BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY

ORDER NO. 00-022

Affirming the Hearings Officer Findings and Adopting Additional Condition of Approval in Land Use Cases MC 8-99, 9-99, 10-99, 11-99, and 12-99

The Multnomah County Board of Commissioners Finds:

a. Arnold Rochlin and Christopher Foster, representing themselves, and Western States Development Corporation, represented by Jeff Bachrach, Attorney at Law, appealed the Hearings Officer Decision in land use cases MC 8-99, MC 9-99, MC 10-99, MC 11-99, and MC 12-99

b. After proper notice of a public hearing, the Board of County Commissioners accepted testimony and evidence presented at a de novo hearing on February 8, 2000

The Multnomah County Board of Commissioners Orders:

1. The Hearings Officer decision dated January 11, 2000 is hereby affirmed.

2. The Board adopts the Hearings Officer findings and conclusions in the decision dated January 11, 2000, attached hereto.

3. The Board adopts the following additional Condition of Approval:

This approval authorizes zoning clearance for the dwelling at the location shown on the site plan in the 1989 farm management plan. A dwelling located in that location is not subject to the requirements of the Significant Environmental Concern (SEC) overlay zone (MCC .6400 through .6425) and the Hillside Development (HDP) permit requirements (MCC .6700 through .6735). If a dwelling location different than shown in the farm management plan is desired, the applicant must apply for and demonstrate compliance with the SEC and/or HDP permit requirements prior to zoning approval of the building permit. Development of either the 1989 farm plan site or an alternative site is subject to the Multnomah County Building and Specialty Code requirements.

ADOPTED this 2nd day of March, 2000.

BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

Beverly Stein, Chair

REVIEWED:

Thomas Sponsler, County Attorney
For Multnomah County, Oregon

By Sandra Duffy
Sandra N. Duffy, Chief Assistant County Attorney

BEFORE THE HEARINGS OFFICER
FOR MULTNOMAH COUNTY, OREGON
FINAL ORDER

This Decision consists of Conditions, Findings of Fact and Conclusions.

January 11, 2000

MC 8-99, MC 9-99, MC 10-99, MC 11-99 and MC 12-99

Appeals of five administrative decisions concerning five applications for determination of Permissible Use and Request for Zoning Clearance for Building Permits based on five 1989 PRE approvals. The appeals were combined for purposes of the hearing, and this decision.

Legal Description & Location of Properties:	**MC 8-99:** 12985 NW Skyline Blvd. Section 36 2N, 2W, Parcel 1 of Partition Plat 1993-4 **MC 9-99:** 12989 NW Skyline Blvd. Section 36 2N, 2W, Parcel 2 of Partition Plat 1993-4 **MC 10-99:** 14180 NW Skyline Blvd. Section 25 2N, 2W, Parcel 1 of Partition Plat 1990-43 **MC 11-99:** 13950 NW Skyline Blvd. Section 26 2N, 2W, Parcel 2 of Partition Plat 1990-43 **MC 12-99:** 13695 NW Skyline Blvd. Section 25 2N, 2W, Parcel 3 of Partition Plat 1990-43
Zoning Designation:	EFU (Exclusive Farm Use)
Owner/Applicant/ Appellant:	Western States Development 20285 NW Amberwood Dr. Hillsboro, OR 97124
Applicant's Attorneys:	Jeff H. Bachrach and Allison P. Hensey Ramis Crew Corrigan & Bachrach, LLP 1727 NW Hoyt St. Portland, OR 97209

PROCEDURAL ISSUES

Impartiality of the Hearings Officer:

A. No ex parte contacts. I did not have any ex parte contacts prior to the hearing of this matter. I did not make a site visit. I have previously issued decisions regarding other applications for each of the subject parcels.

B. No conflicting personal or financial or family interest. I have no financial interest in the outcome of this proceeding. I have no family or financial relationship with any of the parties.

BURDEN OF PROOF

In this proceeding, the burden of proof is upon the Applicant/Appellant.

PROCEDURAL HISTORY

In 1989, Western States Development Corporation, as applicant, received farm dwelling approvals in the matter of PRE 23-89, PRE 24-89, PRE 25-89, PRE 26-89 and PRE 27-89. The approvals related to Parcels 1, 2 and 3 of Partition Plat 1990-43, which received partition approval under LD 25-89, and Parcels 1 and 2 of Partition Plat 1993-4, which received partition approval under LD 26-89. Farm Dwelling approvals were issued in accordance with the County ordinance provisions in effect in 1989. Subsection 11.15.2010(C) of the Multnomah County Code, as it existed in 1989, allowed the approval of a residence in conjunction with farm use when certain conditions were met, including that the farm use be conducted according to a farm management plan, containing approved elements as specified in the ordinance in effect in 1989. The 1989 PRE approvals did not contain any expiration dates. As an administrative matter, it had been a practice of the Multnomah County staff to treat those old approvals as valid approvals, prior to the adoption of MCC 11.15.2031 relating to dwelling approval validation.

Prior to the adoption of Ordinance 903, the Board of County Commissioners had held that approvals for farm dwellings issued pursuant to the Code provisions in effect in 1989 and 1990 were valid approvals. See Final Order 97-215. Since the time of the original 1989 PRE approvals referenced above, State law and County code have been amended.

In 1994, the State adopted OAR 660-033-0135. That administrative rule has a fairly stringent farm income test. The County implemented the standards set forth in OAR 660-033-0135 in MCC 11.15.2010(D) in 1997. The new requirements now codified in .2010(D)

did not apply when the old PRE permits were approved, and the income test is not applicable to old PRE approvals.

Effective May 4, 1998, the County adopted MCC 11.15.2031, the dwelling approval validation ordinance, in order to set an expiration date for all unbuilt farm management plan approvals (PRE's), and to insure that the property meets the statutory requirement of ORS 215.203, that the property is "currently employed" for farm use.

The ordinance adopting MCC 11.15.2030 and MCC 11.15.2031 was challenged by the opponents herein. In LUBA Case No. 98-067, Petitioners Arnold Rochlin and Christopher Foster challenged the adopted amendments on both substantive and procedural grounds.

In case number 98-067, LUBA found that OAR 660-033-0135 and 660-033-0140 have no legal effect on the continued validity of the old farm dwelling permits or the County's authority to impose time limits on the old farm dwelling permits (where none existed before) or adopt standards for extending those new time limits. Rochlin and Foster vs. Multnomah County and Western States Development Corp., No. 98-067, slip op. at 7 (Or LUBA 1998). LUBA also found that certain procedures regarding notice of the appeal hearing which were mandated under Ordinance 903, were inconsistent with certain procedures in ORS 215.416(11). LUBA's decision was affirmed without opinion by the Oregon Court of Appeals. Rochlin and Foster v. Multnomah County and Western States Development Corporation, 159 Or App 681 (1999).

In Final Order 98-210, the Board of County Commissioners for Multnomah County affirmed a Hearings Officer decision in Cases PRE 4-98 and PRE 5-98, both of which cases related to Dwelling Approval Validation requests, for parcels involved in this matter. In that Board Final Order, which was entered after the LUBA decision in Case No. 98-067 was entered, the Multnomah County Board of Commissioners found that the LUBA decision in Case No. 98-067 had been appealed to the Court of Appeals, and that not withstanding LUBA's remand, Ordinance 903 was applicable to PRE 4-98 and PRE 5-98 (the parcels referenced in MC 8-99 and MC 9-99). That decision of the Board was appealed to LUBA and affirmed by LUBA in Rochlin v. Multnomah County, LUBA No. 99-025.

