under ORS 215.422, we conclude that the test for determining when a person is aggrieved under ORS 215.422 is the same as the test explained in Jefferson Landfill under section 4(3). * * * We do not think the legislature intended the term "aggrieved" to have a meaning in ORS 215.422 different from that in section 4(3). To conclude that different meanings were intended would result in one of two anomalies: either persons without standing before a local land use decision-making body would have standing to appeal that body's decisions to LUBA, or the local body might preclude LUBA review.* *Lamb v. Lane County*, 70 Or App 367-368.

² *The county's reasoning [rejecting the League of Women Voters' standing] does not support its conclusion that respondents were not aggrieved. The facts that respondents have no geographic proximity to the area affected by the decision and that they can suffer no economic or noneconomic harm are germane to whether they were adversely affected, not to whether they were aggrieved by the planning commission's decision. See Benton County v. Friends of Benton County*, 294 Or 79, 85-89, 653 P2d 1249 (1982). Indeed, given that the planning commission's decision pertained to the allowance of a non-forest use in a forest district in a county with an unacknowledged comprehensive plan, the conceded fact that respondents showed that they had a long-standing interest in the correct application of the land use laws was sufficient to establish that they were aggrieved by the planning commission's rejection of the position they asserted. See *Jefferson Landfill Comm. v. Marion Co.*, *supra*, 297 Or at 285. *League of Women Voters of Coos County v. Coos County*, *supra*, 76 Or. App. 711.

B. Agents For Parties

Persons who submitted testimony, but only in the capacity of a representative for one of the parties, and not on their own behalf, are agents, not parties to this proceedings. These persons were:

1. Agents For The Applicant

Frank D. Walker, Frank Walker & Associates, 13500 Monmouth Highway,
Monmouth, Oregon 97361

Debbie Parmley, 6495 Cornelius Pass Road, Hillsboro, Oregon 97124

Michael Robinson, attorney, Stoel, Rives, Jones & Grey, 900 Fifth Avenue Suite
2300, Portland Oregon 97204-1268

2. Agents For Opponents

None.

C. Witnesses

Persons appearing to provide information and not as parties in their own right, are witnesses. There were no witnesses in this proceeding.

III. PROCEDURAL ISSUES

A. Impartiality Of The Hearings Officer

1. No *Ex Parte* Contacts

Prior to the first session of the hearing I had no *ex parte* contacts with the applicants or anyone else concerning the merits of this application. Subsequent communications, both before and after the continuation of the hearing, held on March 21, have been made through the mail or telecopier, with simultaneous service on the opposing party.

2. No Conflicting Personal Financial or Family Interests

I have no financial interest in the outcome of this proceeding and have no family or financial relationship with any of the parties.

B. No Identified Procedural Errors

At both sessions of the hearing I asked the participants to identify any procedural errors which had or might occur. The participants did not allege any procedural violations by the County, prior to, during, or after, both sessions of the hearing.

IV. BURDEN OF PROOF

In this proceeding, the burden of proof is upon the applicants. MCC 11.15.8230(D)

V. REVIEW OF THE STANDARDS, ANALYSIS OF THE EVIDENCE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. MCC 11.15.2050 and 2052; Authorization Of, And Standards For, Dwellings Not Related To Forest Management

The provisions of the County's Commercial Forest Use District apply to this decision.

The conditional uses permitted in the CFU district are listed in MCC 11.15.2050, "Conditional Uses." "A dwelling not related to forest management . . ." is allowed under MCC 11.2050(B) "pursuant to the provisions of MCC .2052 and .2074."

MCC 11.15.2052 requires findings addressing ten sets of criteria in MCC 11.15.2052(A), a deadline for qualification in subsection (B).

1. MCC 11.15.2052(A)(1) and .2062; Legal Lot Of Record

(a) The County's Lot of Record Requirements

MCC 11.15.2052(A)(1) provides:

(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) and have been lawfully created prior to January 25, 1990;

MCC 11.15.2062(A) contains three, alternate, definitions of a "lot of record."

To qualify under the first definition, the lot must satisfy "the minimum lot size requirements of MCC .2058," i.e. 80 acres. MCC 11.15.2062(A)(1)(c). According to the

application, the property³ is 5.48 acres and thus cannot qualify under this subsection.

The property would not qualify as a lot of record under the third alternative, which applies only to contiguous parcels under the same ownership with a combined size of 19 acres or more.⁴ MCC 11.15.2062(A)(3)(c). According to the notification list, and tax assessor's maps in the file, the applicants own no other contiguous parcels.

The applicants can qualify, if at all, only under the second alternative, which provides:

(2) A parcel of land:

- (a) For which a deed or other instrument creating the parcel was recorded with the Department of General Services, or was in recordable form prior to February 20, 1990;*
- (b) Which satisfied all applicable laws when the parcel was created;*
- (c) Does not meet the minimum lot size requirements of MCC .2058; and*
- (d) Which is not contiguous to another substandard parcel or parcels under the same ownership,*

MCC 11.15.2062(A)(2)

The information in the application and the tax assessor maps and notification list, demonstrates that the parcel is smaller than 80 acres and is not contiguous to another substandard parcel in the same ownership. Based on this evidence I find subsections .2062(2)(c) and (d) are satisfied.

The issue which has received the most attention from the parties in this proceeding, is whether the parcel "satisfied all applicable laws when the parcel was created." While the parties agree that "all applicable laws" refers to both state statutes and local land use regulations, they disagree over when and how the parcel or pseudo-parcel was created.

³ As will be discussed shortly, the land is referred to as "the property," "Tract 3" or "Tax Lot 30" because its status as a separate lot is in dispute.

⁴ The subsection references 19 acres rather than the minimum lot size of 80 acres because some of the predecessor zoning of forest land had a 19 acre minimum lot size.

In evaluating the legality of the parcel, I cannot infer legality from the absence of evidence of illegality. *See Atkins v. Deschutes County*, 102 Or App 208, 793 P2d 345 (1990). Therefore, the record must affirmatively establish the legality of the lots at the time of their creation.

(b) The Chronology Of The Halsten Lee Land Division(s)

Central to the dispute is a purported subdivision of the land of which the disputed property is a part. The file contains a lengthy correspondence between Halsten H. Lee and the Multnomah County Planning Department, beginning in November, 1965. A review of the history of the property is necessary to resolution of the question of the legality of the Johnson's lot.

According to letters in the file, the property was zoned F-2, an "agricultural district." The F-2 district was established by Ordinance #100, the "Zoning Ordinance Of Multnomah County" (signed November 15, 1962.) Ordinance #100 was in effect from 1962 to 1978. The F-2 district does not specify any minimum lot size; dwellings for the "owner, operator and/or help required to carry out grazing, agriculture, horticulture or the growing of timber" were permitted. Ordinance 100 at §3.112, page 8.

On November 26, 1965, Halsten Lee submitted a "Subdivision Application" form to the Planning Department. On the form he noted: "For Staff Consultation Only - P.C. review & plat not needed as proposed." The date on the plot plan maps in the file was punched to fit the map into a notebook, but appears to be Nov. 4 1965." It shows "Tract #1" as a six-sided 3.0 acre parcel fronting on Morgan Road. Tract #2 has an 80 foot frontage on Morgan Road, is 5.0 acres and crosses the proposed gravel access road. Tract 2 includes a part of what is now the Johnsons' property.

On December 6, 1965, Jack Holst, on behalf of Robert S. Baldwin, the Planning Director, wrote Lee to confirm that the two lots he proposed to sell were in conformance with the County Zoning and Subdivision Regulations. Holst suggested some revision to the lot lines:

These proposed revisions would eliminate future problems caused by "Tract 2" being split by the roadway, and would provide a better, more usable lot shape for both tracts.

All future divisions of this property must be of at least five acres in area unless a subdivision plat is first approved by the Planning Commission.

The file includes the County's "Suggested Subdivision" layout for the property, dated "11-29-65." It shows "Tract #1" as a polygon of 2.00 acres and "Tract 2" as a 6.29 acre parcel lying entirely west of the access road.

On December 21, 1965, Holst wrote Lee again:

The Multnomah County Subdivision Regulations state that you may divide three tracts of less than five acres from your property . . . before you are required to file a subdivision plat approved by the Planning Commission. These tracts must conform to the requirements of the Zoning Ordinance, that is, they must be of at least two acres in size and must have frontage on a dedicated public road. Dedication or your new, private road would require Planning Commission approval.

Any number of tracts of five acres or more may be sold without filing a plat and without having public access.

We have made a field inspection of your property and believe that the plan containing our revisions is quite workable and that it would result in the best development of this tract. You are, however, free to sell these two tracts as your proposed since they do not at this time require our approval.

*If you contemplate selling off four or more tracts from this property, you must file with the Oregon State Real Estate Department. * * * **

On May 9, 1966 the Real Estate Division issued Lee a waiver for "Leewood Park", waiving:

all further requirements for complying with the provisions of the Oregon Subdivision Control Law (ORS 92.210 to 92.390) excepting ORS 92.350 to 92.380 and Subsection (2) of ORS 92.990. However, this does not relieve you of the necessity of complying with local governing agencies' requirements as established in accordance with ORS 92.010 to 92.150.

The drawing for "Leewood Park" shows six parcels, different from the current tax lots. Parcels 2, 4 and 5 straddle the access road (which is identified in a later map as "Leewood Drive.") The drawing of this partitioning is reproduced as Attachment 1. Tract 2 is in the form originally proposed by Lee. What is now the Johnson property, Tract 3, Tax Lot 30, included a piece of Tract 2, in the rough shape of a right-triangle, on the west side of the access road. This is the same layout which appears in a survey by Burton Bros., dated April 2, 1970.

Handwritten notes by an unidentified staff member⁵ dated 14 April 1970, record a conference between Lee and Baldwin. According to these notes "1. The lots are to be

⁵ The signature is indecipherable, but it may be that of Adrienne Brockman.

reassemble [sic] & reparceled [sic] into 5 acre tracts." * * * * Mr. Lee is to bring his proposal to the P.C. for the access to be approved."

On May 19, 1970, Lee wrote Baldwin:

The owners of tracts 2, 3, 4 and 5 have agreed to line changes eliminating small areas which originally extended across the roadway. The engineers[] new plat will show tracts as the enclosed sketch.

The attached sketch shows the Johnson property, Tract 3, and the other parcels, in their present form.

On June 3, 1970, Adrienne Brockman, then Urban Planner I, wrote back to Lee on behalf of Robert S. Baldwin, the Planning Director:

The sketch received from you, May 19, 1970, for Tax Lot '2', Sec. 12, T2N-R3W, W.M. has been reviewed and appears satisfactory. Without dimensions, it is impossible to determine if each parcel contains the number of acres indicated.

In order for building permits to be issued it will be necessary to obtain Planning Commission approval for the access.

On March 8, 1971, Senior Planner Nick Steffanoff, responded to Lee's inquiry about the minimum width for the access road. His letter noted, "The second parpagraph [sic] of our letter dated December 21, 1965, is no longer valid. Each new means of access must be approved by the Planning Commission according to Oregon Revised Statues, Chapter 92."

On August 12, 1971, the County Planning Commission received Lee's survey for his would-be subdivision; this document is annotated on the margin with the words: "PLEASE NOTE: THIS IS NOT A RECORDED SUBDIVISION."

Nick Steffanoff, Senior Planner, sent a letter to Lee (in the name of Baldwin, the Planning Director) dated August 26, 1971, in which Steffanoff stated:

Our Public Works Department forwarded your referenced letter to use for approval of the alignment of the subject road prior to their acceptance of a deed of dedication. Our Planning Commission is the body that approves subdivision and road alignments and the Planning staff is not authorized to make such approvals. (ORS 92.014 and County Subdivision Ordinance Preamble Sec. 1.0)

One of the conditions we would recommend to the Planning Commission for approval of this road, regardless of the alignment, would be its improvement to the minimum standards cited in our letter of April 22, 1971 to you. (i.e. graded

and rocked, 32 feet wide with 24 feet of asphalt pavement.)

On January 31, 1972, Lee wrote to the Planning Department describing his request to the "road department" requesting acceptance of his road right-of-way." He noted:

While there was and still is a dedicated road on which tracts 3, 4, 5 and 6 front, I chose to improve the 60 foot rights-of-way as shown on the enclosed plat, partly because it had been used by the general public for various purposes for a period of about forty [sic] years and partly because it served as a much better and more practical access for the tracts as shown.

On February 9, 1972 he directed a letter to the Planning Commission, "RE: Tracts 3, 4,5 & 6", objecting to the increase in his property tax assessment, which he contended was based on the Tax Department's incorrect assumption that his road was going to be approved and he could obtain building permits for Tracts 4,5 and 6. Lee stated the Tax Department informed him that the Planning Commission

gave assurance to the Tax Department that building permits are available to tracts 4, 5 and 6 and that my road is acceptable as public access without further improvement, and that therefor the tax raise is justified.

On February 18, 1972 Steffanoff sent a 3-page letter to Lee in response, which begins as follows:

The question raised in your January 31st letter concerning the acceptance of your proposed road for public dedication is still best answered by informing you again that our Public Works Department will require the road to be built to a width and standard acceptable to them for purposes of continuing maintenance. Your current 254 foot width gravel road does not meet this minimum specification and therefore the County cannot accept the road for maintenance.

In the next paragraph Steffanoff informs Lee "We cannot at this point in time assure you that building permits can or cannot be issued for the subject properties until the soil conditions and drainage requirements are resolved and approved by our Health Department.

On page 2, Steffanoff directs Lee's attention:

to Chapter ORS 92.10 to 92.30 controlling the sales and leases of subdivided lands. . . . Further in the law 92.230 specifies that no person shall offer any subdivided lands for sale or lease without having complied with all the application divisions of 92.210 to 92.90 [sic] and the subdivided lands have met with requirements of ORS 92.020 to 92.160 or as an alternative have met the following conditions:

- a. *Each lot is situated on a dedicated road or street constructed to the specifications of the County Commissions or the County or governing body of the municipality which accepted the road or streets for maintenance; and,*
- b. *The subdivision has drainage structures and fill necessary to prevent flooding, which structures and fill have been approved by the county Commissioners of the County * * * ; and {etc.}*

On March 13, 1972, Grant Bowder in the Subdivision Section of the Real Estate Division of the Oregon Department of Commerce wrote to Nick Steffanoff, recommending a meeting between Steffanoff, Baldwin and Bowder. Notes on the letter suggest the meeting was held on April 11, 1973, but nothing about the result of the meeting appears in the file.

On May 1, 1972, Steffanoff wrote Lee describing the conditions under which the county would consider accepting dedication of the road. Steffanoff stated:

We already have a copy of the Real Estate Commissioner's waiver of certain requirements, dated May 23, 1966, and are returning the copy you sent to us in your March 9th letter. We requested a copy because we assumed a new waiver has been granted since the parcels you have created vary from those originally approved by the Real Estate Commissioner in 1966.

On December 4, 1973, Irving G. Ewen of the County Division of Land Use Planning submitted a form to the Real Estate Commissioner, advising him:

The proposed partitioning/subdivision apparently benefits from the creation of a way for access which is subject to approval by the Planning Commission. Such approval has not been granted to date.

This notification shall not be construed to imply that these properties have received Health Department approval for subsurface sewage disposal or State Health Division approval of water supply or sewage disposal.

We have no evidence to date that the apparent subdivision has complied with eh Oregon Subdivision Control Laws, and we have reason to believe this subdivision is an accomplished fact by contract, agreement, deed, etc.

Further divisions of Tax Lots 33, 32, 31, 23, 20, 2 as represented on the attached map may require Planning Commission review and action which could result in a plat including the current divisions being proposed.

(original emphasis).

The last (most recent) document in the file regarding Lee's partitionings is a letter from the Real Estate Division to Ewen, dated October 10, 1974, including copies of the 1966 Real Estate Division waiver already in the files and noting "Mr. Halston [sic] H. Lee has filed his development and a waiver was issued by this Division on May 23, 1966."

(c) Legal Analysis

Under the express wording of the County's ordinance, I must determine the lawfulness of the Johnson's lot.⁶ My analysis requires an inquiry under the three laws in effect at the time: ORS 197.016 (1965-1971); ORS 197.014 (1965-1971); and the County's Subdivision Regulations, (1955-75.)

(i) Is Tract 3 Illegal Because It Is Part Of A Subdivision Which Never Received The Required County Approval Under State Statutes In Effect At The Time? No.

In 1965 through 1971, ORS 92.016 provided:

No person shall dispose of, transfer, sell or agree, offer or negotiate to sell any lot or parcel of land in any subdivision or division of land with respect to which approval is required by any ordinance or regulation under ORS 92.046 and 92.048 until such approval is obtained.

Before a "subdivision" could be made and recorded prior approval by the local planning commission was required. ORS 92.040 (1965). "Subdivision" was defined by reference to "subdivide land," defined as the partitioning of a "a parcel of land into four or more parcels of less than five acres each * * * * ."

Ludwick v. Yamhill County, 294 Or 778, 786, 663 P2d 398 (1983) concerned the interpretation of a provision in the Yamhill County zoning ordinance, which authorized a dwelling, as a conditional use in the County's F-40 Forest district "on an existing legal lot-of-record of less than forty (40) acres." The Supreme Court found that lots within a subdivision, for which a plat had been drawn up in 1972 but which had never received

⁶ Two recent Court of Appeals decisions, *McKay Creek Assn. v. Washington County*, 118 Or App 549, 848 P2d 624 (1993) and *Woolsey v. Marion County*, 118 Or App 206, ___ P2d ___ (1993), turned the wording of the local government requirements' regarding the status of a "lot of record." In *Woolsey* the Court affirmed the County's denial of a replacement dwelling on an unlawfully partitioned parcel whereas in *McKay Creek* the County's ordinance did not expressly require the lot to be "legal." Like the Marion County ordinance but unlike Washington County ordinance, Multnomah County's ordinance expressly requires a determination of the lawfulness of the parcel.

County approval as required by ORS 92.016 were not "legal" and therefore not "legal lots-of-record." Therefore the applicants were not entitled to a permit for a dwelling, even though they may have been innocent purchasers. *Ludwick v. Yamhill County, supra*, 294 Or at 788-790.

If the Johnsons' property was part of an illegal subdivision which Halsten Lee attempted to create then it was not "lawfully created" and did not satisfy "all applicable laws."⁷ To make this determination, we must evaluate all three versions of his division of the property: 1965, when "Tracts" 1, 2 and the remainder were created; the 1966-70 partitioning which created four more lots, several of them straddling "Leewood Drive"; and 1970-present, when the six tax lots assumed their present form.

In 1965, Lee did not create "four or more parcels of less than five acres each." In his 1965 effort he created or attempted to create only three lots; Tract 1 at 3.00 acres, Tract 2 at 5.0 acres and the remainder of the property at about 31.5 acres.

His 1966 "Leewood Park" (subject to the 1965 laws) as described by the April 1970 survey, contains six tracts. The sizes of those tracts are not shown. However, it appears that Tracts 1 and 2 were the same size as when they were created in 1965; this would leave 31.5 acres to be divided into four parcels. A comparison of the April 1970 configuration with the revised, May 1970 parcels, suggests that Tracts 5 and 6 were 5.0 and 10.0 acres respectively. This would mean that Lee had not violated the 1965 subdivision laws (which were not changed in these respects until 1973) because he had not created four or more lots each smaller than 5 acres.

When the tax lots assumed their present form in 1970, through adjustments of the boundaries made with the consent of their owners, all but one of the properties were larger than 5.0 acres. Their sizes are shown on the map on page 2 of this decision; 3.05 acres for Tract 1 (Tax Lot 20); 6.86 acres for Tract 2 (Tax Lot 23); 5.48 acres for Tract 3 (Tax Lot 30); 5.00 acres for Tract 4 (Tax Lot 31); 6.89 acres for Tract 6 (Tax Lot 32) and 9.89 acres for Tract 6, Tax Lot 33.)

Consequently, the applicants' property is not part of an illegal (*i.e.* unapproved) "subdivision" as that term was defined in state statutes in effect in 1965 through 1969.

⁷ There is nothing in the record of this proceeding indicating what the County had in mind when it adopted the phrases "lawfully created" in MCC 11.15.2052(A)(1) or the phrase "satisfied all applicable laws" in MCC 11.15.2062(A)(2)(b). However, no administrative history is required to understand these clear provisions. I interpret the phrase "satisfied all applicable laws when the parcel was created" in MCC 11.15.2052 and .2062 in the same way and for the same reasons as the Court interpreted the word "legal" in the phrase "legal lot of record" in *Ludwick*.

**(ii) Is Tract 3 Illegal Under ORS Chapter 92.014 (1965-1971)
Because The County Never Approved The Road? Yes.**

From 1965 through 1972, ORS 92.014 provided:

No person shall create a street or way for the purpose of partitioning a parcel of land without the approval of the agency or body authorized to give approval of plans for subdivision under ORS 92.040 with respect to the area in which the parcel is situated.

"Partition" is not defined until the 1973 edition of ORS Chapter 92, but it must mean something other than subdivide. "Partition" and "division" are synonyms. Clearly, "partitioning" is what Halsten Lee was attempting to do when in his 6-lot division of the property which he prepared and submitted to the County in 1966 and 1970. As the review of the correspondence shows, the County never approved Lee's road because it was not up to County standards.

What the statute does not state expressly, is whether it is illegal to sell lots which front on "a street or way" which has never been approved. In *Columbia County v. O'Black*, 16 Or App 147, 517 P2d 688 (1974) the issue was the status of a former logging road used as access to 19 lots. The road did not meet county subdivision standards so the Planning Commission denied approval. The trial court enjoined further partitioning because the defendants had violated ORS 92.104. The defendants argued that the statutory prohibition did not apply to private roads. The Court of Appeals disagreed and affirmed the injunction.

The *O'Black* court refers to the defendants "subdividing" of the property but it is not clear whether the divisions in fact constituted a subdivision. In any event, the Court's decision rested on the violation of the road approval requirement in ORS 92.014, not the subdivision review requirement in ORS 92.016. The lots could not be sold because the road was never approved. The illegality of the road rendered the lots illegal. This is the only logical way of interpreting the statute. Otherwise, lots would be legal and could be sold, even though there was no legal, approved, access to those lots.

In this case, as the applicants' representatives have pointed out, the Johnson's property has direct access onto a County road and therefore does not need to use the illegal road.

Scenic Sites v. Multnomah County Commission, 33 Or App 199, P2d (1978) sheds only a little dim light on this question. The case interpreted the pre-1973 version of ORS 92.016. Although the developer attempted to evade the requirement of approval of the access road or way by dividing the access road longitudinally and giving each lot a narrow strip connecting it directly to the County road. The Court held: "If anything, this device created a 'way' for each parcel to a public road. We hold that ORS 92.014 was applicable, requiring

defendant's approval of the road." *Scenic Sites, supra*, 33 Or App 203. The case could be read as requiring adherence to ORS 92.016 even for lots having direct frontage on county roads. But the facts in that case suggest that the seven connecting strips, into which the illegal road had been divided, may have been too narrow to provide individual access across the lot. The most that can be said of this opinion is that it shows that the Court of Appeals' is unwilling to treat *pro forma* direct access as obviating the need for compliance with ORS 92.106(1965 -1971).

I conclude that Tax Lot 30 was created in violation of ORS 92.016, despite direct access onto Morgan Road because Tax Lot 30 and the other properties were consistently described or presented by Halsten Lee as part of a group of partitioned properties. In his January 31, 1972 letter he described Tax Lot 30 as fronting on the access road, rather than on Morgan Road, even though it would have been in his interest to describe Tract 3 as fronting on Morgan Road.

In addition, while the illegal road was not used to provide access, after the reconfiguration of the lots in 1970, it was used to define the boundaries of Tax Lot 30. Neither the statute nor *O'Black* provide an exception for lots fronting on a public road; I read them as invalidating the entire group of lots, which are accessed or defined by the illegal road.

(ii) **Is Tract 3 Illegal Because It Was Created In Violation Of
County Regulations In Effect At The Time? Yes.**

The County's Subdivision Regulations which were in effect from 1955 to 1975 provided:

1.0 *Preamble*

It shall be unlawful hereafter to subdivide land into four (4) or more lots, except land for agricultural purposes of five (5) acres or more, or to accept a dedication of land for any public street or road or part thereof, until plans thereof are submitted to and approved by the county planning commission."

Multnomah County Subdivision Regulations, (April 19, 1955) §1.0, Preamble. Under this regulation, what Lee did in 1965 was not a subdivision because it created only three parcels.

Lee's 1966/70 partitioning created four lots out of the remainder of the land left after Tracts 1 and 2 had been created. This would constitute a "subdivision" under the County's regulations, unless the lots were created for "agricultural purposes" and were 5.0 acres or larger. Lee's 1966/70 partitioning created lots 5.0 acres or larger but the record does not provide any indication the "purpose" of the lots. The question which remains is whether the lots were created for "agricultural purposes."

Under the County Code, the applicant has the burden of proving the "agricultural purpose." Mr. Robinson's letter of March 11, 1994 states: "The current landowners cannot be required to reach back more than 20 years ago to determine whether an agricultural purpose existed on the property." I understand the applicants' frustration in trying to prove the "purpose" behind a partitioning almost 25 years in the past. However, I am charged with applying the County's ordinances as written; I cannot ignore the requirements in the Code whenever one of the parties, or I, regard them as unreasonable.

There is no written indication of the purposes behind the 1966/70 partitioning. Consequently I must look to the actual use of the land to see what purpose can be inferred from the condition or management of the land.

The June 1986 aerial photo in the record shows the only agriculture in the vicinity to be some small orchards along Highway 30. The Johnson's property is shown in that photo, to be heavily forested. The current forest cover on the property is described in the "Significant Natural Resources Report" prepared for the applicant. (See pages 2, 3.)

The photo also shows the Morrison property, due east across Morgan Road, was logged shortly before the photo was taken. This is confirmed by the testimony regarding compatibility of the proposed house with nearby forestry activities. Evidence of other logging operations nearby are also evident in the aerial photo. Lee's April 14, 1970 sketch of the lots on this property shows parallel dotted lines stretching out from the end of his road, annotated with "Access to Publisher Paper Co. Tree Farm."

From this information it appears the Johnsons' property has been producing timber, with or without management, over the past several years. The applicants contend that timber production is an "agricultural purpose."

The subdivision ordinance contains no definition of "agricultural purposes" or "agriculture."

The 1962 Zoning Ordinance contains this definition of "agriculture":

The tilling of the soil, the raising of crops, dairying and/or animal husbandry, but not including the keeping or raising of fowl, pigs, or fur-bearing animals unless such is clearly incidental to the principal use of the property for the raising of crops.

Ordinance #100 §1.02 (1962). Permitted uses in the F-2 Agricultural District included "Grazing, agriculture, horticulture, or the growing of timber." If the Zoning Ordinance can be used to construe the Subdivision Ordinance, agriculture and timber production were defined as different activities.

The 1971 version of the exclusive farm use statutes also differentiates between agriculture and the forest management activities. "Farm use" was defined to exclude "the use of land subject to the provisions of ORS chapter 321 * * * ." ORS 215.203(2)(a) (1971). ORS Chapter 321 established the various preferential forest use assessment programs.

I conclude that "agriculture" does not include timber production. Therefore, the record does not support a conclusion that Halsten Lee's 1966-70 partitionings were for an "agricultural purpose."

As a result, I must conclude that the 1970 partitioning was a "subdivision" under the County's definition of the term because four parcels were created and the applicant has not carried its burden of proving an agricultural purpose for the parcels which would take their parcel outside the scope of the County's regulations.

I conclude that the subdivision was also illegal because Halsten Lee never received approval for the road which would provide access to his subdivision. This is confirmed by the quoted letters from various County officials to Lee, (Brockman June 3, 1970; Steffanoff, March 8, 1971; Nordlander and Baldwin, April 22, 1971; Steffanoff, August 26, 1971; Steffanoff, February 18, 1972; Steffanoff, May 1, 1972) as well as the letter from Irving Ewen to the Subdivision Section of the Real Estate Division, dated December 4, 1973.

(iv) Was Tract 3 Independently Created By The 1972 Deed? No.

In their application materials and argument submitted by their attorney, the applicants take the position that a parcel was created in 1972, when the applicant supposedly purchased the lot from Halsten Lee. Mr. Robinson states in his letter to me of March 11, 1994:

Moreover, the Hearings Officer can separate the question of the legality of the entire subdivision from the question of whether the applicants' lot was lawfully created. The Hearings Officer should find that the lot was lawfully created.

An extract from his rebuttal of March 28, 1994 summarizes his reasoning well:

Mr. Lee conveyed Tax Lot 30 to the Applicants by deed, as he did the other lots. Therefore, there was no single "package" creation of lots. Each creation by deed standards or falls on its own. Whether a lot is now a lot of record must be determined by viewing that lot individually and assessing whether it met all applicable requirements at the time of creation. The Applicants' lot meets that test and the Hearings Officer need go no further.

Mr. Robinson's argument has merit. It was legal to create an individual lot through deed or other transfer in 1972. Assuming that all the other transactions were legal nullities,

then the Johnson property (and perhaps others) became a separate, legal, parcel on the date it was deeded to them, assuming this occurred before the 1973 statutes and subsequent LCDC rules, which imposed state requirements on the creation of individual lots.

However, I reject this argument for two reasons. First, the record does not contain a 1972 deed for the property, to the Johnsons or to anyone else. Mr. Robinson refers to a deed for the property recorded on October 24, 1972 at Book 889, page 662. Robinson states that Lee transferred the lot directly to the applicants. However there is no photocopy of the deed in the file. The record contains a deed from Mildred Owen to Sven and Carol Johnson dated September 29, 1976, recorded at Book 1130 page 909. The document in the dated October 24, 1972, appears to be the cover of some kind of deed with the Johnsons' and Halsten Lee's name hand-written on the outside. But the contents of that document, identifying what was sold and to whom, is not shown. By 1976, the date of the Owen/Johnson deed, county approval was required for the creation of individual lots and findings demonstrating compliance with the statewide planning Goals were required.⁸

Second, Lee and the County all discussed his land divisions as a "subdivision." The lengthy correspondence reflects the County's continuing refusal to accept the road and to recognize the legality of the subdivision. It would be rewriting the written record to ignore the letters from the County about the Leewood subdivision and pretend that Tax Lot 30 was not a part of this subdivision.

(v) **Argument By Estoppel**

The applicants contend that doctrine of equitable estoppel obliges the County to approve the application. They rely on *Coos County v. State of Oregon*, 303 Or 173, 180-181, 743 P2d 1348 (1987).⁹ As a authority for a contrary proposition, that "estoppel does not

⁸ Statewide Planning Goal 3, "Agricultural Lands" and Goal 4, "Forest Lands," became effective January 1, 1975, and like all the Goals, it was applicable to all land use decisions affecting farm land during the pre-acknowledgment period. ORS 197.175(), *Peterson v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977); *Alexanderson v. Polk County*, 289 Or 427, 616 P2d 459 (1980); *Jurgenson v. Union County*, 42 Or App 505, 600 P2d 1241 (1977); *1000 Friends of Oregon & Seehawer v. Douglas County et al*, 3 LCDC 230 (1979).

⁹ The elements of equitable estoppel in pais are quoted in the *Coos County v. Oregon* case, from *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722 (1908):

To constitute estoppel by conduct there mst (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should

prevent the local government from enforcing its land use regulations," Mr. Rochlin cites *Clackamas County v. Emmert*, 14 Or App 493, 513 P2d 532 (1973) and *Hanley v. City of Salem*, 14 Or LUBA 204 (1986).

The applicants seek to distinguish *Emmert* and *Hanley* on the grounds estoppel was raised as a defense to an enforcement proceeding:

Both cases stand for the proposition that estoppel cannot be invoked to prevent a local government from enforcing its land use regulations. The issue in this case is not whether the local government can be prevented from enforcing its land use regulations. The issue is correctly framed as whether Multnomah County's actions in the past ought to require the County to now issue a building permit. In other words, since the County has treated the parcels as lawfully created, issued other building permits, and created an appearance may be lawfully obtained, the County should now be estopped from taking a different position.

Memo from Michael Robinson dated March 18, 1994 at page 4.¹⁰

Mr. Robinson is drawing a distinction between cases based on "enforcing" of regulations, from the situation in this permitting proceeding. He does not explain what he means by enforcing. If he means the kinds of enforcing initiated the local government in a circuit court against an alleged violator of land use regulations, then he is mistaken that both *Hanley* and *Emmert* were enforcement cases.¹¹

*be acted upon by the other party; (5) the other party must have been induced to act upon it. * * **

¹⁰ To the extent this argument could fit under the headings of "issue preclusion" and "claims preclusion", LUBA has rejected the application of those concepts to land use adjudications. *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990); and see *Okeson v. Union County*, 10 Or LUBA 1, 5 (1983); *Reeder v. Clackamas County*, 20 Or LUBA 238, 243 (1990) (local governments not bound by past erroneous interpretations.)

¹¹ *Emmert* arose out of a regulatory enforcement proceeding in Circuit Court but *Hanley* did not. In *Hanley*, estoppel was used as the basis for arguing the City was required to issue the necessary land use "check off" for the septic permits issued by DEQ. Without the City's approval, septic permits would be denied and construction of houses on five lots would not be possible. *Hanley, supra* 14 Or LUBA 205. LUBA has rejected estoppel arguments in at least one other case in the context of a permitting decision, rather than an enforcement, decision. *Sellwood Harbor Condo Assoc. v. City of Portland*, 16 Or LUBA 505, 510 (1988) (estoppel used offensively against a decision to grant a permit.) To summarize, equitable estoppel has been rejected both when it was used as a sword in the permitting context and as a shield against enforcement in circuit court.

In any event, I do not understand why a difference in the context, (between enforcement and permitting actions) makes any difference to the application of the doctrine of equitable estoppel. A review of the limited case law shows that equitable estoppel has never been applied by an Oregon appellate court or LUBA as the basis for requiring the issuance of a land use permit, regardless of the regulatory context. *Bankus v. City of Brookings*, 252 Or 257, 449 P2d 646 (1969); *Emmert, supra*; *Hanley, supra*; *Sellwood Harbor Condo Assoc. v. City of Portland*, 16 Or LUBA 505 (1988).

In the case cited by the applicants, the Supreme Court said that "an estoppel may be raised against government entities, subject to certain specific limitations". *Coos County, supra*, 303 Or 181 (emphasis). The circumstances in which equitable estoppel would apply to a government were set out in *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 692, 669 P2d 1132 (1983); when the doctrine would "prevent unjust enrichment [by the government] and to accord fairness to those who bargain with the agents of municipalities for the promises of the municipalities." Quoted in *Coos County, supra*, 303 Or 181.

Multnomah County is not "enriched" by the denial of the permit. There has been no bargaining between the applicants and the County; the County is the decision maker. In *Coos County*, the County was one of the parties in interest to a land title dispute with the state.

I conclude that "equitable estoppel" is not available to the applicants under the facts of this case under the governing authorities. *Bankus v. City of Brookings, supra*; *Wiggins v. Barrett & Associates, Inc.*; *Emmert, supra*; *Hanley, supra*; *Sellwood Harbor Condo Assoc., supra*.

In addition, there are weaknesses in the factual basis for several of the elements of estoppel when used by the applicants.

First, the "false representation" (the issuance of building permits to owners of neighboring tax lots) was not made to the applicants but to their neighbors. I question whether the applicants are entitled to rely on the issuance of permits to other persons.

Second, the Supreme Court noted that "Courts generally have held that the misrepresentation must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or a conclusion of law." *Coos County, supra*, 303 Or 181. The legality of the parcel seems to be a conclusion of law rather than of fact.

Third, it is not clear how the Johnsons' were "induced" to act upon the County's "misrepresentation." They had bought the property in 1972 or 1976, before the County had issued the permits which their attorney claims they relied upon.

(vi) Conclusion Regarding The Lawful Creation Of Tax Lot 30

For the foregoing reasons, I conclude: (a) Tax Lot 30 is not "a parcel which satisfied all applicable laws when the parcel was created" and thus does not qualify as a "lot of record" as defined by MCC 11.15.2062; (b) the county is not equitably estopped from denying the Johnsons' a permit for a nonforest dwelling.

2. MCC 11.15.2052(A)(2); Sufficient Size To Meet Siting Standards

The applicants are seeking a variance to the 200' side-yard set-back requirement. The variance is discussed below.

3. MCC 11.15.2052(A)(3); Parcelization, Proximate Development And Productivity Standards

MCC 11.15.2052(A)(3) (based on OAR 660-04-028 (1991)) established a framework of tests for nonforest dwellings, requiring increasing levels of parcelization and dwellings and decreasing size, for each of three timber productivity ranges. Based on the evidence in the record (lot maps, aerial photo, notice list, etc.) and the analysis provided on page 6 of the Staff Report, I conclude that the parcel's soils exceed 85 cubic feet/acre/year and that the parcel satisfies the tests in MCC 11.15.2052(c).

4. MCC 11.15.2052(A)(4)

Subsection .2052(A)(4) requires the applicant to demonstrate that:

- (4) *The dwelling will not force a significant change in, significantly increase the costs of, or impeded accepted forestry or farming practices on surrounding forest or agricultural lands;*

Mr. Rochlin contends the house will not be compatible with (industrial style) forestry on nearby lands.

The infiltration of houses into areas of commercial forest production is always a source of serious concern because of the frequency of conflicts between some forest management activities and residential uses. In this case, the record (e.g. 1986 aerial photo, testimony, references to Publisher's Tree Farm on Halsten Lee plat surveys) discloses ongoing commercial logging activities across NW Morgan Road and on nearby properties to the east and northwest.

My chief concern about compatibilities are aerial application of pesticides and forest fires.

The record shows that logging and aerial spraying occurred in the last decade on the Morrison property across NW Morgan Road from the applicants' property. The applicants' house would be located about 100 feet from the Morrison's property. However, the area under production across Morgan Road is just short of 200 feet from the proposed dwelling site and the Oregon Department of Forestry recommends a 200' spray buffer. While the risk of conflict over spraying is high, I am impressed by the continuation of logging operations within the recent past, near other residences. The applicants have described existing limitations on the use of aerial spraying which I believe should avoid conflicts over spraying at this site in the future.

With regard to fire, the applicants' compliance with the fire siting safety standards in MCC 11.15.2052(A)(6); .2074(A)(5) and (D) and the installation of spark arresters, should be made a condition of approval. These, coupled with Morgan Road, should be adequate to minimize the risk of fire posed to nearby forest lands.

For these reasons, and the reasons and evidence set out in the Staff Report at pages 7-9 and 10-11, I conclude the applicants satisfy MCC 11.15.2052(4).

5. MCC 11.15.2052(A)(5); Dwelling Is Outside Big Game Winter Habitat Area

MCC 11.15.2052(A)(5) provides:

The dwelling will be located outside a big game winter habitat area as defined by the Oregon Department of Fish and Wildlife, or that agency has certified that the impacts of the additional dwelling, considered with approval of other dwellings in the area since acknowledgment of the Comprehensive Plan in 1980 will be acceptable.

At pages 6-7, the Staff Report states:

The Comprehensive Plan Wildlife Habitat map shows that the subject property may be in the West Hills Sensitive Big Game Wintering Area. (Due to the small map scale and generalized boundaries of habitat areas, an exact determination is left to the Department of Fish and Wildlife.) Because of the number of existing residences in the area, it is doubtful that the proposed dwelling will cause any additional impacts to big game. However, the applicant has not submitted written certification from ODFW to that effect.

After the initial session of the hearing, the record was left open, in part to allow Mr. Walker to secure the necessary certification from Gene Herb. Minutes of February 16, 1994, hearing at page 2. However, Mr. Walker was unable to do so and requested me to rely on the "Significant Natural Resources Report" prepared by The Resource Company, in lieu of the certification by ODFW.

The Code requires either a demonstration that the property is outside a big game winter habitat area or a certification by ODFW that the impacts, "considered with approval of other dwellings since acknowledgment" are acceptable. Because the applicant has not demonstrated that the property is outside the habitat area and has not provided the required certification, the applicants do not satisfy this criterion.

6. MCC 11.15.2052(A)(6); Rural Fire Protection

The file contains a County "Fire District Review" form completed on September 22, 1993, by Fire Chief Martyn Wheller, of the Multnomah County Rural Fire District #20. The form indicates the District's ability to provide fire protection to this property. This standard is satisfied.

7. MCC 11.15.2052(A)(7); Long Term Road Access

The applicants property has direct access onto NW Morgan Road. I find this standard inapplicable.

8. MCC 11.15.2052(A)(8); Disqualification from Preferential Assessment

The applicants' property has not been receiving preferential farm or forest use assessment. In the event a dwelling is approved for the property, a condition of approval should be the submission of proof of permanent disqualification from farm or forest use preferential assessment.

9. MCC 11.15.2052(A)(9); Satisfaction of Standards in MCC 11.15.2074

The satisfaction of the standards in MCC 11.15.2074 is discussed below.

10. MCC 11.15.2052(A)(10); Acknowledgment of farm and forest practices

The application materials describe the "property owners willingness to enter a declaratory statement into their chain of title" recognizing the "right of nearby property owners to conduct farm and forest practices." However, a signed copy of the declaration (prior to recording) is not included in the file.

A copy of the signed declaration, with proof of recordation, should be a condition of approval in the event the permit is ultimately granted.

11. MCC 11.15.2052(B); Qualification Period

Subsection (B) provides:

- (B) *Dwellings not related to forest management shall not be allowed upon the effective date of a small scale resource land program adopted pursuant to the requirements of OAR 660, Division 6 and 33.*

Early in 1993, LCDC adopted amendments to OAR 660 Division 6 and adopted a new Division 33, for a small scale resource land program. OAR 660-33-010 (1993) The small scale resource land rules had an effective date of August 7, 1993, OAR 660-33-160(1)(1993), before the Johnsons' application. These rules were repealed by HB 3661, which went into effect on November 5, 1993, after their application.

It would be ironic if it was the applicants' rush to beat the effective date of the new statutes which may have led them to file during the period when the County's authorization of non-forest dwellings had lapsed under the terms of its own ordinance.

However, the 1993 small scale resource land rules adopted by LCDC continued to authorize nonforest dwellings of the type permitted under MCC 11.15.2050(b)¹². It would exalt form over substance to hold that the County could not approve the Johnson's nonforest dwelling application because of the implementation of state rules which expressly authorized that type of dwelling, rules rendered invalid under a bill which already passed by the Legislature.

While this aspect of my ruling may be open to challenge, I find that the County retained authority to approved nonforest dwellings because the "small scale resource lands" rules never truly became effective.

B. MCC 11.15.2074 Development Standards for Dwellings and Structures

1. .2074(A)(1) and (2); Compatibility With Farm And Forest Uses

(A) The dwelling or structure shall be located such that:

- (1) It has the least impact on nearby or adjoining forest or agricultural lands and satisfies the minimum yard and setback requirements of .2058(C) through (G);*
- (2) Forest operations and accepted farming practices will not be curtailed or impeded;*

* * * * *

¹² The qualification standards were slightly different.

