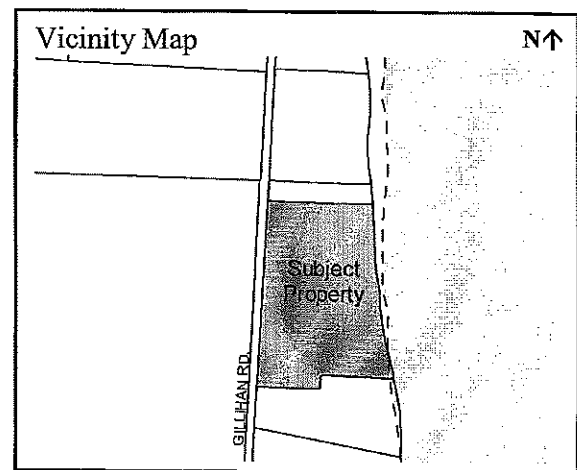


**MULTNOMAH COUNTY****LAND USE AND TRANSPORTATION PROGRAM**1600 SE 190TH Avenue Portland, OR 97233

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BEFORE THE HEARINGS OFFICER FOR MULTNOMAH COUNTY, OREGON FINAL ORDER

Case File: T2-09-040**Location:** 21700 NW Gillihan Road
Township 2 North, Range 1 West,
Section 2C, TL 501, W.M.
Tax Account #R649890770**Applicant:** Christeen Egger**Owner:** Chris & Christeen Egger**Base** Exclusive Farm Use**Zone:**

Summary: Appeal of Planning Director's Decision Denying Applicant's request to allow under Multnomah County Code (MCC) 34.2620(B) an existing second story deck attached to an existing agricultural building as a farm use or as a structure/building accessory to the farm use in the Exclusive Farm Use (EFU) Zone District.**Decision:** The Planning Director's Decision is reversed. The Application is approved with conditions.

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 did not make a site visit.
- 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.

SCOPE OF APPEAL

An appeal from an administrative decision of the Planning Director is conducted as a *de novo* hearing. The issues raised in the notice of appeal as well as the testimony, arguments and evidence submitted at the hearing and in the record in this matter will be considered herein.

STANDARDS, CRITERIA, ANALYSIS AND FINDINGS OF FACT

1. PROJECT DESCRIPTION

The applicants are requesting an Administrative Decision by the Planning Director that the deck attached to the approved Exempt Farm Building (Exhibit B.5) can be allowed outright under Code Section MCC 34.2620(B) (Allowed Uses) as part of a farm building and that the deck is exempt from building permit requirements.

2. PROPERTY DESCRIPTION

The 11.78 acre property is accessed from Gillihan Road on the west and the Columbia River on the east (Exhibit B.3). The subject property is zoned Exclusive

Farm Use (Exhibit B.2). The property is being used as a cutting horse farm operation with an existing Farm Exempt Building, an outdoor riding arena, hot walker, training pen and pasture land used for the horses and cattle.

3. PROPERTY HISTORY

The existing agricultural building was certified as meeting the requirements for a Farm Exempt Building by one of the property owners, Christeen Egger/ on January 9, 2006, by signing the Farm Exempt Building zoning form (Exhibit B.5). Ms. Egger certified that the then proposed building would meet the regulations that allow farm buildings to be exempt from building permit requirements. The certification was reviewed by County Land Use Planning staff to determine whether the proposed building met minimum yard setback requirements. That building was authorized to be built under that certification.

The subject property was legalized as a Lot of Record through Case T2-08-044 and Partition Plat 2009-20.

The County received a complaint that the farm building was being used as a dwelling and a deck had been built. County staff inspected the farm building and no dwelling was found. County staff told the applicant herein that the determination of whether the deck was an allowed use was a discretionary decision that required a land use decision for Review Uses. In response, the applicant submitted the subject application. At the hearing in this matter, County staff testified that there were no outstanding compliance issues and that the question of whether the deck was an allowed farm use was the only pending matter before the County.

