

**MULTNOMAH COUNTY**

LAND USE AND TRANSPORTATION PROGRAM

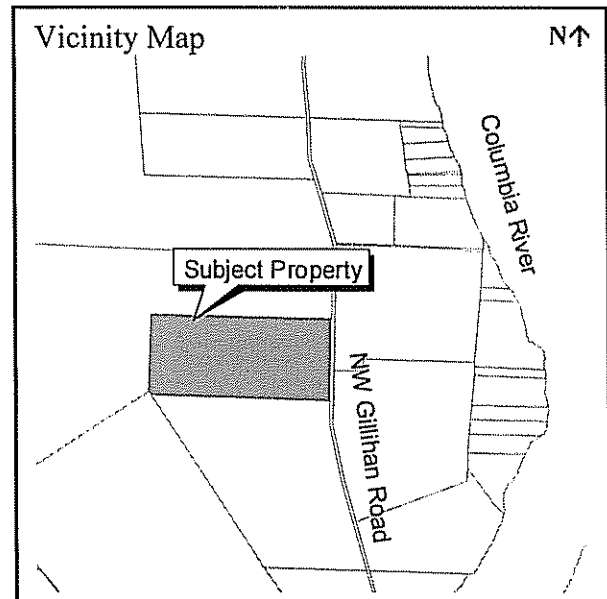
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Findings and Decision of the Multnomah County Hearings Officer

Major Variance

Case File: T3-06-010**Applicant/
Owner:** Brian Bowman
Bailey Nurseries, Inc.
18616 NW Reeder Road
Portland, OR 97231**Location:** 19815 NW Gilihan Road
TL 300, Section 14
Township 2N South, Range 1W, W.M.
Tax Account # 971140050**Zoning:** Exclusive Farm Use (EFU)**Site Size:** 72.71 Acres**Public
Hearing:** Held December 8, 2006, at the offices of the Multnomah County Land Use and Transportation Program. The record for this case closed at adjournment of the hearing on December 8.**Summary:** A Major Variance request for relief from the driveway paving requirements in MCC 34.4170(A) of decision T2-04-082 and modification of condition #1 of that decision..

Impartiality of Hearings Officer: As a preliminary to the public hearing, the Hearings Officer stated that she had no financial interest in the outcome of the decision; that she had no prior relationship with the applicant; that she had neither visited the site nor had any ex parte communication with any person concerning the merits of the case; and that she could fairly render a decision based upon the evidence and criteria. No person objected to this Hearings Officer hearing and rendering a decision on the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Note: Findings herein address Multnomah County ordinance requirements. Multnomah County Code criteria and Comprehensive Plan Policies are in a **bold** font. Planning staff comments and analysis may follow applicant comments. The notation "Applicant" precedes the applicant's comments, and the notation "Staff" precedes staff comments and analysis. The Hearings Officer's analysis and conclusions may follow, preceded by the notation "Hearings Officer." **Unless explicitly noted otherwise, the Hearings Officer adopts and incorporates Staff comments and analysis as findings supporting this decision.**

1. Project Description

Applicant: Applicant has completed construction of an agricultural nursery farm product processing building on a 49 acre parcel which is part of an 800 acre tract located on Gillihan Road on Sauvie's Island. The conditions of approval in Case File T2-05-059 required the Applicant to construct a 2000 foot long and 20 foot wide paved access driveway across high value farmland to access the new building. The Applicant seeks a variance(s) from the strict application of MCC 34.4170(A) as it is being applied in this rural and agricultural portion of the County, to shorten and narrow the area required to be paved.

Staff: Staff agrees with the applicant's description of the general scope of and reason for imposition of the paving requirement except that the decision imposing the condition is casefile T2-04-082. MCC 34.4170(A) provides:

"MCC 34.4170 ACCESS (A) - Where a parking or loading area does not abut directly on a public street or private street approved under MCC 34.7700 et seq., the Land Division Chapter, there shall be provided an unobstructed paved drive not less than 20 feet in width for two-way traffic, leading to a public street or approved private street. Traffic directions therefore shall be plainly marked."

The requirement to complete the paving is imposed under condition #1 of T2-05-059, Exhibit 1.

Subsequent to issuance of T2-04-082, the applicant requested a Modification of condition #1 seeking a waiver to the driveway improvement requirement. That request was decided under T2-05-059, and was denied on the grounds that the code does not provide for waiver to the driveway improvement requirement. [] Exhibit 2.

