ANNOTATED MINUTES

Tuesday, April 1, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

LAND USE PLANNING MEETING

Chair Beverly Stein convened the meeting at 9:35 a.m., with Vice-Chair Gary Hansen and Commissioner Sharron Kelley present, Commissioner Tanya Collier excused, and Commissioner Dan Saltzman arriving at 9:36 a.m.

P-1 CU 7-96/SEC 33-96 DE NOVO HEARING, TESTIMONY LIMITED TO 20 MINUTES PER SIDE on Appeal of Hearings Officer Decision Regarding Denial of a Conditional Use Permit for a Template Dwelling and Significant Environmental Concern Permit for Single Family Dwelling in the Commercial Forest Use Zone, on Property Located at 10220 NW 160th AVENUE.

CHAIR STEIN EXPLAINED QUASI-JUDICIAL PROCESS.

Commissioner Saltzman arrived at 9:36 a.m.

AT CHAIR STEIN'S REQUEST FOR DISCLOSURE, NO EX PARTE CONTACTS WERE REPORTED. AT CHAIR STEIN'S REQUEST FOR CHALLENGES AND/OR OBJECTIONS, NONE WERE OFFERED. PLANNER SUSAN MUIR PRESENTED CASE HISTORY AND DISCUSSED PLANNING STAFF RECOMMENDED MODIFICATION TO INCLUDE INDEPENDENT FINDINGS FOR THE STATE CRITERIA AND THE COUNTY CRITERIA APPLICABLE TO THE CASE. HEARINGS OFFICER DENIECE WON PRESENTED CONDITIONS, FINDINGS OF FACT AND CRITERIA USED IN DETERMINATION TO DENY APPLICATION AND SUGGESTED MODIFICATION ADDING SENTENCE FOLLOWING "CRITERIA IS NOT MET AT PREFERRED SITE BUT IS AT ALTERNATE SITE." DOROTHY COFIELD, ATTORNEY FOR APPLICANT ANDREW MILLER, TESTIFIED IN SUPPORT OF

REVERSAL OF THE HEARINGS OFFICER DENIAL, ADVISING THE MULTNOMAH COUNTY TEMPLATE TEST DOES NOT APPLY AND THAT APPLICANT HAS MET BURDEN OF PROOF IN SHOWING THE AMOUNT OF FOREST LAND USED TO SITE THE DWELLING IS MINIMIZED BY THE ALTERNATIVE SITE. IN RESPONSE TO A QUESTION OF COMMISSIONER SALTZMAN, MS. COFIELD ADVISED THE ALTERNATE SITE DOES NOT MEET THE COUNTY TEMPLATE TEST OF. ARNOLD ROCHLIN TESTIFIED IN OPPOSITION TO APPLICANT'S REQUEST AND IN SUPPORT OF HEARINGS OFFICER DECISION, WITH PLANNING STAFF RECOMMENDED MODIFICATION AND HEARINGS OFFICER RECOMMENDED MODIFICATION. MS. COFIELD REBUTTAL TO MR. ROCHLIN'S TESTIMONY, CITING LINDQUIST CASE AND OREGON STATUTES. HEARING CLOSED. IN RESPONSE TO CHAIR STEIN'S REQUEST FOR CONTINUANCE OR OBJECTION TO HEARING, NONE WERE OFFERED. CHAIR STEIN ADVISED ALL PARTIES WILL RECEIVE A COPY OF THE BOARD'S WRITTEN DECISION, WHICH MAY BE APPEALED TO LUBA. COMMISSIONER KELLEY MOVED, SECONDED BY COMMISSIONER HANSEN, TO UPHOLD THE HEARINGS OFFICER DECISION WITH A MODIFICATION TO INCLUDE INDEPENDENT FINDINGS FOR THE STATE CRITERIA AND THE COUNTY CRITERIA APPLICABLE TO THIS CASE. IN RESPONSE TO A QUESTION OF CHAIR STEIN, DENIECE WON REITERATED HER SUGGESTED MODIFICATION. COMMISSIONER KELLEY MOVED, SECONDED BY COMMISSIONER SALTZMAN, TO AMEND PREVIOUS MOTION TO INCLUDE ADDITIONAL MODIFICATION ADDING SENTENCE TO HEARINGS OFFICER DECISION AS FOLLOWS: "CRITERIA IS NOT MET AT PREFERRED SITE BUT IS AT ALTERNATE SITE." FOLLOWING DISCUSSION, AMENDMENTS UNANIMOUSLY APPROVED. CHAIR STEIN DIRECTED STAFF TO PREPARE FINAL ORDER FOR BOARD CONSENT CALENDAR APPROVAL. [ORDER 97-89]

There being no further business, the land use planning meeting was adjourned and the briefing convened at 10:08 a.m.

Tuesday, April 1, 1997 - 10:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

BOARD BRIEFING

B-1 Debriefing on the January and February, 1997 Multnomah County Community Meetings on the Impact of Measure 47. Facilitated by Carol Ford.

CAROL FORD AND DAVE WARREN PRESENTATION AND RESPONSE TO BOARD QUESTIONS AND DISCUSSION CONCERNING COMMUNITY MEETINGS; PROPOSED BUDGET WORK SESSION AND HEARING SCHEDULE. BOARD CONSENSUS PUBLIC HEARINGS TO INCLUDE BRIEF EXECUTIVE BUDGET PRESENTATION; BUDGET WORK SESSIONS TO INCLUDE CITIZEN BUDGET ADVISORY COMMITTEE PRESENTATIONS FOR EACH DEPARTMENT; AND MAY 21, 1997 PUBLIC HEARING TO BE A ROUND TABLE BUDGET DISCUSSION WITH AN ELECTED OFFICIAL PER TABLE OF CITIZENS. STAFF DIRECTED TO REQUEST CABLE TO COVER PUBLIC HEARINGS; PUBLICIZE BUDGET MEETING SCHEDULE WITH COMMISSIONERS NAMES, U.S. AND E-MAIL ADDRESSES, PHONE AND FAX NUMBERS; AND TO COORDINATE BUDGET MEETING SCHEDULE WITH PORTLAND AND GRESHAM TO AVOID CONFLICTING MEETINGS. BUDGET SCHEDULE TO BE SENT TO LEGISLATIVE DELEGATION TO ENCOURAGE THEIR ATTENDANCE. GARY OXMAN TO SEND COPY OF "SIM CITY" VARIATION FOR BOARD REVIEW. STAFF TO PREPARE ANOTHER DRAFT SCHEDULE FOR BOARD REVIEW AND APPROVAL.

There being no further business, the briefing was adjourned at 10:47 a.m.

Thursday, April 3, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

REGULAR MEETING

Chair Beverly Stein convened the meeting at 9:34 a.m., with Vice-Chair Gary Hansen and Commissioners Sharron Kelley and Tanya Collier present, and Commissioner Dan Saltzman arriving at 9:36 a.m.

CONSENT CALENDAR

AT THE REQUEST OF CHAIR STEIN AND UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER HANSEN, CONSENT CALENDAR ITEMS C-1 THROUGH C-4 WERE APPROVED, WITH COMMISSIONERS KELLEY, HANSEN, COLLIER AND STEIN VOTING AYE.

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-1 Amendment 3 to Intergovernmental Agreement 101957 with Portland Public Schools, Adding Funds for El Club, Spanish Language Summer Camp Program Sponsored by the City of Portland, Parks and Recreation Program Operating Out of the Metropolitan Learning Center in Northwest Portland

C-2 Intergovernmental Agreement 103557 with Portland Public Schools, Providing Educational Assistants in the Classroom for Mentally Ill Children Served through the Multnomah CAPCare Plus Program

DEPARTMENT OFJUVENILE AND ADULT COMMUNITY JUSTICE

C-3 Intergovernmental Agreement 700617 with Washington County Juvenile Department, Providing Facilitation of Save Our Youth: a Violence Prevention and Weapons Intervention Program to Washington County Youth and Their Families

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-4 ORDER Authorizing Execution of Deed D971429 Upon Complete Performance of a Contract to Michael Davis

ORDER 97-57.

REGULAR AGENDA
DEPARTMENT OF ENVIRONMENTAL SERVICES

C-5 CU 8-96/SEC 14-96 Report the Hearing's Officer Decision Regarding Denial of a Conditional Use Permit and a Significant Environmental Concern Permit for a Single Family Dwelling on Tax Lot 23, Section 10, T2N, R2W which is in the Commercial Forest District

AT THE REQUEST OF CHAIR STEIN WHO ADVISED AN APPEAL WAS FILED, AND UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, IT WAS APPROVED THAT A DE NOVO HEARING BE SCHEDULED FOR 9:30 AM, TUESDAY, APRIL 29, 1997, WITH TESTIMONY LIMITED TO 20 MINUTES PER SIDE, WITH COMMISSIONERS KELLEY, HANSEN, COLLIER AND STEIN VOTING AYE.

Commissioner Saltzman arrived at 9:36 a.m.

PUBLIC COMMENT

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

NO ONE WISHED TO COMMENT.

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-2 ORDER Authorizing Sale at Public Auction of 13 Properties Acquired by Multnomah County through the Foreclosure of Liens for Delinquent Taxes

COMMISSIONER KELLEY MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-2. COMMISSIONER HANSEN EXPLANATION. COUNTY COUNSEL SANDRA DUFFY RESPONSE TO BOARD QUESTIONS REGARDING CLEAR TITLE. IN RESPONSE TO A QUESTION OF POLICY RAISED BY COMMISSIONER COLLIER, CHAIR DIRECTED STAFF ASSISTANT MARIA ROJO DE

STEFFEY TO PROVIDE COMMISSIONER COLLIER WITH A WRITTEN REPORT AND INDIVIDUAL BRIEFING. CHAIR STEIN ADVISED COMMISSIONER SALTZMAN THE PROPERTIES WERE SCREENED FOR GREENSPACES. ORDER 97-58 UNANIMOUSLY APPROVED.

R-3 RESOLUTION Requesting Economic Development Commission and State of Oregon Assistance in the Financing of the Oregon Metal Slitters, Inc. Project within Multnomah County through Issuance of an Industrial Development Revenue Bond

COMMISSIONER SALTZMAN MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-3. COUNTY PLANNER PHIL BOURQUIN, PORTLAND DEVELOPMENT COMMISSION STAFF BOB ALEXANDER AND OREGON METAL SLITTERS EXECUTIVE VICE-PRESIDENT STEPHEN ABOUAF EXPLANATION AND RESPONSE TO BOARD QUESTIONS AND COMMENTS IN SUPPORT. RESOLUTION 97-59 UNANIMOUSLY APPROVED.

DEPARTMENT OF SUPPORT SERVICES

R-4 RESOLUTION of Multnomah County's Support of HB 2752 to Improve and Modernize the Local Budget Law Statutes

COMMISSIONER KELLEY MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-4. DAVE BOYER EXPLANATION. COMMISSIONER KELLEY AND CHAIR STEIN COMMENTS IN APPRECIATION OF MR. BOYER'S EFFORTS. RESOLUTION 97-60 UNANIMOUSLY APPROVED.

R-5 RESOLUTION Authorizing Execution of a Letter of Intent Relating to the Issuance and Negotiated Sale of $53,000,000 Educational Facilities Revenue Bonds; Designating an Authorized Representative, and Special Counsel to the County; Authorizing Publication of a Notice of Intent to Issue Educational Facilities Revenue Bonds; Providing for a Public Hearing and Designating a Hearings Official

COMMISSIONER KELLEY MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-5. DAVE BOYER EXPLANATION AND RESPONSE TO QUESTION OF CHAIR STEIN REGARDING BOND RATING, ADVISING THIS ACTIVITY WOULD NOT IMPACT THE COUNTY'S BOND RATING. RESOLUTION 97-61 UNANIMOUSLY APPROVED.

R-6 Intergovernmental Agreement 500317 with the State of Oregon, Approving and Authorizing Execution of a Facilities Lease and a Facilities Sublease Relating to State Funding of the Multnomah County SB 1145 Project

COMMISSIONER KELLEY MOVED AND COMMISSIONER HANSEN SECONDED, TO POSTPONE R-6 FOR ONE WEEK. SANDRA DUFFY AND DAVE BOYER EXPLANATION, ADVISING ALICE BLATT FILED A NOTICE OF INTENT TO THE LAND USE BOARD OF APPEALS, AND RESPONSE TO BOARD QUESTIONS, ADVISING THE COUNTY HAS OBTAINED PERMITS AND THE SHERIFF PLANS TO MOVE AHEAD. MS. DUFFY ADDED THEY WOULD HAVE TO BE REMOVED IN THE UNLIKELY EVENT THE LITIGATION IS SUCCESSFUL. AGREEMENT UNANIMOUSLY CONTINUED ONE WEEK, TO THURSDAY, APRIL 10, 1997.

R-7 Intergovernmental Agreement 500657 with the Cities of Fairview, Gresham, Maywood Park, Portland, Troutdale and Wood Village, Providing Emergency Management Consolidation

COMMISSIONER COLLIER MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-7. COMMISSIONER COLLIER AND MIKE GILSDORF EXPLANATION AND RESPONSE TO BOARD QUESTIONS AND COMMENTS IN SUPPORT. CHAIR STEIN THANKED COMMISSIONER COLLIER AND MR. GILSDORF FOR THEIR EFFORTS. AGREEMENT UNANIMOUSLY APPROVED.

R-8 PROCLAMATION Proclaiming April, 1997, EARTHQUAKE PREPAREDNESS MONTH in Multnomah County, Oregon

COMMISSIONER COLLIER MOVED AND COMMISSIONER HANSEN SECONDED, APPROVAL OF R-8. MIKE GILSDORF EXPLANATION. PROCLAMATION 97-62 UNANIMOUSLY APPROVED.

R-9 Second Reading and Adoption of an ORDINANCE Establishing a Retirement Incentive Program for County Employees, and Amending Ordinance 631

ORDINANCE READ BY TITLE ONLY. COPIES AVAILABLE. COMMISSIONER COLLIER MOVED AND COMMISSIONER KELLEY SECONDED, APPROVAL OF SECOND READING AND ADOPTION. NO ONE WISHED TO TESTIFY. COMMISSIONER KELLEY MOVED AND COMMISSIONER COLLIER SECONDED, AMENDMENT TO FIRST SENTENCE OF SECTION VIII (B) ADDING: "AND RELEASE OF ALL CLAIMS". AMENDMENT UNANIMOUSLY APPROVED. VICKIE GATES RESPONSE TO BOARD QUESTIONS AND DISCUSSION, REGARDING THE 18 EMPLOYEES WITH THIRTY YEARS OF SERVICE REQUESTING PARTICIPATION IN THE PROGRAM; PERS RULES; VOLUNTARY RETIREMENT INCENTIVES; AND PAYOFF OPTIONS. COMMISSIONER SALTZMAN'S MOTION APPROVING A PAYOFF OPTION FOR EMPLOYEES WITH THIRTY YEARS OR MORE OF SERVICE FAILED FOR LACK OF A SECOND. UPON MOTION OF COMMISSIONER KELLEY, SECONDED BY COMMISSIONER COLLIER, IT WAS UNANIMOUSLY APPROVED TO ADD EMERGENCY CLAUSE LANGUAGE TO MAKE THE ORDINANCE EFFECTIVE IMMEDIATELY UPON ADOPTION. ORDINANCE 877 UNANIMOUSLY APPROVED, AS AMENDED.

There being no further business, the regular meeting was adjourned at 10:27 a.m.

Thursday, April 3, 1997 - 10:15 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

EXECUTIVE SESSION

Chair Beverly Stein convened the meeting at 10:29 a.m., with Vice-Chair Gary Hansen and Commissioners Sharron Kelley, Tanya Collier and Dan Saltzman present.

E-1 The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h) for Legal Counsel Consultation Concerning Current Litigation or Litigation Likely to be Filed. Presented by Sandra Duffy, John Rakowitz and Barry Brook.

EXECUTIVE SESSION HELD.

There being no further business, the meeting was adjourned at 11:23 a.m.

BOARD CLERK FOR MULTNOMAH COUNTY, OREGON

Deborah L. Bogstad

MULTNOMAH COUNTY OREGON

BOARD CLERK
OFFICE OF BEVERLY STEIN, COUNTY CHAIR
1120 SW FIFTH AVENUE, SUITE 1515
PORTLAND, OREGON 97204
TELEPHONE • (503) 248-3277
FAX • (503) 248-3013

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

MEETINGS OF THE MULTNOMAH COUNTY BOARD OF COMMISSIONERS

AGENDA

FOR THE WEEK OF

MARCH 31, 1997 - APRIL 4, 1997

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

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

INDIVIDUALS WITH DISABILITIES MAY CALL THE BOARD CLERK AT (503) 248-3277, OR MULTNOMAH COUNTY TDD PHONE (503) 248-5040, FOR INFORMATION ON AVAILABLE SERVICES AND ACCESSIBILITY.