In PRE case nos. 16-98, 17-98 and 18-98, the applicant herein sought approval of its dwelling approval validation requests filed pursuant to Ordinance 903. The Hearings Officer affirmed the Planning Director's Administrative Decisions for dwelling approval validation and determination of substantial compliance with approved farm management plan on May 7, 1999. The decision of the Hearings Officer on PRE 16-98, 17-98 and 18-98 was issued after the LUBA decision referenced above, but before the Court of Appeals affirmed that decision. The decision of the Hearings Officer was appealed to the Multnomah County Board of Commissioners. Prior to the Board hearing, the County did receive notice of the decision of the Court of Appeals regarding the validity of Ordinance 903. The Board found that the notice provisions of Ordinance 903 were invalid, and that

the substantive provisions of Ordinance 903 set out criteria for validation of previously approved farm management plans that were less strict than OAR 660-05-030 (4) 1986. (Ex. 37). Accordingly, the Board denied the applications of Western States Development because the applications were submitted under Ordinance 903, and found that the criteria of Ordinance 903 was not applicable to a determination of sufficient day to day farm use of the land for a dwelling in conjunction with farm use.

The Board subsequently adopted Ordinance No. 935, which repealed Ordinance 903. The second reading and adoption of Ordinance 935 was dated August 5, 1999. The applicant did appeal the Board of Commissioners' denial of the approvals in cases 16-98, 17-98 and 18-98, to LUBA. That appeal is currently pending.

On August 19, 1999, the applicant submitted applications for determination of Permissible Use for all five parcels. Those applications are the matters at issue here, file nos. MC 8-99, MC 9-99, MC 10-99, MC 11-99 and MC 12-99.

The applicant has set forth a detailed chronology in Exhibits 1 though 3, Volume I through 4, of the reorganized exhibits received by the County on December 2, 1999.

NATURE OF THIS PROCEEDING

On August 19, 1999, the County received five applications for Permissible Use determinations and requests for Zoning Clearance for building permits, based on PRE applications 23-89 through 27-89. All applications were submitted by applicant's attorney Allison Hensey. The applicant sought a finding by the County that the applicant did have zoning clearance or dwelling approval validation to obtain a building permit from the City of Portland. The applications were filed pursuant to the provisions of Multnomah County Code set forth in 11.15.8205, et seq.

Pursuant to MCC 11.15.8205:

> **11.15.8205 Definition**
>
> *Action* means a proceeding, other than an enforcement proceeding pursuant to MCC .8135, in which the legal rights, duties or privileges of specific parties are determined only after a hearing in which such parties are entitled to appear and be heard, including requests for:
>
> * * *
>
> (F) Other requests for permits and other contested cases determining permissible uses of specific property.

Pursuant to MCC 11.15.8210(B):

11.15.8210 Initiation

* * *

(B) An action initiated by a record owner or owner's agent shall be filed with the Planning Director on application forms provided by the Director which shall contain all information requested. The Planning Director may require submission of a certified land survey as part of the application.

The applicant specifically followed the process set forth in .8205 and .8210.

The applicant submitted five separate applications with voluminous exhibit materials in support of each application, and paid five separate filing fees. On October 25, 1999 the County Planning Director, acting through Multnomah County Planner Chuck Beasley, issued a letter opinion finding that the applicant's request could not be approved because the farm management plans "were not implemented as proposed and approved". The Planning Department made interpretations regarding the requirements of the 1989 Multnomah County ordinances, and determined that the plans were not implemented as proposed or approved, and could therefore no longer be implemented in accordance with the approvals. The County Planning Department further found that the letter was not a land use decision, because "it merely restates some of the findings in the original decisions in light of the inaction of the applicant in furtherance of the management plans. No land use standards are being applied." The County Planning Department further stated: "Even though this is not an appealable land use decision, I am providing you with our standard appeal information."

After receipt of that letter, the applicant's attorney submitted a letter dated November 4, 1999. Exhibit A-4. In that letter, Allison Hensey, quoted a prior Decision of a Multnomah County Hearings Officer in which it was determined that:

> "the Hearings Officer, not the Planning Director or staff, has original jurisdiction to rule on applications for property rights determinations submitted pursuant to MCZO 11.15.8205(F) and 11.15.8210."

That finding would certainly be consistent with the Multnomah County code provisions, in Sections .8205, et seq.

Attorney Hensey further inquired in bewilderment, how the letter which purported to be a denial of the five applications, could at the same time indicate that the decision was not an appealable land use decision.

The procedural chronology set forth in the prior section of this opinion indicates that this is an extremely complex case that has been through various stages of land use approvals. Prior hearings officers struggled with these issues and so has the Multnomah County

Board of Commissioners, the Land Use Board of Appeals, and the Court of Appeals. I find it incredible that the County staff at this time can blithely tell the applicant herein that the previously approved PRE approvals have expired and that such a determination is not a land use decision.

At the hearing held on November 16, 1999 before this Hearings Officer, even the opponents stipulated that the County had made a land use decision.

I find that the interpretations made by the Planning Director did in fact involve the exercise of policy or legal judgment, and therefore fell within the definition of a land use decision as defined by ORS 197.015. See, Goddard v. Jackson County, 35 Or LUBA 97-164, Heceta Water District v. Lane County, 24 Or LUBA 402 (1993). Where, as here, the local government exercises a significant level of legal and factual judgment in making its determination (whether a previously issued land use decision is still valid so as to authorize the issuance of a building permit) a land use decision is made. I do specifically find that the County Planning Department made a land use decision and that that decision was appealable.

The other aspect of the County decision creates more procedural issues, in that it appears that the County staff did not have jurisdiction to make the original determination as to whether or not the prior PRE approvals had expired, and whether the applicants could receive zoning clearance for a building permit based on those prior PRE approvals. Again, at the hearing below, both the applicant and the opponents requested the Hearings Officer in fact make a decision in regards to these issues.

In the memorandum to the Hearings Officer dated November 8, 1999, the Planning Department indicated that staff was interested in resolving both the applicant's submittal and the appeal of the letter from staff date October 25, 1999 in response to the application. Staff further indicated that MCC 11.15.8205 through .8295 (action proceedings), does not preclude a hearing wherein both an appeal and an original application are decided. Accordingly, I find that the scope of this proceeding is not limited solely to those specific grounds for appeal relied on for reversal or modification by the appellant as provided under MCC .8290. Rather, since this is in essence an original proceeding or hearing before the Hearings Officer, any issues or criteria applicable to this decision can be addressed by the Hearings Officer.

In view of the fact that the County Planning Department should have scheduled an original hearing on these issues before a Hearings Officer, I am directing the County to refund the appeal fees to the Applicant. Since these applications have been consolidated for purposes of this hearing, it would be appropriate for the County to require only one appeal fee if any party appeals this decision.

APPLICATION TIME LINE

In a memorandum addressed to the Multnomah County Hearings Officer dated November 8, 1999, Chuck Beasley of the County Planning staff indicated that the applicant submitted an application under the provisions of MCC 11.15.8205(F) on August 19, 1999. Although applicant's letter is dated August 18, 1999, it appears that the application was not actually received by the County until August 19, 1999. Following submittal of the application, the County did not notify the applicant within thirty days that the application was incomplete. Accordingly, the application was deemed complete thirty days after it was filed, pursuant to ORS 215.428. See, Simon v. Board of County Commissioners of Marion County, 84 Or App 311 (1987).

Accordingly, the application would have been deemed complete as of September 16, 1999. Since the property in question is not within an Urban Growth Boundary, the 150-day "time clock" would be applicable. The hearing was held on November 16, 1999, which would have been the 59th day of the 150-day time clock. At that time, the applicant requested the opportunity to present the final legal memorandum and closing argument. The applicant stipulated to a stay of the running of the 150-day clock until the time scheduled for filing of the memorandum. The applicant was given until December 13, 1999 to submit the written memorandum. On December 13th the applicant requested additional time within which to submit the memorandum and agreed to a continued stay of the running of the 150-day clock. On December 23, 1999, the final legal argument was submitted by the applicant and received by the Hearings Officer. On that day the clock again started to run. I find that this is the 20th day after the clock did resume running. Accordingly, I find that this is the 79th day on the 150-day time clock. The calculation of the status of the case time differs from the calculation made by staff in the memorandum dated November 8, 1999. However, as stated above, this is a matter of original jurisdiction with the Hearings Officer and I must make an independent calculation of the time line, based on the relevant case law standards and actions taken by the Planning Department in regards to this application. Accordingly, I do find that this is the 79th day on the "time clock".

