



**MULTNOMAH COUNTY OREGON**  
**LAND USE AND TRANSPORTATION PROGRAM**  
1600 SE 190<sup>TH</sup> Avenue Portland, OR 97233  
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[http://www.co.multnomah.or.us/dbcs/LUT/land\\_use](http://www.co.multnomah.or.us/dbcs/LUT/land_use)

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## NOTICE OF DECISION

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This notice concerns a Planning Director Decision on the land use case(s) cited and described below.

**Case File:** T2-03-073

**Permit:** Planning Director's Determination

**Location:** N/A

**Applicant:** Kathleen Worman  
57588 Bay View Ridge  
Warren, Oregon 97053

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**Summary:** This is a request for a Planning Director's determination if an existing single family dwelling split by a template boundary would be considered inside or outside of the 160-acre template used to qualify a new template dwelling on Commercial Forest Use land (**Multnomah County Code 33.2240**).

**Determination:** An existing dwelling bisected by a 160-acre template boundary would not be considered "within" the template used, in part, to qualify a new template dwelling on Commercial Forest Use zoned land.

**Unless appealed, this decision is effective Friday February 13th, 2004 at 4:30 PM.**

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Issued by:

By: \_\_\_\_\_  
Adam Barber, Planner

For: Karen Schilling - Planning  
Director

Date: Friday, January 30, 2004

**Opportunity to Review the Record:** A copy of the Planning Director Decision, and all evidence submitted associated with this application, is available for inspection, at no cost, at the Land Use Planning office during normal business hours. Copies of all documents may be purchased at the rate of 30-cents *per* page. The Planning Director's Decision contains the findings and conclusions upon which the decision is based, along with any conditions of approval. For further information on this case, contact Adam Barber, Staff Planner at 503-988-3043.

**Opportunity to Appeal:** This decision may be appealed within 14 days of the date it was rendered, pursuant to the provisions of **MCC 37.0640**. An appeal requires a \$108.00 fee and must state the specific legal grounds on which it is based. To obtain appeal forms or information on the procedure, contact the Land Use Planning offices at 1600 SE 190th Avenue (Phone: 503-988-3043). This decision cannot be appealed to the Land Use Board of Appeals (LUBA) until all local appeals are exhausted.

This decision is final at the close of the appeal period, unless appealed. The deadline for filing an appeal is **Friday February 13, 2004 at 4:30 pm**.

**Applicable Approval Criteria:** Multnomah County Code (**MCC**) **33.2200 – 33.2310**; Commercial Forest Use-2 land, **MCC 33.0005**; Definitions, **MCC Chapter 37**; Administration and Procedures.

Copies of the referenced Multnomah County Code sections can be obtained by contacting our office at 503-988-3043 or by visiting our website at:

*[http://www.co.multnomah.or.us/dbcs/LUT/land\\_use/index.shtml](http://www.co.multnomah.or.us/dbcs/LUT/land_use/index.shtml)*

# DECISION OF THE PLANNING DIRECTOR

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(Formatting Note: As necessary to address Multnomah County ordinance requirements; Staff provides Findings referenced here. Headings for each finding are underlined. Multnomah County Code requirements are referenced using a **bold** font. Written responses by the applicant or their representative are *italicized*. Planning staff comments and analysis may follow applicant responses. Where this occurs, the notation “Staff” precedes such comments).

## **Findings of Fact**

### **1. Introduction**

The applicant has requested an interpretation of code section **MCC 33.2240(A)(3)(c)(2)** as it applies to a specific set of circumstances. The applicant has asked if a lawfully established single family dwelling split down the center by a template boundary could be used to qualify a new dwelling on Commercial Forest Use-2 (CFU) zoned land. Specifically, the question is whether an existing dwelling split by a template boundary line would qualify for the 160-acre template, or not be counted towards the required density of lawfully existing residential development when attempting to establish a proposed template dwelling.