The farm crop processing facility is approved for storage, preparation, and shipping of nursery products. The use occurs on a site with a building that is 30,000 square feet in size, and the

number of employees ranges from 3 up to 40 seasonally in the winter. The applicant has received a road approach permit that requires paving the full 20' width to a distance of 50' from the right-of-way

Hearings Officer: The applicant and his attorney Walter Gowell testified at the public hearing that the farm processing facility has been constructed and is in use. Exhibit 5; Exhibit H-1, tabs 2, 4. The access road from the right-of-way of Gillihan Road to the facility's parking and loading area has been built to standard as a twenty-foot-wide road that is paved for 50 feet adjacent to the right of way, and graveled for most of its distance. See photos at Exhibit H-1, tab 2.

2. Site Characteristics

Staff: The subject site is off of Gillihan Road on Sauvie Island. The subject property is 72.71-acres but in a tract of over 800-acres. The surrounding area is zoned Exclusive Farm Use (EFU) and is in farm production. The building site is roughly ½ mile into the property from Gillihan Road and near a private irrigation ditch system. The property is virtually flat and being actively farmed.

Hearings Officer: The applicant located the processing facility toward the rear of the property, 2,000 feet from the county road, where the soils on the parcel were least productive. The soils closer to the right of way are protected, high value soils, and remain in farm production. See Exhibit H-3, tab 5. The graveled portion of the access road could also be used for production in the applicant's nursery business if it were no longer needed for access. The paved portion of the road is no longer available for farm use without, at the least, significant deconstruction efforts.

The configuration of the developed and farmed areas on the subject site is unusual in that other agricultural operations in the vicinity have typically located structures, parking lots, and loading areas much closer to the county rights of way. See Exhibit H-1, tab 8.

3. Proof of Ownership

MCC 37.0550 Initiation Of Action.

Except as provided in MCC 37.0760, Type I - IV applications may only be initiated by written consent of the owner of record or contract purchaser. PC (legislative) actions may only be initiated by the Board of Commissioners, Planning Commission, or Planning Director.

Staff: Multnomah County Assessment and Taxation records show Bailey Nurseries, Inc. as the owner of the subject property. Brian Bowman, Administrator of Bailey's Nurseries, Inc. has signed the General Application Form (Exhibit 3) authorizing the processing of the permit.

Hearings Officer: This criterion is satisfied.

5. Variance Classification

(A) A Major Variance is one that is in excess of 25 percent of an applicable dimensional requirement. A Major Variance must be found to comply with MCC 34.7600 (A).

(1) A Major Variance must be approved at a public hearing except when all owners of record of property within 100 feet of the subject property grant their consent to the variance according to the procedures of MCC 34.7605 (B) (1) and (2).

Staff: The applicant is requesting two variances. The first is described in his narrative (Exhibit 5) as:

“To reduce the twenty foot width requirement of the access roadway to a minimum width of 12 feet or the width needed to satisfy emergency vehicle standards and requiring periodic turnouts at regular intervals to permit two-way travel.”

The applicable dimensional requirement is the 20 foot roadway width in MCC 34.4170. This equates to an approximately 60% reduction in the dimensional requirement, therefore the request is classified as a Major Variance and is subject to the criteria in finding 6 below. The applicant did not obtain all the signatures of property owners within 100 of the subject property, therefore the request must be processed as a Type 3 application at a public hearing.

The second variance request is:

“To reduce the required length of the paved portion of the access roadway to between 100 and 500 feet or the minimum amount necessary as approved by the County’s traffic engineering staff to assure removal of mud from vehicles and equipment prior to their entry onto the public right of way.”

The length of the required driveway is not a specified dimensional requirement that is subject to a variance request pursuant to the Variance Classification provision above. Furthermore, the paving is an improvement requirement of the code not subject to a variance request. With that in mind, the focus of the staff report is on a reduction to the width of the paved driveway from 20-feet to 12-feet.

Hearings Officer: The applicant contends that staff has mistakenly construed variance classification criteria at MCC 34.7605 and thereby improperly limited the requirements from which a variance may be requested. According to the applicant, a criterion from which a variance may be approved is “an applicable dimensional standard,” and that a dimensional standard can be one that is defined by some identified point of termination, such as a monument or the parking and loading area of the applicant’s facility. The improvement standards from which the applicant seeks partial relief is therefore conceptually dimensional standards. The applicant argues that both the length and the width of the required improvements are dimensional standards within this sense.

