MULTNOMAH COUNTY
LAND USE PLANNING DIVISION
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BEFORE THE HEARINGS OFFICER FOR MULTNOMAH COUNTY, OREGON FINAL ORDER

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

May 12, 2005

Case File # T2-04-089 Appeal of an Administrative Decision

An appeal of a planning director decision which determined that the previous zoning approval for a dwelling expired on January 1, 2003 pursuant to MCC 37.0750, and the approved Farm Management Plan for the subject property had not been implemented in accordance with BOC Order No. 00-022.

Location: 12955 NW Skyline Boulevard

Map Description: 2N 2W Section 36 Tax Lot 600
Parcel 1 of Partition Plat 1993-4
Alt. Account #R64973-0130

Owner/Applicant/ Appellant: Don Morissette Homes, Inc.
4230 Galewood Street #100
Lake Oswego, OR 97035

Applicant's Attorney: Dorothy S. Cofield
Cofield Law Office
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Lake Oswego, OR 97035

1990 were valid approvals. Since the time of the original 1989 PRE approvals referenced above, State law and County code were amended.

In 1994, the State adopted OAR 660-033-0135. That administrative rule had 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 codified in .2010(D) did not apply when the old PRE permits were approved, and the income test was 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 Arnold Rochlin and Christopher Foster 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 used by Multnomah County 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, 37 Or LUBA 237 (1999).

After the County received 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.

The Board subsequently adopted Ordinance No. 935, which repealed Ordinance 903.

submitted additional information which supports a finding that the applicant/property owner has continued the implementation of the farm management plan approved in PRE 26-89.

7. WAS IT APPROPRIATE FOR THE PLANNING DIRECTOR TO REQUIRE A TYPE II DECISION PROCESS IN THIS MATTER?

In view of the fact that it had been five years since the applicant had received a zoning clearance in BOC Order No. 00-022, it is appropriate for the Planning Director to require the applicant to demonstrate continued implementation of the farm management plan.

8. DOES THE FINDING THAT THE TEN YEAR FARM MANAGEMENT PLAN TIME FRAME SETS FORTH A DIFFERENT TIME FRAME FOR ISSUANCE OF A PERMIT, PLACE AN ULTIMATE LIMITATION ON THE TIME WITHIN WHICH A BUILDING PERMIT CAN BE ISSUED FOR THE SUBJECT PARCEL?

Earlier in this Final Order, I found that the ten year farm management plan time frame sets forth a different time frame for the expiration of the land use decision in PRE 26-89 and MC 8-99. The decision of the hearings officer in MC 8-99 was issued on January 11, 2000. That decision found that the applicant was just entering the third year of the farm management plan. Accordingly, it appears that the terminus of the plan, or the end of the tenth year, would occur no later than January 11, 2008. That date would be consistent with the applicant's representations that it intends to harvest the Christmas trees over the next three seasons (2005, 2006 and 2007). Accordingly, I will make a finding that no building permit for the subject parcel may be issued pursuant to the approval granted in PRE 26-89, after January 11, 2008.

9. ARE THERE ANY VESTED RIGHTS OR ESTOPPEL ISSUES THAT NEED TO BE RESOLVED?

Although it is probably unnecessary to address the vested rights arguments raised by applicant because of the other findings I have made in this order, I do affirm staff's decision that the land owner has no vested right to a dwelling based on the analysis set forth in staff's decision.

Since I have found that the approval of a single-family residence in conjunction with the proposed farming operation conducted according to a farm management plan authorized by PRE 26-89 has not expired, it is not necessary to consider applicant's argument that the County is estopped from applying the expiration provision set forth in MCC 37.0750.

CONCLUSION

The applicant has provided substantial evidence that the farm management plan approved in PRE 26-89 has continued to be implemented since the time the plan was last examined in Board of Commissioners Order No. 00-022, and that the approval of a dwelling authorized under PRE 26-89 has not expired.

that the level of plan implementation is sufficient to issue a building permit for a house on each lot."

The only condition imposed in MC 8-99 read as follows:

> "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."

