BEFORE THE BOARD OF COUNTY COMMISSIONERS

FOR MULTNOMAH COUNTY, OREGON

In the Matter of CU 17–93 & HV 9–93, Review of a decision of the Hearings Officer, denying Variances and Non-Resource Related Residence for property at 3130 NW Forest Lane	)))))	**FINAL ORDER** 93-359

On September 28, 1993, the Board of County Commissioners conducted a public hearing on the record plus additional testimony in the above entitled matter. Based on the evidence and argument of the parties, it is ORDERED:

1) The Decision of the Hearings Officer is affirmed, and
2) The Findings and Conclusions in the Hearings Officer's decision are adopted and made a part of this order.

Dated this 2nd day of November, 1993.

BOARD OF COUNTY COMMISSIONERS
MULTNOMAH COUNTY, OREGON

By _____
Beverly Stein, Chair

REVIEWED
LAURENCE KRESSEL, COUNTY COUNSEL
FOR MULTNOMAH COUNTY, OREGON

By _____
John DuBay, Chief Deputy County Counsel

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

DECISION
OF THE HEARINGS OFFICER

This decision consists of Findings and Conclusions
August 13, 1993

CU 17-93 **HV 9-93**	**Conditional Use Request** **Lot Size Variance**	Sectional Zoning Map # 11

I. SUMMARY

Location: 3130 NW Forest Lane

Legal: Tax lot '77', Section 25, T1N-R1W, WM, Multnomah County, 1992 Assessor's Map

Site size: 4.06 acres (variance); 2.23 acres (conditional use)

Owner/Applicant: William Hackett represented by Michael Robinson

Comp Plan Map: Multiple Use Forest (when the applications were filed)

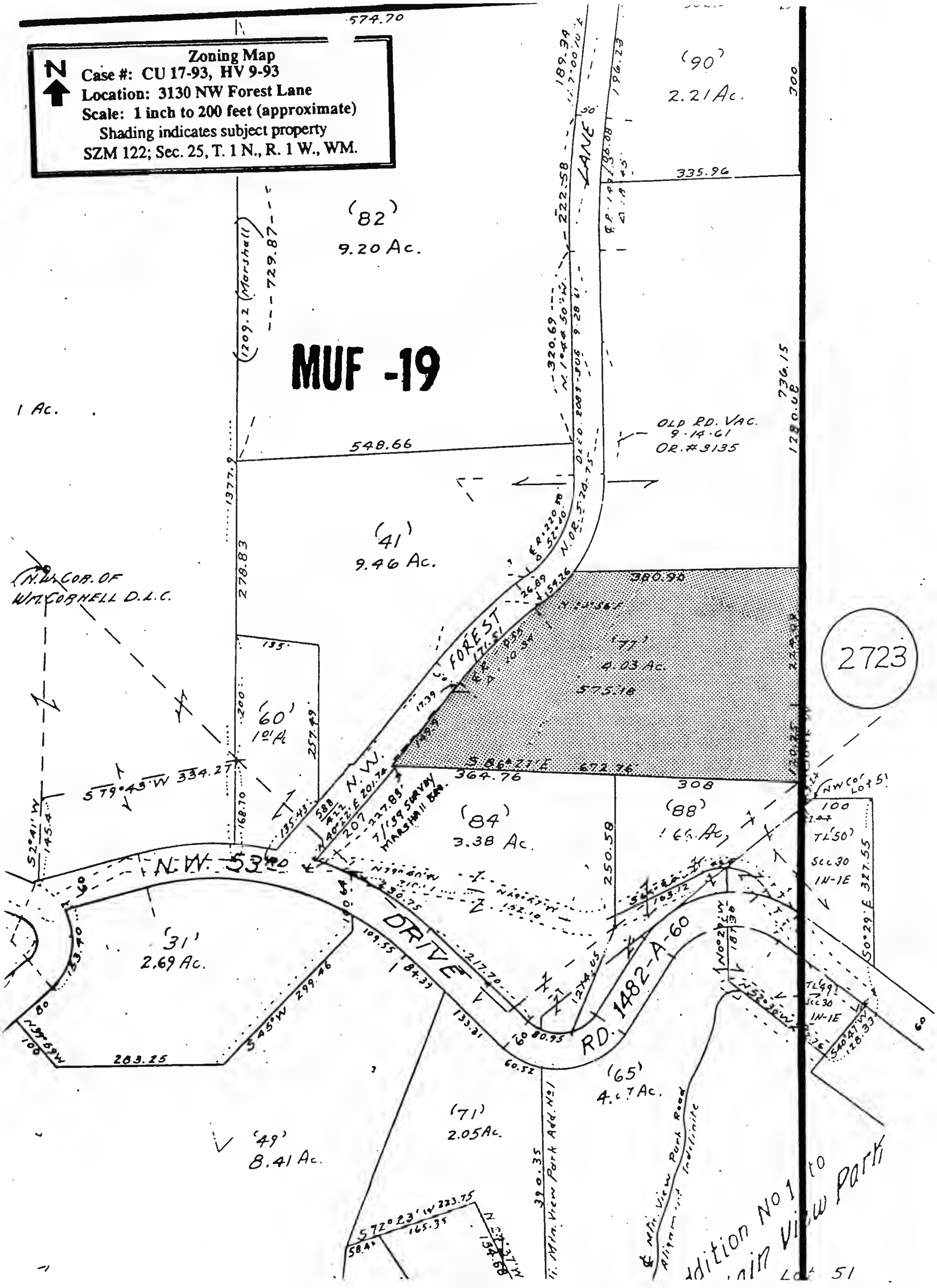
Zoning: MUF-19 (Multiple Use Forest) (when the applications were filed)