AN EQUAL OPPORTUNITY EMPLOYER

Tuesday, April 1, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

LAND USE PLANNING MEETING

P-1 *CU 7-96/SEC 33-96 DE NOVO HEARING, TESTIMONY LIMITED TO 20 MINUTES PER SIDE on Appeal of Hearings Officer Decision Regarding Denial of a Conditional Use Permit for a Template Dwelling and Significant Environmental Concern Permit for Single Family Dwelling in the Commercial Forest Use Zone, on Property Located at 10220 NW 160th AVENUE. ONE HOUR REQUESTED.*

Tuesday, April 1, 1997 - 10:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

BOARD BRIEFING

B-1 *Debriefing on the January and February, 1997 Multnomah County Community Meetings on the Impact of Measure 47. Facilitated by Carol Ford. 30 MINUTES REQUESTED.*

Thursday, April 3, 1997 - 9:30 AM
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

REGULAR MEETING

CONSENT CALENDAR

DEPARTMENT OF COMMUNITY AND FAMILY SERVICES

C-1 *Amendment 3 to Intergovernmental Agreement 101957 with Portland Public Schools, Adding Funds for El Club, Spanish Language Summer Camp Program Sponsored by the City of Portland, Parks and Recreation Program Operating Out of the Metropolitan Learning Center in Northwest Portland*

C-2 *Intergovernmental Agreement 103557 with Portland Public Schools, Providing Educational Assistants in the Classroom for Mentally Ill Children Served through the Multnomah CAPCare Plus Program*

DEPARTMENT OF JUVENILE AND ADULT COMMUNITY JUSTICE

C-3 *Intergovernmental Agreement 700617 with Washington County Juvenile Department, Providing Facilitation of Save Our Youth: a Violence Prevention and Weapons Intervention Program to Washington County Youth and Their Families*

DEPARTMENT OF ENVIRONMENTAL SERVICES

C-4 *ORDER Authorizing Execution of Deed D971429 Upon Complete Performance of a Contract to Michael Davis*

C-5 *CU 8-96/SEC 14-96 Report the Hearing's Officer Decision Regarding Denial of a Conditional Use Permit and a Significant Environmental Concern Permit for a Single Family Dwelling on Tax Lot 23, Section 10, T2N, R2W which is in the Commercial Forest District*

REGULAR AGENDA

PUBLIC COMMENT

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

DEPARTMENT OF ENVIRONMENTAL SERVICES

R-2 *ORDER Authorizing Sale at Public Auction of 13 Properties Acquired by Multnomah County through the Foreclosure of Liens for Delinquent Taxes*

R-3 *RESOLUTION Requesting Economic Development Commission and State of Oregon Assistance in the Financing of the Oregon Metal Slitters, Inc. Project within Multnomah County through Issuance of an Industrial Development Revenue Bond*

DEPARTMENT OF SUPPORT SERVICES

R-4 *RESOLUTION of Multnomah County's Support of HB 2752 to Improve and Modernize the Local Budget Law Statutes*

R-5 *RESOLUTION Authorizing Execution of a Letter of Intent Relating to the Issuance and Negotiated Sale of $53,000,000 Educational Facilities Revenue Bonds; Designating an Authorized Representative, and Special*

Counsel to the County; Authorizing Publication of a Notice of Intent to Issue Educational Facilities Revenue Bonds; Providing for a Public Hearing and Designating a Hearings Official

R-6 *Intergovernmental Agreement 500317 with the State of Oregon, Approving and Authorizing Execution of a Facilities Lease and a Facilities Sublease Relating to State Funding of the Multnomah County SB 1145 Project*

R-7 *Intergovernmental Agreement 500657 with the Cities of Fairview, Gresham, Maywood Park, Portland, Troutdale and Wood Village, Providing Emergency Management Consolidation*

R-8 *PROCLAMATION Proclaiming April, 1997, EARTHQUAKE PREPAREDNESS MONTH in Multnomah County, Oregon*

R-9 *Second Reading and Adoption of an ORDINANCE Establishing a Retirement Incentive Program for County Employees, and Amending Ordinance 631*

Thursday, April 3, 1997 - 10:15 AM
(OR IMMEDIATELY FOLLOWING REGULAR MEETING)
Portland Building, Second Floor Auditorium
1120 SW Fifth Avenue, Portland

EXECUTIVE SESSION

E-1 *The Multnomah County Board of Commissioners Will Meet in Executive Session Pursuant to ORS 192.660(1)(h) for Legal Counsel Consultation Concerning Current Litigation or Litigation Likely to be Filed. Presented by Sandra Duffy, John Rakowitz and Barry Brook. 1 HOUR REQUESTED.*

TANYA COLLIER
Multnomah County Commissioner
District 3

1120 SW Fifth St., Suite 1500
Portland, OR 97204
(503) 248-5217

MEMORANDUM

TO: Office of the Board Clerk
Board of County Commissioners

FROM: Michele Fuchs

DATE: March 31, 1997

SUBJECT: Commissioner Collier's absence from Board meeting

Commissioner Collier will be unable to attend the April 1st Board meeting due to personal family matters.

PLEASE PRINT LEGIBLY!

MEETING DATE 4/1/97

NAME Dorothy Cofield

ADDRESS 12725 SW 66th Ave

STREET

Portland OR 97223

CITY **ZIP CODE**

I WISH TO SPEAK ON AGENDA ITEM # P-1

SUPPORT X **OPPOSE** _____

SUBMIT TO BOARD CLERK

PLEASE PRINT LEGIBLY!

MEETING DATE 4/1/97

NAME Arnold Rochlin

ADDRESS PO Box 83645
STREET
Portland, OR 97283
CITY **ZIP CODE**

I WISH TO SPEAK ON AGENDA ITEM # P-1

SUPPORT _____ **OPPOSE** Application + Appeal

SUBMIT TO BOARD CLERK

Meeting Date: APR 0 1 1997
Agenda No: P-1
Est. Start Time: 9:30am

(Above Space for Board Clerk's Use ONLY)

AGENDA PLACEMENT FORM

SUBJECT: DeNovo Hearing in the Matter of an Appeal of the Hearings Officer's decision on CU 7-96 & SEC 33-96.

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

REGULAR MEETING Date Requested: April 1, 1997
Amt. of Time Needed: 1 hour

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

PERSON(S) MAKING PRESENTATION: Susan Muir / Deniece Won

ACTION REQUESTED

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

SUGGESTED AGENDA TITLE

DeNovo Hearing in the Matter of an Appeal of the Hearings Officer's decision regarding an denial of a Conditional Use Permit and Significant Environmental Concern Permit for a single family dwelling in the Commercial Forest Use Zone.

BOARD OF COUNTY COMMISSIONERS
'97 MAR 27 PM 1:22
MULTNOMAH COUNTY OREGON

SIGNATURES REQUIRED

Elected Official: _____

or

Department Manager: K Blair E. Nicholas

BOARD HEARING OF APRIL 1, 1997

TIME 9:30am

MULTNOMAH COUNTY

CASE NAME: Andrew Miller Residence **NUMBER:** CU 7-96, SEC 33-96

Action Requested of Board

- [x] Affirm Hearings Officer Dec.
- [ ] Hearing/Rehearing

Scope of Review

- [ ] On the record
- [x] De Novo
- New information allowed

1. **Applicant Name/Address:** **Represented by:**

   Andrew Miller
   2130 SW 21st Ave
   Portland, OR 97201

   Dorothy Cofield
   Attorney at Law
   12725 SW 66th Ave.
   Executive Center, Ste 107
   Portland, OR 97229

2. **Action Requested by Applicant**

   Applicant is requesting the Board of County Commissioners overturn the Hearings Officer decision that denies a Conditional Use Permit and Significant Environmental Concern Permit for a single family dwelling in the Commercial Forest Use Zone.

3. **Planning Staff Recommendation**

   Staff recommends the Board uphold the Hearings Officer decision because the parcel does not meet the template test of Multnomah County, the amount of land used to site the development had not been minimized in the preferred location, and also based on the preferred location, the applicant had not demonstrated that the access road was the minimum length required. In addition, the staff found that the applicant failed to comply with OAR 660-06-027(4)(a).

4. **Hearings Officer Decision**

   Denied the applicant's request and adopted the staff recommendation.

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

   Not applicable.

ISSUES

(who raised them?)

6. **The following issues were raised:** The applicant argues that the County incorrectly applied an unacknowledged portion of the Multnomah County Zoning Ordinance by requiring there be 5 dwellings within the template instead of the less restrictive requirement from the state of 3 dwellings. The applicant filed a notice of appeal on March 14, 1997.

7. **Do any of these issues have policy implications? Explain**: Policy implications for this type of case were discussed at length with the Board of County Commissioners in the Evans Conditional Use Permit appeal process (CU 7-95). One implication associated with reversing the Hearings Officer decision could include the determination that local governments do not have the ability to make their own codes more restrictive than the state codes.

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

NOTICE OF REVIEW

1. Name: CoField (Last), S. (Middle), Dorothy (First)
2. Address: 12725 SW 66th Ave (Street or Box), Portland (City), OR 97223 (State and Zip Code)
3. Telephone: (503) 639-5566
4. If serving as a representative of other persons, list their names and addresses:
   Andrew Miller, Owner & Applicant
   2130 SW 21st Ave.
   Portland, OR 97201
5. What is the decision you wish reviewed (*e.g.*, denial of a zone change, approval of a subdivision, *etc.*)?
   Conditional Use Permit, nonforest Dwelling and SEC Permit
6. The decision was announced by the ~~Planning Commission~~ Hearings Officer on March 5, 1997
7. On what grounds do you claim status as a party pursuant to MCC 11.15.8225?
   MCC 11.15.8225 (C) Appellant is the applicant and owner of the subject property & entitled to notice. He appeared orally and in writing through his representative, Dorothy S. Cofield Attorney at Law.

BEFORE THE BOARD OF COMMISSIONERS
MULTNOMAH COUNTY

In The Matter Of Application For A Conditional Use Application For A "Template Dwelling" and Significant Environmental Concern Permits	))))	File No. CU 7-96; SEC 33-96

NOTICE OF APPEAL
OF THE HEARINGS OFFICER DECISION

Applicant's Name and County Casefile: The applicant is Andrew Miller. The county's casefile number is CU 7-96 and SEC 33-96. The application is for a "template dwelling" permit and significant environmental concern permit on the applicant's property located at 10220 NW 160th Avenue, Tax Lot 13 in Section 5, T1N R1W, W.M., Multnomah County, Oregon. The Hearings Officer denied the applications.

Petitioner: Petitioner is Andrew Miller, the owner and applicant of the subject property. He is represented by Dorothy S. Cofield, Attorney at Law. Both the applicant and his representative appeared both orally and in writing at the public hearing on the applications on February 19, 1997. Therefore, the petitioner is a party as defined in MCC 11.15.8225(1).

Decision Date: The Hearings Officer rendered the challenged decision on March 5, 1997. The Decision was submitted to the Board Clerk on March 7, 1997. The notice indicates that the appeal period ends March 17, 1997.

Scope of Review: The petitioner requests an "On the Record" hearing.

Nature of the Decision and Grounds for Appeal: In the Conclusions for Conditional Use Requests for Template Dwelling, the Hearings Officer's found that "the application for the template dwelling does not comply with the Multnomah Code tests for a template dwelling." The Hearings Officer also found "the preferred site does not comply with the requirement to minimize the access length, but the alternative site does. The application complies with other requirements of the County Code and Multnomah County Comprehensive Framework Plan." The Hearings Officer concluded that the application for a dwelling not related to forest management demonstrates compliance with the MCC standards for development within an identified wildlife habitat area."

Dorothy S. Cofield
Attorney at Law
12725 S.W. 66th ave.
Executive Centre, Suite 107
Portland, OR 97229

1. The Hearings Officer erred in deciding that the county template test as well as the state template test applies to the application. Until the county readopted its template dwelling ordinance, the state template test was directly applicable to the application and the county template test did not apply because it had not been through post-acknowledgment procedures as required in ORS 197.646(1) and (3). *See* DLCD v. Lincoln County, 925 P.2d 135, 144 or. App. 9 (1996).

2. The Hearings Officer erred in defining the issue in this application as "whether the County can have more restrictive regulations" and that Dilworth v. Clackmas County, 30 Or LUBA 319 (1996) provides the answer in the affirmative. That case does not apply to the subject application, because in Dilworth, the county had adopted new ordinances to implement the state template dwelling statute which Multnomah County had not done at the time the subject application was submitted.

3. The Hearings Officer erred by not concluding that ORS 215.720(3) preempts the county from allowing any other forestland dwellings than those described in that section and ORS 215.740 and 215.750. The county's preexisting template dwelling is not described in those statutory provisions and is therefore, not allowed.

4. The Hearings Officer erred in not adopting a finding that the alternative site meets the criterion set out in MCC 11.15.2074(A)(3) (the amount of land to site the dwelling and access road is minimized.). The Hearings Officer stated in her conclusion that the alternative site complies with the requirement to minimize the access length, but the findings on page 17 of the Hearings Officer Decision are in conflict with that conclusion.

5. The Hearings Officer erred in finding that the SEC permit must be denied, reasoning that the conditional use permit for a template dwelling cannot be approved under the county's template test. The applicant meets the state template test and the county template test does not apply as explained above. Because the Hearings Officer concludes that the application "demonstrates compliance with the Multnomah County Code standards for development within an identified wildlife habitat area", the Hearings Officer erred in denying the SEC permit.

Appeal Fee: A check for the appeal fee of $500.00 is enclosed.

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Dorothy S. Cofield
Attorney at Law
12725 S.W. 66th ave.
Executive Centre, Suite 107
Portland, OR 97229

Petitioner's Legal Representative: For purposes of this appeal proceeding, all correspondence, notices, and other documentation should be sent to petitioner's legal counsel.

Dorothy S. Cofield
12725 S.W. 66th Ave.
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Respectfully submitted this 14th day of March, 1997.

Law Office of Dorothy S. Cofield

Dorothy S. Cofield, OSB #92261
Of Attorney for Petitioner

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HEARINGS OFFICER DECISION

March 5, 1997

This Decision Consists of Findings of Fact and Conclusions

CU 7-96 **SEC 33-96**	Conditional Use Permit for a "Template Dwelling" Significant Environmental Concern Permit The applicant has requested a Conditional Use Permit for a "template dwelling" and a Significant Environmental Concern Permit for this tract which is in the Commercial Forest District.
Site Address	10220 NW 160th Avenue
Tax Roll Description	Tax Lot 13 in Section 5, T1N R1W, W.M., Multnomah County, Oregon
Site Size	20 acres
Property Owner and Applicant	Andrew Miller 2130 SW 21st Avenue Portland, OR 97201
Comprehensive Plan Designation	Commercial Forest
Zoning Designation	Commercial Forest (CFU) SEC-h (wildlife habitat)

I. SUMMARY OF THE REQUEST

The applicant requests a Conditional Use Permit for a "template dwelling" and a Significant Environmental Concern Permit for this tract which is in the Commercial Forest District and has a Significant Environmental Concern (wildlife habitat and streams) overlay zone.

The lot consists of 20 acres. The lot generally slopes gently up from Kaiser Road to the north and contains slopes up to 25 percent in areas.

II. PUBLIC HEARING

A. Hearing

Hearings Officer Deniece Won held a duly noticed public hearing regarding the application on February 19, 1997.

B. Summary of Testimony and Evidence Presented

1. Susan Muir, County planner, showed a video of the site and summarized the staff report.

2. Dorothy Cofield, attorney for the applicant, Andrew Miller. Submitted four copies of her original testimony, Exhibit F1. The staff report erroneously says that Ms Cofield is the applicant, but Mr. Miller is the applicant. There are two main issues. First, are what template dwelling standards apply and second, is whether the access is the minimum necessary. She asked that the petitioner's brief and Hearings Officer findings in *Evans v. Multnomah County*, LUBA No. 96-198 be adopted by the hearings officer. She testified that in 1993 and 1994 the State legislature and LCDC respectively adopted template dwelling standards. Ms. Coflield said the County, at the time this application was filed, had not adopted the State standards into the County Code. The County had a preexisting template dwelling in the County Code that required five (5) houses and eleven (11) parcels in the 160-acre template square. She said the application meets the State standards for a template dwelling which requires three (3) houses and eleven (11) parcels in the 160-acre template square, which can be rotated or turned.