For the reasons set out above in the discussion of the applicants' satisfaction of MCC 11.15.2052(A)(4) and .2074(A)(3), and based on the Staff Report, I find (a) there are no nearby farming practices and (b) nearby forest operations will not be curtailed or impeded. Satisfaction of .2074(A)(1) depends on the applicants' success in securing a variance to the side-yard set-back (discussed below.)

2. .2074(A)(3) Limiting the Amount of Forest Land Used to Site Dwelling And Other Improvements

The size and terrain of the lot limit the building site to a small level area near Morgan Road. This also has the effect of limiting the amount of forest land used for the dwelling and improvements. This standard is satisfied.

3. .2074(A)(4) Justification Of Access Road In Excess of 500 Feet

The site plan shows short access (less than 100 feet) from the home site directly onto Morgan Road. I find this standard inapplicable.

3. .2074(A)(5); Wildfire Safety Standards (access to water, fire breaks and slope)

Subsection .2074(A)(5) sets out six wildfire safety standards.

The first concerning access to perennial water source on the property is inapplicable because there is no perennial surface water source on the property. (The stream described in the applicants' "Significant Natural Resources Report" is intermittent not perennial.)

While the applicants have testified that the primary fire break has been cleared, they did not submit a map of the secondary fire safety zones (fire breaks.) Should the grounds for denial be overturned on appeal, the clearing (not just the mapping) of the primary and secondary fire breaks, adjusted for slope as required by .2074(A)(5)(b)(ii)), should be made a condition for issuance of the building permit. This determination could be made administratively based on a site inspection, but because it may require the exercise of discretion, it notice of the administrative decision and an opportunity for a hearing on appeal must be provided. ORS 197.763(2), 215.416, *Rhyne et al v. Multnomah County, Swan & Trotter*, 23 Or LUBA 442, 447-78 (1992)

Based on the topographical maps, I find the slopes at the building site to be less than 40%.

4. .2074(B); Building Code Compliance

The applicant has not submitted information about the proposed dwelling.

Should a dwelling be authorized on the property, proof of compliance with the requirements for the minimum size, an adequate foundation and the Uniform Building Code, should be made a condition for issuance of the building permit. 'This is very important given the slope of the property and the presence of fill on the site. (See geotechnical report.) These determinations can be made administratively. Because they may require the exercise of discretion, notice of the administrative decision and an opportunity for a hearing on appeal must be provided. ORS 197.763(2), 215.416, *Rhyne et al v. Multnomah County, Swan & Trotter*, 23 Or LUBA 442, 447-78 (1992)

5. .2074(C); Domestic Water Supply

The applicants have stated their intention to use well water. This mean they will not be taking their water from a Class II stream, which is prohibited by this subsection.

They have submitted information about flow from wells in the same section but they have not provided "evidence that the domestic water supply is from a source authorized" by the Water Resources Department's ground water rules, OAR 690 Division 10.

Should a dwelling be approved for the property, (a) proof of an adequate domestic water supply from a well; and (b) evidence that the withdrawal is authorized by WRD's ground water rules, should be provided prior to the issuance of a building permit. These determinations can be made administratively. Because they may require the exercise of discretion, notice of the administrative decision and an opportunity for a hearing on appeal must be provided. ORS 197.763(2), 215.416, *Rhyne et al v. Multnomah County, Swan & Trotter*, 23 Or LUBA 442, 447-78 (1992)

6. .2074(D); Driveway Design

Subsection .2074(D) has seven subsections which regulate the design of access roads to two or more houses or driveways "accessing a single dwelling." Based on the information provided addressing this criteria in the application (unpaginated) which is consistent with the topographic maps, testimony and site plans in the record, I conclude that the application will satisfy the standards in (D)(1) through (5).

I find subsections (6) and (7) inapplicable because the driveway access is shorter than the distances which require turn-outs or turn-arounds under the ordinance.

C. Major Variance To Side-Yard Setback Requirements; MCC 11.15.8505

Because the applicants are seeking a variance "in excess of 25 percent of an applicable dimensional requirement" i.e., to reduce the side-yard setback from 200' to 100', the variance is a "major variance" and they must satisfy all four subsections of MCC 11.15.8505(A). MCC 11.15.8515(A).

1. MCC 11.15.8505(A)(1); Circumstances Specific to the Property

The first subsection of the variance standards provides:

- (1) *A circumstance or condition applies to the property or to the intended use that does not apply generally to other property in the same vicinity or district. The circumstances or condition may relate to the size, shape, natural features and topography of the property or the location or size of physical improvements on the site or the nature of the use compared to surrounding uses.*

I find that the narrow and irregular shape of the property combined with the steep slopes on the wider portions of the property, render satisfaction of the 200' side-yard set back requirement impossible. These factors are sufficient to satisfy this criterion.

2. MCC 11.15.8505(A)(2); Greater Restriction On This Than Other Properties

The second subsection of the variance standards provides:

- (2) *The zoning requirement would restrict the use of the subject property to a greater degree than it restricts other properties in the vicinity or district.*

Because of the shape and terrain of the property, if a variance was not granted no house would be allowed on the property. Houses are not generally allowed in the (former) CFU district. But if the lot otherwise qualifies for a nonforest dwelling under MCC 11.15.2052(3), the owners may receive approval for a house. Many other lots in the vicinity would qualify for a nonforest dwelling under MCC 11.15.2052(3). According to the applicants' Exhibit 1, all of the existing properties in the Leewood Park subdivision have houses already.¹³

I find that the applicants have carried their burden of proving that the standard for side-yard set-back requirement would impose a greater restriction on their property, than other properties of similar size nearby.

¹³ On page 12, the Staff Report notes that the 200' setback requirement was not adopted until 1993 and "[n]one of the other 17 houses in the vicinity were required to comply with this large a setback.... Staff plans to recommend that the county drop the 200 foot setback requirement when it amends its CFU code" Neither of these factors is an appropriate basis for a variance under this subsection of the code.

3. MCC 11.15.8505(A)(3); Granting The Variance Will Not Be Materially Detrimental To The Public Welfare, Will Not Be Injurious To Property In The Vicinity And Will Not Adversely Affect Appropriate Development Of Adjoining Properties.

The third subsection of the variance standards provides:

- (3) *The authorization of the variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or district in which the property is located, or adversely affects [sic] the appropriate development of adjoining properties.*

Provided they comply with the various standards in the County Code and Plan, the Johnsons' house would not be "materially detrimental" to the public welfare, as the public welfare has been articulated and protected by the Code and Plan.

The nearest house is several hundred feet away. The Johnson's house would not block anyone's view or sunlight. The only way in which the approval of the variance might be "injurious" to anyone else was described by Virginia Casey, in her letter of February 28, 1993, in which she contends that building a house on the small level area will eliminate a bus stop now located on the property, increasing risks to children. The small area available for the house may cause the owners to park cars partly on the roadway, which will decrease safety and congestion.

The school district has the responsibility for providing safe school bus stops, not the applicants. As far as the problem with parking, should the dwelling be approved, the County should impose a condition of approval that the driveway, other improvements and any grading which is authorized, should be designed so as to prevent roadside parking by the applicants or their guests.

As conditioned, the application would satisfy this subsection of the variance standard.

4. MCC 11.15.8505(A)(4); The Variance Will Not Adversely Affect Realization of the Comprehensive Plan Nor Establish A Use Not Listed In Underlying Zone

The third subsection of the variance standards provides:

- (4) *The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor will it establish a use which is not listed in the underlying zone.*

I believe the 200' setback standard for forest dwellings in MCC 11.15.2052(A)(2) is

not adopted in order to implement the County's Comprehensive Plan but rather because it was required by the Goal 4 Administrative Rule. Therefore, provided all applicable Plan Policies and implementing standards in the County Code are satisfied, the variance will not "adversely affect" the realization of the Comprehensive Plan.

The variance would allow a nonforest dwelling, a use expressly authorized by MCC 11.15.2050(B).

This subsection is satisfied.

D. Policies In The County Comprehensive Plan Which Are Or May Be Applicable To This Quasijudicial Decision

1. Policy 13: Air, Water and Noise Quality

Policy 13 of the Multnomah County Comprehensive Framework Plan provides, in relevant part:

FURTHERMORE, IT IS THE COUNTY'S POLICY TO REQUIRE, PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASIJUDICIAL ACTION, A STATEMENT FROM THE APPROPRIATE AGENCY THAT ALL STANDARDS CAN BE MET WITH RESPECT TO AIR QUALITY, WATER QUALITY, AND NOISE LEVELS. IF THE PROPOSAL IS A NOISE SENSITIVE USE AND IS LOCATED IN A NOISE IMPACTED AREA, OR IF THE PROPOSED USE IS A NOISE GENERATOR, THE FOLLOWING SHALL BE INCORPORATED INTO THE SITE PLAN: [Etc.]

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983) at 56.

I find the noise and air quality elements of the policy inapplicable because a single family residence is not a "noise generator" and the dwelling would not be located in a "noise sensitive area." No state air quality standards apply to the proposed use.

For the reasons set out below under Policy 37, I find the application does not demonstrate compliance with the water quality provisions of Policy 13.

2. Policy 14; Development Limitations

Comprehensive Plan Policy 14 is to

DIRECT DEVELOPMENT AND LAND FORM ALTERATIONS AWAY FROM AREAS WITH DEVELOPMENT LIMITATION EXCEPT UPON A

SHOWING THAT DESIGN AND CONSTRUCTION TECHNIQUES CAN MITIGATE ANY PUBLIC HARM OR ASSOCIATED PUBLIC COST, AND MITIGATE ANY ADVERSE EFFECTS TO SURROUNDING PERSONS OR PROPERTIES. DEVELOPMENT LIMITATIONS AREAS ARE THOSE WHICH HAVE ANY OF THE FOLLOWING CHARACTERISTICS:

- A. SLOPES EXCEEDING 20%;**
- B. SEVERE SOIL EROSION POTENTIAL**
- C. LAND WITHIN THE 100 YEAR FLOOD PLAIN**
- D. A HIGH SEASONAL WATER TABLE WITHIN 0-24 INCHES OF THE SURFACE FOR 3 OR MORE WEEKS OF THE YEAR;**
- E. A FRAGIPAN LESS THAN 30 INCHES FROM THE SURFACE;**
- F. LAND SUBJECT TO SLUMPING, EARTH SLIDES OR MOVEMENT.**

Multnomah Comprehensive Framework Plan at page 58.

With respect to subsections A through E, I concur with the Staff Analysis, based on my review of the record and therefore find these subsections satisfied.

With respect to subsection F, I have some unsatisfied concerns due to disagreement in the record about the location of the drainfields.

The County's "Geotechnical Reconnaissance and Stability" Form-1 questionnaire) was completed and signed by the Johnsons' engineer, Christine Gregory, on November 30, 1993. The form addresses the issue of the stability of the site and required her to discuss the drainfields because of their potential effect on soil stability (question 6.) In the map (apparently) attached to Gregory's report, a single drainfield is shown northwest of the building footprint, immediately beside the "intermittent stream" flowing downhill from the intersection of the subdivision access road and Morgan Road.

In Figure 4 of the revised application (submitted December 27, 1993) two drainfields are shown approximately 40 feet E/NE of the dwelling footprint. This is their location in Figure 3 of the Johnsons' "Significant Natural Resources Report" dated December 16, 1993.

In response to a question about "visible signs of instability" Gregory wrote (emphasis added):

** * * The proposed building site is overlain by silt fill which was probably placed*

*when Morgan Road was constructed. The surface of the fill has recently been disturbed when the site was cleared. Organic debris (tree limbs, logs and stumps) and refuse (tires, garbage, etc.) were observed at the outer edge of the proposed building site. It is not known if the fill was engineered when it was placed. * **

I am concerned that the location of the drainfields shown on the December 27, 1993 application materials are positioned in the area described by Gregory. If so, then her response to question 6 may have been different if she assumed they would be located E/NE of the site.

For this reason, I cannot find the applicants have carried their burden of proof of compliance with subsection F of Policy 14.

3. Policy 22: Energy Conservation

Comprehensive Plan Policy 22 provides:

THE COUNTY'S POLICY IS TO PROMOTE THE CONSERVATION OF ENERGY AND TO USE ENERGY RESOURCES IN A MORE EFFICIENT MANNER. IN ADDITION, IT IS THE POLICY OF MULTNOMAH COUNTY TO REDUCE DEPENDENCY ON NON-RENEWABLE ENERGY RESOURCES AND TO SUPPORT GREATER UTILIZATION OF RENEWABLE ENERGY RESOURCES. THE COUNTY SHALL REQUIRED A FINDING PRIOR TO THE APPROVAL OF LEGISLATIVE OR QUASIJUDICIAL ACTION THAT THE FOLLOWING FACTORS HAVE BEEN CONSIDERED;

- A. THE DEVELOPMENT OF ENERGY-EFFICIENT LAND USES AND PRACTICES;**
- B. INCREASED DENSITY AND INTENSITY OF DEVELOPMENT IN URBAN AREAS, ESPECIALLY IN PROXIMITY TO TRANSIT CORRIDORS AND EMPLOYMENT, COMMERCIAL AND RECREATIONAL CENTERS;**
- C. AN ENERGY-EFFICIENT TRANSPORTATION SYSTEM LINKED WITH INCREASED MASS TRANSIT, PEDESTRIAN AND BICYCLE FACILITIES;**
- D. STREET LAYOUTS, LOTTING PATTERNS AND DESIGNS THAT UTILIZE NATURAL ENVIRONMENTAL AND CLIMACTIC CONDITIONS TO ADVANTAGE.**

***E. FINALLY, THE COUNTY WILL ALLOW GREATER FLEXIBILITY
IN THE DEVELOPMENT AND USE OF RENEWABLE ENERGY
RESOURCES.***

Based on their terms I find that subsections (B) through (E) of this policy only applies to quasijudicial decisions within urban areas and are thus inapplicable to this decision. Subsection E does not apply to a decision on an application for a house.

The application of subsection A to decisions on applications for a single family dwelling in a rural area, is problematic. The policy would require either a denial of every application (since all dispersed residential development is energy inefficient) or approval of every application on the theory that each approval represent only a *de minimis* inconsistency with the subsection. To resolve this dilemma, I interpret subsection A as being applicable to decisions on rural rezonings and amendments to the text of rural zones.

4. Plan Policy 37: "Utilities"

Multnomah County Plan Policy 37, "Utilities" provides:

POLICY 37

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

WATER AND DISPOSAL SYSTEM

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

DRAINAGE

- E. *THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR*
- F. *THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND*
- G. *THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.*

ENERGY AND COMMUNICATIONS

- H. *THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND*
- I. *COMMUNICATIONS FACILITIES ARE AVAILABLE*

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 167-168.

The record shows there is no public water, stormwater drains, or sewer system to which the dwelling would be connected; if a residence is approved, the applicants will use a septic disposal system, a well for their water and the natural drainage of the property.

In his January 31, 1994 letter, Terry Vollertsen expressed concern about the possibility that leachate from the septic drainfields leaching into "the East Fork of Paterson Creek which serves several families for both domestic and irrigation water use."

The proposed drainfield site is on a sidehill and only a few feet from these drainage systems. What is to prevent this sewer [sic] from leaching into this water source? How did this ever get septic approval? There is not enough area to put in a minimum 200 ft. of drainfield not to mention a reserve area for replacement for even the smallest home! Someone had better look into this.

In her letter dated February 28, 1994, Virginia Casey stated:

*A certification for on-site sewage disposal was approved if 'setbacks can be met.'
I don't think they can be met and applicant has not provided any survey data
that shows they can.*

The County sanitarian, Phil Crawford, signed the form and circled the choice: "the proposed use can be served by an on-site sewage disposal system in the form of: [circled] A Septic Tank and Drainfield." He added, "If stake out shows that setbacks can be met." The form states that "Land Feasibility Study No. 13-89 was conducted on this side (date): 1-13-89." However, the copy of the study is not attached. I cannot determine where the drainfields were located on the property in the 1989 study and whether the effects on downstream water quality had been considered.

As noted under the discussion of Policy 14, the information in the record regarding the location of the drainfield(s) is contradictory. Their location is relevant to the potential for contamination of the surface waters.

Because of (1) the absence of a copy of the original 1989 land feasibility study for sewage disposal; (2) the uncertainty over the location of the drain field(s); and (3) the absence of an rebuttal to Vollertsen and Casey's concerns about sewage disposal, I find the applicants have not met their burden of proving their sewage disposal system, will satisfy subsections C (for sewage) and G of Plan Policy 37.

The applicants have submitted well log information for the section in which their property is located but no information about which wells were monitored and their proximity to the property. However, in the event a dwelling is approved, satisfaction of this subsection could be deferred for later approval by the means described under MCC 11.15.2074(C) described above.

With respect to subsections H and I of Policy 37, the record is sufficient to indicate the availability of electrical power and telephone service, since those utilities are available to other properties nearby.

5. Plan Policy 38: "Facilities"

Multnomah County Plan Policy 38, "Facilities" provides:

POLICY 38

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

SCHOOL

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

FIRE PROTECTION

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

POLICE PROTECTION

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 169-170.

Subsection A is satisfied by the return of the County's School District Review form signed by Reg martinson, Director of the Physical Plant for Portland Public Schools, dated September 24, 1993.

Subsection B and C are satisfied by the return of the County's Fire District Review form signed by Martyn Wheller, Fire Chief for County Fire District 20, dated September 22, 1993.

Subsection D is satisfied by the return of the County's Police Services Review form signed by Lieutenant Bill Goss of the County Sheriff's office dated September 27, 1993.

The applicants have satisfied Policy 38.

6. Plan Policy 40: "Development Requirements"

Multnomah County Plan Policy 40, "Development Requirements" provides:

POLICY 40

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

- 1. PEDESTRIAN AND BICYCLE PATH CONNECTIONS TO PARKS, RECREATION AREAS AND COMMUNITY FACILITIES WILL BE DEDICATED WHERE APPROPRIATE AND WHERE DESIGNATED INT HE BICYCLE CORRIDOR IMPROVEMENTS PROGRAM AND MAP.**
- 2. LANDSCAPED AREAS WITH BENCHES WILL BE PROVIDED IN COMMERCIAL, INDUSTRIAL AND MULTIPLE DEVELOPMENTS, WHERE APPROPRIATE.**
- 3. AREAS FOR BICYCLE PARKING FACILITIES WILL BE REQUIRED IN DEVELOPMENT PROPOSALS, WHERE APPROPRIATE.**

I concur with the Staff Report in finding these provisions are inapplicable to this application.

E. State Statutes, Goals And Administrative Rules Applicable To The Decision

1. The Effective Date Of The New Statutory Criteria For Forest Dwellings

HB 3661 established the first statutory standards for forest dwellings, codified at ORS 215.705; 215.720, 215.730 and 215.740. HB 3661 became effective on November 5, 1993, 60 days after it was signed by the Governor.

ORS 215.428(3) provides:

If the application was complete when submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a land use plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

The applicant supplied the missing information identified by the staff within 180 days of the

date the application was first submitted.¹⁴

The question is whether ORS 215.428(3) applies only to the "standards and criteria" in the local plan and land use regulations or whether it also applies to statutes which came into effect after the application but before the decision. LUBA has held that it does. *Warren v. City of Aurora*, 25 Or LUBA 11, 15 (1993). But LUBA did not provide any explanation of its conclusion. In particular it did not address the conflicting provisions in the state constitution.

Article IV §28 of the Oregon Constitution specifies the effective date for legislation as "ninety days from the end of the session at which the same shall have passed, except in case of emergency; which emergency shall be declared in the preamble or in the body of the law." HB 3361 was passed without an emergency clause and so became effective on November 5, 1993, 90 days after adjournment.

Article I §21 of the Oregon Constitution states, in part, "nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution;"

I conclude that ORS 215.428(3) cannot override state Constitution, even if the Legislature intended it.¹⁵ State statutes establishing criteria for dwellings in resource zones apply directly to local government decisions. *Kenagy v. Benton County*, 115 Or App 131, 136, __ P2d __ (1992); *Forster v. Polk County*, 115 Or App 475, 478, __ P2d __ (1992). The statutes containing the standards for forest dwellings passed by the last Legislature are in effect now; therefore they apply to the decision I am making today.

This interpretation of ORS 215.428(3) is consistent with the reference in the statute to acknowledged local plans and land use regulations. If the statute was not to be limited to local laws the reference to acknowledged plans and regulations would be pointless.

¹⁴ A letter from Staff Planner Sandy Mathewson dated December 2, 1993 to the applicants' agent, Frank Walker states: "The application is currently incomplete." Mathewson informs Mr. Walker "The application will be deemed complete as soon as (1) the items outlined above are submitted, or (2) you refuse to submit the additional information." A revised application, still dated October 5, 1993, is stamped "Received December 27, 1993." The photocopy of the applicants' check which is found in the variance file, is dated November 10, 1993.

¹⁵ If the legislature had wished to limit the application of the new statutory standards to applications submitted after its effective date it could have said so. I conclude that the standards in ORS 215.705 - .740 apply to this application.

Fortunately for the applicants, most of the new statutory provisions are minimum standards which apply only at the discretion of the local government while others are based on the former Goal 4 Rule which the County has implemented through the CFU zone.

2. ORS 215.705

(a) ORS 215.705(1)(a)

ORS 215.705(1)(a) requires the "lot or parcel" to be "lawfully created and was acquired by the present owner (A) Prior to January 1, 1985;". For the reasons set out addressing MCC 11.15.2062(A)(2) I find the applicants held the property by the deadline but do not satisfy the "lawfully created" requirement.

(b) ORS 215.705(1)(b)

This subsection requires the tract to be unoccupied by another dwelling. The applicants' property satisfies this standard.

(c) ORS 215.705(1)(c)

This subsection requires the dwelling to comply with the County's plan and land use regulations. This compliance is discussed in detail in the remainder of this opinion.

(d) ORS 215.705(1)(d)

The property is not "high value farmland" as defined in ORS 215.710. The property complies with this subsection.

(e) ORS 215.705(1)(e)

This subsection provides "The lot or parcel on which the dwelling will be sited, if zoned for forest use, is described in ORS 215.720, 215.740 or 215.750." (emphasis added.) These sections are discussed below.

(f) ORS 215.705(1)(f)

The Multnomah County Plan and Code do not establish density limitations as the means of protecting big game habitat. Therefore this subsection is inapplicable.¹⁶

¹⁶ If the provisions of MCC 11.15.2052(A)(5) are properly interpreted as density provisions, then this standard is not satisfied for the reasons given in the analysis of that section of the Code.

(h) ORS 215.705(1)(g)

Since the applicants do not own any adjoining lots, the consolidation requirement in this subsection does not apply.

3. ORS 215.720

To qualify under this section, the applicants' property must satisfy the maximum production and road access standards in ORS 215.720(1)(a):

(a) The tract on which the dwelling will be sited is in western Oregon, as defined in ORS 321.257 and is composed of soils not capable of producing 5,000 cubic feet per year of commercial tree species and is located within 1,500 feet of a public road as defined under ORS 368.001. The road shall not be a United States Forest Service Road or Bureau of Land Management road and shall be maintained and either paved or surfaced with rock.

Multnomah County is in "Western Oregon" as defined in ORS 321.257.

The record shows the applicants' land is overlain with Goble silt loam which has a potential yield of 135 to 145 cubic feet/acre/year. The parcel's annual production is calculated thus: 5.48 acres x 145 cu.ft./ac./yr. = 794.6. The parcel qualifies under the maximum production test.

The property also meets the road access standard, since it has direct access to Morgan Road, a County road.

The property qualifies under ORS 215.720; there is no need for it to meet the requirements in ORS 215.740 or 215.750.

4. ORS 215.730

ORS 215.730(1) requires that single-family dwellings allowed under ORS 215.705 on lands zoned forestland provided the applicants meet several standards set out in subsections (a) and (b).

(a) ORS 215.730(1)(a); Timber stocking survey and certification by assessor

The statute requires the applicants to submit a timber stocking survey report which will enable the assessor to verify that the property meets the minimum stocking requirements under ORS 527.610 to 527.770. The applicants have not satisfied this standard.

(b) ORS 215.730(1)(b)(A); Fire retardant roof

Should the dwelling be approved, under this section of the statute the County must require a "fire retardant roof" as a condition of approval.

(c) ORS 215.730(1)(b)(B); Maximum slope

As discussed under MCC 11.15.2074(5)(c), I have concluded that the dwelling "will not be sited on a slope of greater than 40%." The applicants satisfy this standard.

(d) ORS 215.730(1)(b)(C); Source of water

The applicants have identified their water source as a future well, which satisfies the prohibition on supplying water from a Class II stream. However, they have not provided evidence that "the domestic water supply is from a source authorized by the Water Resources Department." This standard could be satisfied later at the same time and in the fashion as MCC 11.15.2074(C).

(e) ORS 215.730(1)(b)(D); Inclusion in fire district

The Fire District Service form proves the applicants' satisfaction of this requirement.

(f) ORS 215.730(1)(b)(E); Alternate fire protection arrangements

Because the property is within a fire district, this section does not apply.

(g) ORS 215.730(1)(b)(F); Spark arresters

Should the dwelling be approved, under this section of the statute the County must require as a condition of approval, the installation of spark arrester in every chimney.

(h) ORS 215.730(1)(b)(G); Primary and secondary fuel breaks

The statute's requirements of a primary and secondary fuel breaks echo the provisions in MCC 11.15.2074(5). The discussion under that section suffices to address these provisions.

(I) ORS 215.730(2)

Subsection (2) of ORS 215.730 only applies if the property is outside a fire protection district; it is inapplicable to this decision.

3. Other Statutes And State Standards

The provisions of state law governing county quasijudicial decisions, found in ORS 197.763 and 215.416 apply to this proceeding. They have been fulfilled through the notice of, and conduct of, the hearing on this matter.

No other provisions in ORS Chapters 197 and 215 are applicable.

No statewide planning goals and no Oregon Administrative Rules interpreting those goals, apply to this quasijudicial permitting proceeding.

VI. CONCLUSIONS AND ORDER

A. Standards Which The Applicant Has Not Satisfied

I conclude that the applicants have failed to demonstrate compliance with the following provisions of the Multnomah County Code:

MCC 11.15..2052(A)(1); Satisfaction of the definition of "Lot of Record" in .2062(A) and (B))

MCC 11.15.2052(A)(5); Big game habitat protection standards.

Plan Policy 13, (water quality provisions)

Plan Policy 14, subsections F

Plan Policy 37, subsections C (sewage subpart) and G.

ORS 215.705(1)(a)

ORS 215.730(1)(a)

These are the grounds for denial of the application.

B. Standards Which The Applicant Has Satisfied

The applicant has satisfied the following applicable sections of the County Code, County Plan and state statutes:

MCC 11.15.2052(A)(2)

MCC 11.15.2052(A)(3)

MCC 11.15.2052(A)(4)

MCC 11.15.2052(A)(6)
MCC 11.15.2052(A)(7)
MCC 11.15.2074(A)(1)
MCC 11.15.2074(A)(2)
MCC 11.15.2074(A)(3)
MCC 11.15.2074(A)(5)
MCC 11.15.2074(C) (in part)
MCC 11.15.2074(D)(1) through (5)
MCC 11.15.8505
Comprehensive Framework Plan Policy 14, Subsections A through E
Comprehensive Framework Plan Policy 37, Subsections H and I
Comprehensive Framework Plan Policy 38
ORS 215.705(1)(b)
ORS 215.705(1)(d)
ORS 215.720
ORS 215.730(1)(b)(C) (water source not from Class II stream)
ORS 215.730(1)(b)(D)
ORS 215.730(1)(b)(G)

C. Standards Which The Applicant Failed To Address But Which Could Be Deferred To Subsequent Proceeding(s)

The applicant did not offer evidence addressing compliance with several provisions in the County Code, some of the applicable Plan policies and some subsections of the state statutes. I believe determinations of compliance with these standards can be deferred to subsequent proceedings or satisfied through the imposition of the conditions identified in this opinion. These standards and policies are:

MCC 11.15.2052(A)(8)

MCC 11.15.2052(A)(10)

MCC 11.15.2074(B)

MCC 11.15.2074(C) evidence that the water source is authorized by Water Resources Department)

Plan Policy 37, Subsection C (subpart relating to water supply)

ORS 215.730(1)(b)(A)

ORS 215.730(1)(b)(C) (evidence that the water source is authorized by Water Resources Department)

ORS 215.730(1)(b)(F)

Compliance with the provisions which cannot be satisfied by the imposition of a condition, can be confirmed subsequently through an administrative decision. Because these determinations will require the exercise of discretion, notice of the administrative decision and an opportunity for a hearing on appeal must be provided. ORS 197.763(2), 215.416, *Rhyne et al v. Multnomah County, Swan & Trotter*, 23 Or LUBA 442, 447-78 (1992)

D. Standards Which Are Inapplicable To This Decision

Although the following standards appear in otherwise relevant code sections, I found them inapplicable to this application or this proceeding:

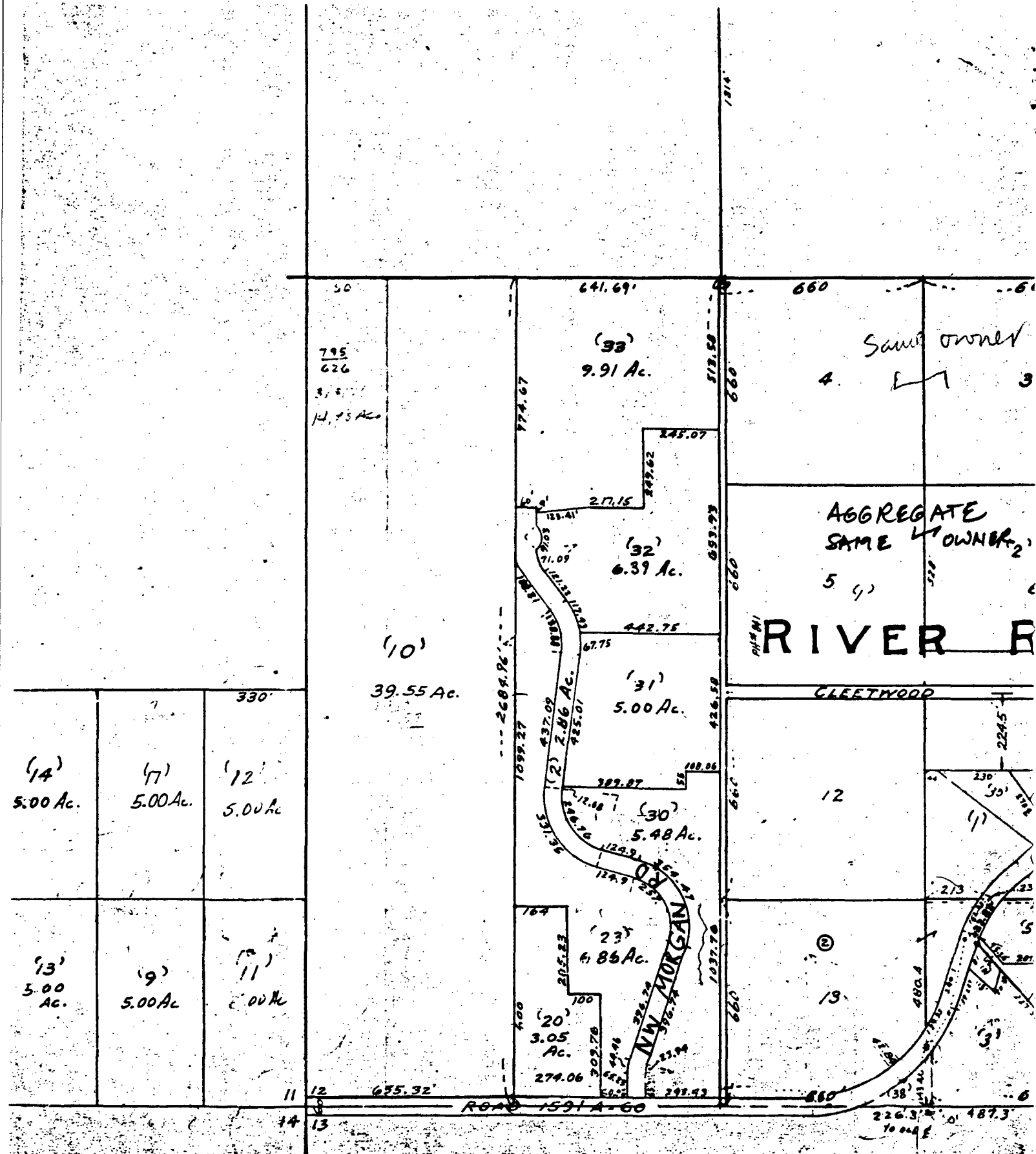
MCC 11.15.2052(B)
MCC 11.15.2074(D)(6), (7)
Plan Policy 13 (noise and air quality provisions)
Plan Policy 22
Plan Policy 40
ORS 215.705(1)(f)
ORS 215.705(1)(g)
ORS 215.730(1)(b)(E)
ORS 215.730(2)
ORS 215.740
ORS 215.750

ORDER

For the foregoing reasons, the application is denied.

April 11 1994
Date


Robert L. Liberty, Hearings Officer



Attachment 1

1966-70 Partitioning



Radius	Delta	Curve Length	Tangent Length	Chord Length	Chord Bearing
70.00	19°35'45"	23.94	12.09	23.82	N. 8°54'37" E.
130.00	19°35'45"	44.46	22.45	44.25	N. 8°54'37" E.
160.00	92°19'00"	257.80	166.60	230.80	N. 27°27'00" W.
220.00	73°44'40"	283.16	165.01	264.01	N. 18°09'50" W.
220.00	18°34'39"	71.31	35.97	71.00	N. 64°09'20" W.
235.00	80°47'15"	331.35	199.96	304.98	N. 33°12'52" W.
175.00	51°39'47"	157.80	84.72	152.50	N. 47°46'37" W.
175.00	29°07'28"	88.98	45.46	88.00	N. 7°22'49" W.
240.00	0°36'23"	2.54	1.27	2.54	N. 6°52'33" E.
180.00	44°12'30"	138.88	73.11	135.46	N. 14°55'30" W.
240.00	43°36'07"	182.64	96.00	178.26	N. 15°13'42" W.
140.00	29°05'41"	71.09	36.33	70.33	N. 22°28'54" W.
50.00	104°18'58"	91.03	64.36	78.97	N. 0°57'53" W.

IRVE DATA ON ROADWAY E

Radius	Delta	Length	Tangent
100.00	19°35'45"	34.20	17.27

- S.W. Cor. Sec. 12
T.2 N., R.2 W., W.M.

NORTH

Survey of a division of land in the
S.W. 1/4 Sec. 12, T.2 N., R.2 W., W.M. in
Multnomah County, Oregon
for Halsten Lee
April 2, 1970 Scale: 1"=200'

Scale: 1" = 200'

BURTON BROS.



Signed by the Hearings Officer:	April 11, 1994
Decision Mailed to Parties	April 18, 1994
Decision Submitted to Board Clerk	April 18, 1994
Last day to Appeal Decision	4:30 p.m., April 28, 1994
Reported to Board of County Commissioners	1:30 p.m., May 10, 1994

Appeal to the Board of County Commissioners

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

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

MEETING DATE: May 10, 1994

AGENDA NO: P-2

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: PRE 12-94 Hearings Officer Decision

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING: Date Requested: May 10, 1994

Amount of Time Needed: 2 Minutes-

DEPARTMENT: DES

DIVISION: Planning

CONTACT: R. Scott Pemble

TELEPHONE #: 3182

BLDG/ROOM #: 412/103

PERSON(S) MAKING PRESENTATION: Planning Staff

ACTION REQUESTED:

[] INFORMATIONAL ONLY [] POLICY DIRECTION [] APPROVAL [] OTHER (x) DENIAL

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

PRE 12-94 Review the April 18, 1994 Hearings Officer Decision, reserving Administrative Decision, and denying entire application for a single family residence in conjunction with far use in the EFU zoning district, for property located at 100 NE Lucas Road.

SIGNATURES REQUIRED:

ELECTED OFFICIAL:

OR

DEPARTMENT MANAGER:

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

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

BOARD OF
COUNTY COMMISSIONERS
MULTI-MAN COUNTY
OREGON
1994 MAY -3 AM 8:47



BOARD HEARING OF May 10, 1994

CASE NAME: Appeal of Planning Director Decision

TIME 2:00 pm

NUMBER PRE 12-93

1. Applicant Name/Address:

Todd Klinski, Frank and Susan Windust
36039 Crown Point Highway
Corbett, OR 97019

2. Action Requested by applicant:

Approve a single family residence in conjunction with
farm use in the Exclusive Farm Use (EFU) district.

3. Appellant Name/Address:

Jeff Klann
32431 E. Bell Rd.
Corbett, OR 97019

and

Tim Hall
3423 E. Bell Rd.
Corbett, OR 97019

4. Planning Director Decision: Approved.

4. Hearings Officer Decision: Reversed Planning Director Decision and denied application.

5. If recommendation and decision are different, why? The Hearings Officer found that:

- (1) The lot was created after the February 20, 1990 deadline required by MCC .2018(A) (2)(a) and (3)(a);
- (2) The farm use may not be profitable, based on information from the OSU Extension Service Cow/Calf Budget. Consequently, the dwelling would not comply with ORS 215.283(1)(f), which requires the dwelling to be customarily provided "in conjunction with" a for-profit farm operation;
- (3) The request does not comply with OAR 660-05-030(2)(1986), which states that dwellings customarily provided in conjunction with farm use are only authorized on parcels which meet the minimum lot size, in this case 38 acres;
- (4) There has been insufficient evidence to show that the "day-to-day activities on the subject land are principally directed to the farm use of the land", or that the farm use is established, as required by OAR 660-05-030(4)(1986);
- (5) The dwelling is not "appropriate, accessory and necessary for" carrying out the farm use, as required by MCC .2010(A)(4), and there will not be a "material improvement in the potential productivity resulting from and dependent upon the dwelling";
- (6) The farm use is not a commercial agricultural enterprise because it is unlikely to make a profit, so it would not continue the commercial agricultural enterprise in the area as required by MCC .2010 (A)(5)(c);
- (7) The applicant has not shown that runoff can be adequately handled on-site.

ACTION REQUESTED OF BOARD

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



**Department of Environmental Services
Division of Planning and Development
2115 S.E. Morrison Street
Portland, Oregon 97214 (503) 248-3043**

HEARINGS OFFICER DECISION

This Decision consists of Findings of Fact and Conclusions

April 18, 1994

PRE 12-93

Appeal of Planning Director Decision which approved
a residence in conjunction with farm use in the EFU zone

Property Location: 100 NE Lucas Road

Legal: Tax Lot 24, Section 33, T1N, R4E; and Tax Lot 2 of
Lot 3, Partition Plat 1991-29, Section 32, T1N, R4E

Plan Designation: Agricultural Land

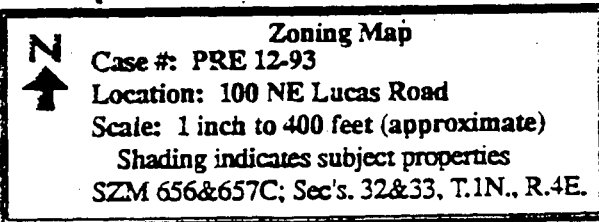
Zone Designation: EFU, Exclusive Farm Use

Property Owner: Todd Klinski, Frank and Susan Windust
36039 Crown Point Highway
Corbett, OR 97019

Appellants: Jeff Klann and Tim Hall
32431 E. Bell Rd. 32423 E. Bell Rd.
Corbett, OR 97019 Corbett, OR 97019

Decision: **Reverse** Administrative Decision and **deny** entire application,
based on the following Findings and Conclusions.

PRE 12-93



II. PARTIES, AGENTS AND WITNESSES TO THE PROCEEDING

A. Participants And Party Status

1. Applicants/Landowners

Todd Klinski, 36039 Crown Point Highway, Corbett, Oregon 97019

Frank Windust, 36039 Crown Point Highway, Corbett, Oregon 97019

Susan Windust, 36039 Crown Point Highway, Corbett, Oregon 97019

2. Other Persons Supporting The Application

None.

3. Appellants (Persons Who Appealed The Administrative Approval)

Jeff Klann, 32421 East Bell Road, Corbett Oregon 97019 (Appeared in person, by letter dated February 16, 1994 and through his attorneys, John Nelson and Edward Sullivan)

Tim Hall, 32423 East Bell Road, Corbett Oregon 97019 (Appeared in person and through his attorneys, John Nelson and Edward Sullivan)

4. Other Persons Opposed To The Application

Christopher H. Foster, 15400 NW McNamee Road, Portland, Oregon 97231 (Appeared in person and by memo and letters dated February 16, March 16 and March 21, 1994)

Susan V. Davis, 32535 East Bell Road, Corbett, Oregon 97019-9608 (Appeared by letter dated February 15, 1994)

Michael Mackin, 135 NE Lucas Road, Springdale, Oregon 97060 (Appeared by letter dated November 19, 1993)

Phillip DuFresne, 31815 East Crown Point Highway, Corbett Oregon 97019 (Appeared by letter dated December 14, 1993)

5. Determination Of Party Status

MCC 11.15.8225, provides, in pertinent part:

(A) *The following persons only are parties, and shall be entitled either themselves or through their representatives or counsel, to make an appearance of record at a hearing before the approval authority and to seek review by the Board and the courts;*

- (1) *Those persons entitled to notice under MCC .8220(C) who also make an appearance of record before the approval authority; or*
- (2) *Other persons who demonstrate to the approval authority at its hearing, under the Rules of Procedure, that they could be aggrieved or have interests adversely affected by the decision.*

The record shows that Davis, Hall, Klann and Mackin were entitled to, and received, written notice of the appeal hearing. They qualify as parties under MCC 11.15.8225)(A)(1).

I find that the other persons who testified in opposition to the administrative decision also have standing as parties, under *Lamb v. Lane County*, 70 Or App 364, 689 P2d 1049 (1984), which stands for the proposition that the County cannot impose stricter standing requirements than the Legislature has established for LUBA.¹ Standing to appeal a "land use decision" to LUBA requires only participation at the local level and filing of a notice of intent to appeal; potential parties are not required to demonstrate either "adverse affect" or "aggrievement." ORS 197.830(2).

Even assuming the County has the authority to impose a requirement of "adverse affect" or "aggrievement" DuFresne meets LUBA's tests' for being "adversely affected." He lives with sight and sound of the applicants' property. See e.g. *Prentice v. Clackamas County*, 9 Or LUBA 813 (1983) (residency within sight and sound of subject property sufficient to

¹ *Although the issue here is not whether Lamb has standing to appeal to LUBA under section 4(3) [the predecessor to former ORS 197.830(3)] but is whether Lamb has standing to appeal to the Board [of County Commissioners] under ORS 215.422, we conclude that the test for determining when a person is aggrieved under ORS 215.422 is the same as the test explained in Jefferson Landfill under section 4(3). * * * We do not think the legislature intended the term "aggrieved" to have a meaning in ORS 215.422 different from that in section 4(3). To conclude that different meanings were intended would result in one of two anomalies: either persons without standing before a local land use decision-making body would have standing to appeal that body's decisions to LUBA, or the local body might preclude LUBA review.*

Lamb v. Lane County, supra, 70 Or App 367-368 (emphasis added.)

confer standing.) In addition, he has alleged two potential adverse impacts on his property if final approval is granted; stormwater runoff causing flooding off his downhill property and septic contamination of a stream which might result from a failure of the applicant's septic system. These allegation are un rebutted.

