

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

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<http://www.co.multnomah.or.us/landuse>

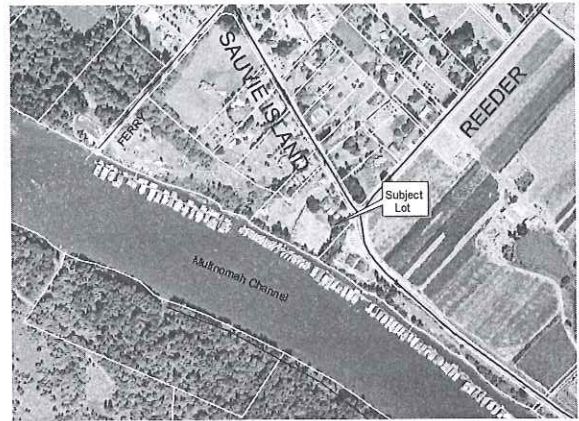
DECISION OF HEARINGS OFFICER

This notice concerns a Hearings Officer's Decision on the land use case(s) cited and described below.

Case File: T2-09-043**Permit:** Willamette River Greenway Permit**Location:** 18015 NW Sauvie Island Road
Tax Lot 3100, Section 17D,
Township 2 North, Range 1 West, W.M
R971170100**Owners:** June Parker LLC;
Big Island Marina LLC;
Mike Hashem**Applicant:** Mike Hashem
PO Box 1587
Clackamas, OR 97015**Base Zone:** MUA-20

Vicinity Map

N↑



Summary: Willamette River Greenway Permit for 2 pergolas, a concrete walkway and concrete pad that were constructed on the property without permits and for a proposed gazebo for use as part of Big Island Marina.

Decision: The application and appeal are denied.

This decision is the County's final decision and is effective when mailed.

Dated this 2nd day of March, 2010.

By: _____

Liz Fancher, Hearings Officer

Opportunity to Review the Record: A copy of the Hearings Officer's 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 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 Kevin Cook, Staff Planner at 503-988-3043 ext. 26782.

This decision is the County's final decision, when mailed. The decision may be appealed to the Oregon Land Use Board of Appeals but you must perfect such an appeal in the manner and within the time period prescribed by State law.

Applicable Approval Criteria: Multnomah County Code (MCC): 34.5810 (Uses – Greenway Permit Required); 34.5825 (Greenway Permit Application); 34.5830 (WRG Permit – Required Findings); 34.5835 (Decision by Planning Director); 34.5855 (Greenway Design Plan); 34.2855 (Dimensional Requirements – MUA-20 zone) 34.2825(K) (structures or uses customarily accessory or incidental to any use permitted or approved in the MUA-20 district); 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/landuse>.

Findings of Fact

FINDINGS: Written findings are contained herein. The Multnomah County Code criteria and Comprehensive Plan Policies are in **bold** font. Staff comments and analysis are identified as '**Staff:**' and address the applicable criteria. Staff comments may include a conclusionary statement in *italic*. The hearings officer's findings are preceded by the term '**Hearings Officer.**' In addition, staff findings have been accepted as findings of the Hearings Officer except where those findings are rejected by the findings prepared by the Hearings Officer. The Hearings Officer has also revised some of the text of staff findings.

Summary of Relevant Facts:

In 1975, Multnomah County approved the application of a Community Service area to the subject property. It also approved a site plan that allows the subject property to be developed with a 38-space sailboat moorage and an associated motor vehicle parking area. When the plan was approved, two single-family homes were located on the property and were shown on the moorage site plan. These homes remain on the property and are located close to Sauvie Island Road on the eastern part of the property.

The applicant purchased the subject property in 2008. Thereafter, Mr. Hashem improved the south and east part of the property located for use as a venue for weddings. This area borders the bank of the Multnomah Channel of the Willamette River. The wedding site has been landscaped with trees and shrubs. A meandering walkway has been installed between the parking area and the wedding area. A concrete pad for a gazebo and two pergolas were built near the river bank in a scenic location. The walkway was constructed, in part, over a septic drainfield that serves the Big Island Marina and Sauvie Island Marina.

The applicant was advised by Multnomah County that the development of his property for use as a wedding venue required land use approvals. At a minimum, County approval of a modification of the community service district and site plan approval granted for the property by Multnomah County in 1975, a WRG review and a flood plain review were needed before the property could be developed and used as a wedding venue.ⁱ

The commercial wedding venue use proved to be highly controversial with area property owners. Mr. Hashem says that he has abandoned plans to use the property for weddings but this statement was later qualified. Mr. Hashem's attorney, Harold Hickok, asked the hearings officer to allow Hashem family use and weddings in the venue if a condition of approval was imposed to limit the use of the wedding venue improvements. Additionally, the improvements lend themselves to and invite use for public and private events regardless of the use label applied.

Mr. Hashem is seeking approval of the existing and planned wedding venue improvements. No changes to the venue are proposed. Mr. Hashem and his attorneys have asked the County to approve the improvements by finding that they will be used for one or more of three different uses. These uses were residential landscaping, farm use and community service (marina) use. Two of the new uses – the farm and residential landscaping uses – were presented in an effort to exempt the wedding venue development from WRG review.ⁱⁱ

Prior to development, the wedding venue area of the property was in a neglected state. Mr. Hashem removed blackberries that were growing over a portion of the drainfield and along the riverbank. Neighbors claim that Mr. Hashem also removed native vegetation from the river banks. A cottonwood tree was removed.ⁱⁱⁱ Mr. Hashem says the tree was a hazard and was removed after consultation with an arborist. Mr. Hashem removed old oil barrels and other trash from the water and generally improved the appearance of the property. Mr. Hashem submitted color photographs that show that his property presents a superior appearance to at least one other nearby river property.

The applicant seeks retroactive approval of the two pergola structures and the walkway. In addition, the applicant seeks prospective approval of a gazebo. The applicant's site plan drawing includes marks that indicate landscaping in some but not all of the areas landscaped by Mr. Hashem but the application does not seek specific approval of the plants that have been added to the marina property as landscaping for the wedding venue.

Applicant's Claims Re Legal Impact of County Staff Advice:

The applicant says that someone on the County's staff told him, in an over-the-counter discussion, that the marina property is a residential property and that no permit is required to construct or install the pergolas, trees, grass, concrete walkways (Exhibit H-34). Mr. Hashem does not claim, however, that he told staff during this discussion that he would use the area as a wedding event venue. The intended use of the land, rather than the physical improvements, dictate land use law requirements. Landscaping provided in conjunction with a residence is exempt from WRG review whereas landscaping and the use of land for a commercial venture like a wedding event venue requires WRG review and other approvals.

Even if County staff knew all of the relevant facts and told Mr. Hashem that he could install "residential" landscaping and use it for a commercial wedding event venue use without obtaining a WRG permit and other required land use approvals, the over-the-counter opinion would not bind Multnomah County to make a decision consistent with that advice as this decision must be based on the applicable land use law. As noted by County attorney Jed Tomkins in Exhibit H.10, "estoppel cannot arise from an action of a local government official who purports to waive a mandatory standard. *Bankus v. Brookings*, 252 Or 257, 260, 449 P2d 646 (1969); *Holdner v. Columbia County*, 123 Or App 48, 53, 858 P2d 901 (1993)." This rule was affirmed by the Court of Appeals in *City of Mosier v. Hood River Sand, Gravel & Ready-Mix, Inc.*, 206 Or App 292, 136 P3d 1160 (2006).

In the *Mosier* case, the Court ruled that representations to a quarry owner in prior proceedings by a City mayor, planner and council that it had no land use authority over quarry operations because the quarry was located outside the city did not prevent the City from seeking to regulate quarry operations at a later date because an access road to the mine was located in the city. The Court determined that:

"A party's intent to waive a right must be 'plainly and unequivocally manifested, either in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power.' " *Guardian Management, LLC v. Zamiello*, 194 Or App 524, 529, 95 P3d 1139 (2004) (quoting *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685-86, 893 P2d 560 (1995)). *In this case, nothing about the city's official actions in any of the three proceedings constitutes an explicit waiver of its zoning authority on the part of the city. Moreover, it is well established that a local government cannot waive the*

requirements of the law. See, e.g., Bankus v. City of Brookings, 252 Or 257, 260, 449 P2d 646 (1969) ("the authorities are uniform that the mandatory requirements of an ordinance specifically stated cannot be waived"). We reject HRSG's waiver argument without further discussion and turn to the question whether the city is estopped from asserting the claims in this case.

As a general proposition, a governmental agency may be estopped from asserting a claim inconsistent with a previous position that it has taken. See, e.g., Dept. of Transportation v. Hewett Professional Group, 321 Or 118, 126, 895 P2d 755 (1995). There must, however, have been reasonable reliance on the governmental actor's misstatements. Kucera v. Bradbury, 337 Or 384, 407, 97 P3d 1191 (2004). "Reliance on a misstatement is not reasonable if the governmental actor had no authority to make the misstatement." Id. Thus, a city cannot be estopped by the acts of a city official who purports to waive the provisions of a mandatory ordinance. Mannelin v. DMV, 176 Or App 9, 13-14, 31 P3d 438 (2001).

In this case, even if it were true that city officials had represented to HRSG that the zoning ordinance would not be enforced in the R-10 zone, they would have been wholly without power to make such an assurance. Whatever the representations may have been from city officials, there is no evidence presented that any of those officials had the power to waive the enforcement of a lawful zoning ordinance. Under such circumstances, the city cannot be estopped from enforcing its ordinance.

Mr. Hashem's written materials also describe other discussions with County staff regarding blackberry removal and his development plans. As with the over-the-counter advice, any comments or suggestions offered by staff in those discussions are not binding in this land use review for the same reason that the over-the-counter advice is not binding.

Use of Improvements/Landscaping:

The key to determining the rules that apply to the review of this application depends on the use intended for the improvements. As a result, the use of the area is addressed in this section of the report. The conclusions regarding uses are then used to make findings related to the approval criteria.

Wedding Venue

When installed, the landscaping and improvements were designed to create a wedding venue on a property that already contains a marina, marina parking area and two single-family homes. Prior to the development of the wedding venue area for a wedding venue use Mr. Hashem should have obtained WRG review and other, related land use approvals. After Mr. Hashem was advised by Multnomah County that the wedding venue improvements required land use approval, he made three claims about the existing and future use of the wedding venue area in order to retain the unlawfully installed improvements and landscaping while continuing to seek approval to use the area for weddings by filing an application for approval of a kayak club that would include weddings as a related activity. That application was recently withdrawn.

Community Service/Marina Use

The entire subject property was designated a community service district in 1975. That designation was needed to allow a marina to be developed on the property. The entire property and the two residences were included on the marina site plan approved in 1975. One of the residences was shown as the home of the marina owner/operator and the other as a rental property. The use of the entire property is governed by the 1975 site plan. The County's 1975 approval specifically prohibits a new "commercial enterprise" from being located on the site which would prohibit a wedding venue use. The approval also requires that native plantings be provided along the slough line and that trees be planted along Sauvie Island Road.

In the WRG land use application, the applicant's attorney advised Multnomah County that the improvements are not a community service use. The improvements are, however, an improvement of a property that has been developed with a community service use, Big Island Marina. Mr. Hashem testified that the wedding venue area is used by marina residents as their front yard and this is the planned use of the area. The improvements, therefore, are a new part of the marina community service use. The new sidewalk provides access from the marina's parking area to the wedding venue area of the property. This invites use of the wedding venue by marina users and residents. The improvements are not residential landscaping or farm use activities that are exempt from WRG review.