TESTIMONY AND EVIDENCE PRESENTED

A. Chuck Beasley testified for the County, summarized the history of the application, and explained the administrative decision of the Planning Director.

B. Jeff Bachrach and Allison Hensey, attorneys for the applicant, testified on behalf of the applicant.

C. Kevin Bender spoke on behalf of the applicant/appellant, Western States Development.

D. Arnold Rochlin and Christopher Foster both testified in opposition to the application.

E. In addition to the Planning Department file, the exhibits referenced in the application, and the decisions of the Planning Director, the Hearings Officer received the following exhibits:

H-1 Posting affidavit
H-2 Aerial photo
H-3 Invoice notebook for applications MC 8-99 and MC 9-99
H-4 Invoice notebook for applications MC 10-99, MC 11-99 and MC 12-99
H-5 Applicant's hearing exhibits
H-6 Rochlin memorandum

F. At the November 16th hearing before the Hearings Officer, the applicant's representatives offered to reorganize the exhibits submitted in support of the application in order that the County would have one master set of exhibits to refer to. Those exhibits consisted of four volumes, received by the County on December 2, 1999. A copy of the exhibit list to those volumes is attached hereto as Exhibit "A". In this opinion, when reference is made to an exhibit by number not prefaced by a letter designation, the reference will be to an exhibit listed in Exhibit "A".

G. After the hearing, the applicant's attorney wrote a letter to the Hearings Officer dated December 13, 1999. That letter will be referred to as Exhibit H-7. On December 14, 1999, I responded to that letter, which response will be designated as Exhibit H-8. On December 15, 1999, the applicant's attorney responded to my letter regarding the request for a further extension for the submission of the legal argument. That letter will be referenced as Exhibit H-9.

H. On December 23, 1999, the applicant's attorney submitted a final legal memorandum with closing argument, which will be referred to as Exhibit H-10.

STANDARDS, CRITERIA, ANALYSIS AND FINDINGS OF FACT

The applicant herein has submitted five applications seeking a determination of permissible use and zoning clearance for a building permit for a farm-related dwelling on each of the five parcels referenced in the subject applications, based on 1989 PRE approvals.

The County has issued a determination finding that because the farm plans were not implemented during the five years immediately following approval, the plans were not implemented on the parcels as proposed and approved and can therefore no longer be implemented in accordance with the approvals. The County opinion does not set a specific expiration date on the plans, but does imply that the plans have expired and that no

building permits for a dwelling in conjunction with farm use can be issued based on PRE approvals 23-89 through 27-89.

The opponents concur with the County and contend that the 10-year period referenced in the described farm plans commenced immediately after approval of the plans and that now, at the end of those10 years, very little activity described in the plan was actually undertaken. Therefore, the plan cannot be complied with because the full ten years have passed with less than full implementation of the work called for within the 10-year period of time.

The applicant contends that the plan has no expiration date or any kind of deadline for implementation. In fact, the applicant goes so far as to argue that no implementation of farming activities is necessary and asks for a finding to that effect. The applicant also raises vested rights arguments based on the work and expenditures made in good faith to maintain and implement the PRE approvals.

In discussing the various issues involved in this proceeding, I will address the questions I see raised by the arguments of the parties.

1. IS THE APPLICANT REQUIRED TO IMPLEMENT THE FARM MANAGEMENT PLANS DESCRIBED IN THE1989 PRE APPROVALS?

The applicant contends that neither the 1989 PRE approval decisions or the county code contained any conditions regarding an expiration date or deadline for implementation of the plans.

The County contends that the applicant is required to implement the plan in accordance with the specific provisions of the plan and implies that the implementation period must commence immediately after plan approval.

The opponents recognize that the PRE findings, conclusions and conditions are very cursory and offer no express direction concerning when the farming in the farm plan must be implemented and when, in the process of implementation, a farm dwelling may be built and occupied. Mr. Rochlin asserts that we must go back to the requirements of the time and the farm plans to deduce what was intended from what was required.

The plan approvals make findings related to the requirements of MCC 11.15.2010(C). The first finding is that the "applicant requests approval of a single-family residence in conjunction with a proposed farming operation on this property." (Ex. 8). The plan approval explicitly recognizes that the farm use is proposed, not existing. The approvals conclude: "The applicant has satisfied the approval criteria for a farm-related, single-family residence in the Exclusive Farm Use District through the submission of a proposed five-year management plan which has been certified by Bernard Douglas of Douglas Tree

Farm". There are no time lines in the approval and no conditions requiring compliance with the plan. In fact there is no specific plan implementation requirement imposed at all.

In a memorandum to the Hearings Officer dated November 8, 1999, County Planner, Chuck Beasley, wrote: Staff cites the 1999 hearing Officer decision in NSA 10-98 as an example of how a County Hearings Officer decided that implementation of farm management plans was required, and that the applicant is responsible for following the plan that they submit in order to gain approval. This is a final decision that resulted in the removal of a dwelling constructed under an unimplemented farm management plan that was approved under the same provisions as were the plans that are the subject of this matter. Findings 26 and 30 address these two key points." (Ex. 40). The County not only required implementation but also determined that the applicant waited too long prior to commencing implementation.

I have reviewed that Talmage decision cited by staff. That decision involved a National Scenic Area Site Plan Review appeal, wherein the applicant sought to replace an existing dwelling with a new dwelling. The property in question had two existing houses, one of which was constructed in 1986 pursuant to a land use approval to construct a single-family dwelling "in conjunction with" farm use. The farm use was described in a farm plan. The farm plan was not implemented at any time. No farm use was being conducted by applicants on the property at the time the Talmage's sought approval to replace the dwelling which had been approved "in conjunction with" farm use. Since there was no farm use, the structure was not lawful and could not be replaced pursuant to the provisions of 11.15.3562.

In Talmage, the hearings officer found that the farm plan approved by the County must have been implemented to lawfully establish the approved residence rather than merely approved by the County. (Ex. 43 p.8). The hearings officer cited the case of Matteo v. Polk County, 11 Or LUBA 259, (1984). In Matteo, LUBA stated: "before a farm dwelling may be established on agricultural land, the farm use to which the dwelling relates must be existing." Matteo, 11 Or LUBA at 263.

The hearings officer in Talmage also stated that: "At the very least, the farm plan promised in the management plan must be established at some point in time and the residence used in conjunction with the plan." The hearings officer also recognized that cases following Matteo found that partial implementation of a farm plan was sufficient to allow the establishment of a farm dwelling. (Ex. 43, p.8).

The 1984 requirements of section 11.15.2010, interpreted in Talmage were very similar if not identical to the code provisions in effect at the time the applicant herein received PRE approvals in 1989.

The 1989 code authorized farm uses as the primary use in the EFU zone. (11.15.2008). (Ex. 9) A residence in conjunction with a farm use was allowed subject to three conditions. The third condition required that the farm use be "(3) Conducted according to a farm management plan containing the following elements: . . . " (.2010(c) Ex. 9). The code on its face seems to contain a requirement that farming had to be "conducted". The farm plan had to meet certain conditions for approval and the farm use had to be conducted in accordance with the farm plan. Accordingly, I concur with the hearings officer in Talmage and find that the farm plan has to be implemented at some point in time before the applicant can receive a building permit for the home to be established in conjunction with farm use. The farm use must then continue to be conducted after the house is built in order for the house, a residence in conjunction with a farm use, to continue to be lawful

Talmage does not discuss at what point in time the farm plan must be implemented other than to say that it should have been implemented before the house in question was built. Accordingly, I do not find that Talmage is dispositive of the other issues raised in this case.