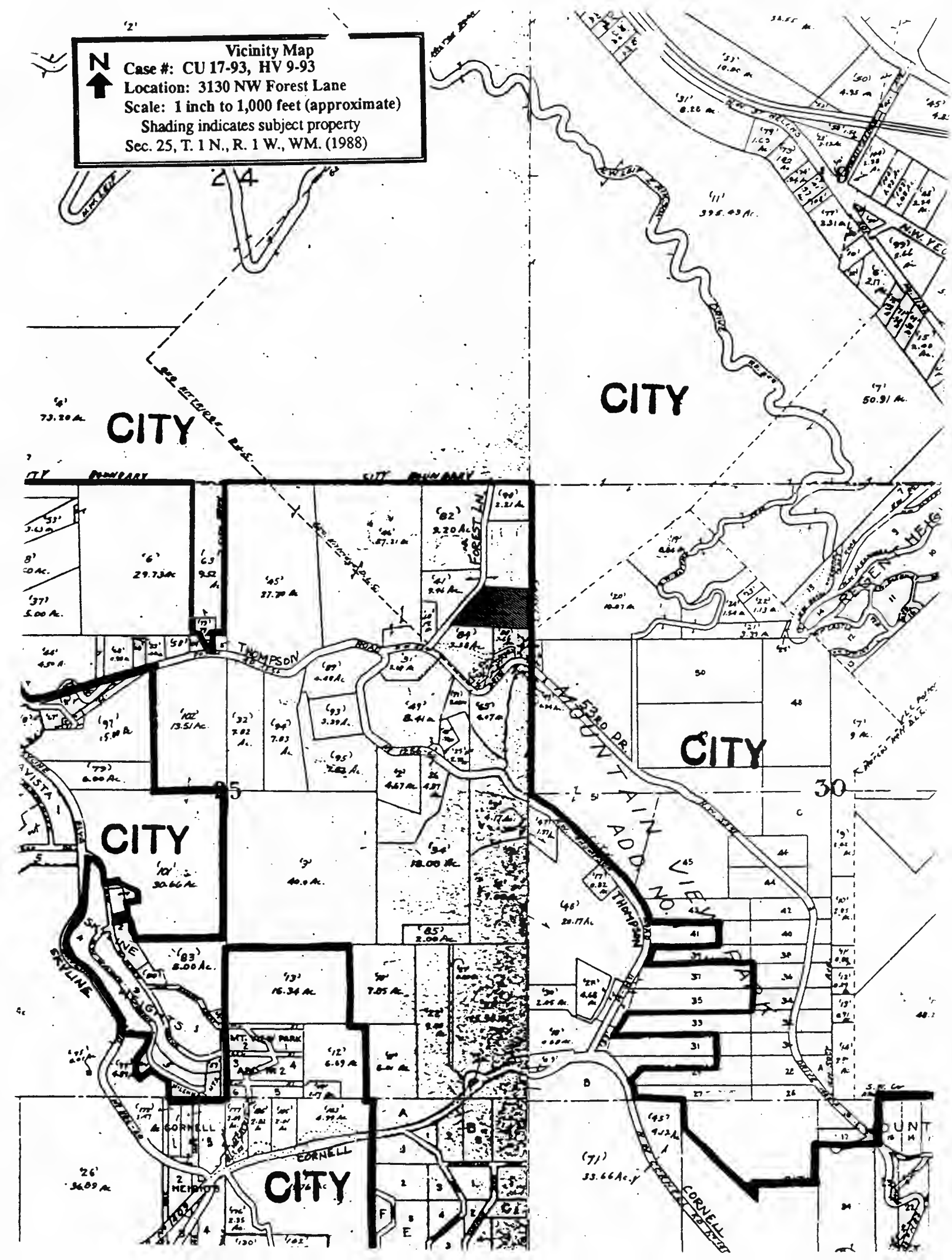
Decision: Denied

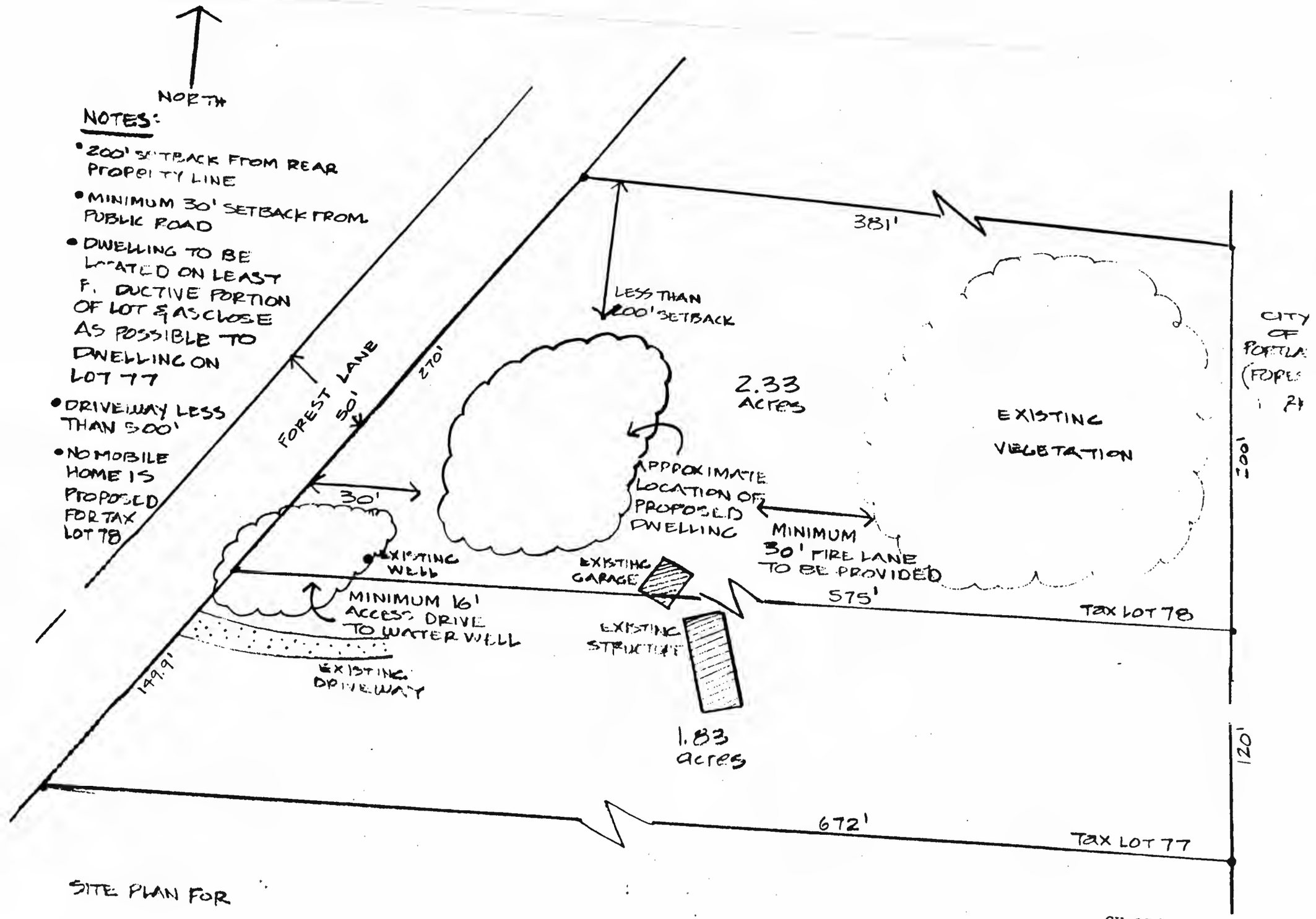
The applicant requests approval of two variances to the minimum lot size standard in the MUF-19 (Multiple Use Forest) zone. The minimum lot size in the zone is 19 acres. The applicant proposes lots that contain 1.83 and 2.23 acres. The two proposed lots were created by deed in 1967 and were acquired by the applicant in 1967 and 1978. They are aggregated into one Lot of Record for zoning purposes by Multnomah County Ordinance 236 (MCC 11.15.2182(C)). The effect of granting the variances would be to extinguish the aggregation and to recognize the two parcels as separate for zoning purposes.

There is a dwelling on the 1.83-acre lot. If the variances are granted, the applicant requests approval of a conditional use permit for a non-resource dwelling on the proposed 2.23-acre lot. The proposed dwelling would be less than 200 feet from NW Forest Lane and side lot lines. A minimum 30-foot fire lane would be cleared and maintained around the dwelling. A drive would extend to the dwelling from NW Forest Lane. An existing well will serve the existing and new homes. A subsurface sanitation system will serve the new home.

Regarding the variances, major issues include whether the applicant carried the burden of proving that (1) the property is subject to an unusual condition; (2) the subject property is more restricted by the lot size regulation than other properties; (3) the variances will not be materially detrimental to nor adversely affect adjoining properties; and (4) the variances will not adversely affect realization of the comprehensive plan.