The decision in MC 8-99 was appealed to the Multnomah County Board of Commissioners. The County staff recommended that a two year time limitation for implementation be imposed. The County Board of Commissioners decided not to impose a time limitation for obtaining a building permit under the approved plan.

On July 13, 2001, a prior owner obtained a building permit sign-off from Multnomah County and then applied for a building permit from the City of Portland to construct a dwelling on the property. That permit application was cancelled by the applicant on August 16, 2001 and a permit was not issued.

Don Morissette Homes, Inc. bought the subject property in December of 2003 and approached the County to obtain a building permit to construct a dwelling. A pre-filing meeting was held on June 29, 2004, at which time the property owner's representative was advised that a determination would need to be made as to whether or not the prior approvals had expired as a result of 2001 legislation and whether the farm management plan had been implemented as required in the MC 8-99 condition of approval. This application was filed with the County on October 19, 2004.

On February 2, 2005, the County Planning Director issued a decision which found that BOC Order No. 00-022 expired on January 1, 2003, and the farm management plan had not been implemented in accordance with BOC Order No. 00-022. The applicant appealed that decision.

STANDARDS, CRITERIA, ANALYSIS AND FINDINGS OF FACT

On October 19, 2004 a general application form, together with a more detailed "Application for Planning Director Interpretation of BOC Order No. 00-022 and Hearings Officer Decision MC 8-99 Request for Building Permit Review Approval" was submitted by Don Morissette Homes, Inc. The County denied the application for several reasons and found that BOC Order No. 00-022 expired pursuant to the provisions of MCC 37.0750 on January 1, 2003, and that the applicable farm management plan had not been implemented.

In discussing the various issues involved in this proceeding, I will address the questions and issues that I see arising from the arguments of the County and the parties.

Transcript Pages 83-84.

> Later on in the discussion, a motion was made to impose a 10-year deadline to obtain a building permit, but that motion failed, and then the Board of Commissioners voted 3-2 to uphold the Hearings Officer's decision, with one clarification that is not relevant to this appeal. (Transcript page 87.)"

In the quoted material, it appears that the Commissioners were uncomfortable with putting a time limit on the decision. Commissioner Linn indicated she would rather track the case in terms of its adherence to the law and implementation of the farm plan as a code enforcement question. The County Attorney specifically stated "Okay. And then what you're looking at is whether they have abandoned the use." It appears that at the time of the hearing in 2000, both the Board of Commissioners and County staff thought the property owners would be able to build a home unless they abandoned the farm management plan.

I do find that the ten year time frame of the farm management plan is a "different time frame" applicable to BOC Order No. 00-022. Thus, the decision in BOC Order No. 00-022 did nto expire pursuant to MCC 37.0750.

Nonetheless, assuming *arguendo*, that County staff is correct in its assertion that the "zoning clearance" authorized by BOC Order No. 00-022, expired on January 1, 2003, that expiration would not mean that the decision became void, or that the findings made in the decision were invalid. The decision in BOC Order No. 00-022 found that as of the time of the submittal of the application for "zoning clearance" the applicant had implemented the farm plan and was in the third year of the applicable farm management plan.

The "expiration" of the zoning clearance would not invalidate the findings made in BOC Order No. 00-022 that the plan had been implemented.

The applicant herein has submitted a request for a Planning Director interpretation and a request for building permit review approval. Such a request is similar to the request for zoning clearance that was submitted in 1999 and approved in 2000. Whether or not BOC Order No. 00-022 "expired", the current applicant would still have to address at this time the question of whether continued implementation of the farm management plan had occurred. The applicant has successfully done so.

It is the decision in PRE 26-89 which actually authorized the dwelling. Subsequent decisions in this procedurally complex case have involved questions related primarily to whether the farm management plan approved in PRE 26-89 had been implemented.