Chris Foster described the basis for his standing in an attachment to his February 16, 1994 testimony. He states that he has been involved in "numerous local land use cases" and testified before State and local legislative bodies on rural land use law issues * * * and [is] currently serving as a Multnomah County Planning Commissioner." Although the applicants challenged the legal basis for Foster's standing, they did not challenge the facts upon which his claim of standing was advanced. I conclude that Foster meets the test for being "aggrieved" under *League of Women Voters v. Coos County*, 76 Or App 705, 712 P2d 111 (1985)². He also is entitled to standing under *Lamb v. Lane County*, *supra*.

B. Agents For Parties

Persons who submitted written or testimony only in the capacity of a representative for one of the parties, are agents, not parties to this proceedings. These persons were:

1. Agents For The Applicants

Michael Robinson, attorney, Stoel, Rives, Jones & Grey, 900 Fifth Avenue Suite 2300, Portland Oregon 97204-1268

² *The county's reasoning [rejecting the League of Women Voters' standing] does not support its conclusion that respondents were not aggrieved. The facts that respondents have no geographic proximity to the area affected by the decision and that they can suffer no economic or noneconomic harm are germane to whether they were adversely affected, not to whether they were aggrieved by the planning commission's decision. See Benton County v. Friends of Benton County, 294 Or 79, 85-89, 653 P2d 1249 (1982). Indeed, given that the planning commission's decision pertained to the allowance of a non-forest use in a forest district in a county with an unacknowledged comprehensive plan, the conceded fact that respondents showed that they had a long-standing interest in the correct application of the land use laws was sufficient to establish that they were aggrieved by the planning commission's rejection of the position they asserted. See Jefferson Landfill Comm. v. Marion Co., supra, 297 Or at 285.*

League of Women Voters of Coos County v. Coos County, supra, 76 Or App 711.

2. Agents For Opponents

John H. Nelson and Edward J. Sullivan of Preston, Thorgrimson, Shidler, Gates & Ellis, 3200 Bancorp Tower, 111 SW Fifth Avenue, Portland, Oregon 97204-3688 (attorneys for appellants Klann and Hall)

C. Witnesses

Persons appearing to provide information and not as parties in their own right, are witnesses. There were no witnesses in this proceeding.

III. PROCEDURAL ISSUES

A. Impartiality Of The Hearings Officer

1. No *Ex Parte* Contacts

Prior to the first session of the hearing on February 16, 1994, I had no *ex parte* contacts with the applicants or anyone else concerning the merits of this appeal. Subsequent communications, both before and after the continuation of the hearing, on March 21, on the merits of the appeal, have been made through the mail or telecopier, with simultaneous service on the opposing party.

2. No Conflicting Personal Financial or Family Interests

I have no financial interest in the outcome of this proceeding and have no family or financial relationship with any of the parties.

B. No Other Identified Procedural Errors

At both sessions of the hearing I asked the participants to identify any procedural errors which had occurred or might occur. The participants did not allege any procedural violations by the County, prior to, during, or after, both sessions of the hearing, other than the issue over the scope of review (discussed below.)

C. Burden of Proof

"The burden of proof is upon the person initiating an action." MCC 11.15.8230(D). The initiators of this action are the appellants. The burden on the appellants (and other opponents) is to prove that an error was made in the original administrative decision granting approval of the farm dwelling.

D. Scope Of Review, MCC 11.15.8295: Issues Presented For Decision

Appeals of an administrative decision are to "be limited to the specific grounds relied on for reversal or modification of the decision in the Notice of Appeal." Multnomah County Code ("MCC") 11.15.8295. The grounds alleged in October 4, 1993 letter attached to the Notice of Appeal were; "failure . . . to show compliance with MCC 11.15.2010(A), failure to demonstrate that the application is in conjunction with a farm use, and a failure to consider applicable provisions of OAR 660-05-020 to 030." Letter of Edward J. Sullivan to Multnomah County, October 4, 1993. Most, but not all, of the issues raised at the initial hearing fall within the scope of these three alleged errors.

The appellants contend that ORS 215.416(11)(a) bars the County from limiting the scope of the initial hearing to the grounds for review set out in the Notice of Appeal. More generally they argue that the scope of my review cannot be more limited than would be allowed in an initial hearing, made without a prior administrative decision. In support of this proposition they quote this sentence in ORS 215.416(11)(a): "In either case, the appeal shall be a *de novo* hearing."

I disagree with the argument that the Legislature must have intended the same scope for testimony and argument for hearings on review of an administrative decision, ORS 215.416(11), as for hearings held prior to the initial decision. ORS 215.416(16) The Legislature has seen fit to restrict the avenues for participation in different kinds of local land use proceedings in many ways, including eliminating the opportunity to have a hearing at all. ORS 197.195(3)(c); 215.402(4)(a),(b),(c); 215.425.

I am not persuaded that the phrase *de novo* has the broad meaning given to it by the appellants. *De novo* might mean simply that new evidence may be introduced at the hearing; it may be irrelevant to the scope of the issues. After all, the Legislature described these hearings as an "appeal" of an administrative decision, not a "hearing" on the administrative decision. ORS 215.416(11)(a).

However, in the absence of any objection from the applicants about the scope of the initial hearing and memoranda³, I will confine myself to addressing the issues raised by the parties at or before the hearing on February 16, 1993. These issues were:

1. Is the applicants' parcel a "lot of record" under any of the subsections of MCC 11.15.2018(A)? These issue were raised by the appellants at pages 8-22 of the "Appellants Hearing Memorandum" submitted on 16 February, 1994 and by Chris

³ The applicants' object to one of the issues raised by the appellants, number 4, below, was beyond the scope of issues articulated in their first memo and therefore was waived. This objection is addressed below.

Foster at page 1 of his February 16, 1994 memo. Under this general heading are three sub-issues:

- (a) Was it created before the qualification deadlines in MCC .2018(A)(1), (2) or (3)? (Discussed at pages 13-14.)
 - (b) Is it contiguous to other parcels in the same ownership? (Discussed at page 15.)
 - (c) Did it satisfy "all applicable laws when it was created? (Discussed at pages 15-17.)
- 2. Will the proposed dwelling be "customarily provided in conjunction with farm use" (ORS 215.283(1)(f)). Compliance with ORS 215.283(1)(f) was raised by the appellants at pages 5-8 of the "Appellants Hearing Memorandum" submitted on February 16, 1994 and by Chris Foster at page 1 of February 15, 1994 memo. (Discussed at pages 17-20.)
 - 3. Is the parcel on which the proposed farm dwelling will be sited "large enough to satisfy the Goal 3 minimum lot size standard (i.e., appropriate for the continuation of the existing commercial agricultural enterprise within the area)" as required by OAR 660-05-030(2)(1986)? This issue was raised by the appellants at pages 28-30 of the "Appellants' Hearing Memorandum." (Discussed at page 20.)
 - 4. Compliance with subsection OAR 660-05-030(4) was raised by the appellants at pages 5-8 of the "Appellants Hearing Memorandum." OAR 660-05-030(4)(1986) establishes two tests for the farm dwelling:
 - (a) Will the "day to day use of the property be for farm rather than residential use? (Discussed at pages 22-23.)
 - (b) Has the farm use, for which the house is being built, already been established? (Discussed at pages 23-24.)
 - 5. Will the proposed dwelling be "appropriate, accessory and necessary for the realization of the farm management plan" and will the plan "materially improve the potential productivity" of the farm (as required by MCC 11.15.2010(A)(4))? These issues were raised by the appellants at pages 22-27 of the "Appellants Hearing Memorandum" and by Chris Foster at pages 1 and 2-3 of his February 16, 1994 memo. (Discussed at pages 24-30.)
 - 6. Have the applicants provided the inventory and analysis showing that the proposed farm use will continue the "existing commercial agricultural enterprise within the

area" and will be compatible with nearby by farm uses (as required by MCC 11.15.2010(A)(5))? This issue was raised by the appellants at page 31 of the "Appellants Hearing Memorandum". (Discussed at pages 30-37.)

7. Will the proposed sewage disposal system be adequate to prevent degradation of water quality, as required by Plan Policies 13 and 37? This issue was raised by opponent DuFresne in his letter of December 14, 1993. (Discussed at pages 37-39.)
8. Will the runoff from the property damage or interfere with the downhill property owned by DuFresne, in violation of Plan Policy 37 subsection G? This issue was raised by DuFresne in his letter of December 14, 1993. (Discussed at pages 39-40.)

In their letter of rebuttal dated March 23, 1994 (page 2-3), the applicants argue the issue of the property's compliance with the parcel size requirement in OAR 660-05-030(2) (issue 3, above) was not raised at the appellants "initial evidence and argument" and therefore could not be raised or considered in the rebuttal phase. The issue of compliance with the parcel size standard in OAR 660-05-030(2) was raised at pages 28-30 of the "Appellants' Hearing Memorandum", submitted at the hearing on February 16, 1993. The letter attached to the "Notice of Appeal" listed as an error, "failure to consider applicable provisions of OAR 660-05-020 to 030." I find this issue within the scope of this appeal.

Michael Mackin opposed the application in his letter of November 19, 1993 but did not raise an issue with sufficient specificity to allow me to associate it with an applicable standard or criterion in state law or County land use regulations. ORS 197.763(1).

Susan Davis and Jim Davis opposed the application in her letter of February 15, 1993, in which she asked the County "to take into consideration the proximity this property has to the scenic Historic Columbia River Highway." However, I am unable to find a standard or criterion in state law or County land use regulations which requires consideration of the effect of a farm dwelling on the Columbia River Highway. Therefore, I do not address their concerns. ORS 197.763(1).

IV. RESPONSE TO THE ISSUES: REVIEW OF THE STANDARDS, ANALYSIS OF THE EVIDENCE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Qualification As A "Lot Of Record" Under MCC 11.15.2018(A)

1. The Code's Provisions

Within the Exclusive Farm Use (EFU) District the following use is permitted "under prescribed conditions."

(A) *A residence, including a mobile or modular home, customarily provided in conjunction with an existing use, as provided in MCC .2008(A), subject to the following:*

- (1) *Located on a Lot of Record as described in MCC .2018, or*
- (2) *Located on a lot created under MCC 11.45, Land Divisions after August 14, 1980, with a lot size not less than 76 acres on Sauvie Island or 38 acres elsewhere in the EFU district; and*

The first three sub-issues concern whether the lot for the applicants' proposed "farm dwelling"⁴ qualifies as a "Lot of Record" as defined in MCC .2018. MCC 11.15.2018(A) contains three, alternate, definitions of a "lot of record."

MCC 11.15.2018(A)(1) provides:

(1) *A parcel of land:*

- (a) *For which a deed or other instrument creating the parcel was recorded with the Department of General Services, or was in recordable form prior to August 14, 1980;*
- (b) *Which satisfied all applicable laws when the parcel was created;*
- (c) *Which satisfies the minimum lot size requirements of MCC .2016,*

The minimum lot size for this part of the County, is 38 acres. MCC 11.15.2016(A). According to their application, the applicants' parcel is 18.22 acres, too small to qualify under this definition.

The dispute among the parties is whether the parcel qualifies as a "lot of record" under either subsection MCC .2018(A)(2) or (3).

MCC 11.15.2018(A)(2) defines a "lot of record" as:

⁴ This type of dwelling is commonly referred to as a "farm dwelling" because the use to which the house is "in conjunction with" is "Farm use, as defined in ORS 215.203(2)(a), except as provided in MCC .2012(B)." MCC 11.15.2008(A): (MCC 11.15.2012(B) is inapplicable because it applies to "conditional uses," which do not include farm dwellings.) The issue of whether the home will be "customarily provided in conjunction with" a "farm use" is addressed, in different ways, under ORS 215.283(1)(f), OAR 660-05-030(4) and MCC 11.15.2010(A)(4) and (5).

(2) *A parcel of land:*

- (a) *For which a deed or other instrument creating the parcel was recorded with the Department of General Services, or was in recordable form prior to February 20, 1990;*
- (b) *Which satisfied all applicable laws when the parcel was created;*
- (c) *Does not meet the minimum lot size requirements of MCC .2016; and*
- (d) *Which is not contiguous to another substandard parcel or parcels under the same ownership,*

MCC 11.15.2018(A)(2).

Subsection MCC 11.15.2018(A)(3)(a) contains the third, alternate, set of criteria for qualification as a lot of record:

(3) *A group of contiguous parcels of land:*

- (a) *For which deeds or other instruments creating the parcels were recorded with the Department of General Services, or was in recordable form prior to February 20, 1990;*
- (b) *Which satisfied all applicable laws when the parcels were created;*
- (c) *Which individually do not meet the minimum lot size requirements of MCC .2016, 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.*

2. The Administrative Decision

The findings and conclusion in the administrative decision addressing the lot of record provisions were:

1. and 2. The subject parcel is a Lot of Record pursuant to MCC .2018(A)(2). Parcel size is less than the 38 acres required in the EFU district. The property was legally created by a property line adjustment in 1991. There are no

contiguous substandard size parcels under the same ownership.

* * * *

1. This property is a Lot of Record.

"Planning Director Decision; PRE 12-93" (September 23, 1993) at 3.

3. A Cautionary Note: Tax Lots Are Not The Same As Lots And Parcels

The discussion of the issues related to "lots of record" is complicated by the absence of maps showing "lots" or "parcels" as distinct from maps of tax lots used in the Assessor's office. It is easy to fall into error by treating tax lots as though they were the same thing as a lot or parcel; they are not.

"Parcels" and "lots" are units of ownership as defined by statute. The statutes define them by their method of origin and date. ORS 92.010; 215.010(1). By contrast, a tax lot is an administrative convenience of property tax assessors.

It is common for one parcel to be made up of more than one tax lot. This happens in several circumstances in Oregon, including: (1) The boundary of a taxing districts crosses the parcel; (2) A township or other mapping limit crosses the parcel⁵; (3) When separate assessment formulae or programs apply to different parts of the same parcel, such as when the homesite value is calculated differently, ORS 308.378, or one part of the property receives preferential farm use assessment while the other portion is valued for forest use under the Western Oregon Forest Land And Severance Tax or Western Oregon Small Tract Optional Tax.

Only when a map shows that all adjoining tax lots are in separate ownerships, is it possible to conclude that the tax lot is also a separate parcel.

4. The History Of The Subject Parcel

According to the applicants, in 1968 Glen and Marilyn Oakes acquired two separate parcels east of Lucas Road; Tax Lot 6, a 22.22-acre parcel and Tax Lot 18, 24.73 acre parcel. The parcels were aligned north/south. "Applicants Memorandum" of March 16, 1994 at 3.

⁵ A north-south section line was the dividing line between the applicants' two tax lots before the 1991 lot line adjustment which reconfigured them so as to be separated by an east-west boundary.

A chronology about what happened next to the subject parcel(s) was prepared and documented by the appellants' attorney. (Respondent's Exhibit A-1) The facts about that chronology are not disputed by the applicants' attorney, although the legal conclusions are.

On February 7, 1991, Marilyn Oakes gave Todd Klinski authority to seek the partitioning of Tax Lot 18 into three parcels; a 22.84 acre parcel, zoned EFU, ("Parcel III", which continued to be denominated "Tax Lot 18") and two small parcels zoned "Rural Center", of 0.95 acres ("Parcel II") and 0.94 acres ("Parcel I"). Tax Lot 6 was not involved in the transaction. The approval was granted by the County through an administrative decision by David H. Prescott, as the Planning Director's delegate, on March 14, 1991. (A copy of the partition plat, signed by Prescott, is Exhibit A-2.)

On April 2, 1991, Oakes conveyed to the Windusts and Klinski, the three parcels partitioned in March and Tax Lot 6. On the same day Parcel I (0.94 acres) was conveyed to W. H Lewis. On September 17, 1992, Parcel II (0.95 acres) was sold to Mark and Karen Schaap. ("Respondent's [sic] Exhibit A-1") Windust and Klinski retained Parcel III (Tax Lot 18) and Tax Lot 6.

Tax Lots 6 and 18 were radically reconfigured on May 17, 1991, when the County approved Frank Windust's application for a lot line adjustment, (County case file LA 2-91; Respondent's Exhibit A-3.) After the lot line adjustment, what had been two north-south parcels became two east-west parcels. The northern parcel is 18.22 acres. The southern parcel is shown as 25.86 acres in the 1991 map (25.84 acres in the map submitted for the hearing.)

The applicants wish to build a farm dwelling on the northern parcel.

5. First Sub-Issue: The Date Of Creation (MCC 11.15.2018(A)(2)(a) & .2018(A)(3)(a))

In deciding the questions of whether the "original" lot of record still exists, I look to the definitions of "lot" and "parcel," first in the Code and then applicable state statutes.

"Lot" is defined as: "A plot, parcel or area of land owned by or under the lawful control and in the lawful possession of one distinct ownership." MCC 11.15.0010. There is no definition of "parcel." Except for defining a "lot" as a "parcel," this definition does not shed any light on the question at hand. I look to statutory definitions for guidance.

ORS 92.010(3) defines "lot" as "a unit of land that is created by a subdivision of land."

ORS 92.010(5) defines "parcel" as "a unit of land that is created by a partitioning of land."

ORS Chapter 215 governs county planning and zoning, including the administration of EFU zoning. ORS 215.010(1) incorporates the definitions in ORS 92.010 except that "parcel" "(a) Includes a unit of land created: (A) By partitioning land as defined in ORS 92.010." In other words, under both County and state definitions a lot and parcel are both units of ownership created through a County review and approval process.

The subject parcel was constituted from a part of Tax Lot 18 and another part of Tax Lot 6. The present parcel cannot be any older than the parcels from which it was derived. One of the predecessor parcels was created through the partitioning on March 14, 1991, after the qualification date of February 20, 1990.

I also conclude that the subject parcel was created on May 17, 1991 when the lot lines were adjusted.

The applicants contend that LUBA has held that lot line adjustments do not create new parcels. *McKay Creek Valley Association v. Washington County*, 24 Or LUBA 187 (1992). That is a misreading of the case. LUBA did not establish a general proposition that lot line adjustments are not partitions. Rather the case turned on the statutory definition of "partition land," which excludes some lot line adjustments:

(b) An adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance.

ORS 92.010(7)(b).

The facts here lie outside the "normal" situation described by the statutory exclusion. In this case, no new unit of land was created. But after the adjustment, the unit of land reduced by the adjustment remained smaller than the minimum lot size of 38 acres established by MCC 11.15.2016(A). For this reason, the 1991 lot line adjustment does not fit within the statutory exclusion. As a result, it constituted a partitioning. A partition creates new parcels, ORS 92.010(5), which the County defines as synonymous with a lot. MCC 11.15.0010.

A simpler way of analyzing the lot is to ignore the individual transactions and consider the combined effect of the 1991 partitioning and lot line adjustment. Common sense tells us that a 24.73 acre, north-south aligned parcel, fronting on the Crown Point Highway, (Tax Lot 18 as of February 20, 1990) is not the same lot as the 18.22 acre east-west aligned parcel fronting on Lucas Road today.

I conclude that the subject lot was created after the February 20, 1990, deadline in MCC 11.15.2018(A)(2)(a) and (3)(a).

6. Second Sub-Issue: The Consequences Of Ownership Of Adjoining Parcels (MCC .2018(A)(2)(d) & .2018(A)(3))

Under MCC 11.15.2018(A)(2)(d) the applicants must show that their land "is not contiguous to another substandard parcel or parcels under the same ownership." The applicants attorney states: "The applicants also own contiguous property known as Tax Lot 6 and Tax Lot 1 of Parcel 3, Partition Plat 1991-29. This parcel contains 25.86 acres." Applicants' Memorandum of March 16, 1994 at page 2. The applicants' contiguous ownership is 44.08 acres. For this reason, they cannot qualify as a lot of record under MCC 11.15.2018(2)(d).

MCC 11.15.2018(A)(3) defines a "lot of record" as a "group of contiguous parcels" "held under the same ownership."

Foster contends that should the applicants qualify under this section, they would be obliged to aggregate their parcels into a single "lot of record." I agree with part of the analysis but disagree that the Code requires the consolidation of the parcels.

If the County had intended to authorize a dwelling on each separate lot, regardless of ownership, it would not have adopted MCC 11.15.2018(A)(2)(d) or .2018(A)(3), which define a "lot of record" as a group of contiguous lots. The Code authorizes "A residence, * * * customarily provided in conjunction with an existing use * * * "Located on a Lot of Record as described in MCC .2018" (emphasis added).

I interpret these provisions as allowing a single dwelling on a group of lots; once the dwelling is allowed on one lot, the "entire lot of record" as used up its entitlement and the other lot becomes unbuildable. To carry out this intent, the County should require, as a condition of approval, a deed restriction which prevents construction of another house on a different lot which is part of the "lot of record."

7. Third Sub-Issue: The Lawfulness Of The 1991 Partitioning (MCC 11.15.2018(A)(2)(b) & .2018(A)(3)(b))

(a) Introduction: The Issue And Defense Of Waiver

The appellants argue that

the applicant's 1991 "partition" was actually a subdivision, and thus an unlawful partition. When Ms. Oakes "partitioned" Tax Lot 18 in 1991, she also owned a contiguous property, Tax Lot 6. Because this entire property (Tax Lots 6 and 18) was owned by one person (Ms. Oaks), partitioning Tax Lot 18 into three parcels actually created four parcels: Parcels 1 and 2 in the RC District and Parcels 3 and 4 (Tax Lot 6) in the EFU District.

Appellants Hearing Memorandum at 15.

The appellants contend this action was unlawful for two reasons; (1) the County did not provide prior notice and a public hearing which is required for subdivisions (but not partitions) MCC 11.15.45.080, .45.200-.280; and (2) two subminimum parcels were created, in violation of MCC 11.15.2016(A), ORS 215.263 and OAR 660-05-020.

In response, the applicants raise an affirmative defense of waiver:

*The appellants argue that the 1991 partition by Mrs. Oakes should have been processed as a subdivision. * * * * Whether this is correct is irrelevant to the current application and, moreover, the appellants may not raise this issue now. The appellants could have appealed the partition request at that time, but apparently chose not to do so. Even assuming the County made the land use decision without providing a hearing or notice, the 21-day appeal period to the Land Use Board of Appeals begins to run when a person receives actual notice of the permit decision. Citizens Concerned v. City Of Sherwood, 21 Or LUBA 515 (1991). There is no dispute in this case that appellants failed to file a notice of intent to appeal with LUBA within 21 days of the partition decision, within 21 days of the date of actual notice, or exhausted their local remedies. The appellants are barred from raising this issue now.*

Applicants' Memorandum (in rebuttal), March 16, 1994 at 6. They also dispute the assertion that either the partitionings or the lot line adjustment created four lots.

(b) The 1991 Partition Was Not A "Subdivision"

The appellants' contention that the property was subdivided in 1991, depends on whether Tax Lot 6 in Section 32 now is a parcel separate from Tax Lot "1" of Parcel 3, in Section 33.

As noted above, the applicants take the position that Tax Lot 6 is part of the same parcel as Tax Lot 1 of Parcel 3:

The applicants also own contiguous property known as Tax Lot 6 and Tax Lot 1 of Parcel 3, Partition Plat 1991-29. This parcel contains 25.86 acres.

"Applicants' Memorandum" (March 16, 1994) at 2 (emphasis added.)

Based on this information, I find that the two tax lots are the descendent of the single, original, Tax Lot 18, 24.73 acres in size before April 1991, when the two small lots

were partitioned off.⁶ Former Tax Lot 6 was a separate lot or parcel from Tax Lot 18 in 1968 when the Oakes acquired it by a separate deed. Consequently only three parcels were created by the partitioning and it did not constitute a subdivision as defined by MCC 11.45.010(JJ), which was improperly processed as a partitioning. Nor did the partitioning divide a conforming parcel (larger than the minimum lot size of 38 acres) into two-subminimum parcels in violation of MCC 11.15.2016(A), 11.45, ORS 215.263 or OAR 660-05-020.

(c) The Appellants Waived Other Challenges To The Legality Of The Decision

In their letters and testimony, the appellants assert that the County failed to provide notice of its 1991 administrative decision on the partition application, notice which would have been required by ORS 197.763(2) and ORS 215.416, *and see Rhyne et al v. Multnomah County, Swan & Trotter*, 23 Or LUBA 442, 447-78 (1992)

At the very latest, the appellants learned of the partitioning on or before the hearing February 16, 1994. As of the date of this opinion, no appeal of the partitioning has been filed with LUBA. When no notice has been provided, a party must file an appeal to LUBA within 21 days of actual or constructive notice. ORS 197.830(3)(a)(b).

In the cases in which the lawfulness or legality of a lot or parcel was successfully challenged, the required local government approval had never been granted. *Ludwick v. Yamhill County*, 294 Or 778, 663 P2d 398 (1983); *Columbia County v. O'Black*, 16 Or App 147, 517 P2d 688 (1974); *Woolsey v. Marion County*, 118 Or App 206, ___ P2d ___ (1993). In this case, a local government approval was granted and that approval was not challenged when it became known. The decision might indeed have been illegal but the appellants declined to take advantage of the proper means of establishing that illegality. In the absence of an appeal, the County's decision must be deemed to have been proper; I will not "go behind" the earlier determination and allow the appellants to litigate the issues which they waived. *McKay Creek Valley Association v. Washington County*, 24 Or LUBA 192-193 (1992) affirmed *McKay Creek Assn. v. Washington County*, 118 Or App 549, 848 P2d 624 (1993).

B. ORS 215.283(1)(f) and 215.203(2)(a): Demonstration Of The Profitable Purpose Of The Farm Management Plan

The statutory criteria for dwellings in EFU zones apply directly to local government decisions. *Kenagy v. Benton County*, 115 Or App 131, 136, ___ P2d ___ (1992); *Forster v. Polk*

⁶ It will help avoid future confusion on the part of the County and potential purchasers if the County's maps were amended to show that the two tax lots are a single parcel.

County, 115 Or App 475, 478, ___ P2d ___ (1992); *McKay Creek Valley v. Washington County* (A79779), 122 Or App 59, 64, ___ P2d ___ (1993).

1. The Statute

ORS 215.283(1)(f) authorizes: "The dwellings and other buildings customarily provided in conjunction with farm use." "Farm use" is defined in ORS 215.203(2)(a)⁷ as:

*the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, * * *.*

2. The Administrative Decision

The administrative decision does not identify or address either standard. "Planning Director Decision; PRE 12-93 (September 23, 1993)."

3. Analysis Of The Record

The issue presented under the statute is whether the dwelling will be in conjunction with a farm, which has a "primary purpose of obtaining a profit in money" from the sale of calves.

The applicants submitted a five-year "Farm Management Plan" describing how the parcel will be used for cattle production. The applicants proposed that the property be stocked with 15 Limousin cow/calf pairs.

⁷ By an amendment made in 1993, the definition of "farm use" applies to all of Chapter 215, ORS 215.010(4), eliminating the narrow application the Court of Appeals gave that definition in *Newcomer v. Clackamas County*, *supra*. This means the following interpretation of ORS 215.203(2)(a), now applies to ORS 215.283(1)(f):

The great boon of tax relief to the bona fide farmer through the special exemption for farm use is not to be extended to the professional man's fine residence in a filbert orchard, the city worker's five suburban acres and a cow, the retired person's 20 acres of marginal land on which a travel trailer constitutes the personal residence, unless the day-to-day activities on the subject land are principally and patently directed to achieving a profit in money through the farm use of the land.

Capsey v. Dept. of Rev., 294 Or 455, 657 P2d 680 (1983) quoting *Beddoe v. Dept. of Rev.*, 8 OTR 186 (1979)

Annual "profit" of \$6,000 for the 15 pair operation, is shown as the difference between the sale price for fifteen 7-8 month calves each fall (\$7,500) and the annual feed cost (\$1,500.) The five-year "profit" of \$17,250 is calculated as the sum of these sales (\$30,000) less the purchase price of cows in 1994 (\$12,750). Using these figures as the basis for calculating "profit," the annual profit for the operation would be \$3,450.

By their "Applicants' Memorandum", dated March 16, 1994, the applicants amended their plan to increase the number of cow/calf pairs to 20 (page 12-13). For purposes of my analysis I will assume that the increase in the herd by 1/3 translates into a corresponding increase in gross annual sales to \$10,000/year; annual profit to \$8,000/year; the 5-year "net profit" into \$23,000; and an annual 5-year "net profit" of \$4,600.

The applicants calculation of the "profit" depends on the expenses of the operation. The "Farm Management Plan" omits expenses which are part of the projected farm operation. The applicants have stated that their operation will include weeding and fertilizing of the 18.22 acre parcel in order to improve the pasturage but their profit calculations do not include the costs of these improvements.

Other costs appear to have been ignored in calculating the "profit." The appellants submitted a document prepared by the OSU Extension Service, entitled "Enterprise Budget; Cow-Calf, Willamette Valley Region" dated March 1988, (hereafter "Extension Service Cow/Calf Budget.") (Respondents' Exhibit A-4) The budget is for a hypothetical 100 cow/4 bull herd.

This enterprise budget estimates the typical costs and returns of producing calves in the Willamette Valley area of Oregon. It should be used as a guide to estimate actual costs and is not representative of any particular ranch.

Extension Service Cow/Calf Budget at 1.

The cow/calf farm budget lists sources of gross income and costs; variable, fixed and capital costs. Among the variable cash costs listed by the OSU Extension Service agents who prepared the budget are: bedding, fence repair, implants, marketing costs, salt and minerals, vaccines, veterinary costs⁸, fuel and utilities. Fixed costs include annual taxes, livestock insurance, liability insurance and machinery and equipment insurance. Capital costs include interest and depreciation on the livestock (the aging cows) and machinery. Extension Service Cow/Calf Budget at 2. None of these costs are discussed in the applicants' farm management plan.

⁸ The applicants' budget does not include any cost for inseminating the cows. The OSU budget assumes 4 bulls are on the farm.

The Extension Service Cow/Calf Budget shows a net negative return of -\$117.36/cow. *Id.* However, the extension agents calculated their "profit" by subtracting the owner's labor as an expense. If we treat the operator's labor as a "profit" instead of a cost, we decrease the loss by \$73.10/cow. However, the net return is still negative. *Id.*

Finally, the costs listed by the Extension Service do not include mortgage payments. If the dwelling is one customarily provided "in conjunction with" a for-profit farm operation⁹, then the calculation of the profit needs to include the expense of the mortgage payments.

In their rebuttal memorandum of March 23, 1994, after they had time to review the Extension Service Cow/Calf Budget, the applicants stated:

Mr. Foster asks about expenses for the operation. A barn is not required. The Applicants have indicated that the size of the cow/calf operations will be increased, and if additional expenses are found, they can be subtracted from the increased gross profit. Little in the way of farm equipment [or] machinery is required. Other expenses cannot be anticipated with certainty at this time.

Genuine farms, like businesses, are not always profitable. But in order to pass muster under the statute, there must be at least a the possibility of a profit, based on standard farming practices and reasonable estimates of expense and income. After weighing the evidence in the record, I cannot conclude that the applicants' farm operation can be expected to yield a profit in money, because it is based on calculations which omit obvious and essential expenses for a cow/calf operation.

The applicants have failed to satisfy the requirement in ORS 215.283(1)(f), that the dwelling will be customarily provided in conjunction with a "farm use" as defined in ORS 215.203(2)(a).

C. Satisfaction Of OAR 660-05-030(2)(1986)

LCDC's administrative rules interpreting those statutes also apply directly to this decision. *Newcomer v. Clackamas County*, 94 Or App 33, 39, 764 P2d 927 (1988)

⁹ Under MCC 11.15.2010(A)(4), discussed below, the applicant must demonstrate that the dwelling is "accessory and necessary for the realization of the farm management program."

1. The Rule's Requirements

OAR 660-05-030(2)(1986)¹⁰ provides:

(2) The Goal 3 standard for minimum lot sizes is used to distinguish between farm and nonfarm parcels as it is applied according to OAR 660-05-015. Dwellings customarily provided in conjunction with farm use are authorized on parcels which are large enough to satisfy the Goal 3 minimum lot size standard (i.e., appropriate for the continuation of the existing commercial agricultural enterprise within the area). Dwellings proposed for new or existing parcels which do not satisfy the Goal 3 minimum lot size standard under OAR 660-05-020 are considered nonfarm dwellings and can only be approved according to ORS 215.213(3) or 215.283(3).

2. The Administrative Decision

The administrative decision does not identify or address the administrative rule. "Planning Director Decision; PRE 12-93 (September 23, 1993).

3. Analysis

The requirements of the rule are straightforward; farm dwellings must be located on lots which meet the minimum lot size standard. The standard can be met either through a minimum lot size or through a case by case analysis. OAR 660-05-015(3). Multnomah

¹⁰ This rule lapsed on August 7, 1993. The applicants' application was filed on August 6, 1993. The parties believe that ORS 215.428(3) requires me to decide this appeal under the administrative rules in effect at the time of the application.

The question is whether ORS 215.428(3) applies only to the "standards and criteria" in the local plan and land use regulations or whether it also applies to statutes and rules interpreting those statutes which came into effect after the date of the application but before the decision. LUBA has held that it does. *Warren v. City of Aurora*, 25 Or LUBA 11, 15 (1993). But LUBA did not provide any explanation of its conclusion. I believe LUBA's decision conflicts with Article I §21 and Article IV §28 of the Oregon Constitution, which specify the effective date for legislation.

However, the new tests for farm dwellings do not apply to this application for two reasons. First, the new gross income standards only apply to high value farmland, and the Mershon soils on this property fall outside the list of soils in the statutory definition of high value farmland. ORS 215.710. Second, ORS 215.428(3) could apply to agency rules, without violating the state constitution.

County has chosen to adopt minimum lot sizes. The lot size applicable to all EFU zoned land except Sauvie Island, is 38 acres. MCC 11.15.2016(A). The parcel is 18.22 acres. Approval of a farm dwelling on this size of parcel would violate OAR 660-05-030(2).

D. Satisfaction Of OAR 660-05-030(4)(1986)

1. The Rule's Requirements

OAR 660-05-030(4)(1986) provides:

ORS 215.213(1)(g) and 215.283(f)(f) authorize a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than for farm use, a proposed dwelling would not be "customarily provided in conjunction with farm use" and could be approved according to ORS 215.213(3) or 215.283(3). At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land (see Matteo v. Polk County., 11 Or LUBA 259 (1984) affirmed without opinion by the Oregon Court of Appeals September 12, 1984 and Matteo v. Polk County LUBA No, 85-037, September 3, 1985).

2. The Administrative Decision

The administrative decision does not identify or address the administrative rule. "Planning Director Decision; PRE 12-93 (September 23, 1993)"

3. Analysis Of The "Day To Day" Activities On The Farm

The management plan does not indicate how much time would be required to carry it out. The appellants noted: "The record does not indicate whether the applicant's cow/cal operation will require one-hour per day, one day per week or one-day per month worth of farm activity." Appellants Rebuttal Memorandum at 2. Foster raised the same issue in the general terms used by the Rule: "To what extent are the day to day activities directed toward farm use?" Memorandum of February 17(?), 1994 at 2.

In response to these challenges, the applicants stated:

The farm management plan and additional evidence in the record demonstrate that the Applicants' day-to-day activities will be directed toward care of the cow/calf operations, improvement of the pasture, feeding of the cattle and other activities to maintain and improve cattle operations on the property.

Applicants Letter of March 23, 1994 at 6.

By failing to provide any indication of the amount of time required to carry out the management plan, it is impossible to determine whether the "day-to-day activities on the subject land are principally directed to the farm use of the land." OAR 660-05-030(4)

(d) Prior Establishment Of The Farm Use: OAR 660-05-030

OAR 660-05-030(4) requires, "at a minimum" that "farm dwellings cannot be authorized before establishment of farm uses on the land," (citing *Matteo v. Polk County*, 11 Or LUBA 259 (1984)) The appellant contend that because the applicants have not established their cow/calf operation the dwelling cannot be approved. The applicants respond, correctly, that the full operation need not be established prior to the siting of the farm dwelling. *Forster v. Polk County*, 114 Or App 475, 478, 839 P2d 241 (1992). But the Court indicated that some part of the farm operation should be underway on the property. *Id.*

On their "Farm Management Plan" the applicants stated:

Last year we lost our pasture renter because neighbors dogs kept chasing his cattle. His cattle had been chased through the fences on several occasions. He left with his cattle in the middle of July 1992.

In a post-hearing submission, the applicants attorney stated: "The fact that some cattle are now grazing on the property without a residence does not defeat the applicants' contention that more cattle and a more productive farm could be established if the farm operator was on the residence [sic] and able to deter dogs from attacking and chasing the cattle." Applicants Memorandum of March 16, 1994 at "The applicants currently maintain cattle on the property but, as indicated, less cattle are on the property than would be with a dwelling and a resident farm operator." *Id.* at 11.

Appellant Jeff Klann testified that since 1991 the property has been used sporadically for grazing cattle and that there are no cattle on the property now. Minutes of February 16, 1994 at 10. Klann submitted ground level photographs, undated, which do not show any cattle on the property.

The evidence on the question of whether there are cattle on the property today is in direct conflict. The appellants have carried their burden of proving the administrative decision was in error, because it failed to address the Goal 3 Rule. The applicants have failed to carry their burden of responding to the appellants' allegation of error, by demonstrating that the proposed use is in existence, even in a reduced form, on the property, as required by OAR 660-05-030(4).

Even if I were to consider the applicants' testimony in isolation from the appellants conflicting testimony, it does not indicate whether the "cattle on the property now" are owned by the applicants or if they are the Limousin (rather than Hereford, for example) cows which would be employed as part of the cow/calf operation described in the farm management plan.

E. MCC 11.15.2010(A)(4): The Dwelling Is "Appropriate," "Accessory" And "Necessary" For Carrying Out The Farm Management Plan And The Plan Will Yield A "Material Improvement" In The Potential Productivity Of The Farm.

1. The Requirements Of The Code

MCC 11.15.2010(a)(4) provides:

- (4) *Demonstration by the applicant that the dwelling is appropriate, accessory, and necessary for the realization of a farm management program as described in subsection (5) below. The record shall include a finding of material improvement in the potential productivity resulting from and dependent upon the existence of the dwelling. That finding shall be based upon factual information, certified by an agency, firm or individual who is recognized, or demonstrates qualifications, as an expert in the proposed area of agricultural production.*

2. The Administrative Decision

The administrative decision devotes a paragraph of findings to this and the following section in the Code:

*The applicant has submitted a farm management plan indicating that the parcel will be used to raise beef through a cow/calf operation. Soils on the parcel are Mershon silt loam, subclasses IIIe and IVe. The Soil Survey indicates that Mershon soils on lesser slopes are well suited to farming, * * * [etc.] The proposed plan and production acreage are similar to and compatible with other farm uses in the area, which are mainly hay and pasture, and some nursery stock and vegetable crops. The management plan was certified by Ross Johnson and the property owners, all of whom have experience with cow/calf operations, as being appropriate for the continuation of the existing commercial agricultural enterprise in the area.*

"Planning Director Decision; PRE 12-93 (September 23, 1993) at 3. The conclusions are:

2. *A management plan has been developed for the property and that plan*

has been certified as being appropriate for the continuation of the existing agricultural enterprise in the area.

3. *The applicant has carried the burden necessary for granting of a farm related residence in the Exclusive Farm Use District.*

Id.

The administrative decision contains no interpretation of the key words and phrases in the Code, even though the outcome may turn on those interpretation. To fulfill my obligations to the parties to explain the law I am applying, as well as to withstand judicial review, I must provide an interpretation of MCC 11.15.2010(A)(4), because its provisions are completely different from state standards in the ORS Chapter 215 and the Goal 5 rule. To omit an interpretation of these terms would risk the waste of time and money caused by a remand for an interpretation. *Gage v. City of Portland*, 123 Or App 269, ___ P2d ___ (1993).

My interpretation is based on the purpose and policy of the County regulations, the "express language in the ordinance" and its context within the framework of regulations in the EFU zone. *See Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992).

3. **Interpreting And Applying The "Appropriate," "Accessory" and "Necessary Tests."**

- (a) **Interpreting The Standards**

- (i) **The Context, Purpose And Policy Of MCC 11.15.2010(a)(4)**

The purpose and policy for this section is described by its administrative history. The extracts from the County's April 1990 Periodic Review order (added to the record by Foster) shows that MCC 11.15.2010(A)(4) and (5) were added to the Code as part of periodic review. Multnomah County Periodic Review Order at 93-94 (Ordinance 643, April ___, 1990.) In the section of land division in the EFU zone, the County's order commented on the use of "farm management plans":

However, we propose to eliminate 11.15.2010(C)(2) which allows new lots of between 38 and 76 acres on Sauvie Island and 19 and 38 acres elsewhere in the EFU District upon approval of farm management plans. Our experience has been that the management plans are often prepared mainly for the purpose of land division and sale and do not insure that the resulting less than normal minimum lot size parcels will be used for commercial agricultural purposes.

Id. at 54-55. This passage demonstrates that past practice has made the County skeptical

of "farm management plans" and that the County regards the purpose of this section is to separate commercial from non-commercial operations. This section is particularly relevant, given that the appellants and other opponents have alleged that Mr. Windust is a realtor and developer, not a farmer.¹¹

(ii) Interpreting "Appropriate", "Accessory" and "Necessary"

This section, (like subsection 5) is entirely of the County's devising; it uses key words, "appropriate," "necessary" and "accessory" which are not used in ORS 215.283(1)(f), Goal 3 or OAR 660-05-000 *et seq.* Two of these words, "appropriate" and "necessary," have no relevant definitions in the Code. Another key term is "materially improve," also undefined in the Code. The parties agree that in interpreting these words and phrase, I may rely on the common dictionary definition. *See Sarti v. City of Lake Oswego*, 106 Or App 594, 597, 809 P2d 701 (1991). Not surprisingly, they recommend different definitions, from different dictionaries.

Webster's New Collegiate Dictionary (1979) defines appropriate as "especially suitable or compatible." It is easy to imagine how this standard could be applied to the dwelling itself. For example, a 5,000 square foot house with a 2,500' paved drive, two tennis courts, a landing strip and a 3-car garage, might not be an "appropriate" investment in housing for use in conjunction with an 18-acre cattle ranch. Because the applicants have not indicated what kind of house would be built on the site, it may be impossible to determine whether the house itself is "especially suitable" for the farm use.

In this case, the decision about whether a house of any type is "appropriate", that question is answered by the "accessory" and "necessary" tests described below.

"Accessory" is not defined in the County Code, but "accessory building" is: "A subordinate building, the use of which is clearly incidental to that of the main building on the same lot." MCC 11.15.0010. This definition is consistent with the definitions given to the term "accessory" throughout planning law and practice. *Yunker v. Means*, 271 Or 57, 59, 530 P2d 846 (1975); *Card v. Flegel*, 26 Or App 783, 787, 554 P2d 596 (1976); 3A *Williams, American Land Planning Law* §74 (1985); 2 *Rathkopf, Zoning and Planning* §23 (1991); 2 *Anderson, American Law of Zoning* 3d §§9.28, 9.43, 13.02 (1986.)