Farm Use

One of Mr. Hashem's attorneys, Andrew Stamp, claims that Mr. Hashem's wedding venue and its landscaping should be exempt from WRG review because the live landscaping materials are a farm use. He says:

"Mr. Hashem intends to use the property to augment his 10-acre nursery operation located on a nearby property he owns (the "Bella Farms Property."). So far, he has planted 900 trees and shrubs on the subject property, and intends to plant 1000 more in the near future. He intends to let the trees and shrubs grow for a number of years, and then individual specimens will be periodically removed for sale. The area where trees have been removed will be replanted with younger replacement trees."^{iv}

The photographs provided by Mr. Hashem as a part of Exhibit H.34 show that the trees and shrubs planted by Mr. Hashem are landscaping for a wedding venue or other gathering area; not nursery stock. Trees are planted on a slope between the homes and the wedding venue to provide screening between the residences and the venue. Ornamental shrubs are planted along the pathway at a significant distance apart. Shrubs also line the gazebo pad and the top of bank in a single row rather than in multiple rows. Five vines are planted on five of six posts of a good-sized pergola in an area that could easily accommodate many more vines. The subject property does not receive farm tax deferral which is available for land used for farm use. To qualify as a farm use and for farm tax deferral, a property owner must intend to make a profit from the farm use. In this case, Mr. Hashem must intend to earn a profit from growing nursery stock in the wedding venue area of the marina.

The County's code says that a farm use is the "current employment of land . . . supporting accepted agricultural practices for the purpose of making a profit in money by raising, harvesting and selling crops." MCC 34.5815(D). This definition is similar to the State definition of the term "farm use." In *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007), the Oregon Supreme Court rejected a DLCD administrative rule that said that an intention to generate gross income is all that is required to establish a farm use. It required that the farmer have a genuine intention to make a profit from farming

activities. This excludes hobby farms and inherently unprofitable agricultural activities from the definition of a "farm use."^v

In the case of *J.R. Golf Services v. Linn County*, 62 Or App 360, 661 P2d 91 (1983), the Court of Appeals applied the farm use rule to a WRG review. It found that incidental agricultural use of a golf course did not qualify as a farm use because it was not designed to earn a profit in money. The use of the golf course for experimentation in grass seed production, herbicide and pesticide experimentation and field condition testing of golf course grass by Oregon State University was not a farm use that is exempt from WRG restrictions and rules.

In the Hashem application, the applicant has failed to show that growing nursery stock in an event venue setting is an accepted farm practice or that this activity is designed to be profitable. The nursery stock was planted as landscaping in an event venue not in a farm field or in a nursery where such activities typically occur. The intensity of the use is so low, as shown by the photographs submitted by Mr. Hashem, that it is not reasonable to conclude that the landscaping is designed to make a profit by growing and harvesting the plants. Mr. Stamp indicates that additional plants will be added to the property but has not shown that the plants will be anything more than landscaping.

Much of the event area is a septic drainfield and is not suited for growing nursery stock, as shown by the concerns expressed by sanitarian Erin Mick. It appears, from all the evidence, that the farm use idea was advanced to avoid WRG review rather than to reflect the true nature of the use of the wedding venue area of the marina property. As a result, the hearings officer finds that the landscaping and improvements are not a part of a farm use.

The hearings officer also adopts the following analysis of the farm use issue provided by staff planner Kevin Cook:

*"The Community Service Permit (CS) that approved the Marina included a condition of approval that requires the protection of native vegetation along the bank of the Multnomah Channel. This condition of approval and the approved marina plan make it clear that the banks of the Channel on the property are an extension of the CS use of the property. Any change to the CS that was not included in * * * the original permit requires a new CS permit." p. 3, 2/1/10 Memo. [Hearings Officer Note: Event venue landscaping was installed in this part of the property in violation of the CS permit.]*

"The applicant has suggested that the concrete, pergolas, and gazebo are part of a nursery operation. There is a difference between a farm that grows nursery stock and a nursery that is open to the public for commercial sales of potted nursery stock and the like. The former is an allowed use in MUA-20 zone. The latter requires a farm-stand permit as a Review-Use which the applicant has not applied for. A pergola, concrete path, and gazebo are not customarily accessory to farming. Vines on farms are typically grown using stakes and wire strands. Pergolas and concrete paths are things that could conceivably be accessory to a Commercial Nursery (farm-stand), but again they would need to be approved through the proper review.

The MUA-20 zone district includes the following provision under Allowed Uses, MCC 34.2815(F): "Accessory Structures: (1): Structures or uses listed below when

customarily accessory or incidental to any use permitted or approved in this district: ... (k) Gazebos, pergolas, and detached decks” In this case the concrete, pergolas, and gazebos are not customarily accessory to farm use.” pp. 3-4, 2/1/10 Memo.

Residential Use

The applicant has claimed that the landscaping is exempt from review because it is a part of a residential use. While landscaping for a residence is exempt, I cannot find that the wedding venue landscaping and improvements are landscaping related to a residence. I reach this conclusion because the sidewalk is connected to the marina’s parking area rather than to either of the two residences. This design invites use by non-resident marina users. This is how this area has been used according to the testimony offered by Cynthia Woldridge. This type of use is not a residential use.

The marina is a community service use. It is not a residential development. Its improvements and landscaping do not qualify for the residential landscaping exception to WRG review because they serve a non-residential use, the marina.

The applicant planted a considerable number of trees on the slope that exists between the wedding venue and the single-family homes with the apparent intent of dividing the residential use of the property from the wedding venue. The parking area and the start of the walkway through the septic drainfield that serves as the entrance to the wedding venue are located a considerable distance away from the two homes.^{vi} The wedding venue area is not fenced to prevent use by marina users. Rather, they are invited to use the area by the drainfield sidewalk. Since the applicant is proposing no change to the sidewalk or design of the wedding venue, I cannot find that the venue improvements are landscaping for or accessory structures related to the residential use of the property.

The applicant’s attorney said “as stupid as it sounds, we suppose that we would accept a condition of approval requiring the pergolas and gazebo only be ‘used’ by the persons living in the residences.” I agree, from the facts of this case, that such a condition would be “stupid.” Given the design of the walkway and improvements, there is no practical way to convert them from facilities that are designed to rely on and connect to the marina parking lot into improvements for homes located elsewhere on the property without tearing out the sidewalk – the facility the applicant is seeking to retain.

Drainfield:

A large septic drainfield exists on the property. The drainfield was installed about ten years ago, long after the marina site plan was approved. The drainfield serves the Big Island Marina and Sauvie Island Marina (Exhibit H.46).

The location of the pergolas and the proposed gazebo in relation to drainfield has not been accurately shown by the applicant. In addition, the site plan does not accurately depict the shape of the sidewalk. As the submitted plan was not drawn to scale, it also does not depict any of the plan’s features accurately. The applicant’s attorney, Andrew Stamp, says that a comparison of the drainfield map and photographs of the pergolas shows that the pergolas are not located directly above the drainfield pipes. Mr. Stamp acknowledges, however, that a portion of the

walkway is located directly above at least one of the drainfield pipes.

The evidence, as a whole, shows that the applicant placed the wedding venue sidewalk over the drainfield and landscaped the property without first seeking review of his plans by DEQ or the County's sanitarian. OAR 340-071-0130(12) says: "Except as provided in specific rules, the absorption area, including installed system and replacement area, must not be subject to activity that is likely, in the opinion of the agent, to adversely affect the soil or the functioning of the system. This may include but is not limited to vehicular traffic, covering the area with asphalt or concrete, filling, cutting, or other soil modification." According to Gary Artman, Natural Resource Specialist for DEQ, "if damage to this drainfield has occurred, it would be contrary to the conditions found in your Water Pollution Control Facilities (WPCF) permit and could result in expensive repairs or even the requirement to eliminate some of the existing connections to the system."^{vii}

Proposal:

Staff: The applicant constructed two pergolas, and a concrete walking path on the subject property within the Willamette River Greenway overlay without the benefit of review by Multnomah County as is required in Multnomah County Code (MCC) 34.5810. The applicant filed this application in response to the County's request for compliance (compliance case #UR-09-014). Additionally, the terminus of the concrete walkway contains a concrete pad that is intended for the construction of a gazebo. The proposed gazebo is also part of this review. A separate Flood Development permit has been applied for in order to evaluate the development against the Flood Hazard regulations of the MCC.

Hearings Officer: The applicant also applied for land use approval to develop a kayak club and clubhouse on the subject property (Case T3-09-002). The application has been withdrawn. The applicant has not applied for approval of the landscaping of the wedding venue area with trees and shrubs.

Staff: The concrete walkway begins at the lower parking lot (which serves as parking for the marina) approximately 150 feet from the river, extends approximately 115 feet south across the relatively flat grassy area, and then turns west (the walkway is wider at the point of the this turn) and continues for another 100 feet terminating at a circular pad, which is approximately 20 feet from the river at the top of a steep bank (see site plan labeled Exhibit A.7 and photographs labeled Exhibits B.6 through B.16). The bank is approximately 10 feet higher than the summer water surface elevation of the Multnomah Channel (staff site visit to the property was conducted in late September, 2009). The two pergolas are also located approximately 20 feet from the river at the top of the steep-sided bank as seen on the applicant's site plan (Exhibit B.13).

Hearings Officer: The applicant's site plan does not accurately depict the walkway. The walkway meanders. That proposed site plan shows a walkway that does not meander. The drawing, also, does not show the location of a septic drainfield. The concrete walkway crosses the drainfield area of the subject property. The locations of the pergolas and the gazebo are not precisely identified although Andrew Stamp, one of the applicant's attorneys, claims that these structures are not and will not be located on top of the septic drainfield. All of the trees and shrubs added as landscaping are not shown on the submitted site plan and the plan lacks adequate detail to determine what was planted by the applicant. The photographs submitted by the applicant fill in some, but not all, of the details about the new landscaping.

Willamette Greenway Review Required or Not?

Staff: The western half of the property is located within the Willamette River Greenway overlay district (Exhibit B.17). The proposal requires the issuance of a Willamette River Greenway (WRG) permit. MCC 34.5810 indicates that any development, change in use or intensification of use requires a WRG permit. In this case, the addition of a concrete walkway, pergolas, and a gazebo qualify as an intensification of use as defined in MCC 34.5815(E):

(E) Intensification - means any additions which increase or expand the area or amount of an existing use, or the level of activity. Remodeling of the exterior of a structure not excluded below is an intensification when it will substantially alter the appearance of the structure. Intensification shall not include the completion of a structure for which a valid permit has been issued as of December 6, 1975 and under which permit substantial construction has been undertaken by July 1, 1976. Maintenance and repair usual and necessary for the continuance of an existing use is not an intensification of use. Reasonable emergency procedures necessary for the safety or protection of property are not an intensification of use. Residential use of land within the Greenway includes the practices and activities customarily related to the use and enjoyment of one's home. Landscaping, construction of driveways, modification of existing structures, or construction or placement of such subsidiary structures or facilities adjacent to the residence as are usual and necessary to such use and enjoyment shall not be considered an intensification for the purposes of this order. Seasonal increases in gravel operations shall not be considered an intensification of use.