4. TESTIMONY AND EVIDENCE PRESENTED

A. At the hearing on October 16, 2009, the following exhibits were received:

- H-1 An aerial photo showing the improvements on site.
- H-2 Written testimony, evidence and photos submitted by Appellant
- H-3 Photos of Farm Building, deck and view from hotwalker
- H-4 Form related to Farm Building/Equine Facility Exemption from Building Codes (Multnomah County Form)
- H-5 Multnomah County Exempt Agricultural Building (FAQ) form

B. Planner, Adam Barber, testified for the County and summarized the history of the decision on appeal.

C. Applicant/Appellant Christeen Egger and Consultant Julie Cleveland testified in support of the Appeal

5. EXCLUSIVE FARM USE ZONE CRITERIA

Allowed Uses

5.1. MCC 34.2620 (A) Farm use, as defined in ORS 215.203.

Staff: The allowed uses as defined in ORS 215.230 to include the following, "Farm use also includes the current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines including but not limited to providing riding lessons, training clinics and schooling shows." Staff interprets this section of the ORS to include the rising and training of equines as cutting horses.

5.2. MCC 34.2620(B) Buildings other than dwellings customarily provided in conjunction with farm use.

Hearings Officer: The interpretation by staff of this section, as applied to this application, is set forth below. Following the staff discussion, I will review the issues raised on appeal.

Staff: This request has resulted from a Code Compliance case investigating as to whether the deck that was added to east side of the agricultural farm building as an addition to an existing Farm Exempt Building qualifies as an allowed use under MCC 64.2620(B). The applicant is requesting a determination that the deck is allowed an observation deck under the MCC 34.2620(B) as a building other than dwellings customarily provided in conjunction with farm use. The applicant describes the deck and its use in the narrative included as Exhibit A.3 and is shown in photos submitted by the applicant included as Exhibit A.4. The applicant has included narrative about other observation decks as well as several photos showing examples of other observation decks used in conjunction with horse arenas included as Exhibit A.6.

The applicant states, "The deck built on the back of the farm building is used as an observation deck for the outdoor arena..." She continues,

"An observation deck is a widely used farm practice used to see down onto an arena where livestock such as horses and cattle can be viewed. Observation decks are common in both indoor and outdoor areas around the world. In the case of the applicant, the observation decks' Birdseye" view allows an observer to see cutting horses train and work as well as cattle reared for cutting horse competition."

The applicant states that Chris Egger, one of the subject property owners, is a champion non-pro cutting horse trainer. She also states that Mr. Egger has trained and sold completion cutting horses for decades and continues to do so at this property.

The applicant states,

"The addition of the observation deck allows the applicant to market and sell their cutting horses to clients by giving a potential buyer an unobstructed view of the cutting horses and cattle at work. This can not be accomplished by standing at the arena fence. The movements of the horses are too easily obscured by cattle and dust."

Given the submitted photos (Exhibit A.4), staff is concerned about whether the existing deck really provides an "unobstructed view" of the cutting horses and cattle at work. The photos show trees have been planted between the arena and the deck and that the arena is located a significant distance from the deck as shown on the 2008 aerial of the property included as Exhibit B.3. During a site visit staff concluded that the deck is located more than 130 feet from the arena fence. Additionally the deck is located on the east side of the building which also somewhat obstructs the view of the arena or the other livestock fenced areas of the property. The deck does provide a view of the river to the east.

Staff finds that an observation deck used in conjunction with a cutting horse farm operation can be allowed as an agricultural structure/building. However, the practical test for an observation deck is whether the view from the deck of the arena is unobstructed and the deck is close enough that the observer would be able to truly view the cutting horse's performance. Indeed, a review of the photos of other observation decks submitted by the applicant (Exhibit A.6) shows that they are all located directly adjacent to the arena.

Given that the trees that have been planted between the arena and the deck, which currently partially obscure the view of the arena from the deck and in the future will significantly obscure the view, this indicates another intent for this deck other than the use as an arena observation deck. Additionally building the deck on the east side of the building and the deck being a significant distance from the arena also draws us to determine that this deck was built for uses other than the applicant's stated use as an observation deck.

Staff finds that an observation deck for cutting horses is allowed under MCC 34.2620(B) and would be allowed as an agricultural Farm Exempt Building. However, staff finds that the existing deck is not allowed under MCC 34.2620(B) as a Farm Exempt Building due to its distance from the arena and the obstructed view from the deck of the arena.

Hearings Officer:

In the application narrative, (Exhibit A.3) the applicant described the farm uses of the deck. In addition to the portion of the application narrative that staff quoted above, the applicant also stated:

"The observation deck is used as a break/lunch area for the applicants and farm workers."

"The observation deck is also used to photograph and make videos of the cutting horse training sessions. The photos and videos are then used as a training tool to review the horse and trainer performance."

At the hearing, the applicant discussed the other farm related uses for the deck and pointed out that staff did not discuss any of those other farm uses. The applicant also discussed the hot walker and the round pen and stated that the deck was also used to observe horses in those areas. The hotwalker is located 80 feet from the deck. The applicant also testified that the deck provided a comfortable lunch break area for employees away from the dust. In addition, the deck was shaded in the afternoon.