Cases have often construed the term in the context of challenges to accessory uses which have actually become principal uses, or some courts put it, when the tail (the accessory use) has begun to wag the dog (the primary use.) *E.g. Keseling v. Baltimore*, 220

¹¹ An advertisement from the February 6, 1994 *Sunday Oregonian* has been made a part of the record. It states: *LAST CHANCE: to buy Corbett/Springdale acreages from \$49,000. Call area specialist, Frank Windust, 695-5132 or 695-222. Oregon Realty Company.*

Md 263, 151 A2d 726 (1959). Factors used in analyzing the relationship between the primary and accessory use have considered such factors as the relative income than the principal use, *Bennett v. Zoning Board of Adjustment*, 396 Pa 57, 151 A2d 439, 440-441 (1959), and the scale of the accessory use. *Taber v. Multnomah County*, 11 Or LUBA 127, 135 (1984).

The concept of an "accessory" use embodies many of the state standards which apply to farm dwellings. One of the alternative expressions, or definition, of the accessory relationship is that the accessory use is "customarily incidental to" the principal use. 3A *Williams, American Land Planning Law* §74.15. This definition parallels the standard in ORS 215.283(1)(f); "a dwelling customarily provided in conjunction with farm use." Appellate cases from outside Oregon have come to the same conclusion stated in *Matteo v. Polk County*, codified in OAR 660-05-030(4), that a use cannot be "accessory" to a primary or principal use until the primary use is in existence. *Mola v. Reiley*, 100 NJ Super 343, 241 A2d 861 (Law Div 1968).

The appellants propose that "necessary" should be defined according to Webster's Third International Dictionary as "that which cannot be done without; that must be done or had; absolutely required; essential, indispensable." (Webster's Third International at 1511.)

Foster believes¹² "accessory and necessary" were borrowed by the County, during periodic review, from the Goal 4 standard for forest dwellings, originating in *Lamb v. Lane County*, 7 Or LUBA 147 (1983), confirmed by the Supreme Court in *1000 Friends of Oregon v. LCDC (Lane County)*, 305 Or 384, 394-396, 752 P2d 271 (1988), and later codified in LCDC's Goal 4 Rule. OAR 660-06-027(1), (2) (1991). Consequently, "necessary" should be given the definition from *Webster's Third New International Dictionary*, cited by the Court of Appeals and quoted by the Supreme Court in *Lane County*: "that cannot be done without: that must be done or had: absolutely required." *Lane County, supra*, 305 Or 394.

The applicants argue that "necessary" should be defined as "required." Webster's Ninth New Collegiate Dictionary, at 790 (1990). They reject Foster's contention that the County meant to employ a term or concept from the different regulatory context of forest land conservation.

The term "necessary" should be interpreted in this context as meaning "essential," because it seems more likely to fulfill the County's intent (expressed in its Periodic Review order) to tighten up their restrictions in order to screen out phony "farm management plans," plans prepared only as a means of dividing and selling lots with a dwelling permit, in its EFU zone.

¹² He does not offer any administrative history to support this theory.

Defining "necessary" as "required" would not change the analysis. Either definition ("essential" or "required") conveys the County intent to impose requirements stricter and/or supplemental to those established by statute¹³: The statute would allow a house when such a house would be "customarily provided in conjunction with a farm use" even if the house was not "essential" or "required." For example, a family working full time in farming might wish to build a house on their farm, even though they could rent a house on adjoining land. Their new house would meet the statutory test, but because the rental house was available, the house would not be "essential" or "required."

(c) Application Of The "Accessory" And "Necessary" Tests To The Facts

The applicants believe the proposed farm management plan demonstrates compliance with the first three standards, for the following reasons:

The dwelling is accessory, appropriate and necessary for the cow/calf operation because a resident farm operator is necessary when the cows are calving and when they are ill. If a non-resident farm operator is not present when cows are calving or become ill, they can die without immediate assistance. If the applicants' farm management plan is to be established, it is necessary (i.e. required that the farm operator be present on a full-time basis in order to take care of the cows.)

Moreover, a dwelling can be found to be accessory, appropriate and necessary where the farm use includes the maintenance of pasture for the cow/calf operation. The applicants have indicated that the pasture must be weeded, reseeded and fertilized in order to provide satisfactory forage for the cattle. LUBA has held that maintenance of pasture and controlling of weeds is a farm use. [Citation omitted.]

Applicants' Memorandum at 10.

The projected profits from the farm management plan (overlooking the omission of many expenses) are shown to be \$4,600 year. This level of profit would not support even a single resident of the farm dwelling. It is hard to imagine why anyone would build or site a house for \$50,000 and maybe \$200,000, in order to generate \$4,600 a year in income. That would be equivalent to building a house in order to obtain a part-time that paid \$90.00 per week. For this reason, I conclude that the dwelling is not accessory to the proposed farm use; rather the farm use is accessory to the residential use.

¹³ There would be no point to adopt a standard which was weaker than, or merely replicated, the state standards which the County must apply.

The next question is whether the dwelling is "necessary" (essential or required) for the farm use.

In Oregon in 1992 there were 11,362 farms classified as cattle operations (SIC code 021); 1,095 of them (9.6%) were operated by persons not residing on the farm. *1992 Census of Agriculture* State Data Table 51, page 133.¹⁴

Unfortunately, the *1992 Census of Agriculture* does not provide this information for Multnomah County alone. However, the census shows that in Multnomah County, in 1992, of the 602 farms of all types responding to the Census, 98 of them were operated by persons not residing on the farm. *1992 Census of Agriculture* County Data Table 11, page 225. Of the 208 farms in the County which had gross annual sales of \$10,000 or more, (most of which had sales far in excess of the sales projected from this application) 47 were operated by farmers who did not live on the farm. *1992 Census of Agriculture*, County Data Table 12, page 245.

The applicants survey of nearby land uses (Applicants' Exhibit 5) and the 1986 aerial photograph document the availability of many houses nearby, which might provide the operators of the farm with a house closer to their cattle operations than are the houses of farmers on much larger farms and ranches.

The record does not support the conclusion in the administrative decision that the application satisfies the "necessary" test in MCC 11.15.2010(A)(4).

4. Interpreting And Applying The "Material Improvement Of Potential Productivity Resulting From And Dependent Upon The Dwelling" Standard

MCC 11.15.2010(A)(4) requires "a finding of material improvement in the potential productivity resulting from and dependent upon the existence of the dwelling." The standard is confusing because it calls for a "material improvement" in "potential productivity." A material improvement in "production" or "productivity" is easy to understand and to demonstrate. I am not sure how the "potential" for "productivity" could be improved, unless the County Code is seeking proof of capital investments in farming, such as installation of

¹⁴ The County Framework Plan's discussion of agriculture relies extensively on the 1978 Census of Agriculture. Multnomah County Comprehensive Framework Plan, 126-138. I asked the parties whether I should consider the more recent Census of Agriculture. A copy of the *1992 Census of Agriculture; Volume 1 Geographic Area Series; Part 37 Oregon; State and County Data* (U.S. Department of Commerce, Bureau of the Census Publication AC92-A-37 (December 1993) (cited as "*1992 Census of Agriculture*") was submitted by the appellants as part of the record.

drainage tiles, irrigation systems, planting orchard trees.

I will interpret and apply the test as meaning both (a) "improvement in production resulting from and dependent on the dwelling;" and (b) "improvement in productive capacity through capital investments, resulting from and dependent on the dwelling." That way, the parties will have a finding regardless of the correct interpretation of the standard.

The degree of that improvement is specified by the use of the term "material." Several definitions of "material" are found on page 702 of *Webster's New Collegiate Dictionary* (1979) but only one of them is relevant: "having real important or great consequences < facts ~ to the investigation>."

The applicants' proposed improvements are weeding, reseeding and fertilizing. They have not established (1) that these improvements are dependent of having a house on-site; (2) what the increase in production in animal feed would be compared with prior levels of production, (needed in order to allow a finding that the improvement is "material"); (3) that they increase "potential productivity," in the same way which a capital investment would. These improvements are of the character of an annual expense rather than a capital investment.

I find that the applicants have not demonstrated that their farm management plan complies with the "material improvement" standard in the MCC 11.15.2010(A)(4).

F. MCC 11.15.2010(A)(5): Matching The Farm Management Plan To The Commercial Farm Enterprises In The Area

1. The Code's Requirements

The Code requires a "farm management plan" with the following contents:

- (5) *Conducted according to a farm management plan containing the following elements.*
 - (a) *A written description of a proposed five-year development and management plan which describes the cropping or livestock pattern by type, location and area size which may include forestry as an incidental use;*
 - (b) *Soil test of Soil Conservation Service OR-1 soils field sheet data which demonstrate the land suitability for each proposed crop or pasturage use;*
 - (c) *Certification by the Oregon State University Extension*

Service, or by a person or group having similar agricultural expertise, that the production acreage and the farm management plan are appropriate for the continuation of the existing commercial agricultural enterprise within the area. For the purposes of this Chapter "appropriate for the continuation of the existing commercial agricultural enterprise within the area" means:

- (i) That the farm use and production acreage are similar to the existing commercial farm uses and production acreage in the vicinity.*
- (ii) In the event the farm use is different that [sic] the existing farm uses in the vicinity, that the production acreage and the farm management plan are reasonably designed to promote agricultural utilization of the land equal to or great than that in the vicinity. "Agricultural utilization" means an intended profit-making commercial enterprise which will employ accepted farming practices to produce agricultural products for entry into conventional agricultural markets.*
- (d) A description of the primary uses on nearby properties, including lot size, topography, soil types, management practices and supporting services, and a statement of the ways the proposal will be compatible with them.*

2. The Farm Management Plan Complies With MCC 11.15.2010(A)(5)(a), (b) and (d)

I interpret subsection (a) and (b) as specifying the contents of "farm management plan", but not as establishing any substantive review criteria for the proposed use itself. I find that the applicants have submitted the type of information required by those three subsections, in their original application and as supplemented, following the initial hearing.

I find the applicants have carried their burden of demonstrating compatibility with nearby uses, many, but not all of which are not "commercial farm enterprises."

3. Subsection MCC 11.15.2010(A)(5)(c); Appropriateness For The Continuation Of The Commercial Agricultural Enterprises In The Area

Subsection (c) imposes a serious evidentiary burden upon applicants. They must provide information about uses of the land "in the area" and distinguish between uses which are "profit making" "commercial farm enterprises" and other uses which are not. Their farm must continue those existing "commercial farm enterprises" or if the proposed use is different than those commercial uses, then the plan must "promote agricultural utilization of the land equal to or great than that in the vicinity."

(a) The Definition Of "Commercial Farm Enterprises"; Gross Sales and Profits

The County's Comprehensive Plan provides information about the nature of agriculture in Multnomah County, which is relevant to the determination of which uses are "commercial farm enterprises" in Multnomah County.

According to the Comprehensive Plan¹⁵, in 1978, 202 (38.8%) of the 520 farms inventoried by the 1978 *Census of Agriculture*, had gross annual sales of \$10,000 or more. *Comprehensive Plan* at Chart VI, page 133. Total gross farm sales in the County in 1978 were \$24,653,000, averaging \$47,409 per farm. *Comprehensive Plan* at Chart VI, page 133. Horticultural sales accounted for an estimated 60.5% of gross cash receipts in 1980 and livestock accounted for 9.4%. *Id.* at page 135.

The *Comprehensive Plan's* analysis concludes by expressing the following concerns under the heading "The Agricultural Future in Multnomah County":

Part of the strength of an agricultural area lies in its cohesiveness as a unit. Once a farming area is partially urbanized, the ability of that area to resist further conversion is substantially reduced. The strength of an area lies not in the fact that an operator is currently farming the land, but that upon ownership exchange, the land will continue in agriculture.

The County's land use regulation program responds to changes in the farming community, and these changes must be closely monitored to ensure that land use decisions are responding to legitimate agricultural needs for more specialized farm units, and are not damaging the agricultural land base with non-resource uses.

Comprehensive Plan at 138.

¹⁵ As noted above at footnote 14, the County's comprehensive plan's discussion of agriculture, relies extensively on information from the 1978 *Census of Agriculture*.

According to the 1992 *Census of Agriculture* there were 602 "farms" in the County, 1992 *Census of Agriculture*, County Data Table 1, page 165 (i.e. operations which can or could produce \$1,000 in gross sales. 1992 *Census of Agriculture*, page vii.¹⁶ Total gross sales from Multnomah County in 1992 were \$38,667,000, with an average of \$52,012 in gross annual sales for all farms(i.e. all farms which grossed or could gross \$1,000 or more per year). 1992 *Census of Agriculture*, County Data Table 2 page 170. Horticulture accounted for \$24,830,000 in sales (64.2%), while sales of cattle and calves accounted for \$996,000 (2.6%). 1992 *Census of Agriculture*, County Data Table 2 page 175.

Of the 602 farms, 208 (34.5%) grossed \$10,000 or more each year, a decrease from 1978, despite inflation. By contrast, 394 of the 602 farms (65.4%) grossed less than \$10,000/year. 1992 *Census of Agriculture*, County Data Table 1, page 165. A total of \$37,653,000 in gross sales, 97.4% of the total, came from the farms with annual sales of \$10,000 or more, 1992 *Census of Agriculture*, County Data Table 2, page 170, while the remaining two-thirds of the farms (which gross less than \$10,000/year) produced only 3% of the total.

In 1992, the total "net cash return from agricultural sales, and other farm sources, in Multnomah County was \$10,575,000. There were 285 farms (47.2%) with net gains and 318 (52.7%) with net losses.¹⁷ 1992 *Census of Agriculture*, County Data Table 4, page 185.

Within the subset of 207 farms with gross annual sales of \$10,000 or more, 186 (89.9%) had net gains and only 21 (10.1%) had net losses. The sum of the net cash return for farms in this category in 1992, was \$11,699,000, averaging \$40,822 per farm. 1992 *Census of Agriculture*, County Data Table 12, page 240.¹⁸

These same statistics for the class of farms with gross annual sales of less than \$10,000 are not given but are easily derived from the two sets of statistics above. Of the 394 farms in the this class, 297 (75.4%) had a net loss. Farms in the under \$10,000 in sales category were, on average, money losers not money makers; the average loss per farm was

¹⁶ The numbers are not adjusted for inflation, which was considerable between 1978 and 1992.

¹⁷ The Census shows both 602 and 603 farms in the County, depending on the table.

¹⁸ The very fact that the *Census* contains 25 pages of separate statistics in the a separate table for "Farm With Sales of \$10,000 or More" is interesting. The Census contains no explanation. Perhaps the *Census* itself is trying to distinguish between genuine business enterprises and hobby farms.

-\$2,852.79/year.¹⁹ This is consistent with statewide figures.²⁰

What these figures in the *1992 Census of Agriculture* show is that although the total number of the "farms" responding to the census questionnaire has increased since 1978, a large, and growing, percentage of these "farms" are noncommercial. The statistics strongly suggest a break between profitable farms, those grossing between \$10,000 and \$20,000/year and those which gross less than this amount, which lose money.

Documents from the Department of Land Conservation and Development (DLCD) demonstrate that it also regards gross sales as an important tool for the evaluation of applications for farm dwellings sought under ORS 215.283(1)(f).

The document entitled "DLCD Analysis and Recommendations of the Results and Conclusions of the Farm and Forest Research Project" dated May 24, 1991²¹, describes a state-wide study of the implementation of various standards governing farm and forest dwellings and land divisions, including field research on "farm dwellings" approved under ORS 215.283(1)(f) and ORS 215.213(1)(g) between 1985 and 1987 (inclusive). DLCD's analysis sheds light on DLCD's view of the distinction between dwellings for commercial agricultural enterprises and rural residences associated with hobby farms:

Key Results:

1. *A majority of approved farm dwellings are not in conjunction with commercial farm operations. (Task II, Appendices B1, B2, B3 and B4):*
 - *Three fourths (75%) of the farm operations with new dwellings gross less than \$10,000 dollars [sic] annually;*
 - *A majority (62%) of owners of farm operations with new dwellings work less than 40 hours per week on the farm. Over one-third (39%) work under 20 hours per week on the farm.*

¹⁹ \$10,575,000 (County total net cash return) - \$11,699,000 (net cash return from \$10,000+ sales farms) = \$1,124,000 net cash loss for farms with gross sales of less than \$10,000. \$1,124,000 loss/394 farms = -\$2,852.79/year.

²⁰ Statewide, farms which grossed \$5,000 to \$9,999/year lost an average of \$2,339 per farm each year. *1992 Census of Agriculture*, State Data Table 50, page 109. The net cash return from farms in the \$10,000 to \$19,999/year category was negative also; - \$840/farm/year. *Id.*

²¹ Introduced by Foster into the record as an attachment to his testimony.

- *A significant number (14%) of farm dwelling approvals report no management or that all the land is leased out.*

2. *Farm operations with new dwellings on less than 40 acres are more likely not to be managed for commercial farm use (Task II, Appendices A@, A3, B2, B3 and B4);*

"Analysis and Recommendations" at 4. The Department concluded: "Results from the study confirm that land use patterns in many EFU and forest zones are being changed from commercial resource to predominantly noncommercial and residential uses." *Id.* at 1. The report recommended the establishment of a more objective standard for farm dwellings, including, for example, a gross income test of \$85,000/year. *Id.* at 5.

Earlier this year the Land Conservation and Development Commission established a clear and objective standard for farm dwellings; its new administrative rule requires a farm operation on high value farm land to either gross \$40,000 in annual sales, or have gross sales equal to or greater than "the midpoint of the median income range of gross annual sales for farms in the county with gross annual sales of \$10,000 or more according to the 1987 Census of Agriculture." OAR 660-33-130(1)(d) (1994). The midpoint of the 1987 median income range for the \$10,000+/size farms in Multnomah County in the 1992 *Census of Agriculture*²² is \$22,499.50 and would be \$32,499.50 using 1992 figures. 1992 *Census of Agriculture* County Data Table 2 at 170 (midpoint range is \$25,00 to \$39,999.) While the new rule does not apply to this application²³, the new rule certainly provides some indication of LCDC's interpretation of the ORS 215.283(1)(f).

(b) Analysis Of The Proposed Farm Use As Continuing The "Commercial Agricultural Enterprises In The Area."

The applicants' farm management plan for 20 cow/calf pairs is projected to yield gross annual farm sales of \$10,000.

This sales level is substantially below the \$52,012 in 1992 gross sales average for all farms in the County (1992) as well as the gross sales in 1978 of \$47,409/farm. It appears to be below the gross sales threshold typical of profit-making farms in the County, a statistic which is supported by the OSU Extension Service's Cow/Calf Enterprise Budget. Finally, this amount is substantially below the \$40,000 and the \$22,499.50 in gross annual sales tests now applicable to farm dwellings on high value farmland. The projected profit (\$4,600/year) would be insufficient to support an individual.

²² Statistics from the 1987 *Census of Agriculture* are included as part of the 1992 census.

²³ See footnote 10, above.

I conclude this use is not a "commercial agricultural enterprise" and it would not continue the "commercial" "profit making" enterprises in the area.

(c) Defects In The Applicants' Inventory

The applicants' certification is based on an incorrect interpretation of the standard. The applicants contend that the proposed dwelling should be allowed because it is the same type of use which is occurring on nearby parcels. The information supplied by the applicants convincingly demonstrate that nearby uses are not "commercial [farm] enterprises" of the type practiced on nearby properties. The applicants' post-hearing memo described the results of their survey of nearby uses, (Exhibit 5):

Exhibit 5 demonstrates that the majority of uses in the surrounding area (determined to be a one-mile radius of the subject property) are not commercial agricultural enterprises because of the small sizes of the parcels and the little agricultural use observed. For example, Mr. hall and Mr. Klahn [sic] reside on 2.05-acre and 10.40-acre parcels, respectively. Mr. Hall indicated that he was "not a cattleman" and that he was not engaged in farm operations. These two parcels are typical in the surrounding area.

Only two parcels within the area contain cattle operations. Tax Lot, 1N 4E, sec. 32 is 40.81 acres. This operation contains about 22 cows. The other parcel is located between Mershon and Hurt Roads. This operation contains cattle on about 60 acres. Both farm operations contain a residence.

The June 1986 aerial photograph confirms that the area contains a high proportion of small lots (or fields) with houses on them. In fact, the justification for the proposed farm dwelling was based on the infiltration of residential uses: On the farm management plan, the applicants stated: "With the encroachment of many new residences in the area it is necessary to have a resident farmer living on the property."

However, the applicants are in error in asserting that there is no evidence of commercial farming activity in the vicinity, against which the proposed use of the property could be compared.

The 1986 aerial photo was annotated with information about current land uses, in preparation for the hearing. It shows that some of the nearby land is used for row cabbage, (confirmed by Respondents' Exhibit C, the ground photos of the site), nursery stock and what appear to be Christmas trees or orchards. Some of these farming activities are occurring on small tax lots.

The small size of a farm or farm tract does not mean it is noncommercial or that it couldn't be put to commercial farm use. The average horticultural farm operation in

Multnomah County produces \$8,176/acre in gross annual sales. *1992 Census of Agriculture*, County Data Table 33, page 326. A parcel the size of the applicants' in nursery production could yield \$148,000 in annual sales, compared to the \$7,500 to \$10,000 proposed. Berries and vegetables also can produce high gross yields per acre. Compare sales and acreage figures for Multnomah County in *1992 Census of Agriculture* County Data Table 2, page 175; County Data Table 29, page 311; County Data Table 32, page 324.

Exhibit 5 also does not establish that the two cattle operations within a mile are "commercial farm enterprises" *i.e.* that they are profit-making farm businesses. They may be simply larger hobby farms.

(d) Conclusion With Respect To MCC 11.15.2010(A)(5)(c)

The record shows this is an area in the EFU District which has suffered from residential encroachment. As the County Plan states:

Part of the strength of an agricultural area lies in its cohesiveness as a unit. Once a farming area is partially urbanized, the ability of that area to resist further conversion is substantially reduced. The strength of an area lies not in the fact that an operator is currently farming the land, but that upon ownership exchange, the land will continue in agriculture.

Comprehensive Plan at 138.

Instead of promoting commercial farm use of the land, the proposed farm management plan proposes low-level grazing use with little or no prospect of a profit. Approving the house will simply expand the area to given over to non-commercial hobby farming and residential uses, already too common in the vicinity.

The application does not satisfy MCC 11.15.2010(A)(5)(c).

E. Adequacy Of The Septic Disposal System: Policy 13: Air, Water and Noise Quality

In his December 14, 1993 letter, Phillip DuFresne stated:

Both places have septic systems on the property. The rental home is very old and the system probably has limited time on it. My concern is, if either of these septic systems fail, where would they put another system?

The property on Lucas Road is split by a creek running down the middle of it, If you allowed a septic system for a mobile home, there would be no back up for either place.

These comments raise an issue relevant under Policy 13 of the Multnomah County Comprehensive Framework Plan, which provides, (in part):

FURTHERMORE, IT IS THE COUNTY'S POLICY TO REQUIRE, PRIOR TO APPROVAL OF A LEGISLATIVE OR QUASIJUDICIAL ACTION, A STATEMENT FROM THE APPROPRIATE AGENCY THAT ALL STANDARDS CAN BE MET WITH RESPECT TO AIR QUALITY, WATER QUALITY, AND NOISE LEVELS. IF THE PROPOSAL IS A NOISE SENSITIVE USE AND IS LOCATED IN A NOISE IMPACTED AREA, OR IF THE PROPOSED USE IS A NOISE GENERATOR, THE FOLLOWING SHALL BE INCORPORATED INTO THE SITE PLAN: [Etc.]

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983) at 56.

The relevant part of Multnomah County Plan Policy 37, "Utilities" provides:

POLICY 37

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

WATER AND DISPOSAL SYSTEM

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)

at 167-168.

The administrative decision does not make findings addressing Policy 37. However, the record includes a "site evaluation report" prepared on July 11, 1991, by Phil Crawford, the County sanitarian. The report describes the type of septic disposal system required for this property. He signed the "Certification Of Private On-Site Sewage Disposal" form on the same date, and indicated "the proposed use can be served by an on-site sewage disposal system in the form of: [circled] A Septic Tank and Drainfield."

The opponent has not provided any argument or evidence showing why or how Crawford's analysis of the suitability of the site for sewage disposal was in error. The applicants have carried their burden of proof and the opponent failed to carry his burden of demonstrating some error in the administrative decision.

F. Potential Adverse Effects From Run-Off

In his January December 14, 1993 letter, Phillip DuFresne stated:

My property lies to the south of this at the bottom of the hill at 31815 East Crown Point Highway. I just spent last year repairing my septic system on my mobile home. The damage came from water flooding my system that runs off this hillside. We had to install a curtain drain across the north end and along the east side to contain this water run off from getting into my system again.

Allowing this mobile home to be install [sic] would create more water run off. If you allowed this mobile home, how are you going to contain the water? Will I have more water added to my property?

This questions are relevant to this proceeding under Multnomah County Plan Policy 37, "Utilities" which provides (in part):

POLICY 37

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

* * * *

DRAINAGE

E. THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR

- F. THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND
- G. THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983) at 167-168.

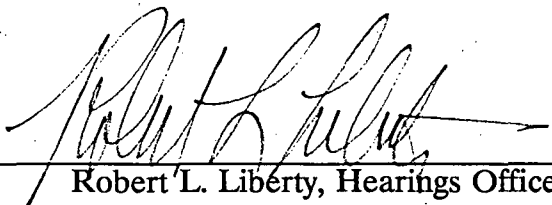
There is no finding addressing this policy in the administrative decision, no evidence in the record addressing run-off and no response from the applicants on this point.

The opponent has carried his burden of demonstrating error. I find the applicants have not demonstrated the dwelling will comply with Policy 37, subsections E, F and G.

ORDER

For the foregoing reasons, the administrative decision is reversed and the application is denied.

April 18 1994
Date


Robert L. Liberty, Hearings Officer

Signed by the Hearings Officer: April 18, 1994
Decision Mailed to Parties: April 22, 1994
Decision Submitted to Board Clerk: April 22, 1994
Last Day to Appeal Decision: 4:30 p.m., May 2, 1994
Decision Reported to Board of County Commissioners: 2:00 p.m., May 10, 1994

Appeal to Board of County Commissioners

Decisions of the Hearings Officer may be appealed to the Board of County Commissioners by any person or organization who appears and testifies at the hearing, or by those who submit written testimony to the record. A "Notice of Appeal" form and fee must be submitted to the Multnomah County Planning Director within ten days after the Hearings Officer Decision is submitted to the Clerk of the Board [MCC11.15.8260(A)(1)]. The appeal fee is \$300.00. Notice of Appeal forms and instructions are available at the Planning and Development Office at 2115 SE Morrison Street, Portland.

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

MEETING DATE: May 10, 1994

AGENDA NO: P-3

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: FD 1-94 Public Hearing - DeNovo

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING: Date Requested: May 10, 1994

Amount of Time Needed: 45 Minutes

DEPARTMENT: DES DIVISION: Planning

CONTACT: R. Scott Pemble TELEPHONE #: 3182
BLDG/ROOM #: 412./103

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED:

(x) DENIAL

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

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

FD 1-94 Public Hearing - DeNovo

5/10/94 Rescheduled for 5/24/94

Review the Hearings Officer Decision of denial for a variance of 4.5 feet to the finished floor elevation of a proposed single family residence for property located at 11930 SE Liebe Street.

This Decision has been appealed by the applicant.

Time Allowed for Testimony - 20 Minutes

SIGNATURES REQUIRED:

ELECTED OFFICIAL:

OR

DEPARTMENT MANAGER:

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

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

0516C/63

1994 MAY -3 11 8 47
MULTNOMAH COUNTY
OREGON



MULTNOMAH COUNTY OREGON

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

DIVISION OF PLANNING AND DEVELOPMENT

Board Planning Packet Check List

File No. FDI-94

☒ Agenda Placement Sheet No. of Pages 1

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

☒ Notice of Review No. of Pages 4
*(Maybe distributed at Board Meeting)
☐ Previously Distributed _____

☒ Decision No. of Pages 18
(Hearings Officer/Planning Commission)
☐ Previously Distributed _____

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



BOARD HEARING OF May 10, 1994

TIME 2:00pm

CASE NAME Flood Hazard Variance

NUMBER

FD 1-94

1. Applicant Name/Address

Gregory J. Frank
P.O. Box 19478
Portland 97280

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

Reversal of Hearing Officer's decision in the matter of a request for a 4.5 foot height variance to the finished floor elevation for a proposed single family residence on property within the Flood Hazard district.

3. Planning Staff Recommendation

Approval

4. Hearings Officer Decision:

Denial

5. If recommendation and decision are different, why?

The Hearings Officer found that the applicant had failed to demonstrate compliance with the standards for sewage disposal, certification of hydrostatic equalization, exceptional hardship to the applicant, and that fraud and victimization might occur to future purchasers of the property. He also found that the applicant had not provided information regarding Comprehensive Plan Policy #37 with respect to drainage and energy and communications.

ISSUES

(who raised them?)

- a. The appearance of a house with a foundation five feet higher than that of surrounding residences (neighbor).
- b. The low probability of flooding in the area based on over twenty years of observation (neighbor).

Do any of these issues have policy implications? Explain.

No



DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE Morrison Street
Portland, Oregon 97214 (503) 248-3043

May 10, 1994

NOTICE OF PUBLIC HEARING

This notice concerns a public hearing scheduled to consider the land use cases cited and described below:

Case Files: FD 1-94
Scheduled Before: Board of County Commissioners
Hearing Date, Time, & Place: MAY 10, 1994 at 2:00 p.m.
Multnomah County Courthouse, Room 602
1021 SW 4th Avenue, Portland

Scope of Review: De Novo

Time Allowed for Testimony: 20 minutes per side.

Proposed Actions and Uses: Variance of 4.5 feet to the finished floor elevation of a proposed single family residence

Location of the Proposal: 11930 SE Liebe Street

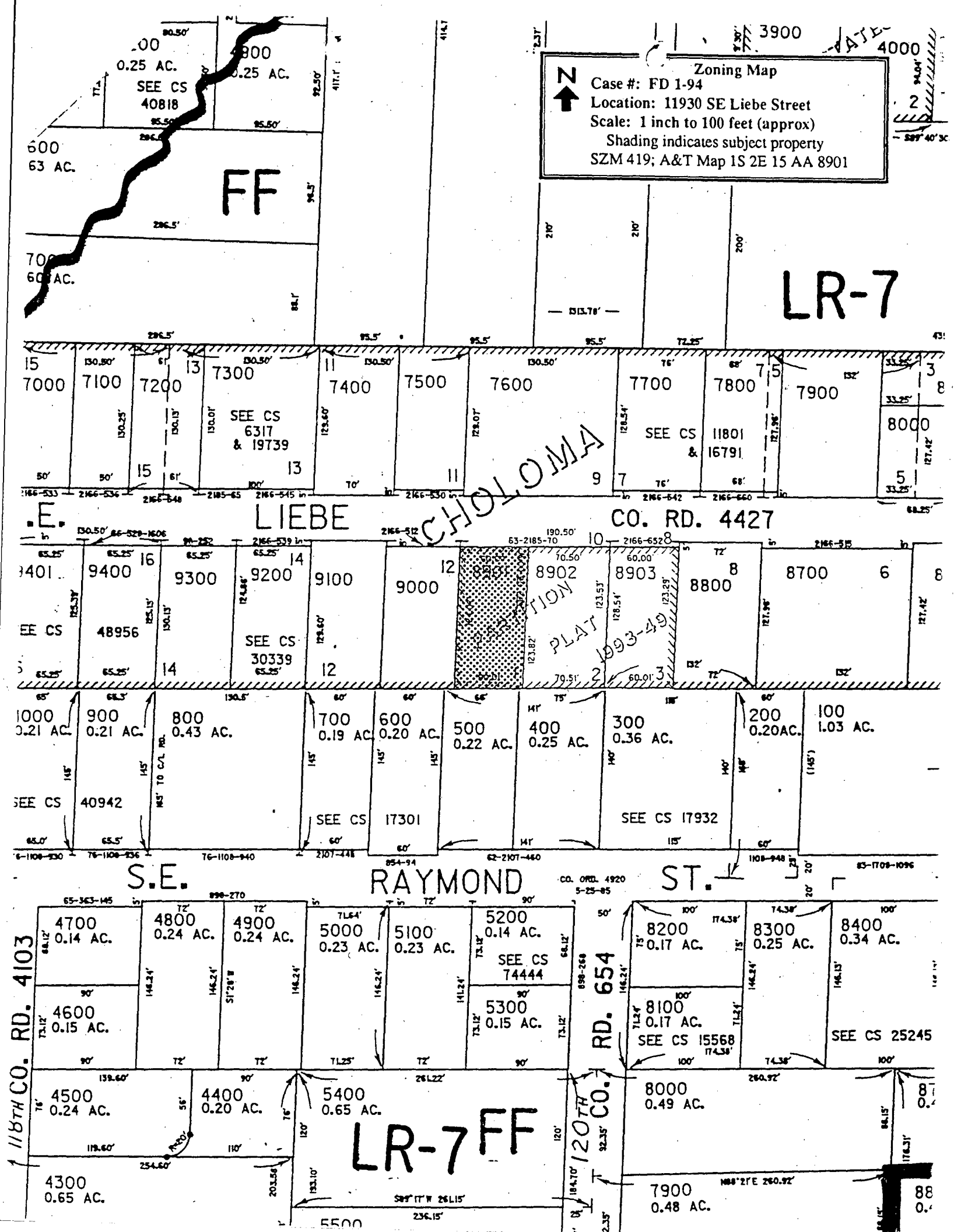
Legal Description of Property: Parcel #1 of Partition Plat 1993-49

Plan Designation: Urban Low Density Residential

Zoning District: LR-7/FF — Urban Low Density Residential District
Flood Fringe overlay district

Applicant: Joseph Vaughn
5761 SE Harrison Street
Milwaukie, OR 97222

Property Owner: Same



APPEAL SUMMARY: Appellant appeals a February 16, 1994 Hearings Officer decision which denied application FD 1-94 for a 4.5 foot variance to the finished floor elevation of a proposed single family residence for property located at 11930 SE Liebe Street. A *Notice of Review* (appeal) of FD 1-94 was filed on April 1, 1994. On April 12, 1994, the appeal was reported to the Board and the Board acted to hear the appeal de novo. The Board will limit testimony to twenty minutes per side.

PUBLIC PARTICIPATION AND HEARING PROCESS: Application materials and the grounds for appeal are available for inspection at no cost at least 20 days prior to the hearing. Copies may be purchased for 30-cents per page. For further information on this case, call Bob Hall at 248-3043 [M-F, 8:00-4:30].

To comment on the this proposal, you may write to or call the Planning Division or attend and speak at the hearing. All interested parties may appear and testify or submit written comment to the Board of Commissioners. All comments should address the approval criteria applicable to the request, but be limited to the *Scope of Review* listed on the front page of this notice. The hearing procedure will follow the Board of Commissioner's *Rules of Procedure* (enclosed) and will be explained at the hearing.

The Board's decision on the item may be announced at the close of the hearing, or upon continuance to a time certain. A written decision will be mailed to the participants and filed with the Clerk of the Board of County Commissioners usually within ten days of the announcement. The decision of the Board of County Commissioners may be appealed to State Land Use Board of Appeals (LUBA) by either the applicant or other hearing participants.

Failure to raise an issue in person, or by letter, or failure to provide sufficient specificity to allow the Board of County Commissioners an opportunity to respond to the issue precludes subsequent appeal to LUBA on that issue.

VARIANCE TO THE FLOOD PLAIN ELEVATION APPROVAL CRITERIA

[ref. MCC 11.15.2172(C)]

MCC 11.15.6315: FLOOD HAZARD DEVELOPMENT STANDARDS

(1) MCC 11.15.6315(A): State Building Code Compliance

MCC 11.15.6315(A) requires "all new construction and substantial improvement shall be constructed in conformance with Oregon State Building Codes."

(2) MCC 11.15.6315(B): Flood Elevation Requirement

MCC 11.15.6315(B) provides, in part:

*New construction and substantial improvement of any residential structure, including manufactured homes, shall have the lowest floor, including basement, elevated to at least one foot above the base flood level. * * * **

(3) MCC 11.15.6315(C): Floodproofing Of Nonresidential Structures

MCC 11.15.6315(C) (floodproofing of structures) is inapplicable because it applies only to "new construction and substantial improvement of any commercial, industrial or other non-residential structure * * * ." This is an application for approval of the construction of a residential structure.

(4) MCC 11.15.6315(D): Foundation and Anchoring

MCC 11.15.6315(D) is inapplicable because it applies only to manufactured homes.

(5) MCC 11.15.6315(E): Foundations And Drainage In Mobile Home Parks And Subdivisions

MCC 11.15.6315(E) is inapplicable because it applies only to manufactured homes.

(6) MCC 11.15.6315(F): Prevention Of Infiltration Of Water Into Household Utility Systems

MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

(7) MCC 11.15.6315(G): Standards For Sewage Disposal Systems

MCC 11.15.6315(G) requires new and replacement water and sewer disposal systems to be designed to:

- (1) Minimize infiltration of flood waters into the system;*
- (2) Minimize discharge from systems into flood waters;*
- (3) Avoid impairment or contamination during flooding.*

(8) MCC 11.15.6315(H): Certification Of Hydrostatic Equalization

MCC 11.15.6315(H) requires that the portions of the dwelling "below the lowest floor that are subject to flooding [will] automatically equalize the hydrostatic flood forces * * * ."

(9) MCC 11.15.6315(I): Exemptions For Land Above Flood Level

MCC 11.15.6315(I) is inapplicable because it authorizes exemptions from the requirements of MCC 11.15.6315 when a surveyor demonstrates the land is 1 foot or more above base flood level. The applicants and staff concur that the property is 6 feet below base flood level.

(10) MCC 11.15.6315(J): Exemption For Historic Structures

MCC 11.15.6315(J) is inapplicable because it authorizes an exemption from MCC 11.15.6315 for the reconstruction, rehabilitation or restoration of "structures listed on the National Register of Historic Place or the State Historic Site Inventory." There is no structure on the site and thus it cannot be on the Historic Site registry or Historic Site Inventory.

C. MCC 11.15.6323: VARIANCE STANDARDS

(1) The Applicable Portions Of The Variance Provisions

The variance standards are set out in the five subsections of MCC 11.15.6323(B). The fifth subsection applies only to structures in "an area identified as the floodway". As found above, the variance is for property in the flood fringe, not the floodway.

(2) Variance From Flood Elevation Requirements In MCC 11.15.6315(B)

(a) MCC 11.15.6323(B)(1): Lot Size And Surrounding Development

MCC 11.15.6323(B)(1) provides:

- (1) The site of the proposed variance is a lot of one-half acre or less in size and is surrounded by and contiguous to lots with existing structures constructed below the base flood level.*

(b) MCC 11.15.6323(B)(2): Exceptional Hardship to the Applicant

MCC 11.15.6323(B)(2) provides:

- (2) Failure to grant the variance will result in exceptional hardship to the applicant;*

(c) MCC 11.15.6323(B)(3): Variance Is Minimum Necessary

MCC 11.15.6323(B)(3) provides:

- (3) The variance is the minimum necessary to afford relief.*

(d) MCC 11.15.6323(B)(4): No Additional Threats To Public Safety, Public Nuisance, Fraud Or Conflicts With Existing Laws

MCC 11.15.6323(B)(4) provides:

- (4) The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances.*

E. APPLICABLE SECTIONS OF THE COUNTY COMPREHENSIVE PLAN

1. Policy 14; Development Limitations

Comprehensive Plan Policy 14 is to

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

* * * *

C. LAND WITHIN THE 100 YEAR FLOOD PLAIN

2. Policies 37 And 38, In General

Both policy 37, "Utilities" and Policy 38, "Facilities" are prefaced with the statement: "The county's policy is to require a finding prior to approval of a legislative or quasi-judicial action that * * ." "Action" is defined in MCC 11.15.8205 as:

a proceeding in which the legal rights, duties or privileges of specific parties are determined only after hearing in which such parties are entitled to appear and be heard, including requests for:

* * *

(D) Variances, except as otherwise provided herein;

* * *

(F) Other requests for permits and other contested cases determining permissible uses of specific property.

3. Plan Policy 37: "Utilities"

Multnomah County Plan Policy 37, "Utilities" provides:

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

WATER AND DISPOSAL SYSTEM

A. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC SEWER AND WATER SYSTEM, BOTH OF WHICH HAVE ADEQUATE CAPACITY; OR

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

The remainder of Policy 37 provides:

DRAINAGE

- E. *THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR*
- F. *THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND*
- G. *THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.*

ENERGY AND COMMUNICATIONS

- H. *THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND*
- I. *COMMUNICATION FACILITIES ARE AVAILABLE. FURTHERMORE, THE COUNTY'S POLICY IS TO CONTINUE COOPERATION WITH THE DEPARTMENT OF ENVIRONMENTAL QUALITY, FOR THE DEVELOPMENT AND IMPLEMENTATION OF A GROUND WATER QUALITY PLAN TO MEET THE NEEDS OF THE COUNTY.*

The concluding paragraph of Policy 37 is inapplicable.

4. Plan Policy 38: "Facilities"

Multnomah County Plan Policy 38, "Facilities" provides:

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

SCHOOL

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

FIRE PROTECTION

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

POLICE PROTECTION

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



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

NOTICE OF REVIEW

1. Name: Frank J. Gregory
Last Middle First
2. Address: P.O. Box 19478 Portland Oregon 97280
Street or Box City State and Zip Code
3. Telephone: (503) 244 - 6811

4. If serving as a representative of other persons, list their names and addresses:

Representative for:

Joseph Vaughn

5761 SE Harrison Street

Milwaukie, Oregon 97222

, Applicant

5. What is the decision you wish reviewed (e.g., denial of a zone change, approval of a subdivision, etc.)?

FD 1-94, #419

Denial of request for variance to flood hazard standards by Hearings Officer.

6. The decision was ^{signed} announced by the ^{Hearings Officer} Planning Commission on March 1, 1994
Submitted to Board Clerk on March 21, 1994

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

Joseph Vaughn

is the owner of the subject property and the applicant in this land use matter.

Pursuant to MCC 11.15.8225 (A)(1) "Those person entitled to notice under MCC

11.15.8220(C) who also make an appearance before the approval authority" are partys.

MCC 11.15.8220 (C)(1) includes the "applicant". Applicant appeared before the Hearings Officer.

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

See attached additional sheets

9. Scope of Review (Check One):

(a) ☐ On the Record

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

(c) ☒ De Novo (i.e., Full Rehearing) See #10 Below

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*.

The Multnomah County Board of Commissioners, on March 22, 1994, adopted Resolution 94-56, which established the Scope of Review for the next five appealed cases.

Accordingly, the Board will consider all evidence submitted to the Hearings Officer and any new relevant evidence submitted by parties.

