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P18377-001

SENT VIA EMAIL

Mr. David Blankfeld, Senior Assistant County Attorney
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*Re: Scott Reed v. Multnomah County, LUBA No 2022-097 (Remand Proceeding)
Multnomah County File T2-2021-14981*

Dear Mr. Blankfeld:

In our recent conversations, you identified two issues which need to be addressed in the remand proceeding that the hearings officer left unresolved. These issues are in addition to the issues for which the LUBA case was remanded.

In this letter, I seek to address these two issues, and summarize the applicant's fulfillment of its burden of proof on these topics. In addition, I am providing you with "proof of past income" on the farm operations, which relates to the issue we raised at LUBA. I do so without waiving the arguments set forth in my Petition for Review related to the fact that no proof of past income is required. Our Petition for Review is included as Exhibit 1, and we ask that this document be physically placed before the Hearings Officer and incorporated into the Record of the above-listed proceeding.

I. Legal Analysis

We begin by addressing the County's quasi-judicially-imposed income standard.

A. Proof of Income.

In 2022, the Springwood Acres farm produced \$44,478.00 in gross farm income. My client has provided me with three sets of figures to support that number. The most important of these is the gross income from farming activity for the 2022 calendar year. This list is set forth on page 2:

	Egg Sales	Goat Sales
January	\$ 2,586.00	\$ 0.00
February	\$ 2,388.00	\$ 0.00
March	\$ 3,120.00	\$375.00
April	\$ 3,776.00	\$250.00
May	\$ 4,332.00	\$640.00
June	\$ 4,374.00	\$375.00
July	\$ 4,044.00	\$ 0.00
August	\$ 3,888.00	\$ 0.00
September	\$ 3,821.00	\$375.00
October	\$ 3,630.00	\$ 0.00
November	\$ 3,522.00	\$ 0.00
December	\$ 2,997.00	\$ 0.00
Total	\$42,478.00	\$2,015.00

The second is the list of egg sales broken down by month. That list is provided at Exhibit 2. This list shows that the applicant's chickens produced 86,444 marketable eggs in 2022, which is comparable to 2020's numbers.

The third is the egg production figures broken down by day. Exhibit 3.

B. SEC-h (Significant Environmental Concern - Wildlife Habitat) Permit.

The first unresolved issue relates to the fact that the property is subject to the SEC-h overlay. MCC 39.5860(B) states:

(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.*
- (2) Development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developable portion of the site.*
- (3) The access road/driveway and service corridor serving the development shall not exceed 500 feet in length.*

It appears that only MCC 39.5860(B)(3) remains at issue. This is because there was some disagreement in the record about the length of the driveway, which stems from differences in how the driveway was measured. *Compare LUBA Rec. 569¹ with LUBA Rec. 426 & 671.²* Because of this uncertainty, the applicant decided to avail itself of MCC 39.5860(C)(1). This proposition is available in situations where the applicant cannot meet the standards set forth at MCC 39.5860(B)(1) & (2). MCC 39.5860(C)(1) states:

(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 subsection (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 ***.*

The applicant's property does have "unique physical characteristics" that limit the locations of the proposed dwelling in relation to the driveway. Specifically, the most logical place to construct the dwelling is on the previously disturbed high ground which is unsuitable for farm use due to compaction and the removal of top soil. *See Existing Conditions Map, at LUBA Rec. 551-552 (showing prior grading and development).* However, that building site is located next to a sharp bend in Springfield Road, which precludes placement of an approach road / driveway near that building site due to sight distance concerns. For this reason, the approach road was previously sited at a location where sight distance requirements can be met. LUBA Rec. 692 (showing main driveway and garage driveway); LUBA Rec. 182 (1936 aerial photograph showing location of four approach roads).

At the local proceeding before the Hearings Officer, the applicant submitted a Wildlife Conservation Plan prepared by Anita Cate Smyth of Winterbrook Planning. LUBA Rec. 194-202. The Wildlife Conservation Plan demonstrates compliance with MCC 39.5860(C)(3)(a)-(e), which are quoted below:

- (3) Unless the wildlife conservation plan demonstrates satisfaction of the criteria in subsection (C)(5), the wildlife conservation plan must demonstrate the following:*

¹ Note 2 of Plan Sheet C-401 states that the "[t]otal driveway length from the end of the roundabout to edge of pavement on Springfield Road is $8+41.75 - 3+74.78 = 468.97$ [linear feet]."