2. DID THE APPLICANT'S DELAY IN COMMENCING THE IMPLEMENTATION OF THE PLAN PRECLUDE COMPLIANCE WITH THE PLAN?

As pointed out in the previous section, the PRE approvals did not contain any conditions nor was a specific time frame for implementation of the farm plans mandated. The farm plans did not contain any dates. Activities described in the plan were to occur in "year 1 of the plan" or "year 2 of the plan" without reference to specific dates. Once implementation was commenced, (year 1), activities and costs were estimated for each year of the plan. The plans also contained a pre-planting phase of indefinite duration.

Mr. Rochlin contends that for the first 9 years after approval of the plan, little or no work on the farms was done. Finally, after nearly nine years, in 1998, a couple of days work by an outside contractor was performed. Now, after 10 years, the plans that were approved can never be complied with, because their specified time has passed. Mr. Rochlin infers, as does the County, that the plans required immediate implementation.

I find nothing in the farm plans, the County approvals or the County Code that mandates immediate implementation of the farm plans or sets an expiration date for the farm plans. The County's actions and decisions are specifically contrary to such an interpretation.

In 1993, the applicant herein submitted two applications (PRE 7-93 and PRE8-93) for dwellings in conjunction with a farm use for properties that had previously received PRE approvals in 1989, PRE 26-89 and PRE 27-89. (Ex. 13) These are the same two parcels under review in MC 8-99 and MC 9-99. The Multnomah County Planning Department returned the applications to the applicant and refunded the application fees stating: "The 1989 approvals have not expired. Therefore, it was not necessary to submit new applications." (Ex. 13) The County did not impose a requirement of immediate

implementation. Rather, in 1993, the County specifically decided that the unimplemented farm plans and the PRE approvals were still valid. This is not a situation where an applicant is asserting that the County made an undocumented promise that the applicant relied upon. Rather, the applicant submitted formal applications which were returned by the County with a decision that the 1989 permits, which were issued in accordance with as yet unimplemented farm plans, were still valid.

In final order 97-215, the Multnomah County Board of Commissioners affirmed a Hearings Officer Decision which allowed the issuance of a building permit based on a 1990 PRE approval in a situation where the applicant had not commenced implementation of the farm management plan until several years after the approval had been obtained. (Ex. 22 & 23). The Hearings Officer in that case, (the Robinson case), required the County Planning Department to determine if there was a "currently established farm use", prior to issuance of the building permit. The County staff found that there was current employment for farm use through implementation of the farm plan. In Robinson, the farm plan involved grape production. The grape stock had been ordered but not yet planted at the time of the determination by the County that the applicant in Robinson had implemented the first two years of the farm plan.

The fact that the County adopted ordinance 903 is further evidence that the County considered previously issued PRE approvals based on unimplemented farm plans still valid. If the plans had been implemented and homes built, there would have been no "problem" to address. When the Board denied this applicant's request for validation of the farm management plan in cases PRE16-98, 17-98 and 18-98, (because the applications had been submitted under Ordinance 903 which the Board intended to repeal), the Board adopted findings which gave a partial summary of the history of this issue. In Final Order 99-113, the Board stated:

> "In 1998, a case came before a prior Board involving a similar permit. Opponents requested that the permits be declared invalid because they were nine years old and had never been implemented. The Board was reluctant to declare the permits invalid and requested an ordinance be drafted to void unimplemented pre-1994 farm dwelling permits unless, within two years of adoption, there was a determination of substantial implementation of the first two years of the farm management plans." (Ex. 37)

The Board had adopted Ordinance 903 as a means of "sun setting" old farm management plans. The holders of old PRE permits were being given several years to implement the plan, and if they did not, the old PRE approvals would be voided. Prior to adoption of Ordinance 903, which was never acknowledged, the Board recognized the validity of the old PRE approvals and specifically approved building permit issuance in instances of delayed implementation of the farm plans. This is the existing precedent which I must

defer to. Accordingly, I find that the delayed commencement of the implementation of the farm plans by the applicant herein, does not violate any code provision or plan requirement and does not preclude successful implementation of the Plan.

However, in order to receive a building permit or in this instance "zoning clearance" for issuance of a building permit, the applicant must demonstrate that the day to day activities on the subject land are principally directed to the farm use of the land. (See OAR 660-05-030(4) (1986) and Board Order 99-113). This requirement will be met if the applicant demonstrates that it has implemented the farm plans.

3. HAS THE APPLICANT IMPLEMENTED THE FARM MANAGEMENT PLANS?

Satisfactory implementation of the farm management plans is necessary in order for an applicant to demonstrate current employment of land for farm use, as required in OAR 660-05-030(4) (1986). If the farm plan has been implemented, then a finding can be made that the day to day activities on the land are principally directed to the farm use of the land, and the requirements of the OAR satisfied. However, the question then becomes, "What is a sufficient level of implementation?". In Kunze v. Clackamas County, 27 Or LUBA 130 (1994), LUBA held that if a County approves a farm dwelling based on a farm management plan, the County may allow issuance of building permits for a farm dwelling when the farm management plan is substantially implemented. Kunze, at 138. The opponents in this matter argue, in essence, that exact implementation of nothing less than the full plan will do.

In Forster v. Polk County, 115 Or App 475 (1992), the Oregon Court of Appeals stated:

> "However much actual farm use OAR 660-05-030(4) may have been intended to require, the rule does not require the full establishment of all planned farm uses in all cases as a condition precedent to the building of a primary farm dwelling on any EFU parcel." Forster at 481.

In Forster, Polk County had appealed LUBA's ruling that a farm management plan had not been adequately complied with because only half of the Christmas trees called for under the plan, had been planted. Both LUBA and the Court of Appeals seemed to infer that the planting of all seven acres of Christmas trees that were called for in the plan would constitute "full implementation" of the plan, even though it would be many years before the harvest of the trees would occur.

Forster also specifically reiterated certain general rules that were stated in Hayes v. Deschutes County, 23 Or LUBA 91 (1992) and Miles v. Clackamas County, 18 Or LUBA 428 (1989). In both Miles and Hayes, LUBA said it is consistent with OAR 660-05-030(4), for a County to approve a farm dwelling in conjunction with approval of a specific farm

management plan, even though the farm use proposed in the management plan does not yet exist on the subject property:

> "so long as the county (1) determines the level of farm use proposed by the farm management plan satisfies OAR 660-05-030(4), and (2) ensures through conditions that the farm dwelling cannot actually be built until after the county determines that the farm management plan has been carried out." Miles v. Clackamas County, 18 Or LUBA 428, 439 (1989).

Accordingly, in the PRE approvals relevant herein, it was not inappropriate for the County to issue PRE approvals based on the farm management plans that has been proposed but not implemented. However, the County should have attached conditions to the PRE approvals, requiring implementation before the dwellings could be built.

Although the PRE approvals did not have conditions, I found earlier in this opinion that the Code itself requires that farming be "conducted" in accordance with the farm management plan, in order to make the proposed farm dwelling lawful.

The plans themselves, do contain some guidance in determining when it would be appropriate to allow a farm dwelling in conjunction with the farm use contemplated in the plan. Each plan states:

> "The applicant proposes extra care in the form of a dwelling on each lot by the third year after planting. The reason for timing the dwelling in the third year is that the time consuming work of shaping the trees will be in the fourth year after planting, and is best to have the operator settled on site by then." (Ex. 6 and 7, page 3.)

In discussing the levels of implementation for each farm plan, I will discuss MC 8-99 and MC 9-99 together, and then MC 10-99, MC 11-99 and MC 12-99 together.

MC 8-99 and MC 9-99 Farm Plan Implementation:

These two parcels are the parcels that were involved in the Hearings Officer Decision dated October 16, 1998 involving PRE approvals PRE 4-98 and PRE 5-98. In that matter, two applications for dwelling validation were approved under the provisions of Ordinance 903. Multnomah County Board of Commissioners affirmed that order and that decision was also affirmed by LUBA. Subsequently, the County has repealed Ordinance 903. Accordingly, the ruling in PRE 4-98 and 5-98 does not affect this application. However, the findings made in that opinion related to the degree of implementation of the farm plans is relevant and will be referenced herein.