### **2. Scope of Review**

The applicant has asked for an interpretation to code section **MCC 33.2240(A)(3)(c)(2)**, which is used in part to evaluate a request to establish a template dwelling on CFU land. This is not a template test decision. The Planning Director has the authority to interpret any provision of the comprehensive framework plan, rural area plan or other land use code (**MCC 37.0740**). This report evaluates the purpose and intent of the particular code section in question. This request was processed as a Type II application, consistent with the provisions of **MCC 37.0740**.

### **3. CFU Template Test - Background**

For purposes of this analysis, the CFU-2 ordinance standards were selected out of the multiple CFU zones in order to provide a specific code reference for discussion. The criterion in question is identical in content throughout the CFU zones (**MCC 33.2240(A)(3)(c)(2)**).

Because the presence of new homes on CFU zoned land has the potential to interfere with surrounding forest production, the State requires local governments to create strict criteria for new residential use qualification. One option for establishing a new single family dwelling on CFU-2 zoned land is through a Template Test process (**MCC 33.2240**). This is a fairly complex review process containing many approval criteria. The most fundamental criteria of the Template Test process addresses the density of existing, lawfully established residences and lawfully established lots, at a specific point in time, within a 160-acre square template centered on the subject tract (**MCC 33.2240(A)**). This pre-existing residential impact on the forest resource is a significant part of the template test. The Multnomah County Template Test is stricter than state requirements.

The required minimum density of lawfully established residences and lots depends on the capability of the subject property soils to produce Douglas fir timber. The more productive the soils, the more valuable the land for forest production and the more restrictive the existing development density

requirements become in the Commercial Forest Use zoning ordinance. In this way, the most productive forest land receives the highest level of resource protection.

Soils in Multnomah County are broken into three main categories as they apply to Douglas fir yields. The most productive soils have the capability of producing more than 85 cubic feet/acre/ year of Douglas fir timber (**MCC 33.2240(A)(3)(c)**). For a highly productive CFU-2 zoned subject property to potentially qualify for a Template Dwelling: “*the lot upon which the dwelling is proposed to be sited and at least all or part of 11 other lawfully created lots (shall have) existed on January 1, 1993 within a 160-acre square when centered on the center of the subject tract parallel and perpendicular to section lines; and at least five dwellings (shall have) lawfully existed on January 1, 1993 within the 160-acre square (MCC 33.2240(A)(3)(c)(1)-(2)).*” This criterion is only one of numerous criteria used to evaluate a template dwelling request, but is the criterion that will be primarily discussed within this decision.

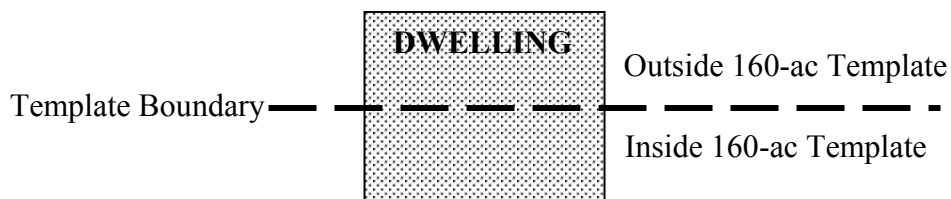
#### **4. Definition of Within**

According to **MCC 33.2240(A)(3)(c)(2)**, a dwelling must be within the template square to be counted towards the total number of dwellings required to qualify a template dwelling.

*Applicant: “Encyclopedic Unabridged Dictionary and Random House Dictionary's definition of the word "within" is: in or into the interior or inner part; inside. It does not exclude parts not entirely inside...The word "within" as used to count the number of lots to meet the "lot of record" test in the existing Multnomah County Code does not require these lots be entirely inside of the template in order to be to be "within". Because the use of the word "within" doesn't exclude any quantity, it therefore must include any quantity. In the Oregon Revised Statutes, Multnomah County Code, and other county codes throughout the state, the use of the word "within" is inclusive. Therefore, the meaning of the word "within" as used by the State and by Counties is inclusive (Exhibit A1).”*

Staff: Before the phrasing of the word “within” is discussed, it should be made expressly clear that the county has always read the code to require the dwellings be entirely within the template and that approach has been affirmed by the Land Use Board of Appeals, discussed in more detail within Finding 5 of this report.