Ms. Cofield made several legal arguments on the question of which template dwelling apply.

Ms. Cofield said the second main issue is the access road. Attached to her memorandum, Exhibit F1, is a report from a wildlife biologist, SRI Shapiro. The wildlife biologist made an evaluation of the alternative site. He found that if the applicant uses the

alternative site, the slopes average 21 percent, ranging from 18 to 25 percent. The public will save somewhere between 160 and 180 feet by using the alternative site. There's no existing road for the alternative site, so the applicant will have to clear a road. She argued the existing road will not be abolished because the applicant is going to need to use it for forestry practices and to access the well. She contended that consequently there will be two impacts from two roads. She said the wildlife biologist also pointed out that the applicant would have to clear the alternative site. Even though the County Code would require reforestation of the preferred site, she doesn't think that the quality of the reforestation would be of much benefit to wildlife. For the alternative site there will be more cut and fill because there is 7.5 percent more slope. The wildlife biologist has provided evidence that there will be more soil sedimentation into Rock Creek at the alternative site because the construction is closer to Rock Creek and there are steeper slopes than exist at the preferred site. The applicant argues that for all of these additional impacts at the alternative site only 160 feet on the access road will be saved and in addition the existing road isn't going to go away so nothing would be gained.

Ms. Cofield said that on the back of her written testimony there is a map to scale provided by the wildlife biologist showing that the setback is 210 feet.

3. Arnold Rochlin, PO Box 83645 Portland, Oregon, testified that he agrees with the staff findings of noncompliance on the issues on which they have found noncompliance. Relating to the length of the road, he pointed out that the Mutnomah County Code (MCC) section .2074(4) limits the length of the road to 500 feet unless there is a showing that a longer road is necessary. He thinks that both the County and State standards apply. Mr. Rochlin made several legal arguments on the question of which template dwelling provisions apply.

4. Chris Foster, 15400 N.W. NcNamee Road, testified that he agrees with Mr. Rochlin. Mr. Foster said he has one further concern about this site. His concern is with OAR 660-06-029(1)(b) that requires that adverse impacts on forest practices on the site will be minimized. He said that people typically want to maximize the view opportunity when siting houses. Usually the best view site corresponds to a landing site. He said that this parcel was recently harvested and it appears to him that the house may be located at the highest point which was the landing site for the harvesting operation. He concludes that if a house is located on a site that has been engineered and determined to be the preferable site for harvesting logs then the site will be rendered useless for timber harvesting. Therefore, there will be adverse impacts on harvesting operations. He testified that logging from a landing site and a tower operation has been determined to be the most economical way to harvest logs. He said that there is a question about whether there is another suitable landing site on the property. He testified that he hasn't confirmed the preferred dwelling site, but he suspects that it is the former landing site. He said the housing location should make sure that it provides an alternative landing site. Otherwise the resource value has been diminished and the standard in OAR 660-06-029(1)(b) has not been met.

5. Ms. Cofield, on rebuttal responded to Mr. Foster's statement that the house site would impact forest practices. The applicant, a professional forester, submitted a statement, Exhibit A3, applicant's Exhibit V, showing there won't be an adverse impact on forest practices if a dwelling is located on this parcel. She said he's well aware of not siting the dwelling so that it will get in the way of any logging practices. She said there won't be any adverse impact on forest operations on the tract.

Ms. Cofield said that the applicant is willing to use the alternative site if the access to the preferred site is found not to be the minimum access length required. She argued that the access length standard doesn't say that the Hearings Officer can deny the application if it exceeds the minimum access standard. Ms. Cofield said that if the Hearings Officer were to find that the preferred site didn't meet the access standard, the applicant wants to be able to appeal that issue.

6. Andrew Miller, applicant, testified that he is the vice president for Stimpson Lumber Company, a Forest Grove based timber company that owns about 200,000 acres throughout Oregon, Washington and California. He said one of his responsibilities is to manage Stimpson Lumber Company's operations in California, so he has extensive experience dealing with all the regulatory, environmental and wildlife issues relative to the management of timber land and the growing and harvesting of timber.

Mr. Miller testified that the alternative dwelling site has been cleared and will work well as an area from which to conduct logging operations. He said that the alternative site is a flat area at the top of the hill. He corrected Mr. Foster, stating that there has never been any logging operation on the property, that it was the adjacent owners that have clear-cut their timber. He said he is well aware of the impacts of logging and the conditions that need to exist for fishing and for the cost-efficient management of timber land. He said he has incorporated that knowledge into his application.

He said that he is not completely knowledgeable about the controlling criteria but it impresses him that there is a great interest in the environmental effects and water resource effects on fisheries. He thinks that the staff and the opponents are saying that some significantly greater environmental effects should be created to build a technically shorter access road. He said that future forestry operations can be conducted with equal effectiveness regardless of which site is chosen for the dwelling. Mr. Miller testified that he allowed the land owner lots 5 and 6 of Schoppe Acres to use his property for logging. He said that the southwest and northwest corners of the property are relatively flat and that the area has bench topography and slopes downhill to a stream on the east of his property, so either area would be appropriate for a basis of logging.

7. Susan Muir, Planning Staff, said the applicant will be required to get a grading and erosion control permit if they build on the steeper slopes. She said that the County compromises between the minimum length of the driveway and the environmental issues. She doesn't believe that the applicant has demonstrated that the preferred dwelling site has minimized the amount of area used for the access road. Ms. Muir stated that the

minimum setbacks are 200 feet and the staff wouldn't recommend any less of a setback than that in this case. Therefore, the staff recommendation is that the minimum length required would be what the setback of 200 feet from the property lines, which is 10 feet over on their alternative.

8. Ms. Cofield said that the code says is you can have a road longer than the 500 feet so long as you show that it is the minimum. The applicant is willing to go with the alternative site and that would be the minimum because due to the unique limitations of the site you need 1,550 feet to get from N.W. Kaiser Road to the southwest corner of TL 13. Mr. Miller could place the dwelling on the farthest southwest corner and then the Hearings Officer has to find that is the minimum due to the unique location of this property.

III. STANDARDS AND CRITERIA, FINDINGS OF FACT AND EVALUATION OF REQUEST

A. Conditional Use Permit Request for Template Dwelling

1. Under the County Code a "template dwelling" may be approved as a conditional use permit in a Commercial Forest zone when it is found to satisfy the standards of the Multnomah County Code. MCC 11.15.2050(B). The standards are in subsections .2052 and .2074. Section 11.15.2052 contains the siting criteria for and 11.15.2074 contains development standards.

At issue is whether the County Code or the State standards in ORS 215 and OAR 660-06-027 apply to siting template dwellings. OAR 660 Division 6 was first adopted by LCDC in 1990 and was amended in 1990 and 1992. In December 1991 Multnomah County amended its Commercial Forest Use (CFU) zone to full comply with State standards. The 1993 legislature amended ORS 215 to incorporate template dwelling provisions, effective in November 1993. Following that amendment the County initiated a policy to apply the County CFU standards and the statutory standards where the State law is more restrictive than the County standards. In 1995 LCDC amended OAR 660 Division 6. This application was filed on July 5, 1996. On January 2, 1997, 180 days after the original application was filed, the applicant filed completed application materials with Multnomah County. The Hearings Officer, in this order, will first address all the criteria that are alleged to apply to the conditional use permit and conclude in subsection B with a discussion about which criteria are found by the Hearings Officer to apply.

2. Oregon Revised Statutes

ORS 215.750: Alternative forestland dwellings:

(1) In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are:

(c) Capable of producing more than 85 cubic feet per acre per year of wood fiber if:

(A) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract; and

(B) At least three dwellings existed on January 1, 1993, on the other lots or parcels.

(4) A proposed dwelling under this subsection is not allowed:

(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law.

(b) Unless it complies with the requirements of ORS 215.730.[1]

(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under ORS 215.740 (3) for the other lots or parcels that make up the tract are met.

(d) If the tract on which the dwelling will be sited includes a dwelling.

Finding. The subject parcel is a twenty-acre parcel located off of N.W. Kaiser Road. The property is composed of soils capable of producing 145 to 165 cubic feet per acre per year of wood fiber. The 160-acre square template, centered over the subject parcel, and twisted so the southern point of the square is aligned with TL 30, shows that there are 11 parcels within the 160-acre square that existed prior to January 1, 1993. The staff does not disagree with this statement of the petitioner.

At least three dwellings that existed on January 1, 1993. Tax Lot 11, Section 8 T1N R1W of Partition Plat 1990-107 has a dwelling built in 1975. Tax Lot 2 of Lot 8 *Schoppe Acres*, Section 5 T1N R1W has a dwelling built in 1907. Tax Lot 9 Section 5 T1N R1W has a dwelling built in 1972. The staff does not disagree with this statement of the petitioner.

ORS 215 and OAR 660 Division 6 defines "tract" as one or more contiguous lots or parcels in the same ownership. This applicant does not own any additional contiguous parcels of land. Therefore, this criterion is satisfied.

ORS 215.740(3)(b): If an owner totals 320 or 200 acres, as appropriate, under paragraph (a) of this subsection, the owner shall submit proof of nonrevocable deed restrictions recorded in the deed records for the tracts in the 320 or 200 acres, as appropriate. The deed restrictions shall preclude all future rights to construct a dwelling on the tracts or to use the tracts to total acreage for future siting of

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[1] ORS 215.730 requires the County to condition approval of forest land dwellings to have a fire retardant roof, not be sited on slopes greater than 40 percent, have fire protection, have a spark arrester on any chimney and to provide primary and secondary fire breaks.

dwellings for present and any future owners unless the tract is no longer subject to protection under goals for agricultural lands or forestlands.

Finding. This application is for a parcel 20 acres in size. Therefore, this criterion is not applicable.

3. Oregon Administrative Rules

The following OAR 660 Division 6 requirements are applicable:

660-06-027(1)(d): In western Oregon, a governing body of a county or its designate may allow the establishment of a single-family dwelling on a lot or parcel located within a forest zone if the lot or parcel is predominantly composed of soils that are: (C) Capable of producing more than 85 cubic feet per acre per year of wood fiber if: (i) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the center of the subject tract; and (ii) At least three dwelling existed on January 1, 1993 on the other lots or parcels.

Finding. The OAR is the same as ORS 215.750. Both are complied with.

OAR 660-06-027(4): A proposed dwelling under this rule is not allowed:

(a) If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law;

(b) Unless it complies with the requirements of OAR 660-06-029 and 660-06-035

(c) Unless no dwellings are allowed on other lots or parcels that make up the tract and deed restrictions established under section (6) of this rule for other lots or parcels that make up the tract are met;

(d) If the tract on which the dwelling will be sited includes a dwelling.

Finding. This OAR is the same ss ORS 215.750. Both are met by this application.

OAR 660-06-029: The following siting criteria or their equivalent shall apply to all new dwellings and structures in forest and agriculture/forest zones. These criteria are designed to make such uses compatible with forest operations and agriculture, to minimize wildfire hazards and risks and to conserve values found on forest lands. A governing body shall consider the criteria in this rule together with the requirements in this rule to identify the building site:

(1) Dwellings and structures shall be sited on the parcel so that:

(a) They have the least impact on nearby or adjoining forest or agricultural lands;

(b) The siting ensures that adverse impacts on forest operations and accepted farming practices on the tract will be minimized;

(c) The amount of forest lands used to site access roads, service corridors, the dwelling and structures is minimized; and

(d) The risks associated with wildfire are minimized.

(2) Siting criteria satisfying section (1) of this rule may include setbacks from adjoining properties, clustering near or among existing structures, siting close to existing roads and siting on that portion of the parcel least suited for growing trees.

Finding. These criteria str implemented through the siting standards of MCC 11.15.2074.

(3) The applicant shall provide evidence to the governing body that the domestic water supply is from a source authorized in accordance with the Water Resources Department's administrative rules for the appropriation of ground water or surface water and not from a Class II stream as defined in the Forest Practices rules (OAR Chapter 629). For purposes of this section, evidence of a domestic water supply means:

(a) Verification from a water purveyor that the use described in the application will be served by the purveyor under the purveyor's rights to appropriate water; or

(b) A water use permit issued by the Water Resources Department for the use described in the application; or

(c) Verification from the Water Resources Department that a water use permit is not required for the use described in the application. If the proposed water supply is from a well and is exempt from permitting requirements under ORS 537.545, the applicant shall submit the well constructor's report to the county upon completion of the well.

Finding. The applicant submitted a water well report from the State of Oregon. The well report log is evidence that the domestic water supply is from a source authorized in accordance with the Department of Water Resources. This criterion is met.

(4) As a condition of approval, if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, the U.S. Bureau of Land Management, or the U.S. Forest Service, then the applicant shall provide proof of a long-term road access use permit or agreement. The road use permit may require the applicant to agree to accept responsibility for road maintenance.

Finding. The applicant provided copies of an Easement Reservation (Exhibit C) and Easement Agreement for road (Exhibit S). This criterion is met.

(5) Approval of a dwelling shall be subject to the following requirements:

(a) Approval of a dwelling requires the owner of the tract to plant a sufficient number of trees on the tract to demonstrate that the tract is reasonably expected to meet Department of Forestry stocking

requirements at the time specified in Department of Forestry administrative rules;

Findings. The applicant intends to reforest the subject property as shown on the Forest Management Plan, Exhibit J, planting cleared areas of the property with 2-0 Douglas-fir seedlings from a suitable seed source. The current stand of timber is Big Leaf Maple and alder. Crown closure is 100 percent. The hardwoods range in age from 20 to 70 years and are in a general state of decay. The applicant intends to selectively clear-cut and reforest the site. The applicant agrees to apply for Department of Forestry forest practices permits as a condition of approval. This criterion can be met

OAR 660-06-035: Fire Siting Standards for Dwellings and Structures: The following fire siting standards or their equivalent shall apply to new dwelling or structures in a forest or agriculture/forest zone:

(1) The dwelling shall be located upon a parcel within a fire protection district or shall be provided with residential fire protection by contract. If the dwelling is not within a fire protection district, the applicant shall provide evidence that the applicant has asked to be included within the nearest such district. If the governing body determines that inclusion within a fire protection district or contracting for residential fire protection is impracticable, the governing body may provide an alternative means for protecting the dwelling from fire hazards. The means selected may include a fire sprinkling system, onsite equipment and water storage or other methods that are reasonable, given the site conditions. If a water supply is required for fire protection, it shall be a swimming pool, pond, lake, or similar body of water that at all times contains at least 4,000 gallons or a stream that has a continuous year round flow of at least one cubic foot per second. The applicant shall provide verification from the Water Resources Department that any permits or registrations required for water diversion or storage have been obtained or that permits or registrations are not required for the use. Road access shall be provided to within 15 feet of the water's edge for firefighting pumping units. The road access shall accommodate the turnaround of firefighting equipment during the fires season. Permanent signs shall be posted along the access route to indicate the location of the emergency water source.

Finding. The property is within the Tualatin Valley Fire and rescue District. This criterion is met.

(2) Road access to the dwelling shall meet road design standards described in OAR 660-06-040.

660-06-040 Fire Safety Design Standards for Roads: The governing body shall establish road design standards, except for private roads and bridges accessing only commercial forest uses, which ensure that public roads, bridges, private roads and driveways are constructed so as to provide adequate access for fire fighting equipment. Such

standards shall address maximum grade, road width, turning radius, road surface, bridge design, culverts, and road access taking into consideration seasonal weather conditions. The governing body shall consult with the appropriate Rural Fire Protection District and Forest Protection District in establishing these standards.

Finding. The County has adopted these standards and they will be addressed in MCC 11.15.2074.

(3) The owners of the dwellings and structures shall maintain a primary fuel-free break area surrounding all structures and clear and maintain a secondary fuel-free break area in accordance with the provisions in "Recommended Fire Siting Standards for Dwellings and Structures and Fire Safety Design Standards for Roads" dated March 1, 1991 and published by the Oregon Department of Forestry.

Finding. The applicant has stated throughout his application that he intends to comply with this standard. Multnomah County verifies compliance with this standard at the building permit stage when the clearing has been completed. This criterion can be met.

(4) The dwelling shall have a fire retardant roof.

Finding. The applicant is proposing that this criterion be met as a condition of building permit issuance and has stated he intends to comply. Multnomah County verifies compliance with this standard at the building permit stage when the clearing has been completed. This criterion can be met.