Signed: Gregory J. Frank
Gregory J. Frank

Date: April 1, 1994

For Staff Use Only

Fee:

Notice of Review = \$300.00

Transcription Fee:

Length of Hearing N/A x \$3.50/minute = \$ N/A

Total Fee = \$ 300.00

Received by: SM

Date: 4-1-94

Case No. FD 1-94

8. Grounds for Reversal of Decision (additional comments to Notice of Review)

The Hearings Officer's decision should be reversed based upon the staff report dated February 16, 1994 (which recommended approval of the requested variance) and for the following reasons::

1. MCC 11.15.6323 (B)(2) *"Failure to grant the variance will result in exceptional hardship to the applicant."*

The Hearings Officer found "no showing of financial hardship" and concluded that the "reasons offered by the applicant are insufficient to justify a variance." The Hearings Officer disregarded the staff's and applicant's interpretation of "hardship."

There is undoubtedly a financial hardship to the applicant. If the variance is not granted then, in order to build a house on the subject property, an eight foot (8') high foundation will be required. Such a home in this neighborhood would be totally out of design character. In fact, according to the application the property might not even be marketable at a reasonable sales price. In addition, construction of an eight foot (8') high foundation would increase construction costs by \$12,500 (12.5%). Increasing the price of the property to reflect the increased cost would price the house out of the neighborhood's market. In essence, such a house might not even sell at a breakeven price. The applicant has clearly demonstrated at least a \$12,500 hardship unless the variance is granted.

2. MCC 11.15.6323 (B)(3) *"The variance is the minimum necessary to afford relief."*

The Hearings Officer stated that the applicant "did not provide any information about the possibility of raising the foundation higher than was proposed..." This is not an entirely accurate statement by the Hearings Officer. The applicant proposed a thirty inch (30") foundation which would be in conformance with the neighborhood and be of a conventional appearance. The applicant, by implication, indicated that above a thirty inch (30") foundation costs would increase (hardship), continuity of the neighborhood would be diminished, and marketability would be decreased. The applicant is not required to demonstrate to mathematical certainty the absolute point of minimum relief. The applicant concurs with the staff's position that the proposed variance does in fact represent the minimum necessary variance to afford relief. The applicant intends to submit additional support regarding this matter to the Board at the de novo hearing.

3. MCC 11.15.6323 (B)(4) *"The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances"*

The applicant agrees with the staff's analysis and conclusion regarding MCC 11.15.6323 (B)(4). The applicant disagrees with the Hearings Officer's reasoning and conclusion. There will be no "unwitting victimization in that the applicant is fully aware of the flood hazard. If the Hearings Officer was truly concerned about future purchaser's a simple condition to the granting of the variance would have alleviated any such fears: a required notice in the deed indicating the location of the property within a flood fringe of a flood hazard district. Applicant would agree to record a deed containing such a notice. These types of deed notices are very common in Multnomah County and the City of Portland.

4. MCC 11.15.6315 (F) *"Prevention of infiltration of water into household utility systems"*

The Hearings Officer incorrectly interpreted "the applicant's materials as an application for a variance from flood proofing requirements of MCC 11.15.6315 (F) as well as the flood elevation requirements of MCC 11.15.6315 (B)." The applicant and staff agree that applicant requested a variance from MCC 11.15.6315 (B); but not a variance from MCC 11.15.6315 (F). The applicant and staff agree the correct implementation of MCC 11.15.6315(F) is that construction details will be regulated by building codes and the City of Portland (re State Plumbing, Heating, Ventilation and Air Conditioning Codes). The applicant has satisfied this section of the Code and will be held accountable by the appropriate regulatory agency at the appropriate time.

5. MCC 11.15.6315 (G) *"Standards for Sewage Disposal Systems"*

The Hearings Officer indicted that the applicant did "not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315 (G)." The Hearings Officer is mistaken. First, the application and staff noted that the sewer connection on this property would have to be made in conformance to the Mid-County Sewer District's Rules of Connection. Secondly, the Hearings Officer is again trying to intercede in the building permit process; which he admits on page 4 of his decision, will be determined by others (ie Planning Director, City of Portland, etc.)

6. MCC 11.15.6315 (H) *"Certification of Hydrostatic Equalization"*

The Hearings Officer erred in requiring the applicant to present a "certification by a registered professional engineer..." at the time of the request for the variance. The staff position, which the applicant contends is correct, is that compliance with MCC 11.15.6315 (H) "will be determined by the Planning Director in conjunction with the building permit" (page 4 of staff report). Applicant has agreed, at the appropriate time, to file the required certification.

7. Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant disagrees with the Hearings Officer's application of these sections of the Comprehensive Plan to the subject case. The applicant concurs with the staff position and contends that a proper interpretation of these sections would permit a "determination by the Planning Director in conjunction with the building permit decision" as to whether the appropriate utilities are present (pages 9 & 10 of staff report). Further, applicant intends to present evidence to the Board that in fact utilities are in fact present.

8. MCC 11.15.6315 (B)

The Hearings Officer erred in denying the variance requested under MCC 11.15.6315(B) based upon reasons stated in this notice, the application for variance, the staff report, the staff record, and testimony to be presented to the Board upon the de novo review.



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

DECISION

This Decision consists of Findings of Fact, and Conclusions

MARCH 1, 1994

FD 1-94, #419 VARIANCE TO FLOOD HAZARD DISTRICT STANDARDS
(Construct a Single Family Dwelling Below the 100-year Flood Elevation)

I. INTRODUCTION; NATURE OF THE REQUEST

This application is to construct a single family dwelling on a lot within the Flood Hazard District. Applicant requests a variance from the requirements in Multnomah County Code (MCC) 11.15.6315. MCC § .6315(B) requires that the floor of new houses in the Flood Hazard District be "*at least one foot above the base flood level.*" The ground elevation of this property is 205 feet and the base flood elevation in the surrounding area is 211 feet. Consequently, if constructed without a variance, the finished floor of the new dwelling would need to be seven feet above existing ground level.

Location: 11930 SE Liebe Street

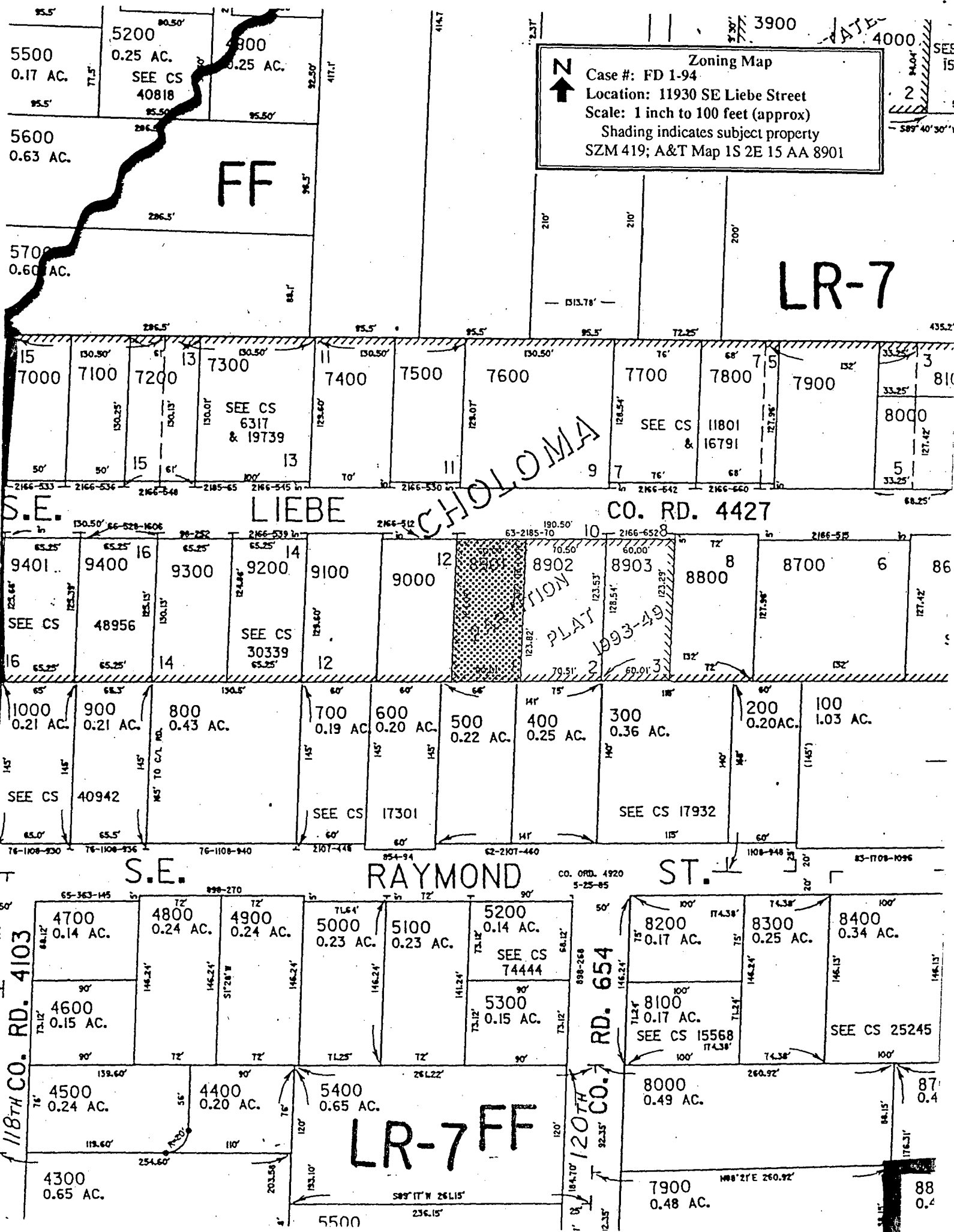
Tax Roll Description: Parcel #1 of Partition Plat 1993-49

Owner/Applicant Joseph Vaughn
5761 SE Harrison Street
Milwaukie, Oregon 97222

Comprehensive Plan: Urban Low Density Residential

Zoning: LR-7/ FF; Low Density Residential District
Flood Fringe subdistrict

DECISION:: Denied entire application, based on the following Findings and Conclusions.



II. PARTIES, AGENTS AND WITNESSES TO THE PROCEEDING

A. Parties

The persons, agencies and organizations who submitted written or oral testimony in this proceeding on their own behalf are parties to the proceedings. MCC 11.15.8225(A)(1). These persons were:

1. Applicant and Landowner

Oregon Trail Custom Homes, PO Box 20686, Portland, Oregon 97220 (applicant)

Joseph Vaughn, 5761 SE Harrison St., Milwaukie, Oregon 97222 (landowner)

2. Other Persons Supporting The Application

John Mahaffey, Georgetown Realty, 10000 NE 122nd, Portland, Oregon 97230

Roger Adams, 12022 SE Liebe, Portland, Oregon 97266

Brenda Luma, 12021 SE Liebe, Portland, Oregon 97266

3. Persons Opposed To The Application

None

B. Agents

Persons who submitted written or testimony, but only in the capacity of a representative for one of the parties, and not on their own behalf, are agents, not parties to this proceedings. These persons were:

1. Agents For The Applicant

Robert Totaro, President, Oregon Trail Custom Homes (at applicant's address)

Mike Totaro, Vice President, Oregon Trail Custom Homes (at applicant's address)

C. Witnesses

Persons appearing to provide information on behalf of someone else, and not as parties in their own right, are witnesses. There were no witnesses in this proceeding.

III. PROCEDURAL ISSUES

A. Impartiality Of The Hearings Officer

Prior to the hearing I had no *ex parte* contacts with the applicants or anyone else concerning the merits of this application.

I have no financial interest in the outcome of this proceeding and have no family or financial relationship with any of the applicants.

B. Other Procedural Issues

The applicants did not allege any procedural violations by the County, prior to, or during, the hearing.

IV. BURDEN OF PROOF

The burden of proof is upon the applicant. MCC 11.15.8230(D)

V. REVIEW OF THE STANDARDS, ANALYSIS OF THE EVIDENCE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. MCC Chapter 11.15.6301 *Et. Seq.*: The Applicability Of The Flood Hazard District Requirements In General

MCC Chapter 11.15.6301 *et. seq.*, "Flood Hazard District," is applicable, because the area is within a flood fringe area mapped on Flood Insurance Rate Map; Community Panel Number 410179 0382 B, revised 18 March 1986. The property is not within a floodway. *Id.*

The sections of the Flood Hazard Chapter containing standards applicable to this decision are MCC 11.15.6315, "Development Standards" and MCC 11.15.6323, "Variances." As noted below, I find some subsections of those provisions are inapplicable.

B. MCC 11.15.6315: Flood Hazard Development Standards

(1) MCC 11.15.6315(A): State Building Code Compliance

MCC 11.15.6315(A) requires "all new construction and substantial improvement shall be constructed in conformance with Oregon State Building Codes." If the variance is granted on appeal, compliance with this standard will be determined by the Planning Director before, or in conjunction with, the issuance of a placement permit.

The County has an intergovernmental agreement by which it relies on certification by the City of Portland as to the satisfaction of the State Building Code. The submission of an unqualified certification is a decision which does not require the exercise of discretion. ORS 197.015(10)(b)(A), (B). Therefore, no notice or opportunity for a hearing would be required.

(2) MCC 11.15.6315(B): Flood Elevation Requirement

MCC 11.15.6315(B) provides, in part:

*New construction and substantial improvement of any residential structure, including manufactured homes, shall have the lowest floor, including basement, elevated to at least one foot above the base flood level. * * * **

According to the Flood Insurance Rate Maps, the property is at 205 feet about sea level and the "base flood level" in the surrounding area is 211 feet. The site of the proposed dwelling is shown as being in the "flood fringe," not the "floodway." The applicant proposes to construct the floor at 206.5 feet, 4.5 below the flood level and seeks a variance for this amount, discussed below.

(3) MCC 11.15.6315(C): Floodproofing Of Nonresidential Structures

MCC 11.15.6315(C) (floodproofing of structures) is inapplicable because it applies only to "new construction and substantial improvement of any commercial, industrial or other non-residential structure * * * ." This is an application for the approval of the siting of a residential structure.

(4) MCC 11.15.6315(D): Foundation and Anchoring

MCC 11.15.6315(D) requires all manufactured homes to be "placed on a permanent foundation and shall be anchored to resist flotation, collapse and lateral movement by providing tie downs [etc.] * * * ." Because this standard applies to manufactured homes, it is inapplicable to this proceeding.

(5) MCC 11.15.6315(E): Foundations And Drainage In Mobile Home Parks And Subdivisions

MCC 11.15.6315(E) is inapplicable because it governs foundations and drainage for "new manufactured home parks" and replacement of manufactured homes "in an existing manufactured home park or subdivision * * * ." The standard is does not apply to this application.

(6) MCC 11.15.6315(F): Prevention Of Infiltration Of Water Into Household Utility Systems

MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

In this proceeding, the applicant is seeking a variance from the flood elevation requirements of MCC 11.15.6315(B). The variance would allow the applicant to site a house on an 30" foundation, leaving the first floor approximately 4.5 feet below the crest of the 100-year flood level.

Based on the record before me, I interpret the applicants' materials as an application for a variance from the flood proofing requirements of MCC 11.15.6315(F) as well as the flood elevation requirements of MCC 11.15.6315(B). This implied variance is denied for the same reasons discussed below.

(7) MCC 11.15.6315(G): Standards For Sewage Disposal Systems

MCC 11.15.6315(G) requires new and replacement water and sewer disposal systems to be designed to:

- (1) Minimize infiltration of flood waters into the system;*
- (2) Minimize discharge from systems into flood waters;*
- (3) Avoid impairment or contamination during flooding.*

The Mid-County Sewer district requires the applicants to connect to the existing sewer line in SE Liebe Street. The application does not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315(G).

(8) MCC 11.15.6315(H): Certification Of Hydrostatic Equalization

MCC 11.15.6315(H) requires certification by a registered professional engineer or architect that the portions of the dwelling "below the lowest floor that are subject to flooding" are designed to "automatically equalize the hydrostatic flood forces * * * ."

The record does not contain the required certification. This is grounds for denial.¹

(9) MCC 11.15.6315(I): Exemptions For Land Shown To Be Above Flood Level

MCC 11.15.6315(I) authorizes exemptions from the requirements of MCC 11.15.6315 when a surveyor demonstrates the land is 1 foot or more above base flood level.

Testimony by Brenda Luma and Roger Adams challenged the accuracy of the FIRM maps. Mr. Adams stated that he had owned his house since 1968. Although his house has a full basement, it has never flooded.

However, the standard requires a showing that the property is actually 1 foot above the base flood level, as shown on the map. No one testified that the elevation of the property was inaccurate; in fact the request for the variance is based on the assumption that the base flood level is above the floor level.

I conclude that no exemption is warranted under this standard.

(10) MCC 11.15.6315(J): Exemption For Historic Structures

MCC 11.15.6315(J) is inapplicable because it authorizes an exemption from MCC 11.15.6315 for the reconstruction, rehabilitation or restoration of "structures listed on the National Register of Historic Place or the State Historic Site Inventory." There is no structure on the site and thus it cannot be on the Historic Site registry or Historic Site Inventory.

C. MCC 11.15.6323: Variance Standards

(1) The Applicable Portions Of The Variance Provisions

As noted above, the applicants are seeking a variance from the flood elevation requirements of MCC 11.15.6315(B) and, by implication, from the flood-proofing requirements of MCC 11.15.6315(F).

There are three sections to the variance provisions found at MCC 11.15.6323. The first section, (A), is introductory and the third section, (C), applies to "non-residential structures." Neither section contains standards which apply to these variances.

¹ Since the existence of a certification would be a ministerial decision, the certification can be provided by the Planning Director in conjunction with the issuance of a building permit or in the course of a *de novo* appeal, if this kind of review is granted by the County Commission.

The variance standards are set out in the five subsections of MCC 11.15.6323(B). The fifth subsection applies only to structures in "an area identified as the floodway". As found above, the variance is for property in the flood fringe, not the floodway.

(2) Variance From The Flood Elevation Requirement In MCC 11.15.6315(B)

(a) MCC 11.15.6323(B)(1): Lot Size And Surrounding Development

MCC 11.15.6323(B)(1) provides:

- (1) *The site of the proposed variance is a lot of one-half acre or less in size and is surrounded by and contiguous to lots with existing structures constructed below the base flood level.*

Based (1) on the information on the parcel size in the Staff Report (page 5); (2) the applicant's "windshield survey," which was confirmed by the staff (Staff Report at page 5-6); and (3) the oral testimony presented at the hearing, I conclude that both elements of this standard have been satisfied.

(b) MCC 11.15.6323(B)(2): Exceptional Hardship To The Applicant

MCC 11.15.6323(B)(2) provides:

- (2) *Failure to grant the variance will result in exceptional hardship to the applicant;*

The hardship identified at page 4 of the application is:

First, the cost for the 8 foot high foundation wall is estimated to be \$15,000, an increase of \$12,500 from the \$2,500 for a standard 2-1/2 foot high foundation wall. That cost will be directly reflected in the sale price of the house, which will make it more difficult to sell in the relatively modest neighborhood. The home propose for Parcel 3 is expected to sell for \$98,500. An increase of \$12,500 in costs would push the price over \$100,000 and represent over 12% of the value of the house and land.

Secondly, the finished structure will appear totally out of place, standing one complete story above its neighbors. This factor will also make the house more difficult to sell.

Therefore, the additional expense of the foundation, the resulting appearance of the finished structure, and the likelihood that the house will be difficult to sell given market values in the neighborhood will combine to cause the

Applicant exceptional hardship.

Because I believe local governments have an ethical (even when it is not a legal) responsibility to interpret their standards consistently, I have reviewed my findings on a pair of earlier flood plain variance decisions, HV 22-92 dated February 1, 1993 and HV 23-92 dated December 7, 1992. In that case I reviewed the financial hardship to the applicant, and concluded (emphasis added):

There is no question that failure to grant the variance would create an "exceptional hardship" given Ms. Swank's conditions and these additional charges. The question is whether or not the need for the flood elevation and flood proofing variance was created by the applicants' decision to purchase property within the Flood Hazard District and to buy the manufactured home in advance of seeking the necessary variance.

This hardship standard differs from the most common forms of variance standards in two ways. First, it omits the commonly used prohibition against granting variances based on "self-created" hardships. Secondly, the hardship is described in terms of the circumstances of the applicant, rather than characteristics of the property itself.

While I am troubled by the idea of approving, in part, the siting of a manufactured home at an elevation 4.5 feet below the base flood level, I conclude the hardship standard has been met given the phrasing of the standard. However, a corollary of this interpretation of the ordinance is that this variance will remain valid only so long as the property is occupied by Lucy Swank.

Findings and Decision in HV 23-92, dated December 7, 1992 at page 7.

In this case, there is no showing of financial hardship to the developer as there was to the individual homeowner/applicant. The grounds for the hardship offered here would apply equally well to all new houses in the floodplain. If all houses qualified for a variance then the purpose of the flood plain protection provisions would be subverted.

For this reason, despite the more permissive (non-traditional) hardship standard in the County Code, I find that the reasons offered by the applicant are insufficient to justify a variance.

(c) MCC 11.15.6323(B)(3): The Variance Is The Minimum Necessary

MCC 11.15.6323(B)(3) provides:

(3) *The variance is the minimum necessary to afford relief.*

The applicant did not provide any information about the possibility of raising the foundation higher than was proposed, albeit less than the height necessary to avoid flooding the ground floor. The applicant has not carried its burden of proof with respect to this criterion.

(d) MCC 11.15.6323(B)(4): No Additional Threats To Public Safety, Public Nuisance, Fraud Or Conflicts With Existing Laws

MCC 11.15.6323(B)(4) provides:

- (4) The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances.*

(i) Threats To Public Safety, Extraordinary Public Expense

The possible additional threats to public safety and sources of extraordinary expense are (1) displacement of floodwaters by the house, (2) possible damage caused by the house if it were to float free during a flood, (3) the public resources which would be expended to rescue residents of the dwelling in the event of a flood.

Floodwater displacement by this property will be negligible, provided the applicants satisfy MCC 11.15.6315(H), which requires hydrostatic equalization "by allowing for the entry and exit of floodwaters" for all parts of the house "subject to flooding."

The house should not float free provided the applicants satisfy MCC 11.15.6315(D), which requires the house to be "anchored to resist flotation."

(ii) Create a Nuisance

The house, with or without a flood plain variance, would not constitute a "nuisance" as that term is used in planning and tort law. This part of the standard has been satisfied.

(iii) Fraud and Victimization

With regard to the "fraud and victimization" element, in the 1992 Mercer/Swank variance I said:

Fraud and victimization of the public would occur if the approval of the variance would lead unwitting purchasers to acquire the property without knowledge of the risk of serious flood damage. In this case, this variance proceeding has left no doubt that all of the applicants are well aware that the

bottom of the house is resting 4.5 feet below the 100 year flood level. In addition, adjoining property owners who signed a petition supporting a variance to the flood elevation requirement are also aware that the property lies within the flood fringe. Finally, by making the variance personal to the applicant, subsequent purchasers will be put on notice of the circumstances of the property.

The circumstances in this case are quite different; since the applicant is not the prospective resident, there may well be unwitting purchasers who could acquire the house without being aware that it was located within the flood plain.

During the hearing, Mr. John Mahaffey of Georgetown Realty referred to a new statute which would require this disclosure of the fact the property was within the flood plain. He was unable to provide a citation to the Oregon Revised Statutes at the hearing. My review of the statutes revealed ORS 104.465. "Seller's Property Disclosure And Disclaimer Statements." ORS 104.465(2)(b) specifies the contents, ("in substantially the following form") of the seller's disclosure statement. This includes, under section 8, "General": "D. To your knowledge, is the property in a designated flood plain?"

However, ORS 105.470(1) excludes "[t]he first sale of a dwelling never occupied" from the disclosure requirements in ORS 105.465.

After the hearing, Mr. Mahaffey sent the County an undated letter, which stated.

Enclosed is a disclosure form which we will fill out when we sell the homes on S.E. Liebe. We would be happy to accept a directive that the buyers are to receive this form concerning the 100 year flood plain.

Unfortunately, no disclosure form appears in the file. Even if one did, the County has no means of monitoring or enforcing such a disclosure requirement.

Based on this record, I am unable to conclude that fraud or perhaps unwitting victimization would not occur in the event a purchaser acquired the property without knowledge of the location in the flood plain and there lives or property were damaged in a flood.

(iv) Conflicts With Existing Local Laws Or Ordinances

The local laws and ordinances governing this application are expressed in the County Code and Plan. Given a finding that they have been satisfied, there is no "conflict with existing local laws or ordinances."

(e) **Conclusion With Respect To Variance From The Flood Elevation Requirement**

I conclude that the applicant has satisfied the variance standards in MCC 11.15.6323(B)(1) and not satisfied the standards in MCC 11.15.6323(B)(2), (3) and (4), as applied to its request for a variance from the flood elevation requirement in MCC 11.15.6315(B).

(3) **Variance From The Flood-Proofing Requirements In MCC 11.15.6315(F)**

As quoted above, MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

Subsections (2), (3) and (4) of the variance standard are not satisfied for the reasons given previously with respect to the variance for the flood elevation variance.

D. Applicable Sections Of The County Comprehensive Plan

1. Policy 14; Development Limitations

Comprehensive Plan Policy 14 is to

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

* * * * *

C. LAND WITHIN THE 100 YEAR FLOOD PLAIN

Multnomah Comprehensive Framework Plan at page 58.

Under the terms of Policy 14 and the implementation strategies, see Multnomah Comprehensive Framework Plan at 59, I find this policy has been implemented by the Flood Hazard District and has no independent application to this action.

2. Policies 37 And 38, In General

Both policy 37, "Utilities" and Policy 38, "Facilities" are prefaced begin with the statement: "The county's policy is to require a finding prior to approval of a legislative or quasi-judicial action that * * * ." "Action" is defined in MCC 11.15.8205 as a

*a proceeding in which the legal rights, duties or privileges of specific parties are determined only after hearing in which such parties are entitled to appear and be heard, including requests for: * * **

(D) Variances, except as otherwise provided herein;

** * * **

(F) Other requests for permits and other contested cases determining permissible uses of specific property.

Because this is a proceeding on an application for a variance, I find that it is an "action" and that consequently both of these policies apply.

As noted above, satisfaction of standards not addressed by the applicant to date, could be determined by the Planning Director before, or in conjunction with, either an appeal or the issuance of a building permit. Because compliance with Policies 37 and 38 may require the exercise of judgment as to facts and interpretation of the policies, notice of this subsequent decision and an opportunity for a hearing should be provided. ORS 197.763(2), 215.416, *Rhyne et al vs. Multnomah County, Swan & Trotter*, ___ Or LUBA ___ (1992.)

3. Plan Policy 37: "Utilities"

Multnomah County Plan Policy 37, "Utilities" provides:

POLICY 37

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

WATER AND DISPOSAL SYSTEM

A. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC SEWER AND WATER SYSTEM, BOTH OF WHICH HAVE ADEQUATE CAPACITY; OR

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 167.

As noted previously, the applicant would connect the proposed house to the City of Portland's sewer system. The signed Portland Fire District review establishes the existence of a hydrant 70' from the residence with adequate water pressure nearby. From this I conclude the house would also be served by City water. This evidence is sufficient to carry the applicants' burden of proof with respect to this portion of Policy 37.

The remainder of Policy 37 provides:

DRAINAGE

- E. THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR
- F. THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND
- G. THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.

ENERGY AND COMMUNICATIONS

- H. THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND
- I. COMMUNICATIONS FACILITIES ARE AVAILABLE

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 168.

There is no evidence in the record concerning energy and communications facilities, subsections E, F, G, H and I, although the location of the property within the urbanized portion of the County suggests these facilities are readily available.

The failure to address these standards is grounds for denial. However, the applicant might be able to address them in the event of a *de novo* appeal of this decision.

The concluding paragraph of Policy 37 is inapplicable to this quasijudicial proceeding.

4. Plan Policy 38: "Facilities"

Multnomah County Plan Policy 38, "Facilities" provides:

POLICY 38

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

SCHOOL

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

FIRE PROTECTION

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

POLICE PROTECTION

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 169-170.

The David Douglas School District returned the "School District Review" form, with the signature of the Dr. Ron Russell, Assistant Superintendent, dated February 8, 1994. (The "no comment" box was checked.) This satisfies the requirement in subsection A of policy 38 that the school district has "an opportunity to review and comment on the proposal."

The completed Portland Fire District Review form, signed by Don Patty (undated), Plans Review provides sufficient evidence satisfying subsection B, ("there is adequate water pressure and flow for fire fighting purposes") and C (the fire district "had an opportunity to review and comment on the proposal.")

Lt. Bill Goss, of the Multnomah County Sheriff's Office returned the "Police Services Review" form, dated February 8, 1994, indicating there would be an "adequate" level of service "available to serve the proposed project."

The applicant has satisfied Policy 38.

E. State Statutes, Goals And Administrative Rules Applicable To The Decision

The provisions of state law governing county quasijudicial decisions, found in ORS 197.763 and 215.416 apply to this proceeding. They have been fulfilled through the notice of, and conduct of, the hearing on this matter.

No other provisions in ORS Chapters 197 and 215 are applicable.

No statewide planning goals and no Oregon Administrative Rules interpreting those goals apply to this quasijudicial permitting proceeding.

VI. CONCLUSIONS AND ORDER

A. Standards Which The Applicant Has Not Satisfied

I find that the evidence and argument offered by the applicant is insufficient to satisfy the "hardship" standard in MCC 11.15.6323(B)(2) and the "minimum variance necessary" standard in MCC 11.15.6323(B)(3), with respect to the applicant's request for a variance to the flood elevation standards and its implied request for a variance to the flood-proofing

requirements of MCC 11.15.6315(F).

I also find that the applicant failed to satisfy the "fraud" and "victimization" provisions in MCC 11.15.6323(B)(4), as to the flood elevation variance to MCC 11.15.6315(B) and the flood-proofing variance to MCC 11.15.6315(F).

These are grounds for denial.

B. Standards Which The Applicant Failed To Address

The applicant did not offer evidence addressing compliance with several provisions in the County Code and some of the applicable Plan policies. These standards and policies are:

MCC 11.15.6315(G)
MCC 11.15.6315(H)
Plan Policy 37 §§(E) through (I)
Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant's failure to carry its burden of proof for these standards, is grounds for denial.

C. Standards Which The Applicant Has Satisfied

The applicant has satisfied the following applicable sections of the County Code and County Plan:

MCC 11.15.6323(B)(1), as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(1), as to flood-proofing variance to MCC 11.15.6315(F)
MCC 11.15.6323(B)(4), in part, as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(4), in part, as to flood-proofing variance to MCC 11.15.6315(F)
Comprehensive Framework Plan Policy 14
Comprehensive Framework Plan Policy 37, Subsections A through D
Comprehensive Framework Plan Policy 38

D. Standards Which Are Inapplicable

Although the following standards appear in otherwise relevant code sections, I found them inapplicable to this application or this proceeding:

MCC 11.15.6315(A),(B),(C),(D),(E),(I)
MCC 11.15.6323(A),(C),(E)

ORDER

For the foregoing reasons, the application is denied.

March 1994
Date

Robert L. Liberty
Robert L. Liberty, Hearings Officer

Signed by the Hearings Officer:	March 1, 1994
Decision Mailed to Parties:	March 21, 1994
Decision Submitted to Board Clerk:	March 21, 1994
Lay day to Appeal Decision:	4:30 p.m., April 1, 1994
Reported to Board of County Commissioners:	1:30 p.m., April 12, 1994

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of \$300.00. Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street, Portland.

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

To appeal the Hearings Officer decision, a "Notice of Review" form and fee must be submitted to the County Planning Director. For further information call the Multnomah County Planning and Development Division at 248-3043.

MEETING DATE: April 12, 1994

AGENDA NO: P-4

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Hearings Officer Decision

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING: Date Requested: April 12, 1994

Amount of Time Needed: 2 Minutes

DEPARTMENT: DES

DIVISION: Planning

CONTACT: R. Scott Pemble

TELEPHONE #: 3182

BLDG/ROOM #: 412/103

PERSON(S) MAKING PRESENTATION: Planning Staff

ACTION REQUESTED:

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

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

FD 1-94 Review the March 1, 1994 Hearings Officer Decision, denying request for construction of a single family dwelling below the 100-year flood elevation, for property located at 11930 SE Liebe Street.

BOARD OF
COUNTY COMMISSIONERS
MULTNOMAH COUNTY
OREGON
1994 APR - 6 AM 8:55

SIGNATURES REQUIRED:

ELECTED OFFICIAL:

OR

DEPARTMENT MANAGER:

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

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



BOARD HEARING OF April 12, 1994

TIME 1:30pm

CASE NAME Flood Hazard Variance

NUMBER

FD 1-94

1. Applicant Name/Address

Gregory J. Frank
P.O. Box 19478
Portland 97280

2. Action Requested by Applicant

Reversal of Hearing Officer's decision in the matter of a request for a 4.5 foot height variance to the finished floor elevation for a proposed single family residence on property within the Flood Hazard district.

ACTION REQUESTED OF BOARD

- ☐ Affirm Plan.Com./Hear.Of
☐ Hearing/Rehearing
☒ Set date of Hearing for Review

3. Planning Staff Recommendation

Approval

4. Hearings Officer Decision:

Denial

5. If recommendation and decision are different, why?

The Hearings Officer found that the applicant had failed to demonstrate compliance with the standards for sewage disposal, certification of hydrostatic equalization, exceptional hardship to the applicant, and that fraud and victimization might occur to future purchasers of the property. He also found that the applicant had not provided information regarding Comprehensive Plan Policy #37 with respect to drainage and energy and communications.

ISSUES
(who raised them?)

- a. The appearance of a house with a foundation five feet higher than that of surrounding residences (neighbor).
- b. The low probability of flooding in the area based on over twenty years of observation (neighbor).

Do any of these issues have policy implications? Explain.

No



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

NOTICE OF REVIEW

1. Name: Frank J. Gregory
Last Middle First
2. Address: P.O. Box 19478 Portland Oregon 97280
Street or Box City State and Zip Code
3. Telephone: (503) 244 - 6811

4. If serving as a representative of other persons, list their names and addresses:

Representative for:

Joseph Vaughn
5761 SE Harrison Street
Milwaukie, Oregon 97222
, Applicant

5. What is the decision you wish reviewed (e.g., denial of a zone change, approval of a subdivision, etc.)?

FD 1-94, #419

Denial of request for variance to flood hazard standards by Hearings Officer.

6. The decision was signed by the Hearings Officer on March 1, 1994
Submitted to Board Clerk on March 21, 1994

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

Joseph Vaughn

is the owner of the subject property and the applicant in this land use matter.

Pursuant to MCC 11.15.8225 (A)(1) "Those person entitled to notice under MCC

11.15.8220(C) who also make an appearance before the approval authority" are partys.

MCC 11.15.8220 (C)(1) includes the "applicant". Applicant appeared before the Hearings
Officer.

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

See attached additional sheets

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

(a) ☐ On the Record

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

(c) ☒ *De Novo* (i.e., Full Rehearing) See #10 Below

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*.

The Multnomah County Board of Commissioners, on March 22, 1994, adopted Resolution 94-56, which established the Scope of Review for the next five appealed cases.

Accordingly, the Board will consider all evidence submitted to the Hearings Officer and any new relevant evidence submitted by parties.

Signed: Gregory J. Frank
Gregory J. Frank

Date: April 1, 1994

For Staff Use Only

Fee:

Notice of Review = \$300.00

Transcription Fee:

Length of Hearing N/A x \$3.50/minute = \$ N/A

Total Fee = \$ 300.00

Received by: SM

Date: 4-1-94

Case No. FD 1-94

30.00

8. Grounds for Reversal of Decision (additional comments to Notice of Review)

The Hearings Officer's decision should be reversed based upon the staff report dated February 16, 1994 (which recommended approval of the requested variance) and for the following reasons::

1. MCC 11.15.6323 (B)(2) *"Failure to grant the variance will result in exceptional hardship to the applicant."*

The Hearings Officer found "no showing of financial hardship" and concluded that the "reasons offered by the applicant are insufficient to justify a variance." The Hearings Officer disregarded the staff's and applicant's interpretation of "hardship."

There is undoubtedly a financial hardship to the applicant. If the variance is not granted then, in order to build a house on the subject property, an eight foot (8') high foundation will be required. Such a home in this neighborhood would be totally out of design character. In fact, according to the application the property might not even be marketable at a reasonable sales price. In addition, construction of an eight foot (8') high foundation would increase construction costs by \$12,500 (12.5%). Increasing the price of the property to reflect the increased cost would price the house out of the neighborhood's market. In essence, such a house might not even sell at a breakeven price. The applicant has clearly demonstrated at least a \$12,500 hardship unless the variance is granted.

2. MCC 11.15.6323 (B)(3) *"The variance is the minimum necessary to afford relief."*

The Hearings Officer stated that the applicant "did not provide any information about the possibility of raising the foundation higher than was proposed..." This is not an entirely accurate statement by the Hearings Officer. The applicant proposed a thirty inch (30") foundation which would be in conformance with the neighborhood and be of a conventional appearance. The applicant, by implication, indicated that above a thirty inch (30") foundation costs would increase (hardship), continuity of the neighborhood would be diminished, and marketability would be decreased. The applicant is not required to demonstrate to mathematical certainty the absolute point of minimum relief. The applicant concurs with the staff's position that the proposed variance does in fact represent the minimum necessary variance to afford relief. The applicant intends to submit additional support regarding this matter to the Board at the de novo hearing.

3. MCC 11.15.6323 (B)(4) *"The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances"*

The applicant agrees with the staff's analysis and conclusion regarding MCC 11.15.6323 (B)(4). The applicant disagrees with the Hearings Officer's reasoning and conclusion. There will be no "unwitting victimization in that the applicant is fully aware of the flood hazard. If the Hearings Officer was truly concerned about future purchaser's a simple condition to the granting of the variance would have alleviated any such fears: a required notice in the deed indicating the location of the property within a flood fringe of a flood hazard district. Applicant would agree to record a deed containing such a notice. These types of deed notices are very common in Multnomah County and the City of Portland.

4. MCC 11.15.6315 (F) *"Prevention of infiltration of water into household utility systems"*

The Hearings Officer incorrectly interpreted "the applicant's materials as an application for a variance from flood proofing requirements of MCC 11.15.6315 (F) as well as the flood elevation requirements of MCC 11.15.6315 (B)." The applicant and staff agree that applicant requested a variance from MCC 11.15.6315 (B); but not a variance from MCC 11.15.6315 (F). The applicant and staff agree the correct implementation of MCC 11.15.6315(F) is that construction details will be regulated by building codes and the City of Portland (re State Plumbing, Heating, Ventilation and Air Conditioning Codes). The applicant has satisfied this section of the Code and will be held accountable by the appropriate regulatory agency at the appropriate time.

5. MCC 11.15.6315 (G) *"Standards for Sewage Disposal Systems"*

The Hearings Officer indicted that the applicant did "not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315 (G)." The Hearings Officer is mistaken. First, the application and staff noted that the sewer connection on this property would have to be made in conformance to the Mid-County Sewer District's Rules of Connection. Secondly, the Hearings Officer is again trying to intercede in the building permit process; which he admits on page 4 of his decision, will be determined by others (ie Planning Director, City of Portland, etc.)

6. MCC 11.15.6315 (H) *"Certification of Hydrostatic Equalization"*

The Hearings Officer erred in requiring the applicant to present a "certification by a registered professional engineer..." at the time of the request for the variance. The staff position, which the applicant contends is correct, is that compliance with MCC 11.15.6315 (H) "will be determined by the Planning Director in conjunction with the building permit" (page 4 of staff report). Applicant has agreed, at the appropriate time, to file the required certification.

7. Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant disagrees with the Hearings Officer's application of these sections of the Comprehensive Plan to the subject case. The applicant concurs with the staff position and contends that a proper interpretation of these sections would permit a "determination by the Planning Director in conjunction with the building permit decision" as to whether the appropriate utilities are present (pages 9 & 10 of staff report). Further, applicant intends to present evidence to the Board that in fact utilities are in fact present.

8. MCC 11.15.6315 (B)

The Hearings Officer erred in denying the variance requested under MCC 11.15.6315(B) based upon reasons stated in this notice, the application for variance, the staff report, the staff record, and testimony to be presented to the Board upon the de novo review.



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

DECISION

This Decision consists of Findings of Fact, and Conclusions

MARCH 1, 1994

FD 1-94, #419 VARIANCE TO FLOOD HAZARD DISTRICT STANDARDS
(Construct a Single Family Dwelling Below the 100-year Flood Elevation)

I. INTRODUCTION; NATURE OF THE REQUEST

This application is to construct a single family dwelling on a lot within the Flood Hazard District. Applicant requests a variance from the requirements in Multnomah County Code (MCC) 11.15.6315. MCC § .6315(B) requires that the floor of new houses in the Flood Hazard District be "at least one foot above the base flood level." The ground elevation of this property is 205 feet and the base flood elevation in the surrounding area is 211 feet. Consequently, if constructed without a variance, the finished floor of the new dwelling would need to be seven feet above existing ground level.