The definition section within the Commercial Forest Use-2 zoning ordinance does not provide a definition of the term “within” (**MCC 33.2210**). Similarly, the definition for the term “within” is not found within the general provision section of the West Hills Rural Plan Area zoning ordinance (**MCC 33.0005**). The Merriam Webster’s Collegiate Dictionary (10<sup>th</sup> Edition), defines “within” as a function word to indicate “enclosure” or “containment”. The term “enclosure” is defined within the same dictionary as “to close in”, or “surround” (Exhibit A2). The following schematic represents a situation where a dwelling is bisected by a template boundary.

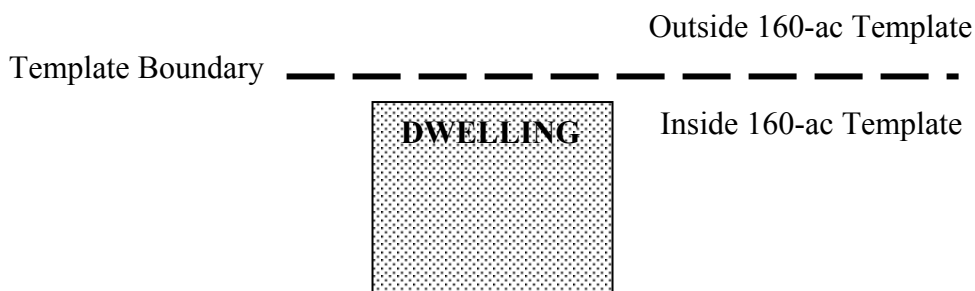


Working through the definitions provided above, an object would need to be surrounded by, or closed in by another object to be considered within the larger object. The dwelling above is not surrounded by the template boundary and the template boundary does not enclose the dwelling. It is possible that the dwelling could be interpreted to be “partially within” the template boundary, but is not considered “within” as defined by the Merriam Webster’s Collegiate Dictionary (10<sup>th</sup> Edition), presented as Exhibit A2. The Black’s Law Dictionary (2<sup>nd</sup> edition, 2001) does not contain a definition for “within”.

The term “within” is used a second time in the CFU-2 Template Dwelling ordinance: *“the lot upon which the dwelling is proposed to be sited and at least all or part of 11 other lawfully created lots existed on January 1, 1993 within a 160-acre square when centered on the center of the subject tract parallel and perpendicular to section lines...(MCC 33.2240(A)(3)(c)(1) & (2)).”*

In this instance, the code specifically states that at least **all or part** of 11 other lawfully created lots must fall **within** the template boundary. Allowing a lot that partially falls within the boundary to be counted towards the template test criteria is synonymous with saying a lawfully created lot bisected by the template boundary would qualify. In other words, the code has specifically called out lots that are bisected by the template boundary but not dwellings. The statement “all or part” does not precede the dwelling requirement of **MCC 33.2240(A)(3)(c)(2)** supporting an interpretation that the dwelling must fully be contained within the template boundary to qualify towards the Template Test requirements.

The applicant has suggested “within” can also be defined as meaning to the inside of another object. The definition of “inside”, as defined by the Merriam Webster’s Collegiate Dictionary (10<sup>th</sup> Edition), is “to the inner side of.” Using a glass of wine as an analogy; it is most logical to consider wine poured into a glass “inside” the wine glass. The wine would then be considered “within” the glass as defined by Webster’s. In this scenario, the wine is fully contained within the glass rather than half way contained, for example. In conclusion, Staff believes the following schematic is representative of an object being fully contained within another as no overlapping occurs.