(5) The dwelling shall not be sited on a slope of greater than 40 percent.

Finding. The slope where the dwelling is to be sited does not exceed 25 percent and the property is not identified on the County Slope Hazard map. This criterion is met.

(6) If the dwelling has a chimney or chimneys, each chimney shall have a spark arrester.

Finding. The applicant proposed that this criterion be met as a condition of building permit issuance. This criterion can be met.

3. **Multnomah County Code (Zoning Ordinance)**

Under MCC 11.15.2052(A) as applicable on July 5, 1996, "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;

Finding. Tax Lot 13 was created by a Bargain and Sale deed, recorded December 1942 with the Multnomah County Recording section in Book 725, Page 159. The subject parcel is 20 acres in size and satisfied all applicable laws when the parcel was created. The parcel is currently less than 80 acres in size and thereby does not meet the current minimum lot size requirements in the CFU zone. The applicant does not own contiguous property except for an access easement and an additional 10-foot easement entered into in 1996. The subject property (Tax Lot 13) is a lawfully created lot of record.

(2) The tract shall be of sufficient size to accommodate siting the dwelling in accordance with MCC .2074 with minimum yards of 60 feet to the centerline of any adjacent County maintained road and 200 feet to all other property lines. Variances to this standard shall be pursuant to MCC .8505 through .8525, as applicable;

Findings. The subject property contains 20 aces, generally sufficient to accommodate a dwelling. When applying the 200-foot setback requirement from the back and sides and the 60-foot requirement from the county road, a rectangular envelope is identified. This envelope is the area where development would meet the setback standards of MCC .2074. The area in the envelop leaves much area for the location of a dwelling. The applicant has demonstrated that the site is of sufficient size to accommodate a dwelling that meets al of the setback requirements of the Multnomah County Code. The subject parcel meets this criterion.

(3) The lot shall meet the following standards:

(c) The lot shall be composed primarily of soils which are capable of producing above 85 cf/ac/yr of Douglas Fir timber; and

(i) The lot and at least all or part of 11 other lots [that existed on January 1, 1993, OAR 660-06-027(1)(2)(C)(I)] existed within a 160-acre square when centered on the center of the subject tract parallel and perpendicular to section lines; and

(ii) Five dwellings [that existed on January 1, 1993, OAR 660-06-027(1)(d)(C)(ii)] exist within the 160-acre square.

Findings. The application has failed to demonstrate the parcel in question meets the above listed criteria specifically with regards to the number of dwellings existing within the 160-acre template. Five dwellings did not exist within the template as of January 1, 1993.

(d) Lots and dwellings within urban growth boundaries shall not be counted to satisfy (a) through (c) above.

Finding. No dwellings or lots within an urban growth boundary were utilized in verifying the number of dwellings and lots which existed on January 1, 1993.

(e) The lot is not capable of producing 5,000 cubic feet of wood fiber per year from commercial tree species recognized by the Forest Practices Rules.

Finding. The applicant's parcel has a site index of 145-155 for Douglas Fir, resulting in a capability of 3,100 cubic feet per year of wood fiber from Douglas-Fir. Based on the Multnomah County Public Assessment and Taxation records and a staff visit to the site, no dwellings currently exist on the property. The application complies with this criterion.

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

Finding. In the area between N.W. Kaiser Road and Skyline Boulevard there are numerous residential dwellings on large lots. There is little commercial forestry or agricultural use in this area.

The applicant has visited his property on a regular basis (every one to two months) since he purchased it in 1992. He has observed and kept track of activities on adjoining and nearby lots. His comments on forestry and agricultural activities on adjacent and nearby lots are based on regular personal observations during the 1992-1996 period.

Farming that occurs is hay and alfalfa production for pasturing animals. These farming activities will not be affected by construction of a house on tax Lot 13 because the house with the 200 foot setbacks wil notl prevent landowners on nearby lots from engaging in farming activities.

Little sustained commercial forestry is practiced in the area. Adjacent lots have ben clear-cut. Lots 5, 6, and 7 of Schoppe Acres are each twenty-acre parcels that were clear-cut in 1994-1995. The owner of lots 5 and 6, Mr. Steinberg, informed the applicant at the time of harvesting his timber that his long-term plan was to sell his lots for residential development. According to the unrebutted evidence, his timber harvest was economically feasible because of a historic spike in Northwest wood chip and pulpwood prices. Prices have declined 67% since mid-1995 and are not expected to rebound due to structural changes in world pulp paper markets. The timber on Tax Lot 12 was harvested during the same period of time for similar reasons.

Should Mr. Steinberg maintain his land as forest, he, or succeeding owners, will not be impeded from engaging in forestry activities by construction of a house on Tax Lot 13 because lots 5 and 6 have their own, separate access, and construction of a house on Tax Lot 13 will not create conditions that will impede or restrict forestry activities on lots 5 and 6 of Schoppe Acres.

Lots 5, 6, and 7 of Schoppe Acres have legal access from the west. Access for future land use activities is not dependent on the applicant's road, Lots 5, 6, and 7 of Schoppe Acres and Tax Lot 12 have been restocked with Douglas Fir. Future timber management activities would be twelve to fifteen years in the future when pre-commercial thinning would be appropriate. Harvest of timber would be forty to fifty years in the future. Construction of a house on Tax Lot 13 will not impede or increase the costs of forestry practices on lots 5, 6 and 7 of Schoppe Acres and Tax Lot 12. Forestry practices on those lots would be self-contained.

Tax Lot 11 is a forty-acre parcel with a residential dwelling located in its center. The applicant has observed no farming activity on Tax Lot 11 since acquiring Tax Lot 13 in 1992. Access to Tax Lot 11 is a private driveway from N.W. Kaiser Road. Future farming or forestry activities on Tax Lot 11 will not be impacted by construction of a house on Tax Lot 13 because Tax Lot 11 has its own access.

Lot 8 of Schoppe Acres is a twenty-acre parcel with a residential dwelling located in its southwest corner. The owner engages in occasional harvesting of timber. Construction of a house on Tax Lot 13 as proposed will not hinder, or add to the cost of, his continuing this forest practice because access to his timber is through his own driveway off N.W. Kaiser Road. The applicant observed the owner of Lot 8 harvest timber in 1993 and 1994. In both cases the timber was removed through the owner's driveway. Construction of a house on Tax Lot 13 will not impact future forestry activities on Lot 8 of Schoppe Acres because the house on Tax Lot 13 will be more than 1,500 feet from Lot 8, and past forestry operations have not been dependent on activities on Tax Lot 13.

Lots 3 and 4 of Schoppe Acres, located to the west of lots 5, 6 and 7 of Schoppe Acres are owned by the same individual. A large house sits on the northeast corner of Lot 3. The remaining acreage on Lot 3 and all of Lot 4 are pasture. No farming practices have been observed on these tax lots.

Tax Lots 6 and 7 which lie north of lot 5 of Schoppe Acres are timbered with small areas of pasture. No farming practices have been observed on these tax lots. Farm and forest activities on these tax lots will not be affected by construction of a house on Tax Lot 13. Access to Tax Lots 6 and 7 is from Skyline Blvd. They are 660 feet removed from Tax Lot 13. The proposed house on Tax Lot 13 will not be visible from Tax Lots 6 and 7.

The proposed dwelling, in either the preferred location or the alternative location, will not force a significant change in, significantly increase the costs of, or impede accepted forestry or farming practices on surrounding forest or agricultural lands because both sites meet the minimum setback requirements of 200 feet.

(5) **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**

approvals of other dwellings in the area since acknowledgment of the Comprehensive Plan in 1980, will be acceptable.

Finding. The subject parcel is not identified as a big game winter habitat area on the Multnomah County Wildlife Habitat map. Therefore, this criterion has been met.

(6) The proposed dwelling will be located on a lot within a rural fire protection district, or the proposed resident has contracted for residential fire protection.

Finding. The property is within the Tualatin Valley Fire and Rescue District. This criterion is met.

(7) Proof of a long-term road access use permit or agreement shall be provided if road access to the dwelling is by a road owned and maintained by a private party or by the Oregon Department of Forestry, and the Bureau of Land Management, or the United States Forest Service. The road use permit may require the applicant to agree to accept responsibility for road maintenance;

Finding. The applicant has submitted an Easement Reservation (Exhibit C) and an easement Agreement for Road (Exhibit S). This criterion is met.

(8) The parcel on which the dwelling will be located has been disqualified from receiving a farm or forest deferral.

Finding. OAR 660-06-029(5) and Senate Bill 245 (1995 session) supersede the requirement to disqualify the property from farm or forest deferral. If the property is planted to Department of Forestry standards then the property can be retained or added onto tax deferral programs

(9) The dwelling meets the applicable development standards of MCC .2074;
MCC .2074 - Development Standards for Dwellings and Structures: Except as provided for the replacement or restoration of dwellings under MCC .248(E) and .2049(B), all dwellings and structures located in the CFU district after January 7, 1993, shall comply with the following:
(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).

Finding. The preferred house site, Exhibit 1, is located in the northwest corner of the tax lot. The two story house being planned for construction measures 38 feet in width by 56 feet in length, contains 3,800 square feet of living space and 600 feet of garage space. The distance from the property line separating Tax Lot 13 from Lot 6 of Schoppe

Acres (west) to the proposed house is 210 feet. The distance from the house to the property line separating Tax Lot 13 from Tax Lot 11 (south) is 440 feet. The distance from the house to the eastern property line, which borders the urban growth boundary, is 1,110 feet. The slope in the preferred home site area ranges from 10 to 15 percent.

A private road accesses the property from N.W. Kaiser Road. The distance from Kaiser Road to the southwest corner of Tax Lot 13 s 1,575 feet the road then arches northeast for a distance of about 200 feet to the preferred site. The road is an all-weather rock road twenty feet in width. The road has been used by logging trucks, logging equipment, and heavy duty equipment trailers in conjunction with the clear-cut logging of lots 5, 6, and 7 of *Schoppe Acres* and Tax Lot 12, and drilling a well on Tax Lot 13. The applicant granted the neighbor's logging contractor permission to use his road on a temporary basis in return for monetary payment and road maintenance. The road is clear of all overhead obstacles to a height of 14 feet.

The road slope is zero to six degrees throughout its distance with the exception of a 28 percent slope that runs for a distance of 190 feet. The slope of this segment of the access road can be reduced by grading, which can be done as a condition of building permit approval. The road can be modified to satisfy the Tualatin Valley Fire and Rescue District's Fire Marshall.

The road was designed for access of construction and well drilling equipment, much of which weighed in excess of 52,000 gross vehicle weight. A turnaround with a radius of fifty feet for emergency vehicles is planned for the area shown on applicant's Exhibit 1, in the southwest corner of the tax lot. The turnaround will be located approximately 350 feet from the preferred site. The applicant said he would post permanent signs along the access road indicating the location of the emergency water source and vehicle turnaround. Multnomah County verifies compliance with this standard at the building permit stage.

The applicant proposes a turnout for fire equipment and other emergency vehicles for the area identified on Exhibit 1, 97 feet from the southwest corner of Tax Lot 13 and 350 feet from the preferred site.

The applicant selected the preferred site because it conforms to the 200 foot minimum setbacks from other property lines, set forth in MCC .2074, and results in minimal land disturbance in comparison to the alternative house site. The applicant argued that minimizing land disturbance is important to maintain a maximum forested acreage and wildlife habitat, and to provide the best setting to buffer the house from adjacent lots using timber and other vegetation.

The alternative home site (Exhibit 2) is in the southwest corner of the property. This site would require substantially more soil disturbance due to requirements of MCC .2074. To meet the 200-foot setback requirement a house at the alternative site would have to be located on slopes of 19 to 25 percent. Although construction is allowable on slopes up to 40 percent, construction on these steeper slopes will require a larger forest clearing (at

least one acre) for construction and fire safety zone purposes, and have a greater potential of sedimentation impact on the intermittent stream that is located 790 feet from the west property line, and 590 feet from the alternative home site.

The applicant contended that the minimum impact on wildlife and water resources will occur with the preferred house site. The alternative home site will require a larger clearing, (at least one acre), more cut and fill, and could create long-term erosion conditions. However, the code's least impact requirement does not concern effects on wildlife, water resources, or erosion. The Code requires that the location of the dwelling should have the least impact on nearby forest or farm lands.

The difference between the two home sites is that the preferred site is 180 feet closer to N.W. Kaiser Road than the alternative home site. The preferred site is closer to Tax Lot 12 whereas the alternative site is closer to Tax Lot II. The locational choice between these sites alters which neighboring parcel is affectd but not the extent of that affect. Because both sites can demonstrate that they satisfy the minimum setback requirements of 200 feet both have the least impact on nearby or adjoining forest or agricultural lands. The proposed dwelling at either location meets development standards criteria of the Code.

(2) Forest operations and accepted farming practices will not be curtailed or impeded.

Finding. Based on the applicant's statements regarding the location of the proposed dwelling and the access for this site and the surrounding properties, this criterion is met.

(3) The amount of forest land used to site the dwelling or other structure, access road, and service corridor is minimized;

Finding. The applicant has not demonstrated that the preferred home location has minimized the amount of land used to site the access road. The existing driveway and site clearing was done under a forest management permit. To obtain that permit the applicant was not required to show compliance with development standards. The fact that the road was constructed under a forest permit does not exempt the applicant from complying with the requirement that the minimum amount of land be used for development. Multnomah County has consistently determined that existing roads and cleared areas do not always comply with all code sections. Therefore, parcels that have some clearing for constructed roads must still comply with all code criteria. The fact that cleared areas must be replanted at a 2:1 ratio under the Significant Environmental concern Permit disputes the argument that building in an already cleared area and utilizing the already constructed road will limit cleared areas on the site, because any cleared areas will be required to be revegetated.

Each application is evaluated for compliance with all applicable criteria considering all site conditions and the best building location must be determined regarding all of the applicable criteria. Although there may be some slope issues with the alternative site,

development is supposed to be directed away from slopes of 25 percent or greater. The slope on the areas described by the applicant for the alternative development site are 18 to 25 percent. This degree of slope does not support a decision to extend the access length. The site plans referenced as Exhibits 1 and 2 indicate that the access corridor would be approximately 180 feet shorter in length in the alternative site.

This site has not been identified as a significant view area. The parcel and is in a resource protection area in which the County Comprehensive Plan and Zoning Ordinance have determined that minimization of the amount of land used for access is more important than criteria relating to visibility of development.

This criterion states that the amount of land to site the dwelling or other structures, access roads, and service corridor is to be minimized. The preferred development site does not do this. The reasons listed by the applicant that the alternative site has greater slopes, additional cleared areas, more visible development, and additional cleared areas for driveway construction do not support the conclusion that the amount of land used to site the dwelling or other structures, access roads, and service corridor at the preferred site is minimized. Therefore, this criterion is not met.

(4) Any access road or service corridor in excess of 500 feet in length is demonstrated by the applicant to be necessary due to physical limitations unique to the property and is the minimum length required; and

Findings. The access road to the property is already constructed of all-weather rock and is 1,575 feet from N.W. Kaiser Road to the southwest corner of Tax Lot 13. The driveway access across Tax Lot 13 to the preferred site will be an additional 600 feet of driveway access. See applicant's Statement Exhibit V and Exhibit R, SRI/Shapiro report. Due to the location of the subject parcel, there access road can not meet the 500-foot limitation. The applicant has prepared an alternative home site analysis which would reduce the access driveway by 180 feet. However, with the alternative site there are potentially negative impacts on wildlife and water resources because of steeper slopes and larger forest openings. The applicant argued that access road for the preferred site is the minimum length required due to the location of the subject parcel and the placement of N.W. Kaiser Road.

The detrimental impact on wildlife and water resources the alternate site would have compared to the preferred site are not relevant to this criterion. The fact that there are slopes of up to 25 percent at the alternative home site is not sufficient evidence to determine that the additional 180 feet of length of road is required. Although the steep slopes are a concern during development and for erosion control during construction (and would therefore require a Hillside Development Permit if more than 25 percent), a building area with a maximum slope of 25 percent would not restrain or restrict building in that area. To demonstrate that the road is the minimum length required, the house would need to be located 200 feet from the south and west property lines. The applicant has not

proved that this criterion has been satisfied based on the preferred home site. This criterion is not met by the preferred site, but is met by the alternative site.