Zoning Map
N
Case #: CU 17-93, HV 9-93
Location: 3130 NW Forest Lane
Scale: 1 inch to 200 feet (approximate)
Shading indicates subject property
SZM 122; Sec. 25, T. 1 N., R. 1 W., WM.
MUF -19
2723
(82)
9.20 Ac.
(90)
2.21 Ac.
(41)
9.46 Ac.
(77)
4.03 Ac.
(60)
(84)
3.38 Ac.
(88)
(31)
2.69 Ac.
(65)
(71)
2.05 Ac.
(49)
8.41 Ac.
1 Ac.
N.W. FOREST
LANE
N.W. 53RD
DRIVE
RD. 1482-A-60
OLD RD. VAC.
9-14-61
OR.#3135
N.W. COR. OF
WM. CORNELL D.L.C.
574.70
548.66
335.96
380.90
364.76
308
283.25
Mtn. View Park Road


Vicinity Map
Case #: CU 17-93, HV 9-93
Location: 3130 NW Forest Lane
Scale: 1 inch to 1,000 feet (approximate)
Shading indicates subject property
Sec. 25, T. 1 N., R. 1 W., WM. (1988)
N
CITY
CITY
CITY
CITY
CITY
FOREST LN.
THOMPSON
MOUNTAIN VIEW ADD. NO.
CORNELL
SKYLINE
MT. VIEW PARK
ADD. NO. 2
25
30



SITE PLAN FOR

CU 17/93
HV 9-93

Regarding the conditional use permit, major issues include whether the applicant carried the burden of proving that (1) the lot complies with lot size standards and (2) the dwelling would be compatible with primary uses on other nearby properties or would interfere with resources or resource management practices or materially alter the stability of the land use pattern of the area.

The applicant also raises the issues of (1) whether denial of the variances would result in a taking of all reasonable economic value of the property under state and federal constitutions; (2) whether the county gave adequate notice to the applicant of the 1980 zone change to MUF-19, and (3) whether aggregation violates state law.

Hearings Officer Larry Epstein held a public hearing to receive testimony and evidence regarding the applications on July 19, 1993 and held open the public record until August 2, 1993 to receive additional written testimony and evidence. The hearings officer finds that the variances do not comply with any of the applicable approval criteria, and the conditional use application fails to comply with all applicable approval criteria for a non-resource dwelling in the MUF-19 zone.

II. FINDINGS OF BASIC FACTS ABOUT THE SITE AND VICINITY

A. History and status of the site.

1. The applicant owns two contiguous parcels, hereinafter referred to collectively as "the Site".

a. The southerly parcel was created by deed dated November 30, 1967 and was identified as Tax Lot '77' until the two parcels were merged. The applicant acquired TL '77' in 1967. See attachment 4 of Exhibit 13 for the deed. The applicant built a single family home on it in 1978.

b. The northerly parcel was created by deed dated November 30, 1967 and was identified as Tax Lot '78' until the two parcels were merged. See attachment 2 of Exhibit 4 for the deed. The applicant contracted to acquire TL '78' in 1978 and acquired fee title to it in 1981. See attachment 5 of Exhibit 13 for the deed.

c. When these two parcels were created, the Site was zoned R-20 (Single Family Residential). The minimum lot size was 20,000 square feet. See attachment 3 of Exhibit 4 for the R-20 regulations. In 1977, the County rezoned the Site MUF-20. In 1980, the County rezoned the Site MUF-19. The MUF-19 regulations contained an aggregation requirement; that is, a requirement that contiguous, substandard-sized lots under common ownership be treated as one lot for purposes of zoning.

d. The applicant merged the two parcels for tax purposes on January 17, 1985. See the attachment to Exhibit 12 for the merger request. The two parcels are now identified as Tax Lot '77' on the Assessor's Map. However, the hearings officer will continue to refer to the two parcels as Tax Lots '77' and '78' when it is appropriate to distinguish between them. The hearings officer assumes the merger of tax lots does not affect the status of the Site for purposes of zoning or alienability.

B. Existing conditions and proposed use of the Site.

1. The Site is situated on the east side of NW Forest Lane about 200 feet north of its intersection with NW 53rd Drive. It has the following dimensional characteristics:

	TL '77'	*TL'78'*	*Total site*
Width	120 feet	200 feet	320 feet
Depth	575 to 672 feet	381 to 575 feet	381 to 672 feet
Area	1.83 acres	2.23 acres	4.06 acres

2. Based on the site plan, there is a single family detached dwelling situated on TL '77' about 240 feet east of NW Forest Lane, 60 feet from the south edge of the lot, and near the north edge of the lot. A detached accessory structure (garage) is situated northwest of the home straddling the line between TL '77' and '78'. There is a gravel drive from NW Forest Lane to the garage and home. There is a well situated near the southwest corner of TL '78' which serves the existing home. Based on the aerial photographs, most of the Site and surrounding area are forested. Based on Exhibit 20, TL '78' contains 25- to 35-year old maple and alder with few conifer trees. Most of the trees are of poor commercial quality. The Site contains slopes of up to 70 percent, with steepest slopes in the east half of the Site, limiting access to and potential value of timber. Based on Figure 3A of the county Geologic and Slope Hazard Map, the Site is not in an identified hazard area.

3. The applicant proposes to build a single family home on TL '78' at least 30 feet from NW Forest Lane. It would be about 120 feet east of the road, based on the site plan. The specific setbacks are not identified. The applicant states that the home will be as close as possible to the existing home on TL '77', but will be less than 200 feet from the north edge of the parcel. The applicant does not describe what will be done with the garage that straddles the line between the two parcels, but the hearings officer assumes it will be relocated or will be addressed by a lot line adjustment or easement if the applications are granted. The applicant proposes to provide water to the new dwelling from the existing well. A well log accompanying Exhibit 43 shows that the well produced about 16 gallons per minute (gpm) during a pump test. The applicant proposes to use a subsurface sanitation system to serve the new dwelling. The County Sanitarian notes that a Land Feasibility Study must be done to determine whether such a system can be accommodated. Such a study is not in the record. The applicant proposes to provide a 16-foot gravel drive to the new dwelling; it is not clear from the record whether the applicant will extend the drive serving the dwelling on TL '77' or will build a separate drive to NW Forest Lane.

4. Based on Exhibits 45 and 46, roughly the southwest half of the Site is situated in the Balch Creek basin. The county has not adopted regulations to protect that basin other than those that apply generally to development in the county.

a. The applicant did not provide specific measures to address erosion or storm water quality protection, treatment or disposal. The hearings officer assumes potential erosion can be prevented or mitigated and the storm water from the relatively small impervious area of the Site can be treated as necessary and discharged on the Site, provided appropriate plans are prepared and approved.

C. Existing and potential land uses in the vicinity of the Site.

1. Immediately north of the Site is a roughly 4-acre lot of record that is forested and not otherwise developed. Immediately east of the Site is Forest Park. Immediately south of the Site are two lots of record (1.66-acre and 3.38-acre), each of which is developed with a single family home. West of the Site across Forest Lane is a forested lot of record.