The decision of the hearings officer and the Board in BOC Order No. 00-022 clearly indicates that neither the hearings officer or Board intended to place any date conditions for the issuance of a building permit. The farm management plan itself set forth a ten-year time frame once the plan was implemented, which could be viewed as an ultimate time limitation on the issuance of a building permit. Once the tenth year of the plan is reached

Accordingly, it is necessary to review the level of farm activity which occurred from 2000 through October of 2004 to determine whether the applicant has abandoned or discontinued the implementation of the farm management plan.

The farm management plan in years 3 through 7 called for fairly similar activity in each year. Year 3 anticipated a minimal amount of replacement of dead seedlings, spraying, fertilizing, and basal pruning. Similarly, in years 4 and 5, the plan anticipated spraying for grass and weed control, spraying for aphids, fertilizing, basal pruning a portion of the trees, and shearing and top work.

In the plan, year 6 anticipates spraying for grass and weeds, spraying for aphids, fertilizing, shearing and top work. Similar work activity was proposed for year 7, with the anticipation that some trees might be harvested in year 7.

The amount of information the applicant originally submitted regarding the level of plan implementation was inadequate. The County staff requested additional information. In a letter dated November 24, 2004, the applicant's representative refused to provide the additional requested information and asked the County staff to deem the application complete, pursuant to the provisions of ORS 215.427(2) and proceed to process the application. Based on the limited information provided from only the year 2004, the County staff determined that the property owner had not continued to implement the plan.

At the hearing, and subsequently, additional information regarding the continued implementation of the farm management plan was provided. Keith Jehnke, a certified arborist of AKS Engineering & Forestry, testified and submitted a tree farm report in regards to the subject application. That report was marked as Exhibit H-7.

The report indicated that the subject property has four acres of Nobles in a Christmas tree plantation with approximately 7,000 trees. Mr. Jehnke determined that the site was well stocked with healthy Noble fir trees of fairly good form, from three feet to seven feet tall. In addition, the competing vegetation within and around the plantation has been controlled. The trees have all been basal pruned, sheared within the last year and controlled for multiple tops, and fertilized. He further indicated from the size variation of some of the trees, that it appears that replacement of dead seedlings did occur. He further indicated that the trees are healthy and thriving.

In his analysis, Mr. Jehnke indicated that the key information to be gathered from his review, was that the site contains healthy, thriving, Noble fir trees from three to seven feet tall. The trees have been actively managed with cultural practices intended to produce high quality Noble fir Christmas trees for market, and the site has many of the characteristics required for a successful Noble fir plantation.

Mr. Jehnke indicated that the plantation was started in 1998 and will be seven years of age at harvest time in 2005. The plantation will have some seven year old trees that are between six and eight feet tall, which can be harvested.

farming activity. The Assistant County Counsel also asserted that only the obtaining of the building permit and substantial construction activity under such a valid building permit could be construed as implementation of a right to build a dwelling in conjunction with a farm management plan. The County's position as detailed in the staff decision, was that since the dwelling had not been constructed, the plan had not been implemented. The County appears to be imposing a strict compliance standard to a farm management plan that is general in nature.

The applicant takes the position that the farm management plan was implemented and beginning year 3 at the time of the Board approval of zoning clearance for construction of the dwelling in Order No. 00-022. The applicant takes the position that implementation has continued and I have so found earlier in this decision.

PRE 26-89 approved a farm related single family residence, pursuant to an approved ten-year farm management plan. Although PRE 26-89 did not have a condition requiring implementation of the farm plan, such a condition was found to exist in MC 8-99. In essence, MC 8-99 inferred two conditions as pre-requisites for house construction. The first was that the farm management plan must be implemented in order for the property owner to be able to build a house on the "farm". Secondly, once implemented, the applicant could not discontinue implementation or abandon the farm management plan prior to construction of the home.

I do not concur with County staff's interpretation that the farm management plan would have to be fully implemented to preclude the application of MCC 37.0750. The effect of MCC 37.0750 is substantive in nature, it is not simply a procedural provision. The County may not retroactively apply MCC 37.0750 to the approval for a dwelling which was contingent upon the implementation of the farm management plan, after the farm management plan had in fact been implemented.