(5) The risks associated with wildfire are minimized. Provisions of reducing such risk shall include:

(a) Access for a pumping fire truck to within 15 feet of any perennial water source on the lot. The access shall meet the driveway standards of MCC .2074(D) with permanent signs posted along the access route to indicate the location of the emergency water source;

(B) Maintenance of a primary and a secondary fire safety zone;

(i) A primary fire safety zone is a fire break extending a minimum of 30 feet in all directions around a dwelling or structure.

(ii) On lands with 10 percent or greater slope the primary fire safety zone shall be extended down the slope from a dwelling or structure as follows:

(Iii)

Percent Slope	Distance In Feet
Less than 10	Not required
Less than 20	50
Less than 25	75
Less than 40	100

(iV) A secondary fire safety zone is a fire break extending a minimum of 100 feet in all directions around the primary safety zone. . . .

(ix) No requirement in (i), (ii), or (iii) above may restrict or contradict a forest management plan approved by the State of Oregon Department of Forestry pursuant to the State Forest Practice Rules; and

(C) The building site must have slope less than 40 percent.

Findings. There is no perennial water source on the lot, but the lot is serviced by the Tualatin Valley Fire and Rescue District. There is a fire break of 40 feet in all directions from the dwelling site (applicant's statement Exhibit V). Slopes in the cleared area range from 10 to 17 percent (applicant's statement Exhibit V). For lands with slopes between 10 and 20 percent an additional 50 feet is required for the primary fire safety zone, a total of 70 feet. With this larger primary fire safety zone, the total primary and secondary fire safety zone required is 170 feet. Verification of the clearing to the fire safety zones is done by the County at the building permit stage. This criterion can be met at either site.

(B) The dwelling shall:

(1) Comply with the standards of the uniform Building code or as prescribed in ORS 445.092 through 446.200 relating to mobile homes;

(2) Be attached to a foundation for which a building permit has been obtained; and

(3) Have a minimum floor are of 600 square feet.

Finding. The two story house planned for construction measures 38 feet in width by 56 feet in length, contains 3,800 feet of living space and 600 square feet of garage space. Compliance with this criterion can be verified at the building permit stage.

(C) The applicant shall provide evidence that the domestic water supply is from a source authorized in accordance with the Department of Water Resources Oregon Administrative Rules for the appropriation of ground water (OAR 690, Division 10) or surface water (OAR 690, Division 20) and not from a Class II stream as defined in the Forest Practices Rules. If the water supply is unavailable from a public source, or sources located entirely on the property, the applicant shall provide evidence that a legal easement has been obtained permitting domestic water lines to cross the properties of affected owners.

Findings. The applicant has submitted a well report from the State of Oregon (Exhibit D). The well-log report is evidence that the domestic water supply is from a source authorized in accordance with the Department of Water Resources. This criterion is met.

(D) A private road (including approved easements) accessing two or more dwellings, or a driveway accessing a single dwelling, shall be designed, built, and maintained to:

(1) Support a minimum gross vehicle weight (GVW) of 52,000 lbs. Written verification of compliance with the 52,000 lb. GVW standard from an Oregon Professional Engineer shall be provided for all bridges or culverts;

(2) Provide an all-weather surface of at least 20 feet in width for a private road and 12 feet in width for a driveway;

(3) Provide minimum curve radii of 48 feet or greater;

(4) Provide an unobstructed vertical clearance of at least 13 feet 6 inches;

(5) Provide grades not exceeding 8 percent, with a maximum of 12 percent on short segments, except as provided below:

(a) Rural Fire Protection District No. 14 requires approval from the Fire Chief for grades exceeding 6 percent;

(b) The maximum grade may be exceeded upon written approval from the fire protection service provider having responsibility;

(6) **Provide a turnaround with a radius of 48 feet or greater at the end of any access exceeding 150 feet in length;**

(7) **Provide for the safe and convenient passage of vehicles by the placement of:**

(a) **Additional turnarounds at a maximum spacing of 500 feet along a private road; or**

(b) **Turnouts measuring 20 feet by 40 feet along a driveway in excess of 200 feet in length at a maximum spacing of ½ of the driveway length or 400 feet whichever is less.**

Findings. The private easement will only access the applicant's proposed dwelling. The applicant has provided a drawing in Exhibit 3 to show that the road meets the minimum standards of the Tualatin Valley Fire and Rescue District for minimum gross weight, surface preparation, radii, vertical clearance, maximum grands not to exceed 8 to 12 percent, and turn-around radius of 48 feet (applicant's statement, Exhibit V and Exhibit 3). The applicant will provide confirmation by a Professional Engineer that the driveway/private road has been constructed as proposed as a condition of approval of obtaining his building permit. This criterion can be met but the applicant may need to obtain either a Grading and Erosion Control Permit or Hillside Development Permit before a finding of compliance can be made because of the nature of the grading that must occur to get the sections of the road that are 28% to meet the standards of the Tualatin Valley Fire and Rescue District. It is also possible that another easement from the adjoining property owners for the grading work required on the road may be necessary because the easement submitted is only 10 feet wide.

MCC 11.15.2052(A)(10): A statement has been recorded with the Division of Records that the owner and the successor in interest acknowledge the rights of owners of nearby property to conduct forest operations consistent with Forest Practices Act and Rules, and to conduct accepted farming practices.

Finding. The applicant has stated he will submit a recorded deed restriction as a condition of approval as shown in Exhibit X. This criterion can be met.

B. Conclusions Concerning Applicable Conditional Use Permit Criteria

4. **ORS 215.428 provides that:**

(1) **Except as provided in subsections (3) and (4) of this section, the governing body of a county or its designate shall take final action on an application for a permit . . . within 120 days after the application is deemed complete.**

(2) **If an application for a permit . . . is incomplete, the governing body or its designate shall notify the applicant of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section**

upon receipt by the governing body or its designate of the missing information. . . .

(3) If the . . . the applicant submits the requested additional information within 180 days of the date the application was first submitted and the county has a comprehensive 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.

Finding. The application is deemed complete for purposes of the 120-day time limitation when the local jurisdiction receives any missing information. This application was first received by Multnomah County on July 5, 1996. On January 2, 1997, Multnomah County received a revised application from the applicant. January 2, 1997 was 180 days from the date of the original filing of the application on July 5, 1996. Because the applicant submitted the requested additional information within 180 days of the date the application was first submitted and the county has acknowledged comprehensive plan and land use regulations, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted.

2. At issue are differences between OAR 660-06-027(1)(d)(C), effective on March 1, 1994 and MCC 11.15.2052(A)(3)(c), effective in 1992. The question is whether the County Code's template dwelling provisions, which were adopted before the legislative and OAR 660, division 6 template dwelling provisions, were adopted, apply as well as state law or whether only the legislative enactment as interpreted by the administrative rule apply. The applicant does not dispute that the County regulations are not met. The applicant only contends that the County regulations do not apply.

a. The primary directives for determining applicable standards are ORS 197.175(2)(d), ORS 215.416(4) and(8) and ORS 197.646(1) and (3).

(1) **ORS 197.175. Cities' and counties' planning responsibilities; rules on incorporations; compliance with goals.**

(2) Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations; and

(2) **ORS 215.416. Application for permits; consolidated procedures; hearings; notice; approval criteria; decision without hearing.**

(4) The application shall not be approved if the proposed use of land is found to be in conflict with the

comprehensive plan of the county and other applicable land use regulation or ordinance provisions. . . .

(8) 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 . . .

(3) **197.646. Implementation of new or amended goals, rules or statutes.**

(1) A local government shall amend the comprehensive plan and land use regulations to implement new or amended statewide planning goals, commission administrative rules and land use statutes when such goals, rules or statutes become applicable to the jurisdiction. Any amendment to incorporate a goal, rule or statute change shall be submitted to the department as set forth in ORS 197.610 to 197.625. [post acknowledgment procedures]

(3) When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. . .

b. Ms. Cofield stated that ORS 197.646(3) says a new state law or rule applies directly until the County adopts that new standard into the County Code. The County had not adopted the State standards on July 5, 1996 when this application was filed. She argued that only the State law applies directly to this application, as the petitioner argued in *Evans*.

She said that the staff argued that if there isn't a County template test then the application violates the County's Comprehensive plan because the County doesn't have a template test. She argued that ORS 197.646(3) however, says that state laws, rules and goals apply directly. She said that LUBA found in *Blondeau v. Clackamas County*, 29 Or LUBA (1995) that State law could apply directly. She does not think that the argument that you can't approve a template dwelling if there is no county template test holds merit. She urged that the Hearings Officer should make a finding and approve the application based on the template dwelling portion of state law disregarding County standards.

Evans argued that after state laws are amended local governments are required to amend their regulations. The applicant contends that ORS 197.646 states that when a local government does not adopt land use regulations to implement amended state administrative rules when those rules become applicable the amended rules shall be directly applicable to the local government's land use decision, and further contends that only the state rules are applicable.

The applicant disputes the County's claim that the County regulations that are stricter than the state law and administrative rules are also applicable arguing that the County tried to add an exception to the statue that bot contain. The applicant argues that the plain language of the statute must be construed to mean what it says and if the legislature had wanted the statute to read as the County contends it does the legislature would have included terms such as "more restrictive" or "less restrictive" in ORS 197.646(1). Rather than ending with "when such goals, rules, or statutes become applicable to the jurisdiction," the statute would need to read "when such goals, rules, or statutes are more restrictive than local regulations."

The applicant argues that *Dilworth v. Clackamas* County does not apply because the decision was not related to ORS 197.646. In Dilworth, Clackamas County denied a template dwelling application because the applicant did not meet Clackamas County requirements that the dwellings exist at the time of the application. LUBA considered the application of ORS 215.750 because the statutory provision does not require that the other dwellings exist on the date of application but only on January 1, 1993. LUBA held that a county is not precluded from regulating the establishment of dwellings more stringently than is required under ORS 215.750. Dilworth did not challenge the County's authority to set standards more stringent than those in the statute, nor did Dilworth address the issue of whether preexisting more restrictive County regulations apply after state law is amended.

The applicant argued that the hearings officer should consider *Blondeau* for the proposition that the legislature intended that the state template dwelling criteria should be the only applicable criteria. At the time of Blondeau's application for a farm dwelling, "lot of record" farm dwellings had been authorized by ORS 215.705, but not by County regulations which had not been updated after the enactment of the statute. The County denied the application because it did not comply with previously adopted county standards adopted to satisfy a previous statutory prohibition against non-farm dwellings on prime farm lands.

LUBA held that the County could not deny the dwelling because it hadn't updated its code to comply with the new law. LUBA interpreted ORS 215.705(5) as allowing the county to deny the non-farm dwelling for the reasons given in that subsection only by enacting or reenacting local legislation.[2] Addressing the statutory context, LUBA found

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[2] ORS 215.705(5): "A county may, by application of criteria adopted by ordinance, deny approval of a dwelling allowed under this section in any area where the county determines that approval of the dwelling would:

(A) Exceed the facilities and service capabilities of the area;

(B) Materially alter the stability of the overall land use pattern in the area; or

(C) Create conditions or circumstances that the county determines would be contrary to the purposes or intent of its acknowledged comprehensive plan or land use regulations."

that ORS 215.705(1)(c) does not explicitly prohibit the application of local land use regulations, but that ORS 215.705(5) allows a county to adopt ordinance standards that would allow it to deny a lot of record dwelling otherwise approvable under ORS 215.705. LUBA found that for both sections to have meaning, subsection .705(5) should be understood to imply a requirement of subsequent enactment for the county regulation to be effective. Addressing the legislative intent, LUBA found that the legislative intended to allow counties to approve lot of record dwellings under ORS 215.705 without first requiring amendments to their plans and regulations. This would be impossible if ORS 215.705(1)(c) requires lot of record dwellings to comply with plan and regulation provisions previously adopted to protect agricultural soils. LUBA held that ORS 215.705(1)(c) does not allow a county to deny a lot of record dwelling because it fails to comply with code provisions previously adopted to implement ORS 215.283(3) (1991) or with comprehensive plan provisions generally requiring protection of agricultural land.

She said that Blondeau cited in the *Evans* case isn't on point because it concerned farm zones. In the farm zone lots of record provisions there is a specific prohibition that says that a County has to re-adopt their ordinances if the County wants to apply additional criteria to lots of record. She agreed that there isn't a similar provision in the forest-land provisions. But, she argued that the Hearings Officer should take the idea from *Blondeau* and consider legislative intent. She thinks that the legislature said that if a county opts-in and uses the State's forest-land dwelling provisions they have to use them as provided in the state statute, and no other forest land dwellings are allowed.

The applicant argues that ORS 197.646 was an attempt by the legislature to promote uniformity in the regulation of land use activities and to prevent inconsistences among County codes from interfering with the State's attempt to regulate forest land uses. Essentially the applicant argues that when the legislature addresses a subject it preempts local governments from adopting different more restrictive regulations on that subject. The applicant cites no authority for this proposition.

The applicant argued that if both the County Code and the State template dwelling criteria are applied that would mean for each application someone would have to sort through the criteria and determine whether a County provision is in conflict with a State provision. She argued that if these different criteria apply then an applicant would have to decide whether: 1) he or she can apply directly under state law, 2) the County Code is inconsistent with State law, and the applicant would have to decide 3) which criteria are more restrictive. She argued that the reason for acknowledgment and post-acknowledgment procedures is to require that new local government enactments go to the State and be reviewed so that which criteria apply need not be decided on a particular case.

The applicant argued that ORS 215.720(3), concerning forest land dwellings, says that "no other dwellings than those described in this section and ORS 215.740 and 215.750 may be sited on land zoned for forest use under a land use planning goal protecting forest land." The dwellings that referred to are the "lot of record forest land

dwelling," the "template dwelling" and the "large acreage dwelling." She argued that the County's template test that requires the five (5) houses and other prohibitions, is not a dwelling that is described in 215.750 and it can't be applied.

C. Mr. Rochlin said that ORS 215.705 and 215.750 begin by saying that "counties may allow the following uses." He argued that the provisions of ORS 215.705 and 215.704 are contrasted with ORS 215.283 or 215.213 which start out using the passive voice saying "uses may be allowed" which led the Supreme Court to rule that under that language the uses that may be allowed must be allowed by the county. *Brentmar v. Jackson County*, 321 Or 481, P2d 1030 (1995). Mr. Rochlin argued that the language applicable here is completely distinguished removing the ambiguity.

He argued that there are other provisions, for example ORS 215.750(4), that provide that dwellings can't be allowed if they conflict with the County's plan or land use regulations. He discussed *Blondeau* arguing that in *DeBates v. Clackamas County*, ___ Or LUBA ___, (LUBA No. 96-100 01/03/97) the court held that the application of *Blondeau* is very limited to requiring that counties reenact any legislation if they want to prohibit nonfarm lot of record dwellings. He said that if a County's lot of record regulations had been adopted only to enforce ORS 215.283 intended specifically to preserve farm land then they would have to reenact those provisions to make them make the more restrictive regulations effective. Mr. Rochlin said that *DeBates* very carefully pointed out that *Blondeau* is limited to just the lot of record farm regulation. He said the reason for that is that ORS 215.705, which addresses farm dwellings, has two provisions, one of which can be interpreted to require re-enactment of regulations. He said that ORS 215.750 doesn't have a comparable provision; 215.750 simply has the general statement that dwellings may not be allowed if they conflict with county regulations. He submitted brief written testimony.

The Multnomah County Board of Commissioners, in *Evans v. Multnomah County*, has considered its interpretation of ORS 197.646(3). The Board of County Commissioners rejected Evan's argument that only the OAR applies and concluded that both the County regulations and the OAR apply.

The County argues that the context of ORS 197.646(3) includes 197.175(2) and 215.416(8) which require a local government to make land use decisions in compliance with the local government's acknowledged regulations and comprehensive plan. The County's plan and regulations are acknowledged. The County argues that the applicant tries to add a provision to ORS 197.646(3) that would extinguish County regulations, but that ORS 197.646(3) only requires that the relevant statues and OAR be applied directly.

The County argues that reliance on only the state law and rules would be impossible to administer and that if the OAR is the only applicable criteria this application would not comply with the rule's requirement of compliance with an acknowledged comprehensive plan or land use regulations because there would be no local provision allowing a template dwelling. Addressing the argument that new state law extinguishes preexisting local

regulations the County says that it would be impossible to determine which local law remains applicable and which is extinguished. The problem of knowing which county regulations are extinguished by state law is avoided by applying both local and state requirements whenever county regulations have not been updated to reflect amended state requirements. Even if this results in applying standards unnecessarily by mistake, the method does not lead to erroneous determinations of compliance, because state law will alter the result only when the county regulation does not satisfy state law. The mandate of the statute is achieved, while preserving the meaning of ORS 197.175(2)((d) and (e) and 215.416(8) by applying the relevant state rules in addition to the relevant county regulations, setting aside a county rule only if it is inconsistent with a state rule.