2. The vicinity of the Site is a roughly one-half square mile area to the north, west, and east. This is an appropriate area to consider, because it is the unincorporated portion of Section 25, T1N, R1W, WM that was zoned MUF-19 when the applications were filed. Therefore, this area is most like the subject Site for purposes of zoning and is most likely to be affected by the proposed development.

a. Within this vicinity are three lots containing more than 19 acres. There are 36 substandard-sized lots (those with less than 19 acres). Twenty of those lots are aggregated into eight lots of record listed below:

Tax lots aggregated in lot of record	*Area*
TL '77' & '78'	4.06 acres
TL '6' & '33'	30.39 acres
TL '89', '93' & '94'	15.62 acres
TL '2' & '26'	9.25 acres
TL '65' & '71'	6.12 acres
TL '3', '4', '34' & '85'	33.17 acres
TL '9', '10' & '11'	52.86 acres
TL '21' & '22'	15.57 acres

b. There are 25 dwellings in the vicinity. Eight of the dwellings (32%) are situated on lots of record that aggregate two or more substandard lots. There are only two undeveloped lots of record. If each parcel aggregated by MCC 11.15.2182(C) could be developed separately, at least seven dwellings could be sited in the vicinity in addition to the applicant's. See the map on page 13 of the county staff report (Exhibit 40). Dwellings also could be proposed on tax lots '21' and '33', bringing the total to 9 (a 36% increase in dwellings in the vicinity).

3. The vicinity of the Site also includes Forest Park, which occupies a large area to the east and north. The City of Portland has designated Forest Park as a significant natural resource under Statewide Planning Goal 5. The park is in forest, open space and recreational uses.

4. The vicinity of the Site also includes Balch Creek. The City of Portland has recognized the creek basin as a significant natural resource under Statewide Planning Goal 5 and has adopted the Balch Creek Watershed Protection Plan to manage the resource conflicts in the incorporated area of that basin. See Exhibit 46.

5. The vicinity of the Site also includes forested habitat for wildlife. That habitat was recently evaluated for the county. See Exhibit 47. That Exhibit includes the following statements:

Residential development poses some particular conflicts with forest wildlife. Domestic dogs and cats prey on small vertebrates including shrews and woodpeckers. Additionally when dogs form packs which chase black-tailed deer, elk and other large and medium-sized mammals.

Another concern is the establishment of non-native ornamental species of plants, gardens and lawns. Non-native ornamental plants can become the seed source for introduction of escaped exotic plant species into natural plant communities. Lawn carte and garden products such as pesticides and chemical fertilizers can adversely affect water quality. Some pesticides are toxic to wildlife and native plant species. Many garden crops will attract wildlife, and conflicts develop when crops are not sufficiently fenced or otherwise protected from wildlife depredation. This problem can increase in situations where natural habitats are declining in quality and quantity in the area, forcing displaced animals to overcome their reluctance to avoid humans in order to get enough food to survive. (p. 9)

A once contiguous forested habitat is rapidly being fragmented and nibbled away at the edges by timber extraction, road construction and residential development. The ecological integrity of Forest park is dependent upon the maintenance of forest habitat along the entire peninsula of which it is the southern portion...

Forest Park alone is not large enough to support self-sustaining populations of medium- and large-sized mammals, such as elk, bobcats, mountain lions and black bears, for which hundreds of square miles of habitat would be required (cit. omitted). *These species, as well as smaller and much less mobile species, will not be able to pass securely through the northern part of this peninsula if current trends of urbanization and clearcutting continue without regard to maintaining contiguous forested habitat throughout. The long-term survival of small less mobile species is dependent on the size of current populations within the undisturbed portion of Forest park. Many of these species may already have been lost, or are in the process of disappearing, from residential and clearcut areas. The success of future colonization or recolonization of this peninsula will depend on habitat conditions throughout the peninsula...* (p. 25)

III. HEARING AND RECORD

A. Hearing and record generally.

1. Hearings Officer Larry Epstein received testimony at the public hearing about these applications on July 19, 1993. The hearings officer held open the public record until August 2, 1993 to receive additional written evidence.

2. A record of that testimony and evidence is included herein as Exhibit A (Parties of Record), Exhibit B (Taped Proceedings), and Exhibit C (Written Testimony). These exhibits are filed at the Multnomah County Department of Environmental Services. The contents of Exhibit C are listed in an appendix to the decision.

B. Objections to introduction of evidence.

1. The applicant objected to the introduction of Exhibits 46 and 47 into the record, arguing they do not contain and are not relevant to applicable approval criteria and standards in the County Code. See pages 2 to 4 of Exhibit 43.

a. The hearings officer overruled the objection and admitted both documents into the record.

b. The hearings officer finds that both documents relate to the character of land uses in the vicinity, which makes them relevant under MCC 11.15.8505(A) through (C); they both relate to the compatibility of the proposed dwelling with uses in the vicinity and the land use pattern of the area, which makes them relevant under MCC 11.15.2172(C)(3); and they both relate to subject matter relevant to compliance with comprehensive plan policy 12 (Multiple Use Forest).

2. Mr. Rochlin objected to introduction of Exhibit 34 and applicant's arguments and evidence related to constitutional claims.

a. The hearings officer overruled the objection and admitted the exhibit, arguments and evidence related to constitutional claims.

b. The hearings officer finds that exhibits, argument and evidence have to be introduced by the applicant to preserve his rights to raise those issues on appeal. As noted in finding V below, the constitutional arguments are not within the hearings officer jurisdiction, and they are not relevant to an applicable approval standard or criterion in the County Code. But such exhibits, arguments and evidence should be accepted to give the applicant the opportunity to preserve those issues on appeal to the courts.

IV. APPLICABLE LAW AND RESPONSIVE FINDINGS

A. Compliance with MCC 11.15.8505 (Variances).

1. MCC 11.15.8515(A) defines a "Major Variance" as one that is "in excess of 25 percent of an applicable dimensional requirement." The applicant proposes variances of 88 and 90 percent. Therefore the applicant is requesting two Major Variances.

2. MCC 11.15.8505(A) contains four approval criteria for a variance. In addition it provides the following in an introductory paragraph:

> ***The Approval Authority may permit and authorize a variance from the requirements of this Chapter only when there are cause (sic) practical difficulties in the application of the Chapter. A Major Variance shall be granted only when all of the following criteria are met...***

a. Mr. Rochlin argued that the introductory paragraph cited above contains an additional approval criterion, i.e., that the variance is warranted by practical difficulties.

b. The hearings officer finds the term "practical difficulties" in the introductory paragraph is not intended to be an approval criterion for a variance, based on

the plain meaning of the second sentence in that paragraph. The second sentence subjects a Major Variance only to the criteria that *follow* the paragraph. The hearings officer construes the paragraph to reflect a legislative intent that practical difficulties warrant a variance. The nature of the practical difficulties is defined in the four criteria that follow the paragraph.

3. MCC 11.15.8505(A)(1) provides the following criterion:

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 circumstance 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.

a. The applicants arguments about this criterion are provided at page 12 of Exhibit 40. In summary, the applicant argues that the Site is subject to a circumstance or condition that does not apply to other property in the vicinity, because (1) other non-aggregated substandard-sized Lots of Record lots in the vicinity are developed with dwellings; (2) the applicant could have conveyed one of the tax lots to a third party before the effective date of the 1980 zone change to create two non-aggregated substandard-sized Lots of Record lots; and (3) it would be unfair to deny the applicant the same chance now.

b. The hearings officer finds that the Site is not subject to a circumstance or condition that does not apply generally to other property in the same vicinity or district.

(1) All substandard-sized properties in the MUF-19 zone in Multnomah County are subject to aggregation. It is not an unusual condition for substandard-sized lots in the MUF-19 zone to be aggregated; they are all aggregated.

(2) Based on finding II.C.2, twenty of the 36 lots in the vicinity are aggregated; therefore, it is not an unusual condition or circumstance for substandard-sized lots in the MUF-19 zone in the vicinity of the Site to be aggregated; they are all aggregated. The applicant's lot of record is the smallest of those made up of aggregated parcels; yet it can be developed to the same extent as the largest of the substandard lots of record.