The purpose of this zoning is preservation of agricultural lands for farm use. The purposes of the paving and width requirements are to ensure that the access road is adequate for its normal, intended two-way traffic and for emergency use, and to keep the county road and nearby properties unobstructed by farm traffic and clear of mud and farm debris. The variance requirements should be construed consistently with these purposes. Nothing set forth in the road or variance requirements is inconsistent with the notion that as much high value farmland as possible should be preserved from damaging development, or to restate that concept, as little as possible of the best farmland in the Sauvie Island EFU zone should be paved over or used for a roadway. I concur with the applicant that both the requirement for the width of the roadway and the requirements for the width and length of the pavement are dimensional standards subject to variance within the exclusive farm use zone of the Sauvie Island/Multnomah Channel Rural Plan Area.

The findings immediately below in section 6 of this decision will apply the criteria for a major variance to the applicant's request for relief from the requirements related to both the length of the pavement and the width of the access roadway.

6. Major Variance Approval Criteria

MCC 34.7600(A) The Approval Authority may permit and authorize a variance from the requirements of this Chapter only when there are practical difficulties in the application of the Chapter. A Major Variance shall be granted only when all of the following criteria are met. A Minor Variance shall meet criteria (3) and (4).

- 6.1. Staff:** Staff understands that the practical difficulty in this matter is the significant cost involved with constructing and paving a 2,000 foot long driveway to the processing facility. This "threshold" requirement for consideration of a variance is therefore met.

Hearings Officer: The other practical difficulty involved in compliance with the paving requirements is the damage to valuable agricultural land that would result.

- 6.2. (1)** A circumstance or condition applies to the property or to the intended use that does not apply generally to other property in the same vicinity or district. The circumstance or condition may relate to the size, shape, natural features and topography of the property or the location or size of physical improvements on the site or the nature of the use compared to surrounding uses.

Applicant: Applicant's land has unique topographical features resulting in the location of water bearing soils of lesser quality located at the rear of the property. The applicant has chosen to construct its agricultural processing facility on the portion of the property with the less productive soils

These topographical features of Applicant's individual parcel have resulted in drainage characteristics which have located the portions of the property with poor soils being remote from the public roadways adjacent to the property. In this instance, the location of the processing facility is about 2000 feet from the nearest public roadway

Applicant's use of the portion of the property with lesser soils is the best location and use of an agricultural processing building for nursery crops. Most adjacent property owners do not operate agricultural buildings which have parking and access roadway requirements. Most agricultural buildings on adjacent parcels are not regulated in this fashion

The MCC 34.4170(A) requirement for a 20 feet paved access roadway to a parking area works a financial hardship when the facility requiring parking is 2000 feet from the public roadway. If paved to the full regulation width and length the roadway is estimated by the County Engineer to cost \$78,000. A Voluntary Compliance has been entered into with the County covering this potential cost and permitting time for the processing of this Variance application. A 12 foot paved roadway would provide adequate access if regular periodic "turnouts" are provided to allow safe two way passage of traffic.

The "dimensional" standards of the access roadway are subject to variance for good cause shown. The requirement of MCC 34.4170(A) for the full length of the private access roadway to be paved works a financial hardship on the applicant, and damages Applicant's parcel by unnecessarily paving of EFU lands

Agricultural access road ways on adjacent parcels are not typically required to be paved. A 100 to 500 foot paving requirement would be fully adequate to protect the public roadway against mud being tracked onto the public road.

Staff: Staff concurs with the applicant that the property contains a unique circumstance. Because of the tract configuration of Bailey's nurseries, the applicant has explained that the location of the processing plant provides the best site for crop management and preparation for all their contiguous farm holdings by utilizing an area of poorly drained soils not well suited for agriculture. Soils adjacent to the roadway where a building would typically be built are productive soils better suited to use as farm land. In addition, the processing facility is subject to code requirements for greater improvements than are outright farm use buildings. In this case, the decision to place the facility in an area of lower productivity coupled with the higher improvement requirements results in a circumstance that does not apply generally to all farm structures in the area.