PRE 4-98 and PRE 5-98 Findings:

"These two parcels are located on the east side of Skyline Blvd., approximately one mile northwesterly of its intersection with NW Cornelius Pass Road. The property varies in slope from nearly level to over 30° and has been used for various agricultural purposes for a number of years prior to receiving approvals in PRE 26-89 and 27-89.

The majority of soils on this and surrounding properties are Cascade Silt Loam. Properties in the surrounding area range in size from less than one to over 80 acres.

The applicant's submittals described the measures taken to substantially comply with the management activities for the first two years as set out in the plan.

The applicant had implemented the activities generally described in the first two years of the farm plan.

The appellants contend that the farm plan requires the planting of 9,000 trees on 6 acres in the first 2 plan years for parcel 2. 7,000 trees were planted on 4 acres of parcel two, as that parcel is now configured.

Appellants also argue that a plan approved under 1989 standards can not be reapportioned to accommodate new lot lines. Appellants contend that the planting does not comply with the plan and can not support a finding of substantial compliance unless, at least 9,000 trees spread over at least six acres of parcel two as that parcel is now configured has occurred.

The applicant submitted credible evidence indicating that 21,000 trees were planted (the number called for in the farm plan). The trees were planted in the exact locations called for in the 1989 approved farm management plan. The plan called for planting approximately 12,000 Christmas trees on parcel 1 and 9,000 trees on parcel 2, as those lots were configured in 1989. The trees were planted in accordance at the locations specified in the plan. The trees were planted in the projected numbers for each parcel as those parcels were described and configured in 1989. As the result of a 1995 lot line adjustment, the parcels were reconfigured, resulting in 15,000 trees on parcel 1 and 7,000 trees on parcel 2 as those lots are now configured.

The lot line adjustment did not amend, modify or alter the approved farm management plan. The applicant has established substantial compliance

with the approved farm plan both as to the number and location of trees planted.

The appellants contend that there is no substantial evidence indicating that the described pre-planting activities were carried out.

Substantial evidence is evidence a reasonable person would rely on in reaching a decision. Brandt vs. Marion Co., 23 Or LUBA 3216 (1992). In a case where the relevant facts are not in dispute, the choice between different reasonable conclusions based on evidence in the record belongs to the County. Dority III vs. Clackamas Co., 23 Or LUBA 384 (1992).

The appellants contend that the canceled check to Chaparral Reforestation is insufficient to establish that pre-planting activity occurred on the site. Appellants also contend that the BTN statement only addressed only herbicides not the balance of planned pre-planting activities.

At the hearing, the appellants did not present any evidence directly contradicting the factual evidence submitted by applicants. Rather, the appellants chose to question the adequacy and accuracy of the information presented by the applicants.

Christopher Foster testified in regards to pre-planting activities carried on by the applicant. Mr. Foster questioned whether the applicants had adequately prepared the soil and fully complied with the farm plan pre-planting requirements. However, when I asked Mr. Foster if he had any direct knowledge if any of the activities had occurred or not, or the manner in which the soil had been prepared, he indicated he did not. He simply doubted that the applicant had actually done all the work claimed.

The applicant's farm management plan is general in nature. The plan lists the type location and quantity of crops needed, and then analyzes the financial viability of the plan.

The anticipated work schedule for the first two years of the plan was to prepare for planting and plant the seedlings. The applicant states in the plan:

> 'The ground to be planted with Noble fir seedlings is already cleared, but must be prepared in the year before planting. As outlined on the cost sheet, there will be some leveling, spraying, plowing and cultivating, and subsoiling to 18 inches. The spraying may be done by backpack or by helicopter.'

The plan contemplated 'some' leveling, spraying, plowing and cultivating and subsoiling. There is no indication that all of these tasks were required for the entire acreage to be planted.

The written materials submitted by applicant, together with the credible testimony does provide substantial evidence that pre-planting activity occurred. The written and oral testimony by appellants is not sufficient to controvert the substantial evidence submitted by applicant." (Ex. 34)

Additional Evidence From This Record:

The applicant also submitted invoices detailing the expenditures that had been made in furtherance of the implementation of the farm management plan on these two parcels. Ex. H-4.

Kevin Bender, Vice President of Western States Development Corporation, submitted a written affidavit describing activity conducted in furtherance of the farm management plans:

"The farm management plans developed by Bernard Douglas of Douglas Tree Farms, and approved in PREs 23-89, 24-89, 25, 89, 26-89 and 27-89, were a prediction of what activities would likely occur in establishing a Noble Fir farm on each parcel. The purpose of each farm management plan was to establish that a Noble Fir farm was feasible on each parcel. Some of the activities described in the pre-planting phase of the farm management plans were not necessary, or were consolidated, because the parcels had been farmed annually for several decades, and the activity had already been accomplished. For instance, leveling was not required on the parcels because each of them had been in farm use, and were already leveled. Subsoiling was not required on the parcels because they had already been plowed and drain tiled for other crops. New technology now commonly used in planting Noble Firs has allowed the plowing and planting to be done simultaneously, substantially reducing soil erosion on each tree farm. However, every pre-planting activity necessary to ensure that the Noble Fir crop would be healthy and viable was carefully done. To this day, all five tree farms are closely managed, and the trees are healthy and growing." (Ex. 18).

In addition, Mike Stone, of Best in The Nation Christmas tree management firm, submitted a letter with the following information:

"The plantings are now almost two years old, and the crop's survival rate is in the high 90th percentile. Weed control is excellent. These farms should produce high quality noble firs in approximately seven years.

> The planting method I used to establish the noble fir crops on the Western States' five parcels is the standard planting method in the industry, and the best method to ensure the survival and health of the Noble Fir crop. Some pre-planting activities such as leveling and subsoiling were not necessary on the Western States parcels because the five parcels have been farmed for several decades, and the soil was already plowed and drain tiled for other crops. To plant the Noble Fir crop on the Western States' parcels I used a machine to plow each spot in which a tree would be planted, and then immediately planted a tree in the spot. This method is superior to previous tree-planting methods, which plowed the entire plot of land and then planted the trees, because plowing is site-specific rather than in rows, reducing erosion." (Ex. 19).

The applicant also submitted color photos of the Christmas tree farm, for each of the parcels. The trees appear healthy, growing and well cared for. (Ex. 20).

I find that the farm management plans are general in nature. The plans list type, location and quantity of crops needed and then analyze the financial viability of the plans. The plans set forth an anticipated work schedule, but because of the nature of the plans, and practical realities of farming, it would not be reasonable to require exact, literal adherence to the plans' estimates set forth in the plans.

The applicant has planted the requisite number of trees on the two parcels in question, and those trees are growing and appear healthy. Accordingly, I do find that the applicant has implemented the farm plan on these two parcels.

MC 10-99, MC 11-99 and MC 12-99 Farm Plan Implementation:

The three parcels involved in applications MC 10-99, MC 11-99 and MC 12-99 are the same parcels that were involved in applicant's prior applications for PRE approvals, PRE 16-98, 17-98 and 18-98, which were submitted under the provisions of Ordinance 903. Those approvals were invalidated by the Board, after the Court of Appeals decision relating to Ordinance 903. Accordingly, the Hearings Officer decision dated May 7, 1999 is not dispositive of the issues involved herein, however, there was significant discussion in that case regarding the level of the implementation of the farm plan. Accordingly, I will quote those portions of the opinion here, because they are consistent with the evidence submitted in this proceeding.

<u>PRE 16-98, 17-98 and 18-87 Findings:</u>

> "the applicant described the management activities which were accomplished in regards to each parcel. Such activities include pre-planting, soil conditioning and planting of approximately 7500 noble fir Christmas tree

seedlings each on Parcels 2 and 3, PRE 17-98 and PRE 18-98, and approximately 6375 noble fir Christmas tree seedlings on Parcel 1, PRE 16-98.

Staff verified in a site inspection on January 4, 1999 that the tree seedlings had been planted according to the plan, and appear to have survived the first summer at the rate estimated in the plan.