## 5. Previous Decisions

In 1996 Multnomah County was challenged by several parties on grounds that it was impermissible for the county to have a template test stricter than statutory standards. The Land Use Board of Appeals (LUBA) rejected these challenges, finding the county could be more restrictive than the minimum standards. In LUBA case number 97-116, presented in Exhibit A6, LUBA recognized the county requirement that five dwellings be within the template as a specific example of where the county can and is more restrictive than state requirements (footnote #3, pages 3-4, Exhibit A6).

Staff reviewed 17 Multnomah County Template Test Decisions and found only one reference to a house intersected by a Template Boundary. The associated staff report (Case CU 9-98), hearing’s

officer report (Case CU 9-98) and Land Use Board of Appeals decisions were reviewed (Carson Linker vs. Multnomah County, LUBA No. 99-182). These reports are presented as Exhibits A3-A5, respectively.

*Applicant: "The third reason (a dwelling split by a Template Boundary should be included in the Template) is found in the LUBA Final Opinion and Order in the case, Carson Linker v. Multnomah County. The Board responds to the "Centerpoint" Method (Applicant's Methodology): "If the center is located in this manner, five dwellings are located within the 160 acre square template, including one that straddles the north template line." The significance of the Board's Opinion of the Petition for Review is that it responds only to the Applicant's assertion that the County misconstrued applicable law to determine center. In the Petition for Review, the Appellant contests how "center point" is determined. There is no assertion made in the Petition for Review regarding the dwelling that straddles the template line. The Board's opinion written by Ms. Briggs, does not reiterate an issue of a dwelling straddling the template line. The Order clearly asserts that the Board includes the dwelling straddling the template line in the dwelling count.*

*On the morning of November 20, 2003 I spoke with Fred Wilson, staff attorney for LUBA. Our conversation centered on the FINAL OPINION AND ORDER written for the CARSON LINKER v. MULTNOMAH COUNTY LUBA No. 99-182. We reviewed the case together and read the FINAL OPINION AND ORDER with particular attention to the last sentence on page 4 under A. "Centerpoint" Method (Applicant's Methodology).*

*At issue in the Linker case is an unorthodox method of finding the center of a subject parcel. The applicant and his attorney tested their "centerpoint" method to challenge the county in an effort to break new ground and create a precedent. The LUBA officers disagreed with applicant's methodology and their opinion is reflected in this decision. The LUBA Board members carefully reviewed applicant's methodology and made this statement, "If the center is located in this manner, five dwellings are located within the 160-acre square template, including one that straddles the north template line." The Board members did not need to make this particular statement in order to assign error to applicant's methodology. Nor does the Petition for Review make assertions regarding the dwelling on the template line either. Nowhere is there any argument about the dwelling on the template line. The Boards intent is clear. They accept a dwelling on the template line in the template count.*

*In the Petition for Review a footnote appears on page 9, footnote 5, which reads, "There is no dispute that if the Petitioners method of determining the center of the subject tract was followed, there are five dwellings that lawfully existed on January 1, 1993 within the 160-acre square. The Board recognizes this fact. (R. 18.)" Here again, the Board recognizes and agrees that the dwelling on the template line is included in the dwelling count. Throughout the Linker case, the inclusion of the dwelling on the template line is reasserted. This fact was accepted as the basis from which the Linker case was tested. The Board made no issue of the dwelling on the template line other than to state that they recognize its inclusion in the template count. Mr. Wilson agreed that this is not casual statement or an oversight. The Board's intent is clear. They are counting the dwelling on the template line."*

*Staff: The staff report in Exhibit A3 (case CU 9-98) states on page 7, "Based on the submitted map, the house on Tax Lot 18 is directly on the north boundary line of the 160-acre area of the Template Dwelling test. As outlined in the Findings and Conclusions portion of this report, Staff Does not believe the Template Dwelling test map of the 160-acre square provided by the applicant is accurate." After reviewing this case in detail, it became apparent that the applicant's method used to center the template was in dispute and was the sole point of discussion. In 1998, Staff recommended denial of*

the request as the approval criteria were not met. It is fact that the template must first be centered before its boundary locations could be evaluated in detail. In short, because the applicant's template centering method was in dispute, qualification or rejection of the house directly on the template line was not evaluated as more fundamental issues had not yet been resolved.