Location: 11930 SE Liebe Street

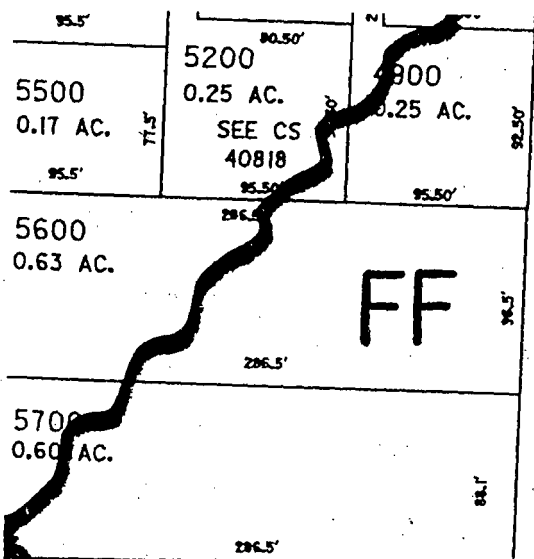
Tax Roll Description: Parcel #1 of Partition Plat 1993-49

Owner/Applicant Joseph Vaughn
5761 SE Harrison Street
Milwaukie, Oregon 97222

Comprehensive Plan: Urban Low Density Residential

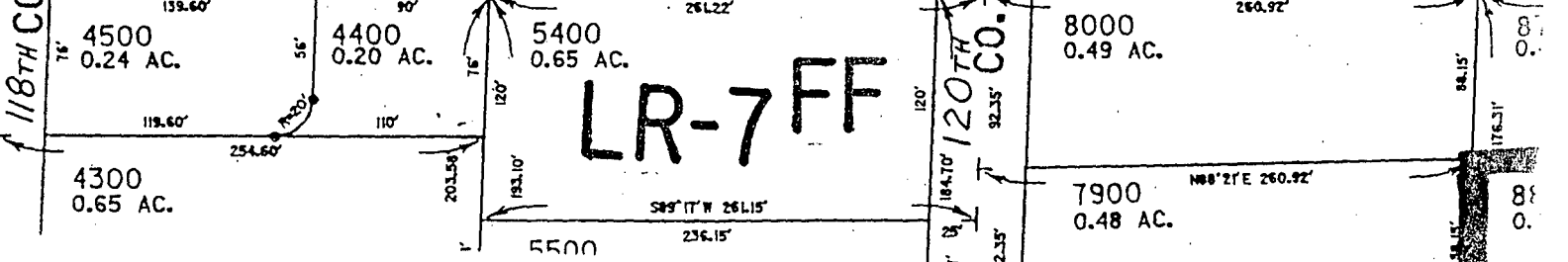
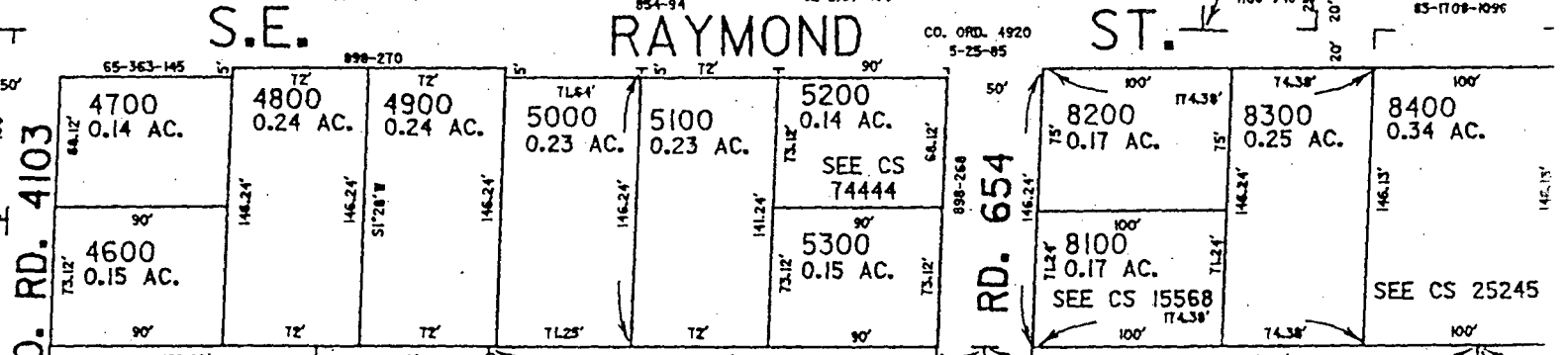
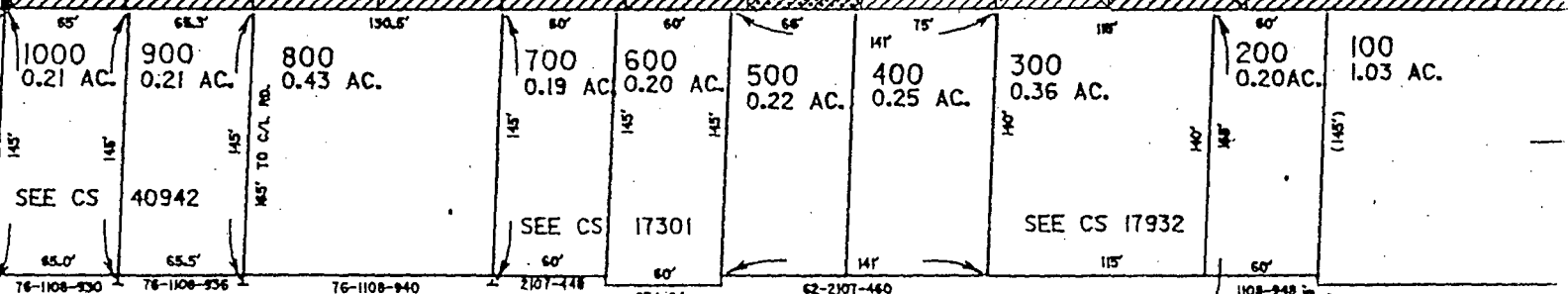
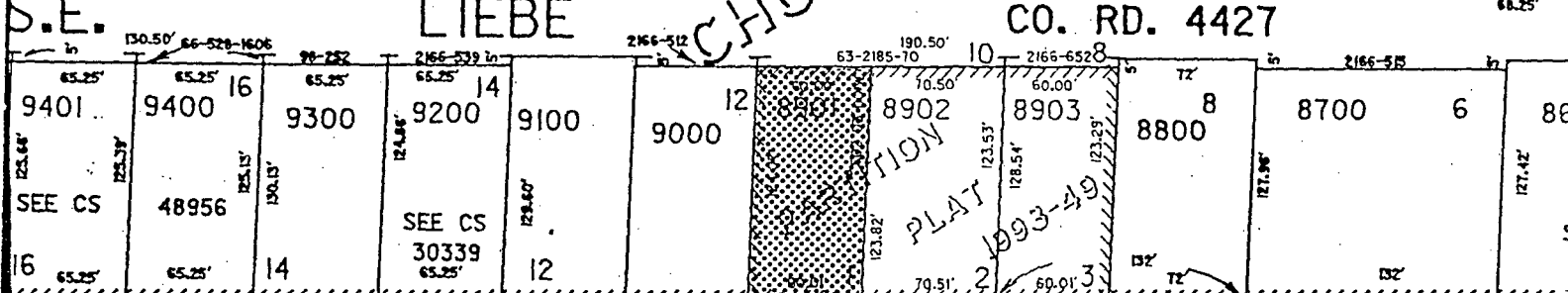
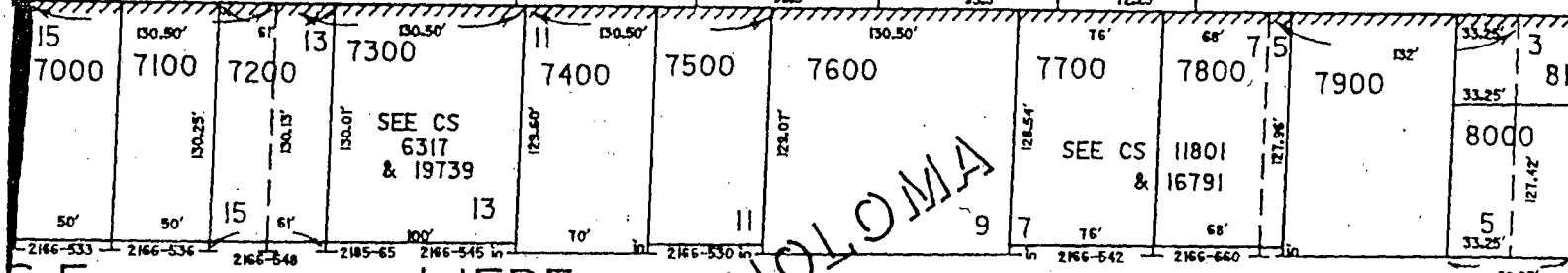
Zoning: LR-7/FF; Low Density Residential District
Flood Fringe subdistrict

DECISION:: Denied entire application, based on the following Findings and Conclusions.



Zoning Map
Case #: FD 1-94
Location: 11930 SE Liebe Street
Scale: 1 inch to 100 feet (approx)
Shading indicates subject property
SZM 419; A&T Map 1S 2E 15 AA 8901

LR-7



LR-7 FF

II. PARTIES, AGENTS AND WITNESSES TO THE PROCEEDING

A. Parties

The persons, agencies and organizations who submitted written or oral testimony in this proceeding on their own behalf are parties to the proceedings. MCC 11.15.8225(A)(1). These persons were:

1. Applicant and Landowner

Oregon Trail Custom Homes, PO Box 20686, Portland, Oregon 97220 (applicant)

Joseph Vaughn, 5761 SE Harrison St., Milwaukie, Oregon 97222 (landowner)

2. Other Persons Supporting The Application

John Mahaffey, Georgetown Realty, 10000 NE 122nd, Portland, Oregon 97230

Roger Adams, 12022 SE Liebe, Portland, Oregon 97266

Brenda Luma, 12021 SE Liebe, Portland, Oregon 97266

3. Persons Opposed To The Application

None

B. Agents

Persons who submitted written or testimony, but only in the capacity of a representative for one of the parties, and not on their own behalf, are agents, not parties to this proceedings. These persons were:

1. Agents For The Applicant

Robert Totaro, President, Oregon Trail Custom Homes (at applicant's address)

Mike Totaro, Vice President, Oregon Trail Custom Homes (at applicant's address)

C. Witnesses

Persons appearing to provide information on behalf of someone else, and not as parties in their own right, are witnesses. There were no witnesses in this proceeding.

III. PROCEDURAL ISSUES

A. Impartiality Of The Hearings Officer

Prior to the hearing I had no *ex parte* contacts with the applicants or anyone else concerning the merits of this application.

I have no financial interest in the outcome of this proceeding and have no family or financial relationship with any of the applicants.

B. Other Procedural Issues

The applicants did not allege any procedural violations by the County, prior to, or during, the hearing.

IV. BURDEN OF PROOF

The burden of proof is upon the applicant. MCC 11.15.8230(D)

V. REVIEW OF THE STANDARDS, ANALYSIS OF THE EVIDENCE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. MCC Chapter 11.15.6301 *Et. Seq.*: The Applicability Of The Flood Hazard District Requirements In General

MCC Chapter 11.15.6301 *et. seq.*, "Flood Hazard District," is applicable, because the area is within a flood fringe area mapped on Flood Insurance Rate Map; Community Panel Number 410179 0382 B, revised 18 March 1986. The property is not within a floodway. *Id.*

The sections of the Flood Hazard Chapter containing standards applicable to this decision are MCC 11.15.6315, "Development Standards" and MCC 11.15.6323, "Variances." As noted below, I find some subsections of those provisions are inapplicable.

B. MCC 11.15.6315: Flood Hazard Development Standards

(1) MCC 11.15.6315(A): State Building Code Compliance

MCC 11.15.6315(A) requires "all new construction and substantial improvement shall be constructed in conformance with Oregon State Building Codes." If the variance is granted on appeal, compliance with this standard will be determined by the Planning Director before, or in conjunction with, the issuance of a placement permit.

The County has an intergovernmental agreement by which it relies on certification by the City of Portland as to the satisfaction of the State Building Code. The submission of an unqualified certification is a decision which does not require the exercise of discretion. ORS 197.015(10)(b)(A), (B). Therefore, no notice or opportunity for a hearing would be required.

(2) MCC 11.15.6315(B): Flood Elevation Requirement

MCC 11.15.6315(B) provides, in part:

*New construction and substantial improvement of any residential structure, including manufactured homes, shall have the lowest floor, including basement, elevated to at least one foot above the base flood level. * * * **

According to the Flood Insurance Rate Maps, the property is at 205 feet about sea level and the "base flood level" in the surrounding area is 211 feet. The site of the proposed dwelling is shown as being in the "flood fringe," not the "floodway." The applicant proposes to construct the floor at 206.5 feet, 4.5 below the flood level and seeks a variance for this amount, discussed below.

(3) MCC 11.15.6315(C): Floodproofing Of Nonresidential Structures

MCC 11.15.6315(C) (floodproofing of structures) is inapplicable because it applies only to "new construction and substantial improvement of any commercial, industrial or other non-residential structure * * * ." This is an application for the approval of the siting of a residential structure.

(4) MCC 11.15.6315(D): Foundation and Anchoring

MCC 11.15.6315(D) requires all manufactured homes to be "placed on a permanent foundation and shall be anchored to resist flotation, collapse and lateral movement by providing tie downs [etc.] * * * ." Because this standard applies to manufactured homes, it is inapplicable to this proceeding.

(5) MCC 11.15.6315(E): Foundations And Drainage In Mobile Home Parks And Subdivisions

MCC 11.15.6315(E) is inapplicable because it governs foundations and drainage for "new manufactured home parks" and replacement of manufactured homes "in an existing manufactured home park or subdivision * * * ." The standard is does not apply to this application.

(6) MCC 11.15.6315(F): Prevention Of Infiltration Of Water Into Household Utility Systems

MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

In this proceeding, the applicant is seeking a variance from the flood elevation requirements of MCC 11.15.6315(B). The variance would allow the applicant to site a house on an 30" foundation, leaving the first floor approximately 4.5 feet below the crest of the 100-year flood level.

Based on the record before me, I interpret the applicants' materials as an application for a variance from the flood proofing requirements of MCC 11.15.6315(F) as well as the flood elevation requirements of MCC 11.15.6315(B). This implied variance is denied for the same reasons discussed below.

(7) MCC 11.15.6315(G): Standards For Sewage Disposal Systems

MCC 11.15.6315(G) requires new and replacement water and sewer disposal systems to be designed to:

- (1) Minimize infiltration of flood waters into the system;*
- (2) Minimize discharge from systems into flood waters;*
- (3) Avoid impairment or contamination during flooding.*

The Mid-County Sewer district requires the applicants to connect to the existing sewer line in SE Liebe Street. The application does not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315(G).

(8) MCC 11.15.6315(H): Certification Of Hydrostatic Equalization

MCC 11.15.6315(H) requires certification by a registered professional engineer or architect that the portions of the dwelling "below the lowest floor that are subject to flooding" are designed to "automatically equalize the hydrostatic flood forces * * * ."

The record does not contain the required certification. This is grounds for denial.¹

(9) MCC 11.15.6315(I): Exemptions For Land Shown To Be Above Flood Level

MCC 11.15.6315(I) authorizes exemptions from the requirements of MCC 11.15.6315 when a surveyor demonstrates the land is 1 foot or more above base flood level.

Testimony by Brenda Luma and Roger Adams challenged the accuracy of the FIRM maps. Mr. Adams stated that he had owned his house since 1968. Although his house has a full basement, it has never flooded.

However, the standard requires a showing that the property is actually 1 foot above the base flood level, as shown on the map. No one testified that the elevation of the property was inaccurate; in fact the request for the variance is based on the assumption that the base flood level is above the floor level.

I conclude that no exemption is warranted under this standard.

(10) MCC 11.15.6315(J): Exemption For Historic Structures

MCC 11.15.6315(J) is inapplicable because it authorizes an exemption from MCC 11.15.6315 for the reconstruction, rehabilitation or restoration of "structures listed on the National Register of Historic Place or the State Historic Site Inventory." There is no structure on the site and thus it cannot be on the Historic Site registry or Historic Site Inventory.

C. MCC 11.15.6323: Variance Standards

(1) The Applicable Portions Of The Variance Provisions

As noted above, the applicants are seeking a variance from the flood elevation requirements of MCC 11.15.6315(B) and, by implication, from the flood-proofing requirements of MCC 11.15.6315(F).

There are three sections to the variance provisions found at MCC 11.15.6323. The first section, (A), is introductory and the third section, (C), applies to "non-residential structures." Neither section contains standards which apply to these variances.

¹ Since the existence of a certification would be a ministerial decision, the certification can be provided by the Planning Director in conjunction with the issuance of a building permit or in the course of a *de novo* appeal, if this kind of review is granted by the County Commission.

The variance standards are set out in the five subsections of MCC 11.15.6323(B). The fifth subsection applies only to structures in "an area identified as the floodway". As found above, the variance is for property in the flood fringe, not the floodway.

(2) Variance From The Flood Elevation Requirement In MCC 11.15.6315(B)

(a) MCC 11.15.6323(B)(1): Lot Size And Surrounding Development

MCC 11.15.6323(B)(1) provides:

- (1) *The site of the proposed variance is a lot of one-half acre or less in size and is surrounded by and contiguous to lots with existing structures constructed below the base flood level.*

Based (1) on the information on the parcel size in the Staff Report (page 5); (2) the applicant's "windshield survey," which was confirmed by the staff (Staff Report at page 5-6); and (3) the oral testimony presented at the hearing, I conclude that both elements of this standard have been satisfied.

(b) MCC 11.15.6323(B)(2): Exceptional Hardship To The Applicant

MCC 11.15.6323(B)(2) provides:

- (2) *Failure to grant the variance will result in exceptional hardship to the applicant;*

The hardship identified at page 4 of the application is:

First, the cost for the 8 foot high foundation wall is estimated to be \$15,000, an increase of \$12,500 from the \$2,500 for a standard 2-1/2 foot high foundation wall. That cost will be directly reflected in the sale price of the house, which will make it more difficult to sell in the relatively modest neighborhood. The home propose for Parcel 3 is expected to sell for \$98,500. An increase of \$12,500 in costs would push the price over \$100,000 and represent over 12% of the value of the house and land.

Secondly, the finished structure will appear totally out of place, standing one complete story above its neighbors. This factor will also make the house more difficult to sell.

Therefore, the additional expense of the foundation, the resulting appearance of the finished structure, and the likelihood that the house will be difficult to sell given market values in the neighborhood will combine to cause the

Applicant exceptional hardship.

Because I believe local governments have an ethical (even when it is not a legal) responsibility to interpret their standards consistently, I have reviewed my findings on a pair of earlier flood plain variance decisions, HV 22-92 dated February 1, 1993 and HV 23-92 dated December 7, 1992. In that case I reviewed the financial hardship to the applicant, and concluded (emphasis added):

There is no question that failure to grant the variance would create an "exceptional hardship" given Ms. Swank's conditions and these additional charges. The question is whether or not the need for the flood elevation and flood proofing variance was created by the applicants' decision to purchase property within the Flood Hazard District and to buy the manufactured home in advance of seeking the necessary variance.

This hardship standard differs from the most common forms of variance standards in two ways. First, it omits the commonly used prohibition against granting variances based on "self-created" hardships. Secondly, the hardship is described in terms of the circumstances of the applicant, rather than characteristics of the property itself.

While I am troubled by the idea of approving, in part, the siting of a manufactured home at an elevation 4.5 feet below the base flood level, I conclude the hardship standard has been met given the phrasing of the standard. However, a corollary of this interpretation of the ordinance is that this variance will remain valid only so long as the property is occupied by Lucy Swank.

Findings and Decision in HV 23-92, dated December 7, 1992 at page 7.

In this case, there is no showing of financial hardship to the developer as there was to the individual homeowner/applicant. The grounds for the hardship offered here would apply equally well to all new houses in the floodplain. If all houses qualified for a variance then the purpose of the flood plain protection provisions would be subverted.

For this reason, despite the more permissive (non-traditional) hardship standard in the County Code, I find that the reasons offered by the applicant are insufficient to justify a variance.

(c) MCC 11.15.6323(B)(3): The Variance Is The Minimum Necessary

MCC 11.15.6323(B)(3) provides:

(3) *The variance is the minimum necessary to afford relief.*

The applicant did not provide any information about the possibility of raising the foundation higher than was proposed, albeit less than the height necessary to avoid flooding the ground floor. The applicant has not carried its burden of proof with respect to this criterion.

(d) MCC 11.15.6323(B)(4): No Additional Threats To Public Safety, Public Nuisance, Fraud Or Conflicts With Existing Laws

MCC 11.15.6323(B)(4) provides:

- (4) The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances.*

(i) Threats To Public Safety, Extraordinary Public Expense

The possible additional threats to public safety and sources of extraordinary expense are (1) displacement of floodwaters by the house, (2) possible damage caused by the house if it were to float free during a flood, (3) the public resources which would be expended to rescue residents of the dwelling in the event of a flood.

Floodwater displacement by this property will be negligible, provided the applicants satisfy MCC 11.15.6315(H), which requires hydrostatic equalization "by allowing for the entry and exit of floodwaters" for all parts of the house "subject to flooding."

The house should not float free provided the applicants satisfy MCC 11.15.6315(D), which requires the house to be "anchored to resist flotation."

(ii) Create a Nuisance

The house, with or without a flood plain variance, would not constitute a "nuisance" as that term is used in planning and tort law. This part of the standard has been satisfied.

(iii) Fraud and Victimization

With regard to the "fraud and victimization" element, in the 1992 Mercer/Swank variance I said:

Fraud and victimization of the public would occur if the approval of the variance would lead unwitting purchasers to acquire the property without knowledge of the risk of serious flood damage. In this case, this variance proceeding has left no doubt that all of the applicants are well aware that the

bottom of the house is resting 4.5 feet below the 100 year flood level. In addition, adjoining property owners who signed a petition supporting a variance to the flood elevation requirement are also aware that the property lies within the flood fringe. Finally, by making the variance personal to the applicant, subsequent purchasers will be put on notice of the circumstances of the property.

The circumstances in this case are quite different; since the applicant is not the prospective resident, there may well be unwitting purchasers who could acquire the house without being aware that it was located within the flood plain.

During the hearing, Mr. John Mahaffey of Georgetown Realty referred to a new statute which would require this disclosure of the fact the property was within the flood plain. He was unable to provide a citation to the Oregon Revised Statutes at the hearing. My review of the statutes revealed ORS 104.465. "Seller's Property Disclosure And Disclaimer Statements." ORS 104.465(2)(b) specifies the contents, ("in substantially the following form") of the seller's disclosure statement. This includes, under section 8, "General": "D. To your knowledge, is the property in a designated flood plain?"

However, ORS 105.470(1) excludes "[t]he first sale of a dwelling never occupied" from the disclosure requirements in ORS 105.465.

After the hearing, Mr. Mahaffey sent the County an undated letter, which stated.

Enclosed is a disclosure form which we will fill out when we sell the homes on S.E. Liebe. We would be happy to accept a directive that the buyers are to receive this form concerning the 100 year flood plain.

Unfortunately, no disclosure form appears in the file. Even if one did, the County has no means of monitoring or enforcing such a disclosure requirement.

Based on this record, I am unable to conclude that fraud or perhaps unwitting victimization would not occur in the event a purchaser acquired the property without knowledge of the location in the flood plain and there lives or property were damaged in a flood.

(iv) Conflicts With Existing Local Laws Or Ordinances

The local laws and ordinances governing this application are expressed in the County Code and Plan. Given a finding that they have been satisfied, there is no "conflict with existing local laws or ordinances."

(e) **Conclusion With Respect To Variance From The Flood Elevation Requirement**

I conclude that the applicant has satisfied the variance standards in MCC 11.15.6323(B)(1) and not satisfied the standards in MCC 11.15.6323(B)(2), (3) and (4), as applied to its request for a variance from the flood elevation requirement in MCC 11.15.6315(B).

(3) **Variance From The Flood-Proofing Requirements In MCC 11.15.6315(F)**

As quoted above, MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

Subsections (2), (3) and (4) of the variance standard are not satisfied for the reasons given previously with respect to the variance for the flood elevation variance.

D. Applicable Sections Of The County Comprehensive Plan

1. Policy 14; Development Limitations

Comprehensive Plan Policy 14 is to

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

* * * * *

C. LAND WITHIN THE 100 YEAR FLOOD PLAIN

Multnomah Comprehensive Framework Plan at page 58.

Under the terms of Policy 14 and the implementation strategies, see Multnomah Comprehensive Framework Plan at 59, I find this policy has been implemented by the Flood Hazard District and has no independent application to this action.

2. Policies 37 And 38, In General

Both policy 37, "Utilities" and Policy 38, "Facilities" are prefaced begin with the statement: "The county's policy is to require a finding prior to approval of a legislative or quasi-judicial action that * * * ." "Action" is defined in MCC 11.15.8205 as a

*a proceeding in which the legal rights, duties or privileges of specific parties are determined only after hearing in which such parties are entitled to appear and be heard, including requests for: * * **

(D) Variances, except as otherwise provided herein;

** * * **

(F) Other requests for permits and other contested cases determining permissible uses of specific property.

Because this is a proceeding on an application for a variance, I find that it is an "action" and that consequently both of these policies apply.

As noted above, satisfaction of standards not addressed by the applicant to date, could be determined by the Planning Director before, or in conjunction with, either an appeal or the issuance of a building permit. Because compliance with Policies 37 and 38 may require the exercise of judgment as to facts and interpretation of the policies, notice of this subsequent decision and an opportunity for a hearing should be provided. ORS 197.763(2), 215.416, *Rhyne et al vs. Multnomah County, Swan & Trotter*, ___ Or LUBA ___ (1992.)

3. Plan Policy 37: "Utilities"

Multnomah County Plan Policy 37, "Utilities" provides:

POLICY 37

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

WATER AND DISPOSAL SYSTEM

- A. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC SEWER AND WATER SYSTEM, BOTH OF WHICH HAVE ADEQUATE CAPACITY; OR*

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 167.

As noted previously, the applicant would connect the proposed house to the City of Portland's sewer system. The signed Portland Fire District review establishes the existence of a hydrant 70' from the residence with adequate water pressure nearby. From this I conclude the house would also be served by City water. This evidence is sufficient to carry the applicants' burden of proof with respect to this portion of Policy 37.

The remainder of Policy 37 provides:

DRAINAGE

- E. THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR
- F. THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND
- G. THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.

ENERGY AND COMMUNICATIONS

- H. THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND
- I. COMMUNICATIONS FACILITIES ARE AVAILABLE

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 168.

There is no evidence in the record concerning energy and communications facilities, subsections E, F, G, H and I, although the location of the property within the urbanized portion of the County suggests these facilities are readily available.

The failure to address these standards is grounds for denial. However, the applicant might be able to address them in the event of a *de novo* appeal of this decision.

The concluding paragraph of Policy 37 is inapplicable to this quasijudicial proceeding.

4. **Plan Policy 38: "Facilities"**

Multnomah County Plan Policy 38, "Facilities" provides:

POLICY 38

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

SCHOOL

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

FIRE PROTECTION

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

POLICE PROTECTION

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 169-170.

The David Douglas School District returned the "School District Review" form, with the signature of the Dr. Ron Russell, Assistant Superintendent, dated February 8, 1994. (The "no comment" box was checked.) This satisfies the requirement in subsection A of policy 38 that the school district has "an opportunity to review and comment on the proposal."

The completed Portland Fire District Review form, signed by Don Patty (undated), Plans Review provides sufficient evidence satisfying subsection B, ("there is adequate water pressure and flow for fire fighting purposes") and C (the fire district "had an opportunity to review and comment on the proposal.")

Lt. Bill Goss, of the Multnomah County Sheriff's Office returned the "Police Services Review" form, dated February 8, 1994, indicating there would be an "adequate" level of service "available to serve the proposed project."

The applicant has satisfied Policy 38.

E. State Statutes, Goals And Administrative Rules Applicable To The Decision

The provisions of state law governing county quasijudicial decisions, found in ORS 197.763 and 215.416 apply to this proceeding. They have been fulfilled through the notice of, and conduct of, the hearing on this matter.

No other provisions in ORS Chapters 197 and 215 are applicable.

No statewide planning goals and no Oregon Administrative Rules interpreting those goals apply to this quasijudicial permitting proceeding.

VI. CONCLUSIONS AND ORDER

A. Standards Which The Applicant Has Not Satisfied

I find that the evidence and argument offered by the applicant is insufficient to satisfy the "hardship" standard in MCC 11.15.6323(B)(2) and the "minimum variance necessary" standard in MCC 11.15.6323(B)(3), with respect to the applicant's request for a variance to the flood elevation standards and its implied request for a variance to the flood-proofing

requirements of MCC 11.15.6315(F).

I also find that the applicant failed to satisfy the "fraud" and "victimization" provisions in MCC 11.15.6323(B)(4), as to the flood elevation variance to MCC 11.15.6315(B) and the flood-proofing variance to MCC 11.15.6315(F).

These are grounds for denial.

B. Standards Which The Applicant Failed To Address

The applicant did not offer evidence addressing compliance with several provisions in the County Code and some of the applicable Plan policies. These standards and policies are:

MCC 11.15.6315(G)
MCC 11.15.6315(H)
Plan Policy 37 §§(E) through (I)
Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant's failure to carry its burden of proof for these standards, is grounds for denial.

C. Standards Which The Applicant Has Satisfied

The applicant has satisfied the following applicable sections of the County Code and County Plan:

MCC 11.15.6323(B)(1), as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(1), as to flood-proofing variance to MCC 11.15.6315(F)
MCC 11.15.6323(B)(4), in part, as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(4), in part, as to flood-proofing variance to MCC 11.15.6315(F)
Comprehensive Framework Plan Policy 14
Comprehensive Framework Plan Policy 37, Subsections A through D
Comprehensive Framework Plan Policy 38

D. Standards Which Are Inapplicable

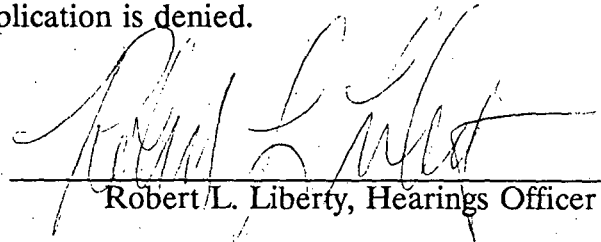
Although the following standards appear in otherwise relevant code sections, I found them inapplicable to this application or this proceeding:

MCC 11.15.6315(A),(B),(C),(D),(E),(I)
MCC 11.15.6323(A),(C),(E)

ORDER

For the foregoing reasons, the application is denied.

March 1994
Date


Robert L. Liberty, Hearings Officer

Signed by the Hearings Officer: March 1, 1994
Decision Mailed to Parties: March 21, 1994
Decision Submitted to Board Clerk: March 21, 1994
Lay day to Appeal Decision: 4:30 p.m., April 1, 1994
Reported to Board of County Commissioners: 1:30 p.m., April 12, 1994

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of \$300.00. Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street, Portland.

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

To appeal the Hearings Officer decision, a "Notice of Review" form and fee must be submitted to the County Planning Director. For further information call the Multnomah County Planning and Development Division at 248-3043.

MEETING DATE: May 10, 1994

AGENDA NO: P-4

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: FD 3-94 Public Hearing - DeNovo

BOARD BRIEFING Date Requested: _____

Amount of Time Needed: _____

REGULAR MEETING: Date Requested: May 10, 1994

Amount of Time Needed: 45 Minutes

DEPARTMENT: DES DIVISION: Planning

CONTACT: R. Scott Pemble TELEPHONE #: 3182

BLDG/ROOM #: 412/103

PERSON(S) MAKING PRESENTATION: Bob Hall

ACTION REQUESTED:

☒ (x) DENIAL

☐ [] INFORMATIONAL ONLY ☐ [] POLICY DIRECTION ☐ [] APPROVAL ☐ [] OTHER

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

5/10/94 RESCHEDULED FOR 5/24/94

FD 3-94 Public Hearing - DeNovo

Review the Hearings Officer Decision of denial for a variance of 4.5 feet to the finished floor elevation of a proposed single family residence for property located at 11950 SE Liebe Street.

This Decision has been appealed by the applicant.

Time Allowed for Testimony - 20 Minutes

SIGNATURES REQUIRED:

ELECTED OFFICIAL: _____

OR

DEPARTMENT MANAGER: [Signature] [Signature]

BOARD OF
COUNTY COMMISSIONERS
1994 MAY -3 AM 8:47
MULTNOMAH COUNTY
OREGON

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

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



MULTNOMAH COUNTY OREGON

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

DIVISION OF PLANNING AND DEVELOPMENT

Board Planning Packet Check List

File No. FD3-94

☒ Agenda Placement Sheet

No. of Pages 1

☒ Case Summary Sheet

No. of Pages 1

☐ Previously Distributed

☒ Notice of Review

No. of Pages 4

*(Maybe distributed at Board Meeting)

☐ Previously Distributed

☒ Decision

No. of Pages 18

(Hearings Officer/Planning Commission)

☐ Previously Distributed

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



BOARD HEARING OF May 10, 1994

TIME 2:00pm

CASE NAME Flood Hazard Variance

NUMBER

FD 3-94

1. Applicant Name/Address

Gregory J. Frank

P.O. Box 19478

Portland 97280

2. Action Requested by Applicant

Reversal of Hearing Officer's decision in the matter of a request for a 4.5 foot height variance to the finished floor elevation for a proposed single family residence on property within the Flood Hazard district.

ACTION REQUESTED OF BOARD

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

3. Planning Staff Recommendation

Approval

4. Hearings Officer Decision:

Denial

5. If recommendation and decision are different, why?

The Hearings Officer found that the applicant had failed to demonstrate compliance with the standards for sewage disposal, certification of hydrostatic equalization, exceptional hardship to the applicant, and that fraud and victimization might occur to future purchasers of the property. He also found that the applicant had not provided information regarding Comprehensive Plan Policy #37 with respect to drainage and energy and communications.

ISSUES

(who raised them?)

- a. The appearance of a house with a foundation five feet higher than that of surrounding residences (neighbor).
- b. The low probability of flooding in the area based on over twenty years of observation (neighbor).

Do any of these issues have policy implications? Explain.

No



DEPARTMENT OF ENVIRONMENTAL SERVICES
DIVISION OF PLANNING AND DEVELOPMENT
2115 SE Morrison Street
Portland, Oregon 97214 (503) 248-3043

May 10, 1994

NOTICE OF PUBLIC HEARING

This notice concerns a public hearing scheduled to consider the land use cases cited and described below:

Case Files: FD 3-94
Scheduled Before: Board of County Commissioners
Hearing Date, Time, & Place: MAY 10, 1994 at 2:00 p.m.
Multnomah County Courthouse, Room 602
1021 SW 4th Avenue, Portland

Scope of Review: De Novo

Time Allowed for Testimony: 20 minutes per side.

Proposed Actions and Uses: Variance of 4.5 feet to the finished floor elevation of a proposed single family residence

Location of the Proposal: 11950 SE Liebe Street

Legal Description of Property: Parcel #3 of Partition Plat 1993-49

Plan Designation: Urban Low Density Residential

Zoning District: LR-7/FF — Urban Low Density Residential District
Flood Fringe overlay district

Applicant: Mike Tataro, Oregon Trail Custom Homes
P.O. Box 20686
Portland, OR 97220

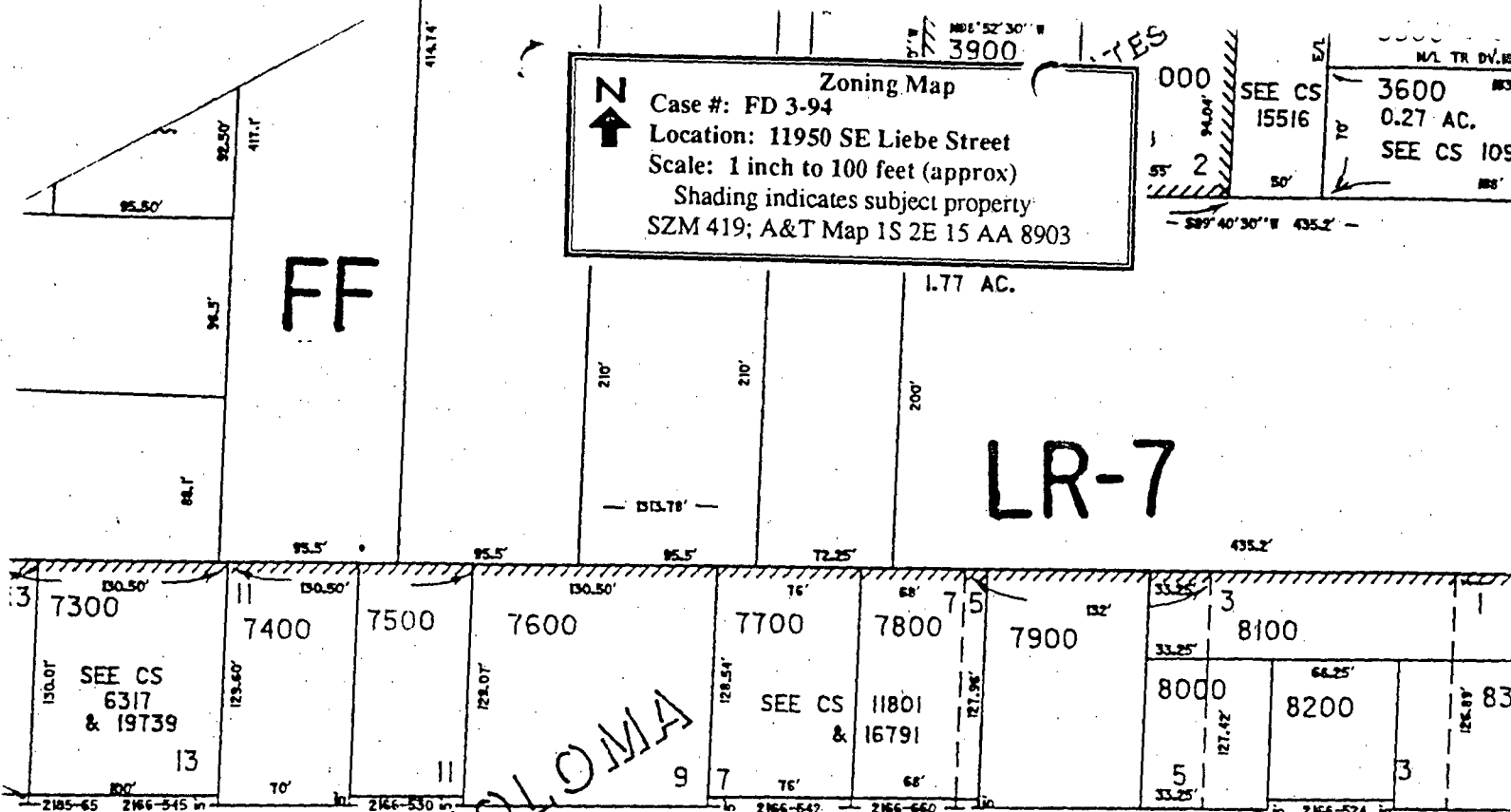
Property Owner: Same

Zoning Map
 Case #: FD 3-94
 Location: 11950 SE Liebe Street
 Scale: 1 inch to 100 feet (approx)
 Shading indicates subject property
 SZM 419; A&T Map 1S 2E 15 AA 8903

SEE CS 15516
 3600
 0.27 AC.
 SEE CS 109

FF

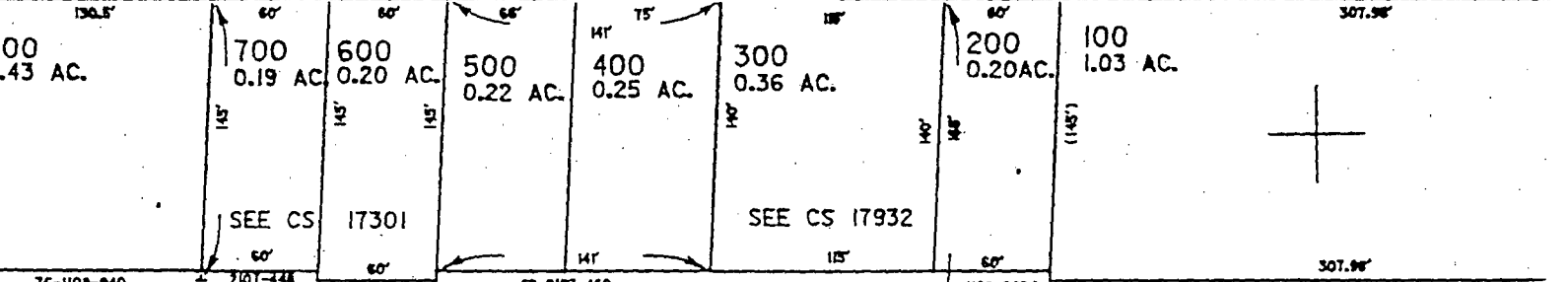
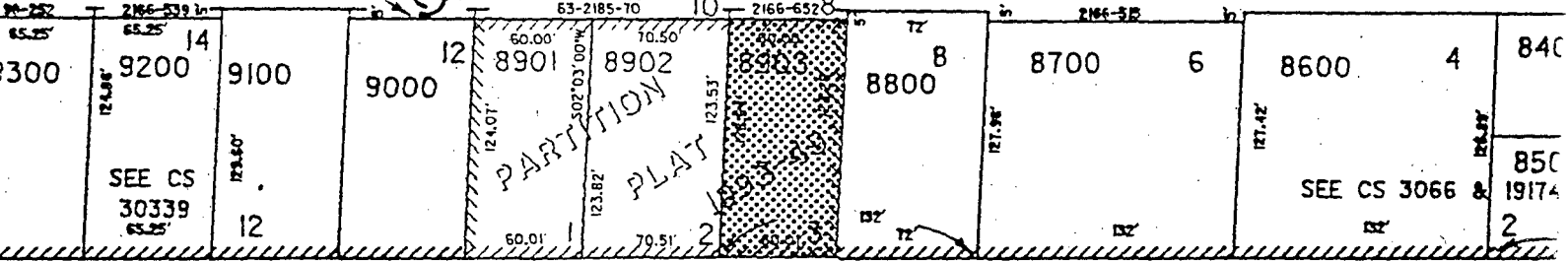
LR-7



LIEBE

CO. RD. 4427

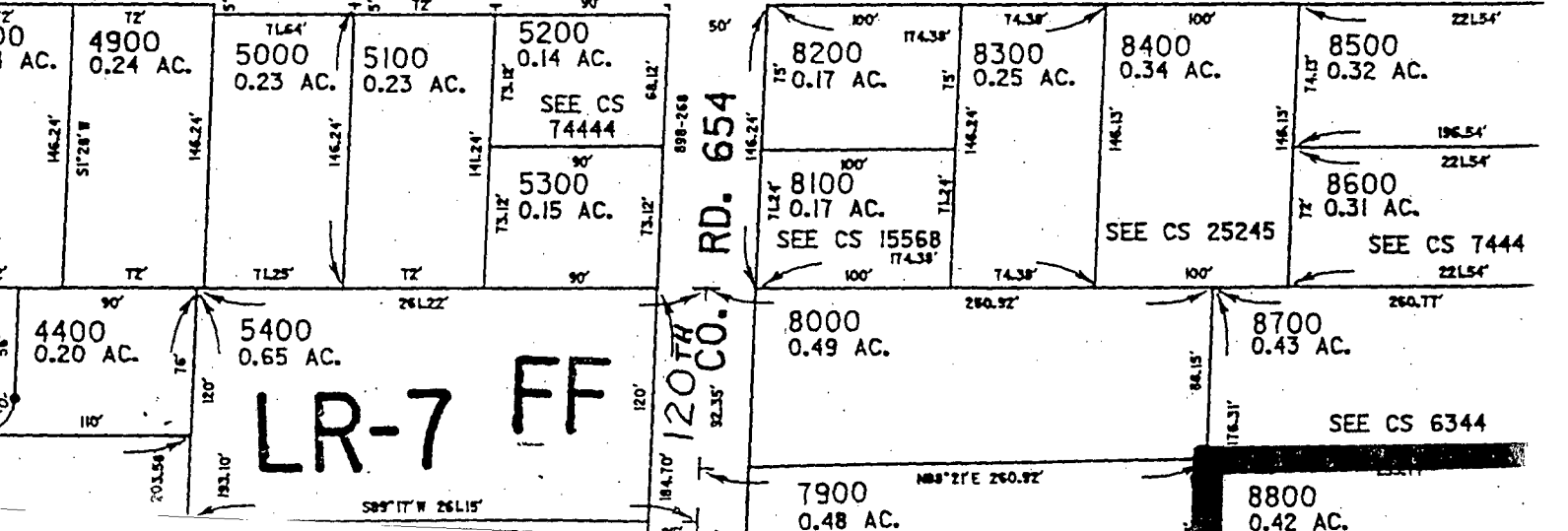
ST.



RAYMOND

ST.

CO. RD. 49



APPEAL SUMMARY: Appellant appeals a February 16, 1994 Hearings Officer decision which denied application FD 3-94 for a 4.5 foot variance to the finished floor elevation of a proposed single family residence for property located at 11950 SE Liebe Street. A *Notice of Review* (appeal) of FD 3-94 was filed on April 1, 1994. On April 12, 1994, the appeal was reported to the Board and the Board acted to hear the appeal de novo. The Board will limit testimony to twenty minutes per side.