(3) The intended use of TL '78' for a non-resource dwelling on a substandard-sized lot is not unusual. There are other non-resource dwellings on aggregated and non-aggregated parcels in the vicinity and district.

(4) The hearings officer finds that it is not an unusual condition or circumstance for land use laws to change and for rights created by older laws to be changed or eliminated by newer laws. The applicant could have conveyed his interest in TL '78' before the effective date of Ordinance 236, avoiding aggregation. His failure to do so at that time does not constitute an unusual condition or circumstance. Many other owners of substandard-sized properties in the MUF-19 zone failed to do so, too.

4. MCC 11.15.8505(A)(2) provides the following criterion:

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.

a. The applicant's argument is reprinted at page 14 of Exhibit 40. In summary, the applicant argues the minimum lot size standard restricts the subject property to a greater degree than it restricts other properties in the vicinity. In particular, of the seven lots of record nearest the Site, five are substandard in size and have homes on them. Of the 36 substandard and three 19+acre lots in the vicinity, 22 contain dwellings. The implication is that, if these other lots can be developed with dwellings, then a requirement that prohibits the applicant from doing so on TL '78' is more restrictive. The applicant also argues that it is more restrictive to apply MCC 11.15.2182(A)(3) in a manner that permanently aggregates the two former tax lots. (See also finding V.D.2.)

b. The hearings officer finds that the zoning requirement does not restrict the use of the subject property to a greater degree than it restricts other properties in the vicinity or district.

(1) Other property in the vicinity is subject to the lot size standard in exactly the same way the applicant's property is subject to it. The impact of the standard is the same for each contiguous ownership: a minimum lot size of 19 acres is required. If the lot is smaller than 19 acres, then it must be aggregated with other contiguous properties under the same ownership. Each Lot of Record can be developed consistent with the standards for a Lot of Record in the MUF-19 zone. Nothing makes the impact of the lot size standard on the Site more onerous than its impact on other properties in the vicinity.

(2) The Site is the smallest aggregated parcel in the vicinity; but that does not make the minimum lot size standard more onerous. For purposes of permitted uses, it could be argued that the regulations of the MUF-19 zone treat the applicant's Site better than other properties in the vicinity, because they allow the Site to be developed with a dwelling notwithstanding it is smaller than most other lots of record in the vicinity.

5. MCC 11.15.8505(A)(3) provides the following criterion:

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 affect the appropriate development of adjoining properties.

a. The applicant's argument is reprinted at page 15 of Exhibit 40. In summary, the applicant argues another single family home in the area 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 affect the appropriate development of adjoining properties, because there are single family homes in the vicinity and on five of seven adjoining parcels.

b. The hearings officer finds that the variances would be materially detrimental to the public welfare, because they would subvert the adopted policy of the County to prevent excessive non-resource use in resource areas by requiring minimum lot sizes commensurate with the nature of the area. The minimum lot size in the zone is 19 acres. The hearings officer finds the minimum lot size standard reflects a legislative intent that the Multiple Use Forest area be characterized by lots at least that large to preserve the opportunity for farm and forest uses by preserving land in large blocks. Preserving land in large blocks also reduces the potential for non-resource uses. The applicant proposes lots that are 88 and 90 percent smaller than the minimum lot size. Such significant deviations from the minimum lot size standard conflict with the adopted legislative policy.

c. The hearings officer also finds that the applicant failed to sustain the burden of proof that granting the variances would not adversely affect appropriate development of adjoining property.

(1) Although each application is judged on its own merits, if the requested variances (and conditional use permit) are granted, they would result in a substantial change in the economic value of the applicant's property. It is asserted by the applicant that TL '78' has no economic value if a building permit cannot be issued for it as a separate lot of record. See Exhibit 24. If the variances are granted, the value of TL '78' would be at least $60,000 to $100,000. See Exhibits 16 and 24. This difference in value would create a powerful economic incentive for owners of other aggregated properties to apply for variances and conditional use permits for non-resource dwellings throughout the MUF-19 zone generally and in the vicinity of the Site particularly. The appropriate development of adjoining property is for multiple use forest purposes on lots of 19 acres or more or on smaller lots of record. By creating a powerful economic incentive for the creation of more substandard-sized parcels, the proposed variances are contrary to the appropriate development of adjoining property.

(2) Based on Exhibit 47, the hearings officer finds that approval of the variances would be contrary to the appropriate development of adjoining property to the east, i.e., Forest Park. The granting of the variances would allow the granting of a conditional use permit for an additional non-resource dwelling on a parcel adjoining the Park. The impacts of residential development on the quality of wildlife habitat in the Park and the preservation of a continuous wildlife corridor are described in Exhibit 47. Although the incremental impact of the proposed variances is small per se, the cumulative impact of the variance in combination with other development that is or may be permitted in the vicinity, would be significantly adverse, particularly if the granting of these variances provides an incentive for other variances in the vicinity of the Park.

6. MCC 11.15.8505(A)(4) provides the following criterion:

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.

a. The applicant's argument is reprinted at page 16 of Exhibit 40. In summary, the applicant argues the variances will not adversely affect realization of the comprehensive plan, because the zoning that implements the plan allows non-resource dwellings such as the one being proposed.

b. The hearings officer finds that MCC 11.15.8505(A)(4) is vague. It is not clear what is meant by the phrase "realization of the comprehensive plan." The hearings officer construes that phrase to require a variance to comply with applicable policies of the comprehensive plan, because only if the plan policies are implemented will the comprehensive plan be realized.

c. The hearings officer finds that granting of the variances will not be consistent with comprehensive plan policy 12 (Multiple Use Forest) and that denial of the variances is more consistent with the realization of the comprehensive plan. That policy provides as follows in relevant part:

The County's policy is to designate and maintain as Multiple Use Forest, land areas which are:

a. Predominantly in forest site class I, II, III, for Douglas fir as classified by the U.S. Soil Conservation Service;

b. Suitable for forest use and small wood lot management, but not in predominantly commercial ownerships;

c. Provide (sic) with rural services sufficient to support the allowed uses, and are not impacted by urban-level services; or

d. Other areas which are:

(1) Necessary for watershed protection or are subject to landslide, erosion or slumping; or

(2) Potential reforestation areas, but not at the present used for commercial forestry; or

(3) Wildlife and fishery habitat areas, potential recreation areas, or of scenic significance.

The County's policy is to allow forest use along with non-forest use; such as agriculture, service uses, and cottage industries; provided that such uses are compatible with adjacent forest lands.

(1) The Site adjoins forest land, based on the aerial photo and Exhibits 46 and 47. Residential development is not compatible with forest lands for the reasons identified in Exhibits 46 and 47 and noted in finding II.C.5. Therefore, variances that allow residential development in a forested area are not consistent with the goal of policy 12 to manage MUF lands for forest uses and compatible non-forest uses. Although some potential adverse impacts could be mitigated, nothing obligates the county to find such mitigation is sufficient to prevent or reduce the potential for the incompatibilities, particularly where mitigation measures are difficult to monitor and enforce over time.