The decision in Order No. 00-022 placed no time limits on the approval, although County staff had recommended that such time limits be imposed. In essence, once the farm management plan is implemented, the ten-year time frame set forth in the plan becomes the approval time frame for the approval to allow a resource related single family residence on the property. Thus, I do find that the farm management plan sets forth "a different time frame" within the meaning of MCC 37.0750. The approval authorized in PRE 26-89 has not expired pursuant to the provisions of MCC 37.0750.

I find that the planning director decision in PRE 26-89 which approved the development of a single family residence on the subject 20 acre parcel has not expired as a result of MCC 37.0750.

3. WHAT EFFECT WOULD THE "EXPIRATION" OF BOC ORDER NO. 00-022 HAVE ON THE APPROVAL OF A DWELLING AUTHORIZED IN PRE 26-89?

The County Planning Director decision on appeal herein found that the Board decision in BOC Order No. 00-022 has expired. In taking that position, the County seems to be taking

in years 4, 5 and 6. One hundred trees were surveyed on the site. No evidence of a current aphid infestation was found, and there was no evidence of twisting, stunting or matting of growth that would indicate a past infestation. The trees had been basal pruned and the woundwood formed over the pruning cuts appeared to be a minimum of two to three years old, and probably older, which was consistent with the farm management plan. Approximately 3% of the trees appeared to be unmarketable, as opposed to a 10 to 15% projection if no work at all had been done in years 4, 5 and 6.

The April 1, 2005 Jehnke report included an approximate value of the trees at harvest. Wholesale price for the trees would be $15 per tree. The average price for a u-cut Noble fir Christmas tree is $45. Seven thousand Noble fir trees were planted in 1998. The farm plan assumes that 13% of those 7000 trees would be unmarketable. Accordingly, the gross wholesale value of the trees at harvest would be $91,350. At u-cut prices, the gross value of the harvested trees would be $274,050. Mr. Jehnke's report also addressed the question of why it is necessary to have a dwelling in year 7 of the ten-year plan rotation. Mr. Jehnke's report states:

> "It is especially important to have a permanent caretaker for the Christmas tree plantation in the 7th year as this is the time that the newly marketable trees become the most attractive to thieves. The permanent caretaker on the site will serve to deter theft of the merchantable trees. The control of pest problems in noble fir plantation is also especially critical as the trees reach merchantability, as there is little time to correct any defects that may occur. The onsite farmer can therefore investigate the problem and implement a solution much quicker, before severe damage to the crop has occurred, ensuring that both the number of trees affected and the amount of damage to each tree is minimized. Having a permanent caretaker also makes it much easier and more efficient to have a 'U-cut' lot and take advantage of the higher retail prices.
>
> There are benefits to having a permanent caretaker throughout the plantation rotation. After all of the trees from this rotation are harvested or removed, the site will be replanted for the second rotation. The most important reason to have an onsite caretaker results from the inherent efficiencies of living at the place where the work is being done. Thus eliminating commute time and making the farm operation more efficient. The Christmas tree farm will be more commercially viable with an on site farmer at any year in the plantation rotation."

There is substantial evidence of compliance with the farm management plan.

The County decision in this matter in part involved a finding that because the home was not established in the third year of the farm management plan, the farm management plan has not been implemented. However, I find that finding inconsistent with the decision of the Board in Order No. 00-022.

In determining whether an appropriate level of implementation has occurred, the County should be looking at the farm use of the land. In order to receive a building permit, the applicant must show that the farm activities have been carried on. The County has turned this requirement around 180°, and found that because the applicant had not constructed a home sooner, it had failed to carry out the necessary farm activities on the land.

The decision of the Board in Order No. 00-022 adopted the hearings officer's finding that no date conditions for the issuance of a building permit would be imposed. The staff finding is specifically inconsistent with the decision of the Board of County Commissioners. In addition, evidence presented by the applicant clearly indicates that at the time of the Board hearing for BOC Order No. 00-022, staff recommended that a condition be imposed requiring issuance of a building permit within two years. The Board of County Commissioners refused to impose such a condition and in fact they decided not to approve an even longer proposed time limit on the issuance of a building permit.