² In the incompleteness letter, staff concludes that the "access road/ driveway and service corridor exceeds 500 feet, which does not comply with MCC 39.5860(B)(3)." In its staff decision, staff states that the driveway is approximately 589 linear feet. Rec. 426. Staff provided an annotated site plan map to demonstrate how it arrived at its conclusion. Staff's calculations include an implied interpretation of MCC 39.5860(B)(3), which requires the measurement of "the access road/driveway and service corridor serving the development."

- (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.*
- (b) *That any newly cleared area associated with the development is not greater than one acre, excluding from this total the area of the minimum necessary accessway required for fire safety purposes.*
- (c) *That no fencing will be built and existing fencing will be removed outside of areas cleared for the site development except for existing cleared areas used for agricultural purposes.*
- (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.*
- (e) *That revegetation and enhancement of disturbed stream riparian areas occurs along drainages and streams located on the property.*

The specific responses set forth in the Wildlife Conservation Plan are not recreated here, but can be found at LUBA Rec. 201-2.

In its Post-Hearing Memorandum to the Hearings Officer, staff reviewed the Wildlife Conservation Plan and concluded that it was adequate to meet MCC 39.5860(C)(3):

Based on the new information (Exhibits H.2.a – H.2.u, and H.3) submitted by the applicant to the [Hearings Officer], staff is able to recommend approval of the requested SEC-h permit.

LUBA Rec. 48. For reasons that are not clear from the record, the Hearings Officer did not address the SEC-h issue in his final decision. On remand, we believe that the Hearings Officer can find that the standards for the SEC-h permit can be met, especially considering the staff recommendation for approval based on the Wildlife Conservation Plan.

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C. Geologic Hazards (GH).

The second unresolved issue relates to the fact that a small portion of the driveway is located in a Geologic Hazards (GH) overlay zone. In the Notice of [Staff] Decision dated June 10, 2022, staff Planner Chris Lui stated:

The subject tract contains areas within the mapped GH overlay [designated with an orange crosshatch], as shown in the image below. These areas within the GH overlay include a portion of the planned³ access road/driveway, which is marked with a black star. The tract also contains areas with steeper slopes, as shown by the contour information in the image below. The image below is a screenshot of County GIS information.

LUBA Rec. 428-9. Staff included the following aerial photograph in the staff decision:



The County ROW staff say that paving is required for the driveway apron abutting NW Springfield Road *See August 10, 2022 Memorandum. LUBA Rec. 67-77.* On May 31, 2022,

³ Contrary to the statement made by staff at LUBA Rec. 428, the “access road/driveway” is not a “planned” driveway. The driveway was constructed over five years ago under driveway/ROW permit #80244 with the approval of Eileen Cunningham, Transportation Planner for the Multnomah County Transportation Program at the time of permit issuance (see Exhibit L-Original Driveway/ROW Permit). LUBA Rec. 204. The driveway was built according to the site plans that are incorporated into the driveway/ROW permit. Eileen Cunningham no longer works for Multnomah County.

at 1:46 pm, Mr. Graham Martin from Multnomah County Transportation Division sent an email to the applicant to discuss issues related to the driveway. LUBA Rec. 93. Mr. Martin emphasized two main points:

1. Although the approved site plans that are part of the original driveway permit do not show any asphalt, the Transportation Division requires a driveway apron to be paved with asphalt 20 feet from the road surface.
2. The permit fee of \$1,870 will need to be paid again.

See also LUBA Rec. 73 (setting forth the 20-foot width requirement). Staff acknowledges that the applicant proposes that “Access 1” is shown on the site plan C-401 at 25 foot wide at the ROW. LUBA Rec. 74.

The applicant believes a Geologic Hazard Permit is not required, because the following exemption set forth at MCC 39.5080(O) applies:

§ 39.5080 EXEMPTIONS. Ground disturbing activity occurring in association with the following uses is exempt from GH permit requirements:

(O) Placement of gravel or asphalt for the maintenance of existing driveways, roads and other travel surfaces.

The Hearings Officer addressed the “exemption” issue but, but left it unresolved:

The exemption for existing driveways (O), may apply. The Hearing Officer finds that the exemption for “existing driveways” only applies to existing driveway at the time the code was adopted or those lawfully permitted after the code was adopted. Appellant testified that the driveway is over 80 years old so it may apply. The exemption is only for “maintenance”. It appears from the record that placement of asphalt on top of existing gravel without any other ground disturbance would qualify for exemption (O). Exhibit H.3. page 31.

LUBA Rec. 26. Thus, the Hearings Officer determined that a new driveway permit is required because the old one expired. The Hearings Officer then opined that “[i]f the application is refiled, and the access permit is reviewed and only asphalt is required over existing driveway, the Hearings Officer finds that Appellant may qualify for an exemption from the GH overlay.” Thus, on remand, the applicant carries the burden to show that “only asphalt is required over existing driveway” for the exemption to apply.