Hearings Officer: This criterion is satisfied, both as to the length and width requirements. The applicant has provided narrative and photographic evidence that most farm properties in the area have located farm structures adjacent to the county road for whatever set of reasons. This applicant located the processing facility in a place uniquely appropriate for the subject site and consistent with state and local EFU policy. Requiring the applicant to pave a 2,000-foot by 20-foot strip through the field would punish good planning for farm management of the soils on this property. Because of these unique circumstances, related to the natural features of this property, this criterion is met.

6.3. (2) The zoning requirement would restrict the use of the subject property to a greater degree than it restricts other properties in the vicinity or district.

Applicant: MCC 34.4170(A) does not apply to most agricultural structures and out buildings on adjacent parcels such as barns, shops and storage buildings.

Applicant's agricultural building is occupied on a daily basis, but could be accessed via a different route if nursery field layouts or crops grown are modified in the future.

Other nearby farms remain free to modify the route of non-paved access roadways to maximize agricultural production and maintain crop rotation flexibility.

The over breadth of the paving requirement restricts the future flexibility to relocate the access roadway as a part of any future reconfiguration of fields and crops.

Other adjacent farmers are not restricted in a similar fashion

Staff: Staff agrees with the applicant's statement that the 20 foot width requirement does not apply to the other buildings noted. It is clear that given the length of the road, a measurably greater amount of land is removed from production than would be the case for a farm road used to access fields. A farm field access road is typically one lane, perhaps about 12 feet wide, with minimal if any surface and subsurface improvement. Staff estimates that reducing the required width would put just over 1/3 of an acre back into farm production, and this supports farm production which is the purpose of the zone. Requiring a third of an acre of land to be paved and taken out of farm production is a greater restriction than adjacent properties are under when having a 12-foot wide paved access would meet the purpose of the code.

Staff is not convinced by the applicant's other argument, that there is greater restriction because the width and paving requirements make it impractical to relocate the road thus there is a loss of crop management flexibility compared to other farm roads. Construction of the road will presumably require construction of a rock base sufficient to support loaded trucks going to and from the processing facility in winter conditions. It isn't clear that a road built to this level of durability would be removed and reconstructed elsewhere for crop rotation purposes.

This criterion is met due to the road width requirement removing more farmland than is usual for a farm access road.

Hearings Officer: Staff's conclusion that the previously-required width of the paved road removes from farm production an inordinate amount of agricultural land is no less true when one also considers a reduction in length of the paved road. This criterion is satisfied.

6.4. (3) The authorization of the variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or district in which the property is located, or adversely affects the appropriate development of adjoining properties.

Applicant: The reduction of the paving width from 20 feet to 12 feet will have no impact or effect off of the applicant's property. The impact is limited to those persons actually using the private roadway on-site. The suggested requirement for compliance with emergency vehicle standards would protect the public welfare of Applicant's employees.

The reduction of the dimension relating to the length of the paving should not have any impact or effect off of the property if the requirement is maintained for a sufficient distance to result in mud being dislodged from the wheels of vehicles prior to reaching the public roadway. A 100-500 foot distance for paving should be more than adequate for that purpose.

There is no other external impact of the paving requirement which adversely affects the development of adjoining properties if the paving is required for a sufficient distance to protect the public roadway from debris being tracked onto the roadway surface.

The reflexive and literal application of MCC 34.4170(A) in the rural context can significantly increase access costs and will likely inhibit the appropriate development of adjoining properties by imposing an undue cost of construction requirement on those wishing to build agricultural processing buildings permitted outright in the zone.

Staff: For this matter, staff understands that the relevant elements of this criterion in this case are detriment to public welfare and injury to property in the vicinity. The public welfare is further understood to be related to safety of vehicles using the access and any impacts to Gillihan Road. Injury to property in the vicinity is associated with off-site impacts of use of the road as constructed. There does not appear to be any relationship between the road width and surfacing requirement and development of adjoining properties.

It is not clear that off-site impacts from dust would not occur from the road if it was unpaved for a substantial portion of its length. In any event, and as indicated in finding number 1., waiver of the paving requirement is not a remedy provided in the code. Staff does agree that reduction of the paved width from 20' to one lane - perhaps 12' - would suffice since most trips would use the paved surface and therefore likely result in minimal dust. Staff further agrees that tracking of soil onto Gillihan Road would be minimized by the combination of the approved 20' wide paved road approach, and a paved travel lane.