Some of the best evidence regarding the continued implementation of the farm management plan is the current condition of the Christmas tree plantation. Substantial evidence was presented by the applicant through their arborist, Keith Jehnke regarding the current condition of the tree farm (the trees are thriving) and its present value. Accordingly, I find that the applicant has not abandoned or discontinued the implementation of the farm management plan.

2. DOES MCC 37.0750 APPLY TO A DWELLING APPROVED IN CONJUNCTION WITH A PROPOSED FARMING ACTIVITY CONDUCTED ACCORDING TO A FARM MANAGEMENT PLAN WHICH HAS BEEN IMPLEMENTED?

The Multnomah County decision in PRE 26-89 approved a resource related single family residence on a 20 acre lot in an Exclusive Farm Use district. MCC 11.15.2010C, as it was constituted in 1989, allowed the approval of a single family residence in conjunction with a farm use when it was found that the proposal was conducted according to a farm management plan. The farm management plan was a ten year plan related to the establishment of a Christmas tree plantation.

The decision in Board Order No. 00-022, which affirmed the hearings officer decision in MC 8-99, involved an application for permissible use. The decision in Order No. 00-022 does not provide the underlying authority for the construction of a single family home in conjunction with the operation of the farm management plan. It is the earlier decision, PRE 26-89, that provides the authority to construct the home.

In Order No. 00-022, the applicant, which was then Western States Development, had applied for a building permit. The County staff had denied the building permit on the grounds that the farm management plans were not implemented as proposed and approved. The County also found that its decision in regards to the applicant's application for determination of permissible use, was not an appealable decision. The applicant did appeal the staff decision and the determination that the decision was not appealable. The

hearings officer found, and the Board affirmed, that such a decision was in fact an appealable land use decision.

Now, the current property owner came to the County to apply for a building permit, as allowed in the original approval set forth in PRE 26-89. The County told the applicant that it had to go through a Type II procedure to determine whether or not the prior approvals had expired, as a result of MCC 37.0750, and to determine whether the farm management plan had been implemented as required in the MC 8-99 condition of approval.

The applicant did submit a general application, which sought a planning director's interpretation pursuant to MCC 37.0740. That application was for a planning director's interpretation of BOC Order No. 00-022 and Hearings Officer Decision MC 8-99, and a request for a land use sign off on the building permit review request.

The staff decision denied the request and the applicant appealed staff's decision.

Ultimately, the authority to issue a building permit emanates from the decision in PRE 26-89, not BOC Order No. 00-022. The decision in BOC Order No. 00-022 found that the farm management plan was valid and had been implemented, and that the applicant had the right to construct a home on the subject parcel. Such a right would continue, provided that the applicant continued to follow the farm management plan. No building permit could be issued if the applicant abandoned or discontinued implementation of the farm plan.

This proceeding and application are somewhat similar to the application presented in MC 8-99 / Order No. 00-022.

The County has found in its decision that the farm management plan has not been implemented. That decision seems inconsistent with the Board's order in 00-022. I am construing the County's findings to actually be that the applicant has discontinued implementation or has abandoned the farm management plan. For the reasons stated earlier in this opinion in response to the first question posed, I find that the applicant has not discontinued implementation of the plan or abandoned the plan. I did in fact find that the applicant and the applicant's predecessors in interest had continued to implement the farm management plan. Accordingly, the question then becomes, does MCC 37.0750 cause the expiration of the approval for a dwelling which was authorized in PRE 26-89.

MCC 37.0750 provides that all land use decisions authorized prior to January 1, 2001, shall expire on January 1, 2003 unless a different time frame was specifically included in the decision.

During the course of the hearing, I posed a question to staff regarding whether MCC 37.0750 applies to implemented approvals. The staff replied that it does not.