Staff expressed concerns about whether the deck really provides an "unobstructed view" of the cutting horses and cattle at work.

The appellant's hearing submittal discussed this concern in detail. The photos submitted, which were taken from the deck, did not appear to show an "obstructed" view. The arena was fully visible. The observer would have a view from an angle for over one half of the area of the arena. For view evaluation only, I would compare the view to that of a spectator at a football stadium who is watching from the 15 yard line rather than the 50 yard line. The viewing location may not be optimal, but it is not "obstructed". The appellant also stated that staff did not actually go on to the deck. Since the deck is the primary issue here, I found it surprising that the staff visit did not entail actually going on to the deck.

The appellant submitted evidence indicating that the distance from the deck to the arena fence is 127 feet. In Hearing Exhibit 2, the appellant stated:

"The fenced arena size is 140x160 feet. The distance to view horses and cattle in the fenced arena area is well within the exhibit distance submitted with the application that shows other observation decks and arena sizes."

Hearing Exhibit 2 also contained a letter from Kenneth Switzer, a long-time member of the National Cutting Horse Association (NCHA), who has been training and selling horses for over 35 years. In addition, he was also a professional NCHA judge for three years. The appellant summarized the salient points of Mr. Switzer's letter as follows:

"Mr. Switzer states at Fort Worth Texas, the NCHA's largest venue for showing and selling young horses, the distance to the judge's

stand is 200 feet. The arena at his ranch is 150x150. He also states elevation is important when observing a horse for judging and/or purchase."

There is also a letter from Richard Eagle, Past President of the NCHA, in which Eagle stated that he has been involved in the production and management of cutting horse events for over twenty years and that the optimal viewing area is 100 to 140 feet from the action.

There was also testimony which indicated that the observation area should not be located immediately adjacent to the arena because of dust concerns. Exhibit H.2 contained photos of the cutting horses while they were working. The photos showed substantial amounts of dust being generated.

Staff also discussed the small pine trees adjacent to the arena, which staff thought would eventually grow to a height that would obstruct the view of the arena from the deck.

The appellant explained that the trees were purchased at an auction, as Mugo pines, "a squatty short pine variety", that ended up being a different variety that grew taller than expected. The appellant stated that she told staff during the site visit that she would remove the trees, thereby eliminating any future view obstructions. This will be a condition of approval.

Staff concluded that the applicant carried the burden necessary to demonstrate that an observation deck in relationship to a cutting horse training farm operation meets the standard in MCC 34.2620(B) as an agricultural building customarily provided in conjunction with farm use and can be allowed as a Farm Exempt Building. I concur with this portion of the staff determination.

However, staff went on to determine that the proposed deck must be located within 20 feet of the existing arena. I find no evidence in the record that would support this determination by staff, nor does staff articulate any clear rationale for this determination. The dust issue alone would make siting the observation deck within 20 feet of the arena, a somewhat uncomfortable location for an observation area.

The appellant contends that staff is speculating that there are other intended uses for the deck and I concur. For example staff states:

"Additionally the deck is located on the east side of the building which also somewhat obstructs the view of the arena or the other livestock fenced areas of the property. The deck does provide a view of the river to the east."

The applicant/appellant's submittal and testimony clearly indicates that at the time the deck was built, there was no unimpaired view of the river. Exhibit H.2 states:

"We are submitting an aerial photo taken in 2008 of the property. In it you can see the black cottonwood grove that significantly impaired any view of the river. When staff did his on-site visit, the grove was being removed by the Sauvie Island Drainage Company to comply with FEMA codes regarding dike maintenance. When the applicant's built the observation deck, they did not know the Drainage Company would be required to remove these trees."

Exhibit H.1 clearly shows the grove of trees referenced by appellant and the location of the deck in relation thereto. The grove of trees would clearly have significantly impaired the view of the river from the deck. I find the appellant's testimony credible.

In reviewing the evidence and staff decision, my greatest initial concern about this application was not the distance of the deck from the arena but rather the location of the deck on the east side of the farm building rather than on the south side of the farm building. However, the South side of the farm building was already being used for the covered parking of farm vehicles and equipment. The appellant thought that the East end was the only area that could readily accommodate the deck. One of the photos in Exhibit H.3 shows a large horse trailer parked in the covered area on the south side of the farm building. The dimensions shown on the site plan (Exhibit A.2), supports the appellants contention that there would not be sufficient maneuvering room for vehicles on the East side of the building if the covered parking area had been moved to that side.