The County argued that LUBA agreed in *Dilworth* that a local government can implement a non-forest dwelling regulation stricter than those found in the OAR and state statute. The option of stricter local regulation is the express intent of the legislature. ORS 215.750(4)(a) provides that the template dwellings allowed by the section may be prohibited by provisions in local regulations. The County did not introduce Dilworth to define ORS 197.646 but rather to argue that local governments can implement local regulations stricter than state requirements.

The County argued that the only authority for the interpretation that the state's not the county's template test applies is *Blondeau*. The County argues that Blondeau does not apply here because (1) that case concerned lot of record provisions for nonfarm dwellings for agricultural lands (ORS 215.705) whereas this case concerns template dwelling provisions for forest lands (ORS 215.750), (2) while in Blondeau Clackamas County had not addressed lot of record provisions Multnomah County has addressed template dwellings in its regulations, and (3) in Blondeau LUBA relied on ORS 215.705(5) for its decision that a local government cannot rely on previously acknowledged code provisions when a statute is subsequently amended whereas ORS 215.750 does not contain similar language. The County therefore concludes that Blondeau does not prevent the County from relying on both its already acknowledged standards as well as subsequently amended statutes and administrative rules.

The County argued, and the applicant agrees, that *Blondeau* concerns only farm zone dwellings and ORS 215.705, and not forest zone dwellings or ORS 215.750 which applies to this case. ORS 215.750(4)(a) like ORS 215.705(1)(c) disallows a dwelling prohibited by, or not complying with, local regulations. ORS 215.705(5) has no counterpart in 215.750. Therefore there is nothing in ORS 215.750 that requires local reenactment of template dwelling provisions for a County to deny a non-forest dwelling for failing to comply with county regulations.

The County further argues that the statute and the administrative rule allows for a local government to apply its own standards. ORS 215.750 says that a County "may" allow a dwelling in a forest zone under the standards that follow in the statute. The statute does not say a County "must" use those standards. This, combined with no

wording having been inserted into ORS 197.646(3) negating the effect of a previously adopted and acknowledged county code allows a county to apply its stricter standards.

Finally, the County has an April 30, 1996 letter from the Department of Land Conservation and Development in which the DLCD staff disagrees with the argument that the county may not apply its more stringent standards in addition to the applicable state laws.

Thus, in applying both template tests, the stricter standards of the County test are that five, not three, houses must exist within the 160 acre square, not somewhere on the lot, and the square is aligned with the section lines as opposed to any way. The state standard provides only two stricter standards, the houses and the other eleven lots must have existed on January 1, 1993.

Conclusion. Nothing in ORS 197.646(3) says that the County's ordinance does not also apply and its language does not imply that the County's ordinance does not apply unless local regulations are inconsistent with the state rule required to be directly applied. In *Evans*, the County Board of Commissioners applied the stricter features of each test. The County staff, in this application, applied the stricter features of both the County Code and the OAR. The Hearings Officer agrees with the County that both State law and County code criteria are applicable. The issue is whether the County can have more restrictive regulations. It was established that the County can have more restrictive template dwelling regulations by *Dilworth v. Clackamas County*, 30 Or LUBA 319 (1996).

C. Significant Environmental Concern Permit

1. Uses Permitted in Significant Environmental Concern lands

MCC 11.15.6404(A): All uses permitted under the provision of the underlying district are permitted on lands designated SEC; provided, however, that the location and design of any use, or change or alternation of a use, except as provided in MCC. 6506, shall be subject to an SEC permit.

Finding. A single family dwelling in the CFU zoning district requires review and approval of a conditional use permit. Provided a Conditional Use Permit is approved, an SEC permit for the single family dwelling may obtain an SEC approval. However, with the findings that the application cannot be permitted on the subject lot as a Conditional Use because it cannot demonstrate compliance with applicable Commercial Forest Use criteria, the SEC should be denied due to the fact that a dwelling on the lot will not be considered a permitted use.

2. Criteria for Approval of SEC Permit.

MCC 11.15.6420. The SEC designation shall apply to those significant natural resources, natural areas, wilderness areas, cultural areas, and wild and scenic waterways that are designated SEC on Multnomah County sectional zoning maps. Any proposed activity or use requiring an SEC permit shall be subject to the following:

(A) The maximum possible landscaped area, scenic and aesthetic enhancement, open space or vegetation shall be provided between any use and a river, stream, lake, or floodwater storage area.

Finding. The applicant has preserved the maximum space between the stream on the site which is designated a significant stream. The SEC-stream overlay extends 300 feet from the centerline of the stream and this application exceeds that. The application has maintained the minimum setback allowed (with the addition of 10 feet to allow a setback of 210 feet) to the property line opposite the stream. This criterion is met.

(B) Agricultural land and forest land shall be preserved and maintained for farm and forest use.

Finding. The subject parcel is designated Commercial Forest Use (CFU) under the Multnomah County Comprehensive Framework Plan. Statewide Planning Goal 3 - Agricultural lands and Goal 4 - Forest Lands were established in part to preserve and maintain agricultural lands and to conserve forest lands for forest uses. The County CFU zone has been deemed consistent with Goal 4 and provides for dwellings in certain instances. Only the footprint area of the proposed dwelling, the fire safety zone area and the driveway access area will be affected. The applicant proposes to remove 2/3 of an acre from the 20 acres of forest property. This amount of land is included to be able to maintain the minimum required fire safety zones around the proposed dwelling. The remaining 19 1/3 acres will be maintained for forest use. This criteria is met.

(C) A building, structure, or use shall be located on a lot in a manner which will balance functional considerations and costs with the need to preserve and protect areas of environmental significance.

Finding. This application has balanced the functional considerations of proposing a dwelling in a Commercial forest Use District with those of cost while maintaining the minimum standards allowed under the CFU District.

(D) Recreational needs shall be satisfied by public and private means in a manner consistent with the carrying capacity of the land and with minimum conflict with areas of environmental significance.

Findings. The proposed use and location do not conflict with any known recreational plans nor is recreational use proposed. The proposed use is a single family residence. This criterion does not apply.

(E) The protection of the public safety and of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.

Finding. The applicant has submitted a Police Services Review form signed by the Multnomah County Sheriff's Office indicating the level of police service available to serve the project is adequate. No significant concerns for vandalism and trespass are in the record. The added presence of a dwelling will likely provide protection for the property owner by having a permanent presence on the site. This criterion is met.

(F) Significant fish and wildlife habitats shall be protected.

Findings. The applicant has made the effort to maintain a substantial buffer between the identified stream and the proposed dwelling to preserve fish habitat. The applicant can addressing the wildlife habitat criteria through the implementation of a wildlife conservation plan that satisfies the criteria of MCC 11.15.6426(B) . This criterion can be met.

(G) The natural vegetation along rivers, lakes, wetlands and streams shall be protected and enhanced to the maximum extent practicable to assure scenic quality and protection from erosion, and continuous riparian corridors.

Finding. The proposed dwelling at either the preferred or the alternative site is further removed from the stream than required by the code and would maintain the largest buffer from the on-site stream. Other than the removal and thinning of vegetation required for the fire safety zones, the applicant intends to implement a forest management plan that outlines the intentions of the owner to "grow Douglas-fir for commercial purposes. He proposes to selectively thin trees when the trees reach 30 to 35 years. This is the only proposal the application contains for the removal of vegetation other than for the required fire safety zones and all forest management plans are specifically exempted from these provisions (MCC 11.15.6404(B). This criterion is met.

(H) Archaeological areas shall be preserved for their historic, scientific, and cultural value and protected from vandalism and unauthorized entry.

Finding. There are no archaeological areas identified on this property as part of the County's Goal 5 inventory. The applicant is advised that, if archaeological objects are discovered during construction, state statutes require construction be stopped and the State Historic Preservation Office be notified. This criterion is met.

(I) Areas of annual flooding, flood plains, water areas, and wetlands shall be retained in their natural state to the maximum possible extent to

preserve water quality and protect water retention, overflow, and natural; functions.

Finding. There are no identified wetlands or areas of flooding as identified on the FEMA floodplain maps and no wetlands by the Army Corps of Engineers. This criterion does not apply.

(J) Areas of erosion or potential erosion shall be protected from loss by appropriate means. Appropriate means shall be based on current Best Management Practices and may include restriction on timing of soil disturbing activities.

Finding. The applicant will be required to obtain a Grading and Erosion Control Permit for any earth movement under MCC 11.15.6710(C) because this site is lcoated within the Tualatin River Drainage Basin. This criterion can be met.

(K) The quality of the air, water, and land resources and ambient noise levels in areas classified SEC shall be preserved in the development and use of such areas.

Finding. Construction of the dwelling and improvement of the driveway is not expected to cause any adverse affect on the air, water and land quality or noise levels in the area. The impacts of a single family dwelling have not been determined to be detrimental to the existing levels. This criterion is met.

(L) The design, bulk, construction materials, color and lighting of buildings, structures and signs shall be compatible with the character and visual quality of areas of significant environmental concern.

Finding. Under the provisions of MCC 11.15.7820 this application will be required to go through the Design Review process. The process looks at design issues. This criterion will be ensured through the design review process.

(M) An area generally recognized as fragile or endangered plant habitat or which is valued for specific vegetative features, or which has an identified need for protection of the natural vegetation, shall be retained in a natural state to the maximum extent possible.

Finding. This site has not been identified as having any fragile or endangered plant habitats or specific vegetative features other than as an asset to wildlife habitats. These issues can be addressed more specifically through the wildlife conservation plan, therefore, this criteria can be met.

(N) The applicable policies of the Comprehensive Plan shall be satisfied.

Findings. The County requires a finding before approval of a quasi-judicial action of certain factors have been considered. Since this application involves a Quasi-judicial action, Plan Policies 13, 22, 37, 38, and 40 are applicable. These are addressed in the staff report and incorporated herein. The Comprehensive Plan policies are themselves approval criteria if they have not be incorporated into the zoning code.

3. Criteria of Approval of SEC-h Permit

MCC 11.15.6426. Criteria for approval of SEC-h Wildlife Habitat:

(A) In addition to the information required by MCC .6409(C), an applicant for development in an area designated SEC-h shall include an area map showing all properties which are adjacent to or entirely or partially within 200 feet of the proposed development, with the following information, when such information can be gathered without trespass:

(1) Location of all existing forested areas (including areas cleared pursuant to an approved forest management plan) and non-forested "cleared" areas; For purposes of this section, a forested area is defined as an area that has at least 75% crown closure, or 80 square feet of basal area per acre, of trees 11 inches DBH and larger, or an area which is being reforested pursuant to Forest Practices Rules of the Oregon Department of Forestry. A non-forested "cleared" area is defined as an area which does not meet the description of a forested area and which is not being reforested pursuant to a forest management plan.

(2) Location of existing and proposed structures;

(3) Location and width of existing and proposed public roads, private access road, driveways, and service corridors on the subject parcel and within 200 feet of the subject parcel's boundaries on all adjacent parcels;

(4) Existing and proposed type and location of all fencing on the subject property and on adjacent properties entirely or partially within 200 feet of the subject property.

(B) Development Standards:

(1) Where a parcel contains any non-forested "cleared" areas, development shall only occur in these areas, except as necessary to provide access and to meet minimum clearance standards for fire safety.

Finding. The home site location is an area of approximately 2 acres that was cleared of vegetation in 1992. This criterion is met.

(2) Development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developable portion of the site.

Finding. The preferred home site is 1,950 feet from N.W. Kaiser Road at the closest point. A right-of-way gravel road approximately 1,575 feet long provides access from N.W. Kaiser Road to the southeastern corner of the property. It provides the only reasonable and practical access to the property and proposed home site. The proposed driveway from the end of the right-of-way to the home site is 375 feet long. The driveway to the alternate home site is 180 feet closer to N.W. Kaiser Road. This is the closest the home site can be and meet the County's setback requirements.

(3) The access road/driveway and service corridor serving the development shall not exceed 500 feet in length.

Finding. The access road and driveway are approximately 1,950 feet long. This criteria cannot be met. The applicant has submitted a response to 11.15.6426(C) for a wildlife conservation plan.

(4) The access road/driveway shall be located within 100 feet of the property boundary if adjacent property has an access road or driveway within 200 feet of the property boundary.

Finding. Adjacent properties access roads are greater than 200 feet from the subject property boundary. The proposed access road will be located along the western edge of the property within 100 feet of the property boundary. This criteria does not apply because the adjacent properties do not have access roads or driveways within 100 feet of the property boundary.

(5) The development shall be within 300 feet of the property boundary if adjacent property has structures and developed areas within 200 feet of the property boundary.

Findings. Developed areas on adjacent properties are greater than 200 feet from the subject property boundary. The proposed home site will be located 170 feet from the western property boundary, 220 feet from the northern property boundary, 370 feet from the southern property boundary, and 1,030 feet from the eastern property. This criteria is not applicable because the adjacent property development is not located within 200 feet of the property boundary. This application has gone through at least two versions of site plans, and apparently the first one had a property setback of 170 feet. Revised maps drawn to scale by the wildlife expert were submitted at the hearing show a distance of 210 This criterion is met.

(6) Fencing within a required setback from a public road shall meet the following criteria:

(a) **Fences shall have a maximum height of 42 inches and a minimum 17 inch gap between the ground and the bottom of the fence.**

(b) **Wood and wire fences are permitted. The bottom strand of a wire fence shall be barbless. Fences may be electrified, except as prohibited by County Code**

(c) **Cyclone, woven wire, and chain link fences are prohibited.**

(d) **Fences with a ratio of solids to voids greater than 2:1 are prohibited.**

(e) **Fencing standards do not apply in an area on tohe proeprty bounded by a line along the pbulic road serving the development, two lines each drawn perpendicular to the principal structure from 100 feet from the end of the structure on a line perpendicular to and meeting with the public road serving the development, and the front yard setback line parallel to the public road serving the development.**

Finding. No fencing is proposed. This criterion is met.

(7) The nuisance plants listed shall not be planted on the subject property and shall be removed and kept removed from cleared areas of the subject property.

Finding. The applicant stated that landscaping will not include any plants on the Multnomah County nuisance plant list and that nuisance plants that currently occur on the property (Himalayan blackberry, Canada thistle, and English Ivy) will be removed and kept clear from at least a 1 acre area surrounding the home site. This criteria can be met.

(C) Wildlife Conservation Plan. An applicant shall propose a wildlife conservation plan if one of two situations exist.

(1) The applicant cannot meet the development standards of Section (B) because of physical characteristics unique to the property. The applicant must show that the wildlife conservation plan results in the minimum departure from the standards required in order to allow the use; or

(2) The applicant can meet the development standards of Section (B), but demonstrates that the alternative conservation measures exceed the standards of Section B and will result in the proposed development having less detrimental impact on forested wildlife habitat than the standards in Section B.

Finding. A wildlife conservation plan is necessary becasue the applicant cannot meet the requirements of MCC 11.15.6426(B)(3). The siting of a home at any location on the property will require an access road in excess of 500 feet from a public road. To offset any impacts from the siting of a home outside the requirements of Section B, the following

wildlife conservation plan addresses the guidelines of Section C, Criteria 1, has been submitted.

Selected harvest and reforestation is recommended to improve the overall wildlife habitat of the forest stand while not negatively impacting the continuation of forestry practices on the parcel. Small areas (1-2 acres) should be harvested over a number of years and reforested with conifer species. This will eventually convert the existing hardwood forest stand to conifer. A few selected trees from each acre harvested should be killed and retained for the creation of snags and/or downed logs.

This harvest method will minimize disturbances to the land and wildlife habitat. Over time, wildlife habitat would be enhanced by the successful establishment of a conifer forest on the parcel. In addition, the structural diversity of the stand would be improved through establishment of multiple age classes and diversity of species. A forest stand of this type is a natural condition for this area.

(3) The wildlife conservation plan must demonstrate the following:

(a) That measures are included in order to reduce impacts to forested areas to the minimum necessary to serve the proposed development by restricting the amount of clearance and length/width of cleared areas and disturbing the least amount of forest canopy cover.

Finding. The home site is proposed to be located in the non-forested area in the northwestern portion of the property. No additional forested areas will be cleared for siting of the home. This criterion is met.

(b) That any newly cleared area associated with the development is not greater than one care, excluding from this total the area of the minimum necessary accessway required for fire safety purposes.