(2) The Site is just one instance where parcels are aggregated into a lot of record. Arguably, granting the proposed variances for this one Site would have a negligible effect per se on realization of the comprehensive plan as a whole. However, the variances could have a synergistic impact. The Site and related circumstances of this applicant are characteristic of many other aggregated substandard lots in the farm and forest resource zones and their owners. If the variances are granted for this Site, then there is a powerful economic incentive for owners of other similarly-situated properties to do the same. To the extent granting the proposed variances would spur similar applications by others, it would increase the potential that other variances would be granted, thereby decreasing the likelihood that the MUF area would remain a principally resource-oriented zone, in conflict with policy 12.

d. The hearings officer finds that granting of the variances will not be consistent with comprehensive plan Policy 22 (Energy Conservation) and that denial of the variances is more consistent with the realization of the comprehensive plan. That policy provides as follows in relevant part:

> ***The county shall require a finding prior to approval of a legislative or quasi-judicial 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...***

(1) The hearings officer finds that increasing density in a rural area does not result in an energy-efficient land use practice, because it consumes more energy to travel from the rural area to the urban area where jobs, schools and shopping are located.

(2) The hearings officer also finds that, to the extent housing in the rural area fulfills housing needs that would otherwise be provided in the urban area, granting the variances would be inconsistent with the policy of increasing urban densities.

B. Compliance with MCC 11.15.2162 - 11.15.2194 (MUF zone).

1. Because the variances are denied, the Site contains only one lot of record. A second dwelling is not permitted on a single lot of record. Therefore, the conditional use permit must be denied, too. However, the following findings are adopted in the interest of providing a complete decision.

2. MCC 11.15.2172(C) allows a residential use in the MUF-19 zone, not in conjunction with a primary use, subject to six criteria.

3. MCC 11.15.2172(C)(1) provides:

> ***The lot shall meet the standards of MCC .2178(A), .2180(A) to (C), or .2182(A) to (C).***

a. The hearings officer finds the lot in question (i.e., TL '78') does not comply with MCC .2178(A), because it does not contain 19 acres. It does not comply with MCC .2180(A), because the applicant did not apply for or receive approval of a lot of exception. It does not comply with MCC .2182(A) to (C), because it does not contain 19 acres, is aggregated with TL '77', and is not divided from TL'77' by a county-maintained road or zoning district boundary.

4. MCC 11.15.2172(C)(2) provides in relevant part:

> ***The land is incapable of sustaining a farm or forest use, based upon one of the following:***
>
> ***(c) The lot is a Lot of Record under MCC .2182 (A) through (C), and is ten acres or less in size.***

a. The hearings officer finds that TL '78' is not a lot of record under MCC .2182(A) through (C), because it is aggregated with TL '77'. The lots are contiguous, smaller than 19 acres and are owned by the same party.

5. MCC 11.15.2172(C)(3) provides:

A dwelling, as proposed, is compatible with the primary uses as listed in MCC 11.15.2168 on nearby property and will not interfere with the resources or the resource management practices or materially alter the stability of the overall land use pattern of the area.

a. The hearings officer finds that a dwelling on TL '78' would be compatible with other rural residential uses in the vicinity, but would be incompatible with one primary uses on nearby property, i.e., Forest Park, for the reasons listed in Exhibit 47 and cited above in findings II.C.5 and IV.A.5.c(2).

b. The hearings officer finds that a dwelling on TL '78' would materially alter the stability of the overall land use pattern of the area for the same reason the variances would be detrimental to the public welfare; i.e., allowing a second dwelling on this lot of record would effectively eliminate the aggregation requirement of the zone under circumstances that differ little if at all from the circumstances that apply to many other aggregated parcels, making it more likely that further non-resource development would be proposed. The incremental effect of such development would alter the land use pattern of the area which the MUF regulations seek to preserve.

6. MCC 11.15.2172(C)(4) provides:

The dwelling will not require public services beyond those existing or programmed for the area.

a. The hearings officer finds the dwelling will not require public services beyond those existing or programmed for the area, based on the response forms in the application, provided the applicant shows that private water and sanitation systems are approved before construction is authorized.

7. MCC 11.15.2172(C)(5) provides:

The owner shall record with the Division of records and Elections a statement that the owner and successors in interest acknowledge the rights of owners of nearby property to conduct accepted forestry or farming practices.

a. The hearings officer finds the applicant can record such a statement before construction is authorized.

8. MCC 11.15.2172(C)(6) provides:

The residential use development standards of MCC 11.15.2194 will be met.

a. The hearings officer finds the applicant does or can comply with the residential use development standards, based on finding IV.B.9, except as noted therein.

9. The residential use development standards of MCC 11.15.2194 require the following:

a. The fire safety measures outlined in the "Fire Safety Considerations for Development in Forested Areas," published by the Northwest Inter-Agency Fire Prevention Group, including at least the following:

(1) Fire lanes at least 30 feet wide shall be maintained between a residential structure and an adjacent forested area; and

(2) Maintenance of a water supply and of fire fighting equipment sufficient to prevent fire from spreading from the dwelling to adjacent forested areas;

b. An access drive at least 16 feet wide shall be maintained from the property access road to any perennial water source on the lot or an adjacent lot;

c. The dwelling shall be located in as close proximity to a publicly maintained street as possible, considering the requirements of MCC 11.15.2178(B);

d. The physical limitations of the Site which require a driveway in excess of 500 feet shall be stated in writing as part of the application for approval;

e. The dwelling shall be located on that portion of the lot having the lowest productivity characteristics for the proposed primary use, subject to the limitation of subpart #3 above;

f. Building setbacks of at least 200 feet shall be maintained from all property lines, wherever possible, except:

(1) A setback of 30 feet or more may be provided for a public road; or

(2) The location of dwelling(s) of adjacent lot(s) at a lesser distance which allows for the clustering of dwellings or the sharing of access...

j. The dwelling shall be located outside a big game winter wildlife habitat area as defined by the Oregon Department of Fish and Wildlife or that agency has certified that the impacts will be acceptable.

a. The hearings officer finds the applicant can comply with the fire safety measures. Fire lanes at least 30 feet wide are proposed and shown on the site plan.

b. The applicant proposes to maintain access to the well to provide water for fire fighting purposes. There is no other perennial water source on or adjoining the Site.

c. The dwelling will be located within about 120 feet of NW Forest Lane. It is not clear from the record whether a location closer to the road is possible. A driveway in excess of 500 feet is not required.

d. The hearings officer finds that the productivity potential of the Site is greatest where the Site is least sloped, because that is the area where access for commercial timber practices would be easiest. That also is the area where the dwelling is proposed. To that extent, the dwelling is not located on the portion of the site having the lowest productivity characteristics. The area of the site with the lowest productivity characteristics is the most steeply sloped land. However, this land is the most difficult to access for any purpose, and any development of that area would be closer to Forest Park and would be likely to have more significant effects due to the steep, forested slopes. In balance, the area of the Site proposed for the home is the area best suited for that purpose.

e. The hearings officer finds the proposed dwelling will not have a 200-foot setback from the north and south property lines. To the south, a lesser setback is warranted to cluster the new home with the existing home on TL '77'. To the north, a 200-foot setback is not possible, because TL '78' is only 200 feet wide (north-south).

f. The dwelling is outside a big game winter wildlife habitat area.

C. Compliance with applicable Comprehensive Plan Policies.

1. The applications do not comply with Policies 12 (Multiple Use Forest) or 22 (Energy Conservation) for the reasons given in finding IV.A.6.c and d.