Staff finds that the development qualifies as intensification because it would qualify as a new use and is not a residential use or exempt landscaping (see findings under 2.01 below); therefore, the Willamette River Greenway permit is required.

Hearings Officer: The applicant and his attorneys argue that no Willamette River Greenway permit is required for a variety of reasons. The primary reason advanced by the applicant is that the sidewalk, pergolas and gazebo are landscaping and that any landscaping (residential, commercial or other) is exempt from review for compliance with WRG approval criteria. I disagree. In certain cases, landscaping is exempt from WRG review but those exemptions do not apply to the marina wedding venue improvements and landscaping. I read the WRG rules as follows:

First, MCC 34.5810 requires a WRG permit for “any development, change of use or intensification of use.”

Wedding Venue (Use Intended When Built)

The construction of a concrete walkway, gazebo and pergolas for a new use such as the wedding venue is development because it meets the definition of “develop” and “development” provided by MCC 34.5815(B) and (C). The improvement “bring about growth or availability” of the wedding venue area of the property to the marina users and visitors. It also involves the construction of structures. The improvements also qualify as development because they make a physical change in the use or appearance of land.

Landscaping and Structures for Residential/Marina Use

The improvements made by Mr. Hashem, if considered as landscaping for either the residences or marina, still meet the definition of development. They increase the availability of the wedding venue part of the property and structures were built or are proposed. The appearance of the land has also been changed. This means that the improvements are not exempt unless exempted by some other provision of the WRG code. Those exemptions are addressed later in this decision.

Farm Use

I have found that Mr. Hashem's improvements are not a part of a farm use of the property. No farm use of the property was authorized by its community service designation or site plan. If the applicant wishes to establish a farm use on the property in addition to the marina use, he will need to amend the marina site plan approval to include the farm use.

Second, MCC 34.5815(B) indicates that uses excluded by the terms "intensification" or "change of use" are exempt from WRG regulation even if they involve development.

Third, MCC 34.5815(A) defines "change of use."

Wedding Venue

A wedding venue is a change of use of the subject property as the term is defined by MCC 34.5815(A) because it is a different use than existed on the property on December 6, 1975. It is different than the approved land uses of the property (marina with two single-family homes). It involves the construction of new structures. As a wedding venue use is a new use the landscaping for the venue does not qualify as exempt landscaping. Only landscaping that is "usual and necessary to the use of existing improvements" is exempted from WRG review by MCC 34.5815(A).

Landscaping and Structures for Marina Use

The marina use was approved prior to December 6, 1975 and existed at some level on that date. The nature of the marina use would be changed by the addition of the gathering spot created by Mr. Hashem. The improvements include a change that requires construction, alterations or land outside of existing buildings and structures. The changes substantially alter or affect the land. The sidewalk and landscaping may impact the functioning of the on-site, shared septic system. The gazebos, plantings and pergolas substantially change the appearance of this area of the property – mostly for the better.

Landscaping is not considered a change of use if it is "usual and necessary to the use of the existing marina use." While it could serve as a nice amenity for the moorage, it is not necessary for that use and has not been shown to be "usual." Additionally, the improvements and landscaping are not consistent with or authorized by the marina site plan. I believe that if the improvements are to be retained as marina recreational facilities, the marina site plan must be amended to reflect these new marina facilities.

Residential Use

I have found that the wedding venue improvements are not designed for residential use as the term is defined in the WRG regulations. As a result, I have not addressed whether a residential use of the facilities would be an exempt change of use.

Fourth, MCC 34.5815(E) that defines the term "intensification."

Wedding Venue

The term "intensification" does not exempt the wedding venue development from WRG review as the venue is a new use rather than an intensification of an existing use. The venue use created additions to the development of the marina property that increased the area and amount of the marina use and allowed a more intense level of activity by allowing use of what had been an undeveloped area^{viii} for weddings. While the definition of an intensification of a use excludes landscaping, it does so with qualifications. It allows landscaping, as well as accessory structures, to be developed adjacent to a residence without need for WRG review. The landscaping also must be provided for a use that has already been established as the existence of an existing, presumably lawful, use or activity that is being

intensified.

Landscaping

The language regarding residential use and landscaping is somewhat unclear. The meaning of the term as it relates to landscaping is discernible when it is considered as a part of the entire Greenway ordinance and only residential landscaping is exempt.

All landscaping cannot be exempt from WRG review because the WRG rules specifically regulate landscaping when a new use is proposed and reviewed. The WRG rules call for the maximum possible landscaped area between the use and the river, require the protection and enhancement of natural vegetation along the river and the preservation of natural landscaping in flood plains. These rules are achieved through site plan review. If the applicant's interpretation is accepted, any site plan-approved use could be re-landscaped after receiving WRG site plan approvals. This would mean that preserved natural areas could be filled with non-native plants and landscaping that does not comply with the Greenway rules. As a result, I do not agree that this is the intended meaning of the exception. Instead, I believe the exception for landscaping is limited to residential use.

My conclusion is supported by the way the definition and exclusion are structured. In the middle of the definition of "intensification" the text says:

"Residential use of land within the Greenway includes the practices and activities customarily related to the use and enjoyment of one's home."

This text, alone, is neither a description of an activity that is considered an intensification of an existing use nor an activity that is exempt from regulation as intensification. Instead, this sentence helps explain the meaning of the following sentence which says:

"Landscaping, construction of driveways, modification of existing structures, or construction or placement of such subsidiary structures or facilities adjacent to the residence as are usual and necessary to such use and enjoyment shall not be considered an intensification for the purposes of this order."

The first sentence explains that a residential use includes practices and activities customarily related to the residential use of land and the second describes what specific types of practices and activities that are customarily related to the use and enjoyment of one's home. These residential accessory uses are not an intensification of use and do not require WRG review.

The wedding venue landscaping installed by Mr. Hashem is not adjacent to a residence and is not usual and necessary for the residential use of the land. The structures that the applicant says are landscaping cannot qualify for an after-the-fact exemption because they were not designed to be subsidiary to an adjacent residential use. While the residents of the two homes located on the marina property might choose to use this area, the area is clearly designed to serve the marina or the general public rather than the residents of the homes.

Finally, the applicant has argued that the marina is a residential use. I disagree as the marina is a community service use.^{ix} The primary character of the use is a commercial use that supports recreational use of the river. The fact that a maximum of three slips in the marina may be used as "live aboard" spaces does not make the marina a residential use of the type exempted by the WRG rules. This is true because the live aboard spaces are a minor part of the 38-space marina use that is defined by the County code as a community service use. Also, gazebos and landscaping of the type built by Mr. Hashem have not been shown to be customarily related to the use and enjoyment of a home of this type.

The applicant's attorney, Andrew Stamp, argues that LUBA's approach to the landscaping issues from

its decision in *J.R. Golf Services v. Linn County*, 5 Or LUBA 81 (1982) should be followed by this hearings officer. That decision, however, was reversed by the Oregon Court of Appeals so cannot serve as guidance for my decision.

1.00 ***Administration and Procedures***

1.01 **MCC 37.0560 Code Compliance And Applications.**

Except as provided in subsection (A), the County shall not make a land use decision, or issue a building permit approving development, including land divisions and property line adjustments, for any property that is not in full compliance with all applicable provisions of the Multnomah County Land Use Code and/or any permit approvals previously issued by the County.

(A) A permit or other approval, including building permit applications, may be authorized if:

- (1) It results in the property coming into full compliance with all applicable provisions of the Multnomah County Code. This includes sequencing of permits or other approvals as part of a voluntary compliance agreement; or**
- (2) It is necessary to protect public safety; or**
- (3) It is for work related to and within a valid easement over, on or under an affected property.**

(B) For the purposes of this section, Public Safety means the actions authorized by the permit would cause abatement of conditions found to exist on the property that endanger the life, health, personal property, or safety of the residents or public. Examples of that situation include but are not limited to issuance of permits to replace faulty electrical wiring; repair or install furnace equipment; roof repairs; replace or repair compromised utility infrastructure for water, sewer, fuel, or power; and actions necessary to stop earth slope failures.

Staff: Pergolas and a concrete walkway and pad have been constructed on the Hashem property without the required Willamette River Greenway permit, and Flood Development Permit. This application addresses the pergolas, walkway and pad, as well as a proposed gazebo.

Hearings Officer: Photographs submitted by the applicant show that trees and shrubs were also planted as a part of the landscaping for the wedding event venue. This landscaping also requires WRG review.

Staff: The applicant indicated that the sanitary drain-field for the neighboring marina to the south (Sauvie Island Moorage Company – Tax Lot 3200) is located either partially or wholly on the Big Island Marina (subject) property on the same grassy field where the walkway and pergolas are constructed. However, the applicant does not know the precise location of the drainfield.

The drainfield is likely quite large since it is connected to a community system that handles all of the Sauvie Island Moorage and Big Island Marina sewage discharge. Without a clear understanding how the pergolas and particularly the newly placed concrete relate to the location of the drainfield staff cannot evaluate or approve the request for a Willamette River Greenway permit because it is not clear whether such an approval would run afoul of the above standard

since the placement of concrete over a drainfield can affect the functioning of the drainfield and may constitute a threat to public health.

Hearings Officer: The applicant's attorney, Andrew Stamp, argues that MCC 37.0560 does not prevent the hearings officer from approving this application. I agree with Mr. Stamp. The wedding venue landscaping and improvements may violate OAR 340-071-0130(12). That rule applies to any subsurface septic system, including both a WPCF permit and local septic permit. The rule's reference to an "agent" refers to either the Director of DEQ or to a local entity that has contracted with DEQ. OAR 340-071-0100. The rule is adopted pursuant to a delegation of authority to DEQ provided in ORS 454.625. OAR 340-071-0130(12) is not, however, a provision of the Multnomah County Code nor is it a violation of a state statute. Additionally, no land use approval applicable to this property requires the applicant to maintain the drainfield in compliance with State law.

Staff has indicated that MCC 37.0910 and MCC 37.0915 make a violation of State law a violation of the Multnomah County code. This is partially correct. MCC 37.0910 defines the term "violation" as follows:

"Violation: Any act or failure to act that is prohibited or not allowed, including any failure to take any required action, under the goals, laws, rules, regulations or permits specified in MCC §37.0915."

MCC 37.0915 provides that a violation is:

"Any use of land, land division, adjustment to property boundaries, work within a County right-of-way, or other activity by a person in violation of any provision of:

(A) MCC Chapters 11.15, 11.45, 33, 34, 35, 36 and 38; §§ 29.001 through 29.365 and 29.500 through 29.611; Multnomah County Road Rules or the terms and conditions of any permit issued under those code provisions; or

(B) Any statute adopted by the Oregon Legislature and those land use planning goals and rules of the Land Conservation and Development Commission (LCDC) that apply directly to the County through ORS 197.646 may be subject to enforcement and fines as provided in this subchapter."

A violation of the conditions of an existing DEQ permit or an Administrative Rule promulgated by the Environmental Quality Commission is not within the category of laws set forth in MCC 37.0915 (A) or (B). The rule is not found in the County code or road rules or in a County permit of any kind. The rule was not adopted by statute. The rule is not a land use planning goal or rule of LCDC that applies directly to the County.