The staff discussion of this section commences with the phrase: *"This request has resulted from a Code Compliance case . . ."* The investigative suspicion that is often found in a code compliance investigation seems to have carried over to staff's review of this application. In the decision, staff speculates that the deck was built for purposes other than farm uses, yet does not explain what staff thinks those uses are. In the decision in this matter, rather than require the applicant to remove the pine trees that grew taller than expected, staff cites the pine trees as an indication that the deck was not intended for a farm use.

In the decision, staff ultimately found that:

" . . . (T)he existing deck is not allowed under MCC 34.2620(B) as a Farm Exempt Building due to its distance from the arena and the obstructed view from the deck of the arena"

I do not concur with staff's finding.

While the distance of this deck from the arena appears to be at the high end of the range of the acceptable viewing area distance for an observation deck used in conjunction with a cutting horse farm operation, it is within that range. The letters submitted in Exhibit H.2 provide evidence that the outside range for such a deck would be 140 to 200 feet. There was no contrary evidence in the record. In addition, I find that elevation is important and that an above ground or second story deck for this specific use would be far preferable to a ground level observation area.

Although there were two e-mails submitted in opposition to this application, no one testified in opposition to the application at the appeal hearing and the opponents cited no actual evidence in support of their position. However, the staff decision appears to follow the contentions made by the Hortons, (Exhibit C.2), even including the reference to the visibility of the fields assertion found in the staff decision. The applicant did not contend that the deck would be used for the observation of fields and the Farm building is not being used as a residence as asserted by the Hortons.

A cutting horse farm operation, involving the training of cutting horses is a somewhat specialized farm use. The horses engage in the cutting of cattle and what the applicant termed, "lightning fast starts and turns." (Exhibit A.3) An elevated observation deck located at least some distance removed from the area viewed, protects the observer from dust and provides a better view and perspective of the whole area of the arena. The findings and interpretation herein related to the acceptable distance for the observation deck to the arena is specific to this application for a farm use involving a cutting horse farm operation and would only be relevant to other applications involving a farm of a similar nature.

Based on the findings set forth above, it is unnecessary to address the statutory arguments raised by the appellant. I am reversing the staff decision and approving the application to allow the existing deck as an allowed Farm Exempt Building subject to the following Conditions of Approval set forth below.

CONDITIONS OF APPROVAL

1. The applicant shall remove the small pine trees bordering the north side of the arena with 60 days.
2. The deck approved herein must meet the land use setbacks of the zone.

CONCLUSION

Based on the findings and other information provided above, the appellant has met the burden of proof necessary to demonstrate that the existing deck on the farm building can be used as an observation deck in relationship to a cutting horse training farm operation and meets the standard in MCC 34.2620(B) as an agricultural building customarily provided in conjunction with farm use and can be allowed as a Farm Exempt Building.

The staff decision in this matter dated September 4, 2009 is reversed and the request to allow the existing deck as a farm building is approved, subject to the conditions of approval set forth above.

IT IS SO ORDERED, this 20th day of November, 2009


JOAN M. CHAMBERS, Hearings Officer

EXHIBITS

The record includes the following listed exhibits:

- A: Applicant's Exhibits
- B: Staff Exhibits
- C: Exhibits by others

All exhibits are available for review in Case File T2-09-040 at the Land Use Planning office.

Exhibit #	# of Pages	Description of Exhibit	Date Received/ Submitted
A.1	1	Application form	6/25/09
A.2	1	Site Plan	6/25/09
A.3	5	Narrative	6/25/09
A.4	2	Photos of the deck and view from the deck	6/25/09
A.5	2	Letters supporting the request	6/25/09
A.6	24	Narrative and photos describing other observation decks	6/25/09
A.7	4	ORS and County Code addressing farm uses	6/25/09
'B'	#	Staff Exhibits	Date
B.1	5	A&T Property Information and Tax Map with Property Highlighted	NA

B.2	1	Zoning maps	NA
B.3	1	2008 Aerial Photo of the subject property	NA
B.4	2	Partition Plat 2009-20	NA
B.5	1	Farm Agricultural Building Land Use Permit (Farm Exempt Building form)	NA
C	#	Comments Received (Date
C.1	1	Email comment letter submitted by Susan Wessinger	8/11/09
C.2	1	Email comment letter submitted by Grey Horton	8/12/09