Regarding the public welfare/safety aspects of the road, it is not clear from the information in the casefile what configuration of the road is being represented as safe. There is no road design. There is a fire district response that was signed by the fire chief four months prior to submittal of the variance request, and there is no indication of what road design was considered (Exhibit 6). It is further not clear that fire access is the only consideration needed to support a finding of safe access since there are other vehicles using the road.

The County has adopted code requirements for driveways under MCC 29.012 Fire Apparatus Means of Approach – Standards for Private Streets and Private Driveways Serving New and Replacement One-and Two-Family Dwellings (Exhibit 7). As indicated in the title, this code is directed toward fire access for dwellings. In contrast, the use served by this driveway is an industrial use that will have different trip and vehicle characteristics since there will be up to 40 employees and relatively large trucks using the site. Staff has no way to evaluate nor evidence to support what the proper spacing of turnouts should be, or what the turnout dimension should be considering that some of the trucks might be quite long.

Staff believes that it is possible to design a safe and functional driveway that is less than 20 feet wide, however the applicant has not met his burden of providing substantial evidence that the proposed road meets these objectives.

Hearings Officer: Staff's analysis suffers from an apparent misunderstanding of the circumstances on the subject site and some confusion regarding the process. At the public hearings, the applicant and his attorney addressed the general confusion and have cleared up the misunderstandings. This criterion is satisfied, based upon the testimony and evidence in the entire record, as explained below.

The Fire Chief's response, on behalf of the local fire district, that the roadway would be safe was meant to accompany the current application. The application materials were mistakenly submitted by the applicant before the required pre-application meeting with county planners, but the application has not changed since that meeting. Furthermore, a 20-foot-wide, graveled road has been constructed for much of the length from the right of way to the facility. The fire district response was therefore based upon the knowledge of the design, capacity and operation of the existing access way and the current application.

That the road has been constructed to standard and graveled for a 20-foot-width from the pavement adjacent to and in from the right of way to the facility demonstrates that it will be feasible to reduce the width to a 12-foot travel lane with turn-outs of sufficient size and correct spacing to allow two-way travel. Satisfaction of a condition of approval to this effect will protect the public's interests in ensuring that farm traffic will not line up on the right of way, obstructing traffic, or on nearby properties, and that emergency access will be available to the property.

Satisfaction of a condition of approval requiring that the road be paved to the length necessary to assure removal of mud, dust and debris from vehicles and their equipment before their entry on to the public right of way will protect the public's interest in keeping the county road clear of damaging substances. That the access road has been partially paved at its intersection with the county road, as required, that the roadway has already been laid out and constructed as a gravel road, demonstrate that satisfaction of the condition is feasible. A number of nearby property owners on Sauvie's Island have testified in support of the application that the applicant's current roadway is preventing the tracking of debris on the county road. Exhibit H-1, tab 12.

As conditioned, this criterion is satisfied.

6.5. (4) The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor will it establish a use which is not listed in the underlying zone.

Applicant: The fact that Applicant's roadway approach design received *plan review approval by the City of Portland* transportation staff indicates the proposed driveway improvement with a 50 foot approach area to Gillihan Road was not in conflict with the Comprehensive Plan as interpreted by the County traffic engineering staff.

The Comprehensive Plan does not preclude the approval of variances where applicable criteria

can be satisfied. MCC 29.507 is another example of the Zoning Code's authority for discretion to permit variances from roadway improvements when written information substantiates the variance is in keeping with the intent and purpose of the subchapter and adopted rules, and the intended variance will not adversely effect the intended function or the street or other related facility.

Comprehensive Plan Policy 10. provides that roadway standards should adopt standards specific to the function of the road in an exclusive agricultural area., MCC34,4170(A) fails to reflect this Comp Plan policy spirit that most private access roads in EFU zones are not paved, and that the paving over of high value EFU lands should be discouraged..

Comprehensive Plan Policy 9. specifies the purpose of the policy is to preserve the best agricultural lands from inappropriate and incompatible development. A variance to minimize paving requirements to a width needed for safety, and a length needed to protect public roadways is consistent with this Plan policy.

Comprehensive Plan Policy 9. also declares the County's policy to preserve the economic value of agricultural lands and preserve essential environmental characteristics. A variance to the 20 foot wide paving of 2000 feet of prime agricultural land is consistent with this policy. The reduction of the length of the paving requirement to that needed to protect the public roadway is also consistent with this Comp Plan policy.