Staff: Additionally, there are a number of large landscaping boulders that have recently been dumped on the property near the existing lower parking area. The applicant indicated the boulders are intended to be placed in the vicinity of the concrete walkway. However, the site

plan does not show the proposed location of the landscaping boulders. Therefore, staff cannot evaluate the proposed landscaping boulders in relation to the Willamette River Greenway standards.

The applicant has not demonstrated how the landscaping boulders will meet the Willamette River Greenway standards. The criterion is not met.

Hearings Officer: I cannot determine, conclusively, whether the boulders are or are not in a location on the property that is inside the WRG review area. Mr. Hashem must obtain land use approval to place the boulders inside the Greenway but on this record I cannot find that the current location of the boulders or the need for an additional permit for future landscaping work that will incorporate the boulders into the wedding venue setting prevents approval of this application.

Hearings Officer: Staff has noted that if the improvements on the subject property are a part of the marina use, approval must be obtained to amend the community service approval. I agree. The installation of improvements without that required approval is a violation of the County's land use code. The applicant's attorney, Andrew Stamp, agrees with that assessment but asks that compliance be achieved through the imposition of a condition of approval to obtain approval to modify the community service approval. I cannot impose such a condition, however, because it is not certain that the applicant will be able to obtain approval of the marina site plan and community service use approval or that the approval will authorize all of the Hashem wedding venue improvements. In particular, I think it is possible that the County might deny approval of the gazebo. It might allow or require viewing benches to commit the area to its claimed use. While I would like to avoid the need for a subsequent WRG review, Oregon case law requires me to determine that it is feasible for the applicant to comply with any condition of approval I might impose. Otherwise, I may not impose the condition. As I do not know whether it is feasible for the applicant to obtain community service approval, I cannot condition the application as requested by Mr. Stamp.

Land use approval should have been obtained before the wedding venue improvements were installed. This application seeks WRG review only. A flood plain review was also requested but no request was made to modify the community service use and its site plan. As a result, the approval of this application will not bring the property into compliance with all county land use rules. As a result, I do not have the authority to approve the applicant's proposed and installed development. I have, however, reviewed the other approval criteria in the event this is appealed and as a non-binding reference if the applicant seeks approval of a modification of the marina community service use approval.

In addition, I am concerned that Mr. Hashem's landscaping activities and the prior development of the site do not comply with the approved site plan. I raise this issue so it can be addressed and resolved in a future community service review of the wedding venue improvements if and when the applicant seeks approval to make them a part of his marina operations. The following issues bear consideration: (a) have the native plantings required to be provided along the slough line by the 1975 marina permit been provided and preserved; and (b) is the lower level parking area authorized by the site plan (the area was not shown on the 1975 site plan; a neighbor drew in information about this lot to show the actual development of the site compared to what was proposed); and (c) are the paved parking area, catch basins and drywells discussed in the condition of the 1975 site plan provided on site; (d) were the recent changes Mr. Hashem made to the parking area consistent with the approved site plan; and (e) will the marina's use of the area be conducted in a way that will not violate the requirement in the 1975

	<p>permit that prohibits commercial use of the property?</p>
1.02	<p><i>Comments Received</i></p> <p>MCC 37.0530(B) Type II Decisions</p> <p>(B) Type II decisions involve the exercise of some interpretation and discretion in evaluating approval criteria. Applications evaluated through this process are assumed to be allowable in the underlying zone. County Review typically focuses on what form the use will take, where it will be located in relation to other uses and natural features and resources, and how it will look. However, an application shall not be approved unless it is consistent with the applicable siting standards and in compliance with approval requirements. Upon receipt of a complete application, notice of application and an invitation to comment is mailed to the applicant, recognized neighborhood associations and property owners within 750 feet of the subject Tract. The Planning Director accepts comments for 14 days after the notice of application is mailed and renders a decision. The Planning Director's decision is appealable to the Hearings Officer. If no appeal is filed the Planning Directors decision shall become final at the close of business on the 14th day after the date on the decision. If an appeal is received, the Hearings Officer decision is the County's final decision and is appealable to LUBA within 21 days of when the decision is signed.</p> <p>Staff: An opportunity to comment letter was mailed on September, 29, 2009 to property owners within 750-feet of the property lines and those who have asked to received notice of this permit. A total of 14 comment letters were received during the 14-day comment period and 3 additional letters were received after the comment period closed (Exhibit D.1 through D.17). Issues raised in the letters include:</p> <ul style="list-style-type: none"> • The concrete and pergolas are located at the river bank and don't meet the Greenway setbacks. • The replaced dock should be a part of the Greenway permit review. • Sheds were added to the dock and should be part of the Greenway review. • The County should not reward code violators. • There are more than three live-aboards at the marina in violation of the marina approval. • There are no sanitation pump-out facilities for the live-aboards at the marina. • Nonnative vegetation has been planted in the riparian area. • The site plan is deficient and/or inaccurate. • Applicant needs to demonstrate that the development is water dependent or water related or apply for an exception to state-wide planning goals (goal 15). • Was fill brought in for placing the concrete path? • Why do the structures need to be located at the river's edge? • Removal of riparian vegetation is contrary to the Greenway standards.

	<p>Additional letters were received from the applicant rebutting various citizen comments (Exhibits A.15 through A.22).</p> <p>Staff: The marina's dock was approved under permit CS 2-75 (Exhibit B.2). The dock was replaced but was determined by County staff to have been replaced in kind and therefore did not trigger a new Greenway review. Aerial photographs show the dock sheds existed prior to the dock replacement (Exhibits B.6 and B.7). The applicant has indicated there are no more than three live-aboards at the marina although he could not verify which slips were being used for that purpose. The applicant has indicated that the concrete pad has a gravel base.</p>
2.00	<i>Willamette River Greenway Permit</i>
2.01	<p>MCC 34.5855 Greenway Design Plan</p> <p>The elements of the Greenway Design Plan are:</p> <p>(A) The maximum possible landscaped area, scenic and aesthetic enhancement, open space or vegetation shall be provided between any use and the river.</p> <p>Applicant (July 2, 2009): <i>"The installations or the pergolas and the concrete walkways and pad covered by this application are landscaping. The entire area between these installations and the river consists of open space and vegetation. Similarly, the installation of temporary tent-structure has not degraded any landscaping, vegetation, or space between that structure and the Multnomah Channel."</i></p> <p>Applicant (November 17, 2009): <i>"The concrete walkway and the two pergolas are not a "use" in and of themselves. They are landscaping fixtures intended to help create a place where residents of the Big Island Marina community could be in the shade, enjoying a quiet view of the flowing waters of the Multnomah Channel. As also discussed in response to paragraph (Q) later in this letter, this is a water-related use. A flowing stream is an inherently fascinating to humans, a source of endless fascination and escape from the chaos of the faster and more frenetic aspects of life. To experience the flowing stream effectively, a watcher must be near the river, close enough to see the eddies, ripples, swirls, and endless and constant changes to the water as it flows along. The sole purpose of the pergolas is to enhance this experience. Of necessity, they must be situated relatively close to the bank of the Multnomah Channel.</i></p> <p><i>The pergolas and the concrete walkway were installed as part of a landscaping effort that has included the entire property. Vegetation that had grown up in the parking lot was pared. Accumulated items, including the tent used as a work-station, were removed. Many trees and shrubs were planted to prevent erosion. In addition to the climbing plants on the pergolas, the same plants were planted along the main walkway and its supports, so that these will gradually acquire an appearance comparable to that of the pergolas. Substantial steps were taken involving much of the property to restore it to an effective working marina location, and, in the case of the walkway and the pergolas, to provide a place from which community residents could enjoy this aesthetic experience that a view of the Multnomah Channel provides.</i></p> <p><i>The walkway and the pergolas are a focus of the aesthetic enhancement that this project was intended to achieve. They have been situated a reasonable distance from the river bank, to ensure that there is no degradation of this particularly delicate area, but they have also been</i></p>

situated close enough to the water's edge that they provide a location from which community residents can watch the Multnomah Channel."

Staff: The applicant indicates that the development, for the purposes of this criterion, fit the category of landscaping and/or aesthetic enhancement more so than the category of a "use" that is to be screened or buffered by landscaping, aesthetic enhancement, or open space. Based upon the location, concrete pad and the pergolas, it is clear that the pergolas and concrete pad are not screened by a significant amount of landscaped area between the use and the river.

Pergolas: Pergolas are often employed as a landscaping feature for the purpose of supporting climbing vines. However, the two pergolas are structures (as defined by MCC 34.0005)^x nevertheless and are a visually dominant feature at the top of the river bank as viewed from the river. While pergolas are often part of a landscaped environment they are still a structure first and foremost and the fact that pergolas are typically enhanced with vegetation does not change the fact that they are structures and serve a purpose or a use. The applicant has stated that the structures are used by marina residents for recreational use. In this case, the location and orientation of the pergolas suggest that they are meant to provide a place for people to view the river below or to have picnics (Exhibits A.7, B.10, B.11, and B.13).

Concrete walkway and pad: The general intent of the standard is to maintain the scenic quality of the river and the land areas adjacent to the river. The concrete is generally not visible as seen from the river but it is located on the adjacent land area within the mapped greenway area. The concrete could reasonably be considered part of the landscaping of the property, however, the concrete pad (Exhibits A.7 and B.13) is located adjacent to the river. The standard is not met because additional landscaped area could be provided between the concrete pad and the river if the concrete pad were located further from the river.

Gazebo: The proposed gazebo is not strictly a landscaping feature. While gazebos are commonly found in landscaped settings they are not by themselves landscaping. A gazebo is a structure as defined by MCC 34.0005 and a building (as defined by MCC 34.0005).^{xi} Because of its location 20 feet from the river, the proposed gazebo cannot meet the standard of including the maximum possible landscaped area, scenic and aesthetic enhancement, open space or vegetation because if the gazebo was located further away from the river then additional landscaped area could be provided between it and the river.

Based upon the above findings Staff cannot approve the development being considered under this permit. The criterion is not met.

Hearings Officer: The focus of this section is the use of the property; not the nature of the new improvements, landscaping or structures. As noted by the applicant, landscaping is not a use. The applicant has provided three different descriptions of the use. The only use label selected by the applicant that fits the improvements as installed is a recreational use by marina users. The applicant has indicated that marina users use the area like a front yard, picnic in the area and come to and gather in the area to view the river. It is possible that marina users may use the area for its intended purpose – weddings or other large gatherings. This part of the marina use is not river-dependent as are the docks and slips.