In an April 1, 2005 memorandum, Assistant County Counsel, Sandy Duffy, further addressed that question. In her memorandum, she states that implemented should be interpreted to mean fully implemented, and that the permit at issue is not the farm management plan, but is the right to obtain a building permit for a dwelling to facilitate the

Mr. Jehnke discussed the general nature of the farm management plan. The plan incorporates elements that are not needed unless certain circumstances occur. An example would be the spraying of aphids. If the trees have no aphids, then the property owner would not go to the expense and effort of spraying for aphids. Mr. Jehnke indicated that he found no evidence of aphids on the trees, which could indicate that either aphids had not been a problem, or that past spraying had been effective. Although the time of the hearing was a time when aphids would not seasonally be expected to be observed on the trees, there was no indication of prior aphid damage on the trees.

Kevin Bender, the former applicant and representative of Western States Development, testified at the hearing that while he had been involved with the property, Western States Development had done everything required to comply with the farm management plan.

In a submittal received by the County on April 1, 2005, and attached as Exhibit 1 to Applicant's Post-Hearing Memorandum, Keith Jehnke of AKS Engineering & Forestry, provided additional information. In submitting the additional report, Mr. Jehnke also reviewed evidence from Mike Stone of BTN, Brian Bennett of Don Morissette Homes, and other submittals. Mr. Jehnke reviewed the evidence related to the work performed in the years 2000 through 2004 and projected into 2005.

The evidence presented demonstrates that in 2000, the third year of the farm plan, Mike Stone sprayed herbicides on the Noble fir tree farm for weed control. No aphid spraying occurred because there was a low population of aphids in the area and such spraying was unnecessary. Because of the size of the seedlings, the basal pruning was not yet necessary, nor was fertilization. The trees had an excellent survival rate and no replacement or replanting of dead seedlings was necessary.

In 2001, year 4 of the plan, spraying for weed control again occurred. Neither aphid spraying or fertilization was necessary, nor was basal pruning yet needed. The trees were not large enough yet for shearing and top work.

In 2002, spraying for weed control was done by Jim Milligan. Similarly, according to Jim Milligan, spraying for weed control and shearing and top work was done in 2003, year 6 of the plan.

In 2004, spraying for weed control, shearing and top work were done by Juan Marquez. Additional work has occurred in 2005, since the application was submitted. In the affidavit of Brian Bennett of Don Morissette Homes, Mr. Bennett stated:

> "We considered harvesting some of the Christmas trees in 2004. However, we anticipated that it would be more economically advantageous to wait for a residence to be approved and constructed. Not only would the trees be larger, but an on site resident has an improved ability to sell the trees at the retail price, as opposed to an off site owner."

The April 1, 2005 submittal from Keith Jehnke compares the current state of the tree farm to what would be expected from a tree plantation if no management tasks were completed

the position that it is BOC Order No. 00-022 which solely gives the applicant the authority to construct a dwelling. The County decision also seemed to totally disregard the contents of that final order.

The applicant and the former property owner, Western States Development, have both taken the position that the approval granted in BOC Order No. 00-022 is still valid, based on the clearly expressed intent of the hearings office and the Board not to place time limitations on the issuance of a building permit.

As pointed out by Jeff Bachrach, attorney for intervenor-appellant Western States Development Corporation, neither the hearings officer or the Board chose to place a time limit on the building permit which received zoning clearance in BOC Order No. 00-022. On page four of his memorandum, Mr. Bachrach quotes the following excerpts from the transcript of the Board hearing on the appeal of MC 8-99:

> "'COUNTY ATTORNEY (Sandra Duffy): I don't think there's any reason you couldn't go ahead and put a timeframe for obtaining a building permit if you wanted to do that.
>
> CHAIRWOMAN STEIN: I'd like to do that. What would be an appropriate time frame?
>
> COUNTY ATTORNEY: Chuck, two years, three years? Do you have a suggestion for a period of time in which they need to obtain a building permit?
>
> MR. BEASLEY: We discussed two years before. Mr. Bachrach's client feels that that's too short a time. They suggested that they would like to have at least three years if we have to have a final time frame.
>
> COUNTY ATTORNEY: Okay. So I'm going to say it's up to your discretion as to how long to obtain a building permit.
>
> CHAIRWOMAN STEIN: Commissioner Linn?
>
> COMMISSIONER LINN: I'm terribly uncomfortable with us making an arbitrary decision along those lines and I'm also not clear or sure why we would want to attempt to proceed ahead on that piece of it. I'd rather kind of track the case in terms of its adherence to the law and implementation of the farm plan as a code enforcement question.
>
> COUNTY ATTORNEY: Okay. And then what you're looking at is whether they have abandoned the use.
>
> COMMISSIONER LINN: That's right.'