Staff: Staff agrees with the applicant's statements regarding consistency of a road width/paving width variance with Framework Plan Policy 9 because this reduced width does preserve agricultural land (see Exhibit 9). The applicant also cites MCC 29.507 and associated sections that comprise the County Street Standards code, and these rules are generally not applicable to driveways outside of the public right-of-way interface (reproduced in part in Exhibit 8). The arguments regarding Comprehensive Plan Policy 10 are also not clear. Staff is unaware of any other Framework Plan policies that are relevant to or inconsistent with this request and therefore finds this criterion is met.

Hearings Officer: This criterion is satisfied.

7. Modification of Condition of Approval #1 of T2-04-082

7.1. 37.0660 Conditions Of Approval And Notice Of Decision.

(E) Modification of Conditions. Any request to modify a condition of permit approval shall be processed in the same manner, and shall be subject to the same standards, as was the original application provided the standards and criteria used to approve the decision are consistent with the current code. However, the decision maker may at its sole discretion, consider a modification request and limit its review of the approval criteria to those issues or aspects of the application that are proposed to be changed from what was originally approved.

Staff: In order to effect a variance to the road width approval, staff recommends that any variance decision include a modification of the condition for the road imposed in the original decision. The text of that condition is included below, and the full decision is included as Exhibit 1.

1. A minimum 20-foot wide unobstructed paved surface driveway shall be constructed from NW Gillihan Road to the parking area of the new structure prior to a Certificate of Occupancy being issued by the City of Portland Building Bureau or, a performance bond in the favor of Multnomah County equivalent to the cost of completing such improvements shall be filed with the Planning Director [MCC 34.4135(A) and MCC 34.4170].

Staff believes that this variance application and process results in adequate consideration of the subject criterion, MCC 34.4135(A). The wording of the modification will need to be decided when the design of the road is approved. Staff recommends that the road be constructed as soon as reasonably possible because the processing facility is in use.

Hearings Officer: The wording of Condition of Approval 1, Decision T2-04-082, is modified and restated as set forth in Conditions of Approval 1 and 2, below.

Conditions of Approval:

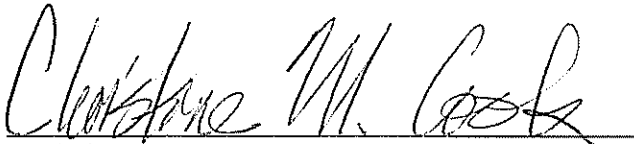
NOTE: Once conditions of approval have been met, application for building permits may be made. When ready for zoning sign-off for plan check to obtain a building permit, the applicant shall call Staff Planner Don Kienholz at (503) 988-3043, for an appointment for a zoning review plan check..

1. A minimum 12-foot wide, unobstructed, paved surface roadway shall be constructed from NW Gillihan Road from the pre-existing, paved access to the right of way for a length of between 100 and 500 feet, or the minimum length necessary as approved by the County's traffic engineering staff to assure removal of mud, dust, and other debris from vehicles and equipment prior to their entry to the public right of way.
2. The remainder of the required access roadway from the paved section required by Condition of Approval 1 to the parking and loading area of the farm processing facility shall have a minimum width of 12 feet, or the width necessary to satisfy emergency vehicle standards and accommodate farm vehicles and equipment, and shall have periodic turnouts of the size, number, and spacing approved by the County's traffic engineering staff as necessary to accommodate
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two-way travel. The required roadway shall have a gravel surface and be built to the standards required by the County traffic engineering staff.

Hearing Officer Decision:

Based upon the evidence in the record, including the Exhibits listed below, and the applicable approval criteria, and the findings, analysis, and conclusions in this decision, and subject to the Conditions of Approval above, the request for major variances from the requirements for length and width of a paved access roadway on the subject site are approved.



Christine M. Cook, Multnomah County Hearings Officer

Dated: December 22, 2006.

Exhibits

1. T2-04-082 Decision
 2. T2-05-059 Decision
 3. General Application Form
 4. Assessment and Taxation Property Information sheet
 5. Applicant's Statement
 6. Fire Access Review Form
 7. MCC 29.012 Fire Apparatus Means of Approach
 8. Street Standards-Part 1: General Provisions
 9. Framework Plan Policies 9 and 10
- H-1. Applicant's public hearing submittal, in a binder with Tabs 1-12.
- H-2. Hearing sign-in sheet.
- H-3. Memorandum dated November 29, 2006 from Alison Winter to Don Kienholz.