What is clear about the design of the wedding venue area and the improvements is that they are placed close to the river bank. Only a very small landscaped area is provided between the use and the river. The legal question is whether this code criterion imposes a supplemental setback standard or whether it requires that amenities be provided between a properly sited use, as determined by other code standards, and the river. The LUBA case of *Stotter v. City of Eugene*,

	<p>18 Or LUBA 135 (1989) says the latter interpretation is correct. Staff's interpretation of the code, therefore, is not adopted as a part of this decision.</p> <p>The area between the use and the river is open space or contains landscaping. It is not possible to increase the amount of landscaping and open space in this part of the property. As a result, the maximum possible landscaped area or open space area has been provided.</p>
2.02	<p>(B) Reasonable public access to and along the river shall be provided by appropriate legal means to the greatest possible degree and with emphasis on urban and urbanizable areas.</p> <p>Applicant (July 2, 2009): <i>"The installations covered by this permit application do not alter the public access to any part of the Big Island Marina Property."</i></p> <p>Staff: The criterion has limited applicability to the proposed Willamette River Greenway permit. The property is privately-owned land located well outside of any urban growth boundary. Marina users have reasonable access to the river and public river access is provided by the State of Oregon at a public boat launch located less than one half mile downstream from the property. The criterion is satisfied.</p>
2.03	<p>(C) Developments shall be directed away from the river to the greatest possible degree, provided, however, that lands in other than rural and natural resource districts may continue in urban uses.</p> <p>Applicant (July 2, 2009): <i>"The location of these installations has been selected in order to minimize the changes to the marina property as a whole. Any attempt to move these installations farther from the Multnomah Channel would have required much greater potential for erosion or comparable degradation of natural resources."</i></p> <p>Applicant (November 17, 2009): <i>"Arguably, the installation of the concrete walkway and the two pergolas are not a "development" under the Multnomah County Code. That Code specifically exempts landscaping, stating that it shall not be considered an "intensification." See MCC 34.5815(E), suggesting that landscaping does not come within the definition of "development" for purposes of the Code.</i></p> <p><i>Even assuming that the concrete walkway and the pergolas are deemed to be a "development," the requirement of paragraph (C) should be deemed met: the concrete walkway and the pergolas cannot be directed away from the river without effectively defeating their purposes. The purpose of these fixtures is to allow the members of the Big Island Marina community a pleasant place from which to watch the flowing Multnomah Channel, and to provide easy access to those viewing places. To remove the pergolas and the walkway would effectively defeat the purposes for which the walkway and the pergolas were installed."</i></p> <p>Staff: The concrete, pergolas, and proposed gazebo are located in the MUA-20 zone district which is a rural zone. The applicant has failed to demonstrate that the development will be located away from the river to the greatest possible degree because the property is over 400 feet deep (Exhibit B.17) when measured from the river and the development is proposed approximately 20 feet from the river's edge. See findings under sections 2.01 and 2.17. The applicant has not demonstrated that developments are or would be directed from the river to the</p>

	<p>greatest possible degree. The criterion is not met.</p> <p>Hearings Officer: The applicant's improvements and landscaping are development that is not exempt from WRG review. It, therefore, must comply with this criterion. The applicant directed this development toward the river to the greatest possible degree by placing the structures (pergolas and proposed gazebo) near the top of the river bank and by building a path that brings users out to the river from a part of the property that is set back from the river.</p> <p>The applicant's attorney, Andrew Stamp, argues that the improvements must be placed where located because they must remain within the "curtilage of the marina use." I am unable to find any such rule in the County's code. Marina-related improvements can be proposed anywhere on the subject property as the entire property has been approved as a community service district and any development that is shown to be accessory to or an integral part of that use may be allowed.</p> <p>If the applicant requests that the wedding venue area be converted to use for gatherings of marina users, it would not be necessary for marina users to gather next to the river. If the only use that will occur is viewing the river, a different conclusion may be appropriate. If river viewing is the intended use, a location close to the river might meet this criterion. Park benches, however, would be a more appropriate improvement than a gazebo for a river viewing only use because they would not invite event use of the area. Without an analysis of other potential sites and without clearer details of the future use of the wedding venue areas (which has been described in three different ways thus far) and without a clear understanding of where the drainfield is located, I cannot determine that the use complies with this criterion.</p>
2.04	<p>(D) Agricultural lands shall be preserved and maintained for farm use.</p> <p>Applicant (July 2, 2009): <i>"No agricultural lands were affected by any of the installations covered by this permit application."</i></p> <p>Staff: The property is not currently employed in agriculture. The nearest agricultural land is located across Sauvie Island Road. The pergolas, concrete path, and proposed gazebo would not conflict with agricultural practices on Sauvie Island. The criterion is met.</p> <p>Hearings Officer: The subject property, also, is not "agricultural land" as the term is defined by Statewide Goal 3.</p>
2.05	<p>(E) The harvesting of timber, beyond the vegetative fringes, shall be conducted in a manner which shall insure that the natural scenic qualities of the Greenway will be maintained to the greatest extent practicable or will be restored within a brief period of time on those lands inside the Urban Growth Boundary.</p> <p>Applicant (July 2, 2009): <i>"No timber harvesting are involved or affected by any of the installations covered by this permit applicant."</i></p> <p>Staff: No timber harvests are proposed under this permit. The criterion is met.</p>
2.06	<p>(F) Recreational needs shall be satisfied by public and private means in a manner consistent with the carrying capacity of the land and with minimum conflicts with farm uses.</p>

	<p>Applicant (July 2, 2009): <i>“All recreational needs involved in installations covered by this application are being satisfied in a manner consistent with the carrying capacity of the land and without conflicts with farm uses.”</i></p> <p>Hearings Officer: It has not been established that the recreational use of the wedding venue area of the marina property will occur in a way that will be consistent with the carrying capacity of the land. While the applicant has said the area will be used for picnics and river viewing by marina residents, the gazebo and pergolas are clearly designed for events or gatherings. Thus, it seems reasonable to assume that marina users will put the facilities to that use. The applicant indicated, through his attorney, at the hearing, that he would want to use the facility for family gatherings and weddings.</p> <p>An event use of the wedding venue area for marina gatherings may cause damage to the septic drainfield, especially if vehicles drive over the drainfield to set up equipment for events. The drainfield is needed to support events and two area marinas. Without septic disposal for all of these uses, the recreational use of this area for gatherings would exceed the carrying capacity of the land. Also, without more information about the location of the drainfield and an idea of how event use will be controlled, I cannot find that the proposal is consistent with the carrying capacity of the land.</p>
2.07	<p>(G) Significant fish and wildlife habitats shall be protected.</p> <p>Applicant (July 2, 2009): <i>“No fish and wildlife habitats are involved or affected by any of the installations covered by this permit application.”</i></p> <p>Applicant (November 17, 2009): <i>“The overall landscaping project, of which the installation of the concrete walkway and the pergolas are a part, have been carried out so as to protect all significant fish and wildlife habitats that are affected.</i></p> <p><i>The removal of the blackberry vines is not believed to have disrupted any significant wildlife, because this overgrowth has only arisen in the last few years as the former owners of the Big Island Marina were unable to maintain the property. The pergolas have been planted with climbing plants which attract bees for pollination.</i></p> <p><i>The fish habitats in the Multnomah Channel have been protected and enhanced by this landscaping project. The removal of the blackberry vines and there replacement with native plants has reduced the potential for erosion which would have degraded fish habitat.</i></p> <p><i>The two pergolas have added variety to the vegetation, while also sinking roots more deeply than would be the case with grasses alone. The walkway does not interfere with these habitats. For these reasons, Mr. Hashem contends that he has met the requirements of this paragraph.”</i></p> <p>Staff: Much of the native riparian vegetation has been removed from top of the river bank and has not been replaced (Exhibits B.6, B.7, B.12, and B.13) and two pergolas and an impervious concrete pad were placed in the area that was previously occupied native vegetation; a situation that is generally considered detrimental to wildlife habitat. Staff finds that wildlife habitat has not been protected. The criterion is not met.</p> <p>Applicant’s Attorney: Staff states that “wildlife habitat has not been protected.” However, staff does not identify any “wildlife habitat” on the subject property, or provide a basis to</p>

conclude that such habitat is “significant.” In this regard, it is important to understand that the code standard is not referring to *any* “habitat.” Rather, it is referring to the particular habitat identified in the County’s Goal 15 inventory. The County is required by Goal 15 to inventory the “fish and wildlife habitats.” See Goal 15, Section B (7). According to the “Findings” document included in the Comprehensive Plan, the County has apparently completed this inventory, but when we asked to see the maps, staff could not find the maps. They told us that we could pay a research fee and they would find them for us, which I declined. (It’s not the applicant’s job to pay to “find” applicable regulatory documents for the County.). Unless the County can produce maps showing inventoried resources, this code provision cannot form a basis for denial. Furthermore, if staff does “find” these maps and attempts to introduce them, the hearings officer will have to reopen the record to allow the applicant an opportunity to address those standards. To fail to do would violate due process.

Hearings Officer: While I agree that Goal 15, Section B (7) requires an inventory of “fish and wildlife habitats,” the stated purpose of this inventory is to assist the County in “determining which lands are suitable or necessary for inclusion within the Willamette River Greenway Boundaries and to develop the plans and management acquisition programs.” OAR 660-015-0005(B)(7). Unlike Goal 5, the inventory does not serve the purpose of identifying what resources may be protected. That function is fulfilled by the WRG boundary.

Section C (2) of Goal 15 requires Multnomah County to protect *significant* fish and wildlife habitat. The term “significant” is not defined. I believe, however, that the term refers to some but not all of the fish and wildlife habitat inventoried to comply with the inventory requirement of Section B of Goal 15.

I cannot determine whether the river section in question provides significant fish and wildlife habitat from the evidence contained in the record and, if so, if the change in use and vegetation removal related to the change complies with this standard. It is possible that the change may negatively impact significant habitat. The burden of proof lies with the land use applicant to show that the relevant legal standard has been met and I cannot find that this criterion has been met.

In the event the applicant files a new application seeking to include this area as a part of the marina use, I would ask that the County review its WRG inventory maps to determine if a finding of significance is contained in the County’s WRG inventory or in the comprehensive plan. While these maps are not a part of the regulatory scheme, if no fish and wildlife areas are inventoried on or near the subject property it is unlikely that any significant inventory will be compromised. It will, however, remain the applicant’s burden to make this showing.

2.08

(H) Significant natural and scenic areas and viewpoints and vistas shall be preserved.

Applicant (July 2, 2009): *“The installations covered by this permit application will preserve and enhance the natural and scenic areas on and around the Big Island Marina property.”*

Staff: Much of the native riparian vegetation has been removed from top of the river bank and has not been replaced (Exhibits B.6, B.7, B.12, and B.13) and two pergolas and a concrete pad were placed in the area that was previously occupied native vegetation. Staff finds that the

	<p>natural area has been negatively affected by the development, which is clearly visible from the river. The criterion is not met.</p> <p>Applicant's Attorney: The County is required by Goal 15 to inventory the "significant natural and scenic areas, and vegetative cover." Goal 15, Section B(6). Until the county demonstrates that these areas have been inventoried, there is no basis for denial.</p> <p>Hearings Officer: The applicant has not shown that viewpoints and vistas have been preserved. The applicant, also, has not met its burden of demonstrating compliance with this approval criterion. The Goal 15 inventory does not serve as a regulatory document. Instead, it provides the basis for deciding which land should be included in the WRG boundary and which lands should be managed or acquired for further protection.</p>
2.09	<p>(I) Maintenance of public safety and protection of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.</p> <p>Applicant (July 2, 2009): <i>"Public safety and protection of public and private property, especially from vandalism and trespass, will be enhanced by these installations because the pergolas and the concrete walkways and pads have not increased access to the marina property but have increased openness and visibility on that portion of the Big Island Marina property, the temporary tent structure similarly may represent an improvement of public safety and protection of property. At a minimum, these installations do not represent any deterioration of public safety or protection of property on the Big Island Marina property."</i></p> <p>Staff: The pergolas, concrete, and proposed gazebo would be expected to have nearly no effect on public safety concerns on the subject property or adjacent properties. The criterion is met.</p>
2.10	<p>(J) The natural vegetation along the river, lakes, wetlands and streams shall be enhanced and protected to the maximum extent practicable to assure scenic quality, protection from erosion, screening of uses from the river, and continuous riparian corridors.</p> <p>Applicant (July 2, 2009): <i>"Natural vegetation along the Multnomah Channel has been protected and enhanced as much as practical to assure scenic quality, protection from erosion, and continuous riparian corridors."</i></p> <p>Applicant (November 17, 2009): <i>"As this letter has already stated, the landscaping project, of which the pergolas and the walkway are integral parts, was an effort to remove blackberry vines and create a quiet setting in which people can watch the Multnomah Channel, amid natural vegetation. Blackberry vines are regarded as a noxious weed, and these have been replaced by native, natural vegetation. The climbing plants on the pergolas have also been planted on the main walkway, so that it will gradually acquire the same appearance as the pergolas. Considering all of these factors, this project is fully compatible with this paragraph."</i></p> <p>Staff: An aerial photograph from June 2006 (Exhibit B.6) shows a significant number of riparian trees located along the bank of the river in the location of the pergolas and proposed</p>