The video played during the course of the hearing showed that the trees in fact were green and appeared to be growing. The ground the trees were planted in appeared to have been cultivated and did not appear to be overgrown with vegetation.

The last element listed in the 1989 Farm Management Plans under Year 1 is roadway and landing construction. In regards to each application, the applicant submitted a letter/addendum that explained why construction of an access road was not necessary in order to establish the Christmas tree crop (Exhibit A4). County staff verified in the January 4, 1999 site inspection that a gravel road from Skyline to the mobile home on Parcel 1, PRE 17-98, exists at this time. Staff was unclear as to whether that gravel road would meet width and grade requirements. Staff also noted that the approval standards were not applied as a strict list of things which must be done prior to approval. Rather, staff indicated that the standard is intended to insure that the farm use, in this case the proposed Christmas tree farm, is established prior to dwelling approval in order to meet the "currently employed" for farm use standards. Based on the currently adequate access to the crop area, the road appears to not be needed until construction of the farm dwelling begins. Approval to construct/widen the access road will require a Grading and Erosion Control permit and access permit.

The appellants contend that the Planning Director's findings and the evidence itself, do not establish that the activities provided for in the first two years of the farm management plan have been implemented.

In particular, the appellants, both in their written and oral testimony, challenged the adequacy of the pre-planting and Year 1 activities.

The appellants dispute the applicant's contention that the pre-planting activities occurred. The appellants contend that the following specific activities were required for preparation for planting: leveling, fence laying and access road adjustment. In addition, appellants contend that subsoiling to a depth of 18" did not occur and that the appropriate plowing and cultivating activities did not occur.

In regards to Year 1 activities, the appellants contend that there was not adequate plowing and disking, that the machine planting was not adequate, and that roadway and landing station construction was required, but not implemented.

At the hearing, Kevin Bender testified for Western States Development. Mr. Bender testified that the property had been utilized for farming over the last 15 years. Mr. Bender testified that the property had been planted with various crops, including crimson clover, oats, vetch, and dry land wheat. Even those crops which were capable of being treated as perennials had been planted annually in order to achieve a crop rotation.

Although the appellants contended that the soil on the subject site had been compacted, the direct testimony of someone who had observed the farming methods contradicted that and provided substantial prohibitive evidence that in fact the subsoiling to the required depth had been provided over a number of years through an ongoing farming practice.

Mr. Bender testified that the property had annually been cultivated utilizing a disk, and that five years ago the property had been tiled for drainage purposes at a depth of 3 feet, with six inch perf pipe.

Mr. Rochlin, in oral argument, compared the property to a yard with grass where compaction would occur. However, the evidence which I found believable, was directly contrary. A residential yard is planted with perennial grasses which are not cultivated or disturbed for years, and do in fact experience compaction. The process utilized in regards to the subject parcels described by Mr. Bender was directly contrary. The parcels in question were disked annually. No compaction would occur because of the regular farm practices on the property and subsoiling to a depth of 18" was achieved. I found that evidence credible and substantial.

I also viewed the video which presented objective visual substantiation of the testimony of Mr. Bender and the written materials submitted by applicant. The land appears as if it had been tilled.

The applicant's written submittals indicated that the applicant purchased noble fir seedlings and hired Christmas tree contractor B.T.N. of Salem to prepare the ground, apply pre-planting herbicide, plant the seedlings and apply post-planting herbicide. B.T.N. planted a total of 21,375 seedlings on the three parcels in accordance with the projections on the approved management plan. The distribution of the seedlings on the three parcels in accordance with the plan was confirmed by staff and I find both the

applicant's written submittals and testimony, and the confirmation by staff credible substantial evidence.

B.T.N. performed a number of farm activities using the farm management plan as a guide. The ground area outlined in the approved management plan was prepared for planting. The existing young wheat crop on the site was sprayed to keep it from competing with the seedlings. At that point, the activities projected for the first year of the plan (pre-planting) had been substantially implemented.

The evidence also indicated that the noble fir seedlings were planted by machine as called for in the second year of the plan. Additional plowing and cultivation was accomplished by the machine that planted the seedlings.

The objective of the farm management plan is to create a commercially viable noble fir Christmas tree farm on each of the three parcels. The plan makes certain assumptions and projects expenses and anticipated revenues from the operation of the Christmas tree farm. The activities set forth in the cost projection portion of the plans are not stated as mandatory elements that must be followed without deviation. Rather, these activities are listed as items that are anticipated and are likely to require some cost allocation. Obviously there is a certain level of pre-planting activity and ground preparation necessary before the trees can be planted. Similarly, in Year 1 of the plan (the second year), the requisite number of trees must be purchased and planted in the areas specified in the plan. However, other activities which were projected to generate costs would not necessarily be undertaken unless those activities were actually needed.

The appellants contend that the applicants have not complied with the literal requirements of the plan because roadway and landing station construction did not occur on each of the parcels in Year 2 of the plan.

The applicant addressed this issue and explained why the roadway and landing station construction did not occur in its submittal dated November 24, 1998.

The goal of the farm plan is to create a workable tree farm. One of the objectives in managing land for farm purposes is to create a commercially viable farm.

The applicant indicated that the road and landing were not built because they were not needed to implement the plan in year two for several reasons. All of the parcels included in the management plans had been farmed in

recent years and access for farming equipment to reach the fields was created during the farming process. Parcel 2 has an existing road to the old mobile home on the lot. The equipment used to prepare the ground and plant the Christmas tree seedlings used the existing farm access. A new access and landing were not necessary to complete the main activities of the first two years of the management plan, which was to prepare for and plant the seedlings in the specified locations.

The tree farms are relatively small (five acres or less) and on level ground. Because of the flat terrain, a landing was not required as a staging area for preparing the ground and planting the seedlings. The farm plan proposes dwelling construction "by the third year after planting". A primary reason for the dwelling is to allow the owner to work the tree farm. A road into the tree farm would not be needed until the dwelling is built. The location of the road to the tree area, if it is needed, will depend on the exact location of the dwelling. At this point, the dwelling location is approximate, and the placement of a road is premature. Economic viability is a primary objective in regards to the plan. The applicant's written materials reference this aspect of the plan. The applicant indicated:

> 'With Christmas trees, there is no return for several years, and the future market at harvest time is always uncertain at planting time. The owner needs to make wise decisions to keep costs down while getting the product ready for market. The only important function of the first two years to get all of the trees safely planted. The approved plan's management objective is to make a profitable venture from 'a small farm with a fine product and prudent marketing, and intensive on-site management.' Plan, page 3. If the road and landing is not necessary at this point, it makes no economic sense in a risky venture to spend the money unnecessarily. The existing access was adequate for planting the tree farms, and will be adequate for interim maintenance of the farm until the dwelling can be built.' (Page 2, Paragraph 4, November 24, 1998 Addendum)

I concur with applicant's assertions. It does not appear that the projected construction of the road need to occur in Year 2 of the plan. Accordingly, the plan could be substantially implemented without the construction of roadway and landing station in Year 2.

The plan does not fail because the projected activities cost more or less than projected. Similarly, it may not be necessary to undertake all activities in the

projected year in order to substantially implement the plan. Some activities may in fact occur sooner than projected or later.

If, for example, only 2% of the initial tree planting died by the end of the first year, the applicant would not be expected to replace 10% of the trees. The property owner would replace the 2% that died.

I concur with staff's interpretation that the substantial compliance standard is not a strict standard. The focus is to insure that the farm use, in this case the proposed Christmas tree farm, is established prior to dwelling approval, in order to meet the "currently employed" for farm use standard.