To meet that burden of proof, the applicant offers the following observations:

- (1) The existing driveway was installed per the site plans included in the original driveway permit that were designed by the project's civil engineer. The existing driveway has been in use for over four years. No additional grading is required for the existing driveway to get a top coat of asphalt paving.
- (2) The existing driveway dimensions meet the 20-foot County standard.

In addition, the applicant offers photographs of the apron to show that no additional land needs to be disturbed. (Exhibit 4).

If the exemption does not apply, the applicant would then need to obtain a Geologic Hazards Permit, which entails compliance with MCC 39.5085(C)(3)(c). This provision provides as follows:

(C) Written findings, together with any supplemental plans, maps, reports or other information necessary to demonstrate compliance of the proposal with all applicable provisions of the Geologic Hazards standards in MCC 39.5090. Necessary reports, certifications, or plans may pertain to: engineering, soil characteristics, stormwater drainage control, stream protection, erosion and sediment control, and replanting. The written findings and supplemental information shall include:

* * * * *

(3) One of the following:

* * * * *

(c) A GHP Form- 1 completed, signed and certified by a Certified Engineering Geologist or Geotechnical Engineer with their stamp and signature affixed indicating that the site is suitable for the proposed development.

Staff states that "if the project requires a GH permit, the [Hearings Officer] is not able to grant a GH permit through the appeal process due to the fact that the Applicant did not include a GH permit in their application." Despite this fact, the record already contains the information required to make a feasibility finding for the issuance of a Geologic Hazards Permit, in the form of a completed GHP Form-1. LUBA Rec. 216-236. (Exhibit H.2.m).

In its "Post-Hearing Memorandum" to the Hearings Officer, staff states the following:

The Applicant references new documentation from an Oregon Licensed Professional Engineer to address this section (Exhibit H.3, p. 33). The new documentation (Exhibit H.2.m), must be reviewed by the HO to determine if the project qualifies for any relevant GH permit exemption(s) in MCC 39.5080.

Staff did not understand the purpose of the applicant's submittal. As noted above, staff states that the Exhibit H.2.m is for the purpose of qualifying "for a GH permit exemption." That is not correct. The GHP Form-1 has nothing to do with any permit exemption.

It is not clear why the Hearings Officer did not review that document. Nonetheless, on remand the Hearings Officer can review the applicant's GHP Form-1 and find that it is feasible to obtain a Geologic Hazards Permit to the extent MCC 39.5080(O) somehow does not apply.

Finally, it should not unnoticed that the whole idea of a Geologic Hazards Permit at this location is somewhat academic, since this area is relatively flat. Thus, no formal training in Geology is required to understand that the area in the vicinity of the driveway is not in danger of geologic instability or mass wasting, despite being mapped Geologic Hazards (GH) overlay zone. I say that as someone who does have a B.S. degree in Geology from Tulane University. However, persons with an understanding of geologic processes will know that the soils in this area are Cascade Silt Loam, which is a soil that develops from wild-blown silts known as Loess. These fine-grain soils typically have a fragipan that creates perched water tables at very shallow depths. Exhibit 5. For this reason, in areas where the topography is relatively flat, water drains on the surface and via shallow ground water, and is unlikely to create major mass wasting events in the absence of water being redirected outside of established channels.

II. Conclusion.

In summary, the applicant's LUBA brief explains why the Production Capacity test set forth at OAR 660-033-0135(2) does not require proof of past farm income. The Hearings Officer can approve the application based on documentation set forth in the existing record, as explained in our brief to LUBA. We have provided proof of farm income for 2022, however, in the interest of moving this case forward.

The Hearings Officer can also find in favor of the applicant with regard to the SEC-h overlay. Our review of the record reveals that staff and the applicant were in agreement with regard to the sufficiency of the Wildlife Conservation Plan prepared by Anita Cate Smyth of Winterbrook Planning.

Finally, a Geologic Hazard Permit is not required, because the exemption set forth at MCC 39.5080(O) applies in this case.

We ask that staff review this information and set the matter for hearing.

Sincerely,

VIAL FOTHERINGHAM LLP

s/ Andrew H. Stamp

Andrew H. Stamp

AHS/ctol
cc: Scott Reed

1. Exhibit 1: Petitioner's Petition for Review to LUBA (Brief only, no cover, TOC, TOA, or Appendices).
2. Exhibit 2: Egg Production 2022
3. Exhibit 3: Egg Production 2002 (By Day).
4. Exhibit 4: Photographs of Approach Road Apron.
5. Exhibit 5: NRCS WSS & Information Related to Cascade Silt Loam.