The hearing's officer decision on this case (CU 9-98) states on page 10, *"Based on the applicant's revised map...the house on Tax Lot 18 is directly on the north boundary line of the 160-acre area of the Template Dwelling test. Without deciding whether that dwelling qualifies to be counted for the Template Dwelling test, under the applicant's method of calculating the center of the center of the parcel, there are at least five dwellings within the 160-acre square."* The hearing's officer made it clear that it was not decided whether the dwelling directly on the template boundary qualified, but decided the applicant's method for centering the template was not acceptable. The hearing's officer recommended denial based on the template centering methodology proposed. This decision is presented as Exhibit A4.

The subsequent Land Use Board of Appeals decision in Exhibit A5 (Case No 99-182) states on page 4, *"In this case, the center of the "X" is located towards the northeast corner of the flag portion of the property. If the center is located in this manner, five dwellings are located within the 160-acre square template, including one that straddles the north template line."* Careful review of the previous staff report and hearing's officer report showed the underlined statement above first appears in the LUBA decision and is not a cannibalized quote from a previous decision. The applicant for this case (T2-03-073) apparently came to the same conclusion after reviewing the sequential decisions... *"The Board's opinion written by Ms. Briggs, does not reiterate an issue of a dwelling straddling the template line. The Order clearly asserts that the Board includes the dwelling straddling the template line in the dwelling count."*

Although it is stated in the LUBA decision that the dwelling straddling the north template line is located within the 160-acre square template, this issue was not discussed and was only mentioned in passing. It is not clear to staff why the LUBA decision stated, without discussion *"If the center is located in this manner, five dwellings are located within the 160-acre square template, including one that straddles the north template line"*. This quote did not parallel the topic of contention within the LUBA decision and is not consistent with staff's interpretation of the Commercial Forest Use zoning ordinance for establishing template dwellings as previously discussed in detail within this report. This isolated quote does not provide enough evidence to outweigh staff's interpretation of the Multnomah County Commercial Forest Use template test requirements adopted by the Board of County Commissioners via Ordinance 997, 10/31/2002 and the definitions as provided by Webster's dictionary (Exhibit A2).

More on-point to this issue is LUBA case 97-116 where it was affirmed that Multnomah County can be more restrictive than the minimum state requirements in administering the template test and requiring that *"five other dwellings exist within the template"* is an acceptable standard (Exhibit A6).

## **6. Policy Objectives of the West Hills Rural Area Plan**

Staff: As stated in the Purpose Section of the Commercial Forest Use-2 zoning code, *"The purposes of the Commercial Forest Use District are to conserve and protect designated lands for continued commercial growing and harvesting of timber and the production of wood fiber and other forest uses; to conserve and protect watersheds, wildlife habitats and other forest associated uses; to protect scenic values; to provide for agricultural uses; to provide for recreational opportunities and other uses which are compatible with forest use; implement Comprehensive Framework Plan Policy 11,*

*Commercial Forest Land, the Commercial Forest Use policies of the West Hills Rural Area Plan, and to minimize potential hazards or damage from fire, pollution, erosion or urban development (MCC 33.2200).*” The West Hills Rural Area Plan states “*The primary purpose of the Commercial Forest Use zoning district is to conserve and protect designated lands for continued commercial growing and harvesting on timber.*” The West Hills Rural Area Plan is presented as Exhibit A7.

The Planning Director has the authority to interpret any provision of the comprehensive framework plan, rural area plan or other land use code (MCC 37.0740). This section evaluates the purpose and intent of the West Hills Rural Area Plan. As indicated above in the West Hills Rural Area Plan, the purpose of the CFU base zoning caters to growing and harvesting of timber, not residential uses. As stated in the Multnomah County handout *Application for Template Dwelling in the CFU District – A Special Type of Conditional Use*, it is made clear on page 1 that “*Siting homes in CFU areas takes land out of tree production and interferes with commercial use of nearby forestland. The presence of homes increases risk of fires and may disturb efficient forest practices.*” A copy of this handout is presented as Exhibit A8. According to page 7 of the West Hills Rural Area Plan (Exhibit A7), homes on CFU land adversely impacts industrial practices used in primary forest lands, such as controlled burns and aerial spraying. This statement addresses Policy 1 of the West Hills Rural Area Plan titled *Low Population/Density of People* (Exhibit A7).