I find that the applicant has demonstrated substantial compliance with the approved farm management plan, based on the evidence in the record that the activities provided for in the first two years of the farm management plan have been implemented." (Ex. 35)

Additional Evidence From This Record:

In addition, the Affidavit of Kevin Bender (Ex. 18) and statements of Mike Stone (Ex. 19) referenced above are relevant to these three farm plans, as well. The invoices and records contained in Exhibit H-4 also demonstrate that the applicant incurred significant expenses in implementing the farm management plans on these three parcels. As stated in the findings quoted above, the farm management plans are not exact in nature. Literal adherence to the plans is not required in order to accomplish the goals and objectives of the plans. For example, the plans anticipated that 10% of the trees would need to be replaced. However, statements of Mike Stone indicate that the survival rate of the trees was greater than that projected in the plans. Accordingly, it is not necessary for the applicant to replace 10% of the trees. The estimated die-off simply did not occur. The trees are healthy and growing. Photos in the record contained in Exhibit 20, depict a healthy, thriving tree farm.

I find that the applicant has implemented the farm plans, and that the applicant is in fact now starting the third year of the plans, the time at which the plans call for the construction of a house as a residence for an on-site operator.

Summary:

Accordingly, as to all five farm dwelling plans, I find that there has been implementation of the plans, sufficient to support a finding that the parcels are "currently employed" for farm use in accordance with OAR 660-05-030(4).

The total number of trees called for in the plans have been planted and appear to be thriving.

At this point in time, the applicant is starting the third year of the plan implementation. According to the terms of the plan, it would be appropriate to allow the applicant to receive building permit approval. Since the applicant is now commencing the third year of the plan, I will not impose any date conditions for issuance of the building permit. I am finding that the level of plan implementation is sufficient to issue a building permit for a house on each lot. The applicant is now at the stage of the plans where construction of the house was anticipated, in order to allow the operator of the Christmas tree farm to become settled in before the more intense level of management required in the fourth year of the plan.

4. ARE THERE ANY VESTED RIGHTS ISSUES THAT NEED TO BE RESOLVED?

Page 11 of applicant's closing argument states:

> "In this case, the 'change in the law' prohibiting the PRE dwellings will take effect only if the county issues a final decision that accepts staff's recommendation for denial."

Thus, as stated by applicant, there is only a vested rights issue to be resolved if I had upheld staff's denial of the five MC applications. Since I have in fact held that the applicant has implemented the farm management plans and is entitled to a determination that a building permit can be issued on each of the five parcels, there is no vested rights question to be addressed.

SUMMARY OF ISSUES

1. I find that past precedent of the County and Multnomah County Code in effect at the time of the PRE approvals in question, requires implementation of the farm management plan prior to issuance of building permit for dwellings approved in conjunction with farm use, based on a farm management plan.

2. I find that the applicant's delayed implementation of the farm management plans did not preclude the applicant's ability to successfully implement the plans.

3. I find that in each instance, the applicant has implemented the plan and is in fact close to the start of the third year of each plan. All trees called for in the plan have been planted. The implementation of the farm management plans demonstrates that the parcels are currently employed for farm use, as required by OAR 660-05-030(4) (1986).

CONCLUSION MC 8-99

Subject to the following condition, and based on the findings and substantial evidence cited or referenced herein, and based on past County precedent, I conclude that the applicant is entitled to approval of its request for zoning clearance for dwelling approval validation. The applicant has implemented the farm management plan, which is a prerequisite to issuance of a building permit for the dwelling that was authorized in PRE 26-89.

Condition: The applicant must continue to follow the farm plan applicable hereto, in order for the house which is hereby receiving "zoning clearance" to be lawful. No building permit may be issued if the applicant abandons or discontinues implementation of the farm plan applicable hereto.

CONCLUSION MC 9-99

Subject to the following condition, and based on the findings and substantial evidence cited or referenced herein, and based on past County precedent, I conclude that the applicant is entitled to approval of its request for zoning clearance for dwelling approval validation. The applicant has implemented the farm management plan, which is a prerequisite to issuance of a building permit for the dwelling that was authorized in PRE 27-89.

Condition: The applicant must continue to follow the farm plan applicable hereto, in order for the house which is hereby receiving "zoning clearance" to be lawful. No building permit may be issued if the applicant abandons or discontinues implementation of the farm plan applicable hereto.

CONCLUSION MC 10-99

Subject to the following condition, and based on the findings and substantial evidence cited or referenced herein, and based on past County precedent, I conclude that the applicant is entitled to approval of its request for zoning clearance for dwelling approval validation. The applicant has implemented the farm management plan, which is a prerequisite to issuance of a building permit for the dwelling that was authorized in PRE 23-89.

Condition: The applicant must continue to follow the farm plan applicable hereto, in order for the house which is hereby receiving "zoning clearance" to be lawful. No building permit may be issued if the applicant abandons or discontinues implementation of the farm plan applicable hereto.

CONCLUSION MC 11-99

Subject to the following condition, and based on the findings and substantial evidence cited or referenced herein, and based on past County precedent, I conclude that the applicant is entitled to approval of its request for zoning clearance for dwelling approval validation. The applicant has implemented the farm management plan, which is a prerequisite to issuance of a building permit for the dwelling that was authorized in PRE 24-89.

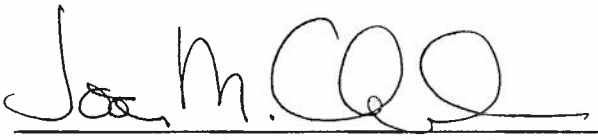
Condition: The applicant must continue to follow the farm plan applicable hereto, in order for the house which is hereby receiving "zoning clearance" to be lawful. No building permit may be issued if the applicant abandons or discontinues implementation of the farm plan applicable hereto.

CONCLUSION MC 12-99

Subject to the following condition, and based on the findings and substantial evidence cited or referenced herein, and based on past County precedent, I conclude that the applicant is entitled to approval of its request for zoning clearance for dwelling approval validation. The applicant has implemented the farm management plan, which is a prerequisite to issuance of a building permit for the dwelling that was authorized in PRE 25-89.

Condition: The applicant must continue to follow the farm plan applicable hereto, in order for the house which is hereby receiving "zoning clearance" to be lawful. No building permit may be issued if the applicant abandons or discontinues implementation of the farm plan applicable hereto.

IT IS SO ORDERED, this 11th day of January, 2000



JOAN M. CHAMBERS, Hearings Officer

EXHIBIT LIST

FIVE APPLICATIONS FOR A DETERMINATION OF PERMISSIBLE USE AND REQUEST FOR ZONING CLEARANCE FOR A BUILDING PERMIT

MC NOs. 8-99, 9-99, 10-99, 11-99 AND 12-99
(PREs 26-89, 27-89, 23-89, 24-89 AND 25-89)

Submitted by Western States Development Corporation

November 1999

Volume I

1. Chronology of Western States' PRE dwelling approval validation process.

2. Chronology of Application and Approval Numbers Associated with PREs 23-89, 24-89 and 25-89.

3. Chronology of Application and Approval Numbers Associated with PREs 26-89 and 27-89.

4. Preliminary approval for 2-parcel partition in LD 26-89 (Partition Plat No. 1993-4), October 24, 1989.

5. Preliminary approval for 3-parcel partition in LD 25-89 (Partition Plat No. 1990-43), October 25, 1989.

6. Farm Management Plan attached to applications for dwelling approvals in PREs 23-89, 24-89 and 25-89.

7. Farm Management Plan attached to applications for dwelling approvals in PREs 26-89 and 27-89.

8. County approvals of a dwelling in conjunction with farm use.

   A. PRE 23-89 (November 6, 1989).

   B. PRE 24-89 (September 14, 1989).

   C. PRE 25-89 (November 6, 1989).

   D. PRE 26-89 (November 20, 1989).

E. PRE 27-89 (November 20, 1989).

9. Law in effect at the time of the 1989 PRE dwelling approvals: 1989 versions of (1) MCC 11.15.2010(C), (2) OAR 660-05-030(4), and (3) ORS 215.203 and ORS 215.283(f).