1. HAS THE APPLICANT ABANDONED THE FARM MANAGEMENT PLAN OR DISCONTINUED IMPLEMENTATION OF THE PLAN?

In 1989, a residential dwelling in conjunction with 10-year farm management plan was approved for the subject parcel. That plan included a pre-planting period of activity and nine additional plan years of activity. The final order approving the plan had one condition. That condition read as follows:

> "This decision shall become effective ten days following the date of notification of surrounding residences unless appealed under MCC 11.15.2010(C)(5)."

In PRE 26-89 the County concluded that the applicant had satisfied the approval criteria for a farm related single family residence in the EFU district. The decision did not contain a condition which actually required implementation of the plan.

In MC 8-99, the applicant, Western States Development, sought a determination that a building permit could be issued pursuant to the provisions of the original farm management plan approved in 1989. In the 2000 decision, which was approved by Multnomah County Commissioners as Order No. 00-022, a finding was made by both the hearings officer and the Board of County Commissioners, that implementation of the farm management plan was required before a house could be built. The Board also found that the delay in commencement of the implementation of the plan did not preclude compliance with the plan. The Board found that the delayed commencement of the implementation of the farm plans did not violate any code provision or plan requirement and does not preclude successful implementation of the plan. In order to receive a building permit or, as the application was termed "zoning clearance" for issuance of a building permit, the applicant was required to demonstrate that the day to day activities on the property were principally directed to the farm use of the land. The applicant could meet that burden if the applicant had demonstrated that it had implemented the farm plans.

The Hearings Officer and the Board found that the applicant had implemented the activities generally described in the first two years of the plan. The Board approval was dated March 2, 2000.

The current applicant and property owner commenced discussions to obtain a building permit with the County in June of 2004 and the application under review herein was submitted in October of 2004.

The Board order in Case No. 00-022 included a condition that read as follows:

> "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."

and the final harvest of the trees occurs, there would no longer be a farm operation on the property conducted in accordance with an approved farm management plan.

In Mr. Jehnke's submittals, he appeared to anticipate a cycle of replanting. That is something that was not called for in the original plan. While the applicant should certainly be encouraged to continue the farm activity, such a replanting would not establish a new ten-year farm management plan or extend the time frame for issuance of a building permit pursuant to the farm management plan approved in 1989.

4. IS THE APPELLANT CORRECT IN ASSERTING THAT THE PLANNING DIRECTOR ERRED IN FINDING THAT THE FARM PLAN'S TEN YEAR TIME FRAME IS NOT A "DIFFERENT TIME FRAME" THAT EXEMPTS THE OWNER FROM THE TWO YEAR EXPIRATION IN MCC 37.0750?

For reasons stated earlier in this opinion, the farm plan's ten year time frame is "a different time frame" that exempts the approval for a dwelling issued in PRE 26-89 from the effects of MCC 37.0750. In addition, I found that MCC 37.0750 would not apply to the approval of a single family residence in conjunction with a proposed farming operation conducted according to a farm management plan, once that farm management plan had been implemented.

5. DID BOC ORDER NO. 00-022, OR ANY OTHER DECISIONS RELEVANT TO THIS MATTER, GRANT A PERPETUAL APPROVAL FOR A DWELLING ON THE SUBJECT PARCEL?