Finding. The proposed home site is currently cleared of large diameter trees. Vegetation is dominated by hardwood species at a sapling/pole seral stage that have reestablished since 1992 when the site was cleared of trees. This criterion is met.

(c) That no fencing will be built and existing fencing will be removed outside of areas cleared for the site development except for the existing areas used for agricultural purposes.

Finding. The applicant is not proposing fencing. If the applicant chooses to have fencing at a later date, the applicant will be required to obtain a Significant Environmental Concern Permit for the proposed fencing before installation unless it is identified as fencing for agricultural purposes. This criterion is met.

(d) That revegetation of existing cleared areas on the property at a 2:1 ratio with newly cleared areas occurs if such cleared areas exist on the property.

Finding. The home is proposed to be sited in the only non-forested area on the property. No additional forest cover will be removed. This criterion is met.

(e) That revegetation and enhancement of disturbed stream riparian areas occurs along drainages and streams located on the property occurs.

Finding. The stream on the site is not disturbed and riparian vegetation occurs in a natural, functioning condition. No disturbance or alteration of the stream and/or riparian area is expected to occur as a result of the proposed residence. Construction activities will be approximately 800 feet from the creek channel and 500 feet from the edge of the SCA area. No enhancement of the stream and/or riparian area is recommended. This criterion is met.

(4) For protected Aggregate and Mineral (PAM) subdistrict, the applicant shall submit a Wildlife Conservation Plan which must comply only with measures identified in the Goal 5 protection program that has been adopted by Multnomah County for the site as part of the program to achieve the goal.

Finding. The site is not in the protected Aggregate and Mineral (PAM) subdistrict. This criterion does not apply.

4. **MCC 11.15.6428: Criteria for approval of SEC-s Permit - Streams:**

Finding. Although this parcel does contain an identified significant environmental stream, the application as proposed does not contain any development within 300 feet of the centerline of the stream and is therefore not subject to the SEC-s criteria.

IV. CONCLUSION AND DECISION

A. Conclusions for Conditional Use Request for Template Dwelling

The application for the template dwelling does not comply with the Multnomah County Code tests for a template dwelling. The preferred site does not comply with the requirement to minimize the access length but the alternative site does. The application complies with other requirements of the County Code and Multnomah County Comprehensive Framework Plan.

B. Conclusions for significant Environmental Concern Permit

The application for development of this property with a single family dwelling not related to forest management, demonstrates compliance with the Multnomah County Code standards for development within an identified wildlife habitat area.

V. Final Order and Conditions of Approval

Based on the findings of fact and conclusions contained herein, and incorporating the Staff Report and other reports of affected agencies and public testimony and exhibits received in this matter, the Hearings Officer hereby denies CU 7-96 and SEC 33-96.

Dated this 5th day of March, 1997

Deniece B. Won

Deniece B. Won, Attorney at Law
Hearings Officer

March 26, 1997

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

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

Re. **CU 7-96/SEC 33-96—Miller CFU Dwelling—Hearing 4/1/97**

A. Summary

The Board is asked to uphold the Hearings Officer's decision to deny the application, but with some changes to the findings. The applicant requests a dwelling on a 20 acre property in the Commercial Forest Use zone. The critical issue of law is the same as in the Evans case now before LUBA. Because the county did not promptly amend its code to implement changes of state law affecting forest zone dwellings, state standards must be directly applied to individual land use decisions. All parties agree state standards apply, but disagree over how. The applicant argues that all county standards not updated by revision or reenactment are to be disregarded. The staff and opponents believe all county standards not conflicting with state standards are to be applied along with the state standards. The Hearings officer in the Evans case adopted the applicant's view and was reversed by the Board on appeal. In this case, the Hearings Officer agreed with the staff and the Board's holding in Evans. She found the state template standard was satisfied, but denied the application for not meeting the county template standard that requires five dwellings within the template. The last page of this testimony identifies the differences between the state and county standards. That the county template standard is not met, is not disputed. The dispute concerns whether or not that standard is valid.

Since the Board's decision in Evans, LUBA and the Court of Appeals have issued two decisions that support your interpretation of ORS 197.646. In requiring that state standards be applied, it does not preclude application of stricter preexisting county standards that are not conflicting. Those decisions are discussed below.

B. Which Standards Apply?

The primary directions for applicable standards are ORS 197.175(2)(d), 215.416(4) and 215.416 (8) which provide in relevant part:

> 197.175(2)(d): "If [the county's] comprehensive plan and land use regulations have been acknowledged ... make land use decisions ... in compliance with the acknowledged plan and land use regulations;"
>
> 215.416(4): "The application shall not be approved if the proposed use of land is found to be in conflict with the comprehensive plan of the county and other applicable land use regulations or ordinance provisions."
>
> 215.416 (8): "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 ..."

A secondary direction in ORS 197.646(3) applies to the circumstances of this case:

> (3) When a local government does not adopt ... land use regulation amendments as required [to implement a new or amended statute or state administrative rule], the new or amended rule or statute shall be directly applicable to the local government's land use decisions.

Unless a state standard is preemptive, the county can comply with all of the cited ORS sections by applying both new state requirements and unamended county requirements to applications. LUBA ruled in *Dilworth v. Clackamas County*, 30 Or LUBA 279 (1996) that the state template standard is not preemptive. A county can have a more restrictive template standard. DLCD wrote to the county concerning the Evans case, expressing the Department's view that both the county and state standards apply:

> "We do not disagree with the finding that the county must apply the applicable state laws directly as required by ORS 197.646(3). We do disagree with the conclusion that the county may not apply their more stringent standards in addition to the applicable state laws." (James W. Johnson, April 30, 1996, copy attached.)

The applicant has cited *Blondeau v. Clackamas County*, 29 Or LUBA 115 (1995) as giving some support to its claim that county regulations do not apply. *Blondeau* held that a Clackamas County regulation not allowing certain dwellings on land suitable for farming, could not be applied because it predated a statute that allows such dwellings without that standard. The statute clearly allows stricter county regulation, but LUBA resolved a perceived ambiguity and possible redundancy, by interpreting one of two relevant sections as requiring some county regulations protecting farmland to be reenacted to be given effect. The Board's order in Evans was issued October 1, 1996. Three months later, in *DeBates v. Yamhill County*, __ Or LUBA __, (LUBA No. 96-100 01/03/97) LUBA explained that its holding in *Blondeau* applied only to a particular category of regulations protecting farmland. *DeBates* assures that *Blondeau* cannot be mistaken as announcing a general principle of invalidation of county regulations in the face of an amended statute, but only interprets the particular language of a particular part of one statute, a part not relevant to this case. (Discussion of Second Assignment of Error.) In *Lindquist v. Clackamas County*, __ Or App __ (CA A95229, Jan. 29, 1997), the Court's analysis of ORS 197.646 is not comprehensive, but plainly holds it does not preclude application of county regulations:

> "It bears noting that the repeal and replacement of a statutory provision containing a particular substantive regulation does not necessarily indicate a legislative intent to displace local regulations of comparable substance. (citation omitted) We find no indication that the legislature intended the 1993 amendments to ORS 215.283(3) et seq. to have such an effect on the county's general unsuitability standard.[4]
>
> * * * * *
>
> "[4] * * * [Petitioner] argues that the county is required by ORS 197.646 to apply the 1993 legislation. That is of course true, but petitioner appears to regard that as a prohibition against the application of local provisions that predated the 1993 amendments, even if they are consistent with the new state provisions. The county answers, correctly, that ORS 197.646 requires local governments to incorporate the new state provisions into their local legislation and to comply with new state requirements, but it does not prohibit the existence or application of local legislation that supplements the state requirements." (Id. at 5-6, emphasis added)

C. How State and County Standards are Applied Together.

Combining the stricter features of different regulations correctly can be difficult. For example, 5 dwellings today, or 3 dwellings in 1993, may satisfy the county or state requirements. But neither requires 5 dwellings in 1993. The easiest way to correctly comply with ORS 197.646 is to apply state and county standards separately, as the independently adopted standards that they are. That method satisfies DLCD and gives full and fair meaning to all of the relevant ORS sections, which require a decision based on county regulations and on state standards not yet implemented by county regulations.

The Hearings Officer's decision errs in how it combines the county and state standards, trying to give effect to the stricter standards of each. At page 11, addressing MCC 11.15.2052(A)(3)(c), the findings on combined OAR and county provisions requires that **5** dwellings existed **within the template square aligned with the section lines on January 1, 1993**. But OAR 660-06-027 requires **only 3** dwellings in 1993 on parcels of which any part is within the template rotated in any direction the applicant wishes. And MCC .2052 requires the 5 dwellings inside the template aligned with the section lines, to be existing today. There is no standard or valid combination of standards that requires 5 dwellings in 1993 inside a template aligned with the section lines.[1] The outcome is unaffected in this case, but as was found in the Evans case, it is acutely awkward to explain to LUBA why it should uphold a county decision that hinges on application of both state and county regulations, when the county applied the regulations incorrectly, but only fortuitously reached a correct decision. The Board is asked to amend the decision to apply state and county regulations without trying to combine them into a composite standard. Alternatively, the decision could be amended with a correct composite, but at best, it's hard to prove a composite is correct when it consists of complicated regulations that differ in several ways. It's a completely unnecessary complication. All of these problems vanish if state and county standards are applied independently. It allows the correct standards to be easily identified, allowing the decision maker to focus on whether or not the standards are met.

D. Miscellaneous.

The Hearings Officer's decision is clear to me and probably to all parties, but there are typographical and other errors that could cause the decision to be not perfectly understood if it were appealed to LUBA. If the Board affirms all or part of the decision in substance, it should authorize the staff to make the appropriate technical and clarifying corrections in addition to any substantive changes that may be adopted by the Board.

---

[1] An extreme example would have a template rotated in any direction, with 3 dwellings outside the template itself, but on parcels with corners in the template, on January 1, 1993. If all the houses were torn down on January 2, 1993, the state standard would still be fully met today. If later, 5 different dwellings were lawfully established, within the template aligned with section lines, and they still exist, the county standard would be met. The proposal would qualify because both standards are met, but would fail the incorrect composite standard used in the decision.

E. Differences Between State and County Template Tests.

Significant differences are underlined and listed in the table that follows:

OAR 660-06-027(1)(d)(C) and identical ORS 215.750(1)(c), require:

(i) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the center of the subject tract; and

(ii) At least 3 dwellings existed on January 1, 1993 on the other lots or parcels.

Corresponding county standards in MCC .2052(c) require:

(i) The lot and at least all or part of 11 other lots exist within a 160-acre square when centered on the center of the subject lot parallel and perpendicular to the section lines; and

(ii) Five dwellings exist within the 160 acre square.

Table:

	State Qualification	County Qualification
Lots and Dwellings in Place	January 1, 1993	Now
Number of Dwellings	Three	Five
Location of Dwellings	Anywhere on lots	Within template
Orientation of Template	Any	Aligned with section lines

Oregon

DEPARTMENT OF
LAND
CONSERVATION
AND
DEVELOPMENT

April 30, 1996

VIA FACSIMILE

Phillip Grillo, Hearings Officer
% Multnomah County Division of Planning and Development
2115 SE Morrison Street
Portland, Oregon 97214

Dear Mr. Grillo:

The department has reviewed the Intermediate Ruling in CU7-95 HV 17-95 involving the application for a single family dwelling not related to forest use in the CFU zone. We have the following comments.

In the Ruling, the hearings officer finds that the applicable criteria for review of a "template" dwelling are those found in OAR 660-06-027. We understand that this ruling would also in effect void the more stringent law found in the Multnomah County Zoning Ordinance. We do not disagree with the finding that the county must apply the applicable state laws directly as required by ORS 197.646(3). We do disagree with the conclusion that the county may not apply their more stringent land use regulations in addition to the applicable state laws.

ORS 197.646(3) requires a local government to directly apply any new or amended goal, rule or statute when a local government has not adopted comprehensive plan or plan amendments to implement new state laws. This statute does not preclude a county from applying other standards found in county land use regulations. The statute in effect establishes a minimum requirement which must be met in addition to any other applicable laws. This interpretation was confirmed by the Land Use Board of Appeals in *Dilworth v. Clackamas County*, _ Or LUBA _ (LUBA No. 95-115, January 4, 1996). Like the subject case, *Dilworth* involved the application of template dwelling standards which are more stringent than those found in state law. LUBA agreed with the county "that it is not precluded from regulating the establishment of dwellings more stringently than is required under ORS 215.750."

Please enter this letter into the record of the proceedings. We also request a copy of the final decision and the findings and conclusions in support of the decision. If you have any questions, please contact me at 503.373.0082.

Respectfully,

James W. Johnson
Farm/Forest Coordinator

<i:\\multco.eva>

c: Susan Muir, Multnomah County Division of Planning
Celeste Doyle, AAG
Jim Knight and Michael Rupp, DLCD
DLCD Field representatives

RECEIVED
APR 30 1996
Multnomah County
Zoning Division

John A. Kitzhaber
Governor

1175 Court
Salem, OR
(503) 37
FAX (

MEMORANDUM

TO: BOARD OF COUNTY COMMISSIONERS

FROM: SUSAN MUIR, PLANNER

SUBJECT: CU 7-96, SEC 33-96

DATE: APRIL 1, 1997

REVISED RECOMMENDATION

The staff recommendation for the Board decision on the appeal of CU 7-96 and SEC 33-96 is to **uphold the Hearings Officer decision of March 5, 1997 with a modification to include independent findings for the state criteria and the county criteria applicable to this case.** Staff believes that this will clarify the findings in this case. Although Staff and the Hearings Officer did try and consolidate the criteria from each code, we believe it would be best to be as specific as possible in the supportive findings.

/slm

BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF MULTNOMAH COUNTY, OREGON

IN THE MATTER OF THE APPEAL OF ANDREW MILLER OF THE HEARING OFFICER DECISION TO DENY THE CONDITIONAL USE PERMIT FOR A SINGLE FAMILY DWELLING FILE NO. CU-7-96 & SEC 33-96	)	APPEALS MEMORANDUM

I. INTRODUCTION

The applicant Andrew Miller (hereinafter "appelant") has requested conditional use and significant environmental concern review and approval for development of a single family dwelling on the owner's property, zoned commercial forest use ("CFU") with a Significant Environmental Concern overlay.

The hearings officer's decision adopted the planning staff's recommendation to deny the application deciding that 1) the parcel does not meet the county template test and 2) the amount of land used to site the development in the preferred location has not been minimized.

There are two main issues on appeal that the appelant will address in section II of this Appeals Memorandum.

II. DISCUSSION

The application meets the state template test which is the only template dwelling test that can legally be applied by the terms of the statute.

The main issue on appeal is whether the county can apply both its template dwelling test as well as the state template test. The hearings officer found that "nothing in 197.646(3) says that the County's ordinance does not also apply and its language does not imply that the County's ordinance does not apply unless local regulations are inconsistent with the state rule required to be directly applied."

The opponent to the application, Arnold Rochlin, asserts in his appeals memorandum, that there are two new cases construing ORS 197.646 that support the Hearings Officer's decision. Debates v. Clackamas County, ___ OR LUBA ___ (LUBA No. 96-100, 1/3/97); Lindquist v. Clackamas County, ___ OR App ___ (CA A95229, 1/29/97). The appelant would like to add there is a third case recently decided case that construes ORS 197.646.

DLCD v. Lincoln County, 144 Or. App. 9 (1996).

DLCD v. Lincoln County stands for the proposition that statewide goal amendments are directly applicable to land use decisions until the local government adopts new implementing legislation. In Lincoln County, the local government had not implemented the new rule, but had a similar ordinance regarding increase of density via a water system in its code. The court of appeals looked at the terms of the amended Goal 11 and decided it applied only to new water system, not existing water system which is what the county ordinance regulated. Therefore, the Goal 11 did not effect the county's approval, and the Court of Appeals reversed LUBA's decision.

The opponent cites a footnote in Lindquist that appears to suggest that ORS 197.646 does not prohibit the existence or application of local ordinances that supplement state requirements. However, it is important to look at how the Court of Appeals reached that point. The case turns on whether the Legislature intended that local governments can add conditions to an amended statute. The 1993 Legislature amended the state statute for nonfarming dwellings and deleted the "general unsuitability" standard in ORS 215.284 but Clackamas County kept its existing "general unsuitability" provision applying to nonfarm dwelling criteria and denied Lindquist's nonfarm dwelling application. The Court looked ORS 215.284(1)(e) and because it clearly allows local governments to add additional conditions it feels are necessary, the Court held that Clackamas County could apply its preexisting "general unsuitability" standard. Lindquist, 1997 WL 37402, page 2. The relevance of Lindquist to our appeal is that there is no such permissive clause in ORS 215.705 (Forest Land Dwellings). In fact, there is a prohibition against allowing any other forest land dwellings than those described in the statute:

> "**No other dwellings than those described in this section and ORS 215.740 and 215.750** may be sited on land zoned for forest use under a land use planning goal protecting forest land." (Emphasis added.)