PUBLIC PARTICIPATION AND HEARING PROCESS: Application materials and the grounds for appeal are available for inspection at no cost at least 20 days prior to the hearing. Copies may be purchased for 30-cents per page. For further information on this case, call Bob Hall at 248-3043 [M-F, 8:00-4:30].

To comment on the this proposal, you may write to or call the Planning Division or attend and speak at the hearing. All interested parties may appear and testify or submit written comment to the Board of Commissioners. All comments should address the approval criteria applicable to the request, but be limited to the *Scope of Review* listed on the front page of this notice. The hearing procedure will follow the Board of Commissioner's *Rules of Procedure* (enclosed) and will be explained at the hearing.

The Board's decision on the item may be announced at the close of the hearing, or upon continuance to a time certain. A written decision will be mailed to the participants and filed with the Clerk of the Board of County Commissioners usually within ten days of the announcement. The decision of the Board of County Commissioners may be appealed to State Land Use Board of Appeals (LUBA) by either the applicant or other hearing participants.

Failure to raise an issue in person, or by letter, or failure to provide sufficient specificity to allow the Board of County Commissioners an opportunity to respond to the issue precludes subsequent appeal to LUBA on that issue.

VARIANCE TO THE FLOOD PLAIN ELEVATION APPROVAL CRITERIA
[ref. MCC 11.15.2172(C)]

MCC 11.15.6315: FLOOD HAZARD DEVELOPMENT STANDARDS

(1) MCC 11.15.6315(A): State Building Code Compliance

MCC 11.15.6315(A) requires "all new construction and substantial improvement shall be constructed in conformance with Oregon State Building Codes."

(2) MCC 11.15.6315(B): Flood Elevation Requirement

MCC 11.15.6315(B) provides, in part:

*New construction and substantial improvement of any residential structure, including manufactured homes, shall have the lowest floor, including basement, elevated to at least one foot above the base flood level. * * * **

(3) MCC 11.15.6315(C): Floodproofing Of Nonresidential Structures

MCC 11.15.6315(C) (floodproofing of structures) is inapplicable because it applies only to "new construction and substantial improvement of any commercial, industrial or other non-residential structure * * * ." This is an application for approval of the construction of a residential structure.

(4) MCC 11.15.6315(D): Foundation and Anchoring

MCC 11.15.6315(D) is inapplicable because it applies only to manufactured homes.

(5) MCC 11.15.6315(E): Foundations And Drainage In Mobile Home Parks And Subdivisions

MCC 11.15.6315(E) is inapplicable because it applies only to manufactured homes.

(6) MCC 11.15.6315(F): Prevention Of Infiltration Of Water Into Household Utility Systems

MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

(7) MCC 11.15.6315(G): Standards For Sewage Disposal Systems

MCC 11.15.6315(G) requires new and replacement water and sewer disposal systems to be designed to:

- (1) Minimize infiltration of flood waters into the system;*
- (2) Minimize discharge from systems into flood waters;*
- (3) Avoid impairment or contamination during flooding.*

(8) MCC 11.15.6315(H): Certification Of Hydrostatic Equalization

MCC 11.15.6315(H) requires that the portions of the dwelling "below the lowest floor that are subject to flooding [will] automatically equalize the hydrostatic flood forces * * * ."

(9) MCC 11.15.6315(I): Exemptions For Land Above Flood Level

MCC 11.15.6315(I) is inapplicable because it authorizes exemptions from the requirements of MCC 11.15.6315 when a surveyor demonstrates the land is 1 foot or more above base flood level. The applicants and staff concur that the property is 6 feet below base flood level.

(10) MCC 11.15.6315(J): Exemption For Historic Structures

MCC 11.15.6315(J) is inapplicable because it authorizes an exemption from MCC 11.15.6315 for the reconstruction, rehabilitation or restoration of "structures listed on the National Register of Historic Place or the State Historic Site Inventory." There is no structure on the site and thus it cannot be on the Historic Site registry or Historic Site Inventory.

C. MCC 11.15.6323: VARIANCE STANDARDS

(1) The Applicable Portions Of The Variance Provisions

The variance standards are set out in the five subsections of MCC 11.15.6323(B). The fifth subsection applies only to structures in "an area identified as the floodway". As found above, the variance is for property in the flood fringe, not the floodway.

(2) Variance From Flood Elevation Requirements In MCC 11.15.6315(B)

(a) MCC 11.15.6323(B)(1): Lot Size And Surrounding Development

MCC 11.15.6323(B)(1) provides:

- (1) The site of the proposed variance is a lot of one-half acre or less in size and is surrounded by and contiguous to lots with existing structures constructed below the base flood level.*

(b) MCC 11.15.6323(B)(2): Exceptional Hardship to the Applicant

MCC 11.15.6323(B)(2) provides:

- (2) Failure to grant the variance will result in exceptional hardship to the applicant;*

(c) MCC 11.15.6323(B)(3): Variance Is Minimum Necessary

MCC 11.15.6323(B)(3) provides:

- (3) The variance is the minimum necessary to afford relief.*

(d) MCC 11.15.6323(B)(4): No Additional Threats To Public Safety, Public Nuisance, Fraud Or Conflicts With Existing Laws

MCC 11.15.6323(B)(4) provides:

- (4) The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances.*

E. APPLICABLE SECTIONS OF THE COUNTY COMPREHENSIVE PLAN

1. Policy 14; Development Limitations

Comprehensive Plan Policy 14 is to

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

* * * *

C. LAND WITHIN THE 100 YEAR FLOOD PLAIN

2. Policies 37 And 38, In General

Both policy 37, "Utilities" and Policy 38, "Facilities" are prefaced with the statement: "The county's policy is to require a finding prior to approval of a legislative or quasi-judicial action that * * * ." "Action" is defined in MCC 11.15.8205 as:

a proceeding in which the legal rights, duties or privileges of specific parties are determined only after hearing in which such parties are entitled to appear and be heard, including requests for:

* * *

(D) Variances, except as otherwise provided herein;

* * *

(F) Other requests for permits and other contested cases determining permissible uses of specific property.

3. Plan Policy 37: "Utilities"

Multnomah County Plan Policy 37, "Utilities" provides:

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

WATER AND DISPOSAL SYSTEM

A. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC SEWER AND WATER SYSTEM, BOTH OF WHICH HAVE ADEQUATE CAPACITY; OR

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

The remainder of Policy 37 provides:

DRAINAGE

- E. *THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR*
- F. *THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND*
- G. *THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.*

ENERGY AND COMMUNICATIONS

- H. *THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND*
- I. *COMMUNICATION FACILITIES ARE AVAILABLE. FURTHERMORE, THE COUNTY'S POLICY IS TO CONTINUE COOPERATION WITH THE DEPARTMENT OF ENVIRONMENTAL QUALITY, FOR THE DEVELOPMENT AND IMPLEMENTATION OF A GROUND WATER QUALITY PLAN TO MEET THE NEEDS OF THE COUNTY.*

The concluding paragraph of Policy 37 is inapplicable.

4. Plan Policy 38: "Facilities"

Multnomah County Plan Policy 38, "Facilities" provides:

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

SCHOOL

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

FIRE PROTECTION

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

POLICE PROTECTION

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



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

NOTICE OF REVIEW

1. Name: Frank J. Gregory
Last Middle First
2. Address: P.O. Box 19478 Portland Oregon 97280
Street or Box City State and Zip Code
3. Telephone: (503) 244 - 6811
4. If serving as a representative of other persons, list their names and addresses:
Representative for:
Mike Totaro
Oregon Trail Custom Homes
P.O. Box 20686
, Applicant
5. What is the decision you wish reviewed (e.g., denial of a zone change, approval of a subdivision, etc.)?
FD 3-94, #419
Denial of request for variance to flood hazard standards by Hearings Officer.
6. The decision was ^{signed} ~~announced~~ by the ^{Hearings Officer} ~~Planning Commission~~ on March 1, 19⁹⁴
Submitted to Board Clerk on March 21, 1994
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
Mike Totaro is the owner of the subject property and the applicant in this land use matter.
Pursuant to MCC 11.15.8225 (A)(1) "Those person entitled to notice under MCC
11.15.8220(C) who also make an appearance before the approval authority" are partys.
MCC 11.15.8220 (C)(1) includes the "applicant". Applicant appeared before the Hearings
Officer.

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

See attached additional sheets

9. Scope of Review (Check One):

(a) ☐ On the Record

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

(c) ☒ De Novo (i.e., Full Rehearing) See #10 Below

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*.

The Multnomah County Board of Commissioners, on March 22, 1994, adopted Resolution 94-56, which established the Scope of Review for the next five appealed cases.

Accordingly, the Board will consider all evidence submitted to the Hearings Officer and any new relevant evidence submitted by parties.

Signed: _____

Gregory J. Frank

Date: April 1, 1994

For Staff Use Only

Fee:

Notice of Review = \$300.00

Transcription Fee:

Length of Hearing N/A x \$3.50/minute = \$ N/A

Total Fee = \$ 300.00

Received by: JM

Date: 4-1-94

Case No. PD 3-94

11H
TOTAL FEE
\$300.00

8. Grounds for Reversal of Decision (additional comments to Notice of Review)

The Hearings Officer's decision should be reversed based upon the staff report dated February 16, 1994 (which recommended approval of the requested variance) and for the following reasons::

1. MCC 11.15.6323 (B)(2) *"Failure to grant the variance will result in exceptional hardship to the applicant."*

The Hearings Officer found "no showing of financial hardship" and concluded that the "reasons offered by the applicant are insufficient to justify a variance." The Hearings Officer disregarded the staff's and applicant's interpretation of "hardship."

There is undoubtedly a financial hardship to the applicant. If the variance is not granted then, in order to build a house on the subject property, an eight foot (8') high foundation will be required. Such a home in this neighborhood would be totally out of design character. In fact, according to the application the property might not even be marketable at a reasonable sales price. In addition, construction of an eight foot (8') high foundation would increase construction costs by \$12,500 (12.5%). Increasing the price of the property to reflect the increased cost would price the house out of the neighborhood's market. In essence, such a house might not even sell at a breakeven price. The applicant has clearly demonstrated at least a \$12,500 hardship unless the variance is granted.

2. MCC 11.15.6323 (B)(3) *"The variance is the minimum necessary to afford relief."*

The Hearings Officer stated that the applicant "did not provide any information about the possibility of raising the foundation higher than was proposed..." This is not an entirely accurate statement by the Hearings Officer. The applicant proposed a thirty inch (30") foundation which would be in conformance with the neighborhood and be of a conventional appearance. The applicant, by implication, indicated that above a thirty inch (30") foundation costs would increase (hardship), continuity of the neighborhood would be diminished, and marketability would be decreased. The applicant is not required to demonstrate to mathematical certainty the absolute point of minimum relief. The applicant concurs with the staff's position that the proposed variance does in fact represent the minimum necessary variance to afford relief. The applicant intends to submit additional support regarding this matter to the Board at the de novo hearing.

3. MCC 11.15.6323 (B)(4) *"The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances"*

The applicant agrees with the staff's analysis and conclusion regarding MCC 11.15.63223 (B)(4). The applicant disagrees with the Hearings Officer's reasoning and conclusion. There will be no "unwitting victimization in that the applicant is fully aware of the flood hazard. If the Hearings Officer was truly concerned about future purchaser's a simple condition to the granting of the variance would have alleviated any such fears: a required notice in the deed indicating the location of the property within a flood fringe of a flood hazard district. Applicant would agree to record a deed containing such a notice. These types of deed notices are very common in Multnomah County and the City of Portland.

4. MCC 11.15.6315 (F) *"Prevention of infiltration of water into household utility systems"*

The Hearings Officer incorrectly interpreted "the applicant's materials as an application for a variance from flood proofing requirements of MCC 11.15.6315 (F) as well as the flood elevation requirements of MCC 11.15.6315 (B)." The applicant and staff agree that applicant requested a variance from MCC 11.15.6315 (B); but not a variance from MCC 11.15.6315 (F). The applicant and staff agree the correct implementation of MCC 11.15.6315(F) is that construction details will be regulated by building codes and the City of Portland (re State Plumbing, Heating, Ventilation and Air Conditioning Codes). The applicant has satisfied this section of the Code and will be held accountable by the appropriate regulatory agency at the appropriate time.

5. MCC 11.15.6315 (G) *"Standards for Sewage Disposal Systems"*

The Hearings Officer indicted that the applicant did "not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315 (G)." The Hearings Officer is mistaken. First, the application and staff noted that the sewer connection on this property would have to be made in conformance to the Mid-County Sewer District's Rules of Connection. Secondly, the Hearings Officer is again trying to intercede in the building permit process; which he admits on page 4 of his decision, will be determined by others (ie Planning Director, City of Portland, etc.)

6. MCC 11.15.6315 (H) *"Certification of Hydrostatic Equalization"*

The Hearings Officer erred in requiring the applicant to present a "certification by a registered professional engineer..." at the time of the request for the variance. The staff position, which the applicant contends is correct, is that compliance with MCC 11.15.6315 (H) "will be determined by the Planning Director in conjunction with the building permit" (page 4 of staff report). Applicant has agreed, at the appropriate time, to file the required certification.

7. Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant disagrees with the Hearings Officer's application of these sections of the Comprehensive Plan to the subject case. The applicant concurs with the staff position and contends that a proper interpretation of these sections would permit a "determination by the Planning Director in conjunction with the building permit decision" as to whether the appropriate utilities are present (pages 9 & 10 of staff report). Further, applicant intends to present evidence to the Board that in fact utilities are in fact present.

8. MCC 11.15.6315 (B)

The Hearings Officer erred in denying the variance requested under MCC 11.15.6315(B) based upon reasons stated in this notice, the application for variance, the staff report, the staff record, and testimony to be presented to the Board upon the de novo review.



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

DECISION

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

MARCH 1, 1994

FD 3-94, #419 VARIANCE TO FLOOD HAZARD DISTRICT STANDARDS
(Construct a Single Family Dwelling Below the 100-year Flood Elevation)

I. INTRODUCTION; NATURE OF THE REQUEST

This application is to construct a single family dwelling on a lot within the Flood Hazard District. Applicant requests a variance from the requirements in Multnomah County Code (MCC) 11.15.6315. MCC § .6315(B) requires that the floor of new houses in the Flood Hazard District be *"at least one foot above the base flood level."* The ground elevation of this property is 205 feet and the base flood elevation in the surrounding area is 211 feet. Consequently, if constructed without a variance, the finished floor of the new dwelling would need to be seven feet above existing ground level.

Location: 11950 SE Liebe Street

Tax Roll Description: Parcel #3 of Partition Plat 1993-49

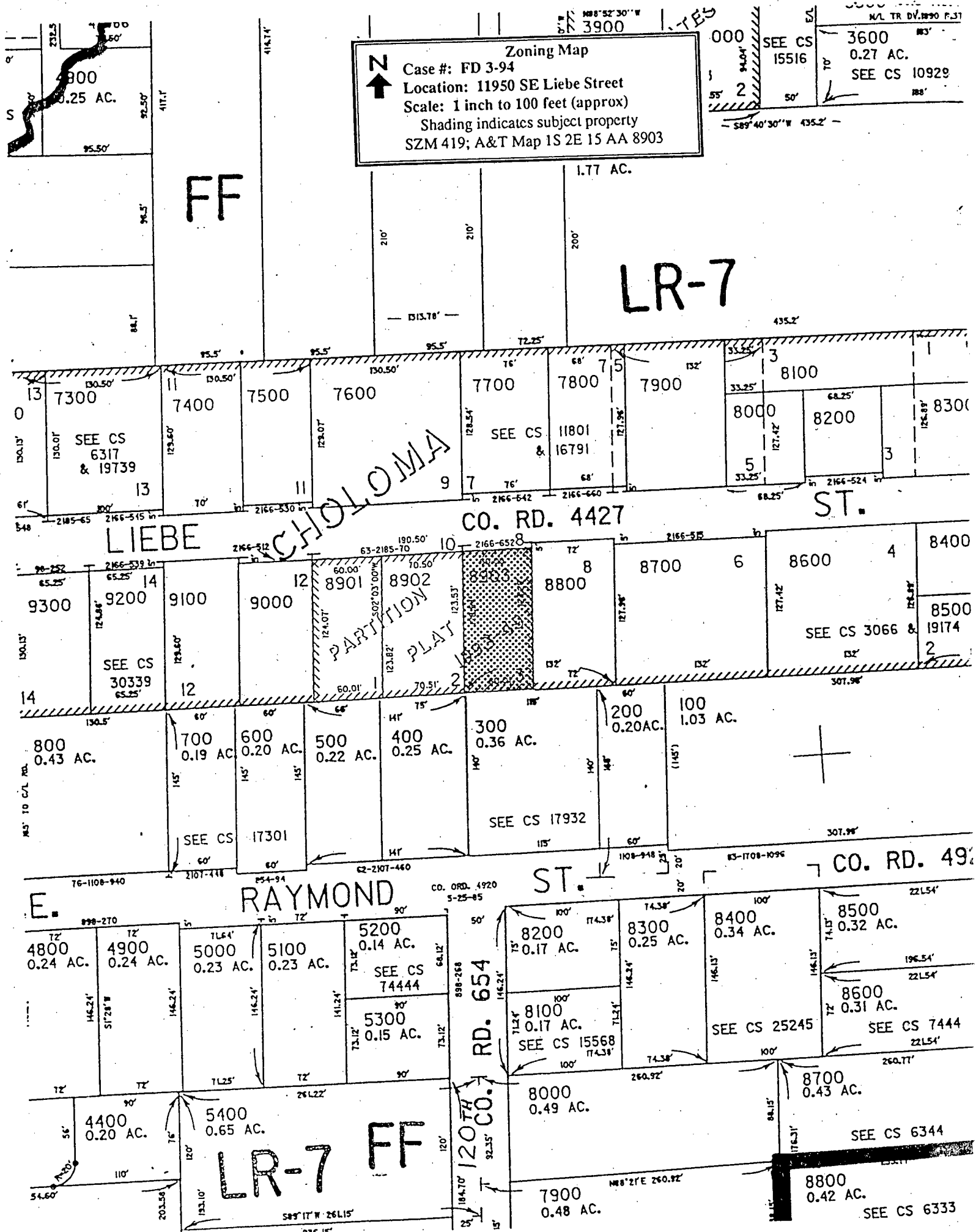
Owner Mike Tataro, Oregon Trail Custom Homes
PO Box 20686
Portland, OR 97220

Applicant Same

Comprehensive Plan: Urban Low Density Residential

Zoning: LR-7/FF; Low Density Residential District,
Flood Fringe subdistrict

DECISION:: Denied entire application, based on the following Findings and Conclusions.



II. PARTIES, AGENTS AND WITNESSES TO THE PROCEEDING

A. Parties

The persons, agencies and organizations who submitted written or oral testimony in this proceeding on their own behalf are parties to the proceedings. MCC 11.15.8225(A)(1). These persons were:

1. Applicant and Landowner

Oregon Trail Custom Homes, PO Box 20686, Portland, Oregon 97220 (applicant)

Joseph Vaughn, 5761 SE Harrison St., Milwaukie, Oregon 97222 (landowner)

2. Other Persons Supporting The Application

John Mahaffey, Georgetown Realty, 10000 NE 122nd, Portland, Oregon 97230

Roger Adams, 12022 SE Liebe, Portland, Oregon 97266

Brenda Luma, 12021 SE Liebe, Portland, Oregon 97266

3. Persons Opposed To The Application

None

B. Agents

Persons who submitted written or testimony, but only in the capacity of a representative for one of the parties, and not on their own behalf, are agents, not parties to this proceedings. These persons were:

1. Agents For The Applicant

Robert Totaro, President, Oregon Trail Custom Homes (at applicant's address)

Mike Totaro, Vice President, Oregon Trail Custom Homes (at applicant's address)

C. Witnesses

Persons appearing to provide information on behalf of someone else, and not as parties in their own right, are witnesses. There were no witnesses in this proceeding.

III. PROCEDURAL ISSUES

A. Impartiality Of The Hearings Officer

Prior to the hearing I had no *ex parte* contacts with the applicants or anyone else concerning the merits of this application.

I have no financial interest in the outcome of this proceeding and have no family or financial relationship with any of the applicants.

B. Other Procedural Issues

The applicants did not allege any procedural violations by the County, prior to, or during, the hearing.

IV. BURDEN OF PROOF

The burden of proof is upon the applicant. MCC 11.15.8230(D)

V. REVIEW OF THE STANDARDS, ANALYSIS OF THE EVIDENCE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. MCC Chapter 11.15.6301 *Et. Seq.*: The Applicability Of The Flood Hazard District Requirements In General

MCC Chapter 11.15.6301 *et. seq.*, "Flood Hazard District," is applicable, because the area is within a flood fringe area mapped on Flood Insurance Rate Map; Community Panel Number 410179 0382 B, revised 18 March 1986. The property is not within a floodway. *Id.*

The sections of the Flood Hazard Chapter containing standards applicable to this decision are MCC 11.15.6315, "Development Standards" and MCC 11.15.6323, "Variances." As noted below, I find some subsections of those provisions are inapplicable.

B. MCC 11.15.6315: Flood Hazard Development Standards

(1) MCC 11.15.6315(A): State Building Code Compliance

MCC 11.15.6315(A) requires "all new construction and substantial improvement shall be constructed in conformance with Oregon State Building Codes." If the permit is approved on appeal, compliance with this standard will be determined by the Planning Director before, or in conjunction with, the issuance of a placement permit.

The County has an intergovernmental agreement by which it relies on certification by the City of Portland as to the satisfaction of the State Building Code. The submission of an unqualified certification is a decision which does not require the exercise of discretion. ORS 197.015(10)(b)(A), (B). Therefore, no notice or opportunity for a hearing would be required.

(2) MCC 11.15.6315(B): Flood Elevation Requirement

MCC 11.15.6315(B) provides, in part:

*New construction and substantial improvement of any residential structure, including manufactured homes, shall have the lowest floor, including basement, elevated to at least one foot above the base flood level. * * * **

According to the Flood Insurance Rate Maps, the property is at 205 feet about sea level and the "base flood level" in the surrounding area is 211 feet. The site of the proposed dwelling is shown as being in the "flood fringe," not the "floodway." The applicant proposes to construct the floor at 206.5 feet, 4.5 below the flood level and seeks a variance for this amount, discussed below.

(3) MCC 11.15.6315(C): Floodproofing Of Nonresidential Structures

MCC 11.15.6315(C) (floodproofing of structures) is inapplicable because it applies only to "new construction and substantial improvement of any commercial, industrial or other non-residential structure * * * ." This is an application for the approval of the siting of a residential structure.

(4) MCC 11.15.6315(D): Foundation and Anchoring

MCC 11.15.6315(D) requires all manufactured homes to be "placed on a permanent foundation and shall be anchored to resist flotation, collapse and lateral movement by providing tie downs [etc.] * * * ." Because this standard applies to manufactured homes, it is inapplicable to this proceeding.

(5) MCC 11.15.6315(E): Foundations And Drainage In Mobile Home Parks And Subdivisions

MCC 11.15.6315(E) is inapplicable because it governs foundations and drainage for "new manufactured home parks" and replacement of manufactured homes "in an existing manufactured home park or subdivision * * * ." The standard is does not apply to this application.

(6) MCC 11.15.6315(F): Prevention Of Infiltration Of Water Into Household Utility Systems

MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

In this proceeding, the applicant is seeking a variance from the flood elevation requirements of MCC 11.15.6315(B). The variance would allow the applicant to site a house on an 30" foundation, leaving the first floor approximately 4.5 feet below the crest of the 100-year flood level.

Based on the record before me, I interpret the applicants' materials as an application for a variance from the flood proofing requirements of MCC 11.15.6315(F) as well as the flood elevation requirements of MCC 11.15.6315(B). This implied variance is denied for the same reasons discussed below.

(7) MCC 11.15.6315(G): Standards For Sewage Disposal Systems

MCC 11.15.6315(G) requires new and replacement water and sewer disposal systems to be designed to:

- (1) Minimize infiltration of flood waters into the system;*
- (2) Minimize discharge from systems into flood waters;*
- (3) Avoid impairment or contamination during flooding.*

The Mid-County Sewer district requires the applicants to connect to the existing sewer line in SE Liebe Street. The application does not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315(G).

(8) MCC 11.15.6315(H): Certification Of Hydrostatic Equalization

MCC 11.15.6315(H) requires certification by a registered professional engineer or architect that the portions of the dwelling "below the lowest floor that are subject to flooding" are designed to "automatically equalize the hydrostatic flood forces * * * ."

The record does not contain the required certification. This is grounds for denial.¹

(9) MCC 11.15.6315(I): Exemptions For Land Shown To Be Above Flood Level

MCC 11.15.6315(I) authorizes exemptions from the requirements of MCC 11.15.6315 when a surveyor demonstrates the land is 1 foot or more above base flood level.

Testimony by Brenda Luma and Roger Adams challenged the accuracy of the FIRM maps. Mr. Adams stated that he had owned his house since 1968. Although his house has a full basement, it has never flooded.

However, the standard requires a showing that the property is actually 1 foot above the base flood level, as shown on the map. No one testified that the elevation of the property was inaccurate; in fact the request for the variance is based on the assumption that the base flood level is above the floor level.

I conclude that no exemption is warranted under this standard.

(10) MCC 11.15.6315(J): Exemption For Historic Structures

MCC 11.15.6315(J) is inapplicable because it authorizes an exemption from MCC 11.15.6315 for the reconstruction, rehabilitation or restoration of "structures listed on the National Register of Historic Place or the State Historic Site Inventory." There is no structure on the site and thus it cannot be on the Historic Site registry or Historic Site Inventory.

C. MCC 11.15.6323: Variance Standards

(1) The Applicable Portions Of The Variance Provisions

As noted above, the applicants are seeking a variance from the flood elevation requirements of MCC 11.15.6315(B) and, by implication, from the flood-proofing requirements of MCC 11.15.6315(F).

There are three sections to the variance provisions found at MCC 11.15.6323. The first section, (A), is introductory and the third section, (C), applies to "non-residential structures." Neither section contains standards which apply to these variances.

¹ Since the existence of a certification would be a ministerial decision, the certification can be provided by the Planning Director in conjunction with the issuance of a building permit or in the course of a *de novo* appeal, if this kind of review is granted by the County Commission.

The variance standards are set out in the five subsections of MCC 11.15.6323(B). The fifth subsection applies only to structures in "an area identified as the floodway". As found above, the variance is for property in the flood fringe, not the floodway.

(2) Variance From The Flood Elevation Requirement In MCC 11.15.6315(B)

(a) MCC 11.15.6323(B)(1): Lot Size And Surrounding Development

MCC 11.15.6323(B)(1) provides:

- (1) The site of the proposed variance is a lot of one-half acre or less in size and is surrounded by and contiguous to lots with existing structures constructed below the base flood level.*

Based (1) on the information on the parcel size in the Staff Report (page 5); (2) the applicant's "windshield survey," which was confirmed by the staff (Staff Report at page 5-6); and (3) the oral testimony presented at the hearing, I conclude that both elements of this standard have been satisfied.

(b) MCC 11.15.6323(B)(2): Exceptional Hardship To The Applicant

MCC 11.15.6323(B)(2) provides:

- (2) Failure to grant the variance will result in exceptional hardship to the applicant;*

The hardship identified at page 4 of the application is:

First, the cost for the 8 foot high foundation wall is estimated to be \$15,000, an increase of \$12,500 from the \$2,500 for a standard 2-1/2 foot high foundation wall. That cost will be directly reflected in the sale price of the house, which will make it more difficult to sell in the relatively modest neighborhood. The home propose for Parcel 3 is expected to sell for \$98,500. An increase of \$12,500 in costs would push the price over \$100,000 and represent over 12% of the value of the house and land.

Secondly, the finished structure will appear totally out of place, standing one complete story above its neighbors. This factor will also make the house more difficult to sell.

Therefore, the additional expense of the foundation, the resulting appearance of the finished structure, and the likelihood that the house will be difficult to sell given market values in the neighborhood will combine to cause the

Applicant exceptional hardship.

Because I believe local governments have an ethical (even when it is not a legal) responsibility to interpret their standards consistently, I have reviewed my findings on a pair of earlier flood plain variance decisions, HV 22-92 dated February 1, 1993 and HV 23-92 dated December 7, 1992. In that case I reviewed the financial hardship to the applicant, and concluded (emphasis added):

There is no question that failure to grant the variance would create an "exceptional hardship" given Ms. Swank's conditions and these additional charges. The question is whether or not the need for the flood elevation and flood proofing variance was created by the applicants' decision to purchase property within the Flood Hazard District and to buy the manufactured home in advance of seeking the necessary variance.

This hardship standard differs from the most common forms of variance standards in two ways. First, it omits the commonly used prohibition against granting variances based on "self-created" hardships. Secondly, the hardship is described in terms of the circumstances of the applicant, rather than characteristics of the property itself.

While I am troubled by the idea of approving, in part, the siting of a manufactured home at an elevation 4.5 feet below the base flood level, I conclude the hardship standard has been met given the phrasing of the standard. However, a corollary of this interpretation of the ordinance is that this variance will remain valid only so long as the property is occupied by Lucy Swank.

Findings and Decision in HV 23-92, dated December 7, 1992 at page 7.

In this case, there is no showing of financial hardship to the developer as there was to the individual homeowner/applicant. The grounds for the hardship offered here would apply equally well to all new houses in the floodplain. If all houses qualified for a variance then the purpose of the flood plain protection provisions would be subverted.

For this reason, despite the more permissive (non-traditional) hardship standard in the County Code, I find that the reasons offered by the applicant are insufficient to justify a variance.

(c) MCC 11.15.6323(B)(3): The Variance Is The Minimum Necessary

MCC 11.15.6323(B)(3) provides:

(3) *The variance is the minimum necessary to afford relief.*

The applicant did not provide any information about the possibility of raising the foundation higher than was proposed, albeit less than the height necessary to avoid flooding the ground floor. The applicant has not carried its burden of proof with respect to this criterion.

(d) MCC 11.15.6323(B)(4): No Additional Threats To Public Safety, Public Nuisance, Fraud Or Conflicts With Existing Laws

MCC 11.15.6323(B)(4) provides:

- (4) The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances.*

(i) Threats To Public Safety, Extraordinary Public Expense

The possible additional threats to public safety and sources of extraordinary expense are (1) displacement of floodwaters by the house, (2) possible damage caused by the house if it were to float free during a flood, (3) the public resources which would be expended to rescue residents of the dwelling in the event of a flood.

Floodwater displacement by this property will be negligible, provided the applicants satisfy MCC 11.15.6315(H), which requires hydrostatic equalization "by allowing for the entry and exit of floodwaters" for all parts of the house "subject to flooding."

The house should not float free provided the applicants satisfy MCC 11.15.6315(D), which requires the house to be "anchored to resist flotation."

(ii) Create a Nuisance

The house, with or without a flood plain variance, would not constitute a "nuisance" as that term is used in planning and tort law. This part of the standard has been satisfied.

(iii) Fraud and Victimization

With regard to the "fraud and victimization" element, in the 1992 Mercer/Swank variance I said:

Fraud and victimization of the public would occur if the approval of the variance would lead unwitting purchasers to acquire the property without knowledge of the risk of serious flood damage. In this case, this variance proceeding has left no doubt that all of the applicants are well aware that the

bottom of the house is resting 4.5 feet below the 100 year flood level. In addition, adjoining property owners who signed a petition supporting a variance to the flood elevation requirement are also aware that the property lies within the flood fringe. Finally, by making the variance personal to the applicant, subsequent purchasers will be put on notice of the circumstances of the property.

The circumstances in this case are quite different; since the applicant is not the prospective resident, there may well be unwitting purchasers who could acquire the house without being aware that it was located within the flood plain.

During the hearing, Mr. John Mahaffey of Georgetown Realty referred to a new statute which would require this disclosure of the fact the property was within the flood plain. He was unable to provide a citation to the Oregon Revised Statutes at the hearing. My review of the statutes revealed ORS 104.465. "Seller's Property Disclosure And Disclaimer Statements." ORS 104.465(2)(b) specifies the contents, ("in substantially the following form") of the seller's disclosure statement. This includes, under section 8, "General": "D. To your knowledge, is the property in a designated flood plain?"

However, ORS 105.470(1) excludes "[t]he first sale of a dwelling never occupied" from the disclosure requirements in ORS 105.465.

After the hearing, Mr. Mahaffey sent the County an undated letter, which stated.

Enclosed is a disclosure form which we will fill out when we sell the homes on S.E. Liebe. We would be happy to accept a directive that the buyers are to receive this form concerning the 100 year flood plain.

Unfortunately, no disclosure form appears in the file. Even if one did, the County has no means of monitoring or enforcing such a disclosure requirement.

Based on this record, I am unable to conclude that fraud or perhaps unwitting victimization would not occur in the event a purchaser acquired the property without knowledge of the location in the flood plain and there lives or property were damaged in a flood.

(iv) Conflicts With Existing Local Laws Or Ordinances

The local laws and ordinances governing this application are expressed in the County Code and Plan. Given a finding that they have been satisfied, there is no "conflict with existing local laws or ordinances."

(e) **Conclusion With Respect To Variance From The Flood Elevation Requirement**

I conclude that the applicant has satisfied the variance standards in MCC 11.15.6323(B)(1) and not satisfied the standards in MCC 11.15.6323(B)(2), (3) and (4), as applied to its request for a variance from the flood elevation requirement in MCC 11.15.6315(B).

(3) **Variance From The Flood-Proofing Requirements In MCC 11.15.6315(F)**

As quoted above, MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

Subsections (2), (3) and (4) of the variance standard are not satisfied for the reasons given previously with respect to the variance for the flood elevation variance.

D. **Applicable Sections Of The County Comprehensive Plan**

1. **Policy 14; Development Limitations**

Comprehensive Plan Policy 14 is to

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

* * * * *

C. **LAND WITHIN THE 100 YEAR FLOOD PLAIN**

Multnomah Comprehensive Framework Plan at page 58.

Under the terms of Policy 14 and the implementation strategies, see Multnomah Comprehensive Framework Plan at 59, I find this policy has been implemented by the Flood Hazard District and has no independent application to this action.

2. Policies 37 And 38, In General

Both policy 37, "Utilities" and Policy 38, "Facilities" are prefaced begin with the statement: "The county's policy is to require a finding prior to approval of a legislative or quasi-judicial action that * * * ." "Action" is defined in MCC 11.15.8205 as a

*a proceeding in which the legal rights, duties or privileges of specific parties are determined only after hearing in which such parties are entitled to appear and be heard, including requests for: * * **

(D) Variances, except as otherwise provided herein;

** * * **

(F) Other requests for permits and other contested cases determining permissible uses of specific property.

Because this is a proceeding on an application for a variance, I find that it is an "action" and that consequently both of these policies apply.

As noted above, satisfaction of standards not addressed by the applicant to date, could be determined by the Planning Director before, or in conjunction with, either an appeal or the issuance of a building permit. Because compliance with Policies 37 and 38 may require the exercise of judgment as to facts and interpretation of the policies, notice of this subsequent decision and an opportunity for a hearing should be provided. ORS 197.763(2), 215.416, *Rhyne et al vs. Multnomah County, Swan & Trotter*, __ Or LUBA __ (1992.)

3. Plan Policy 37: "Utilities"

Multnomah County Plan Policy 37, "Utilities" provides:

POLICY 37

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

WATER AND DISPOSAL SYSTEM

A. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC SEWER AND WATER SYSTEM, BOTH OF WHICH HAVE ADEQUATE CAPACITY; OR

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

Multnomah County Comprehensive Framework Plan: Volume 2: Policies (September 1983)
at 167.

As noted previously, the applicant would connect the proposed house to the City of Portland's sewer system. The signed Portland Fire District review establishes the existence of a hydrant 70' from the residence with adequate water pressure nearby. From this I conclude the house would also be served by City water. This evidence is sufficient to carry the applicants' burden of proof with respect to this portion of Policy 37.

The remainder of Policy 37 provides:

DRAINAGE

- E. *THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR*
- F. *THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND*
- G. *THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.*

ENERGY AND COMMUNICATIONS

- H. *THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND*
- I. *COMMUNICATIONS FACILITIES ARE AVAILABLE*

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 168.

There is no evidence in the record concerning energy and communications facilities, subsections E, F, G, H and I, although the location of the property within the urbanized portion of the County suggests these facilities are readily available.

The failure to address these standards is grounds for denial. However, the applicant might be able to address them in the event of a *de novo* appeal of this decision.

The concluding paragraph of Policy 37 is inapplicable to this quasijudicial proceeding.

4. **Plan Policy 38: "Facilities"**

Multnomah County Plan Policy 38, "Facilities" provides:

POLICY 38

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

SCHOOL

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

FIRE PROTECTION

- B. *THERE IS ADEQUATE WATER PRESSURE AND FLOW FOR FIRE FIGHTING PURPOSES; AND*

- C. *THE APPROPRIATE FIRE DISTRICT HAS HAD AN OPPORTUNITY TO REVIEW AND COMMENTS [sic] ON THE PROPOSAL.*

POLICE PROTECTION

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 169-170.

The David Douglas School District returned the "School District Review" form, with the signature of the Dr. Ron Russell, Assistant Superintendent, dated February 8, 1994. (The "no comment" box was checked.) This satisfies the requirement in subsection A of policy 38 that the school district has "an opportunity to review and comment on the proposal."

The completed Portland Fire District Review form, signed by Don Patty (undated), Plans Review provides sufficient evidence satisfying subsection B, ("there is adequate water pressure and flow for fire fighting purposes") and C (the fire district "had an opportunity to review and comment on the proposal.")

Lt. Bill Goss, of the Multnomah County Sheriff's Office returned the "Police Services Review" form, dated February 8, 1994, indicating there would be an "adequate" level of service "available to serve the proposed project."

The applicant has satisfied Policy 38.

E. State Statutes, Goals And Administrative Rules Applicable To The Decision

The provisions of state law governing county quasijudicial decisions, found in ORS 197.763 and 215.416 apply to this proceeding. They have been fulfilled through the notice of, and conduct of, the hearing on this matter.

No other provisions in ORS Chapters 197 and 215 are applicable.

No statewide planning goals and no Oregon Administrative Rules interpreting those goals apply to this quasijudicial permitting proceeding.

VI. CONCLUSIONS AND ORDER

A. Standards Which The Applicant Has Not Satisfied

I find that the evidence and argument offered by the applicant is insufficient to satisfy the "hardship" standard in MCC 11.15.6323(B)(2) and the "minimum variance necessary" standard in MCC 11.15.6323(B)(3), with respect to the applicant's request for a variance to the flood elevation standards and its implied request for a variance to the flood-proofing

requirements of MCC 11.15.6315(F).

I also find that the applicant failed to satisfy the "fraud" and "victimization" provisions in MCC 11.15.6323(B)(4), as to the flood elevation variance to MCC 11.15.6315(B) and the flood-proofing variance to MCC 11.15.6315(F).

These are grounds for denial.

B. Standards Which The Applicant Failed To Address

The applicant did not offer evidence addressing compliance with several provisions in the County Code and some of the applicable Plan policies. These standards and policies are:

MCC 11.15.6315(G)
MCC 11.15.6315(H)
Plan Policy 37 §§(E) through (I)
Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant's failure to carry its burden of proof for these standards, is grounds for denial.

C. Standards Which The Applicant Has Satisfied

The applicant has satisfied the following applicable sections of the County Code and County Plan:

MCC 11.15.6323(B)(1), as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(1), as to flood-proofing variance to MCC 11.15.6315(F)
MCC 11.15.6323(B)(4), in part, as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(4), in part, as to flood-proofing variance to MCC 11.15.6315(F)
Comprehensive Framework Plan Policy 14
Comprehensive Framework Plan Policy 37, Subsections A through D
Comprehensive Framework Plan Policy 38

D. Standards Which Are Inapplicable

Although the following standards appear in otherwise relevant code sections, I found them inapplicable to this application or this proceeding:

MCC 11.15.6315(A),(B),(C),(D),(E),(I)
MCC 11.15.6323(A),(C),(E)

ORDER

For the foregoing reasons, the application is denied.

1 March 1994
Date

Robert L. Liberty
Robert L. Liberty, Hearings Officer

Signed by the Hearings Officer:	March 1, 1994
Decision Mailed to Parties:	March 21, 1994
Decision Submitted to Board Clerk:	March 21, 1994
Lay day to Appeal Decision:	4:30 p.m., April 1, 1994
Reported to Board of County Commissioners:	1:30 p.m., April 12, 1994

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of \$300.00. Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street, Portland.

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

To appeal the Hearings Officer decision, a "Notice of Review" form and fee must be submitted to the County Planning Director. For further information call the Multnomah County Planning and Development Division at 248-3043.

MEETING DATE: April 12, 1994

AGENDA NO: P-5

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Hearings Officer Decision

BOARD BRIEFING Date Requested:

Amount of Time Needed:

REGULAR MEETING: Date Requested: April 12, 1994

Amount of Time Needed: 2 Minutes

DEPARTMENT: DES DIVISION: Planning

CONTACT: R. Scott Pemble TELEPHONE #: 3182
BLDG/ROOM #: 412/103

PERSON(S) MAKING PRESENTATION: Planning Staff

ACTION REQUESTED:

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

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

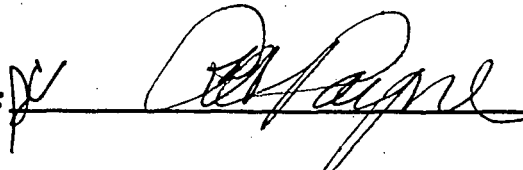
FD 3-94 Review the March 1, 1994 Hearings Officer Decision, denying request for construction of a single family dwelling below the 100-year flood elevation, for property located at 11950 SE Liebe Street.

SIGNATURES REQUIRED:

ELECTED OFFICIAL:

OR

DEPARTMENT MANAGER:



1994 APR 13 AM 8:55
CLERK OF BOARD OF
MULTI-JURISDICTIONAL
OREGON

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

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



BOARD HEARING OF April 12, 1994

TIME 1:30pm

CASE NAME Flood Hazard Variance

NUMBER

FD 3-94

1. Applicant Name/Address

Gregory J. Frank

P.O. Box 19478

Portland 97280

2. Action Requested by Applicant

Reversal of Hearing Officer's decision in the matter of a request for a 4.5 foot height variance to the finished floor elevation for a proposed single family residence on property within the Flood Hazard district.

ACTION REQUESTED OF BOARD

- ☐ Affirm Plan.Com./Hear.Of
☐ Hearing/Rehearing
☒ Set date of Hearing for Review

3. Planning Staff Recommendation

Approval

4. Hearings Officer Decision:

Denial

5. If recommendation and decision are different, why?

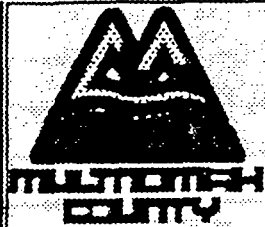
The Hearings Officer found that the applicant had failed to demonstrate compliance with the standards for sewage disposal, certification of hydrostatic equalization, exceptional hardship to the applicant, and that fraud and victimization might occur to future purchasers of the property. He also found that the applicant had not provided information regarding Comprehensive Plan Policy #37 with respect to drainage and energy and communications.