There is no perpetual time frame applicable to the PRE 26-89 authorization for a single-family residence in conjunction with a farm use which was to be conducted in accordance with the approved farm management plan. BOC Order No. 00-022 clearly indicated that the right to build a house was conditional upon continued implementation of the farm management plan referenced in PRE 26-89.

6. IS STRICT COMPLIANCE WITH THE FARM MANAGEMENT PLAN REQUIRED?

In the specific grounds for appeal, the applicant contended that the Planning Director erred in finding the applicant has the burden of demonstrating the farm management plan must be implemented according to the strict schedule of the farm plan, and that revocation is not the appropriate review procedure if the farm plan has been abandoned. The farm management plan is general in nature. InRochlin vs. Multnomah County, 37 Or LUBA 237 (1999), the case cited by applicant/appellant, LUBA upheld Multnomah County's determination in that instance, that the substantial compliance standard is not a strict compliance standard. In that case, LUBA upheld Multnomah County's decision that there had been substantial compliance with the 1989 farm plan approved in PRE 26-89.

At the time of the Planning Director's decision, the applicant had not submitted sufficient evidence to enable the Planning Director to find that there had been continued implementation of the farm plan approved in PRE 26-89. Subsequently, the applicant/appellant has

In MC 8-99, an application for determination of permissible use, the County contended that the farm plans were not implemented during the five years immediately following approval and that the plans were not implemented on the parcels as proposed and approved, and could therefore no longer be implemented in accordance with the approvals. The applicant contended that the plan had no expiration date or any kind of deadline for implementation. The applicant went so far as to argue that no implementation of farming activities is necessary and asked for a finding to that effect.

The first question addressed in MCC 8-99 was whether the applicant was required to implement the farm management plans described in the 1989 PRE approvals. The plans themselves had no time lines in the approvals and no conditions were imposed requiring compliance with the plan. In fact, there was no specific plan implementation requirement imposed at all in the original approval, for a single-family residence in conjunction with the proposed farming operation on the property.

The decision in MC 8-99 did 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 decision in MC 8-99 was affirmed by the Multnomah County Board of Commissioners, and as such, is a finding that I must defer to at this time.

The second question addressed in MC 8-99, was whether the applicant's delay in commencing the implementation of the plan precluded compliance with the plan. The decision in MC 8-99 found that there was nothing in the County approvals or the County Code that mandated immediate implementation of the farm plan. Following past Board precedent, the decision in MC 8-99 found that the delayed commencement of the implementation of the farm plans did not violate any Code provision or plan requirement and did not preclude successful implementation of the plan. Again, the Multnomah County Board of Commissioners affirmed that decision.

MC 8-99 then addressed the question of whether the applicant implemented the farm management plans. The decision in MC 8-99 found that the farm management plans are general in nature. 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 on the plans. The applicant had planted the requisite number of trees on the parcel in question, and those trees were growing and appeared healthy. The decision found that the applicant had implemented the farm plan on the parcel.

A finding was made that there had been implementation of the plan sufficient to support a finding that the parcels were currently employed for farm use in accordance with OAR 660-05-030(4).

The decision in MC 8-99 further found that:

> "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

Subject to the following conditions, and based on the findings and substantial evidence cited or referenced herein, I conclude that the applicant is entitled to zoning sign off on its building permit review request.

CONDITIONS OF APPROVAL:

1. The applicant must continue to follow the farm management plan approved in PRE 26-89. No building permit may be issued if the applicant abandons or discontinues implementation of the farm management plan.

2. No building permit may be issued pursuant to the approval granted under PRE 26-89 after termination of the farm management plan on January 11, 2008.

IT IS SO ORDERED, this 12th day of May, 2005

JOAN M. CHAMBERS, Hearings Officer

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PROCEDURAL ISSUES

1. 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 have previously issued a decision regarding the earlier application for the subject parcel.

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.

2. Jurisdictional Issues

At the commencement of the hearing I asked the participants to indicate if they had any objections to jurisdiction. The participants did not allege any jurisdictional or procedural violations regarding the conduct of the hearing.

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 approval in the matter of PRE 26-89 and PRE 27-89. The approvals related to 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