	<p>gazebo. Many of the trees that were located on the bank adjacent to the grassy field have been removed, based upon a comparison of the 2008 aerial photograph and more recent site photographs (Exhibits B.6 through B.16). The applicant indicates that native vegetation has been restored but has not provided any evidence supporting this claim. The applicant has not demonstrated compliance with the standard. The criterion is not met.</p> <p>Hearings Officer: This code requirement requires that the applicant enhance and protect natural vegetation. One of the goals of the vegetation is to screen uses from the river. It is clear that the applicant has not <i>enhanced</i> the area along the river with natural vegetation that will screen the wedding event venue area from the river. In fact, the applicant has made it clear that he wants to maintain views of the river rather than provide screening between the river and the use. This may be reasonable for a riverfront path and viewing area with minimal improvements but this is not the case for events where a view is not an essential part of the use.</p>
2.11	<p>(K) Extraction of known aggregate deposits may be permitted, pursuant to the provisions of MCC 34.6300 through 34.6535, when economically feasible and when conducted in a manner designed to minimize adverse effects on water quality, fish and wildlife, vegetation, bank stabilization, stream flow, visual quality, noise, safety, and to guarantee necessary reclamation.</p> <p>Applicant (July 2, 2009): <i>"The installations covered this permit application are not connected with any extraction operations."</i></p> <p>Staff: Extraction of aggregate is not proposed. The criterion is not applicable.</p>
2.12	<p>(L) Areas of annual flooding, flood plains, water areas and wetlands shall be preserved in their natural state to the maximum possible extent to protect the water retention, overflow and natural functions.</p> <p>Applicant (July 2, 2009): <i>"The installations covered by this permit application have been installed so that they preserve areas of annual flooding, flood plains, water areas and wetlands in their natural state so as to the maximum extent to protect the water retention, overflow, and natural functions."</i></p> <p>Applicant (November 17, 2009): <i>"The landscaping that has been undertaken, including the installations of the walkway and the pergolas, have not disrupted the natural water retention. The pergolas are not a closed-top structure, so that while rainwater may flow off the climbing plants rather than falling straight to the ground, there is no interference with water retention. As the report of the Professional Engineer who assessed the concrete walkway shows, it similarly will not interfere with natural groundwater retention.</i> <i>Indeed, in the long run, the removal of the blackberry vines and the replanting of this area with grasses and other plants will secure the soil in this area, allowing it to [protect the Greenway from erosion]."</i></p> <p>Staff: If the Greenway permit was approved, the applicant would be required to demonstrate compliance with the Flood Hazard Regulations of MCC 29.600 through MCC 29.611 by obtaining a County Flood Development permit. The applicant has submitted an application for a Flood Development permit. If this application for a Willamette River Green permit was</p>

	<p>approved, staff would include a condition of approval requiring the applicant to meet the Flood Development Regulations of MCC 29.600 through MCC 29.611. The criterion would ordinarily be met through a condition of approval in the case of an approved Willamette River Greenway permit.</p> <p>Hearings Officer: The record does not provide sufficient factual information to allow the hearings officer to find that the improved areas have been preserved in their natural state to the maximum extent possible. I believe this code criterion asks the applicant to do more than to comply with flood hazard rules. It is clear that the subject property is in the flood plain and that flood plain zoning has been applied to the property by the County. I disagree with Mr. Stamp's argument that the flood plain must be shown on the Goal 15 inventory to be protected by this approval criterion. As discussed above, the inventory is used to develop the WRG boundary and rules but is not assigned the role of designating specific areas for protection under the WRG approval criteria.</p> <p>I cannot conclude that a proposal to build a gazebo close to the river in an area with a history of flooding and where natural vegetation was required to be planted as a condition of marina approval meets the "maximum extent possible" requirement. A natural path and a few benches, for instance, would seem to be all that would be needed for a marina river viewing area and would be a development that would do a better job of keeping the property in a natural state. To date, it has not been demonstrated that a more intense level of development did not and will not adversely impact natural areas.</p>
2.13	<p>(M) Significant wetland areas shall be protected as provided in MCC 34.5865.</p> <p>Applicant (July 2, 2009): <i>"No significant wetland areas are involved or affected by the installations covered by this permit application."</i></p> <p>Staff: There are no identified wetlands on located on the property. The criterion is satisfied.</p>
2.14	<p>(N) Areas of ecological, scientific, historical or archaeological significance shall be protected, preserved, restored, or enhanced to the maximum extent possible.</p> <p>Applicant (July 2, 2009): <i>"The installations covered by this permit application do not affect any areas of ecological, scientific, historical or archaeological significance."</i></p> <p>Staff: There are no known areas of ecological, scientific, historical or archaeological significance on the subject property. The criterion is satisfied.</p>
2.15	<p>(O) Areas of erosion or potential erosion shall be protected from loss by appropriate means which are compatible with the character of the Greenway.</p> <p>Applicant (July 2, 2009): <i>"As shown by Storm Water Certificate of Adnan Haddad, P.E., the installations covered by the present permit application will not increase the potential for erosion on any affected property."</i></p> <p>Applicant (November 17, 2009): <i>"The landscaping effort, including the walkway and the pergolas were undertaken at the Big Island property has enhanced the protection of this area"</i></p>

	<p><i>from erosion. To open the area where the pergolas and the walkway are located, Mr. Hashem removed a large thicket of blackberry vines. These vines had done what blackberry vines do: they had choked out competing vegetation, including groundcover. This meant the underlying soil was bare and vulnerable to erosion. The blackberries have now been replaced with of native grasses as well as planting trees and shrubs along the bank above the river and on the pergolas, anchoring this soil and reducing the threat of erosion.</i></p> <p><i>The installation of the pergolas and the concrete walkway were part of the overall landscaping plan and are consistent with protecting the property from erosion. By directing foot traffic away from the grass in this area, the concrete walkway will protect the soil from erosive damage that might otherwise be caused. As shown in the report of the engineer consulting on this project, Mr. Adnan Haddad, which is attached to the Flood Plain Permit application, the concrete walkway itself will have no significant effect on the flow of groundwater, so that it does not present a concern for erosion. The pergolas enhance erosion control because they have been planted with climbing plants. This project is consistent with paragraph (O)."</i></p> <p>Staff: The pergolas, concrete and gazebo pad most likely have little affect on the erosion potential of the site since only very minor ground disturbance would have resulted from the placement of the development.</p>
2.16	<p>(P) The quality of the air, water and land resources in and adjacent to the Greenway shall be preserved in development, change of use, or intensification of use of land designated WRG.</p> <p>Applicant (July 2, 2009): <i>"The quality of the air, water and land resources of all land designated to be part of the Willamette River Greenway will not be affected adversely by any of the installations covered by this permit application."</i></p> <p>Applicant (November 17, 2009): <i>"The landscaping of the Big Island property has been done in ways that preserve "[t]he quality of the air, water and land resources in and adjacent to the Greenway." The walkway and the pergolas are part of a project to recover and restore the Big Island property. Noxious, aggressive weeds were removed. Diseased trees that posed a safety risk were removed, although their roots systems were left undisturbed to anchor surrounding soil. The cleared area was replanted with native grass as well as trees and shrubs planted along the top of the slope leading down to the river. The sloping area along the riverbank was covered with straw order to secure the bank from any erosion. The new grass which now covers this area is a much more dense, thickly rooted, and secure ground cover than could grow under blackberry vines.</i></p> <p><i>The walkway and the pergolas are part of this project. As shown by the engineering report of Adnan Haddad, professional engineer, which is included with the Flood Plane Permit Application, the concrete walkway has a negligible effect on groundwater flow. The pergolas similarly pose no threat to the natural resources. Indeed, because the pergolas have been planted with various pollen-bearing flowering plants, these will attract insects such as bees, a significant natural resource because of their pollinating activities.</i></p> <p><i>In short, the walkway and the pergolas are consistent with paragraph (P)."</i></p> <p>Staff: The pergolas, concrete and proposed gazebo are at a relatively small enough scale that they would not be expected to affect air, water, or land resources. The criterion is met.</p>

2.17

(Q) A building setback line of 150 feet from the ordinary low waterline of the Willamette River shall be provided in all rural and natural resource districts, except for non-dwellings provided in conjunction with farm use and except for buildings and structures in conjunction with a water-related or a water dependent use.

Applicant (July 2, 2009): *"A building setback line of 150 feet from the ordinary low waterline of the Willamette River has been provided consistent with the terms of the Willamette River Greenway Plan."*

Applicant (November 17, 2009): *"In the Multnomah County Code, paragraph (Q) requires a building setback line of 150 feet from the ordinary low waterline of the Willamette River "except for buildings and structures in conjunction with water-related or water dependent use." The pergolas and the concrete walkway are within 150 feet of the waterline of the Multnomah Channel, so that if they are deemed to be structures, these installations must be part of a "water-related or water dependent use" to be exempt from the setback requirement.*

The walkways and the pergolas are part of a landscaping project which is a water-related or water dependent use. The concrete pad and the pergolas are intended to provide a suitable setting for people to gather in small groups, such as families, where they can watch the river. Anyone familiar with simple real estate values realizes that "waterfront" property is almost invariably more valuable than landlocked property, other things being equal. The concrete walkway allows people to reach the pergolas with minimal disturbance to the grasses in this area. While it is not anticipated that there will be excessive foot traffic in this area, the concrete walkway invites anyone using this part of the property to do so without damaging the grass. The pergolas are situated so that they provide a comfortable, shaded setting where members of the marina community and guests can gather and watch the waters of the Multnomah Channel.

This is a water-related use. To remove this viewing location to 150 feet from the river's edge would largely destroy the aesthetic attraction of this setting. To provide a place from which members of the marina community can enjoy watching the river flow, the pergolas must be close enough to the water that they are effectively "on" the water. Removing them to the 150 foot setback line would largely destroy the experience these pergolas were intended to provide. The pergolas and the concrete walkway are part of an overall effort to landscape this property and in fairness to the goals with which they were installed, they must be regarded as "water related."

Notably, there is no other comparable place at the Big Island property for this sort of river-watching. The docks and the walkways must be kept open, so that groups cannot sit and relax on these. Boats are often unsuitable for want of space and because of the need to manage children. The pergolas provide a relaxed, shady location where family groups can take advantage of the beauty of the setting.