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

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

a. The hearings officer finds the conditional use application does not comply with Policy 13 (Air and Water Quality and Noise), because the application does not include a statement from the applicable agency that all standards can be met with respect to subsurface sanitation. The statement on the response form from the Sanitarian indicates a land feasibility study is necessary. Until that study is done and it is determined that a sanitary waste system can be situated on the Site, there is no assurance sanitary wastes will be treated properly. Improper or inadequate treatment would adversely affect water quality.

b. There is no agency with authority to comment about water quality impacts in the Balch Creek basin generally. The basin is split by jurisdicitional boundaries. For the portion of the basin in unincorporated Multnomah County, the county is the agency with authority to review drainage plans. The applicant did not submit any plans. The county has not adopted specific drainage standards for the basin even if the applicant did submit those plans. Given the relatively small impervious area of the site and the relatively

large undeveloped area of the site, the hearings officer assumes storm water can be collected and discharged on-site without causing or significantly contributing to storm water quality problems, provided appropriate erosion control measures are used during development and until vegetation is re-established on the Site. Given the circumstances, the hearings officer finds the applicant complies with this policy with respect to storm water quality.

c. The proposed use will not generate significant noise or air quality impacts and is not a noise sensitive use. There is no likelihood the proposed use will violate state noise or air quality regulations. Therefore statements from ODEQ regarding noise and air quality are not required.

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

> ***A. The proposed use can be connected to a public sewer and water system, both of which have adequate capacity, or, to the extent such a system is not available, there is an adequate private water system and a private sanitation system approved by ODEQ;***
>
> ***B. There is adequate capacity in the storm water system to handle the run-off; or the run-off can be handled on the site or adequate provisions can be made;***
>
> ***C. The run-off from the site will not adversely affect the water quality in adjacent streams, ponds or lakes or alter the drainage on adjoining lands;***
>
> ***D. There is an adequate energy supply to handle the needs of the proposal and the development level projected by the plan; and***
>
> ***E. Communications facilities are available.***

a. The hearings officer finds that the conditional use application does not comply with this policy, because the application does not include a statement from the applicable agency that a subsurface sanitation system will be approved. The statement on the response form from the Sanitarian indicates a land feasibility study is necessary. Until that study is done and it is determined that a sanitary waste system can be situated on the Site, there is no assurance a private sanitation system will be approved by ODEQ.

b. The application includes information about a well on the Site. The applicant argues the well is adequate. Ms. Sauvageau and Mr. Rochlin argue the evidence is inconclusive. See Exhibits 30 and 44. The hearings officer concludes the well is an adequate private water system, based on the well log in the record, provided the applicant obtains whatever permits and approvals are necessary from the Water Resources Department before construction is authorized.

c. The applicant did not provide information about storm water drainage. However, the hearings officer finds that storm water run-off can be accommodated on the Site without adverse off-site effects for the reasons given in finding IV.C.2.b.

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

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

> ***A. The appropriate school district has had an opportunity to review and comment on the proposal.***
>
> ***B. There is adequate water pressure and flow for fire fighting purposes; and***
>
> ***C. The appropriate fire district has had an opportunity to review and comment on the proposal.***
>
> ***D. The proposal can receive adequate local police protection in accordance with the standards of the jurisdiction providing police protection.***

a. The hearings officer finds the school district, fire district and sheriff had an opportunity to review and comment about the application, based on the response forms with the application. Based on the form from the sheriff, adequate local police protection can be provided to the Site.

b. Based on the form from the fire district, water pressure and flow are not adequate for fire fighting purposes, because there are no public water mains or pereenial surface water supplies in the area. However, the fire district can provide tanker trucks to provide adequate water flow and pressure in the event of fire. When combined with review of the proposed structures by the fire district, and imposition of conditions of approval to address fire safety in that review process, the hearings officer finds that tanker trucks provide adequate water flow and pressure for fire fighting purposes.

V. OTHER ALLEGATIONS AND RESPONSIVE FINDINGS

A. Relevance of ORS 92.017.

1. The applicant argued that ORS 92.017 requires the County to recognize TL '77' and '78' as discrete lots and to grant a building permit for a home on each lot. See particularly, Exhibits 3, 4, 11, 13 and 43.

2. ORS 92.017 provides:

> *A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided, as provided by law.*

3. The hearings officer does not have jurisdiction to determine whether a county ordinance complies with State law. The hearings officer is limited by ORS 215.416(8), which provides:

Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application with the zoning ordinance and comprehensive plan for the area in which the proposed sue of land would occur into the zoning ordinance and comprehensive plan for the county as a whole.

4. ORS 92.017 is not listed as an approval standard or criteria for a variance or conditional use permit in the zoning ordinance or comprehensive plan. It cannot be the basis for a decision to approve or deny the applications. The hearings officer finds the issue of compliance with ORS 92.017 is not relevant to the applications. However, it is relevant to show a land division application is not necessary. See finding V.D below.

5. Although not necessarily dispositive, the hearings officer takes notice of the decision of the Land Use Board of Appeal in Kishpaugh v. Clackamas County, (LUBA No. 92-080, October 22, 1992) regarding aggregation language like that in MCC 11.15.2182(C) in a fact situation similar to that in this case. LUBA concluded, "[n]othing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local government as being separately developable." LUBA's decision was affirmed by the Oregon Court of Appeals.

B. Notice of the 1980 zone change.

1. The applicant alleged that the failure of the county to mail notice of the 1980 zone change (from MUF-20 to MUF-19) to the applicant denied the applicant due process. See p. 5 of Exhibit 35. ORS 215.508 requires the county to give individual notice of a legislative land use action unless funds are not available for such notice. The county staff report states funds were not available. The applicant argues there is not substantial evidence in the record to show funds were not available.

2. ORS 215.508 is not listed as an approval standard or criteria for a variance or conditional use permit in the zoning ordinance or comprehensive plan. Failure to comply with that statute cannot be the basis for a decision to approve or deny the application. The hearings officer finds the issue of the lack of notice of the 1980 zone change is not relevant.

C. Economic value of the parcel.

1. The applicant alleges TL '78' has no economic value unless the variance and conditional use permit are granted, and submits Exhibits 20 and 34 in support of that allegation. The implication is that denial of the applications will result in a "taking" of property rights under state and federal constitutions.[1]

2. State and federal constitutional provisions regarding "taking" of property are not listed as an approval standard or criteria for a variance or conditional use permit in the zoning ordinance or comprehensive plan. The hearings officer does not have jurisdiction to decide constitutional issues. Whether TL '78' has economic value if the applications are denied is not relevant to the applicable approval standards and criteria.

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[1] Article I, section 18 of the Oregon Constitution provides that "Private property shall not be taken for public use ... without just compensation." The 5th Amendment to the US Constitution provides, "[N]or shall private property be taken for public use, without just compensation."

3. Although not necessarily dispositive, the hearings officer takes notice of the decision of the Land Use Board of Appeal in Lardy v. Washington County, (LUBA No. 92-170, February 23, 1993). LUBA ruled that Article I, Section 18 of the Oregon Constitution does not guarantee a property owner the right to build a dwelling on the owner's property.

D. Nature of the application.

1. Mr. Rochlin argued the application must include a request for a land division, because the two former tax lots were aggregated by Ordinance 236. See Exhibit 26. However the hearings officer finds a request for a land division is not necessary, because no merger of the parcels occurred for purposes of Oregon and Multnomah County land division laws. Aggregation merges lots for zoning purposes. Combining tax accounts merges the lots for tax purposes. However neither of those actions voids the status of the two former tax lots as two separate parcels for purposes of the land division laws.