10. Partition Plat 1990-43 recorded for 3-parcel partition created by LD 25-89 (July 19, 1990).

11. Partition Plat 1993-4 recorded for 2-parcel partition created by LD 26-89 (January 13, 1993).

12. County approval of Lot Line Adjustment for Partition Plat No. 1993-4 (December 15, 1995).

13. Letter from Sandy Mathewson, Multnomah County Planner, to Frank Walker and Associates (a consultant for Western States) stating that the 1989 dwelling approvals have not expired and are still valid (August 26, 1993).

14. Memorandum from County Counsel to County Planning Director advising that PRE dwelling approvals approved prior to August 1993 are not subject to new conditions or limitations (August 11, 1995).

15. Letter from Kenneth D. Helm to Ron Eber, Department of Land Conservation and Development, confirming that new administrative rules containing permit expiration provisions do not apply to applications submitted prior to August 1993 (November 4, 1996).

16. Multnomah County Hearings Officer vested rights decision re: lots in Skyline Ridge Estates owned by Western States, MC 2-95 (October 13, 1995).

17. Expenditures from 1989 through 1999 to implement PREs 23-89, 24-89, 25-89, 26-89 and 27-89.

A. Invoices supporting list of expenditures to implement dwelling approvals in PREs 23-89, 24-89 and 25-89.

Volume II

B. Invoices supporting list of expenditures to implement dwelling approvals in PREs 26-89 and 27-89.

18. Affidavit of Kevin Bender (August 10, 1999).

19. Letter from Mike Stone, Best in the Nation of Oregon, regarding the tree planting methods used on the five parcels (November 9, 1999).

20. Pictures of the Noble Fir crop on the subject property.

A. PRE 23-89: Noble Fir crop planted in February 1998 on the subject property.

B. PRE 24-89: Noble Fir crop planted in April 1998 on the subject property. Hayfield on subject parcel. Well on subject parcel.

C. PRE 25-89: Noble Fir crop planted pursuant to PRE 25-89 in February 1998. Hayfield on subject parcel. Well on subject parcel.

D. PRE 26-89: Noble Fir crop planted pursuant to PRE 26-89 in April, 1998. Hayfield on subject parcel. Subdivision gate and road for subject parcel.

E. PRE 27-89: Nobel Fir crop planted pursuant to PRE 27-89 in February 1998. Hayfield on subject parcel. Subdivision gate and road for subject parcel. Electricity box and well on subject parcel.

21. Recent Multnomah County decisions granting zoning clearance based upon PRE dwelling approvals:

A. Zoning clearance granted on February 27, 1997 based on dwelling approval granted in PRE 14-93 on September 27, 1993.

Volume III

B. Grading and erosion control permit granted in Case No. GEC 32-97 on October 24, 1997 based on the dwelling approval granted in PRE 11-93.

22. Multnomah County Hearings Officer Decision in Case No. SEC 3-97 granting SEC approval based upon PRE 26-90 (June 2, 1997) (Robinson case).

23. A. Multnomah County's memorandum to circuit court in support of case No. 9707-05441 (September 8, 1997) (Robinson case).

B. Final Order 97-215 by Multnomah County Board of Commissioners upholding Planning Director's decision in SEC 3-97 (December 18, 1997) (Robinson case).

C. Excerpt from transcript of Multnomah County Board of Commissioners meeting upholding the Planning Director's decision in SEC 3-97 (December 9, 1997) (Robinson case).

24. Multnomah County Planning Director decision granting zoning clearance based upon the dwelling approval in PRE 26-90, and exhibits to the Robinson application. (Case No. PRE 1-98) (June 2, 1998) (Robinson case).

25. A. Letter from Jeff H. Bachrach, O'Donnell Ramis Crew Corrigan & Bachrach LLP, to Kathy Busse, Director County Department of Environmental Services, and Sandra Duffy, Multnomah County Counsel, clarifying lot-of-record issue (February 25, 1998).

B. Memorandum by Jeff H. Bachrach, O'Donnell Ramis Crew Corrigan & Bachrach LLP, regarding lot-of-record issue.

C. Letter from Kathy Busse, Director Land Use Planning Division, to Jeff Bachrach, O'Donnell Ramis Crew Corrigan & Bachrach LLP clarifying lot-of-record issue (April 17, 1998).

D. Pre-application conference notes by Chuck Beasley, Multnomah County Planner, regarding Western States' Request for a permissible use determination regarding PREs 23-89, 24-89, 25-89, 26-89 and 27-89 (November 19, 1997).

26. Ordinance 903.

27. Final Opinion and Order in *Rochlin v. Multnomah County*, _____ Or LUBA ____, LUBA No. 98-067 (December 7, 1998), *affirmed without opinion*, *Rochlin v. Multnomah County*, ____ Or. App. ____, CA A104562, CA A104709 (February 19, 1999).

28. Western States' applications for validation of dwelling approvals pursuant to Ordinance 903.

A. PRE 26-89 (Case No. 4-98) (May 8, 1998).

B. PRE 27-89 (Case No. 5-98) (May 8, 1998).

C. PRE 23-89 (Case No. 16-98) (September 28, 1998).

D. PRE 24-89 (Case No. 17-98) (September 28, 1998).

E. PRE 25-89 (Case No. 18-98) (September 28, 1998).

Volume IV

29. Multnomah County Planning Director validation of dwelling approval in PRE 26-89 pursuant to Ordinance 903, Case No. PRE 4-98 (July 22, 1998).

30. Multnomah County Planning Director validation of dwelling approval in PRE 27-89 pursuant to Ordinance 903, Case No. PRE 5-98 (July 22, 1998).

31. Multnomah County Planning Director validation of dwelling approval in PRE 23-89 pursuant to Ordinance 903, Case No. PRE 16-98 (January 6, 1999).

32. Multnomah County Planning Director validation of dwelling approval in PRE 24-89 pursuant to Ordinance 903, Case No. PRE 17-98 (January 6, 1999).

33. Multnomah County Planning Director validation of dwelling approval in PRE 25-89 pursuant to Ordinance 903, Case No. PRE 18-98 (January 6, 1999).

34. Multnomah County Hearings Officer Decision upholding validation of dwelling approvals in PREs 26-89 and 27-89 (Case Nos. PRE 4-98 and 5-98) (October 16, 1998).

35. Multnomah County Hearings Officer Decision upholding validation of dwelling approvals in PREs 23-89, 24-89 and 25-89 (Case Nos. PRE 16-98, PRE 17-98 and PRE 18-98) (May 7, 1999).

36. Multnomah County Board of Commissioners Final Order No. 98-210 upholding the validation of Western States' dwelling approvals in PREs 26-89 and 27-89 (Case Nos. 4-98 and 5-98) (December 17, 1998).

37. Multnomah County Board of Commissioners Final Order No. 99-113 denying the validation of Western States' dwelling approvals in PREs 23-89, 24-89 and 25-89 (June 17, 1999).

38. Ordinance No. 935, repealing Ordinance No. 903 (August 5, 1999).

39. Letter from Allison Hensey to Chuck Beasley regarding pre-application conference (June 23, 1999).

40. Letter from Chuck Beasley to Kevin Bender denying Western States' five applications requesting a determination of permissible use for the parcels pursuant to MCC 11.15.8205(F) (October 25, 1999).

41. Letter from Allison P. Hensey to Chuck Beasley requesting a hearing on the five applications as provided for in MCC 11.15.8230 and 11.15.8005 (November 4, 1999).

42. Memorandum and Staff Report on MC 8-99 through 12-99 from Chuck Beasley, County Land Use Planning Division, to Multnomah County Hearings Officer (November 8, 1999).

43. Multnomah County Hearings Officer decision in NSA 10-98 (Talmage case), cited by Chuck Beasley in Staff Report on MC 8-99 through 12-99.

A. EFU and CFU farm regulations in effect in 1984.

44. Exhibits to Talmage application for replacement dwellings to replace non-conforming uses in NSA 10-98.

45. Final Opinion and Order in *Rochlin v. Multnomah County*, LUBA No. 99-025 (November 24, 1999), affirming county approval of dwelling validation for PREs 26-89 and 27-89 (Case Nos. 4-98 and 5-98).