The Planning Director has the authority to interpret any provision of the comprehensive framework plan, rural area plan or other land use code (MCC 37.0740). Staff must take into consideration the primary commercial forest use purpose of CFU land, and compare that to the risks new dwellings impose on that primary purpose. By merging these two thoughts, it appears that using a questionable existing dwelling (one bisected by a template boundary, for example) to qualify a new template dwelling would not be consistent with the purpose of CFU district and may not be considered a responsible planning action.

The West Hills Rural Area Plan lists six basic qualities which the people living in the West Hills wished to preserve (Exhibit A7):

1. Low Population/Density of People
2. Peace and Quiet/Privacy
3. Private Property Rights
4. Abundant Wildlife
5. Clean air and Water
6. Renewable Resource Use (Forestry & Agriculture)
7. Greenspace/Open Space

The addition of a new residence on CFU land will most likely impact quality #1, #2 and #6 above by increasing the density of people in the area, decreasing privacy of existing residences and taking a portion of forest land out of production. Converting forest land to residential land could also adversely impact deer and elk wildlife migration patterns through the area (quality #4) and increase turbidity conveyed to local water bodies during construction (quality #5). Taking into consideration all the potential impacts a new residence could have on the six basic qualities attempting to be preserved by the West Hills Rural Area Plan. Staff finds the private property rights listed as quality #3 would not be infringed upon as it is not clear, in this case, that a property owner has a “right” to include such a dwelling into the template in the attempt to qualify a template dwelling. This view parallels a quote directly from the West Hills Rural Area Plan, “*Regardless of changes to state law, Multnomah County should maintain strong controls on non-forest related uses in order to protect not*



*only continued forestry uses, but also maintain protection of environmental resources that are important to the protection of wildlife habitat and significant streams.”*

## **7. Comments Received**

Upon receipt of a complete application, notice of the application and an invitation to comment is mailed to the applicant, recognized neighborhood associations and property owners within 750-feet of the subject tract (**MCC 37.0530(B)**).

Written comments were received by only one citizen - Fred Weinel. Mr. Weinel's comment letter is presented as Exhibit A9. Mr. Weinel explains that the County planning department had previously indicated the property may not qualify for a template dwelling. Although Mr. Weinel states that in his opinion, the parcel does not qualify for a template dwelling in his opinion; no specific approval criteria that had not been met were cited in the comment letter (Exhibit A9). Again, it should be pointed out that this is not a template test decision.

## **Conclusion**

Considering all evidence in its entirety, Staff finds that an existing dwelling bisected by a 160-acre template boundary **would not** qualify as being “within” the template used to qualify a new template dwelling on Commercial Forest Use zoned land.

## **Exhibits**

All materials submitted by the applicant, prepared by County staff, or provided by public agencies or members of the general public relating to this request are hereby adopted as exhibits hereto and may be found as part of the permanent record of this application. Exhibits referenced herein are enclosed, and a brief description of each is listed below:

<u>Label</u>	<u>Pages</u>	<u>Description</u>
A1	2	Applicant's narrative
A2	3	Excerpts from Merriam Webster's Collegiate Dictionary (10 <sup>th</sup> Edition)
A3	30	CU 9-98 Staff Report
A4	38	CU 9-98 Hearing's Officer Report
A5	8	LUBA case # 99-182
A6	9	LUBA case # 97-116
A7	52	West Hills Rural Area Plan
A8	12	Brochure (Application for Template Dwelling in the CFU District – A Special Type of Conditional Use)
A9	1	Comment letter submitted by Fred Weinel