ISSUES
(who raised them?)

- a. The appearance of a house with a foundation five feet higher than that of surrounding residences (neighbor).
b. The low probability of flooding in the area based on over twenty years of observation (neighbor).

Do any of these issues have policy implications? Explain.

No



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

NOTICE OF REVIEW

1. Name: Frank J. Gregory
Last Middle First
2. Address: P.O. Box 19478 Portland Oregon 97280
Street or Box City State and Zip Code
3. Telephone: (503) 244 - 6811

4. If serving as a representative of other persons, list their names and addresses:

Representative for:

Mike Totaro

Oregon Trail Custom Homes

P.O. Box 20686

, Applicant

5. What is the decision you wish reviewed (e.g., denial of a zone change, approval of a subdivision, etc.)?

FD 3-94, #419

Denial of request for variance to flood hazard standards by Hearings Officer.

6. The decision was signed Hearings Officer on March 1, 19 94
Submitted to Board Clerk on March 21, 1994

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

Mike Totaro is the owner of the subject property and the applicant in this land use matter.

Pursuant to MCC 11.15.8225 (A)(1) "Those person entitled to notice under MCC
11.15.8220(C) who also make an appearance before the approval authority" are partys.

MCC 11.15.8220 (C)(1) includes the "applicant". Applicant appeared before the Hearings
Officer.

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

See attached additional sheets

9. Scope of Review (Check One):

- (a) ☐ On the Record
- (b) ☐ On the Record plus Additional Testimony and Evidence
- (c) ☒ De Novo (i.e., Full Rehearing) See #10 Below

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*.

The Multnomah County Board of Commissioners, on March 22, 1994, adopted Resolution 94-56, which established the Scope of Review for the next five appealed cases.

Accordingly, the Board will consider all evidence submitted to the Hearings Officer and any new relevant evidence submitted by parties.

Signed: Gregory J. Frank
Gregory J. Frank

Date: April 1, 1994

For Staff Use Only

Fee:

Notice of Review = \$300.00

Transcription Fee:

Length of Hearing N/A x \$3.50/minute = \$ N/A

Total Fee = \$ 300.00

Received by: SM

Date: 4-1-94

Case No. PD 3-94

8. Grounds for Reversal of Decision (additional comments to Notice of Review)

The Hearings Officer's decision should be reversed based upon the staff report dated February 16, 1994 (which recommended approval of the requested variance) and for the following reasons::

1. MCC 11.15.6323 (B)(2) *"Failure to grant the variance will result in exceptional hardship to the applicant."*

The Hearings Officer found "no showing of financial hardship" and concluded that the "reasons offered by the applicant are insufficient to justify a variance." The Hearings Officer disregarded the staff's and applicant's interpretation of "hardship."

There is undoubtedly a financial hardship to the applicant. If the variance is not granted then, in order to build a house on the subject property, an eight foot (8') high foundation will be required. Such a home in this neighborhood would be totally out of design character. In fact, according to the application the property might not even be marketable at a reasonable sales price. In addition, construction of an eight foot (8') high foundation would increase construction costs by \$12,500 (12.5%). Increasing the price of the property to reflect the increased cost would price the house out of the neighborhood's market. In essence, such a house might not even sell at a breakeven price. The applicant has clearly demonstrated at least a \$12,500 hardship unless the variance is granted.

2. MCC 11.15.6323 (B)(3) *"The variance is the minimum necessary to afford relief."*

The Hearings Officer stated that the applicant "did not provide any information about the possibility of raising the foundation higher than was proposed..." This is not an entirely accurate statement by the Hearings Officer. The applicant proposed a thirty inch (30") foundation which would be in conformance with the neighborhood and be of a conventional appearance. The applicant, by implication, indicated that above a thirty inch (30") foundation costs would increase (hardship), continuity of the neighborhood would be diminished, and marketability would be decreased. The applicant is not required to demonstrate to mathematical certainty the absolute point of minimum relief. The applicant concurs with the staff's position that the proposed variance does in fact represent the minimum necessary variance to afford relief. The applicant intends to submit additional support regarding this matter to the Board at the de novo hearing.

3. MCC 11.15.6323 (B)(4) *"The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances"*

The applicant agrees with the staff's analysis and conclusion regarding MCC 11.15.6323 (B)(4). The applicant disagrees with the Hearings Officer's reasoning and conclusion. There will be no "unwitting victimization in that the applicant is fully aware of the flood hazard. If the Hearings Officer was truly concerned about future purchaser's a simple condition to the granting of the variance would have alleviated any such fears: a required notice in the deed indicating the location of the property within a flood fringe of a flood hazard district. Applicant would agree to record a deed containing such a notice. These types of deed notices are very common in Multnomah County and the City of Portland.

4. MCC 11.15.6315 (F) *"Prevention of infiltration of water into household utility systems"*

The Hearings Officer incorrectly interpreted "the applicant's materials as an application for a variance from flood proofing requirements of MCC 11.15.6315 (F) as well as the flood elevation requirements of MCC 11.15.6315 (B)." The applicant and staff agree that applicant requested a variance from MCC 11.15.6315 (B); but not a variance from MCC 11.15.6315 (F). The applicant and staff agree the correct implementation of MCC 11.15.6315(F) is that construction details will be regulated by building codes and the City of Portland (re State Plumbing, Heating, Ventilation and Air Conditioning Codes). The applicant has satisfied this section of the Code and will be held accountable by the appropriate regulatory agency at the appropriate time.

5. MCC 11.15.6315 (G) *"Standards for Sewage Disposal Systems"*

The Hearings Officer indicted that the applicant did "not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315 (G)." The Hearings Officer is mistaken. First, the application and staff noted that the sewer connection on this property would have to be made in conformance to the Mid-County Sewer District's Rules of Connection. Secondly, the Hearings Officer is again trying to intercede in the building permit process; which he admits on page 4 of his decision, will be determined by others (ie Planning Director, City of Portland, etc.)

6. MCC 11.15.6315 (H) *"Certification of Hydrostatic Equalization"*

The Hearings Officer erred in requiring the applicant to present a "certification by a registered professional engineer..." at the time of the request for the variance. The staff position, which the applicant contends is correct, is that compliance with MCC 11.15.6315 (H) "will be determined by the Planning Director in conjunction with the building permit" (page 4 of staff report). Applicant has agreed, at the appropriate time, to file the required certification.

7. Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant disagrees with the Hearings Officer's application of these sections of the Comprehensive Plan to the subject case. The applicant concurs with the staff position and contends that a proper interpretation of these sections would permit a "determination by the Planning Director in conjunction with the building permit decision" as to whether the appropriate utilities are present (pages 9 & 10 of staff report). Further, applicant intends to present evidence to the Board that in fact utilities are in fact present.

8. MCC 11.15.6315 (B)

The Hearings Officer erred in denying the variance requested under MCC 11.15.6315(B) based upon reasons stated in this notice, the application for variance, the staff report, the staff record, and testimony to be presented to the Board upon the de novo review.



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

DECISION

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

MARCH 1, 1994

FD 3-94, #419 VARIANCE TO FLOOD HAZARD DISTRICT STANDARDS
(Construct a Single Family Dwelling Below the 100-year Flood Elevation)

I. INTRODUCTION; NATURE OF THE REQUEST

This application is to construct a single family dwelling on a lot within the Flood Hazard District. Applicant requests a variance from the requirements in Multnomah County Code (MCC) 11.15.6315. MCC § .6315(B) requires that the floor of new houses in the Flood Hazard District be *"at least one foot above the base flood level."* The ground elevation of this property is 205 feet and the base flood elevation in the surrounding area is 211 feet. Consequently, if constructed without a variance, the finished floor of the new dwelling would need to be seven feet above existing ground level.

Location: 11950 SE Liebe Street

Tax Roll Description: Parcel #3 of Partition Plat 1993-49

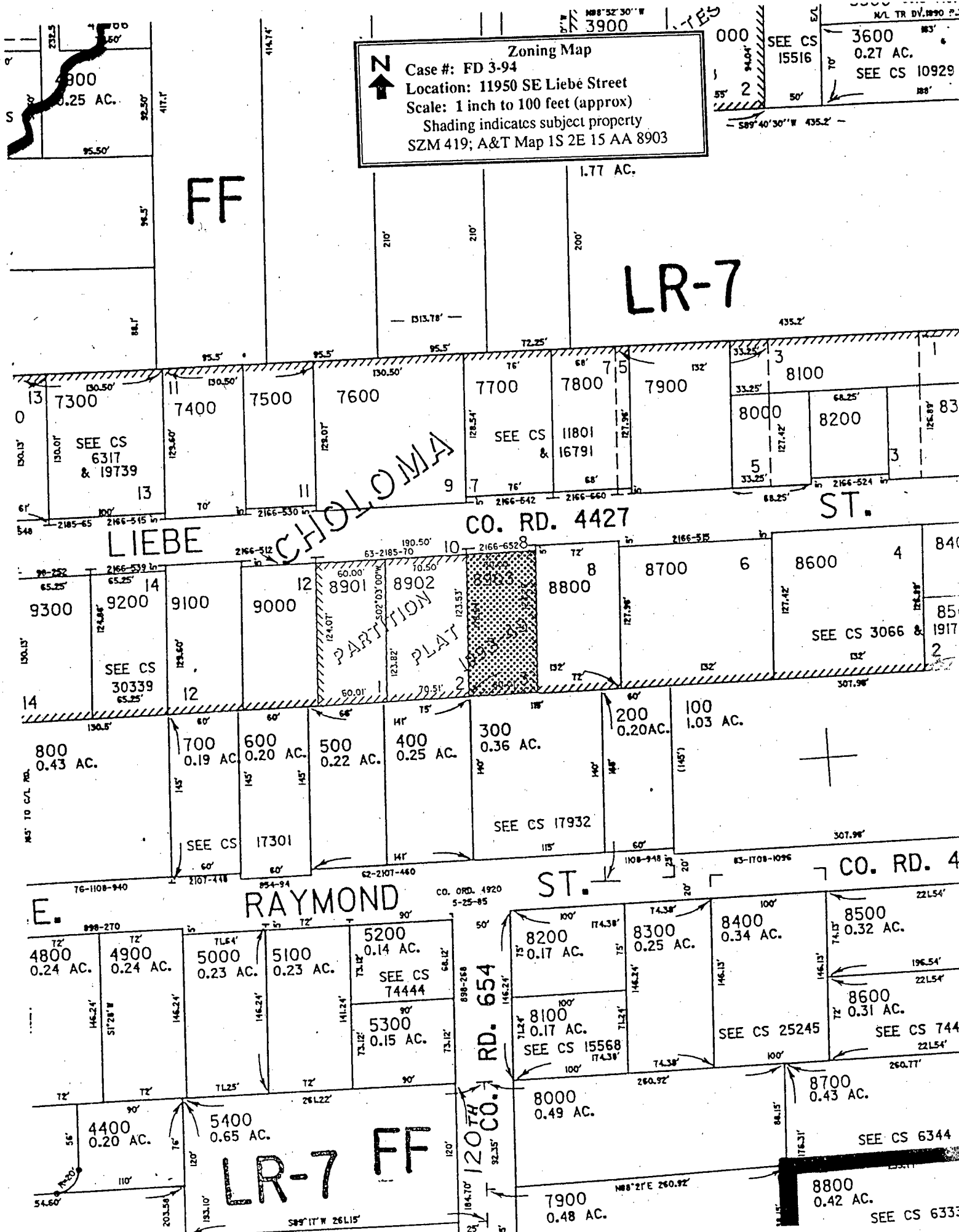
Owner Mike Tataro, Oregon Trail Custom Homes
PO Box 20686
Portland, OR 97220

Applicant Same

Comprehensive Plan: Urban Low Density Residential

Zoning: LR-7/FF; Low Density Residential District,
Flood Fringe subdistrict

DECISION:: Denied entire application, based on the following Findings and Conclusions.



II. PARTIES, AGENTS AND WITNESSES TO THE PROCEEDING

A. Parties

The persons, agencies and organizations who submitted written or oral testimony in this proceeding on their own behalf are parties to the proceedings. MCC 11.15.8225(A)(1). These persons were:

1. Applicant and Landowner

Oregon Trail Custom Homes, PO Box 20686, Portland, Oregon 97220 (applicant)

Joseph Vaughn, 5761 SE Harrison St., Milwaukie, Oregon 97222 (landowner)

2. Other Persons Supporting The Application

John Mahaffey, Georgetown Realty, 10000 NE 122nd, Portland, Oregon 97230

Roger Adams, 12022 SE Liebe, Portland, Oregon 97266

Brenda Luma, 12021 SE Liebe, Portland, Oregon 97266

3. Persons Opposed To The Application

None

B. Agents

Persons who submitted written or testimony, but only in the capacity of a representative for one of the parties, and not on their own behalf, are agents, not parties to this proceedings. These persons were:

1. Agents For The Applicant

Robert Totaro, President, Oregon Trail Custom Homes (at applicant's address)

Mike Totaro, Vice President, Oregon Trail Custom Homes (at applicant's address)

C. Witnesses

Persons appearing to provide information on behalf of someone else, and not as parties in their own right, are witnesses. There were no witnesses in this proceeding.

III. PROCEDURAL ISSUES

A. Impartiality Of The Hearings Officer

Prior to the hearing I had no *ex parte* contacts with the applicants or anyone else concerning the merits of this application.

I have no financial interest in the outcome of this proceeding and have no family or financial relationship with any of the applicants.

B. Other Procedural Issues

The applicants did not allege any procedural violations by the County, prior to, or during, the hearing.

IV. BURDEN OF PROOF

The burden of proof is upon the applicant. MCC 11.15.8230(D)

V. REVIEW OF THE STANDARDS, ANALYSIS OF THE EVIDENCE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. MCC Chapter 11.15.6301 *Et. Seq.*: The Applicability Of The Flood Hazard District Requirements In General

MCC Chapter 11.15.6301 *et. seq.*, "Flood Hazard District," is applicable, because the area is within a flood fringe area mapped on Flood Insurance Rate Map; Community Panel Number 410179 0382 B, revised 18 March 1986. The property is not within a floodway. *Id.*

The sections of the Flood Hazard Chapter containing standards applicable to this decision are MCC 11.15.6315, "Development Standards" and MCC 11.15.6323, "Variances." As noted below, I find some subsections of those provisions are inapplicable.

B. MCC 11.15.6315: Flood Hazard Development Standards

(1) MCC 11.15.6315(A): State Building Code Compliance

MCC 11.15.6315(A) requires "all new construction and substantial improvement shall be constructed in conformance with Oregon State Building Codes." If the permit is approved on appeal, compliance with this standard will be determined by the Planning Director before, or in conjunction with, the issuance of a placement permit.

The County has an intergovernmental agreement by which it relies on certification by the City of Portland as to the satisfaction of the State Building Code. The submission of an unqualified certification is a decision which does not require the exercise of discretion. ORS 197.015(10)(b)(A), (B). Therefore, no notice or opportunity for a hearing would be required.

(2) MCC 11.15.6315(B): Flood Elevation Requirement

MCC 11.15.6315(B) provides, in part:

*New construction and substantial improvement of any residential structure, including manufactured homes, shall have the lowest floor, including basement, elevated to at least one foot above the base flood level. * * * **

According to the Flood Insurance Rate Maps, the property is at 205 feet about sea level and the "base flood level" in the surrounding area is 211 feet. The site of the proposed dwelling is shown as being in the "flood fringe," not the "floodway." The applicant proposes to construct the floor at 206.5 feet, 4.5 below the flood level and seeks a variance for this amount, discussed below.

(3) MCC 11.15.6315(C): Floodproofing Of Nonresidential Structures

MCC 11.15.6315(C) (floodproofing of structures) is inapplicable because it applies only to "new construction and substantial improvement of any commercial, industrial or other non-residential structure * * * ." This is an application for the approval of the siting of a residential structure.

(4) MCC 11.15.6315(D): Foundation and Anchoring

MCC 11.15.6315(D) requires all manufactured homes to be "placed on a permanent foundation and shall be anchored to resist flotation, collapse and lateral movement by providing tie downs [etc.] * * * ." Because this standard applies to manufactured homes, it is inapplicable to this proceeding.

(5) MCC 11.15.6315(E): Foundations And Drainage In Mobile Home Parks And Subdivisions

MCC 11.15.6315(E) is inapplicable because it governs foundations and drainage for "new manufactured home parks" and replacement of manufactured homes "in an existing manufactured home park or subdivision * * * ." The standard is does not apply to this application.

(6) MCC 11.15.6315(F): Prevention Of Infiltration Of Water Into Household Utility Systems

MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

In this proceeding, the applicant is seeking a variance from the flood elevation requirements of MCC 11.15.6315(B). The variance would allow the applicant to site a house on an 30" foundation, leaving the first floor approximately 4.5 feet below the crest of the 100-year flood level.

Based on the record before me, I interpret the applicants' materials as an application for a variance from the flood proofing requirements of MCC 11.15.6315(F) as well as the flood elevation requirements of MCC 11.15.6315(B). This implied variance is denied for the same reasons discussed below.

(7) MCC 11.15.6315(G): Standards For Sewage Disposal Systems

MCC 11.15.6315(G) requires new and replacement water and sewer disposal systems to be designed to:

- (1) Minimize infiltration of flood waters into the system;*
- (2) Minimize discharge from systems into flood waters;*
- (3) Avoid impairment or contamination during flooding.*

The Mid-County Sewer district requires the applicants to connect to the existing sewer line in SE Liebe Street. The application does not address the issue of whether the sewer connection will satisfy the flood infiltration standards in MCC 11.15.6315(G).

(8) MCC 11.15.6315(H): Certification Of Hydrostatic Equalization

MCC 11.15.6315(H) requires certification by a registered professional engineer or architect that the portions of the dwelling "below the lowest floor that are subject to flooding" are designed to "automatically equalize the hydrostatic flood forces * * * ."

The record does not contain the required certification. This is grounds for denial.¹

(9) MCC 11.15.6315(I): Exemptions For Land Shown To Be Above Flood Level

MCC 11.15.6315(I) authorizes exemptions from the requirements of MCC 11.15.6315 when a surveyor demonstrates the land is 1 foot or more above base flood level.

Testimony by Brenda Luma and Roger Adams challenged the accuracy of the FIRM maps. Mr. Adams stated that he had owned his house since 1968. Although his house has a full basement, it has never flooded.

However, the standard requires a showing that the property is actually 1 foot above the base flood level, as shown on the map. No one testified that the elevation of the property was inaccurate; in fact the request for the variance is based on the assumption that the base flood level is above the floor level.

I conclude that no exemption is warranted under this standard.

(10) MCC 11.15.6315(J): Exemption For Historic Structures

MCC 11.15.6315(J) is inapplicable because it authorizes an exemption from MCC 11.15.6315 for the reconstruction, rehabilitation or restoration of "structures listed on the National Register of Historic Place or the State Historic Site Inventory." There is no structure on the site and thus it cannot be on the Historic Site registry or Historic Site Inventory.

C. MCC 11.15.6323: Variance Standards

(1) The Applicable Portions Of The Variance Provisions

As noted above, the applicants are seeking a variance from the flood elevation requirements of MCC 11.15.6315(B) and, by implication, from the flood-proofing requirements of MCC 11.15.6315(F).

There are three sections to the variance provisions found at MCC 11.15.6323. The first section, (A), is introductory and the third section, (C), applies to "non-residential structures." Neither section contains standards which apply to these variances.

¹ Since the existence of a certification would be a ministerial decision, the certification can be provided by the Planning Director in conjunction with the issuance of a building permit or in the course of a *de novo* appeal, if this kind of review is granted by the County Commission.

The variance standards are set out in the five subsections of MCC 11.15.6323(B). The fifth subsection applies only to structures in "an area identified as the floodway". As found above, the variance is for property in the flood fringe, not the floodway.

(2) Variance From The Flood Elevation Requirement In MCC 11.15.6315(B)

(a) MCC 11.15.6323(B)(1): Lot Size And Surrounding Development

MCC 11.15.6323(B)(1) provides:

- (1) *The site of the proposed variance is a lot of one-half acre or less in size and is surrounded by and contiguous to lots with existing structures constructed below the base flood level.*

Based (1) on the information on the parcel size in the Staff Report (page 5); (2) the applicant's "windshield survey," which was confirmed by the staff (Staff Report at page 5-6); and (3) the oral testimony presented at the hearing, I conclude that both elements of this standard have been satisfied.

(b) MCC 11.15.6323(B)(2): Exceptional Hardship To The Applicant

MCC 11.15.6323(B)(2) provides:

- (2) *Failure to grant the variance will result in exceptional hardship to the applicant;*

The hardship identified at page 4 of the application is:

First, the cost for the 8 foot high foundation wall is estimated to be \$15,000, an increase of \$12,500 from the \$2,500 for a standard 2-1/2 foot high foundation wall. That cost will be directly reflected in the sale price of the house, which will make it more difficult to sell in the relatively modest neighborhood. The home propose for Parcel 3 is expected to sell for \$98,500. An increase of \$12,500 in costs would push the price over \$100,000 and represent over 12% of the value of the house and land.

Secondly, the finished structure will appear totally out of place, standing one complete story above its neighbors. This factor will also make the house more difficult to sell.

Therefore, the additional expense of the foundation, the resulting appearance of the finished structure, and the likelihood that the house will be difficult to sell given market values in the neighborhood will combine to cause the

Applicant exceptional hardship.

Because I believe local governments have an ethical (even when it is not a legal) responsibility to interpret their standards consistently, I have reviewed my findings on a pair of earlier flood plain variance decisions, HV 22-92 dated February 1, 1993 and HV 23-92 dated December 7, 1992. In that case I reviewed the financial hardship to the applicant, and concluded (emphasis added):

There is no question that failure to grant the variance would create an "exceptional hardship" given Ms. Swank's conditions and these additional charges. The question is whether or not the need for the flood elevation and flood proofing variance was created by the applicants' decision to purchase property within the Flood Hazard District and to buy the manufactured home in advance of seeking the necessary variance.

This hardship standard differs from the most common forms of variance standards in two ways. First, it omits the commonly used prohibition against granting variances based on "self-created" hardships. Secondly, the hardship is described in terms of the circumstances of the applicant, rather than characteristics of the property itself.

While I am troubled by the idea of approving, in part, the siting of a manufactured home at an elevation 4.5 feet below the base flood level, I conclude the hardship standard has been met given the phrasing of the standard. However, a corollary of this interpretation of the ordinance is that this variance will remain valid only so long as the property is occupied by Lucy Swank.

Findings and Decision in HV 23-92, dated December 7, 1992 at page 7.

In this case, there is no showing of financial hardship to the developer as there was to the individual homeowner/applicant. The grounds for the hardship offered here would apply equally well to all new houses in the floodplain. If all houses qualified for a variance then the purpose of the flood plain protection provisions would be subverted.

For this reason, despite the more permissive (non-traditional) hardship standard in the County Code, I find that the reasons offered by the applicant are insufficient to justify a variance.

(c) MCC 11.15.6323(B)(3): The Variance Is The Minimum Necessary

MCC 11.15.6323(B)(3) provides:

(3) *The variance is the minimum necessary to afford relief.*

The applicant did not provide any information about the possibility of raising the foundation higher than was proposed, albeit less than the height necessary to avoid flooding the ground floor. The applicant has not carried its burden of proof with respect to this criterion.

(d) MCC 11.15.6323(B)(4): No Additional Threats To Public Safety, Public Nuisance, Fraud Or Conflicts With Existing Laws

MCC 11.15.6323(B)(4) provides:

- (4) *The granting of the variance will not result in additional threats to public safety, extraordinary public expense, create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances.*

(i) Threats To Public Safety, Extraordinary Public Expense

The possible additional threats to public safety and sources of extraordinary expense are (1) displacement of floodwaters by the house, (2) possible damage caused by the house if it were to float free during a flood, (3) the public resources which would be expended to rescue residents of the dwelling in the event of a flood.

Floodwater displacement by this property will be negligible, provided the applicants satisfy MCC 11.15.6315(H), which requires hydrostatic equalization "by allowing for the entry and exit of floodwaters" for all parts of the house "subject to flooding."

The house should not float free provided the applicants satisfy MCC 11.15.6315(D), which requires the house to be "anchored to resist flotation."

(ii) Create a Nuisance

The house, with or without a flood plain variance, would not constitute a "nuisance" as that term is used in planning and tort law. This part of the standard has been satisfied.

(iii) Fraud and Victimization

With regard to the "fraud and victimization" element, in the 1992 Mercer/Swank variance I said:

Fraud and victimization of the public would occur if the approval of the variance would lead unwitting purchasers to acquire the property without knowledge of the risk of serious flood damage. In this case, this variance proceeding has left no doubt that all of the applicants are well aware that the

bottom of the house is resting 4.5 feet below the 100 year flood level. In addition, adjoining property owners who signed a petition supporting a variance to the flood elevation requirement are also aware that the property lies within the flood fringe. Finally, by making the variance personal to the applicant, subsequent purchasers will be put on notice of the circumstances of the property.

The circumstances in this case are quite different; since the applicant is not the prospective resident, there may well be unwitting purchasers who could acquire the house without being aware that it was located within the flood plain.

During the hearing, Mr. John Mahaffey of Georgetown Realty referred to a new statute which would require this disclosure of the fact the property was within the flood plain. He was unable to provide a citation to the Oregon Revised Statutes at the hearing. My review of the statutes revealed ORS 104.465. "Seller's Property Disclosure And Disclaimer Statements." ORS 104.465(2)(b) specifies the contents, ("in substantially the following form") of the seller's disclosure statement. This includes, under section 8, "General": "D. To your knowledge, is the property in a designated flood plain?"

However, ORS 105.470(1) excludes "[t]he first sale of a dwelling never occupied" from the disclosure requirements in ORS 105.465.

After the hearing, Mr. Mahaffey sent the County an undated letter, which stated.

Enclosed is a disclosure form which we will fill out when we sell the homes on S.E. Liebe. We would be happy to accept a directive that the buyers are to receive this form concerning the 100 year flood plain.

Unfortunately, no disclosure form appears in the file. Even if one did, the County has no means of monitoring or enforcing such a disclosure requirement.

Based on this record, I am unable to conclude that fraud or perhaps unwitting victimization would not occur in the event a purchaser acquired the property without knowledge of the location in the flood plain and there lives or property were damaged in a flood.

(iv) Conflicts With Existing Local Laws Or Ordinances

The local laws and ordinances governing this application are expressed in the County Code and Plan. Given a finding that they have been satisfied, there is no "conflict with existing local laws or ordinances."

(e) Conclusion With Respect To Variance From The Flood Elevation Requirement

I conclude that the applicant has satisfied the variance standards in MCC 11.15.6323(B)(1) and not satisfied the standards in MCC 11.15.6323(B)(2), (3) and (4), as applied to its request for a variance from the flood elevation requirement in MCC 11.15.6315(B).

(3) Variance From The Flood-Proofing Requirements In MCC 11.15.6315(F)

As quoted above, MCC 11.15.6315(F) requires that in "all new construction:"

the electrical, heating, ventilation, plumbing and air conditioning equipment and other service facilities shall be designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

Subsections (2), (3) and (4) of the variance standard are not satisfied for the reasons given previously with respect to the variance for the flood elevation variance.

D. Applicable Sections Of The County Comprehensive Plan

1. Policy 14; Development Limitations

Comprehensive Plan Policy 14 is to

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

* * * * *

C. LAND WITHIN THE 100 YEAR FLOOD PLAIN

Multnomah Comprehensive Framework Plan at page 58.

Under the terms of Policy 14 and the implementation strategies, see Multnomah Comprehensive Framework Plan at 59, I find this policy has been implemented by the Flood Hazard District and has no independent application to this action.

2. Policies 37 And 38, In General

Both policy 37, "Utilities" and Policy 38, "Facilities" are prefaced begin with the statement: "The county's policy is to require a finding prior to approval of a legislative or quasi-judicial action that * * * ." "Action" is defined in MCC 11.15.8205 as a

*a proceeding in which the legal rights, duties or privileges of specific parties are determined only after hearing in which such parties are entitled to appear and be heard, including requests for: * * **

(D) Variances, except as otherwise provided herein;

** * * **

(F) Other requests for permits and other contested cases determining permissible uses of specific property.

Because this is a proceeding on an application for a variance, I find that it is an "action" and that consequently both of these policies apply.

As noted above, satisfaction of standards not addressed by the applicant to date, could be determined by the Planning Director before, or in conjunction with, either an appeal or the issuance of a building permit. Because compliance with Policies 37 and 38 may require the exercise of judgment as to facts and interpretation of the policies, notice of this subsequent decision and an opportunity for a hearing should be provided. ORS 197.763(2), 215.416, *Rhyne et al vs. Multnomah County, Swan & Trotter*, __ Or LUBA __ (1992.)

3. Plan Policy 37: "Utilities"

Multnomah County Plan Policy 37, "Utilities" provides:

POLICY 37

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

WATER AND DISPOSAL SYSTEM

A. THE PROPOSED USE CAN BE CONNECTED TO A PUBLIC SEWER AND WATER SYSTEM, BOTH OF WHICH HAVE ADEQUATE CAPACITY; OR

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 167.

As noted previously, the applicant would connect the proposed house to the City of Portland's sewer system. The signed Portland Fire District review establishes the existence of a hydrant 70' from the residence with adequate water pressure nearby. From this I conclude the house would also be served by City water. This evidence is sufficient to carry the applicants' burden of proof with respect to this portion of Policy 37.

The remainder of Policy 37 provides:

DRAINAGE

- E. *THERE IS ADEQUATE CAPACITY IN THE STORM WATER SYSTEM TO HANDLE THE RUN-OFF; OR*
- F. *THE WATER RUN-OFF CAN BE HANDLED ON THE SITE OR ADEQUATE PROVISIONS CAN BE MADE; AND*
- G. *THE RUN-OFF FROM THE SITE WILL NOT ADVERSELY AFFECT THE WATER QUALITY IN ADJACENT STREAMS, PONDS, LAKES OR ALTER THE DRAINAGE ON ADJOINING LANDS.*

ENERGY AND COMMUNICATIONS

- H. *THERE IS AN ADEQUATE ENERGY SUPPLY TO HANDLE THE NEEDS OF THE PROPOSAL AND THE DEVELOPMENT LEVEL PROJECTED BY THE PLAN; AND*
- I. *COMMUNICATIONS FACILITIES ARE AVAILABLE*

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 168.

There is no evidence in the record concerning energy and communications facilities, subsections E, F, G, H and I, although the location of the property within the urbanized portion of the County suggests these facilities are readily available.

The failure to address these standards is grounds for denial. However, the applicant might be able to address them in the event of a *de novo* appeal of this decision.

The concluding paragraph of Policy 37 is inapplicable to this quasijudicial proceeding.

4. Plan Policy 38: "Facilities"

Multnomah County Plan Policy 38, "Facilities" provides:

POLICY 38

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

SCHOOL

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

FIRE PROTECTION

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

POLICE PROTECTION

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

Multnomah County Comprehensive Framework Plan; Volume 2: Policies (September 1983)
at 169-170.

The David Douglas School District returned the "School District Review" form, with the signature of the Dr. Ron Russell, Assistant Superintendent, dated February 8, 1994. (The "no comment" box was checked.) This satisfies the requirement in subsection A of policy 38 that the school district has "an opportunity to review and comment on the proposal."

The completed Portland Fire District Review form, signed by Don Patty (undated), Plans Review provides sufficient evidence satisfying subsection B, ("there is adequate water pressure and flow for fire fighting purposes") and C (the fire district "had an opportunity to review and comment on the proposal.")

Lt. Bill Goss, of the Multnomah County Sheriff's Office returned the "Police Services Review" form, dated February 8, 1994, indicating there would be an "adequate" level of service "available to serve the proposed project."

The applicant has satisfied Policy 38.

E. State Statutes, Goals And Administrative Rules Applicable To The Decision

The provisions of state law governing county quasijudicial decisions, found in ORS 197.763 and 215.416 apply to this proceeding. They have been fulfilled through the notice of, and conduct of, the hearing on this matter.

No other provisions in ORS Chapters 197 and 215 are applicable.

No statewide planning goals and no Oregon Administrative Rules interpreting those goals apply to this quasijudicial permitting proceeding.

VI. CONCLUSIONS AND ORDER

A. Standards Which The Applicant Has Not Satisfied

I find that the evidence and argument offered by the applicant is insufficient to satisfy the "hardship" standard in MCC 11.15.6323(B)(2) and the "minimum variance necessary" standard in MCC 11.15.6323(B)(3), with respect to the applicant's request for a variance to the flood elevation standards and its implied request for a variance to the flood-proofing

requirements of MCC 11.15.6315(F).

I also find that the applicant failed to satisfy the "fraud" and "victimization" provisions in MCC 11.15.6323(B)(4), as to the flood elevation variance to MCC 11.15.6315(B) and the flood-proofing variance to MCC 11.15.6315(F).

These are grounds for denial.

B. Standards Which The Applicant Failed To Address

The applicant did not offer evidence addressing compliance with several provisions in the County Code and some of the applicable Plan policies. These standards and policies are:

MCC 11.15.6315(G)
MCC 11.15.6315(H)
Plan Policy 37 §§(E) through (I)
Comprehensive Framework Plan Policy 37, Sections E through I.

The applicant's failure to carry its burden of proof for these standards, is grounds for denial.

C. Standards Which The Applicant Has Satisfied

The applicant has satisfied the following applicable sections of the County Code and County Plan:

MCC 11.15.6323(B)(1), as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(1), as to flood-proofing variance to MCC 11.15.6315(F)
MCC 11.15.6323(B)(4), in part, as to flood elevation variance to MCC 11.15.6315(B)
MCC 11.15.6323(B)(4), in part, as to flood-proofing variance to MCC 11.15.6315(F)
Comprehensive Framework Plan Policy 14
Comprehensive Framework Plan Policy 37, Subsections A through D
Comprehensive Framework Plan Policy 38

D. Standards Which Are Inapplicable

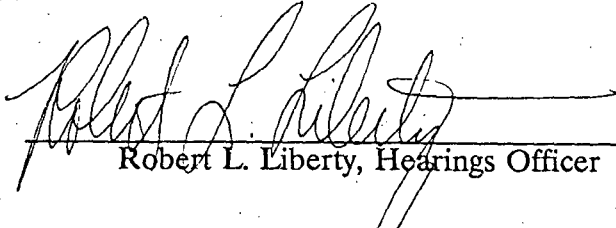
Although the following standards appear in otherwise relevant code sections, I found them inapplicable to this application or this proceeding:

MCC 11.15.6315(A),(B),(C),(D),(E),(I)
MCC 11.15.6323(A),(C),(E)

ORDER

For the foregoing reasons, the application is denied.

March 1994
Date


Robert L. Liberty, Hearings Officer

Signed by the Hearings Officer:	March 1, 1994
Decision Mailed to Parties:	March 21, 1994
Decision Submitted to Board Clerk:	March 21, 1994
Lay day to Appeal Decision:	4:30 p.m., April 1, 1994
Reported to Board of County Commissioners:	1:30 p.m., April 12, 1994

Appeal to the Board of County Commissioners

The Hearings Officer Decision may be appealed to the Board of County Commissioners (Board) by any person or organization who appears and testifies at the hearing, or by those who submit written testimony into the record. An appeal must be filed with the County Planning Division within ten days after the Hearings Officer decision is submitted to the Clerk of the Board. An appeal requires a completed "Notice of Review" form and a fee of \$300.00. Instructions and forms are available at the County Planning and Development Office at 2115 SE Morrison Street, Portland.

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

To appeal the Hearings Officer decision, a "Notice of Review" form and fee must be submitted to the County Planning Director. For further information call the Multnomah County Planning and Development Division at 248-3043.

MEETING DATE: MAY 10 1994
AGENDA NO: P-5

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: Designate Days to Consider Planning Items

BOARD BRIEFING Date Requested: _____

Amount of Time Needed: _____

REGULAR MEETING: Date Requested: May 10, 1994 - Planning Item Agenda

Amount of Time Needed: 5 Minutes

DEPARTMENT: DES **DIVISION:** Planning and Development

CONTACT: R. Scott Pemble **TELEPHONE #:** 3182
BLDG/ROOM #: 412/103

PERSON(S) MAKING PRESENTATION: R. Scott Pemble / John DuBay

ACTION REQUESTED:

☐ INFORMATIONAL ONLY ☐ POLICY DIRECTION ☒ APPROVAL ☐ OTHER

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

Request to adopt a Resolution to designate June 13, 1994, August 16, 1994 and August 30, 1994 as days necessary for deliberating land use planning issues.

5/10/94 Continued to 5/12/94

SIGNATURES REQUIRED:

ELECTED OFFICIAL: _____

OR

DEPARTMENT MANAGER: Betsy Williams

BOARD OF
COUNTY COMMISSIONERS
1994 MAY - 2 PM 4:00
MULTNOMAH COUNTY
OREGON

ALL ACCOMPANYING DOCUMENTS MUST HAVE REQUIRED SIGNATURES

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

0516C/63



MULTNOMAH COUNTY OREGON

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

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

TO: BOARD OF COUNTY COMMISSIONERS

FROM: R. SCOTT PEMBLE, PLANNING DIRECTOR

TODAY'S DATE: APRIL 25, 1994

REQUESTED PLACEMENT DATE: MAY 10, 1994 PLANNING ITEMS

RE: BOARD MEETING RULES - DESIGNATE DAYS TO CONSIDER PLANNING ITEMS

I. RECOMMENDATION/ACTION REQUESTED:

Request Board adopt a resolution to designate June 13, 1994, August 16, 1994, and August 30, 1994 as days necessary for deliberating land use Planning issues.

II. BACKGROUND/ANALYSIS:

The Land Conservation and Development Commission (LCDC) when approving the County's revised work program (94-WKPROG-00038) handed the county a plate full, to say the least. I have had several discussions with County Counsel staff concerning procedural requirements pertaining to the review and deliberation of the soon to be completed LCDC remand work. The long and short of the issues are, the timing of Board hearings will be driven by the LCDC order, other legal requirements (*i.e.*, the right to respond to new information presented at an evidentiary hearing) and County resources. Consequently, the Board must designate several meeting days, other than the second and fourth Tuesdays of the month, for Planning matters to adhere to the LCDC schedule.

Board rules dictate that Planning issues should be considered on the the second and fourth Tuesdays of the month. The LCDC approved schedule, coupled with other legal considerations require the Board to meet on other days of the month. The following days are requested for Planning items: June 13, 1994, August 16, 1994, and August 30, 1994.

If the Resolution is approved, on June 13, 1994, a joint Planning Commission and Board hearing will be convened to take testimony on two reports: The "West Hills Reconciliation Report" and the "Howard Canyon Reconciliation Report". The hearing will be held in the Board Room and would be convened as early in the P.M. as possible, since the hearing is expected to last a long time, up to four hours.

The "Reconciliation Reports" are the Planning staff's analysis and recommendation concerning the significance determination and level of protection for several Goal 5 resources (streams, scenic views, mineral/aggregate, and wildlife). At the August 16, 1994 and the August 30, 1994 meetings, the Board will consider Planning Commission proposed ordinances amending the County's Zoning Code for the protection of "Significant" Goal 5 resources.

III. FINANCIAL IMPACTS:

One time amendments to the Boards meeting rules will not have any financial impacts.

IV. LEGAL ISSUES:

Remand work must comply with the Statewide Land Use Planning Goal 5 rules and the LCDC approved work program. The Goal 5 rule requires that a specific planning process must be completed and the LCDC approved work program stipulates completion dates for various Goal 5 products of the process. Failure to properly perform the process within the specified timeline may result in costly litigation.

V. CONTROVERSIAL ISSUES:

The LCDC per their Periodic Review Remand Order and their approved work program require the County to redo the Goal 5 work for both Angell Brothers and Howard Canyon mineral/aggregate sites and other Goal 5 resources associates with both sites. When the Planning Commission and Board first considered the Goal 5 designation for both mineral/aggregate resource sites, considerable public debate occurred. The review of both "Reconciliation Reports" (*i.e.*, the reconsideration of past Board decisions on specific Goal 5 resources) is expected to be as controversial as the initial deliberations. Adding meeting dates to consider these planning matters, however, is not expected to be controversial.

VI. LINK TO CURRENT COUNTY POLICIES:

County Counsel advises that the Board designate additional meeting dates for Planning matters by resolution to implement the Board Meeting Rules.

VII. CITIZEN PARTICIPATION:

Parties to the County's Periodic Review hearing, before the LCDC, were given opportunity by the Commission to comment on the DLCD staff proposed work program. In general, comments were made in support of the DLCD staff proposed work program. The work program was subsequently adopted by the LCDC and that program now controls the County's schedule. If the Board approves the Resolution, notice will be sent to all households in the affected areas, at least three weeks in advance of the June 13, 1994 hearing.

VIII. OTHER GOVERNMENT PARTICIPATION:

Affected state and local agencies were notified when the LCDC considered the County's Remand Order work program. If the Board's approves the Resolution, affected state and local agencies will be notified of the approved meeting dates.

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

In the Matter of Designating June 13, 1994)
August 16, 1994, and August 30, 1994 as)
Meeting Days to Deliberate Land Use)
Planning Issues)

RESOLUTION

94 -

WHEREAS, ORS 197 requires the Land Conservation and Development Commission to Review the Multnomah County Comprehensive Framework Plan Periodically to determine consistency with the State Land Use Goals; and

WHEREAS, the Land Conservation and Development Commission reviewed in April 1993 the Multnomah County Comprehensive Framework Plan and determined it did not comply with State Land Use Goal 5; and

WHEREAS, the Land Conservation and Development Commission required Multnomah County to complete Goal 5 work by December 31, 1993 and subsequently approved a detailed work Program extending the County's deadline to September 6, 1994; and

WHEREAS, Multnomah County is required to complete various work by the deadlines stipulated within the Land Conservation and Development Commission approved Periodic Review Work Program ; and

WHEREAS, the Multnomah County Board of Commissioners has adopted rules for the conduct of meetings which established the second and fourth Tuesdays of the month and other times as necessary as meeting dates to consider Planning issues; and

WHEREAS, in order to comply with the Land Conservation and Development Commission's approved work program, the Multnomah County Board must meet on other days;

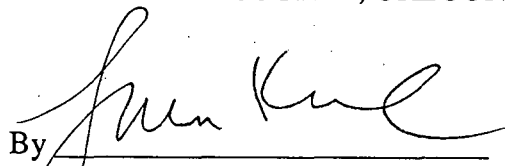
NOW, THEREFORE, IT IS RESOLVED that June 13, 1994, August 16, 1994, and August 30, 1994 are hereby designated by the Board of County Commissioners as meeting dates to consider Planning issues.

APPROVED this 10th day of May, 1994

MULTNOMAH COUNTY, OREGON

REVIEWED
COUNTY COUNSEL FOR
MULTNOMAH COUNTY, OREGON

By _____
Beverly Stein
Multnomah County Chair

By 

John L. Dubay
Laurence Kressel