The county's preexisting template test, and other forest land dwellings contained in the former CFU code section allow several kinds of dwellings not authorized by ORS 215.740 and 215.750, one of which is the county's template dwelling, another being the Forest Management Dwelling. The statute is clear that "no other dwelling" than those described in ORS 215.750 are allowed. The template dwelling provided for in ORS 215.750(1)(c)

allows a template dwelling if there are three dwellings on 11 parcels within an 160-acre square. The county's ordinance which requires 5 homes is specifically not described in ORS 215.705-.750. Therefore, the county is prohibited by applying its template dwelling ordinance and the state template test alone applies. Staff concurs that the applicant meets the criteria under the state template test.

The County has argued in Evans v. Multnomah County, that based on Dilworth v. Clackamas County, a county may implement a non-forest dwelling regulation stricker than those found in state law. In Dilworth, LUBA held that the county's interpretation of ORS 215.750 (that nothing precluded additional county restrictions) was not clearly inconsistent with the express language and intent of the enactment. Dilworth at 17783. However, LUBA did not look at ORS 215.720(3) which applies to ORS 215.750. The case was not well briefed and LUBA's decision was not appealed to the Court of Appeals. Therefore, Dilworth does not properly answer the question of what the express prohibition in ORS 215.720(3) means. Following the Lindquist analysis, LUBA should have looked at the express authority of the statute that prohibits counties from adding any other forestland dwellings than those described in ORS 215.705-.750.

The amount of forest land used to site the dwelling or other structure, access road and service corridor is minimized.

The hearings officer found that the preferred location did not meet the minimum siting standard, and that the degree of slope for the alternative site did not justify a decision to extend the access road, which exceeds 500 feet. Hearings Officer's Decision at 17. The Hearings Officer found that the alternative site did demonstrate that the access road in excess of 500 feet is the minimum necessary. However, the hearings officer is silent on whether the alternative site is the minimum necessary to site the dwelling as set forth in the standard above.

The applicant has provided evidence that the alternative site minimizes the amount of access road length needed, although it would arguably require 1/3 more acreage for siting the dwelling due to slopes. See Exhibit 1 and 2; SRI Letter, dated February 18, 1997. The preferred house site is located in the northwest corner of the parcel and will use approximately 2/3's of an acre. The alternative homesite is in the southwest corner of the property and will use approximately 1 acre of land due to slopes. The appelant testified at the hearing that if the preferred site did not meet the siting standard above, that the alternative site meets the standard. The standard is not a

prohibitive one in that it prohibits siting a dwelling if the site exceeds a maximum. It only requires that the site be the minimized, which is the applicant has demonstrated. There is nothing in the two code sections regarding the access road length and land used to site the dwelling that suggests that one standard is more important than the other. In the case of the alternative site, it will shorten the access road but increase the amount of land needed to site the dwelling. In the case of the preferred site, it will minimize the amount of land needed to site the dwelling but increase the access road length. The Board needs to make a policy choice between which of these two standards are more important and find that either the preferred or alterative site meets both standards.

IV. CONCLUSION

For the reasons given above, the applicant requests that the Board reverse the hearings officer's denial of the subject application, finding that the template test of Multnomah County at MCC 11.15.2052 does not apply; the applicant has met his burden of proof in showing that the amount of forest land used to site the dwelling is minimized by the alternative site.

DATED this 1rst day of April, 1997.

Dorothy S. Cofield, OSB 92261
Attorney for Andrew Miller

C:\LAW\CLIENT\MILLER\APPEALS.MEM

April 1, 1997

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P.O. Box 83645
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Board of County Commissioners
c/o Planning Division
2115 SE Morrison St.
Portland, OR 97214

Re. **CU 7-96/SEC 33-96—Miller CFU Dwelling**

I support the Hearings Officer's decision, but urge some changes.

The most important question in dispute is: Does the county template test apply? The proposal passes the state test, but fails the county's. The main relevant differences are the state requires 3 dwellings in January, 1993, and they can be outside the template area, if they're on lots that are partly inside. The county requires that five dwellings exist now, and inside the template.

Everyone agrees that the state test applies. The applicant argues that ORS 197.646(3) precludes the county test. The decision holds that the county's regulations apply, in additon to the state's. I have no doubt that is correct, but we're here because the statute is not worded so precisely and comprehensively as to allow 100% elimination of any logical possibility of the applicant's interpretation.

Four land use decisions bear on the issue, and together lead to a clear conclusion.

The applicant has cited *Blondeau v. Clackamas County*, a 1995 LUBA decision, as supporting a claim that county regulations do not apply. *Blondeau* held that a Clackamas County regulation not allowing certain dwellings on land suitable for farming, could not be applied because it predated a statute that allows such dwellings without that standard. The statute clearly allows stricter county regulation, but LUBA resolved an arguable ambiguity, by interpreting one of two relevant statute sections as requiring <u>some</u> county regulations, ones <u>protecting farmland</u>, to be reenacted to remain effective. (Our case concerns forest land, and different parts of the statute.) LUBA took notice that Clackamas County interpreted ORS 197.646(3) as not invalidating its regulations, but LUBA then ignored the issue, finding against the county on other grounds. In the context, LUBA would certainly have addressed the county argument <u>if it disagreed</u>. It would have done so to bolster its doubtful decision.

This Board's order in the Evans case, deciding the same point at issue in this case, was signed October 1, 1996. Three months later, on January 3, 1997, LUBA decided *DeBates v. Yamhill County*. LUBA upheld its earlier decision in *Blondeau*. Again, there was no direct holding on ORS 197.646(3), but in DeBates, LUBA made clear that *Blondeau* did not generally invalidate county regulations in the face of amended statutes, but only interpreted the particular language of a part of one statute, a part dealing with farmland only and not relevant to this case.

Four weeks later, at the end of January of this year, the Court of Appeals decided *Lindquist v. Clackamas County*. The Court's discussion of ORS 197.646 is not central to its decision, but it holds the statute does not preclude application of county regulations that predate a statute amendment on the same subject. The court said:

> "It bears noting that the repeal and replacement of a statutory provision containing a particular substantive regulation does not necessarily indicate a legislative intent to displace local regulations of comparable substance. (citation omitted) * * * [4]
>
> * * * * *
>
> "[4] * * * [Petitioner] argues that the county is required by ORS 197.646 to apply the 1993 legislation. That is of course true, but petitioner appears to regard that as a prohibition against the application of local provisions that predated the 1993 amendments, even if they are consistent with the new state provisions. The county answers, correctly, that ORS 197.646 requires local governments to incorporate the new state provisions into their local legislation and to comply with new state requirements, but it does not prohibit the existence or application of local legislation that supplements the state requirements." (Id. at 5-6, emphasis added)

This ruling sets forth the petitioner's position just as it is in our case, and rejects it. *Lindquist v. Clackamas County*, the highest authority to rule, holds ORS 197.646 does not prevent application of county regulations predating an amended statute, providing only they are not inconsistent with the statute.

That brings us to the fourth case. *Dilworth v. Clackamas County*, was decided earlier, in 1996. The case presented LUBA with the question of whether a Clackamas County requirement of six dwellings to satisfy a template test conflicts with or supplements the state requirement of three dwellings. LUBA upheld the six dwelling standard as not conflicting. Thus, our template standard requiring five dwellings, satisfies the Court of Appeals test for a regulation predating a statute amendment, that it not conflict with a state standard.

That is also the position taken by DLCD as said on behalf of the Department by James Johnson, in a letter of April 30, 1996, which is in the record.

Rebuttal #1, (to argument made to hearings officer) No acknowledgment: Appellant argued the county template standards didn't go through "post-acknowledgment". It's not true. But they were acknowledged before the statute changes, which is precisely the reason state statutes apply. The applicant's argument restates the issue, but adds nothing that resolves it.

BOTH STATE AND COUNTY STANDARDS APPLY, BUT HOW?

Assuming you will decide that both state and county standards should be applied, there are two ways to do it. One way is fairly easy and obvious, that is to apply the facts first to the state standard and then to the county standard and see if both are satisfied. The other way is difficult, messy, hard to understand, and hard to prove correct. That way is to try to combine standards with several differences into a single composite standard.

The staff and hearings officer did it the hard way and got it wrong. The state standard requires that there were 3 dwellings in place in January, 1993, on lots of which any part was inside a template rotated in any direction. The county standard requires that 5 dwellings exist now, inside a template aligned with section lines. The state requires 3 dwellings in 1993; the county requires that 5 dwellings exist. Neither requires 5 dwellings in 1993, but that's the standard stated in the staff report (p. 11) and hearings officer's decision (p. 11).

Suppose, hypothetically, there were 3 dwellings in January, 1993, inside a template aligned with the section lines, and 2 more were built in 1996, and all the dwellings are still in place. The state standard of 3 dwellings in January, 1993 is satisfied. The county standard of 5 existing dwellings is satisfied. But under the composite standard of the hearings officer and staff, an application would be wrongly denied for not having 5 dwellings in 1993, a requirement that doesn't exist.

The correct way is to just apply both state and county regulations without mixing. Does it meet the state standard (yes or no)? Does it meet the county standard (yes or no)? All unnecessary complexities are gone.

In this case, the outcome is the same because the correct county standard is not met. But it's still important to get it right. The case will likely be appealed to LUBA. The same mistake was made in the Evans case, and it was painfully awkward to ask LUBA to uphold your decision which applied a standard incorrectly because it derived from a valid principle which if properly formulated would have fortuitously reached the same conclusion. There is no need to risk a remand over this. The error is easily remedied, and I believe the staff will not say I'm wrong.

OTHER REBUTTAL (to arguments made to the hearings officer, at least)

County Regulations Conflict: The appellant claims there are county regulations that conflict with state standards. An example given is the "forest management dwelling" section of the former CFU regulations. Although that part of the code has nothing to do with any issue in this case, an answer disposes of the whole general argument. Forest management dwellings are no longer a specific category of dwellings addressed by the amended statutes. But the new statutes do not disallow a county requirement that dwellings on some tracts be necessary and accessory to forestry. It's just no longer a state requirement. The revised statutes expressly require forest zone dwellings to satisfy county standards as well as state. That provision would be pointless if there could be no additional county standards.

No Dwellings Allowed Except as Provided: The applicant twists the meaning of ORS 215.720(3). It provides that no forest zone dwellings are allowed, except as provided by certain ORS sections in the 215.700 series. It plainly means the county cannot allow dwellings disallowed by statute. It does not prohibit stricter standards, and in fact, the sections cited in 215.720 expressly require compliance with county standards. Under the applicant's reversed interpretation, you should repeal the whole CFU chapter, because all county regulations are irrelevant; because they are allowed to do nothing but duplicate the statutes. But the applicant is wrong about that.

Estoppel: The applicant argues that by reenacting certain CFU provisions with the intent of assuring their effectiveness in the face of the ambiguous *Blondeau* decision, that had not yet been clarified by the subsequent decisions, the county is estopped from claiming those provisions were effective without reenactment.

Estoppel is not relevant here. It applies to a situation where conduct by a party induces reliance by another party who would suffer if what it relied on were not so. The doctrine prevents the inducing party from acting differently from its commitment. The courts consistently require 5 elements to be present for the doctrine to apply:

> "To constitute estoppel by conduct, there must (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 be acted on by the other party; (5) the other party must have been induced to act upon it." *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995) (Citing Bigelow Estoppel (5 ed.), 569, 570 and *Coos County v. State of Oregon*, 303 Or at 180-81."

None of the factors are present.

Also, estoppel has never been applied by an Oregon court to require a local government to allow a use otherwise disallowed by its regulations, and it's doubtful that it would ever be lawful. See *Bankus v. City of Brookings*, 252 Or 257, 260 (1969), *Holdner v. Columbia County*, 123 Or App 48 (1993). To apply estoppel to a zoning case would nullify provisions protecting the general public to favor an individual claiming reliance on an error by a civil servant. Even if there were an error and injury in this case, a staff error could not be remedied by declaring lawful what is not. And, there was no error.

The county was wisely advised by staff that the *Blondeau* decision put validity of some of its forest regulations at risk, and the risk could be eliminated by reenacting them. The county prudently followed the advice. It did not induce anyone to rely on any error or misrepresentation and there were none for anyone to rely on. The applicant's argument is like claiming that a person who buys insurance against a possible liability is presumed to be liable for something because of the act of buying insurance. That's not how it works.

DIFFERENCES BETWEEN STATE AND COUNTY TEMPLATE TESTS.

Significant differences are underlined and listed in the table that follows:

OAR 660-06-027(1)(d)(C) and identical ORS 215.750(1)(c), require:

(i) All or part of at least 11 other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the center of the subject tract; and

(ii) At least 3 dwellings existed on January 1, 1993 on the other lots or parcels.

Corresponding county standards in MCC .2052(c) require:

(i) The lot and at least all or part of 11 other lots exist within a 160-acre square when centered on the center of the subject lot parallel and perpendicular to the section lines; and

(ii) Five dwellings exist within the 160 acre square.

Table:

	State Qualification	County Qualification
Lots and Dwellings in Place	January 1, 1993	Now
Number of Dwellings	Three	Five
Location of Dwellings	Anywhere on lots	Within template
Orientation of Template	Any	Aligned with section lines

CITED CASES

Bankus v. City of Brookings, 252 Or 257, 449 P2d 646 (1969)

Blondeau v. Clackamas County, 29 Or LUBA 115 (1995)

Coos County v. State of Oregon, 303 Or 173, 374 P2d 1348 (1987)

DeBates v. Yamhill County, __ Or LUBA __, (LUBA No. 96-100 01/03/97)

Dilworth v. Clackamas County, 30 Or LUBA 279 (1996)

Holdner v. Columbia County, 123 Or App 48, 858 P2d 901 (1993)

Lindquist v. Clackamas County, __ Or App __ (CA A95229, Jan. 29, 1997)

Sparks v. City of Bandon, 30 Or LUBA 69 (1995)

STATUTES

197.175(2)(d): "If [the county's] comprehensive plan and land use regulations have been acknowledged ... make land use decisions ... in compliance with the acknowledged plan and land use regulations;"

197.646(3): "When a local government does not adopt ... land use regulation amendments as required [to implement a new or amended statute or state administrative rule], the new or amended rule or statute shall be directly applicable to the local government's land use decisions."

215.416(4): "The application shall not be approved if the proposed use of land is found to be in conflict with the comprehensive plan of the county and other applicable land use regulations or ordinance provisions."

215.416 (8): "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 ..."

215.705(1): "* * * a county * * * **may** allow the establishment of a single-family dwelling on a lot or parcel located within a farm or forest zone as set forth in this section and ORS 215.710, 215.720, 215.740 and 215.750.

215.705(1)(c): "The proposed dwelling is not prohibited by, and will comply with the requirements of the acknowledged comprehensive plan and land use regulations and other provisions of law."

215.705(5): "A county may, by application of criteria adopted by ordinance, deny approval of a dwelling allowed under this section in any area where the county determines that approval of the dwelling would:
(a) Exceed the facilities and service capabilities of the area;
(b) Materially alter the stability of the overall land use pattern in the area; or
(c) Create conditions or circumstances that the county determines would be contrary to the purposes or intent of its acknowledged comprehensive plan or land use regulations."

215.720(3): "No dwelling other than those described in this section and ORS 215.740 and 215.750 **may** be sited on land zoned for forest use under a land use planning goal protecting forest land."

215.750(1): "In western Oregon, * * * a county * * * **may** allow the establishment of a single family dwelling on a lot or parcel located within a forest zone * * *"

215.750(4): "A proposed dwelling under this sub-section is not allowed:
(a): If it is prohibited by or will not comply with the requirements of an acknowledged comprehensive plan or acknowledged land use regulations or other provisions of law.

215.750(5): "Except as described in subsection (6) of this section, if the tract under subsection (1) or (2) of this section abuts a road that existed on January 1, 1993, the measurement **may** be made by creating a 160-acre rectangle that is one mile long and one-fourth mile wide centered on the center of the subject tract and that is to the maximum extent possible, aligned with the road. (*Subsection (6) mandates a long template for 60 acre+ tracts on a road or stream .*)