Finally, regarding the pergolas, in addition to the Big Island Marina, Mr. Hashem owns and manages a farm and a nursery on Sauvie Island. As part of the nursery operation, he intends to market climbing plants. As part of this operation, he intends to use the Big Island Marina garden area as a propagation area for his climbing plant and boxwood plant starts. He expects to periodically remove stock from the pergolas at the Big Island Marina, and adding these plants to his nursery stock. Thus, the pergolas come within the exemption for farm use."

Staff: The pergolas and proposed gazebo are approximately 20 feet from the edge of the river. Most, if not all of the concrete walkway is located within 150 feet from the edge of the river. The pergolas and concrete were originally placed in order to facilitate future weddings as a commercial use on the property. While weddings as a commercial use on the property are no longer proposed, the fact remains that the purpose of the structures was originally intended to facilitate weddings.

Now that the proposal to conduct commercial weddings on the property has been dropped, the applicant has indicated that development is intended to serve users of the marina in order to enhance their experience of the river.

Staff does not believe that the users of the marina are deprived of their ability to enjoy the river; and even if this were true, the enjoyment of the river by the marina users is secondary to primary functioning of the marina for mooring boats. Staff believes that the users of the marina have plenty of opportunity for the enjoyment of the river be it from the dock or from the use of the boats themselves.

Water dependent use is defined in the definitions section of the Willamette River Greenway standards (MCC 34.5815)^{xii}. The marina itself (dock, ramp to the dock etc.) is an example of a water dependent use because the related infrastructure necessarily needs to be in and/or near the water in order to serve its function as a place to moor boats. The development being considered under this permit, if used for events or gatherings, is not a water-dependent use because it does not necessarily need to be located near the water to serve its function.

Furthermore, if the development were to be accessory to the marina the applicant would need to apply for a new Community Service permit in order to modify the original Community Service permit.

The applicant's argument that the development is a farm use falls short. It is clear from the location and orientation of the development that its primary purpose is to provide access to a vantage point above the river. The applicant has not demonstrated that the location in question is necessary for the propagation of vines as a farm use. Additionally, the applicant's farm is located on another part of the island and he has not demonstrated that the propagation of vines cannot reasonably be carried out elsewhere on the subject property.

Staff finds the development is located in the MUA-20 district, a rural zone, and is not a water dependent use and is not a farm use; therefore, the development is required to meet the 150 foot setback from the river. At 20 feet from the river, the development does not meet the standard. The criterion is not met.

Hearings Officer: The marina is a water-dependent use. The applicant may be able to show that the proposed building are "in conjunction" with that use in a future land use application. A new land use application is needed, however, because the applicant has not proposed to modify the marina site plan to include the wedding venue development. If such an application is filed, the focus of the review should be whether the facilities meet the "in conjunction with" test and whether activities will be properly restricted to fit with a marina use. Evidence that shows that other marinas provide areas of this type or of more limited viewing areas would help determine whether the improvements are in conjunction with the marina or must be approved as another,

	<p>allowed community service use. The applicant will need to make this determination prior to filing a new application so that he selects the use that will fit with the activities he plans for the area.</p> <p>The improvements made to the site were not, when installed, provided in conjunction with the marina use. The wedding event venue use is not water-dependent or water-related facility. The applicant wishes to maintain some event use of the venue so I cannot conclude that the facilities are provided in conjunction with a water-dependent or water-related use.</p>
2.18	<p>(R) Any development, change of use or intensification of use of land classified WRG, shall be subject to design review, pursuant to MCC 34.7000 through 34.7070, to the extent that such design review is consistent with the elements of the Greenway Design Plan.</p> <p>Applicant (July 2, 2009): <i>"This provision does not appear to be applicable to the present permit application."</i></p> <p>Applicant (November 17, 2009): <i>"With regard to paragraph (R), Mr. Hashem notes that the Greenway permit application materials were drafted based on a specific review and consideration of the design review requirements of MCC 34.7000 and 34.7070. He believes that the application materials, particularly as supplemented by this letter meet all of the criteria of the design review requirements. He would ask that the Planning Department specifically call his attention to any deficiencies in these materials and allow him to correct these deficiencies."</i></p> <p>Staff: If approved, the applicant would be required to demonstrate that the proposal meets the requirements of MCC 34.7000 through 34.7070. The applicant has not addressed the approval the Design Review approval criteria.</p> <p>Hearings Officer: The applicant has not demonstrated compliance with this code criterion nor has he established that it is feasible for the existing and proposed development to achieve compliance with that code by imposing a condition of approval.</p>
2.19	<p>(S) The applicable policies of the Comprehensive Plan are satisfied.</p> <p>Policy 15 of the Multnomah County Comprehensive Plan lays out policies for implementation of the Willamette River Greenway standards including the following:</p> <p>Strategies</p> <ul style="list-style-type: none"> A. The Willamette River Greenway should be based on the boundaries as developed by the state Department of Transportation. For the County, those areas are generally depicted on the map entitled Willamette River Greenway. B. The following strategies should be addressed in the preparations of the Community Development Title:

	<p>C. The Zoning Code should include:</p> <p>a. An overlay zone entitled "Willamette River Greenway" which will establish an administrative review procedure to implement the requirements of the State of Oregon, Greenway Goal. The overlay zone should contain provisions related to:</p> <ol style="list-style-type: none">1. setback lines for non-water dependent uses;2. a design plan;3. the review procedures;4. specific findings required. <p>Staff: The applicant has submitted a Willamette River Greenway permit but has failed to meet setbacks set forth for non-water dependent uses.</p> <p>Hearings Officer: The cited policy applied to the County when it developed the WRG overlay zone and to subsequent amendments. It is not written to serve as an approval in a quasi-judicial, WRG review.</p>								
3.00	<i>MUA-20 Standards</i>								
3.01	<p>§ 34.2805 AREA AFFECTED MCC 34.2800 to 34.2885 shall apply to those lands designated MUA-20 on the Multnomah County Zoning Map.</p> <p>Staff: The entire property is located within the Multiple Use Agriculture – 20 (MUA-20) zone district (Exhibit B.17).</p>								
3.02	<p>§ 34.2815 USES No building, structure or land shall be used and no building or structure shall be hereafter erected, altered or enlarged in this district except for the uses listed in MCC 34.2820 through 34.2830 when found to comply with MCC 34.2855 through 34.2885.</p> <p>Staff: Gazebos and pergolas are listed as an allowed use under MCC 34.2820(k) when customarily accessory or incidental to any use permitted or approved in the district. The applicant has proposed that the gazebo, pergolas, and concrete are accessory to the marina use of the property. The marina was originally approved in 1975 under County permit CS 2-75 (Exhibit B.2). The marina approval did not include the addition of pergolas or a gazebo. However, the approval did include a condition for the planting of native vegetation along the "slough line."</p> <p>Hearings Officer: The applicant has not shown that gazebos or pergolas are customarily accessory to a marina use.</p>								
3.03	<p>MCC 34.2855 – Dimensional Standards:</p> <table><tr><td>Front</td><td>Side</td><td>Street Side</td><td>Rear</td></tr><tr><td>30</td><td>10</td><td>30</td><td>30</td></tr></table>	Front	Side	Street Side	Rear	30	10	30	30
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30	10	30	30						

	<p>Maximum Structure Height – 35 feet</p> <p>Staff: The applicant has not provided information regarding the height of the gazebo. The pergolas are estimated to be 14 feet tall. The rear property setback is 30 feet from the property line. The rear property line appears to be at or near the water's edge. The pergolas are located approximately 20 feet from the rear property line. The pergolas do not meet the required 30 foot setback from the rear property line. The proposed gazebo, at 20 feet from the rear property line would not meet the required 30-foot setback from the rear property line.</p>
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4.00	<p>Conclusion</p> <p>The application is denied. The applicant has not demonstrated that the existing concrete path, pergolas, and proposed gazebo meet the Willamette River Greenway standards.</p>																																
5.00	<p>Exhibits</p> <table border="1"> <thead> <tr> <th>Exhibit #</th><th>Description of Exhibit</th></tr> </thead> <tbody> <tr> <td>'A'</td><td>Applicant's Exhibits</td></tr> <tr> <td>A.1</td><td>General Application Form</td></tr> <tr> <td>A.2</td><td>Applicant's Narrative of 7/2/09</td></tr> <tr> <td>A.3</td><td>Certificate of On-Site Disposal</td></tr> <tr> <td>A.4</td><td>Fire District Review Form</td></tr> <tr> <td>A.5</td><td>Police Services Review Form</td></tr> <tr> <td>A.6</td><td>Certification of Water Service Form</td></tr> <tr> <td>A.7</td><td>Applicant's Site Plan</td></tr> <tr> <td>A.8</td><td>Applicant's Revised Narrative Received November 17, 2009</td></tr> <tr> <td>A.9</td><td>Email from Harold Hickock, Attorney for Big Island Marina, Received November 18, 2009.</td></tr> <tr> <td>A.10</td><td>Zoning Map</td></tr> <tr> <td>A.11</td><td>Email from Mike Hashem regarding number of existing boat slips at the marina. Received August 11, 2009.</td></tr> <tr> <td>A.12</td><td>Email from Mike Hashem. Received August 12, 2009.</td></tr> <tr> <td>A.13</td><td>Email from Mike Hashem regarding number of existing boat slips and live-aboards at the marina. Received August 12, 2009.</td></tr> <tr> <td>A.14</td><td>General Application signed by Connie Parker of June Parker LLC</td></tr> </tbody> </table>	Exhibit #	Description of Exhibit	'A'	Applicant's Exhibits	A.1	General Application Form	A.2	Applicant's Narrative of 7/2/09	A.3	Certificate of On-Site Disposal	A.4	Fire District Review Form	A.5	Police Services Review Form	A.6	Certification of Water Service Form	A.7	Applicant's Site Plan	A.8	Applicant's Revised Narrative Received November 17, 2009	A.9	Email from Harold Hickock, Attorney for Big Island Marina, Received November 18, 2009.	A.10	Zoning Map	A.11	Email from Mike Hashem regarding number of existing boat slips at the marina. Received August 11, 2009.	A.12	Email from Mike Hashem. Received August 12, 2009.	A.13	Email from Mike Hashem regarding number of existing boat slips and live-aboards at the marina. Received August 12, 2009.	A.14	General Application signed by Connie Parker of June Parker LLC
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A.15	Letter from Mike Hashem to Mark Greenfield. Received November 12, 2009.
A.16	Letter from Mike Hashem to Julia Bergren. Received November 12, 2009.
A.17	Letter from Mike Hashem to Jeffrey B. Thomas. Received November 18, 2009.
A.18	Letter from Mike Hashem to Harriet Lovin. Received November 10, 2009.
A.19	Letter from Mike Hashem to JoAnn Waters-White. Received November 05, 2009.
A.20	Letter from Mike Hashem to Patrick Flood. Received November 05, 2009.
A.21	Letter from Mike Hashem to Robbie Lambert. Received November 05, 2009.
A.22	Letter from Mike Hashem to Ivan Kafoury. Received October 26, 2009.
'B'	Staff Exhibits
B.1	Assessment and Taxation Property information (Tax Lot 3100)
B.2	Copy of Case File CS 2-75 (Community Service permit that approved the marina located at the subject property).
B.3	Email from staff to Harold Hickok, Attorney for the Big Island Marina. Sent September 8, 2009.
B.4	Email from Erin Mick (City of Portland Sanitarian) to Julia Bergren regarding sanitation at the Big Island Marina. Received August 12, 2009.
B.5	Email from Michael Grimmet (Multnomah County Code Compliance Specialist) to Mike Hashem. Received August 03, 2009.
B.6	2006 Aerial Photograph of the subject property.
B.7	1998 Aerial Photograph of the subject property.
B.8	Photograph of the beginning of the concrete walkway taken from the marina parking lot. Photograph taken April 24, 2009.
B.9	Photograph of tent structure. Photograph taken April 24, 2009.
B.10	Photograph of concrete walkway and southern pergola. Photograph taken April 24, 2009.
B.11	Photograph of concrete pad. Photograph taken April 24, 2009.
B.12	Photograph of pergolas. Photograph taken April 24, 2009.
B.13	Photograph of river bank with pergolas. Photograph taken April 24, 2009.
B.14	Close up photograph of concrete pad. Photograph taken April 24, 2009.
B.15	Photograph of concrete walkway and northern pergola. Photograph taken April 24, 2009.
B.16	Photograph of marina dock. Photograph taken April 24, 2009.