2. Mr. Robinson argued the hearings officer should decide, as part of the review of the applications in this case, whether MCC 11.15.2182(A)(2) would allow the applicant to convey TL '78' to a third party.[2] See p. 6 of Exhibit 43. However the hearings officer finds that MCC 11.15.2182(A)(2) is not relevant to the applications under review, because the Site is a Lot of Record under MCC 11.15.2182(A)(3). The applicant has not conveyed TL '78' to a third party. The issue is not ripe for review nor raised by the applications in this case.

a. Although the hearings officer necessarily construes the County Code in conducting hearings and ruling on an application, the hearings officer is not empowered to issue an advisory opinion interpreting the County Code based on a hypothetical fact situation not specifically raised by an application. Such an interpretation might be able to be made by the Planning Commission pursuant to MCC 11.15.9045. The applicant proposed an interpretation based on ORS 92.017, (see Exhibit 4), but the county refused to process an application for an interpretation based on that statute, because the Planning Commission cannot construe state law. See Exhibit 5. The applicant has not applied for an interpretation based on the County Code alone.

b. The record in this case includes MCC 11.15.2182(E), which, although not directly relevant to the applications in this case in their current posture, could be construed to prevent the applicant from conveying TL '78' separate from TL '77'.[3] However, the record also includes Exhibit 1, which reflects the county's intention not to object to such a conveyance, but to regulate the use of the two tax lots as a single Lot of Record regardless of such conveyance. In effect the county staff construes MCC 11.15.2182(A)(3) to create and preserve an aggregated Lot of Record for zoning purposes as such over time, notwithstanding division of ownership of parcels aggregated into the Lot of Record. That is, county staff believe a Lot of Record under MCC 11.15.2182(A)(3) cannot be converted into multiple Lots of Record under MCC 11.15.2182(A)(2).

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[2] MCC 11.15.2182(A)(2) contains a definition for "Lot of Record" that is like MCC 11.15.2182(A)(3), except that it applies where the owner of the lot in question does not own a contiguous lot.

[3] MCC 11.15.2182(E) provides in relevant part as follows:

> *[N]o sale or conveyance of any portion of a Lot of record, other than for a public purpose, shall leave a structure on the remainder of the lot with less than the minimum lot or yard requirements or result in a lot with less than the area or width requirements of this district.*

(1) The hearings officer recognizes that such a construction of the ordinance may be disputed, but the dispute is not squarely raised by the applications in this case in their current posture. Therefore the hearings officer declines to construe MCC 11.15.2182(A)(2) or MCC 11.15.2182(E).

VI. CONCLUSIONS AND DECISION

A. Conclusions.

1. The hearings officer concludes that the applicant failed to bear the burden of proving that the proposed variances comply with MCC 11.15.8505(A)(1)-(4), based on finding IV.A.

2. The hearings officer also concludes that the applicant failed to bear the burden of proving that the proposed conditional use permit complies with MCC 11.15.2172(C)(1)-(3), based on finding IV.B.

3. The hearings officer also concludes that the applicant failed to bear the burden of proving that the proposed applications comply with comprehensive plan policies 12 (Multiple Use Forest), 13 (Air and Water Quality and Noise Level), 22 (Energy Conservation) and 37 (Utilities).

B. Decision.

In recognition of the findings and conclusions contained herein, and incorporating the public testimony and exhibits received in this matter, the hearings officer hereby denies HV 9-93 and CU 17-93.

Dated this 13th day of August, 1993.

Larry Epstein, AICP
Multnomah County Hearings Officer

CONTENTS OF EXHIBIT C
WRITTEN EVIDENCE IN THE RECORD
FOR CU 17-93/HV 9-93

Exhibit No.	*Description*
1	Letter dated April 17, 1992 from R. Scott Pemble to Michael Robinson
2	Letter dated April 20, 1992 from Michael Robinson to R. Scott Pemble
3	Letter dated May 28, 1992 from Michael Robinson to R. Scott Pemble w/ exhibits
4	Application for interpretation dated June 5, 1992 by Michael Robinson w/ exhibits
5	Letter dated July 9, 1992 from R. Scott Pemble to Michael Robinson
6	Letter dated July 17, 1992 from Michael Robinson to R. Scott Pemble
7	Letter dated July 23, 1992 from Michael Robinson to R. Scott Pemble
8	Letter dated August 17, 1992 from Sharon Cowley to Michael Robinson
9	Letter dated August 18, 1992 from Michael Robinson to Sharon Cowley
10	Letter dated August 18, 1992 from Michael Robinson to R. Scott Pemble
11	Application for conditional use permit and variance dated December 17, 1992 from Michael Robinson w/ exhibits
12	Letter dated January 7, 1993 from Robert Hall to Michael Robinson w/ exhibit
13	Revised narrative dated January 27, 1993 from Michael Robinson w/ exhibits
14	Letter dated February 11, 1993 from R. Scott Pemble to Michael Robinson
15	Letter dated February 19, 1993 from Michael Robinson to Sharon Cowley
16	Letter dated February 23, 1993 from Mike Louaillier to Robert Hall
17	Notice of hearing and certification of mailing dated March 15, 1993
18	Letter dated March 17, 1993 from Michael Robinson to Robert Hall
19	Notice of postponement and certificate of mailing dated March 22, 1993
20	Letter dated April 1, 1993 from Frank Walker to Michael Robinson
21	Notice of hearing and certification of mailing dated April 8, 1993
22	Copy of published notice
23	Letter dated April 14, 1993 from Michael Robinson to Robert Hall w/ Ex. no. 20
24	Affidavit of posting received April 28, 1993
25	Letter dated April 27, 1993 from Virginia Atkinson to Robert Liberty
26	Letter dated April 28, 1993 from Arnold Rochlin to Hearings Officer
27	Letter dated April 29, 1993 from Michael Robinson to Bob Hall w/ exhibit
28	Letter dated April 29, 1993 from Kathryn Murphy to Multnomah County Department of Environmental Services ("DES")

Exhibit No.	*Description*
29	Notice of postponement and certificate of mailing dated April 30, 1993
30	Letter received April 30, 1993 from Paula Sauvageau to DES w/ exhibit
31	DES Staff Report dated May 3, 1993
32	Letter dated May 17, 1993 from Jim Sjulin to Bob Hall
33	Letter dated June 22, 1993 from Lee Marshall to Bob Hall
33	Letter dated June 22, 1993 from J.E. Bartels to Bob Hall
34	Letter dated June 24, 1993 from John Watson to William Hackett
35	Letter dated June 29, 1993 from Michael Robinson to Gary Clifford
36	Notice of hearing and certification of mailing dated June 29, 1993
37	Letter dated July 13, 1993 from David Smith to Gary Clifford
38	Letter dated July 13, 1993 from William Hackett
39	Two memoranda dated July 19, 1993 by Sharon Cowley to the file
40	DES Staff Report dated July 19, 1993
41	Letter/testimony dated July 19, 1993 from Arnold Rochlin
42	Letter dated July 19, 1993 from Nancy Rosenlund to Larry Epstein
43	Letter dated July 26, 1993 from Michael Robinson to Larry Epstein
44	Letter dated August 2 from Arnold Rochlin to Larry Epstein
45	Two maps of Balch Creek basin (one with parcels & one with topography)
46	Balch Creek Watershed Protection Plan, by Portland Bureau of Planning dated December 19, 1990
47	"A Study of Forest Wildlife Habitat in the West Hills," by Esther Levy, Jerry Fugate and Lynn Sharp dated March, 1992
48	Two aerial photographs (oversized)
49	Land use survey (updated April, 1989)