B.17	County Zoning Map
'C'	Procedural Exhibits
C.1	Opportunity to Comment Notice. Mailed September 29, 2009.
C.2	Letter indicating application is complete. Mailed September 28, 2009.
C.3	Letter indicating application is incomplete. Mailed August 04, 2009.
'D'	Comments Received
D.1	Letter from Patrick Flood. Received October 05, 2009.
D.2	Email from Patrick Flood. Received October 08, 2009.
D.3	Letter from Michael Shinn. Received October 05, 2009.
D.4	Letter from Michele C. Dehart. Received October 08, 2009.
D.5	Letter from Steve and Harriet Lovin. Received October 08, 2009.
D.6	Email from Robbie Lambert. Received October 11, 2009.
D.7	Email from Leslie and Frank Bagon. Received October 11, 2009.
D.8	Letter from Mark J. Greenfield. Received October 13, 2009.
D.9	Email from Jennifer Adams. Received October 11, 2009.
D.10	Email from Jeffrey B. Thomas. Received October 12, 2009.
D.11	Email from Ivan Kafoury. Received October 12, 2009.
D.12	Email from Michelle and Steven Burger. Received October 11, 2009.
D.13	Email from Courtney Frisse. Received October 13, 2009.
D.14	Letter from Julia Bergren. Received October 13, 2009.
D.15	Letter from Julia Bergren. Received October 14, 2009.
D.16	Email from JoAnn Waters-White and Winfield G. White. Received October 13, 2009 at 4:52 PM.
D.17	Email from Leslie Bagon. Received November 23, 2009.
D.18	Email from Jennifer Adams regarding the post-card referenced in D.19 below. Received September 06, 2009.
D.19	Post card from mailed by private group or citizens (not by Multnomah County). Received August 31, 2009.
D.20	Email from Leslie Bagon regarding a "fraudulent flyer" with flyer attached. Received October 1, 2009.
'H'	Exhibits Received After Issuance of Staff Decision
'H'	Exhibits Received After Staff Decision and Prior to Appeal Hearing
H.1	Email from Erin Mick, City of Portland Sanitarian, to staff received December 14, 2009. RE: Drain-field at Big Island Marina.

H.2	Email from Erin Mick, City of Portland Sanitarian, to staff received December 15, 2009. RE: Sauvie Island Marina Drainfield (note Big Island Marina was formerly Parker's Marina).
H.3	Email to Mike Hashem (applicant) from staff sent December 14, 2009. RE: Question concerning what constitutes a live-aboard and agricultural structures.
H.4	Email to Mike Hashem (applicant) and Harold Hickok (applicant's attorney) from staff sent December 15, 2009. RE: additional information concerning the definition of live-aboards.
H.5	Email to Mike Hashem (applicant) from staff sent December 16, 2009. RE: Further discussion regarding definition of live-aboards.
H.6	Email from Mike Hashem (applicant) received December 18, 2009 regarding the drain-field.
H.7	Email from Mike Hashem (applicant) received December 21, 2009 regarding the boundary line dispute with neighbor to the north (includes an attached letter from Surveyor Steven Buckles).
H.8	Letter from W.G. White and JoAnn Waters-White in support of denying the application. Includes attached photographs. Received December 29, 2009.
H.9	Letter from Harold Hickok (applicant's attorney) requesting a supplemental staff report prior to the appeal hearing. Received January 4, 2010.
H.10	Letter from County Attorney's office declining request for a supplemental staff report. Received January 11, 2010.
H.11	Email confirming receipt of letter in Exhibit H.10. Received January 12, 2010.
H.12	Letter from Crystal and Jeremy Pfortmiller in support of approving the application. Received January 12, 2010.
H.13	Letter from Russell Amos Bennett in support of approving the application. Received January 12, 2010.
H.14	Letter from Joe Naboulsi in support of approving the application. Received January 12, 2010.
H.15	Letter from Shannon Powell Naboulsi in support of approving the application. Received January 12, 2010.
H.16	Letter from Ioannis Kondilis in support of approving the application. Received January 12, 2010.
H.17	Letter from Elizabeth Hashem in support of approving the application. Received January 12, 2010.
H.18	Email from Cynthia L. Woldridge in support of approving the application. Received January 13, 2010.
H.19	Email from Rick G. Woldridge in support of approving the application. Received January 13, 2010.

H.20	Email from Mike Hashem (Applicant) with attached letter from Adnan Haddad, PE regarding the concrete path and pergolas. Received January 13, 2010.
H.21	Email from Matt Kramer in support of approving the application. Received January 13, 2010.
H.22	Email from Wilda Williams in support of approving the application. Received January 13, 2010.
H.23	Letter from Julia Bergren in support of denying the application. Received January 13, 2010.
H.24	Letter from Mike Bennett in support of approving the application. Received January 13, 2010.
H.25	Email from Sofia Hashem in support of approving the application. Received January 13, 2010.
H.26	Email from Alex in support of approving the application. Received January 14, 2010.
H.27	Email from Michele DeHart with attached letter in support of denying the application. Received January 14, 2010.
H.28	Copy of OAR ch. 340. div. 071 (03-01-05) relating to DEQ standards for sanitation systems.
H.29	Email from Bob Egger in support of approving the application. Received January 14, 2010.
'H'	Exhibits Received at Appeal Hearing
H.30	Oral Testimony Sign in Sheet #1 from appeal hearing on January 15, 2010.
H.31	Oral Testimony Sign in Sheet #2 from appeal hearing on January 15, 2010.
H.32	Oral Testimony Sign in Sheet #3 from appeal hearing on January 15, 2010.
H.33	Oral Testimony Sign in Sheet #4 from appeal hearing on January 15, 2010.
H.34	Letter from Mike and Liz Hashem Received at the appeal hearing on January 15, 2010. Includes several attachments including a letter from an arborist, a letter from a civil engineer, staff correspondence, and eight site photographs.
H.35	Oral Testimony Sign in Sheet #5 from appeal hearing on January 15, 2010.
'H'	Exhibits Received After Appeal Hearing
H.36	Email form Aric Outlaw in support of approving the application. Received January 19, 2010. (Note: Email was sent on January 15, 2010, prior to the appeal hearing, but was not released from the County's email spam filter until January 19, 2010, after the appeal hearing).
H.37	Email from Peter Mason in support of approving the application. Received January 22, 2010.

H.38	Email exchange between County planning staff and City of Portland Sanitarian from January 22, 2010 to January 25, 2010.
H.39	Letter from Russell Bennett in support of approving the application. Received January 25, 2010.
H.40	Email from Harold Hickok (applicant's attorney) to Hearings Officer and County Counsel (forwarded by County Counsel). Received January 26, 2010.
H.41	Email from Harold Hickok (forwarded from County Attorney's Office) regarding applicant's withdrawal of a Community Service Permit application for a kayak club and clubhouse. Received January 26, 2010.
H.42	Email from Blake Thomas regarding removal of vegetation. Received January 27, 2010.
H.43	Email from Erin Mick regarding concrete path. Received January 28, 2010.
H.44	Email from Erin Mick to Gary Artman, Natural Resource Specialist, Oregon Dept. of Environmental Quality regarding drain-field. Received January 29, 2010.
H.45	Email from Mike Hashem to Erin Mick regarding drain-field. Received January 29, 2010.
H.46	Letter from Gary Artman, Natural Resource Specialist, Oregon DEQ, to Grant T. Johnson, owner of Sauvie Island Moorage regarding drain-field. Received February 1, 2010.
H.47	Memo from Kevin Cook, Multnomah County Staff Planner regarding questions raised at the appeal hearing. Received February 1, 2010.
'H'	Applicant's Final Argument
H.48	Applicant's Final Argument. Received February 8, 2010.

Endnotes:

ⁱ I have not addressed the issue whether a wedding venue is allowed as a community service use and have not attempted to provide a complete list of needed approvals.

ⁱⁱ For the sake of simplicity, the developed area being reviewed by this application will be referred to as the wedding event venue, wedding venue area or wedding venue. These labels reflect the intended function of the area at the time it was developed. The label is not meant to indicate that this is the use proposed by this application.

ⁱⁱⁱ The marina was also billed for removal of a white oak tree by the contractor who removed the cottonwood tree.

^{iv} Exhibit H.48, p. 1.

^v Mr. Stamp argues that a farm use includes a hobby farm use. This argument is based on a 2003 LUBA case, *Harland v. Polk County*, 44 Or LUBA 420 (2003). The *Wetherell* case, however, contradicts that position and provides the controlling rule on the topic of what constitutes a farm use. The hearings officer agrees with Mr. Stamp that the applicant is not required to show that the use is a "commercial farm operation" to be considered a "farm use" but the farm use must fit the statutory and code definitions of the term.

^{vi} The parking lot is not located in the location shown on the 1975 site plan filed by Mr. Parker. Instead, the parking lot is located closer to the slough and farther away from the homes.

^{vii} Letter from Gary Artman to Grant T. Johnson and Sauvie Island Moorage Company dated February 1, 2010 regarding the potential impact of the Hashem improvements on the shared drainfield located on the Hashem property and the Sauvie Island Marina.

^{viii} The site plan for the marina does not include improvements in this area of the property. The only improvement in the area prior to the development of the wedding venue was the septic drainfield.

^{ix} The fact that a maximum of three slips may be used as “live aboard” spaces does not make the marina a residential use of the type exempted by the WRG rules. This is true because the live aboard spaces are a minor part of the 38-space marina use that is defined by the County code as a community service use. Also, gazebos and landscaping of the type built by Mr. Hashem have not been shown to be customarily related to the use and enjoyment of a home of this type.

^x MCC 34.0005 definition of a structure – That which is built or constructed. An edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

^{xi} MCC 34.0005 definition of a building – Any structure used or intended for supporting or sheltering any use or occupancy.

^{xii} MCC 34.5815: *Water-dependent use* – means a use which can be carried out only on, in, or adjacent to water areas because the use requires access to the water body for waterborne transportation or recreation. *Water-dependent use* also includes development, which by its nature, can be built only on, in, or over a water body (including a river). Bridges supported by piers or pillars are *water-dependent uses*.